Upper Tribunal for Scotland

2024UT27
Ref: UTS/AP/23/0004

DECISION OF

Lady Carmichael

ON AN APPEAL
IN THE CASE OF

JC
per Govan Law Centre

Appellant

- and -

South Lanarkshire Council
per Themis Advocates

Respondent

FTS Case reference: FTS/HEC/AR/22/0144

14 May 2024

Decision

The Upper Tribunal for Scotland (UTS) finds that the First-tier Tribunal (FTS) erred in law in determining that it did not have jurisdiction. It therefore quashes that decision. The UTS finds as a matter of law that the FTS does have jurisdiction. It therefore remakes the decision and remits the case to the FTS.

Introduction

1. This is an appeal against the decision of the First-tier Tribunal (FTS). The FTS dismissed the reference having decided that it did not have jurisdiction.

2. I adopt the FTS's summary of the undisputed facts. The appellant is the father of L, who was born on 8 August 2010. L has diagnoses of Autism Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder (ADHD), Tourette's Syndrome, Obsessive Compulsive Disorder (OCD) and Bowel and Bladder Dysfunction.

3. L and his father previously lived with their other family members in England. During 2021, the family moved to live in Falkirk. Falkirk Council placed L in school B on 8 December 2021. It is an independent school. L has continued to attend school B since then. L and his family moved to their current address in South Lanarkshire on 27 May 2022. The address is within the respondent's education authority area.

4. The appellant made a placing request to the respondent for L to attend school B. School B was willing to accept the child as a pupil. The respondent refused that placing request.

5. The respondent offered the child a place at school A from 17 August 2022. On 27 June 2022, the appellant (on his behalf and on behalf of his wife) indicated in writing, and with reasons, his refusal of that offer. On 14 August 2022, the appellant wrote to the respondent stating that he was not yet in a position to make a decision on the offer of a place at school A.

6. The appellant visited school A, in order to find out about the potential provision that could be made if L attended there. The appellant attended there with his wife. They met school A staff and viewed the physical facilities in the school. The possible transition arrangements for the child to move from school B to school A were discussed. An educational psychologist and a Quality Improvement Officer, both employed by the respondent, carried out assessments of L's educational needs.

7. The parties engaged in mediation to resolve this dispute. They agreed for L to visit the school on 18 November 2022.

Proceedings in the FTS

8. The appellant brought a reference to the FTS under section 18 of the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act). Parties agreed that there was a preliminary issue as to the jurisdiction of the FTS. The single question addressed by the FTS was whether the respondent was responsible for providing school education to L at the relevant date. Parties and the FTS all approached the matter on the basis that the answer to that question was determinative as to whether the FTS had jurisdiction. They did so because of the terms of section 18(1) of the 2004 Act.

9. There was no dispute that L belonged to the area of the respondent education authority because his parent was ordinarily resident there: section 29(4) of the 2004 Act and section

23(3) of the Education (Scotland) Act 1980. There is, however, a dispute as to whether the respondent is responsible for L's school education. Section 29(3) of the 2004 Act provides:

"… references to a child or young person for whose school education an education authority are responsible are to any child or young person being, or about to be, provided with school education
(a) in a school under the management of the education authority, or
(b) in pursuance of arrangements made or entered into by the authority."

L was not being provided with school education in either of those ways, and discussion before the FTS focussed on whether L was about to be provided with school education in a school under the management of the respondent.

10. The FTS decided that the respondent was not responsible for L's school education and that it did not, therefore, have jurisdiction. The appellant sought permission to appeal from the FTS on the basis that the FTS had misconstrued the expression "about to be" in section 29(3) and certain other grounds. The FTS granted permission to appeal only on the ground relating to misconstruction of "about to be". There was no application to this tribunal for permission to appeal on any other ground.

Statutory provisions

11. Section 18(1) of the 2004 Act provides:

"18(1) Any of the persons specified in subsection (2) may refer to the First-tier Tribunal any decision, failure or information specified in subsection (3) relating to any child or young person for whose school education an education authority are responsible.

