DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

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

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated November 23, 2016 under file reference EA/2015/0194 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Information Commissioner's Decision Notice FS50560132, dated August 17, 2015, is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the re-hearing:

(1) The new First-tier Tribunal should not involve either the tribunal judge or either of the two members who were previously involved in considering this appeal on November 23, 2016.

(2) These Directions may be supplemented by later directions issued by the Registrar or a Tribunal Judge in the General Regulatory Chamber of the First-tier Tribunal.

This decision is given under section 12(2)(a), 12(2)(b)(i) and 13(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

"Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it."

T. Blair, *A Journey* (Hutchinson, 2010), p.516

Politicians, expenses and freedom of information

1. Where the two words "politicians" and "expenses" appear in close proximity to each other, the phrase "freedom of information" will not be lagging far behind. The present appeal is not just about politicians and their expenses, but about (former) Prime Ministers and their expenses. A former Prime Minister may claim a Public Duty Cost Allowance (PDCA) for office and secretarial expenses incurred in connection with their public duties. The PDCA is currently set at a maximum of £115,000 a year for each previous holder of that office. The Cabinet Office publishes the total annual amount paid to each former Prime Minister under the PDCA.

2. Mr Webber is a freelance journalist who made a request to the Cabinet Office under the Freedom of Information Act 2000 (FOIA) for more detailed information about PDCA expenditure. The present appeal concerns his request for copies of each former Prime Minister's receipts and other supporting documentation ("the disputed information"). The request relates to PDCA claims made by (or made on behalf of) John Major, Tony Blair, Gordon Brown and the late Lady Thatcher.

3. At this point I should admit to the casual reader of Upper Tribunal decisions that the present appeal is not quite as interesting as that introduction might teasingly suggest. The reason for this is that Mr Webber, the Information Commissioner and the Cabinet Office are all agreed that the First-tier Tribunal went wrong in law, even if they are not quite all agreed as to *how* the Tribunal went wrong in law. Furthermore, the primary focus of these proceedings before the Upper Tribunal has been on the First-tier Tribunal's use of its statutory power to review its own decisions, as it made both a first decision and then, following a review, a second decision. The substantive and headline-catching issues about the PDCA have not really been ventilated during this Upper Tribunal appeal. That may be for another day.

The Upper Tribunal's decision: the short version

4. The short version of my decision is that the First-tier Tribunal (from now on, "the Tribunal") made a material error of law in its approach to the use of its power of review under section 9 of the Tribunals, Courts and Enforcement Act (TCEA) 2007 when making its second and post-review decision. I therefore allow Mr Webber's appeal and set aside the Tribunal's second decision. I am not in a position to re-make the Tribunal's decision myself. I therefore send the case back for re-hearing before a differently constituted First-tier Tribunal. The longer version of my decision is as follows.

The Cabinet Office's response to Mr Webber's FOIA request

5. The Cabinet Office refused Mr Webber's request for copies of each former Prime Minister's receipts and other supporting documentation. It refused to disclose the disputed information, citing section 40(2) of FOIA (third party personal data). Mr Webber lodged a complaint with the Information Commissioner.

The Information Commissioner's decision on Mr Webber's complaint

6. The Information Commissioner investigated Mr Webber's complaint. In the course of this process, the Cabinet Office relied on section 41(1) of FOIA (information provided in confidence) as well as section 40(2). The Information Commissioner concluded that the requested information was exempt from disclosure under section 41(1). Having reached that conclusion, the Commissioner did not proceed to rule on the section 40(2) issue, but expressed the opinion that it was "highly unlikely" that disclosing information relating to individuals alive at the time of the request would be in accordance with data protection principles (and so the disputed information would also be exempt under section 40(2)) – see the Decision Notice at paragraphs 30-31. I simply interpose here that those individuals might not just be the former Prime Ministers, but also members of their staff (the "third party data subjects"). Mr Webber lodged an appeal with the Tribunal.

The First-tier Tribunal's first decision

7. The parties to the appeal before the Tribunal were Mr Webber and the Information Commissioner. With their agreement, the Tribunal dealt with the appeal without holding an oral hearing. That was entirely sensible. The Cabinet Office did not apply to be joined as a party. That was not entirely sensible (more on this anon).

