IN THE UPPER TRIBUNAL **Upper Tribunal case No.** HS/2931/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Appellant: Ms D

Respondent: Essex County Council

DECISION

Under section 12 of the Tribunals, Courts and Enforcement Act 2007, I decide that the decision of the First-tier Tribunal of 4 October 2017 not to admit Ms D's late application notice involved errors on points of law. The decision is set aside.

Acting under section 12(2) of the 2007 Act, I re-make the First-tier Tribunal's decision. Under rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, I extend time and admit to the First-tier Tribunal Ms D's late application notice.

I direct as follows:

(1) the First-tier Tribunal is to be notified forthwith that Ms D's application notice has been admitted; and
(2) the appeal papers are to be placed before a salaried judge of the Health, Education and Social Care Chamber of the First-tier Tribunal to consider the need for case management directions for the determination of Ms D's appeal against the EHC Plan decision of Essex County Council.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 I hereby make an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the child with whom this appeal is concerned. This order does not apply to (a) the child's parents, (b) any person to whom a parent discloses such a matter in the proper exercise of parental responsibility, (c) any person exercising statutory (including judicial) functions in relation to the child with whom these proceedings are concerned.

REASONS FOR DECISION

Summary

1. In England, special educational needs proceedings are begun by an individual sending or delivering an application notice to the First-tier Tribunal. A time limit applies.

2. Rule 20(2) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 requires an application notice to include specified matters. If a purported application notice fails to comply with those requirements, is it an application notice? This is an important practical question. If a purported application notice is invalid, by the time an individual has prepared a valid notice s/he may be out of time for appealing to the First-tier Tribunal.

3. I decide that a failure to comply with the requirements of rule 20(2) does not render a purported application notice invalid. If a notice is valid, the First-tier Tribunal is required to admit the application notice and register the appeal to which it relates. However, there may be some purported application notices that are so defectively drafted, or lacking in specifics, that they cannot properly be construed as disclosing an intention to start proceedings. In such cases, there is no application notice as a matter of law.

Background

4. The sequence of relevant events before the First-tier Tribunal was as follows:

- 25 April 17: local authority issue Education, Health and Care (EHC) Plan for Ms D's son;
- 15 May 2017: Ms D informed she is eligible for 'Legal Help';
- 25 May 2017: pre-appeal mediation certificate issued;
- 22 June 2017: Ms D's then solicitors (Simpson Millar) inform her by email that she is ineligible for legal help due to her capital. The email added "if you do not have time to write your reasons for appeal you can fill in the boxes by stating that the reasons for appeal will follow. The tribunal will still lodge your appeal on this basis"
- 25 June 2017 – Ms D emails to the Tribunal "attached paperwork to lodge an appeal". She stated that, because she had only just found out she was ineligible

for legal assistance, "my reasons for appeal will be to follow". The 'attached paperwork' included the standard form for making an EHC Plan appeal (an application notice). The form, as completed, did not indicate the type of decision being challenged (there are a series of tick boxes for this) but she did name her preferred school for her son. No reasons for appealing were given;

- There is nothing, within the papers supplied to the Upper Tribunal by the First-tier Tribunal, to indicate that the First-tier Tribunal informed Ms D that her June 2017 application notice had not been admitted;
- 16 August 2017 – Ms D emails to the First-tier Tribunal "attached paperwork required to lodge an appeal". Her 'reasons for appeal' were lengthy, extending over 8 typed A4 pages;
- 21 August 2017 – Ms D emails the Tribunal stating that she was not informed of her ineligibility for legal aid until two days before the appeal deadline. At that point, her solicitors told her they could no longer represent her but "I was reassured that you could send reasons for the appeal after I had sent the forms to yourselves";
- 31 August 2017 – the Tribunal emails Ms D informing her "we cannot register your appeal as you did not provide key appeal documentation" and inviting her to provide further reasons for the delay in bringing her appeal and suggesting that she "provide something in writing from the solicitor to explain the delay";
- 11 September 2017 - Simpson Millar Solicitors write directly to the Tribunal. They confirm Ms D's account of her legal aid difficulties, include copies of emails sent to her in June 2017 and assert "we advised Ms D that she should submit an appeal form before the deadline and that due to limited time she could ask Tribunal's permission to file the reasons after the deadline". That is not entirely consistent with the June 2017 emails. As mentioned above, on 22 June 2017 the solicitors emailed Ms D stating "if you do not have time to write your reasons for appeal you can fill in the boxes by stating that the reasons for appeal will follow. The tribunal will still lodge your case on this basis". That email did not advise Ms D to apply for permission to 'file the reasons after the deadline'.

5. On 4 October 2017, a Deputy President of the First-tier Tribunal's Health, Education and Social Care Chamber refused to admit Ms D's application notice, finding: a notice of appeal was not received until 16 August 2017 but should have been received by 25 June 2017 (one month after issue of the mediation certificate); Ms D's reasons for delay were not persuasive because they did not explain the lengthy period of delay; and significant prejudice would be caused to the local authority were the appeal admitted. The Tribunal

also took into account that Ms D would have a new right of appeal in the event that she was dissatisfied with the contents of her son's EHC Plan after its next statutory review. The planned review date was not identified.

