IN THE UPPER TRIBUNAL **UT ref: UA-2021-000607-HS**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (Health, Education and Social Care Chamber)

Between:

GP

Appellant

- v –

The Lime Trust

Respondent

and

The Equality and Human Rights Commission

Intervener

Before: Upper Tribunal Judge Wright

Decision date: 22 March 2023
Decided after an oral hearing on 17 November 2022

Representation:
Appellant: Ollie Persey of counsel
Respondent: David Lawson of counsel
Intervener: Amanda Weston KC of counsel

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal made on 6 September 2021 under case number EH908/20/00002 was not made in error of law.

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal against a decision of the First-tier Tribunal dated 3 August 2021 ("the tribunal") dismissing the appellant's discrimination claim against the respondent. The appellant's claim was made against the respondent as proprietor of the school her disabled son was then attending. The claim was, first, that the respondent, through its school, had unlawfully discriminated against the appellant's

son by not providing him with education, or had otherwise discriminated against him in the way he was afforded access to education or a benefit, facility or service, contrary to sections 15 and 85(2) of the Equality Act 2010 ("the Equality Act"). The second aspect of the claim alleged that the respondent had failed to make reasonable adjustments for disability as required by sections 20, 21 and 85(6) of the Equality Act.

Relevant background

2. For the purposes of this appeal I need say no more than that the appellant's son has severe and complex special educational needs. It was common ground before the tribunal that the appellant's son could display challenging behaviour as a result of these needs, including being physically assertive with staff and other pupils.

3. The background to the disability discrimination claim concerns, in broad terms, the provision of education by the school to the appellant's son during the first 'lockdown' brought on by the coronavirus pandemic in March 2020.

4. The appellant's son was a pupil at the relevant school between September 2019 and July 2020. At or after a meeting the school had called to review the appellant's son's Education, Health and Care Plan in March 2020, the school declared it could no longer meet the child's needs. As a result, the local education authority decided that it would only continue to name the school in the child's Education, Health and Care Plan until the end of the summer term in 2020. At the onset of the coronavirus pandemic in March 2020, the school was closed. After 20 March 2020 some remote learning arrangements were put in place. The extent to which the appellant's son was provided with these arrangements was disputed. The school opened on a limited basis to a very small number of pupils from 8 June 2020. By the end of the summer term only 19 of the school's 129 pupils were attending the school, and these 19 were only attending on a part time basis. The appellant's son was not amongst those 19 pupils, although the appellant had expressed a preference that he be able to return.

5. The disability discrimination claim in its final form before the tribunal had three parts.

6. First, whether the respondent had met its duty to make reasonable adjustments to its remote learning arrangements so that the appellant's son was not placed at a substantial disadvantage compared with pupils generally by being unable to access online resources or by paper resources not being sent to him between 1 June and 21 July 2020.

7. Second, whether the respondent had met its duty to make reasonable adjustments to its COVID-19 arrangements so that the appellant's son was not placed at a substantial disadvantage compared with other pupils in being denied the opportunity to attend school between 1 June and 21 July 2020.

8. Third, whether the appellant's son was treated unfavourably by something arising in consequence of his disability when he was denied the opportunity to attend school between 1 June and 21 July 2020, and whether such unfavourable treatment was justified.

The First-tier Tribunal's decision

9. The claim was heard over two days in June and July 2021. It was dismissed by the tribunal on 3 August 2021. The tribunal's findings and reasons for dismissing each aspect of the claim extended to nearly fifty paragraphs. Towards the end of those paragraphs, and having giving its reasons for deciding that the disability discrimination

claim was not made out under sections 20, 21 and 85(6) or sections 15 and 85(2) of the Equality Act, the tribunal addressed the public sector equality duty, as found in section 149 of the Equality Act.

> "*The Public Sector Equality Duty*
>
> 93. In his questioning of [the headteacher of the school], and in his final submissions, Mr Persey raised the question whether she, or the [respondent] generally, had considered their obligations under the Public Sector Equality Duty and in particular, whether the [respondent] had completed an Equality Impact Assessment where [the appellant's son] (and presumably other pupils with similar needs) were to be considered as a protected group within the broader category of disabled children. His contention was that a failure in that duty would of itself render the decision not to permit [the appellant's son] return so flawed that it could not be justified.
>
> 94. Miss Tcakzynska [then counsel for the respondent] objected to that point on the basis it had never been raised at any point before the final hour of the hearing.
>
> 95. In the event, we did not require Miss Tcakzynska's assistance in concluding that the point was without merit in these circumstances. We reached that conclusion because in our view, it was not arguable that [the appellant's son] sat in a category of disability which was distinct from that of other pupils. To the extent that the [respondent], as proprietor of both mainstream and special schools, was required to consider the impact of its decisions on disabled people as a protected group, we were satisfied by [the headteacher's] and [the respondent's director of education's] brief evidence on this point, that they had considered how they might be able to mitigate the impact on disabled pupils by the reallocation of staff from its mainstream to special schools but had decided that on the basis of distance and the lack of skills or experience of mainstream school staff in meeting the needs of children with complex disabilities, it was impractical for them to do so. The admission that this consideration was rudimentary and not recorded in an equality impact assessment does not, in our view, undermine the soundness of that conclusion or have any bearing on the justification of the specific decision not to permit [the appellant's son] to return to [the school]."

