



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. JR/987/2020

Between:

TN

Applicant

- v -

First-tier Tribunal (HESC Chamber)

Respondent

East Sussex County Council

Interested Party

Before: Upper Tribunal Judge Ward

Decision date: 19 April 2021
Decided on consideration of the papers

Representation:

Applicant: JN, his mother
Interested Party: Ms S Sternhardt, counsel, instructed by Ms M Goodchild,
Legal Officer

The Respondent took no part in the proceedings.

DECISION

The decision of the Upper Tribunal is to dismiss the application for judicial review. Though the decision challenged involved a legal error, the applicant had an alternative remedy which is more suitable than judicial review in the circumstances of this case.

REASONS FOR DECISION

1. The decision challenged was the decision dated 26 February 2020 by Judge McCarthy of the First-tier Tribunal (“FtT”) to refuse an application under r.48 of the rules of the HESC Chamber for review of its decision on the ground of a change of circumstances.

2. The FtT’s original decision, dated 6 January 2020, had named a particular college (“the college”). It had been agreed at the FtT hearing that this would be for the applicant to do a one-year Level 2 course in Art, Fashion and Design (“AFD”) and a substantial volume of the evidence before the FtT was predicated on this being the course that he would attend. By 13 January, however, the college was already indicating that what it could offer was a course on a different selection of topics, and at a different level. No explanation was given of why the AFD course was apparently no longer available.

3. The applicant's mother's ensuing application to the FtT was treated as being both for permission to appeal and for a review for change of circumstances. As regards the latter, the judge said:

“[The applicant] argues that the change of course is such a change of circumstance. I disagree because the course was not included in the decision other than to record what the parties believed would happen. It did not form part of the special educational provision and therefore would not have impacted on the panel's decision. Although the appeal proceeded on the basis that [the applicant] would follow a particular course, that course is not named in his EHC plan and is not part of the special educational provision to be made. As a result, the allegation that the change of course is a change of circumstance that would have affected the decision is not sustained.”

5. The applicant's mother sought to challenge both the substantive decision and the refusal of a review for change of circumstances by way of an application to the Upper Tribunal for permission to appeal. The Upper Tribunal consistently sees a few attempts to challenge a refusal to review by way of an application for permission to appeal. That is incorrect. Section 11(5)(d) of the Tribunals, Courts and Enforcement Act 2007 says that “a decision of the First-tier Tribunal under section 9 [as ultimately a decision under r.48 is] not to review an earlier decision of the tribunal” is an “excluded decision”. Under s.11(1) it is not possible to appeal against an “excluded decision”. That is why a challenge to such a decision has to be brought by way of an application for judicial review. Such applications are to be made to the Upper Tribunal, by reason of the relevant Practice Direction by the Lord Chief Justice.

6. The applicant's mother is not a lawyer and I intend no criticism of her for starting by what was the wrong legal route. Because of a misunderstanding on her part it did then take a while to get things on to the proper footing. It is not necessary to set out the details here.

7. The case, which it may fairly be said has not run smoothly, was then subject to an administrative error in the Upper Tribunal, which meant that the interested party's Acknowledgment of Service and Grounds of Opposition filed on 21 August 2020 were not referred to me or placed on the file. Consequently, I gave permission on 13 October 2020 without sight of them. If I had had timely sight of them, it is entirely possible that I would have refused permission to bring proceedings at that point.

8. I gave directions seeking to sort out what had gone wrong and directing further submissions on the judicial review application. In the event, no party has filed any. Nor have they, despite an invitation to do so, provided any update on the annual review process.

9. In the Grounds of Opposition, Ms Steinhardt refers to *R(EL and JB) v FtT and Surrey CC* [2020] UKUT 4(AAC) where Upper Tribunal Judge Jacobs suggests at [3] that rules 48 and 49 “can only be read sensibly together by treating the requirement for a change of circumstances relevant to the decision as a threshold condition that must be satisfied before a review can be undertaken.” She accepts that Judge McCarthy “may have” set the bar too high in asking himself whether the unavailability of the course “would have affected the decision”. However, she submits, even if there

was a misdirection as to the threshold condition, it would have been reasonably open to the judge to conclude that the change of circumstances was not of sufficient importance to justify a review.

10. In any event, she submits that because of Covid-19 provision for courses in general is in a state of flux, so there may well be other changes needing to be catered for besides the unavailability of the course which the FtT envisaged the applicant would attend and that (perhaps inconsistently with the submission in the previous paragraph) the non-availability of the chosen course would appear to throw open a critical aspect of the decision, with the consequence that an FtT would effectively have to restart the appeal from scratch. In those circumstances, the matter would be better progressed via the statutory review process and the interested party was prepared to undertake to carry out such a review in September 2020. The applicant thus had an alternative, more proportionate and more advantageous remedy and on that footing relief should in any event be refused.

11. Since then, as indicated, nothing has been heard from the parties. In particular, there has been no disagreement by the applicant's mother with the points made by Ms Steinhardt.

12. There is relatively little remaining to be said. Rule 48(2) indicates that "a party may make a written application to the tribunal for a review of a decision if circumstances relevant to the decision have changed since the decision was made." As the applicant's attendance at the college was predicated on his following a particular course, that in my view was a "circumstance relevant to the decision". I consider that Ms Steinhardt's cautiously expressed concession that the judge may have set the bar too high in relation to the threshold condition in applying a test of whether the changed circumstances would have affected the decision is correct and that he was in error in that regard. Nor do I regard it as fatal that the course itself was not named in the EHC plan and thus was not part of the special educational provision to be made. That, of itself, is not the test under r.48.

13. I have not received full submissions on it and do not need formally to rule on it but I am very doubtful that even if the threshold condition were to have correctly been treated as met, it would, as Ms Steinhardt submits, have been open to the judge to refuse to review. The applicant has autism. Previous placements for him had broken down and the AFD course was proposed, with a very gentle induction process, as something he might be able to undertake, a view the applicant himself shared following a visit to the college. The proposal for the AFD course had been arrived at with the input of relevant professionals and based on information provided by the college's learning manager in oral evidence.

14. I do however accept (as judicial review is a remedy of last resort) Ms Steinhardt's submission that the statutory annual review process offered a suitable alternative remedy for the reasons she gives and that relief should be refused in this case.

C.G.Ward

Judge of the Upper Tribunal

Authorised for issue on 19 April 2021