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Case No: CO/3812/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2023

Before :

THE HONOURABLE MR JUSTICE SAINI

- -

Between :

THE KING **ON THE APPLICATION OF** **MARY JANE BALUDEN OCEANA**	**Claimant**
- and –	
UPPER TRIBUNAL **(IMMIGRATION AND ASYLUM CHAMBER)**	**Defendant**
- and –	
SECRETARY OF STATE **FOR THE HOME DEPARTMENT**	**Interested Party**

- -
- -

Rajiv Sharma (instructed by **Paul John and Company**) for the **Claimant**
The **Defendant** did not appear and was not represented
John-Paul Waite (instructed by **Government Legal Department**) for the **Interested Party**

Hearing dates: 29 March 2023

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Approved Judgment

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Mr Justice Saini :

This judgment is in 6 main sections as follows:

I. Overview

1. This is the trial of a preliminary issue as to jurisdiction in a claim for judicial review. The Claimant is a citizen of the Philippines. She came to the United Kingdom as a student in 2008 but outstayed her permission to remain. She became liable to be removed from the United Kingdom and then applied for leave to remain here on grounds of her private life. That application was refused by the Interested Party ("the SSHD"). The Claimant appealed this refusal to the First-tier Tribunal ("the FTT"). That appeal was dismissed by First-tier Tribunal Judge Isaacs ("FTJ Isaacs") on 14 April 2022. Another First-tier Tribunal Judge, FTJ Scott, refused her application for permission to appeal to the Upper Tribunal, as did a judge of the Upper Tribunal, UTJ Kopieczek. The Claimant then sought judicial review of that Upper Tribunal decision.

2. Permission to apply for judicial review of that decision was obtained on "the papers" without the Claimant having drawn attention, in her claim, to the terms of section 11A of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). That section ousts the supervisory jurisdiction of the High Court in judicial review proceedings, subject to a number of specific exceptions. The Defendant had taken no part in the permission stage and did not serve summary grounds, in accordance with normal practice where the named Defendant is a court or tribunal. However, following the grant of permission, the SSHD raised the section 11A jurisdictional issue with the Court. She argued that the High Court had no jurisdiction to hear the claim.

3. By Order dated 3 February 2023, a Judge made directions for the trial of a preliminary issue with the following observations:

> "The issue as to jurisdiction was overlooked at permission stage. I anticipate that the Claimant will concede it. If she does not, then it should be dealt with as a preliminary issue. This procedure will further the overriding objective by avoiding the time and expense of preparing for, and conducting, a full substantive hearing, including obtaining a recording of the Claimant's evidence in the First-tier Tribunal, when it may well be academic because the Court does not have jurisdiction to hear the claim".

4. The Claimant refused to accept these points and to concede that the High Court had no jurisdiction and accordingly directions were given for the trial of the preliminary issue which is before me. At the conclusion of oral submissions on 29 March 2023, I indicated I would dismiss the claim on jurisdictional grounds. These are my reasons.

The dispute

5. I begin with the relevant terms of section 11A of the 2007 Act. It was added to the 2007 Act by section 2 of the Judicial Review and Courts Act 2022, and came into force on 14 July 2022.

6. With my underlined emphasis, section 11A of the 2007 Act provides:

> "'11A Finality of decisions by Upper Tribunal about permission to appeal
>
> Subsections (2) and (3) apply in relation to a decision by the Upper Tribunal to refuse permission (or leave) to appeal further to an application under section 11(4)(b).
>
> <u>The decision is final, and not liable to be questioned or set aside in any other court.</u>
>
> In particular—
>
> the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;
>
> the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision.
>
> <u>Subsections (2) and (3) do not apply so far as the decision involves or gives rise to any question as to whether</u>—
>
> the Upper Tribunal has or had a valid application before it under section 11(4)(b),
>
> the Upper Tribunal is or was properly constituted for the purpose of dealing with the application, or
>
> <u>the Upper Tribunal is acting or has acted-</u>
>
> in bad faith, or
>
> <u>in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.</u>
>
> ….
>
> "decision" includes any purported decision;

