[2015] AACR 35

(Sarfraz v Disclosure and Barring Service
[2015] EWCA Civ 544)

CA (Lord Dyson MR and Kitchen LJJ) **V/2733/2014**
22 May 2015

Jurisdiction – permission to appeal – refusal by Upper Tribunal – whether Court of Appeal has power to grant permission to appeal against UT decision

The appellant, a General Practitioner, was the subject of two separate complaints regarding alleged sexual abuse. He was initially suspended for 12 months from the Medical Register by the Professional Conduct Committee of the General Medical Council and then, following a subsequent review by the Committee, he returned to practise under supervision. It was later alleged that the appellant had misled the Committee during the review and the Council removed his name from the Medical Register. This led to an investigation by the Independent Safeguarding Authority (ISA) which decided to include the appellant on the Children's and Adults' Barred lists. The appellant appealed to the Upper Tribunal (UT) and it held that ISA had erred in law and in fact and remitted the matter for a fresh decision. The Disclosure and Barring Service (DBS), which had replaced the ISA, decided to keep the appellant's name on both lists. He then unsuccessfully applied for permission to appeal from the UT against that decision. The appellant applied to the Court of Appeal for permission to appeal against the UT's refusal of permission to appeal against the decision of the DBS.

Held, dismissing the application, that:

the essence of the principle established in *Lane v Esdaile* [1891] AC 210 was that, in the absence of express statutory language to the contrary, a provision giving a court the power to grant or refuse permission to appeal should be construed as not extending to an appeal against a refusal of permission to appeal. The rationale which underlay the principle applied with equal force to any provision which imposed a requirement of permission to appeal. The use of broad words, such as "the right to appeal" and "decision" was not sufficient to indicate a parliamentary intention to disapply the principle. Nor was there support in the authorities for holding that the *Lane v Esdaile* principle should only apply to decisions by tribunals of law. The principle was clear: if it was to be disapplied, clear express language was required. There was no such language in section 13 of the Tribunals, Courts and Enforcement Act 2007 and an inference drawn from the inclusion of section 13(8) of the Act was insufficient to displace the principle. Accordingly, the court had no jurisdiction to give permission to appeal against the refusal by the UT (paragraphs 25 to 26 and 35 to 39).

DECISION OF THE COURT OF APPEAL

Sarabjit Singh of counsel, instructed by Hempsons Solicitors, appeared for the appellant.

Gemma White of counsel, instructed by the Government Legal Department, appeared for the respondent.

Judgment

MASTER OF THE ROLLS:

1. The Disclosure and Barring Service (the DBS) is an Executive Non-Governmental Public Body (NGPB). It was established in 2012 under the Protection of Freedoms Act 2012 and replaced the Criminal Records Bureau and the Independent Safeguarding Authority (the ISA). The DBS is responsible for maintaining the Children's and the Adults' Barred Lists.

2. On 21 May 2014, the appellant applied to the Upper Tribunal (Administrative Appeals Chamber) (the UT) for permission to appeal against the decision of the DBS dated 26 February 2014 to continue to include him in the Children's Barred List under paragraph 3 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 (the SVGA) and in the Adults' Barred List under

paragraph 11 of Schedule 3 to the SVGA. By a decision dated 8 October 2014, the UT refused the application.

3. On 12 November 2014, the appellant applied to the UT for permission to appeal to the Court of Appeal against the UT's refusal of permission to appeal to itself. By a decision dated 14 November 2014, the UT (UT Judge Jacobs) refused this application. The appellant now applies to this court for permission to appeal against the UT's refusal of permission to appeal against the decision of the DBS.

4. Two issues arise. The first is whether this court has the power to grant permission to appeal against a refusal of permission to appeal by the UT against a decision of the DBS. The second is whether, if the court has power to grant permission, it should exercise it in this case.

Brief outline of the factual and procedural background

5. In summary, the appellant worked as a General Practitioner from November 2000. In 2001, two separate complaints were made against him regarding alleged incidents of sexual abuse. Although the appellant was not charged with any criminal offence, the Professional Conduct Committee (the PCC) of the General Medical Council (the GMC) considered the complaints and concluded that the allegations in question were proved. The appellant was suspended from the Medical Register for 12 months.

6. On 21 August 2003, the PCC reviewed the case and decided to allow him to return to practice under supervision. It was subsequently alleged that the appellant had deliberately misled the PCC in relation to its review. As a result, the GMC's Fitness to Practise Panel removed the appellant's name from the Medical Register with effect from 1 April 2006. This led to an investigation by the ISA which decided on 1 August 2011 to include the appellant in the Children's and Adults' Barred lists.

7. The appellant appealed to the UT against the decision of 1 August 2011. The UT held on 6 June 2012 that the ISA had erred in law and in fact and remitted the matter for a fresh decision. The ISA was then replaced by the DBS, and the latter decided on 26 February 2014 to continue to include the appellant in the Barred Lists. The appellant sought permission to appeal against this decision from the UT, but this was refused on 8 October 2014.

The jurisdiction issue

The statutory framework

8. The Tribunals, Courts and Enforcement Act 2007 (the TCEA) (as amended) provides, so far as material, as follows:

> "**11 Right to appeal to Upper Tribunal**
>
> (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
>
> (2) Any party to a case has a right of appeal, subject to subsection (8).
>
> (3) That right may be exercised only with permission (or, in Northern Ireland, leave).
>
> (4) Permission (or leave) may be given by –

(a) the First-tier Tribunal, or

(b) the Upper Tribunal,

on an application by the party.

