THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

THE INFORMATION COMMISSIONER v GORDON BELL
[2014] UKUT 0106 (AAC)

UPPER TRIBUNAL CASE NO: GIA/1382/2013

PARTIES

The Information Commissioner
and
Gordon Bell

DECISION ON AN APPEAL AGAINST A DECISION OF A TRIBUNAL

UPPER TRIBUNAL JUDGE: EDWARD JACOBS

This front sheet is not part of the decision and is issued only to the First-tier Tribunal and the parties.

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 26 February 2013 under reference EA/2012/0210) 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 for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by Mr Bell's appeal against the Information Commissioner's Decision Notice FS50453212.

B. In doing so, it must decide afresh whether Dr C has died and, if so, when the death occurred in relation to Mr Bell's request for information.

C. The tribunal must exercise its powers under section 58 of the Freedom of Information Act 2000 in accordance with my analysis in this decision.

D. The tribunal must consider whether it should join the Thames Valley Police, or invite it to be joined, as a party to the proceedings under rule 9 of Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 or invite them to take part under rule 33.

REASONS FOR DECISION

A. The issue

1. This case raises the issue of how the First-tier Tribunal should proceed if it finds that the basis on which a public authority responded to a request was wrong in fact. This requires an analysis of the powers of that tribunal in its information rights jurisdiction under section 58 of the Freedom of Information Act 2000. In particular, it raises the issue whether that tribunal has power to remit a case to the Information Commissioner (the Commissioner) for reconsideration in the light of further submissions from the public authority. The issue also requires an analysis of the powers of the tribunal to allow a public authority that was not originally a party to participate under rules 9 and 33 of Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976). All references are to the 2000 Act or the 2009 Rules unless otherwise stated.

B. History and background

2. On 23 May 2012, Mr Bell requested the Thames Valley Police (TVP) to provide three pieces of information about a Dr C:

- When and how did TVP discover that Dr C had returned to the United Kingdom from Canada?
- What steps, if any, were taken to locate Dr C after his return to the United Kingdom?
- If TVP made no attempt to locate Dr C, who made that decision and on what grounds?

TVP refused either to confirm or deny that it held the information, relying on section 40(5) on the ground that the information was personal data of a living individual.

3. Mr Bell complained to the Information Commissioner who decided, on 18 September 2012, that TVP had correctly applied section 40(5).

4. Mr Bell exercised his right of appeal to the First-tier Tribunal. It decided that Dr C had died before the date of Mr Bell's request to TVP. Section 40(5) did not, therefore, apply. On 5 February 2013, the tribunal made what it called an

Interim Decision – Pending further evidence & submissions.

On 26 February 2013, the tribunal made a decision, which recorded on its front page:

Decision: Appeal Allowed.

The presiding judge explained that the tribunal had allowed the appeal on the basis of mistaken fact and continued:

> In light of this finding the Tribunal will allow the public authority to consider their position and present the Respondent with arguments on any other exemption that may apply to the disputed information being released on or before 19th March 2013. The Information Commissioner will then consider the position as between the parties and if necessary provide a further Decision Notice on or before 9th April 2013. In any event the Tribunal will expect this matter to be concluded with a further and final decision by the Respondent on or before 9th April 2013 and either party will have the usual right to appeal from that decision if he chooses to do so.

The Commissioner had suggested that the tribunal consider joining TVP as a party to the proceedings. I deal with this in Section D below.

5. When the Commissioner applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal, the application was put before the judge who had presided at the hearing. He refused permission, saying:

> 1. The Tribunal refers to the Respondent's application to appeal and the grounds attached therewith.
>
> 2. It is and was always open to the Parties to seek to join the Public Authority and at no time has this been done.

3. The Tribunal finds the Respondent is premature in this application. The Tribunal found the Respondent's Decision Notice erred in its reliance on Section 40(5) and this is now conceded by the Respondent.

