



DECISION OF

SHERIFF GEORGE JAMIESON

**ON AN APPLICATION FOR PERMISSION TO APPEAL
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND LOCAL TAXATION CHAMBER)
IN THE CASE OF**

Mr Ian Bell, 15a Montrose Crescent, Hamilton, ML3 6LP

Appellant

- and -

South Lanarkshire Council, Benefits & Revenue Service, P.O.Box 3591, Glasgow, G73 9ED

Respondent

FTS Case Reference: FTS/LTC/CT/23/00030

Paisley 6 December 2023

Decision

The Upper Tribunal for Scotland grants the Appellant permission to appeal to the Upper Tribunal for Scotland against the decision of the First-tier Tribunal for Scotland dated 5 September 2023 refusing his appeal against the decision of the Respondent dated 11 August 2022 refusing the Appellant's application for a reduced council tax banding in terms of regulation 3 of the Council Tax (Reductions for Disabilities) (Scotland) Regulations 1992.



Introduction

[1] The Upper Tribunal for Scotland (“UTS”) may only allow an appeal against a decision of the First-tier Tribunal for Scotland (“FTS”) on a point of law. “Point of law” includes any fundamental error of approach by the FTS. This is therefore apt to include any situation where, as the Appellant maintains, the proceedings before the FTS were conducted unfairly by the legal member.

[2] The Decision of the FTS legal member betrays such an erroneous approach. This may account for the Appellant’s impression he had been abused and interrogated by the legal member. The function of the UTS is not, however, to comment on or consider that complaint, but rather to correct any error of law on the part of the FTS.

[3] This Decision therefore only explains why the UTS has granted permission to the Appellant to appeal to the UTS on the basis there is an arguable case that the legal member erred in law in the manner in which he determined the Appellant’s appeal, initiated before the valuation appeal committee, and transferred to the FTS when it acquired jurisdiction in respect of “non-list” council tax appeals on 1 April 2023.

Statutory Appeals

[4] Parliament frequently allows for an appeal to a court or tribunal against a decision of a local authority. Such an appeal provides the citizen with an accessible means of redress where he or she seeks to challenge such a decision. The law is well established that, on considering any such appeal, the court or tribunal must first establish the scope of that appeal.

[5] A statutory appeal is accordingly either by way of rehearing or review.



[6] The difference is explained, with reference to statutory appeals to the sheriff, in paragraphs 27.38, 27.39 and 27.42 of Macphail, *Sheriff Court Practice* (4th edition); but these principles apply generally to all statutory appeals, whether to a court or tribunal (*Begum v Special Immigration Appeals Commission* [2021] A.C. 765 at paragraphs 46 – 50, 54 and 66 - 68, per Lord Reed PSC), including certain housing appeals in the FTS (*Sharma v Renfrewshire Council* 2023 S.L.T. 801) and valuation appeals in non-domestic rates cases (*Assessor for Lothian Valuation Joint Board v McLaughlin* 2020 S.C. 386 at paragraphs [20] and [36]). As in this case, the enactment is frequently silent on the scope of the appeal, and so the appellate court or tribunal must establish the scope of the appeal to it with reference to the following principles.

Appeal by way of rehearing

27.38 An enactment may provide for an appeal by way of a re-hearing. In such an appeal, the sheriff re-hears the matter under consideration on the merits, and makes a decision under the enactment in substitution for that of the original decision maker. This might result in the same decision being made by the sheriff, or the substitution of a different decision for that of the original decision maker. The sheriff will normally hear evidence on the issue under appeal. This can include evidence on matters having occurred after the date of the decision appealed against which are relevant to the determination of that issue unless the enactment in question prevents the sheriff from doing so. An enactment may limit the re-hearing to a particular factual issue. Where the original decision involved the exercise of discretion, the sheriff may require to exercise a degree of deference to the opinion of the original decision maker in relation to the issue under appeal.



Appeal by way of review

27.39 The appeal may alternatively be by way of review rather a rehearing. The sheriff's function in an appeal by way of review is broadly equivalent to that of the Court of Session on a petition for judicial review - seeing to it that the decision maker has acted lawfully and therefore within the bounds of the powers conferred on the decision maker by the law. In such an appeal, interference by the sheriff is only merited on "judicial review" grounds such as illegality, irrationality or procedural unfairness.

Scope of the appeal where the enactment is silent on the question

27.42 Many enactments are silent on the scope of the statutory appeal. Unless the matter has been resolved by case law determining whether the particular statutory appeal is by way of a rehearing or is limited to a review of the decision, then the scope of the appeal must be determined as a matter of inference from the purposes and terms of the enactment in question. There are various ways in which this might be done. First, the extent of any powers conferred on the sheriff on disposing of the appeal, such as the power to quash the decision and substitute a new decision, may point to the appeal being by way of rehearing, though this is not necessarily conclusive of the question. The absence of such powers may point to the appeal being limited to a review of the original decision. Secondly, if the appeal requires the sheriff to make a factual determination on a particular issue, this may also point to the appeal being by way of rehearing. Thirdly, if the appeal is against the exercise of a statutory discretion, this may point to the appeal being limited to a review of the decision.



