RULINGS OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER) ON APPLICATIONS FOR RECUSAL AND COSTS

1. The application by Dr Kirkham that I recuse myself is dismissed.

2. The application by Dr Kirkham for costs is dismissed.

REASONS FOR RULINGS

Introduction

1. Dr Kirkham has made a number of applications consequential upon my decision in *Kirkham v Information Commissioner* [2018] UKUT 6 (AAC) (previously known under file reference GI/1321/2017, and from now on referred to in these reasons as *Kirkham v IC* [2018])). The background was that Dr Kirkham had e-mailed the office of the Senior President of Tribunals a FOIA request for certain information about judicial training. He was not satisfied with the response and complained to the Information Commissioner, who sent Dr Kirkham a letter declining to pursue the matter on the basis that the Senior President was not a "public authority" under FOIA. Dr Kirkham argued this letter was a decision notice that gave him the right of appeal to the First-tier Tribunal. The appeal became the subject of a discretionary transfer to the Upper Tribunal (Administrative Appeals Chamber); accordingly there was no actual First-tier Tribunal decision on the purported appeal. In particular Dr Kirkham has now made applications that:

1. I set aside my decision in *Kirkham v IC* [2018] "on the basis of persistent and material inaccuracies and mischaracterisations of the case in hand";

2. I recuse myself from dealing with his application for costs in *Kirkham v IC* [2018];

3. he should be awarded costs in *Kirkham v IC* [2018] in the light of the Information Commissioner's conduct of the appeal when it was before the First-tier Tribunal.

2. I have dealt with the first application (to set aside my substantive decision) in a separate ruling dated 16 February 2018. I decided there was no procedural irregularity in the Upper Tribunal proceedings in *Kirkham v IC* [2018] within the meaning of rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698; 'the 2008 Rules'). As Dr Kirkham was in reality challenging the reasoning in that decision, I treated his application in parallel (under rule 48) as an application for permission to appeal to the Court of Appeal (under rules 44 and 45). I refused that application for the reasons set out in a further ruling also dated 16 February 2018.

3. Before moving to consider the remaining two applications, it is important not to lose sight of the fact that Dr Kirkham lost the appeal before the Upper Tribunal in *Kirkham v IC* [2018]. To be accurate, his purported appeal was struck out. The Information Commissioner had made an application in those proceedings that the appeal be struck out for want of jurisdiction under rule 8(2)(a) of the 2008 Rules. I acceded to that application, essentially as I found that Dr Kirkham's information request had indeed been made to the Senior President of Tribunals, who is not a "public authority" for the purposes of the Freedom of Information Act 2000 (FOIA). In those circumstances the question of whether the Information Commissioner's letter of

12 April 2017 (ref FS50664994) constituted a "decision notice" for the purposes of sections 50(3)(a) and 57 of FOIA did not fall for decision.

4. I therefore consider the recusal and the costs application in turn. Obviously if I were to decide to recuse myself then the costs application would have to be transferred to another Upper Tribunal Judge.

The recusal application

The background to the application for recusal

5. The proceedings in *Kirkham v IC* [2018] have already spawned a host of satellite proceedings. The first contact that Dr Kirkham made with the First-tier Tribunal General Regulatory Chamber office ('the GRC office') about his intention to lodge an appeal seems to have been on 22 April 2017. The GRC office queried the status of this appeal direct with the Information Commissioner's office on 24 April 2017, without copying in Dr Kirkham. In *Kirkham v IC* [2018] I observed that this was, putting it mildly, inappropriate. An exchange of e-mail communications followed between Dr Kirkham and Mr Sowerbutts, a solicitor in the Information Commissioner's office. The appeal was formally registered by the GRC office under reference EA/2017/0083 on either 25 or 26 April 2017.

6. On 4 May 2017 the case was transferred from the First-tier Tribunal to the Upper Tribunal, with the concurrence of both Chamber Presidents, under rule 19(3) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976; 'the 2009 Rules'). Judge Lane's ruling expressly recorded that "it is in the interests of the overriding objective to direct that the case be transferred to and determined by the Upper Tribunal".

7. On 5 May 2017 Dr Kirkham applied to the First-tier Tribunal for an extension of time to make a costs application against the Information Commissioner. I put to one side the plainly arguable point that, as the case had by then been transferred to the Upper Tribunal, there were no extant proceedings before the First-tier Tribunal in which to make any such application.

8. On 5 May 2017 the GRC registrar refused Dr Kirkham's application to extend time to make a costs application. Dr Kirkham asked for that ruling to be reconsidered by a judge.

9. On 10 May 2017 Judge Peter Lane (as he then was) in effect refused to reconsider that ruling by the GRC registrar. His ruling, communicated to Dr Kirkham by the GRC office by e-mail, was admirably short and to the point: "The case has been transferred to the Upper Tribunal. You should address any matters to that Tribunal."

10. Dr Kirkham then applied for judicial review in the Upper Tribunal of both the GRC registrar's ruling and the ruling by Judge Lane. Those proceedings were issued under the Upper Tribunal reference numbers JR/1615/2017 and JR/1617/2017 respectively. On 8 June 2017 I issued a stay in both proceedings pending the outcome of the substantive appeal in *Kirkham v IC* [2018].

