IN THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER) **Appeal No. UA-2022-000135-HS**

BEFORE UPPER TRIBUNAL JUDGE WEST

Appellant DB

and

Respondent ACADEMY TRANSFORMATION TRUST
(the proprietor of Back Row Primary Academy)

APPLICATION FOR PERMISSION TO APPEAL
AGAINST A DECISION OF A TRIBUNAL

ON APPEAL FROM

Tribunal	SENDIST
Tribunal Case No:	EH935/21/00110
Tribunal Hearing Date:	17/1/2022

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

The application for permission to appeal against the decision of the First-tier Tribunal (HESC) (Special Educational Needs & Disability) (which sat on 11 January 2022) dated 17 January 2022 under file reference EH935/21/00110 is refused.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. An appeal to the Upper Tribunal lies only on "any point of law arising from a decision" (section 11(1) of the Tribunals, Courts and Enforcement Act 2007), not on the facts of the case. The Upper Tribunal has a discretion to give permission to appeal if there is a realistic prospect that the First-tier Tribunal's decision was erroneous in law or if there is some other good reason to do so (Lord Woolf MR in ***Smith v. Cosworth Casting Processes Ltd*** [1997] 1 WLR 1538). In the exercise of its discretion the Upper Tribunal may take into account whether any arguable error of law was material to the First-tier Tribunal's decision.

2. In summary, the basis of this application for permission to appeal is that the Tribunal Judge erred in law in law by holding that the First-tier Tribunal (Special Education Needs and Disability) did not have the power to stay a permanent exclusion decision pending a final hearing, which is due to take place on 9 March 2022.

The Background

3. By way of background I shall summarise the first four paragraphs of the appellant's grounds of appeal, which I shall assume for present purposes to be an accurate exposition of the case. The case concerns J, an 8 year old child with significant additional and special educational needs. J 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 1:1 / 2:1 support at school.

4. The First-tier Tribunal (Special Educational Needs and Disability) ("the First-tier Tribunal" or "the Tribunal" for short) has been involved in relation to J on three occasions. J's initial ECHP was modified and finalized by a specialist panel following an oral hearing (case EH935/19/00051). The second occasion (case EH935/21/00018) resulted in the Tribunal finding that J had been subject to disability discrimination and unlawfully permanently excluded by his school in October 2020. J's immediate reinstatement was ordered. The present case relates to further alleged discrimination (and victimization) by the same school following his reinstatement and its decision permanently to exclude J for a second time on 17 November 2021.

5. J missed ¾ of the 2020/21 academic year due to the first permanent exclusion and only returned to the school in June 2021. In the present academic year J has now been excluded for more than the 45 day statutory limit. During these periods the local authority has been unable to provide a suitable alternative setting, resulting in his parents being forced to home school J in the interim pending a final hearing.

6. In October 2021 the appellant, J's father, filed the present claim. It was following initial registration of the claim that the school determined to exclude J permanently. Accordingly, the claim has subsequently been expanded to include the latest permanent exclusion. As stated above, a final hearing is listed for 9 March 2022.

7. At a telephone case management hearing on 11 January 2022 both parties made submissions in relation to an application made by the appellant to have the permanent exclusion decision of 17 November 2021 stayed pending final determination of the claim. Judge Brownlee, in a reserved judgment issued on 17 January 2022, held that the Tribunal had no such power. Permission to appeal was initially refused by the Deputy Chamber President, Judge Meleri Tudur, on 11 February 2022. The appellant applied to the Upper Tribunal for permission to appeal on 16 February 2022.

8. In view of the imminence of the final hearing on 9 March 2022, I have dealt with the application as soon as it was submitted to me.

9. As is customary, I am not treating the present application as a review of Judge Tudur's determination. Although I have read her decision by way of background, I have in effect put her ruling on one side and considered the matter entirely afresh, with the benefit of having read the appellant's grounds for the application for permission to appeal.

10. I have considered the appellant's grounds of appeal, but am satisfied that the First-tier Tribunal does not have the power to stay a permanent exclusion decision pending a final hearing and that the application for permission to appeal should be dismissed.

