THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: GIA/2422/2019
[2020] UKUT 93 (AAC)

KIRKHAM V INFORMATION COMMISSIONER AND UK RESEARCH AND INNOVATION (STRIKE OUT AND RECUSAL)

Decided without an oral hearing

Representatives

Dr Kirkham	Represented himself
Information Commissioner	Richard Bailey, solicitor to the Commissioner
UKRI	Took no part

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference: EA/2018/0216
Decision dates: 5 and 22 July 2019

Recusal (5th July 2019)

The decision of the Chamber President not to recuse herself did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

Strike out (22 July 2019)

The decision of the Chamber President to strike out the proceedings involved the making of an error in point of law. It is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal to give case management directions to bring the appeal to a hearing. Those directions may be given by the Registrar or Judge who has made decisions on the appeal so far.

REASONS FOR DECISION

1. On 20 June 2019, the Chamber President of the General Regulatory Chamber of the First-tier Tribunal gave notice to Dr Kirkham that she was considering striking out the proceedings in his appeal. On 5 July 2019, she refused to recuse herself from making any decision in this case or any other case (present or future) involving Dr Kirkham, including allocating judges to hear his cases. On 22 July 2019, she struck out the proceedings in the appeal under rule 8(3)(b) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976). She later gave Dr Kirkham permission to appeal to the Upper Tribunal against both decisions. I have decided that the strike out decision was wrong in law, but that the recusal decision was not. I deal with them in that order.

A. How those decisions came to be made

2. Dr Kirkham made a request for information on 15 August 2017. The relevant public body is now UK Research and Innovation. There followed a complaint to the Information Commissioner, who issued her decision notice on 7 September 2018. Dr Kirkham lodged his appeal against that notice on 3 October 2018. In the meantime, he had pursued a challenge to the First-tier Tribunal in respect of the contents of an email from the Commissioner's office, which he claimed amounted to a decision notice. This had gone on for roughly 10 months before the actual decision notice was issued and continued after the appeal against that notice was lodged.

3. The Registrar of the General Regulatory Chamber then gave case management directions and Dr Kirkham raised a number of issues. He applied for permission to appeal against some of the directions. His application to the Upper Tribunal was refused under reference *GIA/0306/2019*, first by Upper Tribunal Judge West on the papers (12 February 2019) and then by me on oral reconsideration (1 April 2019). I will say more about this later.

4. On 5 April 2019, the Registrar issued a direction. She ended by expressing her concern that it might not be possible to be fair and just to all parties, with the consequence that the proceedings might be struck out under rule 8(3)(b). She added that she would not take the decision whether or not to strike out the proceedings. She attached a six page chronology from the request for the information, through the dispute about the email from the Commissioner's office, and the ending with the course of the appeal to date.

5. On 20 June 2019, the Chamber President issued a proposed strike out ruling, setting out her concerns and inviting Dr Kirkham's comments. He applied for the President to recuse herself, which she refused on 5 July 2019. Dr Kirkham then make his submissions on the strike out. On 22 July 2019, the President struck out the proceedings. Finally, on 6 September 2019, she gave permission to appeal against the recusal and strike out decisions.

6. The Information Commissioner has made a submission, opposing the appeal. UK Research and Innovation has not made a submission.

B. Rule 8

7. The Chamber President relied on rule 8(3)(b):

> **8 Striking out a party's case**
>
> …
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> …
>
> (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; …

She treated this provision as having two limbs. First, she considered whether Dr Kirkham had failed to co-operate. Then, she considered 'whether these proceedings may now be determined fairly and justly going forward.'

8. Legislation has to be interpreted as a whole. As Lord Bridge said in *Woodling v Secretary of State for Social Services* [1984] 1 WLR 448 at 352:

> The language of the section should, I think, be considered as a whole, and such consideration will, I submit, be more likely to reveal the intention than an attempt to analyse each word or phrase separately.

This is not, of course, inconsistent with considering some of the individual words or phrases, as Lord Bridge went on to do. But his approach is particularly appropriate to a provision like rule 8(3)(b) which requires a judgment of the effect of the extent of the appellant's failure.

