FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 28
XA28/24

Lord Pentland

OPINION OF THE COURT

delivered by LORD PENTLAND

in an application for leave to appeal against a decision of the Upper Tribunal
under Section 13 of the Tribunals, Courts and Enforcement Act 2007

by

LM

Applicant

against

THE ADVOCATE GENERAL FOR SCOTLAND

Respondent

_____

Applicant: Party
Respondent: Middleton, Office of the Advocate General

19 September 2024

Background

[1] This is an application for permission to appeal a decision of the Upper Tribunal to the Court of Session under s13 of the Tribunals, Courts and Enforcement Act 2007. The legal

framework is somewhat complicated, but the background and procedural history are relatively straightforward.

[2] The applicant is LM. The respondent is the Advocate General for Scotland who represents for the purposes of proceedings such as these the Secretary of State for Work and Pensions. The Child Maintenance Service falls under the auspices of the Department for Work and Pensions. LM has a child, A, whose father is SM. LM has care of A. SM is a police officer. He also owns and runs businesses. In 2018, SM asked the CMS to fix the amount of child maintenance he should pay in respect of A. In February 2019, the CMS determined that he should contribute £79.37 per week. LM sought mandatory reconsideration by the CMS. Her position was (and remains) that SM manipulated the accounts of his businesses to depress his apparent income and thus deceive the CMS into calculating an artificially low figure. The CMS completed its reconsideration in March 2019 and confirmed its original decision.

[3] LM appealed to the First-tier Tribunal. A hearing was held on 25 May 2021. The CMS and SM were parties. SM was unable to give a detailed explanation of his companies' financial affairs under "close questioning" by the tribunal. It nonetheless upheld the decision. LM appealed to the UT. On 10 June 2022, the UT allowed the appeal. It held that the FtT had materially erred in law. The FtT's reasoning suggested that it had failed to take any of the steps available to it to investigate SM's evidence or provide an adequate explanation for reaching its conclusions. The UT set aside the FtT's decision and ordered LM's appeal to be reheard by a differently-constituted tribunal.

[4] At the re-hearing SM did better. He and his accountant provided explanations for his financial affairs which the tribunal considered "reliable" and "authoritative and helpful".

The tribunal accepted their evidence in full. It conducted its own examination of SM's personal bank statement and those of his businesses. Although these revealed a history of "lax" financial organisation and "ill-advised accountancy practices", it did not infer dishonesty on his part. It concluded that there was no evidence that SM had tried to "cook the books" or divert monies between the accounts to obscure income. On 23 May 2023 the FtT again refused LM's appeal ("the Second FtT Decision").

[5] LM sought to appeal the Second FtT Decision. The FtT refused permission to appeal on 29 September 2023. LM then applied to the UT for permission directly. On 11 December 2023, the UT refused permission ("the UT Permission decision"). It noted that s11(1) of the Tribunals, Courts and Enforcement Act 2007 restricts appeals to points of law. LM's proposed grounds of appeal amounted to disagreements with the FtT's findings in fact and a groundless allegation of bias on the tribunal's part. The UT was not persuaded that it was arguable that the Second FtT Decision disclosed an error of law.

[6] LM was disappointed. On 10 January 2024, she emailed the Tribunal clerk in the following terms:

> "I wish to make an application under Rule 43 on the basis of (2)(d) there has been some other procedural irregularity in the proceedings.
>
> The irregularities are detailed in my email of yesterday, 9th January 2024.
>
> I wish it to be noted that I have pursued this matter for almost 5 years, surely this demonstrates the proof and belief I have that [SM] IS deceiving the system? I feel that the tribunal is demonstrating bias towards [SM] by not properly investigating the evidence and facts I have presented. The tribunal clearly claimed that [SM] was "honest" - a statement that the tribunal cannot possibly substantiate."

[7] The reference to "Rule 43" is a reference to the Tribunal Procedure (Upper Tribunal) Rules 2008, Rule 43, which provides:-

> "(1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
>
> (a) the Upper Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;
>
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings."