Judge Brownlee's Decision

11. In her reserved decision of 17 January 2022 Judge Brownlee held that

> "By way of Judge McConnell's order of 16 November 2021, she decided that the Tribunal does not have the power to issue an interim injunction to prevent the Responsible Body from imposing any further exclusions until the determination of the claim. Judge Lom, in her order, decided that the Tribunal does not have the power to stay the permanent exclusion and reinstate [J], on an interim basis, before the conclusion of the hearing.

> Mr [B] requested that I consider issuing a stay of the decision to permanently exclude [J] and order his reinstatement at the school, pending the outcome of the two claims. I understand why Mr [B] wishes to have clarity on this point, as it is likely to impact on decisions he takes in relation to the proposed judicial review application. Ms Jackson indicated that the Tribunal does not have such a power in its procedural rules or under the Equality Act 2010.
>
> Mr [B] explained that in his view, the Tribunal has the power to stay the decision to permanently exclude [J]. He drew my attention to *Essex County Council v FA* [2019] UKUT 38 (AAC) as authority for the Tribunal having the power to issue an order of the kind he request, effectively as an interim order, made as a case management direction, pending the outcome of the claim. That case concerned an application for permission to appeal being made to the Upper Tribunal in a special educational needs appeal and a decision of the Upper Tribunal to suspend the effect of the First-tier Tribunal's decision pending the outcome of the appeal to the Upper Tribunal. My first observation is that the Upper Tribunal makes it clear that the case serves to examine law and practice relating to special educational needs. In that case, the stay was ordered under Rule 5(3)(l) of the First-tier Tribunal (Health, Education and Social Care Chamber) Rules 2008. The power to issue an order under that rule concerns this Tribunal's 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. I turn to the Equality Act 2010 and note that paragraph 5 of schedule 17 to the Act sets out that the Tribunal can make such order as it thinks fit if it finds that the contravention occurred. In conclusion, I do not consider that the Tribunal has the power to impose a stay of the kind Mr [B] has requested and accordingly I make no order to that effect."

12. She consequently ordered that

> "1. The second claim, which is the subject of Judge Lom's order, is joined to claim EH935/21/00110, pursuant to Rule 5(3)(b) of the Tribunal Procedure Rules 2008.

> 2. The claimant's application for a 'stay' of the permanent exclusion is refused.
>
> 3. The hearing remains listed for a one-day video hearing starting at 10 am on 9 March 2022".

The Refusal Of Permission To Appeal

13. In her refusal of permission to appeal, the Deputy Chamber President held that

> "3. I have read the grounds of application and the order issued by Judge Brownlee. I have reminded myself of the provisions of the Tribunal Procedure (First-tier Tribunal) (Health Education and Social Care Chamber) Rules 2008 (as amended), especially rule 5 which sets out the Tribunal's case management powers and the decision in the Upper Tribunal decisions cited.
>
> 4. I have reminded myself that the tribunal is a creature of statute and can therefore do only that which is permitted under the legislation. It has no inherent powers and can only do what is permitted by the law.
>
> 5. The case management powers include the power to "stay proceedings" and to "suspend the effect of its own decision". These powers are very similar to those of the Upper Tribunal but they relate only to the First-tier Tribunal's own internal decisions: the Tribunal can stay the proceedings which are within its own jurisdiction and it can stay the effect of its own decisions.
>
> 6. The Upper Tribunal has a judicial review jurisdiction and it is in that context which the *Ashworth Hospital* judgement must be read. It is a judgement of the Court of Appeal on an application for judicial review and makes reference to the Upper Tribunal's powers in that context. The First-tier Tribunal does not have a judicial review jurisdiction and does not have the power to stay a decision of the Responsible Body pending consideration of the disability discrimination claim.
>
> 7. Paragraph 14 of *F v Responsible Body of School W* [2020] UKUT 0112 (AAC) decision confirms that the Upper Tribunal does not have power under its Procedure Rules to stay ongoing proceedings in the First-tier Tribunal, because that power lies only with the First-tier Tribunal under rule 5(3)(j) of the First-tier Tribunal

> Procedure Rules. The Civil Procedure Rules have no application in the First-tier Tribunal which is governed by its own First-tier Tribunal Procedure Rules.
>
> 8. I note that the application is made on the basis that there is a general matter of principle for consideration which the Upper Tribunal should consider urgently.
>
> 9. I conclude that the application is misguided. It does not present an arguable error of law on the part of the First-tier Tribunal decision and does not identify any error on the part of Judge Brownlee".

