DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

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

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 30 May 2018 under file reference EA/2017/0288 following the hearing on 17 May 2018 does not involve any error on a point of law. The First-tier Tribunal's decision stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The outcome of this appeal in a paragraph

1. The First-tier Tribunal's conduct of this appeal and its decision disclose no error of law. It follows that the Appellant's appeal to the Upper Tribunal is dismissed. The First-tier Tribunal's decision accordingly stands, namely that the Information Commissioner had correctly concluded that the public authority did not hold any further recorded information which it should have disclosed to the Appellant under the Freedom of Information Act 2000 (FOIA).

The background to the present appeal

2. Mr Crossland, the Appellant in the present appeal, has explained the genesis of this case in the following terms: "A wealthy solicitor moved to a conservation area in a small village and in 2011 built-up a historic wall abutting the highway to over 6 foot high without planning permission" (FFT file p.102). Being dissatisfied with the way in which Leeds City Council (LCC) had subsequently handled the matter, Mr Crossland then made a series of freedom of information requests to the City Council on related matters. I turn to consider the details of those requests later. First, however, I must say something about the Appellant's conduct of the present proceedings.

The Appellant's conduct of these proceedings

3. Mr Crossland has been nothing if not determined in his conduct of these proceedings. Over the life of this appeal (and in other proceedings he has brought before the Upper Tribunal) he has subjected the Upper Tribunal office to a veritable deluge of e-mailed communications, usually entitled 'Urgent' in the message line and frequently containing multiple e-mail attachments. In Annex A to this decision I have included a summary of his communications about the present appeal, as e-mailed to the Upper Tribunal office (including, where relevant and to make sense of the chronology, some of the Upper Tribunal responses). I do not pretend for one moment that this list is complete, but it gives a flavour of the demands placed by Mr Crossland on the appellate system. At this stage, I only need to make the following four observations in this context.

4. First, Mr Crossland rails against what he describes as (in terms) a judicial conspiracy to deny litigants in person their rights. However, Upper Tribunal judges, registrars and clerical colleagues have considerable expertise and experience in dealing with litigants in person. Unlike the courts, our procedures are designed and operated with the interests of litigants in person very much in mind. There is

doubtless still much scope for improvement. To take just one example, the current somewhat antiquated case management database operated by the Upper Tribunal Administrative Appeals Chamber is less than optimal. In practice, however, the reality is that very few litigants in person present the sorts of challenges as have been posed by the Appellant in the course of this appeal.

5. Second, Mr Crossland's conduct of the present proceedings – both before the First-tier Tribunal and the Upper Tribunal – suggests that he is unaware of the fundamental principle of litigation that the judge is the final arbiter of case management decisions. This is the principle underpinning the observations of Lord Roskill in *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446 (at 448H), namely that:

> "in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues."

6. Third, and more generally, Mr Crossland also appears not to understand the statutory function of the First-tier Tribunal and the Upper Tribunal. These tribunals do not operate as some form of all-purpose complaints bureau to address each and every one of the actual and/or perceived failings of public authorities or the Information Commissioner's Office in the operation of the freedom of information regime. Rather, each Tribunal's jurisdiction is defined (and defined relatively narrowly) by statute. As Upper Tribunal Judge Jacobs explained at the conclusion of his decision in *Kirkham v Information Commissioner (section 12 of FOIA)* [2018] UKUT 126 (AAC):

> "38. As my decision draws to a close, this is a convenient place to make a general point about some of Mr Kirkham's ambitious submissions to the First-tier Tribunal and on this appeal. The role of the Upper Tribunal is to decide first whether the making of the First-tier Tribunal's decision involved the making of an error on a point of law (section 12(1) of the Tribunals, Courts and Enforcement Act 2007). If, and only if, it so decides, it then has power to re-make the decision or to remit the case to the First-tier Tribunal for rehearing. It is part of the Upper Tribunal's function that it may give guidance to decision-makers and the First-tier Tribunal. That power is, however, confined to the issues that arise in the case before it. It does not include general guidance that extends beyond the scope of those issues. To take a couple of examples raised by Mr Kirkham, it does not include power for me in the context of this case to give guidance to the Information Commissioner on how to deal with issues under the Equality Act 2010 or on the proper form in which a decision should be made and issued."

7. Fourth, Mr Crossland's passionate advocacy of his case has meant, in my assessment, that he has simply lost a proper sense of proportion as to the real issues raised by his appeal. Mr Crossland repeatedly refers to the importance of his appeal. I recognise the appeal is important to him. However, in the overall scheme of things, and by comparison with other cases in the information rights jurisdiction that come before the First-tier Tribunal and the Upper Tribunal, this was at its heart a relatively ordinary and straightforward appeal. It is only because of the Appellant's litigiousness and his refusal to accept case management directions that it has

become unnecessarily complicated. There was no need for the appeal file at the Upper Tribunal level to expand to well over 500 pages and nor should the appeal here have taken two years to be decided. Furthermore, keeping a case such as this on track is not always easy in the face of repeated recusal applications.

Mr Crossland's recusal application

8. That takes me to one other preliminary matter. Mr Crossland has made an application that I recuse myself from dealing with this appeal. I have considered that matter first but refuse that application for the reasons set out in Annex B to this decision. In that context I note in passing that at various stages in these proceedings Mr Crossland appears to have complained about the conduct of General Regulatory Chamber (GRC) Registrar Worth as well as that of the GRC Chamber President, Judge McKenna and Tribunal Judge Christopher Ryan, who had presided at the hearing of the FTT appeal in question. In this Chamber, Mr Crossland has complained about Upper Tribunal Judge Wright and the Upper Tribunal AAC Chamber President, Dame Judith Farbey DBE, as well, of course, about me. Indeed, unless I am very much mistaken, Mr Crossland appears to have complained about each and every judge who has had any involvement in the present proceedings. There has certainly been no shortage of recusal applications. I turn now to the main business underpinning the appeal.

The freedom of information requests to Leeds City Council

9. For present purposes, and by way of context, there were three freedom of information requests made to Leeds City Council.

10. The first request, set out in six detailed parts, was made to the Council's Chief Planning Officer on 26 November 2015. It concerned the City Council's handling of a complaint that its planning officers had acted in circumstances where they allegedly had a conflict of interest. The City Council refused this request, relying on the exception in regulation 12(4)(b) of the Environmental Information Regulations 2004 (SI 2004/3391) ('the EIR' test as to whether a request is "manifestly unreasonable").

11. The second request, addressed to the City Council's CEO, was made on 3 December 2015 and concerned LCC's guidance, rules and codes governing complaints about Council officers. The City Council provided Mr Crossland with copies of certain documents as requested but stated that all relevant information had been disclosed. I interpose here that this was the request which ultimately led to the present proceedings.

12. The third request, dated 10 December 2015, was substantially similar to the second request, but was made by a Ms Fiona Nicholls. The City Council took the view this was either Mr Crossland using an alias or a person acting in concert with him and so again applied regulation 12(4)(b) of the EIR.

The Information Commissioner's decision notices

13. Complaints were made to the Information Commissioner about the City Council's response to each of the information requests.

14. As regard the first information request, the Commissioner decided in Decision Notice (DN) FER0615064 that the City Council had properly applied regulation 12(4)(b) of the EIR.

15. As for the second information request, the Commissioner decided in DN FS50694337 that the City Council did not hold any further information within the

terms of the request and had accordingly satisfied section 1(1) of FOIA. This DN, I repeat, led to the present appeal.

16. So far as the third information request was concerned, the Commissioner decided in DN FS50619764 that the City Council had correctly applied regulation 12(4)(b) of the EIR.

The two First-tier Tribunal decisions

17. Mr Crossland appealed the Commissioner's DN in respect of his first request to the First-tier Tribunal. A tribunal presided over by Judge Henderson ('the Henderson FTT') heard that appeal at York Magistrates' Court on 10 April 2017 (EA/2016/0182). The Henderson FTT decided that its jurisdiction was limited to dealing with the first request and that the DN was based on a mistake of fact. It substituted a new DN for the one issued by the Commissioner in the following terms:

> "Leeds City Council breached Regulation 5(1) EIRs in that it failed to identify additional information within the scope of the request of 26th November 2015 and it failed to plead regulation 5(3) EIRs to withhold it in response to this request.
>
> The information concerned has now been provided to the Appellant pursuant to a SAR and no further information remains outstanding. The public authority is therefore not required to take any further action in this matter."

18. Mr Crossland also appealed the Commissioner's DN in respect of the second request to the First-tier Tribunal. A different tribunal presided over by Judge Ryan ('the Ryan FTT') heard that appeal against the second DN at York County Court on 17 May 2018 (EA/2017/0288). The Ryan FTT concluded that the City Council did not hold any further information which it should have disclosed to Mr Crossland under FOIA.

19. It is unclear from the file before me what happened, if anything, to the third Commissioner's DN and whether or not that notice was appealed to the FTT. It matters not for present purposes. To complete the picture, the Henderson FTT's decision was not taken further on appeal whereas, of course, the Ryan FTT's decision is the subject of present appeal to the Upper Tribunal.

The lead-up to the hearing before the Ryan FTT

20. The FTT papers are before me in two files, one being the paginated hearing bundle and the other being an unnumbered file comprising papers filed after the hearing bundle had been produced. The sequence of events (so far as is relevant) can be summarised as follows.

21. On 9 December 2017, Mr Crossland lodged his notice of appeal against the Commissioner's DN FS50694337 (relating to the <u>second</u> information request). The notice of appeal and more than 20 file attachments ran to a total of 86 pages, much of which related to the FTT proceedings following the <u>first</u> information request. In Box 5 on Form T98 (Notice of Appeal), which invites appellants in the GRC to set out their reasons for appealing, Mr Crossland wrote "The grounds for appeal are detailed on the attached supplementary sheets". There were, however, no such supplementary sheets setting out grounds of appeal specifically against Commissioner's DN FS50694337, although the grounds of appeal which had been prepared for the Henderson FTT (which, of course, had only considered the first information request) were included (FTT file pp.38-46).

22. On 18 December 2017, the Commissioner's legal representative sought clarification as to the grounds of appeal (FTT file p.94). Mr Crossland promptly provided his amended grounds of appeal (FTT file p.96 and pp.102-111).

23. On 28 December 2017, the GRC Registrar issued case management directions joining the City Council as a party to the appeal and setting a timetable for written submissions (FTT file pp.99-100).

24. On 29 January 2018, the Commissioner filed her response to the appeal. In doing so she identified four grounds of appeal derived from the Appellant's narrative account. Ground 1 was the Appellant's argument that the second request should have been dealt with under the EIR rather than FOIA. Ground 2 was his submission that the Commissioner should have applied the public interest test. Ground 3 concerned Mr Crossland's arguments that the City Council had failed to comply with the requirements of the EIR/FOIA. Ground 4 involved a complaint about the Commissioner's handling of the earlier appeal (to the Henderson FTT) and the allocation of the same case officer to investigate the second complaint. The Commissioner opposed the appeal on all grounds (FTT file pp.113-126).

25. On 30 January 2018, the City Council filed its response, likewise resisting the appeal, although counsel referred to some difficulty in identifying what exactly were the Appellant's grounds of appeal. The Council's case, in short, was that it had conducted a reasonable search, had disclosed relevant information and on the balance of probabilities held no further information within the scope of the request (FFT file pp.127-131).

26. On 16 February 2018, the Appellant filed his reply, stating that "At the hearing I will address and rebut each and every one of the ICO's [and LCC's] grounds relying on relevant laws, reasoning and supporting evidence to be placed in the bundle" (FTT file p.132).

27. On 20 March 2018, the Commissioner's solicitor provided the FTT office with four copies of the indexed and paginated open bundle (there was no closed material). This bundle ran to a total of 250 pages and was divided into four parts. Tab 1 comprised the notice of appeal and the tribunal's case management directions (CMD) and the parties' written submissions to date (FTT file pp.1-132). Tab 2 consisted of correspondence relating to the original information requests (pp.133-143). Tab 3 included correspondence relating to the Commissioner's investigation of the complaints about the City Council's handling of both the first and second requests (pp.144-243). Tab 4 was a short witness statement from the Council's Information Governance Officer (pp.244-250).

28. At this point the subsequent case papers are filed in the second and unpaginated FTT bundle.

29. On 27 March 2018, the GRC Registrar issued further case management directions (CMD). In summary, she noted that a hearing date had been scheduled for 17 May 2018 (more than six weeks away). She also directed that if Mr Crossland had any further documents that he wished to have added to the bundle then they should be provided by 26 April 2018. She further directed that if the extra documents ran to fewer than 50 pages of A4 they could be sent to the FTT office electronically; otherwise, hard copies would need to be provided.

