First-tier Tribunal Care Standards

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

[2023] 4948.INS
NCN: [2024] UKFTT 00386 (HESC)

HYBRID HEARING at the Royal Courts of Justice
On 22 and 23 April 2024

BEFORE
Tribunal Judge Siobhan Goodrich
Ms Heather Reid Specialist Member
Miss Rachael Smith Specialist Member

Mr TREVOR AVERRE-BEESON

Appellant

v

THE SECRETARY OF STATE FOR EDUCATION

Respondent

DECISIONS ON PRELIMINARY ISSUES

The Background

1. The Appellant is a former Trustee, Member, Chief Executive Officer, Accounting Officer, and Chair of the Board of Trustees at Lilac Schools Sky Trust. The Respondent has statutory responsibility for issuing and publishing Prohibition Directions under the Education and Skills Act 2008.

2. The appeal is against the Respondent's decision dated 10 January 2023 to issue a "Direction' pursuant to s.128 of the Education and Skills Act 2008 ('the Act'). The effect of the Direction is to bar the Appellant from any future involvement in the management of independent schools, including academy or free schools. It also disqualifies him from being a governor of a maintained school.

3. The Appellant lodged an application on or about 19 April 2024 seeking a direction that the hearing of his appeal to be held in private in its entirety.

4. It was apparent from the Respondent's skeleton argument that there were also preliminary issues to be decided regarding the nature and the scope of the appeal.

5. Having heard oral submissions from both sides on the public/private issue we retired to make our decision which we then announced in brief terms. We then heard submissions regarding the nature and scope of the appeal. Again, we retired and then gave a brief decision. In respect of each decision we reserved our fuller reasoning which we now give.

6. On the morning of 23 April 2024 the Appellant applied to withdraw his appeal under paragraph 17 of the Rules. We granted his application.

PUBLIC/PRIVATE

7. We considered paragraph 2 of the Tribunal Procedure Rules ("the rules") which provides:

*"**Overriding objective and parties' obligation to co-operate with the tribunal***

2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction."

Public and private hearings

26.—(1) Subject to the following paragraphs, all hearings must be held in public.

……

(3) Subject to paragraph (2), the Tribunal may give a direction that a hearing, or part of it, is to be held in private.

(3A) Without prejudice to paragraph (3), the Tribunal may direct that a hearing, or part of it, is to be held in private if—

(a) the Tribunal directs that the proceedings are to be conducted wholly or partly as video proceedings or audio proceedings;

(b) it is not reasonably practicable for such a hearing, or such part, to be

accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing;

(c) a media representative is not able to access the proceedings remotely while they are taking place; and

(d) such a direction is necessary to secure the proper administration of justice.

…..

(5) The Tribunal may give a direction excluding from any hearing, or part of it—
(a) any person whose conduct the Tribunal considers is disrupting or is likely to disrupt the hearing;

(a)…..

(b) any person whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely;

(c) any person who the Tribunal considers should be excluded in order to give effect to a direction under rule 14(2) (withholding information likely to cause harm);

(d) any person where the purpose of the hearing would be defeated by the attendance of that person;…"

8. There was interest in the appeal. Amongst others, Mr John Dickens, the Editor of "Schools Week" attended the hearing on 22 April via video link.

9. We decided to hear the Appellant's application in private. We were conscious that, as a litigant in person, the Appellant might well have difficulty in making his application and/or in responding to any questions posed by the panel without referring to the personal and family matters that he sought to protect.

10. We became aware that Mr Dickens sent an email to the Tribunal Administration during the morning to the effect he wished to make an application to be heard on the public/private issue.

11. We considered on balance that the fairest and most efficient way of dealing with Mr Dickens' interest, whilst still progressing the appeal in a timely manner, was to put back consideration of his application to be heard, and to consider this only if we were minded to grant the Appellant's application.

The Appellant's Position

12. In summary the broad nature of the grounds of appeal is that the Appellant contends that the decision made by the Secretary of State was procedurally flawed, not justified, and was unnecessary and disproportionate.

13. As to the Appellant's application that the hearing be conducted in private, he explained that he had been unaware until very recently that the hearing would be conducted in public. He said that he had not read the rules. The judge directed his attention to

paragraph 26 and went through these provisions with him. She also referred him to paragraph 14 of the rules.

