



DECISION NOTICE OF LADY CARMICHAEL

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

in the case of

PD

Appellant

and

MIDLOTHIAN COUNCIL, 40-46 Buccleugh Street, Dalkeith, EH22 1DN
per Anderson Strathern Solicitors, 1 Rutland Court, Edinburgh, EH3 8EY

Respondent

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

5 October 2020

Decision

[1] I refuse permission to appeal to the Upper Tribunal, for the following reasons.

Introduction

[2] The appellant has applied for permission to appeal to the Upper Tribunal against a decision of the First-tier Tribunal (“FtT”) dated 21 May 2020 confirming the respondent’s decision to refuse a placing request in respect of the appellant’s son. The FtT refused

permission to appeal on 16 June 2020, and Lord Ericht refused permission to appeal on 26 August 2020, without a hearing.

[3] The appellant sought reconsideration at a hearing, in terms of Rule 3(7) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016. The hearing was conducted by telephone conference. The appellant's husband, spoke for the appellant, although the appellant made some contributions also. The respondent was represented by Ms Armstrong, solicitor.

Grounds of appeal

[4] The grounds of appeal are in the following terms:

"The tribunal Scotland Act 2014 states a tribunal should be accessible and fair.

It was not accessible and fair because we had 7 children all at home from school, one child with severe autism , one child with a Learning Disability and other small children, and being expected to participate in a conference call which wasn't possible given our circumstances and the current Covid-19 situation. We feel that we was taken advantage of.

We should have been given more time for an up to date educational Psychology report done, given the length of time passed since the last report was done it should have been scrapped brought up to date. We also stated in our parental statement that we wanted time to be able to get an independent psychological assessment to present to the tribunal.

There was a case conference call on the 10th January 2020 - next steps

Back in January 2021 The Tribunal Expressed they wished us to meet with Fiona Brown, the child's Education Psychologist and that contact with her was necessary to discuss the current situation and to enable the child to return to education. This was never done because of Lockdown and Covid-19.

The Tribunal requested this, but then it was said that the tribunal had all the paperwork needed. Clearly you didn't have all the paperwork that you needed requested because this was not followed through, we had minimal contact with Fiona but there was a very small amount of time before lockdown where for various reasons a meeting wasn't managed. We did co-operate in this. It seems this request was overlooked by the Tribunal.

A letter from Jennifer Barr dated 21-1-2020 States -

The council have until the 31st January to provide up to date information. The tribunal have also expressed that they would wish you to meet with Fiona Brown to discuss the current situation with the child. It was pointed out by Midlothian Council that should you wish for the child to return to education Fiona Brown will be the child's Educational Psychologist and contact with her will be necessary. I would strongly advise that you meet with Fiona Brown and refusal to do so will be viewed negatively by the tribunal and seen as a refusal to engage and work towards a solution for the child. This is likely to prejudice the outcome of your case.

It looks like you have favoured the council here.

The council failed to provide the up to date evidence from Fiona Brown.

Error of Law, a failure to do so is an error of law because it constitutes a failure to take a material matter into account.

Material Error of law, Failure to have regards to material evidence, failure to take a material matter into account.

We feel the Tribunal has not been conducted out correctly because you have look at this on the basis of the child going into school full time at School A and have mentioned about the cost of needing to build a Pod and him not being able to access the main building of the school and that there would not be toilets . We did not and have never asked for the child to be a full time student at School A, we asked for him to go there for a short time to allow for a period of assessment to find out where he was with his level of learning abilities. This was also the case at the last tribunal.

On 4 separate occasions we asked the tribunal about taking in discrimination, the last time we was on the last conference call. We was advised someone would get back to us. They assured us they would send out paperwork. We didn't here anything again, we now have recent got the paperwork after repeated requests but there seems to be a long list of errors and failures. We feel we have been discriminated against.

There has been procedural irregularities in the proceedings and how the tribunal has been conducted and important things have been overlooked. We have no legal representation and we are not lawyers and it appears we have been taken advantage of because of this.

The tribunal Scotland Act 2014 –

To be accessible and fair.

To be handled quickly and effectively.”