11. With the benefit of hindsight, it might have been better if I had treated both those applications as applications for permission to appeal the two rulings in question and then issued a stay. I say that as, in principle, First-tier Tribunal case management decisions are plainly appealable so long as they are not by statute "excluded decisions" (see *LS v LB of Lambeth* [2010] UKUT 461 (AAC); [2011] AACR 27). As Dr Kirkham had a right of appeal to the Upper Tribunal against the decisions of 5 and

10 May 2017, and those decisions were not excluded decisions as defined, it followed that the Upper Tribunal had no jurisdiction to entertain the purported judicial review applications: see Condition 3 of section 18(6) of the Tribunals, Courts and Enforcement Act (TCEA) 2007 and the Lord Chief Justice's *Practice Direction (Upper Tribunal: Judicial Review Jurisdiction)* [2009] 1 WLR 327. However, nothing turns on that procedural issue now.

12. Following my decision to strike out the discretionary transfer appeal in *Kirkham v IC* [2018], I lifted the stay in both JR/1615/2017 and JR/1617/2017. I did not consider it proportionate to require the Information Commissioner to file an acknowledgement of service, but dealt with both matters on the papers as they stood. Nor did I treat the proceedings as applications for permission to appeal the rulings by the GRC registrar and Judge Lane. Instead, I dismissed both applications for the same reason, namely that each ruling was a case management decision that was well within the reasonable discretion of the registrar and judge respectively. Thus it is not the role of the Upper Tribunal to 'micro-manage' such interlocutory decisions on appeal in a jurisdiction confined to errors of law. It is old (but still good) law that an interlocutory ruling should only be interfered with if it is "plainly wrong" (see e.g. Lord Templeman in *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446 at 454A-B). I added in both cases, in a passage seized on by Dr Kirkham, that "given the outcome of the appeal in GI/1321/2017 [i.e. *Kirkham v IC* [2018]), I can see no realistic prospect of any costs application by the Applicant succeeding, whether in respect of proceedings before the First-tier Tribunal or the Upper Tribunal".

13. For completeness I should add that Dr Kirkham has renewed his applications for permission to apply for judicial review in JR/1615/2017 and JR/1617/2017. Those applications have now been transferred to Upper Tribunal Judge Gray, who I understand has issued initial observations. Dr Kirkham has asked that I delay dealing with the present applications until Judge Gray has given further directions in those applications. I see no sound reason for any such delay.

The principles governing recusal by a judge

14. The law governing apparent bias is well known. The test is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": see Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357 at [103]. The "fair-minded and informed observer", according to Lord Steyn in *Lawal v Northern Spirit* [2003] UKHL 35, "is neither complacent nor unduly sensitive or suspicious" (at [14]). See also *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; [2006] 1 WLR 781 (also reported as *R(DLA) 5/06*), where Lord Hope added that the "fair-minded and informed observer" must be taken to be to be able distinguish between what is relevant and what is irrelevant and decide what weight should be given to facts that are relevant.

15. Thus, as Underhill LJ recently observed in *Shaw v Kovac* [2017] EWCA Civ 1028 at [86], "An impartial observer will generally have no difficulty in accepting that a professional judge will decide the case before him or her on its own merits and will be unaffected by how they may have decided different issues involving the same party or parties". Moreover, as Burnett LJ (as he then was) added in the same case at [88], "The party who seeks to bounce a judge from a case may be fair-minded and informed but may very well lack objectivity."

16. The rule against bias was considered in more detail by the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004; [2000] QB 451, where it was stressed that the "mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the

evidence of a party or witness to be unreliable, would not without more found a sustainable objection". So, for example, where a member of a tribunal makes it clear (e.g. through comments or body language) that he or she is unimpressed by evidence that is being given, that may be a rational reaction to the evidence even though it may be discourteous or even intemperate. In such circumstances, it does not show that the tribunal member had a closed mind or was biased, with the result that the tribunal's decision is not vitiated (*Ross v Micro Focus Ltd* UKEAT/304/09).

17. As already noted, the "fair-minded and informed observer" will recognise that judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. As Mr Commissioner Bano (as he then was) pointed out in *CIS/1599/2007* at paragraph 12:

> "In *R (on the application of Holmes) v General Medical Council* [2002] 2 All ER 524 the Court of Appeal held, applying the *Porter* test, that the fact that a Lord Justice of Appeal had refused leave to appeal was not a ground for requiring the lord justice to recuse himself from hearing the full appeal, and in *AMEC Capital Projects Limited v Whitefriars City Estates Limited* [2005] 1 All ER 723 the Court of Appeal held that the same principles apply even where an adjudicator has already decided an issue on the merits against one of the parties."

18. Referring to the passage in *Locabail*, and cited above, Dyson LJ held as follows in *AMEC Capital Projects Limited v Whitefriars City Estates Limited* (at paragraph 21):

> "…As was said in *Locabail,* the mere fact that the tribunal had previously commented adversely on a party or found his evidence unreliable would not found a sustainable objection. On the other hand, if the tribunal had made an extremely hostile remark about a party, the position might well be different. Thus, in *Ealing London Borough Council v Jan* [2002] EWCA Civ 329, this court decided that the judge should not hear the retrial of proceedings where he had twice said of the respondent in preliminary proceedings that he could not trust him 'further than he could throw him'."

19. Thus in *Otkritie International Investment Management Limited* v *Urumov* [2014] EWCA Civ 1315 the Court of Appeal held that the fact a trial judge had made adverse findings against a party did not preclude him or her sitting in subsequent proceedings. As Davis LJ further noted in *Shaw v Kovac* (at [19]), "It is striking that in that case the trial judge was held by the Court of Appeal to have been positively wrong to recuse himself on the application of the defendant in circumstances where, in the same complex commercial proceedings, the judge previously had made findings of actual fraud on the part of the defendant."

