

Care Standards

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

[2018] 3649.EY

Hearing held Royal Courts of Justice
on 30 July 2019

Before

Tribunal Judge Ian Robertson
Specialist Member Brian Cairns
Specialist Member Denise Forshaw

Solo-Steven Gisanrin

Appellant

-v-

OFSTED

Respondent

REPRESENTATION

Mr Gisanrin was represented by Mr Sebastian Townsend Ukegheson
Consultant/Foreign qualified Barrister and Solicitor (Supreme Court of Nigeria)

OFSTED were represented by Mr Gordon Reed – Solicitor - Advocate

DECISION

1. This is an appeal brought by Mr Solo-Steven Gisanrin against a decision by OFSTED not to grant consent to allow Mr Gisanrin to work in a Childrens Home. (Herein after referred to as “the waiver”).

2. Mr Gisanrin had been manager of a Childrens home, Seasons of Joy, from 14 August 2015 to at least August 2016. He was not however registered as a manager by OFSTED. Between October 2015 and September 2016 issues arose at the home that ultimately led to its registration being cancelled from November 2016. On 18 August 2016 this Tribunal confirmed an earlier OFSTED decision to put restrictions on

accommodation at the home. The Tribunal gave detailed reasons and that decision was not appealed.

3. Mr Gisanrin's initial application for waiver was by way of a letter dated 18 October 2018. A more detailed letter dated 1 November 2018 clarified his request

"I would like to request waiver to enable me get(sic) involved in the management of a childrens home"

On 13 December 2018 OFSTED wrote to Mr Gisanrin saying "we are refusing your application for written consent to carry on, manage, have a financial interest in or **work** in a childrens home" (our emphasis).

4. Mr Gisanrin appealed this decision by application dated 14 March 2019. He appealed the decision by the appropriate pro forma and ticked the boxes "Disqualify or refuse to waive disqualification" and "refuse to waive disqualification from involvement in or working in a childrens home"

5. The application was treated by Ofsted as an application for written consent to carry on, manage or have a financial interest in in a childrens home" In accordance with S65 (1A) Children Act 1989 or at least that is the implication of their response document dated 12 April 2019.

6. In a statement prepared by Mr Gisanrin dated 18 May 2019 he states as follows;

"I have been advised to narrow my appeal to only one issue and that is that I should be allowed to at least work in a childrens home in any capacity or [other] than being a manager, owner or having a financial interest in the childrens home"

and further

"Whilst I may have failed in my duties as a manager, I strongly believe that I can and should be given opportunity to be a worker in any other capacity than being a manager of a childrens home"

7. In a statement dated 7 June 2019 Mr Gisanrin states;

"It is my contention that whilst other forms of restriction may be appropriate such as preventing me from managing, carrying on, or having a financial interest in a childrens home, it is my humble believe (sic) that Ofsted is taking this personal (sic) because of skin colour by insisting that I must never work with children again"

8. For the avoidance of doubt Mr Ukeghesan representing Mr Gisanrin during the course of submissions confirmed that Mr Gisanrin was not appealing against the refusal of written consent to carry on, manage, or have a financial interest in a childrens home.

9. By his own admissions set out above he would, in any event have no prospect of success in respect thereof.

10. Thus the application before us is for a waiver to allow Mr Gisanrin to be employed in a childrens home.

THE STATUTORY FRAMEWORK

11. The Statute governing appeals of this nature is the Children Act 1989 (as amended).

S65 Children Act 1989

2 Persons disqualified from carrying on, or being employed in children's homes.

(A1) A person ("P") who is disqualified (under section 68) from fostering a child privately must not carry on, or be otherwise concerned in the management of, or have any financial interest in, a children's home in England unless;

(a) P has, within the period of 28 days beginning with the day on which P became aware of P's disqualification, disclosed to the appropriate authority the fact that P is so disqualified, and

(b) P has obtained the appropriate authority's written consent.

(A2) A person ("E") must not employ a person ("P") who is so disqualified in a children's home in England unless;

(a) E has, within the period of 28 days beginning with the day on which E became aware of P's disqualification, disclosed to the appropriate authority the fact that P is so disqualified, and

(b) E has obtained the appropriate authority's written consent.

