Upper Tribunal for Scotland

2024UT51
Ref: UTS/AP/24/0056

DECISION OF

Sheriff Kelly

ON AN APPLICATION FOR PERMISSION TO APPEAL
DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND
IN THE CASE OF

Mr David Fraser Roy

Appellant

- and -

Mrs Susan McCamley and Mrs Sheila McCamley

Respondent

FTS Case Reference: FTS/HPC/EV/23/2899

Glasgow, 25 September 2024

Decision

The Upper Tribunal refuses the appellant permission to appeal the decision of the First Tier Tribunal for Scotland, Housing and Property Chamber dated 29 April 2024.

Introduction

[1] The landlords of the property at 30 Brodie Park Avenue, Paisley, PA2 6JA ("the property") sought an eviction order against the appellant, Mr David Roy. They made application to the First Tier Tribunal for Scotland, Housing and Property Chamber ("FTS") on 23 August 2023. A case

management discussion was convened on 12 January 2024. The appellant confirmed opposition to the application, accepting that the tenancy was a short assured tenancy and that the formal notices were served timeously and the period of notice was complied with. The appellant opposed the application on the basis of reasonableness. At the conclusion of the CMD there remained outstanding a number of disputed issues and the matter was therefore continued to an evidential hearing. A number of orders were made by the FTS with a view to ensuring relevant documentation was lodged in advance of the evidential hearing.

[2] 29 April 2024 was assigned as the date for the evidential hearing. On that date, the appellant contacted the Tribunal administration in advance of the commencement of the hearing. He subsequently attended at the hearing in person and on time.

[3] At the outset of the hearing a number of preliminary issues were canvassed. These are detailed in the FTS decision of 29 April 2024 at paras. 11–18. The appellant sought to raise concerns before the FTS about the conduct of the CMD. He submitted that the note which was issued by the FTS after the CMD contained errors. After what appears to have been a considerable ventilation of this issue, the chairing legal member determined that the evidential hearing proceed as the issues raised in connection with the conduct of the CMD had no bearing on the evidential hearing and the issues ultimately to be determined by the FTS (para.13). At this point in the hearing, the appellant expressed concern and noted that he intended to appeal the decision made by the FTS. He was provided with advice from the clerk about making complaints.

[4] When the FTS turned to consider the application, it asked the appellant for confirmation of his position in relation to opposition. It records him as "not [being] particularly clear on this". In

light of the continued opposition to the application on the grounds of reasonableness it was decided that the hearing should proceed.

[5] The appellant indicated that he was unwell. He explained his symptoms. He noted that he had contacted the Tribunal administration prior to the hearing to advise of his ill-health and that he was running late. He was afforded an adjournment to consider his position.

[6] After a break the hearing reconvened. The members of the FTS had considered whether the hearing ought to be postponed. As it was, after the adjournment the appellant did not seek an adjournment of the hearing. The Tribunal chair indicated that if the appellant was unable to proceed or required a break he should alert him to that. He did not do so.

[7] The FTS then goes on to narrate the conduct of the evidential hearing. The appellant gave evidence in some detail (see paras. 21 and 24). The appellant asked questions of the applicants' witnesses and was able to respond to questions put to him by Tribunal members. The detailed responses are contained in the FTS decision. His summing up of his position is recorded also.

[8] The FTS delivered a judgement and issued a detailed decision containing 41 findings in fact together with a supporting note of reasons. The FTS found in favour of the applicants and granted an eviction order.

Appeal

[9] The appellant sought permission to appeal from the FTS. By decision dated 16 July 2024 it refused permission to appeal on the basis that the appeal had been marked out of time (see rule 2, the Scottish Tribunals (Time Limits) Regulations 2006). The appellant now seeks permission to appeal from the Upper Tribunal.

[10] In the Form UTS1 where the appellant was asked to identify the points of law on which he is appealing it is stated:

> "Article 6(1) Human Right Act - Right to a Fair Trail (sic) in line with the Practices and Regulations through an "Inquisitorial Model" and NOT "Adversarial Court Model" in regards to Article 6(1) guarentee (sic) of following such Principles, if NOT Authorities under EUHR (sic) Law are apply quoted.
>
> Futhermore (sic) the conduct of the Legal Member when dealing with hearing issues of Repondent (sic) at CMP and Illness at the Evidential Hearing supported by both Consultants and GP's Medical Cetificates (sic), Please note the Pleas in Law No1 referrs (sic) to the Upper Tribunal request to Sist the Eviction Notice until the Upper Tribunal duly considered the important issues of "Fair Trail/Tribuna" (sic) and the "lntersts (sic) of Justice".

