IN THE UPPER TRIBUNAL **Appeal No. GIA/1399/2019**
ADMINISTRATIVE APPEALS CHAMBER

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

On appeal from the First-Tier Tribunal (General Regulatory Chamber) (Information Rights)

First-tier Tribunal (FTT) case no: EA/2018/0052/GDPR

FTT Hearing Date: 30 April 2019 (Judge A. McKenna, Chamber President)

Between:

Mr Wayne Francis Leighton (Applicant)

v

The Information Commissioner (Respondent)

Before: Upper Tribunal Judge N Wikeley

Hearing date: 9 January 2020

Representation:

Appellant: In person
Respondent: No attendance

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. This application for permission to appeal relates to the ruling by Judge McKenna, Chamber President of the First-tier Tribunal (FTT) General Regulatory Chamber (GRC), dated 30 April 2019. There is quite a complex back story to this matter but for present purposes the key events in the timeline for the present application were as follows.

The immediate timeline for this application

2. On 24 February 2019 Mr Leighton filed a T98 Notice of Appeal with the FTT GRC. He stated on that Form T98 that he was appealing against the Information Commissioner's decision letter under reference RFA0793173 and dated 28 January 2019 (p.31 of the Upper Tribunal file). The Information Commissioner had stated in that letter her view that the North Yorkshire Police (NYP) had complied with its obligations to Mr Leighton under the Data Protection Act 2018 (DPA 2018). This followed Mr Leighton's earlier subject access request to NYP and his subsequent complaint to the Commissioner dated 9 October 2018.

3. On 26 March 2019 the Commissioner filed a response to Mr Leighton's application dated 24 February 2019. She opposed the application and invited the FTT to strike out the application under rule 8(3)(c) of the Tribunal Procedure (FTT) (GRC) Rules 2009 (SI 2009/1976; 'the 2009 Rules') as having no reasonable prospects of success.

4. On 7 April 2019 Mr Leighton responded to that application, explaining why he considered that the Commissioner's argument was misconceived. He argued that the paramount issue concerned the application of DPA 2018 section 45(6), which he contended was a matter for the FTT and not the county court.

5. On 11 April 2019 the FTT GRC Registrar struck out Mr Leighton's 'appeal' (technically his application, but nothing turns on this). In her view the application had no reasonable prospects of success. In doing so, she explained the FTT's powers (paragraphs [5]-[9] of her ruling) and considered what "success" would look like for Mr Leighton (paragraphs [10]-[16]). As was his right, Mr Leighton asked for that ruling to be reconsidered by a Judge under rule 4(3) of the 2009 Rules.

6. On 30 April 2019 Judge McKenna considered the matter afresh but came to the same conclusion as the Registrar. She dealt with the matter in short order but must be taken to have adopted the Registrar's reasoning. She also rejected applications by Mr Leighton that she recuse herself for bias and that she issue rulings with a "wet" signature.

7. On 23 May 2019 Judge McKenna refused Mr Leighton permission to appeal against her decision of 30 April 2019.

The back story (in outline)

8. The back story provides a helpful context to the present application. Mr Leighton has been involved in a long-running dispute with North Yorkshire Police. He contends that he was the subject of a covert surveillance operation conducted by NYP in 2015. He made a FOIA request to NYP for information about the operation. NYP took the position that they would neither confirm nor deny whether information was held. Mr Leighton complained to the Commissioner, who issued a decision notice (DN) on 23 July 2018 finding that NYP were entitled to adopt that stance (FS50760607). The Commissioner intimated in the DN her view that information sought about a data subject was more appropriately made by a DPA subject access request (SAR) (DN paragraph 32). She also included in the DN the information that an appeal against the DN should be lodged with the FTT within 28 days (DN paragraph 39).

9. Mr Leighton then pursued the SAR route with NYP and the Commissioner, as outlined above. On 25 February 2019 – having effectively reached a dead end under the DPA 2018, and so the day after submitting his Form T98 in these proceedings – he also filed a notice of appeal with the FTT against the FOIA DN (so just over 6 months out of time). On 13 March 2019 the GRC Registrar refused to extend time to admit the notice of appeal. On 20 March 2019 Judge McKenna reviewed the matter but reached the same decision as the Registrar. Mr Leighton applied to the Upper Tribunal for permission to appeal, which was granted (following an oral hearing) by Upper Tribunal Judge Church on 3 October 2019 (under UT reference GIA/1148/2019, his decision now available as *Leighton v The Information Commissioner* [2019] UKUT 378 (AAC)).

10. Having considered written submissions from both Mr Leighton and the Commissioner, Judge Church then allowed Mr Leighton's FOIA appeal on 4 December 2019. Mr Leighton was unaware of this development when I held my oral hearing on 9 January 2020, as Judge Church's decision was not sent out to the parties until 7 January (and was presumably sent by second class post).

