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

The Upper Tribunal dismisses:

(1) the application for permission to appeal against the decision 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

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

There is to be no publication of any matter likely to lead members of the public directly or indirectly to identify the person who is the subject of the application: Rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) applies. Accordingly, save for the front sheet (which identifies the parties by name), this determination may be made public.

REASONS

Introduction

1. This an application for permission to appeal against the decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights), dated 23 July 2010, to refuse to extend time to admit the applicant's late appeal. The applicant has also applied for permission to apply for judicial review of the same decision. The two 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 make determinations of permissions to appeal widely available, 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 available for 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, and applications for permission to appeal, 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 would normally be 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. Like the AAC, however, and for the same reasons, it does not normally publish determinations on permissions to appeal and other such rulings.

6. In the present case the applicant has serious ill-health issues. In those circumstances it seems to me that what may be the normal convention in the information rights jurisdiction, namely a presumption of openness, is displaced. For that reason I refer to the applicant simply as Mr X.

7. Accordingly, I also direct that, save for the front sheet (which identifies the parties by name), this determination may be made public. There is to be no publication of any matter likely to lead members of the public directly or indirectly to identify the person who is the subject of this application: see Rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008. I turn now to the issue of late appeals.

The statutory provisions governing late appeals

8. 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".

9. 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)—
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> (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
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> (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."

10. 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 background to the late appeal to the First-tier Tribunal (Information Rights)

11. In the present case Mr X has been involved in a long running dispute with his local authority about various planning matters concerning a neighbour's property. This has led to a complaint to the Local Government Ombudsman. It had also prompted Mr X to make an application to the council under freedom of information legislation. He subsequently complained to the Information Commissioner's Office (ICO) about the way that the request had been handled by the local authority.

12. The Information Commissioner issued a Decision Notice (FS50213882) on 4 March 2010, which partly upheld but in part did not uphold the complaint. Mr X, like the local authority, had a right of appeal against the Decision Notice (Freedom of Information Act 2000, section 57, as applied by regulation 18 of the Environmental Information Regulations 2004 (SI 2004/3391)), and subject to the rules on time limits referred to above. The time limit under Rule 22(1) expired on 1 April 2010.

13. Mr X's notice of appeal was received by the FTT (GRC) (Information Rights) administration by fax on 7 July 2010 (with hard copy accompanying documents received by post on 9 July 2010). His appeal was therefore some 2 months out of time. In accordance with Rule 22(4)(a), Mr X asked for an extension of time, referring to "(Following a diagnosis of cancer) the side effects of radiotherapy" and referring also to previous correspondence with the tribunal administration.

14. That correspondence was extensive. In summary it comprised the following letters.

15. On 7 April 2010 Mr X wrote to the ICO, explaining he had been unwell and receiving treatment and he had only just realised that there was a 28 day time limit and asking for a "further 28 days to assimilate your Decision Notice and, if appropriate, prepare and submit an appeal".

16. On 12 April 2010 the ICO replied, pointing out that any request to lodge a late appeal should be taken up directly with the FTT (information Rights).

17. On 16 April 2010 Mr X wrote to the FTT (information Rights), requesting a further 28 days to lodge an appeal and offering to provide medical evidence.

18. On 19 April 2010 the FTT (GRC) (Information Rights) administration replied, stating that the tribunal's President had granted an extension of time to lodge the appeal by 14 May 2010.

19. On 11 May 2010 Mr X replied, reporting that he remained unwell and did not expect to meet the deadline of 14 May 2010 but "do not wish to lose my right of appeal" and asked for the tribunal's "further consideration of my situation".

20. On 12 May 2010 the FTT (GRC) (Information Rights) administration wrote to Mr X advising him that the Principal Judge had asked Mr X to provide supporting medical evidence and a date by which he expected to be able to lodge his appeal. The letter continued: "all that is needed in the notice of appeal is for you to set out

briefly the reasons why you consider the Information Commissioner's decision notice is wrong. There will then be further opportunities to prepare your case before the hearing".

21. On 13 May 2010 Mr X replied in turn, by way of two letters, enclosing the medical evidence requested but not actually providing a specific date by which he anticipated being able to lodge his notice of appeal. He also provided a leaflet which described the effects of fatigue following his treatment (which he had completed in January 2010) as lasting for up to 12-18 months. He stated that he was not seeking a deadline of either "January or July 2012" but, given his condition, "the most generous of periods for lodging my notice of appeal would be appreciated... I apologise for my inability to be more helpful at this time".

