Tribunal (Additional Support Needs) Forum

20th June 2018
In-House Convener Presentations

1. Appeals and reviews

New procedures came into force for any appeals or reviews lodged on or after 12th January 2018. A party may apply for a review of a decision as well as seek permission to appeal the same decision.

A. Appeals

These now go to the Upper Tribunal, and permission to appeal must be obtained.

(a) Permission to appeal (2014 Act ss46-47; FtT Rules 2018 rule 10)

There are two ways to obtain this:

(i) From the First-tier Tribunal (FtT); or
(ii) From the Upper Tribunal (UT) direct (only where permission is refused by the FtT).

All applications for permission to appeal will come to the In-house Convener (IHC) unless the IHC was the Legal Member on the original case, in which case the President will decide on the application for permission to appeal.

The test for permission: arguable grounds of appeal.

The basis of an appeal: a point of law, usually where it is argued that there has been an error(s) in law.

So, where there is at least one arguable point (error) of law, the IHC will grant permission to appeal; where not, permission will be refused.

What are errors of law? See *Nixon (permission to appeal grounds)*[1], Mr Justice McCloskey, at para 10:

> "Inexhaustively, these include a failure to have regard to material evidence; taking into account and being influenced by immaterial evidence; inadequate reasons; unfair procedure; misunderstanding or misconstruction of the law; disregarding a relevant statutory provision; failing to give effect to a binding decision of a superior court; and irrationality."

[1] [2014] UKUT 368.

For an appeal based on the adequacy of the tribunal's reasons, 'genuine prejudice' must be shown to have occurred*: JC v Gordonstoun Schools Ltd* [2], para 63, per Lady Smith. It is not yet clear whether there will be a materiality-type requirement in connection with other types of appeal and what the test for such a requirement might be.

(b) Appeal Process

The application for permission to appeal is passed to the IHC and copied to the tribunal and the other party.

A decision on the permission application is made. There are three possible procedural pathways:

> (1) Permission granted on all grounds of appeal (Notice of appeal to be sent by the appellant to UT within 30 days setting out grounds of appeal);
>
> (2) Permission refused on all grounds of appeal (Notice seeking permission to appeal to be sent by appellant to UT within 30 days); or
>
> (3) Permission granted on some grounds and refused on others (Notice to be sent by appellant to UT within 30 days covering both – setting out grounds of appeal on those grounds for which permission granted and (if desired) seeking permission on those grounds for which permission refused).

In the case of outcome (2) or (3), a note of reasons for the decision must be provided by the FtT; none is required for outcome (1), but in practice one will be provided, to assist the UT, the parties, their representatives and the original tribunal.

(c) Powers on appeal (2014 Act s.47)

The decision may be upheld or quashed by the UT. Where quashed, the UT may: (a) make the decision afresh; (b) send the case back to the tribunal to be reconsidered or (c) make any other order as it sees fit.

There can be an appeal from the Upper Tribunal to the Court of Session, but only where there is an important point of principle or practice or where some other compelling reason for an appeal exists.

B. Reviews (2014 Act ss.43-45; FtT Rules 2018, rule 11)

These can be initiated by the FtT at its own instance or at the instance of a party.

(a) Threshold test for review

A review must be 'necessary in the interests of justice'. This is a high test – has to be necessary, not just desirable.

The interests of justice test is wider than the point of law test. So, the grounds for review could involve points of law (errors in law) or it may involve a procedural issue.

[2] 2016 SC 758.

For example: a review application under the former rules was made by a party litigant where she argued that she had not had a chance to make a 'closing statement', although written submissions were ordered. So, there could be a procedural point which falls short of a point of law.

The necessity test means that, in an error-based review application, it should be arguable that had the error(s) not been made, the decision may, in some substantive way, have been different.

(b) Process for review

Th usual process for a party-initiated review will be as follows:

(i) Application comes into IHC to make a decision on whether the 'necessary in the interests of justice' test is met; if not, the application for review is refused. That refusal decision may not be appealed.

