IN THE UPPER TRIBUNAL **Case No** HS/523/2019
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant:	Ms Louise Price, instructed by Simpson Millar
For the Respondent:	Mr Tom Tabori, instructed by Weightmans

Decision: The appeal is allowed to the following extent. The decision of 1 October 2018 refusing to consider an application for extension of time under sch 17, para 4(3) of the Equality Act 2010 on the grounds that such an application had already been considered and so further consideration was precluded by para 4(4) of that Schedule was in error of law and is set aside. The file is to be referred to a duly authorised judge of the HESC Chamber fo the First-tier Tribunal who has not previously been involved in this matter to consider an application by the appellant under para 4(3).

I direct the Upper Tribunal office to send a copy of this decision to the Tribunal Procedure Committee.

REASONS FOR DECISION

1. This case raises a point of general importance about the time limit for making a claim under the Equality Act 2010 ("the 2010 Act") in respect of alleged disability discrimination in schools. It holds that r.12(3)(a) of the relevant First-tier Tribunal ("FtT") rules cannot be relied upon to extend the time for claiming under the 2010 Act. I emphasise that this decision only rules against the validity of r.12(3)(a) in relation to disability discrimination cases; for special educational needs cases, where the time limit is not set down by statute, the rule is valid. It also raises questions abut the FtT's approach to deciding on extensions of time in Equality Act cases.

2. The appellant is the mother of C, whom she alleges was unlawfully singled out on the grounds of his disability by being made to wear a hi-vis jacket in the playground at school. While this is not to be understood as a finding, the suggestion before me is that such a step was unique to C as a pupil in the mainstream setting within the school, but pupils in what is described as the school's SEN unit were also required to do so. The FtT appears to have understood that this occurred on a single occasion, although this may be in dispute. C left the school in March 2018. The remedy sought is an apology. The application was sent by email to the FtT on 24 August 2018: it is common ground that that was six months and two days after the alleged incident relied upon.

3. On 30 August 2018 Judge A ruled, in what were expressed to be case management directions, that the case was out of time and that (no reasons for lateness having been provided) she did not exercise her discretion in favour of registering it.

4. On 13 September 2018 the appellant's solicitors wrote challenging Judge A's ruling on the ground that rule 12(3)(a) of the FtT's rules of procedure applied. Put shortly, it provides that if the time limit for making an application in a case of this type would otherwise run out in August, it suffices if the application is made on the first working day in September.

5. On 1 October 2018 Judge A ruled that under the 2010 Act there was a 6 month time limit imposed by statute which could not be extended by rules of procedure and that, as the judge had previously considered the exercise of the discretion under the 2010 Act to extend time and had decided not to do so, the Act precluded a further exercise of discretion.

6. Thereafter, the case underwent a convoluted process in the FtT, which ended up in Judge B giving permission to appeal to the Upper Tribunal. It appeared debatable whether the Upper Tribunal had jurisdiction. For the reasons set out in the Schedule to this decision, I concluded that it has and both parties supported that analysis.

Time-limit in primary legislation

7. The current provision is Schedule 17 of the 2010 Act, which so far as material provides:

> "4. Time for bringing proceedings
>
> (1) Proceedings on a claim may not be brought after the end of the period of 6 months starting with the date when the conduct complained of occurred.
> …
>
> (3) The Tribunal may consider a claim which is out of time.
>
> (4) Sub-paragraph (3) does not apply if the Tribunal has previously decided under that sub-paragraph not to consider a claim."

The FtT Rules

8. These are made under s.22 and sch 5 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). Section 22 provides that there are to be rules "governing – (a) the practice and procedure to be followed in the First-tier tribunal", while s.22(4) lists objectives to be borne in mind when rules are being made:

> "(4) Power to make Tribunal Procedure Rules is to be exercised with a view to securing–

> (a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,
> (b) that the tribunal system is accessible and fair,
> (c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,
> (d) that the rules are both simple and simply expressed, and
> (e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently."

