

[2017] AACR 25
(SK v Secretary of State for Work and Pensions (AA))
[2016] UKUT 529 (AAC)

Judge Jacobs
28 November 2016

CA/2920/2016

Upper Tribunal procedure – rule 43 of Tribunal Procedure (Upper Tribunal) Rules 2008 – does not apply to procedural irregularities in First-tier Tribunals and does not allow challenges to Upper Tribunal’s decision or reasoning

The Upper Tribunal (UT) refused the claimant permission to appeal as her claim to have been self-employed had not been before the First-tier Tribunal (F-tT) and therefore had to be disregarded. The claimant applied to the UT for the refusal decision to be set aside, arguing that her self-employed status should have been apparent to the F-tT from both the calculation of her state pension and her testimony during the hearing. Under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 the UT may set aside its decision if it considers that it is in the interests of justice to do so and if one or more of following conditions within rule 43(2) are satisfied, namely: (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party’s representative; (b) a document relating to the proceedings was not sent to the UT at an appropriate time; (c) a party, or a party’s representative, was not present at a hearing related to the proceedings; or (d) there has been some other procedural irregularity in the proceedings.

Held, dismissing the application, that:

1. no information or reference to the claimant’s self-employment was contained within either the calculation of the claimant’s state pension or the record of the tribunal proceedings (paragraphs 5 to 6);
2. the matters raised by the claimant challenged the correctness of the UT’s decision and accordingly were outside the scope of rule 43, which was limited to matters of procedure and the UT’s handling of the claimant’s application and did not encompass judicial errors (paragraphs 7 to 10).
3. the only way to challenge a decision refusing permission to appeal to the UT was by way of judicial review, an appeal to the Court of Appeal being excluded by section 13(8)(c) of the Tribunals, Courts and Enforcement Act 2007. The importance of maintaining proper jurisdictional boundaries applied equally to that jurisdiction as to an appeal. Moreover, rule 43 applied to all decisions that disposed of proceedings, so it must be interpreted and applied consistently to all those decisions, regardless of whether they could be challenged by way of appeal or on judicial review (paragraph 11);
4. the scope of the enabling power under which rule 43 was made was also important as it controlled its permissible scope. In R(U) 3/89 the Social Security Commissioners interpreted their equivalent power by reference to the enabling provision which applied only to procedure. The same was true of rule 43 which was made under the Tribunals, Courts and Enforcement Act 2007, which in section 22 provided for “rules ... governing ... the practice and procedure” of the F-tT and UT (paragraph 12);
5. the judge explained why any complaints of procedural irregularity by the F-tT were outside the scope of rule 43 (paragraphs 13 to 14).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008:

The decision of the Upper Tribunal of 17 October 2016, refusing permission to appeal against the decision of the First-tier Tribunal made on 1 March 2016, is NOT SET ASIDE.

REASONS FOR DECISION

1. The claimant has applied for me to set aside my decision. Before dealing with the application, it is helpful to set out the legislation that governs the Upper Tribunal’s power to set aside one of its own decisions.

A. Legislation

2. The Upper Tribunal has limited jurisdiction to set aside its own decisions. The power is contained in rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). It confers a limited, discretionary jurisdiction:

“Citation, interpretation, application and interpretation

1. – ...

(2) These Rules apply to proceedings before the Upper Tribunal except proceedings in the Lands Chamber.

...

Setting aside a decision which disposes of proceedings

43. – (1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if –

- (a) the Upper Tribunal considers that it is in the interests of justice to do so; and
- (b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are –

- (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party’s representative;
- (b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;
- (c) a party, or a party’s representative, was not present at a hearing related to the proceedings; or
- (d) there has been some other procedural irregularity in the proceedings.”

B. The application

3. I have read the claimant’s application to set aside my decision. In view of its contents, I did not consider it necessary for the Secretary of State to have an opportunity to make representations.