(ii) If the test is met, the parties will be informed and will be asked for views on whether the application should be decided on the written evidence and submissions, with no oral hearing.

(iii) If the test is met, the parties may also be asked for a view on whether the review should be decided by the legal member sitting alone or by the full tribunal – the rules provide that where practicable at least one of the members of the original tribunal should conduct the review. The legal member alone might be selected where the arguments are purely legal in nature; this is less likely where there are factual issues or issues over the assessment of skilled evidence.

(iv) Once views are expressed on (b) and (c), the IHC will decide these two questions and then direct the procedure accordingly.

All three tribunal members will be informed about the review, and will receive a copy of the application. The IHC's directions on (a)-(c) above will be made available to all three tribunal members and to the parties.

(c) Powers on review

These are:

(a) Leave the decision unchanged;
(b) Correct a minor error; or
(c) Set the decision aside and re-make it.

Where option (c) is pursued, there are three possible courses of action:

(i) The tribunal may re-decide the matter;
(ii) The tribunal may refer to matter to the UT; or
(iii) The tribunal may make such other order as it considers appropriate

Course of action (i) does not mean that the case goes back to the beginning; it could mean a fresh decision with the same outcome but with different reasons; or a

different outcome may be reached with (of course) different reasons. It is also possible that the original tribunal may direct further procedure as part of the review process (for example, taking of additional evidence or argument), but this is not expected to be common.

Following the review, if the decision is set aside and re-made (option (i) above), there might follow an appeal in relation to the new decision (s.51 and 52(2) of the 2014 Act).

(d) Review at instance of the FtT

The FtT may initiate a review. This has happened in circumstances where the IHC has taken the view that an application for permission to appeal raises issues which lead to the conclusion that it is necessary in the interests of justice that the decision is reviewed instead of appealed. This will usually be where the reasons for the decision would benefit from clarification. The application for permission to appeal could, in that event, be refused, or it might be suspended pending the outcome of the review process, depending on the circumstances.

C. Clerical mistake, accidental slip or omission

The FtT may correct a decision containing any of these. There is no prescribed procedure. This will only happen where the error is obvious and where correction is required in order to make the decision work.

2. *City of Edinburgh Council v R* [2018] CSIH 20: Analysis

This case was heard by the Inner House on appeal from the decision of a tribunal on a disability discrimination claim related to a delayed and then inadequate CSP. It was unusual in that there had been proceedings relating to the CSP prior to the claim.

The appeal was based on a number of grounds, but was refused on each one. The decision provides guidance on the interpretation of certain provisions in the Equality Act 2010, as well as on decision reason adequacy.

Discrimination arising in consequence of a disability (2010 Act, s.15)

On this form of discrimination, the Inner House held (para [14]) that the two building blocks are:

(a) The authority treating the pupil unfavourably; and
(b) The cause of this being something arising in consequence of the pupil's disability.

The court went onto explain that the 'something' in (b) above in this case was the delayed and then inadequate CSP. In other words, the relevant causal link is not one directly between the disability and the unfavourable treatment; rather there is a middle stage. The pupil's disability leads to something happening and that something can be categorised as unfavourable treatment of the pupil. The court went onto explain that even if the impact of the treatment would have been the same for a disabled pupil as for a non-disabled pupil, this is not a defence to a s.15 discrimination claim. No comparison with non-disabled pupils is necessary (in fact, such a comparison is irrelevant). The Inner House refers, with approval, to a number of other cases (employment and housing cases) in which similar interpretations of s.15(1) have been adopted. This is an indication that it is perfectly in order for a tribunal to be referred to decisions from other disciplines and parties should be prepared to look for cases from other disciplines to illustrate their arguments where no suitable discipline-relevant cases can be found.

