DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 31 October 2016 under file reference EA/2016/0054 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The application by the Second Respondent, the Merseyside Fire and Rescue Authority, for a costs order to be made against the Appellant is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

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

DIRECTIONS

The following directions apply to the re-hearing:

(1) The new First-tier Tribunal must comprise a Tribunal Judge sitting alone, and not the Tribunal Judge who dealt with the original case.

(2) The new First-tier Tribunal should deal with matter entirely afresh.

(3) The Appellant is to send the First-tier Tribunal office, within one month of the date of issue of this decision, a breakdown and details of his income for the last complete tax year (2018/19), indicating the source of each form of income and whether it is sole or joint.

(4) These Directions may be supplemented by any later directions issued by a Tribunal Case Worker, the Tribunal Registrar or a Tribunal Judge in the General Regulatory Chamber of the First-tier Tribunal.

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

REASONS FOR DECISION

Summary

1. This appeal before the Upper Tribunal primarily deals with a very narrow point, namely the proper composition of a First-tier Tribunal in the General Regulatory Chamber which hears an application for costs against a party. Such applications must be determined by a Judge sitting alone, and not by a multi-member tribunal panel.

The background to this appeal

2. The Appellant made an information request to the Second Respondent, the Merseyside Fire and Rescue Authority (MFRA), about the estimated costs of building a new fire station. He made his request under the Freedom of Information Act 2000 but the Information Commissioner treated the Environmental Information Regulations (EIR) 2004 (SI 2004/3391) as the applicable regime. The Commissioner decided that MFRA was entitled to withhold the information under the exception in regulation 12(5)(e) (commercial confidentiality) of the EIR – see Decision Notice FER0592270 (dated 16 February 2016). The Appellant appealed to the First-tier Tribunal (FTT).

3. On 4 August 2016, about six weeks before the scheduled hearing, MFRA's solicitor wrote to the Appellant advising him that the requested information had in fact now been publicly disclosed. She sent him a copy of the report which was on the MFRA website and invited him to withdraw his appeal. The circumstances, including the Appellant's reasons for not acceding to that invitation, are described by the FTT in its subsequent costs ruling and need not be repeated here. Suffice to say that on 22 August 2016 the Appellant refused the GRC Registrar's invitation to agree a consent order ending the appeal.

4. Following the FTT hearing on 21 September 2016, the public authority made a costs application for the recovery of £1,261.50 to cover its costs from 4 August 2016 through to 25 September 2016. On 22 September 2016 the FTT issued a consent order to the effect that the appeal was withdrawn, the requested information having already been provided to the Appellant by the public authority, and adjourning MFRA's costs application. The Appellant then filed an 11-page reply to that application. He also provided a one-page summary of his income for the 2015/16 financial year, which amounted to £16,523.11, including a joint tax credits award of £7,402.91.

5. On 31 October 2016 the FTT made a ruling under rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976; "the 2009 GRC Rules") that the Appellant had conducted the proceedings unreasonably and ordered him to pay the MFRA £500 in costs. The majority of the FTT found the Appellant's conduct had been unreasonable from 22 August 2016, while the third member concluded it was unreasonable from the earlier date of 4 August 2016. The public authority's costs from the later date of 22 August 2016 were adjudged to be £967.57. It is not evident from the FTT's ruling whether it was the Judge or one of the members who was in the minority, in effect arguing for a higher costs award over the longer period.

6. Matters then became somewhat complicated as the Appellant made a counter application for costs against the public authority – this application became the subject of the subsequently withdrawn Upper Tribunal application in GIA/2503/2017. This counter application led to the FTT issuing 'show cause' directions on 22 November

2016 and a strike out order then followed on 20 January 2017. The FTT Judge subsequently refused permission to appeal to the Upper Tribunal in a ruling dated 3 March 2017. At the same time, he also indicated he was minded to issue a wasted costs order against the Appellant for what he described as "this latest excursion into frivolous litigation".

7. For reasons that are unclear, it appears the Appellant did not receive the Judge's ruling of 3 March 2017 until 25 July 2017. He then filed a 6-page response to the FTT's ruling. On 25 August 2017 the FTT Judge issued a further ruling but making no wasted costs order for the very good reason that such an order can only be made against a *representative*, and not a *party*. The Appellant's own application for costs was confirmed as having been struck out.

8. Meanwhile, in December 2016, the Appellant had lodged an application for permission to appeal to the Upper Tribunal against the costs order made against him and dated 31 October 2016. There then seems to have been some breakdown in the FTT office's administrative processes as the application was not determined until 28 January 2019. In the event the FTT refused permission to appeal. The Appellant renewed his application for permission direct to the Upper Tribunal, citing five revised grounds of appeal. In a ruling dated 26 March 2019, I gave permission on two of those grounds being (in the Appellant's words) "Decision made by wrong people" (Ground 1) and "Disregard of Disability Living Allowance (mobility) income" (Ground 3). The Information Commissioner and the MFRA both accept that the appeal must succeed on Ground 1.

