Herman v Information Commissioner and Chief Constable of Kent Police
[2023] UKUT 240 (AAC)

IN THE UPPER TRIBUNAL **UT ref: UA-2022-001544-GIA**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (General Regulatory Chamber) (Information Rights)

Between:

Mr Christian Herman

Appellant

- v –

The Information Commissioner

First Respondent

and

The Chief Constable of Kent Police

Second Respondent

Before: Upper Tribunal Judge Wright

Decision date: 22 September 2023

Decided on consideration of the papers and written arguments.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decisions of the First-tier Tribunal dated 17 October 2017 and 31 August 2022 under case number EA/2017/0100 both involved the making of material errors of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set aside the First-tier Tribunal's decision of 31 August 2022 not to set aside its decision of 17 October 2017 and remake that decision. My remade decision is to set aside the First-tier Tribunal's decision of 17 October 2017 under rule 41 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. Given this, and in these circumstances, there is no need for me to separately set aside the First-tier Tribunals decision of 17 October 2017 under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. This appeal was heard by the First-tier Tribunal ("the tribunal") at Snaresbrook Crown Court as long ago as 11 October 2017 and was decided on 17 October 2017.

The tribunal dismissed Mr Herman's appeal against the Information Commissioner's decision notice of 20 April 2017.

2. The appeal to the tribunal concerned requests Mr Herman had made to the Kent Police on 20 and 21 August 2016 under the Freedom of Information Act 2000 ("FOIA") seeking the service and disciplinary records of three police officers from the Kent Police. It was and remains Mr Herman's belief that his conviction, for which he was in prison at the time of the tribunal's hearing on 11 October 2017, had arisen because of misconduct of the three police officers from Kent Police.

3. The Chief Constable of Kent Police, as the public authority under paragraph 59 in Schedule 1 to FOIA, refused to supply the information requested under section 40(2) of FOIA. This was on the basis that the information requested was the personal data of the police officers and disclosing it would breach the first data protection principle.

4. The crucial point about the tribunal hearing on 11 October 2017 for the purposes of this appeal is that Mr Herman was not present at it. The tribunal dealt with this at paragraph four of its decision as follows:

> "In his Notice of Appeal Mr Herman stated that he wanted an oral hearing and the Tribunal staff went to considerable efforts to arrange such a hearing in a secure court at Snaresbrook. We were informed at the outset of the hearing that Mr Herman had refused to be brought from prison on the morning of the hearing and we therefore proceeded with the hearing in his absence, taking account of the written material put before us and the assistance we were given by counsel for the Kent Police, who in the event were the only party to attend the hearing.

5. The tribunal had, however, been misled. It is now accepted that it was untrue that Mr Herman had refused to attend the hearing of his appeal. He had been expecting to attend but had been called to a class in the prison instead. On the face of it, this was clear breach of natural justice in that Mr Heman had been unable to be heard on his appeal through no fault of his own.

6. The tribunal in the absence of Mr Herman dismissed his appeal. It did so for the following reasons:

> "6. There can be no doubt that the information requested in this case constituted the personal data of the three officers in question. (Indeed, it is also likely that some of it amounted to "sensitive personal data" under the definition in section 2 of DPA since it may have included, for example, information about the officer's health, whether s/he was a member of a trade union and whether s/he was alleged to have committed an offence). In the circumstances the requested information could only be disclosed under FOIA if such disclosure would not contravene the first data protection principle, and in particular if its disclosure was "necessary" for the administration of justice or for the purposes of legitimate interests carried on by Mr Herman.
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> 7. Apart from being given a little detail on Mr Herman's complaints about the officers in the Kent Police's document at pp 15 to 17 of our bundle and told by Mr Herman in his Notice of Appeal that he has appealed to the Independent Police Complaints Commission against the rejection of his