> "first-instance decision" means the decision in relation to which permission (or leave) to appeal is being sought under section 11(4)(b);
>
> "the supervisory jurisdiction" means the supervisory jurisdiction of—
>
> …the High Court, in England and Wales or Northern Ireland
>
> …"

7. The Claimant does not accept this provision precludes her claim. Her Counsel makes two points. First, he says her complaint falls within an expressly permitted exception to the general 'finality' rule - the "natural justice" exception (see my underlining above). In the alternative, he argued that the "ouster" of the High Court's supervisory jurisdiction is ineffective in this case for a number of reasons (some narrow and some of a broader nature). In response, the SSHD says that the complaint does not even arguably fall within the "natural justice" exception; and that the section is a clear and valid exclusion of the supervisory jurisdiction, which applies on the facts before me.

8. The SSHD also makes a number of points on the merits about the arguability of the underlying claim, aside from the jurisdictional finality objection. Those matters are not strictly before me because I am, in accordance with the directions for this hearing, limited to considering the jurisdictional issue. Counsel for the Claimant also stressed that his client still disputes what the tribunals below understood she said in evidence before FTJ Isaacs. This is a surprising submission given that a transcript of the recording is now available. I will however make no findings but will simply record as part of the narrative what is said by each side in order to explain the context in which the "natural justice" exception to the ouster is invoked by the Claimant.

II. The Facts

9. The Claimant is a national of the Philippines who entered the UK on 22 January 2008 as a student. She was given a series of grants of leave to remain as a student until 15 July 2016. At the material times, her home residence was in Feltham, West London. From 25 March 2012 until the curtailment of her leave in 2015 the Claimant was studying at an institution called Eynsford College. The address of this College was 37-39 Oxford Street, London W1D 2DU.

10. In 2015, the Home Office determined that the Claimant had fraudulently used a proxy to complete an oral English language test at an institution called Eden College International ("Eden College") on 25 September 2013. That is, using another person to sit the test for her. The Claimant had relied upon having sat and passed this test in an application for leave to remain which she made on 4 October 2013. At the time when this test was said to have been taken, and thereafter, the Claimant was studying at Eynsford College in Central London. Eden College was at the material time located in the Mile End Road in East London. As explained by FTJ Isaacs in her decision - see [13] below - Eden College has been established in other court proceedings to be an institution where testing frauds were rife.

11. The Claimant's leave was curtailed with immediate effect on 15 October 2015. The Claimant's scores from the language test had been cancelled by the Educational Testing Service (ETS) because of claimed fraud. The Home Office decided that the Claimant's presence in the United Kingdom was not conducive to the public good because of her fraud in obtaining a TOEIC test certificate. The Claimant made no challenge at that time to the allegation of fraud. She then unlawfully remained in the UK thereafter and was eventually served with notice of her liability to removal as an overstayer. On 22 November 2019, the Claimant applied for leave to remain on the basis of her private life. That application was refused by the SSHD on 25 February 2021. This decision was the subject of the appeal before the FTT which was heard by FTJ Isaacs on 11 April 2022.

12. In addition to giving oral evidence to FTJ Isaacs, the Claimant submitted a detailed written statement in support of her case. That statement did not suggest that she completed the English Language Test at Eden College because it was close to the college at which she was studying. Her written witness evidence in relation to why she took the test at Eden College (including her journey to get there) was in the following terms:

> "15. I submit that I sat the TOEIC test and this was submitted as part of a UK visa application. I sat the test at Eden College International, 401 Mile End Road, Bow, E3 4PB.
>
> 16. At the time of application this was an approved test by the Respondent and therefore there was no issues or circumstances to doubt the test. It was equivalent to any other English language test. At the time also it was a very common test amongst students and it was recommended by my College.
>
> 17. I sat my test on 25 September 2013. I travelled to the test centre by bus and train. The journey was from Richmond to Mile End on the district line. This journey was roughly 1 hour by train. Richmond station was roughly 30- 45 minutes by bus from my home depending on the traffic. At the time, I was living at Wigely Road, Feltham, Middlesex, TW13 5HF, UK. This was roughly 2 hours away from the test centre. I got off at Mile End station and then had a 5 minute walk from there to the test centre at Eden College International.
>
> 18. The test centre was located on the 1st and 2nd floor of the building. I did not attend any prior classes to the tests. I was confident in my level of English Language and therefore did not feel the need to take training. I paid £700 for the test fee. I paid in cash to my college. My college was called Eynsford College. They booked the test for me.
>
> …
>
> 26. I further submit that I decided to sit the TOEIC test as it was recommended by my college. I did consider sitting another English language test, that being the IEL TS, however my

