Upper Tribunal for Scotland

2024UT37
Ref: UTS/AP/23/0971

DECISION OF

Sheriff Ian Hay Cruickshank

ON AN APPLICATION FOR REVIEW
IN THE CASE OF

Mr Angus O'Donoghue
per Dr Susan O'Donoghue

Appellant

- and -

Celtad Limited,
per Mr Ryan Malone

Respondents

FTS Case Reference: FTS/HPC/EV/22/1099

24 June 2024

Refuses the appellant's application to review the decision of the Upper Tribunal for Scotland dated 14 May 2024.

Introduction

[1] On 14 May 2024 I refused an appeal against a decision of the First-tier Tribunal for Scotland, Housing and Property Chamber ("the FTS") dated 19 June 2023. Permission to appeal

had been granted by the FTS on eight numbered grounds. My written decision of that date is referred to and to the reasons stated therein for refusing the appeal. The appellant has now lodged an application for my decision to be reviewed in relation to refusal of grounds of appeal 1, 2, 6, 7 and 8.

The Upper Tribunal for Scotland – power to review a decision

[2] The Upper Tribunal for Scotland ("the UTS") has the power to review one of its own decisions by virtue of the Tribunals (Scotland) Act 2014 ("the 2014 Act"). This is a power which can also be exercised by the FTS. Section 43 of the 2014 Act is in the following terms:

43 Review of decisions

(1) Each of the First-tier Tribunal and the Upper Tribunal may review a decision made by it in any matter in a case before it.

(2) A decision is reviewable—

(a) at the Tribunal's own instance, or

(b) at the request of a party in the case.

(3) But—

(a) there can be no review under this section of an excluded decision,

(b) Tribunal Rules may make provision—

(i) excluding other decisions from a review under this section,

(ii) otherwise restricting the availability of a review under this section (including by specifying grounds for a review).

(4) The exercise of discretion whether a decision should be reviewed under this section cannot give rise to a review under this section or to an appeal under section 46 or 48.

(5) A right of appeal under section 46 or 48 is not affected by the availability or otherwise of a review under this section.

[3] An "excluded decision" is defined in section 51 of the 2014 Act. For the avoidance of doubt the matters upon which review in this case are sought do not fall within that definition.

[4] On review the UTS may take no action, set the decision aside, or correct a minor or accidental error contained in the decision (section 44(1)). A particular decision of the UTS may not be reviewed more than once (section 45(1)).

[5] When considering whether or not to review a decision the UTS must apply the terms of Rule 30 of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 ("the 2016 Regulations"). The Rule is as follows:

30.— Reviews

(1) The Upper Tribunal may at its own instance or on the application of a party review a decision (except an excluded decision) made by it if it considers it necessary in the interests of justice to do so and on review it may confirm, set aside, or set aside and redecide the decision.
(2) An application under paragraph (1) shall be made in writing within 14 days after the day of the decision and must state the reasons for making the application.
(3) The Upper Tribunal must send a copy of the application to any other party involved in the proceedings within 10 working days after the day of receipt of the application.
(4) The review must be decided as soon as reasonably practicable by the Upper Tribunal, with insofar as practicable the same members that decided the case, or where this is not practicable with members selected by the President.
(5) A notice of the decision of a review under paragraph (1) must as soon as reasonably practicable be sent by the Upper Tribunal to each party.
(6) The 30 days referred to in regulation 2(2) of the Scottish Tribunals (Time Limits) Regulations 2016 in respect of an application to the Upper Tribunal is extended by any review period.

[6] The UTS therefore has the power to review its own decisions without the need for onward appeal in every case. The decision to review is a discretionary power and if there is a refusal to exercise that discretion then the decision is neither subject to review nor to appeal. What may, or may not, give grounds for seeking a review is not further defined in the legislation. The purpose of proceeding to review is to allow the UTS to consider whether it has erred "in any matter in a case before it" (section 43 (1)). Rules of procedure prescribe the circumstances in which those powers may be exercised. Rule 30 of the 2016 Regulations states that the UTS may review a decision if it considers it necessary in the interests of justice to do so.