20. Whilst each case necessarily turns on its own facts, these authorities demonstrate clearly that judges must be robust and are not expected to jump to recuse themselves. The rationale was explained clearly by Chadwick LJ in *Triodos Bank N.V. v Dobbs* [2001] EWCA Civ 468, in which the defendant had invited Chadwick LJ to recuse himself as a result of his conduct in relation to a permission to appeal application in related proceedings. Chadwick LJ observed as follows:

> "7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against

> him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally, Mr Dobbs' appeal could never be heard."

Applying those principles in these proceedings

21. Dr Kirkham advances two reasons in support of his application that I recuse myself from considering his costs application.

22. The first is that the "persistent inaccuracies" which he claims to have identified in my decision in *Kirkham v IC* [2018] demonstrate apparent bias. This takes Dr Kirkham nowhere. If Dr Kirkham considers that I have misapplied the law in *Kirkham v IC* [2018] then, following my ruling dated 16 February 2018, his remedy is to apply direct to the Court of Appeal for permission to appeal. As I have already had cause to remind Dr Kirkham some time ago in other proceedings (in an application he made for permission to appeal against another interlocutory ruling by Judge Lane, this time in GIA/1604/2015), Rimer J famously characterised this type of ground as being in essence "no more than the deployment of the fallacious proposition that (i) I ought to have won; (ii) I lost; (iii) therefore the tribunal was biased" (see *London Borough of Hackney v Sagnia* [UKEAT0600/03, 0135/04, 6 October 2005] at paragraph [63]). Dr Kirkham cannot simply recycle his grounds for a set aside without more as a recusal application.

23. Secondly, however, Dr Kirkham says he has more – he refers to my comment in the rulings JR/1615/2017 and JR/1617/2017, namely that "given the outcome of the appeal in GI/1321/2017, I can see no realistic prospect of any costs application by the Applicant succeeding, whether in respect of proceedings before the First-tier Tribunal or the Upper Tribunal". I reiterate that the applications in both JR/1615/2017 and JR/1617/2017 sought to challenge case management rulings by the GRC registrar and Judge Lane; they were not concerned with the merits of any costs application.

24. The "fair-minded and informed observer" (FMIO) will understand the basic principles and so the broad outline of the law governing costs, but not the finer details. The FMIO will know that in the civil courts, costs normally follow the event, and so the default position is that the losing party pays the winning party's costs (subject to special rules for various exceptions, such as proceedings in the small claims court). The FMIO will also know that as a general rule tribunals constitute what is sometimes described as a 'costs-free zone' – i.e. the usual position is that no order is made as to costs, and each party therefore picks up their own legal expenses. The FMIO will also appreciate that different tribunals have different rules, but that the First-tier Tribunal (GRC) (Information Rights) is like many others in exceptionally having provision for making a wasted costs order (against a representative for e.g. improper or unreasonable conduct) or an order for costs

where a party has acted unreasonably in conducting the proceedings. It is difficult to contemplate circumstances in which it would be appropriate as a matter of discretion for such an exceptional order to be made against a winning party in a tribunal jurisdiction. The observation I made has to be seen in that context – as presently advised, I could see no realistic prospect of such a highly unusual outcome.

25. The FMIO will also understand that it is normal practice for judges, whether in courts or tribunals, to give the parties 'a steer' at appropriate junctures, whether such an indication has been actively sought by a party or not. Active judicial case management may require that judges give the parties an indication of the way they are thinking, as that may then inform parties' decisions as to whether or not to make a particular type of application or to press on with a particular line of argument. My comment was no more than an indication that, in the light of both the context described in the previous paragraph and the principles referred to below, any costs application brought by Dr Kirkham necessarily faced a serious uphill struggle.

26. It follows that the FMIO would not consider this to be a case of apparent bias and so would see no need for me to recuse myself. The FMIO would also understand the 'added value' to be had by having the same judge, so far as possible, dealing with all matters in the same case. By way of analogy, and also bearing in mind that each case turns on its own facts, the FMIO would note that applying the *Porter* test the fact that a Lord Justice of Appeal had refused leave to appeal was not a ground for requiring that same judge to recuse himself from hearing the full appeal (*R (on the application of Holmes) v General Medical Council* [2002] 2 All ER 524). By the same token, the FMIO would consider that an Upper Tribunal judge who has indicated in parallel judicial review proceedings the elementary point that there are serious difficulties in a losing party seeking an award of costs in a costs-free jurisdiction is not required to recuse himself when that matter does arise.

27. In his submissions Dr Kirkham relies principally on the Court of Appeal's decision on recusal in *Mengiste v Endowment Fund for the Rehabilitation of Tigray* [2013] EWCA Civ 1003. On closer analysis this authority advances Dr Kirkham's case not one iota. All these recusal cases turn on their own facts. It is clear from Arden LJ's judgment in *Mengiste* that the first instance judge in that case (Peter Smith J.) had made extensive and highly critical findings about the conduct of the claimants' solicitors (as to how they had prepared an expert witness for a trial). This was against a background in which there was no need to make any such findings. Moreover, the judge's criticisms were expressed in absolute terms and were repeated six times in the course of a lengthy judgment at first instance. Arden LJ was accordingly satisfied that the trial judge's findings were "extreme and unbalanced" (adopting Lord Bingham's test as set out in *Locabail*). The circumstances of *Mengiste* are thus far removed from the present case.

28. Arden LJ made it clear that the starting point was as follows (at paragraph [58]):

> "In almost every case, the judge who heard the substantive application will be the right judge to deal with consequential issues as to costs, even if he made findings adverse to a party in the course of reaching his conclusion. But there can always be exceptions, as in *Re Freudiana*, summarised above."

