**DETERMINATION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

The Upper Tribunal dismisses:

(1) the applications for permission to appeal against the decisions of the First-tier Tribunal dated 12 February 2010 (Tribunals, Courts and Enforcement Act 2007, section 11 and Rule 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008); and

(2) the applications for permission to apply for judicial review in respect of the same decisions (Tribunals, Courts and Enforcement Act 2007, section 15 and Rule 28 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

REASONS

Introduction

1. This case involves two applications for permission to appeal against the decisions of the First-tier Tribunal (General Regulatory Chamber) (Information Rights), dated 12 February 2010, to refuse to extend time to admit the applicant's two late appeals. The applicant has also applied for permission to apply for judicial review in respect of the same decisions. The four applications have been dealt with together in the Upper Tribunal as they essentially raise the same issues.

The reporting of this determination

2. It is not the normal practice of the Administrative Appeals Chamber (AAC) of the Upper Tribunal to publish determinations of permissions to appeal, as they are usually of interest only to the parties concerned and by their very nature are unlikely to establish points of law of any wider interest. Accordingly such determinations are not usually to be found available for public consultation on the AAC website (http://www.osscsc.gov.uk/Decisions/decisions.htm).

3. However, this is one of the very first determinations in a new jurisdiction. Before January 18, 2010, appeals from the former Information Tribunal went to the High Court. Since that date, the Information Tribunal has become part of the General Regulatory Chamber (GRC) of the First-tier Tribunal (FTT). Onward appeals now go to the AAC. In those circumstances it is appropriate to accord this determination some wider publicity, not least as a guide to other tribunal users.

4. The general practice of the AAC has been to anonymise its decisions, unless the judge decides that this is not appropriate. The AAC hears many cases about issues of considerable sensitivity for the individuals involved and where there is little or no legitimate public interest in knowing the person's identity (e.g. in social security, mental health, or special educational needs appeals). Those same considerations may not apply to cases in some of the newer AAC jurisdictions (see, e.g., the comments of Judge Ward in the local government standards case of *CC v Standards Committee of Durham County Council* [2010] UKUT 258 (AAC) at paragraph 9).

5. Information rights cases are typically more akin to the local government standards jurisdiction than the traditional AAC jurisdictions, not least because the former Information Tribunal – and now its successor arm of the FTT (GRC) – has always, and appropriately, adhered to a policy of complete transparency, so far as is possible. Its general approach has been to post all its decisions on its website at http://www.informationtribunal.gov.uk/Public/search.aspx with the parties' names attached.

6. In the present case it seems to me that there is no reason to displace the normal convention in the information rights jurisdiction, namely a presumption of openness. For that reason I make no direction under Rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The statutory provisions governing late appeals

7. The starting point 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."

8. 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."

9. Rule 5(3)(a) in turn 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."

The context of these late appeals to the First-tier Tribunal (Information Rights)

10. In the present case Mr Macleod has been in dispute with the Ministry of Justice about various matters, in particular the conduct of civil servants and the terms of reference and responsibilities of the Ministerial Correspondence Unit. This appears to have started in 2005, when he states that he received "an extraordinarily arrogant and vitriolic phone call from the Head of Ministerial Correspondence in the Ministry of Justice". This in turn seems to have prompted a complaint to the Ombudsman and also proceedings in the High Court for judicial review.

11. According to Mr Macleod's letter to the Information Tribunal dated 4 January 2010, enclosing an aide-mémoire, and recounting his experience in the Administrative Court:

> "I was granted a 90 minute hearing to present my case which included nearly a hundred pages of documents as well as this aide-mémoire. Amazingly, however, the judge – Mr Justice Stanley Burnton (later Lord Justice) – stopped me after only 35 minutes, when I had summarised a small fraction of my case, and rejected my appeal without giving any clear reasons."

