**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL**

**Appeal No: EA/2010/0039**

**BETWEEN:**

**ADAM MACLEOD**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**First Respondent**

**THE SECRETARY OF STATE FOR JUSTICE**

**Second Respondent**

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STRIKE OUT RULING

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**RULING in relation to the Information Commissioner's Decision Notice No: FS50155363 Dated: 3RD December 2009**

1. The Information Commissioner in his response dated 24th August 2011 (supported by the second Respondent) to the Notice of Appeal dated 1st February 2010 applies for the appeal to be struck out because, in his view, it has no reasonable prospect of success.

2. Under rule 8(3) of the *Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009*:

   *"the Tribunal may strike out the whole or part of the proceedings if*
   *…(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."*

3. Pursuant to rule 8(4):

*"the Tribunal may not strike out the whole or part of the proceedings under paragraph ...*

*(c) without first giving the appellant an opportunity to make representations in relation to the proposed strike out."*

4. The Tribunal indicated that it was of the preliminary view that the application had merit and the Appellant was given the opportunity to make representations in reply to the Response pursuant to rule 8(4) which he did on 12th September 2011. The Tribunal is also in receipt of a letter from the Appellant dated 30th September 2011 which the Tribunal treats as additional representations under r8(4) GRC Rules.

5. In *Southworth v Information Commissioner (EA/2010/0050)*, the Tribunal considered that the tests developed by the Tribunal under the previous set of rules (which were applicable prior to 18 January 2010) to be a useful starting point for considering rule 8(3)(c) of the GRC Rules. One of those cases was *Tanner v Information Commissioner and HMRC (EA/2007/0106)* where the Tribunal adopted a similar test to that provided for in rule 24 of the Civil Procedure Rules, namely whether there is a realistic as opposed to fanciful prospect of success and apply it to each of these grounds. I apply this test to each of the Appellant's grounds of appeal.

**Oral hearing**

6. In his grounds of Appeal the Appellant has set out reasons why he wishes to have an oral hearing. I note that these submissions are made in contemplation of a substantive appeal hearing, however, they have been taken into consideration in determining whether to offer the Appellant an oral strike out hearing.

7. There is no requirement to hold an oral strike out hearing under the GRC Rules. Rule 32 provides:

*(3) The Tribunal may in any event dispose of proceedings without a hearing under rule 8 (striking out a party's case).*

8. Having considered the reasons that the Appellant seeks an oral hearing, these largely revolve around the questioning of witnesses, this is not a part of a strike out hearing. There is no suggestion that the Appellant is disadvantaged in producing his submissions in writing or unable to participate through this method. Consequently pursuant to the overriding objective as set out in rule 2 (2) (a), (c) and (e) I am satisfied that it is in the interests of justice that this strike out hearing proceed by way of a paper hearing.

**Background**

9. The background to the appeal is set out in the Decision Notice and Part II of the Appellant's Grounds of Appeal, it is summarized below.

10. The Appellant has been in correspondence with the Department of Constitutional Affairs which has now become the Ministry of Justice (MOJ) since 1999. During 2005 the Appellant discovered that several letters and faxes that he had sent to the MOJ could not be traced. As a result of the correspondence that ensued, the Appellant's ability to contact the MOJ was restricted so that special measures were imposed by them such that in certain circumstances his correspondence would be filed without being actioned or acknowledged. The Appellant contends that in their dealings with him the MOJ have been discourteous and have failed to answer information requests in accordance with s 10 FOIA (within 20 working days).

**The Information Request**

11. On 11th September 2007 the Appellant wrote to the MOJ to request 6 items of information (a – f) relating to the Department's attitude towards and compliance with s10 FOIA, and the guidance and internal rules given in relation to the way the public were to be treated and correspondence handled; and considerations on the possible amendments to FOIA. It is this request for information with which the Commissioner's Decision Notice, and this appeal, is concerned.

***12.*** The request was refused in a letter dated 21st October 2006 on the grounds that it was vexatious and s14 FOIA was engaged. The decision was upheld upon review as set out in the letter of 5th February 2008. The Appellant appealed to the Commissioner on 23rd March 2007.

**The Commissioner's Decision Notice**

13. The Commissioner issued a Decision Notice dated 3rd December 2006 finding that the request was vexatious because:

    - complying with it would impose a significant burden on MOJ in terms of costs and by diverting staff away from other duties;
    - The request was obsessive or manifestly unreasonable.

    The Commissioner also found that there had been a breach of s17(5) FOIA in that the refusal notice was not served within 20 working days.

**The notice of appeal**

14. The Appellant appeals by way of a Notice of Appeal dated 1st February 2010. This was accompanied by various documents and 2 submissions to the Tribunal both headed *"Appeal against Decision Notices Dated 7 September and 3 December 2009"*. Additionally the Appellant set out his arguments in his letter of 4th February. The Tribunal Judge notes that The Upper Tribunal, in a ruling dated 20 May 2011 granted permission to appeal against the decision notice dated 3 December 2009 (FS50155363) only. Consequently the Tribunal considers the grounds of appeal only insofar as they apply to this Decision Notice and disregards entirely Part IV of the undated Appeal document.