One of the persons specified in subsection (2) is the parent of a child to whom a decision relates. Parties agreed in oral submissions to me that the relevant paragraph of subsection (3) is (da), which provides:

"(da) a decision of an education authority refusing a placing request made in respect of a child or young person (including such a decision in respect of a child or young person for whose school education the authority refusing the request are not responsible)—
(i) made under sub-paragraph (1) of paragraph 2 of schedule 2 in relation to a special school, or
(ii) made under sub-paragraph (2) of paragraph 2 of schedule 2 in relation to a school mentioned in paragraph (a) or (b) of that sub-paragraph"

12. Paragraph 2 of schedule 2 provides:

"(1) Where the parent of a child having additional support needs makes a request to an education authority to place the child in the school specified in the request, being a school under their management, it is the duty of the authority, subject to paragraph 3, to place the child accordingly.
(2) Where the parent of a child having additional support needs makes a request to the education authority for the area to which the child belongs to place the child in the school specified in the request, not being a public school but being–
(a) a special school the managers of which are willing to admit the child,
(b) a school in England, Wales or Northern Ireland the managers of which are willing to admit the child and which is a school making provision wholly or mainly for children (or as the case may be young persons) having additional support needs, or
(c) a school at which education is provided in pursuance of arrangements entered into under section 35 of the 2000 Act,
it is the duty of the authority, subject to paragraph 3, to meet the fees and other necessary costs of the child's attendance at the specified school.
[…]
(5) In sub-paragraph (1), the reference to an education authority includes an education authority which are not responsible for the school education of the child.

13. Subsection 18(3)(da) and subparagraph (5) of paragraph 2 of schedule 2 were added by section 1(9)(a) of the Education (Additional Support for Learning) (Scotland) Act 2009.

14. Where the FTS does not have jurisdiction in respect of a reference of a decision refusing a placing request, a parent may refer the decision to an appeal committee set up under section 28D of the Education (Scotland) Act 1980: 2004 Act, Schedule 2, paragraph 5(1) and (2).

Proceedings in the UTS

15. The submissions of the parties at the appeal focused, as might be expected, on the construction of section 18(1). Given the way that matters have developed, there is no need to reproduce those submissions. They did not focus on the terms of section 18(3)(da).

16. Both parties produced three decisions of the Additional Support Needs Tribunal, and the respondent also produced one of the FTS: ASNTS D 10 2012; ASNTS D 11 2012; ASNTS R 16 0015; FTS/HEC/AR/19/056. The last of these simply records the view of the convenor that the appellant was correct to withdraw a reference on the basis that the tribunal did not have jurisdiction.

17. In each of the other three cases, the tribunal grappled with the question of how to read section 18(1), which refers to "any decision, failure or information specified in subsection (3) relating to any child or young person for whose school education an education authority are responsible", along with section 18(3)(da) which refers to "a decision of an education authority refusing a placing request made in respect of a child or young person (including such a decision in respect of a child or young person for whose school education the authority refusing the request are not responsible)". As I have already noted, section 18(3)(da) was added by amendment in 2009. The amendment followed the decision of the Inner House in *WD* v *Glasgow City Council* [2007] CSIH 72 and appears to have been intended to remedy some of the issues identified by the court in that case.

18. ASNTS D 10 2012 related to a situation in which the refusing authority was not responsible for the child's education and no other authority was responsible for the child's education at the time of the reference. The tribunal in that case determined that, standing the amendment to the 2004 Act, it was not bound by the construction of "an education authority" in *WD*. The Inner House had construed it as meaning "the education authority". The tribunal construed it as meaning any education authority in Scotland: paragraph 30. The convenors in both that case and ASNTS D 11 2012 considered a variety of material including the Policy Memorandum and the Explanatory Notes relating to the 2009 Act, in seeking to discern the intention of the Scottish Parliament. ASNTS R 16 0015 followed a concession that the tribunal did not have jurisdiction, but the convenor considered whether the concession was rightly made. The convenor noted that they had hesitated in relation to the matter because they could see no sensible reason for Parliament to provide that some children with additional support needs should have access to the tribunal and others not.

19. The appellant did not submit that any of the provisions added to the 2004 Act by the 2009 Act assisted his position. In the course of the appeal I sought the assistance of both parties' representatives as to how the words in brackets in section 18(3)(da) were to be read along with section 18(1). I asked whether counsel might be able to assist me in relation to that matter having regard to the background to the 2009 Act and the mischiefs that it may have been seeking to counter. Counsel for the respondent said he had not considered that matter and was unable to assist. That is perhaps not surprising given the focus of the argument before the FTS, and the point in respect of which permission had been granted.

20. In attempting to draft a decision on the arguments advanced by parties, I became concerned that the focus that parties jointly placed on the interpretation of the words "about to be" in this appeal and also before the FTS might be misplaced, and that I might have been asked to determine a matter going to the jurisdiction of the FTS on the wrong legal basis. There appeared to be a real question as to how section 18(1) and 18(3)(da) were to be read together, and as to whether it was the intention of Parliament in enacting

the 2009 legislation that refusals of placing requests for children with additional support needs should be referred to the tribunal even where the refusing authority was not the authority responsible for the child's school education. I considered that there was also a real question as to whether in the light of the amendments effected by the 2009 Act the decision of the Inner House in *WD* at paragraph 63 as to the construction of "an education authority" was binding in relation to certain dicta on which the respondent had relied.