[8] In her email of 9 January 2024, LM set out at length her disagreement with the Second FtT Decision. She drew attention to the timing of SM's engagement of an accountant: shortly after she applied for reconsideration, which she considered suspicious. She said that SM had lied about his willingness to take a paternity test. He had called the CMS "repeatedly" to ask about closing her case – why, she asked, would he do this if he had nothing to hide? She could not understand why the UT had upheld her first appeal but then referred the case back to the FtT. The first UT's findings "still remain[ed]". She had assisted SM with his businesses and she knew how much money they had made. SM had not provided actual evidence of his finances like receipts and invoices, just a spreadsheet which the FtT had uncritically accepted. SM and his family were "dishonest and liars". LM had lodged newspaper articles with stories to that effect. By finding that SM was an honest witness in such circumstances the tribunal demonstrated bias.

[9] The UT refused the application to set aside the UT Permission Decision on 1 February 2024 under Rule 43 ("the Rule 43 Decision"). In a short note of reasons, it highlighted that the circumstances set out in Rule 43 were exhaustive. The UT had to refuse the application unless one of the conditions in (2)(a) – (d) applied. Those conditions related to the procedure before the Upper Tribunal, not the FtT. LM's email of 9 January, which she had adopted as her application, did not explain why it was arguable that any of the Rule 43(2) conditions applied. It simply reiterated the arguments she had unsuccessfully advanced before the FtT and in her application for permission to appeal.

[10] LM was undeterred. On 27 February 2024 she again emailed the Tribunal clerk. She attached a fresh copy of her email of 9 January and advised that she wished to appeal to this court against the Rule 43 Decision "as quite simply the case has not been fully investigated and [SM] is being allowed to deliberately conceal his income". On 21 March 2024, the UT refused permission to appeal to the Court of Session ("the Rule 43 Permission Decision").

[11] LM now applies to this court for permission to appeal directly.

The law

[12] A party dissatisfied with a decision of the UT has three potential avenues available to her.

[13] The first is a right of appeal under s13 of the 2007 Act. S13 reads as follows:-

> "13. Right to appeal to the Court of Appeal etc
>
> (1) For the purposes of subsection (2), the reference to a right of appeal is to a right of 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 (4)
>
> (3) That right may be exercised only with permission […]

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

[…]

(b) The relevant appellate court

[…]

(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

[…]

(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."

[14] The key provision here is s13(8)(c), which provides that a decision of the UT to refuse permission to appeal a decision of the FtT to itself is an excluded decision. As a result, the UT Permission Decision may not be appealed to this court, which is the relevant appellate court in the present case.

[15] The second avenue available to a disappointed UT litigant is to seek a review under s10 of the 2007 Act. This does not arise in the present appeal; LM did not seek a review under s10, and in any event such a review may only be undertaken for a decision which is not an excluded decision - which a refusal to grant permission to appeal a decision of the FtT

is. Even if the UT had the power to review its decision of 11 December 2023, s13(8)(d)(i) provides that a decision by the UT to review, or not to review, an earlier decision is an excluded decision and so could not be appealed to this court.

[16] Finally, there is Rule 43, quoted above. A party seeking to have the UT set aside a decision under Rule 43 must, therefore, demonstrate that one of the conditions in Rule 43(2) is met. Even if one of these conditions is met, that does not entail automatic success – the UT must be persuaded that it is in the interests of justice for it to set its decision aside. Four further points are significant.

i) First, Rule 43 is concerned with the procedure by which the UT deals with a case. It does not open the door to a reconsideration of the UT's decision on the merits. As Upper Tribunal Judge Jacobs put it in *SK* v *Secretary of State for Work and Pensions (AA)* [2016] UKUT 529 (AAC) at [7]: "the rule is concerned with how the Upper Tribunal handled the claimant's application for permission to appeal. It does not provide a means of challenge to the decision itself or the reasons on which it is based."

ii) Secondly, an application relating to a decision by the UT under Rule 43 does not give rise to an excluded decision in terms of s13(1) of the 2007 Act. A party may therefore, with permission, appeal such a decision to the Court of Session, even where the Rule 43 application relates to a decision which is itself an excluded decision (*Plescan* v *Secretary of State for Work and Pensions* [2024] 1 WLR 530). That includes, in the present case as in *Plescan*, an application for permission to appeal against a decision of the UT under Rule 43 refusing to set aside a previous decision of the UT refusing permission to

appeal to the UT a decision of the FtT. As the authors of an article[1] in the *Journal of Social Security Law* (JSSL 2023 30(3), D73 – D74) put it, the permission hearing for such an appeal may be described as "a hearing about having a hearing about a decision, about a decision, about a judgment about a decision."