10. The tribunal concluded its decision in the following terms:

> "97…our decision reflects the law as set out in the Equality Act 2010 that disability need not, indeed cannot, be considered in isolation from other factors. London as much as the rest of the UK and the world, in the spring and summer of 2020 faced challenges that are unprecedented in modern times and defined for many by fear, uncertainty, grief and displacement. Every child was affected. Within that context, [respondents] like the Lime Trust were required to make incredibly difficult decisions about very important issues, including how they met their obligations to vulnerable children like [the appellant's son]. In [his] case, the [respondent] decided that he could not safely return to school while the risk from coronavirus was so high. Having exhaustively considered the circumstances around that decision, we conclude that despite the serious impact on [the appellant's son's] education, that decision was justified."

The issue on this appeal

11. The appeal against the tribunal's is brought to the Upper Tribunal on one ground only. That ground is whether the tribunal erred in law in its application of the public sector equality duty to the evidence before it. The important logically anterior question to that ground, and a question which is fundamental to it, is whether the public sector equality duty had any legal relevance to the matters the tribunal had to decide on the disability discrimination claim. If it did not then what the tribunal said in paragraph 95 of its decision was irrelevant, and the appellant is no longer arguing that any other aspect of the tribunal's decision was flawed.

12. The appellant accepts that it was not open to her to bring a separate claim before the First-tier Tribunal based on the public sector equality duty found in section 149 of the Equality Act. This, as we shall see, is because of the terms of section 113 of the Equality Act. However, she argues, as her main argument, that notwithstanding this statutory exclusion, the public sector equality duty is relevant to whether discrimination can be justified under section 15 of the Equality Act and so must be considered. The appellant is supported in that argument by the EHRC. If the appellant is correct in her main argument, she argues that the tribunal's consideration of the public sector equality duty was flawed when it considered whether any discrimination was justified.

13. I will return to these arguments, as necessary, after I have set out the most relevant parts of the Equality Act.

Some common ground

14. Before doing that, however, I should set out that it was not disputed before me that the respondent is a "public authority" for the purpose of section 149 of the Equality Act: see the amendments made to schedule 19 of the Equality Act by regulation 8 and paragraph 4 of schedule 3 to the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, which added the 'proprietor of an Academy' to (or perhaps just reconfirmed them in) the list of public authorities in schedule 19 to the Equality Act.

15. I should also add that it was accepted before the tribunal that the appellant's son is disabled within the meaning of "disability" found in section 6(1) of the Equality Act. Section 6 is found in Part 2 of the Equality Act, which is concerned with "Equality: Key Concepts", and further appears under Chapter 1 of Part 2. Chapter 1 in Part 6 is titled "Protected Characteristics". Disability is thus a protected characteristic under the Equality Act.

The Equality Act 2010

16. Section 15 appears in Chapter 2 of the Equality Act. That chapter is concerned with identifying "prohibited conduct". Section 15 itself is concerned with "Discrimination arising from disability" and provides as follows:

> "**Disability**
>
> 15.-(1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

17. Section 20 of the Equality Act is perhaps less central to the arguments on this appeal to the Upper Tribunal. It appears in the part of the Act concerned with *Adjustments for disabled persons* and provides, so far as is material, as follows:

"**Duty to make adjustments**

20.-(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid…"

18. Under section 20(13) and schedule 13 to the Equality Act, the first and third requirements apply to a school to which section 85 applies. Moreover, by section 21 of the Equality Act a school will discriminate against a person if it fails to comply with the relevant requirements under section 20.

19. Part 6 of the Equality Act covers "Education". Chapter 1 of Part 6 concerns "Schools" and contains within it section 85. It provides, so far as is material as follows:

"**Pupils: admission and treatment, etc.**

85(1) The responsible body of a school to which this section applies must not discriminate against a person—

(a) in the arrangements it makes for deciding who is offered admission as a pupil;

(b) as to the terms on which it offers to admit the person as a pupil;

(c) by not admitting the person as a pupil.

(2) The responsible body of such a school must not discriminate against a pupil—

(a) in the way it provides education for the pupil;

(b) in the way it affords the pupil access to a benefit, facility or service;

(c) by not providing education for the pupil;

(d) by not affording the pupil access to a benefit, facility or service;

(e) by excluding the pupil from the school;

(f) by subjecting the pupil to any other detriment….