> complaints by the Kent Police and that he has also sought to appeal against his conviction through the Criminal Cases Review Commission, we are given no indication in the papers at all as to how the disclosure of the officers' service and disciplinary records to Mr Herman was necessary for the administration of justice or the pursuit of any legitimate interest of his. Given that the IPCC and the CCRC both have ample powers to collect relevant information from the Kent Police (see: s17 of the Police Reform Act 2002 and s17 of the Criminal Appeal Act 1995) we doubt very much that disclosure to him could have been necessary for these purposes. We have briefly reviewed the service and disciplinary records which were provided to us by the Kent Police on a closed basis and nothing in them has caused us to change that view.
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> 8. In the circumstances we are satisfied that none of the conditions in Schedule 2 was met and that disclosure of the records by the Kent Police to Mr Herman would have involved an infringement of the first data protection principle and that they were therefore entitled to rely on section 40(2) of FOIA to withhold the requested information. We therefore uphold the Information Commissioner's decision notice and refuse the appeal."

7. Over four years later, on 20 February 2022, Mr Herman made an application for permission to appeal the tribunal's decision. The First-tier Tribunal in its determination of 31 August 2022 extended time so as to admit the application made by Mr Herman. That decision of the First-tier Tribunal has not been challenged by any party in these proceedings.

8. Having admitted the application, the First-tier Tribunal in its determination of 31 August 2022 refused to set aside the tribunal's decision of the 17 October 2017 and may also have refused Mr Herman permission to appeal against that decision. I say 'may also' as the First-tier Tribunal's determination of 31 August 2022 describes itself as a "Ruling on application for permission to appeal/set aside". Moreover, paragraph six of the determination refers to Mr Herman having made an application for permission to appeal. However, in paragraph twelve of the determination the salaried judge said that under rule 45 of the GRC Rules she was treating "the application as one to set aside which is governed by rule 41". Against this, in paragraph twenty eight of the determination the judge said: "For the avoidance of any doubt, I have also considered whether there is a material error of law in the tribunal's decision and find that there is no such error, and none is suggested by Mr Herman". Such a step would be unnecessary if the application was only being treated as a rule 41 application.

9. The First-tier Tribunal refused to set aside its decision of 17 October 2017 because, although rule 42(1)(b) and 42(2)(c) of the GRC Rules was met (as Mr Herman had not been present at the hearing of his appeal), rule 41(1)(a) of the GRC Rules was not because it was not "in the interests of justice" to set aside the 17 October 2017 decision. The First-tier Tribunal reasons for finding that it was not in the interests of justice to set aside the decision were as follows:

> "24. Mr Herman says it is in the interests of justice to do so as he has evidence that is relevant and admissible that the Tribunal did not have. These are transcripts of evidence from a criminal trial, and a report from Kent police professional standards. However, he confirmed the transcripts that he wished to rely on had been in his possession since 20 April 2015

and the report since 2016 at the latest. He says he was not given an opportunity to place these before the tribunal as he had planned to do so orally; but evidence to be considered by a tribunal should be placed before it in advance of the hearing and not be adduced by way of oral submissions on 18 the day. In any event the tribunal's decision shows that they received and considered such material in reaching their decision.

25. The request for information at the heart of this case was for the service and disciplinary records of 3 police officers. Mr Herman says that a new hearing would allow a comparison between the "necessity for disclosure" due to his legitimate interest in demonstrating that a police officer misled the court at his trial by saying that she had retired when she remained employed as a staff member of Kent Police and it would allow evidence of misconduct to be made available which he submits is in the interests of the administration of justice.

26. In considering whether s40(2) FOIA applied to the information he had requested the tribunal considered whether the processing was necessary for the administration of justice and/or his legitimate interests. The tribunal noted he had not made clear how disclosure was necessary for that purpose or for his legitimate interest. The tribunal nonetheless considered the matter and decided that given the powers of the IPCC and CCRC they doubted "very much" that disclosure would be necessary for the administration of justice or for his legitimate interest. Even if Mr Herman could now show some form of irregularity as to the dates of the officer's retirement the tribunal's decision is clear that the proper course is to deal with the issues via the IPCC and CCRC who have the power to collect all relevant information.

27. In all the circumstances of this case I do not consider it is in the interests of justice to set aside the decision of the tribunal. The essence of the case Mr Herman says he wants to put to the tribunal was considered by them in 2017 and a decision made."

