IN THE UPPER TRIBUNAL Case Nos: HS/3865/2016
ADMINISTRATIVE APPEALS CHAMBER HS/3866/2016

Before UPPER TRIBUNAL JUDGE WARD

Decision: To the limited extent of the point raised by the appeal to the Upper Tribunal, it is allowed. The decisions of the First-tier Tribunal reissued on 18 November 2016 under references EH886/16/00022 and 00023 involved the making of an error of law and are set aside. The cases are referred to the First-tier Tribunal (HESC Chamber) to consider the appellant's implied application to be joined as a party to the above appeals, for the purpose of seeking from the First-tier Tribunal ("FtT") permission to appeal against the substantive decisions in those cases. I direct that the files are to be placed before a salaried judge of the First-tier Tribunal to consider whether case management directions should be given.

REASONS FOR DECISION

1. In these two linked appeals, which raise an identical issue, the Appellant is the father of twin boys, A and J. The First Respondent is the local authority which issued Education Heath and Care ("EHC") Plans in respect of them. The Second Respondent is the mother of A and J. She and the Appellant are divorced and hold differing positions on certain matters relating to A and J.

2. The mother had appealed against the EHC Plans to the First-tier Tribunal ("FtT") which on 19 October 2016 allowed the appeals. The father was not a party to those appeals. It has been suggested that he had been given the chance but declined: that is not a matter on which I need to make findings.

3. By applications received on 20 December 2016 the father sought from the Upper Tribunal permission to appeal against the FtT's substantive decisions, dated 19 October 2016. Prior to that, on 15 November 2016 he had applied to the FtT for permission to appeal against those decisions. By a decision re-issued on 18 November 2016, the Deputy Chamber President had ruled that the applications could not be accepted for consideration because the father had not been a party to the original appeal. In support of this view she relied on the terms of section 11 of the Tribunals, Courts and Enforcement Act 2007. Sub-section (2) confers a right of appeal on "any party to a case,…subject to subsection (8)." The latter subsection confers a power on the Lord Chancellor to make provision for a person to be treated as being, or to be treated as not being, a party to a case for that purpose.

4. On 22 December 2016 Upper Tribunal Judge Jacobs dismissed the applications for permission to appeal, essentially following the reasoning of the judge below. He pointed out that the Upper Tribunal's rules did allow the father the right of renewal at an oral hearing but questioned whether such a hearing had the potential to avail him in the circumstances of these cases.

The father did apply for an oral hearing and the file was transferred to me. I gave directions inviting representations as to why the appeals should not be struck out for want of jurisdiction, to which the father in due course responded, indicating among other things that the Lord Chancellor had declined his request that she exercise her power under section 12(8) to make him a party by order.

5. Meanwhile I had become conscious of the implications for the present cases of a recent decision in the Tax and Chancery Chamber of the Upper Tribunal. I gave the father the opportunity to apply for leave to amend his grounds of appeal, observing:

> "2. …The Lord Chancellor has declined to exercise her power under s12(8) of the Tribunals, Courts and Enforcement Act 2007. Apart from that, a right of appeal is only conferred on a party to an appeal in the First-tier Tribunal ("FtT"). If that was the end of the matter, I would be required to strike the case out on the ground that the Upper Tribunal had no jurisdiction.
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> 3. However, it may be that the applicant is pursuing a challenge to the wrong decision.
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> 4. On 15 November 2016 the FtT received an application from the applicant for permission to appeal. For the reasons already given, he could not appeal against a decision to which he was not a party and at any rate to that extent Judge Tudur's decision re-issued on 18 November 2016 was correct. But could his application have been treated as an application to be joined as a party even at that late stage? And if it could have been, should it have been?
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> 5. In a recent decision in the Tax and Chancery Chamber, *Razzaq and Malik v The Charity Commission* [2016] UKUT 546 (TCC) Upper Tribunal Judge McKenna allowed an appeal by two individuals who had applied to be joined to FtT proceedings after the decision in those proceedings had been given, with a view to appealing against it. Judge McKenna held that the power conferred by rule 9 of the FtT(General Regulatory Chamber) Rules survived judgment and therefore that the FtT ought to have considered the application Mr Razzaq and Mr Malik had made.
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> 6. The FtT has diferent rules for different types of case and rule 9 is in somewhat different terms for the General Regulatory Chamber and for the Health Education and Social Care Chamber (which hears SEN cases). However, the differences are not such as obviously to exclude the possibility that the decision in *Razzaq and Malik* ought equally to apply to the HESC Chamber.

> 7. A further issue in the present case is that whereas Messrs Razzaq and Malik had made an express application to be joined, the present applicant did not. However, the FtT (HESC), like other parts of the tribunal system, is subject to the so-called "overriding objective", in which, among other things, "avoiding unnecessary formality and seeking flexibility in the proceedings" is a consideration. Ought Judge Tudur therefore to have construed the application before her as encompassing an application to be joined as a party, given that that was an essential step to pursuing the application for permission to appeal which the applicant was evidently keen to make?
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> 8. Even if the answer to 7. was yes, it would not mean that the judge would have been obliged to grant it. Appellate courts and tribunals allow the courts and tribunals from which they are hearing appeals a generous margin of discretion when it comes to matters of case management. "

The father duly applied for, and was given, permission to amend his grounds so as to pursue this point, in substitution for his original grounds of challenge which had been directed to the substantive decision.

