Upper Tribunal for Scotland

[2020] UT 36
UTS/RF/20/0018

DECISION NOTICE OF SHERIFF NIGEL ROSS

ON REFERRAL FROM THE FIRST-TIER TRIBUNAL FOR SCOTLAND

in the case of

MISS EMMA SKOLL, Diepenbrock Straat 8, 5151 ke, Drunen, Netherlands
per T C Young Solicitors, 7 West George Street, Glasgow, G2 1BA

Appellant

and

MISS MARIA ISABEL BARBOSA HUMANES, MR IAN CRUICKSHANK,
MR ADRIAN SANCHEZ RODRIGUEZ, 2/5 Bonnington Avenue, Edinburgh, EH6 5QH

Respondent

FTT Case Reference FTS/HPC/EV/19/3012

24 August 2020

Decision

The Tribunal, in respect that the present referral procedure is not competent in terms of the Tribunals (Scotland) Act 2014, refuses same and remits the claim to the First-tier Tribunal to proceed as accords; in terms of the Scottish Tribunals (Time Limits) Regulations 2016 reg 2(2) on cause shown extends the time-limit for appeal to 30 days from the date of notification to the parties of this decision.

Note

[1] This is a referral to the Upper Tribunal under section 44(2) of the Tribunals (Scotland) Act 2014 (the "2014 Act") in a housing and property case. It follows a review, and subsequent setting aside, by the First-tier Tribunal of its own decision (2014 Act sec 44(1)). It raises the question about the circumstances in which review of a decision is available, or whether instead, if challenge is intended, it must be the subject of appeal proceedings.

[2] Review and appeal are two modes of reconsidering a decision. The 2014 Act provides for both but does not attempt a definition of either term. These are, however, established legal terms and concepts and fall to be understood as having distinct features and consequences.

[3] Some of those consequences are procedural. Review may be carried out by the First-tier Tribunal at its own hand, or at the request of a party (2014 Act sec 43(2)). It can be used to set a decision aside or correct minor errors (sec 43(3)). It allows the decision to be reconsidered and changed, or left unchanged, as the First-tier Tribunal sees fit (sec 44(1)). It need not at any stage be referred to the Upper Tribunal, unless the First-tier Tribunal so elects (sec 44(2)(b)). The scope of review is unrestricted and is discretionary (sec 43(1)), as long as it is in the interests of justice to do so (The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 SSI2017/328 reg 39).

[4] Appeal can only be on a point of law (sec 46(2)(b)). It requires permission, to be given only if there are arguable grounds (sec 46(3) and (4)). The procedure for appeal is determined by the Upper Tribunal (The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 SSI 2016/232 reg 7).

[5] In the present case, the issue arising is a point of law, involving the interpretation of the grounds for eviction under the Private Housing (Tenancies) (Scotland) Act 2016 (the

"2016 Act"). Neither the 2014 Act nor the relevant Regulations stipulate which procedure is appropriate. This means that:

> "There is a tension between the scope of a review and an appeal in the case of errors of law. Two issues arise. First, when is the review power available? It is only available if the tribunal is satisfied that there is an error of law. In contrast, permission to appeal may be given if it is merely arguable that there is an error…" (Jacobs: *Tribunals Practice and Procedure* 4th edition 2016, para 15.59).

[6] In my view that statement, although made in relation to English tribunal practice, is correct in principle and equally applicable to Scottish practice. In applying it, I require to decide that these proceedings have not been competently the subject of review procedure, and this tribunal cannot make any substantive decision on the merits. The facts are set out below.

The decision under review

[7] The original decision by the First-tier Tribunal, dated 29 November 2019, was made at a case management discussion. It concerned a submission in law by the claimant to the effect that the respondents were in breach of their lease on the basis that they had been in arrears of rent for a consecutive period of three months. That is a ground of eviction, namely ground 13 of Schedule 13 of the 2016 Act. However, at the time of the application, the respondents were no longer in arrears. The question arose whether, as a matter of construction of the wording of the 2016 Act, the consecutive period of three months' arrears required to be the period immediately preceding the application, or could be a consecutive period at any time prior to the application. It was a question of law. The First-tier Tribunal decided that the period required immediately to precede the application, that the claimant had accordingly not established a breach of ground 13 and refused the eviction order.