[7] Standing the terms of the 2014 Act, and the 2016 Regulations, the discretion afforded to the UTS to accede to a review will be a decision to be made on a case by case basis. The power is wide enough to review matters of both substance and procedure (see for example *Floyd* v *Gettka* 2024 SLT (Tr) 47 where the UTS on review accepted that the original decision could not stand following reconsideration of the relevant statutory provisions). However, it remains important to distinguish between grounds for reviewing a decision as opposed to grounds for appealing a decision albeit review and appeal are two modes of reconsidering a decision. That said they are "established legal terms and concepts and fall to be understood as having distinct legal features" (*Skoll* v *Humanes* [2020] UT 36, paragraph 2). Accordingly, the concepts of review and appeal can lead to tension when it comes to determining which mode is the appropriate route to reconsider matters of law. Whereas courts may correct their own mistakes they should not subvert the appeal process (Jacobs, *Tribunal Practice and Procedure*, 5th Edition at paragraph 15.61; *Compagnie Noga D'Importation et D'Exportation SA* v *Abacha* [2001] 3 All ER 513 at [47])

[8] In summary, a review is not an automatic right. The UTS can only proceed to review a decision if it considers the interests of justice require that. Although that provides the UTS with a wide discretionary basis the interests of justice must be considered from the perspective of all parties. It demands that fairness to both the appellant and the respondent has to be weighed and balanced. Furthermore, the interests of justice require consideration to be given to the appeal process sought to be reviewed and cognisance has to be given to matters as presented or argued on appeal. Satisfaction that the interests of justice require matters to be revisited on review is the initial hurdle to be cleared.

Conclusion

[9] Upon receipt of this application for review the respondents have been notified. They are opposed to a review and have given notice that should there be further procedure, including an assigned hearing, they would be seeking reimbursement of any expenses occasioned. In all of the circumstances, however, I do not consider it is necessary to seek further submissions from the respondents in determining whether I consider it is in the interests of justice to accede to the request for review at this stage. If I were to conclude that, in the interests of justice, a review should take place then clearly the respondents would be given an opportunity to provide further submissions.

[10] I will summarise the lengthy submissions made on behalf of the appellant. The appellant's conclusion on each ground is that the UTS on review should set aside its decision and remake the decision in favour of the appellant by upholding the reviewed grounds of appeal and thereafter remit the case to the FTS.

[11] Reasons as to why the decision on these grounds should be reviewed are provided in order as follows – 6, 7, 8, 1 and 2. For ease of reference I will consider what is said in support of a review of each ground in that order and I will thereafter confirm whether I consider it necessary in the interests of justice to proceed to review.

Application to review Grounds 6 and 7

[12] These grounds are taken together in the application for review. The terms of grounds 6 and 7 upon which the FTS granted permission to appeal are as follows:

"6. Fairness of the process. The landlord and assistant presented their case. The respondent alleges that they were allowed to interrupt the respondent during his evidence.

7. Fairness of the process. The respondent alleges that the applicants subjected him to unpleasant comments on his character during his evidence. He remained silent through their presentation."

[13] In relation to these grounds of appeal (and also ground of appeal 8) the appellant commences his submissions by referring to the Supplementary Note prepared by the FTS following the order issued to it by the UTS. The appellant states that the FTS did not supply the UTS with important information relating to day 1 and 2 of the hearing and that if such information had been supplied the UTS would have upheld these grounds of appeal.

[14] The appellant then refers to pre-hearing emails which I am told are part of the FTS bundle. It is submitted that on the first day of the hearing the appellant discovered he was not able to question Mr. Chesmehdoost although he had made it clear to the FTS in an email sent 7 days before the hearing that he sought assurances this would be permitted. The FTS did not respond to the email and the appellant was only permitted to cross-examine Mr. Malone. Had

the appellant been told this in advance he would have called Mr. Chesmehdoost as a witness. He should have been allowed to do this and, in not being allowed to do so by the FTS, the hearing "effectively fell apart". The FTS made a major and material error in not responding to the email and this failure resulted in the appellant being placed at a huge disadvantage on day 1. This affected the appellant's ability to challenge the respondents' case and, in turn, this had a major impact on the FTS's evaluation of the applicant's evidence.

