THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: GIA/2320/2019

APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

Tribunals, Courts and Enforcement Act 2007, section 11
Tribunal Procedure (Upper Tribunal) Rules 2008

Appellant:	Dr Reuben Kirkham
Respondent:	The Information Commissioner
Tribunal:	First-tier Tribunal (General Regulatory Chamber) (Information Rights)
First-tier Tribunal Case No:	EA/2018/0036
Date of decision:	02 October 2019

DECISION

Permission to appeal is refused.

REASONS FOR DECISION

A. When the Upper Tribunal can give permission

1. An appeal to the Upper Tribunal lies on 'any point of law arising from a decision' (section 11(1) of the Tribunals, Courts and Enforcement Act 2007). The Upper Tribunal has a discretion to give permission to appeal if there is a realistic prospect that the First-tier Tribunal's decision was erroneous in law or if there is some other good reason to do so (Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538).

B. Background

2. Following a hearing before the First-tier Tribunal (General Regulatory Chamber) (the **"FtT"**) on 5 March 2019 Dr Kirkham wrote to the FtT on 10 September 2019 to "order" a transcript of the hearing and a copy of the notes of the hearing made by Judge McKenna, Chamber President of the General Regulatory Chamber of the First-tier Tribunal (the **"Chamber President"**).

3. While the FtT initially refused to provide Dr Kirkham with a copy of the transcript of the hearing a transcript has now been provided to him, so my decision deals only with the request for the Chamber President's notes.

4. On 2 October 2019 an administrative officer of the FtT sent an email to Dr Kirkham in response to his 10 September request saying that the Chamber President's notes of the 5 March 2019 hearing were the judge's private property, Dr Kirkham was not entitled to "order" them, and they were absolutely confidential. She said that the Chamber President referred Dr Kirkham to the decision of the High Court in *R (McIntyre) v Parole Board* [2013] EWHC 1969 (Admin) (***"McIntyre"***) in support of her position. She said that the Chamber President would not be issuing any ruling on Dr Kirkham's application and invited him to address all further applications on the matter to the Upper Tribunal.

5. On 24 October 2019 Dr Kirkham applied to the Upper Tribunal for permission to appeal in respect of the 2 October 2019 email. Judge Markus QC decided the application on the papers. She was puzzled (as am I) by the Chamber President's position that she would not issue a ruling on Dr Kirkham's application, because the upshot of the email sent by the administrative officer on her behalf, was that she would not provide the notes. The email from the administrative officer amounted, in substance, to the Chamber President's refusal of Dr Kirkham's application. Judge Markus QC treated it as such and she waived the requirement in rule 21(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the **"UT Rules"**) that he must first apply to the FtT for permission to appeal before pursuing his application to the Upper Tribunal on the basis that such an application would have been pointless given the Chamber President's position that she had made no ruling which could be appealed. Judge Markus QC admitted the application but she refused permission to appeal because she decided that Dr Kirkham had no arguable right to the notes of the 5 March 2019 hearing. She said that the notes were not the record of proceedings and that, as set out in *McIntyre*, they were absolutely confidential. She said that the rationale set out in *McIntyre* applied equally to proceedings in tribunals as it did to court proceedings.

6. Dr Kirkham exercised his right to renew his application to the Upper Tribunal at an oral hearing. Dr Kirkham said that he wished to present slides to me at the hearing of his application, and he argued that simply sending the slide deck to me would be inadequate to capture the points he was seeking to make. I made directions for a remote hearing using a conference platform with a facility for screen sharing as I decided that this form of hearing would maximise Dr Kirkham's ability to participate in the hearing and to argue his case and was therefore in the interests of justice in this case.

7. The oral hearing was held by Skype on 30 October. I participated from The Rolls Building in London while Dr Kirkham participated from Australia. We were supported by a clerk. No-one else attended the hearing.