> college advised me to sit the TOEIC test as the results arrive faster".

13. The Claimant's appeal was dismissed by FTJ Isaacs on 17 April 2022. The Judge concluded for a number of reasons that she had indeed fraudulently used a proxy to take the test. As to Eden College, FTJ Isaacs said:

> "[15]. The case of *RK and DK* at paragraph 67 and 68 makes it clear that the prevalence of fraud at an institution is relevant. At Eden College 77% of tests were found to be invalid and 23% questionable this cheating was rife at this particular college. At paragraph 117 of the case it is stated that the respondent's evidence in these kind of cases is not unreliable. Furthermore this appellant's look up tool returned her test as invalid and the reliability of the look up tool in general has never been in doubt".

14. In relation to the Claimant's oral evidence, one of the findings of FTJ Isaacs was as follows (with my underlining):

> "[35] Secondly, her explanation as to why she chose to travel so far from her home in West London to this particular test centre [Eden College] was not convincing. She said she wanted the result quickly and that her college advised her that the tests carried out at Eden College could provide results quickly. She did not explain why she needed the result quickly – from her immigration history she was experienced in extending her leave and she appears to have made her applications for extensions close to the expiry of existing leave. She has given no explanation as to why a quick turnaround on her result was a key factor on this occasion and <u>in oral evidence she simply said that her college had told her to go to the centre in Mile End Road.</u> She told me that in 2010 she had taken an IELTS test at a centre in Acton. Therefore, I did not find her explanation as to why she travelled across London to Eden College to take the test in 2013 was credible".

15. The overall conclusion of FTJ Isaacs was in the following terms (with my underlining):

> "[37]…The appellant has not explained in a credible manner why she did not take issue with the allegation of deception as soon as it was made. This is because she has only mentioned for the first time at the tribunal hearing that she had taken previous legal advice and been told her case was hopeless. In

> addition she has made inquiries at ETS but only following the refusal of her current application and seemingly as part of her preparation for this appeal. The evidence she gave about travelling to the test centre added nothing to her case because she could have travelled to the test centre as normal and still used a proxy. She has not given a credible explanation as to why she chose to take a test on the other side of London to where she was living at the time for the reason I have explained above. I have considered that the appellant's performance in previous and subsequent English tests indicates that there was no logical reason for her to cheat. However this is the only piece of evidence which weighs in her favour and in my view it does not outweigh the combined weight of respondent's evidence that the appellant used a proxy, the appellant's failure to give a credible explanation as to why she took the test at Eden College in the Mile End Road and the lack of a credible explanation for her failure to take issue with the ETS cancelling of her scores until 6 months after she had lodged her appeal.
>
> [38] Therefore, I find on the balance of probabilities that the appellant did use deception to obtain the English language certificate submitted with her application on 4 October 2013".

16. On 4 May 2022, the Claimant applied for permission to appeal against the dismissal of her appeal by FTJ Isaacs. That came on the papers before FTJ Scott. Amongst a range of complaints about FTJ Isaacs' decision, the Grounds of Appeal stated that there was a plausible reason why the Claimant had sat the test at Eden College, namely that it was close to her existing school. The Grounds further argued that FTJ Isaacs had made an error of fact in failing to accurately record her oral evidence to that effect. The nature of the complaint made in the Grounds is recorded in the following terms in FTJ Scott's refusal of permission:

> "…the appellant submits that the Judge's recollection of the appellant's evidence is 'materially inaccurate', and that the appellant's response under cross-examination by the respondent to the question 'Why did you choose this test centre' was 'It was near my school. The college told me to get this test here.' The submissions state that the appellant had expressly stated that the reason she 'travelled across London' to take the test at Eden College was because it was near her school. The submissions state, 'On the face of it, this is a completely reasonable explanation for why she would travel from West London to East London for the test if the centre is near her school where she would have to travel to anyway."