8. The Tribunal first convened on February 22, 2016. It promulgated its first decision on March 22, 2016. The Tribunal concluded (contrary to the view of the Information Commissioner) that the disputed information was not exempt under section 41(1) of FOIA. However, as regards the section 40(2) exemption, the Tribunal recognised that the personal data related both to the PDCA claimants (the former Prime Ministers) but also certain non-claimants, namely individuals involved in processing the claims and others who were recipients of payments e.g. for secretarial services provided to those former office holders. The Tribunal drew a distinction between the way that the data protection principles played out as regards claimants and non-claimants respectively.

9. Allowing Mr Webber's appeal in part, the Tribunal issued a substituted Decision Notice and ruled as follows in its first decision (as summarised at paragraph [51]):

> '(1) that part of the Disputed Information which comprises the personal data of the four former Prime Ministers is not exempt under section 40(2), and must be disclosed, except for any bank account details; and
>
> (2) that part of the Disputed Information which comprises the personal data of other individuals (including their names, personal addresses, and personal email addresses) should be anonymised and/or redacted as further specified in the Confidential Annex, before the Disputed Information is disclosed to the Appellant.'

10. What happened after that is helpfully summarised by the Tribunal in a footnote to its second decision (dated November 23, 2016):

> *'The Cabinet Office was not a party to this appeal. Following promulgation of the decision of the First-tier Tribunal ("FTT"), the Cabinet Office applied to be joined as a party. That application was allowed on 21 April 2016 by the President of the General Regulatory Chamber. On 20 May 2016, the Cabinet Office made an application for permission to appeal the FTT's decision to the Upper Tribunal, or in the alternative, for the FTT to set aside its decision under Rule 44 of the Tribunal Procedure (First-tier Tribunal) (General*

> *Regulatory Chamber) Rules 2009. The application was made on various grounds. By a decision dated 10 October 2016, the application was refused on all grounds except that the FTT agreed to review the decision on one point only, namely, whether the steps as set out in the Confidential Annex would be effective to provide anonymity in relation to non-claimants (the "Review Question").'*

11. The substituted Decision Notice in the Tribunal's second decision was in precisely the same terms as the substituted Decision Notice in the Tribunal's first decision. However, what had previously been paragraph [51] of the Tribunal's decision had now become paragraph [53]. Sub-paragraph (1) was identical; sub-paragraph (2) was slightly modified and sub-paragraph (3) was new (the latter two sub-paragraphs now drawing a distinction between two categories of non-claimants):

> '(1) that part of the Disputed Information which comprises the personal data of the four former Prime Ministers is not exempt under section 40(2), and must be disclosed, except for any bank account details;
>
> (2) that part of the Disputed Information which comprises the personal data of the staff who received payment from the individual former Prime Ministers' offices is exempt under section 40(2), and should be redacted as further specified in the Open Annex and Confidential Annex; and
>
> (3) that part of the Disputed Information which comprises the personal data of other individuals involved in making or processing the claims is exempt under section 40(2) in some cases, and should be redacted as further specified in the Open Annex and the Confidential Annex, but is not exempt in other cases.

12. The amendments to this summary concluding paragraph were not the only changes. The Tribunal helpfully explained as follows in the footnote to its second decision:

> '*As a result of the review, paragraphs 50 to 53, inclusive, of the decision are new or have been revised. There has been no change to paragraphs 1 to 49, inclusive. The content of the former paragraphs 52 to 54, inclusive, have not been changed, except for their numbering. There is a new Open Annex, and paragraph 2 of the Confidential Annex has been revised.'*

The proceedings before the Upper Tribunal

13. Mr Webber (GIA/279/2017) and the Cabinet Office (GIA/735/2017) both applied for permission to appeal to the Upper Tribunal. The First-tier Tribunal refused both applications. I granted both applications, commenting that "it is usually not a good sign when two parties independently seek permission to appeal". Mr Webber's appeal has been treated for convenience as the lead case.

14. There has been no request for an oral hearing of this appeal to the Upper Tribunal. All parties are seemingly agreed that such a hearing is unnecessary and disproportionate. I am also satisfied that the appeal can be dealt with fairly and justly 'on the papers'. I have had the benefit of two rounds of detailed written submissions from Mr Webber in person and Mr Matthew Hill of Counsel (for the Cabinet Office), joined in round 2 by Mr Christopher Knight of Counsel (for the Information Commissioner). I am indebted to them all for their incisive analysis. In particular, Mr Webber has more than held his own forensically in some talented legal company.

