THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: JR/2396/2019
[2020] UKUT 4 (AAC)

R (EL and JB)
v
First-tier Tribunal (respondent) and Surrey County Council (interested party)

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (Health, Education and Social Care Chamber)

Reference: EH936/19/00104
Decision date: 18 September 2019

The decision of the First-tier Tribunal is quashed under section 15(1)(c) of the Tribunals, Courts and Enforcement Act 2007. The Upper Tribunal substitutes the decision that the tribunal should have made under section 17(1)(b), which is that there are grounds to carry out a review of the decision of 9 August 2019 pursuant to rule 48 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699). The tribunal will now carry out that review.

REASONS FOR DECISION

A. The legislation

1. In order to understand what has happened in this case and why I have quashed the tribunal's decision, it is necessary to know the law that governs the procedure in the First-tier Tribunal.

2. As part of the structure of the Tribunals, Courts and Enforcement Act 2007, the First-tier Tribunal is given power to change its own decisions without the need for an appeal to the Upper Tribunal. One of those powers is conferred by rules 48 and 49 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699):

48 Application for review in special educational needs cases

(1) This rule applies to decisions which dispose of proceedings in special educational needs cases, but not to decisions under this Part.

(2) A party may make a written application to the Tribunal for a review of a decision if circumstances relevant to the decision have changed since the decision was made.

(3) An application under paragraph (2) must be sent or delivered to the Tribunal so that it is received within 28 days after the date on which the Tribunal sent the decision notice recording the Tribunal's decision to the party making the application.

(4) If a party sends or delivers an application to the Tribunal later than the time required by paragraph (3) or by any extension of time under rule 5(3)(a) (power to extend time)—

(a) the application must include a request for an extension of time and the reason why the application was not provided in time; and

(b) unless the Tribunal extends time for the application under rule 5(3)(a) (power to extend time) the Tribunal must not admit the application.

49 Review of a decision

(1) The Tribunal may only undertake a review of a decision—

(a) pursuant to rule 47(1) (review on an application for permission to appeal) if it is satisfied that there was an error of law in the decision; or

(b) pursuant to rule 48 (application for review in special educational needs cases).

(2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.

(3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may

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apply for such action to be set aside and for the decision to be reviewed again.

3. Rules 48 and 49 do not sit happily together. Rule 49(1)(a) authorises a review on error of law. Rules 49(1)(b), in contrast, merely authorises a review pursuant to rule 48, but that rules merely sets out the grounds on which an application for a review can be made. That cannot mean that the act of making an application on a change of circumstances is of itself sufficient to allow a review. Those provisions can only be read sensibly together by treating the requirement for a change of circumstances relevant to the decision as a threshold condition that must be satisfied before a review can be undertaken.

4. Rules 48 and 49 are authorised by section 9(3)(c) and (d) of the Tribunals, Courts and Enforcement Act 2007. There is no express power authorising a provision in the terms of rule 48, but the general provisions of section 9 are apt to cover it. If the tribunal carries out a review, section 9(4) and (5) provide for powers following a review:

9 Review of decision of First-tier Tribunal

(1) The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9)).

…

(4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following—

(a) correct accidental errors in the decision or in a record of the decision;

(b) amend reasons given for the decision;

(c) set the decision aside.

(5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either—

(a) re-decide the matter concerned, or

(b) refer that matter to the Upper Tribunal.

Section 9(4) is permissive rather than exhaustive. Although the section does not expressly say so, the tribunal is entitled to carry out a review but then decide to take no action in the light of it. That possibility is recognised by section 11(5)(d)(ii), which makes such a decision an excluded one.

5. There is no appeal to the Upper Tribunal against a decision refusing to review under rules 48 and 49: see section 11(5)(d)(i). That decision can only be

challenged by way of judicial review, which is how those challenges have generally been presented to the Upper Tribunal. The Lord Chief Justice has directed that the Upper Tribunal has jurisdiction over those cases:

> It is ordered as follows-
>
> 1. The following direction takes effect in relation to an application made to the High Court or Upper Tribunal on or after 3 November 2008 that seeks relief of a kind mentioned in section 15(1) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act").
>
> 2. The Lord Chief Justice hereby directs that the following classes of case are specified for the purposes of section 18(6) of the 2007 Act-
>
> …
>
> b. Any decision of the First-tier Tribunal made under Tribunal Procedure Rules or section 9 of the 2007 Act where there is no right of appeal to the Upper Tribunal and that decision is not an excluded decision within paragraph (b), (c), or (f) of section 11(5) of the 2007 Act.