17. In refusing permission to appeal, FTJ Scott addressed this particular ground in the following terms:

> "For the purpose of assessing the merits of the appellant's application for permission to appeal, I have listened to the recording of the appellant's evidence in order to verify what the appellant said in cross-examination. She stated, 'It was advised to me by my school because I used to attend in Ilsford college, so they are the one who told me to go there and take the exam.' It is apparent from the recording that the appellant did not state that the test centre was near her school. She refers to a school college where she used to attend advising her to attend at that test centre. I find that the Judge did not make a material mistake of fact in stating what the appellant had said".

18. FTJ Scott refused permission on this and a number of other grounds on 29 August 2022. The SSHD says that an official transcript of the Claimant's oral evidence (taken from the recording) supports FTJ Scott's recitation of what is heard on the tape. I have been provided with the transcript (attached to the SSHD's skeleton argument) and it does appear to support what FTJ Scott said. The Claimant does not say in the transcript that she was told to attend Eden College because it was near her school.

19. On 17 May 2022 (some five months before the above refusal of permission by FTJ Scott) the Senior President of the Tribunal issued a Practice Direction in respect of the Immigration and Asylum Chamber First Tier Tribunal. It includes the following provisions as regards recordings:

> "12. Record of proceedings
>
> 12.1 The Tribunal will keep a record of the proceedings of every hearing.
>
> 12.2 The record of proceedings referred to in paragraph 12.1 will normally be an audio recording rather than a written record. Accordingly, any written record of the proceedings taken by the Tribunal will only be disclosed to the parties if an audio recording was not made or has become unavailable.
>
> …
>
> 12.3 Any application made to the Tribunal for disclosure of the record of proceedings shall be considered by the President".

20. The Claimant renewed her application for permission to appeal to the Upper Tribunal without making an application to the President for disclosure of the Record of Proceedings. She restated the assertion that FTJ Isaacs had failed to accurately record her oral evidence to the effect that Eden College was close to her school. Permission

was refused by UTJ Kopieczek on 29 August 2022 on all grounds. As to the discrete complaint about her evidence on why she took the test at Eden College, the UTJ said:

> "There is nothing in the point raised in the grounds about the FtJ's understanding of the evidence in terms of why the appellant went to that particular college for the test. It would appear accurate given that First-tier Tribunal judge Scott in refusing permission to appeal listened to the recording and she did not say that Eden College was near her school. In any event, the FtJ did not find the appellant's evidence credible in terms of why she wanted a result quickly; said to have been another reason for going to Eden College. The FtJ explained why she came to that view".

21. The Claimant applied to judicially review the refusal of permission to appeal. Her grounds of challenge argue that the parties ought to have been provided with the audio recording by the Upper Tribunal, and invited to comment prior to the UTJ reaching his decision. That is the core submission in the arguments said to ground the natural justice complaint. However, the pleaded grounds for judicial review were directed to showing how the so-called *second appeals* test was satisfied by the application (referring to the Cart case: see [23] below). The grounds failed to refer to the applicable legislation in section 11A of the 2007 Act.

22. On 7 November 2022, permission to pursue this ground was granted by a Judge of this Court without regard to the terms of s11A of the 2007 Act. The Judge's reasons show he applied the Cart JR test. After setting out the nature of the dispute about what the Claimant says she said as to why she took the test at Eden College, the Judge explained that "…this judicial review raises an important point of practice and that there is a compelling reason to permit it to proceed. If the actual evidence given at a hearing does not accord with the judge's findings of fact on a relevant matter, or a clear error of misunderstanding has been made on a relevant matter, the appellant rights should be properly aired on an appeal".

