IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. GIA/2353/2010

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Name:	Mr Michael Jacobs
Tribunal:	
Tribunal Case No:	EA/2010/0041
Tribunal Venue:	First-tier Tribunal (Information Rights)
Hearing Date:	24 August 2010

NOTICE OF DETERMINATION OF
APPLICATION FOR PERMISSION TO APPEAL

I refuse permission to appeal.

REASONS

1. No arguable error of law in the decision of the tribunal is shown. An appeal to the Upper Tribunal can only be brought on a question of law: see section 11 of the Tribunals, Courts and Enforcement Act 2007. No such question is identified in the application for permission to appeal: the tribunal's decision that, on the facts of this case, the applicant's request fell within exception in section 14 of the Freedom of Information Act 2000 for "vexatious" requests was properly based on the evidence before it and a decision that the tribunal was entitled to reach, applying any reasonable meaning of the word "vexatious". The reasons for the tribunal's conclusion are clearly and adequately set out in the "Reasons for Decision" issued by the First-tier Tribunal.

2. I also adopt and endorse the comments of the First-tier Tribunal Judge made when he refused the applicant permission to appeal on 20 September 2010.

(Signed)

A Lloyd-Davies
Judge of the Upper Tribunal

(Dated) 10 December 2010

Under rule 22(3)-(5) of the Upper Tribunal Procedure Rules, the applicant may apply for this decision to be reconsidered at an oral hearing but any such application must be made in writing and received by the Upper Tribunal within 14 days after the date on which this notice is sent to the applicant.

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Appeal No. GIA/2353/2010

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Name:	Mr Michael Jacobs
Tribunal:	First-tier Tribunal (General Regulatory Chamber) (Information Rights)
Tribunal Case No:	EA/2010/0041
Tribunal Venue:	Not known – appeal decided on the papers
Decision Date:	24 August 2010

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

I refuse permission to appeal.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 21 and 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS

1. George Bernard Shaw famously wrote that "all professions are conspiracies against the laity". There is much wisdom in that maxim and it certainly appears to be a view firmly held by the applicant in the present case. He may or may not have good reasons for his views.

2. Certainly the applicant has over a number of years been seeking to right what he regards as a grievous wrong and a serious injustice to his family. I am not going to rehearse the details here, as they are set out in the papers. Suffice it to say that the applicant's father established an offshore discretionary family trust in or about 1978. In 1993 an action brought by the father against the family's accountants for alleged misappropriation of trust funds was settled out of court, albeit with a deduction of a substantial sum for solicitors' costs. The applicant's father later failed in an action against his bank for knowing assistance in that alleged misappropriation, which led to the bank taking bankruptcy proceedings against the father in 1995. The trustee in bankruptcy subsequently took court action in 2004 against the applicant and his mother. Since then the applicant has sought to challenge the conduct of the trustee in bankruptcy in various ways, including a complaint to the Association of Chartered Certified Accountants (ACCA) and pursuing related issues with the Insolvency Service, the overall regulator.

3. I note that the report of the ACCA independent assessor on file dated 27 June 2006 refers to the applicant's conduct of the 2004 legal proceedings in these terms (at paragraph 7):

> "... the Complainant represented himself – and it would seem that he had a fair (but patchy) amount of knowledge of the relevant law and court procedure. By layman's

standards he performed the task heroically and intelligently. Sadly, however, this DIY job was a poor substitute for the services of an experienced Chancery Queen's Counsel who, too, would have found it not an easy task to articulate the case to convince the court...."

4. The ACCA independent assessor continued (at paragraph 9):

"One may quite understand the nature and amount of frustration which the Complainant may be feeling in relation to the whole saga. However, matters were not helped by the fact that he represented himself in such technically complex proceedings and, being too much personally and emotionally involved in them, may not have viewed the other side's case dispassionately."

5. There are, in my view, echoes of that assessment in the current proceedings, even though the services of a Chancery silk are not usually required in the context of the ordinary Freedom of Information Act [FOIA] request. In July 2006, the ACCA independent assessor having dismissed his complaint against the trustee in bankruptcy, the applicant took the matter up further with the Insolvency Service. There was then lengthy and detailed correspondence (on both parts) between the applicant and the Deputy Section Head of the Insolvency Practitioner Policy section at the Insolvency Service on various matters concerning the role of a trustee in bankruptcy. I would observe that whatever view one takes of the Deputy Section Head's analysis of the role of the trustee in bankruptcy – which is not the issue before the Upper Tribunal – there is no doubt that he sought to address the applicant's many points fully and thoroughly. On 30 January 2007 the Deputy Section Head wrote to the applicant advising him that he could add nothing further to the previous exchanges.