[11] The appellant also has submitted with the application to appeal, a 9 page document headed "pleas in law". This was supplemented by a further document some 13 pages in length together with a number of addendums. This was augmented by a further addendum in advance of the hearing on permission to appeal which contained details of the appellant's career and publications from the bulletin of the British Psychological Society.

Hearing: 4 September 2024

[12] The appellant, Mr Roy, was personally present at the hearing which convened via Webex. Mr Higgins, a relative of the landlords, appeared on their behalf. Prior to the hearing proceeding the procedure to be employed, and the nature of the scope of any appeal, before the Upper Tribunal was clarified. It was noted that the Upper Tribunal could only deal with errors of law and was not able to review factual matters canvassed before the FTS, save in clearly defined circumstances.

Appellant

[13] Mr Roy sought to explain why he had failed to submit the appeal within the time limit

provided for in the regulations. He referred to correspondence from a Consultant dated 1 May 2024 confirming that there had been a recent adjustment of medication relative to his health condition. This, he submitted, also explained why he may have reacted poorly in the evidential hearing of 29 April 2024.

[14] Mr Roy then referred to his pleas in law document outlining what were described as "background and arguments". The appellant placed stress upon his criticism of the conduct of the evidential hearing and the legal member's treatment of his ill-health:

> "The Legal member seemed to be fixated upon Medical Certificates at the Evidential Hearing on 29th April 2024 [however impossible at that point in time it would have been to obtain a GP'S appointment, never mind an actual Medical Certificate] and not the fairness of the due process and welfare of the Respondent"

[15] The appellant said he had kept the Tribunal administration updated about the position and referred to emails dated 12 and 24 June 2024. He explained the circumstances which pertained at the time of preparation of his appeal.

[16] The appellant criticised the manner in which the evidential hearing had been conducted and the failure of the legal member presiding to deal with his challenge to the conduct of the case management discussion. He submitted that the legal member was not being diligent in reporting what he had said accurately. The appellant submitted that the legal member had not reacted properly to his description of the pressurised system in the property. He had moved from conducting proceedings on an inquisitorial basis and had instead adopted an adversarial approach. The consequence of this was that the Tribunal proceedings were invalidated. The Tribunal was not abiding by its rules. The consequences were laid out, said the appellant, in the

cases from the European Court of Human Rights.

[17] The appellant then went on to deal with factual matters regarding boiler pressure within the property and referred to his career. He eventually came to acknowledge that the Upper Tribunal could not deal with this factual matter: no ground of appeal was directed to the findings in fact of the FTS.

[18] The appellant said he had been criticised for not producing a medical certificate. This had taken some time to produce. He referred to a letter from his general practitioner dated 17 June 2024. It states:

> "I understand that Mr Roy attended a tribunal recently regarding his accommodation. He told me that he did not feel well at the time of the tribunal and I can confirm that during that period there had been a lot of changes to his diabetic medications which may have been making him feel nauseous. He is now on a reduced dose and feeling better, but he feels he was not able to give a good account of himself and I would be grateful if this could be taken into consideration. He is also currently being treated for peripheral neuropathy which is possibly secondary to his diabetes or low vitamin B12 and this may have been contributing to his symptoms.

[19] The case law from the European Court of Human Rights made it clear, said the appellant, that if a Tribunal falls short of the necessary quality of being an inquisitorial Tribunal, this amounted to a violation of Article 6 of the European Convention on Human Rights.

Respondent

[20] Mr Higgins submitted that none of the grounds of appeal canvassed before the Upper Tribunal merited permission to appeal and invited the Upper Tribunal to refuse the application for permission to appeal.

Decision

[21] In terms of rule 3(6) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, where the FTS has refused leave to appeal, the Upper Tribunal may give permission to appeal if "the Upper Tribunal is satisfied that there are arguable grounds for the appeal", section 46(4) of the Tribunals (Scotland) Act 2014. Nowhere in the statute or secondary legislation is the phrase "arguable grounds for the appeal" defined.

[22] In *Wightman v Advocate General* 2018 SC 388 Lord President Carloway (at [9]) observed that arguability and statability were synonyms. That was said to be a lower threshold than "a real prospect of success", the test applicable in deciding whether to grant permission for an application to the supervisory jurisdiction to proceed, in terms of section 27D(3) of the Court of Session Act 1988, as amended, see [2] – [9].