23. On 15 December 2022, Detailed Grounds were lodged by the SSHD drawing attention to section 11A of the 2007 Act which came into force on 14 July 2022 and applied to the application made to the High Court (the Upper Tribunal decision was made on 29 August 2022). Counsel for the Claimant (who drafted the grounds for judicial review) accepted before me that he should have referred to that section in his grounds and apologised for his oversight. The terms of the Judge's grant of permission reflect the old law on so-called "Cart JR" cases, after Cart v Upper Tribunal [2011] 11 UKSC 28; [2012] 1 AC 263. The Judge's preamble to his reasons show he directed himself specifically by reference to the Cart principles. The grounds for judicial review, wrongly, directed the Judge to apply those principles which have been superseded by the terms of section 11A of the 2007 Act.

24. The Administrative Court Guide (2022) helpfully summarises the position both before and after section 11A of the 2007 Act came into force. The material part of the 2022 Guide provides as follows:

"9.7 Procedure where the Upper Tribunal is the defendant

9.7.1 In most cases, decisions of the Upper Tribunal are subject to appeal. Decisions subject to appeal should not be challenged in judicial review proceedings because the appeal is an adequate alternative remedy. However, where the Upper Tribunal decision is one refusing permission to appeal from the First tier Tribunal, there is no further right of appeal. In that case, the only route of challenge is by judicial review, naming the Upper Tribunal as defendant and there is a special procedure for judicial review in CPR 54.7A.

9.7.2 A party seeking to challenge a decision of the Upper Tribunal should consider whether the decision was taken before or after 14 July 2022, the date on which s. 2 of the Judicial Review and Courts Act 2022 was commenced:

9.7.2.1 Where the Upper Tribunal's decision was taken before 14 July 2022, the Court will only grant permission to apply for judicial review if it considers that: there is an arguable case which has a reasonable prospect of success that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and either the claim raises an important point of principle or practice or there is some other compelling reason to hear the claim: see CPR 54.7A(7).

9.7.2.2 Where the Upper Tribunal's decision was taken on or after 14 July 2022, parties should bear in mind in addition that the High Court's judicial review jurisdiction is ousted except "so far as the decision involves or gives rise to any question as to whether—

(a) the Upper Tribunal has or had a valid application before it under section 11(4)(b),

(b) the Upper Tribunal is or was properly constituted for the purpose of dealing with the application, or

(c) the Upper Tribunal is acting or has acted—

(i) in bad faith, or

(ii) in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice

…".

III. Section 11A of the 2007 Act

25. Given the wide-ranging nature of the arguments made on behalf of the Claimant, particularly in relation to her second ground (concerning effectiveness of the ouster), I must briefly address the history of this section and its purpose. Following the Government's Manifesto commitment to "ensure that Judicial Review is available to protect the rights of the individual against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays", the Independent Review of Administrative Law ("the IRAL") was established on 3 July 2020 to examine trends in judicial review and make recommendations for reform.

26. The IRAL was conducted by a distinguished panel of public law experts. Insofar as presently material, these experts concluded:

> "...the continued expenditure of judicial resources on considering applications for a Cart JR cannot be defended, and that the practice of making and considering such applications should be discontinued".

27. Following consultation, the Government introduced the Judicial Review and Courts Bill 2022 ("the Bill"). I note that the relevant clause in its original form referred (in describing the exception to the proposed exclusion of the supervisory jurisdiction) to the Upper Tribunal acting "in fundamental breach of the principles of natural justice." During its passage through Parliament, the relevant clause in the Bill was amended to refer to the Upper Tribunal acting "in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice". That is how it now stands. The purpose of the amendment was to clarify that the fundamental breach of natural justice must be procedural in nature: see hyperlink Hansard - UK Parliament.