4. The Tribunal has effectively issued directions that will allow the relevant Public Authority to consider any other exemptions that might apply before the Tribunal issues a substitute Decision Notice. In the event that the parties agree then a consent order may be applied for but if there is no consent then the Respondent can issue a further Decision Notice. The result will have the same effect as, and is not exclusive to, the Respondents result as sought in paragraph 22(a) and (b) of the Grounds of this application to Appeal. This Tribunal will issue such further directions as are sought before coming to a final conclusion on any outstanding issues.

5. As the only binding decision of the Tribunal to date is not an issue the application for leave to appeal is refused.

6. The Commissioner did not take issue with the tribunal's finding that Dr C had died. However, he applied for permission to appeal to the Upper Tribunal on the grounds that: (i) the tribunal had no jurisdiction to make the order it did; (ii) the tribunal should have considered allowing TVP to participate in the proceedings. I gave permission to appeal on those grounds.

7. I directed an oral hearing of the appeal. It was held before me on 4 March 2014. Robin Hopkins of counsel appeared for the Commissioner. I am grateful to him for his written and oral arguments. Mr Bell did not attend. Nor did he take up my invitation to make written submissions in respect of the issues raised by the appeal. He had written at length about issues that concerned him, but they were not relevant to the issues I had to decide.

C. The First-tier Tribunal's powers of disposal on an appeal

8. To anticipate my analysis, these are my conclusions. The tribunal gave a decision that was in form a final decision, remitting the case to the Commissioner for further consideration and imposed a timetable for doing so. It had no power to do that. If I am wrong and the refusal of permission correctly summarises what the tribunal intended to do, the reasons given in its decision failed to say so and were inadequate. If the tribunal intended to undertake a two stage process by first allowing the appeal and then substituting a different decision notice, it had no power to do so. Anyway, the course suggested in the refusal of permission improperly sought to impose a responsibility on the public authority which was not a party to, or otherwise involved in, the proceedings.

9. I come now to the analysis of the tribunal's powers of disposal.

Was the tribunal's decision of 26 February 2013 final?

10. Yes, for these reasons. First, the tribunal allowed the appeal. That is what it says on the front page if its decision. Second, it did not call its decision an

interim one, as it had its earlier decision. If it intended to make an interim decision, why did it not adopt the same language as before? Third, it referred to there being a further right of appeal. There was no need to mention that, if it intended to retain control of the matter in the way that the judge suggested in his refusal of permission.

11. It is possible that the tribunal saw the appeal before it as limited to the section 40(5) issue and considered that it would need a new decision notice and further appeal in respect of other exemptions. If so, that was contrary to the nature of an appeal and to the decision of the Court of Appeal in *Birkett v Department for the Environment, Food and Rural Affairs* [2012] AACR 32. It is also not consistent with the judge's later explanation in his refusal of permission.

The structure of the legislation

12. The process under the Act begins with a request for information, in this case by Mr Bell. The public authority, in this case TVP, responds. The requester may apply to the Commissioner for a decision whether the public authority dealt with the request in accordance with the requirements of Part I of the Act (section 50). The Commissioner may serve a decision notice (section 50), an information notice (section 51) or an enforcement notice (section 52). In the simplest terms, the decision notice deals with the rights of the requester as against the public authority, the information notice requires the public authority to provide the Commissioner with information, and the enforcement notice seeks to remedy a public authority's failure to provide information to the requester. Section 57 provides for an appeal against all these notices.

13. The powers of the First-tier Tribunal on an appeal are governed by section 58:

> **58 Determination of appeals**
>
> (1) If on an appeal under section 57 the Tribunal considers—
>
> (a) that the notice against which the appeal is brought is not in accordance with the law, or
>
> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
>
> the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
>
> (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

14. The concept of dismissing an appeal does not give rise to difficulties; it is simply a decision that the notice was in accordance with the law. The difficulties

arises with the other two forms of disposal: allowing the appeal or substituting such other notice as could have been served by the Commissioner.

Mr Hopkins' argument

15. Mr Hopkins argued that the scheme did not allow any power for a tribunal to remit a case to the Commissioner for further consideration and decision, as the Commissioner had exhausted his powers under section 50 (or, as he put it, was *functus officio*) once he had issued his decision notice on Mr Bell's complaint. In support of his argument, Mr Hopkins cited two first instance decisions of the former Information Tribunal. Neither is binding on me, but I must consider their reasoning for what it is worth.