The Legislation

14. So far as material, the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("the HESC Rules") provide (with emphasis added) that

> **"Case management powers**
>
> 5(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (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—
>
> (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;
>
> (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;
>
> (c) permit or require a party to amend a document;
>
> (d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

> (e) deal with an issue in the proceedings as a preliminary issue;
>
> (f) hold a hearing to consider any matter, including a case management issue;
>
> (g) decide the form of any hearing;
>
> (h) adjourn or postpone a hearing;
>
> (i) require a party to produce a bundle for a hearing;
>
> (j) stay proceedings;
>
> (k) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and—
>
> (i) because of a change of circumstances since the proceedings were started, the Tribunal no longer has jurisdiction in relation to the proceedings; or
>
> (ii) 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.*

15. Again so far as material, the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules") provide (again with emphasis added) that

> **"Case management powers**
>
> 5(1) Subject to the provisions of the 2007 Act and any other enactment, the Upper Tribunal may regulate its own procedure.
>
> (2) The Upper 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 Upper Tribunal may—

(a) extend or shorten the time for complying with any rule, practice direction or direction;

(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;

(c) permit or require a party to amend a document;

(d) permit or require a party or another person to provide documents, information, evidence or submissions to the Upper Tribunal or a party;

(e) deal with an issue in the proceedings as a preliminary issue;

(f) hold a hearing to consider any matter, including a case management issue;

(g) decide the form of any hearing;

(h) adjourn or postpone a hearing;

(i) require a party to produce a bundle for a hearing;

(j) stay (or, in Scotland, sist) proceedings;

(k) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and—

(i) because of a change of circumstances since the proceedings were started, the Upper Tribunal no longer has jurisdiction in relation to the proceedings; or

(ii) the Upper Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case;

(l) suspend the effect of its own decision pending an appeal or review of that decision;

(m) in an appeal, or an application for permission to appeal, against the decision of another tribunal, suspend the effect of that decision pending the determination of the application for permission to appeal, and any appeal;

(n) require any person, body or other tribunal whose decision is the subject of proceedings before the Upper

> Tribunal to provide reasons for the decision, or other information or documents in relation to the decision or any proceedings before that person, body or tribunal".

16. As a matter of construction it is clear that the Upper Tribunal (a superior court of record, like the High Court) has the power under rule 5(3)(m) of its rules (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 that Tribunal pending the determination of the application for permission to appeal, and any appeal. By contrast, it is equally clear that the First-tier Tribunal under rule 5(3)(l) of its rules (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. The First-tier Tribunal does not have any power on an interim basis to suspend the effect of a decision being challenged on appeal to it pending the determination of the appeal, such as the permanent exclusion decision in the present case (see volume 3 of the Social Security Legislation 2021/22: Administration, Adjudication and The European Dimension) at 3.259 and 3.438).

17. The appellant sough to rely on the decision of Judge Ward in ***Essex CC v FA*** [2019] UKUT 38 (AAC) in support of his contention that the Tribunal at first instance did have the jurisdiction for which he contended. In the course of his decision Judge Ward conveniently set out the relevant passages of the decision of the Court of Appeal in ***R(H) v Ashworth Hospital Authority*** [2002] EWCA Civ 923, on which he also sought to rely:

> "37. I directed post-hearing submissions on the significance of applications for a stay in public law proceedings. I am grateful to Mr Tabori and Mr Bowers for their responses. It is common ground between them that the most relevant authority is *R(H) v Ashworth Hospital Authority* [2002] EWCA Civ 923. For the sake of other cases in which the same point may arise, I set out the relevant extract:

