



2026UT20

Ref: UTS/AP/25/0098

DECISION OF

Sheriff C Dunipace

**ON AN APPLICATION FOR PERMISSION TO APPEAL
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)
IN THE CASE OF**

Miss Carolann Curran

Appellant

- and -

Mr Douglas McLennan, Mrs Linda McLennan

Per Lindsays

Respondent

FTS Case Reference: FTS/HPC/EV/24/0583

6 February 2026

Decision

The Upper Tribunal refuses leave to appeal on all grounds.

Introduction

1. Ms Carolann Curran (hereinafter “the Appellant”), has submitted an application seeking leave to appeal a decision of the First-tier Tribunal (hereinafter referred as “the Tribunal”) dated 19 March 2025 following a Hearing on 12 March 2025, determining an application lodged by Mr Douglas McLennan and Mrs Linda McLennan (hereinafter referred to as “the Respondents”) seeking an eviction order in terms of Rule 51 and Ground 5 of the Housing (Scotland) Act 2016 in respect of the property at Flat 22 Taypark, 30 Dundee Road, Broughty Ferry, Dundee, DD5 1LX (hereinafter referred to as “the subjects”). The Applicants were represented at that Hearing by Ms Fitzgerald, solicitor, and the Appellant was present and supported by her daughter, Ms McKenzie. The decision of the Tribunal was to grant an eviction order against the Appellant with a delay in execution of the order until 10 June 2025. Full and detailed reasons for the decision of the Tribunal were provided in their decision of 19 March 2025.

2. The Appellant thereafter lodged an application to recall this order under Rule 30 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 on 13 May 2025 on the basis that she had not had legal representation and been distressed and vulnerable during the proceedings. She had also felt overwhelmed and under pressure, had been suffering from depression and anxiety, had suffered a recent bereavement and just recovered from COVID which explained why her application had been late. She felt that there had been a procedural imbalance given that the Respondents had been legally represented.

3. The Tribunal had sought clarification of her position on the basis that Rule 30 only applied to situations where a party had not been present at the Hearing, and she had responded by saying that this Rule was not confined to those situations, referring to Rule 39 of the aforementioned Rules of Procedure, stating that there had been procedural irregularity, and that new evidence had come to light.

4. The Tribunal thereafter determined on 24 May 2025 that the Appellant may have been confused in relation to the various ways that a decision of the Tribunal could be challenged, particularly in her reference to Rule 39 which referred to applications to review and not recall. There was also said to be no discretion for the Tribunal to consider a late application for review under Rule 39. The Tribunal decided that a party could only seek recall where a party did not attend at the Hearing where a decision was made, and in the present instance the Appellant had been present, and in fact had advised the Tribunal that she intended to move out of the property and did not oppose the order. The Tribunal determined that the remedy of recall did not apply to the Appellant and that the order of 19 March 2025 should not be recalled. Full reasons for the decision of the Tribunal were provided in their decision of 24 May 2025.

5. The Appellant thereafter sought Leave to Appeal against this decision on 27 May 2025 on the following grounds:

- a) That the Tribunal had misinterpreted Rule 30(1) in relation to the words “Did not take part.” Although she had attended, she was “denied meaningful participation” because she was not legally represented, she was distressed, had recently suffered a bereavement and was subjected to undue pressure during the discussions and gave “non voluntary consent” to the order.

- b) The Tribunal failed to consider the Appellant's Article 6 rights in relation to equality of arms, effective participation and access to justice.
- c) The Tribunal's interpretation of the Rule meant that the interests of justice were not applied properly. The Tribunal ought to have exercised its discretion to consider the request although late. They also ought to have applied the broader test, namely whether it is in the interests of justice to recall the decision.

6. The aforementioned application for Leave to Appeal was refused by the First-tier Tribunal on 17 June 2025, with full reasons for that decision being provided in the First-tier Tribunal's decision of that date.

7. The Appellant has lodged an appeal against that decision on 27 June 2025, again requesting that the eviction order be suspended for the following reasons:

- (i) Misinterpretation of Rule 30(1) – “Did not take Part”. The Tribunal erred in law in concluding that the Appellant was not entitled to seek recall under Rule 30(1) because she “attended” the hearing. While physical presence occurred, the Appellant was effectively denied meaningful participation due to:

- Lack of legal representation while the opposing party had a solicitor;
- Extreme distress, vulnerability, and bereavement at the time of the hearing;
- Being subject to undue pressure and imbalance in negotiations resulting in a non-voluntary consent to the eviction order.