[8] The claimant applied for a review, not appeal, of that decision. The First-tier Tribunal carried out a review and issued a decision dated 30 January 2020. The First-tier Tribunal decided that the 29 November 2019 decision should be set aside, but not because it was wrong in law. The Tribunal discussed with the applicant's submissions and found there to be no error of law in the 29 November 2019 decision. However, it stated:

> "Given the incomplete and in places irrelevant consideration of the issue given in the Decision, the Tribunal considers that it should be set aside. Rather than simply substitute a new decision, the Tribunal is of the opinion that this is in the interests of justice that the matter be referred to the Upper Tier Tribunal (*sic*) for consideration. The question of how this provision should be interpreted is of sufficient importance that an authoritative decision on the matter is desirable."

[9] In so stating, the First-tier Tribunal was not doubting the correctness of the 29 November 2019 decision, but rather finding fault with its means of expression. It found no fault with its own reasoning, or persuasive merit in that of the claimant. There was no reason in fact or in law, following review, to set aside the decision. A decision is distinct from the reasoning supporting the decision.

[10] This referral was made for the purpose of obtaining a decision on the legal argument. Such a referral goes beyond the powers created by sec 43 of the 2014 Act. Those are not powers to refer for a ruling on a point of law, but rather to refer for a disposal following a ruling having already been made by the First-tier Tribunal. That, on the authority of the extract from Jacob (above), would only be appropriate if the First-tier Tribunal was satisfied that it had erred, and reference was sought to correct the error. It is not, in my view, a correct use of procedure when the First-tier Tribunal found there to be no error in the original decision, and thereby had no substantive reason to quash that decision.

[11] The decision of 29 November 2019, unless found to be wrong in review proceedings, must stand until challenged. If the applicant wants to challenge it, her remedy is appeal, not

review. That is not an empty distinction, because upon appeal a new set of rules is engaged, involving a permission procedure, and the opportunity for the Upper Tribunal to regulate procedure, invite representation, request lodging of legal authorities and hear such submissions as it considers necessary. Appeal introduces a new structure which review does not. It is noteworthy that the powers of the Upper Tribunal on review are limited to the same powers that the First-tier Tribunal has (2014 Act sec(3)(b)).

[12] On one view, it would be competent to intervene if this decision was plainly wrong in fact or in law. That is properly one function of review. However in the present case, for the reasons set out by the First-tier Tribunal, the decision in law is not plainly wrong. It is, at its highest, arguably challengeable. Indeed, the First-tier Tribunal considers it to be correct. If the appellant wishes to present an argument on the law, she must appeal, and observe the procedural requirements that process engages.

[13] I will therefore decline to issue a decision on the merits, as this Tribunal does not have power to do so. The wrong procedure has been instigated by the applicant and followed by the First-tier Tribunal. The only appropriate procedure is now to return the case to the First-tier Tribunal to proceed as accords. In doing so, I note that one consequence of following this review procedure instead of appeal, is that the time-scale for applying for permission to appeal of 30 days from the date of the decision has now elapsed (Scottish Tribunals (Time Limits) Regulations 2016 reg 2(1)). It may be unjust if, the claimant having evinced an intention to challenge the decision, the mere lapse of time deprived the applicant of any right to appeal. I will therefore exercise the power under sec 44(3)(a) of the 2014 Act to make such other order as appropriate, and apply the power under reg 2(2) of those Regulations, to "on cause shown extend the period beyond 30 days if it considers it to be in

the interests of justice". I will extend the time-limit for appeal to 30 days from the date of notification to the parties of this decision.

A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within 30 days of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.