"42. The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon*, Glidewell LJ said that the phrase "stay of proceedings" must be given a wide interpretation so as apply to administrative decisions. In my view, it should also be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in *Vehicle and Supplies* would appear to deny jurisdiction even in case A. That would indeed be regrettable, and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review. As I have said, this extreme position is not contended for by Mr Pleming. Thus it is common ground that "proceedings" includes not only the process leading up to the making of the decision, but the decision itself. The Administrative Court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect. A good example is where a planning authority grants planning permission, and an objector seeks permission to apply for judicial review. It is not, I believe, controversial that, if the court grants permission, it may order a stay of the carrying into effect of the planning permission.

43. In some and perhaps many contexts, the result desired by the court can be achieved by the grant of an injunction. This was, in effect, the point that was made by Lord Oliver in the passage that I have cited. But that would not be an appropriate remedy in a case concerning the detention of a patient pursuant to the Act. The judge recognised that, if there were no jurisdiction to grant a stay, there was a serious lacuna in the law, unless it could be overcome by a fresh admission to hospital. At paragraph 97 of his judgment, he said that there was power in the court under section 37 of the Supreme Court Act 1981 to grant an injunction prohibiting a patient from leaving hospital, and requiring him to agree to treatment. But, he added, he could not think of circumstances in which it

would be proper to use this power. As he pointed out:

> "The Court should not deprive a person of liberty by injunction or compel him to submit to treatment, except in the most exceptional cases. Moreover, an injunction cannot authorise a doctor to treat a patient: it can only require the patient to agree to treatment. If notwithstanding the injunction, the patient does not agree to the treatment in question, the only remedy is committal for contempt. Difficulties would also arise in specifying the treatment in question."

44. For these and other reasons, the judge held that the solution to the problem did not lie in the jurisdiction to grant an injunction. It was common ground before us that the judge was right, and I agree. Where the patient has actually left the hospital, the arguments in favour of an injunction have even less attraction. It is unthinkable that the court would grant an injunction to order the patient to return to hospital and submit to the regime of the Act.

45. I return, therefore, to the question whether the court has jurisdiction to grant a stay in cases B and C. As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.

46. I now turn to the third situation, which occurs where the decision has not only been made, but it has been carried out in full. At first sight, it seems nonsensical to speak of making an order that such a decision should be suspended. How can one say of a decision that has been fully implemented that it

> should cease to have effect? Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It overlooks the fact that a successful judicial review challenge does in a very real sense rewrite history. Take a decision by a tribunal to discharge a patient. The order has effect for the purposes of being implemented, i.e. releasing him into the community. But it also has effect in a more general sense: it declares that at the time it was made, the tribunal was not satisfied that the criteria for the patient's continued detention were fulfilled. If the order is ultimately quashed, it will be treated as never having had any legal effect at all: see *R(Wirral Health Authority) v Finnegan and DE* [2001] EWCA Civ 1901. If that occurs, it will be treated as if it had never been made, and the patient will once again become subject to the Mental Health Act regime to which he was subject before the order was made. It is, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect, with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented as in cases B and C."

18. The decision, properly understood, provides no support for the appellant's contention. What Judge Ward was considering was the role of an order for a suspension of the effect of the First-tier Tribunal's decision made by the Upper Tribunal under rule 5(3)(m) of the UT Rules. Nothing that he said bore on the issue now at stake of any power in the first instance Tribunal to order a suspension of a decision on appeal to it by way of interim remedy pending the determination of the appeal and thus outside the terms of rule 5(3)(l) of its own rules.

19. Nor does the decision in ***Ashworth Hospital*** assist the appellant. What was under consideration there was the power of the High Court to order a suspension of a decision in the course of a judicial review. It was in that context that it was said by Dyson LJ in paragraph 42

> "The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon*, Glidewell LJ said that the phrase "stay of proceedings" must be given a wide interpretation so as apply to administrative decisions."