15. In this decision I will not travel down all the procedural by-ways explored in the course of my earlier observations and in some of those submissions by the parties. I will stick to the main highway and explain my conclusions on the principal issues. I do so – rather than issuing a consent decision with no or minimal reasons – not least as this sorry tale holds a number of lessons which other tribunals should be alive to if they decide to review a decision under the powers contained in section 9 of the TCEA 2007.

The Upper Tribunal's analysis

Was the First-tier Tribunal entitled to exercise its power of review under rule 44?

16. It will be recalled that, having been joined as a party, the Cabinet Office applied to the Tribunal for permission to appeal the first decision to the Upper Tribunal, or in the alternative for that decision to be set aside. Rule 43(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976; "the 2009 Rules") provides as follows:

> '**43.**—(1) On receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 44 (review of a decision).

17. Rule 44(1) in turn provides:

> '**44.**—(1) The Tribunal may only undertake a review of a decision—
> (a) pursuant to rule 43(1) (review on an application for permission to appeal); and
> (b) if it is satisfied that there was an error of law in the decision.'

18. Mr Webber's primary argument is that there simply was no legal error by the Tribunal in its first decision that had the effect of triggering the review power under section 9 of the TCEA 2007 and rule 44 of the 2009 Rules. At most, he argued, and assuming the Tribunal's first decision did not properly anonymise all the data subjects, then the Tribunal had made an error of fact, not an error of law – the redacted information it thought rendered the disputed information anonymous did not in fact do so. Absent any error of law, he contended, the review was unlawful and the first decision remained intact. There are four reasons why I am not persuaded by this analysis.

19. First, the division between an error of fact and an error of law is not as hard-edged as Mr Webber suggests; rather it is notoriously blurred at the margins. Indeed, there may well be circumstances in which a more flexible approach to the fact/law distinction is taken in tribunals as against in courts (see Lord Carnwath in *R (Jones) v First-tier Tribunal* [2013] UKSC 19; [2013] 2 AC 48 at paragraphs 42-48; see also the Court of Appeal's decision in *Criminal Injuries Compensation Authority v Hutton & Ors* [2016] EWCA Civ 1305 at paragraph 57 and the incisive critique by Professor Mark Elliott of the University of Cambridge: https://publiclawforeveryone.com/2017/03/24/cica-v-hutton-the-lawfact-distinction-and-the-opportunities-and-risks-of-post-analytical-reasoning/).

20. Second, as the Tax and Chancery Chamber of the Upper Tribunal has recently observed (see *Vital Nut v HMRC* [2017] UKUT 192 (TCC) at paragraph 45(6)), rule 44 does not mean that there *must* be an error of law in the Tribunal's decision before the review power can be exercised:

> 'the conditions precedent for a review – or "gateway" requirements, as we call them – require there to be an application for permission to appeal and that the FTT be satisfied that there is an error of law in the decision. There is no requirement that there actually be an error of law, merely that the FTT be satisfied that there is, which is a very different matter.'

21. Third, it is plain from the rulings the Tribunal issued after its first decision that it was satisfied it had erred in law. In short, it concluded it had failed to consider whether it had properly anonymised the third party data subjects. The purport of the original decision was that the third party data subjects should not have their personal data disclosed, and so identifying information should be redacted. The issue of identifiability involves certain issues of fact, but also shades into issues of law (e.g. a failure to make sufficient findings of fact). Plainly, the Tribunal recognised that the methodology it had adopted had failed to achieve that end. As Mr Knight for the Commissioner submits, the Tribunal "had created the problem and it was entitled to consider how best to solve it".

22. Fourth and finally, and in any event, I recognise that a tribunal's decision to review (or indeed not to review) an earlier decision is an "excluded decision" within section 11(5)(d)(i) of the TCEA 2007 and so is non-appealable. It is, in theory, susceptible to judicial review but that is one of the procedural by-ways (or more likely procedural cul-de-sacs) down which I do not propose to travel, given the overriding objective.

23. Accordingly in my view the Tribunal was entitled to exercise its review power under rule 44.

Which review power did the First-tier Tribunal exercise under section 9?

24. Section 9(4) of the TCEA 2007 provides:

> '(4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following—
> (a) correct accidental errors in the decision or in a record of the decision;
> (b) amend reasons given for the decision;
> (c) set the decision aside.'