9. So far as relevant, sch 5 provides:

> "1. Introductory
>
> (1) This Part of this Schedule makes further provision about the content of Tribunal Procedure Rules.
>
> (2) The generality of section 22(1) is not to be taken to be prejudiced by–
> (a) the following paragraphs of this Part of this Schedule, or
> (b) any other provision (including future provision) authorising or requiring the making of provision by Tribunal Procedure Rules.
>
> (3) In the following paragraphs of this Part of this Schedule *"Rules"* means Tribunal Procedure Rules.
>
> 4. Time limits
>
> Rules may make provision for time limits as respects initiating, or taking any step in, proceedings before the First-tier Tribunal or the Upper Tribunal."

10. Paras 27 to 29 set out how the Tribunal Procedure Committee is to make Rules and provide for the involvement of the Lord Chancellor.

11. Para 30 confers a broad power on the Lord Chancellor in the following terms:

> "30. Lord Chancellor's power
>
> (1) The Lord Chancellor may by order amend, repeal or revoke any enactment to the extent he considers necessary or desirable–
> (a) in order to facilitate the making of Tribunal Procedure Rules, or
> (b) in consequence of–
> (i) section 22,
> (ii) Part 1 or 3 of this Schedule, or
> (iii) Tribunal Procedure Rules.

> (2) In this paragraph *"enactment"* means any enactment whenever passed or made, including an enactment comprised in subordinate legislation (within the meaning of the Interpretation Act 1978 (c. 30))."

12. The relevant rules for our purposes are the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 SI No.2699 (as amended on a number of occasions) ("the HESC Rules").

13. Rule 5 provides that:

> "(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may—
> (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment containing a time limit;
> …"

Reg 5(3)(a) is the subject of a footnote in the Queen's Printer's copy of the statutory instrument that:

> "Provisions in primary legislation which contain time limits include: sections 66(1) and (2), 68(2) (subject to any order made under section 68A), 69(1), (2) and (4), 70, 71(2) (subject to any order made under section 71(3)) and 75(1) and (2) of the Mental Health Act 1983; sections 21(2) and 86(5) of the Care Standards Act 2000; section 166(2) of the Education Act 2002(c.32); and section 32(2) of the Health and Social Care Act 2008 (c.14)."

Whilst the 2010 Act post-dated the making of the statutory instrument and so could not have been mentioned at that point, nor was the DDA (which could have been) and nor has the list been amended when amendments were made the HESC Rules after 2010.

14. Rule 6 provides:

> "Procedure for applying for and giving directions
>
> (1) The Tribunal may give a direction on the application of one or more of the parties or on its own initiative.
>
> (2) An application for a direction may be made—
> (a) by sending or delivering a written application to the Tribunal; or
> (b) orally during the course of a hearing.

> (3) An application for a direction must include the reason for making that application.
>
> (4) Unless the Tribunal considers that there is good reason not to do so, the Tribunal must send written notice of any direction to every party and to any other person affected by the direction.
>
> (5) If a party, or any other person given notice of the direction under paragraph (4), wishes to challenge a direction which the Tribunal has given, they may do so by applying for another direction which amends, suspends or sets aside the first direction."

15. Rule 12 provides that:

> "(2) If the time specified by these Rules, a practice direction or a direction for doing any act ends on a day other than a working day, the act is done in time if it is done on the next working day.
>
> (3) In a special educational needs case or a disability discrimination in schools case—
> (a) if the time for starting proceedings by providing the application notice to the Tribunal under rule 20 (the application notice) ends on a day from 25th December to 1st January inclusive, or on any day in August, the application notice is provided in time if it is provided to the Tribunal on the first working day after 1st January or 31st August, as appropriate; and
> (b) the days from 25th December to 1st January inclusive and any day in August must not be counted when calculating the time by which any other act must be done.
>
> (4) Paragraph (3)(b) does not apply where the Tribunal directs that an act must be done by or on a specified date."

"Special educational needs case" and "disability discrimination in schools case" are defined terms: the present case is the latter rather than the former.