28. In his written submissions, Counsel for the Claimant argued that section 11A is inconsistent with the decision of the Supreme Court in Cart. The Claimant's submission however ignores the fact that Section 11A was intended to overturn that very decision. Thus, in introducing the Bill in the House of Lords the Parliamentary Under Secretary of State at the Ministry of Justice observed as follows:

> "…Clause 2 implements another recommendation of the independent review: it ousts the supervisory jurisdiction of the High Court and Court of Session over the Upper Tribunal under certain circumstances. This overturns a Supreme Court judgment in 2011 that established what is now commonly known as a Cart judicial review…"

29. I turn to the language of the section. Giving section 11A its plain and ordinary meaning, its effect is to abolish the right to judicially review a refusal of permission by the Upper Tribunal, save in the specific circumstances set out in s11A(4). To retain jurisdiction, the Administrative Court must make an objective assessment as to

whether one or more of those circumstances arguably arise on the facts of the case. The necessity for such an assessment stems from the words "*involves or gives rise to any question"* in section 11A(4). If, on an objective analysis of the case by the Court, no such issue or question arguably arises then the Court must decline jurisdiction. The above analysis will ordinarily be undertaken at the permission stage.

30. In addition to being satisfied that the complaint arguably falls within an exception, the Judge will need to be satisfied that the complaint itself has sufficient merit to meet the traditional JR "arguability" threshold. But that only arises if a claimant gets through one of the jurisdictional gateways (the exceptions).

31. I pause here to note that the issue of why the Claimant chose to travel from Feltham in West London to take her test at Eden College in East London (and her now disputed evidence on that matter) was only a single factor in FTJ Isaacs' overall factual conclusions that the Claimant had been involved in procuring a fraudulent result. A number of other more detailed reasons were given by the Judge for disbelieving the Claimant's evidence. I mention this point given the time, energy and cost expended in pursuing the present JR proceedings which concern a matter that was not the principal issue decided against the Claimant. Although it is not a matter for my decision, the Claimant would have faced substantial hurdles in challenging FTJ Isaacs' overall conclusions as to fraud in any appeal to the Upper Tribunal.

The principles of natural justice or fairness

32. I was referred to a large number of cases as to what natural justice or fairness requires. Subject to the need to be flexible and to avoid hard and fast rules, a high level summary of what fairness in process generally requires would include the following guarantees: the right to be heard by an unbiased tribunal; the right to have notice of the case to be met or proved; and the right to be heard on those matters. However, several cases of high authority underline that the principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision. An essential feature of the context is the statute which gives the relevant public body the power to make decisions, as regards both its language and the shape of the legal and administrative system within which the decision is taken. The requirements of fairness must be interpreted in a manner which does not frustrate the intention of Parliament.

33. Crucially, in the present context, Parliament has taken care to require a "fundamental breach" of natural justice before the exception comes into play. That is an important qualification and needs to be given some meaning. Without seeking to be prescriptive, in my judgment that requires a claimant to identify a failure in process which is so grave as to rob the process of any legitimacy. That is a substantial hurdle. When considering whether this hurdle has been surmounted, a court will need to consider the *entire* process, as opposed to focussing on the discrete aspect which is the subject of the claim. The fairness of a process has to be assessed holistically.

34. Given some of the arguments made by the Claimant, I also need to underline that complaints about the result and the merits of the decision cannot be the subject of the exception. The exception is concerned with failures of *process* and not with disappointing *outcomes*. Parliament has decided that an outcome may in fact be

shown to be wrong, but has determined that this is not a basis for allowing a judicial review challenge to be made.

IV. Ground 1: the Natural Justice Exception

35. The Claimant's primary submission is that her complaint falls within this exception. She argues that she had a right to be informed prior to any decision on permission to appeal by FTJ Scott and UTJ Kopieczek (acting in their appellate jurisdiction as regards her application for permission to appeal to the Upper Tribunal) of any discrepancy between her grounds (and her adviser's recollection of evidence) and the official record of the evidence she gave (the recording).

36. It is said given that the Claimant had no access to the evidence giving rise to the purported inconsistency, that right could only be exercised following provision of the evidence relied upon by the judges who refused permission. Counsel for the Claimant argued that in terms of practical reality she would not have been able to access the recording in accordance with the Practice Direction (see [19] above).

37. Counsel for the SSHD submitted that the facts do not fall within the natural justice exception. He argued that the issue is whether the Claimant had a reasonable opportunity to present her case, and she was provided with that.

