IN THE UPPER TRIBUNAL **UT ref: UA-2022-000135-HS**

ADMINISTRATIVE APPEALS CHAMBER

NOTICE OF DETERMINATION ON APPLICATION FOR PERMISSION TO APPEAL AFTER ORAL HEARING ON 2 MARCH 2022

Applicant:	**DB**
Respondent:	**Academy Transformation Trust**
Tribunal:	**First-tier Tribunal (Health, Education and Social Care Chamber)**
Tribunal Case No:	**EH935/21/00110**
Decision date:	**17 January 2022**

ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the child in these proceedings. This order does not apply to (a) the child's parents (b) any person to whom the child's parents, in due exercise of their parental responsibility, disclose such a matter or who learns of it through publication by either parent, where such publication is a due exercise of parental responsibility (c) any person exercising statutory (including judicial) functions in relation to the child where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

DETERMINATION

I refuse Mr B permission to appeal.

REASONS

1. Permission to appeal is refused because I do not consider that it is arguable with a realistic prospect of success that First-tier Tribunal erred **in law** in its decision of 17 January 2022 not to stay, pending the determination of Mr B's disability discrimination claim against the respondent, the respondent's decision of 17 November 2021 to permanently exclude Mr B's son, J, from school.

2. Permission to appeal was refused by Judge Meleri Tudur, Deputy Chamber President of the First-tier Tribunal, on 11 February 2022. Mr B renewed his application for permission to appeal to the Upper Tribunal. Upper Tribunal Judge West refused Mr B permission to appeal, on consideration of the papers, in a detailed determination dated 21 February 2022.

3. Mr B then renewed his application for permission to appeal to an oral hearing. The oral hearing took place before me on 2 March 2022, remotely via the CVP video platform. The hearing being remote, by CVP, was at Mr B's request as it enabled him to attend the hearing from his home and therefore not disrupt too greatly his caring and schooling responsibilities for J. The respondent had not been expected to attend the hearing and did not attend it. Save for the clerk, no one else was present at the hearing.

4. The hearing and the form in which it was to take place had been notified in the 'daily courts list' along with information telling any member of the public or press how they could observe the hearing at the time it took place through CVP. The Upper Tribunal has used its reasonable endeavours to make a recording of these proceedings using the CVP recording facility and will preserve that recording for a reasonable time in case members of the public or the press would wish to follow the proceedings. I heard oral submissions from Mr B at the hearing just as I would have done had we been in the same tribunal room. I was satisfied in all these circumstances that the hearing constituted a public hearing (with members of the public and press able to attend and observe the hearing), that no party had been prejudiced and that the open justice principle had been secured.

5. Having heard from Mr B, and considered his arguments, I am at one with Judge West in considering there is no arguable merit in error of

law terms in the arguments he makes, and for that reason I refuse him permission to appeal.

6. By way of background, J is an 8 year old child with significant additional and special educational needs. He has been formally diagnosed with both Autistic Spectrum Disorder and Avoidant Restrictive Food Intake Disorder. He has an educational health and care plan ("ECHP") which includes continual support at school.

7. There have been three sets of First-tier Tribunal proceedings concerning J. His initial ECHP was modified and finalized by a specialist panel following an oral hearing in case EH935/19/00051. The second proceedings, under First-tier Tribunal case reference EH935/21/00018, resulted in the First-tier Tribunal finding that J had been subject to disability discrimination and unlawfully permanently excluded by his school in October 2020. His immediate reinstatement was ordered. The present case relates to further alleged discrimination (and victimization) by the same school following J's reinstatement and the school's decision permanently to exclude J for a second time on 17 November 2021.

8. Mr B filed a further claim for disability discrimination in respect of J in October 2021. It was following the initial registration of that claim that the school determined to exclude J permanently. The claim was subsequently expanded to include the latest permanent exclusion. A final hearing of that claim is listed to be heard by the First-tier Tribunal next week, on 9 March 2022.

9. At a telephone case management hearing on 11 January 2022 that Mr B sought to have the permanent exclusion decision of 17 November 2021 stayed pending final determination of the disability discrimination claim he had made in October 2021. Judge Brownlee, in a reserved judgment issued on 17 January 2022, held that the Tribunal had no such power. It is that decision which is the subject of this challenge by Mr B.

10. Mr B has refined his arguments in a skeleton argument since being refused permission to appeal by Judge West. In summary, his two arguments are now as follows.

11. First, that the word "proceedings" in rule 5(3)(j) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("the HESC Rules") has a special and wide meaning in public law proceedings which encompasses the administrative decision the subject of the statutory claim to the First-tier Tribunal (in this case, the permanent exclusion decision). Mr B argues that this meaning can be traced back to the Court of Appeal's decision in *R v Secretary of State for Education and Science ex parte Avon County Council* [1991] 1 QB 558.

12. Second, and in the alternative, he argues that rule 5(3)(j) should be so read under section 3 of the Human Rights Act 1998 in circumstances where paragraph 2 of Schedule 1 to the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 is in effect.