- (ii) Failure to consider ECHR Article 6 Rights. The Tribunal failed to consider the Appellant's right to a fair hearing under Article 6 of the European Convention on Human Rights. Article 6 encompasses:

- Equality of Arms – clearly absent where one party is represented and the other is not;
- Effective participation – undermined by the Appellant's lack of legal assistance and vulnerable state;
- Access to Justice – hindered by complex procedure and the mistaken view that she could not apply for recall.

The Tribunal's narrow interpretation of Rule 30 effectively deprived the Appellant of an opportunity to challenge a life-altering eviction order and failed to balance the procedural power appropriately.

(iii) Interest of Justice were not applied properly (Rule 30(2)) Even if Rule 30(1) was interpreted narrowly the Tribunal should have exercised its discretion under Rule 30(5) to consider late recall “on cause shown” and applied the broader test under Rule 30(2) as to whether “it would be in the interests of justice to recall the decision. The Appellant showed cause, including:

- Her mental health challenges;
- A bereavement and recovery from COVID during the relevant time;
- Her lack of understanding of the 14-day deadline due to the absence of legal advice.

The Tribunal's failure to consider these as legitimate grounds amounts to a failure to exercise discretion properly.

The Relevant Law

8. This appeal is brought by the Appellant under the provisions of Rule 46 of the Tribunals (Scotland) Act 2014 ("the 2014 Act") and the procedural rules contained within The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 ("the 2016 Regulations"). It is also submitted in terms of rule 3(6) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, where the First-tier Tribunal has refused permission to appeal, the Upper Tribunal may give permission to appeal if "the Upper Tribunal is satisfied that there are arguable grounds of appeal. The phrase "arguable grounds for the appeal" is not defined within the statute.

9. In essence, therefore, the task of the Upper Tribunal is to ascertain, with reference to the material submitted, whether the appellant has identified an error of law that is capable of being stated or argued before the Upper Tribunal at a hearing. As indicated that is a relatively low threshold.

10. In terms of the relevant law, section 46 of the Tribunals (Scotland) Act 2014 (hereinafter referred to as "the 2014 Act") provides:

46. Appeal from the Tribunal

(1) A decision of the First-tier Tribunal in any matter in a case before the Tribunal may beAppealed to the Upper Tribunal.

(2) An Appeal under this Rule is to be made—

(a) by a party in the case,

(b) on a point of law only.

(3) An Appeal under this Rule requires the permission of—

(a) the First-tier Tribunal, or

(b) if the First-tier Tribunal refuses its permission, the Upper Tribunal.

11. Accordingly, and from an application of the foregoing section 46 of the 2014 Act, it is apparent that the Appellants may only Appeal to the Upper Tribunal on a point of law (Section 46(2)(b)).

12. The grounds of this Appeal are as stated above at paragraph 7.

The Application for Leave to Appeal

13. As indicated above, permission to appeal is now sought on the following grounds:

- a) Erroneous Findings of Fact;
- b) Failure to consider mitigating circumstances; and
- c) Potential Breach of Legal Procedures

The Hearing

14. The Hearing in respect of this matter took place on 7 August 2025 by WebEx. I have taken cognisance of all of the submissions received in this case. The Respondents were represented by Ms Fitzgerald Solicitor, and the Appellant was also present. The Appellant was not represented at this Hearing. Following the Hearing the Appellant submitted further submissions on 2 September 2025, and the Respondents submitted answers to these submissions on 12 September 2025. Whilst these have been considered they are not directly relevant to the issues in dispute at this stage.

Discussion

15. This appeal is brought by the Appellant under the provisions of Rule 46 of the Tribunals (Scotland) Act 2014 ("the 2014 Act") and the procedural rules contained within The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 ("the 2016 Regulations"). It is also submitted in terms of rule 3(6) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, where the First-tier Tribunal has refused permission to appeal, the Upper Tribunal may give permission to appeal if "the Upper Tribunal is satisfied that there are arguable grounds of appeal. The phrase "arguable grounds for the appeal" is not defined within the statute.

16. Case law in other situations is of assistance. For example, in *Czerwinski v HM Advocate* 2015 SLT 610, the court was formulating the appropriate test for the grant of leave to appeal in an extradition case in the absence of statutory guidance. It settled on adopting the test applicable to criminal appeals: "do the documents disclose arguable grounds of appeal?" in terms of Rule 107 of the Criminal Procedure (Scotland) Act 1995.

17. In *Wightman v Advocate General* 2018 SC 388 Lord President Carloway (at paragraph 9) observed that arguability and stateability were synonyms. That was said to be a lower threshold than "a real prospect of success", the test applicable in deciding whether to grant permission for an application to the supervisory jurisdiction to proceed, in terms of Rule 27D(3) of the Court of Session Act 1988, as amended. The threshold of arguability is therefore relatively low.

