Upper Tribunal for Scotland

2024UT38
Ref: UTS/AP/23/0034

DECISION

BY

SHERIFF GEORGE JAMIESON

ON AN APPEAL
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND HOUSING AND PROPERTY CHAMBER)
IN THE CASE OF

Mr Campbell Taylor, Miss Louise Drysdale
per DWJLAW
Appellants

- and -

Mr Nicholas Karl Hocking
per TC Young
Respondent

FTS Case Reference: - FTS/HPC/EV/22/2683

Paisley 28 May 2024

Decision

The Upper Tribunal for Scotland ("UTS") Allows the appeal, Quashes the decision of the First-tier Tribunal for Scotland ("FTS") dated 4 May 2023 granting an eviction order against the Appellants, on grounds of appeal 2.1, 2.2 and 4.2 and, in part, ground of appeal 5; Remits the case to a differently constituted FTS to reconsider at an evidential hearing whether it is both reasonable and proportionate to issue an eviction order on eviction ground 4 in this case.

Introduction

[1] By decision dated 6 November 2023, the UTS granted the Appellants permission to appeal on grounds of appeal 2.1, 2.2, 4.2 and 5 against the Decision of the FTS dated 4 May 2023. By order dated 16 February 2024, the UTS decided to determine the appeal without a hearing in terms of rule 24 of the Upper Tribunal for Scotland Rules of Procedure 2016. This is my decision in respect of the appeal.

Background

[2] By decision dated 4 May 2023, the FTS determined that an eviction order be granted against the Appellants in terms of section 51 of the Private Housing (Tenancies) (Scotland) Act 2016. The Respondent relied on grounds of eviction 4 (landlord intends to live in the let property) and 11 (breach of tenancy agreement). The FTS heard the application over two days, 21 February 2023 and 21 April 2023. It found in fact and law that the Respondent intended to live in the property; and also, that the Appellants had failed to comply with clause 7 of the private residential tenancy agreement and had therefore failed to comply with an obligation under the tenancy. This related to the Appellants' failure to pay the rent on the first day of each month.

[3] The FTS correctly identified that both grounds of eviction were "discretionary" and subject to a test of reasonableness. It adopted the correct approach of considering whether the grounds of eviction were met and then, if either or both were, considering whether it would be reasonable to grant an order for eviction. The Respondent relied on breaches of clauses 6, 7, 16, 27, 34 and 36 of the tenancy agreement. The FTS found a breach only of clause 7. It considered, however, that it was not reasonable to issue an order for eviction on account of that failure "on what was a comparatively minor breach of the tenancy agreement" (paragraph 64 of its Decision).

[4] The FTS considered, however, that it would be reasonable to issue an order for eviction in respect of eviction ground 4. It identified and discussed four factors relevant to its "balancing and weighing exercise" to determine whether it was reasonable to issue the eviction order. It discounted two of those factors as affecting that exercise, which left the respective circumstances of both the Appellants and Respondent to consider. At paragraph 129 of its Decision, it stated:

> "In coming to a determination, the tribunal considered the written and oral evidence, the written representations of parties and the submissions made by parties' representatives. In the balancing exercise carried out by it, the tribunal determined that is was reasonable to grant the eviction order."

[5] The FTS did not provide any specific reason why the balancing exercise favoured the issuing of an eviction order, in other words why it considered the personal circumstances of Respondent carried greater weight than those of the Appellants.

[6] At paragraph 130 of its Decision, the FTS acknowledged that the Appellants would need to find time to find a suitable property and:

> "Accordingly delayed execution of the order until 31st August 2023."

[7] It gave no reasons for selecting that date and it did not indicate whether it had sought submissions from parties on making such an order and, if so, what those submissions were.

[8] The UTS granted permission to appeal only on restricted grounds relating to ground of possession 4. Three of those four grounds of appeal related to the adequacy of the FTS's reasoning in respect of its decision to issue an eviction order with execution delayed until 31 August 2024.

[9] The fourth ground of appeal raised challenges to the Decision of the FTS under the Human Rights Act 1998, referring to article 8 of the ECHR (right to respect for home) and article 1 of protocol 1 (protection of property).

Ground of Appeal 2.1

[10] This ground of appeal challenges the adequacy of the FTS's reasons for concluding that it was reasonable to grant the order for eviction on ground of eviction 4.