Submissions

[5] The appellant's husband, oral submission focused on the lack of an up-to-date report by an educational psychologist. He explained that the FtT erred in not allowing the appellant time to commission such a report. He said that the FtT erred also in proceeding with the hearing when the respondent had not produced such a report.

[6] Paragraphs 13 to 18 of the FtT's decision are in the following terms:

"13. The appellant lodged an additional statement prepared by her husband summarising her position in relation to the reference and also providing the additional information requested by us. The statement also included submissions and the consolidated document is at A110-A121. At A118 it is stated that the appellant would find the proposal to proceed without a further hearing difficult to accept.

14. The respondent lodged supplementary witness statements and submissions. These documents are at R74-93. The respondent's representative confirmed that the respondent was content to rest its case based on the previous oral evidence and all written evidence.

15. A case conference call was proposed to discuss the appellant's concerns about the tribunal proceeding without a further oral hearing. Initially, the appellant advised that she and her husband could not participate as all of their children were at home due to school closures. The tribunal case work team advised the parties that the legal member could be flexible regarding the timings of the conference call and a call was arranged at a time suitable to the appellants and proposed by them. However, approximately 45 minutes prior to the scheduled call the appellant emailed the case work team to say they were unable to participate and wished their supporter to take the call on their behalf.

16. The call took place on 4 May 2020 with the appellant's supporter and the respondent's representative. The appellant's supporter was unable to advise if the appellant agreed to the case being decided without a further hearing or if she or her husband wished an opportunity to address us on any issues arising from the supplementary statements or submissions from the respondent. It was explained that we could adapt proceedings to accommodate, as far as reasonably practical, the appellant's domestic circumstances. The appellant's supporter agreed to discuss the matter with the appellant and her husband and explain the options outlined to them.

17. The appellant's supporter contacted the casework team later that morning to confirm that the appellant was happy for the tribunal to proceed on the basis of all of the evidence and did not wish a further opportunity to make oral submissions to the

tribunal members. A direction was issued on 4 May 2020 discharging the remote hearing scheduled for 5, 6 and 7 May 2020.

18. We were satisfied that we had sufficient evidence to reach a decision and noted that the child's circumstances remain largely unchanged since the date of the first hearing. We convened remotely to consider the evidence to reach our decision."

[7] The reference to contact from the appellant's supporter, is a reference to an email from Michael Sinclair to the FtT, copied to the appellant, dated 4 May 2020 and timed at 1150h. It includes the following:

"The child's parents have asked me to let you know that they are happy to proceed on the evidence they have submitted to date and would like to decline the offer to make a final submission."

[8] I asked the appellant's husband about paragraphs 16 and 17 of the FtT's decision. He submitted that there must have been some miscommunication by Mr Sinclair. The appellant and the appellant's husband would not have wanted to proceed as matters stood. He explained that he and the appellant had found it very difficult to participate because they had all seven of their children at home at the time, one of whom has autism. He reiterated that the proceedings were not fair in the absence of an up-to-date report. He said that it was difficult to participate without the assistance of a lawyer. Both he and the appellant referred to having made extensive and unsuccessful efforts to secure alternative legal representation after their solicitor withdrew from acting. He asked me to consider all of the grounds of appeal presented in writing, as well as his oral submissions.

[9] Ms Armstrong adopted the written response sent to the Upper Tribunal by her former colleague Mr Guy on 19 August 2020. She referred to paragraphs 8 to 10 of the FtT's decision, which relate to the opportunity given to the appellant to obtain legal representation, and submitted that the context was one in which the child had already been out of school for a number of years. Paragraphs 8 to 10 are in the following terms:

“8. An initial case conference call was held on 10 January 2020 and hearing dates assigned for 12, 13 and 16 March 2020. The appellant’s solicitor thereafter withdrew from acting on her behalf and a further conference call was held on 19 February 2020. The appellant and her husband, the child’s father, took part in the call with a supporter present, Head of Direct Help and Support from the charity Mindroom, who had worked with the family for a number of years. The appellant wished time to seek alternative legal representation and the hearing assigned for 12, 13 and 16 March 2020 was discharged.

9. A further conference call was held on 16 March 2020 and it was noted that the appellant had been unable to secure alternative legal representation.