12. Mr Macleod also lodged two complaints under the Freedom of Information Act 2000 against the Ministry of Justice. The first was lodged on 23 March 2007. This (eventually) resulted in the Information Commissioner issuing a Decision Notice (FS50155363, or Decision Notice 2) on 3 December 2009. The Information Commissioner's decision was that the request was properly categorised as vexatious, although the Ministry had breached procedures by failing to issue the refusal notice in good time. The Information Commissioner required no steps to be taken. The second and later complaint was dated 26 October 2007 and resulted in a slightly earlier Decision Notice (FS50184581, or Decision Notice 1) on 7 September 2009. The substantive outcome was essentially the same.

13. The delays which have occurred in dealing with complaints to the Information Commissioner's Office (ICO) are a matter of public record, as are the steps which have been taken to deal with them. However, such delays are undoubtedly frustrating for complainants, including Mr Macleod.

14. Under the GRC Procedure Rules, the appeal against Decision Notice 1 should have been lodged by 5 October 2009 and the appeal against Decision Notice 2 by 4 January 2010 (given Rule 12(2) and (3) of the GRC Procedure Rules).

15. Mr Macleod's Notice of Appeal was dated 1 February 2010 and was received by the FTT (GRC) (Information Rights) administration by fax on 3 February 2010. His appeal was therefore nearly 4 months out of time as regards Decision Notice 1 and almost a month late as regards Decision Notice 2.

16. The Notice of Appeal form includes a box to be ticked to indicate that an extension is being sought for an out of time appeal and a section to complete giving the reasons for such an application. Mr Macleod did not complete that part of the form.

17. There had, however, been extensive correspondence before that date between Mr Macleod and the FTT (GRC) (Information Rights) administrative office.

18. Nearly a year earlier on 9 March 2009 – i.e. while the ICO investigations were still ongoing and before the issue of either Decision Notice (DN) – Mr Macleod wrote to the tribunal office thanking them for a copy of the Detailed Guidance Notes and noting that appellants had to appeal any DN within 28 days unless there were special circumstances. I interpose that this advice would have been referring to the provision that <u>then</u> governed late appeals (Rule 5(2) of the Information Tribunal (Enforcement Appeals) Rules 2005 (SI 2005/14)). In his letter Mr Macleod indicated that he might well have to appeal "well beyond 28 days" and asked for "confirmation <u>in principle</u> that the following [10] reasons justify such a delay" (original emphasis). He referred to various difficulties he had encountered, including, in particular, the ICO's refusal to treat the two complaints as a single case, despite the common ground concerned.

19. On 12 March 2009 a member of the tribunal's administrative staff replied, explaining that the tribunal only had jurisdiction once a Decision Notice had been issued. She advised that at that point "if you wish to appeal, then you should complete the Tribunal's Notice of Appeal form and send it to us within 28 days as indicated in the guidance and asking us not to take any further action until a second Decision Notice is issued."

20. On 9 September 2009 – i.e. having just received Decision Notice 1 – Mr Macleod wrote to the tribunal office repeating the point made in his 9 March letter that the matters should be treated as one appeal. He also "formally request[ed] that the recommendations in my letter of 9 March be adopted, and that my formal appeal against this decision [i.e. Decision Notice 1] may be deferred until after the decision on my second complaint."

21. On 11 September 2009 the Information Tribunal Manager replied to Mr Macleod. She reiterated the advice given on 12 March, expressly pointing out that "If an appeal is received later than 28 days then the Tribunal will consider the explanation and reasons for the late submission and decide as to whether the appeal can proceed or be dismissed."

22. On 23 September 2009 Mr Macleod replied, complaining about the delays he had encountered with the ICO. He pointed out that he was 90 years old and was receiving no assistance with the matters in question. He concluded as follows (emphasis in the original):

> "I have therefore now decided that I am <u>not</u> prepared to waste a lot of time – <u>and</u> that of everyone else involved in your Tribunal, in MoJ and IC – producing and considering two separate but virtually identical – and <u>lengthy</u> – sets of documents.
>
> Instead I intend to await the second Decision Notice and <u>then</u> draft a <u>single</u> appeal against both within 28 days.
>
> If you do not accept this, it will be a victory of bureaucracy over common sense, and I will have to consider my position."