4. The application does not disclose any basis on which I could set aside my refusal of permission under rule 43. There is nothing to show that any of the conditions in rule 43(2) is satisfied. In any event, it would not be in the interests of justice under rule 43(1)(a) to set the decision aside, because the claimant has not identified any issue of law that would justify giving permission under section 11 of the Tribunals, Courts and Enforcement Act 2007.

5. The claimant’s application mainly refers to what I wrote in paragraph 3 of my refusal of permission:

“I see that you now mention having been self-employed. That evidence was not put to the First-tier Tribunal, so I must disregard it. The Upper Tribunal has to decide whether to give permission to appeal on the evidence that was before the First-tier Tribunal. It is not permissible for the Upper Tribunal to take account of other evidence, whether or not it was in existence at the time of the hearing before the First-tier Tribunal.”

The claimant now says that the information about her self-employment was apparent from the calculation of her state pension credit and that she told the First-tier Tribunal that, after an accident in the factory where she had been working, she was self-employed.

6. Those matters are outside the scope of rule 43. I explain why later. First, as a courtesy, I deal with the points the claimant has made about her self-employment. With regard to her state pension credit calculation, this is in the First-tier Tribunal's papers. It does not contain any information to indicate that she was self-employed. With regard to what she told the First-tier Tribunal, I have read the whole of the record of proceedings for both hearings before the First-tier Tribunal. The judge took a detailed record in clear handwriting. It appears to be a comprehensive record of what everyone said and there is no mention of self-employment. There is also a printout of her national insurance record, which contains no contributions relating to self-employment. I remain of the view that that issue was not put to the First-tier Tribunal.

7. I now explain why these matters are outside the scope of rule 43. This is because that rule is limited to matters of procedure and what the claimant says is a matter of substance. In other words, the rule is concerned with how the Upper Tribunal handled the claimant's application for permission to appeal. It does not provide a means of challenge to the decision itself or the reasons on which it is based. The points the claimant makes in respect of her self-employment do not relate to how this tribunal dealt with her application. Rather, they challenge the correctness of my decision on the merits of her application.

8. Powers like that conferred by rule 43 have been consistently interpreted as applying only to procedural irregularities and not as including challenges to the substance of the tribunal's decision or reasons. That is how rule 43 has been interpreted by the Tax and Chancery Chamber of the Upper Tribunal in *Tager v Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 663 (TCC):

"18. The error on which Miss McCarthy relies is not of the same character. It occurred, not because a document which should have been available to me was absent, because Mr Tager was not present, or for any similar reason, but because (if Miss McCarthy is right) I failed to understand the evidence available to me, or made a finding which was not supported by that evidence. That is, classically, a judicial rather than procedural error. In my view the manner in which the rule has been drafted makes it clear that it was intended to apply only in the case of failings which have led to a flawed hearing, and that it cannot be extended to encompass judicial errors."

The same reasoning applies to all the Chambers of this tribunal. As a three-judge panel of the Administrative Appeals Chamber said in *VK v Commissioners for Her Majesty's Revenue and Customs (TC)* [2016] UKUT 331 (AAC); [2017] AACR 3:

"4. ... The rules of procedure are, to a large extent, generic. The circumstances of the various jurisdictions may require the rules to be applied differently, but it cannot be right that the same language should have a different meaning in different contexts."

9. The Upper Tribunal has also given the same interpretation to the equivalent power in rule 45 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699) in *R (LR) v First-tier Tribunal (Health, Education and Social Care Chamber) and Hertfordshire County Council (SEN)* [2012] UKUT 213 (AAC), [2013] AACR 26:

"46. ... What is contemplated by a 'procedural irregularity' can be inferred both from the existence of the distinct enabling power to provide for a set aside in Schedule 5 of TCEA, contrasted with section 9 of that Act, and from the residual category which forms rule 45(2)(d) coming after a list of procedural difficulties such as documents going missing, people not attending and so on. I respectfully agree with Judge Jacobs, writing extra-judicially in *Tribunal Practice and Procedure* (Second Edition) at page 535 where he observes that 'the power is limited to procedural errors; it does not allow a decision to be

set aside for matters that relate to the substance of the decision'. I accept however that if, contrary to my view, there had been a point of substance, it could potentially have been dealt with by way of review under rule 49."

