



DECISION OF

Colin Dunipace

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

Mr Andrew O'Connor, Ms Lea O'Connor
per Lindsays LLP

Appellant

- and -

Mr Stuart Pearson, Ms Sarah Marshall

Respondent

FTS Case Reference: FTS/HPC/PR/24/3313

17 July 2026

Decision

[1] Permission to Appeal all grounds is refused.

Introduction

[2] This application for permission to appeal has been lodged by Mr. Andrew O'Connor and Ms. Lea O'Connor (hereinafter referred to as "the Appellants") against Mr. Stuart Pearson and Ms. Sarah Marshall, (hereinafter referred to as "the respondents" against a decision of the First-tier



Tribunal (hereinafter referred to as “the Tribunal”) dated 23 September 2025. In respect of that decision permission to appeal was initially sought from the Tribunal, this permission being refused on 12 November 2025.

[3] By way of background, the Respondents had lodged an application with the Tribunal in terms section 58 of the Private Housing (Tenancies) (Scotland) Act 2016 seeking a Wrongful Termination Order. This application was opposed and the Appellants had sought to have the application dismissed at a Case Management Discussion (“CMD”) on the basis of competency, submitting that the terms of section 58 of the 2016 Act had not been complied with in the circumstances of the present case.

[4] At the CMD on 23 September 2025 the Appellants submitted that the application was not competent because the notice to leave which induced the departure of the Respondents from the property was, without express contractual provision on the matter, emailed to them rather than sent in hard copy, meaning that the Respondents had not therefore received a “valid notice to leave,” which meant that they ought to have remained within the property given they would have been entitled to ignore the purported notice to leave. In these circumstances the requirements of sections 50 and 58 of the Private Housing (Tenancies) (Scotland) Act 2016 had not been complied with.

[5] The Legal Member heard submissions in respect of this matter and ultimately refused the motion to have the application dismissed, thereafter determining that the matter should proceed to a full hearing. The Legal Member provided detailed reasons for this decision in their aforementioned determination of 23 September 2025.

[6] The Appellants thereafter sought permission to appeal against this decision on three grounds, and the matter was considered by a Legal Member on 12 November 2025. At that time the Tribunal refused permission to appeal on all three submitted grounds.



Grounds of appeal

[7] The Appellants now seek leave to appeal against this decision on the following grounds:

1. The appellants seek permission to appeal a decision made in an application at the First-tier Tribunal (Housing and Property Chamber) in which they are respondents. The application against them was made by their former tenants in terms of Section 58 of the Private Housing (Tenancies)(Scotland) Act 2016 (“the 2016 Act”).
2. The application called at a case management discussion on 23 September 2025. On that date, the respondents moved the Tribunal to reject the application under Section 58 of the 2016 Act on the basis that, given the facts agreed by the parties, it was not competent.
3. The respondents refer to the Case Management Discussion Note which was prepared by the First-tier Tribunal on that date (hereinafter “the CMD Note”). The respondents refer in particular to the section of the CMD Note named “Decision”. In paragraph 16 of the CMD Note, the Tribunal states: “*The motion to refuse the Application is therefore refused.*” This is a “decision” of the Tribunal in terms of Section 46 of the Tribunals (Scotland) Act 2014 and Rule 37. It is not an excluded decision. It is accordingly capable of being appealed under Rule 37.
4. In terms of its written decision dated 12 November 2025, the First-tier Tribunal rejected the appellants’ request for permission to appeal the decision to the Upper Tribunal for Scotland. The appellants accordingly seek permission from the Upper Tribunal in terms of Section 46(3)(b) of the Tribunals (Scotland) Act 2014.
5. The appellants’ position is that the Tribunal made errors in law when deciding that, on the admitted facts, the application was competent under Section 58 and should not be rejected. More particularly, the Tribunal made (a) an error of general law, and the content



of its rules; and (ii) an error in the application of the law to the facts. The details of the errors of law are under two broad headings as follows:

6. The appellants refer to paragraph 13 of the CMD Note. This addresses Section 58 of the 2016 Act. The appellants argue that it is an essential prerequisite to any application under Section 58 that the application must meet the criteria set out within that provision. The appellants argue that the wrongful termination application is incompetent because it does not comply with all requirements of Section 58 of the Private Housing (Tenancies)(Scotland) Act 2016. In particular, the CMD Note addresses the appellants' argument that a Notice to Leave was not "received" as required by Section 58(1). Prior to the case management discussion, the appellants lodged case law and authorities to address their position. The Tribunal states at paragraph 13:

"The premise of the competency argument is therefore flawed. It supposes that there must be a valid notice to leave served before an application can be brought for a Wrongful Termination Order. As per Smith (supra), that is not so."