29. Arden LJ summarised *Re Freudiana* (an unreported case) in the following terms (at paragraph [49]):

> "In this case the trial judge (Jonathan Parker J) made stringent findings against the solicitors following a trial lasting 165 days. There was then a wasted costs

> application. The judge concluded that no other judge could hear it and held that he was himself disqualified from hearing the application. An appeal against his ruling was rejected by this Court. Rose LJ held that it should almost always be for the trial judge to adjudicate on a wasted costs application. In the normal way, it would not be an objection that the judge had criticised the solicitors in question in his substantive judgment. However in that case, the judge had made express findings which were not couched in provisional terms and amounted to grave criticisms of solicitors and counsel. Rose LJ therefore concluded that this was an exceptional case in which it might have been extremely difficult for there to be an appearance of fairness if the trial judge had conducted the wasted costs application. Accordingly, he held that at its lowest there was ample material to justify the judge in disqualifying himself."

30. The present case is not in any way exceptional in the terms required by the case law. For all the reasons as set out above, the *Porter v Magill* test is not satisfied. I therefore dismiss the application by Dr Kirkham that I recuse myself from dealing with his costs application.

The costs application

Introduction

31. Dr Kirkham's application for costs raises two issues, one procedural and one substantive. The procedural issue concerns the proper forum in which costs should be decided in this case. It raises a nice point which I do not believe has been the subject of decided authority at Upper Tribunal level or above. The substantive issue is whether it is in fact appropriate as a matter of discretion in the circumstances of this case to make an order for costs in favour of Dr Kirkham and against the Information Commissioner.

The procedural issue: the proper forum

32. Dr Kirkham argues that the First-tier Tribunal is the proper forum for his costs application to be determined. He says this is because what he describes as the Information Commissioner's unreasonable conduct took place before the First-tier Tribunal. He further contends that the First-tier Tribunal is the appropriate forum because what he terms residuals (e.g. costs) were "never expressly transferred and there is a presumption that costs are to be determined in the forum where they were incurred". He cites three decisions in support of his argument. None of them actually assists him.

33. The first is the Court of Appeal's decision in *Mengiste*, referred to above in the context of the recusal application, which he cites as authority for the proposition that most applications for wasted costs should be made to the trial judge. Indeed it is such authority. As such, *Mengiste* simply supports the argument that in the circumstances of this case, where the preliminary issue and strike out application were tried in the Upper Tribunal, then that is in fact also the appropriate forum to decide any costs application (wherever those costs were supposedly incurred).

34. The second case is *UA v London Borough of Haringey (SEN)* [2016] UKUT 87 (AAC), in which Upper Tribunal Judge Jacobs held that an application for costs could be made in the First-tier Tribunal after the appeal in question had been withdrawn by a party. Dr Kirkham suggests that the same analysis can be applied equally to a transferred case as to a withdrawn appeal. This is an attempt to compare apples and pears. Judge Jacobs's decision is (with respect) obviously correct but he has nothing to say about the position as regards costs in an appeal that is transferred from one level of the tribunal hierarchy to another. The only relevant point to take from *UA v London Borough of Haringey* is that a purposive interpretation should be adopted of

the costs provisions "that makes coherent sense of the rules as a whole" (at paragraph 12).

35. The third decision is *NK v London Borough of Barnet (SEN) (Costs)* [2017] UKUT 265 (AAC). Upper Tribunal Judge Rowland held there that the Upper Tribunal may "re-make the First-tier Tribunal's decision in relation to costs even though it remits the substantive case to the First-tier Tribunal" (at paragraph 20). Dr Kirkham sought to argue that the converse must also apply, i.e. the First-tier Tribunal could retain the issue of costs even if the substantive case was transferred to the Upper Tribunal. This is another fruitless apples and pears comparison. Judge Rowland's observation was in the context of an appeal and in the light of the Upper Tribunal's powers under section 12 of TCEA 2007. Again, this takes Dr Kirkham nowhere other than a cul-de-sac.

36. More generally, Dr Kirkham seeks to argue that there is no warrant for the assumption when a case is transferred from the First-tier Tribunal that all incidental or residual matters (such as costs) are also automatically transferred. It is important here to go back to first principles. The starting point is rule 19 of the 2009 Rules, which (as amended) provides as follows:

> **"Transfer of cases to the Upper Tribunal**
> **19.**—(1) This rule applies to charities cases and proceedings under the Data Protection Act 1998 and the Freedom of Information Act 2000 (including those Acts as applied and modified by the Privacy and Electronic Communications (EC Directive) Regulations 2003 and the Environmental Information Regulations 2004).
> (1A) On receiving a notice of appeal in an appeal under section 28 of the Data Protection Act 1998 or section 60 of the Freedom of Information Act 2000 (including that section as applied and modified by regulation 18 of the Environmental Information Regulations 2004) (appeals in relation to national security certificates) the Tribunal must transfer the case to the Upper Tribunal without taking further action in relation to the appeal.
> (2) In any other case the Tribunal may refer a case or a preliminary issue to the President of the General Regulatory Chamber of the First-tier Tribunal with a request that the case or issue be considered for transfer to the Upper Tribunal.
> (3) If a case or issue has been referred by the Tribunal under paragraph (2), the President of the General Regulatory Chamber may, with the concurrence of the President of the appropriate Chamber of the Upper Tribunal, direct that the case or issue be transferred to and determined by the Upper Tribunal."