11. I discovered this when I returned to chambers after holding the oral hearing. I had advised Mr Leighton I would call for the file to see which stage his FOIA appeal had reached. As the decision in GIA/1148/2019 (now *Leighton v The Information Commissioner*) was potentially relevant to Mr Leighton's recusal ground of appeal in the present proceedings, I read the Registrar's decision (which Mr Leighton had specifically referred me to), Judge McKenna's reconsideration ruling in that case and Judge Church's decision.

12. I record here that Judge Church gave permission to appeal, addressing Mr Leighton in the following terms: "it is arguable that it was incumbent on [Judge McKenna] to address your argument about your reliance on the Information Commissioner's advice in paragraph 32 of the ICO's Decision expressly, and to explain how she evaluated it, and I find it arguable with a realistic prospect of success that the omission to do so renders her reasons inadequate" (paragraph 14, citing paragraph 24 of the grant of permission to appeal). In his decision proper, Judge Church rejected the Commissioner's argument that the outcome of the judge's consideration of the extension of time request would have remained the same had Judge McKenna expressly dealt with that point (paragraph 23). The error by the FTT was accordingly material:

> "… In this case we can't know whether Mr Leighton's argument that it was reasonable of him to follow the Information Commissioner's advice to pursue his request under the framework of the DPA rather than FOIA was weighed in the balance with the other factors or, if it was, whether appropriate weight was given to it" (paragraph 25).

13. Judge Church accordingly allowed Mr Leighton's FOIA appeal. He remitted the issue of whether to grant an extension of time to admit the late FOIA appeal to a differently constituted FTT (paragraph 26).

14. I considered whether I needed to invite further submissions from Mr Leighton on his successful appeal before Judge Church. I concluded it was not – Mr Leighton had made his submissions (primarily in the context of his recusal ground of appeal) at the oral hearing in the knowledge that permission had already been granted by Judge Church, and it did not appear to me that anything further could be usefully added. Mr Leighton acknowledged at the hearing before me that his FOIA case was about an extension of time and did not concern the merits of the substantive case.

The proposed grounds of appeal in the present application for permission to appeal

15. Returning to the present proceedings, on 19 June 2019 Mr Leighton filed a UT13 Application for Permission to Appeal with the Upper Tribunal, citing the decision of the FTT

(Registrar) dated 11 April 2019. Strictly, however, and as a matter of jurisdiction, Mr Leighton was challenging Judge McKenna's subsequent decision of 30 April 2019, but as already noted that decision in effect endorsed and adopted the Registrar's decision. Mr Leighton summarised his five grounds of appeal on his UT13 as follows:

(i) The FTT erred in its interpretation of its jurisdiction when considering a complaint about DPA 2018 s.45(1)(a);
(ii) The FTT's strike out procedure was defective and a disproportionate means of resolving the appeal;
(iii) Judge McKenna erred by not recusing herself and her decision was in breach of ECHR article 6;
(iv) Judge McKenna erred in holding it was not a requirement to sign judicial orders;
(v) The FTT's decision was incompatible with the obligation to provide effective access to information in accordance with ECHR article 8 in conjunction with the Appellant's right pursuant to DPA 2018 s.45(1)(b)).

16. Mr Leighton also provided with his UT13 what was in truth a well fleshed out 'skeleton argument', running to 82 paragraphs, which added two further grounds of appeal:

(vi) The FTT misinterpreted the powers of GDPR article 78; and
(vii) The FTT failed to address the DPA 2018 s.45(6) submission.

17. On 10 July 2019 Upper Tribunal Judge Jacobs granted Mr Leighton's request for an oral hearing of this application (p.33). The matter was initially listed in Leeds before me but was subsequently relisted in London for Mr Leighton's convenience. I held an oral hearing of the application at Field House on 9 January 2019. Mr Leighton attended, representing himself. There was no attendance on behalf of the Commissioner, but none was required at this stage.

18. Mr Leighton provided a helpfully slimmed down skeleton argument in advance of the oral hearing of his application. This skeleton crystallised his grounds of appeal as follows:

- Ground 1: "The Tribunal failed to give adequate reasons for the departure from the normal rule of law (s.45(1) DPA)";
- Ground 2: "The Tribunal erred when applying the reasonable prospect test for the strike out procedure";
- Ground 3: "Judge McKenna and Registrar Worth's judgment in the FOI Decision creates an impression of bias from a fair-minded observer";
- Ground 4: "The Tribunal erred in holding that there is no common law requirement for a signature. In any event, the Order striking out the Appellant' claim does not meet the Regulations minimum authenticity requirements of a public certified signatory".

19. I will treat these as the definitive grounds of appeal, which Mr Leighton elaborated upon at the oral hearing with his customary clarity and concision. First, however, it is necessary to say something about the overarching legislative framework.

