THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

NOTICE OF DETERMINATION OF
APPLICATIONS FOR PERMISSION TO APPEAL
AND TO APPLY FOR JUDICIAL REVIEW

Application for permission to appeal (GIA/1681/2010)

Applicant:	Mr Julian Shephard
First Respondent:	The Information Commissioner
2nd Respondent	West Sussex County Council

Application for permission to apply for judicial review (JR/2013/2010)

Applicant:	Mr Julian Shephard
Respondent:	First-tier Tribunal (Information Rights)
Interested party:	The Information Commissioner
Interested party:	West Sussex County Council

JUDGE WIKELEY

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to give permission to appeal from the First-tier Tribunal decision dated 14 September 2009, refusing to admit the applicant's late appeal to the First-tier Tribunal. In so far as is necessary, I also give permission to apply for judicial review in respect of the same decision. The parties should note the directions listed at the end of this determination.

This determination is given under sections 11, 15 and 18 of the Tribunals, Courts and Enforcement Act 2007 and rules 21, 22, 28 and 30 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Introduction

1. This matter concerns an application for permission to appeal and a parallel application to apply for judicial review of a decision of the General Regulatory Chamber of the First-tier Tribunal. Through no fault of the applicant, the matter has become procedurally rather complex.

2. The background is as follows. The applicant has been involved in a long-running dispute with West Sussex County Council over the legal and evidential basis for traffic restriction orders (TROs) and road signs near Haywards Heath. As I understand it, his fundamental point is that the county council carried out a review of various routes and as a result modified the restrictions imposed on HGVs using certain roads in the district. The effect, he contends, is that HGVs stopped using a previous route and instead started using a different route, which involved such vehicles passing down the unclassified road on which the applicant lives, a road which he states is not suited for this purpose. The applicant's concern about such a state of affairs, if so, is entirely understandable.

The applicant's request and the Information Commissioner's Decision Notice

3. On 17 October 2007 the applicant made a detailed request from the county council for various types of information about the basis for the traffic arrangements in question. He was dissatisfied with the council's response and on 12 April 2008 contacted the Information Commissioner with a complaint. After a lengthy process of inquiry, the Information Commissioner issued a Decision Notice (FS50200310) on 15 February 2010.

4. In summary, the Information Commissioner decided that:

> (1) the council had wrongly considered the request under the provisions of the Freedom of Information Act 2000 rather than the Environmental Information Regulations 2004 (SI 2004/3391);
> (2) the council's refusal notice breached regulation 14(3) of the 2004 Regulations; and
> (3) the council was not correct to rely on the exception in regulation 12(4)(b), namely that the request was "manifestly unreasonable".

5. In the Decision Notice the Information Commissioner directed the county council to take two steps. The first was to conduct a manual search of its TRO files to ascertain whether any of the information requested was held. The second was

that, in the event of any relevant information being found, the council should then either disclose that information to the applicant or issue a (fresh) refusal notice citing a valid exception.

6. Some two months later on 12 April 2010 the council wrote to the applicant stating that it had undertaken a manual search of its records, as required by the Information Commissioner, but that it did not hold the requested information. The applicant did not accept this and wrote to the Information Commissioner asking him to take enforcement action against the council. On 7 May 2010 a Senior Complaints Officer for the Information Commissioner wrote to the applicant advising him that as, in the Information Commissioner's view, the council had complied with the terms of the Decision Notice, their role was now at an end.

The applicant's late appeal to the First-tier Tribunal

7. A week later, on 12 May 2010, the applicant appealed to the First-tier Tribunal (Information Rights) in respect of the Decision Notice dated 15 February 2010. That appeal was received on 14 May 2010. His primary ground of appeal was his request for "a new decision notice upheld in favour of full disclosure based on the original information request". He alleged that the Information Commissioner was allowing the county council to get away with maladministration; he argued that the Information Commissioner was in breach of his duty by allowing the council deliberately to withhold evidence against themselves in order to pervert the course of justice. The applicant accepted that his appeal was outside the 28-day time limit. He added "I did not consider a tribunal at the onset because the decision notice was in my favour. However I have not received any information, even though the decision notice has been apparently complied with."

8. On 14 May 2010, the day that the appeal was received, an administrative officer for the First-tier Tribunal, apparently acting on the advice of Principal Judge Angel, wrote to the applicant in the following terms:

> **"Notice of Appeal lodged against Decision Notice FS50200310**
> Thank you for your correspondence dated 12th May enclosing a notice of appeal against the above decision notice. Unfortunately the Notice of Appeal is well out of time and the Tribunal is not prepared to allow the appeal to proceed. In any case the grounds of appeal do not appear to raise matters which the Tribunal has powers to deal with and should be pursued elsewhere."