[23] The appellant has lodged a ground of appeal in the Form UTS1 and supplemented this with a number of documents which were further developed in the course of the hearing. I consider that his grounds of appeal can be grouped under the following headings:

i. Criticism of the conduct of the case management discussion; and

ii. Criticism of the conduct of the evidential hearing.

[24] The case management discussion of 12 January 2024 proceeded in terms of rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. The purpose of such a hearing, as provided for in rule 17(3), includes: identifying the issues to be resolved; identifying what facts are agreed between the parties; raising with parties any issues that require to be addressed; discussing what witnesses, documents and other evidence will be required and discussing whether or not a hearing is required.

[25] The appellant was present and the respondent was represented at the CMD. A comprehensive note was produced by the FTS. Before the evidential hearing of 29 April 2024, the appellant sought to re-open what had occurred at the CMD. After that was examined in some detail, the legal member decided that it could not be revisited, at least in part because it had no bearing upon the issues to be decided by the FTS. The evidential hearing proceeded.

[26] At the hearing on permission to appeal, the appellant focused upon what was described in the FTS decision of 29 April 2024 about the CMD. He was, however, unable to point to the manner in which that discussion of the CMD had any effect on the conduct, or outcome, of the evidential hearing. The FTS noted the appellant as saying he disagreed with the contents of the CMD note. The FTS endeavoured to explain that this note was not a decision and merely recorded what had happened.

[27] The FTS at the hearing of 29 April 2024 decided to proceed with the evidential hearing because, no matter what had occurred at the CMD, the issue of eviction, opposed on the grounds of reasonableness, was to be determined by it. That decision appears to be well within the bands of reasonable decisions open to the FTS governing the procedure before it. The appellant has been unable to persuade me that this arguably amounts to an error of law. I refuse permission to appeal on this ground.

[28] In connection with the conduct of the evidential hearing, the appellant came to acknowledge that the factual differences that he had with the FTS decision were not capable of being reviewed by the Upper Tribunal. He had a number of criticisms of the conduct of the evidential hearing of 29 April 2024. He focused upon his ill-health.

[29] Of greatest significance for the appellant appears to be a failure to fully and properly record the communication that he had with the Tribunal administration in advance of the hearing on 29 April. This is described at para.10 of the FTS decision. The appellant recovered through a Freedom of Information request, presumably made under the Freedom of Information (Scotland) Act 2002, what that communication was. He contended that this had not been accurately recorded in para.10 of the FTS decision. I do not accept that submission. There is no material difference between the communication and what is recorded about it in the FTS decision. That does not form an arguable ground of appeal capable of being argued at any full hearing.

[30] The focus for the appellant was thereafter upon his ill-health. The FTS records at para.16 that he had been experiencing sickness and diarrhoea. He was taking medication. An adjournment was afforded to him. He returned after a break in proceedings. He did not seek a discharge or adjournment of the hearing. The hearing progressed. The appellant was able to engage with, and to participate in, that process.

[31] A detailed narration of what occurred at the hearing – as provided for in the FTS decision - does not sit easily with the appellant's description of him being unable, through ill-health, to participate properly in it. The appellant did not move the FTS to discharge the hearing. The members of the FTS appear to have discussed the prospect of such a motion, despite it not having been made before them. They indicated a provisional view. No motion was made. Nothing therefore turns upon their provisional view on such an application being made to them.

[32] Separately, the submission that the appellant was unable to participate meaningfully in the proceedings is not made out in light of his many and wide-ranging contributions to the evidential

hearing including the giving of evidence, the asking and answering of questions and contributing to summing up, all of which are described in detail in the FTS decision.

[33] The appellant also complains that the FTS moved "from inquisitorial to adversarial" in its conduct of proceedings. He relies upon case law from the European Court of Human Rights. He lodged with his application for permission to appeal the following cases: *Cyprus v. Turkey* (Application no. 25781/94); *Lithgow v United Kingdom* (Application nos. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81); and *Belilos v. Switzerland* (Application no. 10328/83). These do not assist the appellant's case.

[34] I do not accept that there was any improper conduct on the part of the FTS. The nature of the hearing was not altered by anything said or done by its members. Permission to appeal is refused because the application discloses no arguable ground of appeal on this issue.

Conclusion

[35] There being no arguable ground of appeal tendered by the appellant, permission to appeal the decision of the FTS dated 29 April 2024 is refused.

Member of the Upper Tribunal for Scotland