13. I do not consider either argument has any arguable merit. In my judgement, properly read in its statutory context "stay proceedings" in rule 5(3)(j) of the HESC Rules plainly only means staying the proceedings before the First-tier Tribunal.

14. The HESC Rules were made by the Tribunal Procedure Committee under, insofar as is material, section 22 of the Tribunals, Courts and Enforcement Act 2007. Section 22 provides, so far as is relevant, as follows:

> "22.-(1)There are to be rules, to be called "Tribunal Procedure Rules", governing—
> (a) the practice and procedure to be followed in the First-tier Tribunal, and
> (b) the practice and procedure to be followed in the Upper Tribunal.
> (2) Tribunal Procedure Rules are to be made by the Tribunal Procedure Committee.
> (3) In Schedule 5—
> (a) Part 1 makes further provision about the content of Tribunal Procedure Rules,
> (b) Part 2 makes provision about the membership of the Tribunal Procedure Committee,
> (c) Part 3 makes provision about the making of Tribunal Procedure Rules by the Committee, and
> (d) Part 4 confers power to amend legislation in connection with Tribunal Procedure Rules.
> (4) Power to make Tribunal Procedure Rules is to be exercised with a view to securing—
> (a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,
> (b) that the tribunal system is accessible and fair,
> (c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,
> (d) that the rules are both simple and simply expressed, and
> (e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.
> (5) In subsection (4)(b) "the tribunal system" means the system for deciding matters within the jurisdiction of the First-tier Tribunal or the Upper Tribunal."

15. I need not refer to Schedule 5 to the Tribunals, Courts and Enforcement Act 2007. However, the language of section 22(1)(a) is instructive and, in my view, stands against Mr B's main argument (his first), as it emphasises that the rules are to govern the practice and procedure to be followed *in* the First-tier Tribunal. The *vires* for the rules do not therefore, on their face, confer power to make procedural

rules governing matters outwith the First-tier Tribunal's jurisdiction (per s. 22(5)) to decide matters (here, the claim for disability discrimination). Further, the exercise of the power to make such rules to secure "justice is done" is subordinate to section 22(1) and so cannot be used to confer a rule making power which is beyond the scope of section 22(1).

16. Nothing which was decided by the Court of Appeal in *R(ABC Ltd) v Revenue and Customs* [2017] EWCA Civ 956; [2018] 1 WLR 1205 affects this point. The issues in that case were, first, whether HMRC had a statutory basis under which it could grant the companies a temporary approval to trade pending an appeal to the First-tier Tribunal and, second, whether the High Court could grant interim relief to the companies on a challenge to HMRC's denial that it had such a power. The scope of the First-tier Tribunal (Tax Chamber)'s ability to grant any interim relief was not argued out in *ABC*. However, it was accepted by all parties in *ABC* that that Chamber of the First-tier Tribunal had no power under its procedural rules to grant interim relief to the companies pending their appeal. It is noteworthy that rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 is in identical terms to rule 5 of the HESC Rules.

17. I interpolate at this point to say that I found Mr B's distinction between interim relief and a stay of proceedings (so as to suspend the effect of the exclusion decision under appeal) somewhat elusive and not entirely helpful. In both *ABC* and in this case the effect of the argument is to allow the High Court (in the *ABC* case) and the First-tier Tribunal (in this case) to interfere on an interlocutory basis with the decision of the party against which the challenge is being brought.

18. I note the discussion in paragraph [32] of *ABC* about the First-tier Tribunal (Tax Chamber) not having the power to grant interim relief and the possibility of such a power being lawfully conferred. That discussion was plainly *obiter*. However, I do not consider anything said in that paragraph stands against my analysis in paragraph 15 above because, as the Court of Appeal adverted to in paragraph [31] of *ABC*, paragraph 16 of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007 would arguably provide the *vires* for conferring any interim relief power in the relevant tribunal procedure rules.

19. The HESC rules made by the Tribunal Procedure Committee contain within them rule 5. This provides as follows:

> "Case management powers
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> 5(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
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> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may—
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> (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment containing a time limit;
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> (b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case;
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> (c) permit or require a party to amend a document;
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> (d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;
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> (e) deal with an issue in the proceedings as a preliminary issue;
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> (f) hold a hearing to consider any matter, including a case management issue;
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> (g) decide the form of any hearing;
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> (h) adjourn or postpone a hearing;
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> (i) require a party to produce a bundle for a hearing;
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> (j) stay proceedings;
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> (k) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and—
>
> because of a change of circumstances since the proceedings were started, the Tribunal no longer has jurisdiction in relation to the proceedings; or
>
> the Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case; or
>
> (l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal of an application for permission to appeal against, and any appeal or review of, that decision."

20. Consistently with section 22(1) of the Tribunals, Courts and Enforcement Act 2007, the opening words of rule 5(1) are concerned with the First-tier Tribunal regulating *its own* procedure. That language, again, stands against rule 5 enabling the First-tier Tribunal to regulate procedures or decisions outwith its own procedures, other than once the First-tier Tribunal has made its substantive decision on the claim or the appeal.