C. Preliminary issues

8. Dr Kirkham made three applications. The first was for me to vary my direction that he should restrict his presentation to a maximum of 15 slides. He had prepared a presentation running to 21 slides. I assured Dr Kirkham that I was happy for him to speak to his 21 slides. The second application was for me to agree to Dr Kirkham making his own recording of the hearing. I refused this application on the basis that HMCTS was recording the hearing, I had done a "dry run" of the recording feature to confirm that it would capture both audio and video without difficulty and I was confident that it would. I said that I would have no difficulty with Dr Kirkham bring provided with a copy of the recording. In the event it appears that there was an issue with the screen sharing because while the presentation

visible on my screen was stuck on an early slide 7 Dr Kirkham got much further forward with his presentation on his own screen. This didn't create any particular problem for me as I was mainly focusing on what Dr Kirkham was saying rather than looking at the slides to which he was speaking, but interestingly had Dr Kirkham been recording the hearing from his end as he had proposed he would have ended up with a recording that would not reflect what I had seen (and which would conflict with the record of proceedings made by HMCTS). Dr Kirkham kindly sent me the updated slides that he had presented after the hearing so I could look at those at my leisure while preparing this decision.

9. The third point related to litigation before the FtT in relation to the meaning of "any person" for the purposes of Sections 1, 50 and 57 of the Freedom of Information Act 2000 (**"FOIA"**), and whether non-UK nationals, those outside the UK, and those outside the EU at relevant times have standing to make requests under section 1(1) FOIA, to make applications under section 50(1) FOIA, or to appeal section 50(2) decisions under section 57 FOIA. Dr Kirkham asked, in effect, that I rule on these issues in order to "short-circuit" matters and avoid delay in getting the issues resolved.

10. The matter before me is a permission application. The purpose of the hearing is for Dr Kirkham to seek to persuade me that it is arguable, with a realistic prospect of success, that the FtT erred in law when it refused his application to be provided with a copy of the Chamber President's notes of the 5 March 2019 hearing. It is not an opportunity to seek to resolve any legal issues which are of interest to Dr Kirkham, whether for his academic research or to assist him in other cases to which he is party. The issues before the FtT in the linked cases to which Dr Kirkham referred do not arise in this appeal as I understand that Dr Kirkham is a UK national and I have no reason to believe that he was outside the jurisdiction when he made any request, application or appeal relevant to this matter. I therefore refuse Dr Kirkham's application for me to rule on these matters.

D. Dr Kirkham's grounds of appeal in summary

11. Dr Kirkham put his case in a variety of different ways:

a. as a decision of the High Court, *McIntyre* is not binding on the Upper Tribunal, and the FtT was wrong to consider itself bound by it;

b. even if *McIntyre* does apply to tribunals, it can be distinguished because in this case the hearing was recorded, but the recording was an incomplete record of proceedings;

c. *McIntyre* does not concern tribunals and there are good reasons why the principles outlined in it should not be applied to tribunals;

d. the principles set out in *McIntyre* should not be applied in relation to matters of science;

e. *McIntyre* is wrongly decided because:

i. it is based on an assumption as to the necessity of a judge's notes being kept confidential rather than on evidence;

ii. HMCTS does not in fact keep judges' notes absolutely confidential (as it disclosed evidence relating to the panel's deliberations in litigation

to which Dr Kirkham was a party and "the (Tribunal) world has not ended");

iii. granting access to the judge's notes would promote open justice without undermining the tribunal's impartiality; and

iv. the notion of a judge's work product other than the decisions s/he issues being their private property is "absurd" and has been criticised as such by distinguished jurists;

f. to deny Dr Kirkham access to the Chamber President's notes is analogous to excluding him from the hearing; and

g. the judge's notes should be disclosed to him because he requires them to prove that the Chamber President was biased against him, and to defeat an application for costs against him.

12. For these reasons, Dr Kirkham says, the Chamber President erred in law when she decided not to accede to his request for a copy of her notes.

13. Dr Kirkham argued that I need to review the Chamber President's notes before determining this application for permission to appeal (unless I am to grant permission), and that to refuse permission to appeal without doing so would be in error of law.

E. What does *McIntyre* say?

14. *McIntyre* concerned an application by Mr McIntyre's solicitor to be provided with a copy of the panel's notes of Mr McIntyre's parole hearing. Mr McIntyre applied for a judicial review of the Parole Board's decision" to fail to have a policy or practice regarding the disclosure of notes of Parole Board hearings recording evidence heard at such hearings and their refusal to disclose such notes."