7. The appellants submit that this is incorrect. It is a clear error of general law, and in particular a misinterpretation of Section 58 of the 2016 Act and the relevant case law. In terms of Section 58(1) of the Private Housing (Tenancies)(Scotland) Act 2016, it is a specific and essential precursor to any application for wrongful termination that a Notice to Leave (as defined in Section 62) must be "received" by the tenant in accordance with Section 50. The Tribunal's interpretation of the Upper Tribunal for Scotland case of *Smith v MacDonald & Munro* [2024] UT 45 is erroneous. It is furthermore wholly inconsistent with the unambiguous terms of the 2016 Act.

8. The appellants refer to paragraph 15 of the CMD Note. In this paragraph, the Tribunal addresses the appellants' submission that in order to be "received" in accordance with Section 50 of the 2016 Act (and therefore valid), the Notice to Leave must be served in accordance with either (a) the terms of the tenancy or (b) Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010. The Tribunal states at paragraph 15:



“There is no doubt that the Applicants received the notice to leave and acted upon it in this case. The Tribunal therefore agrees that in any event, even if an Application for a Wrongful Termination Order could only be based on a notice to leave having been served, it would still have been competently brought even if the notice to leave was served defectively.”

9. This is incorrect. This is both an error of general law and a misapplication of the law to the facts. The definition of the term “receive” in the context of the 2016 Act is a matter which has already been determined by the Upper Tribunal in *Smith v MacDonald & Munro* [2021] UT 20. In that case, the word “receive” was confirmed to mean receipt by a method compliant with the Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 (the “2010 Act”). No other interpretation of “receive” is capable of being used.

10. The parties in this application all admit that the Notice to Leave in the current case was sent to the tenants by email. The appellants submit it was accordingly not served in a manner which was compliant with Section 26. It has accordingly not been “received”. Therefore, Section 58 of the 2016 Act cannot apply in the current circumstances. If Section 26 cannot apply, the Notice has not been served in accordance with Section 50 and accordingly Section 58 does not operate to allow the former tenants to apply for a wrongful termination order.

11. The Tribunal’s interpretation of the term “receive” within the context of the 2016 Act is accordingly an error of law.

The Test for Permission to Appeal

[8] Section 46(3)(b) of the Tribunals (Scotland) Act 2014 sets out that an appeal to the Upper Tribunal can only be made on a point of law. Section 46(4) also sets out that permission to appeal can only be granted where there are arguable grounds for appeal. It has been held that this is a low bar and is a lower threshold than requiring a real prospect of the appeal succeeding on the grounds stated. Accordingly, at this juncture the Tribunal is not concerned with whether the Appellant is likely to succeed or not. An Appellant must demonstrate an issue or argument that can properly



be argued, and the grounds should focus on where it is suggested that the Tribunal has erred in its original decision. A permission to appeal decision is not concerned with considering the whole argument which can be considered in full at the appeal hearing if permission to appeal is granted. Rather, at this stage the question to be considered is whether there is something of substance which can be argued at a full hearing. If the appeal is hopeless or without any merit, it would not be in the interests of justice to grant permission to appeal.

[9] The test to be applied when assessing whether to grant permission to appeal, is whether that party seeking permission has identified an error of law which is capable of being stated or argued before the Upper Tribunal. Whilst the term “arguable ground of appeal” is not defined in the legislation, it has been held to be a lower threshold than “a real prospect of success.”¹ The Upper Tribunal has also stated that: “The threshold for arguability is therefore relatively low. An appellant does however require to set out the basis of a challenge from which can be divined a ground of appeal capable of being argued at a full hearing.... The Respondent in a hopeless appeal ought not to have to meet any further or additional procedure in a challenge with no merit. It is in the interest of justice that a ground of appeal which is misconceived is stopped in its tracks”.²

[10] In the case of *Advocate General for Scotland v Murray Group Holdings Ltd*³ the Inner House identified four categories of cases covered by the concept of an appeal on a point of law, namely:

- “(i) an error of general law; the content of its rules;
- (ii) an error in the application of the law to the facts;
- (iii) making findings in fact without a basis in the evidence; and
- (iv) taking a wrong approach to the case by, for example, asking the wrong questions or taking account of manifestly irrelevant considerations or by arriving at a decision that no reasonable tribunal can properly reach”.