16. One decision was in *Mitchell v Information Commissioner* EA/2005/0002. The tribunal noted to the issue:

> 45. We therefore rule, pursuant to s.58(1)(a), that the Respondent's Notice is not in accordance with law. We are then faced with the rather odd alternatives of allowing the appeal or substituting any Notice that the Respondent could have served on the Council (under s.50). We say odd because the order on a successful appeal will presumably often involve both allowing the appeal and substituting such a Notice.

In the circumstances of that case, the tribunal allowed the appeal but did not substitute a notice requiring the public authority to take any further action as it no longer held the information concerned.

17. The other decision was *Guardian Newspapers Ltd and Brooke v Information Commissioner* [2011] 1 Info LR 854. Mr Hopkins relied on the analysis in paragraphs 16-23:

> 16. We think it right, although no arguments were addressed to us on the topic, to add some brief comments on the curious wording of s58(1) in regard to possible outcomes:
>
> > *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal .*
>
> 17. The curiosity is in the use of the word "*or*", which appears to make the substitution of a new notice an alternative to allowing the appeal.
>
> 18. In *R v Federal Steam Navigation Co Ltd* [1973] 1 WLR 1373, CA, Lawton LJ (giving the judgment of the Court) said at 1376:
>
> > 'The word "or" in statutes has caused many difficulties of construction, difficulties which could have been avoided had greater care been taken with the drafting. The word "or" can be used in a conjunctive sense but when it is, greater clarity can be obtained by the use of other words. For example, had the draftsman intended "or" in section 1(1) [of the Oil in Navigable Waters Act 1955, referring to " *owner or master* "] to be

> construed conjunctively he could have achieved the same result by the use of the phrase "the owner and master or either of them." The ordinary and natural meaning of "or" is disjunctive: see *In re Diplock* [1941] Ch 253, in which Sir Wilfred Greene MR said, at p. 260: "The word 'or' is prima facie, and in the absence of some restraining context, to be read as disjunctive. ..."'

19. The wording of s 58(1), read disjunctively, can accommodate without undue strain the possible outcomes of appeals by public authorities against decision notices or enforcement notices. In such cases the Tribunal might allow the appeal by declaring the notice to be not in accordance with the law, or might substitute a notice requiring rather less to be done by the public authority, or might dismiss the appeal (thereby leaving the notice in force). In such cases the reference to allowing the appeal is a reference to allowing it in full, and the reference to substituting a notice may be read as making provision for a partial success of the appeal.

20. There is more difficulty when an applicant for information is appealing against a decision made in favour of the public authority. In such a case allowing the appeal entails stating what information must be released, which is the same thing as substituting such notice as could have been served by the Commissioner. It makes no sense to read the word "or" in a disjunctive sense and to view these as alternative outcomes.

21. The most likely source for the phraseology of FOIA ss 57-58 is ss 48-49 of the Data Protection Act 1998. Under that Act appeals are brought only by the data controller in respect of notices served on the data controller by the Commissioner. Data subjects do not bring appeals under ss 48-49 of the 1998 Act. We can only think that by a drafting error this wording was adopted for FOIA without being adjusted to provide in clear and appropriate terms for appeals by applicants for information.

22. In the circumstances we can only make sense of s 58(1) by interpreting the word "*or*" disjunctively in the context of appeals by public authorities and conjunctively in the context of appeals by applicants for information. In other words, we construe the subsection as if it read:

> *the Tribunal shall allow the appeal and/or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

23. In our judgment the Tribunal has power, in the case of an appeal by an applicant for information, to allow the appeal and substitute such notice as could have been served by the Commissioner.

Analysis of the Information Tribunal decisions

18. The passage from the *Mitchell* decision neatly captures the problem with the language. It assumes that *other notice* means, or at least includes, a different

form of the notice under appeal. The circumstances of that case required the tribunal to allow the appeal but not to substitute a different form of the decision notice. To that extent, it demonstrates that *or* cannot be read conjunctively, at least not in all cases when an appeal is allowed. On this, see also paragraph 23.