Legal Framework

6. Below, "the Rules" means the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008.

7. The overriding objective of the Rules is to "enable the Tribunal to deal with cases fairly and justly" (rule 2(1)). Dealing with a case fairly and justly includes "(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties…(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings…and (e) avoiding delay, so far as compatible with proper consideration of the issues" (rule 2(2)).

8. Rule 2(3) requires the Tribunal to seek to give effect to the overriding objective when it exercises any power under the Rules or interprets any rule or practice direction (rule 2(3)). Parties are required to help the Tribunal further the overriding objective and co-operate with the Tribunal generally (rule 2(4)).

9. Rule 5(3) provides the Tribunal with specific powers to:

> "(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment containing a time limit; [and]
>
> …(c) permit or require a party to amend a document…".

10. Rule 6(1) permits the Tribunal to give a direction on its own initiative or on application.

11. Rule 7(1) provides that "an irregularity arising from a failure to comply with any requirement in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings". Where a party has failed to comply with a requirement mentioned in rule 7(1), the Tribunal may take such action as it considers just, which may include "(a) waiving the requirement; [or] (b) requiring the failure to be remedied…".

12. In most special educational needs cases, including this one, an applicant "must start proceedings" by sending or delivering an application notice to the Tribunal so that it is received within 2 months of the date written notice of the decision under challenge was sent to the applicant or, if later, one month of the date of issue of a mediation certificate (rule 20(1)(c)).

13. Rule 20(2) sets out what an application notice must contain including the grounds relied on and the result the applicant is seeking. Rule 20(4) provides that, if an application notice is provided later than the time required by rule 20(1), it must include a request for an extension of time and reasons for lateness. Unless the Tribunal extends time under rule 5(3)(a), it must not admit a late application notice.

The grounds of appeal

14. I granted Ms D permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision on the following grounds:

(1) Arguably, the First-tier Tribunal erred in law by finding that Ms D had not supplied a notice of application/appeal within the primary deadline for appealing. She did supply the standard application form but it was incomplete. Arguably, this did not mean Ms D's application was ineffective;

(2) Arguably, in the light of the overriding objective the Tribunal should have either construed the email that accompanied Ms D's 'application' as a request for a rule 5(3)(c) direction extending time for supplying an application notice or considered making a rule 5(3)(c) direction of its own initiative;

(3) Even if the notice of application was ineffective, arguably the First-tier Tribunal erred in law by failing to apply the overriding objective in deciding whether to extend time;

(4) Arguably the First-tier Tribunal erred in law by failing to take into account relevant considerations in deciding whether to extend time namely:

(i) Ms D's solicitor had advised her that she could submit an incomplete application, provide her grounds of appeal subsequently and the Tribunal "will still lodge your appeal on this basis";

(ii) There is no evidence to suggest that, between the end of June 2017 and the end of August 2017, the Tribunal informed Ms D that her June 2017 'application' was considered ineffective;

(iii) Ms D's August 2017 reasons were far more extensive than the draft reasons provided by the solicitors in June 2017.

The arguments

15. The respondent local authority's stance is not partisan. I am grateful for their co-operative approach.

16. The local authority support Ms D's appeal. They say Ms D arguably made her appeal in time, albeit it was by way of an incomplete application notice. What the Tribunal should have done was impose a timely requirement on Ms D to perfect her application rather than remain inactive until Ms D herself sought to complete her application. Further, argue the local authority, there were obvious mitigating factors that the Tribunal should have taken into account when deciding how to deal with Ms D's appeal in August 2017. The Tribunal determined that the authority would suffer significant prejudice if Ms D's appeal proceeded. However, the authority themselves submit that they will only be "slightly prejudiced" and argue Ms D's appeal should be registered. The authority submit that the Upper Tribunal should allow Ms D's appeal and, rather than remitting to the First-tier Tribunal, itself "register the Appellant's appeal out of time".

17. Ms D informed the Upper Tribunal in February 2018 that she had not received a copy of the local authority's response to her appeal. The written response was re-sent following which Ms D confirmed she agreed with the local authority's written submissions.

Conclusions

Operation of the rules about bringing appeals

18. Rule 20(1) requires a person to "start proceedings" by sending or delivering an application notice to the Tribunal, within the time limit. The required contents of an application notice are set out in rule 20(2). The question is this. If a document fails to comply with the requirements of rule 20(2) does this mean it is not an application notice at all or is it a valid but incomplete application notice? If not an application notice at all, the person has not 'started proceedings' and there is nothing for the Tribunal to admit.

