DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The application by the Information Commissioner for permission to appeal against the decisions of the First-tier Tribunal dated 9 April 2010 and 19 May 2010 is granted. However, the Information Commissioner's appeal is dismissed.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

The application by the Information Commissioner for permission to apply for judicial review in respect of the decision of the First-tier Tribunal dated 19 May 2010 is granted. However, the Information Commissioner's application for judicial review is dismissed.

This decision is made under sections 15-18 of the Tribunals, Courts and Enforcement Act 2007 and Part 4 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

REASONS FOR DETERMINATION

Introduction

1. This an application by the Information Commissioner for permission to appeal against the decision of the First-tier Tribunal (General Regulatory Chamber) (information Rights) to admit Professor Sikka's late appeal under reference EA/2010/0054. The Information Commissioner has also applied for permission to apply for judicial review of the same decision. The two applications have been dealt with together as they (for the most part) raise the same issues.

2. With the consent of both parties, I am also treating the applications for permission and the substantive appeal and application for judicial review on a "rolled up" basis. In summary, my decision is to give the Information Commissioner permission both to appeal and to apply for judicial review, on the basis that the grounds are arguable, but to dismiss the substantive appeal and the application for judicial review. In short, I have concluded there was no material error of law in the First-tier Tribunal's decision. As a result, Professor Sikka's substantive appeal to the First-tier Tribunal against the Information Commissioner's Decision Notice should now proceed.

The background to this application for permission to appeal

3. Professor Sikka is a Professor of Accounting at the University of Essex. Nearly five years ago, on 6 March 2006, he made a request to HM Treasury under the Freedom of Information Act (FOIA) 2000. He asked for a copy of the Sandstorm Report, which had been commissioned by the Bank of England from Price Waterhouse in relation to the collapse of the Bank of Credit & Commerce International (BCCI). Some, but not all, of that report was already in the public domain. Over a year later, on 28 March 2007, HM Treasury refused Professor Sikka's request in part.

4. Professor Sikka asked for an internal review of that refusal notice. After nearly another year later, on 13 March 2008, he was notified that HM Treasury's internal review had upheld the refusal notice. On 16 May 2008 Professor Sikka lodged a complaint with the Information Commissioner about the way in which HM Treasury had handled his request. For reasons that are not apparent from the Upper Tribunal file, the Information Commissioner's investigation did not start until more than a further year later on 3 July 2009. I understand, however, that delays of this nature have not been uncommon in other cases.

5. On 14 December 2009, the Information Commissioner issued a Decision Notice (FS50202116). In short, the Information Commissioner ruled that the withheld parts of the Sandstorm report were exempt from disclosure under section 40(2) (personal data) and section 27(1)(a) (international relations) of FOIA 2000. Thus the Commissioner concluded that HM Treasury was correct to rely on these exemptions to withhold the remainder of the report, although he found that in handling this request the public authority had breached a number of procedural requirements of the Act. The Decision Notice, which indicated that HM Treasury need take no further steps on the request, was sent to Professor Sikka's University address, where it (presumably) arrived on or about 15 December 2009.

6. Professor Sikka had a right of appeal against the Decision Notice (FOIA 2000, section 57). The basic rule is set out in rule 22(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976, as amended; "the GRC Procedure Rules"). This provides that:

> "An appellant must start proceedings before the Tribunal by sending or delivering to the Tribunal a notice of appeal so that it is received ... within 28 days of the date on which notice of the act or decision to which the proceedings relate was sent to the appellant".

7. Rule 22(4) provides further that:

> "(4) If the appellant provides the notice of appeal to the Tribunal later than the time required by paragraph (1) or by any extension of time under rule 5(3)(a) (power to extend time)—
>
> (a) the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time; and
>
> (b) unless the Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Tribunal must not admit the notice of appeal."

8. On that basis there is no dispute that, given that the Decision Notice arrived at Professor Sikka's work address on 15 December 2009, the time limit for appealing expired on 12 January 2010. In fact Professor Sikka did not lodge his appeal with the First-tier Tribunal until 4 March 2010. He sought to explain the delay and asked the tribunal to admit his late appeal.

9. On 9 April 2010, in a detailed ruling, Principal Judge Angel considered that application and decided to admit the late appeal ("the original ruling"). The Information Commissioner applied for permission to appeal against that decision. On 19 May 2010 Judge Angel considered that application, but refused permission to appeal, again giving detailed reasons, in what was described as a "revised ruling". The Information Commissioner then renewed that application direct to the Upper Tribunal.

The facts found by the First-tier Tribunal

10. Judge Angel found the following facts in his original ruling of 9 April 2010. Professor Sikka had corresponded with the Information Commissioner's Office by e-mail during the investigation of the complaint but the Decision Notice had only been sent by post. Professor Sikka had not actually received the Decision Notice himself until 18 January 2010, as his return to the office from the Christmas break had been delayed by a combination of bad weather and research commitments. Judge Angel added "The inference is that if Prof Sikka had been sent the DN [Decision Notice] by email he would have received it during the vacation."

11. Judge Angel then made the following further findings. First, Professor Sikka had taken some time to consider and reflect on the Decision Notice. Second, he had initially contacted the Information Commissioner's Office, "presumably to appeal", which had directed him to the First-tier Tribunal (FTT). Third, on 25 February 2009 Professor Sikka had contacted the FTT Information Rights team leader, who had advised him to complete a notice of appeal. Finally, Professor Sikka completed the notice of appeal form on 2 March 2009, which was lodged with the FTT on 4 March 2009. Judge Angel calculated that this was 46 days out of time (or 11 days late were time to be calculated from the date of Professor Sikka's actual receipt of the Decision Notice).