18. *Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77; 2016 SC 201 (affirmed by UKSC in [2017] UKSC 45; 2018 SC (UKSC) 15) concerned an appeal from the Tax & Chancery Chamber of the First Tier Tribunal under Rule 13 of the Tribunals, Courts & Enforcement Act 2007. An appeal to the Upper Tribunal was available "on any point of law arising from the decision made by the First Tier Tribunal." The appeal thereafter to the Court of Session is "on any point of law arising from a decision made by the Upper Tribunal." It was in this context that the Inner House examined what was meant by "a point of law." It identified four distinct categories that an appeal on a point of law covers:

- (i) General Law, being the content of rules and the interpretation of statutory and other provisions;
- (ii) The application of law to the facts as found by the First-Tier Tribunal;
- (iii) A finding, where there was no evidence, or was inconsistent with the evidence; and

(iv) An error of approach by the First Tier Tribunal, illustrated by the Inner House with examples: “such as asking the wrong question, or by taking account of manifestly irrelevant considerations or by arriving at a decision that no reasonable tax tribunal could properly reach.” ([41]-[43])

19. Accordingly, from application of the foregoing Section 46 of the 2014 Act, it is apparent that the Appellant may only Appeal to the Upper Tribunal on a point of law (Section 46(2)(b) that is arguable. A disagreement of opinion or over factual findings or conclusions is insufficient. Permission can only be granted if there is arguably a relevant or material legal error in the Tribunal’s decision. Simply disagreeing with the Tribunal’s original decision is not in itself a point of law.

Discussion

20. The Appellant maintains that the decision of the Tribunal that she was not entitled to recall the previous order for eviction made on 19 March 2025 was erroneous on the basis that there had been a misinterpretation Rule 30(1) of the 2016 Procedure Rules by determining that it was incompetent to recall the order on the basis that the Appellant had attended the Hearing on 12 March 2025. In this regard the Appellant has stated that the relevant Rule of the 2016 Procedure Rules envisaged more than simple physical presence at a hearing. The references in the Rules were to not taking part in the proceedings and also to failing to appear or be represented at a hearing. There was therefore a distinction between not taking part and failing to appear.

21. Dealing with the first ground of the Appellant’s application, it is noted that she stated that whilst she had not failed to appear, she had not “taken part” on the basis that she was denied meaningful representation due to:

- Lack of legal representation;
- Extreme distress, vulnerability and bereavement at the time of the Hearing; and
- Being subject to undue pressure and imbalance in negotiations resulting in a non-voluntary consent to the eviction order

22. The Appellant asserted that “taking part” must be interpreted purposively and that participation must be real, effective and meaningful and not merely formal. A party’s presence does not equal participation if capacity, support or understanding are absent. The Appellant made reference in this regard to the cases of *R (Osborn) v Parole Board*,¹ and *Runa Begum v Tower Hamlets LBC*.²

23. In its decision of 17 June 2025, the Tribunal considered that the submission of the Appellant that she had not effectively taken part was not convincing for a number of reasons, summarised as follows;

¹ [2013] UKSC 61

² [2003] UKHL 5

- The Appellant had been present and taken part in extensive discussions resulting in a joint position being put before the Tribunal. The Appellant indicated that she no longer opposed the action.
- The Appellant was not denied legal representation, but rather she chose not to seek this. She was aware that the Respondents were represented from the outset and had time to make her own arrangements. Whilst not providing advice, the Tribunal, as an impartial body, had provided information to and answered questions to the Appellant to assist her. They had specifically reminded her about the option of seeking legal representation, which she declined to do. She did not seek an adjournment for legal advice or representation.
- The Tribunal were satisfied that the Appellant had taken part in the proceedings. She had addressed the Tribunal and been given every opportunity to make representations.
- The two cases referred to by the Appellant were not relevant, the first dealing with a situation where an oral hearing had not taken place, with the latter case involving the impartiality of a housing officer.