10. It was decided that, notwithstanding the lack of legal representation, it was important to reach a decision without further delay and a hearing was assigned for 5, 6 and 7 May 2020. The conference call note is at T133-134.”

Reasons for Decision

[10] In making this decision I am not reviewing the decision of the FtT, or the decision of Lord Ericht. My task is to decide whether the grounds of appeal disclose an arguable material error of law on the part of the FtT: *Secretary of State for the Home Department v Nixon* [2014] UKUT 00368 (IAC), paragraph 5.

[11] The appellant made a number of complaints about the fairness of the proceedings. She also made particular complaints about the approach of the FtT to the evidence of Fiona Brown; its approach to evidence about the costs associated with the child attending School A; and about discrimination.

[12] The appellant’s complaints were in relation to the lack of opportunity to commission an educational psychology report and the FtT’s proceeding in the absence of any such report produced by the respondent. These complaints required to be looked at particularly in the context of the appellant’s not having a lawyer, and the difficulties in participating in proceedings with all the children at home during lockdown.

[13] It is clear from the passages of the FtT's decision at paragraphs 8-10 quoted above that the appellant was given time to look for alternative legal representation. The FtT set down a case conference for discussion as to proceeding without a further oral hearing. The FtT offered to adapt proceedings to accommodate the appellant's domestic circumstances. The appellant's supporter represented to the FtT that the appellant was happy to proceed on the basis of the evidence already produced. That representation was made in an email copied to the appellant. Against that background there can be no proper criticism of the FtT's decision to proceed on the basis of the available evidence. There is no arguable error of law on the part of the FtT so far as the fairness of the proceedings is concerned in any of the respects mentioned by the appellant.

Fiona Brown

[14] The appellant refers in the grounds of appeal to an expression of view by the FtT that the appellant should meet with Ms Brown. She quotes from what appears to be written advice to her from her former solicitor, Ms Barr. She complains that the respondent failed to provide up-to-date evidence from Ms Brown, and that the FtT "favoured" the respondent in this context.

[15] The respondent provided a statement dated 27 April 2020 from Ms Brown. That statement contains the following:

"11. In December 2019, at the request of Andrew Sheridan following an update from the appeal, I made indirect contact with the family through Mig Coupe at Mindroom. I went through Mig for two reasons; firstly, I was not sure whether the personal contact details we had on file were up to date and secondly, I am aware that the family has a very negative perception of Midlothian Council as a whole and I did not want to cause them distress or discomfort. I advised Mig that I was willing to meet with the family to discuss their current situation and try to find some next steps. Mig replied to me stating that the family had declined this offer.

12. On 13 January 2020, Andrew Sheridan forwarded me an email that the appellant had sent to him, together with his response to that email. Mig Coupe then contacted me by email on 22 January 2020 to try and set up a meeting with us and the child's parents. We exchanged various emails trying to arrange this meeting, but the meeting did not take place prior to Andrew Sheridan meeting with Mig Coupe and the child's parents on 27 February 2020.

13. Following the meeting on 27 February 2020, I had some email contact with the appellant, initially indirectly via Mig but latterly directly. The family wished me to arrange visits to the Creative Learning Department at School B and the Complex Needs Base at School C. I arranged these visits and offered to meet with the family before or after the visits or to accompany them on the visits. The family declined these offers. The appellant cancelled her visits on the morning they were due to happen citing her concerns about Coronavirus which was becoming a wider public health concern at the time."

[16] The complaint that the respondent did not produce an up-to-date statement from Ms Brown is factually incorrect. The appellant did not object to the introduction of Ms Brown's statement, nor did she seek to make any representations about it. The grounds of appeal do not identify any arguable error of law in the FtT's approach to Ms Brown's evidence.

Costs associated with the child attending School A

[17] The FtT is said to have erred in taking into account evidence as to the cost of adding suitable teaching space at School A for the child, because the appellant's proposal was only that the child should attend for a short period for the purposes of assessment. The reference to the FtT was in respect of a placing request, rather than a request for assessment. There is no arguable error of law in the FtT's treatment of this matter.

Discrimination

[18] The grounds of appeal do not identify any arguable error of law on the part of the FtT so far as unlawful discrimination is concerned.