19. As to the *Guardian Newspaper* decision, it may be possible for the same words to be read both conjunctively and disjunctively according to who has brought the appeal. This is, though, not a reading that I would adopt if there were another, more appropriate, interpretation. I come to this later (beginning at paragraph 19). Before doing so, I need to deal with the tribunal's analysis by comparison with section 49 of the Data Protection Act 1998:

> **49 Determination of appeals**
>
> (1) If on an appeal under section 48(1) the Tribunal considers—
>
> (a) that the notice against which the appeal is brought is not in accordance with the law, or
>
> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
>
> the Tribunal shall allow the appeal or substitute such other notice or decision as could have been served or made by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
>
> (2) On such an appeal, the Tribunal may review any determination of fact on which the notice in question was based.
>
> (3) If on an appeal under section 48(2) the Tribunal considers that the enforcement notice ought to be cancelled or varied by reason of a change in circumstances, the Tribunal shall cancel or vary the notice.
>
> (4) On an appeal under subsection (3) of section 48 the Tribunal may direct—
>
> (a) that the notice in question shall have effect as if it did not contain any such statement as is mentioned in that subsection, or
>
> (b) that the inclusion of the statement shall not have effect in relation to any part of the notice,
>
> and may make such modifications in the notice as may be required for giving effect to the direction.
>
> (5) On an appeal under section 48(4), the Tribunal may cancel the determination of the Commissioner

20. I do not accept that section 58 contains a drafting error as a result of infelicitous copying of section 49. Whilst it is true that the same words are used in both Acts, the provisions of the two sections contain significant differences, reflecting the different statutory structures. Although section 58 may well have been modelled on section 49, it has been adapted to its new context.

My analysis

21. My starting point is that the tribunal is dealing with an appeal against a notice, in this case a decision notice. Both elements of that statement are important: the appeal and that it is against a particular type of notice. I begin with the former and come to the latter later in my analysis (in paragraph 26).

22. What is the nature of the appeal? The tribunal undertakes a complete reconsideration of the issues before the Commissioner. It is not limited to the evidence or submissions considered by the Commissioner. Nor is it bound by his findings of fact or the way he has exercised a discretion. In the convenient phrase that is often used to describe the role of the First-tier Tribunal, it stands in the shoes of the decision-maker.

23. There is a spectrum of possible conclusions that the tribunal might reach. At one end, the tribunal may find nothing wrong in the notice. In that case, it will dismiss the appeal. At the other end, the tribunal might find that there had in law never been a notice at all. Such a possibility may be easier to imagine than to find in the real world, but it is important, because it has to be taken into account as one of the possibilities that the statutory language has to cater for. One example would be if the Commissioner had no jurisdiction to serve a notice, because there had not been a complaint. This is a further example (see also paragraph 18) of why *or* cannot be read conjunctively. If the tribunal allowed the appeal in this case, it could not substitute another notice, because the Commissioner lacked the jurisdiction to do so. It could only allow the appeal on the ground that the Commissioner had no jurisdiction to serve the notice. Another example would be if the notice served by the Commissioner was so completely incoherent or unconnected to his legal powers that it was not in law a notice at all, a possibility recognised by the Tribunal of Commissioners in *R(IB) 2/04* at [72]. In that case, the tribunal could allow the appeal on the ground that the purported notice was of no force or effect, leaving the Commissioner free to issue another notice.

24. In between those possibilities, there are others.

25. One possibility is that the tribunal might find that the notice served was erroneous in some respect. By way of examples, it might find that the Commissioner had applied an exemption that did not apply or failed to apply one that did. In those cases, the tribunal would allow the appeal. This gives rise to the doubt over the words 'allow the appeal or substitute such other notice as could have been served by the Commissioner'. Should the tribunal allow the appeal and substitute an amended version of the notice? The judge's refusal of permission in this case seems to envisage doing that. I have already demonstrated (in paragraphs 18 and 23) that it is not possible to read *or* conjunctively, as it would not take account of some forms of decision that the tribunal might reach. Nor is it necessary to do so in order to deal with the case in which the tribunal finds an error in the notice. The tribunal's power to vary the notice arises from the nature of the appeal, as I have described it (in paragraph

22). It is not necessary to rely on the express power to substitute. Those words are redundant for this purpose. It is sufficient for the tribunal to allow the appeal and, in doing so, to identify the mistake in the notice.