22. On 14 May 2010 the FTT (GRC) (Information Rights) administration wrote to Mr X, expressing the tribunal's sympathy but stating that it was not prepared to grant an open-ended extension of time. The letter continued:

> "As a result you will need to apply for the appeal to be permitted to proceed out of time in your Notice of Appeal once lodged and the Tribunal will consider your application again at that time. It is only fair to point out to you now that the longer you leave to lodge an appeal the less likely the Tribunal will be to exercise its discretion to allow an appeal to proceed out of time".

23. On 28 May 2010 Mr X wrote again to the tribunal, reporting encouraging words from his specialist and adding "I will speak with you before returning to the subject of my Notice of Appeal, hopefully in the next few weeks". It seems that Mr X rang the administrative office nearly a month later on 23 June 2010 to discuss the matter further.

24. On 30 June 2010 Mr X wrote again, to report that "but for locating a few supporting documents, I have not only virtually completed the preparation of my appeal but also done so in greater detail than I had originally thought circumstances would allow". He mentioned that he had been delayed further by another planning matter involving his neighbour and concluded that "I am confident that [my appeal] will be posted to you by the middle of next week, if not sooner".

25. On 7 July 2010, Mr X faxed his notice of appeal (see paragraph 13 above). The accompanying evidence, sent by post, comprised 25 Appendices running to a total of 102 pages (mostly correspondence about the subject matter of the dispute, some of it of going back some years).

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

26. On 23 July 2010 Tribunal Judge McKenna considered Mr X's notice of appeal. She referred in similar detail to the chronology of events set out at paragraphs 15-25 above, noting that when Mr X wrote to the ICO in April he was already outside the 28-day time limit, albeit by only a few days. She referred to the provisions of Rules 5 and 22 of the GRC Procedure Rules, as well as to the overriding objective "to deal with cases fairly and justly" in Rule 2. She observed that this imposed a duty on the tribunal to seek to give effect to the overriding objective when exercising any power under the Rules and also on the parties to assist the tribunal and to co-operate generally in furtherance of the overriding objective.

27. Tribunal Judge McKenna declined to grant an extension of time under Rule 5(3)(a) and therefore ruled that the appeal could not proceed. Her detailed reasons were as follows:

> "8. In common with the Principal Judge and the Tribunal administration, I express my sympathy to Mr X regarding his medical condition and the debilitating effects of his treatment. I note, however, that he was already out of time when he first approached the Tribunal for an extension of time; that he was given a generous extension of time by the Principal Judge but that he stated in advance of that date that he did not expect to comply with the new time limit. I further note that he did not then provide the Tribunal, despite being requested to do so, with a date by which he did expect to be able to lodge the Notice of Appeal and that he was expressly warned (a) that he could not have an open ended extension and (b) that the longer he left it, the less likely the Tribunal would be to grant his request.
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> 9. I also note that Mr X was expressly informed by the Tribunal administration on 12 May that he needed only to provide brief details of why he considered the Information Commissioner's decision was wrong in order to lodge the appeal, and that he could provide further details later on. Mr X was able to respond to that letter with his two letters sent on 13 May, but nevertheless waited a further eight weeks to provide a fully-documented set of Grounds and enclosures. During those eight weeks he was able to correspond with the Tribunal administration several times and, apparently to make objections to another planning application.
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> 10. I have taken into consideration Mr X's illness and treatment, and I have made allowances for the fact that he is unrepresented and must be assumed to be unfamiliar with Tribunal procedures. Nevertheless, I have concluded that he has not co-operated with the Tribunal to the extent required by the overriding objective. In particular, I find that he did not take heed of the Tribunal's advice to lodge brief grounds of appeal as soon as possible, preferring to delay in order to provide it with a full argument. I find that he did not comply with the earlier extension of time granted by the Principal Judge and did not, when asked to do so, provide the Tribunal with a further date by which he did feel able to send in his Notice of Appeal. I find that he failed to take heed of the Tribunal's warnings that it could not grant him an open-ended extension of time and that the longer the delay, the less likely the chance of a further extension being granted. The result of Mr X's failure to accept the advice given to him was that his application was eventually received some thirteen weeks after the date required by the Rules. I have considered the Tribunal's duty to further the overriding objective and in particular to avoid delay. I have also taken into account the inconvenience and drain on resources which would be caused to the Information Commissioner in having to respond to an appeal made so long after his decision."

The grounds of appeal

28. On 5 August 2010 Mr X lodged what he described as an appeal against that decision. He conceded that the tribunal's administrative staff had been "considerate and helpful" but that Tribunal Judge McKenna's decision was "harsh". He reiterated the various difficulties he had faced, concluding:

> "In a situation where a diagnosis of cancer and the unpredictable and debilitating effects of radiotherapy have severely affected my ability to submit a Notice of Appeal on time, and I have somewhat unwittingly submitted excessive, though relevant information, after investing considerable time and effort over the past 6 years in a dispute to which my Appeal relates, the right to which I do not wish to lose, I am at the mercy of the Tribunal."