30. On 29 March 2018 Mr Crossland e-mailed the FTT office requesting a review of the GRC Registrar's CMD. In short, the Appellant argued that given his health and other circumstances the period allowed for him to prepare the appeal was wholly insufficient to enable him to have a fair and just hearing. He added:

> "The bundle of my documents when produced would contain well in excess of 50 pages of documents ... [and the CMD] would burden me for a period in excess of 1 week to cover the necessary ordering, checking, indexing, page numbering (by hand) taking for copying, checking, addressing errors, collating for posting and taking for posting in excess of 1,000 pages total."

31. Three inter-related observations are in order at this juncture.

32. First, and reading that e-mail in isolation, it was not entirely clear whether the Appellant meant his own bundle was to comprise over 1,000 pages in total or whether he had more than 250 pages to include but was aware he would need to provide four sets (and so deliver in excess of 1,000 printed pages) in accordance with the CMD. However, on the basis of Mr Crossland's latest witness statement, dated 31 July 2020, it is abundantly clear that he meant the former, namely that he anticipated his own bundle would run to "well over 1000 pages" (witness statement at §8a).

33. Second, it is apparent from his e-mail that as at that date in March 2018 Mr Crossland had yet to receive his own copy of the bundle provided by the Commissioner. It is therefore a mystery as to how he was so confident that he would need to add a further 750 pages (or more) of his own.

34. Third, the simple fact is that a further bundle being in excess of 1,000 pages, in addition to the 250-page bundle prepared by the Information Commissioner, would have been wholly disproportionate and would have made a mockery of the overriding objective of dealing with cases fairly and justly, bearing in mind especially the factors identified in rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976).

35. Be that as it may, on 5 April 2018 Judge McKenna, the GRC Chamber President, conducted a rule 4(3) review of the GRC Registrar's CMD dated 27 March 2018. After due consideration, she reaffirmed the Registrar's CMD but at the same time indicated that she would reconsider the matter if the Appellant provided "medical or other independent evidence supporting his request". She directed that any such information would need to be provided by 13 April 2018.

36. On 17 April 2018, Judge McKenna issued a further ruling, noting that the Appellant had provided some hard copy medical information that was "two years out of date". In the event she reaffirmed the Registrar's CMD, but at the same time reminded the Appellant he could request a short adjournment at the hearing if he found it arduous.

37. On 26 April 2018, Mr Crossland sent the FTT office a further bundle of documentation, mostly comprising a mixture of correspondence and e-mails. This extra bundle ran to some 125 pages.

38. On 3 May 2018, Judge McKenna refused to grant Mr Crossland permission to appeal to the Upper Tribunal against her ruling of 17 April, adding that the application was premature in any event. She also declined to direct a stay of the proceedings,

ruling as follows: "The oral hearing on 17 May must go ahead unless a sick note is provided to show that the Applicant cannot attend the hearing on health grounds".

A detour to the Upper Tribunal

39. On 11 May 2018 – and so six days before the FTT hearing was scheduled to take place – the Upper Tribunal received the Appellant's application for permission to appeal against Judge McKenna's case management rulings of 5 and 17 April. On 31 May 2018, in the Appellant's application under Upper Tribunal file reference GIA/1388/2018, I refused permission to appeal 'on the papers' for the following reasons:

> "7. The present application concerns a ruling that contains Case Management Directions, i.e. what lawyers call an interlocutory ruling. In principle FTT case management decisions are plainly appealable, so long as they are not "excluded decisions" by statute (see *LS v LB of Lambeth* [2010] UKUT 461 (AAC); [2011] AACR 27). However, it is not the role of the Upper Tribunal to 'micro-manage' such decisions on appeal where its jurisdiction is 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). Moreover, the extent of any reasons required for an interlocutory decision will be very much context-specific and will typically be short; see e.g. *Carpenter v Secretary of State for Work and Pensions* [2003] EWCA Civ 33 and *KP v Herts CC* (SEN) [2010] UKUT 233 (AAC)).
>
> 8. There are essentially two reasons why I am refusing permission to appeal on this application.
>
> 9. First, the ultimate question is whether there is an arguable case that these case management rulings fell outside the range of reasonable case management decisions that the FTT could take. In making that assessment the Upper Tribunal, as any appellate court or tribunal, affords considerable respect to FTT rulings as a necessary corollary of the importance attached to the fair, timely and resource-efficient disposal of litigation at first instance. In my view it is simply not arguable that these rulings demonstrate any error of law. The application here falls squarely into the category of a challenge to interlocutory case management decisions which were well within the remit of the FTT to take. It is simply not arguable that no reasonable Tribunal could have made the rulings in issue. The applications essentially amount to a request that the Upper Tribunal re-exercise a case management discretion already properly exercised by the FTT but to a different end.
>
> 10. Second, the caravan has moved on. The Upper Tribunal registrar has made enquiries with the FTT GRC office and advises me that the hearing of the Applicant's FTT appeal went ahead at York on 17 May 2018. The Applicant's UT11 has stated his primary desired remedy as being the revocation of the case management direction relating to the bundle for that hearing and the rescinding of the hearing date. Even if granted, this application cannot now provide that remedy. The proceedings have thus become otiose."

40. I also added that I did "not consider that any delay [in the Upper Tribunal] in handling this application had any effect on the outcome. Having reviewed the file, I am confident that had the matter been referred to any Judge of the Chamber the application for permission would have been refused and the application for suspension of the FTT ruling likewise" (at paragraph 14). I further advised Mr

Crossland of his right to apply for an oral renewal hearing of his application, but in doing so I pointed out that if he "considers that the procedural or case management matters he relies on in the *present application* meant that he was denied a fair hearing of his appeal on 17 May 2018, then naturally that is an issue he can raise in the context of such a *further application* for permission. This refusal of permission does not prevent him raising those matters in the latter context" (at paragraph 17). Despite having had this principle explained to him on more than one occasion, Mr Crossland has appeared not to grasp this point.

41. I should add that I have explained in Annex B why I have taken the view that my prior involvement in GIA/1388/2018 is not such as to require me to recuse myself from dealing with the current appeal (see paragraph B29 below).

The Ryan FTT: an outline of the hearing and its decision

42. The Ryan FTT (Judge Ryan, Ms Jean Nelson and Mr John Randall) did indeed convene to hear Mr Crossland's appeal at York County Court on 17 May 2018. In the course of that hearing, the tribunal both refused Mr Crossland's application for an adjournment of the hearing and refused him permission to appeal against that ruling. Then, after having held a hearing that covered the best part of a full day, the Ryan FTT reserved its decision on the substantive appeal. Judge Ryan, doubtless following consultation with his panel colleagues, subsequently signed off the FTT's decision on 30 May 2018 (pp.47-62). As already noted, and so far as the substantive case was concerned, the tribunal dismissed Mr Crossland's appeal against the Information Commissioner's DN relating to the second request, concluding on the balance of probabilities that the City Council did not hold any recorded information which it should have disclosed to the Appellant under FOIA. The first part of the Ryan FTT's decision summarised the outcome (paragraph [1]), explained the background so far as it was relevant (paragraphs [2]-[5]), considered the Appellant's second information request and the Commissioner's DN (paragraphs [6]-[9]) and summarised the main steps that had been taken in the appeal (paragraphs [10]-[19]). The decision then proceeded to set out the substantive issues it had to address. These were stated to be (i) whether the tribunal should consider the appeal under FOIA or the EIR (paragraphs [21]-[26]); (ii) whether the City Council held any information within the scope of the second request which had not been disclosed (paragraphs [27]-[36]); and, finally, (iii) whether any of the other issues raised by the Appellant were relevant or within its jurisdiction (paragraphs [37]-[42]).

43. Judge Ryan subsequently gave the Appellant permission to appeal to the Upper Tribunal in a ruling dated 2 August 2018 and in the following terms:

> *"The Application for Permission to Appeal is based entirely on an allegation that the conduct of the Judge who chaired the Tribunal during the hearing had denied the Appellant a fair hearing. No error of law is alleged in respect of either the procedural ruling referred to in the Application for Permission to Appeal or the substantive decision.*
>
> *For the purposes of this Application I set aside my personal conviction that, in difficult conditions, I conducted the hearing with fairness, courtesy and patience, taking due consideration of the agitation that the Appellant was clearly experiencing at times. My procedural ruling was intended to balance those considerations against the overriding objective, including the requirement to devote to the Appellant's case a balanced and proportionate allocation of Tribunal Time and Resources.*

Ruling

1 I have considered, in accordance with rule 44 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, whether the Appellant received a fair hearing. I believe that he did. However, the fairness of a hearing is to be assessed, not through my eyes, but through those of a fair minded and informed observer. It is evident that it did not seem to be fair to Ms Nichols, who has submitted a Witness Statement recording her impressions.

2 In those circumstances I consider that it would be appropriate for the Upper Tribunal to consider the case (including, if thought appropriate, a full transcript of the hearing and the Judge's corrected, written version of the *ex tempore* procedural ruling he made) in order to consider the fairness of the hearing and its outcome, viewed overall."

A renewed detour to the Upper Tribunal

44. Notwithstanding the grant of permission to appeal from Judge Ryan in relation to the substantive hearing on 17 May 2018, the Appellant still pursued his application for an oral renewal of his application for permission to appeal the earlier CMD by Judge McKenna, i.e. the application that I had refused on the papers in GIA/1338/2018. This renewed application came before Upper Tribunal Judge Wright in Leeds on 18 September 2018. On 1 October 2018 Judge Wright gave two reasons for refusing permission to appeal in GIA/1338/2018.

45. The first reason was that Judge McKenna's CMD had been overtaken by events, and there was now no practical remedy that could be provided, were the case to proceed as an appeal proper.

46. The second reason was that Judge Ryan's grant of permission to appeal was sufficiently broad that any challenge to the substantive decision could "include any flaws in the procedural steps taken before the hearing on 17 May which (i) the First-tier Tribunal did not correct on or before 17 May 2018, and (ii) affected the substantive fairness of the decision then arrived at by the First-tier Tribunal. There is therefore no need for Judge McKenna's decision(s) to be separately and directly challenged in these proceedings, even ignoring the lack of remedy point referred to under the first ground for refusing permission to appeal" (Judge Wright's ruling in GIA/1338/2018 at paragraph 10).

47. For good measure Judge Wright also explained as follows:

> "Upper Tribunal Judge Wikeley's decision refusing Mr Crossland permission to appeal in these proceedings (i.e. GIA/1338/2018) is <u>not</u> binding or determinative of the appeal in GIA/2169/2018: see *R (SB) and ors v First-tier Tribunal and Criminal Injuries Compensation Authority* (CIC) [2014] UKUT 497 (AAC); [2015] AACR 16 at paragraph 87. Mr Crossland is therefore free to deploy all relevant arguments he may wish in GIA/2169/2018 as to whether the First-tier Tribunal appeal proceedings were fair" (at paragraph 13).

The proceedings in the Upper Tribunal

48. Meanwhile, on 31 August 2018 the Appellant lodged his notice of appeal with the Upper Tribunal pursuant to Judge Ryan's grant of permission to appeal. The notice of appeal and accompanying documentation ran to 190 pages (p.9-199).

49. On 2 October 2018, Judge Wright issued initial observations and CMD (p.200-202). On 26 November 2018, the Commissioner lodged her response, resisting the appeal (pp.205-214). On 27 November 2018, the City Council filed a short response agreeing with the Commissioner (p.214a). On 27 December 2018, the Appellant filed his reply (pp.216-229).

50. Regrettably, the appeal then made little progress in the course of the calendar year 2019 as it became bogged down in a procedural mire. First, Mr Crossland insisted that he should be provided with both hard copies and electronic copies of all Upper Tribunal rulings and other documents in the proceedings. Judge Wright refused that application in a detailed ruling dated 19 March 2019, as well as making various other CMD. Mr Crossland then wrote requiring further reasons for Judge Wright's decision, resulting in a registrar writing to him to explain that judges did not give reasons for their reasons and the particular issue was closed. Second, Mr Crossland then applied for Judge Wright to recuse himself on the basis that the judge had treated him unfairly, especially at the permission hearing in Leeds. Judge Wright directed an oral hearing to consider the recusal application (p.271), followed by further CMD (p.407) in response to a torrent of further e-mails and documentation from the Appellant.