9. The applicant asked for the tribunal's decision not to proceed with the appeal to be reviewed. He pointed out that the council had taken 7 weeks to respond to the Decision Notice and asked whether it was reasonable to expect the appeal to be lodged in time in those circumstances. A different tribunal clerk, again acting on the advice of the Principal Judge, then wrote to the applicant on 24 May 2010 in the following terms:

> "… I am able to tell you that your appeal was not accepted by the tribunal because it was lodged some sixty days outside the twenty eight day period allowed for such appeals and you have not provided adequate reasons for the delay.
>
> In any case, the tribunal notes that Information Commissioner, in effect, found in your favour and that if the public authority has not complied with the decision notice, then that is a matter that you need to take up with the

Commissioner. The tribunal does not have jurisdiction to enforce the Commissioner's decisions."

10. On 1 June 2010 the applicant applied for permission to appeal to the Upper Tribunal against the decision of 14 May 2010 not to admit his appeal. On 16 June 2010 Tribunal Judge McKenna – who, it seems, had had no previous involvement in the matter – considered the matter. In a detailed ruling, she first reviewed the decision of 14 May 2010 but decided that no further action should be taken on the review. She acknowledged the applicant's frustration that circumstances beyond his control had caused the appeal to be lodged late, but concluded that the late appeal was without merit. The reason for this was that the tribunal had no power to grant him the relief he sought, which was, as she put it, "namely enforcement of the Information Commissioner's Decision Notice".

11. As regards the application for permission to appeal, Tribunal Judge McKenna took into account the fact that the Information Commissioner's Decision Notice was in the applicant's favour, that it had apparently been complied with by the local authority – while recognising that he remained dissatisfied with the outcome – and that it was a well established legal principle that a successful party should not be permitted to bring an appeal. She therefore decided that there was no error of law identified in the decision of 14 May 2010 and accordingly refused permission to appeal.

The proceedings before the Upper Tribunal

12. The applicant has now renewed his application for permission to appeal direct to the Upper Tribunal. He has phrased his application in terms of an application for permission to appeal against the decision of Tribunal Judge McKenna on 16 June 2010. This was entirely understandable, as her decision was the most recent refusal by the First-tier Tribunal to consider the merits of his proposed appeal. However, there is no appeal as such against a refusal by the First-tier Tribunal of permission to appeal to the Upper Tribunal, for the simple reason that it is unnecessary – the application can be renewed direct to the Upper Tribunal as here. The applicant's chief complaint against the First-tier Tribunal was its refusal to admit his late appeal, as communicated in the letter of 14 May and confirmed on 24 May. I therefore treat the application he has made as an application for permission to appeal against the decision of 14 May.

13. However, there is currently some uncertainty at present as to the appropriate route for challenging a refusal by the First-tier Tribunal on the jurisdictional question of whether or not to admit a late appeal. It may be that an appeal in the normal way against the refusal decision is the proper way to challenge such a decision. An alternative view is that a decision 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. Those competing views are currently under consideration by a three-judge panel of the Upper Tribunal in another case under the combined references of CH/1758/2009 and JR/2204/2009. That test case was part heard in the summer but further submissions are being made and I understand that a decision is not expected until later this year at the earliest.

14. An Upper Tribunal Registrar therefore invited the applicant to lodge an application for judicial review in order to protect his position, which he has duly done. Again, although the applicant phrases that application as a challenge to Tribunal Judge McKenna's decision of 16 June 2010, in essence it is a challenge to the refusal on 14 May to admit his late appeal as well as the later refusals to change that decision and so I treat it as such. The Information Commissioner has filed an

Acknowledgement of Service, opposing the application for permission to apply for judicial review on the twin grounds that (1) the purported appeal was late; and (2) the First-tier Tribunal's powers are governed by section 58 of the Freedom of Information Act 2000 and the remedy sought by the applicant is not one which the tribunal can grant.

15. I have considered whether it is appropriate to delay determining the applications in the present case until the procedural issues currently before the three-judge panel of the Upper Tribunal in the test case mentioned above (CH/1758/2009 and JR/2204/2009) have been resolved. I have decided that it would not be right to await the outcome of that test case. It is unclear when that decision will become available and I do not think it is reasonable to expect the applicant to wait longer in a process which has already been protracted. Although there are certain procedural differences between an application for permission to appeal and one for judicial review respectively, the fundamental issue remains the same, namely – does the decision of the First-tier Tribunal to refuse to admit the applicant's late appeal disclose an arguable error of law?

The format of the decision of the First-tier Tribunal

16. I must first confess to some reservations about the format of the decision of the First-tier Tribunal, being in the form of a letter to the applicant, on Tribunals Service notepaper, and signed by a member of the tribunal's administrative staff. I appreciate the arguments based on the need for tribunals to be user-friendly and accessible and to avoid undue legalism. It is also undoubtedly the case that the letter was indeed written on the instructions of the judge concerned.

17. That said, the decision on whether or not to admit a late appeal is plainly a judicial decision. Not only should it be taken by a judge (as was plainly the case here) but it should be seen to have been taken by a judge. The precise format may be a matter for debate, but I would suggest that good practice would require the judge's decision to be on a separate sheet, preferably referring to any relevant statutory provisions, albeit doubtless accompanied by a covering letter from the Tribunals Service clerk, which might deal with any consequential issues (see e.g. the guidance of HH Judge Pearl in *London Borough of Camden v FG (SEN)* [2010] UKUT 249 (AAC)). The difficulty with the approach taken in this case is that the judicial nature of the decision was effectively obscured. In some cases that might result in the opportunity to request a review or to apply for permission to appeal being lost, although I accept that was not the case here – however, that was due as much to the applicant's persistence as anything else.