The reasons why the First-tier Tribunal admitted the late appeal

12. First, Judge Angel referred to the relevant legislation and in particular to rule 22 of the GRC Procedure Rules. He also referred to rule 5(3)(a), which provides that the FTT may:

> "extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment containing a time limit".

13. Contrasting this provision with the position under the previous procedural rules (on which see paragraph 18 below), Judge Angel continued in the following terms (at paragraph 10):

> "The FTT seems to have very wide powers to allow late appeals. However the 2009 Rules have an overriding objective to enable the Tribunal to deal with cases fairly and justly – rule 2. Rule 2(2) provides examples of how the Tribunal can deal with cases fairly and justly. None of these appear to relate to out of time applications as such. However in my view that does not restrict the Tribunal from considering the overall objective when exercising its powers under rules 22 and 5."

14. At this juncture I should refer to the provisions of rule 2 of the GRC Procedure Rules:

> **"Overriding objective and parties' obligation to co-operate with the tribunal**
>
> **2.**—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
> (2) Dealing with a case fairly and justly includes—

> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
> (a) exercises any power under these Rules; or
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
> (a) help the Tribunal to further the overriding objective; and
> (b) co-operate with the Tribunal generally."

15. In terms of the particular case before him, Judge Angel then made further findings of fact (at paragraph 11):

> "In this case the applicant is an unrepresented person with little or no experience of FOIA, although clearly intelligent and articulate. Like many applicants he went back to the IC's office for advice about appealing, despite the notice in the DN giving the FTT (Information Rights) contact details. Before appealing he discussed the matter with the Tribunals Service to ensure he knew how to apply. Such reassurance is often sought by unrepresented litigants and even some legal advisers. Prof Sikka was keen to ensure his notice of appeal was correctly completed with proper grounds of appeal and the necessary supporting documentation. He knew he was applying out of time because he completed the appropriate part of the form giving reasons why his application should be accepted out of time."

16. In addition, the Principal Judge also noted Professor Sikka's argument that the high level of public interest in the collapse of BCCI and the fact the events were (relatively) so long ago weakened the public interest in maintaining the FOIA exemption. Judge Angel concluded (at paragraph 13):

> "I have taken all these matters into account (and note the delay taken from the date of the request to the time the DN was issued). I have decided that in all the circumstances of this particular case it would be just and fair to allow this appeal to proceed."

17. It appears that this case was one of the first late appeals to be considered since the former Information Tribunal became part of the FTT under the Tribunals, Courts and Enforcement Act (TCEA) 2007, which for this purpose came into force on 18 January 2010 (coincidentally the same date as Professor Sikka actually received the Decision Notice). Judge Angel, as Principal Judge in the jurisdiction, took the opportunity to provide some general guidance to other FTT judges in these terms (at paragraph 14):

> "I would observe that when dealing fairly and justly with out of time applications under the 2009 Rules tribunals might wish to take into account, inter alia:

a. the lateness of the application;
b. the extent to which the applicant has complied with rule 22(4)(a);
c. the date the applicant received the decision notice;
d. whether the reason for the delay was due to a holiday, ill health or other causes largely beyond the control of the appellant;
e. the complexity of the decision being appealed;
f. the fact an appellant is unrepresented and unfamiliar with the appeal process;
g. the fact the appellant had made enquiries about appealing before the deadline; and
h. the public interest in the disputed information."

18. Finally, Judge Angel noted that under its previous procedural rules the Information Tribunal had had the power to allow an appeal out of time where it was of "the opinion that, by reason of special circumstances, it is just and right to do so" (this was a reference to rule 5(2) of the former Information Tribunal (Enforcement Appeals) Rules 2005 (SI 2005/14)). The judge (in my view correctly) observed that the 2009 Rules included no such limitation and generally provided greater flexibility.

The proceedings before the Upper Tribunal

19. Both the Information Commissioner and Professor Sikka have made written submissions on this application. In addition, I held an oral hearing at Harp House on 2 December 2010. The Information Commissioner was represented by Mr Timothy Pitt-Payne QC while Professor Sikka appeared in person. I am grateful to them both for their various detailed and helpful submissions before, at and after the oral hearing. I am especially grateful to Professor Sikka for his patience in dealing with what, to his eyes, must seem something of a legalistic sideshow to the real issues behind his appeal.

The Information Commissioner's application for permission to appeal

20. The Information Commissioner's application for permission to appeal contends that the proper approach to be applied by the FTT when considering whether to accept a late notice of appeal against one of his Decision Notices "is of general importance to the way in which the FTT exercises its appellate function in respect of decisions taken by the Commissioner." To that extent the Information Commissioner evidently regards this matter as being in the nature of a test case.

21. The Information Commissioner agrees that the FTT had regard to the relevant statutory provisions. However, he argues that the FTT erred in failing to direct itself on three matters. First, that notwithstanding the wide terms of rules 5(3)(a) and 22(4), it was important that the time limit for lodging an appeal should be complied with. Second, the FTT should not extend time unless the appellant could show good reason for having failed to lodge the claim within time. Third, that even if the appellant could show a good reason for the failure to meet the 28-day time limit, the FTT should not extend time unless the appellant acted with reasonable expedition once the time limit had expired.

22. Furthermore, the Information Commissioner argues that if the FTT had properly directed itself in accordance with those three principles, then "the only decision open to the FTT would have been to refuse to accept the late notice of appeal." Four reasons are given to justify this contention.