(5) For the purposes of subsection (1), an 'excluded decision' is –

(a) any decision of the First-tier Tribunal on an appeal made in exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with section 5(1)(a) of the Criminal Injuries Compensation Act 1995 (c. 53) (appeals against decisions on reviews),

(aa) any decision of the First-tier Tribunal on an appeal made in exercise of a right conferred by the Victims of Overseas Terrorism Compensation Scheme in compliance with section 52(3) of the Crime and Security Act 2010,

(b) any decision of the First-tier Tribunal on an appeal under section 28(4) or (6) of the Data Protection Act 1998 (c. 29) (appeals against national security certificate),

(c) any decision of the First-tier Tribunal on an appeal under section 60(1) or (4) of the Freedom of Information Act 2000 (c. 36) (appeals against national security certificate),

(d) a decision of the First-tier Tribunal under section 9 –

(i) to review, or not to review, an earlier decision of the tribunal,

(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal,

(iii) to set aside an earlier decision of the tribunal, or

(iv) to refer, or not to refer, a matter to the Upper Tribunal,

… .

13 Right to appeal to Court of Appeal etc.

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (14).

(3) That right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by –

(a) the Upper Tribunal, or

(b) the relevant appellate court,

on an application by the party.

(5) An application may be made under subsection (4) to the relevant appellate court only if permission (or leave) has been refused by the Upper Tribunal.

(6) The Lord Chancellor may, as respects an application under subsection (4) that falls within subsection (7) and for which the relevant appellate court is the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland, by order make provision

for permission (or leave) not to be granted on the application unless the Upper Tribunal or (as the case may be) the relevant appellate court considers—

(a) that the proposed appeal would raise some important point of principle or practice, or

(b) that there is some other compelling reason for the relevant appellate court to hear the appeal.

(7) An application falls within this subsection if the application is for permission (or leave) to appeal from any decision of the Upper Tribunal on an appeal under section 11.

(8) For the purposes of subsection (1), an 'excluded decision' is –

(a) any decision of the Upper Tribunal on an appeal under section 28(4) or (6) of the Data Protection Act 1998 (c. 29) (appeals against national security certificate),

(b) any decision of the Upper Tribunal on an appeal under section 60(1) or (4) of the Freedom of Information Act 2000 (c. 36) (appeals against national security certificate),

(c) any decision of the Upper Tribunal on an application under section 11(4)(b) (application for permission or leave to appeal),

(d) a decision of the Upper Tribunal under section 10 –

(i) to review, or not to review, an earlier decision of the tribunal,

(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal, or

(iii) to set aside an earlier decision of the tribunal,

(e) a decision of the Upper Tribunal that is set aside under section 10 (including a decision set aside after proceedings on an appeal under this section have been begun), or

(f) any decision of the Upper Tribunal that is of a description specified in an order made by the Lord Chancellor."

9. Section 4 of the SVGA (as amended) provides, so far as material:

"(1) An individual who is included in a barred list may appeal to the Upper Tribunal against –

(b) a decision under paragraph 2, 3, 5, 8, 9 or 11 of Schedule 3 to include him in the list;

(c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.

(2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake –

(a) on any point of law;

(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.

> (3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.
>
> (4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.
>
> (5) Unless the Upper Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS.
>
> (6) If the Upper Tribunal finds that DBS has made such a mistake it must –
>
> > (a) direct DBS to remove the person from the list, or
> >
> > (b) remit the matter to DBS for a new decision."

The relevant case law

10. The question whether there is a right of appeal to a court against a refusal by a lower court or other body to grant permission to appeal must depend on the true construction of the statutory provision which confers the right of appeal. It is a question which has troubled the courts on a significant number of occasions in different statutory contexts. But it is necessary to state at the outset that there is a general principle which guides the approach to the question of statutory interpretation that arises in these cases.

11. The starting point is *Lane v Esdaile* [1891] AC 210 which concerned the appellate jurisdiction of the House of Lords. Section 3 of the Appellate Jurisdiction Act 1876 provided that an appeal should lie to the House of Lords from "any order or judgment of … Her Majesty's Court of Appeal in England". The order of the Court of Appeal which it was sought to appeal was a refusal of leave to appeal under Rules of the Supreme Court (RSC) Order LVIII, rule 15 which provided that there should be no appeal to the Court of Appeal from any interlocutory order "except by special leave of the Court of Appeal …". The Court of Appeal refused to give the appellants special leave to appeal. Lord Halsbury LC accepted that the words "order or judgment" in section 3 were capable of including a decision to refuse leave. The question was whether such a construction could be reconciled with the terms and purpose of Order LVIII rule 15. At 211, he said:

> "But when I look not only at the language used, but at the substance and meaning of the provision, it seems to me that to give an appeal in this case would defeat the whole object and purview of the order or rule itself, because it is obvious that what was there intended by the Legislature was that there should be in some form or other a power to stop an appeal – that there should not be an appeal unless some particular body pointed out by the statute (I will see in a moment what that body is), should permit that an appeal should be given. Now just let us consider what that means, that an appeal shall not be given unless some particular body consents to its being given. Surely if that is intended as a check to unnecessary or frivolous appeals it becomes absolutely illusory if you can appeal from that decision or leave, or whatever it is to be called itself. How could any Court of Review determine whether leave ought to be given or not without hearing and determining upon the hearing whether it was a fit case for an appeal? And if the intermediate Court could enter and must enter into that question, then the Court which is the ultimate Court of Appeal must do so also. The result of that would be that in construing this order, which as I have said is obviously intended to prevent frivolous and