15. In the short Grounds of Appeal document (dated 1st February 2011), the Appellant lists 3 questions that he intends to ask each Tribunal Member, relating to their attitude to compliance with s10 FOIA. These are not grounds of appeal but the Tribunal notes that the Appellant is a litigant in person and not therefore accustomed to the process of drafting grounds of appeal. Whilst it is not the role of the Tribunal to assist one party to present its case, I do give effect to the

overriding objective as set out in rule 2(2)(a), (b) and (c) GRC Rules and am satisfied that it would not be appropriate to strike out the grounds of appeal purely as a result of the way in which they are presented. It is clear that the Appellant wishes the Decision Notice to be overturned, and I have adopted a purposive approach in determining the reasons for this highlighted in the grounds and his r8(4) submissions.

Ground 1: The Requests had a serious purpose

16. I am satisfied that these questions should be construed as reflecting the Appellant's assertion that his requests had a serious value or purpose[1]. I note that the Commissioner made no explicit finding on this point in his Decision Notice, however, he noted that the MOJ maintained that the interpretation of the Act [and Codes] was a judicial function. Additionally he noted that the Appellant's correspondence tried to re-open matters which had already been addressed[2].

*17.* The Appellant repeatedly argues that he has the right to access the policy behind the way he has been treated. Additionally he states that he has requested item (f) before[3] and did not receive a response. This Decision Notice deals with the request made on 11 September 2007, any previous requests in relation to item (f) are not the subject of this Decision Notice and hence they are not before the Tribunal.

*18.* Whilst the Appellant has the right to request the information, he only has the right to receive it within the terms of Part 1. The Commissioner's guidance states that: *"if the request forms part of a wider campaign or pattern of requests, then* ***the purpose or value must justify both the request itself and the lengths to which the campaign or pattern of behaviour has been taken****"*.

19. The Commissioner noted that the Appellant had written over 100 letters to the MOJ between 2002 and 2006. In *Welsh v IC EA/2007/0088* the Tribunal differently constituted held:

[1] This is also argued at paras 3-4 and 6-9 of the letter of 4th February 2010.
[2] Para 37 DN
[3] R 8(4) submission

*"There must be a limit to the number of times public authorities can be required to revisit issues that have already been authoritatively determined simply because some piece of as yet undisclosed information can be indentified and requested".*

Whilst the request clearly has value to the Appellant, this must be viewed in context of the case (bearing in mind the history, tone, frequency and content of the correspondence as set out in the Decision Notice). In categorizing the request obsessive or unreasonable the Commissioner has clearly found that the pursuit of the stated end is disproportionate. The fact that there is or may be a valid purpose to the request does not prevent it from also being vexatious. Therefore, I am satisfied that this ground must fail.

20. The grounds of appeal are principally set out in the undated document entitled:

*Appeal against Decision Notices Dated 7 September and 3 December 2009.* The Tribunal understands this document to be the detailed grounds of appeal dated 1st February referred to by the Appellant. I have grouped the submissions under headings and referred to the Appellant's numbering in brackets in bold in order to clarify which point of the Appellant's grounds is being referred to.

Ground 2 the requests were not obsessive/manifestly unreasonable

**21. Part III 1:** T*he Commissioner was wrong to claim (paras 28-29 August) that my letter of 29 August was unreasonable.*

The Commissioner did not use the phrase "unreasonable" in the context of the letter in these paragraphs he noted various matters that are apparent from the face of the document e.g.

- It arises out of previous correspondence.
- It is generated in response to the perceived failings of MOJ.
- The Appellant is trying to engage the MOJ in debate upon a matter that is a matter of judicial interpretation.

22. **Part III 10)** Although the Commissioner has listed 5[4] factors from his guidance, his decision only relies upon 1[5] and 4. The Appellant argues that he is persistent and not obsessive and that the volume of correspondence is linked to the difficulty in obtaining answers from the MOJ. These assertions are not supported by the substance of the correspondence reviewed by the Commissioner. At paragraph 29 he notes that:

*"The correspondence shows the complainant seeking to engage the MOJ on the proper interpretation and implementation of the Act (and codes made thereunder) or on statements made in the Houses of Parliament. The response from the MoJ is comprehensive and makes it clear that ultimately, interpretation of the Act or its subordinate legislation remains a judicial one. Notwithstanding the MOJ's response, subsequent letters from the complainant become argumentative; in addition the complainant sends the same mail to various people within the MOJ by post and fax"*.

I am satisfied that this ground has no reasonable prospect of success.

Ground 3 the Commissioner was wrong to find that the requests would be a significant burden on the MOJ.

*23.* **PART III 3) & 10) (DN para 22 (1)):** *The information requests were not a significant burden and can be answered in a few minutes.*[6]

The Appellant argues that his request could be answered swiftly, and that the reason for the quantity of correspondence is that he had difficulty extracting meaningful replies from the MOJ. In *Gowers v the London Borough of Camden EA/2007/0114*, the Tribunal (differently constituted) noted that the appropriate safeguard for whether the requests impose a significant burden is s12, but that whilst it should not be the only factor in determining if a request is vexatious:

*"the number of previous request and the demands they place on the public authority's time and resources may be a relevant factor"*[7].