(1) A person who is disqualified (under section 68) from fostering a child privately shall not carry on, or be otherwise concerned in the management of, or have any financial interest in a children's home in Wales unless he has;

(a) disclosed to the appropriate authority the fact that he is so disqualified; and
(b) obtained its written consent.

(2) No person shall employ a person who is so disqualified in a children's home unless he has;

(a) disclosed to the appropriate authority the fact that that person is so disqualified; and

(b) obtained its written consent.

(3) Where the appropriate authority refuses to give its consent under this section, it shall inform the applicant by a written notice which states;

- (a) the reason for the refusal;
- (b) the applicant's right to appeal under section 65A against the refusal to the First-tier Tribunal.
- (c) the time within which he may do so.
- (4) Any person who contravenes subsection (A1), (A2), (1) or (2) shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both.
- (5) Where a person contravenes subsection (A2) or (2) he shall not be guilty of an offence if he proves that he did not know, and had no reasonable grounds for believing, that the person whom he was employing was disqualified under section 68.
- (6) In this section and section 65A "appropriate authority" means;
 - (a) in relation to England, the Her Majesty's Chief Inspector of Education, Children's Services and Skills; and
 - (b) in relation to Wales, the National Assembly for Wales.

S68 Children Act 1989

Persons disqualified from being private foster parents

- (1) Unless he has disclosed the fact to the appropriate local authority and obtained their written consent, a person shall not foster a child privately if he is disqualified from doing so by regulations made by the Secretary of State for the purposes of this section.
- (2) The regulations may, in particular, provide for a person to be so disqualified where;
 - (a) an order of a kind specified in the regulations has been made at any time with respect to him;
 - (b) an order of a kind so specified has been made at any time with respect to any child who has been in his care;
 - (c) a requirement of a kind so specified has been imposed at any time with respect to any such child, under or by virtue of any enactment;
 - (d) he has been convicted of any offence of a kind so specified, or discharged absolutely or conditionally for any such offence;
 - (e) a prohibition has been imposed on him at any time under section 69 or under any other specified enactment;

(f) his rights and powers with respect to a child have at any time been vested in a specified authority under a specified enactment.

(2A) A conviction in respect of which a probation order was made before 1st October 1992 (which would not otherwise be treated as a conviction) is to be treated as a conviction for the purposes of subsection (2)(d).

(3) Unless he has disclosed the fact to the appropriate local authority and obtained their written consent, a person shall not foster a child privately if;

(a) he lives in the same household as a person who is himself prevented from fostering a child by subsection (1); or

b) he lives in a household at which any such person is employed.

(3A) A person shall not foster a child privately if;

(a) he is barred from regulated activity relating to children (within the meaning of section 3(2) of the Safeguarding Vulnerable Groups Act 2006); or

(b) he lives in the same household as a person who is barred from such activity.

(4) Where an authority refuse to give their consent under this section, they shall inform the applicant by a written notice which states;

(a) the reason for the refusal;

(b) the applicant's right under paragraph 8 of Schedule 8 to appeal against the refusal; and

(c) the time within which he may do so.

The relevant regulations are;

The Disqualification from Caring for Children (England) Regulations 2002,

Grounds for disqualification

2. (1) For the purposes of section 68 of the Act (persons disqualified from being private foster parents) a person is disqualified from fostering a child privately if any of the following provisions of this regulation apply to him.

(2) He is a parent of a child with respect to whom an order has been made at any time under;

(a) section 31(1)(a) of the Act (care order); or

(b) Article 50(1)(a) of the Children (Northern Ireland) Order 1995(1) (care order).

(3) One of the following orders has been made at any time with respect to a child so as to remove the child from his care, or prevent the child living with him;

(a) an order under section 31(1)(a) of the Act;

(b) any order that would have been deemed to be a care order by virtue of paragraph 15 of Schedule 14 to the Act (transitional provisions for children in compulsory care), had it been in force immediately before the day on which Part IV of the Act came into force;

(c) a supervision order which imposes a residence requirement under paragraph 5 of Schedule 6 to the Powers of Criminal Courts (Sentencing) Act 2000 or section 12AA of the Children and Young Persons Act 1969 (requirement to live in local authority accommodation);

(d) an order under Article 50(1)(a) of the Children (Northern Ireland) Order 1995; or

(e) a fit person order, parental rights order, or training school order under the Children and Young Persons Act (Northern Ireland) 1968.