15. The Administrative Court of the High Court drew a distinction between notes which constitute the record of proceedings on the one hand, and notes which are for the judge or chair's own use on the other. The then President of the Queen's Bench Division, giving the judgment of the Court, said:

> "23.The notes constituting the record are quite distinct from notes taken by the chair for his or her own use or notes made by a judge or chair where there is an audio or visual recording of the proceedings. Such notes do not constitute the record. Nor do they constitute personal data. They are made by the judge or chair or panel member solely for the purpose of assisting in and in preparation for the reaching of the reasoned decision; they are not a record of the proceedings. Their absolute confidentiality is integral to the independent and impartial decision making function of a judge or tribunal or panel member and the proper administration of justice. They are in effect notes made for the preparation of the judgment. They are no different to a preliminary draft of a judgment. If such notes are held by an administrative officer or on a computer system operated by an administrative body for the judge, tribunal or panel member, they are held on behalf of judge, tribunal or panel member and remain under the sole control of the judge, tribunal or panel member. No person has a right of access to them. They must never be disclosed or provided to any person."

> 24. For that reason it was accepted that if the notes of the chair contained observations which were made by the chair for the purpose of reaching a decision or setting out the reasons, then that part of the notes do(sic) not constitute part of the record and can never be made available."

F. Is the decision of the High Court in *McIntyre* binding on the Upper Tribunal?

16. The Upper Tribunal is constituted as a superior court of record (see section 3(5) of the Tribunals, Courts and Enforcement Act 2007). Other than when the High Court is exercising its supervisory jurisdiction, the Upper Tribunal is not bound, as a matter of *stare decisis*, by decisions of the High Court. A decision of the High Court will normally be followed by the Upper Tribunal as a matter of comity unless the tribunal is convinced that the judgment is wrong. However, within its specialist jurisdictions the Upper Tribunal "may in a proper case feel less inhibited in revisiting issues decided even at High Court level, if there is good reason to do so" (see *Secretary of State for Justice v RB* [2010] UKUT 454 (AAC) at [41]).

17. Following a detailed examination of the law in relation to precedent and the relationship between the Upper Tribunal and the High Court, the Upper Tribunal confirmed in *Gilchrist v Revenue and Customs* Commissioners [2015] Ch 183 that this remains the case following the decision of the Supreme Court in *R (Cart) v Upper Tribunal* [2012] 1 AC 663 (***"Cart"***):

> "85. In summary, we consider the following principles to apply in relation to the question of whether the High Court binds the Upper Tribunal as a matter of *stare decisis*:
>
> (i) The question whether the Upper Tribunal is bound by High Court decisions as a matter of *stare decisis* is a matter of Parliamentary intention, in the light of the well-recognised need for predictability and consistency of outcome.
>
> (ii) The Upper Tribunal is not bound by decisions of the High Court, as:
>
> (a) the intention of Parliament, in enacting the Tribunals Courts and Enforcement Act 2007 ("TCEA 2007") and constituting the Upper Tribunal as a court of superior record makes it clear that Parliament did not intend the Upper Tribunal to be bound by the High Court as a matter of *stare decisis*;
>
> (b) as a matter of principle, the need for predictability and consistency of outcome are not offended;
>
> (c) there is a substantial line of authority that Tribunals which are constituted as superior courts of record are free to depart from High Court decisions, which line of authority has not been disturbed.
>
> 86. None of the principles we have set out above is affected by the decision of the Supreme Court in *R (Cart) v Upper Tribunal* [2012] 1 AC 663 ("Cart"). The question whether the High Court binds the Upper Tribunal as a matter of *stare decisis* is conceptually distinct from the question whether the High Court has supervisory jurisdiction, as a matter of judicial review, over unappealable decisions of the Upper Tribunal."

18. I conclude that I am not bound by the High Court's decision in *McIntyre*, but that doesn't mean that the Chamber President was wrong to follow it, or that I shouldn't follow it if I consider it to be correctly decided (as to which see the further discussion below).