18. However, notwithstanding those reservations, the letter of 14 May (and reaffirmed in the letter of 24 May) obviously embodied the First-tier Tribunal's decision not to admit the late appeal and I treat it as such. I am not prepared to rule that the format used was an error of law as opposed to a failure to adopt and follow best practice. The question now is whether there is scope for any further challenge to the First-tier Tribunal's decision before the Upper Tribunal. I will consider this on the alternative bases as an application for permission to appeal and then as an application for permission to apply for judicial review.

The application for permission to appeal to the Upper Tribunal

19. I should grant permission to appeal if I think it is arguable that there is a material error of law in the First-tier Tribunal's decision not to admit the late appeal. I

do not have to be satisfied at this stage that the applicant will probably win any appeal if permission is given.

20. The decision referred to the Notice of Appeal being "well out of time". This was undoubtedly true, but the First-tier Tribunal's decision letter did not really engage with the applicant's reasons for the appeal being late. To that extent it is arguable that there is an error of law in the tribunal's decision on the basis of inadequate reasons. Certainly there was, on the face of the tribunal's decision at least, no express consideration of factors which might have been relevant to granting an extension of time. I can certainly understand the applicant's frustration at a process which took over two years to secure a Decision Notice from the Information Commissioner, after which he then had to wait for a further two months (taking him beyond the 28 day time limit for appeals) only for the council to tell him that they had found no relevant records and for the Information Commissioner to indicate that the matter was closed as far as their Office was concerned.

21. However, even if the lack of reasons is an arguable error of law on the part of the First-tier Tribunal, it does not mean that I must necessarily grant permission to appeal. I have to be satisfied that it was a material error of law (see *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982) and moreover that a grant of permission is an appropriate exercise of the Upper Tribunal's discretion. As Brooke LJ observed in the *Iran* case, "Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

22. So it seems to me that the key question in determining this application for permission to appeal is indeed whether, had the appeal been admitted late, it would have made any difference to the overall outcome. Tribunal Judge McKenna evidently thought not: she expressly relied on the well established legal principle that a successful party should not be permitted to bring an appeal. That principle, of course, is indeed well-established in legal proceedings (see e.g. *Lake v Lake* [1955] P 336*, Osaji-Umeaku & Anor v National Foundation For Teaching Entrepreneurship Inc* [1999] EWCA Civ 837 and Social Security Commissioner's Decision R(I) 68/53). However, that principle surely relates to judicial decisions by courts and tribunals; it does not necessarily apply to decisions by administrative first-instance decision-makers or independent office-holders. Section 57(1) expressly confers a right of appeal on both parties, and not simply "the losing party" (however that term might be defined), before the Information Commissioner. Both the applicant, as the complainant, and the council, as the public authority, had the right to appeal the Information Commissioner's decision to the First-tier Tribunal (see section 57(1) of the Freedom of Information Act 2000). I interpose here that the statutory provisions governing appeals under the 2000 Act apply to the 2004 Regulations with the necessary consequential amendments (see regulation 18 of the 2004 Regulations).

23. However, Tribunal Judge McKenna also took into account the fact that the Decision Notice was in the applicant's favour and that it had been complied with by the council (even if the applicant remained unhappy with the outcome). This was also the approach of Principal Judge Angel in the original decision of 14 May. The letter of that date argued that "the grounds of appeal do not appear to raise matters which the Tribunal has powers to deal with and should be pursued elsewhere". This was clarified in the letter of 24 May – which I note Tribunal Judge McKenna describes as an "administrative confirmation of the Tribunal's earlier decision" – a label which rather reinforces the point made at paragraphs 16-18 above, with the comment that "The tribunal does not have jurisdiction to enforce the Commissioner's decisions."

24. It is undoubtedly true that the applicant obtained a Decision Notice in his favour from the Information Commissioner. The Information Commissioner found the council to be in error and required the council to take certain steps. The council took those steps but apparently uncovered no relevant information. The applicant remains dissatisfied. It is also undoubtedly right that issues of enforcement are outside the jurisdiction of the First-tier Tribunal. The Commissioner himself has certain enforcement powers (section 54 of the 2000 Act), subject ultimately to the supervision of the High Court, but the First-tier Tribunal has no role in such matters.

25. Both Principal Judge Angel and Tribunal Judge McKenna have proceeded on the basis that the applicant is asking the First-tier Tribunal for something it cannot do, namely to supervise the enforcement of the Information Commissioner's Decision Notice. If that was indeed the applicant's motive, I would have no hesitation in dismissing this application for permission to appeal. However, I am by no means sure that that analysis properly reflects the applicant's position. It seems to me that the applicant is arguing that the Information Commissioner's Decision Notice should have required different or further steps to be taken beyond those specified.

26. In this context it is relevant to note that section 50(4) of the 2000 Act provides as follows (emphasis added):

> "(4) Where the Commissioner decides that a public authority–
>
> (a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
>
> (b) has failed to comply with any of the requirements of sections 11 and 17,
>
> the decision notice must specify the steps which must be taken by the authority for complying with that requirement **and the period within which they must be taken**."

