Upper Tribunal for Scotland

[2019] UT 52
UTS/AP/19/0016

DECISION NOTICE OF LADY CARMICHAEL

ON AN APPLICATION FOR PERMISSION TO APPEAL
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)

In the case of

MIDLOTHIAN COUNCIL, The Education Authority, Dalkeith, EH22 1DN
Per Mr Jonathan Guy, Anderson Strathern LLP,
1 Rutland Court, Edinburgh, EH3 8EY

Appellant

and

PD
per Mr Mike Dailly, Govan Law Centre, 18-20 Orkney Street, Glasgow, G51 2BZ

Respondent

FTT Case Reference: FTS/HEC/AR/18/0038

15 August 2019

Order

The Upper Tribunal, having considered the submissions of parties:

(a) grants the applicant permission to appeal on ground 1, but only insofar as the allegation of irrationality or extravagance proceeds on the contention that the FTT rejected the evidence referred to by the applicant in paragraphs 3 -15 on the basis of reasons which disclose errors of law or are inadequate as a matter of law; and in relation to the complaint in paragraph 16 so far as it is

supported by grounds of appeal in respect of which permission has been granted;

(b) grants the applicant permission to appeal on grounds 2 and 3 ;

(c) grants the applicant permission to appeal on ground 4 under deletion of the matter mentioned in paragraph 30 of the grounds of appeal, and in relation to the remaining paragraphs relative to ground 4 only insofar as relating to allegations that evidence was left out of account or rejected on the basis of reasons which disclose errors of law or are inadequate as a matter of law;

(d) requires parties to lodge written submissions within 14 days of the date of this decision as to whether an oral hearing should be held on the appeal.

Reasons for decision

[1] This is an application for permission to appeal to the Upper Tribunal for Scotland ("UT") against a decision of the First-tier Tribunal for Scotland (Health and Education Chamber) ("FTT"). The FTT has itself already refused permission to appeal.

[2] The application proceeds under section 46 of the Tribunals (Scotland) Act 2014. An appeal must be on a point of law: section 46(2)(b). For an application for permission to succeed, the UT must be satisfied that the grounds of appeal are arguable: section 46(4). The word "arguable" is not defined in the legislation. "Arguability" and "statability" are interchangeable terms, and express a less rigorous test than "real prospect of success": *Wightman* v *Advocate General* 2018 SC 388, Lord President (Carloway) at paragraph 9. The requirement that the grounds of appeal be arguable is not intended to impose a high hurdle for an applicant for permission.

[3] On an application of this sort the UT may (a) refuse permission to appeal; (b) give permission to appeal; or (c) give permission to appeal on limited grounds or subject to conditions: Upper Tribunal for Scotland Rules of Procedure 2016, rule 3 (Schedule to the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (SSI 2016/232)) ("the Procedure Rules").

[4] Following the refusal of permission by the FTT, the applicant wrote to the UT by letter dated 3 May 2019 making representations in relation to the application for permission to the UT. Parties made oral submissions at a hearing on 14 August 2019. The respondent's notice of response was late, and had not complied with the requirement in rule 4(4) of the Procedure Rules that the response include a request for extension of time. Mr Guy had no objection to Mr Dailly's motion that it be received late, and I granted that motion. I considered that I had the power to do so notwithstanding the lack of compliance with rule 4(4), by virtue of rule 9(2).

[5] The respondent disputes that any of the grounds of appeal identifies a point of law, and, if any point of law is identified, that it gives rise to an arguable ground of appeal. Parties referred to the following authorities: *C* v *Miller* 2003 SLT 1379; *CF* v *MF* 2017 SLT 945; *City of Edinburgh Council* v *MDN* 2011 SC 513; *City of Edinburgh Council* v *K* 2009 SC 625; *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59; *JC* v *Midlothian Council* [2012] CSIH 77; *Nzolameso* v *Westminster CC* [2015] PTSR 549. Those references were directed principally to what did and did not constitute a point of law, and as to the approach an appellate court or tribunal ought to take to scrutinising the reasons given by an inferior court or tribunal.

[6] The respondent brought a reference under section 18 of the Education (Additional Support for Learning (Scotland) Act 2004 ("the 2004 Act") in respect of the applicant's

refusal of a placing request regarding her son, L. In resisting that reference the applicant relied on paragraphs 3(1)(b) and 3(1)(g) of Schedule 2 to the 2004 Act. The FTT overturned the decision to refuse the placing request, and required the applicant to place L at STGT School with immediate effect. The applicant's position was that L should be educated at the Creative Learning Department of Lasswade High School ("CLD").