19. The First-tier Tribunal is bound by decisions of the Upper Tribunal, both in an individual case by virtue of TCEA s.12 and as a matter of precedent (see *Cart* at 75]). Where a decision of the Upper Tribunal conflicts with a decision of the High Court the First-tier Tribunal is bound to follow the Upper Tribunal precedent, and not the High Court, in accordance with the principles set out above. However, there was no Upper Tribunal authority which cast doubt on *McIntyre*. I am not, therefore, persuaded that it is arguable with a realistic prospect of success that the Chamber President erred in law in seeking to rely on McIntyre as authority for the proposition that her notes of the hearing were confidential and Dr Kirkham had no right to be provided with them.

G. Can *McIntyre* be distinguished on its facts?

20. Dr Kirkham argued that *McIntyre* be distinguished on the facts because his hearing fell between the two stools contemplated in *McIntyre*. The hearing in *McIntyre* was not recorded, and it was held that part of the chair's notes constituted the record of proceedings, but those parts that were made for the chair's own use were not part of the record of proceedings and should not be disclosed. The Court considered hearings that were recorded, and said that the notes made by a judge or chair in such hearings did not constitute the record but were "in effect notes made for the preparation of the judgment" and "no different to a preliminary draft of a judgment" (*McIntyre* at [23]).

21. Dr Kirkham maintained that his case was different because, while the hearing was recorded, the recording was an incomplete record of the proceedings. He argued that it was incomplete in two respects:

a. the recording was started part way through the hearing, and

b. the recording was audio only, so failed to capture drawings he made during the hearing.

22. It appears that the recording was begun very close to the beginning of the hearing, as the transcript begins with the words:

> "Thank you, take a seat. The recording equipment is now on. Just to reiterate what I said before it was switched on, we are going to have no opening statements, then the appellant is going to be cross-examined by Mr Davison[?] on behalf of the Information Commissioner's Office."

23. Dr Kirkham has not suggested that anything important was said before recording started, and he acknowledged that he did not seek the Chamber President's notes for the purpose of ascertaining what was said at the hearing, so the incompleteness of the record of proceedings is something of a red herring. Rather, he wanted to understand what the Chamber President made of the proceedings, the extent to which she was able to follow the proceedings, and what she might have betrayed of her thoughts about him in her notes when she thought that they would remain secret. As such the fact that the audio recording was not started until after some words had been exchanged does not render the principles set out in *McIntyre* inapplicable to this appeal.

24. Similarly, Dr Kirkham's point that the audio recording did not capture his drawings seems to be a technical objection rather than one of substance that goes to the fairness of the proceedings. It is clear from the transcript ("JUDGE MCKENNA: Do not do a demonstration, because it is not captured") that when Dr Kirkham began to draw the Chamber President asked him to stop for the very reason that it would not be captured by the record of proceedings. As such it is highly unlikely that the fact that the record of proceedings does not record Dr Kirkham's aborted drawing has resulted in any unfairness. Again, Dr Kirkham's interest in gaining access to the Chamber President's notes is not to understand what was drawn (by him) but rather to understand what the Chamber President was thinking.

25. A record of proceedings does not have to be complete in the sense that it captures everything that was said and done from the opening to the closing of the proceedings. Indeed, when a hearing is not recorded electronically the note made by the judge or chair that stands as the record of proceedings is necessarily only a summary of key evidence and submissions rather than a full transcript. The simple fact that a record of proceedings does not capture everything said or done at the hearing does not of itself open the door to an examination of the judge's notes of the hearing.

26. I am not persuaded that it is arguable with a realistic prospect of success that, given the incomplete nature of the audio record of proceedings, the Chamber President was in error of law in applying the principles set out in *McIntyre*.

H. Is *McIntyre* applicable to tribunals at all?

27. Dr Kirkham argues that the decision in *McIntyre* expressly does not apply tribunals and the principles set out in *McIntyre* should not be applied to them. He highlights the passage at paragraph [22] of the decision, which reads:

> "Similarly, in the Tribunals where there is no audio recording, the note of the Chairman constitutes the record: see the decision of Judge Hickinbottom, Chief Commissioner, (as he then was) in *R (DLA) 3/08*."