25. Nowhere did the Tribunal say which of these routes it was following. There is no suggestion that it was merely correcting "accidental errors" under section 9(4)(a). So it must have been either amending its reasons (section 9(4)(b)) or setting the decision aside (section 9(4)(c)). I readily confess that my original and provisional view (initially shared by the Information Commissioner) was that the Tribunal was doing the former, given the additional reasoning in the second decision. That raised the very real question as to whether the additional reasoning went beyond the proper boundaries of section 9 in an *ex post facto* attempt to make the first decision appeal-proof (see further *JS v Secretary of State for Work and Pensions* [SSWP] *(DLA)* [2013] UKUT 100 (AAC); [2013] AACR 30). However, on balance I have concluded that the Tribunal was actually setting the first decision aside under section 9(4)(c).

26. My reason for that conclusion is that on closer analysis the Tribunal's second decision went beyond amending its reasons for its first decision (whether within or without the constraints of section 9(4)(b), as interpreted by cases such as *JS v SSWP (DLA)*). True, the terms of the Tribunal's substituted Decision Notice remained exactly the same. But the underlying substance of that Decision Notice had in fact morphed – the Tribunal's decision about the extent of the information that should be disclosed had changed, with an entirely new and detailed Open Annex explaining the

redactions. So, for example, the first decision provided that Mr Webber should be provided with the amounts of specific staff salaries paid to specific (albeit redacted) staff names, while under the second decision both the salaries (and National Insurance figures) and the staff names were to be redacted.

27. Given that the Tribunal was acting under section 9(4)(c), it also had to decide ("the First-tier Tribunal *must* decide") whether to "re-decide the matter concerned" or "refer that matter to the Upper Tribunal" (see section 9(5)). In practice the Tribunal plainly took the first of those alternative courses of action, even if it did not explain why or even avert to the fact it had to take one or other such course.

What was the effect of the Tribunal's exercise of section 9(4)(c) on the first decision?
28. The Tribunal's first decision was reviewed and set aside. Mr Webber acknowledges as much in his final reply to the Respondents' submissions. The necessary corollary of that is the first decision no longer had any legal effect. It had become an ex-decision. This much is clear both from the ordinary meaning of "set aside" and from the terms of section 9(11) of the TCEA 2007. Furthermore, the Tribunal's decision to set aside the first decision is non-appealable (see TCEA 2007, section 11(5)(d)(iii), as is the decision that was set aside itself (see TCEA 2007, section 11(5)(e)). Theoretically at least there may be some possibility of those "excluded decisions" being susceptible to judicial review. However, I agree with Mr Knight that by this stage the Tribunal's first decision cannot "be resurrected, zombie-like, from the legal oblivion into which it had quite properly been cast on review".

Did the First-tier Tribunal err in law in its approach to the section 9(4)(c) review?
29. In a word, yes. At the very least (and this common ground on all sides) the Tribunal failed to give adequate reasons. It failed to explain whether it was acting under section 9(4)(b) or (c). It also failed to explain which course of action it was adopting under section 9(5) and why. It did not even make it clear that its first decision had indeed been set aside (and confusingly I note that at the time of writing the first and second Tribunal decisions are both available on the public website of First-tier Tribunal information rights decisions, suggesting that the first decision still has some sort of zombie existence in hyperspace, even if legally of no effect whatsoever). In the circumstances of this case – and all parties are agreed on this – these omissions amounted to a material error of law, not least given the late joinder of the Cabinet Office and the significance of the changes made in the Tribunal's second decision. It was important for the Tribunal to be clear about what it was doing in procedural terms and why it was doing that, and to explain to the parties (and the Upper Tribunal) why. It did not.

30. There is yet a further procedural wrinkle in this appeal. The Senior President's Practice Statement (dated February 27, 2015) on the composition of tribunals in the General Regulatory Chamber provides, in mandatory terms, that the default position is that any matter decided under "section 9 of the Tribunals, Courts and Enforcement Act 2007 must be decided by one judge". This is subject to the proviso "unless the Chamber President considers it appropriate that it is decided" either by the same panel or by a new panel. It seems clear that in the present case the Tribunal's second decision on review was decided by the same full panel and presumably on the Chamber President's say-so. I say that as there is a chain of emails on file in the Cabinet Office's parallel appeal in which a member of the Tribunal staff refers to the panel reconvening in November. In any event I take the view that the presumption of regularity can be applied. However, and especially given the terms of the Practice Direction, it would be best judicial practice to spell out (either in the review decision itself or in a separate ruling) the route adopted in settling the composition of the Tribunal second time around.