The legislative framework: the Data Protection Act 2018

20. DPA section 165 provides as follows (omitting subsections (6) and (7), which are not material for present purposes):

> **"Complaints by data subjects**
> **165.** (1) Articles 57(1)(f) and (2) and 77 of the GDPR (data subject's right to lodge a complaint) confer rights on data subjects to complain to the Commissioner if the data subject considers that, in connection with personal data relating to him or her, there is an infringement of the GDPR.

(2) A data subject may make a complaint to the Commissioner if the data subject considers that, in connection with personal data relating to him or her, there is an infringement of Part 3 or 4 of this Act.
(3) The Commissioner must facilitate the making of complaints under subsection (2) by taking steps such as providing a complaint form which can be completed electronically and by other means.
(4) If the Commissioner receives a complaint under subsection (2), the Commissioner must—
(a) take appropriate steps to respond to the complaint,
(b) inform the complainant of the outcome of the complaint,
(c) inform the complainant of the rights under section 166, and
(d) if asked to do so by the complainant, provide the complainant with further information about how to pursue the complaint.
(5) The reference in subsection (4)(a) to taking appropriate steps in response to a complaint includes—
(a) investigating the subject matter of the complaint, to the extent appropriate, and
(b) informing the complainant about progress on the complaint, including about whether further investigation or co-ordination with another supervisory authority or foreign designated authority is necessary."

21. It will be observed that section 165(2) provides for a data subject to make a complaint to the Commissioner about possible breaches of Parts 3 or 4 of the DPA 2018. On receipt of such a complaint, the Commissioner must take the steps summarised in section 165(4), as also elaborated upon by sub-section (5). DPA section 166 is consequential and further provides as follows:

"Orders to progress complaints
166.(1) This section applies where, after a data subject makes a complaint under section 165 or Article 77 of the GDPR, the Commissioner—
(a) fails to take appropriate steps to respond to the complaint,
(b) fails to provide the complainant with information about progress on the complaint, or of the outcome of the complaint, before the end of the period of 3 months beginning when the Commissioner received the complaint, or
(c) if the Commissioner's consideration of the complaint is not concluded during that period, fails to provide the complainant with such information during a subsequent period of 3 months.
(2) The Tribunal may, on an application by the data subject, make an order requiring the Commissioner—
(a) to take appropriate steps to respond to the complaint, or
(b) to inform the complainant of progress on the complaint, or of the outcome of the complaint, within a period specified in the order.
(3) An order under subsection (2)(a) may require the Commissioner—
(a) to take steps specified in the order;
(b) to conclude an investigation, or take a specified step, within a period specified in the order.
(4) Section 165(5) applies for the purposes of subsections (1)(a) and (2)(a) as it applies for the purposes of section 165(4)(a)."

22. Thus, if the Commissioner fails in any of the ways identified in section 166(1), the data subject has the statutory right to apply to the FTT under section 166(2) for an order requiring the Commissioner to act as set out there. However, sections 165 and 166 (which fall under the general cross-heading of "Complaints") cannot be read in isolation from the rest of Part 6 (Enforcement) of the DPA 2018. In particular, the immediately following three sections (ss.167-169) appear beneath the cross-heading "Remedies in the court". Those are compliance orders (s.167), compensation for breach of the GDPR (s.168) and compensation for breach of other

data protection legislation (s.169). Thus, if "a court is satisfied that there has been an infringement of the data subject's rights under the data protection legislation in contravention of that legislation" (s.167(1)) then *the court* may make a compliance order. Notably, this is a power vested in "a court" and not "the Tribunal" – the jurisdiction to make such compliance orders is exercisable not by the FTT but by either the High Court or the county court (in England & Wales, at least): see DPA 2018 section 180(1) and (2)(d). The same is true as regard orders under sections 168 and 169 (see DPA 2018 section 180(2)(e)).

Ground 1: the section 45 DPA 2018 issue

23. Mr Leighton's first ground of appeal concerned section 45 of the DPA 2018. Section 45 falls in Part 3 of the Act, which is devoted to law enforcement processing, and more particularly in Chapter 3 of that Part, which concerns rights of the data subject. Section 45 provides as follows:

> **"45. – Right of access by the data subject**
> (1) A data subject is entitled to obtain from the controller—
> (a) confirmation as to whether or not personal data concerning him or her is being processed, and
> (b) where that is the case, access to the personal data and the information set out in subsection (2).
> (2) That information is—
> (a) the purposes of and legal basis for the processing;
> (b) the categories of personal data concerned;
> (c) the recipients or categories of recipients to whom the personal data has been disclosed (including recipients or categories of recipients in third countries or international organisations);
> (d) the period for which it is envisaged that the personal data will be stored or, where that is not possible, the criteria used to determine that period;
> (e) the existence of the data subject's rights to request from the controller—
> (i) rectification of personal data (see section 46), and
> (ii) erasure of personal data or the restriction of its processing (see section 47);
> (f) the existence of the data subject's right to lodge a complaint with the Commissioner and the contact details of the Commissioner;
> (g) communication of the personal data undergoing processing and of any available information as to its origin.
> (3) Where a data subject makes a request under subsection (1), the information to which the data subject is entitled must be provided in writing —
> (a) without undue delay, and
> (b) in any event, before the end of the applicable time period (as to which see section 54).
> (4) The controller may restrict, wholly or partly, the rights conferred by subsection (1) to the extent that and for so long as the restriction is, having regard to the fundamental rights and legitimate interests of the data subject, a necessary and proportionate measure to—
> (a) avoid obstructing an official or legal inquiry, investigation or procedure;
> (b) avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties;
> (c) protect public security;
> (d) protect national security;
> (e) protect the rights and freedoms of others.
> (5) Where the rights of a data subject under subsection (1) are restricted, wholly or partly, the controller must inform the data subject in writing without undue delay—
> (a) that the rights of the data subject have been restricted,
> (b) of the reasons for the restriction,
> (c) of the data subject's right to make a request to the Commissioner under section 51,

(d) of the data subject's right to lodge a complaint with the Commissioner, and
(e) of the data subject's right to apply to a court under section 167.

(6) Subsection (5)(a) and (b) do not apply to the extent that the provision of the information would undermine the purpose of the restriction.

(7) The controller must—
(a) record the reasons for a decision to restrict (whether wholly or partly) the rights of a data subject under subsection (1), and
(b) if requested to do so by the Commissioner, make the record available to the Commissioner."

24. Mr Leighton's argument was that section 45(1) gave him a presumptive right to access information held by NYP about him. Section 45(6) was an exception to that general principle, relieving the data controller of the usual obligation to inform the data subject of any restrictions and the reasons for them. The burden was on NYP to show that it could take advantage of the exception in section 45(6). The FTT, Mr Leighton argued, had failed to give adequate (or indeed any) reasons as to why section 45(6) prevailed over section 45(1) in his case.

25. The fundamental problem with this submission relates to jurisdiction. There is nothing in the architecture of the DPA 2018 (see discussion above) to suggest that the proper application of section 45 is a matter that falls within the remit of the FTT. It must therefore be a matter for the county court (or High Court). When I raised this difficulty in the course of oral argument, Mr Leighton had two responses.

26. The first was to say that he was not seeking damages or rectification at this stage, he was simply seeking information, which is properly a matter for the FTT. This is not persuasive – the FTT does not have a general, original and unlimited jurisdiction at common law to determine appeals related to requests for information, whether under FOIA or the DPA. It is a creature of statute. In both contexts its jurisdiction is limited by the terms of the governing legislation. In the case of DPA 2018, its jurisdiction is narrowly defined (as above).

27. Mr Leighton's second response was that he was seeking to exercise his rights under Article 78 of the GDPR. He was not seeking to hold the data controller (NYP) accountable, which would be by proceedings in the county court. Rather he was seeking to hold the ICO accountable, and that was a matter for the FTT. This does not assist his case, and for similar reasons. GDPR Article 77 gives data subjects the right to lodge a complaint with the national supervisory authority (here the ICO), a right given effect in domestic law by DPA 2018 section 165. GDPR Article 78.2 then gives data subjects the right to an "effective judicial remedy" where that supervisory authority either does not handle a complaint or inform the data subject of the progress or outcome of the complaint within 3 months, a right given effect in domestic law by DPA 2018 section 166. It is true that Article 78.1 also gives persons a right to an effective judicial remedy "against a legally binding decision of a supervisory authority concerning them", but that does not give Mr Leighton a freestanding right to challenge the underlying substantive merits of the Information Commissioner's decision on his complaint (given the courts' jurisdiction to provide remedies under sections 167-169 and the fall-back availability of judicial review against the Commissioner in the absence of any other avenue of challenge).

28. The GRC Registrar correctly explained in her ruling that the FTT had no jurisdiction to determine the section 45 issue, and Judge McKenna impliedly adopted that reasoning. That was a sufficient explanation in the circumstances and so this ground of appeal is not arguable.

Ground 2: the proper test

29. Mr Leighton's second ground of appeal was his contention that the Tribunal erred when applying the reasonable prospect test for the strike out procedure. There were essentially two prongs to this argument.