27. Furthermore, the First-tier Tribunal's own powers on determining an appeal are governed by section 58 of the 2000 Act:

> **"58 Determination of appeals**
>
> (1) If on an appeal under section 57 the Tribunal considers–
>
> (a) that the notice against which the appeal is brought is not in accordance with the law, or
>
> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
>
> the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
>
> (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

28. So, where there has been a finding that the public authority has not acted in accordance with its obligations, the Commissioner's Decision Notice must require the authority to take certain steps (section 50(4)). That duty to specify steps is plainly a mandatory requirement; but presumably the particular steps to be taken and to be specified in the Decision Notice are ultimately a matter for the Information Commissioner in the exercise of his discretion. That is an issue on which the First-tier Tribunal can take its own view (see section 58(1)(b)). So to the extent that the applicant was arguing that the Information Commissioner should have exercised his discretion differently, the applicant might have had an argument under section

58(1)(b). There is, however, another point, which the applicant has not himself identified, but appears to be potentially relevant.

29. The Information Commissioner's Decision Notice in this case certainly specified the steps which had to be taken; but there was no time limit mentioned. However, section 50(4) of the 2000 Act (which applies equally to the 2004 Regulations: see regulation 18) requires the Decision Notice to specify both the relevant steps and "the period within which they must be taken". Indeed, there is a further express statutory provision in that regard, designed to safeguard the position of public authorities which plan to lodge an appeal against the Information Commissioner's Decision Notice (see section 50(6)). On that basis it is at least arguable that the Information Commissioner's Decision Notice is not "in accordance with the law" within the terms of section 58(1)(a) of the 2000 Act.

30. Therefore, for the reasons outlined above, it is arguable that the applicant, had his late appeal under section 57 been admitted, would have been able to mount a case to the effect that the First-tier Tribunal should have considered allowing his appeal or substituting a different Decision Notice on the basis of either of both of section 58(1)(a) and (b). I am therefore not satisfied that it is inevitable that his appeal, if admitted, would necessarily have failed.

The application for permission to apply for judicial review in the Upper Tribunal

31. I need to consider the application for permission to apply for judicial review separately. The reason for this is the three-judge panel in the test case referred to above may conclude that it is not possible to appeal against a refusal to admit a late appeal, but only to apply for judicial review. On the basis that this application is therefore an application for permission to apply for judicial review, I grant permission for the same reasons as identified above in relation to the application for permission to appeal. I have considered whether there are any other considerations that might carry less or more weight on a judicial review than on an appeal, but have concluded that there are not.

32. I am satisfied that the applicant has a sufficient personal interest in the matter under dispute. He lives on one of the roads concerned. I am also satisfied that he has acted within the time limits for judicial review. It is, of course, important on an application for permission to appeal that a complainant acts promptly. Any complainant in judicial review proceedings is also expected to exhaust internal procedures first. In this case the First-tier Tribunal procedures were effectively at an end when Tribunal Judge McKenna issued her decision on 16 June 2010. The applicant's permission to appeal application was received on 12 July 2010, within the time limits. The Upper Tribunal Registrar wrote to him on 23 July 2010 in relation to the judicial review issue. The applicant returned his judicial review application on 20 August 2010. On that basis I conclude that he has acted expeditiously and certainly within three months of the last relevant decision of the First-tier Tribunal. I am not aware of any other matter which makes it likely that the Upper Tribunal would necessarily refuse relief, assuming for the present both that the application for permission to apply is granted and (which has not been decided) the substantive application is made out.

33. On that basis, if it were to transpire that an application for permission to appeal is not the appropriate means of challenging the First-tier Tribunal's refusal to admit the late appeal, I would in any event grant the application to apply for judicial review.

The Upper Tribunal's determination of the applications and further directions

34. I therefore grant permission to appeal and, if it is necessary, permission to apply for judicial review. The two applications had best proceed in parallel pending the resolution of the test case already referred to.

35. I therefore make the following directions for the appeal and the application for judicial review proper.

DIRECTIONS

Directions on the appeal (GIA/1681/2010)

(1) The respondent (the Information Commissioner) is directed to provide a response to the appeal within one month of the date on which this notice is sent to the parties.

(2) The appellant (Mr Shephard) will then have one month in which to reply to the respondent's submission.

(3) Each party should indicate whether or not they wish to have an oral hearing of this appeal. If so, that party must give reasons for that request so that I can decide whether one is actually required.

Directions on the application for judicial review (JR/2013/2010)

(4) Any response by the Respondent or any Interested Party must be made within 35 days of the date this grant of permission is sent to them, in accordance with rule 31 of the Tribunal Procedure (Upper Tribunal) Rules 2008, and shall state whether the party making the response wants there to be an oral hearing.

(5) If either the Respondent or an Interested Party opposes the application for judicial review, the Applicant may make a written reply to that party's response within one month of being sent a copy of the response and any reply shall state whether the Applicant wants there to be an oral hearing.