51. Mr Crossland in turn wrote to the Chamber President, Farbey J., asserting that he was the victim of injustice and unlawful processes. Remarkably, he sought further CMD in the appeal direct from the Chamber President, purporting to require her to deal with his application within 7 days or else he would deem her to have accepted his submissions and proposed CMD. In doing so, Mr Crossland appeared to overlook the fact that judges make case management rulings in accordance with rule 2 and do not respond to ultimatums from a party. Thus, the Chamber President issued CMD under her own name on 22 November 2019 (pp.411-412), pointing out amongst other things that Mr Crossland's demand was not how the legal system worked. She subsequently issued further CMD on 16 April 2020, exceptionally directing the production at public expense of a transcript of the hearing before the Ryan FTT (pp.437-439). On 28 May 2020, the Chamber President then made provision for any submissions to be made on the transcript (p.440) and subsequently reallocated the appeal file to me. I issued further CMD in the appeal on 25 June 2020.

52. I have considered all the parties' written submissions on this appeal and, in the case of Mr Crossland, his multiple and multifarious submissions. However, I have not addressed every single argument in this decision, for the very simple reason that I am not required to do so. I am obliged to give my reasons for my decision, no less and no more. This I now proceed to do. In Annex B I have explained why I have not held an oral hearing to consider the recusal application. I have considered separately whether I should hold an oral hearing of the substantive appeal. I have concluded the matter can be dealt with fairly and justly 'on the papers'. It would be wholly disproportionate to hold an oral hearing of the appeal proper, not least given the issues have been fully ventilated in the written submissions.

The Upper Tribunal's analysis

Introduction

53. The central question for me to determine is whether the Ryan FTT materially erred in law in its approach to the appeal in EA/2017/0288. Judge Ryan himself gave Mr Crossland permission to appeal to the Upper Tribunal. I agree with Judge Wright that the terms in which Judge Ryan gave permission to appeal were sufficiently broad to encompass all issues of fairness that may have a bearing on the appeal. Shorn of unnecessary noise, the essence of the Appellant's case is that he was

denied a fair hearing of his appeal because of the combined effect of the GRC's pre-hearing case management directions and because of the Ryan FTT's conduct of the hearing at York County Court on 17 May 2018. I consider each of those matters in turn.

The GRC's pre-hearing case management directions

54. The Appellant has attacked the GRC's case management directions in the run-up to the hearing on 17 May 2018. These included the GRC Registrar's directions of 27 March 2018, followed by the GRC Chamber President's rule 4(3) review (on 5 April 2018) and her later directions of 17 April 2018 and 3 May 2018. These CMD are summarised at paragraphs 35-38 above. In short, they dealt with the Appellant's unhappiness with the arrangements for bundles for the hearing allied to his concern that for health and other reasons he needed more time in which to prepare for the scheduled hearing. However, Mr Crossland fell into the trap of believing that because he regarded his proposed adaptations to the timetable as entirely reasonable it necessarily followed that any decision not to accede to his proposals was utterly unreasonable. As it is, however, and as I have already indicated above, Mr Crossland's own expectations about the hearing bundles was frankly unrealistic. I do not doubt he had health concerns, but Judge McKenna's approach was one that was plainly open to her on the evidence she had to hand. Her directions, while they may have been rather more robust than some other tribunal judges might have adopted, were well within the bounds of a reasonable response by way of case management. On the face of it, there was nothing to suggest there had been any error of law on her part. That said, the real test of the fairness or otherwise of the GRC's pre-hearing case management was to see how the effect of those directions played out at the hearing of the substantive appeal at York County Court on 17 May 2018.

The Ryan FTT's conduct of the hearing at York County Court on 17 May 2018

<u>Introduction</u>

55. This section is divided into the following parts and themes:

(i) the general picture as regards transcripts and recording of First-tier Tribunal hearings;
(ii) the four transcripts from the Ryan FTT hearing;
(iii) pulling the procedural threads together from the Ryan FTT hearing;
(iv) was it unfair of the Ryan FTT to refuse an adjournment?;
(v) was it unfair of the Ryan FTT to narrow the issues raised by the appeal?;
(vi) was the FTT's conduct of the appeal unfair to the Appellant as a litigant in person?;
(vii) the Information Commissioner's response on the fairness of the FTT proceedings; and
(viii) other matters raised by the Appellant in his grounds of appeal.

<u>The general picture as regards transcripts and recording of First-tier Tribunal hearings</u>

56. Mr Crossland appears to be under the misapprehension that it is his entitlement to have free of charge both a transcript of, and a copy of the digital recording of, any First-tier Tribunal oral hearing in which he participates. Nothing could be further from the truth.

57. At this juncture, several general observations are in order. First, there is no automatic right under the European Convention on Human Rights (ECHR) to a copy of a transcript of a tribunal hearing. Nor does the Human Rights Act 1998 provide any such right. Moreover, and perhaps somewhat remarkably, there is no statutory requirement on the First-tier Tribunal even to maintain a record of proceedings,

whether digital, audio or handwritten. The Tribunals, Courts and Enforcement Act 2007 is entirely silent on the matter, as are the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. There is no Practice Direction or Practice Statement that governs the position in the GRC (*contra* the position in the Social Entitlement Chamber of the FTT). The most that can perhaps be said is that the Judge is under a duty to take a note of the evidence (see *Houston v Lightwater Farms Ltd* [1990] ICR 502 at 507, where it was held that a chairman of what was then an industrial (now an employment) tribunal "as a judge, has in our judgment a judicial duty to make some note of the proceedings before him, including the evidence, for the assistance of an appellate court in the event of an appeal"). As a matter of good practice, panel members are also typically encouraged to keep their own notes although practice varies across the different FTT Chambers. Although the GDPR provides certain rights to access personal data, judicial notes (whether those of judges or specialist members) are exempt from disclosure (see Data Protection Act 2018, section 15 and Schedule 2, Part 2, Paragraph 14(2) and (3)).

58. The absence of any prescriptive legislative framework means that recording practice also varies across tribunals. Some tribunals digitally record all hearings as a matter of course. Other tribunals rarely, if ever, digitally record hearings, relying simply on the judge's note. As the Court of Appeal has observed in the context of FTT immigration and asylum appeals at first instance, "Proceedings in the First-tier Tribunal are not ordinarily recorded (it is not a court of record) and no transcript of the hearing will be available" – see *Singh v Secretary of State for the Home Department* [2016] EWCA Civ 492 at [53(4)]. Still other tribunals operate entirely pragmatically, recording hearings if they happen to be sitting at a venue which offers that facility, but not if they are not. This is the case with some peripatetic tribunals such as the GRC First-tier Tribunal dealing with information rights hearings. Even if the hearing is digitally recorded, there is no automatic right to a free transcript of that recording. The default position is usually that a transcript can be prepared on payment of a fee. Leadership judges certainly have a discretion to direct a transcript be prepared at public expense. This might be appropriate, for example, as a reasonable adjustment for a person with a relevant disability. However, Mr Crossland's insistence that he was entitled to a transcript was not supported on any such basis.

<u>The four transcripts from the Ryan FTT hearing</u>

59. It follows from the general position as set out above that in normal circumstances there would be no recording or transcript of any FTT information rights appeal hearing. But the present case is an aberration from the norm. There are, remarkably, a total of four separate transcripts of at least parts of the hearing. In this section I explain how this remarkable multiplicity of transcripts came about. These transcripts were only made possible because the Ryan FTT hearing was held at York County Court in a hearing room that had a digital recording facility and because Judge Ryan himself went above and beyond the call of duty.

60. I list (and summarise) the four transcripts in the order in which they came to my notice:

(1) First, the Ryan FTT's decision itself included a three-page Appendix, described as being a "RULING ON ADJOURNMENT (a transcript of the *ex tempore* decision made at the time, amended to improve comprehension)" (see pp.59-62, original emphasis). I call this "the Ryan revised adjournment ruling";

(2) Second, a further ‘home-made’ five-page transcript was prepared by Judge Ryan, again from having listened to the court venue’s CD, which was headed “Transcript of the recorded portion of the hearing of *Crossland v Information Commissioner and Leeds City Council* in York on 17 May 2018 between the delivery of the ruling on an application to adjourn and the start of the substantive appeal” (this appears as document 1 in the second FTT file). I call this “the Ryan mini-transcript”;

(3) Third, a 56-page transcript of the hearing (pp.442-498), produced at public expense by Ubiqus, and made following the direction of Farbey J (p.439) – see paragraph 51 above. I call this “the Ubiqus hearing transcript”;

(4) Fourth, a five-page transcript of the Ryan FTT’s judgment on the Appellant’s adjournment application, again produced at public expense by Ubiqus, and made following the direction of Farbey J (p.439). I call this “the Ubiqus adjournment ruling transcript”.

61. The circumstances in which these various transcripts were prepared is as follows. The first, the Ryan revised adjournment ruling, was annexed to the FTT’s decision. It had been prepared by Judge Ryan, having listened to the digital recording. The ruling began by stating that “At the start of the hearing today we considered an application by the Appellant to adjourn. Effectively, a renewal of his previous application to the Registrar”. The GRC office issued the Ryan FTT’s decision to the parties by e-mail on 30 May 2018. By return, Mr Crossland requested the GRC office to “urgently provide me with the unedited transcript of what was recorded on the court recording system” about the “discussions etc. related to the Judge’s decisions and procedure regarding the Appellant’s right to request a review of the judge’s preliminary decision”, as there had, he said, been a difference of view at the hearing as to what had been said (p.45).

62. With commendable and remarkable alacrity, the GRC office issued Mr Crossland on 1 June 2018 with a copy of what it described as the “Judge’s transcript” (pp.39-45). This was the ‘home-made’ Ryan mini-transcript (the second of the four transcripts described at paragraph 60 above). As such, the Judge’s mini-transcript covered the discussion recorded on the official Ubiqus hearing transcript as having started at p.29 (line 11 onwards) and ending on p.37 (at line 12). The Judge’s mini-transcript included the following passage (the text in bold is my emphasis; R is the judge’s own abbreviation for Judge Ryan):

> “R: We have given our decision on that so we are now looking at the appeal issue. You need permission to appeal the order we have just made. I am prepared to treat what you have just said as a request for permission to appeal. I need another quick word with my colleagues to see how we should treat that. You stay there we will pop out of the room.
>
> [voice – are we still being recorded?]
>
> R: I am stopping the recording at 12.22.
>
> [**No recording was made of the conversation when the panel returned to the room, informed the Appellant that his application for permission to appeal was refused and that the substantive hearing should be proceeded with. It was suggested, and agreed, that the hearing be adjourned for one**

> **hour to enable to Appellant to consider his position and prepare his submissions**].
>
> 13:18
>
> R: Come in … [pause]
> Right we are staring at twenty past one and we have got until 4 o'clock…"

63. Over the following fortnight the Appellant sent the GRC office a series of further e-mails (e.g. dated 4 June, 5 June and 14 June 2018). In short, Mr Crossland complained he had not been sent a proper transcript. It appears that he requested (i) an official court transcript of the adjournment ruling (i.e. the authorised version of what appeared as the Appendix to the FTT's decision), which he called "the Preliminary issue"; (ii) an official court transcript of what he described as the "Missing Ruling", being the tribunal's refusal to grant permission to appeal against that adjournment ruling and related matters; and (iii) copies of the judge's and panel members' notes of the hearing. These requests were framed in terms of an overarching complaint that he had not had a fair hearing. For example, as regard the Preliminary issue (p.36):

> "The Appellant considers it fair and just that he, the Appellant, should have a formal transcript of that decision not one subject to any transcribing errors by the Judge or conscious or subconscious editing by the judge after the judge has subsequently heard the case and has the benefit of hindsight, to edit the record so to reflect what he wished to have said – not what he actually said."

64. On 28 August 2018, the GRC's 'Delivery Manager' e-mailed the Appellant explaining that Judge Ryan had provided a transcript of both the adjournment ruling (annexed to the decision) and the subsequent dialogue "out of courtesy … [The Judge] granted your request in recognition of your status as a litigant in person and your concerns about the way you believed you had been treated. He had no obligation to do so and made no promise." The Delivery Manager noted that permission to appeal to the Upper Tribunal had been granted and in effect stated that the correspondence was now closed. There was no mention of the panel's notes, but as noted above (see paragraph 57)
they were exempt from disclosure in any event because of the Data Protection Act 2018.