9. The reference to a failure to co-operate, linked with dealing with proceedings fairly and justly, refers back to the parties' duty to 'co-operate with the Tribunal generally' (rule 2(4)(b)), to the 'overriding objective of these Rules [which] is to enable the Tribunal to deal with cases fairly and justly' (rule 2(1)), and to the parties' duty to 'help the Tribunal to further the overriding objective' (rule 2(4)(a)).

10. The Chamber President was familiar with the provisions I have just quoted, and referred to them extensively in her proposed strike out direction and in her decision to strike out the proceedings. Why then, in the context of the second of her two instances of failure to co-operate, did she refer to 'a misuse or abuse of the Tribunal's process within the terms of the case law to which [Dr Kirkham] has been referred'? And what was the case law to which Dr Kirkham had been referred? The answer is in her proposed strike out ruling. The case law is *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, in which Lord Bingham said at 31 that the decision to strike out a case involved:

> … a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court …

That case is an authority on the general approach to striking out, but the reference to misusing or abusing the process of the court is not part of the statutory language under the Tribunals, Courts and Enforcement Act 2007 and it is better not to import it. It may be that the concept of misuse or abuse can be incorporated, in a particular case, into the analysis of failure to co-operate, but doing so merely introduces an additional and unnecessary complication to the process of applying rule 8(3)(b). I am not, though, setting aside the decision on this ground because (a) it is clear that the Chamber President knew the correct test to apply and (b) her reasoning suggests that she would have come to the same conclusion even without the concept of misuse or abuse.

C. The Chamber President's grounds for striking out the proceedings were in error of law

11. I come now to the grounds given by the Chamber President to support her conclusion that Dr Kirkham had failed to co-operate to such an extent that the tribunal could no longer deal with the proceedings fairly and justly. I emphasise that these are the only grounds she gave. She gave two instances of failure to co-operate, one relating to the listing of the appeal, the other to Dr Kirkham's behaviour in relation to *GIA/0306/2019*. She said that either of her grounds on its own was 'of such gravity that a strike out would be the appropriate course' and that that was even more so when they were taken together. Dr Kirkham did not understand 'his obligations or intends to comply with the standard of behaviour properly to be expected of a litigant before this Tribunal in the future. I conclude that there is an unacceptable risk going forward that he will behave in a manner which delays proceedings, increases the costs of the Respondents, and disrupts the Tribunal's usual processes.'

Ground 1 – impossible to list for hearing

12. The Chamber President's first ground related to the difficulties in making practical arrangements for the hearing of Dr Kirkham's appeal. In summary, this is what the President said. Dr Kirkham had asked for expedition, but made frequent interlocutory applications that delayed listing. He also took up a post at an Australian University. Coming to the practicalities, Dr Kirkham had proposed a video hearing split over at least four mornings. He did not address the Registrar's concerns about the increase in the costs of the other parties and of the tribunal itself that this would involve. The Chamber President decided that his proposal would not be fair, because:

- it would increase the other parties' costs unreasonably;
- it would be unreasonably disruptive of the tribunal's usual business;
- Dr Kirkham was vague about when he would be back in this country;
- it would not be fair to delay listing for his return.

She concluded: 'I share the Registrar's concerns that the Appellant has left the jurisdiction and thus put himself beyond the reach of the usual sanction for unreasonable behaviour.' There are a number of flaws in this reasoning.

13. I begin with the alleged lack of co-operation. Arguing for a particular listing arrangement is not of itself a failure to co-operate with the tribunal. Dr Kirkham put his proposal. The Chamber President's grounds suggest that she either had to take it or reject it. That is not correct. The tribunal is responsible for deciding on the listing of an appeal. It will take account of the wishes of the parties and the convenience of their representatives, but the final decision is a matter for the tribunal. The tribunal should have made a decision on listing and proceeded accordingly, without allowing delay for interlocutory issues.