30. The first was Mr Leighton's submission that he had never made a section 166 application at all – rather, he claimed he had made what he characterised as an Article 78 GDPR appeal (and, by necessary inference (see further ground 1 above), I think he must have been referring to Article 78.1 rather than Article 78.2). This is unconvincing, for similar reasons as undermine the first ground of appeal. Mr Leighton's T98 Notice of Appeal to the FTT cited ICO decision RFA0793173, which was in response to his section 165(2) complaint. The ICO letter dated 29 January 2019 was plainly a section 165(4) response (however unsatisfactory in Mr Leighton's eyes), triggering Mr Leighton's right to apply to the FTT under section 166, but subject to the limitations of that provision. Furthermore, section 166 applies only where a data subject "makes a complaint under section 165 or Article 77 of the GDPR" (see s.166(1)). It does not seek to implement Article 78.

31. I note that in *Platts v Information Commissioner* (EA/2018/0211/GDPR) the FTT accepted a submission made on behalf of the Commissioner that "s.166 DPA 2018 does not provide a right of appeal against the substantive outcome of an investigation into a complaint under s.165 DPA 2018" (at paragraph [13]). Whilst that is a not a precedent setting decision, I consider that it is right as a matter of legal analysis. Section 166 is directed towards providing a tribunal-based remedy where the Commissioner fails to address a section 165 complaint in a procedurally proper fashion. Thus, the mischiefs identified by section 166(1) are all procedural failings. "Appropriate steps" mean just that, and not an "appropriate outcome". Likewise, the FTT's powers include making an order that the Commissioner "take appropriate steps to *respond to* the complaint", and not to "take appropriate steps to *resolve* the complaint", least of all to resolve the matter to the satisfaction of the complainant. Furthermore, if the FTT had the jurisdiction to determine the substantive merits of the outcome of the Commissioner's investigation, the consequence would be jurisdictional confusion, given the data subject's rights to bring a civil claim in the courts under sections 167-169 (see further DPA 2018 s.180).

32. The second facet to this ground of appeal was Mr Leighton's argument that the FTT had thereby applied the wrong test for exercising the draconian power to direct a strike out. It was sufficient on well-established authority that his case was "arguable", in the sense of having a "reasonable prospect of success". This was a case in which he had been advised by the Commissioner to make a SAR, as the data requested was private data – and this advice, in and of itself, demonstrated that his case had some arguable merit. Rather than considering strike out, the FTT could have considered changing the remedy that was sought. This argument goes nowhere. Reading the Registrar's decision, the reasons she decided the application had no reasonable prospects of success were as follows:

> (a) the Commissioner's letter of 25 January 2019 was a response to Mr Leighton's complaint (i.e. a response within the meaning of s.165(4)) (paragraph [8]);
>
> (b) section 166 provides an avenue to challenge the Commissioner's procedural failings, not the substantive outcome of a complaint (paragraph [9]);
>
> (c) moreover section 166 is directed to ordering the Commissioner to take steps, whereas Mr Leighton ultimately wants NYP to take steps, and so the FTT has no power under section 166 to order a data controller or data processor to do anything (paragraph [12]); and
>
> (d) the FTT would be acting beyond its powers if it sought to make a ruling on DPA section 45(6) as requested, as that was a matter for the courts (paragraphs [14]-[16]).

33. Judge McKenna effectively endorsed that analysis. I recognise Mr Leighton's point as regard issue (c) in the previous paragraph – namely that he was not at this stage seeking to ask the FTT to order NYP to do anything, rather he was seeking to hold the Commissioner to account – but that nuance does not get round the fundamental difficulty faced by him as to the

narrow remit of the FTT on a section 166 application (see section 166(2)). In all those circumstances the FTT was entitled to reach the conclusion that Mr Leighton's appeal had no reasonable prospects of success and should be struck out, applying the test in *HMRC v Fairford Group (in liquidation)* [2014] UKUT 329 (TCC)).

Ground 3: the recusal issue

34. Mr Leighton's submission on his third ground of appeal was straightforward. The GRC Registrar and Judge McKenna had both been involved in his (other parallel) appeal against the Commissioner's FOIA decision notice. The Registrar had described Mr Leighton's substantive grounds of appeal in that case as "not at all strong" (paragraph 4 of her ruling dated 13 March 2019) and her reasons for refusing to grant him an extension of time had been adopted and endorsed by Judge McKenna. The requested information in the FOIA and DPA cases was the same, the FTT adjudicators were identical, and the two cases were inextricably inter-linked. Mr Leighton had accordingly asked for his DPA case to be decided by some other FTT GRC personnel, but Judge McKenna had responded that "if she were to accept your allegation of bias, which she does not, there is no other salaried Judge in the Chamber to whom your application could be referred" (e-mail from the Chamber President's PA, acting on Judge McKenna's instructions, dated 24 April 2019). Mr Leighton would now doubtless add that this third ground of appeal is given further considerable support by Judge Church's decision in *Leighton v The Information Commissioner* (see above), which overruled Judge McKenna's decision in the FOIA appeal.