65. Be that as it may, it follows that from a date very soon after the FTT hearing in York, the Appellant has had sight of both Judge Ryan's revised adjournment ruling and the mini-transcript. He may not at that stage have had an official transcript of either ruling but the simple fact of the matter is that he had no entitlement to such (see paragraphs 56-58 above).

66. The other two transcripts – the Ubiqus hearing transcript and the Ubiqus adjournment ruling transcript – have only been made available more recently, as a result of the directions by Farbey J, as noted above.

67. The Upper Tribunal sent Mr Crossland a copy of the former on 28 May 2020. The transcript does not include timings but evidently the hearing continued for the best part of a day, with a break of about one hour for lunch. Although Mr Crossland has sent in extensive final representations about his appeal, he makes very little reference to the Ubiqus hearing transcript.

68. For reasons that are not immediately apparent from the Upper Tribunal file, none of the parties was sent a copy of the Ubiqus adjournment ruling transcript at the same time. This latter transcript had also been filed with the Upper Tribunal papers in such a way that unfortunately I overlooked it when drawing up my directions of 25 June 2020. It follows that neither Mr Crossland nor the respondents in this appeal have had the opportunity to make any observations on the Ubiqus adjournment ruling transcript. For the reasons I explain later, I am not satisfied that fairness and justice require the parties to have that further opportunity now to make representations. However, I will direct, if only for the purposes of completeness, that a copy of the Ubiqus adjournment ruling transcript should be issued to all parties with the decision on this appeal.

69. It is also right to note that there is further evidence about the hearing in the form of Ms Nicholls's sworn witness statement (pp.31-33) and Mr Crossland's own witness statements and lengthy written submissions.

Pulling the procedural threads together from the Ryan FTT hearing

70. By way of a recap, it is not in dispute that the Ryan FTT made two procedural rulings in the course of the appeal hearing at York on 17 May 2018. The first ruling was to refuse Mr Crossland's renewed application for the hearing to be adjourned to allow him more time to prepare for the FTT hearing. The second ruling was to refuse Mr Crossland's application for permission to appeal that ruling refusing to grant an adjournment.

71. As to the first ruling, there are, as noted above, two versions of this adjournment ruling. The first is the Ryan revised adjournment ruling, annexed to the FTT's decision, while the second is the Ubiqus adjournment ruling transcript. I have read both carefully. In substance they are identical, the only difference being that the former includes some minor elucidation of certain issues. I am satisfied beyond any doubt that the latter, generated from the county court's digital record by a professional transcription firm, is an accurate record of what was actually said at the hearing as the reasons for refusing the adjournment application.

72. As to the second ruling, I am also now satisfied that the decision to refuse Mr Crossland's application for permission to appeal that ruling refusing to grant an adjournment was <u>not</u> captured on the venue's digital recording system. The reason for that was simply that the recording was not running at that point. That conclusion is supported by the almost contemporaneous note by Judge Ryan in the Ryan mini-transcript (the passage in bold at paragraph 62 above).

73. It is only right that I record that I have changed my mind on this issue since issuing my initial directions. In the reasons for my CMD dated 25 June 2020 I stated as follows:

> "Nor am I persuaded that there is a 'missing' part of the transcript at p.32 (at 21-22) as alleged. The transcript is a professionally prepared document. It is not prepared by either the Upper Tribunal or the First-tier Tribunal. As is the usual practice, the Upper Tribunal office sent the digital file or CD to an independent court transcriber, who then prepared the transcript with no input from either Tribunal or from their judicial or administrative staff. The Tribunal's ruling on the permission application is summarised on p.33 at 16-21."

74. The reason why I have changed my mind is the compelling evidence by way of the contemporaneous note (now in bold) referred to above in the Ryan mini-

transcript. When preparing the ruling dated 25 June 2020, I had read the Ubiqus hearing transcript in detail, assuming that to be the authoritative record of the tribunal's proceedings. I remain satisfied that the Ubiqus hearing transcript is a full and accurate record of everything that was digitally recorded at the FTT hearing. However, it missed off the ruling refusing permission to appeal against the adjournment ruling because that passage in the hearing had not been digitally recorded. The mere fact that a relatively short passage in the hearing went unrecorded does not make the proceedings unfair without more.

75. Mr Crossland's very many detailed and extensive written submissions on why he says the FTT hearing was unfair really boil down to three propositions, namely that (1) it was unfair for the tribunal to refuse him an adjournment; (2) it was unfair of the tribunal to narrow the issues raised by the appeal in such a way that he could not properly present his case; and (3) it was unfair of the FTT to approach the hearing in the way it did, given he was a litigant in person. Each of these submissions must be considered in turn.

<u>Was it unfair of the Ryan FTT to refuse an adjournment?</u>

76. According to the Ubiqus adjournment ruling transcript, the FTT started by summarising the grounds on which Mr Crossland had made his renewed application to adjourn (namely health reasons and insufficient time to prepare). Judge Ryan then specifically referred to the guidance in Jacobs, *Tribunal Practice and Procedure*, noting that the crux of the issue was the effect an adjournment would have on the parties and the tribunal system. The Judge then announced the panel's conclusion that the effect of an adjournment "would be disproportionate and that proceeding with the hearing would not be unreasonable or injurious to any party". The reason for this was "because we see the scope of the decision in a much more limited [sense] than the appellant, Mr Crossland, does". Judge Ryan then referred to the terms of the decision in the Information Commissioner's DN that was under appeal.

77. By way of examples, the Judge also addressed three issues raised by Mr Crossland which the panel had concluded were not relevant to the DN under appeal, while making it clear these were not the only ones he could have selected. The first concerned the public authority's original reliance on its view that the request was "manifestly unreasonable"; but as that had not been pursued in relation to the second request, the FTT did not need to consider it. The second was Mr Crossland's desire to counter criticisms made of him in the public authority's witness statement. Here, the FTT was satisfied that the points at issue did not impact on the questions it had to determine. The third was Mr Crossland's criticism of the ICO's deployment of staff to conduct the investigation; again, the FTT found this was not relevant to what it had to decide.

78. In conclusion, and on a more positive note, Judge Ryan identified the issues which the FTT *would* consider, namely (i) the scope of Mr Crossland's information request; (ii) the factual evidence about the public authority's conduct in that regard; (iii) whether the request was covered by the EIR or FOIA; and (iv) whether the test as to whether the public authority held material was the balance of probability or some other measure. The legal matters so raised did not involve reliance on extensive documentation. Moreover:

> "20. Reverting to the factual issues, they are quite narrow. They are – the documentation relating to them is quite limited. It is only when one goes into what we regard as the irrelevant issues that one may or may not get involved in all the other documentation, some of which is in the first bundle; some of which

> is in Mr Crossland's additional papers and for the reasons I have given, we do not think that we need or should do that.
>
> 21. In particular, we do not think we should consider anything to do with EIR 12.4(b); the issue of whether or not at any time it was alleged that information was exempted under – as being manifestly unreasonable. That is simply not an issue that arises on this appeal. It may have arisen in other cases. It may have been raised in correspondence but it does not arise on this appeal.
>
> 22. For all those reasons, we think we are well able to proceed with the case today and we have to say that the manner in which Mr Crossland has addressed these issues undermined his own case in that he clearly is well on top of the detail and is able to make his points very clearly and comprehensively.
>
> 23. We feel that he and we are in a position to deal with this hearing today and deliver fair justice and so, that is our decision. We shall proceed with the hearing."

79. I reiterate that the Ryan revised adjournment ruling provided as an annex to the FTT's decision was not materially different in any respect. It follows that a further round of submissions inviting comments from the parties on the Ubiqus adjournment ruling transcript is both unnecessary and disproportionate.

80. There is one other significant matter to note. The FTT's decision to refuse the renewed adjournment application was not made at the outset of the hearing. Far from it. The Ubiqus hearing transcript does not have timings attached. However, the FTT's adjournment ruling is noted parenthetically therein as "**Judgment transcribed separately**" at line 11 on p.29 of the transcript. Given the fact that the tribunal broke for an early lunch at about 12.15 (at p.32), my best guesstimate is that the adjournment ruling was delivered at about 12 noon. By that stage the FTT had had ample time (in the order of two hours) to explore fully the Appellant's concerns.

81. Thus, the Ryan FTT's adjournment ruling – whether read in the Ubiqus version or the slightly revised Ryan version – was a careful and considered response to Mr Crossland's application. It has long been established that the decision to adjourn is a matter in which tribunals have a broad discretion (see *Jacobs v Norsalta Ltd* [1977] ICR 189). The tribunal here directed itself to the relevant law (although it did not expressly refer to *MA v Secretary of State for Work and Pensions* [2009] UKUT 211 (AAC), the principles therein were helpfully summarised by the citation from *Tribunal Practice and Procedure*). Although the FTT did not explicitly mention the overriding objective in rule 2, its analysis of the issues demonstrated that it had those factors firmly to the forefront of its collective mind. The reasons it gave were not simply adequate but were comprehensive and cogent. The decision to refuse the adjournment request and to proceed with the hearing was plainly one that was open to the FTT. Mr Crossland may well have been unhappy with the tribunal's decision, but that did not make it unfair or unreasonable. It was eminently fair by any objective criterion.

<u>Was it unfair of the Ryan FTT to narrow the issues raised by the appeal?</u>

82. The short answer is No.

83. The longer answer is it is elementary that it is for the tribunal to identify the range of issues which arise for determination (see also paragraphs 5 and 6 above). This is especially so in an inquisitorial jurisdiction such as the FTT. As a matter of

active case management, the tribunal is perfectly entitled to advise the parties that it wants to hear submissions on points A, B and C but will not wish to hear about matters X, Y and Z. This tribunal here quite properly did just that. The Appellant, as with any other party, was required to respect that (see rule 2(4)). The FTT cannot be expected simply to sit back and allow a party, whether professionally represented or acting as a litigant in person, to read aloud the equivalent of a small (or even a large) telephone directory of submissions on a range of issues which the party (but not the tribunal) happens to consider important. If the FTT wrongly excludes a matter from consideration, that can be tested on an appeal confined to a material error of law before the Upper Tribunal.

84. In his original notice of appeal, Mr Crossland argued that the FTT's decision omitted what he described as "Judge Ryan's 'Missing Ruling'". The Appellant recorded this ruling as follows (as he put it, "hereby reproduced by the Appellant as faithfully and truthfully as possible"):

> **"Mr Crossland has claimed that there are points of law in his case:**
> - **That the requests fall within EIR (and therefore not FOIA).**
> - **That the responses by Leeds City Council had been given under EIR including a claim for exemption under R12(4)(b) unreasonable. Therefore the ICO should have considered the response in this context.**
> - **That the test used by the ICO – 'balance of probabilities' that Leeds City Council had provided all relevant information was not the correct test given the circumstances.**
>
> **The Tribunal rejects these grounds as arguable and Rules that the Tribunal's jurisdiction is only to consider whether or not the ICO's Decision Note [sic] is correct:**
>
> > ***23. The Commissioner's decision is therefore that, on the balance of probabilities, the Council complied with section 1 of the FOIA by providing the complainant with information relevant to his request in its letters of 9 and 17 December 2015.***
>
> **The Tribunal shall only consider whether or not 'on the balance of probabilities, the Council complied with section 1 of the FOIA by providing the complainant with information relevant to his request in its letters of 9 and 17 December 2015.'**
>
> **Furthermore, if Mr Crossland tries to introduce these matters which he considers to be points of law into the hearing of his Appeal then he will be stopped from doing so."**

85. The purported 'missing ruling' is also to be found in Ms Nicholls's witness statement in precisely the same terms. In the circumstances – notably, given her role in the third information request (see paragraph 12 above) – I do not regard Ms Nicholls as an independent witness. Accordingly, her apparently corroborating account does not add any weight to Mr Crossland's own evidence.

86. Moreover, I am driven to the conclusion that Mr Crossland's own account of this so-called missing ruling is neither accurate nor reliable in all respects. It amounts to no more than a garbled and partly misleading version of the FTT's ruling refusing his adjournment application. In that ruling the FTT certainly mentioned each of the three bullet points listed in Mr Crossland's account. However, the FTT only disregarded the

second of those issues as being irrelevant to its enquiry (see paragraph 77 above). In no sense did it reject the first and third bullet points as arguable. Indeed, the FTT's final decision spent two pages analysing whether the correct regime was FOIA or the EIR (at [21]-[26]). It also considered at length the appropriateness of the balance of probabilities test as part of its discussion as to whether information was held by the public authority (see [27]-[36]). The suggestion (or rather the assertion) by Mr Crossland that the tribunal had excluded the first and third bullet points at an early stage of its enquiry, rendering the whole of the proceedings unfair, is simply fanciful. It is completely undermined by the detailed treatment of both those points in the FTT's substantive decision.