(6) A duty to make reasonable adjustments applies to the responsible body of such a school."

20. Part 9 of the Equality Act is concerned with "Enforcement". Section 113 appears in Part 9 and is perhaps the key statutory provision on this appeal. It provides as follows:

"**Proceedings**

113.-(1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part.

(2) Subsection (1) does not apply to proceedings under Part 1 of the Equality Act 2006.

(3) Subsection (1) does not prevent—

(a) a claim for judicial review;

(b) proceedings under the Immigration Acts;

(c) proceedings under the Special Immigration Appeals Commission Act 1997;

(d) in Scotland, an application to the supervisory jurisdiction of the Court of Session.

(4) This section is subject to any express provision of this Act conferring jurisdiction on a court or tribunal.

(5) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(6) Chapters 2 and 3 do not apply to proceedings relating to an equality clause or rule except in so far as Chapter 4 provides for that.

(7) This section does not apply to—

(a) proceedings for an offence under this Act;

(b) proceedings relating to a penalty under Part 12 (disabled persons: transport)"

21. Chapter 2 of Part 9 then sets out, pursuant to section 113(4) of the Equality Act, the express provisions of the Act conferring jurisdiction on certain courts and tribunals. Section 116 appears in Chapter 2 of Part 9 and conferred the jurisdiction on the First-tier Tribunal to determine the appellant's disability discrimination claim. So far as is relevant, it provides as follows:

"**Education cases**

116.-(1)A claim is within this section if it may be made to—

(a) the First-tier Tribunal in accordance with Part 2 of Schedule 17,

(b) the Education Tribunal for Wales in accordance with Part 2 of that Schedule, or

(c) the First-tier Tribunal for Scotland Health and Education Chamber in accordance with Part 3 of that Schedule.

(2) A claim is also within this section if it must be made in accordance with appeal arrangements within the meaning of Part 4 of that Schedule.

(3) Schedule 17 (disabled pupils: enforcement) has effect."

22. Although this involves a statutory jumping over of section 149, it makes sense to next refer to the relevant terms of Schedule 17 to the Equality Act. It is titled "Disabled Pupils: Enforcement". Part 2 of Schedule 17 applies, inter alia, to the First-tier Tribunal in England. It then sets out the following in paragraphs 3 and 5 (paragraph 4 deals with time limits, which have no bearing on this appeal).

"*Jurisdiction*

3 A claim that responsible body in England has contravened Chapter 1 of Part 6 because of a person's disability may be made:

(a) to the [First-tier Tribunal] by the person's parent or, if the person is over compulsory school age, the person.

Powers

5 (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."

23. Part 4 of Schedule 17 deals with admissions and exclusions and, in broad terms, provides that if appeal arrangements have been made in relation to admissions or exclusion decision then a claim that Chapter 1 of Part 6 of the Equality Act has been contravened in respect of an admissions or exclusion decision must be made under those appeal arrangements.

24. Part 11 of the Equality Act is titled "Advancement of Equality". It contains the public sector equality duty in section 149, in Chapter 1 of Part 11. Section 149 is in the following terms.

"149.-(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

(a) a breach of an equality clause or rule;

(b) a breach of a non-discrimination rule.

(9) Schedule 18 (exceptions) has effect."

25. No material exceptions arise under Schedule 18. However, it may be worth noting that paragraph 1 in schedule 18 is concerned with children and provides that the public sector equality duty in section 149, so far as it relates to *age*, does <u>not</u> apply to, inter alia, the provision of education to pupils in schools or to the provision of benefits,

facilities or services to pupils in schools. That implies that the public sector equality duty may apply to, inter alia, the provision of education to child with a disability, or any other protected characteristic other than age. However, even if this is so, it does not answer how the public sector equality is to be enforced or otherwise taken into account for a child with a disability in respect of the provision of education to them in school.

26. The last relevant section in the Equality Act to which I need refer is section 156. This also falls within Chapter 1 of Part 11 to the Act. It is concerned with enforcement of the performance of a duty imposed by or under Chapter 1 of Part 11, including therefore section 149, but deals with a negative. It provides:

> "156.- A failure in respect of a performance of a duty imposed by or under this Chapter does not confer a cause of action at private law."

Discussion

27. The appellant's case in essence is that the tribunal erred in finding that the respondent's decision-making was compliant with the public sector equality duty. She accepts, as I have noted already, that it was not open to her to bring what she terms a separate ground of challenge based on the public sector equality duty before the First-tier Tribunal. However, she argues, relying on cases such as *R(Hussein) v SSHD* [2018] EWHC 213 Admin, that the "discharge of the PSED is relevant to whether discrimination can be justified". Indeed, she goes further and argues that "the respondent cannot advance justification of discrimination while in breach of the PSED on the same issue".