10. Mr Herman sought permission to appeal from the Upper Tribunal in time on 23 September 2022. In giving him permission to appeal I said:

"3. Whether the renewed application for permission to appeal is viewed as being against the First-tier Tribunal's decision of 17 October 2017 or against the refusal to set aside decision of 31 August 2022 (the latter not being an excluded decision under section 13(8)(d)(ii) of the Tribunal, Courts and Enforcement Act 2007), it is arguable that the First-tier Tribunal erred in law in deciding the appeal on a false basis (that Mr Herman would not attend the oral hearing of his appeal) and/or in failing to weigh in the 'interests of justice' test that Mr Herman had been denied the oral hearing before the three-person expert First-tier Tribunal through no fault of his own.

4. Although a robust approach to proceeding may be merited at the hearing when a party is absent for no good reason, and perhaps especially where it seems at the time that the party has deliberately elected not to attend, it is arguable that such an approach should not continue to apply at the set aside stage when (as here) the correct

> reasons for non-attendance have been revealed and on the face of it provide a good reason for the non-attendance: see, by way of example, paragraph 9 of *MK v SSWP* (ESA) [2018] UKUT 33 (AAC). It is arguably relevant to exercise of the interest of justice test (whether under rule 36b or 41 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the "TPR")) that (i) part of the "overriding objective", in rule 2(2)(c) of the TPR, requires the First-tier Tribunal to "ensur[e], so far as practicable, that the parties are able to participate fully in the proceedings"; and (ii) it had not been considered that Mr Herman's appeal had so little prospects of success that it ought have been struck out, without a hearing, under rule 8 of the TPR. It is arguable that the First-tier Tribunal erred in law at the set aside in failing to have regard to these considerations and concentrating solely on the underlying merits of the appeal.
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> 5. I do not consider Mr Herman's other grounds of appeal, insofar as he is raising other grounds of appeal in the UT13 form, have any arguable merit in error of law terms. The further argument Mr Herman makes in Section E of the UT13 form appears to be no more than argument on the merits of his appeal to the First-tier Tribunal that he would have wished to make had he been at the hearing on 11 October 2017. Those arguments raise no arguable error of law in the First-tier Tribunal's approach to evidence which was in fact before it on 11 October 2017. The ground on which I have given permission to appeal above concerns the fairness of the First-tier Tribunal appeal proceedings as a whole because Mr Herman was not able to attend and argue his case before the First-tier Tribunal."

11. The submissions of the respondents on the appeal to the Upper Tribunal have concentrated on whether the First-tier Tribunal erred in law in its decision of 31 August 2022 not to set aside the tribunal's decision of 17 October 2017. I will do so as well, though I will briefly address the decision of 17 October 2017 itself at the end of this decision. Mr Herman's observations in reply to the respondents' submissions concentrate on the evidence he says he would have placed before the tribunal on 11 October 2017 had he attended that hearing.

12. Mr Herman asks for an oral hearing of the appeal before the Upper Tribunal. Neither respondent seeks such a hearing. I am satisfied that no hearing is needed as I can allow the appeal and find in Mr Herman's favour on the set aside point. The oral hearing of his (now) extant appeal to the First-tier Tribunal will be a matter for that tribunal under the provisions of the GRC Rules.

13. Given its importance to this appeal it is worth setting out the relevant terms of rule 41 of the GRC Rules.

> "41.—(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if
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> (a) the Tribunal considers that it is in the interests of justice to do so; and
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> (b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are—

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

(b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;

(c) a party, or a party's representative, was not present at a hearing related to the proceedings; or

(d) there has been some other procedural irregularity in the proceedings.

14. I agree with both respondents (and Mr Herman) that the First-tier Tribunal erred in law in coming to its set aside decision of 31 August 2022. The errors of law it made were plainly material to its decision and therefore require the decision to be set aside.

15. The overall error the tribunal made in my judgment was in failing to weigh in its consideration the central importance, as recognised in the GRC Rules, of an appellant being able to attend the oral hearing of their appeal. That was plainly a significant factor in determining where the 'interests of justice' lay in this case. No argument in fairness is made to this effect, but I would reject an argument that as the absence of a party from the hearing is dealt with in rule 42(2)(c) of the GRC their absence does not fall for consideration again under the interests of justice test under rule 41(1)a) of the GRC Rules. The "interests of justice" is a broad term and can encompass many factors. For example, a person may have clearly and unequivocally chosen not to attend the hearing of their appeal having been given proper notice of it. That person would come within rule 42(2)(c) but the interest of justice test is unlikely to be satisfied based on the reasons for their absence.