14. Coming to the ability to deal with the case fairly and justly, this includes 'seeking flexibility in the proceedings' and 'ensuring, so far as practicable, that the parties are able to participate fully in the proceedings' (rule 2(2)(b) and (c)). The Chamber President's grounds contain no reference to those factors. Dr Kirkham cannot be blamed for taking up employment abroad. There is no suggestion that this was a tactic to delay the proceedings on the appeal. Courts and tribunals conduct hearings by telephone or video link and take account of time differences. Just off the top of my head, the Upper Tribunal has conducted hearings with parties in Switzerland, Malta and Canada. It also held a short permission hearing by telephone with Dr Kirkham in Australia just before Christmas 2019. So the technology is not a problem and Dr Kirkham is comfortable with it. The important feature of this case is the length of the hearing suggested by Dr Kirkham. As I have said, this is a matter for the tribunal to decide, not for him to dictate. That aside, the video time could be reduced by a combination of written arguments and pre-reading, leaving a shorter video hearing for clarification and questions. It may also be possible that some adjustment to the normal sitting hours could reduce the number of days involved. Courts and tribunals are no longer tied to the normal business hours for hearings, so a degree of compromise is possible. On that basis, it ought to be possible to list this case in a way that is, in the Chamber President's own words, 'consistent with the achievement of the overriding objective.'

15. Isn't there an obvious flaw in what I have just said? Won't Dr Kirkham want to challenge any decision that he does not like? Possibly, but he will need permission to do so. The Upper Tribunal, like all appellate bodies, does not favour giving permission to appeal on matters like listing arrangements, preferring to wait to see whether they have affected the fairness of the proceedings and their outcome when they are concluded. So long as the First-tier Tribunal makes reasonable case management decisions, does not give permission to appeal and continues with the listing pending any decision by the Upper Tribunal, this is not an objection to my suggestions.

Ground 2 – concealing an application to appeal to the Upper Tribunal

16. The Chamber President's second ground related to an application to the Upper Tribunal for permission to appeal to the Upper Tribunal against an interlocutory ruling earlier in this case. This is Upper Tribunal case *GIA/0306/2019*, which I have mentioned already. Dr Kirkham had asked the Administrative Appeals Chamber not to disclose to the First-tier Tribunal that he was applying for permission to appeal. His request was of no effect, because

the staff handling his case asked the First-tier Tribunal for a copy of the relevant papers, in accordance with standard practice. The Chamber President remarked that Dr Kirkham's request 'appeared designed to circumvent a ruling that the substantive appeal would not be listed for hearing so long as there were additional interlocutory matters awaiting decision by the Upper Tribunal.' She concluded that Dr Kirkham's 'conduct of the litigation … represented a misuse or abuse of the Tribunal's process within the terms of the case law to which [Dr Kirkham] has been referred.' I have already commented on that language.

17. This reasoning may appear not to sit well with the first ground. There Dr Kirkham was criticised for his demands for listing his appeal. Here he is criticised for taking a step that was intended to ensure that the listing process could continue. That would, though, be unfair to the Chamber President. Her criticism is of the secrecy employed and that it 'appeared designed to circumvent a ruling' that listing would not continue. I emphasise that she did not use this as an indication of an inconsistent course of conduct that was designed to frustrate proceedings.

18. The striking fact about Dr Kirkham's request is that it was an attempt that did not succeed. It was scuppered by the standard practice of the Administrative Appeals Chamber to obtain the First-tier Tribunal's documents from the tribunal itself rather than rely on the appellant to provide them. What Dr Kirkham is accused of is trying, and that has engendered a lack of trust in his future conduct.

19. This ground has to be considered on its own merits. It gains nothing of value by being taken in combination with the first ground, which is flawed for the reasons I have given.

20. A single instance of trying to conceal an appeal to the Upper Tribunal is not sufficient to draw any conclusions about lack of integrity. The President can be sure that Dr Kirkham will not try that one again, now that he knows it won't work. As to the opportunity for further lack of integrity, which is the wider issue underlying the second ground, this comes back to case management. Many, probably most, cases can be managed with routine directions, adapted for the particular circumstances of the case. Others require more attention. The approach taken will vary according to need. My reading of the history of this case, based on the Registrar's chronology, is that Dr Kirkham was not trying to frustrate the listing of his appeal or to disrupt the operation of the General Regulatory Chamber. What he wanted was his case heard, but on his terms. That is consistent with my experience of Dr Kirkham in the Upper Tribunal. The key to case management of his cases is to set the boundaries within which the proceedings will be conducted, after taking his views into account. That may require a hearing for directions. The approach has to be proactive and directive. The risk of delay is less of a concern once it is appreciated that a party can only delay if the tribunal allows it. The possibility of an appeal against robust directions should not concern the First-tier Tribunal, provided that they are fair: *In the matter of TG (a child)* [2013] EWCA Civ 5 at [35]-[36].