(4) A supervision requirement has been imposed at any time with respect to a child so as to remove that child from his care, under;

(a) section 44 of the Social Work (Scotland) Act 1968; or

(b) section 70 of the Children (Scotland) Act 1995.

(5) His rights and powers with respect to a child have at any time been vested in a local authority in Scotland;

(a) under section 16 of the Social Work (Scotland) Act 1968; or

(b) pursuant to a parental responsibilities order under section 86 of the Children (Scotland) Act 1995.

(6) He has been convicted of;

(a) an offence against a child within the meaning of section 26(1) of the Criminal Justice and Court Services Act 2000;

(b) any offence specified in the Schedule to these Regulations; or

(c) any other offence involving bodily injury to a child.

(7) He is a person;

(a) who has been refused registration in respect of a children's home under section 13 of the 2000 Act;

(b) whose registration in respect of a children's home has been cancelled under section 14 or 20(1) of the 2000 Act; or

(c) who has been concerned in the management of, or had any financial interest in, a children's home, in respect of which the registration of any person has been cancelled under section 14 or 20(1) of the 2000 Act.

(8) He is a person who has at any time been refused registration in relation to a voluntary home or a children's home, or who carried on, was otherwise concerned with the management of, or had any financial interest in, a voluntary home or a children's home the registration of which was cancelled, under, as the case may be;

(a) paragraph 1 of Schedule 5 to the Act;

(b) paragraph 1 or 4 of Schedule 6 to the Act;

(c) section 127 of the Children and Young Persons Act (Northern Ireland) 1968; or

(d) Article 80, 82, 96 or 98 of the Children (Northern Ireland) Order 1995.

(9) He is a person in respect of whom;

(a) a prohibition has been imposed at any time under;

(i) section 69 of the Act, section 10 of the Foster Children Act 1980 or section 4 of the Children Act 1958 (power to prohibit private fostering);

(ii) Article 110 of the Children (Northern Ireland) Order 1995 (power to prohibit private fostering); or

(iii) section 10 of the Foster Children (Scotland) Act 1984 (power to prohibit the keeping of foster children); or

(b) a notice in writing has been given by a Health and Social Services Board under section 1(3) of the Children and Young Persons Act (Northern Ireland) 1968 (withholding consent to the care and maintenance of the child being undertaken by a person).

(10) He has at any time been refused registration in respect of the provision of nurseries or day care, or for child minding, or had any such registration cancelled under, as the case may be;

(a) Part X or XA of the Act;

(b) section 1 or 5 of the Nurseries and Child-Minders Regulation Act 1948;

(c) Part XI of the Children (Northern Ireland) Order 1995; or

(d) section 11(5) or 15 of the Children and Young Persons Act (Northern Ireland) 1968.

(11) He has at any time been refused registration or had such registration cancelled;

(a) under section 62 of the Social Work (Scotland) Act 1968 (registration of residential and other establishments); or

(b) in respect of a care home service, child minding or day care of children, under Part 1 of the Regulation of Care (Scotland) Act 2001).

12. We have set out the statutory requirements to demonstrate the breadth of the legislation. S68 is applied by S65 specifically and the criterion that applies under the regulations is Regulation 2 (7) (c).

13. The statutory framework is clear. When S65 bites there are two routes to obtaining consent to either be involved in the management etc of a childrens home or to be employed in a childrens home. They are distinctly different routes. In the former they apply themselves and have to demonstrate to OFSTED why they should be allowed to be involved in running a Childrens home despite S65 biting. In the latter case application is made by the employer on in respect of the employee for a waiver. The distinction is clear and obvious. In the case of an employee one of the issues OFSTED will take into account is the regime in which the employee will work, what their role will be and for example what supervision will be offered by the employer.