87. The FTT certainly identified the primary focus of its inquiry as being the core of the Information Commissioner's DN, but it was correct to do so. As Judge Ryan put it in the course of the hearing (Ubiqus hearing transcript, p.15, lines 29-35 and p.16 line 1):

> "JUDGE RYAN: Mr Crossland, we come back to – we can only review the decision notice which has been presented to us. That is all the law says. S.87 is very, very clear. Information tribunals do not go wandering off all over the place and say whether this was right and that was right. That might be an ombudsman's job; that is not yours. All we have got to look at is, was the Information Commissioner right or wrong when she decided that there were no other documents, there had not been any documents withheld which fell within the scope of that request – quite happy to look at it as an EIR request; it does not seem to matter, we can resolve that problem separately."

88. It must be noted that the Ubiqus transcript was never formally approved (given Judge Ryan had retired). I am satisfied that the reference in the extract above in line 3 to "S.87" must have been to sections 57 and 58 of FOIA, and the "yours" in line 5 was probably misheard by the transcriber, as "ours" makes more sense in this context. However, nothing turns on such matters of minor detail.

89. Finally, I recognise that there is no passage in the Ubiqus hearing transcript in which Judge Ryan stated in express terms, as the Appellant alleges, that "if Mr Crossland tries to introduce these matters which he considers to be points of law into the hearing of his Appeal then he will be stopped from doing so." I accept, however, that the ruling on the application for permission to appeal the adjournment ruling itself was not recorded, and so not transcribed, so it is possible that some such indication was given in the course of that separate ruling. Given the admirably patient way in which Judge Ryan dealt with the Appellant throughout the rest of the hearing, I would be surprised if it had been put in quite such stark terms. But the fact that such a message had plainly been conveyed in one form or another is supported by the exchange which took place in the afternoon session, when Mr Crossland began to present his appeal, having handed in copies of some written submissions for the panel (p.38, lines 1-31, emphasis added in bold):

> "JUDGE RYAN: Shall we read them or are you going to talk us through them or how do you want to play it?
> MR CROSSLAND: Because of what happened this morning, I don't want to be stopped whilst going through those.
> MRS NELSON: What do you want us to do?
> MR CROSSLAND: Well, I would have normally wanted you to read them but I'm so concerned with what I heard this morning that I don't want to be

stopped and have certain parts of those not be considered. I don't want to be stopped from reading part-way through.
JUDGE RYAN: Your plan was to read them to us?
MR CROSSLAND: I was-
JUDGE RYAN: I see-
MR CROSSLAND: Until this morning when you – when you made it clear that you might stop me.
JUDGE RYAN: I might indicate to you that you are dealing with a point that we think is irrelevant, yes.
MR CROSSLAND: Yes. Because the – the order you didn't give this morning-
JUDGE RYAN: Yes, yes-
MR CROSSLAND: And the judgment that you did give-
JUDGE RYAN: Yes. Mr Crossland, I am not sure how you want to proceed with your appeal. Do you want us just to take these away and read them? Or do you want to read them out to us or what?
MR CROSSLAND: I would want to read them out but I don't want any part of them excluded because you say so.
JUDGE RYAN: Well, the thing about saying so, the judge does have control of the proceedings in his own court.
MR CROSSLAND: Yes, I know, but you'd have to put it in writing.
JUDGE RYAN: Why would I have to put it in writing?
MR CROSSLAND: You'd have to note the bits that you weren't happy with considering. That's the basis of – that's the basis of my appeal. It's consistent with my appeal as lodged to the first-tier tribunal..."

90. Both highlighted passages, and indeed others of Mr Crossland's interventions as recorded in the rest of the transcript, only serve to demonstrate the Appellant's inability to understand the role of the First-tier Tribunal in defining the scope of the issues before it for its determination. In addition, the comment at the end of the second highlighted passage – the inference that, at the time it was made, the Judge would be required to commit to writing any ruling on what was or was not relevant – was simply misconceived. It was, furthermore, symptomatic of Mr Crossland's misplaced approach to case management issues, namely that he knows best and so is best placed to advise judges what they can and cannot do.

<u>Was the FTT's conduct of the appeal unfair to the Appellant as a litigant in person?</u>
91. In some respects, this ground is simply another way of putting the two previous sets of arguments about the alleged unfairness of the proceedings. More generally, Mr Crossland's submissions highlight his own status as a litigant in person, faced with health problems and limited resources, as contrasted with the teams of professionals acting for both the public authority and the Information Commissioner. Although he did not put the argument in quite these terms, this was essentially a challenge based on an absence of 'equality of arms', as that concept is understood in the context of Article 6 of the ECHR. I assume for present purposes that the same concept can be imported into domestic notions of the common law requirement for a fair hearing and natural justice.

92. A similar argument was advanced by the appellant Mr Moss in *Moss v Information Commissioner and Cabinet Office* [2020] UKUT 242 (AAC). Upper Tribunal Judge Wright's conclusion was as follows:

"149. As for the 'equality of arms' argument, in my clear judgment there is no merit in it, even assuming Article 6(1) does apply. The starting point is that the

> 'equality of arms' test is a broad one which only requires that a litigant is not placed under a *substantial* disadvantage as compared to his or her opponent: see, for example, *De Haes and Gijsels v Belgium* (1997) 24 EHRR 1 and *Steel and Morris v UK* (2005) 41 EHRR 22 at paragraph [62]. Moreover, it is not a matter of a disadvantage in theory arising but one which can be made out on the concrete facts of an individual case: *Steel and Morris* at paragraph [61]. I have borne these principles in mind when considering whether the proceedings before the First-tier Tribunal lacked 'equality of arms'.
>
> 150. It is quite obvious to me that despite his lack of legal training Mr Moss was well able to marshal and deploy the complex factual and legal arguments that arose on his appeal to the First-tier Tribunal (and on this appeal to the Upper Tribunal, though the primary focus must be on the First-tier Tribunal given Mr Moss needs to show it was that tribunal which erred materially in law in coming to its decision). Indeed, it is Mr Moss who has made the running with all the arguments raised below and on this appeal. The fact that none of those arguments has succeeded has nothing to do with Mr Moss's ability and skill in putting them forward. Nor was he at any disadvantage when arguing this appeal before me against leading practitioners in the field of information rights. In addition, save for the 'late aggregation evidence', which I deal with and reject below, Mr Moss did not identify any instances in the First-tier Tribunal where his circumstances meant that he was placed at a substantial disadvantage in the proceedings, and it is worth emphasising in this respect that Mr Moss was the only party who attended the hearing before the First-tier Tribunal.
>
> 151. Furthermore, it is an important feature of the First-tier Tribunal and the Upper Tribunal system generally, and in particular in this area of law, and one which informs why 'legal aid' has not generally been extended to cover tribunals, that the proceedings are not adversarial in nature but are enabling and inquisitorial, with the specialist expertise of the tribunals being used where necessary to assist litigants in person to advance the important points on their appeals.
>
> 152. In all these circumstances, I do not consider that Mr Moss was placed at any, or at least any substantial, disadvantage in the appeal proceedings below (or before me). Accordingly, there is no merit in this aspect of his argument that he was denied a fair trial contrary Article 6(1), even assuming in his favour that Article 6(1) does apply."

93. I respectfully agree with the statements of principle in paragraph 149 of Judge Wright's decision. Obviously, each such case is fact sensitive, but much of paragraph 150 could apply equally to the present proceedings, with the substitution of 'Mr Crossland' for 'Mr Moss'. The Ryan FTT clearly reached that conclusion (see for example its reasoning for its ruling refusing an adjournment), having heard at some length from Mr Crossland, and had ample evidence to support that view. Ultimately, the reason why Mr Crossland's arguments in the appeal at first instance were unsuccessful had "nothing to do with [Mr Crossland]'s ability and skill in putting them forward." Rather, it was simply they were bad arguments.

94. There are other and more obvious ways in which a litigant in person can be disadvantaged in terms of the conduct of the tribunal proceedings. However, it is right to record that Mr Crossland has not suggested that Judge Ryan acted in, for example, an aggressive, overbearing or unsympathetic manner. Such cases are, sadly, not unknown – the High Court trial which formed the backdrop to the Supreme

Court's decision in *Serafin v Malkiewicz* [2020] UKSC 23 is a recent case in point. That was a case in which, putting it neutrally, the trial judge did not allow the litigant in person to present his case properly. Putting it more bluntly, there was a "barrage of hostility towards the claimant's case, and towards the claimant himself acting in person, fired by the judge in immoderate, ill-tempered and at times offensive language at many different points during the long hearing" (Lord Wilson at [48]). In short, *Serafin v Malkiewicz* in the High Court was an object lesson in how *not* to deal with a litigant in person.

95. I recognise, of course, as Lord Wilson observed in *Serafin v Malkiewicz*, that "the transcripts enable us to read but neither to hear nor to see" (at [48]). However, it has not been necessary for me to call for the original DVD. It is perfectly plain from the Ubiqus hearing transcript that Judge Ryan's conduct of the proceedings was scrupulously fair. His approach at all times was consistent with the guidance contained in the Equal Treatment Bench Book on managing hearings where one or both parties is a litigant in person. For example, there were two occasions in the hearing on which the Appellant became rather over-wrought, which Judge Ryan handled with appropriate and commendable sensitivity. The first occurred about half-way through the morning session (at p.13, lines 9-18):

> "MR CROSSLAND: Yes, let me give you-
> JUDGE RYAN: That is why I say it is a simple point.
> MR CROSSLAND: Let me give you – I am sorry, but it is key that you understand that there are other legal issues that are a consequence of that decision. I'm sorry, I'm getting a bit-
> JUDGE RYAN: Okay, take your time. Take you[r] time. Put your papers down and start again, if you need to. We will wait.
> **Pause.**
> MR CROSSLAND: In the submissions that I prepared for Your Honour, I addressed most of the points…"

96. The second instance occurred later in the morning session, and is worth quoting at some length (at p.23 lines 13-35 and p.24 line 1):

> JUDGE RYAN: Well, what are you going to do with the additional papers in the bundle? I just do not – I am really struggling with all of this. You have got all the arguments at the tips of your fingers. You are expressing them very clearly. You seem to right on top of the papers so, I am saying to myself, 'This appellant is not showing any signs of not being prepared; quite the' – well, you seem to be very well prepared.
> MR CROSSLAND: I – it's this and we've discussed it on the way in, is that the thought of previous encounters – I've had experience where I said, 'Here we are; there's a fact', and someone sat where you're sat said – has disregarded it. I went to the last hearing – could I-
> JUDGE RYAN: Do you want a moment? Yes, sure, sure. Do you want to pop outside?
> MR CROSSLAND: Please.
> JUDGE RYAN: Yes, sure, sure.
> **Appellant leaves the courtroom.**
> **Discussion *sotto voce.***
> **Appellant returns to courtroom.**
> MR CROSSLAND: Sorry about that-
> JUDGE RYAN: Are you happy to continue-
> MR CROSSLAND: Big girl's blouse.

JUDGE RYAN: Are you happy to continue?
MR CROSSLAND: Yes, yes-
JUDGE RYAN: Are you all right to continue?
MR CROSSLAND: Yes. In the first case, as distinct from now-
MRS NELSON: Are you all right?
MR CROSSLAND: Yes, yes…"

97. In fairness, during the hearing itself Mr Crossland had recognised the enabling role which Judge Ryan had played. Shortly before the panel broke to consider the adjournment request, Mr Crossland made this observation: "I don't know whether – you can imagine what it's like for a lay person trying to do this. I'm only able to do this now because of the way you've conducted the hearing but had you been aggressive or unreasonable, I would have had great difficulty conveying to you the points that I needed to make and for that, I thank you. You know, that's a point that needs to be made" (p.28, lines 1-5). Furthermore, in the discussion that followed the panel's announcement of its decision to refuse the adjournment request, Mr Crossland stated "I don't feel – the impression that I firstly get is that I don't feel that you have been unfair but I do feel that you made an error in law" (p.30, line 35 – p.31, line 1). Such contemporaneous recognition of the fairness of the proceedings wholly undermines Mr Crossland's complaint now that the hearing and/or Judge Ryan's conduct of the proceedings was unfair.