[15] Criticism of the terms of the Supplementary Note provided by the FTS continues. The appellant refers to the atmosphere in the hearing room on day 1. The appellant was seen to be in distress after leaving the hearing room. The interruptions by the respondents caused difficulties for the appellant in the presentation of his case. The Supplementary Note prepared by the FTS did not supply information on the appellant's experiences in this respect on day 1. The Note does not record the high level of interruptions which included personal jibes. These alleged jibes are set out in detail in the review request. These are described as having been repetitive and included "You're making it all up", "You were a terrible worker", "You didn't keep the accounts well", "You took money from the safe", and regular shouts of "irrelevant".

[16] It is submitted that the UTS was wrong to state that the appellant's questioning was particularly robust. No party litigant could have acquitted themselves well under the stressful circumstances prevailing. The FTS was not able to control the respondents. The appellant did not get a fair hearing. Informality in proceedings cannot be allowed at the expense of proper conduct of the case. The unfairness, disadvantage and inequality suffered by the appellant stemmed from the failure of the FTS to conduct the hearing "firmly and in a fair and proper

manner". The FTS states in the Supplementary Note that what was said did not prevent either party enjoying fair process. As no examples of what was said are given by the FTS their statement to this effect is an assertion only and offers no proof. There was more information available to the FTS and that should have been provided to the UTS. The missing information was material to determining the fairness of the proceedings.

[17] Finally, it is submitted that the failure of the FTS to define the roles of Mr. Cheshmehdoost and Mr. Malone caused prejudice. It was only at the point the appellant started his cross-examination that the FTS told him he could only ask questions of Mr. Malone. This is described as a "particularly unjust action" on the part of the FTS. The actions of the FTS allowed many digital messages and written submissions to go unchallenged.

[18] I have carefully reflected on all that has been said in support of reviewing the decision on grounds of appeal 6 and 7. I remind the appellant that the appeal proceeded on the grounds of appeal as framed by him and upon which the FTS granted permission to appeal to the UTS. In my original decision I commented on the extreme length of the documentation prepared by the appellant for appeal purposes. I have reminded myself of the terms of these documents for the purposes of review.

[19] In the application for review of ground 6 the significance of pre-hearing email correspondence between the appellant and the FTS is heavily relied upon. From all of the materials available to me the significance of the pre-hearing emails was not a factor which featured when permission to appeal was granted by the FTS. It simply could not have been given the wording of this ground of appeal. Furthermore there was no reference made to these

emails, or their significance, at the appeal hearing before the UTS. Accordingly, this is an attempt to introduce a new ground of appeal going to material unfairness in the FTS process. If the significance of the pre-hearing emails was the basis of a ground of appeal then permission to appeal on this as a point of law should have been sought. The interests of justice do not support the appellant's application for a review on this ground. The application to review ground of appeal 6 is refused.

[20] So far as ground of appeal 7 is concerned, I commented in my decision (at paragraph 16) that at appeal the appellant provided no specification as to what he considered the unpleasant comments to be. My observation in that respect is not challenged or contradicted as part of the application for review. The purpose of review is not to allow an appellant to expand on arguments or provide additional specification which he could have presented at the original appeal. Similarly, the heavy criticism of the Supplementary Note prepared by the FTS, and the lack of what is now referred to as missing information being material to determining the fairness of the proceedings was not the subject of comment at the appeal. It therefore cannot provide just cause for a successful application to review. I do not consider it necessary in the interests of justice to do so. I refuse the application to review my decision in relation to ground of appeal 7.

Application to review Ground 8

[21] Ground of appeal 8, in the terms upon which leave to appeal was granted is in the following terms:

"8. The tribunal relied on evidence dated 18 April 2023 which it is alleged was not presented or recorded in the record of the hearing as part of the case. The respondent alleges he was given no chance to respond to that evidence."