It was also in that context that Glidewell LJ said that the phrase "stay of proceedings" must be given a wide interpretation so as apply to administrative decisions.

20. Moreover, as is apparent from the preceding paragraph 41 the Court of Appeal was considering the provisions of rule 54.10 of the Civil Procedure Rules which, as I have noted below, do not apply to tribunal proceedings. Nor does paragraph 35, on which the appellant also relies, assist in the present context since the case cited therein was considering the meaning of "the proceedings" in the context of Order 53 rule 3(1)(a) of the Rules of the Supreme Court, the predecessor of the Civil Procedure Rules. In that context, the phrase was construed as applying to administrative decisions as well as judicial decisions, but that sheds no light on the ambit of rule 5(3)(l) of the HESC Rules here.

21. By contrast, Judge Ward made it clear in ***F v Responsible Body Of School W*** [2020] UKUT 112 (AAC) that the Upper Tribunal has no power to stay ongoing proceedings in the First-tier Tribunal on a statutory appeal, whereas rule 5(3)(j) of the HESC Rules gave the first instance Tribunal express power to stay its own proceedings:

> "14. The parties made an agreed application to the FtT to stay the remainder of the proceedings pending resolution of the present appeal. That, too, was referred by the FtT to the Upper Tribunal. I refused the resulting application, on the basis that the Upper

> Tribunal has no power to stay ongoing proceedings in the FtT on a statutory appeal, whereas rule 5(3)(j) of the HESC Rules gave the FtT express power to stay its own proceedings."

22. The appellant sought to argued that paragraph 33 of that decision was irreconcilable with Judge Tudur's decision that the Civil Procedure Rules had no application to the Tribunal. That is a misconceived submission. The Civil Procedure Rules which govern procedure in the courts do not apply to Tribunals, which have their own codes of rules, although in case management matters the powers may largely be expressed in the same or similar terms. Judge Ward was not saying in paragraph 33 that the Civil Procedure Rules apply to tribunal proceedings. The context in which Judge Ward was making his decision was as to whether, and in what circumstances, the Tribunal could refuse to register a case in whole or in part and what procedural safeguards were required. He was not considering rule 5(3)(l) of the HESC Rules (as is apparent from its omission in paragraph 16).

23. Counsel had argued in paragraph 29 that it was instructive to consider the position under the Civil Procedure Rules. What Judge Ward was saying in paragraph 33 was that the position under those Rules provided less support than counsel might wish for the legitimacy of a process other than striking out as a means of focussing the issues at a very early stage in a case, but it is quite clear from paragraph 31 that he was applying the Tribunal's own Procedure Rules. He was not applying the Civil Procedure Rules, any more than he was applying the Employment Tribunal rules in paragraph 38.

24. Although the appellant does not mention it, I have considered the terms of s.25 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") which provides that

> **"Supplementary powers of Upper Tribunal**
>
> (1) In relation to the matters mentioned in subsection (2), the Upper Tribunal—

> (a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court, and
>
> (b) has, in Scotland, the same powers, rights, privileges and authority as the Court of Session.
>
> (2) The matters are—
>
> (a) the attendance and examination of witnesses,
>
> (b) the production and inspection of documents, and
>
> (c) all other matters incidental to the Upper Tribunal's functions.
>
> (3) Subsection (1) shall not be taken—
>
> (a) to limit any power to make Tribunal Procedure Rules;
>
> (b) to be limited by anything in Tribunal Procedure Rules other than an express limitation.
>
> (4) A power, right, privilege or authority conferred in a territory by subsection (1) is available for purposes of proceedings in the Upper Tribunal that take place outside that territory (as well as for purposes of proceedings in the tribunal that take place within that territory)".

25. However, I cannot see that the case management of a pending appeal to the First-tier Tribunal falls within the ambit of "all other matters incidental to the Upper Tribunal's functions" when the Upper Tribunal is not otherwise seised of the matter and indeed may never see any onward appeal or application for permission to appeal against the decision of the lower Tribunal.