16. Rule 20 provides that:

> "(1) If rule 19 (application for leave) does not apply, an applicant must start proceedings before the Tribunal by sending or delivering an application notice to the Tribunal so that, unless paragraph (1A) or (1B) applies, it is received—
> (a) if the time for providing the application notice is specified in another enactment, in accordance with that enactment;
> (b) in a case under the Suspension Regulations, within 10 working days after written notice of the decision being challenged was sent to the applicant;
> (c) in a special educational needs case—

> (i) within 2 months after written notice of the decision being challenged was sent to the applicant; or
> (ii) within 1 month from the date of issue of the mediation certificate if that date would be a later date than the date calculated by reference to paragraph (i);
> (d) in a case listed in the Schedule, within 3 months after written notice of the decision being challenged was sent to the applicant;
> (e) in any other case, within 28 days after written notice of the decision being challenged was sent to the applicant."

Paragraphs (1A) and (1B) are immaterial for our purposes.

The predecessor provisions

17. The predecessor primary legislation was schedule 3 of the Disability Discrimination Act 1995 ("the DDA"), which immediately prior to the replacement of the former SENDIST by the FtT provided:

> "10. (1) The Tribunal … shall not consider a claim under section 28I unless proceedings in respect of the claim are instituted before the end of the period of six months beginning when the act complained of was done.
>
> …
>
> (3) The Tribunal … may consider any claim under section 28I which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.
>
> (4) But sub-paragraph (3) does not permit the Tribunal … to decide to consider a claim if a decision not to consider that claim has previously been taken under that sub-paragraph."

18. In the days of SENDIST, the applicable rules were the Special Educational Needs and Disability Tribunal (General Provisions and Disability Claims Procedure) Regulations 2002/1985. Unlike the rules of the FtT, it made provision for matters falling within its scope at any rate largely by reference to "working day[s]", defined as follows:

> ""*working day"* means any day other than a Saturday, a Sunday, any day from 25th December to 1st January inclusive, Good Friday, the first Monday in May, any day in August or a day which is a bank holiday in England and Wales within the meaning of the Banking and Financial Dealings Act 1971."

19. Rule 7 dealt with the making of claims. The only reference to time is in r.7(4):

> (4) Where the parent delivers a notice of claim, or otherwise seeks to institute proceedings, after the end of the period specified in paragraph

> 10(1) (and any extension under paragraph 10(2)) of Schedule 3 of the 1995 Act (Period within which proceedings must be brought), the President shall decide under paragraph 10(3) of that Schedule whether the tribunal will consider the claim out of time, and the President may seek further information from the parent before making the decision."

Caselaw authorities

20. In *Mucelli v Government of Albania* [2009] UKHL 2, [2009] 1 WLR 276 two issues arose which are relevant to the present appeal. Issue 1 was whether the extremely tight time limits for giving notice of appeal created by the Extradition Act 2003 could be modified by the application of the Civil Procedure Rules ("CPR"). Lord Neuberger, giving the principal judgment, held at 295F-297H they could not. I return to the basis for that view below. Issue 2, only indirectly relevant in the present case, was what should happen if the time prescribed by statute ran out on a day when the office of the intended recipient of the notice was closed. At 298B-F, Lord Neuberger said:

> "84. Where the requisite recipient's office is closed during the whole of the last day, I consider that the notice will be validly filed or served if it is given at any time during the first succeeding day on which the office is open (i.e. the next business day). So if the final day for giving a notice of appeal would otherwise be Christmas Day, filing or service can validly be effected on the 27th December (unless it is a weekend, in which case it would be the following Monday). This conclusion accords with that reached in *Pritam Kaur v S Russell & Sons Ltd* [1973] 1 QB 336. As Lord Denning MR said at 349E, "when a time is prescribed by statute for doing any act, and that act can only be done if the court office is open on the day when time expires, then, if it turns out … that the day is a Sunday or other *dies non*, the time is extended until the next day on which the court office is open". I agree, and I can see no reason not to apply the same principle to service on a respondent in relation to the respondent's office. The fact that fax transmission can be effected at any time does not cause me to reconsider that conclusion.
>
> 85. It might be argued that it follows from this that time should be similarly extended to the next business day, in cases where, even if only for a few hours, the required recipient's office is closed before midnight on the final day (as will always be true of the court, and will almost always be true of any other recipient). In my opinion, while there is a real argument based on consistency to support such a proposition, it is not correct, at least where the office in question is open during normal hours. While there is no reason to deprive an appellant of his full statutory 7 or 14 days, if, for instance he transmits his notice of appeal by fax, or even if he posts the notice through a letter box in the door of the respondent's office, just before midnight on the last day for service, it does not follow that he should have cause for complaint if he cannot file the notice at the court office, or serve it on the respondent in person, outside normal office hours. I believe that

> this conclusion is consistent with the law as it is understood in relation to time limits for filing and service, when it comes to the operation of the Limitation Act 1980."