28. I am not persuaded that *Hussein* assists with the issue of statutory construction on which this appeal must resolve itself. *Hussein* was a claim for judicial review and so, given section 113(3)(a) of the Equality Act, did not require the High Court to address its mind to whether it had jurisdiction to consider the challenge under the Equality Act.

29. Nor do I consider *Hussein* supports the argument that discrimination, here under section 85(2) read with section 15 of the Equality Act, cannot be justified without consideration of whether the public sector equality duty in section 149 of the same Act has been met or not. The case of *Hussein*, decided at the same time as another case called *Rahman*, concerned claims for judicial review brought by two men of Muslim faith detained at an immigration removal centre at Gatwick airport. They claimed that the conditions and regime at the detention centre interfered in various ways with their rights to religious observance and had a discriminatory impact against them when compared to people of other faiths or no faith. Included in the judicial review claim brought in *Hussein* were grounds that the defendant had (i) breached Article 9 of the European Convention on Human Rights (ECHR) when read with Article 14 of the ECHR; (ii) indirectly discriminated against the claimants contrary to section 19 of the Equality Act, and (ii) failed to discharge her duty under section 149 of the Equality Act. On this last ground, the defendant Secretary of State for the Home Department had admitted in the High Court proceedings that she had "failed to date" to discharge the section 149 duty. The judicial review succeeded on all three identified grounds. On the section 149 ground the High Court declared that in maintaining the conditions of detention for the claimants "the SSHD failed to have any adequate regard to the public sector equality duty under section 149 of the Equality Act 2010". That was unsurprising given the Secretary of State for the Home Department's concession that she had failed in this way.

30. However, the appellant seeks to rely on what the High Court judge, Mr Justice Holman, then said about whether the indirect discrimination under section 19 of the Equality Act could be justified. A submission was made on behalf of the claimants in *Hussein* (at paragraph [48]) that it was not open to the Secretary of State to seek to justify the discrimination at all as she had failed to discharge her duty under section 149 of the Equality Act. As Mr Justice Holman put it, the submission being made was that as the Secretary of State had not yet thought about the relevant discrimination issues at all, she could not advance as justification matters which she may have later been able to advance once she had conscientiously thought about it. In making this submission in *Hussein*, reliance was placed on what the Supreme Court had said in paragraph [42] of *Coll v Secretary of Sate for Justice* [2017] UKSC 40; [2017] 1 WLR 2093.

31. I can find nothing in either *Hussein* or *Coll* which supports the appellant's argument that, as a principle of law or as a matter of statutory construction of the Equality Act, an assessment of whether a person has been discriminated against under sections 85(2) and 15 of the Equality Act must include the determination of whether the section 149 duty has been met or not.

32. As Mr Justice Holman said in *Hussein* (at paragraphs [57]-[58]), *Coll* is not laying down a rule of law but rather an approach which may on the facts and the given circumstances of the case be adopted. In other words, the argument for the claimants in *Hussein* was, and was no more than, a forensic or evidential one: as the Secretary of State for the Home Department had never turned her mind to (per section 149(1)(a) of the Equality Act) the need to eliminate discrimination at the detention centre, she could not as a matter of evidence show that any discrimination found in the running of the centre the discrimination was justified. This is made plain from paragraph [58] in *Hussein* where the point is put thus:

> "..the point is the same. The minister has failed to address his mind to the problem and how it may be mitigated or avoided. Whilst the question of justification may not "logically depend on whether the [minister] thought about this at the time", a minister who did not think about it is likely to be disadvantaged or disabled in demonstrating justification unless and until he has properly thought about it."

The point is further emphasised by paragraphs [65]-[66] in *Hussein* where it is apparent that Mr Justice Holman considered the discrimination under section 19 of the Equality Act could not in fact be justified unless and until the Secretary of State for the Home Department had "thought the whole problem through" (the problem being the differential discriminatory effect upon practising Muslims of certain conditions in the detention centre). It was on this basis that it was declared in *Hussein* that, unless and until justified, the conditions in the detention centre constituted unlawful indirect discrimination contrary to section 19 of the Equality Act.

33. *Hussein* itself therefore provides no basis for the appellant's argument that deciding whether the respondent to this appeal had, for example, had due regard to eliminating discrimination under section 149(1)(a) of the Equality Act was a legally necessary step to deciding whether any *prima facie* discrimination under section 85(2) when read with section 15(1)(a) of the Equality Act was justified under section 15(1)(b) of the same Act.