[22] As noted above, the appellant submits the Supplementary Note provided by the FTS lacks material information. This relates to the late submission of evidence on day 2. Contrary to the finding of the UTS it is submitted that use of the email correspondence by the FTS materially affected their decision on the issue of withholding rent. The use of this correspondence as evidence by the FTS was unacceptable. One page of the email was read out by Mr. Chesmehdoost and should have been read out by Mr. Malone. The email had not been submitted as evidence with an index, with pagination, which was a basic requirement of the FTS as was stated in the Notice of Direction issued by it in relation to the presentation of evidence. Thirdly, the numbering of this evidence, being C34-C38 were added post hearing. Finally, had the email been presented by the applicant's representative the appellant would have objected to the evidence being submitted late. The appellant would have been expected to have been given time to cross-examine the respondent on all 34 pages of the emails. In allowing this piece of evidence the FTS made a grave error and it was an error which materially affected its decision.

[23] Reference is made to the comments of the FTS in the Supplementary Note to the effect that both parties had sight of the email as evidence. This statement is not accepted as being true. Because the email was not lodged in the form that evidence should be it was simply thought that this was notification to the FTS that the appellant had left the property. As a party litigant it was unfair to him. In the UTS decision the conclusion that the failure of the FTS did not prejudice the appellant in presenting his case in such manner as he wished to do is a conclusion which is disputed. The request for a review disputes the accuracy of the statements made by the FTS at paragraphs 51, 52 and 53 of the Supplementary Note.

[24] The appellant then analyses the basis for finding in fact at paragraph 151 made by the FTS. The comments contained in the decision of the FTS at paragraphs187 and 188 are revisited. There is criticism of my observation at paragraph 39 of the UTS decision to the effect that there is reference in paragraphs 187 and 188 to the email in "general terms". It is submitted that the reference is not general but specific. My conclusion that the email correspondence did not materially affect the assessment of credibility is disputed. According to the appellant the outlined finding in fact and paragraphs in the original FTS decision were major contributing factors to the assessment of credibility made by the FTS.

[25] I have previously commented on the criticisms directed towards the Supplementary Note prepared by the FTS. These were not raised as part of submissions on appeal. In those circumstances the interests of justice test could not possibly be met for the purposes of an application for review. In any event, nothing has been presented of relevance which convinces me that I erred in the conclusions I reached on this ground of appeal. In that respect, if my conclusion is to be challenged that is a matter for onward appeal and not review. The appellant is convinced that the importance of finding in fact at paragraph 151, and the wording of paragraphs 187 and 188, are so adversely affected by the reliance placed on this email correspondence that the whole of the FTS judgement falls to be challenged. That is not a conclusion that can be reached. Indeed whether finding in fact 151 is in any way material to resolution of the dispute between the parties is unlikely. The application to review the decision reached on ground of appeal 8 is refused.

Application to review Ground 1

[26] Ground of appeal 1 is as follows:

"1. It makes findings in fact without a basis in evidence."

[27] It is submitted for the purposes of requesting a review that the FTS failed to make "a good record" of the appellant's submissions on the second day of the hearing. There was only a partial record of the appellant's case. The FTS was asked by the UTS to comment specifically on their record of the appellant's submissions. It confirmed there were many omissions and by contrast the record of the applicant's submission was fulsome and well written. The findings in fact which the appellant sought to correct in his Appeal Document 3 were only corrected in light of evidence that was omitted by the FTS or was otherwise mis-stated. The appellant did not seek to argue on appeal that the UTS should prefer his evidence. The appellant sought to argue that the FTS had not properly recorded the evidence and did not properly consider the evidence in making its decision. It is submitted that at paragraph 26 of my decision I have erred in concluding that the findings in fact which the appellant sought to correct was as based on his evidence which was not accepted by the FTS. The point on appeal was that "it may have been the case that the evidence the appellant presented was not accepted by the FTS because they had not recorded it, or they had misrecorded it".

[28] A further point raised for review is that there was no judgement by the UTS to the effect that the FTS "unwittingly used the personal opinion of the landlord as evidence". The FTS erred in not recognising the difference between the landlord's WhatsApp messages and his personal opinions and this influenced the FTS's judgement of the landlord's credibility.