35. The test for apparent bias, as stated by Lord Hope in *Porter v. Magill* [2002] AC 377, is well-known: "The question 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" (at [103]). The fair-minded and informed observer is "not unduly sensitive or suspicious" and the "real possibility" test ensures an appropriate "measure of detachment" (see *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 at [2], *per* Lord Hope). The mere fact that a judge has dealt previously with the same party and indeed commented adversely, without more, is not enough to found a sustainable objection (see *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [25]). There is ample case law to the effect that judges may need to be robust in dealing with recusal applications (see e.g. *Lodwick v London Borough of Southwark* [2004] ICR 884 and *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] 1 All ER 723, and see further the discussion in *Kirkham v Information Commissioner (Recusal and Costs)* [2018] UKUT 65 (AAC)). The rationale for a robust judicial approach was explained clearly by Chadwick L.J. in *Dobbs v Triodos Bank N.V.* [2005] EWCA Civ 468, in which the defendant had invited that Lord Justice of Appeal to recuse himself following his involvement in a permission to appeal application in related proceedings. Chadwick L.J. 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."

36. Mr Leighton, in support of his argument that the matter should have been put before another judge, relied on dicta in *El-Farargy v El Farargy* [2007] EWCA Civ 1149, where Ward L.J. had observed as follows (at [32], my emphasis added):

> "*It is invidious for a judge to sit in judgment on his own conduct in a case like this* but in many cases there will be no option but that the trial judge deal with it himself or herself. If circumstances permit it, I would urge that first an informal approach be made to the judge, for example by letter, making the complaint and inviting recusal. Whilst judges must heed the exhortation in *Locabail* not to yield to tenuous or frivolous objections, one can with honour totally deny the complaint but still pass the case to a colleague. If a judge does not feel able to do so, then it may be preferable, if it is possible to arrange it, to have another judge take the decision, hard though it is to sit in judgment of one's colleague, for where the appearance of justice is at stake, it is better that justice be done independently by another rather than require the judge to sit in judgment of his own behaviour."

37. I do not consider this assists Mr Leighton. Ward L.J.'s comments in *El-Farargy* were by way of a postscript and were very much context-specific, i.e. "*in a case like this*", namely a case where the Court of Appeal were clear that Singer J.'s comments at first instance, to which exception had understandably been taken, so prompting the recusal application, had "crossed the line between the tolerable and the impermissible". The proper approach in the more run-of-the-mill recusal case is as set out by Chadwick L.J. in *Dobbs v Triodos Bank N.V.* (see above).

38. What then of the present case? The starting point, of course, must be the test in *Porter v. Magill*. Mr Leighton, however, took me to the opinion of Lord Browne-Wilkinson in *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet (No.2)* [2000] AC 119, which he argued was authority for the proposition that "a mere suspicion of a possibility" of bias suffices. I think this is seeking to read too much into *Pinochet (No.2)*, which of course was a case where their Lordships found that Lord Hoffmann was disqualified automatically as a matter of law, given his role as a director of a subsidiary company controlled by one of the parties to that litigation (Amnesty International). The proper approach is to ask whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased, bearing in mind as noted that the fair-minded and informed observer is "not unduly sensitive or suspicious" and there must be a "real possibility" of bias, not just a possibility. This must be addressed from an objective standpoint – as Burnett L.J. (as he then was) observed in *Shaw v Kovac* [2017] EWCA Civ 1028 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."

39. The fair-minded and informed bystander will appreciate that judges swear a judicial oath and undergo training. He or she will understand that judges may well express a provisional view on the merits of a case but will keep an open mind and be ready to change their position. So, the mere fact that an initial view has been expressed (and in very temperate terms) in the parallel FOIA case does not disqualify a judge. This is illustrated by the fact that a judge is not precluded from hearing an appeal simply by virtue of having previously refused permission on the papers in the same case, and before another judge gave permission at an oral hearing (see *Broughal v Walsh Brothers Builders Ltd* [2018] EWCA Civ 1610). The fact that Judge Church allowed Mr Leighton's FOIA appeal does not take him any further – technically that case involved a separate procedural issue (the extension of time) and the appeal to the Upper Tribunal was allowed on a "reasons" basis. As Dyson L.J. held in *AMEC Capital Projects Limited v Whitefriars City Estates Limited* (at [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'." The present case, in my assessment, is a long, long way from that scenario.

40. I therefore do not consider that a fair-minded and informed observer, having considered the facts and circumstances in the present case, would consider that there was a real possibility of bias. Mr Leighton's own suspicion or concern about the possibility of bias is insufficient. Where I do agree with Mr Leighton is that Judge McKenna's status (at the material time) as being the only salaried judge in the Chamber is neither here nor there – if she had to stand down because of actual or apparent bias, then issues around the deployment of judicial personnel cannot trump any finding of bias and some other appropriate arrangement would have to be made. However, this ground of appeal overall is not arguable.