14. Thus an application for waiver to enable a person to work in a childrens home cannot be made by that person direct. Thus Mr Gisanrin is not able to make the application he is purporting to. It follows that OFSTED have no jurisdictional basis to consider it. We as a tribunal have by extension no locus to hear an appeal.

15. The jurisdictional basis therefore is clear. We have none.

16. The very same argument that we have just accepted was raised by OFSTED in a "Striking Out" application before Judge Khan on 16 July. He refused to strike out the application and it is argued by Mr Ukegheson that we have to have very careful regard to this decision. We accept that we do. A striking out application is made by virtue of Rule 8(4) (c) of the Tribunal Procedure Rules (First-tier Tribunal) (HESC) Rules 2008. It is a preliminary application the test being that there is no reasonable prospect of the Applicants case succeeding in whole or part. It is a discretionary power, as Judge Khan put it;

"The test is essentially whether the prospect of success is fanciful. If serious consideration of the issues is required, such that a mini trial might be necessary that indicates that the power should not be exercised."

17. Judge Khan had a telephone hearing. He did not have the advantage of sitting with colleagues and we suspect did not have the advantage we had of plenty of time to read the voluminous papers. A telephone hearing does not have the same dynamic as a live hearing and certainly the argument before us lasted nearly two hours. We are

told by the advocates that this hearing was far more wide ranging than the telephone hearing.

18. Judge Khan observed the following;

“I remind myself that striking out is a draconian step and should be used for the clearest cases. It is a high hurdle.”

19. He was taken to the letter of 13 December which we have already highlighted where OFSTED purport to deal with the issue of working in a childrens home. This took the case out of the exceptional and he correctly indicated that this was a matter for the main Tribunal, to deal with as a mini trial as they felt appropriate. We do not consider that his refusal to strike out amounted to any sort of decision on the facts of the case. It was simply a wise exercise of discretion to leave the issue to the Tribunal. Nothing he said in his decision impacts upon our decision making to any material degree.

20. We would add unless it is not clear from the decision set out above, that we were very conscious of the letter from OFSTED. This was expressed poorly and indeed was outside their powers. Where no jurisdiction exists, an authority purporting to exercise that authority, if that’s what they were doing, cannot create a new jurisdictional basis for their decision. Notwithstanding, the effect of the deregulation of Seasons of Joy, where the Appellant had been employed as a manager, is to prevent him from working in a children's home in any capacity unless and until a successful application for a waiver in respect of him has been made by a prospective employer.

21. That leaves the other arguments advanced by Mr Ukegheson. These related in large part to bad faith on the part of OFSTED. He felt that we should be able to deal with the appeal by considering the facts of the case and determine whether OFSTED were wrong in the decision they made, acted prejudicially or outside their powers. This Tribunal is a creature of statute. Our powers are derived from statute. When pressed on the issue Mr Ukegheson could not point us to any statutory authority for his proposition. He argued that because S68 is headed “private fostering” we should take that quite literally and not apply it to any other situation and that any challenge regarding a Childrens Home fell outside the Children Act and should be dealt with under the Care Standards Act.

22. This argument has no substance what so ever as S68 is specifically applied by S65 to this situation. S65 has been amended by the Children and Families Act 2014. In the explanatory notes that accompany the Act it states the following;

“Support the reform of children’s homes, particularly by enabling the development of a regulation and inspection framework that sets high standards for children in residential care and offers them the support required to achieve positive outcomes.”

23. There is no application or appeal before us under the Care Standards Act and therefore we have no jurisdiction under that Act to consider the matter before us.

24. Mr Ukegheson also raised the issue of the decision of Disclosure and Barring Service not to debar Mr Gisanrin from working with children. He felt that OFSTED had acted inappropriately by not following the DBS decision. Again this misses the point, the decisions of the DBS are theirs and theirs alone. They apply their own criterion and discretion. The purpose of the debarring is different and more wide spread. Again this does not deal in any way with the jurisdictional issue at the heart of this case.

25. Finally the appellant raised the issue of racial discrimination. We have not dealt with this as firstly our decision is based solely upon Jurisdictional issues and secondly we were specifically asked by Mr Ukegheson not to explore this.

26. Accordingly the Appeal is dismissed.

Judge Ian Robertson

15 August 2019