23. First, the Decision Notice was properly served on Professor Sikka at the [work] address which he had given for correspondence (which was also the address he had given for service in his appeal to the FTT). Second, the time limit under rule 22 therefore expired on 12 January 2010. Third, Professor Sikka had not put forward any good reason for his failure to lodge an appeal in time: he appeared to have made no arrangements to have his post forwarded or checked over the vacation; nor had he informed the Information Commissioner that the Decision Notice should be sent electronically. Moreover holiday commitments and/or general pressure of work cannot be a good reason for a failure to lodge an appeal in time. Fourth, and given the undisputed chronology of events, Professor Sikka had failed to act with reasonable expedition after the expiry of the time limit.

Professor Sikka's submissions to the Upper Tribunal

24. Before determining the Information Commissioner's application for permission to appeal, Judge Angel had directed that Professor Sikka be given the opportunity to address the points made. In summary, Professor Sikka stated that (1) much of the previous correspondence had been conducted by e-mail and he had no reason to think that the Decision Notice would not be treated likewise; (2) the matter had been with the Information Commissioner for some considerable time and he had been given no indication that a Decision Notice was on its way – if he had been so advised, he might have been able to put in place arrangements to deal with his post in his absence, although he pointed out that, as is commonplace in universities today, he did not have any dedicated secretarial support; (3) the Decision Notice was 21 pages long, technically complex and indeed in his words "daunting"; he added that he had had no legal training, this was his first appeal and he was anxious both to digest the material and to seek appropriate advice; and (4) he had acknowledged his own culpability but argued that Judge Angel's ruling should stand – as he put it, "great matters of public interest and even-handedness are involved".

25. At the oral hearing before the Upper Tribunal and in his subsequent further written submission Professor Sikka essentially elaborated on those arguments. I intend to do him no disservice by not referring to those submissions in detail, but rather will focus on Mr Pitt-Payne's arguments, not least as those are the ones which, despite the eloquence with which they were put, have ultimately not prevailed on this occasion.

The parallel application for permission to apply for judicial review

26. Consideration of the Information Commissioner's application for permission to appeal to the Upper Tribunal has unfortunately been delayed owing to a wider procedural complication through no fault of the parties. The wider question is the appropriate route by which to challenge, before the Upper Tribunal, a refusal by the FTT to admit a late appeal. One view is that an application for permission to appeal in the normal way is the proper way. The alternative view is that such a decision by the FTT declining jurisdiction because an appeal was late has to be challenged by way of the separate mechanism of judicial review, which is subject to different procedural rules.

27. Those two competing views have been under consideration by a three judge panel of the Administrative Appeals Chamber of the Upper Tribunal in a test case, *LS v London Borough of Lambeth (HB)* [2010] UKUT 461 (AAC). As that test case was still pending at the time these proceedings started, the Information Commissioner, to protect his position, understandably launched parallel proceedings to apply for permission to apply for judicial review. In those parallel proceedings the

Information Commissioner sought an order quashing the FTT's decisions of 9 April 2010 (to admit the late appeal) and of 19 May 2010 (not to review its earlier decision), as well as an order declaring either that Professor Sikka's appeal should not be admitted or remitting that matter for fresh consideration by a new tribunal. The grounds relied upon in the judicial review application are, inevitably, essentially the same as those underpinning the application for permission to appeal.

28. In *LS v London Borough of Lambeth (HB)* a FTT judge of the Social Entitlement Chamber (SEC) had ruled that he had no jurisdiction to hear the claimant's appeal against a housing benefit decision, as the appeal had been lodged outside the maximum period of 13 months allowed by statute. The claimant sought permission to apply for judicial review of that decision, and later permission to appeal. The pre-TCEA 2007 social security jurisprudence suggested that the former was the appropriate route. This was because in *Secretary of State for Work and Pensions v Morina* [2007] EWCA Civ 749 the Court of Appeal had held that a tribunal's refusal to admit an appeal for want of jurisdiction did not constitute a "decision" for the purposes of the right of appeal under section 14 of the Social Security Act 1998.

29. However, in *LS* a three judge panel of the Upper Tribunal, in its decision dated 22 December 2010, ruled that the word "decision" in both sections 11(1) and 13(1) of TCEA 2007 had to be read broadly (at paragraph 90). The consequence, in broad terms, is that there is a right of appeal against interlocutory decisions unless they fall into one of the specifically prescribed categories of "excluded decisions". In *LS* the Upper Tribunal concluded that an appeal did lie against the FTT (SEC) judge's ruling. Moreover, the Upper Tribunal held (at paragraph 97) that:

> "The remedies available on judicial review are discretionary and on established principles are not to be granted where there is an adequate alternative remedy. The right of appeal under s.11 is an adequate remedy and for that reason we consider that it would be inappropriate to grant Miss LS any relief by way of judicial review. Accordingly, we dismiss her application for judicial review".

30. The significance of the outcome of *LS* for the present proceedings is this. The Information Commissioner has an adequate remedy by way of applying for permission to appeal against the original ruling. In respect of that decision, the Commissioner's protective application for judicial review effectively falls away. In those circumstances, which only became clear after the oral hearing, Mr Pitt-Payne has very helpfully and sensibly withdrawn that application for permission to apply for judicial review. It appears that formally the Upper Tribunal needs to consent to such a withdrawal (see rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)). I do so consent.

31. This still leaves standing, of course, the Commissioner's application for permission to apply for judicial review in respect of the revised ruling. A FTT decision "to review, or not to review, an earlier decision of the tribunal" under section 9 of TCEA 2007 is an "excluded decision" within section 11(5)(d)(i). It follows that the revised ruling, insofar as it was a refusal to review, could not be challenged by way of appeal but may be susceptible to judicial review. I return to that point later.

Analysis of the Information Commissioner's challenge to the original ruling

32. In order to grant permission to appeal, I need only be satisfied that the point under challenge is arguable. Mr Pitt-Payne's careful arguments have persuaded me

that it is appropriate to give the Information Commissioner permission to appeal against the original ruling in this matter. As the issues have been fully ventilated, and the parties consent, I proceed to deal with the appeal proper on a "rolled up" basis.