14. The Appellant made clear that based on his past experience of press coverage in "Schools Week" he is particularly concerned about the further impact of any adverse publicity upon his private and family life interests, and also on the interests of particular family members. One of his family members is particularly vulnerable for a number of reasons which we need not relate here. The Appellant made it clear that he did not trust that the press would report his position accurately and this would affect him and his family members, particularly with regard to their reputation in the relatively small community in which they now live and work. His relied on paragraph 26 (5) (b) and (d) of the rules and submitted that if the proceedings were held in public he would be unable to conduct his appeal freely, thereby effectively depriving him of his right of appeal.

15. Mr Line on behalf of the Respondent took a neutral stance but, very properly, he assisted the panel. In particular, he reminded the panel that paragraph 26 (5) of the rules relates to exclusion of individuals and is a narrower basis than the core application which centres on the principle of open justice.

16. In our view under paragraph 26 of the Rules the starting point is that all proceedings "must be heard in public". This is because of the longstanding principle of open justice at common law. If authority is needed, in the lead judgement of the Court of Appeal in *Global Torch Limited v Apex Global and Ors [2013] EWCA Civ 819*, Maurice McKay LJ considered the history and purpose of the principle of open justice. Ultimately the issue involves considering whether it is necessary in the interests of justice that there should be a departure from the long-established principle of open justice.

17. In *Global Torch Limited* the Court of Appeal considered the interplay between competing rights under Article 6 (the right to a fair and public trial), Article 8 of the ECHR (the qualified right to respect for private and family life), Article 10 (the qualified right to freedom which includes the freedom of the public and the press to attend and report on proceedings).

18. Amongst other matters the following passages drawn from the judgement of McKay LJ are instructive:

> "14. The last authoritative consideration prior to the coming into force of the Human Rights Act 1998 was *Regina v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 in which Lord Woolf MR said (at page 977E-G):
>
> *"The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially….It makes uninformed and inaccurate comment about the*

proceedings less likely….Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it."

19. Having considered the texts of Articles 6, 8 and 10 of the ECHR the Court of Appeal in *Global Torch* observed at paragraph 19:

"Much of the early consideration of the relationship between these potentially conflicting rights was in the context of Articles 8 and 10. In Campbell v MGN Limited [2004] 2 AC 457, Lord Hoffmann said (at page 56:

"But when press freedom comes into conflict with another interest protected by the law, the question is whether there is a sufficient public interest in that particular publication to justify curtailment of the conflicting right."

20. McKay LJ also referred to *In re S (a child)* [2005] 1 AC 593, where Lord Steyn, having referred to *Campbell*, said (at paragraph 17),

"What does, however, emerge clearly from the four opinions are four propositions. First, neither article [8 or 10] has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justification for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

Our Consideration

21. It was clear to us that the Appellant did not seek that particular parts of the hearing be heard in private so as to protect against the airing of sensitive or personal parts of the evidence. Further he did not seek anonymity. That particular horse had long since bolted because, as he impressed upon us, there had been adverse press coverage in the past. Rather his application was that the entire hearing should be held in private so as to seek to prevent further adverse publicity and to protect his reputation and the interests of his family members His overarching point was, indeed, that he had brought his appeal in order to seek to restore his reputation and his objective would be entirely defeated if the press was able to be present and to report on the proceedings. In our view the core of his application was that he sought a private hearing so to prevent press attendance and the risk of adverse publicity.

22. We recognise that the Appellant very strongly believes that the press will not report the proceedings accurately. In our view this is not a matter that can logically affect a judicial decision about whether to hold the hearing in private, in whole or in part. There is a very strong public interest in the well-established principle of open justice. The purpose of the hearing is to consider the Appellant's appeal i.e. whether the decision made by the Respondent in the exercise of powers under the Act "is not appropriate". There is a strong public interest in such an important issue. We do not consider that the Appellant would be prevented from exercising his appeal right, but rather that he would prefer to do so in a private hearing so as to avoid the potential for adverse publicity and further damage to his reputation. We were not persuaded that it was necessary in the interests of justice that the proceedings be conducted in private. In

our view to accede to the Appellant's application would very seriously undermine the principle of open justice.

23. We accept that the Appellant's rights under Article 8 of the ECHR are engaged. This is a qualified right. We are satisfied that the decision to hold the hearing in public is in accordance with the law, and is justified and necessary in the public interest. In our view the strong public interest in the principle of open justice far outweighs the private and family life interests of the Appellant, which we take to embrace any adverse impact on his family members.

24. For these reasons we refused the application that the proceedings be heard in private in part or at all, and also the application that members of the press should be excluded pursuant to paragraphs 26 (5) (b) and (d) of the rules.