> unnecessary appeals, you might in truth have two appeals in every case in which, following the ordinary course of things, there would be only one; because if there is a power to appeal when the order has been refused, it would seem to follow as a necessary consequence that you must have a right to appeal when leave has been granted, the result of which is that the person against whom the leave has been granted might appeal from that, and inasmuch as this is no stay of proceeding the Court of Appeal might be entertaining an appeal upon the very same question when this House was entertaining the question whether the Court of Appeal ought ever to have granted the appeal, My Lords, it seems to me that that would reduce the provision to such an absurdity that even if the language were more clear than is contended on the other side one really ought to give it a reasonable construction."

12. As Lord Hoffmann said in *Kemper Reinsurance v Minister of Finance* [2000] 1 AC 1 (a decision of the Judicial Committee of the Privy Council), the *ratio decidendi* of *Lane v Esdaile* was analysed "with great clarity" by the Court of Appeal in *In re Housing of the Working Classes Act 1890, Ex parte Stevenson* [1892] 1 QB 609. The Act under consideration in that case conferred powers of compulsory purchase on local authorities and provided for arbitration on the price. The Act provided that a party dissatisfied with the amount of the compensation ascertained by the award could "upon obtaining the leave of the court" submit the question of the proper amount of compensation to a jury. Mr Stevenson was dissatisfied with the amount of compensation awarded to him by the arbitrator and applied to a judge for leave to appeal. His application was refused and the Court of Appeal, following *Lane v Esdaile,* held that there was no appeal against the refusal of leave to appeal. Lord Esher MR said at 611:

> "I am, on principle and on consideration of the authorities that have been cited, prepared to lay down the proposition that, wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given. So, if the decision in this case is to be taken to be that of the judge at chambers, he is the legal authority to decide the matter, and his decision is final; if it is to be taken to be that of the High Court, then they are the legal authority entrusted with the responsibility of deciding whether there shall be leave to appeal, and their decision is final. In either case there is no appeal to this Court. What was said in the case of *Lane v. Esdaile* supports the view that I am taking. But the very nature of the thing really concludes the question; for, if, where a legal authority has power to decide whether leave to appeal shall be given or refused, there can be an appeal from that decision, the result is an absurdity, and the provision is made of no effect. If the contention for the claimant be correct, it would follow that the case might be taken from one Court to another till it reached the House of Lords on the question whether there should be leave to appeal. That cannot be so. For these reasons, I think the appeal must be dismissed."

13. The reasoning of Fry and Lopes LJJ was to the same effect. At 612, Fry LJ said:

> "I say an 'appeal' because the proceeding is in substance an appeal, and the legislature has called it so in the Act. The legislature has thought fit to impose a condition in respect of this right of appeal, viz., that the leave of the High Court must be obtained, which leave is to be granted in the manner pointed out, viz., either by the Divisional Court or by a judge at chambers. Then is the order – for such I will assume it to be – of the High Court, granting or refusing leave to appeal, subject to appeal? In my opinion it is not. I do not come to that conclusion on the ground that the word 'order' is not properly applicable to it; but from the nature of the thing and the object of the legislature in imposing this

> fetter on appeals. The object clearly was to prevent frivolous and needless appeals. If, from an order refusing leave to appeal, there may be an appeal, the result will be that, in attempting to prevent needless and frivolous appeals, the legislature will have introduced a new series of appeals with regard to the leave to appeal. Suppose, for the sake of argument, that in this case the claimant's grounds for wishing to appeal are frivolous; if the contention on his behalf is correct, he could appeal from the judge at chambers to the Divisional Court, from the Divisional Court to this Court, and from this Court to the House of Lords on the question whether he shall be allowed to appeal. It appears to me that that would be an absurd result in the case of a provision the object of which is to prevent frivolous and needless appeals. Therefore, from the very nature of the thing the decision of the Court which has the power of giving leave to appeal is, in my opinion, final. This seems to me to be the ratio decidendi of *Lane v. Esdaile*. That case appears to decide that, where the right to appeal depends upon the granting or refusal of leave to appeal by a Court, that granting or refusal of leave must be final."

14. The scope of the *Lane v Esdaile* principle was considered in *Kemper,* which is a decision on which Mr Singh places considerable reliance. The question in this case was whether the Court of Appeal of Bermuda had jurisdiction to hear an appeal from an order made by a judge discharging leave to apply for an order of certiorari. The judge gave leave to appeal against her order. The Court of Appeal upheld the respondent's objection that it had no jurisdiction to hear the appeal. The Judicial Committee allowed the applicant's appeal on the jurisdiction issue.

15. The jurisdiction of the Court of Appeal of Bermuda derived from the Court of Appeal Act 1964, section 12 of which provided that any person aggrieved by a judgment of the Supreme Court [which corresponds with our High Court] may appeal to the Court of Appeal; and that no appeal shall lie to the Court of Appeal against a decision in respect of any interlocutory matter or against an order for costs "except with the leave of the Supreme Court or the Court of Appeal".