98. In sum, Mr Crossland does not now accept that the FTT made sufficient allowance for the fact that he was a litigant in person. The record amply demonstrates otherwise.

The Information Commissioner's response on the fairness of the FTT proceedings

99. The Information Commissioner, in her response to the present appeal (pp.205-214; §20-§21), makes the following observations on the overarching issue of the fairness of the proceedings:

> "20. The core of the Appellant's submissions is that he was unable to present his case to the Tribunal as he would have wished, including addressing all the material he considers relevant and with as much understanding of the relevant law and Tribunal procedure as he would have wanted. It is eminently understandable that a lay appellant who believes strongly in their appeal will want to present their case as fully as possible. However, tribunal procedure necessarily reflects the need to deal with cases justly, including the proportionate use of resources. In the context of an adjournment request, this is reflected in the approach explained by Edward Jacobs in *Tribunal Practice and Procedure* (2nd ed.), to which the FTT referred in the appendix to its decision. The purpose an adjournment would serve is relevant, as is the effect it would have on the parties and the operation of the tribunal system.
>
> 21. The Commissioner concurs with the reasons given by the FTT in the appendix, that adjournment would not materially assist the FTT in the determination it had to reach. While the Appellant plainly considers further time would have enabled him to present material relevant to the appeal, the FTT identified that the issues before it were relatively straightforward, and were addressed in the evidence already available to it. Those issues are summarised above, and concern only the relatively narrow question of whether the Council held further information falling within the scope of the request, beyond that it had already disclosed to the Appellant. In making its decision, the FTT took into account the Appellant's submissions that the Council has intentionally withheld

information, and that its conduct in the investigation supported that conclusion. In requesting an adjournment, the Appellant did not identify any factors which would materially affect the FTT's assessment of those matters. The FTT was therefore entitled to conclude that adjournment would therefore be disproportionate, and that further documents identified by the Appellant did not need to be presented."

100. I agree. The Commissioner very fairly adds that her representative "did not attend the hearing, and therefore did not witness the conduct of the Tribunal towards the Appellant. The Commissioner's position on this issue is therefore based on the documents contained in the Upper Tribunal bundle. The Commissioner considers it would assist the Upper Tribunal to be provided with a transcript or recording of the hearing in order to fully understand how the hearing proceeded" (at §22). As discussed above, I have now had the opportunity to read the Ubiqus hearing transcript (and the other three more partial transcripts) and for the reasons above I am satisfied it provides no meaningful support for the Appellant's claims and assertions as to the fairness or otherwise of the proceedings.

101. I would simply add the obvious point that the availability (by happenstance) of a digital recording (and hence the availability of a transcript) of this tribunal hearing has helped immensely in the resolution of this appeal. In the absence of a recording, any appeal or associated complaint of judicial misconduct would have been even more time-consuming and resource-intensive to resolve.

Other matters raised by the Appellant in his grounds of appeal

102. The 'reasons for appealing' section of the Appellant's notice of appeal runs to 15 pages and 108 paragraphs. The great majority of these grounds relate to the alleged unfairness of the FTT proceedings. This decision has accordingly focussed on that central challenge. It is wholly unrealistic to address each individual argument and sub-argument. Suffice to say there is nothing of any substance in the other grounds. So, for instance, there was no material error of law in the FTT's approach to the appropriate regime (FOIA or EIR) or to its approach to the question of whether further information within the scope of the request was held by the public authority.

103. There is, however, one further point which does need to be addressed. This is the Appellant's contention that the FTT misunderstood and misapplied sections 57 and 58 of FOIA. According to Mr Crossland, these provisions mean that "the entire ICO DN and any part of it can be appealed including omissions if they involve an error or non-compliance related to the information rights legislation". This is linked to the Appellant's argument that the FTT erred in 'closing down' the issues on which he wished to bring his appeal.

104. Certainly, the import of section 58 is that the right of appeal to the FTT under FOIA involves a full merits consideration of whether, on the facts and the law, the public authority dealt with the request for information in accordance with Part I of FOIA (see e.g. *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC); [2018] AACR 29 at paragraphs [45]-[46] and [90]). But that does not mean the FTT needs to go 'all round the houses'. As the Ryan FTT correctly identified, the key part of the Information Commissioner's DN was its conclusion that the public authority did not hold any further information, beyond that which had already been disclosed, which fell within the scope of the Appellant's request. That being so, the critical question for the Ryan FTT to determine was whether the public authority had failed to disclose any such information. As the Information Commissioner put it in her response to the appeal:

> "13. In reaching its decision on that matter, the FTT addressed all the relevant issues. First, it correctly identified the scope of the request in issue (paras 4-5); second, it determined whether FOIA, or the EIR, was the correct regime within which to address the request (paras 21-26); third, it identified the relevant test to be applied when determining if a public authority holds information (paras 27-31); fourth, it applied that test to the facts before it (paras 32-36); and fifth, it satisfied itself that other matters raised by the Appellant were not relevant to the appeal. The FTT thus identified correctly the issues before it, and addressed each in its decision. Those issues were not predetermined, but were the subject of the reasoning in the FTT's judgment."

A final matter: the appearance of collusion

105. There is one other matter I should mention. Mr Crossland draws my attention to a copy of an e-mail from Mr Mark Turnbull, the Head of Legal Services at the public authority, to Mr Adam Sowerbutts at the Information Commissioner's office. The e-mail is dated 4 January 2018, about a month after Mr Crossland lodged this particular appeal with the FTT. It reads as follows:

> "Adam,
>
> I hope you are well. I expect the latest appeal by Mr Crossland will have come your way, and if so perhaps we could have a word about this? There are of course no discernible grounds of appeal, and it goes without saying that I'm anxious, as I'm sure you are too, to explore ways of dealing with this matter without wasting yet more public resources.
>
> Regards
>
> Mark"

106. It appears this e-mail was disclosed to Mr Crossland response to a subject access request under the data protection legislation. Mr Sowerbutts's response to the enquiry was simply to e-mail Mr Turnbull to say that, as a result of a staff reorganisation, conduct of the matter had been passed to a colleague. He made no comment as to the grounds of appeal.

107. Mr Crossland has seized on this e-mail as evidence of an "apparently illicit and improper practice" of collusion between the legal teams at the Commissioner's office and the public authority respectively. I accept it might suggest an undesirable degree of cosiness in that relationship. It certainly evidences a sense of frustration on the part of the officer concerned at the City Council. However, whatever its rights and wrongs, it had no bearing whatsoever on the fairness of the proceedings before the FTT.

Conclusion

108. It follows from the above that I dismiss this appeal to the Upper Tribunal. The decision of the First-tier Tribunal sitting at York on 17 May 2018 stands.

Postscript – different models of dealing with FTT permission applications

109. This is a case in which the grant of permission to appeal was made by the presiding Judge of the First-tier Tribunal. I recognise that practice varies across the different FTT Chambers. In some Chambers decisions on permission applications are made by the Chamber President or their deputy. In other Chambers salaried

tribunal judges but not fee-paid judges make permission decisions. In the GRC, the judge who sat on the appeal in question considers permission applications, whether they are salaried or fee-paid. It is not for me to comment on the advantages and disadvantages of those various models (and, of course, different jurisdictional structures may properly result in the adoption of different approaches). However, whichever structure is in place, care should be taken to avoid a scenario in which an allegation of procedural unfairness leads virtually automatically to the grant of permission to appeal. The right to renew an unsuccessful application direct before the Upper Tribunal means that a dissatisfied party is guaranteed an independent consideration of their application for permission to appeal. The Upper Tribunal also has a number of avenues open to it at the application stage to assist in determining whether an allegation of unfairness or bias reaches the threshold of being arguable (for example, whether or not any recording happens to be available, the Upper Tribunal may direct that statements be obtained from other tribunal members and any tribunal clerk, along with any other party who happened to be present).

Nicholas Wikeley
Judge of the Upper Tribunal

(Approved for issue on 26 August 2020)

ANNEX A

31.08.2018	Appellant's notice of appeal and attachments (199 pages)
23.10.2018	Appellant's email request for all documents to be provided electronically
22.11.2018	Appellant repeats request of 23.10.2018 (refused by registrar 21.12.2018)
22.11.2018	In separate e-mail Appellant seeks response to notice of appeal (this had been sent to the Appellant by post on 08.10.2018)
26.11.2018	Appellant repeats request of 23.10.2018
26.12.2018	Appellant's response to Respondents' responses
28.12.2018	Appellant repeats request of 23.10.2018
07.01.2019	Appellant repeats request of 23.10.2018 and seeks directions
10.01.2019	Appellant requests review by Judge of registrar's ruling of 21.12.2018 (refused by UTJ Wright in 7-page ruling on 19.03.2019)
26.03.2019	Appellant requests reasons for UTJ Wright's ruling of 19.03.2019 and extension of time (registrar replied 27.03.2019)
16.04.2019	Appellant questions absence of registrar's signature on 21.12.2017 ruling
18.04.2019	Appellant applies for directions on scope of appeal, etc
18.04.2019	In separate document Appellant writes to Chamber President requiring UTJ Wright to be removed and proceedings stayed
03.05.2019	Appellant writes to Chamber President further to request of 18.04.2019
30.05.2019	Appellant applies direct to UTJ Wright for him to recuse himself
17.08.2019	Appellant writes to Chamber President regarding a judicial complaint
30.09.2019	UTJ Wright directs an oral hearing of recusal application
30.09.2019	Appellant applies for further directions on recusal application
03.10.2019	Appellant applies again for further directions on recusal application
09.10.2019	Appellant applies again for further directions on recusal application
17.10.2019	Appellant applies again for further directions on recusal application (UTJ Wright issued directions on 21.10.2019)
15.11.2019	Appellant questions 'legitimacy of processes involved'
18.11.2019	Appellant writes to Chamber President seeking amended directions
22.11.2019	Chamber President issues case management directions

29.11.2019	Appellant applies for permission to appeal directions dated 21.10.2019
06.12.2019	Appellant makes new application for UTJ Wright to recuse himself
21.12.2019	Appellant applies for permission to appeal directions dated 22.11.2019 (part 1)
04.01.2020	Appellant applies for permission to appeal directions dated 30.09.2019, 21.10.2019 and 21.12.2019 (part 2)
27.01.2020	Appellant applies for permission to appeal directions dated 30.09.2019, 21.10.2019 and 21.12.2019 (part 3)
13.02.2020	Appellant complains about delay in dealing with application of 27.01.2020
20.02.2020	Appellant applies for copy of recording of FTT hearing in EA/2017/0288
15.03.2020	Appellant notes OH fixed for 24.04.2020 later vacated) and seeks directions
16.04.2020	Chamber President issues directions in Appellant's three UT cases
28.05.2020	Chamber President issues directions in GIA/2169/2018
09.06.2020	Appellant's application for directions in GIA/2169/2018, GIA/1338/2018 (UTJ Wikeley issued ruling on 25.06.2020)
23.07.2020	Appellant's application that UTJ Wikeley recuse himself
31.07.2020	Appellant's reply to directions of 25.06.2020

ANNEX B

The Appellant's recusal application dated 23 July 2020

The recusal application itself

B1. On 23 July 2020 Mr Crossland sent the Upper Tribunal office an e-mail entitled "URGENT NEW APPLICATIONS FOR JUDGE NICHOLAS WIKELEY TO RECUSE HIMSELF INCLUDING APPARENT LACK OF VERACITY AND LACK OF TRUTHFULNESS UT AAC Cases GIA/2169/2018 & GIA/26/2020". This comprised a 17-page recusal application, annexed to which were a further 19 documents (Appendix A – Appendix S inclusive). Mr Crossland summarised the application in the following terms:

> "6. This is a new application for Judge Nicholas Wikeley to recuse himself. This application is made to reflect the current situation whereby Judge Wikeley's documented responses to the Appellant's applications and cases in the UT AAC appear to fall well short of meeting the essential and absolute judicial standards regarding veracity and truthfulness.
>
> 7. In short, documentary evidence appears to unambiguously indicate that Judge Wikeley, in his defence of the recusal applications re regarding the Judge's apparent bias/discrimination, in an apparent attempt to cover-up judicial failings, not only made key statements which were untrue, but also that he did so knowing they were untrue, i.e. the Judge appears to have lied breaching his judicial oath. All of which was to the detriment of the Appellant and of justice.
>
> 8. Additionally the documented records, as extracted, show Judge Wikeley discriminates and is biased against and contemptuous of litigants in person (non legal professionals) by refusals to provide proper or adequate reasons, and by failures to address or consider adequately (if at all) a litigant in persons legal points in their case, particularly re Human Rights Act and EA.
>
> 9. Any one of these four failings would appear adequate to justify recusal from Judge Wikeley:
>
> - Lack of veracity, lack of truthfulness, and apparent lying
> - Failure to provide adequate *Reasons*
> - Failure to properly consider or address the legal points submitted by a litigant in person.
> - Failure to Recognise Human Rights Act and UT AAC's and his Duties Under HRA."