[7] The powers of the FTT in a reference of this type are provided in section 19(4A) of the 2004 Act:

> "Where the reference relates to a decision referred to in subsection (3)(da) of that section the First-tier Tribunal may—
>
> (a) confirm the decision if satisfied that—
>
> (i) one or more grounds of refusal specified in paragraph 3(1) or (3) of schedule 2 exists or exist, and
>
> (ii) in all the circumstances it is appropriate to do so,
>
> (b) overturn the decision and require the education authority to—
>
> (i) place the child or young person in the school specified in the placing request to which the decision related by such time as the First-tier Tribunal may require,
>
> and
>
> (ii) make such amendments to any co-ordinated support plan prepared for the child or young person as the First-tier Tribunal considers appropriate by such time as the First-tier Tribunal may require."

[8] The first task for the FTT was, therefore, to consider whether it was satisfied that the grounds mentioned in paragraph 3(1)(b) and/or paragraph 3(1)(g) existed. It is common ground that the onus was on the applicant to establish the existence of one these grounds.

[9] Paragraph 2 of Schedule 2 to the 2004 Act places, broadly speaking, a requirement on education authorities to comply with, or provide funding for, placing requests by the

parents of children with additional support needs. Paragraph 3 provides, so far as is material:

> "(1) The duty imposed by sub-paragraph (1) or, as the case may be, sub-paragraph (2) of paragraph 2 does not apply–
>
> > (b) if the education normally provided at the specified school is not suited to the age, ability or aptitude of the child,
> > …
> > (g) if, where the specified school is a special school, placing the child in the school would breach the requirement in section 15(1) of the 2000 Act."

[10] Section 15 of the Standards in Scotland's Schools etc Act 2000 ("the 2000 Act") provides:

> "(1) Where an education authority, in carrying out their duty to provide school education to a child of school age, provide that education in a school, they shall unless one of the circumstances mentioned in subsection (3) below arises in relation to the child provide it in a school other than a special school.
> …
>
> (3) The circumstances are, that to provide education for the child in a school other than a special school–
>
> > (a) would not be suited to the ability or aptitude of the child;
> > (b) would be incompatible with the provision of efficient education for the children with whom the child would be educated; or
> > (c) would result in unreasonable public expenditure being incurred which would not ordinarily be incurred,
>
> and it shall be presumed that those circumstances arise only exceptionally.
>
> (4) If one of the circumstances mentioned in subsection (3) above arises, the authority may provide education for the child in question in a school other than a special school; but they shall not do so without taking into account the views of the child and of the child's parents in that regard."

[11] The FTT required to consider whether it was satisfied that the education normally provided at the specified school, STGT, was not suited to the age, ability or aptitude of the child (paragraph 3(1)(b)). The applicant did not contend that educating L in a school other than a special school would result in unreasonable public expenditure. The FTT therefore

required to consider also whether it was satisfied that the education in a school other than a special school, namely CLD, was suited to L's ability and aptitude and was not incompatible with the provision of efficient education for the children with whom he was educated (paragraph 3(1)(g)).

The grounds of appeal

Grounds 1 and 3

[12] The first ground of appeal is that "[t]he tribunal reached a decision that was so extravagant that no reasonable tribunal properly directing itself on the law could have arrived at [*sic*]." In paragraphs intended to support that ground of appeal the applicant sets out a number of examples of evidence given by witnesses led by the applicant which was contrary to the conclusions reached by the FTT in relation to each of the two provisions it required to consider.

[13] The way in which the supporting paragraphs are drafted is unhelpful in that they produce the impression that the complaint is, simply, that the tribunal did not accept the evidence in question. A complaint of that sort does not identify any error of law. The way in which this is articulated in some of the paragraphs supporting the first ground of appeal is that "there was no basis to reject [the witnesses's] evidence".

[14] Following discussion with Mr Guy, however, it became clear that what underlay this ground of appeal, when read with the third ground, was a complaint that parts of the evidence of particular witnesses had been rejected for reasons which indicated error of law on the part of the FTT. His primary contention was that the reasons disclosed error of law. That contention is, at least to some extent, foreshadowed in certain passages of the applicant's letter to the UT providing further submissions in relation to the grounds of

appeal. In discussion he accepted that his complaint could be characterised as including one of a failure to give reasons that were adequate as a matter of law.

[15] The third ground of appeal is that the tribunal entertained the wrong issue and took into account manifestly irrelevant considerations and made findings for which there was no evidence. In particular, the third ground of appeal sets out some reasons given by the FTT for particular conclusions on the evidence, but alleges that those reasons amount to considerations that the tribunal ought not to have taken into account, or which were not supported by evidence.

[16] Mr Dailly submitted that the decision must be read as a whole with a view to determining whether the FTT had reached conclusions open to it on the evidence before it. He acknowledged, in relation to ground 3, and also ground 2, which I discuss below, that the FTT had at some points introduced passages of reasoning that were not obviously relevant to the issues it was considering in particular chapters of its decision. It was, however, important, not to look at those in isolation.