[4] The letter of 4th February asserts that the Appellant was not intending to cause disruption. There is no finding on this point in the Decision Notice.

[5] See paragraph 23 below

[6] This is also argued in the Appellant's r 8(4) submissions in relation to paragraph 20 of the Commissioner's reply.

[7] Para 70

24. The Tribunal is satisfied in this case that the volume, and range of the correspondence as described in the Decision Notice has involved staff in an increased workload which has diverted resources from their core functions. The Commissioner does not find that the response to this information request in isolation would impose a significant burden. However, history suggests that this would lead to "endless" correspondence. The Commissioner has detailed the nature of the correspondence including the MOJ's earlier attempts to provide information, and I am satisfied that the history as set out (which is not materially disputed by the Appellant) is such that there is no reasonable prospect of this ground succeeding.

Ground 4 the decision is wrong in law as the Commissioner failed to apply Awareness Guidance No 22

*25. Awareness Guidance No 22 states that there should be sound grounds for deciding a request is vexatious.*[8]

The Commissioner has set out the evidence he has relied upon and the reasons why he has reached his decision. He has applied the Awareness Guidance No.22.

*26.* The Appellant relies upon the following passage in support of his contention that Guidance was not followed:

"*A useful test... is to judge whether information would be supplied if it were requested by another person, unknown to the authority. If this would be the case, the information would normally be provided as the public authority cannot discriminate between different requestors"*[9]

27. The Appellant is quoting from the 2006 version (or earlier) of the Commissioner's guidance. This has been updated in light of the body of case law which has arisen from the Tribunal. In *Welsh v Information Commissioner EA/2007/0088* the Tribunal held that in assessing whether the request is vexatious: "*As part of that context, the identity of the requester and past dealings with the public authority can be taken into account. When considering section 14, the general principles of*

[8] Repeated in Letter of 4th February
[9] Letter of 30th September and paragraph 10 of the letter of 4th February.

*FOIA that the identity of the requestor is irrelevant and that FOIA is purpose blind, cannot apply. Identity and purpose can be very relevant in determining whether a request is vexatious".*

Consequently I am satisfied that this ground must fail.

Ground 5, Bias

28. **4)** *the Commissioner has disregarded or given little weight to much of the evidence presented,... in particular I have repeatedly drawn attention to serious breaches of S10 of the Freedom of Information Act..."*

The questions for the Tribunal relating to s10 are material to the Appellant's reasons for requesting the information. Insofar as the MOJ failed to issue a refusal notice within 20 working days that is already the subject of a finding that there was a breach. Since the Appellant does not argue that the s17 finding of breach was wrong in law it is not therefore subject to appeal by him[10].

29. The Tribunal understands this ground to encompass bias and also that there was a reasonable purpose to the information request.(see paragraphs 16 et seq above.)

30. Alleging bias against the Commissioner is a serious allegation, however it is only relevant to this appeal, if it informs an erroneous finding of fact or has led to a decision being made that is wrong in law. The Appellant's basis for this allegation is that the Commissioner has not drawn the conclusions from the evidence that the Appellant would wish. This appeal is not an opportunity to re-litigate other cases. If the Appellant believes s10 is being breached by the MOJ there is a statutory process under FOIA for holding a public authority to account[11]. In this case there is no evidence that the Commissioner has adopted the wrong approach in his consideration of the evidence, as such this ground must also fail.

Other matters raised by the Appellant

31. The Appellant raises various matters which cannot be the subject of the Decision Notice under s50 and upon which in consequence the Tribunal has no jurisdiction.

[10] See paragraph 37 below
[11] See paragraph 40 below

Section 50 FOIA limits the jurisdiction of the Commissioner to considering whether in any specified respect, a request for information *"... does not comply with the requirements of Part 1"*. Section 58 FOIA provides that the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner only if:

*a)...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*.

32. **7)** This relates to the restriction upon correspondence with the Commissioner's office it does not relate to whether the MOJ handled the request for information in accordance with part I FOIA and is consequently not the subject of the Decision Notice under s50 neither is it within the jurisdiction of the Tribunal under s58.

33. **8 &9)** Deal with the way that the internal reviews were conducted. This is not an obligation under Part 1 of the Act consequently it is not a matter for the Commissioner under s50 or within the jurisdiction of this Tribunal under s58.

34. **10-13)** Argues that the investigation of FS50155363 and FS50184581 should have been dealt with together. FS50184581 is not before this Tribunal, The Appellant argues that the Commissioner's approach was flawed and in his r8(4) submissions, not in the public interest. This is not in itself a ground of appeal. The Tribunal adopts the approach set out in *Billings v IC EA/2007/0076* where it was held that the Appeal process is intended only: *"to provide relief if the Decision Notice is found not to be in accordance with the law"*. Consequently it is the Decision Notice that is the subject of the appeal, and not the process leading up to it.