iii) Thirdly, the relevant test is not the demanding requirement that the appeal raise either an important point of principle or other compelling reason (see RCS 41.57). Instead it is whether the proposed appeal is arguable.

iv) Fourthly, as Lewis LJ put it in *Plescan* at [29]:

> "Any such appeal would, however, have to be based on arguable grounds that the Upper Tribunal erred in considering that it was not in the interests of justice or in finding that there was no procedural error or irregularity in the proceedings in the Upper Tribunal as specified in rule 43. The appeal would not be an appeal against the refusal of permission. It would be an appeal against the refusal to set aside."

Submissions

[17] SM's application is not entirely clear as to what the nature of her proposed appeal is intended to be. This is not intended as a criticism; she is not a lawyer and the applicable law is complicated. The difficulty is that although her application states that she seeks to appeal the UT's decision of 21 March 2024 (the Rule 43 Permission Decision), her submissions in support are entirely directed at the merits of the Second FtT Decision. Her proposed grounds of appeal are: "1. Inadequacy of evidence" and "2. Lack of investigation" which are criticisms of the Second FtT Decision. SM lodged detailed written submissions expanding upon the criticisms of the Second FtT Decision contained in her email of 9 January and

[1] Charlotte O'Brien and Tom Royston

supporting these submissions by reference to various pieces of evidence. These submissions also did not engage with the – admittedly complex – 2007 Act scheme for appeals outlined above.

[18] In view of this, and anxious that SM not be deprived of an opportunity to prosecute a competent and arguable appeal because she is not a lawyer, I decided to invite Mr Middleton for the respondent to address me first, specifically requesting that he provide an overview of the relevant law and the issues in this application in a way which would be accessible for SM. Proceeding in this way also afforded SM the opportunity to focus her own oral submissions on the legal test for permission to appeal outlined by Mr Middleton and to have the last word.

[19] For the respondent, Mr Middleton first outlined in detail the procedural history and statutory scheme set out above, as well as the decision of the Court of Appeal in *Plescan*. The respondent's motion was to refuse permission. No interpretation (however generous) of SM's application was competent and arguable. If the proposed appeal was against the refusal of permission to appeal the Second FtT Decision it was incompetent because that refusal is an excluded decision per s13(8)(c).

[20] If the appeal was against the Rule 43 Decision it was competent, but the proposed grounds of appeal were irrelevant and unarguable. Lewis LJ's *dicta* in *Plescan, supra,* required the appellant to put forward arguable grounds that the UT erroneously found that there was no procedural error or irregularity in its decision or that the interests of justice did not favour its being set aside. In the present case the appellant required to identify a procedural irregularity in the Rule 43 Decision amounting to an error of law. She had failed to do so.

[21] Finally, if the proposed appeal was against the Rule 43 Permission Decision (as the applicant's Form 40.2 suggested it was) it was not competent. Although a decision of the UT refusing permission to appeal a Rule 43 decision to the Court of Session was not an excluded decision per s13(8), *Sarfraz* v *Disclosure and Barring Service* [2015] 1 WLR 4441 was authority for the principle that a decision on whether to grant permission to appeal is final absent express statutory language to the contrary. That principle is well-established and directed at avoiding "the absurdity of allowing an appeal against a decision under a provision designed to limit the right of appeal" (*Kemper Reinsurance Co* v *Minister of Finance & Ors* [2000] 1 AC 1, Lord Hoffman at 13, quoted in *Sarfraz*) and was first expressed by the House of Lords in *Lane* v *Esdaile* [1891] AC 210. Quite properly, Mr Middleton acknowledged that there was possibly an alternative view on this point relying simply on the fact that the Rule 43 Permission Decision was not an excluded decision per s13(8) and that s13(1) referred to "any point of law arising from a decision" without further specification.

[22] Mr Middleton concluded by summarising LM's "complaint" as essentially one about the adequacy of the Second FtT Decision. Although some of her complaints – for example of bias – could amount to public law challenges, matters such as the assessment of SM's credibility and reliability were plainly factual matters and not errors of law. Parliament had laid down a scheme to limit appeals from the UT, and a critical feature of that scheme was that some errors must lie where they fall.