So what should the Upper Tribunal do now?

31. The options now before me are set out in section 12(2) of the TCEA 2007. Having identified a material error of law, I have a discretion as to whether or not to set aside the Tribunal's second decision (the first decision, of course, has already been set aside by the Tribunal's own hand). Given the material failure to explain the procedural steps it was taking on the review, and the fact that all parties are agreed (for a variety of reasons) that the second decision involves an error of law on procedural or reasons grounds (before we even get into the substantive grounds of appeal brought by Mr Webber and the Cabinet Office respectively), that second decision cannot stand. I therefore set aside the Tribunal's review decision dated November 23, 2016 (TCEA 207, section 12 (2)(a)). It now joins the Tribunal's first decision as an ex-decision.

32. The choices then before me are either to remit the underlying appeal to a fresh Tribunal or to re-make the decision myself (see TCEA 2007, section 12 (2)(b)(i) and (ii)). Mr Webber advocates that I adopt the latter approach, and cites by way of example *DH v Information Commissioner and Bolton Council* [2016] UKUT 139 (AAC). In that case Upper Tribunal Judge Markus QC re-made the decision herself, having expressly found that she was in as good a position as the First-tier Tribunal to do so. However, I agree with Mr Knight and Mr Hill that the present appeal is not a case which is suitable for the Upper Tribunal to re-decide. True, I am familiar with the case, but that familiarity is almost entirely confined to its procedural and jurisdictional aspects. As Mr Knight notes, witness evidence will need to be reviewed, the issue of identifiability will need careful consideration, the evidence and arguments on confidentiality will need re-visiting and the respective data protection rights re-examined. In the *Bolton Council* case Judge Markus QC had heard extensive arguments about the substantive data protection issues and public interest considerations that arose on the facts of that case. I have not. That all shouts out for a fresh First-tier Tribunal with its breath of expertise to re-evaluate the factual and public interest issues raised.

33. Nor do I consider it appropriate for me to lay down any precise case management directions under section 12(3)(b) of the TCEA 2007 for the re-hearing of this appeal by the First-tier Tribunal. Such issues are best left to the judiciary (and, where appropriate, the registrar) in the General Regulatory Chamber. An important part of this appeal concerns the privacy rights of third party data subjects who are not represented in these proceedings (namely e.g. the secretarial and support staff of the former Prime Ministers). The First-tier Tribunal judiciary is far better positioned than the Upper Tribunal to refine the appropriate case management directions. Far be it for the Upper Tribunal to cramp the First-tier Tribunal's style in that respect.

34. However, given the unhappy history of this case, I do agree with Mr Webber that it would be inappropriate for the matter to go back to the same panel. I accordingly direct that the appeal should be re-heard by a completely new and differently constituted First-tier Tribunal (TCEA 2007, section 12(3)(a)).

The Cabinet Office's original non-participation in the appeal before the Tribunal

35. It will be recalled that the Cabinet Office was only joined as a party in this appeal after the Tribunal's first decision and before its second review decision. The explanation for this is simple. The Cabinet Office fouled up. The Information Commissioner wrote to the Cabinet Office advising it that the Decision Notice was under appeal. The Cabinet Office did not apply to be joined. According to the covering letter with its own application to the Upper Tribunal, "this was due to a breakdown in lines of communication within a department that seeks to deal with

considerable FOI correspondence with limited resources". The Cabinet Office also complains that the 2009 Rules do not provide for the relevant public authority to be notified by the Tribunal direct about any appeal that has been lodged. That is perhaps a debate for another day.

36. Anyway, the effect of this Upper Tribunal decision, put crudely, is that the Cabinet Office, having messed up first time round, gets to 'have another go' at the First-tier Tribunal re-hearing. I understand that Mr Webber finds that intensely frustrating. He argues that in these circumstances it would be "appropriate to direct the FTT not to allow the Second Respondent to participate in the remitted proceedings in line with Chamber President Lane's decision of last year". Judge Lane's ruling, it will be recalled, was to permit joinder of the Cabinet Office after the first Tribunal decision but not to set that decision aside. Mr Webber advances a number of detailed arguments as to why it would be inconsistent with the overriding objective either (i) to allow the Cabinet Office to participate in the re-hearing of the appeal at all or (ii), if it does, to allow the Cabinet Office to adduce any further and fresh evidence.