[7] Applying these principles: appeals in non-list appeals have in the past been treated as appeals by way of rehearing (*Highland Council v Highland and Western Isles Region Valuation Appeal Committee* 2009 S.C. 1; *Assessor for Lothian Valuation Joint Board v Campbell* 2012 S.L.T. 414 at paragraph [4] L); the issues to be determined by the FTS specifically in respect of regulation 3 appeals are solely questions of fact; and, on considering such an appeal, the FTS is empowered by section 81(1) of the Local Government Finance Act 1992 to “make such decision as they think just”, including the reversal of the decision of the local authority made in respect of the application (rule 38(1)(a), FTS Local Taxation Chamber Rules of Procedure 2022).

[8] In my opinion, the extent of these functions and powers point to a non-list appeal to the FTS in respect of local authority decisions under regulation 3 of the 1992 Regulations being by way of rehearing (*cf Sharma v Renfrewshire Council* 2023 S.L.T 801; Macphail, *Sheriff Court Practice*, 4th edition, paragraph 27.47).

Approach Taken by the FTS

[9] In my opinion, the legal member of the FTS took the wrong approach to the Appellant’s appeal. He used a significant portion of his Decision to criticise the Appellant for failing to provide sufficient information to the Respondent to enable it to make a decision on his application for a reduced council tax banding; and for perceived failures by the Appellant in completing his application and appeal forms. He opined that the real issue in the appeal was whether the decision complained of was wrong in fact or law (paragraphs 18 and 19), and that the Respondent had been given insufficient information to determine the application (paragraphs 26, 27, 30 and 39).



[10] He concluded that the Respondent had, in fact, reached the correct decision in both fact and law (paragraphs 40 and 44).

[11] In his Decision dated 18 October 2023 refusing permission to appeal, the legal member repeated his understanding that the focus of the appeal to the FTS was whether the Respondent had been wrong to refuse the Appellant's application (paragraphs 4, 12 and 13). At paragraph 14 of this Decision, the legal member concluded that: "[it] is not the tribunal's function to receive new information and make its own decision on whether the discount should be granted".

[12] That conclusion was, in my opinion, plainly wrong. The legal member's focus in this appeal on the Appellant's perceived failings in the application and appeal process was misconceived. It was precisely the function of the FTS to hear the matter *de novo* and to establish the facts applicable to the case so that the FTS could properly decide the appeal. Had the legal member appreciated that fact, then he would have realised the focus of his enquiries on past events and procedures in connection with the application and appeal process was entirely misconceived and unnecessary.

[13] The legal member was bound by the overriding objective of the FTS to deal with the proceedings fairly and justly, which included avoiding unnecessary formality and seeking flexibility in the proceedings and ensuring, so far as practicable, that the parties were able to participate fully in the proceedings (rules 2(1), 2(2) (b) and 2(2) (c), FTS Local Taxation Chamber Rules of Procedure 2022). To that end, the FTS had extensive case management powers to order the parties to produce evidence or information to the FTS (rule 4(3) (d), FTS Local Taxation Chamber Rules of Procedure 2022).



[14] Unfortunately, the legal member's approach appears to have been inflexible and to have resulted in the Appellant feeling he had not received a fair hearing.

[15] The legal member did not, in my opinion, seek to enable the Appellant to fully participate in the proceedings because he did not properly explain the correct function of the FTS on hearing this appeal to the Appellant. This prevented the legal member from understanding that he had powers, if required, to obtain sufficient information to determine the appeal *de novo*, by way of a rehearing of the facts, as required by law.

[16] In the foregoing circumstances, the Appellant's ground of appeal is arguable - the FTS did not act fairly and justly in criticising the Appellant for his perceived failures in the application and appeal process, by focusing on the wrong legal approach to the scope of the appeal, and by not acting in accordance with the overriding objective of enabling the Appellant fully to participate in the proceedings by requiring him to provide any additional information necessary to determine the appeal if the legal member thought such information was lacking.

[17] I therefore grant permission to appeal.

Additional Points

[18] I am of the opinion the legal member arguably erred in his approach in two further respects.

[19] First, he also dismissed the appeal as he was of the opinion it had not been presented in accordance with the procedural requirements set out in the relevant legislation - which it is not necessary to quote here - (see paragraph 21 of his Decision). This ignores the fact that the FTS accepted this appeal on transfer from the valuation appeal committee. It is not clear that either tribunal raised this point, or that the Respondent wished to take this point.



[20] Fairness therefore arguably required the legal member, if raising this point on his own motion, to have given the parties due notice of it.

[21] This would have allowed the legal member to fix a hearing in respect of this preliminary issue in accordance with rule 4(3) (e) of the FTS Local Taxation Chamber Rules of Procedure 2022 if he wished to insist upon this point. If he were correct on this point, then there would have been no need for further procedure in respect of this appeal, subject to any appeal to the UTS on this point.

[22] The second omission on the part of the legal member is that this appeal may well turn on the question whether any room (other than a kitchen, bathroom or toilet) in the dwelling is required to meet the needs of the Appellant as being essential or of major importance to the Appellant's well-being by reason of the nature and extent of his disability, in terms of regulation 3(2) of the 1992 Regulations. I see no indication in the legal member's Decision that he attempted to investigate and answer that question.

Conclusion

[23] Permission to appeal is granted for the foregoing reasons.

George Jamieson
Sheriff of North Strathclyde
Judicial Member of the Upper Tribunal for Scotland