34. The appellant also argues that *SG v Headteacher and Governors of St. Gregory's Catholic Science College* [2011] EWHC 1452 (Admin); [2011] ELR 446 and *R(Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213 provide a clear line of authority that the public sector equality duty in section 149 of the Equality Act is intrinsically linked with the discharge of substantive equality duties under, for example, sections 85 and 15 of the Equality Act. As I understood this aspect of the argument, the use of "intrinsically" means that as a matter of law, and not just as a matter of available evidence, compliance with the public sector equality duty in section 149 of the Equality Act must be assessed and determined in all cases where justification for indirect discrimination has to be established under the Equality Act, at least where a public authority is involved. I am not persuaded by this argument either. There are a number of reasons why I consider the argument to be unsound.

35. First, like *Hussein*, *SG* was a claim for judicial review and so the High Court was free to determine whether section 149 of the Equality Act (or its then equivalents in section 71 of the Race Relations Act 1975 and section 76A of the Sex Discrimination Act 1975) had been breached as well as whether there had been unjustified indirect discrimination against *SG* by the defendant's school.

36. Further, the approach the High Court took in SG stands against the appellant's argument. The High Court in *SG*, having found the school's haircut policy indirectly discriminated against *SG* on the grounds of his ethnicity, went on in paragraphs [42]-[51] to consider whether the indirect discrimination was justified. Justification arose in *SG* because of the terms of section 1(1A)(c) of the Race Relations Act 1976 "A person [indirectly] discriminates against another if….he applies to that other person a provision, criterion or practice…..which he cannot show to be a proportionate means of achieving a legitimate aim". This language is identical in all material respects to the 'justification' limb found in section 15(1)(b) of the Equality Act. Mr Justice Collins accepted (at paragraph [42]) that "[p]erformance of equality duty [in what would now be section 149 of the Equality Act] is of relevance in establishing justification. However, when read in context, and particularly with paragraphs [43]-[44] in the judgment, it is apparent that the "relevance" here is not legal but evidential. More decisively for the appellant's argument, however, is what is said by Mr Justice Collins at the end of paragraph [43]: namely "It is clear that the equality duty was not fulfilled, but that does not of itself mean that the policy was not, to use the statutory language, a 'proportionate means of achieving a legitimate aim'". This last passage from *SG* stands contrary to the appellant's argument that justification under section 15(1)(b) of the Equality Act cannot arise if the respondent, as a public authority, was in breach of section 149 of the Equality Act.

37. Second, the passage on which the appellant founded most heavily in *SG* is at paragraph 42 of *SG* and is a quotation from what Lady Justice Arden (as she then was) said in her judgment in *Elias*. However, Lady Justice Arden's judgment was not agreed with by the other two members of the Court of Appeal in *Elias*, and so is at highest no more than an *obiter* comment. There is therefore no *ratio* of a superior court which binds the Upper Tribunal to accept the appellant's construction of the Equality Act.

38. Third, even ignoring its being *obiter*, the relevant part of what Lady Justice Arden said in Elias is not, in my judgment, a clear statement in support of the appellant's argument. The relevant passage appears at paragraph 274 of *Elias* Before setting it out it is important to note that, equivalent to the position in *Hussein*, the county court from which the Court of Appeal in *Elias* was hearing an appeal had declared that the Secretary of State was in breach of the equality duty in section 71 of the Race

Relations Act 1976 (a predecessor equivalent to section 149 of the Equality Act) and there was no appeal from that part of the county court's order. Paragraph 274 reads as follows:

> "It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. It is not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important matter. In the context of the wider objectives of anti-discrimination legislation, section 71 has a significant role to play. I express the hope that those in government will note this point for the future. (My underlining added for emphasis.)

39. As Lady Justice Arden herself expressed it, what she said in this paragraph was no more than in hope that the Government would note it for the future. That is not a secure basis for construing the reach of provisions that were later enacted in the Equality Act. What she said is not an example of an authoritative and settled judicial construction about the place of equality duties in previous equivalent legislative schemes that may be said to inform or determine the role of section 149 in the Equality Act: per *Barras v Aberdeen Sea Trawling etc Co* [1933] AC 402 and *Galloway v Galloway* [1956] AC 299 at 320.

40. The words I have underlined in paragraph 274 of *Elias* are those on which the appellant heavily relies as the foundation for her main argument that compliance with the section 149 duty is a legally necessary part of justification for the tribunal when it was considering the appellant's claim under section 15(1)(b) and 85(2) of the Equality Act. However, whatever their legal status (if any) may be, I do not read those words as mandating that compliance with the public sector equality duty must as a matter of law fall into the consideration of whether a public authority can justify indirect discrimination. It is important to my mind that Lady Justice Arden saw the public sector equality duty as being an integral and important part of the mechanisms (plural) for meeting the aims of anti-discrimination legislation. Thus she seemingly contemplated those aims being achieved in a number of ways. This is not a prescription for how and by which body the public sector equality duty is to be taken into account under a future statutory scheme. Nor does that equality duty being "integral" mean it needs to be a necessary part within each aspect of the scheme, at least as it applies to public authorities. Such language may mean no more than it being integral to the aims of the statutory scheme as a whole.