B2. In this annex to the main decision I am treating those final four bullet points as the four grounds on which the Appellant applies that I should recuse myself. Having referred to some of the case law, Mr Crossland then concluded his summary in his application as follows:

> "14. One of the cited well documented apparent failings of the judge is regarding Judge Wikeley's veracity, truthfulness and apparent lying. This concern is just about the most serious concern about any judge. A fair minded and informed observer will have no alternative but to hold the view that *there appears to be bias or 'apparent bias'*. The nature of this bias is so severe as to justify all Judge Wikeley's decisions regarding the Appellant to be considered unsafe.

15. There appears now to only be two honourable options open to Judge Wikeley:

- Either accept the recusal, apologise to the Appellant and offer a reasonable explanation.

- Or to hold a public recusal hearing. If the public and the media can accept the Judge's position then he lives to fight another day. However, if the Appellant's case for requesting the Judge to recuse himself passes the fair minded and informed observer test, i.e. that *there appears to be bias or apparent bias,* then Judge Wikeley will need to consider his position not only as a judge in the Appellant's cases but also as a Judge in the UT."

B3. I have considered whether an oral hearing is appropriate. Mr Crossland implies that I propose not to hold such a public hearing "under the cover of Covid". This is incorrect. Since the onset of the pandemic, and save for a period of some three weeks when the Upper Tribunal office was completely shut, this Chamber has arranged remote hearings by Skype for Business or by telephone. So, it would be perfectly possible to direct an oral hearing, albeit one held remotely. Mr Crossland, however, has made his points about recusal very clearly and at great length on paper. I am not persuaded that an oral hearing is proportionate or is needed for a fair and just determination of the application. Accordingly, I am not satisfied that the overriding objective requires an oral hearing of this issue.

The principles governing recusal
B4. I am treating this application as a preliminary issue in these proceedings. The principles governing recusal are well-established. They are set out in my decision in *Kirkham v Information Commissioner (Recusal and Costs)* [2018] UKUT 65 (at paragraphs 14-20). I repeat that passage here for convenience:

"*The principles governing recusal by a judge*
14. The law governing apparent bias is well known. The test is "whether the fairminded 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* [2005] 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.""

B5. There is a more concise account of those principles set out in my later decision in *Leighton v Information Commissioner (No.2)* [2020] UKUT 23 (AAC) at paragraph 35. There is, furthermore, a very helpful analysis of the principles governing recusal in the decision of Upper Tribunal Judge Jacobs in *Kirkham v Information Commissioner and UK Research & Innovation (Strike out and Recusal)* [2020] UKUT 93 (AAC). Judge Jacobs's discussion helpfully distinguishes between *recusal as a duty* and *recusal as a power* (see paragraphs 24-33). In addressing the latter power, Judge Jacobs observes as follows (at paragraph 33), citing *Triodos Bank N.V. v Dobbs*:

> "A litigant who wants a judge to exercise the power of recusal cannot do worse than insulting or criticising the judge or presenting their case in a way that appears to do so. This approach will almost certainly be self-defeating. In exercising the power to recuse, it is important that judges should not allow litigants to generate a recusal by criticising them, their conduct or their decisions."

The two relevant Upper Tribunal cases brought by Mr Crossland

B6. As already noted, Mr Crossland's application of 23 July 2020 was made in respect of "UT AAC Cases GIA/2169/2018 & GIA/26/2020". An explanation is in order here. The present appeal is GIA/2169/2018. Case GIA/26/2020 is an entirely different set of proceedings that Mr Crossland had also brought before the Upper Tribunal.

B7. In this other case, under file reference GIA/26/2020, Mr Crossland applied for permission to appeal against certain other case management decisions made by Judge McKenna CP in the First-tier Tribunal and relating to FTT appeal EA/2019/0252 (the present appeal, GIA/2169/2018, is concerned with FTT appeal EA/2017/0288). For the reasons I gave in my ruling on GIA/26/2020 dated 9 January 2020, I indicated I was minded to strike out that application for permission to appeal. This was on the basis that either the Upper Tribunal had no jurisdiction to hear the application (rule 8(2)(a)) and/or the application had no reasonable prospects of success (rule 8(3)(c)). Having considered but rejected Mr Crossland's representations, I proceeded to strike out the application in GIA/26/2020 on 4 May 2020. This summary is but the barest of outlines of the protracted proceedings in

GIA/26/2020. Mr Crossland's application that I recuse myself in the current appeal (GIA/2169/2018) is almost entirely devoted to his lengthy analysis of my rulings in GIA/26/2020. Although he also appears to be arguing that I should recuse myself in GIA/26/2020, I have already refused repeated applications to that effect and indeed those proceedings are now at an end in the Upper Tribunal. If the Appellant wishes to challenge my approach to the proceedings in GIA/26/2020, his remedy is to go to the High Court or the Court of Appeal (depending on precisely which decision is under challenge and which court has jurisdiction: see the explanation in my ruling in GIA/26/2020 dated 23 June 2020). This was reiterated in the Registrar's letter to him dated 9 July 2020.

B8. In his current recusal application, the Appellant barely mentions GIA/2169/2018. This is not in itself surprising as I have had minimal prior involvement in this present appeal. Indeed, my first (and until now only) judicial act in this long-running appeal has been to issue some rather humdrum case management directions on 25 June 2020. Thus, Mr Crossland's sole reference to GIA/2169/2018 in his lengthy recusal application reads as follows:

> "**APPELLANT'S CASE GIA/2169/2018**
>
> 56. The UT AAC inexplicably allocated another of the Appellant's cases GIA/2169/2018 to Judge Wikeley when he already had unanswered recusal applications from the Appellant. The Appellant is now facing the same treatment in case GIA/2169/2018 as in GIA/26/2020 and the Recusal Applications.
>
> 57. The level of detailed analysis and associated research to correlate and pin-down wrong doings of a very clever judge is a substantial and time consuming task for a litigant in person. However, if Judge Wikeley does not recuse himself or is not removed: then the Appellant will be obliged to carry out a similar but broader analysis including of (but not limited to) GIA/26/2020 and GIA/2169/2018 in the UT in the interest of justice."

B9. At this stage, I simply observe that the assertion in paragraph 56 is wholly misconceived on at least two grounds.

B10. First, even assuming there was an unresolved recusal application, there was nothing in principle to prevent the Chamber President from referring the appeal in GIA/2169/2018 to myself. Moreover, experience shows that Mr Crossland's standard response to case management directions with which he disagrees is first to demand that the judge concerned give further reasons for their reasons and then secondly to follow that up by an application that the judge in question recuse themselves.

B11. Second, there was in fact no undetermined recusal application. I can see from the file that the Chamber President referred the appeal in GIA/2169/2018 to me on 17 June 2020. That was plainly well before the current recusal application in the present proceedings, which is dated 23 July 2020. Mr Crossland also refers to what he describes as his first, second and third applications that I recuse myself in dealing with GIA/26/2020. He says the first recusal application in those proceedings was made on 5 March 2020 (which ran to some 18 pages), the second on 16 March 2020 (6 pages) and the third on 5 June 2020 (6 pages). I dealt with and dismissed the first recusal application in my ruling dated 4 May 2020. I also dealt with and dismissed the third recusal application in my ruling dated 23 June 2020. It is perfectly true there is no separate stand-alone ruling in GIA/26/2020 relating to what Mr Crossland asserts was his second recusal application. There are two reasons for this. The first is that

my ruling of 4 May 2020 dealt with the position as at that date and concluded there were no grounds for recusal. The second reason is that this so-called "second recusal application" added nothing. The 'second' application dated 16 March 2020 principally comprised representations on the proposed strike out of those proceedings. That much was plain from both the heading to the document and its principal text. Buried at the end of that 6-page document was paragraph 27, comprising just a single sentence, namely "Judge Wikeley is hereby requested to recuse himself re Misconduct with the PTA as particularised above". The issues "particularised above" were materially the same as the points made in the first application, which were explicitly addressed in the determination dated 4 May 2020. Thus, all extant recusal applications had been properly dealt with.

The Appellant's arguments on the recusal application

B12. As already noted, the Appellant's four grounds for seeking my recusal are almost entirely devoted to my conduct of GIA/26/2020. I reiterate that the recusal applications in those proceedings have been dealt with and indeed those proceedings in the Upper Tribunal are now at an end. However, I consider the arguments based on each of those four grounds in turn.

<u>The first ground of the recusal application</u>

B13. First, at paragraphs 33-40 of his application, the Appellant sets out what he states are "EXAMPLES OF DOCUMENTORY EVIDENCE OF JUDGE WIKELEY APPARENTLY LYING IN HIS RULINGS". On closer scrutiny, the Appellant's examples demonstrate nothing of the sort. It will be sufficient to consider the first example. This example referred to the 'Notice of Determination of Recusal Application' referred to above, which was dated 4 May 2020. According to Mr Crossland (at paragraph 33), he "cites examples, provides details and appends, the documentary evidence of the Judge Wikeley's apparent lying, apparently to cover-up his failures and discrimination against the LIP Appellant, including:-

> 34. (a) Paragraph 7 was untrue and covered-up that the LIP Appellant requested Clarifications and proper Reasons related to the Appellant's appeal, including the HRA issues necessary to inform the Appellant's response to the Proposed '*Draconian*' Strike Out of his case GIA/26/2020 (Appendix 'B').
>
> (b) Paragraph 8 was again untrue: Judge Wikeley also covered-up the fact that he had refused to provide any Clarification or Reasons requested by the Appellant. (It should be remembered that Judge Wikeley's failure to provide adequate reasons to litigants in person was a part of the Recusal Application).
>
> (c) Only dealt with the Appellant's Recusal Application dated the 5th March 2020, and failed to deal with or even refer to the Appellant's more comprehensive and more severe Recusal Application dated 16th March 2020 (Appendix 'H'), which was concerning Judge Wikeley's Proposals to Strike out the Appellant's case, including the Judge's refusal to provide Clarifications and Reasons for his proposals and failure to consider the details of the Appellant's appeal, particularly re the HRA."

B14. The Notice of Determination of Recusal Application to which Mr Crossland refers was one of two rulings that I issued on 4 May 2020. The other was the ruling striking out the application for permission to appeal in GIA/26/2020. The ruling on the recusal application was in terms that "I refuse the application by the Applicant that I should recuse myself from dealing with this application for permission to appeal (and any further applications or appeals involving the Applicant)." The reasons as set out

fell into two parts – first, paragraphs 1-10 set the context and then, secondly, paragraphs 11-17 set out the legal principles governing recusal and their application in the instant case. The passage dealing with the context read as follows:

> "1. On 2 December 2019 Mr Crossland made an application to the Upper Tribunal for permission to appeal against an interlocutory decision or decisions made by the First-tier Tribunal (General Regulatory Chamber) (Information Rights) ["the FTT"]. The application and appendices ran to a total of 163 pages.
>
> 2. On 9 December 2019 an Upper Tribunal Registrar wrote to Mr Crossland seeking clarity as to which specific decision by the FTT he was seeking to appeal (p.164).
>
> 3. On 16 December 2019 Mr Crossland replied (pp.165-166).
>
> 4. On 9 January 2020 I signed off Directions indicating that I proposed to strike out the application dated 2 December 2019 on the basis that either the Upper Tribunal had no jurisdiction to deal with the application and/or the application had no reasonable prospects of success (pp.167-171). Those Directions were issued by the Upper Tribunal office on 4 February 2020.
>
> 5. On 9 February 2020 Mr Crossland wrote making an application that he be provided with electronic copies of all documents in the proceedings in addition to the hard copies as provided for by the Tribunal Procedure (Upper Tribunal) Rules 2008.
>
> 6. On 14 February 2020 I dismissed Mr Crossland's application to receive electronic copies of all documents in the proceedings (pp.175-177). This ruling was issued by post by the Upper Tribunal office on the same date.
>
> 7. On 24 February 2020 Mr Crossland made a further application to the same effect.
>
> 8. On 26 February 2020 the Upper Tribunal Registrar wrote to Mr Crossland again, indicating that I had nothing to add to my earlier rulings.
>
> 9. On 5 March 2020 Mr Crossland applied to the Upper Tribunal for permission to appeal to the Court of Appeal against my ruling of 14 February 2020. That application has been dealt with in a separate ruling. He also apparently sought to make a complaint of judicial misconduct on my part. That, obviously, cannot be a matter for me. Finally, he applied that I recuse myself on the basis that "re his conduct, including apparent bias, lack of independence and lack of intellectual honesty such that any further involvement in any case of the LIP Appellant could not satisfy the necessary standards". Mr Crossland applied that I both recuse myself from dealing with (a) the present matter and (b) "withdraw… from any future involvement in any case involving the Appellant."
>
> 10. This ruling deals with this last application for recusal. I will take the points in reverse order."