16. The error of law the First-tier Tribunal made in its refusal to set aside decision was to concentrate solely on the underlying merits of the appeal and in not, at least as evidenced in its reasons, having any, or any sufficient, regard to Mr Herman's absence from the hearing and why that was so. Moreover, this is not a case where either of the respondents, or the First-tier Tribunal of its own motion, had argued that the merits of the appeal were poor and so should have been struck out without a hearing under rule 8(3)(c) of the GRC Rules on the basis that the appeal had no reasonable prospects of success. This left the position on Mr Herman's appeal that (per rule 31 of the GRC Rules) the First-tier Tribunal was required to hold an oral hearing of the appeal (as it did) **and** (per rule 33(1)(a) of the GRC Rules) that Mr Herman was entitled to attend that hearing. That entitlement had been removed from Mr Herman through no fault of his own and that deficit in the proceedings ought in my judgment to have weighed in the 'interest of justice' test the First-tier Tribunal had to apply. Its failure to do so constituted a material error of law.

17. I agree, moreover, with the Information Commissioner that the First-tier Tribunal erred in two further respects in its set aside decision, though the second further respect may be no more than an aspect of the overall error of law identified above.

18. The first further respect in which the First-tier Tribunal erred in law in its decision of 31 August 2022 was in dismissing in its entirety Mr Herman's argument that he had been prejudiced in not having been able to place before the tribunal in October 2017 the Kent Police Professional Standards report and a criminal trial

transcript. The First-tier Tribunal in its set aside decision rejected this argument because it said that:

> "evidence to be considered by a tribunal should be placed before it in advance of the hearing and not be adduced by way of oral submissions on the day. In any event the tribunal's decision shows that they received and considered such material in reaching their decision."

19. Both parts of the First-tier Tribunal's reasoning here were flawed. It firstly assumed that any attempt by Mr Herman to rely on these documents at the hearing of his appeal (had he been produced to attend it) would have been refused by the tribunal on 11 October 2017. This ignores, however, (i) the broad discretion the tribunal had to admit evidence under rule 15 of the GRC Rules, and (ii) perhaps more importantly, that in exercising that rule 15 discretion the tribunal would have needed to take account of Mr Herman's unusual circumstances of being a serving prisoner and the difficulties he may have had in consequence in providing the tribunal in advance with his evidence. The second flaw in the First-tier Tribunal's reasoning here is perhaps a more fundamental one as the criminal trial transcript on which Mr Herman wished to rely had not been received and considered by the tribunal on 11 (or 17) October 2017. This, as the Information Commissioner helpfully submits on this appeal, had been set out by the Information Commissioner in his submissions of 10 May 2022 in response to the (deemed) set aside application made by Mr Herman. The First-tier Tribunal was therefore also wrong when it said in its refusal to set aside decision that the essence of Mr Herman's case had been considered by the tribunal in 2017. (And this last point on its face also engages rule 41(2)(b) of the GRC Rules.)

20. The second further respect in which the First-tier Tribunal erred in law in its refusal to set aside decision is in failing to consider whether it was "undoubtable" that the outcome of the substantive appeal would have been the same in October 2017 even had Mr Herman attended the hearing on 11 October 2017. The Information Commissioner here relies on paragraph [65] of the Privy Council's decision *Lawrence v Attorney General* [2007] UKPC 18; [2007 1 WLR 1474 as subsequently endorsed by the Court of Appeal at paragraph [51] of *R(Michael) v HMP Whitemoor* [2020] EWCA Civ 29; [2020] 1 WLR 2524. A similar test may be encapsulated in the notion of whether the appeal had a real, as opposed to only a fanciful, prospect of success had the appellant attended: per *Akram v Adam* [2004] EWCA Civ 1601; [2005] 1 WLR 2762. I have already noted above, however, that at no stage in the proceedings had it been argued that the appeal should have been struck out without a hearing because it had no prospects of success. Moreover, it also seems relevant here, in my judgment, to bear in mind (i) the point made at the end of paragraph nineteen above that the tribunal in October 2017 did not have all Mr Herman's evidence before it, and (ii) that the tribunal which Mr Herman was denied the opportunity to appear before was a three person tribunal made up of a judge and two specialist members, rather than one judge reviewing matters on the papers: see, relatedly, the first part of paragraph [189] of *Natural England v Warren* [2019] UKUT 300 (AAC).