35. **14)** *The Appellant argues that the decisions of the Ombudsman and High Court should be disregarded*.

The Tribunal considers this to be an argument that the Commissioner was wrong in law to take into consideration these decisions. There is no evidence from the Decision Notice that is the subject of this appeal, that the Commissioner did. The Tribunal considers this to be a reference to para 23 of FS50184581, therefore, this is not a valid ground of appeal.

**36. PART II paragraphs 1-12**

These do not advance any grounds of appeal and are a synopsis of the Appellant's reasons for requesting the information (see paragraphs 16-18 above).

*37.* **Part III 2):** *The Commissioner has offered no criticism of MOJ's dilatory and unhelpful response.*

The Commissioner found that there was a breach of s17(5) in that the refusal was not issued within 20 working days. Having found a breach of the Act (which is in itself a criticism) this ground of appeal amounts to an assertion that the Decision Notice should have been drafted differently. I repeat paragraph 34 above.

38. **6-7)** The Appellant challenges the validity of the MOJ policy of restricting his communications and the tone of the letter informing him. This is not the subject of the Decision Notice (in that he did receive a refusal response from MOJ albeit late in relation to this information request) and consequently it is not within the Tribunal's jurisdiction.

39. **8-9)** The Appellant comments upon Paragraph 9 of the Decision Notice. This is part of the background of the case and does not form the basis of the decision. The appellant does not recall any restriction on correspondence with MOD, but does not assert that this is wrong in fact. Even if it were, it is accepted that there is such a ban in relation to the Cabinet Office which is material only in relation to

others' perception of the Appellant's correspondence. That the Appellant has complaints against the Cabinet Office are not matters for this Tribunal.

40. In his letter of 30th September the Appellant argues that:

- In the Decision Notice, the Commissioner ignored the evidence of serious breaches of s10 by MOJ.
- The Handling of correspondence by the Information Tribunal was slow,
- The 2 Tribunal Judges who ruled originally that this appeal should not be admitted out of time ignored the evidence that the MOJ had breached s10.

There is a procedure for complaining about a breach of S10 FOIA under the Act. On the facts of this case the failure to respond within 20 working days constituted a breach of s17 and this was the Commissioner's finding. This Tribunal does not have the jurisdiction to determine whether s10 has been complied with in other cases. The unsuccessful application for leave to appeal out of time decisions referred to were not considering the merits of the case, neither is this the appropriate forum to challenge these decisions. Consequently this is not a valid ground of appeal.

**Conclusion**

41. For these reasons I find that the Appellant has no reasonable prospect of succeeding before this Tribunal and I strike out the appeal.

Dated this 7th day of October 2011

Fiona Henderson
Tribunal Judge

**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) GENERAL REGULATORY CHAMBER**

**Appeal No: EA/2010/0039**

**BETWEEN:**

**ADAM MACLEOD**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

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**DECISION ON APPLICATION FOR PERMISSION TO APPEAL**

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1. On 7th October 2011 Mr Macleod's appeal was struck out pursuant to rule 8(3) of the *Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* (the GRC Rules) on the grounds that it had no reasonable prospect of success.

2. Mr Macleod now appeals against that ruling by application dated 24th October 2011.

3. Mr Macleod's grounds of appeal are set out in the application to appeal and also in letters of 11th and 17th October 2011 they can be summarized as follows:

a) Principal Judge John Angel who granted leave to appeal out of time made a clear ruling that the appeal be listed as an oral hearing:
   - This was after reading the papers,
   - This direction should preclude a strike out without an oral hearing
   - No indication was given that this was not binding.

From the letter of 11th October 2011

b) Tribunal Judge Henderson in her recusal ruling of 3rd October stated that *"neither Judge has expressed a view on the merits of the appeal or the mode of hearing"* this was wrong as Judge Angel had read the papers and set the case down for an oral hearing.

c) In the Decision Notice and the strike out ruling of 7th October 2011:

- insufficient weight was given to the appalling behaviour of senior MOJ staff,
- the evidence alleging that the request was vexatious was incredible and should not have been accepted.
- The Tribunal Judge got the balance wrong in her evaluation of the evidence.

d) The Appeal should not have been struck out as there is unchallenged evidence from the Appellant that the Information Tribunal regards s10 FOIA as of no importance.

From the letter of 17th October:

e) No reasons were provided for reversing the ruling that there should be an oral hearing.

4. Taking each of these grounds in turn:

***Ground a***

The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the GRC Rules) provide:

***5.***—*(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.*

*(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.*

5. At the time when Principal Judge John Angel made his directions to progress the case:

- The Appellant had asked for an oral hearing,
- The Commissioner had not yet served his reply and consequently had not yet applied for the case to be struck out.

Pursuant to rule 32(1) of the GRC Rules if a party does not consent to a paper hearing the case must be listed for an oral hearing, however, pursuant to rule 32(3) of the GRC Rules a Judge may dispose of the proceedings without a hearing under rule 8 (i.e. a strike out). The option of considering the case upon the papers arose in

relation to the strike out application. The strike out ruling itself dealt with the reasons for proceeding with the strike out on the papers.