21. I do not need to set out the equivalent rule in the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules"), which is also rule 5. Judge West set out its terms in full.

22. I respectfully agree with Judge West that it is clear that the Upper Tribunal has the power under rule 5(3)(m) of the UT Rules in an appeal, or an application for permission to appeal, against the decision of another tribunal, such as the First-tier Tribunal, to suspend the effect of the decision of the First-tier Tribunal pending the determination of the application for permission to appeal, and any appeal. It is equally clear, again agreeing with Judge West, that the First-tier Tribunal under rule 5(3)(l) of the HESC rules only has the power to suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal of an application for permission to appeal against, and any appeal or review of, that decision. It is instructive that, where the draughtsperson has used the phrase "suspend the effect" of a decision, they have not included within that suspension power any power to suspend on an interim basis the effect of a decision being challenged on appeal or a claim to it pending the determination of the appeal or the claim (such as the permanent exclusion decision in the present case. This limit on the First-tier Tribunal's suspension powers sits consistently with the scope of section 22(1) of the Tribunals, Courts and Enforcement Act 2007 and the wording of rule 5(1).

23. However, Mr B sought to argue that such a suspension effect (in respect of the school's permanent exclusion decision) is permitted instead by rule 5(3)(j) of the HESC Rules to "stay" the "proceedings".

24. The first difficulty with this argument is why the draughtsperson did not include this power under the more natural language of 'suspending the effect of a decision' that is explicitly found in rule 5(3)(l).

25. The second difficulty with this argument is that it is taking a step that is concerned with 'proceedings' other than the First-tier Tribunal's own proceedings., and so involves a step outwith the scope of section 22(1) of the Tribunals, Courts and Enforcement Act 2007 and the wording of rule 5(1).

26. I also do not consider there is anything in Mr B's argument that rule 5(3)(j) needs to have the effect for which he contends as otherwise it would be otiose. It would not. It could legitimately be used, for example, to stay claims or appeals before the First-tier Tribunal that all depended on a decision from the Upper Tribunal on a point of statutory construction which was common to all cases. Such a process would avoid each claim or appeal having to be decided, appealed and then potentially suspended under rule 5(3)(l).

27. Nor do I consider that *ex parte Avon* provides any real support for Mr B's main argument here. That decision, in my clear judgement, has to be understood on its own facts and, in particular, in the context of the

particular rule (and its wording) which was in issue. The factual context in *ex parte Avon* was of a local authority seeking to judicially review the reorganisation of education provision in its county made under decisions made by the Secretary of State for Education. As part of its judicial review Avon sought a stay of the Secretary of State's decisions. The wording of R.S.C., Ord. 53, rule 3(10)(a) in issue was as follows:

> "Where leave to apply for judicial review is granted, then (a) if the relief sought is an order or prohibition or certiorari and the court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the court otherwise orders"

28. The Court of Appeal concluded that the wording "the proceedings to which the application relates" in rule 3(10)(a) should be given a wide meaning and not restricted to judicial proceeding, and so covered Avon's challenge as its judicial review proceedings included a request for an order of certiorari (a quashing order). Although this decision may be one of a number that over time has widened the scope of judicial review challenges, I do not consider it was doing any more than construing the language of the particular legal rule in question and stating what it meant in that context. The similar exercise in construing the legal rule in issue in this case leads to the construction set out above.

29. Nor do I consider that *ex parte Avon* was laying down a legal meaning for the word "proceedings" in all public law cases within and outside judicial review, as Mr B contended (even assuming his disability discrimination claim before the First-tier Tribunal is a 'public law' challenge, a matter over which I have some doubt (see, for example, the discussion *in ex parte Avon* itself at page 561G-562B)). The Order the Court of Appeal was construing in *ex parte Avon* concerned judicial review proceedings alone and I can find nothing in the judgment to support it being about the word 'proceedings' in all or any other set of rules or public law proceedings outside judicial review. I therefore do not consider there is any basis for Mr B's argument that the draughtsperson of the HESC Rules wrote rule 5(3)(l) knowing, and to conform with, the decision in *ex parte Avon*.

30. Nor, for the reasons that Judge West gave, do any of *Essex CC v FA* [2019] UKUT 38 (AAC), *R(H) v Ashworth Hospital Authority* [2002] EWCA Civ 923, or *F v Responsible Body Of School W* [2020] UKUT 112 (AAC) aid Mr B.

31. The alternative arguments based on section 3 of the Human Rights Act 1998 was not really developed before me by Mr B. I agree with Judge West that the High Court's power on judicial review to suspend an administrative decision, together with the First-tier Tribunal's power to order reinstatement after the appeal has been determined, provide a human rights effective remedy against the exclusion decision and do

not require rule 5(3)(j) of the HESC Rules to be read as conferring a power on the First-tier Tribunal to suspend the effect of the permanent exclusion decision made by the respondent.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

3rd March 2022