(6) The file will then be returned to the Judge for further Case Management Directions.

Signed on the original
on 3 November 2010

Nicholas Wikeley
Judge of the Upper Tribunal

THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Upper Tribunal Case No. GIA/1681/2010

PARTIES

Julian Shephard (Appellant)

and

The Information Commissioner (First Respondent)

and

West Sussex County Council (Second Respondent)

APPEAL AGAINST A DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL

JUDGE WIKELEY

DECISION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 14 May 2010 under file reference EA/2010/0094 involves an error on a point of law and is set aside. I re-make the decision that the tribunal should have made as follows:

> Bearing in mind the overriding objective under rule 2 and all the circumstances of the case, it is fair and just to grant an extension of time under rule 5(3)(a) so as to admit the appellant's late notice of appeal (dated 14 May 2010, against the Information Commissioner's decision notice FS50200310 dated 15 February 2010) under rule 22(4).

The case is accordingly remitted to be heard by the First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the new hearing:

(1) The hearing should be at an oral hearing;

(2) The case should be sent to a Judge of the First-tier Tribunal in the General Regulatory Chamber (Information Rights) to issue case management directions for that hearing.

REASONS

Introduction

1. This case has had an unfortunately long and protracted history, through no fault of the appellant's. I will not, therefore, cover every point that has arisen, but focus on the key issues before the Upper Tribunal.

2. I dealt with the background to the case in some detail in my decision dated 3 November 2010, in which I granted Mr Shephard (i) permission to appeal against the FTT's decision of 14 May 2010 (incorrectly referred to as the decision of 14 September 2009 in that Upper Tribunal determination, but nothing turns on that); and (ii) in so far as was necessary, also permission to apply for judicial review in respect of that same decision.

3. The appeal has been dealt with under Upper Tribunal file reference GIA/1681/2010. The companion application for judicial review has been dealt with separately under file reference JR/2013/2010. The two decisions should be read together but this is the principal or lead decision.

The background to the case

4. In my earlier decision giving permission to appeal I explained as follows:

> "2. ... The applicant has been involved in a long-running dispute with West Sussex County Council over the legal and evidential basis for traffic restriction orders (TROs) and road signs near Haywards Heath. As I understand it, his fundamental point is that the County Council carried out a review of various routes and as a result modified the restrictions imposed on HGVs using certain roads in the district. The effect, he contends, is that HGVs stopped using a previous route and instead started using a different route, which involved such vehicles passing down the unclassified road on which the applicant lives, a road which he states is not suited for this purpose. The applicant's concern about such a state of affairs, if so, is entirely understandable."

5. In 2007 Mr Shephard made a detailed request to the County Council for various types of information about the basis for the traffic arrangements in question. In 2008 he contacted the Information Commissioner with a complaint. The Information Commissioner issued a decision notice (FS50200310) on 15 February 2010. In summary, the Information Commissioner decided that:

> (1) the council had wrongly considered the request under the provisions of the Freedom of Information Act 2000 [FOIA] rather than under the Environmental Information Regulations 2004 (SI 2004/3391) [EIR];
> (2) the council's refusal notice breached regulation 14(3) of the 2004 Regulations; and
> (3) the council was not correct to rely on the exception in regulation 12(4)(b), namely that the request was "manifestly unreasonable".

6. In the decision notice the Information Commissioner directed the County Council to take two steps. The first was to conduct a manual search of its TRO files to ascertain whether any of the information requested was held. The second was that, in the event of any relevant information being found, the council should then either disclose that information to the applicant or issue a (fresh) refusal notice citing a valid exception.

7. Some two months later the council wrote to the appellant stating that it had undertaken a manual search of its records but that it did not hold the requested information. The appellant wrote to the Information Commissioner asking him to take enforcement action against the council. In May 2010 a Senior Complaints Officer for the Information Commissioner wrote to the applicant advising him that as, in their view, the council had complied with the terms of the decision notice, their role was now at an end.

8. On 12 May 2010 the appellant sent a notice of appeal to the FTT against the decision notice, giving reasons for his late appeal. That notice of appeal arrived at the FTT on 14 May 2010.

The FTT decision under appeal

9. The decision under appeal is the FTT's decision, itself also dated 14 May 2010, is in these terms.

> **"Notice of Appeal lodged against Decision Notice FS50200310**
> Thank you for your correspondence dated 12th May enclosing a notice of appeal against the above decision notice. Unfortunately the Notice of Appeal is well out of time and the Tribunal is not prepared to allow the appeal to proceed. In any case the grounds of appeal do not appear to raise matters which the Tribunal has powers to deal with and should be pursued elsewhere."

The proceedings before the Upper Tribunal

10. I directed an oral hearing of this appeal which was held at Harp House on 5 September 2011. Mr Shephard attended and explained why he was unhappy with the FTT's decision, and the issues which he had with both the Information Commissioner's decision notice and the County Council's conduct. I am grateful to him for the clear, considered and courteous way that he made his points. I have also taken into account his written submissions.