23. Mr Macleod wrote again on 26 October 2009, complaining about the delays at the ICO and the tribunal's refusal to allow him to appeal both decision notices at the same time, as well as the tribunal's failure to reply to his letter of 23 September 2009. He added that he would be abroad from 4 to 29 December so unless his request was acceded to promptly he would be unable to complete his appeal until January 2010.

24. On 29 October 2009 the tribunal office replied, repeating the points that had been made on 11 September and adding that they had read Mr Macleod's letter of 23 September as a statement of his position and/or his intention, rather than as an inquiry requiring a substantive response.

25. On 4 January 2010 Mr Macleod wrote again, reporting that on his return from abroad he had found Decision Notice 2, which had been issued the day before he had gone away but had presumably arrived in his absence. He repeated his request for confirmation that the tribunal was prepared to accept a single appeal against both decisions.

26. On 8 January 2010 the Information Tribunal Manager replied. She explained:

> "You may submit one appeal form however you must submit separate grounds of appeal in relation to each Decision Notice you are appealing against. If you are submitting your appeal outside of the stipulated timescale of 28 days from receipt of the Information Commissioner Decision(s), you should give clear and detailed explanations and reasons for the lateness of the submission at section 7 of the appeal form."

27. Mr Macleod replied on 16 January 2010 in the following terms:

> "You refer to the stipulated timescale of 28 days as dating from receipt of the Information Commissioner's Decision(s).
>
> However, although I received the second Decision Notice at the end of December, your agreement to submit one appeal in respect of the two Decision Notices did not reach me until 14 January.
>
> As indicated in earlier correspondence, only then was I able to decide on the format of my appeal.
>
> I therefore propose to regard the 28 days as dating from 14 January."

28. Mr Macleod's notice of appeal (against both decisions) was then finally received on 3 February 2010. By this time, of course, the Information Tribunal had become the Information Rights jurisdiction within the First Tier Tribunal (General Regulatory Chamber). Consequently, although the 28 day time limit for appealing remained the same, the criteria for extending time had changed from the relatively strict special circumstances test, as originally communicated to Mr Macleod (see paragraph 18 above), to the rather more open-textured provisions of the GRC Procedure Rules (see paragraphs 7-9 above). The latter, of course, are subject to the overriding obligation to deal with cases fairly and justly (see Rule 2).

The ruling by the First-tier Tribunal (Information Rights) on the late appeals

29. On 12 February 2010 Tribunal Judge Pilling considered Mr Macleod's notice of appeal. She observed first that (i) the appeals were subject to the GRC Procedure Rules; (ii) they were out of time; (iii) Mr Macleod had not made a request or provided reasons for the delay in accordance with Rule 22(4)(a).

30. The Tribunal Judge also referred in detail to the chronology of events and correspondence set out at paragraphs 15-27 above, including the guidance provided by tribunal officials. As regards Decision Notice 1, she found that "despite this repeated advice" Mr Macleod had written on 23 September "that he intended to disregard this advice and wait for the second Decision Notice to be issued before appealing against the first". She was clearly entitled to reach that conclusion.

31. She also concluded that Mr Macleod "chose to interpret" the Manager's letter of 8 January "as an agreement that he could submit one consolidated appeal against the two Decision Notices". Referring to his letter of 16 January, she stated that she was

> "...not satisfied that there is any reasonable basis upon which Mr Macleod could have concluded that he was entitled to alter the stipulated timescale in

> this way. This disregard for the requirement to appeal within 28 days is also in line with his indication in his letter of 23 September 2009 that he would ignore the procedural requirements and advice from [tribunal staff] but would wait for the second Decision Notice to be issued before appealing against the first Decision Notice... It is therefore apparent that Mr Macleod had no intention of complying with the procedural requirements for appealing within 28 days of the issue of the Decision Notice."