41. Fourth, the decision of Court of Appeal in *Elias* is itself instructive, and contrary to the appellant's main argument, because it accepted, in a context where as I have already explained the county court had found that the Secretary of State for Defence was in breach of the then equivalent of section 149 of the Equality Act, that the Secretary of State could nonetheless still advance arguments that the indirect discrimination was justified. This is clear from paragraphs 124-129 of Lord Justice Mummery's judgment.

> "**Indirect race discrimination: justification**
>
> 124. The Secretary of State conceded that the birth link criteria had an adverse impact on a greater proportion of applicants like Mrs Elias than on applicants who were born in the UK and had UK national origins. In other words the birth link criteria excluded a higher proportion of those with non-UK national origins than those with UK national origins. This is indirect race discrimination, which is unlawful, unless objectively justified.
>
> 125. The issue of objective justification, which has a number of different aspects, is the most difficult point in the whole case. The court heard very lengthy arguments on many points with extensive citation of authorities dealing in generalities, which, like so much in this field, are easier to state in the abstract than to apply in practice to the facts of particular cases.
>
> 126. A number of points fall to be considered: the relevance, if any, of the fact that, as reflected in the declaration under section 71 of the 1976 Act, the Secretary of State did not consider the question of justification at the relevant time because it was not accepted by him that there was any race discrimination;…
>
> **Failure to address potential race discrimination**
>
> 128. This is an important point affecting the court's overall view of the defence of justification. Mr Sales submitted that the Secretary of State was entitled to assert that the birth link criteria were justified, even though he had not addressed the issue of discrimination or possible justifications for it at the time of formulating the birth link criteria: *Schonheit v. Stadt Frankfurt am Main* [2004] IRLR 983 at paragraphs 86 and 87. Indirect discrimination may be justified, depending on the circumstances, by reasons other than those put forward when the measure introducing the differential treatment was adopted. What matters is that there are objective reasons for the criteria, which are unrelated to the forbidden grounds of, among other things, national origins and are such as to justify the measure concerned.
>
> 129. While I do not doubt the correctness of the general proposition that in theory ex post facto justification of indirect race discrimination is legally permissible, it does depend on the circumstances….".

42. As far as I can see, this is Court of Appeal authority against the appellant's main argument. It is of relevance in two ways. First, in establishing that a breach of the relevant equality duty does not mean the indirect discrimination cannot be justified. (What Lord Justice Mummery then addresses in paragraphs 131-133 of *Elias* is about the evidential hurdles the Secretary of State faced in justifying the indirect discrimination given his breach of the section 71 Equality duty.) Second, and relatedly, in showing that justification for indirect discrimination may arise otherwise than in terms of compliance with the relevant equality duty.

43. This very last point also has another relevance. This has a bearing in terms of the rational structure of the Equality Act and so may be more relevant to the next stage of the analysis. The point is that section 149 of the Equality Act only applies to public authorities, as listed in Schedule 9 to that Act. However, a number of persons or bodies who are not public authorities are subject to duties not to discriminate against other people. For example, an employer who happens not to be a public authority must not discriminate against a disabled employee under sections 15 and 39 of the Equality Act.

Another example, closer to the facts in this case, is an independent (i.e. private) school, which would fall within section 85(2) of the Equality Act (see section 85(7)(b) but not section 149. The justification limb in section 15(1)(b) of the Equality Act must be capable of substantive application and have meaningful content in such cases, even though section 149 cannot be in play. It must follow from this that the justification under section 15(1)(b) of the Equality Act can apply, and be made out or not, independently from any consideration of section 149 of the same Act. This seems to me to further weaken the appellant's argument that consideration of the respondent Lime Trust's compliance with section 149 of the Equality Act was necessary to the tribunal's determination of whether the school's treatment of the appellant's son was, per s.15(1)(b), a proportionate means of achieving a legitimate aim.

44. The appellant seeks to answer this by saying the respondent in this case was a public authority under section 149 of the Equality Act as well as being a "responsible body for a school" under section 85 of the same Act, and so both statutory duties applied to it. I do not doubt this. However, this does not answer the means by which enforcement of the said duties is conferred under the Equality Act. Moreover, the force of the appellant's argument that justification under section 15(1)(b) of the Equality Act necessarily involved consideration by the tribunal of whether the respondent had complied with its duties under section 149 of the same Act, is undermined by that consideration not arising in relation to many other (non-public authority) defendants under the Equality Act.

45. I may add that nothing in the unreported decision of the country court in *Roseberry Housing Association Ltd v Williams*, 10 December 2021, really assists with the jurisdictional argument with which I am having to grapple on this appeal as it is evident that His Honour Judge Luba QC (as he then was) did no more than assume that compliance with section 149 of the Equality Act fell to be considered in determining whether discrimination could be justified. Reference was made to section 156 of the Equality Act but no argument was made in *Roseberry* about whether the county court had jurisdiction to determine breaches of section 149 in assessing Ms Williams' counter claim.