26. Nor does the invocation of s.22(4) of the 2007 Act or rule 2(3) of the HESC Rule avail the appellant. As Judge Ward made clear in ***F*** (and as was common ground between counsel)

> "26. … In interpreting any rule, it is necessary to do so in the context of the Rules as a whole. It is not permissible to create "by the back door" by relying on general powers a rule covering substantially the same ground as

> an express rule already existing but without the same safeguards (see *Care First Partnership v Roffey* [2001] ICR 87)"

and

> "46. … While statute may do so, the empowering section in the 2007 Act indicates what the Tribunal Procedure Committee is required to have in view when making the Rules. Many of the considerations listed can be achieved in more than one way. Those are matters for the Committee to weigh up within the limits of its discretion set out in *Detention Action*. I do not accept that applying the principle in *Roberts* leads to the conclusion that because a particular rule in a particular case can be argued to result in justice not being done (cf. 2007 Act, s.22(4)(a)), that reflects on the scope of the rule."

27. The High Court would have power on a judicial review to suspend the decision permanently excluding J pending a final hearing. Whether it would in fact do so is not a matter which falls for consideration in the context of the present appeal. The appellant will no doubt consider the impact on any such application of the decisions in ***CC & C Ltd v HMRC*** [2009] UKUT 197(AAC), [2010] AACR 11 and ***R(ABC Ltd) v HMRC*** [2017] EWCA Civ 956, [2018] 1 WLR 1205.

28. The appellant submitted that, in the absence of a power in the First-tier Tribunal to order a suspension of a decision to it on an interim basis, there would be no effective and appropriate remedy against a permanent exclusion. The powers of the Tribunal are set out in paragraph 5 of Schedule 17 of the Equality Act 2010 as follow

> **"5 Powers**
>
> (1) This paragraph applies if the Tribunal finds that the contravention has occurred.
>
> (2) The Tribunal may make such order as it thinks fit.
>
> (3) The power under sub-paragraph (2)—

> (a) may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates;
>
> (b) does not include power to order the payment of compensation".

As I held in ***Proprietor of Ashdown House School v. (1) JKL (2) MNP*** [2019] UKUT 259 (AAC) the power under paragraph 5(2) does include the power to order reinstatement. That is an effective and appropriate remedy against a permanent exclusion. The appellant is not therefore left without an effective and appropriate remedy for an unlawful permanent expulsion.

29. The High Court's power on judicial review to suspend an administrative decision, together with the Tribunal's power to order reinstatement after the appeal has been determined, seem to me to be the answer to the appellant's reliance on Articles 3 and 14 of the European Convention on Human Rights. There is an effective and appropriate remedy against an exclusion, on an interim basis prior to the hearing of an appeal under the High Court's judicial review jurisdiction and after the hearing in the power of the Tribunal to order reinstatement in an appropriate case.

Conclusion

30. For these reasons I am satisfied that the First-tier Tribunal does not have the power to stay a permanent exclusion decision pending a final hearing and that the application for permission to appeal should be dismissed.

31. The appellant complained that he had never sought a review of the decision of Judge Brownlee, but that is to misunderstand the obligation on the Tribunal when faced with an application for permission to appeal since rule 47 of the HESC Rules provides that

> **"Tribunal's consideration of application for permission to appeal**

> 47(1) On receiving an application for permission to appeal the Tribunal *must* first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 49 (review of a decision).
>
> (2) If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision, or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it".

32. That is why Judge Tudur referred to review in paragraph 10 of her decision; she was obliged to do so. In so doing she was not confusing the test for review with the test for granting permission to appeal.

33. Permission to appeal is therefore refused.

34. I do, however, draw to the attention of the appellant the contents of rule 22(3)-(4) of the UT Rules which provide for a renewed oral hearing of the application for permission to appeal which would typically take place before another Upper Tribunal Judge. Whether it would be feasible to arrange such a hearing given the imminence of the final hearing on 9 March 2022 is another matter.

Mark West
Judge of the Upper Tribunal

Signed on the original 21 February 2022