16. At 13D, Lord Hoffmann said:

> "Their Lordships consider that the principle in *Lane v. Esdaile* [1891] A.C. 210, as explained in *In re Housing of the Working Classes Act, 1890, Ex parte Stevenson* [1892] 1 Q.B. 609, is that a provision requiring the leave of a court to appeal will by necessary intendment exclude an appeal against the grant or refusal of leave, notwithstanding the general language of a statutory right of appeal against decisions of that court. This construction is based upon the 'nature of the thing' and the absurdity of allowing an appeal against a decision under a provision designed to limit the right of appeal. This absurdity is greatest in a case such as *Lane v. Esdaile*, in which the appeal is brought to or from the very tribunal to which it is desired to appeal on the merits. As Lord Halsbury pointed out, an appeal against the refusal of leave would involve the higher court in doing the very thing which the provision was designed to prevent, namely, having to examine the merits of the decision appealed against. The *Stevenson* case generalises the proposition to cover all cases in which leave to appeal is required, even if the tribunal before which the applicant seeks a rehearing on the merits (in that case, a jury) is not the same as that to or from which he seeks to appeal against the refusal of leave. But the emphasis which the Court of Appeal in that case placed upon characterising the hearing before the jury as an appeal shows that the judges would not necessarily have been willing to state the principle any more widely and to include cases in which leave is required to do something other than appeal. For example, it has never been suggested that the provisions of the rules which require the leave of the court to serve process out of the jurisdiction impliedly exclude the right of appeal against the refusal of such leave."

17. At 14E, Lord Hoffmann said:

> "The question is therefore whether the requirement of leave to issue a summons for an order of certiorari is sufficiently analogous to a requirement of leave to appeal to attract the reasoning in *Lane v. Esdaile* and the *Stevenson* case and enable a court to say that an appeal from the grant or refusal of such leave would so frustrate the policy of requiring leave as to show, by necessary intendment and "the nature of the thing," that such orders were excluded from the general right of appeal in section 12 of the Court of Appeal Act 1964. For this purpose it is necessary for their Lordships to consider what the policy of the leave requirement is."

18. He then noted that judicial review is quite different from an appeal. He continued:

> "In principle, however, judicial review is quite different from an appeal. It is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct. In the case of a restriction on the right of appeal, the policy is to limit the number of times which a litigant may require the same question to be decided. The court is specifically given power to decide that a decision on a particular question should be final. There is obviously a strong case for saying that in the absence of express contrary language, such a decision should itself be final. But judicial review seldom involves deciding a question which someone else has already decided. In many cases, the decision-maker will not have addressed his mind to the question at all. The application for leave may be the first time that the issue of the legality of the decision is raised and their Lordships think it is by no means obvious that a refusal of leave to challenge its legality should be final. The law reports reveal a number of important points of administrative law which have been decided by the Court of Appeal or House of Lords in cases in which leave was refused at first instance.
>
> In principle, therefore, their Lordships do not think it possible to say that the very nature of the leave requirement for an order of certiorari excludes, or makes absurd, the possibility of an appeal. But unless such a conclusion can be drawn, their Lordships consider it very difficult to find the necessary intendment restricting the general right of appeal conferred by section 12. It may be appropriate, as a matter of policy, to restrict that right of appeal, but their Lordships consider that this is a matter for legislation rather than judicial interpretation."

19. In *The Wellcome Trust Limited v 19-22 Onslow Gardens Freehold* [2012] EWCA Civ 1024, the Court of Appeal considered whether it had jurisdiction to grant permission to appeal against the decision of the President of the Upper Tribunal (Lands Chamber) refusing permission to appeal to the UT against a decision of the Leasehold Valuation Tribunal (the LVT). Sullivan LJ gave the lead judgment (with which Lloyd LJ agreed). Section 175 of the Commonhold and Leasehold Reform Act 2002 provided that a party to proceedings before a LVT may appeal to the UT from a decision of the valuation tribunal, but only with the permission of the valuation tribunal or the UT. Sullivan LJ referred to sections 11 and 13 of the TCEA. He noted that a decision by the UT to refuse permission to appeal under section 175(2) of the 2002 Act was not listed as one of the excluded decisions under section 13(8) of the TCEA. He said:

> "18. In my judgment, it is plain from the Sinclair Gardens Investments case ([2004] EWHC 1910 (Admin)) that there was no right of appeal against a refusal by the Lands Tribunal of permission to appeal against an LVT's decision. Applying the Lane v Esdaile

> principle, the Lands Tribunal's decision to refuse permission to appeal was not a 'decision' for the purposes of Section 3(4) of the Lands Tribunal Act 1949, which then conferred a right of appeal to the Court of Appeal against the Lands Tribunal's decisions.
>
> 19. That position is not affected by the fact that the Lands Tribunal is now the Upper Tribunal (Lands Chamber) and the right of appeal against the decision of the Upper Tribunal is now conferred by Section 13(1) of the 2007 Act. It is understandable that the draftsman of the 2007 Act should have wished to make it clear beyond any doubt in a comprehensive statutory scheme dealing with appeals from the First-tier Tribunal to the Upper Tribunal that the Lane v Esdaile principle applies to refusals of permission to appeal under Section 11(4)(b). In effect what the applicant is seeking to do is to convert an express exclusion of a right to appeal against refusals of permission to appeal in Section 11 cases into an express provision of a new right of appeal against refusals of permission to appeal in Section 175 cases, thereby effectively overturning the decision in Sinclair Gardens Investments. In my judgment such an intention is not to be imputed to the draftsman of Section 13 of the 2007 Act. I accept the respondent's submission that it was unnecessary to include a decision to refuse permission to appeal under Section 175(2) in the list of excluded decisions under Section 13(8) of the 2007 Act because the position, so far as appeals from the LVT to the Lands Tribunal was concerned, was governed by clear authority in the form of Sinclair Gardens, which had made it quite clear that there was no right of appeal against such decisions."