32. Tribunal Judge Pilling then went on to consider whether to extend time to admit the two late appeals. She noted that there was no formal request for an extension of time, and so Rule 22(4)(a) had not been complied with. Even if she inferred such a request, she was not satisfied that there were grounds for an extension of time under Rule 5(3)(a). She concluded as follows:

> "23. Mr Macleod has demonstrated a disregard for the procedural requirements and deliberately ignored the Detailed Guidance Notes and the advice given by the Proper Officer and the Information Tribunal Manager.
>
> 24. I acknowledge that Mr Macleod is not legally represented but the Detailed Guidance Notes and the advice given by the Proper Officer and the Information Tribunal Manager could not have clarified further the need to submit an appeal within 28 days of the issue of the Decision Notice. He could have submitted an appeal against FS50184581 issued on 7 September 2009 within the 28 days and asked for no action to be taken pending the second Decision Notice, but he chose to act contrary to the advice and wait until the second Decision Notice was issued. He could have submitted an appeal against FS50155363 issued on 3 December 2009 but chose to apply his own timescale contrary to the procedural requirements.
>
> 25. For these reasons I do not consider it appropriate to extend time for the notice of appeal under Rule 5(3)(a) and therefore, pursuant to Rule 22(4)(b), I must not admit the notice of appeal."

The grounds of appeal to the Upper Tribunal

33. On 20 February 2010 Mr Macleod wrote to the Principal Judge expressing his "extreme disappointment" with the refusal to admit his two appeals. He referred again to the difficulties that he had encountered, to his oversight in not completing the "reasons for late appeal" part of the form ("at the age of 91 my mind sometimes 'misses a beat' ") and to his conviction that the tribunal's letter of 8 January had "at long last ... confirmed that I could submit a single appeal, and my mind focussed entirely on the task of drafting it within 28 days". I note that in actual fact the Information Tribunal Manager had explained that he could "submit one appeal form however you must submit separate grounds of appeal in relation to each Decision Notice" (emphasis added).

34. Following further correspondence, a member of the FTT administrative staff wrote to Mr Macleod on 26 March 2010, reporting that Tribunal Judge Pilling had declined to set aside her decision of 12 February 2010. The letter continued:

> "While it is appreciated that you are not happy with what you regard as a 'harsh decision' the judge is satisfied that you were informed at all stages in clear and unambiguous terms what was expected of you and that you gave an indication as early as 23 September 2009 that you would ignore the

procedural requirements and advice from both the Proper Officer and the Information Tribunal Manager."

35. There were then yet further exchanges between Mr Macleod and the tribunal. Despite all this correspondence (now on four files), I do not actually have before me a copy of the First-tier Tribunal's refusal(s) of permission to appeal to the Upper Tribunal, as required by Rule 22(5)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698, as amended). That said, the correspondence suggests both that the First-tier Tribunal has refused permission to appeal and that Mr Macleod understood the tribunal to have issued such a refusal. If I am wrong about that, and there never has in fact been such a refusal of permission, I waive that requirement under Rule 7(2)(a).

36. In his Form UT11, applying direct to the Upper Tribunal for permission to appeal, and received on 5 July 2010, Mr Macleod sets out his reasons for so doing. He refers to his earlier letters which he claims "presented an overwhelming case for these DNs [Decision Notices] to be dealt within a single Appeal". He cites Rule 5(3)(b) of the GRC Procedure Rules, which empowers the FTT to "consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues". He complains that the advice he received as a result of what he describes as the "incompetence of First Tier Tribunal staff" was "seriously flawed" as it took no account of this provision. Further, he contends that Tribunal Judge Pilling failed to have regard to the overriding objective and "focused exclusively on the strict observance of the Rules governing the 28 day limit, and has placed an inordinate amount of importance on the precise observance of administrative procedures". His own argument as to why he could not reasonably prepare separate appeals was "given no weight whatever".