25. In the circumstances it was unnecessary to consider representations from Mr Dickens.

THE NATURE AND SCOPE OF THE HEARING

The Decision under appeal

26. The Direction, issued on 10th January 2023, stated: "The Secretary of State found that Trevor Averre-Beeson had engaged in 'relevant conduct', and that because of that conduct, he is unsuitable to take part in the management of an independent school (including an academy or Free School). For the purpose of this direction, 'relevant conduct' means conduct that is so inappropriate that, in the opinion of the appropriate authority, it makes a person unsuitable to take part in the management of an independent school, see regulation 2(5)(c) of the 2014 Regulations".

27. The conduct on which the Respondent relied concerned allegations of financial misconduct which are set out in the Scott Schedule. In very brief summary the Respondent considered that the treatment of academy funds by the Appellant was in breach of the Trust Financial Regulations and the Academies Financial Handbook, and was also contrary to the *Nolan* principles.

The Legal Framework

28. We set out below the key statutory provisions in the 2008 Act:

> ***"128 Prohibition on participation in management***
>
> *(1) The appropriate authority may direct that a person—*
>
> *(a) may not take part in the management of an independent educational institution;*
>
> *(b) may take part in the management of such an institution only in circumstances specified in the direction;*
>
> *(c) may take part in the management of such an institution only if conditions specified in the direction are satisfied.*

(2) A direction under this section may be given in respect of a person only on one or more prescribed grounds connected with the suitability of persons to take part in the management of an independent educational institution.

(3) Regulations may prescribe the procedure for giving a direction under this section (including provision about notification of persons who are subject to directions).

(4) The appropriate authority may vary or revoke a direction under this section in prescribed cases.

(5) Regulations may prescribe the grounds on which a person subject to a direction under this section may seek to have it varied or revoked under subsection (4).

(6) In this section and sections 129 to 131, "the appropriate authority" means—

(a) the Secretary of State, or

(b) such other public authority as may be prescribed.

129 Directions under section 128: appeals

(1) A person in respect of whom a direction has been given under section 128 may appeal to the Tribunal—

(a) against the decision to give the direction;

(b) against a decision not to vary or revoke the direction.

(2) Regulations may—

(a) provide that the Tribunal may not entertain an appeal under this section insofar as the appellant's case is inconsistent with the appellant having been convicted of an offence;

(b) prescribe circumstances in which the Tribunal must allow an appeal under this section;

(c) prescribe the powers available to the Tribunal on allowing an appeal under this section…."

The Regulations

29. The Regulations made pursuant to the Act are the Independent Education Provision in England (Prohibition on Participation in Management) Regulations 2014 ('the Regulations'). Regulation 2 provides:

"Prescribed grounds for a section 128 direction

2.*—(1) The prescribed grounds on which a section 128 direction may be given in respect of a person are that—*

(a) the person—

(i) has been convicted of a relevant offence;

(ii) has been given a caution in respect of a relevant offence;

(iii) is subject to a relevant finding in respect of a relevant offence; or

(iv) has engaged in relevant conduct; and

(b) because of that conviction, caution, finding or conduct, the appropriate authority considers that the person is unsuitable to take part in the management of an independent school.

30. The term 'relevant conduct' in regulation 2 (1)(a)(iv) is defined by regulation 2 (5) as follows:

"(5) For the purposes of paragraph (1), conduct will be relevant if it is conduct which—

(a) is aimed at undermining the fundamental British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs;
(b) has been found to be in breach of professional standards by a professional body; or
(c) is so inappropriate that, in the opinion of the appropriate authority, it makes a person unsuitable to take part in the management of an independent school."

Powers of the Tribunal on appeal

31. The powers of the Tribunal when considering an appeal under s.129(1) of the Act are set out in regulation 7:

"Appeals: Tribunal's powers

7.*—(1) This regulation applies where—*

(a) an appeal has been made to the Tribunal under section 129(1) of the 2008 Act in respect of a decision to give a section 128 direction, or a decision not to vary or revoke a section 128 direction; and

(b) the Tribunal considers that the decision is not appropriate.

(2) The Tribunal may order the appropriate authority to vary or revoke the direction.

(3) Unless the parties to an appeal agree otherwise, the Tribunal, in exercising its powers under this regulation, must not consider—

(a) any information relevant to the decision to give a direction, or not to vary or revoke a direction, which the appropriate authority did not have at the time the decision was made;

(b) any evidence of a material change of circumstances of the person concerned occurring since the decision to give a direction or not to vary or revoke a direction was made."

