Upper Tribunal for Scotland

2024UT25
Ref: UTS/AP/24/0028

DECISION OF

Lady Poole

ON AN APPLICATION TO APPEAL
IN THE CASE OF

TE

Appellant

- and -

City of Edinburgh Council

Respondent

FTS Case Reference: FTS/HEC/AR/23/0088

Representation:
For the appellant – Ms C Minto, Govan Law Centre (in person)
For the respondent – Harper McLeod (by written submissions)

9 May 2024

DECISION

Permission to appeal is REFUSED.

REASONS FOR DECISION

Background

1. The appellant TE submitted a placing request to the respondent, City of Edinburgh Council ("**CEC**"). The placing request was in respect of her child. The child has Autism Spectrum Disorder, a further condition of genetic duplication at 1q2, and a number of

social, emotional and behavioural difficulties. The child is currently educated in a mainstream school. TE wishes her child to be placed in a special school (the "**specified school**"). Her placing request was refused by CEC. CEC relied on three grounds of refusal under schedule 2 to the Education (Additional Support for Learning) (Scotland) Act 2004 (the "**2004 Act**"); paras 3(1)(a)(v), 3(1)(b), and 3(1)(g).

2. TE appealed to the Health and Education Chamber of the First-tier Tribunal for Scotland ("**FTS**"). After a hearing on 29 and 30 January 2024, followed by written submissions, the FTS was satisfied that two of the three grounds of refusal relied on by CEC were made out on the evidence, and that it was appropriate to confirm the decision of CEC.

3. TE applied to the FTS for permission to appeal the decision to the UTS. Permission was refused by the FTS on 21 March 2024. TE applied to the UTS for permission to appeal. An oral hearing of the application was heard before the UTS on 8 May 2024. CEC elected not to be represented in person, but provided written submissions supported by a list of authorities in advance of the hearing. Those written submissions, other written material before the UTS, and the oral submissions on behalf of the appellant at the hearing, have all been taken into account.

Governing law

4. Appeals to the UTS are governed by the Tribunals (Scotland) Act 2014 (the "**2014 Act**")). An appeal to the UTS is restricted to arguable points of law only (section 46 of the 2014 Act). Arguability is not a high threshold. However, for permission to be granted any arguable error of law must have been material to the outcome (*Aberdeenshire Council v SS and DS* [2020] UT 25 para 6).

5. An appeal to the UTS from a decision of the FTS is not a rehearing of the case (*City of Edinburgh Council v K* 2009 SC 625 para 16). The FTS sits as a panel, and panel members have experience relevant to the area covered by the tribunal. The FTS possesses specialist expertise, and has the benefit of hearing directly from witnesses. For these reasons, the jurisdiction of the UTS is limited to points of law. What to make of the evidence, the facts to find on the basis of it, and the outcome on the basis of those facts, are primarily matters for the FTS. A disagreement with the outcome, or the factual findings made by the FTS on the basis of the evidence before it, do not of themselves raise points of law.

Decision

6. The FTS has already provided clear and detailed reasons why it decided to refuse permission to appeal to the UTS on the three grounds of appeal advanced by the appellant. Despite the persuasive submissions made on behalf of the appellant before the

UTS, the reasons for refusal remain substantially as stated by the FTS judge. I deal with the three proposed grounds of appeal in reverse order.

Ground 3

7. It is not arguable that the FTS failed to consider the evidence of the witness known as "witness A". It is appreciated that the appellant relied on this evidence, and it was supportive to her placing request. However, there were a number of sources of evidence before the FTS, which did not all point the same way. The FTS expressly said twice in its decision that it had considered the evidence of witness A at para [26]; and at para [13] referred to support provided by the foundation for whom witness A works. The weight to be given to particular pieces of evidence, and the facts to find on the basis of them, was for the FTS.

8. It is also not arguable that it was an error of law for the FTS not to give reasons expressly explaining what it made of all of the evidence of witness A. Proper and adequate reasons had to be given by the FTS on the "substantial questions in issue" (*Wordie Property Co Ltd v Secretary of State* for Scotland 1984 SLT 345). The substantial questions in issue in this particular case were whether any of the three grounds for refusal of a placing request under schedule 2 of the 2004 Act were made out and it was appropriate to confirm the decision of CEC. The reasons for the decision of the FTS on those matters, when assessed in the context that they are addressed to persons who are familiar with the background and issues (*JC v Midlothian Council* [2012] CSIH 77 paras 29, 31 and 32), were proper and adequate to explain the decision of the FTS. It is not arguable that it was an error of law for the FTS not to explain in any more detail its approach to the evidence of witness A.

Ground 2

9. Further, it is not arguable that the FTS erred in law when it took into account passages in an uninstructed advocacy report before it (paras [45], [47] and [63] of its decision).

10. An advocacy report is made available to the FTS as a way of providing information about the child in question. An "uninstructed" advocacy report is prepared where the child does not have capacity to express views on an application, either by reason of age or disability. An "instructed" advocacy report is when the child does have capacity to express views. It was accepted by the appellant that both are helpful ways for the FTS to have some input on behalf of the child in question. The appellant's objection was that factual observations of the child by the writer of the advocacy report were relied on by the FTS in support of other evidence before it, and the FTS should not have done this.

11. The FTS was entitled to take account of all apparently factual information before it as evidence, including factual observations noted in the report. Indeed it would have been

an error of law for the FTS to fail to have regard to the report. It was then for the FTS then to decide what weight to attach to evidence in the report. If the FTS had not heard directly from the writer of the report, so there had been no opportunity to cross examine, that might have affected the weight it was prepared to attach to the evidence. But weight was ultimately a matter for the FTS in the light of all of the evidence before it. In this case there was no need for the FTS to set out in detail its consideration and findings about weight to be given to parts of the advocacy report. Reasons do not have to address every single issue or piece of evidence before the tribunal individually to be adequate. The substantial questions in issue in this particular case are explained above, and this issue was not one of them.