29. On 23 August 2010 Tribunal Judge McKenna treated that letter as an application for permission to appeal, which she refused.

30. On 17 September Mr X lodged an application for permission to appeal with the Upper Tribunal. His reasons for appealing were stated to be as follows:

> "I would like the Upper Tribunal to consider my feelings that, as the First-tier Tribunal did not take sufficient account of the severity of my illness (cancer) and the related debilitating radiotherapy treatment, the reasons given for the decision are inconsiderate and inadequate."

31. On 21 September 2010 an AAC Registrar wrote to Mr X, pointing out that there was a potential procedural complication. 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 via an application for permission to apply for judicial review.

32. On 4 October 2010 Mr X lodged a parallel judicial review claim form with the Upper Tribunal. His grounds for applying for judicial review were understandably the same as those for his application for permission to appeal.

33. 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 Information Commissioner opposes the application for permission to apply for judicial review; its ground for so doing is that it says Tribunal Judge McKenna was right to refuse to extend time.

The Upper Tribunal's decision and reasons

34. I refuse permission to appeal. 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.

35. 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. As this decision involves the exercise of a discretion, the weight to be attached to those 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.

36. Put another way, this is because the power 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 have another go at challenging a decision which ultimately turns on the facts. Moreover, the overriding objective under the GRC Procedure Rules (and the equivalent codes for other FTT chambers) requires the tribunal "to deal with cases fairly and justly", not "to deal with cases over generously and bending over backwards to make every possible allowance". The very notions of fairness and justice vest the tribunal with a broad discretion.

37. Mr X argues that Tribunal Judge McKenna's reasons were both "inconsiderate and inadequate". If they were, then the inadequacy of any reasons would be an error of law. However, in the circumstances I have to disagree. In my judgment they were both considerate and adequate, indeed more than adequate. The judge recognised the difficulties faced by Mr X but also took into account the other relevant considerations. I have quoted her reasons at length at paragraph 27 above because they are in many ways a model of their kind. Realistically, as I cannot improve upon them, I will not rehearse the issues again. Tribunal Judge McKenna plainly applied the relevant law, made findings of fact which were undoubtedly open to her on the evidence before her and reached a fully reasoned decision. Her refusal of permission to appeal discloses no arguable 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 Tribunal Judge McKenna erred in law in some way. She did not, and accordingly I must refuse permission to appeal to the Upper Tribunal.

38. That leaves the parallel application for judicial review. The focus of judicial review is primarily on issues of process rather than on 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 other way that permits interference by way of judicial review. The issues are, to all intents and purposes, the same, and so for the same reasons I also refuse permission to apply for judicial review.

Some final observations

39. As noted above, Mr X very properly acknowledged that the FTT (Information Rights) administrative staff had been "considerate and helpful". I might add that they were at all times acting with commendable speed and efficiency – as is apparent from the sequence of events outlined at paragraphs 15-25 above, they typically replied to Mr X's (repeated) correspondence within 48 hours or so. AAC judges see appeals from a wide range of jurisdictions and sadly in some of the larger volume tribunals a reply by tribunal administrators within 48 days might sometimes be seen as an achievement.

40. I also recognise that tribunal administrative staff have a very difficult task to do. Tribunals rightly pride themselves on being informal, accessible and user-friendly. Their administrative staff often go out of their way to explain tribunal procedures to applicants, many of whom have little if any experience of such matters

and most of whom are acting without the benefit of legal advice. Such staff have to tread a difficult line in providing generalised advice on procedures while not purporting to provide advice on the merits of individual cases, which are ultimately a matter for the judiciary.

41. In the present case, the administrative staff appear to have given sound procedural advice, on instructions from members of the tribunal judiciary where appropriate, but unfortunately Mr X did not follow that advice. That led inexorably to Tribunal Judge McKenna's refusal to extend time for the late appeal.

Conclusion

42. 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 application for permission to appeal against the decision 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 application for permission to apply for judicial review in respect of the same decision (Tribunals, Courts and Enforcement Act 2007, section 15 and Rule 28 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

43. There is no right of appeal against determination (1) in the previous paragraph, as such a decision is an "excluded decision" 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 determination (1) at an oral hearing, as this determination has been made on the papers. An application for such a reconsideration hearing, which will typically be heard before a different judge, must be made within 14 days (Rule 2(3)-(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

44. There is also the option of applying for a reconsideration of determination (2) at an oral hearing, again as this determination has been made on the papers, and on the same terms (Rule 30(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

45. I should just add the qualification that the position 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 the latter possibility will be closed (and vice versa).

Signed on the original
on 7 December 2010

Nicholas Wikeley
Judge of the Upper Tribunal

(Corrected on 23 December 2010)