Discussion

32. There is no provision in the Regulations which expressly states whether the exercise of the right of appeal involves a redetermination or a review. This contrasts with other appeals heard in this Chamber which are governed by different statutes and secondary regulations. For example: in Public Health Lists (PHL) appeals, which can involve consideration of "suitability" and may also involve recommendations regarding a National Disqualification, the relevant regulation is paragraph 17 of the National Health Service (Performers List) (England) Regulations 2013. This states at paragraph 17 (1) that "A Practitioner may appeal (by way of redetermination) to the First-tier Tribunal…" Paragraph 17(4) also provides that on appeal the First-tier Tribunal may make any decision which the PLDP "could have made". In context this, almost invariably, involves hearing oral evidence in a de novo hearing to determine facts, and the making of a fresh decision as to what, if any, allegations, have been established by the Respondent on the balance of probabilities. It may also involve consideration of a number of different regulatory measures, and in the context of evidence which postdates the decision i.e. evidence that was not before the original decision maker.

33. In Care Standards' appeals the position is similar, albeit not identical. Whilst the Health and Social Care Act 2008 requires the panel to decide whether the decision under appeal should be confirmed or set aside, the panel usually receives post decision evidence from both parties that bears on the issue of whether there was, in fact, any breach of standards of care as alleged, as well as issues such as insight, capacity to improve, attitude to regulation etc. all of which may inform the assessment of risk and, thus, the issue of necessity and proportionality.

34. In our view the fact that Regulation 7 provides that no new evidence can be considered in an appeal against a Direction under s 128 of the Act, unless the parties agree, points to the nature of the appeal right being that of review.

35. The Respondent does not, in this appeal, consent to the panel considering any evidence that was not before the decision maker. It is not within our remit to question that decision.

36. What then is the scope of an appeal which involves a review process rather than a de novo hearing/ redetermination? It was agreed that it was appropriate that we should give a ruling on this since it would govern the conduct of the appeal hearing. We have been assisted by a number of decisions referred to by Mr Line in his comprehensive and very helpful skeleton argument.

37. Although not concerning an appeal under section 129 of the Act we consider that the principles considered in the decision of the Court of Appeal in *Hussain (Nasim) and others v Waltham Forest London Borough Council* [2023] EWCA Civ 733 should guide us.

38. The decision under appeal in *Hussain* concerned a licensing decision by the local

authority under the Housing Act 2004 and whether the applicant was a fit and proper person to hold a licence in relation to houses of multiple occupation. The statutory scheme in question explicitly created an appeal by way of re-hearing which allowed new matters to be taken into account by the First-tier Tribunal. Even in that context, the Court of Appeal emphasised the restrictions which apply to the First-tier Tribunal's jurisdiction. At paragraph 65, Andrews LJ said that:

> *"… Parliament intended the licensing decision to be taken by the local housing authority, and that their decision should not be treated as a mere step on the path to a final decision being taken by the FTT…"*

and at paragraph 77,

> *"Where a re-hearing on appeal does not involve the appellate tribunal starting afresh, the appellate tribunal may still be required to make up its own mind on the application in place of the original decision-maker. But even then, if the decision involves the exercise of a discretion, or judgment, by another person or body, the appellate tribunal will not interfere with the original decision unless, having afforded it what is variously described in the authorities as "great respect", or "considerable weight", it is satisfied that the decision was wrong. In making that evaluation the appellate tribunal must pay proper attention to the decision under challenge and the reasoning behind it."*

39. The Respondent submits that this applies with equal force to an appeal under s.129 of the Act and shows that a high hurdle must be crossed for an appeal to succeed. We agree that as the Respondent's decision under appeal was discretional, then for the appeal to succeed the Tribunal must essentially be satisfied that the exercise of that discretional judgement was wrong in the sense of being unreasonable and/or irrational and/or perverse. The fact that the Appellant disagrees with the decision, or that the decision sits within a range of permissible outcomes, albeit that the Tribunal might itself have chosen a different one, is not sufficient.

40. We consider that this approach is also consistent with the approach historically taken in appeals brought under s 144 (1) of the Education Act 2002. Under s. 144(1) of the 2002 Act, an appeal could be made to the First-tier Tribunal against the decision to make a direction under s.142, or a decision not to vary or revoke the direction. The Education (Prohibition from Teaching or Working with Children) Regulations 2003/1184 were created under s.144(4). Under regulation 13(1), the Tribunal had the power to vary or revoke the direction if it considered that the direction "is not appropriate". Under regulation 13(2), the Tribunal could not "… in exercising its powers under this regulation, consider – (a) any information relevant to the decision to give a direction or not to revoke or vary a direction which the Secretary of State did not have at the time the decision was made; or (b) any evidence of a material change of circumstances of the person concerned occurring since the decision to give a direction or not to revoke or vary a direction was given." As such the powers provided under the 2008 Act are very similar to those that existed under the 2002 Act and subordinate legislation.