Grounds of Appeal 2.2 and 4.2

[11] Grounds of appeal 2.2 and 4.2 challenge the decision of the FTS to delay execution of the eviction order to 31 August 2023. Though not referred to by the FTS, this power derives from rule 16A(d) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 - ordering a delay in execution of an order by the First-tier Tribunal at any time before it is executed.

Duty to Give Adequate Reasons

[12] These duties are summarised, albeit in a different context, in the Appendix to *Secretary of State for the Home Department v TC* [2023] UKUT 164 (IAC), the relevant paragraphs of which are as follows:

> (1) Reasons can be briefly stated and concision is to be encouraged but FTT decisions must be careful decisions, reflecting the overarching task to determine matters relevant to fundamental human rights.

(3) The reasons for a decision must be intelligible and adequate in the sense that they must enable the reader to understand why the matter was decided as it was, and what conclusions were reached on the "principal important controversial issues".

(4) It is not necessary to deal expressly with every point, but enough must be said to show that care has been taken in relation to each "principal important controversial issue" and that the evidence as a whole has been carefully considered.

(9) The reasoning should enable the losing party to understand why they have lost.

(11) The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law but inferences as to insufficiency of reasons will not readily be drawn.

(13) Appellate restraint should be exercised when the reasons a FTT gives for its decision are being examined; it should not be assumed too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.

Parties' Submissions on the Adequacy of the FTS's Reasons About Reasonableness

[13] The Appellants submitted that the FTS did not provide any written reasons why it found it reasonable to issue an eviction order in respect of eviction ground 4, either in its Decision dated 4 May 2023 or its later Decision refusing permission to appeal on this ground of appeal, dated 15 June 2023. *Barclay v Hannah* 1947 S.C. 245 was authority that the FTS was bound to consider the whole circumstances but in the absence of reasons it was not possible to say that the FTS had correctly done so. While the FTS asserted it had carried out the required balancing exercise, it did not explain why the Respondent's position was preferred to that of the Appellants.

[14] Not enough had been said to show that care has been taken in relation to each "principal important controversial issue" and that the evidence as a whole has been carefully considered as per the Guidance at paragraph (4) in the Appendix to *Secretary of State for the Home Department v TC*.

[15] The Respondent submitted that, looking to the two Decisions of the FTS as a whole, it was clear the FTS had understood its task was to carry out an appropriate balancing exercise. It had identified the factors relevant to the conduct of that exercise. Both Decisions referred to the balancing exercise which required taking into account the circumstances of both the Appellants and the Respondent. The FTS had therefore complied with Paragraph (4) of the Guidance in the Appendix to *Secretary of State for the Home Department v TC*.

Parties' Submissions on the Adequacy of the FTS's Reasons About Delaying Execution of The Eviction Order to 31st August 2023

[16] The Appellants submitted that before making an order under rule 16A (d) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, the FTS ought to have invited submissions from parties and it must then have given reasons for making the postponement order. There had been no evidence before the FTS about this matter. The FTS gave no reasons which led them to delay execution of the eviction order to 31 August 2023. There were no reasons given which would on a fair reading enable the reader to "understand why the matter was decided as it was" in terms of paragraph (3) of the Appendix to *Secretary of State for the Home Department v TC*.

[17] The Respondent submitted that that the FTS had given adequate reasons for its decision to postpone the execution of the eviction order. This was an option is was entitled to take on granting an eviction order (*Mason & Downie v Turner& Turner* [2023] UT 38). It had regard to the evidence in the case, as indicated in paragraph 129 of its Decision, which included evidence the Appellants had business assets which they could sell to assist them in buying an alternative property. It could therefore be inferred from the Decision of the FTS that the Appellants had required time to do that. Had the Appellants wanted the eviction order delayed to a certain date beyond that selected by the FTS, then the onus was on them to have made that submission to the FTS.

Submissions on the Human Rights Act 1988

[18] The parties agreed that as a public authority, the FTS was bound to act compatibly with the ECHR and that the Appellants' article 8 right to respect for their home, and the Respondent's protocol 1, article 1 right to his peaceful enjoyment of his possessions may be engaged. The Respondent submitted, however, that the reasonableness requirement gave the Appellants a measure of security of tenure. Having concluded it was reasonable to issue an eviction order, after carrying out the required "balancing exercise", the FTS's decision to issue an eviction order could be taken to have complied with article 8 and article 1 of protocol 1.

[19] The Appellants submitted that, though there was overlap between reasonableness and proportionality, the FTS should have carried out a separate consideration of proportionality. An inadequately reasoned decision was not a proportionate one. The FTS should have carried out the four stage proportionality test referred to by Lord Mance *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] A.C. 1016 at paragraph 45.

