



DECISION NOTICE OF THE HONOURABLE LORD ERICHT

in the case of

PD

Appellant

and

MIDLOTHIAN COUNCIL, 40-46 Buccleugh Street, Dalkeith EH22 1DN  
Per Jonathan Guy, Anderson Strathern

Respondent

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

26 August 2020

**Decision**

**Introduction**

[1] The appellants, who are unrepresented, seek leave to appeal to the Upper Tribunal against a decision of the First-tier Tribunal dated 21 May 2020.

[2] Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 16 June 2020.

## Reasons for appeal

[3] The appellants have applied to the Upper Tribunal for leave to appeal for the following reasons:

“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 10<sup>th</sup> 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 31<sup>st</sup> 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.”

[4] These reasons can be summarised as the following grounds of appeal.

**GROUND 1. Procedural irregularity: proceeding on basis of telephone conference on 4 May 2020 which was not attended by the appellants**

In response the respondent draws attention to the steps taken by the First-tier

Tribunal to ensure a fair hearing and the email by the appellants' supporter sent on

4 May 2020 after the conference confirming that the appellants were happy with the proposed procedure.

In my opinion this ground is not arguable.

The telephone conference was attended by the appellants' supporter. After the telephone conference the supporter emailed the Tribunal stating:

"I am writing on behalf of the child's parents to inform you that they greatly appreciate the opportunity afforded to them by the Legal Member this morning to make a final oral submission to the panel. They would also like to take the opportunity to apologise for being unable to attend the call this morning due to unforeseen circumstances.

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 oral submission."

In these circumstances the Tribunal was entitled to proceed in the way it did.

Permission to appeal on this ground is refused.

**GROUND 2 Failure to take into account material consideration: proceeding without obtaining up to date evidence from Fiona Brown**

In response the respondent submits that Fiona Brown was the respondent's witness and the First-tier Tribunal had regard of the fact that she had not seen the appellant since her first report.

I note that an updated report was in fact obtained from Fiona Brown, dated 27 April 2020. In that report Ms Brown narrates various attempts made by her to meet the family which were declined by the family.

The appellants did not object to the Tribunal considering Ms Brown's updated report of 27 April 2020. They did not make any final submission on that updated report.

In these circumstances this ground is not arguable. Permission to appeal on this ground is refused.

**GROUND 3 Failure to take into account material consideration: not allowing time for appellant to obtain independent psychological report as requested in parental statement**

In response, the respondent submits that as the appellant's position was that she was happy for the First-tier Tribunal to determine the reference without such an assessment taking place, this criticism has no merit.

I note that the supporter's email states:

"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"

As the appellants had confirmed that they were happy to proceed on the evidence they had submitted, they cannot now appeal on the ground that they should have been allowed to submit additional evidence.

This ground is not arguable. Permission to appeal is refused.

**GROUND 4. Error of law as to the matter to be decided by the Tribunal: Tribunal made decision on permanent placement rather than on the short-time assessment sought by the appellant**

In response, the respondent submits that this ground is irrelevant as a temporary placement would not have reduced the costs of attendance.

The matter which was before the Tribunal was a placing request. It was not a request for an assessment. This ground is not arguable and permission to appeal is refused.

**GROUND 5 Discrimination claim**

There was no discrimination claim before the Tribunal. The appellants say that they now have the papers to bring a discrimination claim. A new discrimination claim cannot found a ground of appeal against the decision of the Tribunal.

This ground of appeal is not arguable and permission to appeal is refused.

**Conclusion**

[5] Permission to appeal is refused