37. On 8 July 2010 an AAC Registrar wrote to Mr Macleod, acknowledging receipt of his UT11, but pointing out that there was a potential procedural complication, not of his making. This referred to the technical issue of whether the challenge in question should be brought by way of an application for permission to appeal or by way of an application for permission to apply for judicial review.

38. On 9 July 2010 Mr Macleod replied, lodging a parallel judicial review claim form with the Upper Tribunal. His grounds for applying for judicial review are understandably the same as those for his application for permission to appeal.

39. It is not normally the practice of the Upper Tribunal to ask the other party for their views on an application for permission to appeal. However, the statutory procedure in judicial review applications is different. The FTT is the respondent in the judicial review claim but, as is generally appropriate for a tribunal respondent, has taken no active part in the proceedings. The Information Commissioner is an interested party in the judicial review claim. An acknowledgement of service by the ICO opposes the application for permission to apply for judicial review; its ground for so doing is that it says Tribunal Judge Pilling was right to refuse to extend time.

The applications for permission to appeal and the Upper Tribunal's determination

40. I refuse permission to appeal in both cases. The decision on whether or not to extend time, e.g. as here to admit a late appeal, involves the exercise of a case management power. The tribunal has a discretion whether or not to extend time. That discretion must be exercised judicially and in the light of the overriding objective.

41. There may be a number of factors which will be relevant to the exercise of that discretion. They will typically be (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if the application is granted; and (4) the degree of prejudice to the other party (see *Norwich and Peterborough Building Society v Steed* [1991] 1 WLR 449, where the issue was the delay in appealing against an order of the High Court to the Court of Appeal). It may not always be necessary to consider each of those factors.

42. As the decision on whether to extend time involves the exercise of a discretion, the weight to be attached to these various factors – and any others which are relevant to the overriding objective – is a matter for the tribunal judge at first instance. It is not for the Upper Tribunal to second guess the First-tier Tribunal on such matters. Put another way, this is because the role of the Upper Tribunal is limited to correcting the First-tier Tribunal where it has erred in law. The right of appeal to the Upper Tribunal is not an opportunity to re-open a decision which ultimately turns on the facts.

43. I do not accept the criticisms that Mr Macleod makes about Tribunal Judge Pilling's ruling. The FTT, of course, has the power to consolidate proceedings under Rule 5(3)(b), but that assumes that there are proceedings on foot to be consolidated. Mr Macleod was at a logically prior stage, in that he had yet to have an appeal admitted. If his appeals were both admitted, then the tribunal could consider and quite possibly would have consolidated the two appeals. It follows that the advice he received was not seriously flawed. He was repeatedly given clear advice that he needed to protect his position by filing an appeal against Decision Notice 1 in good time but he chose to ignore that advice. On my reading of the file the FTT administrative staff were competent, efficient and patient in dealing with Mr Macleod's many missives.

44. I also do not accept that Tribunal Judge Pilling failed to have regard to the overriding objective and "focused exclusively on the strict observance of the Rules governing the 28 day limit, and ... on the precise observance of administrative procedures". Having noted that Mr Macleod had not formally requested an extension of time, the judge then went on to consider the matter as though he had, drawing the obvious inference from his lengthy correspondence that he was (by implication) making such a request. Had Tribunal Judge Pilling been a procedural pedant, she might have simply found that Rule 22(4)(a) had not been complied with and that was the end of the matter. Quite rightly, she did not take that narrow approach, but went on to consider the overall merits of the matter.

45. It is true that in doing so Tribunal Judge Pilling did not refer in as many words to the overriding objective in Rule 2. However, it is plain from the terms of her ruling that she was alive to the significance of the change from the old procedural rules to the new GRC Procedure Rules. The manner in which she carefully considered the history of the case(s) demonstrates that she was applying the right legal test, namely considering whether to extend time under Rule 5(3)(a) within the overriding objective of dealing with cases fairly and justly. Her omission to use the precise words of Rule 2, and to refer mantra-like to "the overriding objective", does not detract from that conclusion. To find otherwise would be a triumph of form over substance and entirely unwarranted in the light of the very clear (and eminently supportable) findings of fact that she made.