¹ *Wightman v Advocate General* 2018 SC, Lord Carloway at 388

² *Indigo Square Property Ltd v Mark Welsh* (2023 UT22),

³ 2015 CSIH 77



[11] Further it is not for the Upper Tribunal to rehear the facts in the hope that it might reach a different conclusion on those facts. The initial Tribunal is the sole finder of facts, and the Upper Tribunal will not interfere with any matters found in fact by that Tribunal.

Discussion

[12] Whilst the specified Grounds of Appeal set out eleven Heads, it is apparent that a large number of these effectively constitute background narrative. In broad terms the Appellants appeal on two grounds.

[13] The first argument is that it is an essential prerequisite of any application under Section 58 that being granted that the application must meet the criteria as set out within that statutory provision. In the present case it is submitted that the wrongful termination application is fundamentally incompetent because it does not comply with all of the requirements of Section 58 of the Private Housing (Tenancies)(Scotland) Act 2016. In particular, the CMD Note is said not to address the Appellants' argument that a Notice to Leave was not "received" as required by Section 58(1), by stating that:

"The premise of the competency argument is therefore flawed. It supposes that there must be a valid notice to leave served before an Application can be brought for a Wrongful Termination Order. As per Smith (supra), that is not so."

[14] The Appellants submit that this is an error of general law, misinterpreting Section 58 of the 2016 Act as well as the relevant case law, given that it was submitted that Section 58(1) of the Private Housing (Tenancies)(Scotland) Act 2016, provides that it is a specific and essential precursor to any application for wrongful termination that a Notice to Leave (as defined in Section 62) must be "received" by the tenant in accordance with Section 50. The Tribunal's interpretation



of the Upper Tribunal for Scotland case of *Smith v MacDonald & Munro* [2024] UT 45 was said to be erroneous, and in event inconsistent with the terms of the 2016 Act.

[15] Thereafter it is submitted that again in accordance with the terms of the aforementioned section that in order to be “received” in accordance with Section 50 of the 2016 Act (and therefore valid), that the Notice to Leave must be served in accordance with either (a) the terms of the tenancy or (b) Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010.

[16] It was submitted that the Tribunal erred in stating that there was no doubt that the respondent’s received the notice to leave and acted upon it in this case, and further that even if an application for a Wrongful Termination Order could only be based on a notice to leave having been served, it would still have been competently brought even if the notice to leave was served defectively.

[17] The aforementioned finding was said to be contrary to the determination of the Upper Tribunal in *Smith v MacDonald & Munro* [2021] UT 45, wherein the word “receive” was held to mean receipt by a method compliant with the Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010. The Tribunal’s interpretation of the term “receive” within the context of the 2016 Act and the aforementioned decision was accordingly said to constitute an error of law.

Decision

[18] In relation to the first Ground of Appeal in relation to competency, reference is made to the terms of section 58 of the Private Housing (Tenancies) (Scotland) Act 2016 which states:

58 Wrongful termination without eviction order

(1) This section applies where a private residential tenancy has been brought to an end in accordance with section 50.



(2) An application for a wrongful-termination order may be made to the First-tier Tribunal by a person who was immediately before the tenancy ended either the tenant or a joint tenant under the tenancy (“the former tenant”).

(3) The Tribunal may make a wrongful-termination order if it finds that the former tenant was misled into ceasing to occupy the let property by the person who was the landlord under the tenancy immediately before it was brought to an end.