Ground 4: the absence of a signature on Judge McKenna's ruling

41. The text at the end of the reasons given by Judge McKenna for her decision read simply as follows:

> **Dated: 30 April 2019**
>
> **Alison McKenna**
> **Chamber President**

42. There was no 'wet' (or handwritten) signature by the Judge (at least on the copy sent to Mr Leighton and in the appeal bundle). The subsequent copy of the ruling refusing permission to appeal was identical, save that it included the printed text "**(Signed)**" above the Chamber President's name, but again without any judicial signature.

43. Mr Leighton very properly drew my attention to an e-mail exchange he had had with the FTT office on this very topic. In response to his query, the GRC Chamber President's PA (on behalf of Judge McKenna herself) had e-mailed him on 24 April 2019 in the following terms:

> "Judicial decisions, including those made by the Tribunal Registrar with delegated powers, do not need to served physically or to be signed in 'pen'. See the ruling on permission to appeal in GIA/1741/2014 by UTJ Wikeley paragraph 20:-
>
> > 'There is a common misconception that a formal document is invalid and of no effect if it is not signed. Yet there is no requirement under the Tribunals, Courts and Enforcement Act 2007 or the Tribunal Procedure Rules that a Judge formally signs a tribunal decision or ruling.'"

44. Mr Leighton explained that he had been unable to locate a copy of my ruling in GIA/1741/2014. I should explain it is not on the Upper Tribunal decisions website as it was only a ruling refusing permission to appeal, and such determinations are typically not published more widely (I make an exception with this ruling, which will be posted as *Leighton v Information Commissioner (No.2)*, to distinguish it from Judge Church's decision). The passage from GIA/1741/2014 quoted by the GRC Chamber President's PA appeared in the following paragraph, which I now include in full, dealing with ground 6 (G6) in that application:

> *"G6: the FTT's decision notice striking out the Appellant's appeal and the subsequent refusal of permission were not signed by Judge Warren and hence were invalid*
>
> 20. There is simply nothing in this point either. There is a common misconception that a formal document is invalid and of no effect if it is not signed. Yet there is no requirement under the Tribunals, Courts and Enforcement Act [TCEA] 2007 or the Tribunal Procedure Rules that a Judge formally signs a tribunal decision or ruling. It may, however, be good

> practice for the Judge to sign an order, so as to avoid error and dispute (see by analogy *Solihull Metropolitan Borough Council Housing Benefits Review Board v Simpson* [1995] 2 FCR 424). It is not unusual for tribunals to keep the Judge's signed copy on the tribunal file but to issue unsigned copies for the parties – see e.g. Judge McKenna's directions on behalf of the Upper Tribunal dated 9 July 2014, which were stated to be "*Signed on the original*" (p.26). The absence of a signature on Judge Warren's decision notice and permission ruling is accordingly of no legal or practical significance whatsoever."

45. *Solihull Metropolitan Borough Council Housing Benefits Review Board v Simpson*, also reported at (1995) 27 HLR 41, was a judicial review of a housing benefit review board's decision. Kennedy L.J. observed that "it would be good practice for Boards to develop a standard form with spaces for findings, reasons, the decision itself and a space for the Chairman's signature in order to minimise the chances of error, but of course the regulation can be complied with without bringing into existence a standard form, or for that matter, without the Chairman actually placing his signature upon the document" (at 48; see also Mann L.J. at 50)

46. However, Mr Leighton's submission, in short, was that it was a long-standing common law requirement (unaffected by TCEA 2007) that court orders should be signed. He further argued that as tribunals are an emanation of the Crown, in the same way as are courts, then the same condition applies. Moreover, in the absence of a wet signature, he contended the order must comply with the requirements of both EU law (Regulation 910/2014 on Electronic Identification and Trust Services for Electronic Transactions) and domestic law (Electronic Signatures Regulations 2002 (SI 2002/318)).

47. Those arguments had not been put to me on any previous occasion (including in the proceedings in GIA/1741/2014). In fairness to Mr Leighton they now need to be addressed. It is for this reason I will also arrange for this ruling (as an exception to the normal practice) to be placed on the Upper Tribunal (AAC) decisions website to ensure the reasoning is properly publicised.

48. The starting point is that contrary to Mr Leighton's submission there is no long-standing common law principle that court orders should be signed. Mr Leighton quoted no case law authority for this 'requirement'. I say that not by way of criticism and recognise that he is a litigant in person. I accordingly conducted some research on the point myself but could find no support for this proposition. Indeed, such authority as I could find (from the Victorian era) goes the other way.