11. The Information Commissioner did not attend the hearing. Mr Shephard was not happy with this. However, as I had made clear in earlier directions, the Commissioner "is entitled to be represented at the oral hearing of both the application for permission to apply for judicial review and the appeal. It is a matter for the Information Commissioner whether or not he wishes to be represented in person." The Commissioner submitted a detailed submission to the Upper Tribunal but asked for the matter to be dealt with on the papers. I accept that the Commissioner has many calls on his limited resources and needs to make a judgment call about which cases warrant representation in person, whether before the FTT or the Upper Tribunal.

12. I have, of course, taken into account the Information Commissioner's detailed written submission. However, that submission is mainly concerned with seeking to justify the Commissioner's decision notice. That is not the issue before me. There is no right of appeal direct from the Commissioner to the Upper Tribunal. The sole question before me on this appeal is Mr Shephard's challenge to the FTT decision not to admit his late appeal. The Commissioner says relatively little about that. There is also some conflation or possibly confusion of issues evident in the Commissioner's response, which both asks for the appeal to be transferred back to the FTT (at paragraph 45) and asks for the appeal to be dismissed (at paragraph 49).

13. The County Council was joined as a party to this appeal. Its solicitor indicated that it did not intend to be present at the hearing of the appeal. That was a matter entirely for the County Council. It has made no written representations on the issue before the Upper Tribunal.

The Upper Tribunal's analysis: the error of law in the FTT's decision

14. I reiterate that the merits or otherwise of the Information Commissioner's decision notice and the actions or inactions of the County Council are not matters which are directly before me. I have no jurisdiction over such questions. The role of the Upper Tribunal is limited to deciding whether or not the FTT decision involves an error of law or not.

15. My conclusion is that the FTT decision, refusing to admit the late notice of appeal, does involve an error of law. When giving permission to appeal, I indicated that I had some reservations about the format of the FTT's decision, being in the form of a letter to the appellant, on Tribunals Service notepaper, and signed by a member of the tribunal's administrative staff. I do not need to repeat those points here. However, those are essentially presentational matters and do not alone amount to an error of law.

16. The error of law is that the FTT's decision did not really engage with the appellant's reasons for the notice of appeal being late. To that extent there is an error of law in the tribunal's decision on the basis of inadequate reasons. There was, for example, no express consideration of either the overriding objective or of the various particular factors which might have been relevant to granting or refusing an extension of time (see *Information Commissioner v PS* [2011] UKUT 94 (AAC), other than the issue of the delay.

17. I am not suggesting for one moment that the FTT needed to write a lengthy treatise on the reasons for refusing to admit the late appeal. However, it did need to engage with the appellant's arguments and provide sufficient reasons. Simply saying that the notice of appeal was well out of time and that there was nothing the FTT could do in any event did not meet that threshold of adequacy in the circumstances of this case. My conclusion, therefore, is that the FTT's decision involved an error of law and the appeal to the Upper Tribunal should be allowed. On that basis, and that basis alone, I set aside the FTT's decision.

The options open to the Upper Tribunal when allowing an appeal from the FTT

18. At this juncture I should explain that, if an appellant's appeal to the Upper Tribunal is allowed, as here, then there are three options open to me.

19. First, I can, in the exercise of my discretion, leave the FTT decision unchanged (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). That might be appropriate if I was completely confident that the error of law by the FTT had no material effect on the overall result of case. I cannot say that with certainty in this case, for the reasons that follow. So the FTT's decision must be set aside.

20. Second, I can set aside the FTT's decision and send it back with directions for re-hearing by the same or a different FTT (section 12(2)(b)(i) of the 2007 Act). That is often the most appropriate course of action, especially if there are complex factual issues at stake which involve the input of specialist FTT members. However, I reiterate that the present proceedings involve purely an appeal against a refusal to admit a late appeal.

21. Third, I can set aside the FTT's decision and substitute or "re-make" the decision myself (section 12(2)(b)(ii) of the 2007 Act). Sometimes that may be appropriate. This is one of those cases – no more information is likely to emerge about the circumstances surrounding the late lodging of the appeal and the case before the Upper Tribunal has already been subject to inordinate delays for various reasons (again, I emphasise that this is not the appellant's responsibility in any way).

The question of the late appeal: the Upper Tribunal's analysis

22. The time limit for lodging an appeal to the FTT against a decision notice is 28 days (rule 22(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976, as amended; "the GRC Procedure Rules"). The notice of appeal in this case was 2 months out of time. On the face of it, that is a fairly compelling reason for refusing to admit it. However, the appellant gave reasons for his late appeal. Further, the appeal must not be admitted "unless the Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time)" (rule 22(4)(b)). Rule 5(3)(a) simply states that the tribunal "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".

23. This vests the tribunal with a broad discretion, which must be exercised judicially. Plainly time limits are there for a purpose, are important and should be respected. However, the discretion must be considered in the light of the overriding objective, which is to deal with cases fairly and justly, taking into account all relevant considerations.

24. I have read the submissions on file. I have also had the opportunity of hearing from Mr Shephard in person, who helpfully elaborated on several of his points. I accept that the notice of appeal was about 2 months late. I also accept, of course, that the FTT has no jurisdiction over the Information Commissioner's enforcement role, which is ultimately a matter for the High Court. The appellant also accepted that distinction.