6. On 12 December 2007, having taken the issues up with the Ministry of Justice but having been referred by that department back to the Insolvency Service, the applicant wrote again to the Insolvency Service setting out four issues relating to the role of the trustee in bankruptcy "on which precise and detailed information is sought". I have to say that the four heads of enquiry were then phrased in rather general terms. For example, question 4 referred to "Responsibilities to act fairly and impartially in dealing with false creditors and in presenting a true financial report to the Court concerning all matters relating to the alleged debt." I appreciate that the concept of "information" under FOIA is defined in very broad terms, but it seems that what the applicant was really asking for was a form of legal opinion or statement of principles. However, no point has been taken on that and it would be wrong to take the matter further.

7. On 18 January 2008 the Insolvency Service sent a "Refusal Notice" to the applicant citing section 14 of the Freedom of Information Act (FOIA) 2000. On 24 January 2008 the applicant lodged a complaint with the Information Commissioner's Office (ICO).

8. On 9 February 2010 the ICO issued a Decision Notice (ref FS50183889). The summary of that detailed document read as follows:

"The complainant requested 'precise and detailed information' in respect of a number of issues relating to legal procedures and the responsibilities of an appointed Trustee in Bankruptcy. On receipt of the request the authority initially responded by stating it was a repeated request and refused to answer it on the basis of section 14(2) of the Act but then changed this to a refusal under section 14(1) of the Act (vexatious request). The Commissioner, on balance, considers that the public authority was correct to refuse the request under section 14(1)."

9. On 14 February 2010 the applicant lodged an appeal with the First-tier Tribunal (FTT). On 16 March 2010 the ICO lodged a detailed response resisting the appeal. The applicant lodged a detailed reply and further documentary evidence (running to over 100 pages in total) and asked for a paper hearing.

10. On 24 August 2010 the FTT, chaired by Tribunal Judge Ryan, considered the appeal. The applicant's appeal was dismissed. So the applicant's request was found to be vexatious. Judge Ryan subsequently refused an application for permission to appeal to the Upper Tribunal, which the applicant then renewed direct to the Upper Tribunal.

11. On 10 December 2010 Judge Lloyd-Davies of the Upper Tribunal refused permission to appeal on the papers on the basis that no arguable error of law in the FTT's decision was shown. The judge ruled that the FTT's decision that the request fell within section 14 of FOIA "was properly based on the evidence before it and a decision that the tribunal was entitled to reach, applying any reasonable meaning of the word 'vexatious'." The applicant exercised his right to request a reconsideration of that determination at an oral hearing.

12. On 28 March 2011 I held an oral hearing of the renewed application at Harp House in London. The applicant appeared, representing himself. He had prepared a very helpful written skeleton argument with an accompanying timeline document. I am indebted to him for the clear and measured way in which he presented his case. I have absolutely no doubt as to the fact that the applicant sincerely believes that he and his family have been wronged by the actions of the trustee in bankruptcy, a wrong which has been compounded by what he sees as the failings of the Insolvency Service. However, as the applicant also rightly recognised, the question is not whether he is vexatious but whether his request for information can be characterised in that way.

13. In his original application to the Upper Tribunal the applicant set out five grounds of appeal, which were elaborated upon in the renewed application and at the oral hearing. Those grounds can be summarised as follows:

(1) the FTT allowed minor criticisms to take precedence;
(2) the FTT decision enabled the Insolvency Service to use exaggerated excuses as a veil or diversionary tactic to avoid engaging with the serious underlying issues involved;
(3) the FTT had insufficient evidence to apply section 14(1) of FOIA;
(4) the FTT demonstrated an "obvious absence of impartiality" in selecting a few isolated instances from the correspondence;
(5) the FTT's decision was arbitrary and irrational in that it blocked a legitimate attempt to use FOIA to expose serious failings by the Insolvency Service and others.