21. The ruling in *Mucelli* on Issue 1 was applied to the time limit for challenging orders granting development consent under s.118 of the Planning Act 2008 in *R (Blue Green London Plan) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 495 (Admin). Ouseley J said at [45]:

> "45. It is perfectly clear from the decision of the House of Lords in *Mucelli*, and the Supreme Court in *Pomiechowski*, that the language of giving notice of appeal in accordance with the rules of court did not suffice to bring into that Act, the Extradition Act 2003 , the power to extend time. If ever an Act were to do so it would have been the Extradition Act 2003 , with its engagement of human rights considerations and extremely short time available for the giving of notices of appeal, often by unrepresented people in custody. But it was held on two occasions in those two cases that, in reality, there was no such power to be given to the language of in accordance with the rules of court."

22. The ruling in *Mucelli* on the second point was applied by the Court of Appeal in *R (Modaresi) v Secretary of State for Health and others* [2011] EWCA Civ 1359. (The case subsequently went on appeal to the Supreme Court ([2013] UKSC 53) but not on the point under consideration.) The Court of Appeal, considering a mental health case – likewise subject to the HESC Rules – held that a patient was entitled to rely on r.12(2) of the Rules to establish that his application was made in time, even though the time limit for such an application was laid down by statute (s.66(2)(a) Mental Health Act 1983). To the extent that the status of r.12(2) arises in the present proceedings, *Modaresi* is binding upon me.

23. The effect of *Mucelli* in relation to the rules of the Social Entitlement Chamber of the FtT was considered by a three-judge panel of the Upper Tribunal in *VK v HMRC (TC)* [2016] UKUT 331 (AAC), where the question was whether a tribunal had power to extend the time limit set by section 39 of the Tax Credits Act 2002. The panel relied on the detail of schedule 5 of the 2007 Act, and, in particular, the express indication in para 4 on that Schedule that:

> "Rules may make provision for time limits as respects initiating, or taking any step in, proceedings before the First-tier tribunal or the Upper Tribunal"

to conclude that the 2007 Act does permit Tribunal Procedure Rules to confer power on the FtT to extend time for appealing where some other enactment has already set a time limit for that type of appeal. The panel (at [65]) read Lord Neuberger's observations in *Mucelli* as simply requiring "some statutory basis" which in *Mucelli*, the CPR were unable to provide but which for the reasons given it considered rules made under the 2007 Act in principle could.

24. The panel examined the rules in other Chambers of the FtT besides the Social Entitlement Chamber. It noted how both the HESC and Tax Chambers' Rules qualify their respective rules 5(3)(a) by the inclusion of the italicised words below, an inclusion not found in the rules of the Social Entitlement Chamber.

> "In particular, and without restricting [the general power to regulate procedure], the Tribunal may by direction:
> (a) extend or shorten the time for complying with any rule, practice direction or direction, *unless such extension or shortening would conflict with a provision of another enactment setting down a time limit*".

25. Para 89 of *VK* indicated that that was one of the two reasons to distinguish *Mucelli*: the CPR contained a qualification similar to that set out above, but the rules of the Social Entitlement Chamber did not.

26. As regards whether the 2007 Act provides for statutory power to "extend to provision for judicial extension of time limits set by other enactments including Acts of Parliament" (para 84), as *VK* is a decision of a three judge panel I am required to apply *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC) at [37]):

> "In so far as the AAC is concerned, on questions of legal principle, a single judge shall follow a decision of a Three-Judge Panel of the AAC or Tribunal of Commissioners unless there are compelling reasons why he should not, as, for instance, a decision of a superior court affecting the legal principles involved.

27. However, there remains the question of the effect of the relevant rules made under that power. The panel noted at [42] that in the case of the Tax Chamber's Rules, r.21(3) provided for the tribunal to be able to extend a time limit in an enactment – even though the rules of the Tax Chamber, like those of HESC, contain the italicised wording in the respective versions of r.5(3)(a).

