Upper Tribunal for Scotland

[2020] UT 25
UTS/AP/19/0052

DECISION NOTICE OF LADY CARMICHAEL

ON AN APPLICATION FOR PERMISSION TO APPEAL
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)

in the case of

ABERDEENSHIRE COUNCIL, Woodhill House, Westburn Road, Aberdeen, AB16 5GB per Aberdeenshire Council Legal & Governance, Woodhill House, Westburn Road, Aberdeen, AB16 5GB

Appellant

and

SS, DS, c/o Iain Nisbet, Cairn Legal 1st Floor, Regent House 113 West Regent Street, Glasgow, G2 2RU

Respondents

FTT Case Reference FTS/HEC/AR/18/0071

26 March 2020

Decision

I refused permission to appeal at a hearing on 16 March 2020. The appellant has now requested written reasons for that decision in terms of Rule 29(3) of the Upper Tribunal for Scotland Rules of Procedure 2016, and these are provided below.

Introduction

[1] By its decision of 31 October 2019 the FTT overturned the decision of the appellant to refuse the respondents' placing request. It required the appellant to place the child in school B.

[2] On 26 and 29 April 2019 the FTT had conducted a case conference call. The appellant sought to amend its response during that case conference call. The new ground it sought to add was in terms of section 3(1)(a)(iii) of the Education (Additional Support for Learning) (Scotland) Act 2004 as amended ("the 2004 Act"), namely that to grant the placing request would be seriously detrimental to the continuity of the child's education.

[3] The FTT considered the request in terms of Rule 19(5) of the First-tier Tribunal for Scotland Health and Education Chamber (Procedure) Regulations 2017 ("the FTT Procedure Rules"). That allows amendment of a response in exceptional circumstances and if permission is given by the legal member. Having heard the submissions for the appellant and objections, the FTT refused the request. The FTT took the view that the information that the appellant sought to rely upon would have been available to them when first drafting their response and the fact that Ms. Wheatley, (a solicitor who had recently come into the reference) might have identified something that the appellant had previously failed to identify was not an "exceptional circumstance".

[4] The FTT expressed the view that the appellant would not be precluded from leading evidence regarding the matter it had identified, as it would be potentially relevant to the question in section 19(4A)(a)(ii) of the Act, namely, whether it is reasonable "in all of the circumstances" for the tribunal to uphold or overturn their refusal of the placing request.

[5] The appellant now seeks permission to appeal in relation both to the decision to refuse to allow amendment, and in relation to the outcome of the reference.

[6] Parties were at one in submitting that I required to determine whether the grounds of appeal disclosed an arguable material error of law on the part of the FTT: Secretary of State for the Home Department v Nixon [2014] UKUT 00368 (IAC), paragraph 5.

Grounds of appeal

[7] Ms Cartwright, advocate, who appeared for the appellant at the hearing on permission to appeal, indicated that she did not insist in the third ground of appeal.

[8] The remaining grounds of appeal are in the following terms:

> (i) The First Tier Tribunal refused to allow the respondent to amend its case to include the exception in paragraph 3(1)(a)(iii) of schedule 2 of the Education (Additional Support for Learning) (Scotland) Act 2004 as amended (the 2004 Act) yet at the same held that evidence in support of the ground in relation to which permission to amend was sought could be lead in terms of section 19(4A)(a)(ii) of the 2004 Act. Section 19(4A)(a)(ii) of the 2004 Act should not have been considered in the current case as the Tribunal found that the respondent was unable to satisfy section 19(4A)(a)(i) of the 2004 Act. As a consequence of the error in refusing to permit the respondent to amend its case yet allowing evidence to be led in respect of the basis of the proposed amendment under a subsection of the 2004 Act that should not have been considered it was not possible for sufficient evidence to be adduced in relation to establishing whether the grant of the placing request would be seriously detrimental to the continuity of the child's education. In any event, section 19(4A)(a)(ii) not applying, there was no legal basis under which evidence anent whether the grant of the placing request would be seriously detrimental to the continuity of the child's education could be adduced. The decision of the Tribunal dated 31 October 2019 is silent on the ruling of 29 April 2019 of the first Tribunal to refuse the Minute of Amendment and clearly considers the evidence anent that amendment in its decision. The review Tribunal considers the evidence anent the child's transition to School B in the context of the overall suitability of School B.
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> (ii) The First Tier Tribunal has made an error in its interpretation of paragraph 3(1)(f)(ii) of Schedule 2 of the 2004 Act by exclusion from reasoning of actual education provision made. The First Tier Tribunal's decision is not supported by adequate findings in fact. In paragraph 13 of the decision dated 31 October 2019, the Tribunal determines that as a matter of law it is going to consider the provision made for the child's education at only School A, thereby excluding provision made as a matter of fact at School B. The Tribunal however does not make a finding as to what the provision for the child's education would be were he not placed at School B one day a week and further does not make a finding that the respondent is unable to make provision for the child's education without a placement at School B. As a

consequence the decision proceeds on an erroneous apprehension of the relevant facts. The Tribunal has not considered the facts at the date of the hearing as it excludes the actual educational provision that is being made for the child at School B and makes no allowance for that in its reasoning. The Tribunal does not consider the circumstances in which the placement at School B is provided, that is, as an enhancement of the child's education and in terms of the Respondent's broader duties to the child and therefore the Tribunal errs by excluding from its consideration evidence anent the totality of the child's education based on its analysis of the law. Accordingly, the Tribunal errs in law in stating that the purpose of the words "other than the specified school" is to force the Tribunal to isolate the provision in any school that is not the specified school.