46. For all of these reasons, I reject the appellant's contention that the starting point in construing the Equality Act is whether that Act "expressly authorises [the] weakening of substantive equality rights when a disability discrimination claim is brought within the [First-tier Tribunal]" or that "if Parliament had intended to weaken the justification limb of section 15 it needed to do so expressly". The foundation or premise for this argument – that justification under section 15 necessarily involves consideration of whether the respondent had acted in compliance with its section 149 Equality Act duties – is simply not made out. By "substantive equality right" is meant that the section 15 test for disability discrimination includes within it whether the defendant or respondent, if it is a public authority, acted in conformity with the equality duty in section 149. That meaning is not justified on consideration of the relevant case law, some which in fact points in the opposite direction. Nor is it justified on the structure of the Equality Act.

47. Both in terms of what the Equality Act provides for and whether the tribunal acted properly under that Act, the starting point has to be section 113(1) of the Equality Act. The phrasing of section 113(1) is important, as was noted by the Upper Tribunal in *JA-K v SSWP* [2017] UKUT 420 (AAC); [2018] 1 WLR 2657 at paragraphs [59]-[62] and *TS and EK v SSWP* [2020] UKUT 284 (AAC); [2021] AACR 4. Those two cases are also important as they demonstrate that a close analysis of Part 9 of the Equality Act may lead to results that might appear counter-intuitive. In both cases the Upper Tribunal

held that in its statutory appellate error of law jurisdiction it was precluded from deciding whether delegated legislation was *ultra vires* (i.e. outwith the Minister's powers) on the basis of the Minister having failed to meet their duties under section 149 of the Equality Act when making the delegated legislation. Challenges under section 149 of the Equality Act to the Minister's exercise of their regulation making powers can only be brought by judicial review. This is because of the terms of section 113(1) of the Equality Act.

48. Section 113(1) provides that proceedings relating to a contravention of the Equality Act must be brought in accordance with Part 9 of the Act. There are exceptions to this requirement, but these are immaterial here. However, section 113(3)(a) provides that the requirement in subsection (1) does not prevent a claim for judicial review. It is by this means that a challenge to a public authority's compliance with its public sector equality duties under section 149 of the Equality Act may be brought, by judicial review. Absent this judicial review route, and as section 113(4) emphasises, proceedings must be brought in the court or tribunal identified as having jurisdiction in Part 9 of the Equality Act or elsewhere in the same Act.

49. The appellant accepts that she could not bring a claim before the First-tier Tribunal against the respondent for breach of its duties under section 149 of the Equality Act. This is right and is because bringing such a claim would not be in accordance with Part 9 of the Equality Act. The only claims that can be brought before the First-tier Tribunal in accordance with Part 9 are those that fall within section 116 of the Equality Act, which is in Part 9. However, such claims may only be brought in accordance with Part 2 of Schedule 17 to the Equality Act, and Schedule 17 makes it clear that the claim that may be brought within the First-tier Tribunal's jurisdiction conferred by the Equality Act is, and is only, about whether "the responsible body has contravened Chapter 1 of Part 6 because of a person's disability". Chapter 1 of Part 6 in the Equality Act covers, and only covers, for the purposes of this appeal section 85. That section provides, inter alia, that a responsible body of a school must not discriminate against a pupil in the way it provides education for a pupil. Read with section 116 and Part 2 of Schedule 17 to the Equality Act, it means a claim may only be made to the First-tier Tribunal that the responsible body discriminated against a disabled pupil, for example, in the way it provided education for that pupil; with the test for discrimination arising from disability being founded on section 15 of the Equality Act. Nothing in any of these interlocking provisions enables a claim to be brought before the First-tier Tribunal, in accordance with Part 9 of the Equality Act, for breach of section 149 of the same Act.

50. This jurisdictional point is underscored by section 156 of the Equality Act. If a public authority fails to perform its duties under section 149, for example in not having had due regard to the need to eliminate disability discrimination, the remedy is the public law one of judicial review as such a failure does not confer a cause of action at private law. The disability discrimination claim brought by the appellant before the First-tier Tribunal was a private law claim by her against the respondent. For this reason, it could not have been a claim the Lime Trust had failed to perform its duties under section 149 of the Equality Act. Parliament cannot have been any clearer about this.