26. This does not mean that those words are redundant for all purposes, because there is another possible conclusion that the tribunal might reach. It might find that the Commissioner should have issued a different form of notice, say an information notice instead of a decision notice. In those circumstances, it would be substituting one form of notice for another. It is arguable that that might be authorised by the nature of an appeal in any event. But it is at least understandable why the legislation would make clear that the tribunal has this power. In this case, the tribunal would in a sense be allowing the appeal *against the notice served by the Commissioner*. But it would also be replacing that notice with something else. Substitution by its nature replaces the notice served and thereby removes the notice that was the subject matter of the appeal. That could be seen in turn as affecting the possibility of allowing the appeal against that notice. That would explain why substitution was drafted as an alternative to allowing an appeal, rather than an adjunct to it. It is possible that, in an area such as social security with an established tradition of how appeals work, the tribunal's powers might not have been specified so precisely or even at all. Compare, for example, section 12 of the Social Security Act 1998, which simply provides that 'the claimant and such other person as may be prescribed shall have a right to appeal to the First-tier Tribunal'. However, the drafting of section 58 could not rely on such a background. My analysis and interpretation give proper respect to the language of the section in its context, produce an outcome that takes account of the range of decisions that a tribunal might make, and are easy for a tribunal to apply.

27. It follows that I accept Mr Hopkins' argument that the Commissioner did not have power *in this case* to serve a further notice under section 50. He is correct for a number of reasons. First, as he argued, the Commissioner had exhausted his powers to act under section 50, once he had served his decision notice on Mr Bell. Second, there is no power in the legislative structure for the Commissioner to revisit a notice. Third, it is not possible to have two notices on the same complaint but in different terms, for obvious reasons. Fourth, it was inconsistent with the nature of an appeal to the First-tier Tribunal for that tribunal to remit the case to the Commissioner for reconsideration (as the tribunal's decision appeared to do) or to refer the case to the Commissioner as part of an interlocutory stage in the tribunal's decision-making (as the refusal of permission envisaged). Leaving aside the constitutional issue of the separation of powers, once an appeal is made, the legal responsibility for decision-making was the tribunal's. It had no power to abdicate that duty or to seek to share it in the way that the tribunal may have envisaged.

28. Although Mr Hopkins' argument is correct in this case and, indeed, broadly correct, it needs qualification, because it fails to take account of the possibility that the Commissioner's power might revive by virtue of the retrospective effect

of a tribunal's decision. There are two circumstances in which this might occur, giving the Commissioner power to give another decision notice. See paragraph 23. First, the tribunal might substitute an information notice for a decision notice, which would then require the Commissioner to give another decision notice once the information had been provided. In those circumstances, the effect in law of the substitution would be that there had never been such a decision notice. Second, the tribunal might allow the appeal on the basis that the document served was not a notice. In those circumstances, the effect of the tribunal's decision would be that there had never been a notice, so the Commissioner would (if appropriate) have to exercise his powers for the first time.

Implications for the form of First-tier Tribunal decisions

29. I am aware that different judges in the First-tier Tribunal express their decisions differently. Some merely say that the appeal is allowed and set out why. On my analysis, that is the correct form of decision for most cases. Other judges say that the appeal is allowed and exercise the power to set out a substituted version of the decision notice. On my analysis, that is not the correct form of decision for most cases. That does not mean that decisions expressed in that way are wrong in law. The test of error is a matter of substance, not form. It has only been necessary to undertake this detailed analysis because of the confused way in which the tribunal dealt with the appeal in this case.

D. The First-tier Tribunal's power in respect of the public authority

30. The confusion over the appropriate form of disposal stemmed from the tribunal's realisation that, having found that Dr C had died, TVP might wish to rely on other exemptions. It was entitled to do that: *Birkett v Department for the Environment, Food and Rural Affairs* [2012] AACR 32. The proper course, which would have avoided the difficulties that I have analysed above, was to allow TVP to take part in the proceedings.