[20] Those four stages were: (i) whether there is a legitimate aim which could justify a restriction of the relevant protected right; (ii) whether the measure adopted is rationally connected to that aim; (iii) whether that aim could have been achieved by a less intrusive measure; and (iv) whether, on a fair balance, the benefits of achieving the aim outweigh the disbenefits resulting from the restriction of the relevant protected right.

Decision

[21] I am of the opinion the appeal must succeed on all four grounds.

Reasons for My Decision

[22] I am asked by the Respondent to take an "holistic" approach to the FTS's decision on reasonableness. While the FTS identified the correct approach to assessing reasonableness, and the factors to be weighed in the balance, and was careful to exclude certain considerations as not being relevant to that exercise, ultimately it gave no reason for preferring the circumstances of the Respondent over those of the Appellants in either of its two Decisions. In applying the Guidance in the Appendix to *Secretary of State for the Home Department v TC*, I am conscious of the need to exercise appellate restraint, but absent this part of the reasoning process in the Decisions of the FTS, it is simply not possible for the Appellants to understand why the matter was decided as it was on this "principal important controversial issue". Without those reasons, it is not possible for the UTS to say that the FTS has correctly carried out the "balancing exercise". This was a fundamental error of approach on the FTS's part and hence an error of law (*cf Serapliglia v McInytre* [2023] UT 10).

[23] The FTS similarly gave no reasons for delaying execution of the eviction order to 31 August 2023. Having considered making such an order on its own motion, fairness required the FTS to invite submissions from the parties on whether such an order should be made and, if so its length; and, having considered those submissions, briefly recorded its reasons for making the postponement order in its decision: see *Reid v Redfern No. 4* [2019] SC DUM 41 at paragraphs 17 - 21 for an example of such reasons. Its failure to do either of those things was also a fundamental error of approach and hence an error of law.

[24] On the human rights argument, I agree with the Appellants' submission that the FTS's inadequately reasoned decision on reasonableness amounted to a disproportionate interference with the Appellants' article 8 right to respect for their home. As no adequate reasons were given for the interference, the "losing party" cannot determine whether, on a fair balance, the benefits of achieving the aim of evicting them outweighed the disbenefits resulting from the restriction of their right to respect for their home. Such an interference cannot be justified as propionate.

[25] As far as I am aware, the FTS was not invited to consider making a proportionality assessment when the proceedings were first before it. It appears to be the law that an article 8 issue need only be considered by the FTS if raised by a party to the proceedings (*Pinnock v Manchester City Council* [2011] A.C. 104, paragraph 61). I accordingly find the FTS did not err in law in failing to carry out such an assessment.

Disposal and Observations

[26] The Appellants submitted that, if the appeal were allowed, the case should be remitted to the FTS for reconsideration of the questions of reasonableness and proportionality.

[27] It should not be assumed there would be a further error of law by the FTS, and therefore a further appeal was unlikely.

[28] The Respondent submitted that the UTS should remake the decision if the appeal were allowed. The UTS would not require a fact finding hearing. There was sufficient material in the Decisions of the FTS for the UTS to substitute its own decisions on reasonableness and proportionality. The prospect of a further appeal from the FTS to the UTS was likely if the case were remitted back to the FTS, resulting in further delay.

[29] I have decided that the appropriate course is to remit the case for reconsideration by a differently constituted FTS at an evidential hearing limited to the questions of reasonableness and proportionality. I include proportionality as it has now been raised by the Appellants as an issue they wish the FTS to consider. Determination of these issues requires additional fact finding. Reasonableness is not in itself a finding in fact, but instead a concept or conclusion determined by an exercise of judgment (City of *Edinburgh Council v Forbes* 2002 Hous. L. R. 61, at paragraph 7-16, per Sheriff Principal Nicholson QC). There must, however, be an underlying factual basis upon which the reasonableness assessment is carried out (*Serapliglia v McInytre* [2023] UT 10).

[30] The assessment of reasonableness must take into account all relevant circumstances as they exist at the date of the hearing (*Cumming v Danson* [1942] All ER 653 at 655). The findings in fact made by the FTS that bear on reasonableness in this case, namely, the Appellants are established in the local area where their children (one of whom has health issues) go to nursery school, and the Respondent's need to care for his sister, may have changed since the date of the hearing before the FTS in February and April 2023.

[31] There may also be a need to make more specific findings in fact relating to the health difficulties which the Appellants' child experiences and the Respondent's need to care for his sister.