Ground 1

12. Ground 1 is the ground of most substance, but again it does not raise a material arguable error of law. It is arguable that the FTS ought not to have referred to evidence before it about the effect of certain primary 6 and 7 pupils moving on from the school at a date in the future (para [43]). It is arguable that the FTS made an error of law in doing so, on the basis that that the proper time for assessing whether statutory tests were met was the date on which the hearing proceeded not at some point in the future (*M v Aberdeenshire Council* 2008 SLT (Sh Ct) 126, para [45]).

13. However, that of itself is not sufficient for permission to be granted, because the issue of materiality has to be considered. The rationale for granting permission only on grounds of appeal that may be material to the outcome is the avoidance of time and expense arguing and deciding points that would not alter the ultimate result. (It makes no difference whether judicial decisions which have stated the principle of materiality were applications for permission to appeal, or appeal decisions (in this particular case, *SSHD v Nixon* [2014] UKUT 00368 (IAC) para 10 and *Aberdeenshire Council v SS and DS* [2020] UT 25 (para 6) were cited as authorities); it is a general statement of principle).

14. In this case, CEC only needed to establish one ground of refusal under schedule 2 of the 2004 Act for its decision to be upheld. The criticised passage in the FTS decision appears in its discussion about para 3(1)(b) of schedule 2. But the FTS found in any event that a separate ground, in para 3(1)(g) of the 2004 Act, was made out. That being so, even if the UTS found there was an error in law in relation to the ground in para 3(1)(b), the appeal would still fall to be refused, so the alleged error is immaterial to the outcome.

15. The appellant sought to argue that the finding in para [43] infected the whole of the decision including on other grounds, because it appeared after para [25] where the reasons for the decision started. However, that is not a fair reading of the decision read as a whole, given the careful division of the following reasons so that each potential

ground for refusal was addressed in turn. It is clear that the issue of eight primary 6 and 7 children moving on was considered in relation to para 3(1)(b) and not 3(1)(g).

16. In any event, the offending passage forms only a very small part of the reasoning in relation to para 3(1)(b) of schedule 2 to the 2004 Act. Given the many other factors relied on by the FTS in finding that the para 3(1)(b) ground was made out, set out in para [8] of the refusal of permission by the FTS, even if the matter in para [43] had been left out of account, it is not a reasonable inference that the decision on that ground would have been different.

17. In oral submissions on behalf of the appellant, two further arguments were made in support of permission being granted. First it was argued that in any event the FTS was not entitled to reach the decision it did on para 3(1)(b) of schedule 2 to the 2004 Act. The para 3(1)(b) ground for refusing a placing request applies if the education normally provided at the specified school is not suited to the age, ability or aptitude of the child. The argument was that, given findings that classes in the specified school were based on the needs and abilities of the cohort of all pupils in the school (paras [22] and [23] of the FTS decision), it did not matter that the only 8 children in the specified schools who had similar abilities in communication, letters and counting similar to TE's child (para 43) were in primary 6 and 7 and TE's child was in primary 1. It was submitted that there must be education suited to the education of TE's child in the specified school, on the evidence before the FTS.

18. This argument was essentially a disagreement with the factual conclusion by the FTS on para 3(1)(b), based on a very selective approach to the evidence. But the facts to be found, and reasonable inferences to be drawn from the evidence as a whole, are primarily for the FTS. The issues raised did not properly raise an arguable error of law, given all of the evidence before the tribunal.

19. The other new argument was that even if materiality was not established, permission to appeal should be granted in the public interest. This appeared to be a development of a passage in the respondent's written submissions about the case of *SSHD v Nixon* [2014] UKUT 00368 (IAC) para 5, an immigration case, which states: "where there is no reasonable prospect that any error of law alleged and the grounds of appeal could have made a difference to the outcome, permission to appeal should not normally be granted in the absence of some point of public importance that is otherwise in the public interest to determine".

20. The appellant relied on the public interest in whether the presumption against mainstream education was working in practice. That presumption was intended to create an inclusive environment, but that didn't work if a pupil wasn't actually able to participate because of being doubly incontinent and having limited academic and

communication skills. It was suggested the presumption was too broad because it resulted in children being unable to access special schools when they would be suitable for them.

21. Nothing in these submissions persuaded the UTS to grant permission. First, there was no ground of appeal before the tribunal properly raising this general point about a presumption. Second, the argument in essence seemed to be an alternative way of expressing disagreement with the outcome of the FTS decision, but the facts to find and the outcome based on those facts were matters for the FTS. Third, to the extent the argument sought to raise the issue of how wide a presumption in favour of mainstream education ought to be, what the appellant sought to raise was essentially a matter of policy, not a point of law. Fourth, tribunals exist primarily to determine questions of immediate practical consequence to persons appearing before them. Any discretion to hear appeals even when the point in them is academic or immaterial to the outcome is extremely limited, and exercised with caution. An example of the types of cases where the discretion might be exercised are where a discrete point of statutory construction arises which does not involve detailed consideration of facts, and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future. The present case would not qualify because there was no particular point of statutory construction raised, no information before the UTS of a multiplicity of cases raising the same point of law, and in any event cases about the application of para 3 of schedule 2 of the 2004 Act are highly fact sensitive.

Conclusion

22. As there are no arguable material errors of law in the grounds of appeal, permission is refused.

Lady Poole
9 May 2024