20. In order to explain this decision, I need to make a brief reference to the *Sinclair Gardens Investments* case. This was a decision of Sullivan J some time before the transfer of the jurisdiction of the LVT to the First-tier Tribunal (F-tT). The issue was whether a refusal of permission to appeal to the Lands Tribunal from a decision of the LVT under the Landlord and Tenant Act 1985 could be the subject of an appeal to the Court of Appeal. Sullivan J applied the *Lane v Esdaile* principle and held that there was no right of appeal. He noted (at [29] of his judgment) that LVTs were established in order to provide an alternative to litigating in the courts and (at [26]) that section 31A(6) of the 1985 Act showed that Parliament clearly intended to "place a brake on a proliferation of appeals from decisions of LVTs relating to service charges". He then proceeded to deal with an application for judicial review of the refusal of permission to appeal.

The submissions

21. Mr Singh submits as follows. The language of section 13(2) of the TCEA is broad. So too is the language of section 13(1): a "right of appeal" is a right to appeal to the relevant appellate court on any point of law arising from a decision made by the UT other than "an excluded decision". Since the exceptions in section 13(8) explicitly include appeals against decisions of the UT on an application for permission or leave to appeal from the F-tT to the UT, it follows by necessary implication that appeals against decisions of the UT to refuse permission to appeal to itself from a body other than the F-tT are appealable under section 13(1).

22. Mr Singh submits that this approach to the construction of section 13(1) and (2) is supported by the reasoning of Lord Hoffmann in *Kemper*. The principle in *Lane v Esdaile* is based on the absurdity of allowing a right of appeal in a case where there has already been a determination by a tribunal of law. Mr Singh accepts (and asserts) that *The Wellcome Trust* was correctly decided because in that case there had already been a determination by a tribunal of law, namely the LVT. In holding that the decision in question was not appealable in that case, the court was avoiding the "absurdity" of the case being heard again before a tribunal of law.

23. Ms White submits that the *Lane v Esdaile* principle is applicable in this case. The principle is that decisions on applications for permission to appeal are intended to be final unless a right of appeal is expressly given. It is immaterial whether there has been a decision by a tribunal of law prior to the decision refusing permission to appeal. There is no express statutory provision which disapplies this principle in relation to any refusal of permission to appeal by the UT. *Kemper* should be distinguished: it was not concerned with an appeal, but with an application for judicial review.

Discussion

24. At first sight, there is much to be said for the construction of section 13(1) and (2) of the TCEA advanced by Mr Singh. A decision by the UT refusing permission to appeal is a "decision" as a matter of ordinary language and the appellant is seeking permission to exercise what, as a matter of ordinary language, is a "right of appeal". Moreover, the decision is not an "excluded decision" as defined by section 13(8). At first sight, therefore, there is real force in the argument that the exceptions to the right of appeal provided by section 13(1) are set out exhaustively in section 13(8) and that there is no room for a further exception outside section 13(8).

25. But the *Lane v Esdaile* principle cannot be ignored. It has been repeatedly applied for more than 100 years. It is this principle which led the Court of Appeal in *The Wellcome Trust* to hold that, despite the apparent force of the points to which I have just referred, section 13 of the TCEA did not give the Court of Appeal the power to entertain an appeal from the UT's refusal to grant permission for an appeal from the LVT to the UT.

26. The essence of the principle is that, in the absence of express statutory language to the contrary, a provision giving a court the power to grant or refuse permission to appeal should be construed as not extending to an appeal against a refusal of permission to appeal. This is not because the word used to describe the decision in respect of which permission to appeal is sought bears a special or narrow meaning. It is because, as Lord Esher MR put it in *Stevenson*, the decision which it is sought to appeal is "*from the very nature of the thing*, final and conclusive and is without appeal, unless an appeal from it is expressly given" (emphasis added). As Lord Hoffmann put it in *Kemper*, a provision requiring the leave of a court to appeal "will by *necessary intendment* exclude an appeal against the grant or refusal of leave, notwithstanding the general language of a statutory right of appeal against decisions of that court" (emphasis added).

27. The policy which underlies any restriction on a right of appeal is, as Lord Hoffmann said at 14H, "to limit the number of times which a litigant may require the same question to be decided". In the absence of express contrary statutory language, a decision on whether to grant permission to appeal should be final. As Lord Halsbury said, if the requirement of leave to appeal is intended "as a check to unnecessary or frivolous appeals, it becomes absolutely illusory if you can appeal from that decision or leave". The point was also put with clarity and force by Sir John Donaldson MR in *Dhillon v Secretary of State for the Home Department* (1988) 86 Cr App R 14, 16–17:

> "*Lane v Esdaile* [1891] AC 210 is of general application and provides that where leave to bring proceedings is required it is not possible to appeal a refusal to grant leave. The reason is obvious, namely that if you could appeal such a refusal there would be no point in having a screening process."