B. What happened in this case

6. The applicants are parents who appealed to the First-tier Tribunal in order to challenge their daughter's Education Health and Care Plan. The tribunal held a hearing on 24 July 2019 and made its decision on 9 August 2019. The parents were dissatisfied with the tribunal's decision, in particular with the school named in Section I of the plan.

7. One of the factors that the tribunal relied on in its reasoning was an OfSted report for the school from 2013. The report assessed the school as good both overall and in respect of:

- achievement of pupils,
- quality of teaching, and
- leadership and management,

with behaviour and welfare of pupils rated as outstanding. The tribunal wrote:

> 22. … The Tribunal also attached considerable weight to the OfSted report for [the school], which identified that students with special educational needs were supported extremely well, particularly in developing their skills in literacy and communication and that [the school] is determined that these students make better than expected progress.

8. When the tribunal made its decision, it was not aware that OfSted had carried out an inspection of the school. The report was published on OfSted's website on 9 September 2019, but it was on the school's website by 6 September at the latest. OfSted assessed the school as requiring improvement both overall and in respect of each of the areas assessed:

- effectiveness of leadership and management,
- quality of teaching, learning and assessment,
- personal development, behaviour and welfare, and
- outcomes for pupils.

This led the parents to apply to the First-tier Tribunal for a review of its decision under rule 48 and for permission to appeal to the Upper Tribunal. The tribunal refused both on 18 September 2019. In respect of rule 48, the judge wrote:

> 5. I do not find there is merit in the application for review under rule 48 because the allegation is that the panel did not take into consideration relevant evidence of changes in the school since February 2013 rather than there being evidence of a change in circumstances since the decision was issued. The complaint is that the panel should have waited for the fresh report.

9. The parents applied to the Upper Tribunal for permission to appeal against the decisions of 9 August and 18 September. I directed that the application also be treated as an application for permission to bring judicial review proceedings. I have today given permission to bring those proceedings and have gone on to quash the decision of 18 September 2019 in so far as it related to rule 48. The local authority has said that it did not wish to take part in the proceedings. The tribunal, in accordance with the usual approach of judicial bodies, has not taken part. I have also refused permission to appeal under reference *HS/2318/2019*.

C. How the tribunal misinterpreted and misapplied rule 48

10. The First-tier Tribunal correctly directed itself that the power to review under rule 48 only arose 'if circumstances relevant to the decision have changed since the decision was made'. It applied it wrongly by deciding that a change to the OfSted recommendation was not a change within the meaning of the rule.

11. The tribunal applied rule 48 on the basis that the OfSted report was only relevant as evidence of the quality of the school and its suitability to meet the needs of the applicants' daughter. That is too narrow an interpretation.

12. The tribunal was right that the report contained new evidence of the qualities of the school that had not been before the First-tier Tribunal, but it was more than that. It was also a change in the classification of the school by its regulatory body. That of itself can be an important factor in assessing a school's

suitability. Whether it is sufficiently important to satisfy the rule 48 condition will depend on the circumstances of the case. The test is merely a threshold condition that must be satisfied in order for the tribunal to carry out a review. It is not necessary at that stage to show that the change justifies a different decision, although applicants will want to make the best case for a review that they can.

13. I consider that that test was satisfied in this case and that the tribunal could not properly have decided otherwise. Looking just at the language of rule 48, the new rating was a circumstance that had changed since the tribunal made its decision on 9 August, and it was relevant. Whether the change was sufficient to justify a review was a matter of judgment, which the tribunal should have exercised in favour of a review. I say that because, in its own words, the tribunal 'attached considerable weight to the OfSted report' from 2013. I also say it because the tribunal specifically mentioned what that report had to say about special educational needs and literacy and communication. Finally, from the timing point of view, the inspection had already been made before the appeal was heard, and the report was available within a month of the tribunal's decision on the appeal and within the default period for an application under rule 48.

14. It is not for me at this stage to consider the significance of the new rating and any effect that it might have on the tribunal's decision and reasoning. That task will require a more detailed analysis, personalised to the applicants' daughter and her needs, that is properly the subject of the review itself.

D. What happens now

15. I have directed the tribunal to carry out a review pursuant to rule 48. In practice that means that the tribunal will consider whether to change the tribunal's decision or to amend its reasons for the decision it has already given. It does not mean that the decision of 9 August will necessarily be changed. That is a matter for the tribunal to decide when it carries out the review.

Signed on original
on 03 January 2020

Edward Jacobs
Upper Tribunal Judge