Ground 1: Decision made by wrong people

9. Paragraph 15(1) of Schedule 4 to the Tribunals, Courts and Enforcement Act 2007 provides as follows:

> "The Lord Chancellor must by order make provision, in relation to every matter that may fall to be decided by the First-tier Tribunal or the Upper Tribunal, for determining the number of members of the tribunal who are to decide the matter."

10. Article 2(1) of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 (SI 2008/2835) further provides as follows (paragraph (2) itemises factors to which the Senior President of Tribunals (SPT) must have regard):

> "The number of members of the tribunal who are to decide any matter that falls to be decided by the First-tier Tribunal must be determined by the Senior President of Tribunals in accordance with paragraph (2)."

11. The SPT has made such provision by way of a Practice Statement entitled *Composition of Tribunals in relation to matters that fall to be decided by the General Regulatory Chamber on or after 6 March 2015*. Paragraph 11 of the Practice Statement is headed 'Information Rights Case' but does not deal, directly or indirectly, with costs applications. Accordingly, one is thrown back on the final paragraphs 15 and 16, headed 'All Cases', which state:

> "15. Where the Tribunal has given a decision that disposes of proceedings ("the substantive decision"), any matter decided under, or in accordance with, rule 5(3)(l) or Part 4 of the 2009 Rules or section 9 of the Tribunals, Courts and Enforcement Act 2007 must be decided by one judge, unless the Chamber President considers it appropriate that it is decided either by:- (a) the same members of the Tribunal as gave the substantive decision; or (b) a Tribunal,

> constituted in accordance with paragraphs 4 to 14 comprised of different members of the Tribunal to that which gave the substantive decision.
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> 16. Any other decision, including striking out a case under rule 8, making an order by consent under rule 37 or giving directions under rule 5 of the 2009 Rules (whether or not at a hearing), must be made by one judge."

12. A decision on a costs application does not fall within the scope of paragraph 15. As such, it must be "any other decision" within the terms of paragraph 16, even if it is not one of the specific examples given there. Another (non-specified) example would be a recusal application, whether made in respect of the tribunal judge or a member. As such, the decision on a costs application in the First-tier Tribunal (General Regulatory Chamber) must be made by a judge sitting alone, and not by a two- or (as in the instant case) three-member panel.

13. As Mr Peter Lockley of counsel observes in his written submission on behalf of the Information Commissioner, the Tribunal is a creature of statute and has no inherent jurisdiction to make an order inconsistent with its statutory powers. Moreover, the SPT is under a statutory duty to provide for the composition of tribunals and has done so in mandatory terms. That being so, the costs decision by a three-person panel was ultra vires and void, i.e. of no effect (see also, to similar effect, *TC v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 335 (AAC)).

14. It follows this first ground of appeal succeeds.

Ground 3: Disregard of Disability Living Allowance (mobility) income

15. The Appellant was in receipt of the lower rate of the mobility component of disability living allowance (DLA) at the relevant time. He relies on section 73(14) of the Social Security Contributions and Benefits Act 1992, which states as follows:

> "(14) A payment to or in respect of any person which is attributable to his entitlement to the mobility component, and the right to receive such a payment, shall (except in prescribed circumstances and for prescribed purposes) be disregarded in applying any enactment or instrument under which regard is to be had to a person's means."

16. No secondary legislation appears to have been made under subsection (14) providing for any exceptions. There appears to be no parallel provision in the context of the DLA care component (see section 72).

17. The Appellant seems not to have made any point about section 73(14) to the FTT, but of course he may have been unaware of the provision at the time, as indeed may have been the FTT itself. I note that one year's worth of the lower rate of the DLA mobility component in 2015/16 amounted to 52 x £21.80 = £1,133.60, a not insignificant proportion of his overall income. On the plain wording of section 73(14), this component of the Appellant's income should not have been taken into account when having regard to his means (as required by rule 10(5)(b) of the 2009 GRC Rules).

18. The Appellant also refers to his receipt of the disability element in his award of tax credits. It is true that either component of DLA (and at any rate payable) acts as a passport to the disability element of working tax credit (see regulation 9(4)(a) of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (SI 20092/2005)), but regulation 9 does not appear to include any equivalent provision to

section 73(14). However, the Appellant also made another point about his income which was put to the FTT, namely that his award of tax credits was a joint award. As already noted, his summary for the 2015/16 tax year shows this joint award as being £7,402.91.

19. In its ruling on MFRA's costs application, the FTT noted the Appellant's income as being about £16,500 (and recognised the joint award of tax credits) – see paragraph 11 of the reasons for its costs ruling. The FTT also described his means as "plainly very modest". The FTT was certainly entitled to make a summary assessment but, in my judgement, it should have been clearer as to the (properly assessable) level of the Appellant's means. The better view is *his* assessable income was not £16,500 but rather approximately £11,688, being £16,523.11 less £4,835.05 (being the sum of the disregarded DLA, i.e. £1,133.60 + half of the tax credits award, namely £3,701.45). If this is right, then the Applicant's properly assessed income was about 30 per cent less than the global figure referred to by the FTT in its reasons. This is sufficient to allow the appeal on the third ground.