33. I start from the proposition that the decision on whether or not to grant an extension of time is quintessentially a matter of judicial discretion. The question is not what I would have decided had I been standing in the shoes of the Principal Judge. An appellate tribunal may only intervene if there is an error of law by the First-tier Tribunal.

34. The Information Commissioner argues, first, that the FTT erred in law in failing to direct itself that, despite the wide terms of rules 5(3)(a) and 22(4), it was important that the time limit for lodging an appeal should be complied with. It is true that Judge Angel did not spell out that consideration in quite so many words. However, I am certainly not persuaded that he failed to have regard to that important factor. The judge was clearly aware of the time limit and accurately identified the subtle difference between the previous procedural rules and the GRC Procedure Rules. Both sets of rules inevitably start from that the premise that time limits are there to serve a purpose, although the new rules offer greater flexibility. In addition, Judge Angel acknowledged that the onus was on Professor Sikka to justify an extension of time; that recognition in itself indicates that the judge appreciated the importance of compliance with time limits and that a case had to be made out for extending time.

35. It is also important to be realistic and to keep a sense of proportion about the extent to which tribunals are expected to spell out their reasons in a matter such as this. The issue in this case was whether or not to extend time and admit a late appeal. The requirement under the GRC Procedure Rules to give written reasons for a decision applies to "a decision which finally disposes of all issues in the proceedings" (rule 38(2)(b)). The Principal Judge's decision did not do that. The tribunal also enjoys a discretion to provide written reasons in any other case (rule 38(3)). It is, of course, also good judicial practice to provide summary reasons for non-outcome decisions (see e.g. *Carpenter v Secretary of State for Work and Pensions* [2003] EWCA Civ 33, also reported as Social Security Commissioners' decision R(IB) 6/03; see also *K P v Hertfordshire County Council (SEN)* [2010] UKUT 233 (AAC) at paragraphs 22-30). In this case the FTT's omission to refer by way of an empty mantra to the importance of keeping to time limits does not amount to an error of law.

36. Second, the Information Commissioner argues that the FTT erred in failing to direct itself that it should not extend time unless the appellant could show good reason for having failed to lodge the appeal within time. However, Professor Angel correctly identified the key provision in the rules, namely the overriding objective in rule 2 (see paragraphs 13 and 14 above). To say that the tribunal must direct itself that it can only extend time when the appellant can show good reason for not having lodged an appeal in time is to substitute a different and potentially narrower test for the one laid down by the Rules. It may well be that in very many cases an appellant's reasons for lodging a late appeal will be highly relevant to the exercise of the discretion. However, it cannot determine the decision on whether to grant an extension of time. In that context, I also draw attention to rule 2(3), which states as follows:

> "(3) The Tribunal must seek to give effect to the overriding objective when it—
> (a) exercises any power under these Rules; or

(b) interprets any rule or practice direction."

37. An analogy may be drawn with a FTT's decision on whether to proceed with a hearing in the appellant's absence. This was considered by Judge Lane in *JF v Secretary of State for Work and Pensions (IS)* [2010] UKUT 267 (AAC). Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) provides that a tribunal may hear an appeal in absence where an appellant fails to attend a hearing if it is satisfied that the appellant has been properly notified of the hearing and it is in the interests of justice to do so. The equivalent rule in the GRC Procedure Rules is rule 36. According to Judge Lane (at paragraph 13):

> "A decision on whether it is in the interests of justice to proceed requires an exercise of judicial discretion. Under the Rules, this is informed by rule 2(1), which states that the overriding objective of the Rules is to enable the tribunal to deal with cases fairly and justly. The factors which are included in that assessment are set out in rule 2(2). These serve to focus the tribunal's mind on matters relevant to that consideration. Not every factor will be appropriate to the circumstances of every case. At the end of the day, the question under rule 2(1) is whether the tribunal has dealt with a case fairly and justly."

38. The approach taken by Judge Angel in this case was entirely in accordance with that principle and displays no error of law.

39. Third, the Information Commissioner argues that the FTT erred in failing to direct itself that, even if the appellant could show a good reason for the failure to meet the 28-day time limit, the FTT should not extend time unless the appellant acted with reasonable expedition once the time limit had expired. Again, I am not persuaded that there is an error of law on the tribunal's part. In any event Judge Angel specifically referred to the overriding objective, one aspect of which is the need to avoid delay "so far as compatible with proper consideration of the issues".

40. Indeed, the Information Commissioner's third argument is a further attempt to substitute a different, and possibly narrower, test for the one laid down in the legislation. The appellant's actions after the expiry of the time limit may well be an important factor, but they cannot be determinative. What matters is what is "fair and just" in terms of the overriding objective.

41. The other main plank in the Information Commissioner's grounds of appeal was that, on the facts, the only decision open to the FTT, it was said, would have been to refuse to accept the late notice of appeal. This essentially amounts to a claim of perversity. The principles by which perversity is to be judged in law are set out in *Yeboah v Crofton* [2002] EWCA Civ 794 per Mummery LJ at paragraphs 92-95. In summary, a submission that a decision is perverse should only succeed where an overwhelming case is made out that the tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. In particular, an appeal on a question of law should not be allowed to turn into a rehearing of the evidence by an appellate tribunal which can only rule on points of law. Put another way, the test according to Sir John Donaldson MR, sitting in the Court of Appeal, was whether the decision was so "wildly wrong" as to merit being set aside (*Murrell v Secretary of State for Social Services*, reported as Appendix to Social Security Commissioner's decision R(I) 3/84).