46. In particular, although Tribunal Judge Pilling did not in as many words refer directly to Rule 2(4) of the GRC Procedure Rules, the tenor of her ruling indicated that she was having regard to this important provision. Rule 2(4) provides as follows:

> "(4) Parties must—
> (a) help the Tribunal to further the overriding objective; and
> (b) co-operate with the Tribunal generally.

47. The judge's findings of fact and her analysis overall made it plain that she did not regard Mr Macleod's conduct as helpful to the tribunal and that he was failing to co-operate with the tribunal. Given the history she recounted, it seems to me that her conclusion on that point was not just sustainable but unavoidable.

48. The Upper Tribunal exercises an inquisitorial jurisdiction, and so I have considered whether the ruling of Tribunal Judge Pilling discloses any other possible error of law, independently of the points made by the applicant. For example, despite the common ground and despite Mr Macleod's protestations, these were conceptually two distinct applications for permission to appeal against two separate DNs issued by the ICO on different dates. To some extent the same considerations applied to both, but there were also some differences (notably in the length of the periods of delay). Furthermore, despite all Mr Macleod's arguments, it is entirely possible that an extension of time might properly have been refused as regards the late appeal against Decision Notice 1 but allowed as regards the late appeal against Decision Notice 2. They did not necessarily stand or fall together, however closely they were factually interrelated.

49. I have therefore considered whether Tribunal Judge Pilling dealt appropriately with each late application on its own merits. I have decided that she did, and rely in particular on the final two sentences of paragraph 24 of her Ruling (see paragraph 32 above), where she expressly distinguishes between the two late appeals and her respective reasons for not extending time.

50. In that context it is noteworthy that Decision Notice 1 was issued on 7 September 2009 and the appeal lodged on 3 February 2010 was way out of time. For all the reasons identified by the judge, and which I need not rehearse here, it was not fair and just to extend time under Rule 5(3)(a) to permit the appeal against that Decision Notice to proceed.

51. Decision Notice 2, however, was issued on 3 December 2009, the day before Mr Macleod went abroad for just over 3 weeks. It does not appear to be in dispute but that Decision Notice 2 arrived while he was away. He returned between Christmas and New Year. The judge was certainly aware of that fact, as she mentioned it in her chronology of events at paragraph 14 of her Ruling, but she did not specifically refer to that period of absence in considering whether there were grounds for an extension of time to admit the second appeal. It is, of course, conceivable that an extension of time might well be appropriate in some circumstances when a person has been away on holiday.

52. On that basis, did Tribunal Judge Pilling err by omitting to refer to that period of absence as a relevant consideration as regards the second late appeal? In general terms it seems to me arguable that an applicant who is aged 90, acting without the benefit of legal advice, who is about a month out of time might well have a reasonable case for seeking an extension of time in a case where the ICO decision

notice arrived when he was out of the country and the latter part of the 28 day period fell within a holiday period.

53. This would, however, be a rather artificial way of analysing the situation in this particular case. The tribunal judge was perfectly entitled to have regard to the whole history of the applicant's dealings with the FTT (Information Rights). She had ample grounds for concluding that he had "demonstrated a disregard for the procedural requirements and deliberately ignored" advice tendered in good faith by tribunal staff. His letter of 16 January 2010, in which he announced that he proposed to regard the 28 days as dating from 14 January, the date of the most recent letter from the tribunal office, was perhaps the most flagrant example of that approach. In effect, Mr Macleod was seeking to usurp the tribunal's power to decide what was fair and just in terms of determining any extension of time to permit an out of time appeal. This factor plainly weighed heavily with Tribunal Judge Pilling. On that basis, if she did err – e.g. by not expressly having regard to the shorter delay on the second appeal – it was not a material error of law.