37. In the present appeal it is "the case" that was transferred, i.e. Dr Kirkham's purported appeal against what he insisted was a decision notice issued by the Information Commissioner. There is no suggestion or even hint in rule 19 (or elsewhere) that on such a transfer what he terms "residuals" are left behind, abandoned and bereft in the First-tier Tribunal in a state of juristic orphanhood. That approach would hardly be consistent with the overriding objective as set out in rule 2 of both the 2008 and the 2009 Rules, as it would encourage a multiplicity of proceedings. It is also noteworthy that rule 19(3) stipulates that the effect of a transfer is that "the case or issue be transferred to and determined by the Upper Tribunal" (emphasis added), as Judge Lane directed in his transfer ruling (see paragraph 6 above). If the case is transferred, then in principle everything associated with the case (such as an application for costs) is likewise "transferred to and determined by the Upper Tribunal". In this context I also bear in mind that the 2008 and the 2009 Rules are both designed with a view to ensuring that proceedings "are handled quickly and efficiently" (see TCEA 2007, section 22(4)(c) and (e)). It is in

addition relevant that rules 26A(1) and (2) of the 2008 Rules (as amended, and insofar as are relevant) provide as follows

> "**26A.**—(1) Paragraphs (2) and (3) apply to—
> (a) a case transferred or referred to the Upper Tribunal from the First-tier Tribunal; or
> (b) …
> (2) In a case to which this paragraph applies—
> (a) the Upper Tribunal must give directions as to the procedure to be followed in the consideration and disposal of the proceedings;
> (aa) …
> (b) the preceding rules in this Part will only apply to the proceedings to the extent provided for by such directions."

38. The focus is thus on "the proceedings" which are transferred and then subject to "disposal" in the Upper Tribunal. The proceedings in the present case, as noted, comprised Dr Kirkham's purported appeal against what he argued was a decision notice issued by the Information Commissioner. Whether it was described as 'the appeal', 'the case' or 'the proceedings', the plain fact of the matter is that it was one and indivisible. Anything that was part and parcel of the proceedings (such as a potential costs application, wherever the costs were incurred) travelled with the transferred case. It would be truly bizarre if the Upper Tribunal had the power on an appeal to make its own decision on costs in relation to earlier proceedings before the First-tier Tribunal and yet not have the same power to make a decision on costs in the very same proceedings (when the matter was before the First-tier Tribunal) in a transfer case as well. The latter is the only interpretation "that makes coherent sense of the rules as a whole" (to borrow the test applied in *UA v London Borough of Haringey*).

39. Accordingly the discretionary transfer provisions indicate that when a case is transferred from the First-tier Tribunal to the Upper Tribunal in the information rights jurisdiction the proceedings are transferred lock, stock and barrel. Is there anything in the statutory provisions governing costs which suggests otherwise?

40. Section 29 of TCEA 2007 provides as follows:

> **"Costs or expenses**
> (1) The costs of and incidental to—
> (a) all proceedings in the First-tier Tribunal, and
> (b) all proceedings in the Upper Tribunal,
> shall be in the discretion of the Tribunal in which the proceedings take place.
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.
> (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—
> (a) disallow, or
> (b) (as the case may be) order the legal or other representative concerned to meet,
> the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
> (5) In subsection (4) "wasted costs" means any costs incurred by a party—
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.
>
> (6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.
>
> (7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses."

41. Perhaps the best argument that can be made for Dr Kirkham's preferred approach – namely that the issue of costs, having first been raised in the First-tier Tribunal, properly remained there, regardless of the transfer – is one based on a rather narrow literal reading of section 29(1). On this construction, the costs of (and incidental to) proceedings in the First-tier Tribunal are at the discretion of the First-tier Tribunal while the costs of and incidental to proceedings in the Upper Tribunal are at the discretion of the Upper Tribunal. A clear example of how section 29(1) might work, if on the facts rather improbable in practice, is as follows. Consider a special educational needs appeal in which the local authority successfully defends its decision before the First-tier Tribunal. If the parents' conduct of the appeal has been utterly unreasonable, the local authority may succeed in getting its costs. However, assume that the parents then appeal to the Upper Tribunal and win at that level. If the local authority acts entirely unreasonably before the Upper Tribunal, the parents in turn may then be awarded costs. This is a case in which there are separate sets of proceedings – the one in the First-tier Tribunal is an appeal against the local authority's decision while the one in the Upper Tribunal is an appeal against the First-tier Tribunal's decision. Section 29(1) envisages that it is entirely possible for the First-tier Tribunal to make an award of costs in its own proceedings against one party while the Upper Tribunal in its proceedings may award costs against the other party.

42. However, section 29(1) does not go so far as to say that only the First-tier Tribunal can make an order as to costs as regards proceedings in that tribunal. To do so would obviously be inconsistent with the Upper Tribunal's powers under section 12 of TCEA 2017 when determining any appeal from the First-tier Tribunal's decision. Thus the alternative and better reading of section 29(1), adopting a purposive construction, is simply that the Upper Tribunal, being the tribunal in which the proceedings takes place following a transfer, may make orders as to costs at its discretion as regards all proceedings in both the First-tier Tribunal and the Upper Tribunal. Furthermore, as already noted, the present case concerned a single set of proceedings – an appeal against what was said to be the Information Commissioner's decision notice – which started life in the First-tier Tribunal and was then transferred to the Upper Tribunal. In the last resort, the effect of the discretionary transfer under the 2009 Rules is that all the proceedings, wherever they took place, are in effect deemed to be in the Upper Tribunal. As those proceedings were determined in the Upper Tribunal, it follows that only the Upper Tribunal enjoys the discretion to deal with all costs issues wherever they arise. This latter approach avoids salami slicing and satellite litigation. It allows the Upper Tribunal on a transferred case to take a view of the costs application based on the course of, and outcome to, the proceedings as a whole. That is the only sensible construction.