28. As Lord Hoffmann noted in *Kemper* at 13F, the *Stevenson* case generalises the proposition to cover all cases in which leave to appeal is required. In my view, it cannot make a difference whether the appeal for which permission is sought is a first or second appeal. There may be good reasons for imposing less demanding criteria as a condition for permission to appeal for a first appeal than for a second appeal. But I can see no basis for saying that the *Lane v Esdaile* principle should not apply where there has not been a previous appeal. In the absence of express contrary language, the rationale for having a permission stage to weed out *any* appeal which has no real prospect of success (whether or not it can properly be described as frivolous) is to be regarded as of general application.

29. Mr Singh relies strongly on *Kemper*. I accept the submission of Ms White that this decision is distinguishable. Lord Hoffmann did not cast any doubt on the continuing applicability of the *Lane v Esdaile* principle in cases where permission is required to appeal. At 13G he said that the judges in *Stevenson* "would not necessarily have been willing to state the principle any more widely and to include cases in which leave is required to do something other than appeal". The question in *Kemper* was whether the requirement for leave to issue a summons for an order of certiorari was "sufficiently analogous to a requirement for leave to appeal to attract the reasoning in *Lane v Esdaile"*. He then explained why the rationale which justifies the prohibition on an appeal against a refusal of permission to appeal does not apply (or apply with equal force) to a refusal of permission to appeal against a judicial review decision. It is not possible to say that the very nature of the requirement of leave to apply for judicial review excludes or makes absurd the possibility of an appeal.

30. At 19A, Lord Hoffmann concluded:

> "Nevertheless, the limited nature of the ratio decidendi of *Lane v Esdaile* as explained by the Court of Appeal in the *Stevenson* case, the important differences between applications for leave to appeal and applications for leave to apply for judicial review, and the long-standing practice of the English Court of Appeal to entertain such appeals have persuaded their Lordships that whatever may have been the reasoning in *In re Poh*, it is not applicable to this case."

31. In summary, therefore, the Board decided in *Kemper* that a requirement of leave to issue a summons seeking leave to apply for judicial review was not sufficiently analogous to a requirement of leave to appeal to attract the reasoning in *Lane v Esdaile.* In my view, it is plainly distinguishable from the present case, which is concerned with the question whether the appellant has the right to seek permission to appeal to the Court of Appeal against the UT's refusal to grant permission to *appeal.*

32. Mr Singh also relies on *Campbell v The Queen* [2010] UKPC 26, [2011] 2 AC 79. The defendant had been convicted of murder and his applications for leave to appeal against conviction were refused. He applied to the Privy Council for special leave to appeal from a decision of the Court of Appeal of Jamaica "on appeal from a court of Jamaica". His application for special leave was granted. It was held that special leave could be granted where the appellate courts of the local jurisdiction had refused to entertain any appeal against the decision or conviction in respect of which special leave to appeal was sought. Lord Mance, delivering the judgment of the Board, said that the question was whether the *Lane v Esdaile* principle applied to the interpretation of the statutory provisions under consideration. At paragraph 21, he noted several points. These included the following. First that there was no trace of any such rule having been routinely applied to the statutory provisions which governed the grant of special leave to appeal. Secondly, the statutory provisions contemplated that special leave may be given in

respect of a decision or order of a first instance court. Thirdly, the provisions "affirmed and regulated" in statutory form the former royal prerogative which itself could not "be restricted or qualified save by express words or by necessary intendment". At paragraph 25, he concluded that the combination of these points was "decisive". He continued:

> "There is nothing clearly or necessarily to restrict the broad language reflecting the royal prerogative power to grant special leave now enacted in statutory form in section 3 of the 1833 Act and section 1 of the 1844 Act. The breadth of the prerogative power, now statutorily expressed, and the very varied contexts in which it applies militate against the recognition or introduction of any formal limitation upon section 3 and section 1 paralleling the rule in *Lane v Esdaile.* The Board concludes therefore that the rule in *Lane v Esdaile* is not applicable on any application made for special leave to the Privy Council itself."

33. In my judgment, *Campbell* does not assist Mr Singh. The Board gave cogent reasons for not applying the *Lane v Esdaile* principle. None of them applies to the present case. In particular, the most powerful reason given was the fact that the statutory provisions reflected the royal prerogative under which, historically, special leave to appeal to the Privy Council could be granted where there had been a refusal of leave to appeal by the lower court. I do not regard *Campbell* as being of assistance to the true construction of section 13(1) and (2) of the TCEA.

34. As for *The Wellcome Trust*, I consider that it is not distinguishable from the present case. The only arguably distinguishing feature is the fact that the decision of the LVT was a decision of a tribunal of law which determines disputes between parties; whereas the DBS is an Executive NGPB which is responsible for maintaining the Children's and Adults' Barred Lists. In my view, there is nothing in the reasoning of Sullivan LJ which suggests that this is a material distinction. It was submitted in that case that there were sound policy reasons for treating appeals to the UT from the LVT differently from appeals to the UT from the F-tT. Sullivan LJ rejected this submission in the passage which I have set out at [19] above. In effect, he created an exception to section 13 which is not expressly provided for in section 13(8). He did so by applying the *Lane v Esdaile* principle to a refusal by the UT of permission to appeal a decision of the LVT. As I have said, Mr Singh accepts that *The Wellcome Trust* was correctly decided for the reasons given by Sullivan LJ. There is no hint in this reasoning that the fact that the LVT was a tribunal of law was material to the conclusion.