25. Notwithstanding those factors, I take the view that it is fair and just to extend time to admit this appeal in the rather unusual circumstances of this case. I take into account in particular the following matters.

26. First, although obviously an intelligent man, the appellant is a litigant in person. He does not appear to have extensive experience of these procedures and was anxious to do the right thing and not to make unreasonable requests.

27. Second, a degree of confusion was sown from the outset. Although the decision notice stated that the County Council did not deal with the matter appropriately, and that further steps were required to be taken, the Information Commissioner's covering letter, sent with the decision notice, stated that "the Commissioner has found in favour of the council".

28. Third, there was a clear error in law on the Commissioner's decision notice itself. Section 50(4) of FOIA provides that where the public authority is in breach, "the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken" (emphasis added). In this decision notice there was no such time limit imposed.

29. The Information Commissioner argues that that omission does not matter – it was, it is submitted, simply a drafting error which did not disadvantage the appellant as a further refusal notice has been issued in any event. I cannot accept that argument. I acknowledge that, as a matter of practice (but not statutory requirement), the Commissioner usually gives public authorities 35 days in which to take such steps as are considered appropriate. This is for two reasons. The first is to allow for postage. The second is to reflect the express statutory provision designed to safeguard the position of public authorities which plan to lodge an appeal against the decision notice. This is section 50(6) of FOIA:

> "Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal."

30. In this case the decision notice referred to the 28 day time limit for lodging an appeal. But the County Council was placed under no time limit in taking the steps directed. If the usual 35 day requirement had been imposed on the face of the decision notice, I am sure it would have been noticed by the appellant. He would then have been put on notice, in effect, that if waited until the County Council responded, he would have been out of time to lodge an appeal. That in turn would have led him to make enquiries about what he should do to protect his position as regards his concerns with the scope of the Commissioner's investigations and the terms of the subsequent decision notice. Mr Shephard specifically told me that in principle he thought it would be reasonable to allow the County Council time to respond to the Commissioner's direction to carry out a search. If he had realised that the public authority was going to take two months, and that by so waiting he would run the risk of being out of time to lodge an appeal, he might well have taken other steps himself, e.g. lodging an appeal arguing that the Commissioner should have made more specific directions as to the nature and scope of the search to be conducted.

31. For the reasons set out above, I re-make the decision in terms that the FTT should have done. My decision is that, bearing in mind the overriding objective and all the circumstances of the case, it is fair and just to grant an extension of time under rule 5(3)(a) so as to admit the late notice of appeal under rule 22(4).

What happens next

32. The effect of the Upper Tribunal's decision is simply that (i) the appeal against the refusal to admit the late appeal to the FTT is allowed; (ii) the FTT's decision communicated by e-mail on 14 May 2010 is set aside; (iii) the FTT's decision is re-made so as to extend time and admit what would otherwise be the late appeal against the Commissioner's decision notice.

33. The case as a whole now needs to go back to the FTT for a tribunal judge to make further case management directions for the hearing of the appeal proper.

34. It follows that it would be quite wrong for me to express any views on the underlying merits of the appellant's appeal against the decision notice.

Two final points

35. There are, however, two final points I should mention as they were raised by the appellant at the oral hearing.

36. The first is Mr Shephard expressed concern that the Commissioner had dealt with this case under the EIR rather than under FOIA. He argued that the EIR carries an automatic right of refusal if the public authority does not have the document, whereas there is no such automatic exclusion under FOIA.

37. This is not strictly accurate. It is certainly the case that under the EIR there is an exception in that a public authority may refuse to disclose information under the EIR if it does not have it (see EIR, regulation 12(1)(a) and 14(1)(a)). It is also true that the FOIA list of exemptions does not include one for where the authority does not hold the information requested. But there is a very good reason for that. The right of access to information under FOIA only applies where the public authority holds the information in the first place (see FOIA sections 1(1) and 3(2)). The structure of the two Acts is different, but the end result is the same.

38. The second point was Mr Shephard's concern about the second part of the second bullet point under paragraph 76 of the decision notice. This is ultimately a matter for the FTT, but I would just note as follows. Mr Shephard argued that the Commissioner was wrongly giving the County Council the option of either disclosing the information sought or issuing a refusal notice. He contended that for the public authority to give a refusal notice about information they are legally obliged to hold would be a contradiction in terms.

39. However, the point is not that simple. The second bullet point under paragraph 76 is premised on the assumption that the information sought is located in the search. All that the Commissioner is saying is that if it is so found, then either it must be disclosed or the County Council must provide a valid exception under the EIR for refusing to disclose it.

40. I stress that in information rights cases such as this a preliminary issue under the EIR (and also under FOIA where relevant) is whether the information requested is actually 'held' by the public authority. That is a question of empirical fact. There is a separate normative question about whether the information 'should be held' by the public authority. That is a wider matter of public law which may involve statutory provisions governing e.g. local government functions and road traffic regulations. If – and I make no finding on the point – it is the case that the information should be held by the authority, but is not actually so held, then that is not an issue which the FTT can remedy. There may be other remedies available, e.g. by way of judicial review in the High Court or by way of complaint to the local government ombudsman about alleged maladministration, but those are not issues for the FTT to determine. The FTT's powers, like those of the Upper Tribunal, are defined by FOIA and the EIR, together with the Tribunals, Courts and Enforcement Act 2007.