6. I am satisfied that in amending the earlier direction to take into consideration the change of circumstances occasioned by the strike out application there was no error in law.

Ground b

7. Whilst it is accepted that Judge Angel had read the papers and had set down the case for an oral hearing, this was in the context of the Appellant having requested an oral hearing and there being at the time no application for a strike out. It is not accepted that this constitutes a view upon the merits of the case or a view upon the mode of hearing (in that at the time there was no option but to list it for an oral hearing). However, even if this is wrong and by listing it for an oral hearing Judge Angel had expressed a view upon the mode of hearing, pursuant to rule 5 GRC rules this is not binding and the decision to proceed upon the papers does not constitute an error of law in relation to the strike out hearing. Consequently this ground discloses no error of law.

Ground c

8. The evidence in this case is documentary, it is not the facts that are in dispute (in the sense that it is not denied that certain letters were sent), it is the conclusions that are drawn from the facts that are not agreed. The appeal was struck out because I was of the view that Mr Macleod had no reasonable prospect of success in persuading the Tribunal that his conclusions were correct. In reaching that conclusion I had regard to all the material in front of me and the overriding objective. This ground is an attempt to re-litigate the facts in this case and does not identify an error of law.

Ground d

9. The allegation that the Information Tribunal does not take breaches of s10 FOIA seriously cannot amount to a ground of appeal against the Commissioner's Decision Notice under s 58 FOIA. Consequently this ground does not amount to an error in law in the strike out decision.

Ground e

10. Reasons for proceeding with the strike out ruling on the papers despite the Appellant having asked for an oral hearing of his appeal are given at paragraphs 6-8. This ground does not amount to an error of law in the strike out decision.

11. Under rule 44 of the GRC Rules, the Tribunal may undertake a review of a decision if (a) it has received an application for permission to appeal and (b) it is satisfied there is an error of law in the original decision. I have considered whether Mr Macleod's grounds of appeal identify an error of law in the First-tier Tribunal's ruling. As set out in the consideration of grounds a-e above, I am satisfied that Mr Macleod has not raised any points of law. I conclude, therefore, that there is no power to review the decision in this case.

12. Finally, I consider whether permission to appeal to the Upper Tribunal should be granted. For the reasons given above, having considered the grounds of appeal as set out above, I am satisfied that they do not identify an error of law in the ruling of 7th October 2011, as required by rule 42(5)(g) of the GRC Rules, consequently, permission to appeal is also refused.

**Dated this 22nd day of November 2011**
**Fiona Henderson**
**Tribunal Judge**

**IN THE UPPER TRIBUNAL**
**ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. GIA/3473/2011**

## THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

| | |
|---|---|
| **Name:** | Mr Adam Denys Gordon Macleod |
| **Tribunal:** | First-tier Tribunal (General Regulatory Chamber) (Information Rights) |
| **Tribunal Case No:** | EA/2010/0039 |
| **Tribunal Venue:** | Not applicable (paper hearing) |
| **Decision Date:** | 7 October 2011 |

## 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

*Introduction*

1. I held an oral hearing of this application for permission to appeal at Field House on 3 May 2012. Mr Macleod was present, representing himself, and I am grateful to him for the considered and courteous way in which he put his submissions.

2. Mr Macleod applies for permission to appeal against the decision of Judge Henderson (EA/2010/0039 dated 7 October 2011). The decision of Judge Henderson was to grant the Information Commissioner's application to strike out Mr Macleod's appeal to the First-tier Tribunal ("FTT") under rule 8(3)(c) of the Tribunal Procedure (First tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the FTT Rules"). Mr Macleod's appeal to the FTT had been to challenge the Information Commissioner's Decision Notice FS50155363 dated 3 December 2009. In striking out his appeal in reliance upon FTT rule 8 (3)(c), Judge Henderson concluded that the appeal had no reasonable prospects of success.

*Procedural Matters*

3. Mr Macleod requested an oral hearing of his application for permission to appeal to the Upper Tribunal, which was granted by Judge Wikeley on 19 January 2012. At the hearing before me on 3 May, Mr Macleod expressed his gratitude to Judge Wikeley for having afforded him the opportunity to present his case in person.

4. In correspondence with the Upper Tribunal office, Mr Macleod had expressed concern that a one hour hearing slot would be insufficient time for him to present his case. The matter was therefore listed for an afternoon session and, as I explained to Mr Macleod on 3 May, I was available to listen to him for the whole afternoon to make

sure he could advance all the points that he wished to make. In the event the hearing lasted a little under one and a half hours.

5. Mr Macleod was, in the usual way, sent a paginated bundle for use at the oral hearing. Unfortunately by the time of the hearing he had not maintained the paginated bundle but had broken it up according to his own system of filing. This led to some difficulty in him referencing certain papers as we progressed. Mr Macleod was, of course, already familiar with the relevant papers. I also read out to him extracts from any documents that I wished to refer him to whenever he did not have them immediately to hand. In the circumstances, I am satisfied that he was given a full opportunity to comment in person on all the matters that he had previously raised in writing. Mr Macleod expressed satisfaction with the conduct of the hearing on 3 May.