21. In the context where not all written evidence was before the tribunal in 2017 and where that tribunal stated it had been given "no indication in the papers at all as to how disclosure of the officers' service and disciplinary records to Mr Herman was necessary for the administration of justice or the pursuit of any legitimate interest of his" (the underlining is mine and has been added for emphasis), and given moreover the tribunal only "doubt[ed] very much" that disclosure was necessary, I agree with

the Information Commissioner that the First-tier Tribunal in its refusal to set aside decision erred in law in failing properly to show that Mr Herman's attendance would not have made any difference to the decision made on his appeal.

22. I therefore under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 set aside the First-tier Tribunal's refusal to set aside decision of 31 August 2022 for the above identified material errors of law.

23. Both the Information Commissioner and the Chief Constable of Kent Police invite me to remake the First-tier Tribunal's decision whether to set aside the tribunal's decision of 17 October 2017: per section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. Mr Herman has not addressed that issue in his submissions to the Upper Tribunal.

24. Having set aside the First-tier Tribunal's refusal to set aside decision under section 12(2)(a) of The Tribunals, Courts and Enforcement Act 2007, section 12(2)(b) of the same Act requires me to either remit the case (for set aside) to the First-tier Tribunal for its reconsideration or re-make the (set aside) decision. I take the latter route as I accept that I am in at least as good a position as a First-tier Tribunal judge to decide the issue of set aside.

25. The respondents rely on the following as supporting a decision refusing to set aside the tribunal's decision of 17 October 2017. They argue that the lateness in Mr Herman making the application for set aside is relevant to the 'interests of justice'. The Information Commissioner submits that this lateness is relevant for two reasons. First, as I understand the argument, because the delay in making the application indicates that the appeal was not that important for Mr Herman and, accordingly, he will suffer no serious substantive injustice if the 17 October 2017 decision is allowed to a stand. Second, the Information Commissioner submits that far more limited weight ought to be attached to the factors the First-tier Tribunal identified in paragraph nineteen of its refusal to set aside decision (when it considered the factors that then led it to extend time to admit the late application). That paragraph nineteen reads as follows:

> "I consider the length of the delay to be a serious and significant breach of the rules. The application is made over 4 years from the conclusion of the proceedings. In the normal course of events that would be enough to dispose of this application but this appellant was in custody, he is unrepresented, his correspondence/documentation has been delayed/diverted and he believed that there were efforts being made to relist his case."

26. The Information Commissioner argues, following paragraph [18] of *Barton v Wright Hassall LLP* [2018] UKSC 12; [2018] 1 WLR 1119, that "it is vitally important that unrepresented litigants comply with rules and practice directions". It is argued that whilst Mr Herman may be given greater leeway than a represented party, and perhaps even an unrepresented party not in custody, delay of the magnitude in his case undermines the effective functioning of the justice system and stretches the finite resources of the Commissioner and Kent Police.

27. I do not read the Chief Constable of Kent Police's response to this appeal as really adding anything to the above arguments of the Information Commissioner.

28. The following considerations are in my judgment relevant to whether it is in the 'interests of justice' to set aside the tribunal's decision of 17 October 2017.

29. First, through no fault of his own Mr Herman was kept out of attending a hearing he was entitled to attend before the specialist three-person tribunal which in law was to decide his appeal. I am satisfied that had the tribunal on 11 October 2017 known what the true state of affairs was, it is very likely that it would have adjourned the hearing rather than decide the appeal in Mr Herman's absence. Second, documents were not before the tribunal on 11 October 2017 and had not been sent to it at an appropriate time (per rule 41(2)(b) of the GRC Rules), namely the criminal trial transcript. Third, no argument is made before me that Mr Herman's presence at the hearing on 11 October would have made no difference and that it was inevitable that his appeal would fail. Fourth, Mr Herman's engagement with these Upper Tribunal proceedings and the arguments he has made in them shows that he retains a keen interest in his appeal to the First-tier Tribunal succeeding against the decision refusing his information requests.