Conclusion

41. For the reasons explained above, I allow this appeal.

Signed on the original
on 19 September 2011

Nicholas Wikeley
Judge of the Upper Tribunal

THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Upper Tribunal Case No. JR/2013/2010

PARTIES

Julian Shephard (Applicant)

and

The Information Commissioner (First Respondent)

and

The First-tier Tribunal (General Regulatory Chamber)
(Information Rights) (Interested Party)

APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL

JUDGE WIKELEY

DECISION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the application for judicial review.

This decision is given under sections 15-18 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This case has had an unfortunately long and protracted history, but through no fault of the applicant's. It is the companion or parallel case to the appeal in GIA/1681/2010.

2. I dealt with the background to the case in some detail in my decision dated 3 November 2010, in which I granted Mr Shephard (i) permission to appeal against the FTT's decision of 14 May 2010 (incorrectly referred to as the decision of 14 September 2009 in that Upper Tribunal determination, but nothing turns on that); and (ii) in so far as was necessary, also permission to apply for judicial review in respect of that same decision.

3. The substantive appeal against the FTT's decision, which was not to admit the applicant's late appeal against the Information Commissioner's decision notice, has been dealt with under Upper Tribunal file reference GIA/1681/2010. The two Upper Tribunal decisions should be read together.

The proceedings before the Upper Tribunal

4. I directed an oral hearing of this application, together with the appeal, which was held at Harp House on 5 September 2011. Mr Shephard attended and explained why he was unhappy with the FTT's decision, and the issues which he had with both the Information Commissioner's decision notice and the County Council's conduct. I am grateful to him for the clear, considered and courteous way that he made his points. I have also taken into account his written submissions.

5. The Information Commissioner, the First Respondent on the judicial review application, did not attend the hearing. Mr Shephard was not happy with this. However, as I had made clear in earlier directions, the Commissioner "is entitled to be represented at the oral hearing of both the application for permission to apply for judicial review and the appeal. It is a matter for the Information Commissioner whether or not he wishes to be represented in person." I accept that the Commissioner has many calls on his limited resources and needs to make a judgment call about which cases warrant representation in person, whether before the FTT or the Upper Tribunal. The Commissioner did, however, provide a short written submission to the Upper Tribunal.

6. The First-tier Tribunal is nominally the Second Respondent to these proceedings. However, it has quite properly played no active part in these proceedings, as is usually the way when any decision of a court or tribunal is being challenged by way of judicial review in a higher court or tribunal.

7. The County Council was asked if it wished to be joined as a party to this application. Its solicitor indicated that it did not wish to be joined, and did not intend to be present at the hearing or to make written submissions. That was a matter entirely for the County Council.

The limited scope of this application for judicial review

8. It is important to bear in mind the limited scope of this application for judicial review. The applicant was invited to make this application by the Upper Tribunal office. The reason for that was that, at that time, it was unclear as a matter of law what procedure should be used to challenge a refusal to admit a late appeal to the FTT. One view was that the correct route was by an ordinary appeal. The other view was that such a challenge had to be by judicial review, a separate and more procedurally complex procedure.

9. In my decision on 3 November 2010 I granted Mr Shephard permission to apply for judicial review of the FTT's decision of 14 May 2010 "in so far as was necessary", as well as granting permission to appeal against that same decision.

10. A three-judge panel of the Upper Tribunal has since resolved the jurisdictional issue: see *LS v London Borough of Lambeth (HB)* [2010] UKUT 461 (AAC). The consequence is that there is a right of appeal (or at least a right to apply for permission to appeal) against all FTT interlocutory decisions, unless they fall into one of the specifically prescribed categories of "excluded decisions". A decision not to admit a late appeal is not such an excluded decision. As such, the proper route of challenge is by way of appeal.

11. In the present case the Applicant was invited to lodge a judicial review application with the Upper Tribunal in order to protect his position in case the tribunal decision in question could not be challenged by way of appeal. However, the decision in *LS v Lambeth* confirms that FTT rulings on whether or not to grant extensions and admit late appeals should indeed be challenged by way of appeal, not via judicial review.

12. As is evident from my decision in GIA/1681/2010, I have allowed the appeal in that case, set aside the FTT's decision and re-made it so as to extend time and admit the late appeal to the FTT against the Commissioner's decision notice. The judicial review proceedings therefore serve no further useful purpose and are formally dismissed.

13. I stress that it is not possible to extend the scope of these proceedings to challenge other decisions by way of judicial review, such as the actions (or inactions) of either the Information Commissioner or West Sussex County Council. The Upper Tribunal has no jurisdiction in such matters, which would have to be brought in the High Court, if at all.

Conclusion

14. For the reasons explained above, I formally dismiss this application.

Signed on the original
on 19 September 2011

Nicholas Wikeley
Judge of the Upper Tribunal