38. The question for me is whether it is arguable that there was a procedural error of such severity as to amount to a fundamental breach of the principles of natural justice or fairness. In my judgment, there was no such arguable error. Taking the Claimant's factual case at its highest, she plainly had a reasonable opportunity to present her case. First, the Claimant understood the issues which she was required to address at the substantive appeal and purported to address them. Second, she was then afforded a further opportunity to assert (by way of grounds of appeal) that FTJ Isaacs has misunderstood her oral evidence as to why she attended Eden College. Third, the latter assertion was considered by both FTJ Scott and UTJ Kopieczek. The former took the fair and appropriate step of checking the recording against what FTT Isaacs had understood the evidence to be. This was scrupulously fair. Inserting a process where submissions on what was said on the tape would be made was not necessary as a condition of fairness on the facts before me.

39. In my judgment there was no procedural error in any sense, let alone a "fundamental breach" of the principles of natural justice. FTJ Scott simply checked the official record of evidence when dealing with the complaint. It is entirely proper and reasonable for a judge who is determining a permission application to consult the official record of proceedings and to decide (without further recourse to the parties) whether that record corroborates an assertion in the grounds of appeal. A judge has the necessary skill and independence to decide whether the record is sufficiently clear or whether further recourse to the parties is necessary.

40. I put an example to Counsel. In an ordinary civil case, a judge may well be asked to grant permission to appeal because they have incorrectly recorded a party's oral evidence in a judgment. That judge is entitled to consult their own notes, a recording or transcript and take their own view. It is not a fundamental requirement of common

law fairness principles that the judge is first obliged to convene a further mini-trial for a debate on the terms of the Judge's notes, or the transcript and how it compares to Counsel's own notes.

41. In the event, the Claimant's case is even weaker than this because there *was* a process in place under which she could have applied to the President for the Record of Proceedings if she disputed the accuracy of its interpretation by the FTT in its refusal of permission. I have noted above that the transcript of the recording on its face supports FTJ Scott's understanding but Counsel for the Claimant insisted that the hearing was not to consider the merits but just the jurisdictional issue.

42. A number of cases were cited to me as to the requirements of natural justice. I did not find that of assistance. These cases concern the differing procedural requirements in specific factual and legal contexts. Particular reliance was placed by the Claimant upon two cases. The first was R v Deputy Industrial Injuries Commissioner ex parte Jones [1962] 2 All ER 430. I do not find that case of assistance. The relevant tribunal in that decision decided the substantive issue in the appeal with reference to medical evidence which the Claimant had not seen and had no opportunity to comment upon. That is far removed from the present case. The second case was Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC). That case applies uncontroversial principles in a very different factual situation to that in the present case.

43. I reject the first ground. There was no arguable fundamental breach of the principles of natural justice.

V. Ground 2: efficacy of the ouster

44. The scope of the Claimant's secondary argument was not altogether clear but it appeared to me that there were ultimately two sub-arguments being made. These arguments arise in circumstances where I have concluded the exception does not apply so effect is to be given, subject to these arguments, to the ouster.

45. As I understood it, the first sub-argument was that if cases such as the present (in which it is said an arguable error has been identified, the error first surfaces in the refusal of permission to appeal, and the second appeals test has been met) do not satisfy the test for a grant of permission, then the provisions have gone beyond what was envisaged in Cart. It was argued that the provisions "exceed the restriction on the Jurisdiction of the Courts that was deemed acceptable in those cases". The short answer is that this submission misses the point of the legislation, which was to remove Cart JRs.

46. The second sub-argument was the ambitious submission that section 11A is an impermissible ouster of the inherent supervisory jurisdiction; and that I had the power at common law to ignore what Counsel for the Claimant agreed was a clear statutory exclusion of judicial review. That was put on a specific basis, in relation to section 11A, and also on a wider basis that challenged the ability of Parliament to enact any form of ouster of the supervisory jurisdiction.