28. Dr Kirkham's point here, as I understand it, is that in drawing a *parallel* with tribunals, this passage demonstrates that the decision is not a decision *about* tribunals. While *McIntyre* is a decision of the High Court it concerns a parole board hearing, not a court or tribunal hearing, but the approach set out in *McIntyre* was clearly intended to be of broad application to judicial proceedings. It refers (at [23]) to the notes made by "the judge or chair or panel member" and when it sets out the principle that the absolute confidentiality of notes made solely for the purpose of assisting in and in preparation for the reaching of the reasoned decision is "integral to the independent and impartial decision making function" it does so in relation to "a judge or tribunal or panel member".

29. Dr Kirkham says that open justice is far weaker in the tribunals than in the courts because:

a. while most tribunal hearings are public few or no outside attendees typically attend;

b. more litigants are unrepresented in tribunal proceedings than in court proceedings, so there is less likelihood that counsel will pick up on

inconsistencies between what was said at the hearing and what the tribunal's decision says;

c. less scrutiny is applied to the decision making of tribunals on appeal because of the deference afforded to tribunals as specialist bodies;

d. a lower standard is expected of a tribunal's reasons than is expected of a court's; and

e. tribunals are intended to provide a relatively informal method of dispute resolution between citizen and state.

30. For these reasons, Dr Kirkham argues, it is important that proceedings in tribunals should be more transparent, and the principles set out in *McIntyre* should not apply to them.

31. I am by no means persuaded that what Dr Kirkham says about tribunals is true, but even if it were it does not follow that the notes of a tribunal judge should be treated differently from the equivalent notes of the chair of a parole board panel or a judge in the courts. Addressing Dr Kirkham's points in turn:

a. the hearing which concerned the High Court in *McIntyre* was a parole board hearing, which was not held in public. As such it was less "open" than the hearing of 5 March 2019, which members of the public were entitled to attend. The fact that no third parties chose to attend does not stop the hearing from being "open";

b. the judge's notes, except to the extent that they constitute the record of proceedings, would not assist in identifying inconsistencies between what was said in evidence or argument in proceedings and what the judge says in his or her judgment or statement of reasons. In this case there is a recording and a transcript, so any inconsistencies between what was said and what is said in the judgment will be apparent and could provide material for challenge on appeal;

c. while some deference is afforded by the appellate courts to certain aspects of the decision making of tribunals in acknowledgement of their specialism this deference is quite limited in nature and it doesn't prevent decisions of the First-tier Tribunal being subjected to intense scrutiny by the (also specialist) Upper Tribunal, as well as by the Court of Appeal and Supreme Court;

d. there is considerable authority as to what is required of the reasons given by a tribunal for them to be considered "adequate". Inadequacy of reasons amounts to an error of law and renders a decision vulnerable to set aside. It is not the case that a "lower standard" is expected of a tribunal's reasons than of a court's. In any event, Dr Kirkham has not explained how giving access to a judge's notes made in preparation for writing their reasons would "cure" poor reasons, if he is correct that a lower standard applies to tribunals; and

e. the intention that tribunals should provide a less formal forum for the resolution of disputes (or, in the words of the overriding objective, "avoiding

unnecessary formality and seeking flexibility in the proceedings") does not require that the judge's notes, as opposed to the record of proceedings and the tribunal's reasons, should be liable to be disclosed.

I. Do the principles set out in *McIntyre* apply in relation to matters of science?

32. Dr Kirkham argued that the principle set out in *McIntyre* should not be applied in relation to matters of science because judges are, with very few exceptions, ill-equipped to understand matters of science and technology. He provided me with an academic paper which he had written on this very subject. He maintained that to do justice in cases which hinge on matters of science it is important for the purposes of considering potential grounds of appeal or indeed potential grounds for a future recusal application, to understand the extent to which the judge understood the evidence and argument before them. For that reason, he argued, the judge's notes showing not what was said but what the judge *understood* of what was said, should be liable to disclosure.

33. I don't see this as a good reason for departing from the principles set out in *McIntyre*. If a judge fails to understand the evidence or argument before them this will be apparent when the judge's reasons are read against the record of proceedings, which must explain to the standard of adequacy why the judge made the decision they did.