54. So I find that Tribunal Judge Pilling applied the relevant law, made findings of fact which were undoubtedly open to her on the evidence before her and reached a reasoned decision. In my view her refusal of permission to appeal discloses no arguable and material error of law. I emphasise that the question is not what I would have decided in the same situation (although, as it happens, I would have exercised my discretion in the same way, given the circumstances). However, I stress that my view of the underlying merits is essentially irrelevant. I can intervene only if she erred in law in some way. For the reasons above I have concluded that she did not, and accordingly I must refuse permission to appeal to the Upper Tribunal.

55. If I am wrong about that, and she did commit an arguably material error of law, I would still refuse permission to appeal. This is because even if there is an arguable error of law present, the Upper Tribunal is vested with a discretionary power as to whether or not to grant permission, rather than being subject to the imposition of a duty in determining such applications. In the light of the circumstances of this case as a whole, and the overriding objective, I take the view that further litigation would be wholly disproportionate.

The judicial review applications

56. That leaves the parallel applications for judicial review. The focus of judicial review is primarily on issues of process rather than the substantive merits. In a judicial review application I certainly cannot consider afresh how the Tribunal Judge should have exercised the discretionary power to extend time. I can only grant relief by way of judicial review if the Tribunal Judge's exercise of that discretion was wrong in law or flawed in some way that permits interference by way of judicial review. The issues are, to all intents and purposes, the same as on the applications for permission to appeal. Moreover, even if Tribunal Judge Pilling had misdirected herself, this is an appropriate case in which to refuse relief, given the facts that she found. I therefore also refuse permission to apply for judicial review.

One final point

57. In other correspondence on file, directed to the Upper Tribunal and other bodies which are not parties to these applications, Mr Macleod has demanded to know why Tribunal Judge Pilling was empowered to consider his challenge to her

refusal to admit his late appeals and whether this practice has been approved by the Lord Chancellor and the Lord Chief Justice.

58. This inquiry is misguided. It is common practice in courts and tribunals for the judge who made a decision to consider any initial application for permission to appeal from that decision. It is a perfectly proper and efficient use of judicial resources. Judges not infrequently give permission to appeal from their own decisions because they recognise that there is an arguable point of law involved. Moreover there is – as here – typically the possibility of renewing that application at a higher level. The suggestion that the practice is in some way contrary to the principles of natural justice has no merit.

Conclusion

59. For the reasons explained above, the decision of the tribunal does not involve any material error of law. The Upper Tribunal therefore dismisses (1) the applications for permission to appeal against the decisions of the First-tier Tribunal dated 23 July 2010 (Tribunals, Courts and Enforcement Act 2007, section 11 and Rule 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008); and also (2) the applications for permission to apply for judicial review in respect of the same decisions (Tribunals, Courts and Enforcement Act 2007, section 15 and Rule 28 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

60. There is no right of appeal against the determinations under limb (1) in the previous paragraph, as such decisions are "excluded decisions" under the express terms of the 2007 Act (see Tribunals, Courts and Enforcement Act 2007, section 11(8)(c)). There is, however, the option of applying for a reconsideration of these determinations at an oral hearing, as they have been made on the papers. An application for any such reconsideration, which will typically be heard before a different Upper Tribunal judge, as a matter of general practice, must be made within 14 days (Rule 22(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

61. There is also the option of applying for a reconsideration of the judicial review determinations under limb (2) at an oral hearing, for the same reason. Again, any application for such reconsideration must be made within 14 days (Rule 30(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

62. However, the possibility of applying for a reconsideration outlined in the previous two paragraphs is subject to the forthcoming decision of the three-judge panel of the Upper Tribunal on the appropriate means by which to challenge a FTT decision to refuse to extend time. If the Upper Tribunal decides that this must be by way of an application for permission to appeal, and should not be via judicial review, then that particular possibility will be closed (and indeed vice versa).

Signed on the original
on 10 December 2010

Nicholas Wikeley
Judge of the Upper Tribunal