[29] The conclusion of the UTS, at paragraph 27, that there was a clear evidence base for the FTS to make the findings in fact that it did and that it preferred the evidence of the respondents, is incorrect. Had the FTS preferred the evidence of the respondents for just reasons there would be no objection but the appellant does not believe the FTS acted justly and therefore the ground should be reviewed as the FTS is open to severe criticism.

[30] For review purposes the appellant submits that the FTS had not properly recorded the evidence and did not properly consider the evidence in making its decision. That is not what the appellant argued at appeal. The appellant at appeal relied heavily on Appeal Document 3. In my written decision I gave examples of what the appellant referred to as being the "failures and errors in the record and required corrections based on evidence which are required if a true summary of the case is to be achieved". I am told that for review purposes the point on appeal was that "it may have been the case that the evidence the appellant presented was not accepted by the FTS because they had not recorded it, or they had misrecorded it". I do not understand the point being advanced. In any event, what is now being attempted to be argued for review purposes is not what the ground of appeal was related to, namely that findings in fact were made without a basis in evidence. That point specifically was addressed in my decision.

[31] I am not persuaded that the interests of justice support the UTS reviewing its decision on this ground. The appellant has not persuaded me that the UTS either misunderstood the points raised on appeal or in some way misdirected itself on the points raised under this ground of appeal. I therefore refuse the application to review ground of appeal 1.

Application to review Ground 2

[32] Ground of appeal 2 is as follows:

"2. It omits relevant facts established at the hearing"

[33] It is submitted that the UTS has misunderstood the wording of this ground of appeal. It is submitted that "facts" in the context of the ground of appeal meant matters given in evidence. Such "facts" were omitted from the written record of the hearing. The UTS was wrong to conclude that the FTS recorded the evidence and submissions made by each party (at paragraph 31 of the decision). This is not what happened. The appellant provided examples of facts for appeal purposes and it is stated that the FTS themselves agreed they had omitted facts and that these were material to the case

[34] In its Supplementary Note the FTS confirmed it considered all the evidence before it. Whilst commenting on matters raised at the hearing the FTS said this (paragraph 2):

"We consider that we narrated a fair balance about both parties' positions. We could have written more about both, but we do not consider it necessary to do so to set out the basis for our decision and how we came to it. We understand that we have to record relevant facts and disregard irrelevant factors. We understand that our decision has to be based on evidence."

[35] When commenting specifically on ground of appeal 2 the FTS state in the Supplementary Note (at paragraph 7):

"The appellant considers that not every matter was referred to in the narration of the hearing. He refers in detail throughout his appeal document highlighting where he considers the tribunal omitted relevant facts established at the hearing. If he is correct the tribunal would accept that this would provide him with a ground of appeal….We do not consider that we have omitted relevant facts established at the hearing."

[36] Further in the Supplementary Note the FTS states it did not accept it omitted to consider evidence and that it summarised evidence which it considered to be material (paragraph 19). It provide examples where adding matters raised by the appellant would not have contributed materially to the terms of the decision. The FTS disputes that there were numerous and important errors and omissions in the recording of the evidence.

[37] Looking to the appeal documents prepared by the appellant, and looking at what is said in support of review, the appellant fails to make any clear or decipherable point. Not everything said at an evidential hearing requires to be recorded in a decision. Not everything said, nor all evidence produced, is necessarily relevant. The detailed and almost line by line critique of the original decision of the FTS, which was in large part the basis of presentation of arguments at appeal and is continued in current submissions, does not assist the appellant on review. The contention that the FTS agreed that they had omitted facts and that these were material to the case has no foundation and for review purposes the appellant has failed to convince me that the conclusion of the FTS, and that of the UTS on appeal, is flawed or incorrect in this respect. The interests of justice do not support revisiting this matter on review. The application to review the UTS decision on ground of appeal 2 is refused.

Sheriff Ian Hay Cruickshank

Member of the Upper Tribunal for Scotland