[32] While the UTS may hear additional evidence where this is shown to be in the interests of justice, there would likely be more delay in the UTS hearing evidence, than remitting to the FTS to do so. An evidential hearing before the UTS could not take place before October 2024. No novel issue of law arises for determination by the UTS. This case is about applying existing law to the facts of this case. It should not lightly be assumed that the FTS would make a further error of law in the light of this decision of the UTS. A further appeal would appear to be unlikely. I am therefore not persuaded that the UTS should remake the decision.

[33] I make a few observations about the human rights aspect of the case. Stalker, *Evictions in Scotland*, 2nd edition (2021), discusses the human rights aspects very extensively at pages 376 – 380 and 386 - 399, but accepts that human rights arguments may have relevance where, as with private residential tenancies, the tenant has a measure of security of tenure (page 376). However, on a practical basis, if it is not reasonable to issue an eviction order, it is unlikely to be proportionate for the FTS to do so either (*Pinnock v Manchester City Council* [2011] A.C. 104, paragraph 56).

[34] The structured approach to proportionality of the sort referred to in paragraph [20] above may have no place in a statutory regime which afforded no security of tenure to the tenants (*Hounslow LBC v Powell* [2011] A.C. 186 at paragraphs 41, 87 and 88; *Stalker*, page 392). That is not the situation in this case. The FTS is therefore directed under section 47(4) of the Tribunals (Scotland) Act 2014 to follow the structured approach set out in paragraph [20] of this Decision.

Postscript

[35] A reasonableness requirement for granting orders for possession on certain grounds was first introduced by section 5(2) of the Increase of Rent and Mortgage Interest (Restriction) Act 1919 and section 5(1) of the Increase of Rent and Mortgage Interest (Restriction) Act 1920 as replaced by section 4 of the Rent and Mortgage Interest Restrictions Act 1923 and then by section 3(1) of the Rent and Mortgage Interest Restrictions Act 1933. Some of the leading cases were decided with reference to section 3(1) of the 1933 Act.

[36] Thus, in *Kemp v Ballachulish Estate Co Ltd* 1933 S.C 478 at page 492, it was held that an appellate court will not interfere with a judge's assessment of reasonableness "unless it is made manifest that he has misdirected himself. He ought to have regard to the interests of both parties." In *Cresswell v Hodgson* [1951] 1 K.B. 92 at page 95, it was held that the appellate court would only interfere with the judge's exercise of discretion on reasonableness where the judge "has so plainly gone wrong in law". In *City of Edinburgh District Council v Sinclair* 1995 S.C.L.R 195 at 197F, the sheriff principal held that an appeal against a decision on reasonableness could only succeed if the judge at first instance had erred in law or if it could be shown that the approach to reasonableness in the first instance decision was fundamentally flawed.

[37] The UTS will not therefore normally interfere with a decision of the FTS which gives adequate reasons on the reasonableness of issuing an order for eviction, demonstrating that the FTS has taken into account all relevant circumstances in carrying out the balancing exercise and explaining why the interests of one party were weighed in preference to those of the other party.

[38] In suitable cases, the FTS may also have regard to the public interest as a relevant factor (*Cresswell v Hodgson* at page 97).

[39] Two things might be done in future cases potentially to avoid the need for an appeal where the only issue is that the FTS has provided no reasons for preferring the interests of one party over the other. First, the party aggrieved by the decision might consider requesting the FTS to provide supplementary reasons for the exercise of its discretion if those reasons are missing from the original decision. Secondly, the UTS might, on an appeal to it on such a ground, require the FTS to provide reasons for the decision on the proceedings before the FTS, in terms of rule 7(3) (o) of the Upper Tribunal for Scotland Rules of Procedure 2016. It is, however, impermissible for the UTS to request such reasons from the FTS after it has allowed the appeal. The only possible course after allowing the appeal is for the UTS to remit to the FTS to make a fresh decision or to remake the decision itself (*BMC Software Ltd v Shaikh* [2019] EWCA Civ 267 at paragraph 21E).

Further Appeal

[40] A party aggrieved by my decision may seek permission from the UTS to appeal to the Court of Session on a point of law only within 30 days of the date on which this decision is sent to a party. Any such application 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) in terms of section 50(4) of the Tribunals (Scotland) Act 2014, state the important point of principle or practice that would be raised in the further appeal or any other compelling reason there is for allowing a further appeal to proceed.

George Jamieson
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