42. This is a demanding threshold to meet, and I am certainly not satisfied that Judge Angel's decision was "wildly wrong". I bear in mind the observations of Baroness Hale of Richmond in *Secretary of State for the Home Department v AH*

(Sudan) and others [2007] UKHL 49, [2008] 1 AC 678 on the importance of recognising the fact-finding expertise of expert tribunals:

> "...It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently" (at paragraph 30).

43. Those observations carry just as much weight if the words "may seem generous" are substituted for "may seem harsh" in the first line of that passage. Not all tribunal judges would necessarily have reached the same conclusion as Judge Angel, but that does not mean that the judge erred in law. The question is rather whether he applied the correct legal test and reached a decision he was entitled to on the facts before him. In my view he did.

The approach to time limits and late appeals in the Upper Tribunal case law

44. I have reached the above conclusion to dismiss the Information Commissioner's appeal by considering the GRC Procedure Rules. However, given that one of the objectives of the reforms instituted by the TCEA 2007 was to encourage consistency of approach across the tribunal system, where that is appropriate, it is relevant to consider how equivalent rules have been interpreted in other contexts. At the time of the oral hearing in this case, there was only one Upper Tribunal authority directly in point.

45. In *CD v First Tier Tribunal (CICA)* [2010] UKUT 181 (AAC) the FTT (Social Entitlement Chamber) had declined to extend time so as to admit a late appeal in a criminal injuries case. The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the 2008 Rules") specify that the time limit for lodging a notice of appeal is 90 days in criminal injuries cases (rule 22(2)(b)), rather than 28 days as for FOIA appeals. However, the provision governing extensions of time is in all material respects the same: rule 5(3)(a) of the 2008 Rules refers to the power to "extend or shorten the time for complying with any rule, practice direction or direction". It does not seem to me that the qualification to rule 5(3)(a) of the GRC Procedure Rules – namely "unless such extension or shortening would conflict with a provision of another enactment containing a time limit" – makes any material difference in the present context.

46. In *CD v First Tier Tribunal (CICA)* the claimant applied to the Administrative Appeals Chamber of the Upper Tribunal for judicial review of that decision (there being no statutory right of appeal to the Upper Tribunal in relation to criminal injuries matters). Before the Upper Tribunal, counsel for the Criminal Injuries Compensation Authority (CICA) sought to persuade Judge Turnbull to hold, by way of guidance for future cases, "that the correct approach for a Tribunal Judge who is considering whether to grant an extension of time for appealing is to have regard to the matters listed in CPR [Civil Procedure Rules] Rule 3.9." I should add here that CPR Rule 3.9 lists nine specific issues which are to be considered by the courts when deciding whether or not to extend time.

47. Judge Turnbull's conclusion on that submission was as follows:

> "26. However, it does not seem to me to be appropriate to give guidance in that form. There is no provision in the 2008 Rules in the terms of CPR Rule 3.9, and it does not seem to me right to import it by way of analogy. The power to extend time is unfettered, and the circumstances which will be relevant in exercising it will vary from case to case. Black J. was of that view in *Howes v Child Support Commissioner* [2007] EWHC 559 (Admin). That was a claim for judicial review of a decision of my own, sitting as a Child Support Commissioner, refusing to admit out of time an application for permission to appeal against a decision of a child support appeal tribunal. The procedural rules then in force were not the same as those now applicable, in particular in that the Commissioners' power to admit the application was one expressed to be exercisable for 'special reasons'. In para. 39 Black J. said:
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> > 'Mr Burrows does not produce any authority for importing the CPR 3.9 approach or even simply the checklist in CPR 3.9(1) into the Child Support Commissioners (Procedure) Regulations 1999. I note that in the case of *Sayers v Clarke Walker* upon which he relies as a useful explanation of the operation in practice of CPR 3.9, the Court of Appeal referred back to the earlier case of *Audergon v La Baguette* in which it had deplored the creation of judge-made checklists which it considered an approach which carried the inherent "danger that a body of satellite authority may be built up … leading in effect to the rewriting of the relevant rule through the medium of judicial decision." It seems to me that the danger potentially exists as much when one imports a checklist from one set of rules to another as when one invents one's own checklist. There was no reason why the Child Support Commissioners (Procedure) Regulations could not have contained an equivalent provision to CPR Rule 3.9(1) of a checklist of some sort for the use of Commissioners considering the issue of special reasons if that had been thought appropriate. No doubt the sort of matters to which reference is made in CPR 3.9(1) may quite often also be relevant in cases considered by Commissioners under regulation 11(3) but I do not think it appropriate to impose upon Commissioners an obligation to refer to CPR 3.9(1). The concept of special reasons is a broad and flexible one and the factors that are relevant will be dependent upon the circumstances of the individual case.'
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> 27. I respectfully agree with all of that, and it seems to me that that reasoning is if anything even more applicable in relation to the 2008 Rules, where the First-tier Tribunal's power to extend time is not even limited by reference to a broad consideration such as 'special reasons', but is left wholly unqualified."

48. Mr Pitt-Payne and Professor Sikka have both sought to persuade me that *CD v First Tier Tribunal (CICA)* supports their arguments in the present case. Given that he is facing a litigant in person, Mr Pitt-Payne very fairly notes that "what might perhaps be said for Professor Sikka, in the light of the *CD* case, is that the Commissioner is seeking to formulate principles that would constrain the FTT's exercise of its discretion to extend time". Mr Pitt-Payne argues, however, that the circumstances of the two cases are materially different in various respects. I certainly accept his point that in the present case the Information Commissioner is seeking neither to import Rule 3.9(1) of the CPR nor to formulate a comprehensive checklist of relevant factors. However, for the reasons set out above, I have reached the

conclusion that the Commissioner is seeking to replace the statutory test with a different test, an approach which is incompatible with the overriding objective in rule 2.