[23] In addition to detailed written submissions, and having heard Mr Middleton, SM in reply made concise oral submissions, which she presented with moderation and conviction. She agreed that her challenge was to the adequacy of the Second FtT Decision. The FtT had formed an incorrect view of SM's financial position and of his credibility and reliability.

This erroneous view had led it to uphold the CMS's assessment of his contribution to A's care. Despite her first, successful appeal criticising the FtT, the figure was far too low. LM had suffered prejudice, but more importantly A was not getting the support she deserved. SM was flouting his obligation to support A's upbringing. The procedural irregularity consisted in the fact that the Second FtT Decision was reached on insufficient evidence.

Decision

[24] LM does not accept the Second FtT Decision. She has formed the strongly-held view that it was wrong and that SM pulled the wool over the tribunal's eyes. Her criticisms of the FtT and SM are detailed. For the purpose of deciding this application for permission to appeal, I have taken them *pro veritate* – in other words, I have *assumed* them to be true. That should not be read as suggesting SM has *in fact* behaved in the way LM describes, which is not a question I have to decide.

[25] The starting point is the statutory scheme for permission to appeal which Parliament has set out in the 2007 Act. That statutory scheme provides that an appeal may be taken from the Upper Tribunal to this court on a point of law against any decision which is not an excluded decision per s13(8). S13(8)(c) provides that an UT decision on permission to appeal from the FtT is an excluded decision. Therefore, LM cannot achieve by this route her objective in bringing this application: to have the Second FtT Decision set aside. Her right of appeal from that decision was a right to appeal, with permission, to the UT (s11(1) – (4)). She sought permission and the UT decided to refuse her. Even assuming her detailed criticisms of the Second FtT Decision's factual findings are correct, there is nothing this court can competently do about that in this application and proposed appeal.

[26] An appeal against the Rule 43 Decision is competent per *Plescan*. However, I consider Mr Middleton's submission that the proposed grounds of appeal are irrelevant and unarguable to be well-founded. LM's Form 40.2 sets out 13 statements in support of her application for permission to appeal. In summary these are: that the evidence to justify SM's earnings and expenditure was inadequate; that the Second FtT Decision disregarded the UT's reasoning in setting aside the first FtT decision; that the tribunal should have directed SM to provide invoices for his businesses dating back to 2015; that SM amalgamated a thriving business into a failing one a month after LM raised her case with the CMS; that the FtT found that one of SM's businesses was failing; that SM claimed only to have made £1559 from his businesses despite his significant time commitment; that SM hoodwinked the tribunal into concluding he had not "cooked the books"; that SM described the same monies as both gifts and loans; that SM's previous accountant was not called to give evidence; that the tribunal did not take into account Scottish Government grants SM had received; that there was no reasonable explanation for the amalgamation of his businesses other than an attempt to divert income; that SM failed to provide evidence he had no business interests other than those examined by the FtT; and that the tribunal's assessment of SM as a "generally honest witness" was a subjective and unsubstantiated statement that had no place in a tribunal. These were distilled into the twin grounds of "inadequacy of evidence" and "lack of investigation".

[27] None of these grounds or statements says anything about the Rule 43 Decision. They are all directed at the Second FtT Decision. They do not, therefore, amount to arguable grounds that the UT erred in considering that there was no procedural error or irregularity in the proceedings in the UT. Although LM submitted that the lack of evidence supporting

the Second FtT Decision was a procedural irregularity in itself, I do not consider even on a broad reading that this amounts to an arguable ground. Rule 43 is a procedural rule designed to provide a safeguard for proceedings *in the UT*; it goes without saying that it is not engaged where criticisms are made of a decision of the FtT.

[28] Although the point could not be fully argued in view of the fact that LM was not legally represented, I see force in Mr Middleton's submission that an appeal against the Rule 43 Permission Decision is not competent. However, it is not necessary to decide this question because having decided that there are no arguable grounds for appealing the Rule 43 Decision, it is axiomatic that are also no arguable grounds for appealing the Rule 43 Permission Decision.

[29] At the end of the day the insurmountable difficulty for the applicant is that what she really wishes is to appeal to the Court of Session against the second FtT decision on the basis that the conclusions reached were factually wrong. She has not identified any genuine point of law. An appeal to the Court of Session on such factual grounds is not open to her. The present application must, therefore, be refused.