14. The grounds numbered (1), (2) and (4) above are essentially different ways of saying the same thing. They are all concerned with the weighing of the evidence by the FTT. However, an appeal to the Upper Tribunal is confined to a point of law. I cannot substitute my own view of the facts for that taken by the tribunal – not least as the tribunal is an expert tribunal in this specialist field, comprising a lawyer and two specialist members. In particular, as Dobbs J. remarked in the context of a very different type of tribunal (although the same principle as she expressed there also holds good here), it is axiomatic that the weight to be attached to any particular evidence "is essentially a matter for the Tribunal, unless the approach can be shown to be so illogical as to be irrational or perverse" (per Dobbs J. in *W.S. (by his litigation friend Mr S) v Governors of Whitefield Schools and Centre* [2008] EWHC 1196 (Admin) at paragraph 27).

15. It is clear to me that the FTT in this case took a careful and measured approach to its consideration of the evidence. For example, the FTT recognised that the tone of correspondence has to be considered in the broader context and that little weight should be attached to any suggestion of distress or irritation caused to staff of the Insolvency Service. This is hardly indicative of a tribunal "cherry-picking" the evidence to find points to be made against the applicant. The reality is that the applicant disagrees with the interpretation placed on the evidence by the FTT. As such he is seeking to re-argue the facts of the case, which is not the purpose of an appeal limited to points of law. I therefore reject these three grounds of appeal as not being arguable.

16. Ground (3) alleges that the FTT had insufficient evidence to apply section 14. I disagree. Certainly an absence of evidence would amount to an error of law. However, an argument based on insufficiency of evidence really comes back to the general point encapsulated in the grounds of appeal discussed above. Reading the decision it is plain the FTT applied the relevant principles governing what constitutes a vexatious request, as applied in previous case law, considered the material evidence, made appropriate findings of fact and reached a conclusion that it was entitled to. So, for example, the fact that the present case does not present the same extreme features as the repeated requests in *Coggins v ICO* (EA/2007/0130) is hardly the point. That may well have been an exceptional case. However, it is not simply a question of comparing one case to another. In any event the tribunal was entitled to take into account not just the number of letters but also their length. The FTT's task was to consider the various factors that might point towards a conclusion that the request was (within the meaning of section 14 of FOIA) vexatious, or not, and reach a balanced judgment. The FTT in the present case did just that. That is a quintessential "jury question" for the fact-finding tribunal.

17. The applicant also argued that the tribunal failed to recognise that the chain of correspondence in September 2006 had been set off by the Insolvency Service's comment in their letter of 1 September 2006 that the matter would be considered over the following two weeks, and that this therefore called for a response within two weeks. I have read the letters in question and I have to say that I cannot accept the applicant's construction. Indeed, reading the exchange of views at it develops it is quite clear that the tribunal was entitled to reach the decision it did, namely that the applicant's letters showed an obsessive element. Again, that is a "jury question" for the fact-finding tribunal.

18. Ground (5) is a claim that the FTT's decision was perverse. The principles by which perversity is to be judged are set out in *Yeboah v Crofton* [2002] EWCA Civ 794 (per Mummery LJ at paragraphs 92-95). In summary, such a submission can 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).

19. This is a demanding threshold to meet, and I am certainly not satisfied that the FTT's decision was "wildly wrong"; in fact, far from it, for the reasons I have set out above. I also 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 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).

20. For the avoidance of doubt I should stress that I would not have reached a different conclusion on the facts or, to any significant extent, expressed myself differently to the FTT in this case. But that is not the point. The question is whether I can find any arguable error of law in the tribunal's decision.

21. I return to G B Shaw's maxim. The applicant has complaints against the actions (and perhaps more to the point inactions) of, amongst others, the trustee in bankruptcy, the Association of Chartered Certified Accountants, the Insolvency Service and the Information Commissioner. None of those issues is before me. The Upper Tribunal's sole role is to determine appeals on points of law against decisions of the First-tier Tribunal. As I have sought to explain in this determination, disagreeing with the tribunal's conclusions on particular facts or with the overall outcome is not itself a point of law. My conclusion is there is no arguable point of law here and so I must dismiss the renewed application for permission to appeal – at rather greater length but essentially for the same reasons as Judge Lloyd-Davies.

(Signed on the original)

Nicholas Wikeley
Judge of the Upper Tribunal

(Dated) **29 March 2011**