37. However, I do not consider it would be appropriate for me to make any directions putting any such constraints on the new First-tier Tribunal's consideration of the issues. I say that for two inter-related reasons. First, this is as much an inquisitorial as adversarial process, and the new Tribunal's task is to get to the right decision on the extent of proper disclosure under FOIA. Second, as Mr Knight rightly emphasises on behalf of the Information Commissioner, a key issue in the present appeal concerns the protection of the privacy interests of the third party data subjects, who are not represented in these proceedings. That goal is best served by allowing the Cabinet Office to participate in the re-hearing of the appeal. The First-tier Tribunal Judge who deals with the onward conduct of the appeal should then have a free hand in making such case management directions as she or he sees fit as regards the submission of evidence. As Mr Knight points out, that Judge will doubtless bear in mind that the Cabinet Office has already had the opportunity to put in witness evidence and submissions (including closed material) on the application for permission to appeal before the First-tier Tribunal

The other two cases

38. The First-tier Tribunal's first and second decisions have spawned three separate cases before the Upper Tribunal.

39. Mr Webber's appeal against the Tribunal's second decision, the present appeal in GIA/279/2017, has been treated as the lead case.

40. The Cabinet Office's appeal against the Tribunal's second decision, GIA/735/2017, has been following in its slipstream. In the circumstances I formally allow that appeal by consent for the same reasons as Mr Webber's appeal. The second decision failed adequately to explain how and why the Tribunal was proceeding under section 9 of TCEA 2007 and rule 44 of the 2009 Rules. I do not need to deal with the Cabinet Office's substantive grounds of appeal.

41. The third set of proceedings is the Cabinet Office's stayed application for permission to appeal against the Tribunal's first decision, GIA/3434/2016. Mr Hill for the Cabinet Office concedes that as the effect of the Tribunal's second decision was to set aside its first decision, the Cabinet Office's application in GIA/3434/2016 necessarily falls away. Mr Webber questions the logic of this interpretation, but in my view Mr Hill is correct. The as yet undetermined application in GIA/3434/2016 was against a Tribunal decision (its first decision) which has since been set aside. The

stayed application accordingly has nothing to bite on. One way of proceeding would be to strike out the application in GIA/3434/2016 for want of jurisdiction, but that would necessitate the Upper Tribunal formally giving notice of its intention to do so (Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), rule 8(2)(a) and (4)). The more sensible and proportionate way of proceeding is to treat the Cabinet Office's final written response as by implication a request to withdraw the application in GIA/3434/2016 (Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), rule 17). If it is necessary to lift the stay in order for the implied withdrawal application to take effect, I do so. The application in GIA/3434/2016 is disposed of by way of withdrawal.

Guidance on the exercise of section 9 of the TCEA 2007 and the use of review

42. I do not consider it would be appropriate to provide detailed guidance on the exercise of the review power under section 9 of the TCEA 2007 and rule 44 of the 2009 Rules. There is ample and authoritative guidance in the case law already – see especially *R (RB) v First-tier Tribunal (Review)* [2010] UKUT 160 (AAC); [2010] AACR 41, *JS v Secretary of State for Work and Pensions* [SSWP] *(DLA)* [2013] UKUT 100 (AAC); [2013] AACR 30 and *Vital Nut v HMRC* [2017] UKUT 192 (TCC). I simply add this: if a First-tier Tribunal elects to proceed with a review under section 9 it should as a matter of good judicial practice:

- explain why and how it has exercised its discretion under section 9(4), and in particular whether (if at all) it is proceeding under sub-paragraph (a), (b) or (c);
- if it is acting under section 9(4)(c), also explain whether it is re-deciding or referring to the Upper Tribunal and why (see section 9(5));
- If it is acting under section 9(5)(a), also explain what additional findings of fact (if any) are made (see section 9(8));
- explain the composition of the reviewing Tribunal in the light of the requirements of the relevant Practice Statement.

Conclusion

43. I conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I am not able to re-make the decision under appeal and therefore remit the appeal for re-hearing before a freshly constituted First-tier Tribunal (section 12(2)(b)(i) and (3)(a)).

Signed on the original
on 27 July 2017

Nicholas Wikeley
Judge of the Upper Tribunal