49. Mr Pitt-Payne argues that the *CD* case supports his arguments in another way. In the *CD* case the FTT accepted that the delay up to the point where the applicant's advisors had become aware of the CICA review decision was excusable, but the further delay thereafter was not, a decision subsequently upheld by the Upper Tribunal. This, Mr Pitt-Payne contends, exemplifies the third of the Commissioner's principles, namely that once a time limit has expired time should not be extended unless the applicant has acted with reasonable expedition. I do not accept that this authority supports the Information Commissioner's case. These cases are very fact-sensitive – in the *CD* case the further delay was nearly four months beyond an already generous time limit and the applicant (a child) was acting on the advice of professionals. The circumstances of the present case are obviously very different.

50. I therefore respectfully agree with Judge Turnbull's observations in the *CD* case that "the power to extend time is unfettered, and the circumstances which will be relevant in exercising it will vary from case to case." Those comments, and the added force of the reasoning of Black J. in *Howes v Child Support Commissioner*, are equally applicable to the GRC Procedure Rules.

51. In the final stages of drafting this decision I have become aware of a further decision of the Upper Tribunal on the same point, but again in another jurisdiction. In *Ofsted v AF* [2011] UKUT 72 (AAC), a decision signed on 15 February 2011, Ofsted was seeking to challenge a decision by a tribunal judge in the First-tier Tribunal (Health, Education and Social Care Chamber) to admit a late appeal by a childminder against a cancellation of her registration. Judge Levenson dismissed Ofsted's appeal in these terms (at paragraph 21):

> "OFSTED complains that in cases in which it is involved, the power under rule 5(3)(a) is, or might be, exercised inconsistently and seeks guidance from the Upper Tribunal on how that power should be exercised. However, the power is expressed in deliberately wide terms and the facts of each case vary enormously. The rules already provide that the power must be exercised fairly and justly and so as to avoid delay 'so far as compatible with proper consideration of the issues'. Any further guidance by the Upper Tribunal would either be so general as to be meaningless or would be likely to spark time-consuming and unnecessary satellite litigation."

52. Counsel for Ofsted in that case, as had Mr Pitt-Payne in the present proceedings, had sought to rely on the observations of the Court of Appeal in *Jurkowska v Hlamd Ltd* [2008] EWCA Civ 231, [2008] ICR 841 on extensions of time. Judge Levenson was not persuaded by the analogy, pointing out amongst other matters that employment tribunal proceedings were more adversarial and the structure of proceedings totally different (at paragraph 38). I agree with Judge Levenson that caution needs to be exercised in that regard.

53. Judge Levenson concluded as follows (at paragraph 41):

> "Ultimately these are questions of judgment of the facts and circumstances of each particular case, on which there is in the present case no basis for the Upper Tribunal to substitute its own for that of the First-tier Tribunal (see, for example, the decision of the Court of Appeal in *Walbrook Trustee (Jersey) Ltd and Others v Fattal and Others* [2008] EWCA Civ 427 at paragraph 33)."

54. I agree. I should add that I have not sought further submissions from either Mr Pitt-Payne or Professor Sikka on this very recent decision as it seems to me to be entirely consistent with the approach adopted by Black J. in *Howes v Child Support Commissioner* and by Judge Turnbull in *CD v First Tier Tribunal (CICA)*.

The approach to late appeals in other Chambers of the First-tier Tribunal

55. It is not just the Upper Tribunal which has considered the issue of late appeals. At first instance, the question of the principles to be applied when determining whether to extend time to admit a late appeal has been considered on several occasions by the Tax Chamber of the First-tier Tribunal ("FTT(TC)"). In early decisions the FTT(TC) made express reference, when deciding whether to extend time under the parallel rule 5 in that jurisdiction, to the considerations set out in CPR Rule 3.9 (see e.g. *NVM Private Equity Limited v Commissioners for HMRC* [2010] UKFTT 106 (TC), *Leliunga v Commissioners for HMRC* [2010] UKFTT 229 (TC) and *B Fairall Ltd (in Liquidation) v Revenue & Customs* [2010] UKFTT 305 (TC)).

56. However, later tribunals in the FTT(TC) have declined to follow that approach. In *Pledger v Commissioners for HMRC* [2010] UKFTT 229 (TC) the FTT held as follows, having considered *Leliunga*:

> "...This Tribunal declines to follow that approach; in a situation where the Tribunal's own Procedure Rules set out a general obligation to deal with cases fairly and justly, and set out a number of general principles for interpreting what is 'fair and just', we do not consider it appropriate also to pay specific regard to entirely unrelated rules which set out a non-exhaustive list of circumstances to be considered by courts in other applications" (at paragraph 54).

57. Another FTT(TC) took a similar, if slightly more nuanced, approach in *Former North Wiltshire District Council v Commissioners for HMRC* [2010] UKFTT 229 (TC). There the tribunal accepted a submission that it was not obliged to consider the criteria set out in CPR 3.9(1) when deciding whether to grant an extension of time to an appellant who has filed an out-of-time notice of appeal:

> "56. ... the Rules (which govern our procedure) simply empower us to extend time in appropriate cases and we should exercise the discretion to do so in order to give effect to the overriding objective in rule 2(1) of the Rules to deal with cases fairly and justly. We note, and respectfully adopt so far as it relates to the absence of any equivalent provision to CPR 3.9(1) in the Rules, the reasoning of Black J. in *R (o.a.o. Howes) v Child Support Commissioners* ...
>
> 57. Exercising our discretion to give effect to the overriding objective may however, and often will in practice, involve consideration of some or all of the criteria (a) to (i) set out in CPR 3.9(1)."