30. Pausing at this point, and absent the delay consideration upon which both respondents rely, all the factors set out immediately above in my judgment lie in favour of setting aside the tribunal's decision of 17 October 2017.

31. What then of the delay? I have to confess to being a little troubled that the arguments made here are reargument about whether time should have been extended so as to admit the late application for set aside/permission in circumstances where the First-tier Tribunal's decision to extend time is not under challenge, has not been set aside and so remains in place. That decision of the First-tier Tribunal is therefore binding in the First-tier Tribunal proceedings and so binds me equally in remaking the First-tier Tribunal decision whether to set aside the 17 October 2017 tribunal's decision: see *R(Majera) v SSHD* [2021] UKSC 46; [2022] AC 461. Given this I do not see on what basis the decision in *Barton v Wright Hassall* has a material bearing on the decision I am remaking as Mr Herman's compliance with the time limit rule (for seeking set aside/permission to appeal) has already been considered and waived. To refuse to set aside the 17 October 2017 decision under the 'interests of justice' test because Mr Herman had not complied with the time limit for seeking set aside would in my judgment involve me in trespassing on a decision of the First-tier Tribunal which is expressly not under challenge and is therefore a decision I am obliged to follow.

32. I do accept, however, that delay can be relevant to the 'interests of justice' test even after a late application for set aside has been properly admitted for consideration on its merits. For example, the delay may be such that in an appropriate case it would not be in the interests of justice to set aside a First-tier Tribunal decision because key witnesses would no longer be able to give evidence, or the passage of time has been such that the information requested is no longer held by the public authority. However, no such arguments are advanced by either respondent in this case. In short, neither respondent relies on any actual prejudice arising if the decision was to be set aside. At highest, reliance is placed on general considerations such as the undermining of the effective functioning of the justice system and stretching the finite resources of the respondents. However, as to the former general consideration, no detail is given as to how in fact the effective functioning of the justice system will be undermined by this appeal being reheard

many years later. The late application for set aside has been admitted, as the rules of the justice system allow for, and, absent any actual prejudice arising on this appeal, the grounds for set aside are in my judgment in favour of set aside under the rules of the justice system. As for the latter consideration, the parties had made their written submissions on the appeal to the First-tier Tribunal and the Information Commissioner did not appear at the hearing on 11 October 2017. The additional cost that the Chief Constable of Kent Police may have to bear in attending the rehearing of the substantive appeal is likely to be no more than would have arisen had the tribunal in October 2017 been properly informed as to the reason for Mr Herman's absence and then adjourned the hearing to another date. In any event, I do not consider that unparticularised arguments on costs provide a sufficient basis to outweigh the factors in favour of set aside.

33. I therefore set aside the tribunal's decision of 17 October 2017 under rule 41 of the GRC Rules. I do not remake that appeal decision under rule 41 as, per *Natural England v Warren*, that should be for the specialist three-person constitution of the First-tier Tribunal to decide.

34. I touch briefly on my grant of permission to appeal against the 17 October 2017 decision itself. In my judgment that decision was also based on material error of law. That error of law was a fundamental breach of natural justice in deciding the appeal in the absence of Mr Herman and where the tribunal on 11 October 2017 had been materially misled about the reasons for Mr Herman's absence. Having found that the tribunal's decision of 17 October 2017 was in error of law, I would (but for my set aside decision above) have had to decide as a matter of my discretion whether to set that decision aside. I accept that the same factors I have addressed above when considering the rule 41 set aside may well have been relevant to the exercise of that discretion. However, there is no need for me to even engage in the consideration of whether to exercise that discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, given I have already set aside the 17 October 2017 decision under rule 41 of the GRC Rules.

35. It is for all these reasons that I have allowed Mr Herman's appeal in the terms set out above.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 22nd September 2023.