28. However, while "provision or judicial extension of time limits set by other enactments including Acts of Parliament" was considered to be covered (into which category r.21(3) of the Tax Chamber's Rules would fall), the panel made clear at [86] what the limitations were on the TPC's powers:

> "86. However, we do not think the TPC's powers extend to the effective re-writing of primary time limits set in other enactments. That would stray beyond the proper realm of procedural rules into matters of wider policy. The provision made in the 2008 Rules does not purport to re-write the primary time limit for appealing against a tax credits decision. It provides for case-by-case judicial determinations which are to be made by reference to the Rules' overriding objective of enabling the Tribunal to deal with cases fairly and justly."

29. What then is the effect of r.12(3)(a) of the HESC Rules? It does not provide for a "case by case judicial determination", but creates a generalised rule. The time limit under the DDA was 6 months, as is that under the 2010 Act (subject to various refinements). The 2010 Act was at least largely a consolidating measure. The effect of r.12(3) at the extreme end is that an application which otherwise would have to be made no later than 1 August could instead be made on the first working day in September. That would be to turn a time limit of 6 months into one of 7 months or even a couple of days more. Parliament in passing what became sch 3 of the DDA had said 6 months and may reasonably be taken to have been aware of the way in which the academic year in general operates. It can be seen from [17] - [19] above that immediately before the 2007 Act (and with it the Tribunal Procedure Rules) came into force, the provision made by the previous procedural rules was entirely subordinate to the statute, merely saying how an application under the statute was to be dealt with. What the Rules have then done is to create their own basis for extending time for a claim under the 2010 Act.[1] In my view, therefore, r.12(3)(a) of the HESC Rules insofar as it applies to initiating a claim under the 2010 Act goes beyond what even loyally applying *VK* (effectively the high point of the appellant's case) would permit.

30. In *Sheikh v Care Quality Commission* [2013] UKUT 137 (AAC) (a decision not cited in *VK*), Judge Rowland held that there was no power under the HESC Rules to extend the time limit under s.32 of the Health and Social Care Act 2008. He applied *Mucelli* and, as regards r.5, noted that it applied to the time for complying with any "rules, practice direction or direction (i.e. not the statutory time limit with which he was concerned.) That case was about the scope for a case by case extension, rather than the sort of across-the-board provision which the present case concerns. The potential impact of *VK* upon it might be different and I do not rely upon it for present purposes.

31. Rule 12(2) is, as noted above, the subject of binding authority. It is concerned with how to give effect to existing time limits on days when the relevant office is closed and reflects long-established principles. It must in my view be seen as limited to that particular situation, as a means of implementing existing time limits given the practical constraints of office hours. In para 85 of *Mucelli* (see [20] above) Lord Neuberger acknowledged that there might be other types of case to which the *Pritam Kaur* principle could logically be extended, but declined to do so. That is not the basis for r.12(3)(a): the FtT(HESC) is not closed throughout August. Indeed, the rationale for r.12(3)(a) in the FtT is altogether somewhat elusive. In that tribunal, the person starting proceedings, whether in a special educational needs case or a disability discrimination in schools case, will be the child or young person, or their parent. Even if schools and (up to a point) local authority children's services departments may be operating with reduced

[1] I was not taken to the various consultation documents leading up to the making of the HESC Rules so I express no concluded view on how it came about: it may have been, as Mr Tabori suggests, a mistake- certainly it seems from the footnote to r.5 (see [13] above] that the primary disability discrimination legislation may not have been at the forefront of minds when the HESC Rules were made and the scope for borrowing from the predecessor rules to take an inappropriate form is perhaps evident from the summary at [17] –[19].

staffing during August or in the case of schools even closed altogether, it is not they who need the protection of r.12(3)(a) because it will not be they who will be starting proceedings in the FtT. They might benefit from r.12(3)(b), which (like the previous rules for SENDIST) would give them more time to prepare a response or take other steps, but it is only commencing proceedings which is the subject of statutory provision: after that, matters are properly left to the rules of the tribunal and plainly fall within the enabling powers of the 2007 Act.