43. This analysis is also supported by section 29(3), which expressly makes section 29(1) subject to the 2008 and 2009 Rules – including both rule 19 of the 2009 Rules and rule 26A of the 2008 Rules, as discussed above.

44. I recognise that a contrary view appears to have been taken in the Costs Review Group report to the Senior President of Tribunals entitled *Costs in Tribunals* (December 2011). The report includes the following passage (at paragraph 153):

> "***Costs in another chamber***
>
> 153. Except in the case of a successful appeal (when the UT can, under section 12 of TCEA, make any order which the F-tT could have made), section 29 of TCEA has the effect that it is not generally possible for one chamber to make a costs order in respect of proceedings in another chamber when there has been a transfer or appeal or remitter between chambers. This can sometimes be inconvenient in the case of a transfer or remitter. For instance, where a Complex case in the Tax Chamber is transferred to the T&CC, the latter has no power to award costs in relation to the proceedings before they were transferred. It needs to be considered whether section 29 should be amended to allow a chamber to which a case, or part of a case, is transferred or remitted should have power to deal with the costs incurred in the chamber from which it has been sent.
>
> 154. …
>
> 155. Our recommendation is that section 29 should be amended to allow a chamber to which a case, or part of a case, is transferred or remitted, to deal with the totality of the costs both before and after transfer. The Rules should provide that such a power can be exercised only in a way which reflects the power to award costs in each chamber so that a receiving chamber cannot make an award of costs in respect of costs incurred in the transferring/remitting chamber where there was not power to award costs in that latter chamber."

45. No such amendment has been made to the primary legislation. I draw no inference from that, not least as it may be a question of finding the necessary Parliamentary time. The Costs Review Group's report undoubtedly supports Dr Kirkham's argument. However, notwithstanding the Group's distinguished membership, it is no more than an expression of opinion, not a source of law. Furthermore the central point (that the Upper Tribunal has no jurisdiction over costs issues prior to transfer from the First-tier Tribunal) is asserted in the report rather than argued. There is also no reference to section 29(3) or to the provisions in the Rules which support the analysis adopted in this ruling.

46. I therefore adopt the interpretation "that makes coherent sense of the rules as a whole" (see *UA v London Borough of Haringey*). A reading that regards the proceedings on transfer as indivisible, so allowing the Upper Tribunal to deal holistically with issues of costs, whether they arose before the First-tier or the Upper Tribunal, at the conclusion of proceedings on a discretionary transfer case represents "a plain reading of the legislation when set in the proper context" (*MSM and others (wasted costs, effect of s.29(4))* [2016] UKUT 62 (IAC) at paragraph [38]). The Immigration and Asylum Chamber of the Upper Tribunal helpfully set out the relevant principles of construction as follows, which I rely on too:

> "35. In *Cusack v. London Borough of Harrow* [2013] 1 WLR 2022, Lord Neuberger said of the interpretation of documents, at [58]:
>
> > *"Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim or purpose"*.

> 36. The meaning of an instrument, including an Act of Parliament, is the meaning that it would convey to a reasonable reader with the background knowledge reasonably available to the audience to whom the instrument was addressed *(*see *Attorney-General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [16]).
>
> 37. Where the words of a statutory provision when set in proper context admit of only one meaning then that is the meaning that must be given to such words. However where such words are grammatically ambiguous, an assessment of the reasonableness of the consequences of the opposing constructions may be an aid to the correct construction (see *Gartside v IRC* [1968] AC 553 at 612 per Lord Reid)."

47. If Dr Kirkham is right, the case will have to go back to the First-tier Tribunal, almost a year after it was transferred to the Upper Tribunal, for a costs application to be determined by a Judge who has had no prior involvement in, or knowledge of the issues in, the case (given Judge Lane has been elevated to the High Court bench). That judge would then make a ruling on costs which would give rise to a further right of appeal to the Upper Tribunal. Such an approach is plainly conducive to delay and inefficiency. It follows, for all the reasons above, that the costs application in this case remains in the Upper Tribunal.

The substantive issue: the application for costs

The legislative framework for awards of costs

48. I have already referred to section 29 of the TCEA 2007. Were the proceedings to have remained in the First-tier Tribunal, issues of costs would have been governed by rule 10 of the 2009 Rules:

> **"Orders for costs**
> **10.**—(1) Subject to paragraph (1A), the Tribunal may make an order in respect of costs (or, in Scotland, expenses) only—
> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;
> (b) if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings; or
> (c) where the Charity Commission, the Gambling Commission or the Information Commissioner is the respondent and a decision, direction or order of the Commission or the Commissioner is the subject of the proceedings, if the Tribunal considers that the decision, direction or order was unreasonable.
> (1A) If the Tribunal allows an appeal against a decision of the Gambling Commission, the Tribunal must, unless it considers that there is a good reason not to do so, order the Commission to pay to the appellant an amount equal to any fee paid by the appellant under the First-tier Tribunal (Gambling) Fees Order 2010 that has neither been included in an order made under paragraph (1) nor refunded.
> (2) The Tribunal may make an order under paragraph (1) on an application or on its own initiative.
> (3) A person making an application for an order under this rule must—
> (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
> (b) send or deliver a schedule of the costs or expenses claimed with the application.

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 14 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice under rule 17(5) that a withdrawal which ends the proceedings has taken effect.

(5) The Tribunal may not make an order under paragraph (1) [or (1A) against a person ("the paying person") without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual, considering that person's financial means.

(6) The amount of costs or expenses to be paid under an order under paragraph (1) may be ascertained by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses ("the receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses, including the costs or expenses of the assessment, incurred by the receiving person, if not agreed.