31. TVP was not a party when the appeal was lodged. No doubt, sensibly, it seemed at that stage that it could not make any useful contribution beyond saying, as it had already said, that the request related to Dr C's personal data. That changed when it appeared that Dr C had died. At that stage, the tribunal could have exercised two powers to allow TVP to participate.

32. It had power to add TVP as a party, on application or at its own initiative. This power is conferred by rule 9 of the Rules:

> **9 Addition, substitution and removal of parties**
>
> (1) The Tribunal may give a direction adding, substituting or removing a party as an appellant or a respondent.
>
> (2) If the Tribunal gives a direction under paragraph (1) it may give such consequential directions as it considers appropriate.

Alternatively, the tribunal had power to allow TVP to participate without becoming a party. This power is conferred by rule 33(2):

> **33 Entitlement to attend and take part in a hearing**
>
> ...
>
> (2) The Tribunal may give a direction permitting or requesting any person to-
>
> (a) attend and take part in a hearing to such extent as the Tribunal considers proper; or
>
> (b) make written submissions in relation to a particular issue.

33. Both powers allow the tribunal to act without notice to the public authority or taking account of its wishes. They are, however, subject to two safeguards. First, the powers must be exercised in accordance with the overriding objective set out in rule 2:

> **2 Overriding objective and parties' obligation to co-operate with the tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally.

Second, the direction given by the tribunal is subject to rule 6, especially rule 6(5):

> **6 Procedure for applying for and giving directions**
>
> (1) The Tribunal may give a direction on the application of one or more of the parties or on its own initiative.
>
> (2) An application for a direction may be made—
>
> (a) by sending or delivering a written application to the Tribunal; or
>
> (b) orally during the course of a hearing.
>
> (3) An application for a direction must include the reason for making that application.
>
> (4) Unless the Tribunal considers that there is good reason not to do so, the Tribunal must send written notice of any direction to every party and to any other person affected by the direction.
>
> (5) If a party or any other person sent notice of the direction under paragraph (4) wishes to challenge a direction which the Tribunal has given, they may do so by applying for another direction which amends, suspends or sets aside the first direction.

Those safeguards operate at two stages: the stage when the tribunal is considering what to do and the stage when it had given a direction and the public authority wishes to object.

34. In this case, Mr Sowerbutts, who represented the Commissioner before the First-tier Tribunal, invited the tribunal on two occasions to consider joining TVP as a party in order to adduce evidence and obtain submissions. He did so, first, in his email to the tribunal of 12 February 2013 and, second, in his closing submissions to the tribunal of 15 February 2013. The tribunal did not explain in its decision why it had not exercised the powers available to it.

35. The judge, when refusing permission, wrote: 'It is and was always open to the Parties to seek to join the Public Authority and at no time has this been done.' Strictly speaking, that is correct. Neither Mr Bell nor the Commissioner had applied for TVP to become a party. What the Commissioner had done was to invite the tribunal to consider doing so. Quite properly, Mr Sowerbutts had recognised the proper role for the tribunal and had not sought to act on behalf of TVP from whom he had no authority. What he did was sufficient to raise the matter before the tribunal. The Commissioner was not responsible for liaising with TVP once the appeal was lodged. The tribunal was under a duty to decide how to proceed. It neglected to do so.

36. As I have already explained, the tribunal was wrong to dispose of the case as it did. The proper course for dealing with the change of circumstances was to allow TVP to participate if it wished to do so, whether or not as a party. The tribunal was in error of law for failing to consider exercising its powers to allow that and for failing to explain why it had not done so.

E. Disposal

37. As the tribunal's decision (whatever it actually was) was made in error of law, I have set it aside and directed a rehearing. As I have set the decision aside, the tribunal's finding that Dr C had died must be reconsidered. That is not because I doubt the correctness of that finding. It is just the way that a rehearing works.

Signed on original
on 5 March 2014

Edward Jacobs
Upper Tribunal Judge