21. None of the ASNTS or FTS cases was precisely identical to the present on the facts. In any event none was binding on this tribunal. It appeared that there was no authority binding on this tribunal in relation to the correct construction of the provisions of the 2004 Act as amended. I therefore directed parties to make submissions about the points of construction highlighted above.

22. The respondent very helpfully produced a note indicating that it no longer resisted the appeal. It included the following passage:

    "Having regard to the legislative history, it is clear that the intention of Parliament at the time of the 2009 Act was to provide for an appeal to the Tribunal. Adam Ingram, the Minister in charge of the legislation, on 4 March 2009, having given evidence to the relevant committee (the Education, Lifelong Learning and Culture Committee) on 21 January 2009, said: "As members may know, when giving evidence to the committee, I shared with it three additional amendments that I am minded to explore further. The first would enable all appeals about placing requests for special schools to be heard by the tribunals. "– this was embodied in the amendment that became section 18(3)(da). It seems that there was a failure to appreciate the terms of section 18(1). On 25 March 2024 the Minister proposed the relevant amendments stating "The collective purpose of amendments 1 to 4 is therefore to allow all placing request appeals in respect of a place in a special school to be heard by the tribunal." with that explanation the legislature approved those amendments.

    It is unfortunate that the legislature did not amend section 18(1) of the 2004 Act at the same time but it is clear that the intention of parliament was to bestow jurisdiction in this category of case on the Tribunal."

23. The appellant submitted section 18(1) and section 18(3)(da) imposed different tests. The former would apply where the education authority was responsible for the school education of the child, and the latter when it was not. If there were a factual determination that L was about to be educated by the respondent, then the tribunal would have jurisdiction by virtue of section 18(1). If there were a factual determination that he was not, then the tribunal would have jurisdiction by virtue of section 18(3)(da). The provisions could be read together in that way.

24. I do not accept that there are two "tests", as proposed by the appellant. That involves unnecessary complication. The result of the analysis proposed by the appellant is that, one way or another, the tribunal would have jurisdiction. That would render otiose the consideration of whether the child was, on the facts, about to be educated by the authority.

25. As I have indicated, the respondent now concedes that the FTS has jurisdiction in this matter. I am satisfied that the respondent is correct to do so, for the following reasons.

26. Read alone, section 18(3)(da) clearly indicates a legislative intention that the FTS should have jurisdiction in relation to references in respect of requests to place a child in a special school, including cases in which the requested education authority was not responsible for the school education of the child. The amendment of section 18 by the insertion of section 18(3)(da), however, produced ambiguity because of the terms of section 18(1), which were not changed or qualified in the course of the amendment.

27. The circumstances in which it is legitimate to have regard to extra-statutory materials include circumstances where the statute is ambiguous: *Pepper (Inspector of Taxes)* v *Hart* [1993] AC 593. The ministerial statements produced by the respondent were made by the promoter of the legislation, and are entirely clear in their terms. They may properly be used to assist in construing section 18. They are consistent with the plain words of section 18(3)(da), and strongly suggest that the lack of amendment or qualification to section 18(1) arose as a result of oversight. The words "for whose school education an education authority are responsible" in section 18(1) therefore fall to be disregarded in determining whether the tribunal has jurisdiction in the present case.

28. Having reached that conclusion, it is unnecessary to express a view on the arguments advanced by parties as to the construction of the phrase "about to be". I note, however, that part of the appellant's submission was that the statute should be construed so as to avoid incompatibility with L's rights under A2P1 read with A14 ECHR: section 3 of the Human Rights Act 1998. He argued that the construction at which the FTS had arrived gave rise to an apparently unjustified difference of treatment between different categories of children seeking places in special schools so far as access to the FTS was concerned, which was a matter falling within the ambit of A2P1. Without reaching any conclusion on the merits of that submission, I note that the construction which I have found to be correct appears to eliminate the difference of treatment on which he sought to found.

29. I therefore find that the FTS has jurisdiction in this reference. In terms of section 47 of the Tribunals (Scotland) Act 2014 I therefore quash the decision of the FTS and re-make it, and remit the reference to the FTS.

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*

Lady Carmichael
Member of the Upper Tribunal for Scotland