24. The Appellant continues to assert that she did not take part in proceedings for the three reasons as set out above. In relation to the first ground in relation to a lack of legal representation, it is noticeable that the Appellant was unable to advise of any steps taken by her in this regard. Whilst it is clear that a party may benefit from support or assistance in relation to proceedings, the choice of whether to instruct a representative is a matter for the party and not the Tribunal. It is noticeable that the Appellant was aware from the outset that the Respondents were represented and was aware of this fact prior to the Hearing. The Appellant was unable to advise of any steps taken by her to seek advice and/or representation prior to this Hearing. Further, during the Hearing itself the Tribunal specifically advised the Appellant regarding her right to obtain representation and would no doubt have been given an opportunity to do so had she so requested. Notwithstanding this, the Appellant did not seek an adjournment to obtain representation. In circumstances where a party effectively refuses to avail themselves of an opportunity afforded to them, it is not open to them to pray in aid their own choice as demonstrating that there has been a procedural irregularity to their detriment. The lack of representation was due to the personal choice of the Appellant and in the circumstances as narrated by the Tribunal it cannot be said that her choice not to instruct a representative meant that she could be taken as not having participated in the proceedings. In any event the Tribunal provided her with assistance, and it was noted that there was no suggestion by them that they did not understand the proceedings. The Tribunal noted that the Appellant addressed the Tribunal and was given every opportunity to make representations and give evidence. Further if the Appellant had been of the view that she had been denied the opportunity to participate fully, then her remedy would have been to seek a review or to appeal the decision and not to seek a recall as she has done in the present instance. Accordingly, I am not satisfied that her lack of legal representation prevented the Appellant participating meaningfully in the proceedings.

25. In relation to the secondary position of the Appellant to the effect that she was unable to meaningfully participate in light of her extreme distress, vulnerability and her

bereavement at the Hearing, it is noticeable that no evidence to support this position was provided at the Hearing or indeed subsequently. In any event it was noted that the Appellant had been in receipt of support from her daughter, Ms McKenzie. Whilst it is accepted that a companion might not be able to provide assistance or representation, nonetheless they can provide a valuable function by helping to put a party at ease and helping them to function better in an unfamiliar environment. Again, the Appellant did not seek an adjournment on the basis of any medical or other difficulties, and no mention was made of any such reasons preventing her participating at the relevant time. In these circumstances there is insufficient evidence to conclude that the Appellant was unable to meaningfully participate for the foregoing reasons.

26. The foregoing consideration will also apply to the Appellant's submissions that she was unable to participate due to being placed under undue pressure and imbalance. Again, no evidence has been provided to support this ground. The Appellant chose to attend the Hearing without legal representation and participated in discussions. Had she been uncomfortable in so doing she could have withdrawn from these discussions and advised the Tribunal as an impartial body accordingly. This was not done and accordingly I am not satisfied that the Appellant was unable to meaningfully participate in the Hearing.

27. The Appellant also asserts that she was unable to meaningfully participate in the Hearing and that her Article 6 Rights were denied to her accordingly. Having considered the factual matrix underpinning this Ground it is noted that these broadly replicate elements of the foregoing ground. The Appellant alleges that she was denied equality of arms, however for the reasons provided in paragraph 23 above, I have concluded that the fact that the Appellant was not represented was due to a conscious decision on her part. Further the suggestion by the Appellant that she was unable to participate due to a lack of legal assistance and her vulnerable state, has been addressed in paragraphs 23 and 24 *supra*. The suggestion that Access to Justice was hindered by her lack of knowledge of the procedure and the mistaken view that she could not apply for recall, is misconceived. The Appellant was present at the Hearing and had chosen to do so unrepresented. She had the opportunity to raise questions of law and procedure with the Tribunal as an impartial body and chose not to do so. In these circumstances I am not satisfied that these grounds demonstrate that the Appellant was unable to participate meaningfully in the Hearing, and I do not consider that her Article 6 rights have in any way been demonstrably breached.

28. In relation to the third ground, namely that the Interests of Justice were not applied properly, again this Ground is not well founded. In relation to the suggestion that the Tribunal should have exercised its discretion to consider the request for recall late in terms of Rule 30(5) of the Procedure Rules, as has been pointed out by the Tribunal, this application was not in fact refused on the basis that it was late, and indeed it has been actively considered. In relation to the application of the Interests of Justice test as set out in Rule 30(2), this follows on from Rule 30(1) and is not an alternative route to recalling an order. A party will require to satisfy Rule 30(1) before reference can be made to Rule 30(2), and if the former Rule is not satisfied then there can be no question of the application of Rule 30(2). Accordingly, this ground has not been established.

Conclusion

29. Having regard to the foregoing it is clear that the Tribunal has concluded that the Appellant did meaningfully participate in the original Hearing and as such the terms of Rule30(1) are not applicable in relation to the question of recall. The First-tier Tribunal has taken care to explain the relevant law, and I am satisfied that it has directed itself properly on this law and reached a decision which was reasonably open to it, thereafter, giving adequate reasons for its decision. Any appeal would be unarguable.

Decision

30. Accordingly, I refuse permission to appeal on each of the Appellant's Grounds.

Sheriff Colin Dunipace

Sheriff Colin Dunipace
Member of the Upper Tribunal for Scotland