32. Ms Price argues that r.12 is concerned with the "calculation of time" rather than with extending time. Whilst I acknowledge that that is the rule's heading, in the context of what is actually in r.12(3)(a) the distinction is fine to the point of not existing: as I have said, the rule has the effect of extending a statutory time limit by up to, or slightly more than, one month.

33. It is of course very unsatisfactory that the Rules can be read in a way which on the interpretation I have reached is undoubtedly misleading, even allowing for the prominence in r.20 of the need to meet a statutory time limit where one is specified in an enactment. In this regard, it would be understandable if it were felt that the objectives of s.22(4) of the Act, set out in [8] above, have not been met. For future cases, this decision will serve to make clear that r.12(3)(a) cannot be relied upon to justify making an application to the FtT after the time limit in the 2010 Act has passed. I am directing that the decision be sent to the Tribunal Procedure Committee so that they can consider the matter.

34. That is not to say that a person trying to make a claim would necessarily be left high and dry. As noted above, para 4(3) of Schedule 17 does confer a power to extend time. Ms Price's second ground is that was perverse for the FtT not to have allowed the application for time to be extended under para 4(3) of Schedule 17 of the 2010 Act. It is true, as Mr Tabori says, that no such application was made, at any rate in terms. But tribunals have a wide discretion to treat, as a matter of case management, a submission as constituting an application for a particular purpose and Judge A's decision of 1 October 2018 did not proceed on the basis that no such application had been made. Rather, it was refused because an application for extension of time had already been considered in the course of the directions of 30 August and rejected and schedule 17, para 4(4) expressly prohibits repeat applications.

35. It seems to me that a difficulty arises because the vehicle chosen for the ruling of 30 August 2018 was a case management direction. I can readily see the value in early directions being given in disability discrimination in schools cases. I question though whether they are an appropriate vehicle by which to make a substantive determination (such as that a claim is out of time). The various sets of Tribunal Procedure Rules allow a judge to give directions initially on the papers without having obtained the parties' views.

36. The ability to apply under r.6(5) (set out at [14]) is an essential safeguard ensuring that the speedy and informal process for the giving of directions can be reconciled with the need to take the parties' views into account. Indeed,

both the rubric and the operative part of the directions of 30 August provided for the steps to be taken if the appellant disagreed with the directions. Directions are as a result capable of being changed in response to representations, which is why I am not persuaded they are the right vehicle for a decision on time limits.

37. In the present case, the appellant's solicitors did not give any reasons for seeking an extension of time, because they did not consider one was necessary. I can accept that in many cases it may be appropriate to treat an application which is considered to be a few days late as containing at least an implied request for an extension of time as Judge A on 30 August plainly did. However, in my view, particular caution is needed in doing so in a case under the 2010 Act because of the "one strike" rule of sch 17, para 4(4) if there is not to be a risk of depriving a party of the chance to be heard on the substance of their application for an extension of time. Here the vehicle adopted was a direction, given without submissions from the parties on the extension of time point and with the intrinsic potential to have to be revisited via a reg 6(5) application. Then, that view, for the above reasons provisional, expressed in the Directions of 30 August has then been treated as comprising the "one strike" for the purposes of the 1 October decision, with the consequence that the substantive point in issue – that if the appellant's solicitors are wrong about the ability to rely on r.12(3)(a), an extension of time should be given under the 2010 Act, has never been ruled upon. It can often be difficult to know which label to give to a public law flaw: rather than perversity, I would prefer to say that the decision of 1 October was in error of law for relying on the direction of 30 August as taken pursuant to the (one and only) opportunity to apply for an extension of time under sch 17, para 4(4) without having due regard to the nature of a direction under the HESC Rules, but I accept the tenor of Ms Price's submissions at the oral hearing on the point.

36. The Upper Tribunal does not have the papers regarding the substantive application to the FtT. The appropriate course in the light of the conclusion I have reached is to set aside the FtT's decision of 1 October 2018 and to remit the case to the FtT to consider whether or not to extend time under sch 17 para 4(3) of the 2010 Act. The fact that the present appeal has succeeded to this limited extent carries no implication for how the discretion under that provision should be exercised, which is entirely a matter for the FtT.