[17] I accept what Mr Dailly says as correct in principle. He articulated arguments which may in the appeal, if accepted, counter the position to be advanced by the applicant. In considering permission, however, I have to be satisfied only that the grounds of appeal are arguable, not that they will be successful. The first and third grounds of appeal, as they came to be articulated at the hearing on permission, raise points of law, and I am satisfied that those are arguable. I restrict permission, so far as ground 1 is concerned, to allegations of irrationality or extravagance proceeding on the contention that the reasons given by the FTT for rejecting the evidence referred to by the applicant in paragraphs 3 - 15 disclose errors of law or are inadequate as a matter of law. I do so to make it clear the basis on which I have granted permission, given the way in which the application is drafted. Paragraph 16

of the grounds of appeal relates to the FTT's conclusion that it was not, in all the circumstances, appropriate to confirm the applicant's decision. It will be open to the applicant to challenge that conclusion by reference to any error of law established on the basis of a ground of appeal in relation to which I have granted permission.

Ground 2

[18] The complaint here is that in a passage bearing to relate to the question focused by section 15(3)(b) of the 2000 Act – namely whether the education of L at CLD would be would be incompatible with the provision of efficient education for the children with whom he would be educated – the FTT considered whether L's education at STGT would be incompatible with the provision of efficient education for children educated with him there.

[19] I am satisfied that this ground of appeal is arguable. There are clearly potential counter-arguments, to the effect that the circumstance that the FTT went on to consider STGT under this head does not necessarily vitiate the conclusion expressed in relation to the CLD. It is, nonetheless, arguable that the inclusion of the passage about STGT discloses that the approach of the FTT was to compare the two facilities, and find CLD wanting, rather than to have considered the questions which related to the STGT and CLD separately in relation to the statutory provisions which related to each respectively.

Ground 4

[20] The ground is that the tribunal's findings were inconsistent with the evidence. As with the first ground of appeal, the paragraphs supporting the fourth ground are not particularly helpful in identifying a point of law. Even after discussion with Mr Guy, I am of the view that one of them does not disclose any arguable error of law. This is

paragraph 30; it is not arguably an error of law to have concluded that STGT was suited to L's age, aptitude and ability where L would benefit from access to outdoor education, and STGT did not have a garden or youth workers and the CLD would be more able to provide access to outdoor education. The availability or otherwise of outdoor education was simply one of a number of factors before the FTT for consideration.

[21] The remainder of the paragraphs on first reading produce the impression that the applicant is asserting that it was not open to the tribunal to accept some parts of the evidence of a witness and accept others. It is asserted that the decision was inconsistent with the evidence, on the basis that some parts of the evidence ran counter to the conclusions of the tribunal. Again, however, after discussion with Mr Guy, it is clear that the contention is that there were parts of the evidence, directly relevant to the determination of the issues before the FTT, which were apparently rejected or left out of account by the FTT, either without explanation or with an explanation which discloses error of law. I have therefore expressed the grant of leave on this ground as restricted in a similar way as on ground 1, and for similar reasons.

Case management

[22] Parties are required to lodge written submissions within 14 days of the date of this decision as to whether an oral hearing should be held on the appeal. In the light of those submissions I will determine what other case management directions may be required.

Observations

[23] The following observations are intended to be of assistance to the FTT. They do not reflect any view on my part as to the ultimate prospects of success for the applicant in the

appeal that will follow in this case, although I make them because of some features of the written decision of the FTT.

[24] Written decisions should (a) state clearly what facts the FTT has found, (b) the evidence on which those findings in fact are based, and, (c) where there has been a matter of controversy relevant to the resolution of an important issue in the appeal, an explanation of why the FTT has reached the conclusion that it has on the matter.

[25] The section headed findings in fact in this case contain many passages that are not findings in fact, but narrations of evidence, eg "Mr Chisholm stated that ….". A finding in fact is not a narration of evidence. It an expression of a conclusion, formed on the basis of evidence.

[26] Depending on the issues actually before a tribunal, and the extent to which particular matters have been contentious, it may be necessary to narrate what the evidence was that formed the basis for a particular conclusion. Where there are competing bodies of evidence on a crucial issue, the basis on which one has been accepted and another rejected should be stated clearly. This need not be a lengthy exercise. It should be as concise as is consistent with clarity in the context of the case and the issues for determination. The narration of any relevant evidence and the reasons for accepting or rejecting it should not be described as findings in fact, but included in a separate part of the decision.

[27] Where a tribunal is addressing legal tests it should structure its reasoning by reference to those tests and the language in those tests. The provision of written findings in fact and reasons is a requirement in terms of rule 48 of the FTT Procedure Rules. The purposes of written reasons are summarised by Lord Reed in *Chief Constable, Lothian and Borders Police* v *Lothian and Borders Police Board* 2005 SLT 315, particularly at

paragraphs 62-64, by reference to the authorities cited by him. Those purposes should be in the minds of those providing written reasons for tribunal decisions.

Lady Carmichael
Member of the Upper Tribunal for Scotland