34. If the judge's explanation of their assessment of the evidence and argument discloses a misunderstanding (as opposed to a view of the evidence and/or of the law that is not shared by the appellant but is within the range of reasonable positions open to them on the evidence and argument before them) that misunderstanding is likely to be sufficient to establish an error of law. Sight of the judge's notes is not necessary for this purpose, and is unlikely to help.

J. Was *McIntyre* wrongly decided?

35. Dr Kirkham argued that *McIntyre* was wrongly decided. He said that the principle that the "absolute confidentiality" of a judge's notes (except to the extent that they stand as the record of proceedings) is "integral to the independent and impartial decision making function of a judge or tribunal or panel member and the proper administration of justice" was entirely unsupported by evidence, and therefore invalid.

36. The fact that no evidence was offered in support of the statement does not make it wrong. The then President of the Queen's Bench Division was entitled to make his statement of principle based not on statistics but on his own understanding and experience of the business of judging. Dr Kirkham says that granting access to judges' notes would promote open justice and would not undermine the tribunal's impartiality, but he himself offers no evidence in support of his statement, except to note that he has received copies of email correspondence between panel members and the judge in relation to an appeal to which he is a party, as well as correspondence between the judge and a registrar in another, and that these communications have given him partial access to the tribunal's deliberations, and "the (Tribunal) world has not ended" as a result.

37. Dr Kirkham makes the point that the disclosure to him of the emails referred to above demonstrates that HMCTS does not in fact keep judges' notes and correspondence absolutely confidential, but the fact of their disclosure does not mean that the rule stated in

McIntyre is wrong. It just means that it has been breached in this instance. What of Dr Kirkham's evidence that "the (Tribunal) world has not ended" as a result of these disclosures? The authors of the emails to which Dr Kirkham refers would not have been aware that their emails would be disclosed, and the authors would be unlikely to be inhibited in writing emails in the future simply because past emails had been disclosed in error given their confidence in the applicability of *McIntyre*.

38. However, the consequence of an isolated disclosure of emails in a particular case is very different from the consequence of a decision that establishes precedent for the proposition that judges' notes (and, as Dr Kirkham argues, correspondence) in preparation for the drafting of a judgment are liable to disclosure. Such a decision would mean that judges, chairs or panel members would have in mind the possibility that their notes would be scrutinised in connection with potential appeals, or indeed for other purposes, and this would be likely to change their approach to note taking, or perhaps cause them to stop writing notes altogether, due to concern that their notes might be misconstrued. This would not be likely to serve the interests of justice.

39. Dr Kirkham invoked the American jurist Richard Posner and quoted him as saying that he considered the notion that judges own their work product other than their published judicial output as "absurd", but the opinion of an American jurist is not determinative of the proper approach to be followed in the courts or tribunals of England and Wales.

40. While I am not bound by McIntyre as a matter of *stare decisis* I agree with it in principle and there is no good reason for me not to follow it. I am not satisfied that it is arguable with a realistic prospect of success that *McIntyre* was wrongly decided or that the Chamber President was wrong to rely on it when deciding to refuse Dr Kirkham's application.

K. Was denying access to the judge's notes analogous to excluding Dr Kirkham from the hearing?

41. Dr Kirkham argued that preventing him from seeing the Chamber President's notes is analogous to excluding him from his hearing, but the two things are not analogous at all. Dr Kirkham was present at the hearing and he participated fully in it. He had an opportunity to take his own notes during the hearing and he was (eventually) given an audio recording of the hearing and a transcript of that recording. There is no real sense in which he was excluded from the hearing.

42. What Dr Kirkham really seeks is access to the Chamber President's thinking during the hearing, which he believes access to her notes will provide. To the extent that a judge's notes of the hearing might show something of the judge's thinking what they show is reflective only of what the judge was thinking at the time that the particular note was made. The judge's thinking may well develop during the course of the hearing, or indeed after it has finished.