10. In the employment jurisdiction, the Employment Appeal Tribunal in *Trimble v Supertravel Ltd* [1982] ICR 440 at 442 emphasised the importance of not interpreting equivalent powers (there it was called "review") to impinge on the proper scope of an appeal:

"As it seems to us the fundamental question is whether or not the industrial tribunal's decision that the employee had failed to mitigate her loss was reached after she had had fair and proper opportunity to present her case on the point, being aware that it was a point which was in issue. We do not think that it is appropriate for an industrial tribunal to review their decision simply because it is said there was an error of law on its face. If the matter has been ventilated and properly argued, then error of law of that kind fall[s] to be corrected by this appeal tribunal. If, on the other hand, due to an oversight or to some procedural occurrence one or other part can with substance say that he has not had [a] fair opportunity to present his argument on a point of substance, then that is a procedural shortcoming in the proceedings before the tribunal which, in our view, can be correctly dealt with by a review under rule 10 of schedule 1 to the Industrial Tribunals (Rules of Procedure) Regulations 1980, however important the point of law or fact may be. In essence, the review procedure enables errors occurring in the course of the proceedings to be corrected but would not normally be appropriate when the proceedings had given both parties a fair opportunity to present their case and the decision had been reached in the light of all relevant argument."

The importance of preserving the proper scope for an appeal has been emphasised by the Court of Appeal in *Compagnie Noga D'Importation et D'Exportation SA v Abacha* [2001] 3 All ER 513 at [47] and by a three-judge panel of the Upper Tribunal in *R (RB) v First-tier Tribunal (Review)* [2010] UKUT 160 (AAC); [2010] AACR 41.

11. There is no appeal to the Court of Appeal against a decision refusing permission to appeal to the Upper Tribunal, because it is excluded by section 13(8)(c) of the Tribunals, Courts and Enforcement Act 2007. The only route of challenge is by way of judicial review. The importance of maintaining proper jurisdictional boundaries applies equally to that jurisdiction as to an appeal. Moreover, rule 43 applies to all decisions that dispose of proceedings, so it must be interpreted and applied consistently to all those decisions regardless of whether they can be challenged by way of appeal or on judicial review.

12. The scope of the enabling power under which rule 43 was made is also important, as it controls its permissible scope. The Social Security Commissioners in R(U) 3/89 interpreted their equivalent power by reference to the enabling provision, which applied only to procedure:

"24. ... This provision is authorised under paragraph 1 of Schedule 13 to the Social Security Act 1975. It does not extend further than procedural irregularities ..."

The same is true of rule 43. It is made under the authority of section 22 of, and paragraph 15(2) of Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007. Section 22 provides for "rules ... governing ... the practice and procedure" of the First-tier Tribunal and the Upper Tribunal. And paragraph 15(2) is found in Part 1 of the Schedule that "makes further provision about the content of Tribunal Procedure Rules" (paragraph 1(1)).

13. The claimant's application also refers to the absence without explanation of a presenting officer from the first hearing of her appeal. An officer was in attendance at the resumed hearing. This matter is also outside the scope of rule 43. As rule 1(2) makes clear, the Rules apply only to proceedings in the Upper Tribunal. They do not allow me to set aside my decision on account of

a procedural irregularity in the course of the First-tier Tribunal's proceedings. That tribunal has an equivalent power to rule 43 that it can use in appropriate cases.

14. Moreover, rule 43 only allows the Upper Tribunal to set aside *its* decision. The only way that a procedural irregularity in the First-tier Tribunal could affect my decision refusing permission is if it showed an issue of law on which I could give permission to appeal. That shows that a mistake in the First-tier Tribunal's decision properly goes to the substance of the claimant's application and not to the procedure in the Upper Tribunal. As I have shown, the substance of a decision is outside the scope of the rule.

15. For those reasons, I have refused the claimant's application.