6. Mr Macleod had also expressed in correspondence his concern that his oral hearing before the Upper Tribunal should be transcribed. I can confirm that the proceedings on 3 May were tape-recorded by the clerk in the usual way.

*The background to this case*

7. Mr Macleod is a 93 year old gentleman who takes a deep interest in public affairs. He is, as he told me, a regular correspondent with a number of Government Departments. He is especially concerned about the Freedom of Information Act 2000 and its application by certain public authorities. There is a long and complex history to his case which I summarise shortly as follows.

8. Mr Macleod was in correspondence with the Department for Constitutional Affairs (as it then was) for some years about what he saw as its failure to comply with the time limit for responding to information requests under s. 10 of the Freedom of Information Act 2000. In a decision dated 13 October 2006, the Department refused an information request from Mr Macleod on the basis that the request was vexatious. Mr Macleod complained to the Information Commissioner, who issued a Decision Notice dated 3 December 2009, upholding the Department's decision.

9. Mr Macleod appealed to the FTT against that Decision Notice. Judge Pilling ruled that his application was then out of time and should not proceed. Mr Macleod appealed to the Upper Tribunal against Judge Pilling's ruling. In May 2011 Upper Tribunal Judge Turnbull ruled that Judge Pilling's ruling contained an error of law and remitted Mr Macleod's application to proceed out of time to the FTT for determination. On remittal, the Principal Judge for the Information Rights jurisdiction, Judge Angel, ruled that the appeal could proceed out of time and issued case management directions dated 2 August 2011. The case was then only at the preliminary stage that it would have been at if Judge Pilling had not issued her ruling over a year earlier, as the decision not to accept it out of time had meant that no initial case management directions had been issued. Principal Judge Angel's directions were clearly intended to put the case "back on track" and he set out a brisk timetable directed towards an oral hearing in October 2011.

10. In accordance with paragraph 2 of Judge Angel's directions, the Information Commissioner lodged his response to the Notice of Appeal. This is usually a preliminary step, but it had not been required earlier due to the appeal having initially been ruled out of time. The Information Commissioner at that stage (i) provided his response to each of Mr Macleod's grounds of appeal against the Decision Notice and (ii) applied for the appeal to be struck out under FTT rule 8(3)(c). Judge Henderson

gave Mr Macleod the opportunity to respond in writing to that application as is required by rule 8 (4) of the FTT rules.

11. Judge Henderson then considered the strike out application, together with the representations made by Mr Macleod in respect of it, at a paper hearing. She granted the Information Commissioner's application and gave full reasons for her conclusion that the appeal should be struck out. She also refused what she considered to be a recusal application by Mr Macleod in respect of her alleged pre-determination of the issues. She subsequently refused an application for permission to appeal against the strike out decision. Mr Macleod then renewed his application for permission to appeal to the Upper Tribunal (Administrative Appeals Chamber) as he is entitled to do and that is the matter now before me. I must now decide whether there is an arguable error of law in Judge Henderson's decision to strike out Mr Macleod's appeal.

*The grounds of appeal against Tribunal Judge Henderson's Ruling*

12. Mr Macleod has submitted that there were a number of errors of law in Judge Henderson's strike out ruling. He has raised primarily issues of procedural fairness in relation to the conduct of his case. He wishes for the strike out to be set aside so that his original appeal to the FTT may proceed to a hearing. Some of his submissions were included in the form UT11 dated 27 November 2011, but others have been raised (and earlier arguments expanded upon) in subsequent correspondence. At the hearing, I asked Mr Macleod about each and every ground of appeal that I had identified from the file and he most helpfully elucidated his arguments. He confirmed that we had covered all of the arguments he wished to raise in the hearing. I set out below each of his arguments, having grouped them into broad themes. Part (a) of each paragraph summarises his submission and part (b) provides my response to it.

13. (a) The first ground is that the overriding objective in FTT rule 2 requires the Tribunal to deal with cases fairly and justly and that Tribunal Judge Henderson failed to take rule 2 sufficiently into account and to deal with the case fairly and justly.

    (b) It is important to remember that the overriding objective is contained in part 1 of the FTT rules and that it provides a general introduction to the Tribunal's approach to the determination of appeals. It does not militate in favour of any particular outcome. Having read Judge Henderson's strike out decision, I note that she refers specifically to her consideration of the overriding objective in reaching her decision (paragraphs 8 and 15). Mr Macleod has not identified the particular respects in which he says that the overriding objective was been breached but rather argues that it should have dictated a different outcome. It seems to me that this ground is in essence an argument that the decision was wrong in substance, but relies on rule 2 for support. In the circumstances I do not find an arguable point of law in this ground.

14. (a) The second ground is that a decision to strike out an appeal is one designed to be made at the early stage of proceedings and not many months after the appeal has been received. Further, that rule 8 (3)(c) should not be invoked after an appeal has already been considered and allowed to proceed to a hearing by other Judges. Mr Macleod also argues that, as the Response provided by the Information Commissioner said little that was different from the Decision Notice, it did not justify the complete change of approach adopted by Judge Henderson.