43. A judge must make decisions based on reasons. The law specifies the circumstances in which the judge must provide those reasons. Sometimes a judge will give judgment extempore at the end of a hearing, at other times the judge will announce the decision but give reasons at a later date, and at other times the judge will reserve judgment

entirely until a later date. While in the first two cases the judge must have arrived at their decision and have developed their reasons for that decision by the time the decision is announced, in the third category of case the judge may have arrived at a preliminary view at the end of the hearing but may legitimately write a judgment which gives a completely different outcome, based on different reasons, having changed their mind as they reflected on the evidence and submissions after the hearing. In such circumstances the judge is not obliged to explain the initial view arrived at and the journey that took them from that initial view to their final decision. The judge need only give their final decision and their reasons for it. There is no right of access to a judge's developing thinking. If there were it would not enhance understanding of judicial decision making or further the interests of justice but would instead be liable to sew confusion, with the prospect of a nightmarish Derridan scenario of appeals being pursued based not on what was said in the judge's reasons, but rather on what the judge made a note of but decided *not* to say in their reasons.

L. Relevance of the possible content of the notes, the purpose for which the notes are requested, and their importance to the requester

44. Dr Kirkham told me that he was wholly confident of being able to win his substantive appeal and that the Chamber President's notes were not necessary for him to demonstrate that she had erred in law in numerous respects. His reason for seeking the Chamber President's notes was instead to establish what he believed, based on extensive circumstantial evidence, to be the case i.e. that the Chamber President was biased against him. He explained that it was necessary for him to demonstrate this to defeat a costs application which he faces in related proceedings, and to establish that the Chamber President is not a proper person to be involved in his appeals (having failed to persuade Judge Jacobs that she erred in not recusing herself on grounds of competence in other proceedings).

45. Dr Kirkham speculated as to what the Chamber President's notes might show, contemplating a spectrum extending from a blank sheet of paper, to a detailed note that demonstrated that she had confused references to "Excel" with references to "SQL", to inappropriate comments betraying a private animus towards him. He argued that I needed to see the Chamber President's notes myself before determining this application because unless I knew what was in them I couldn't decide whether he should see them. I don't accept that. For the reasons I have explained above Dr Kirkham has no arguable right to be provided with the Chamber President's notes because they are absolutely confidential in accordance with the principles laid out in *McIntyre*, irrespective of what they say and irrespective of the use to which Dr Kirkham intends to put them.

M. Other submissions

46. For the sake of completeness I note that Dr Kirkham made wide-ranging arguments about the Chamber President's conduct of, and decisions in relation to, various matters that are not before me, as well as trenchant criticisms of others in the General Regulatory Chamber. He seeks not only the Chamber President's notes of the hearing but also correspondence she might have had with her panel members or indeed with others, including with the Upper Tribunal, in relation to the substantive appeal to which this application relates. The delivery to him of emails which include limited disclosure of panel

deliberations have whetted his appetite for further documentation which he hopes will help him to prove what he believes to be the case about the workings of the General Regulatory Chamber and he told me he needs "the rest".

47. I do not deal with those submissions as they fall far outside the scope of this permission application. My role is to decide whether it is arguable that the Chamber President's decision to refuse Dr Kirkham access to her notes involved the making of an error of law, and nothing broader than that. A permission application is not an opportunity to litigate or re-litigate points which have arisen in other proceedings.

48. Dr Kirkham invoked the Convention for the Protection of Human Rights and Fundamental Freedoms (the **"Convention"**) and asserted that the Chamber President's refusal to provide him with her notes of the hearing breached his rights under Articles 6 and 10 of the Convention, but he hasn't explained how he thinks his rights have been breached. I am by no means persuaded that it is arguable that access to the Chamber President's notes of the hearing was required for Dr Kirkham to enjoy his rights either to a fair trial or to freedom of expression.

N. Conclusion

49. I refuse permission to appeal to the Upper Tribunal because I am not satisfied that it is arguable with a realistic (as opposed to fanciful) prospect of success that the Chamber President erred materially in law when she refused Dr Kirkham's application to be provided with her notes of the hearing of 5 March 2019 and there is no other reason justify a grant of permission to appeal to the Upper Tribunal.

(Signed on the original)

Thomas Church

Judge of the Upper Tribunal

Dated **20 November 2020**