35. I can now summarise my reasons for rejecting the submissions of Mr Singh. First, in the absence of clear contrary statutory language, the *Lane v Esdaile* principle applies to *any* provision which requires permission as a condition of the right to appeal. The rationale which underlies the principle applies with equal force to any provision which imposes a requirement of permission to appeal. The use of broad words such as "the right to appeal" and "decision" is not sufficient to indicate a Parliamentary intention to disapply the principle. In *Lane v Esdaile* itself, the relevant statutory provision stated that "an appeal shall lie to the House of Lords from any order or judgment" of the Court of Appeal. Those broad words were insufficient to disapply the principle.

36. Secondly, there is no support in the authorities or justification as a matter of principle for holding that the *Lane v Esdaile* principle should only apply to decisions by tribunals of law.

37. Thirdly, the fact that Parliament has provided by section 13(8)(c) of the TCEA that a decision of the UT on an application for permission to appeal against a decision of the F-tT is an "excluded" decision is not sufficient to indicate that it necessarily intended that the *Lane v*

Esdaile principle should be disapplied in relation to decisions of other bodies. The principle is clear: if it is to be disapplied, clear express language is required. There is no such language in section 13. An inference drawn from the inclusion of section 13(8) is insufficient to displace the principle.

38. Fourthly, for the reasons I have given, the decision in *The Wellcome Trust* cannot be distinguished from the present case. The analysis of Sullivan LJ at [18] and [19] of his judgment applies with equal force in the present context.

39. I conclude, therefore, that there is no jurisdiction in the Court of Appeal to give permission to appeal against the refusal by the UT of permission to appeal to itself. In these circumstances, it is not necessary to go on to consider whether, if there were jurisdiction to grant permission to appeal, it should be exercised in this case. But since we heard argument on this issue, I think it right briefly to express my conclusions in relation to it.

If jurisdiction exists to grant permission to appeal, should it be exercised in this case?

40. The starting point must be the DBS decision of 26 February 2014 which set out its reasons for deciding that it was appropriate to continue to include the appellant in the Children's Barred List and the Adults' Barred List. The DBS said that it had taken into account all the information that had been placed before it.

41. The decision is closely reasoned and has been the subject of penetrating criticism by Mr Singh. At page 2, the DBS said that it applied "significant weighting" to the fact that the appellant's name had not been erased from the Medical Register on account of the alleged incidents of sexual abuse. It also accepted that there was no evidence of any similar abusive behaviour during the 12 years that had passed since 2001. But it said that, in reaching its decision, it had also placed significant weighting on the reasons for the earlier erasure of his name. It noted that the GMC:

> "were seriously concerned regarding your dishonesty and concluded that your deliberate intention to mislead them was so serious that it would be impossible for patients, members of the public and other medical practitioners to trust you in the future. They concluded that they had no option other than to erase your name from the Medical Register. Your dishonesty, together with the proven behaviour in 2001 has culminated in the decision to include your name in the barred lists."

42. At page 3 it stated that it was bound by the finding of fact by the GMC that the appellant had misled the PCC in 2003. His statements to the PCC implied that he acknowledged his inappropriate behaviour. However, he changed his stance in 2006 by stating that he did not admit the allegations and never had done. The evidence revealed that he "demonstrated manipulative and deceptive behaviour in both 2003 and 2006" and that he continued to do so "by denying allegations which had been found proven by the GMC and for which you had previously expressed regret".

43. In reaching its decision, the DBS rejected the submission that the appellant's continued inclusion in the Barred Lists would be "wholly inappropriate and disproportionate on the basis of two isolated incidents 12 years ago".

44. At page 4, the DBS referred to a number of points that had been urged in the appellant's favour. It said that:

> "Consideration has also been given to the psychiatric report [of Dr Reveley], which you have provided, and in particular the opinion of the consultant psychiatrist, who assessed you as not posing any risk to vulnerable groups. However, we have taken into account the fact that the report was completed on the basis that you deny all allegations."

45. It concluded:

> "[The appellant's solicitor] submits that whilst you refuse to admit guilt, you cannot be condemned for the rest of your life on that basis. Inclusion in the barred lists is certainly not intended to be a punitive measure and we cannot treat it as such. The passage of time and absence of similar behaviour has been considered in assessing the potential risk of harm you may pose to vulnerable adults and children in the future. It is accepted that there is no known evidence of similar incidents or inappropriate behaviour in the many years that have elapsed since the incidents in 2001. However, the combination of your lack of insight, remorse and continued refusal to admit the proven behaviour, together with the manipulative behaviour you demonstrated towards your professional regulatory body and that which you continue to display, remains particularly concerning.
>
> To summarise, in the light of the above, the DBS remain concerned that a level of risk remains such that it is appropriate and proportionate that your name remains included in both the Adults' and Children's Barred Lists. Your behaviour in 2001 involved both a child patient and an adult, who was the mother of a patient. Although the adult cannot be defined as vulnerable in accordance with the SVGA, it is reasonable to conclude that similar behaviour could quite easily transfer to vulnerable adults."