20. It is not clear whether the Appellant is still in receipt of DLA or whether he has been 'migrated' (or not, as the case may be) to its successor benefit, personal independence payment (PIP). I note in passing that there appears to be no equivalent to section 73(14) in the Welfare Reform Act 2012 or the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377), which govern entitlement to PIP.

Other matters raised by the Appellant

21. The Appellant has raised two other matters in his reply to the Respondents' submissions. First, he argues that were the Upper Tribunal to remit or redecide the costs application then this would be inconsistent with rule 10(1)(b) of the Tribunal procedure (Upper Tribunal) Rules 2008 (SI 2008/2698; 'the 2008 UT Rules"). There is nothing in this point. Remittal or redeciding is a matter of disposal under section 12 of the Tribunals, Courts and Enforcement Act 2007 and concerns the original costs application under rule 10 of the 2009 GRC Rules. Rule 10 of the 2008 UT Rules is concerned with costs orders in Upper Tribunal proceedings. No such application has been made here.

22. Second, the Appellant contends it would introduce an element of unfairness to allow MFRA's costs application to proceed when his counter-application for costs had been ruled out. However, as noted above, the Upper Tribunal application in GIA/2503/2017, which concerned that counter-application, was subsequently withdrawn. It follows there is no counter-application currently on foot.

Disposal

23. I therefore allow the appeal on both Ground 1 and Ground 3, and set aside the FTT's costs determination. There is something to be said for me remaking the decision under appeal, not least given the passage of time. However, given there was a difference of opinion in the FTT as to the gravity of the unreasonable conduct, it is better for the matter to be remitted to the First-tier Tribunal. As the normal rule in civil litigation, e.g. in civil enforcement proceedings, is that a person's means are determined on a current rather than historic basis, remittal will also permit fresh evidence as to the Appellant's current means to be provided. However, the First-tier Tribunal Judge to whom this remitted case is allocated will need to start afresh, and consider whether a costs order is appropriate in the first place. I note there appear to be ample submissions on file in that regard.

24. I refer to my observations when giving permission to appeal:

"*The principles governing awards of costs in the FTT (GRC)*
10. The general principle is that the FTT(GRC) is a costs-free zone. So, an award of costs is exceptional and should be reserved for the clearest of cases (see *Cancino (Costs – First-tier Tribunal – new powers* [2015] UKFTT 59 (IAC) at paragraph 27 and *Kirkham v IC (Recusal and Costs)* [2018] UKUT 65 (AAC)). The leading authority on costs in tribunals (at least most of those tribunals within the purview of the Upper Tribunal (Administrative Appeals Chamber) is the decision of Upper Tribunal Judge Rowley in *MG v Cambridgeshire County Council (SEN)* [2017] UKUT 172 (AAC); [2018] AACR 35, where she held as follows:

> '26. It is crucially important for me to begin by emphasising that nothing in this decision should be taken as encouraging applications for costs. The general rule in this jurisdiction is that there should be no order as to costs. There are good and obvious reasons for the rule. Tribunal proceedings should be as brief, straightforward and informal as possible. And it is crucial that parties should not be deterred from bringing or defending appeals through fear of an application for costs.
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> 27. Furthermore, tribunals should apply considerable restraint when considering an application under rule 10, and should make an order only in the most obvious cases. In other words, an order for costs will be very much the exception rather than the rule...'

11. Judge Rowley went on to say:

> '28. In considering an application for an order an order for costs on account of "unreasonable conduct" under rule 10(1)(b), a three-stage process should be followed:
>
> (1) did the party against whom an order for costs is sought act unreasonably in bringing, defending or conducting the proceedings?;
> (2) if it did, should the tribunal make an order for costs?;
> (3) if so, what is the quantum of those costs?'

12. She also ruled that a summary assessment is normally appropriate (see paragraph 31). As Judge Rowley concluded:

> '48. The very essence of a summary assessment is that it is a summary process. It follows that the reasons should not, and I would go so far as to say must not, be elaborate. They should be concise and focused. Provided they show that the tribunal has acted judicially, and briefly explain to the parties why they have won or lost (read against the background known to the parties), they will be sufficient.'

13. Although that case arose out of the special educational needs jurisdiction, the similarity in the respective costs rules in the two jurisdictions is such that I regard the principles Judge Rowley laid down as applying equally in information rights cases."

Conclusion
25. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the Appellant's appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I accordingly remit the appeal to a differently constituted First-tier Tribunal, comprised of a Judge sitting

alone, for determination of the MFRA's costs application (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)) in accordance with the Directions set out at the head of these reasons.

26. Finally, the Appellant has indicated, without prompting, that he is not asking for anonymity in this decision in relation to the fact that he was in receipt of DLA at the material time. In the light of that concession, and the circumstances generally, I do not consider it appropriate to make a rule 14 anonymity ruling.

Signed on the original
on 9 October 2019

Nicholas Wikeley
Judge of the Upper Tribunal