51. The appellant, as I have said, accepts this jurisdictional bar to bringing such a claim, as does the EHRC, but she argues that it does not prevent the public authority's compliance with section 149 being considered, indeed being required to be considered,

when deciding under section 15(1)(b) of the Equality Act whether the Lime Trust could show that its treatment of the appellant's disabled son was a proportionate means of achieving a legitimate aim. In my judgment, the appellant's argument here is based on a distinction without a difference. As I have explained above, it is not a legally necessary part of deciding whether discrimination is justified under section 15 to determine whether the Lime Trust was in breach of its section 149 duties. The issue here is one of substance and not form. The appellant's case proceeds, and has to proceed, on the basis that notwithstanding the tribunal's otherwise unimpeachable consideration of whether the Lime Trust's treatment of her son was a proportionate means of achieving a legitimate aim, the tribunal had to determine whether the Lime Trust was in breach of section 149 of the Equality Act. In substance that amounted to a claim by the appellant that the Lime Trust was in breach of section 149. Put another way, and using the language of section 113(1) of the Equality Act, it would make the discrimination claim to the First-tier Tribunal into proceedings that *related to* a contravention of section 149 of the Act. This would not only stand in contravention of section 156 but also the requirement in section 113(1) that proceedings relating to a contravention of section 149 could not be brought in accordance with the Act in the First-tier Tribunal but had to be brought by way of judicial review.

52. A further argument the appellant makes is that nothing in the Equality Act expressly removes consideration of section 149 from Part 6 of the Act and so from section 85 of that Act. I do not consider this point is of any weight. It may equally be said that nothing in in section 85, or elsewhere in Part 6, necessarily implies that section 149 is included. Indeed, the various ways set out in section 85 in which a responsible body must not discriminate against a relevant person or pupil with a disability, when read with section 15 of the Equality Act, may be said on its face to provide a complete code for dealing with the issue of discrimination in schools. When read with sections 113, 114 and Schedule 17 to the Equality Act, which provide the drivers in this appeal for making the Act effective, those provisions more obviously read as excluding the First-tier Tribunal from determining breaches of section 149.

53. The EHCR argued, in support of the appellant, that if compliance with section 149 may be relevant to justification under the Equality Act, it would be absurd to construe the Act as rendering it irrelevant. I do not consider this is a good argument.

54. First, nothing in that I have said above would preclude the First-tier Tribunal from taking account of a finding made on judicial review that the same body, as a public authority, had not, for example, had the necessary due regard to eliminate disability discrimination in its schools, if that finding remained material to whether the public authority's treatment of a disabled pupil had been a proportionate means of achieving a legitimate aim. As *Hussein* shows, a complete failure to have had any regard to the problem is likely to mean section 15(1)(b) of the Equality Act would not have been met in any event. Again, the issue is one of substance and not form: see, albeit in a slightly different context paragraph [24] of *R(MacDonald) v RBKC* [2011] UKSC 33; [2011] 4 All ER 881.

55. Second, for the reasons I have explained above, I do not consider the legislative scheme is constructed on an absurd basis by leaving it to judicial review to determine whether a public authority has acted, or failed to act, in breach of its public sector equality duties. Section 113 of the Equality Act provides a rational and clearly

delineated basis by which the rights and protections conferred by the Equality Act are to be rendered effective in courts and tribunals.

56. Third, the legal tests applied by the First-tier Tribunal under sections 15, 85 and 86 of the Equality Act do not lack focus or detailed consideration of a responsible body's treatment of pupils with disabilities in its schools or in respect of persons with disabilities seeking admission to school. The tribunal's near fifty paragraph consideration of the claims before it bears this out, and no challenge is made to its approach to the issues arising under sections 15, 20, 21 and 85 of the Equality Act, absent the section 149 ground. The evidence before the tribunal included a nine page risk assessment the Lime Trust had carried out in respect of the appellant's son in preparation for the limited re-opening of the school in June 2020. The Lime Trust accepted that not allowing the appellant's son to return to the school in June 2020 did amount, per section 15(1)(a) when read with section 85(2) of the Equality Act, to it treating him unfavourably because of his disability. The issue on this part of the claim for the tribunal was therefore whether that decision was justified: in other words, whether it was a proportionate means of achieving a legitimate aim (per s.15(1)(b)). The legitimate aim was to ensure that those pupils and staff returning to the school would be safe from the risk of Covid-19 transmission in school. The tribunal concluded that not allowing the appellant's son to return to the school in June 2020 was a proportionate means of achieving that aim because, on the basis of the individual risk assessment and other evidence, he would not have been able to keep himself and others free from infection. That was a decision the tribunal was entitled to reach on the law and on the evidence before. It is not obvious what in real terms the "due regard" tests in section 149 of the Equality Act would have added to the tribunal's analysis.

Conclusion

57. For all these reasons I conclude that the tribunal was not required to determine on the disability discrimination claim before it whether the Lime Trust was in breach of its section 149 Equality Act duties. The fact that it did give some consideration to section 149 was therefore legally irrelevant, as was whether it erred in any respect on the detail of that consideration. I therefore do not need to address those arguments

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 23 March 2023