41. In *Secretary of State for Children, Families and Skills v JN* [2008] EWHC 1199 (Admin) Dyson LJ held in relation to the scheme under the 2002 Act:

> *"The Tribunal must form its own view as to whether or not, on the evidence before it, which is the same evidence as that which was before the Secretary of State, there existed sufficient grounds for the direction to be given under section 142. The Tribunal thereby decides whether the Secretary of State's decision was reasonable."*

42. We agree that this dictum now has to be viewed in the light of the Court of Appeal's more recent decision in *Hussain.* We agree with the Respondent's submission that it is telling that this more historic case indicates that the approach of the Tribunal on appeal is to assess whether the Secretary of State's decision was unreasonable.

43. We noted in particular that at paragraph 23 Dyson LJ accepted an explanation/self-direction provided in the First-tier Tribunal decision in *FH v Secretary of State for Education and Skills* [2005] 0552.PT where it said/directed itself :

"Thus, the Tribunal is, in this instance, confined to conducting a review of the decision made by the Secretary of State. The Tribunal is not empowered to re-hear the case or to determine the primary facts. It is required, in effect, to decide whether the Secretary of State had sufficient evidence upon which to base a determination that the specified ground relied upon existed and, further, to decide whether the direction was an appropriate or proportionate response in all of the circumstances known to the Secretary of State."

Our Decision

44. For the reasons stated above we consider that the scope of the right of appeal conferred by s 129 of the Act against the decision to issue a Direction is that of review. For example, and in line with his grounds of appeal, it is open to the Appellant to contend, by reference to the evidence before the Respondent, that:

- the decision was one that was not supported by the evidence before the Respondent and/or that evidence was not considered properly and/or at all.
- the procedure adopted was irregular/unlawful.
- the decision was infected by immaterial considerations.
- the decision was unfair and/or unsafe because of undue delay.
- the decision-making process was flawed or unsafe because of material misdirection.
- The decision was unreasonable and/or unjustified.
- The decision was disproportionate having regard to the appropriate balance between the public and private interests involved.

45. The above list is not intended to be prescriptive but serves to describe the broad principles of a review process which focusses on how and why the decision was made on the basis of the evidence before the Respondent at the date of the decision.

46. For all the reasons explained in the authorities and cases considered above a review process does not enable this panel to make its own decision on the facts underpinning the misconduct found by the Respondent or to simply substitute its own judgement on reasonableness or necessity, or on the ultimate issue of proportionality. The panel would be bound to accord due respect to the Respondent's view that the Direction was justified in pursuit of a legitimate public interest, and was necessary and proportionate to the protection of that interest. That is not to predict any outcome but simply reflects established legal principles regarding the proper approach to review.

47. If, however, the Appellant was to succeed in satisfying us on review that the Respondent's decision was not appropriate, the next stage of the process would involve a discretionary decision as to what Direction, if any, should be made. The outcome of that discretionary decision would be informed by the panel's reasons as to why the decision was inappropriate and any further submissions made.

The Burden and Standard of Proof

48. In our view it is clear from Regulation 7 that it is for the Appellant to satisfy the Tribunal that the Respondent's decision to make a Disqualification direction "is not appropriate". We are aware that our conclusion regarding the burden of proof is different to the decision of the First-tier Tribunal in *Alam v Secretary of State* [2015] 2553.INS and that this aspect was not a ground of appeal before the Upper Tribunal in the onward appeal. We note that the Respondent in *Alam* had agreed to the reception of new evidence which may have had some bearing or influence on the approach taken in that appeal at first instance. In any event the subsequent decision of the Court of Appeal in *Hussain* supports that in an appeal of this nature the burden lies on the Appellant to show that the decision under appeal "is not appropriate".

49. Finally, we would simply add for the sake of completeness that the standard of proof is the civil standard i.e. the balance of probabilities. Given that we consider that the scope of the appeal right is that of review, and that we are not finders of fact, it may be more apt to describe this as the burden on the Appellant to satisfy the panel on balance that the decision was "not appropriate."

Judge S Goodrich

First-tier Tribunal (Health, Education and Social Care)

Date Issued: 16 May 2024