CG Ward
Judge of the Upper Tribunal
16 July 2019

SCHEDULE

1. There were a variety of clerical errors, infelicities of expression and inexact compliance with the FtT's rules in the FtT's chain of decision-making in this matter.

2. In the title of the decision dated 12 November 2018, Judge B gives as "date of original decision" 12 October 2018. No such decision was among the papers the appellant submitted to the Upper Tribunal, nor on the FtT's file.

3. Despite that title, para 7 of Judge B's decision indicates that it was setting aside the decision of 30 August 2018 and that in consequence "the decision by Judge [A] issued on the 12 October 2018" also fell to be set aside.

4. There is a decision by Judge A on the UT file at p37. It indicates on its face that it was issued on 1 October 2018. The FtT file does not appear to contain copies of the letters by which it was issued. I note (UT page 25) that the appellant's solicitors sought permission to appeal on 12 October 2018 having received the FtT's order dated 1 October 2018 (p28). I conclude that the reference to "12 October 2018" is a clerical error which could, if anything turned on it, be corrected under the slip rule and that what was under consideration was Judge A's rulings (to use a deliberately neutral term) of 30 August and 1 October 2018.

5. The ruling of 30 August is expressed (whether or not correctly) as a case management direction. How the matter came before Judge A again is not entirely clear from the letter of 13 September at p19, but it appears it was pursued as an out of time application under r.6(5) for the first "direction" to be amended, suspended or set aside and that a reference in the letter of 13 September to a "right of appeal" was being used, perhaps under time pressure, somewhat loosely. What in my provisional view appeared clear and was subsequently accepted by both parties' representatives is that by 1 October, at latest, a definitive ruling was being made by Judge A. I see no reason (and neither party has suggested otherwise) why that ruling and/or its 30 August predecessor should not potentially constitute a decision to which the provisions of Part 5 of the FtT(HESC)'s Rules are capable of applying.

6. Returning to Judge B's decision at p39a, para 1 of the reasons refers to "an application for permission to appeal against the tribunal's refusal to review a decision issued on the 12 October 2018." I do not think the judge was intending to convey that there had been a decision issued on 12 October, in respect of which there had since been an application for review which had been refused and which it was now sought to appeal against; rather, I consider the judge was intending to refer to the decision of (as I assume) 1
October, as being a decision which refused to "review", (in a loose sense, under, I infer, r.6(5)), the "direction" of 30 August. (If the term was being applied in the strict sense, i.e. that the decision of 1 October was on review of that of 30 August, it would not have been open to the judge to conduct any further review of the former: Tribunals, Courts and Enforcement Act 2007, s.9(10)).

7. The action Judge B was taking was under r.47(1) which links to r.49. The judge's decision to review brought into play s.9(4) TCEA. It may be a moot point whether the decision does in fact set Judge A's decision(s) aside and substitute a decision to admit the claim or merely indicates a proposal to do

so. It appears though that para 9 was a reference to the procedure under r.49(3) i.e. that Judge B had taken action to set aside and admit, subject to the protection which r.49(3) provides.

8. Judge B's decision of 16 January 2019 indicates (para 13) that the judge has "reviewed [the judge's] original decision of the 12 November 2018 again". That is not what r.49(3) appears to envisage: the rule appears to be addressing a further review of the original decision(s) under challenge. In the present case, though, however expressed, it appears to come to much the same thing. However, it is inconsistent with the further exercise of the review power to grant permission to appeal to the Upper Tribunal: see s.9(3) and (4) of TCEA.

9. It appears to me in consequence that what the judge was doing was to consider afresh (because the respondent had had no chance to make representations before the FtT "took action…following a review") the application for permission to appeal (which would have entitled the judge to conduct a review if it was thought there had been a sufficiently clear error of law, but the judge plainly no longer did, referring to the "ambiguity" around the legislation concerned (para 13)). What I conclude the judge was doing on 16 January 2019, however it may have been put, was to decide <u>not</u> to review Judge A's decision(s) but to grant permission to appeal against them.

10. For that reason, I concluded (and the parties' representatives agreed) that despite the difficulties canvassed above, the matter was properly before the Upper Tribunal.