47. I reject these submissions. In Cart, the Supreme Court expressly acknowledged the right of Parliament to oust or exclude judicial review with the use of clear language: see [37]. Parliament did that in the present case by way of section 11A. The section

does not amount to a full ouster but a partial one which restricts judicial review to the particular circumstances referred to in section 11A(4).

48. I note that the second appeals test was adopted by the Supreme Court in Cart because Parliament had not at that stage specified how the scope of judicial review should be limited, requiring the Court to fulfil that task. This is apparent from Lord Dyson's observations in Cart:

> "120. Thus a consequence of giving effect to the Leggatt Report was to bring about a strategic reorganisation of the tribunals system by making it more coherent and improving its expertise and standing. I agree with the views expressed in the Leggatt Report and the 2004 White Paper that the changes demanded a reappraisal of the scope of judicial review. Parliament refused to undertake it. The task of deciding the scope of the judicial review jurisdiction falls therefore to be performed by the courts".

49. However, Parliament has now performed the task which Lord Dyson said it had previously refused to undertake and enacted section 11A. It has covered the relevant field. I note that the new legislation was preceded by an analysis of the number of Cart challenges and their success rate. Parliament decided that a more stringent exclusion was necessary. In my judgment, the policy behind the change does not conflict with the rule of law in any sense and is consistent with the principle set out at [100] of Cart, namely that:

> "The rule of law is weakened, not strengthened, if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff".

50. What I have decided above is sufficient to dispose of the particular issue before me which is confined to the effectiveness of the specific ouster in section 11A of the 2007 Act. However, as I have noted above, Counsel for the Claimant framed his attack on the ouster on a much broader basis by reference to the historic inherent jurisdiction of the High Court at common law.

51. Counsel for the Claimant forcefully submitted that the High Court had the power at common law to ignore clear primary legislation ousting judicial review. In addition to the judgments in Cart at both the Court of Appeal and Supreme Court levels, the parties cited the familiar cases on ouster clauses including Anisminic. I drew to their attention R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22; [2020] A.C. 49, which is the most recent discussion of this issue from a higher court. Without citing from the extensive body of case law and learning on this subject, I will briefly summarise why the Claimant's wider argument must be rejected.

52. Putting aside obiter observations in certain cases and academic commentaries, in my judgment, the legal position under the law of England and Wales is clear and well-established. The starting point is that the courts must always be the authoritative interpreters of all legislation including ouster clauses. That is a fundamental requirement of the rule of law and the courts jealously guard this role. However, the rule of law applies as much to the courts as it does to anyone else. That means that under, our constitutional system, effect must be given to Parliament's will expressed in legislation. In the absence of a written constitution capable of serving as some form of "higher" law, the status of legislation as the ultimate source of law is the foundation of democracy in the United Kingdom. The most fundamental rule of our constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme. The common law supervisory jurisdiction of the High Court enjoys no immunity from these principles when clear legislative language is used, and Parliament has expressly confronted the issue of exclusion of judicial review, as was the case with section 11A. In short, there is no superior form of law than primary legislation, save only where Parliament has itself made provision to allow that to happen.

53. Counsel for the Claimant sought to draw support for his submission from the Human Rights Act 1998 ("the HRA 1998") and the ability of a court under that legislation to make a declaration of incompatibility in relation to primary legislation. In my judgment, the terms of the HRA 1998 undermine the Claimant's submissions, and in fact support the established constitutional approach I have summarised above. When a court makes a declaration of incompatibility under section 4(2) of the HRA 1998, it is using a power which Parliament has given to it. Such a power had to be conferred in circumstances where the common law of England and Wales has never permitted the courts to disregard or disapply primary legislation. To the same effect, when we were within the European Union, it was Parliament, by enacting the European Communities Act 1972, that decided EU law would prevail over our laws including primary legislation. The courts then policed this qualification of sovereignty on behalf of Parliament.

54. The second ground fails. Section 11A of the 2007 Act is a clear, binding and effective partial exclusion of the common law supervisory jurisdiction of the High Court in the circumstances before me.

VI. Conclusion

55. I decide the jurisdictional issue in favour of the SSHD and dismiss the claim for judicial review.