    (b) In considering this ground of appeal, I note that Mr Macleod's appeal only commenced for the purposes of case management after it had been permitted to proceed by Judge Angel in August 2011. As I explained to Mr Macleod at the

hearing, the strike out came at a point effectively only two months after the appeal commenced, because it had made no progress in the FTT before the remittal by the Upper Tribunal. In these circumstances, I conclude that the strike out was, as Mr Macleod has argued it should be, made at an early stage of proceedings. That said, there is nothing in the FTT rules to indicate the point at which a strike out decision should be made and I discern no error of law in a decision to strike out an appeal at the first point that both parties' arguments are put before the relevant Judge. In this case, that opportunity arose for the first time when the Information Commissioner lodged his Response to the remitted appeal. The judges who had considered Mr Macleod's case previously did not have all the arguments before them and their views about its progress did not bind Judge Henderson in any event. In the circumstances I am not satisfied that there is an arguable point of law in relation to this ground.

15. (a) The third ground is that Principal Judge Angel gave a clear ruling that this appeal should proceed to an oral hearing in his directions of 2 August 2011. Mr Macleod argues that this should have indicated to any reasonable reader of the directions that Judge Angel had formed the view that the appeal had merit and should proceed. He argues that in those circumstances, Judge Henderson had no authority to over-ride the opinion of her Principal Judge and therefore acted ultra vires in striking out the appeal. Mr Macleod complained further that Judge Angel had declined to explain why he had allowed Judge Henderson to over-rule him.

(b) Despite much correspondence over this issue, I cannot see that anyone has previously explained to Mr Macleod that the title of "Principal Judge" refers to an administrative role within the Tribunal and not to a superior position in the judicial decision-making hierarchy. After Judge Angel issued case management directions, he allocated the case to Judge Henderson, who was free to take what decision she considered appropriate in the exercise of her office. I do not therefore accept that she acted ultra vires in striking out the appeal or that she was constrained in any way by Judge Angel's earlier decision, which was limited to the question of the appeal proceeding out of time and to the issuing of case management directions. Judge Angel had not, at the time he issued his case management directions, had sight of the Information Commissioner's Response and so was not in a position to consider the merits of the case. The appropriate time to have considered the merits of the appeal was when both parties' cases had been pleaded, and the first Judge to have sight of both parties' cases and therefore able to take a view of the merits was Judge Henderson. In the circumstances I find that there is no arguable point of law in relation to this ground. The appropriate course for Mr Macleod to take on receiving Judge Henderson's ruling was to apply for permission to appeal, which he did. There can be no criticism of Judge Angel for refusing to become engaged in correspondence with Mr Macleod about the strike out decision whilst the appeal process was in train.

16. (a) The fourth ground is that, on any fair reading of the documentary evidence, a reasonable judge would have concluded that the appeal had a good prospect of success. This goes to the merits of Judge Henderson's conclusion that the appeal to the FTT had no reasonable prospect of success. Mr Macleod argues that Judge Henderson could not have given adequate consideration to all the papers before her in reaching her decision, that she failed to take into account the fact that the substance of his appeal was serious; that it was in the public interest for it to be heard and further that she did not approach it in a balanced and considered way, acting instead as "Attorney for the Defence" in championing the views of the Respondent and striking it out.

(b)I take this to be an argument that Judge Henderson's decision to strike Mr Macleod's case out was perverse. If this argument were made out it could amount to an error of law. I have considered the fact that Mr Macleod has acted as a litigant in person throughout this case and considered whether Judge Henderson ought to have exercised her discretion differently so as to allow him to argue his appeal at a full hearing. I have considered in this regard the decision of Mr Justice Eady in Merelie v Newcastle Primary Care Trust and Others (2004) The Times 1 December – referred to in Judge Edward Jacobs' textbook on *Tribunal Practice and Procedure* (second edition) at page 439. This is referred to as authority for the proposition that a litigant in person should not be deprived of a hearing by being struck out merely because the case seems implausible on the papers. There is a somewhat limited case report of this decision, but it appears that the question of a strike out arose in relation to a case founded upon a possibly implausible allegation of conspiracy between senior and junior staff in the NHS Trust. I understand Mr Justice Eady's decision to be to the effect that, in circumstances where there were issues of fact to be determined, a case ought not to be struck out without a hearing because it appeared implausible, as pleaded by a litigant in person, on the papers. I contrast that decision with this case, where it is clear from Judge Henderson's ruling that she considered carefully whether the grounds of appeal disclosed an arguable case notwithstanding certain irregular proposals contained within them (such as a proposal to question each Tribunal member in an attempt to assess bias). As she stated at paragraph 15 of her ruling, she adopted a purposive approach to the grounds in deciding whether they had any prospect of success. Mr Macleod's case, as put to the FTT, was not one involving disputed facts but rather his arguments as to why the Information Commissioner's Decision Notice was wrong in substance. It is clear that Judge Henderson took into account Mr Macleod's status as a litigant in person in considering each ground of appeal in turn and concluding that each ground advanced by Mr Macleod lacked a reasonable prospect of success. In the circumstances I find no arguable error of law on the basis of perversity in relation to her decision.