19. In my determination, a document that fails to comply with rule 20(2) may nevertheless constitute an application notice. I arrive at that conclusion for a number of reasons:

(a) rule 20(2) is not framed as a definition clause. It does not say something like – 'an application notice means a document which complies with the requirements of rule 20(2)'. Had the legislative intention been to discount any document that failed to satisfy rule 20(2), one would expect to see a definition of application notice that incorporated the requirements found in rule 20(2);

(b) rule 20(2) imposes requirements. Therefore rule 7(1) applies to an application notice that does not comply with the requirements of rule 20(2). Rule 7(1) provides that "an irregularity resulting from a failure to comply with any requirement in these Rules…does not of itself render void the proceedings or any step taken in the proceedings". This is a further indication that a document that fails to comply with rule 20(2) was not intended to be viewed as invalid;

(c) to disregard any document that failed to comply with each requirement of rule 20(2) would be contrary to the spirit of the rules, as given expression in the overriding objective. Take, for example, the case of a document that fully complies with rule 20(2) in all respects save one. A person, for example, forgets to sign the document or gets the respondent's address wrong. If non-compliance with rule 20(2) rendered a purported application notice invalid then, assuming that in the meantime the time limit had expired, the individual will be faced with the presumption against admission of a late application notice set out in rule 20(4);

(d) the First-tier Tribunal has ample case management powers to deal with defective application notices, including strike-out powers. The above interpretation of rule 20 does not herald an era in which the Tribunal becomes bogged down trying to deal with defectively made appeals.

20. This is not to say that any document that purports to be an application notice must be taken as such. Under rule 20(1), the purpose of the application notice is to "start proceedings". If a document cannot realistically be viewed as disclosing an intention to start proceedings, the Tribunal may justifiably conclude that it is not an application notice at all. A case of this type might include a document that is so incoherently drafted or so lacking in specifics that it cannot properly be construed as disclosing an intention to start proceedings.

Why the First-tier Tribunal erred in law

21. The First-tier Tribunal did not make an error on a point of law by determining that the document Ms D supplied on 25 June 2017 was not an application notice. That document neither indicated the decision that Ms D wished to challenge nor did it give any reasons for appealing. It simply identified the school that Ms D wanted named in her son's EHC Plan. In my determination, the 25 June 2017 could not properly have been construed as disclosing an intention to start proceedings. It provided no clue at all as to the matter in dispute.

22. However, the First-tier Tribunal's subsequent refusal to extend time and admit Ms D's application notice involved errors on points of law.

23. The Tribunal did not take into account relevant considerations in determining Ms D's application for an extension of time. The Tribunal's reasons for refusing to admit Ms D's application notice included that she had failed convincingly to explain why the application notice was provided late. However, the only direct documentary evidence from Simpson Millar Solicitors showed that, in June 2017, they advised her that "if you do not have time to write your reasons for appeal you can fill in the boxes by stating that the reasons for appeal will follow. The tribunal will still lodge your appeal on this basis". This feature of the evidence was not dealt with. A further consideration which in my determination should have been taken into account was that, after the Tribunal received Ms D's invalid 'application notice' in June 2017, it did not inform her that the notice was not admitted (or, at least, the Tribunal papers contain no record of Ms D having being informed).

24. I also decide that the Tribunal gave inadequate reasons for its decision. I remind myself that the standard of reasoning required for determinations of the sort with which these proceedings are concerned is not as high as that required for a final decision on an appeal. Nevertheless, I decide that the Tribunal's reasons were inadequate. The Tribunal relied on a finding that admitting the application notice would cause the local authority "significant prejudice". The Tribunal gave no reason why and, as has transpired during the present proceedings, the local authority themselves disclaim such prejudice.

Disposal of the appeal

25. I set aside the First-tier Tribunal's decision. Rather than remit this matter the First-tier Tribunal for re-determination, I take the course suggested by both parties. I re-make the Tribunal's decision. For the purposes of rule 20(4) of the First-tier Tribunal's Rules, I extend time under rule 5(3)(a) and admit to the First-tier Tribunal Ms D's application notice.

26. In exercising the rule 5(3)(a) power, I am required to seek to give effect to the overriding objective (rule 2(4)). I decide it is fair and just to extend time. In so doing, I rely on the following matters:

(a) the delay was partly due to Ms D having relied in good faith on legal advice;

(b) the delay was partly due to the First-tier Tribunal's failure to inform Ms D that the June 2017 'application notice' had not been admitted;

(c) the application notice supplied in August 2017 is in my view a carefully and sensibly drafted document;

(d) the local authority accept that admitting the application notice will cause them little prejudice.

27. I place no weight on the possibility that Ms D may, at some point in the future, attain a fresh right of appeal following a statutory review of her son's EHC Plan. While I do not discount this as a potentially relevant factor in some cases, care must be taken not to set off down a slippery slope. If too much weight is placed on the prospect of a fresh right of appeal linked to a future statutory review, very few late applications would be admitted. There will nearly always be a statutory review on the horizon, given the way in which the Education Act 1996, Children and Families Act 2014 and relevant secondary legislation provide for regular reviews of statements of SEN and EHC Plans.

(Signed on the Original)

E Mitchell

Judge of the Upper Tribunal

18 April 2018