58. The point made in paragraph 57 of the tribunal's decision in *Former North Wiltshire District Council* was also echoed more recently in *Lupson v Commissioners for HMRC* [2011] UKFTT 100 (TC) (at paragraphs 25 and 26). Again, I have not invited comments from Mr Pitt-Payne and Professor Sikka to these Tax Chamber decisions, which I only chanced across in the course of writing up this decision, not least as they are only first instance decisions which do not carry any precedential weight. However, I do simply note for the record that the more recent approach

taken by the FTT(TC) in both *Pledger* and *Former North Wiltshire District Council* is entirely consistent with that adopted by Judge Turnbull in *CD v First Tier Tribunal (CICA)* and by Judge Levenson in *Ofsted v AF*.

The significance of earlier delays by HM Treasury and the ICO

59. The chronology outlined above (see paragraphs 3-5) shows that Professor Sikka has so far spent more than four years trying to secure release of the Sandstorm Report. In deciding to extend time, Judge Angel noted in parentheses the delay taken from the date of the request to the time the Decision Notice was issued (see paragraph 16 above). The Information Commissioner has argued that this demonstrated that the judge had taken into account an irrelevant consideration. In his revised ruling on the application for permission to appeal, Judge Angel accepted that the delay in issuing the Decision Notice was not a material consideration but pointed out that the comment he had made about the previous delays was by way of an afterthought and had not been a factor in deciding whether or not to extend time.

60. I am satisfied that Judge Angel did not take into account the delays experienced before the issue of the Decision Notice. I regard his comment in parentheses by way of an aside, acknowledging or anticipating a point made by Professor Sikka. Reading the judge's ruling as a whole it cannot be seen as having a material impact on his decision to admit the late appeal. However, at the oral hearing I questioned whether Judge Angel had actually been right to concede the point being made by the Information Commissioner. The question I put to Mr Pitt-Payne was that if the decision on whether to grant an extension of time is subject to the overriding objective in rule 2, and hence to the need to deal with cases "fairly and justly", then surely it may be pertinent to consider earlier and indeed extensive delays by official agencies. The ordinary person might well consider that factor highly relevant to the issues of fairness and justice. Professor Sikka plainly does.

61. In answer to that question Mr Pitt-Payne made two powerful points. First, he argued that Parliament had not imposed any time limits on the Information Commissioner's investigatory and decision-making processes, whereas there were clearly statutory time limits for lodging an appeal once the Decision Notice had been issued. Second, the contention that delays by e.g. the Commissioner should somehow excuse delays by appellants would not be conducive to the efficient administration of justice, as it would simply encourage further delay on the part of appellants. In this context I also note the observations of the FTT(TC) in *Former North Wiltshire District Council v Commissioners for HMRC* [2010] UKFTT 229 (TC) (at paragraph 71), where admittedly the period of delay in question was much longer:

> "An appellant's tardiness in bringing an appeal must be considered independently of the time taken by HMRC to reach the relevant decision. The two actions are not comparable. It is only the appellant's bringing of an appeal, and not HMRC's reaching of the relevant decision, which engages the Rules and the Tribunal's discretion."

62. I can see the force of Mr Pitt-Payne's arguments. However, I have not had the benefit of full argument on the issues and do not need to decide the point in the particular circumstances of this case. It may yet arise for determination in some future case.

Judge Angel's guidance in the original ruling

63. Mr Pitt-Payne has argued that Judge Angel's guidance at paragraph 14 of his original ruling (see paragraph 17 above) was flawed for the reasons which I have already rejected above. But was Judge Angel right to proffer such guidance at all? In *Howes v Child Support Commissioner* Black J. noted that the Court of Appeal in *Audergon v La Baguette* [2002] EWCA Civ 10 had "deplored the creation of judge-made checklists which it considered an approach which carried the inherent 'danger that a body of satellite authority may be built up … leading in effect to the rewriting of the relevant rule through the medium of judicial decision.'" There are echoes of this scepticism in Judge Levenson's comments in *Ofsted v AF* (see paragraph 51 above).

64. In my view this is not a criticism which can be fairly made against Judge Angel's decision. The judge made it perfectly clear that the test in deciding whether or not to extend time was the overriding objective of dealing with cases fairly and justly. He also noted that none of the particular and non-exhaustive considerations listed in rule 2(2)(a) – (e) was exclusively relevant to decisions under rule 5(3)(a). He then indicated eight factors which "tribunals might wish to take into account", while also making it clear that there may well be other relevant considerations ("inter alia").

65. Plainly there are risks involved in providing such guidance, given the possibility that it may result in satellite litigation "leading in effect to the rewriting of the relevant rule through the medium of judicial decision." Equally, however, tribunals may take the view that it is helpful, both to other tribunals and to tribunal users, for such guidance to be issued, especially where a new procedural regime has recently been put in place which differs from the previous arrangements. In such circumstances guidance designed to ensure a degree of consistency of approach, rather than imposing a straightjacket as to the outcome, is entirely appropriate. It is also preferable that such guidance be publicly available through the medium of a judicial decision rather than e.g. privately circulated amongst judges. It is also relevant to note that paragraphs 14-16 of Judge Angel's initial ruling were all concerned with wider practical and procedural issues raised by the new arrangements.

Conclusion on the grounds of appeal against the original ruling

66. Having granted the application by the Information Commissioner for permission to appeal against the decision of the First-tier Tribunal dated 9 April 2010, I dismiss the Information Commissioner's appeal against the original ruling (section 11 of the Tribunals, Courts and Enforcement Act 2007). There is no error of law in the original ruling. This leaves the Commissioner's challenge to the revised ruling.