17. (a) The fifth ground is that the Information Commissioner has a duty to investigate breaches of s. 10 of the Freedom of Information Act 2000. Mr Macleod argues that Judge Henderson's ruling suggests that the Information Commissioner does not have to take any steps in relation to breaches of s. 10, so that there is an error of law in her decision.

(b) This refers to the finding by the Information Commissioner that the Department (by then the Ministry of Justice) had breached the requirements of s. 10 of the Freedom of Information Act 2000. As Judge Henderson pointed out in her strike out ruling, the Tribunal has no jurisdiction in relation to Mr Macleod's complaint that the Information Commissioner should have imposed a harsher sanction in relation to the procedural breaches he had found. I concur with Judge Henderson that the sanction imposed for breaches of the Act is not a matter which is capable of appeal to the FTT. Whilst acknowledging Mr Macleod's strongly held view that tougher sanctions should be imposed for breaches of the 2000 Act, I find that there is no error of law in Judge Henderson's decision in this regard.

18.(a) At the oral hearing of this matter, Mr Macleod sought to raise a sixth argument, namely that rule 44 (1) (b) of the FTT rules (concerning the power for the FTT to review its own decision) was flawed because, as it only applies to errors of law, it would not allow the FTT to set aside a decision that involved a perverse finding on the facts. This is a matter about which Mr Macleod has corresponded with a number of bodies, including the Tribunal Procedure Committee.

(b)On discussion with Mr Macleod, he agreed that his argument was more properly to be directed at the requirement in rule 42 (5) (g) of the FTT rules to the effect that he must identify errors of law in the decision which he seeks permission to appeal. Mr Macleod's concern in relation to this rule was that the narrow requirement to identify an error of law might have the effect of preventing him from challenging a perverse finding of fact. As noted at paragraph 16 above, there is authority for the proposition that a perverse finding on the facts might constitute an error of law and accordingly I find that his concern is misconceived. In any event, this ground appears to be a free-standing one rather than a ground that is material to the facts of Mr Macleod's case. I do not discern any error of law in the strike out decision as a result of the concern which Mr Macleod expresses.

19.(a) Mr Macleod had originally submitted that, in seeking his views on the proposed strike out under FTT rule 8(4), Tribunal Judge Henderson had demonstrated pre-determination and bias. He has complained to the Senior President of Tribunals about this. At the hearing before me on 3 May, Mr Macleod very fairly and helpfully conceded that Judge Henderson had acted as the rules required her to and that he no longer alleged an error of law in this regard.

(b) In view of the withdrawal of this seventh ground of appeal I do not need formally to rule on it. However, I agree with Mr Macleod that Tribunal Judge Henderson acted as the rules required her to and that this did not of itself indicate bias or pre-determination of the issues.

20. (a) In summing up his case, Mr Macleod expressed his disappointment that his case has taken so many years to get to this stage and that six different Judges have been involved in it to date. He also expressed concern about the standard of administration in the early years of his dealings with the Tribunal (although he commented in fairness that the administration has been much improved of late). He thought that the root of this problem was the FTT Rules and expressed the view that procedural rules should be so clearly worded that there is no ambiguity in them and that Tribunal Judges should not be permitted to interpret them in inconsistent ways. He has written to the Tribunal Procedure Committee (and others) to make this point.

(b) I share Mr Macleod's concern that this matter has taken so long and involved so much resource. It may help him to consider that each stage of this appeal has effectively been a self-contained case on a discrete point, rather than one case spanning several years. Each Judge has effectively been asked by Mr Macleod to consider a different aspect of his grievances and this they have done. As I am the last Judge to consider the application by Mr Macleod, I am able to take an overview of the proceedings and hope that in so doing I have finally addressed all his concerns.

*Conclusion*

21. Having considered Mr Macleod's submissions most carefully, I conclude for the reasons set out above that there is no arguable error of law in the decision of Judge Henderson to strike out Mr Macleod's appeal to the First-tier Tribunal. I entirely understand that Mr Macleod profoundly disagrees with that decision but it follows that I have no option but to dismiss his application for permission to appeal. That decision brings these proceedings to a close.

22. Finally, I am aware that Mr Macleod has, both prior and subsequent to the hearing on 3 May, written to the Lord Chancellor, the Senior President of Tribunals, HMCTS, the Tribunal Procedure Committee and to the Office for Judicial Complaints suggesting

that judicial procedures and indeed judicial standards have been found wanting throughout his case. He has sent me copies of some of his correspondence and alluded to other correspondence which I have not seen. I am sorry that he has formed this view and can only hope that the unusually full explanation that I have here provided goes some way towards answering his concerns. I am sending a copy of this decision to the Judicial Office so that it can be referred to if necessary in any future correspondence with Mr Macleod.

**Alison McKenna**
**Judge of the Upper Tribunal**

**Dated**