[19] For the avoidance of doubt section 50 provides that:

50 Termination by notice to leave and tenant leaving

(1) A tenancy which is a private residential tenancy comes to an end if—

- (a) the tenant has received a notice to leave from the landlord, and*
- (b) the tenant has ceased to occupy the let property.*

(2) A tenancy comes to an end under subsection (1) on the later of—

- (a) the day specified in the notice to leave in accordance with section 62(1)(b), or*
- (b) the day on which the tenant ceases to occupy the let property.*

(3) For the avoidance of doubt, a tenancy which is to come to an end under subsection (1) may be brought to an end earlier in accordance with section 48.

[20] As indicated by the inclusion of section 58(3), it was clearly envisaged by Parliament that situations may arise whereby tenants might be induced into vacating a property due to being “misled.” It is difficult to envisage a situation whereby that might arise if all the statutory requirements had in fact been met. In ascertaining the position, the case of *Reynolds v Henry* 2024 UT 45 is helpful in suggesting a four-part test as follows:

- (i) Firstly the landlord must have made some form of representation from the landlord to the tenant, representing that he has a ground for eviction in a notice to leave given that under the 2017 Regulations, such a notice must have been served to terminate the tenancy under section 50, although conceivably other forms of written or oral representations may have been made to the tenant by the landlord, and if so might also be founded upon.



(ii) Secondly the representation must have been objectively misleading, for example by representing that the landlord has a ground for eviction under schedule 3 of the 2016 Act when in fact that ground does not exist.

(iii) Thirdly, the tenant must have actually been misled by the landlord's representation, and accordingly if the tenant actually knew that the landlord's representation was false then he could not have been misled by it and the application could not succeed.

(iv) Fourthly the representation must actually have misled the tenant into ceasing to occupy the property and must have been at least a significant or material cause of him so doing. So if the tenant's decision to leave the property was for reasons other than

[21] The Tribunal held therefore that given that the terms of the statute specifically referred to situations whereby a landlord might mislead a tenant into leaving that it is not necessary that an Application for a Wrongful Termination Order would be reserved only for those tenants who have received a valid notice to leave. Accordingly, it would be an entirely reasonable conclusion for the Tribunal to reach the effect that the misleading might relate to the method of service rather than simply the contents of any such communication to the tenant to quit the property. As was stated in the foregoing case, other forms of written or oral representations may have been made to the tenant, and if so, might also be founded upon. This definition might readily include emails, as occurred in the present case. It would also clearly be a perverse situation if a landlord might induce a tenant to vacate a property and then pray in aid their own fallings in that regard in seeking to defeat the provisions of section 58. A landlord should not be able to defeat a wrongful termination claim simply by arguing that the notice used by them to cause the tenant to leave was technically defective. Such an approach would clearly be inconsistent with the protective purpose of section 58(3).

Accordingly, I am not satisfied that the position as stated by the Appellants is arguable, and that there has not been a misinterpretation of section 58 and section 58(3) in particular. Permission to appeal on this Ground is therefore refused.



[22] In relation to the second aspect of the application for permission to appeal it has been submitted that to be “received” that the Notice to Leave must be served in accordance with either (a) the terms of the tenancy or (b) Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010. In the present case, whilst not finding that the terms of the tenancy agreement contained any provision for the service of documentation, such as would comply with the terms of section 26(3) of the aforementioned Act, the Tribunal found that the Appellants had in fact received the notice to leave and had indeed acted upon it in this case. Whilst this was said to have been contrary to the determination of the Upper Tribunal in *Smith v MacDonald & Munro* [2021] UT 20, that particular case concerned the terms of section 52 of the Private Housing (Tenancies) (Scotland) Act 2016, and not the terms of section 58 of said Act. It is of significance that the terms of section 52 of the said Act differ somewhat in their terms and in particular they do not contain any provisions regarding people being misled into ceasing to occupy the property such as that contained in section 58(3).

[23] Further the position of the Tribunal appears to be consistent with the decision in the aforementioned case of *Reynolds v Henry* 2024 UT 45 which states:

“But conceivably other forms of written or oral representations may have been made to the tenant by the landlord and if so, might also be founded upon.”

[24] Accordingly and for the foregoing reasons I am again not satisfied that the submissions of the Appellants on this Ground are arguable and permission to appeal is therefore refused.

[25] Permission to appeal on both grounds is therefore refused.

Sheriff Colin Dunipace

Member of the Upper Tribunal for Scotland