(iv) The Tribunal has made an error in law in its analysis of paragraph 3(1)(f)(iii). In relation to paragraph 3(1)(f)(iii), if the decision in relation to School A in terms of paragraph 3(1)(f)(ii) is erroneous it follows that the reasoning anent the suitability of Schools A and B is flawed as it is based on the fact that "school A is not a suitable school for the provision of the child's ASN". On that basis the comparison to School B and all it offers is irrelevant as the Tribunal has found School A is not suitable. Similarly in relation to the cost being not unreasonable the analysis thereto is predicated on School A not being a suitable school to meet the child's needs and is therefore flawed.

Decision

[9] The following paragraphs are an almost verbatim reproduction of the reasons given orally on 16 March 2020.

Ground (i)

[10] The first ground of appeal relates to the refusal of a request to amend the local authority's response. The FTT identified the correct test, namely that set out in rule 19(5) of the FTT Procedure Rules, which provides that in exceptional circumstances the authority may amend the response if permission is given by a legal member or the First-tier Tribunal at a hearing.

[11] It is not arguable that the FTT erred in law in applying that test. The information apparently before the FTT judge was that Ms Wheatley, who had recently come to be

dealing with the case, may have identified something that the authority had previously not identified. I was told today that "the evidence itself" was the exceptional circumstance. It had emerged when Ms Wheatley was taking a statements from a psychologist. When I asked counsel what the evidence was, she said that it was evidence that the child had issues with transitions.

[12] I was told, also, that the response had been lodged by legally qualified local authority staff. The case statement for the parents itself identified that the child had difficulty with change. That statement forms part of the joint minute of agreement that was before the FTT. Difficulty with change is a very frequent feature of the presentation of a child who has an autistic spectrum disorder, as the FTT, an expert tribunal, would have been well aware.

[13] Against that background there is no basis for saying that the FTT erred in law in failing to find that the test of exceptional circumstances had been satisfied.

[14] Separately, I have considered whether, if FTT did err in applying that test, any error is material. It is plain that evidence about transitions was before the FTT which came to conduct the hearing on the reference. The FTT considered that evidence at paragraphs 133-138. It was not considering whether it would be seriously detrimental to the continuity of the child's education, given that the amendment was not allowed. I understood Ms Cartwright to submit that the evidence was led "without legal basis", although some of the evidence on the point appears to have been led by the appellant. It was a matter for the appellant to decide whether to evidence about what it said was the child's difficulty with transitions. It did so, presumably on the basis that it considered that that evidence was potentially relevant to one or more of the statutory tests that the FTT would, or (in the case of section 19(4A)(a)(ii)) might, have to consider.

[15] Ms Cartwright submitted that the FTT had considered section 19(4A)(a)(ii) in this connection, and should not have done so, as the authority was unable to satisfy section 19(4A)(i). The FTT had not been entitled to consider the evidence in the context of appropriateness (or lack of it) in all the circumstances. The FTT did not actually consider this evidence in relation to appropriateness in all the circumstances, but in relation to the suitability of school B. Mr Nisbet had sought to persuade them that they ought to look at transition only in the context of appropriateness in all the circumstances, but they did not accept his submission to that effect: paragraph 133. It is clear that the FTT considered transition, and regarded it as a matter relevant to whether school B was or was not suitable. Given its conclusions about this, which are on their face made on the basis of cogent reasoning, it is not arguable that the result would have been different had they been considering the serious detriment to continuity test.

Ground (ii)

[16] The appellant raises an arguable point of statutory construction, which is a point of law. For the reasons that follow, it does not raise an arguable, material point of law. In this case the child was receiving some provision at school B, and the appellant's argument is that that provision ought not to have been excluded from consideration when the FTT came to consider the ability of the authority to make provision for the additional support needs of the child in a school (whether or not a school under their management) other than the specified school under paragraph 3(1)(f)(ii) of Schedule 2 to the 2004 Act.

[17] The FTT excluded consideration of the provision at school B. They went on, however, explicitly to state (at paragraphs 16 and 93) that their decision would not have

been different had they adopted the statutory construction for which the authority contends. They wrote:

> "… given the nature and extent of the lack of provision for the child's needs at school A and the gap in respective suitability between schools A and B … our conclusion on the reference would have been the same."

[18] The tribunal undertook a thorough and detailed analysis in relation to both schools, under a number of different headings. Reading those provides the context for the FTT's evaluation regarding the nature and extent of the lack of provision at school A and the gap in respective suitability, and, therefore, for the conclusion that an alternative statutory construction would have led to the same outcome. The FTT gave sufficient reasons for its conclusion that the outcome of the reference would not have differed had it adopted the statutory construction promoted by the appellant.

[19] This ground of appeal does not disclose an arguable, material, error of law.

Ground (iv)

[20] This ground relates to the FTT's consideration of paragraph 3(1)(f)(iii). It is to the effect that the decision is vitiated by the purported error already referred to in the construction of para 3(1)(f)(ii). The respective suitability of each school could not have been properly considered in the light of that error. Again, and for similar reasons to those I have given in relation to ground (ii), this ground does not raise an arguable, material error of law.

[21] I observe, further, that the appellant would have had to satisfy the FTT in relation to all four subparagraphs of paragraph 3(1)(f). Subparagraphs (i) and (iv) were not in dispute. In the context of this application, so far as grounds of appeal (ii) and (iv) are concerned, the authority would have to have demonstrated arguable material error of law in relation to both in order to succeed in this application.