The Information Commissioner's submission on strike out

21. The Commissioner argued that the Chamber President had been entitled to make the decision she did. I do not accept that, for the reasons I have given.

Two final words on case management

22. The case management powers in the General Regulatory Chamber are, as I understand, generally exercised by its Registrar. What I have just said is not intended as a criticism of her approach. A Registrar inevitably is seen as carrying less authority than a judge and that can make it difficult to be as directive and proactive as some cases require.

23. Although I have set aside the decision to strike out Dr Kirkham's appeal, that does not prevent it being struck out again if the circumstances justify it.

D. The recusal decision

24. There are two types of recusal: recusal as a duty and recusal as a power. The Chamber President dealt with both in her decision. I will take them separately, as they raise different issues.

E. Recusal as a duty

The approach to bias

25. This arises when there is bias, actual or apparent. The judge is required to take no further part in the proceedings, which is expressed as a duty to recuse themselves. The test of recusal for apparent bias was set out by Lord Hope in *Porter v Magill* [2002] 2 AC 357:

> 103. … The question is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

It is a mystery to me why at the start of the third decade of the third millennium our jurisprudence is encumbered by this observer. They provide a useful shorthand for the test, but beyond that their presence merely stands as an unnecessary embodiment of the knowledge, understanding and values that inform the application of the test. They perform no useful role in that application. It is better to concentrate on the factors that determine the decision, which is what I am going to do.

26. There are numerous examples in the caselaw of matters that are or are not indicative of apparent bias. They share two concerns. One concern is with appearance, that justice be seen to be done. They are factors that are capable of giving rise to a legitimate concern that the judge may be predisposed against a party. The other concern is with risk. The risk that the predisposition may materialise. But also the risk, given the nature of the way that the factors pointing to bias operate, that the judge may not be aware of the effect they are having.

Competence

27. Dr Kirkham's main argument in favour of recusal was competence. In contrast to the factors indicative of bias, competence is not a matter of appearance. It is judged by whether the decision is either correct, in those cases where it must be either right or wrong, or permissible, in those cases where a judgment is involved. There are recognised ways to deal with the correctness of a decision: review under section 9 or 10 of the Tribunals, Courts and Enforcement Act 2007, appeal under sections 11 or 13, and judicial review. Correctness has nothing to do with appearance; it does not figure. Finding an error is not equated with, or indicative of, bias. Nor is apparent bias an indication that the judge has or would come to a wrong or impermissible decision. It is about whether the judge should ever have embarked on, or continued with, making a decision. It is about satisfying the public concern for impartial decision-making, not about correcting errors in decision-making. And it is about recognising that the sort of factors that can occasion an appearance of bias can operate without the judge making the decision being aware of them or that they are influencing the decision, and that their influence may be difficult or impossible to detect on scrutiny by an appellate tribunal. Apparent bias is about risk management, not quality control.

28. This was not Dr Kirkham's only argument in support of recusal. He also referred to the pecuniary interest that the Chamber President had in being made a High Court judge. His argument is that the President cannot acknowledge her errors or, as he puts it, her incompetence without harming her prospect of advancement to the High Court. A pecuniary interest in a decision is a ground for recusal. But the link that Dr Kirkham has proposed is too remote to trigger that principle, even apart from the evidential problems in laying a proper foundation for it.

29. Dr Kirkham also put some other points in support of his application for the President to recuse herself, but in substance they are merely supplementary to the two arguments I have just dealt with. In summary, those arguments including the supplementary points were not sufficient to require the President to recuse herself.

F. Recusal as a power

30. This arises when there is no bias, actual or apparent, but a judge decide to take no further part in the case or arranges for it to be transferred to another judge for decision. This may be for any of a number of reasons, including convenience, workload, broadening or making use of experience, or as a judgment that an extra assurance of impartiality would be desirable. Recusal is regularly used to describe this process. That is especially so of the final example in my list. The reality is that, unless the recusal occurs during a hearing, this is no more than an allocation decision, which is part of case management.