Analysis of the Information Commissioner's challenge to the revised ruling

67. It will be recalled that the Information Commissioner also applied for permission to apply for judicial review of both the original and revised ruling. As explained in paragraph 30 above, the judicial review application as regards the original ruling has now been withdrawn. The challenge to the original ruling was properly dealt with by way of an appeal, which has been dismissed for the reasons set out above.

68. The position as regards the revised ruling of 19 May 2010 is conceptually more complex. Insofar as the revised ruling was a decision on the application to the First-tier Tribunal for permission to appeal to the Upper Tribunal against the original decision, again the judicial review route is otiose. That application has been renewed

before the Upper Tribunal and disposed of, as explained above. However, the revised ruling was also phrased in part as a review decision under rule 43 of the GRC Procedure Rules. A decision by the FTT "to review, or not to review, an earlier decision of the tribunal" under section 9 of TCEA 2007 is an "excluded decision" within section 11(5)(d)(i). It follows that the revised ruling, insofar as it was a refusal to review, might be susceptible to judicial review as there is no right of appeal.

69. Mr Pitt-Payne criticises Judge Angel's revised ruling on the review issue. At paragraph 3 of the revised ruling the judge stated:

> "The FTT has considered whether to review its decision under rule 43(1) of the Rules, taking into account the overriding objective in rule 2, and has decided that this is a case where its decision should be reviewed because the grounds of the application may raise an error of law."

70. Rule 43(1) of the GRC Procedure Rules provides that "on receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 44 (review of a decision)." Rule 44 then reads as follows:

> **"Review of a decision**
>
> 44.–(1) The Tribunal may only undertake a review of a decision–
> (a) pursuant to rule 43(1) (review on an application for permission to appeal); and
> (b) if it is satisfied that there was an error of law in the decision.
> (2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.
> (3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again."

71. Mr Pitt-Payne's point was that paragraph 3 of the revised ruling demonstrated a misunderstanding by the judge of the review power – the FTT could only undertake a review if satisfied that there was an error of law (see rule 44(1)(b)), not that there might be such an error of law. I accept that analysis has some force. However, I do not think that the tribunal's slip in this respect fatally undermined either the original decision to extend time or the revised ruling. I take into account that this was an early ruling under the new procedural regime when the FTT was still finding its way in operating the new rules. The lexicon of the new procedural rules was not fully engrained in the minds of tribunal judges. In essence I regard the judge's reference to "review" in this context as merely a failure to use the correct statutory language to describe what he was in fact doing. To regard this as a material error of law would, I feel, be a triumph of form over substance. On that basis, I refuse the application for judicial review.

72. However, if I am wrong about that, and Judge Angel's treatment of the review power was so far off the mark as to amount to a material error of law so as to ground a successful application for judicial review, I would in any event refuse the Information Commissioner relief. My reason for so saying is that the remedies available on judicial review are, of course, discretionary. They should not be granted where there is an adequate alternative remedy. In the present situation the Information Commissioner has an adequate alternative remedy, namely an

application for permission to appeal against the revised ruling (insofar as it was not a refusal to review the original decision).

73. My analysis is as follows. The original ruling granting the extension of time and allowing the appeal to proceed involved the tribunal giving a direction under rule 5(2) and 5(3)(a) of the GRC Procedure Rules. That direction had in effect been given on Professor Sikka's application (in his original Notice of Appeal) under rule 6(1) and (2). The tribunal's ruling had been issued to the parties under rule 6(4). Rule 6(5) then provides that "If a party or any other person sent notice of the direction under paragraph (4) wishes to challenge a direction which the Tribunal has given, they may do so by applying for another direction which amends, suspends or sets aside the first direction." That was what the Information Commissioner was effectively doing, even if he did not specifically refer to rule 6(5). Mr Pitt-Payne agrees with that analysis.

74. So, in reality, the FTT was treating the Information Commissioner's response to the original ruling as both an application for permission to appeal and also as an application for a direction under rule 6(5) to set aside the original direction extending time. The judge's use of the review label under rules 43 and 44 was incorrect, but it did not undermine the substance of the revised ruling itself, which considered both the initial points and the new submissions following the original ruling and so decided not to set that ruling aside.

75. The FTT's (implicit) refusal of what was in effect an application by the Information Commissioner under rule 6(5) carries a right of appeal in the normal way, as it is not an excluded decision which can only be challenged by way of judicial review. I grant the Information Commissioner permission to appeal against the revised ruling on that basis. However, I also dismiss the substantive appeal for the same reasons as I have dismissed the appeal against the original ruling.

Conclusion and the way forward

76. For the reasons explained above, I give the Information Commissioner permission to appeal against the original decision of the First-tier Tribunal dated 9 April 2010. However, I dismiss that appeal. I also give the Information Commissioner permission to appeal (as regards the refusal to grant the application under rule 6(5)) and permission to apply for judicial review (as regards the refusal to review the original ruling) in respect of the First-tier Tribunal's revised ruling dated 19 May 2010. I dismiss the appeal against the revised ruling. I also refuse the application for judicial review in respect of the revised ruling or, in the alternative, refuse relief.

77. As a result the First-tier Tribunal should now proceed with the hearing of Professor Sikka's substantive appeal against the Decision Notice issued by the Information Commissioner. A First-tier Tribunal judge will presumably need to issue case management directions for the further conduct of, and timetable for, that appeal. Obviously the fact that the present matters have in effect been decided in Professor Sikka's favour on a procedural point will have no bearing on the outcome of his appeal against the Commissioner's Decision Notice, which is a matter for the expert judgment of the First-tier Tribunal (General Regulatory Chamber) (Information Rights).

Signed on the original
on 7 March 2011

Nicholas Wikeley
Judge of the Upper Tribunal