Decision reasons

A number of criticisms were levelled at the tribunal's reasons, but these were brushed aside by the Inner House. The court reiterated the point that the fact that the tribunal is a specialist one is relevant to the interpretation of their reasons, and in this case, that specialist nature allowed the tribunal to infer that certain deficiencies in the CSP would lead to certain consequences (para [8]).

It is worth emphasising here that a significant degree of deference has traditionally been afforded to the tribunal's reasoning by the appeal courts and this is not likely to change under the new appeal system: *City of Edinburgh Council v N* [3]; *JC v*

[3] 2011 SC 513; 2011 SLT 659.

ASNTS [4]*WA v The Highland Council* [5]*; G v Argyll and Bute Council* [6]; *City of Edinburgh Council v K*[7]; *JC v Gordonstoun Schools Ltd*.[8].

CSP and provision of education

Finally, the Inner House held that the definition of 'the way [the education authority] provides education for a pupil' (in s.85(2)(a)) is wide enough to cover issues around a CSP, referring to a CSP as 'an important part of the authority's educational objectives' (para [10]).

[4] [2012] CSIH 77; 2012 GWD 33-669.
[5] 2009 SC 47; 2008 Fam LR 129. The comments of the House of Lords in *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678; [2007] 3 WLR 832 on this point were approved by the Inner House at para 19.
[6] 2008 SLT 541.
[7] 2009 SC 625.
[8] 2016 SC 758; 2016 SLT 587, para 63.

3. Competency issue

The jurisdiction of the FtT flows from s.18(1) of the 2004 Act. That provision requires that a reference under that section may only be made where the child or young person in question is one for whose school education 'an education authority are (*sic*) responsible'. A child or young person in this position is defined as one who is:

> 'being or about to be provided with school education in a school under the management of the education authority' (s.29(3)(a) of the 2004 Act)

The 'decision, failure or information' (s.18(1)) chosen from the list in s.18(3) as one which can afford access to the FtT, may only be chosen in respect of a child who fits the s.29(3)(a) definition.

There are a few situations in which the FtT would ordinarily have jurisdiction (for a placing request reference) in relation to a child with additional support needs, but where one of the following situations apply:

> 1. Where the child is being educated in an independent school already (although probably only where that is a 100% placement);
>
> 2. Where the child is being educated at home (but only where there is no input by the EA to the child's education).

These are examples which have occurred in FtT cases in the past. However, in either of these situations, if the child is 'about to be' (i.e. imminently or at some defined point in the future) provided with a school education in a school under the management of the EA, then the FtT may have jurisdiction.

On when a school education is 'being provided', where the child is on the school roll but is not attending school at all, this will mean the child will not be 'being provided' with such an education. So, there is a distinction between a situation where 'school education' is available and where it is 'being provided'.

It is arguable that any provision of school education counts for the purposes of the test, including e.g. where a child is taken out of school but there is some homework provision or other partial input from an EA school towards the child's home education.

In practical terms, a different route of appeal is available through the Education Appeal Committees (under Schedule 2 para 5(1) and (2) of the 2004 Act), since the wording in s.18(1) does not apply there.

Where there is any doubt, the best course is to raise a reference in both the FtT and the EAC and seek a postponement or suspension of the EAC case hearing until a jurisdiction decision has been taken by the FtT (and that should be sought by the appellant as soon as the reference form is lodged with the FtT).

4. New Documents Guidance

A new procedure will be piloted by the FtT with four EAs from August 2018, to resolve the following issues:

1. Duplication of documents in the bundle.
2. Lodging full copies of documents when partial copies would suffice.
3. Lodging copies of documents of limited or no relevance.
4. Late lodging of documents.
5. The administration and management of the bundle.

It is hoped that the pilot will lead to a new process for documentary evidence lodging and collation. Tackling the above issues should lead to a reduction of unnecessary work for parties, representatives, caseworkers and tribunal members.

Two particular practical measures will be part of the pilot:

(a) Electronic lodging of documents by parties using secure means (and e-distribution to the legal member); and

(b) A duty on the part of the EA to prepare bundles for the hearing.