B15. I return to Mr Crossland's objections, as enumerated in paragraph 34 of his application (see paragraph B13 above).

B16. First, he argues that "(a) Paragraph 7 was untrue and covered-up that the LIP Appellant requested Clarifications and proper Reasons related to the Appellant's appeal, including the HRA issues necessary to inform the Appellant's response to the Proposed '*Draconian*' Strike Out of his case GIA/26/2020 (Appendix 'B')." This is simply nonsense. Paragraph 7 expressly states that "a further application was made to the same effect", i.e. an application to receive electronic copies of all documents in the proceedings, as mentioned in the previous paragraph. The fact that other points may have been made in the further application is by the by and does not show in any sense that paragraph 7 was "untrue". In any event, the Upper Tribunal registrar's letter was noted (see paragraph 8) and the parallel ruling of the same date dealt with the strike out issue.

B17. Later on, in his present recusal application, the Appellant reverts to the recusal ruling dated 4 May 2020 and states as follows:

> "74. It should be noted that in Judge Wikeley's Reasons paragraph 7. The Judge makes an incorrect and misleading statement of - *'On 24 February 2020 Mr Crossland made a further application to the same effect.*' This statement clearly does not meet the Judicial standards for correctness, intellectual honesty or truthfulness, as the Application made by the Appellant related to clarifications and reasons related to Judge Wikeley's *Draconian* proposal of Judge Wikeley to strike out the Appellant's case GIA/26/2020 without a fair hearing, without addressing the Appellant's cases for the PTA including HRA and EA issues, and was not a further application."

B18. This again, is nonsense, and essentially for the same reason. The document of 24 February 2020 was headed by Mr Crossland himself as "Application for Permission to Appeal GIA/26/2020 Necessity for LIP Appellant to Receive Electronic Copies of Documents". My summary to that effect in a short chronology of the proceedings was entirely accurate. It was not "misleading" because, as with so much of Mr Crossland's correspondence, it ranged over other matters. The reference to the registrar's letter in the following paragraph of my determination was again an accurate summary. Mr Crossland's reasoning here is frankly at best obscure.

B19. Second, Mr Crossland contends that "(b) Paragraph 8 was again untrue: Judge Wikeley also covered-up the fact that he had refused to provide any Clarification or Reasons requested by the Appellant. (It should be remembered that Judge Wikeley's failure to provide adequate reasons to litigants in person was a part of the Recusal Application)." Again, this is further nonsense. Paragraph 8 conveys precisely the gist that the Appellant complains was "covered-up", namely that I was not prepared to give reasons for my reasons. My position was made abundantly clear by the registrar's letter to the same effect.

B20. Third, Mr Crossland alleges that the Notice of Determination dated 4 May 2020 "(c) Only dealt with the Appellant's Recusal Application dated the 5th March 2020, and failed to deal with or even refer to the Appellant's more comprehensive and more severe Recusal Application dated 16th March 2020 (Appendix 'H'), which was concerning Judge Wikeley's Proposals to Strike out the Appellant's case, including the Judge's refusal to provide Clarifications and Reasons for his proposals and failure to consider the details of the Appellant's appeal, particularly re the HRA." Yet again, this is nonsense. The second and so-called "more comprehensive" application of 16 March was nothing of the sort – see paragraph B11 above.

B21. In sum, paragraph 34 of the application is misconceived. It seeks to unpick what is an uncontroversial short scene-setting passage in a judicial ruling by asserting that it deliberately conceals information in such a way as to amount to a series of untruths. The remaining examples given in the Appellant's application are likewise misconceived and it would be wholly disproportionate to address each of them in turn. I remind myself that my obligation under the law is to give reasons for my decision, and not to address each and every point made by the Appellant, however tangential. This ground for recusal does not succeed.

<u>The second ground of the recusal application</u>
B22. The Appellant then sets out what he alleges are "EXAMPLES OF JUDGE WIKELEY'S FAILURE TO PROVIDE ADEQUATE REASONS". I have considered the 'examples' that Mr Crossland refers to. I am satisfied that they meet the test for the adequacy of reasons which applies across all courts and tribunals. As Lord Brown of Eaton-under-Heywood explained in the House of Lords' decision in *South Bucks District Council v Porter (No 2)* [2004] UKHL 33 (italicised emphasis added):

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. *Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision.*"

B23. Plainly Mr Crossland disagrees that my reasons are adequate. His remedy, depending on the nature of the ruling or decision in question, is to seek judicial review in the Administrative Court or to apply for permission to appeal to the Court of Appeal. He has not established any ground for recusal.

<u>The third ground of the recusal application</u>
B24. Next, the Appellant gives what he claims are "EXAMPLES OF JUDGE WIKELEY'S FAILURE TO CONSIDER AND ADDRESS LITIGANT IN PERSON'S LEGAL POINTS IN HIS CASES". This ground is asserted rather than reasoned. No illustrations are given. To some extent this is simply another way of putting the second ground for recusal. Mr Crossland alleges that I do "not consider it appropriate to consider and address legal points and arguments when presented by other than a legal professional, i.e. by a litigant in person such as the Appellant. The documented record indicates that he treats such legal points with contempt" (paragraph 52). The Appellant does not explain what he means by "the documented record". I consider this ground to be utterly misconceived (see, for example, *Leighton v Information Commissioner (No.2)* [2020] UKUT 23 (AAC), in which I carefully considered a litigant in person's detailed legal arguments). Again, this ground for recusal is not made out.

<u>The fourth ground of the recusal application</u>
B25. Finally, the Appellant refers to what he alleges to be my "FAILURE TO RECOGNISE HUMAN RIGHTS ACT & EQUALITIES ACT AND UPPER TRIBUNAL'S AND JUDGE'S DUTIES UNDER THESE ACTS".

B26. However, despite repeated references to the Human Rights Act 1998, Mr Crossland has singularly failed to explain the nature of any alleged breach with any degree of particularity. The Appellant makes fleeting mentions of the right to a fair trial under Article 6, but it is very doubtful as to whether Article 6 applies in the context of requests under FOIA (or the EIR) – see *Moss v Information Commissioner*

and the Cabinet Office [2020] UKUT 242 (AAC) at paragraphs 153-154. In addition, it is nowhere explained how e.g. an Upper Tribunal Judge's decision to strike out an application for permission to appeal or not to recuse herself/himself contravenes either the Human Rights Act 1998 or the ECHR. As a matter of domestic or international law, neither procedure (recusal or strike out) requires an oral hearing to be held. For example, as a matter of common law a case can be determined without an oral hearing unless that would be unfair (see *Osborn v Parole Board* [2013] UKSC 61). Similarly, the ECHR does not require a second-tier appellate tribunal (such as the Upper Tribunal) to hold an oral hearing where there has been an opportunity to have an oral hearing before the FTT (see e.g. *Hoppe v Germany* [2003] FKR 384). Moreover, simply because the affected person disagrees with the decision in question does not in itself constitute a breach of that individual's human rights.

B27. In the same way, the Appellant has simply referred to the Equality Act 2010 but without explaining how he says that Act has been breached beyond generalised allegations of discrimination and victimisation. If the Appellant's argument is put in terms of a failure by either the First-tier Tribunal or the Upper Tribunal to make reasonable adjustments, then I bear in mind that section 29 of the Equality Act 2010 does not apply to a tribunal exercising a judicial function: see paragraph 3(1) (a) and (b) and (2) of Schedule 3 to the 2010 Act and *L'OL v Secretary of State for Work and Pensions (ESA)* [2016] UKUT 10 (AAC); [2016] AACR 31 at paragraph 9. That said, clearly a person's health problems should be taken into account when applying the overriding objective set out in rule 2, which includes dealing with a case fairly and justly, and ensuring, as far as practicable, that the parties were able to participate fully in the proceedings (see *L'OL v SSWP (ESA)* at paragraphs 14-19). Those are undoubtedly issues that arise for decision on the substantive appeal in GIA/2169/2018 and are addressed in the main decision.

The recusal principles applied

B28. I have considered carefully whether (a) I am duty-bound to recuse myself and, if not, (b) I should as a matter of discretion exercise the power to recuse myself. I am satisfied that no fair-minded and informed observer would consider there was a real possibility of bias by my continuing to deal with this appeal. I have considered my rulings in GIA/1388/2018, GIA/2169/2018 (this appeal) and GIA/26/2020, all cases involving the Appellant.

B29. I recognise that I refused permission to appeal in the earlier application under reference GIA/1388/2018, which concerned case management decisions that also arise for consideration in the instant appeal. I do not consider that my previous role in that regard disqualifies me from dealing with the present appeal. I expressly noted in my ruling in GIA/1388/2018 that Mr Crossland was perfectly entitled to raise his objections to the case management rulings in an appeal against the First-tier Tribunal's substantive decision. Plainly, the fairness or otherwise of those rulings could only be properly judged after the conduct of, and the outcome to, the main appeal were both known. I note also that Judge Wright reached the same conclusion following an oral hearing, albeit not necessarily for the same reasons. I also note that the Court of Appeal has held that as a matter of principle the fact that a judge had refused permission to appeal was not a ground for requiring the same judge to stand down from hearing the full appeal (see *R (on the application of Holmes) v General Medical Council* [2002] 2 All ER 524; see to similar effect *Mahomed v Morris (No.1)* (2000) *Times*, March 1). In those circumstances, considering matters in the round, I am satisfied the duty to recuse does not arise.

B30. As for GIA/2169/2019, the instant appeal, my sole judicial act to date has been to issue some rather mundane case management directions. There is not even a hint of actual or apparent bias in those directions, so again the duty to recuse does not arise.

B31. I have had much closer involvement in GIA/26/2020, proceedings in which I struck out the Appellant's application for permission to appeal. But that, in and of itself, still gets nowhere near the threshold required under the fair-minded and informed observer test. All I have done is to issue a ruling explaining why the Appellant's submissions have not been persuasive. This is not the sort of judicial conduct that generates a duty to recuse oneself. If it were, no other judicial business would ever get conducted. It certainly falls well short of the recusal requirement as explained in *Locabail (UK) Ltd v Bayfield Properties Ltd* and the associated case law summarised above. Thus, the fact that the Appellant may be convinced in his own mind that I have erred in law does not mean that I was biased. As Rimer J once said, this type of argument is 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" (on which see *London Borough of Hackney v Sagnia* [UKEAT0600/03, 0135/04, 6 October 2005] at paragraph 63).

B32. I have also considered whether, as a matter of discretion, I should exercise the power to recuse myself. I can deal with this shortly. I do not do so for the reasons explained so eloquently by Chadwick LJ in *Triodos Bank N.V. v Dobbs* [2005] EWCA Civ 468 (see paragraph B3 above), on which I cannot improve (see also the helpful recent discussion of the relevant authorities in *Surrey Heath Borough Council v Robb & Ors* [2020] EWHC 1952 (QB)). The shrewd observation of Upper Tribunal Judge Jacobs in *Kirkham v Information Commissioner and UK Research & Innovation (Strike out and Recusal)* (see paragraph B5 above) is very much in point:

> "A litigant who wants a judge to exercise the power of recusal cannot do worse than insulting or criticising the judge or presenting their case in a way that appears to do so. This approach will almost certainly be self-defeating."

Conclusion

B33. In ruling on the Appellant's application that I recuse myself, I have considered all the relevant circumstances. Having done so, I am satisfied that the fair-minded and informed observer would not apprehend any real possibility of bias by my continuing to deal with this case. There is no good reason for me to recuse myself, whether pursuant to the mandatory duty to recuse or the discretionary power to recuse. I accordingly dismiss the recusal application and return to the main business of this appeal.