31. Since recusal in these circumstances is not required to avoid bias, it is discretionary. As such it is very difficult to challenge on appeal. Discretions are treated like other exercises of judgment, qualified as appropriate to take account of the element of choice inherent in a discretion. Even if the tribunal relied on an

irrelevant factor or overlooked a relevant one, the choice involved may make it difficult to show that this was material. And if it comes down to arguing for an error in the balancing exercise, an exercise of a discretion will only be wrong if it is outside the 'generous ambit of reasonable disagreement' allowing 'some slight extra level of generosity apt to one which is discretionary but not to one which is evaluative.' On appeal against a tribunal's exercise of discretion 'the review by an appellate court is at its most benign.' See *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 at [44]-[45] and [112].

32. By their nature, exercises of the power of recusal are unlikely to appear in the caselaw. The only reported case I know in which a judge recused himself without apparent bias being shown is *ex parte Church of Scientology of California*, reported in The Times of 21 February 1978. The Church applied for Lord Denning MR to recuse himself on account of having presided over so many previous, unsuccessful appeals by the Church. This is the report of the judgments:

> After their Lordships had conferred, the Master of the Rolls said that if the Church of Scientology felt that its case would be a little disturbed by his sitting on it, that was the last thing he would wish to do and he would see that it came before a court in which his Lordship was not sitting.
>
> Lord Justice Shaw that it was almost impossible to resist the application even though the grounds were not merely slight but non-existent.
>
> Lord Justice Waller, agreeing with Lord Justice Shaw, thought that only the persuasive way that counsel had put the application gave any substance to the otherwise non-existent grounds for it.

33. 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. As Chadwick LJ explained in *Dobbs v Triodos Bank NV* [2005] EWCA Civ 468:

> 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 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. …

The Chamber President was right not to allow the criticisms of her to affect her judgment on this issue. She was entitled not to exercise the power to recuse herself.

G. What next?

Strike out

34. The strike out decision involved the making of an error of law. Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, I have power to remit the case to the First-tier Tribunal or to re-make the decision. In the circumstances of this case, they come to the same thing. I only have power to re-make the decision under appeal. I do not have power to take the proceedings into the Upper Tribunal and decide them here as if at first-tier.

35. I know that Dr Kirkham would like me to direct that neither the Registrar or the Chamber President should have any future involvement in this case or in any of his cases. I have power to give directions to the First-tier Tribunal under section 12(2)(b)(i), but they must be limited to the individual case and cannot apply generally to all cases involving Dr Kirkham. I have not directed that the Registrar or the Chamber President have no further involvement in this case and, indeed, have authorised them to do so, for two reasons. One is that doing so would effectively go behind my decision on the recusal issue. The other is that the arrangements that will have to be made to deal with the Covid-19 emergency may mean that imposing restrictions on the way that the General Regulatory Chamber operates would not be appropriate in any event.

Recusal

36. Dr Kirkham has asked for a hearing so that I can give directions to the Chamber President to provide evidence, explaining various matters. I refuse that application. Dr Kirkham has won on the strike out, so the case will go back to the First-tier Tribunal. There is no error of law in the recusal decision because his approach to his application to the President was fundamentally flawed. This is not a case in which the outcome can be changed by obtaining evidence or by the additional material he wants to introduce.

37. Dr Kirkham also referred to materials concerning the appointment of a High Court judge. As I understand it, that is the subject of a separate Upper Tribunal case.

Dr Kirkham's final plea

38. In the final paragraph of his reply to this appeal, Dr Kirkham wrote:

> What I would like is a fair, speedy and effective process for dealing with FOIA cases. I hope these proceedings can start to bring them about.

The way to achieve that aim is for Dr Kirkham to obtain directions from the First-tier Tribunal about the preparation for, and listing of, his appeal and for him to comply with them to bring the case to a hearing at the earliest possible date.

Signed on original
on 17 March 2020

Edward Jacobs
Upper Tribunal Judge