6. By a letter dated 4 May 2017, the mother indicated that she does not support the father's "request to appeal or to be made a party to the proceedings so that his application to appeal against the substantive findings of the FtT can be considered." The points she makes go in my judgment to whether the FtT should exercise the power to join the father as a party, not to whether it erred in law by failing even to consider that possibility. In view of the decision I have reached on this appeal, she will doubtless wish to ensure that a copy of that letter is in the papers to be considered by the FtT.

7. One particular point that she makes, is that *Razzaq and Malik* concerns financial matters "rather than the welfare of two vulnerable children whose welfare must be paramount." That, like her other points, is about how a discretion should be exercised, rather than whether such a discretion under the relevant rules of procedure exists at all. As will be seen below, the relevant rules of procedure of different chambers of the FtT are not in all respects identical but my task, given the limited scope of the present appeal, is to apply the relevant rules as they stand. In any event, the principle of paramountcy of a child's welfare, found in s.1 of the Children Act 1984, does not as such apply to special educational needs cases. The points she makes under this heading, such as the effect on the children of further uncertainty caused by an appeal can, again, be made to the FtT.

8. The local authority, in a careful submission drafted by experienced education law counsel accepts that the power in rule 9 subsists beyond the FtT making a final decision, for the reasons given in *Razzaq and Malik*, which in turn had relied upon *Prescott v Dunwoody Sports Marketing* [2007] EWCA

Civ 461. Their submission invites me to remit the question of whether the father should be joined to the FtT. It suggests that it amy be necessary for the Upper Tribunal to give guidance to the FtT about how to consider this application in the light of the HESC Rules. It makes clear that in supporting the remittal to the FtT the local authority should not be taken as supporting the father's application to be joined as a party or his grounds of appeal against the substantive decision: indeed, it indicates that it is likely to oppose an application, if pursued, for further steps in these proceedings.

9. This prompted the father to instruct solicitors to prepare a reply, who sought and were given an extension of time to allow them to seek legal aid to instruct counsel for the purpose. On 23 May an application was made for a further extension of 5 weeks, on the basis that the father wished to pursue an appeal in respect of legal aid, which had been refused. On 24 May I refused that application. I do bear in mind that father has not had an opportunity to obtain the legal advice he sought when I consider below the points made on behalf of the local authority.

10. The submission on behalf of the local authority draws attention to the difference between the relevant rule of the General Regulatory Chamber's rules of procedure (SI 2009/1976) and that of the Health, Education and Social Care Chamber's rules (SI 2008/2699). Rule 9 of the former provides:

> "(1) The Tribunal may give a direction adding, substituting or removing a party as an appellant or a respondent.
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> (2) If the Tribunal gives a direction under paragraph (1) it may give such consequential directions as it considers appropriate.
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> (3) Any person who is not a party may apply to the Tribunal to be added or substituted as a party.
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> (4) If a person who is entitled to be a party to proceedings by virtue of another enactment applies to be added as a party, and any conditions applicable to that entitlement have been satisfied, the Tribunal must give a direction adding that person as a respondent or, if appropriate, as an appellant."

Rule 9 of the latter provides

> "(1) The Tribunal may give a direction substituting a party if—
> (a) the wrong person has been named as a party; or
> (b) the substitution has become necessary because of a change in circumstances since the start of proceedings.
>
> (2) The Tribunal may give a direction adding a person to the proceedings as a respondent.

> (3) If the Tribunal gives a direction under paragraph (1) or (2) it may give such consequential directions as it considers appropriate."

11. The local authority's submission that the former is broader than the latter is correct, but I do not think it has any material impact on this case. If the FtT did decide to join the father as a party to the proceedings below, it would, because of the terms of rule 9(2), have to be "as respondent". The local authority's submission appears to be based on the premise that a "respondent" in the FtT(HESC) will, at least in general, be the public body whose decision is under challenge. That may be so, but the definition of "respondent" in rule 1 of the HESC rules includes, as a free-standing category "a person substituted or added as a respondent under rule 9". While it may be a typical use of the power, as the local authority submits, to change the local authority responding to a SEN appeal when appellants move from one area to another during the course of the appeal, I do not consider that it is confined to instances of that sort.

12. The local authority's apparent concern is that while there is a wide range of people who may have a right of appeal in special educational needs cases (see e.g. Children and Families Act 2014, s.51, the definition of "parent" in s.576 Education Act 1996 and Fairpo v Humberside County Council [1997] ELR 12), the rules allow their involvement as a party only if they begin the case or are substituted because the wrong person was named as a party or there has been a change of circumstances.

13. I do not accept the above analysis. The FtT can simply join others with a right of appeal to proceedings that are under way "as respondent". The position such a person adopts in relation to the substantive issues in the appeal will not be determined by the label of "respondent" he or she is given.

14. Finally, the local authority indicates that guidance as to the relevance of various specified factors might assist. I do not regard it as appropriate to give such guidance. There may be a wide range of circumstances when a person applies to be joined as a party and I do not think it is sensible for the Upper Tribunal to ascribe weight to particular factors, when it is essentially a case management matter for the discretion of the First-tier Tribunal.

CG Ward
Judge of the Upper Tribunal
5 July 2017
(Clerical error corrected 11 July 2017)