(7) Following an order under paragraph (6)(c) a party may apply—

(a) in England and Wales, to the county court for a detailed assessment of costs in accordance with the Civil Procedure Rules 1998 on the standard basis or, if specified in the order, on the indemnity basis;

(b) in Scotland, to the Auditor of the Court of Session for the taxation of the expenses according to the fees payable in the Court of Session; or

(c) in Northern Ireland, to the county court for the costs to be taxed.

(8) Upon making an order for the assessment of costs, the Tribunal may order an amount to be paid on account before the costs or expenses are assessed."

49. It follows that the general rule is that the First-tier Tribunal (General Regulatory Chamber) (Information Rights) is a costs-free zone in which no costs orders are made save for wasted costs or where there has otherwise been unreasonable conduct.

50. The position in the Upper Tribunal is governed by rule 10 of the 2008 Rules. This provides (omitting immaterial paragraphs and sub-paragraphs):

Orders for costs

10.—(1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings transferred or referred by, or on appeal from, another tribunal except—

(aa) in a national security certificate appeal, to the extent permitted by paragraph (1A);

(a) in proceedings transferred by, or on appeal from, the Tax Chamber of the First-tier Tribunal; or

(b) to the extent and in the circumstances that the other tribunal had the power to make an order in respect of costs (or, in Scotland, expenses).

(1A) …

(2) …

(3) In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except—

(a) in judicial review proceedings;

(b) …

(c) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;
(d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;
(e) …
(4) The Upper Tribunal may make an order for costs (or, in Scotland, expenses) on an application or on its own initiative.
(5) A person making an application for an order for costs or expenses must—
(a) send or deliver a written application to the Upper Tribunal and to the person against whom it is proposed that the order be made; and
(b) send or deliver with the application a schedule of the costs or expenses claimed sufficient to allow summary assessment of such costs or expenses by the Upper Tribunal.
(6) An application for an order for costs or expenses may be made at any time during the proceedings but may not be made later than 1 month after the date on which the Upper Tribunal sends—
(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
(b) notice under rule 17(5) that a withdrawal which ends the proceedings has taken effect.
(7) The Upper Tribunal may not make an order for costs or expenses against a person (the "paying person") without first—
(a) giving that person an opportunity to make representations; and
(b) if the paying person is an individual and the order is to be made under paragraph (3)(a), (b) or (d), considering that person's financial means.
(8) ...
(9) …
(10) …"

51. Thus where cases have been transferred to the Upper Tribunal (Administrative Appeals Chamber) on a discretionary basis, the Upper Tribunal has the same powers to award costs as the First-tier Tribunal would have had (see rule 10(1)(b) of the 2008 Rules), which is essentially only to make a wasted costs order or an order for costs where there has been unreasonable conduct (see rule 10(1)(a) and (b) of the 2009 Rules).

52. I should say at the outset that in these proceedings I did not consider it appropriate or necessary, bearing in mind the overriding objective, to give the Information Commissioner the opportunity to make representations on Dr Kirkham's application for costs in accordance with rule 10(7)(a) of the 2008 Rules and rule 10(5)(a) of the 2009 Rules. I took the view, having considered the application, that it was entirely devoid of any merit. To invite the Commissioner's representations would have simply been to add to her burdens and costs for no material gain.

Dr Kirkham's application for costs

53. Dr Kirkham has not particularised whether he is relying on rule 10(1)(a) (wasted costs) or rule 10(1)(b) (unreasonable conduct) of the 2009 Rules. There is plainly a degree of overlap in practice, but there are important distinctions between the two heads (see *Cancino (Costs – First-tier Tribunal – new powers)* [2015] UKFTT 59 (IAC) at paragraphs [10]-[26] – although technically only a First-tier Tribunal decision, the panel comprised the Chamber Presidents of both tiers in the Immigration and Asylum Chamber).

54. Dr Kirkham relies on two matters in support of his application for costs.

55. The first is what he considers to be the Information Commissioner's failure properly to implement the Upper Tribunal's decision in *Fish Legal v Information Commissioner* [2015] UKUT 52 (AAC); [2015] AACR 33. In particular Dr Kirkham alleges that the Commissioner has repeatedly issued letters (or, as he describes them 'accidental decision notices') refusing to take action on requesters' complaints which, properly construed, are decision notices which should (but do not) carry notification of the statutory appeal rights. This issue was discussed in *Kirkham v IC* [2018] but in the event it was unnecessary to resolve it in those proceedings.

56. The second is what Dr Kirkham alleges was unreasonable and/or negligent behaviour by Mr Sowerbutts on behalf of the Information Commissioner. This allegation relates to e-mail communications which passed between the First-tier Tribunal office and Mr Sowerbutts following Dr Kirkham's lodging of his purported appeal. I dealt with this complaint as follows in *Kirkham v IC* [2018] at paragraphs 10 and 67-69:

> "10. On 24 April 2017, a member of the GRC's administrative team sent a copy of the appeal by e-mail to Mr Sowerbutts, a solicitor in the ICO. The covering e-mail stated "we have an appellant who is insisting that this is a decision notice, we do not recognise this as an official decision notice, but you may know better, please can you advise if this is a valid appeal." This e-mail was not (at that time) copied to Dr Kirkham (although it was on the following day). Mr Sowerbutts's response by e-mail to the GRC team was that "This appears to be a case where the Commissioner has not issued a decision notice under section 50 FOIA because, in her view, she does not have jurisdiction to do so.
>
> …
>
> **"The exchange between the GRC and the Information Commissioner's Office**
> 67. I referred above (at paragraph 10) to a brief e-mail exchange between a member of the GRC administrative team and Mr Sowerbutts, a solicitor working for the ICO. Dr Kirkham (perhaps understandably) took great exception to this inquiry to the ICO from the GRC office about the validity of his appeal, which was made without copying him in. At the oral hearing Mr Knight, while making it clear he held no brief for the GRC, unhesitatingly accepted that what happened was not appropriate. In a masterly understatement, Mr Knight described it as "some way short of best practice to e-mail one party and not both."
>
> 68. I agree entirely with Mr Knight. Dr Kirkham's complaint about the HMCTS practice in this regard was certainly justified. I recognise there are clearly going to be some generic and non-case specific issues where it may be entirely appropriate for tribunal administrators to deal exclusively with one party without involving the other (e.g. handling an appellant's enquiry about car parking facilities at or near a tribunal venue or the payment of expenses, where allowed). However, any communication which touches on either the procedure or the substance of the dispute which is the subject of the tribunal proceedings must be shared with both or all parties (see e.g. *SM v Secretary of State for Work and Pensions (SPC)* [2017] UKUT 336 (AAC) at paragraphs 57-58 and *AF v SSWP (No.2)* [2017] UKUT 366 (AAC) at paragraphs 38-41). Of course, special considerations and modifications may apply in the information rights jurisdiction where closed material is in issue.
>
> 69. In any event, in the present case the GRC clerk's inquiry should have been addressed not to the ICO, as the respondent and so a party to the appeal, but to

> the GRC Registrar (or the GRC Chamber President or Principal Judge), who could then, if they considered it appropriate, have invited representations from both parties on the jurisdictional issue that arose (as indeed the GRC Registrar did swiftly afterwards on 3 May 2017). The unfortunate incident revealed here does perhaps suggest a training need for the relevant HMCTS staff. However, I am not satisfied that there was any lasting prejudice to Dr Kirkham, not least as the relevant correspondence was copied to him within 24 hours and he has had ample opportunity since to make his case about jurisdiction."

57. Dr Kirkham complains that this account as extracted above is neither full nor accurate but I am satisfied it suffices for present purposes. Be that as it may, he then makes his application for costs against the Commissioner. He states that as a result of Mr Sowerbutts's conduct he was required to devote "around 20 hours of additional research time on this case. At £25 an hour, this would be a claim for £500". For present purposes I am prepared to accept that this is a schedule, however skeletal, and that it was notified to the Commissioner, as required by rule 10(5) of the 2008 Rules and rule 10(3) of the 2009 Rules.

The Upper Tribunal's ruling on the costs application

58. I do not intend to make an already over-long decision any longer than it need be. I will accordingly deal with this aspect of the matter summarily, as it deserves.

59. Dr Kirkham's first ground for seeking costs is wholly lacking in any merit. He is concerned about how the Information Commissioner conducts herself in other instances which may or may not give rise to other proceedings involving other parties. That has no direct bearing on the present proceedings. His remedy is to seek judicial review in the Administrative Court of the Commissioner's working practices, or to encourage an information rights lobby group to take up cudgels on his behalf and on behalf of others who he claims are being denied their proper appeal rights.

60. Dr Kirkham's second ground fares no better. Mr Sowerbutts answered a question which had inadvisedly been put to him by the First-tier Tribunal clerk in the GRC office. There was no material effect on the registration of Dr Kirkham's purported appeal (at most it was delayed by four days, which in the overall scheme of things is neither here nor there). There are doubtless other avenues of complaint that Dr Kirkham can pursue, whether through the Commissioner or perhaps via the Solicitors Regulatory Authority. It would be wholly inappropriate of me to investigate his allegations of professional misconduct in the context of these proceedings, given the considerations I summarise below.

61. Decisions on the award of costs are always discretionary. The starting point is that the information rights jurisdiction in tribunals is a costs-free zone. The onus is on the person making the costs application. Costs under rule 10 of either the 2008 or the 2009 Rules are very much the exception rather than the rule, and should be reserved for the clearest of cases (see by analogy *Cancino (Costs – First-tier Tribunal – new powers)* at paragraph [27]). A wasted costs order is certainly exceptional (*Byrne v Sefton Health Authority* [2002] 1 WLR 775 at [39]).

62. Dr Kirkham's application for costs is tantamount to an abuse of process. He did not simply lose his appeal. His appeal fell at the first hurdle and was struck out for want of jurisdiction. The matters about which he complains had no bearing on the outcome of the appeal, which was decided on a different point altogether. The quantification of his claim for costs is wholly disproportionate, amounting to a claim for what is effectively three days' work.

63. Finally I remind myself that in *Bastionspark LLP v Her Majesty's Revenue and Customs* [2016] UKUT 425 (TCC), Nugee J, having considered section 29 of TCEA 2007 and rule 10 of the 2008 Rules, held as follows (emphasis added):

> "16. There are no other rules dealing with costs, and hence no guidance in the rules as to the exercise of the FTT's discretion, save for the general provision in rule 2(3) that the FTT must seek to give effect to the overriding objective (which under rule 2(1) is to enable the FTT to deal with cases fairly and justly) when exercising any power under the rules. There is therefore no equivalent of CPR Part 44 which contains general rules about costs, and in particular no equivalent of CPR 44.2(2) under which if the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, although the court may make a different order. **But although there is no express provision to this effect, it does not seem surprising that if the FTT is to have a discretion over costs, the starting point will usually be that if any order for costs is made at all, it will be that costs should follow the event, that is that the loser will pay the winner. This is what fairness and justice would seem normally to require.**"

64. Fairness and justice dictate this application must be dismissed and Dr Kirkham's application for costs must be refused.

Signed on the original
on 1 March 2018

Nicholas Wikeley
Judge of the Upper Tribunal