49. In *Blades v Lawrence* L.R.9 Q.B. 374 (a case from 1874) a High Court master made an Order transferring a case to the county court. The High Court judge's clerk duly stamped the Order with a copy of the judge's signature. The county court judge refused to hear the case and had it struck out on the basis that he could not be satisfied the High Court judge had made the order. The Court of Queen's Bench held it was "perfectly plain" that the county court judge had acted improperly in treating the transfer order as a nullity. According to the headnote:

> "When an order purporting to be made by a judge at Chambers, and bearing the signature of the judge impressed by a stamp, in the usual way, transferring a cause from the superior court to the county court, is served on the judge of the county court, he is bound to obey the order, and he cannot inquire into the circumstances under which it was made."

50. According to Cockburn C.J., "There was an order of the superior court, affirming on the face of it that it emanated from the superior court, and was made by the authority of the court or judge" (p.376). Quain J. observed that "The order was issued according to the ordinary every day's practice; it was a genuine order, the summons being first heard by the master, and the judge's signature stamped by the clerk" (at p.378). Thus, as Archibald J. held, "the order

was authenticated in the usual way" (at p.379). It might have been different if there had been any suggestion of forgery (Blackburn J. at p.377 and Quain J. at p.378). There is no suggestion in any of the four judgments of the judges of the Court of Queen's Bench in *Blades v Lawrence* that the High Court judge needed to have personally signed the transfer order himself. It was sufficient that his clerk had impressed the judge's signature with a stamp as a form of authentication.

51. I am satisfied that the common law requirement to which Mr Leighton refers is no more than a folk myth.

52. Nor does more recent authority assist Mr Leighton in any way. Rule 40.2(1) of the Civil Procedure Rules (which apply to the civil courts, but not tribunals) provides that (subject to certain exceptions) "Every judgment or order must state the name and judicial title of the person who made it" but says nothing about such judgments or orders being *signed*. Rule 40.2(2) further stipulates that every judgment or order must bear the date it was given or made and be 'sealed' by the court, but again there is no mention of any need for a judicial signature.

53. There is certainly no requirement in either the TCEA 2007 or the 2009 Rules that tribunal decisions be either signed or indeed sealed. In the absence of any common law requirement, it follows that the position is as set out by Upper Tribunal Judge Jacobs in his book *Tribunal Practice and Procedure* (5th edition, Legal Action Group, 2019) at paragraph 14.249 (p.574): "Under TCEA, a signature is not required. However, it is good practice to sign a master copy of the final version in order to avoid error and dispute".

54. In those circumstances Mr Leighton's supplementary submissions about formal requirements for electronic signatures in the absence of a wet signature fall away. In any event, the scope of EU Regulation 910/2014 is constrained by Article 2.3, which provides that "This Regulation does not affect national or Union law related to the conclusion and validity of contracts *or other legal or procedural obligations relating to form*" (emphasis added). EU Regulation 910/2014 replaced the previous European Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures, which in turn was implemented by the domestic Electronic Signatures Regulations 2002. Those Regulations concern, amongst other matters the supervision of certification-service-providers, their liability in certain circumstances and data protection requirements. There is nothing to suggest they have any application to the proper form of court or tribunal judgments, orders and decisions.

55. Even if – which I find not to be the case – Mr Leighton is correct in his submissions about the need for a wet (or failing that an approved electronic) signature on the Judge's ruling, I would suggest that the question that immediately arises then is this: so what?

56. For the reasons explained above, a judicial signature by and of itself does not magically transform a Judge's determination from some inchoate and ineffective status to a document that is binding in law. The only question that conceivably might arise in practice is whether the ruling of 30 April 2019 on Mr Leighton's rule 4(3) application was indeed Judge McKenna's decision. However, nobody has suggested it is not. It carries the official judicial crest. It was issued from the official FTT HMCTS e-mail address. Unsurprisingly, it also reads like a decision by the GRC Chamber President. It was not recalled, withdrawn or set aside. As the Immigration and Asylum Chamber of the Upper Tribunal observed in *NMAAB v Secretary of State for the Home Department* ([2019] UKAITUR PA/03030/2018, May 29, 2019) – in a modern-day application of the principle in *Blades v Lawrence* – "Evidence transmitted by electronic means does not require hard copy or a 'wet' signature unless there is some well-founded reason to doubt its authenticity" (paragraph 23). That was said in the context of the admissibility of a witness statement, but there is no good reason why the same principle should not apply in

equal measure to the enforceability and status of a judicial ruling. This ground of appeal is not arguable.

Conclusion

57. In conclusion, and for all the reasons above, and despite the attractive way Mr Leighton marshalled his arguments, I therefore refuse permission to appeal. The First-tier Tribunal's strike-out decision stands as it does not involve any arguable error of law.

(Signed on the original)

Nicholas Wikeley
Judge of the Upper Tribunal

(Dated) **17 January 2020**

As corrected on 6 February 2020 under rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to correct the references in paragraphs 35 and 37 to the citation for the decision of the Court of Appeal in Dobbs v Triodos Bank N.V. [2005] EWCA Civ 468.