The grounds of appeal

46. There are four grounds of appeal. First, it is said that the DBS irrationally took into account the GMC's finding of dishonesty against the appellant as a basis for its decision. It did not explain how the finding of dishonesty disclosed an ongoing risk of harm to children and/or vulnerable adults. Secondly, the DBS irrationally placed decisive or near decisive weight on the fact that the appellant continued to deny the allegations that had been made against him. Thirdly, the DBS's decision was *Wednesbury* unreasonable because (i) it knew that the appellant had denied his guilt before the GMC in 2002, and yet the GMC had not considered him fundamentally unsuitable for practice as a result; (ii) the DBS had before it uncontroverted evidence that the appellant had continued to look after children without incident; and (iii) the DBS had available to it expert psychiatric evidence that the appellant presented no risk even in the light of his denial of the incidents of 2001. Fourthly, the DBS's decision breached the appellant's rights under Article 8(1) of the European Convention on Human Rights (the Convention).

47. Although this is an application for permission to appeal against the refusal of the UT to grant permission to appeal, it is common ground that the decision on which we must focus is that of the DBS. It is important to bear in mind that an appeal against a decision of the UT to this court can only be on a point of law: section 13(1) of the TCEA. The appellant must, therefore, show that he has real prospects of establishing that the UT erred in law in refusing permission to appeal. It is also important to note that the courts should not be astute to find legal error in the decisions of tribunals: see *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663; [2011] AACR 38 at paragraphs 49 and 113.

48. The first three grounds of appeal are closely related. Mr Singh submits that the DBS decision contains no explanation of how there was a link between the finding of dishonesty and the finding of risk. He also submits that the DBS should have applied the same approach as is applied by the Parole Board. This is that, save potentially in the case of offenders who have persistently committed serious sexual or violent offences, it is not open to the Parole Board, when assessing risk, to give decisive or near decisive weight to a denial of guilt: see, for example, *R v Secretary of State for the Home Department, ex parte Zulfikar* [1996] COD 256. The DBS committed the error identified in *Zulfikar* and other Parole Board cases. This can be seen in the way it cursorily dismissed the psychiatric report of Dr Reveley (which concluded that, despite his denial of the allegations, the appellant presented no risk of harm to children or vulnerable adults).

49. I reject this submission for the reasons given by the UT and Ms White. The DBS was entitled to place considerable weight on what it described as his "manipulative and deceptive" behaviour. The dishonesty in question was closely related to his attitude to the sexual incidents. The DBS was entitled to take the view that the appellant's behaviour indicated that he was a person who could not be trusted. As the UT said when refusing permission to appeal, if the appellant wanted to persuade the DBS that his attitude and behaviour had changed, he needed to provide evidence that he had addressed manipulation and exploitation. This he had failed to do.

50. I do not consider that the position stated in the Parole Board cases is as stark as is suggested by Mr Singh. Ms White drew our attention to what Lord Bingham CJ said at paragraph 43 of his judgment in *R v Parole Board, ex parte Oyston* [2000] Prison LR 45:

> "Where there is no admission of guilt, it may be feared that a prisoner will lack any motivation to obey the law in future. Even in such cases, however, the task of the Parole Board is the same as in any other case; to assess the risk that the particular prisoner if released on parole, will offend again. In making this assessment the Parole Board must assume the correctness of any conviction. It can give no credence to the prisoner's denial. Such denial will always be a factor and may be a very significant factor in the Board's assessment of risk, but it will only be one factor and must be considered in the light of all other relevant factors. In almost any case the Board would be quite wrong to treat the prisoner's denial as irrelevant, but also quite wrong to treat a prisoner's denial as necessarily conclusive against the grant of parole."

51. Even if the Parole Board cases are truly analogous to DBS cases, the DBS did not treat the appellant's denial as conclusively supporting his inclusion on the Children's and Adults' Barred Lists. The factor which weighed most heavily with the DBS was the appellant's manipulative and dishonest behaviour in first admitting and then denying guilt. In my view, the DBS was entitled to take this into account. In any event, as Lord Bingham made clear, maintaining a denial of guilt, depending on the circumstances, may be a very significant factor.

52. The DBS was not bound to accept the opinion of Dr Reveley. It was entitled to make its own assessment and to take into account the fact that her report was completed on the basis that the appellant denied the allegations.

53. I accept that the appellant's rights under Article 8 of the Convention were engaged: see *R (on the application of Wright) v Secretary of State for Health*: [2009] UKHL 3, [2009] 1 AC 739. I do not, however, accept that they were even arguably breached. There was an interference with his Article 8 rights, but the interference was justified. There was a cogent basis for concluding that the appellant would be a risk to children and vulnerable adults. The decision to bar him until

1 August 2021 pursued the legitimate aim of safeguarding vulnerable members of the public and protecting the rights and freedoms of others under Article 8(2). The DBS considered and rejected the appellant's submission that his continued inclusion in the Barred Lists would be "wholly inappropriate and disproportionate" and gave its reasons for doing so. In reaching this decision, the DBS enjoyed a wide margin of discretionary judgment. Having regard to (i) the loose-textured nature of the criteria of appropriateness and proportionality and (ii) the self-restraint shown by the courts in relation to errors of law by expert tribunals, I am satisfied that there has been no breach of Article 8 of the Convention.

54. I acknowledge that this was a harsh decision. But for the reasons that I have given, I am not persuaded by the detailed submissions of Mr Singh that the decision of the UT to refuse permission to appeal was erroneous in law.

55. Accordingly, if this court had enjoyed jurisdiction to entertain an appeal from the decision of the UT, I would have refused permission to appeal.

LORD JUSTICE KITCHIN:

56. I agree.