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## **CHALLENGING THE ADDITIONAL SUPPORT NEEDS TRIBUNAL**

A new era has opened in education law. For many years education law has been the reserve of the sheriffs, whose decisions as to placing requests and exclusions have been “final”. Court of Session cases in education law have been few and far between. That changed with the passing of the Education (Additional Support for Learning) (Scotland) Act 2004. The 2004 Act provides for an appeal to the Court of Session from a decision of the Additional Support Needs Tribunal. The response has been a flurry of statutory appeals. To my knowledge there have been at least seven appeals over the last year. There has been the opportunity for some interesting analyses of both old and new aspects of the law. That process is continuing.

### **Procedure**

The right to appeal against a decision of the Tribunal is found in section 21 of the 2004 Act. Appeals may only be made on a point of law. Either the person who made the reference to the Tribunal, or the education authority may appeal. The Act itself does not say a great deal about appeals. The procedure is found in the rules of the Court of Session. No leave to appeal is required. Rule 41.20 provides that the appeal should be lodged within 42 days after the date on which the decision appealed against was intimated to the appellant. Where the tribunal issues a statement of reasons for its decision later than the decision, the appeal may be lodged within 42 days after the date of intimation of that statement of reasons to the appellant. In education cases 42 days may represent a significant proportion of a school term. There is may be good reason to lodge an appeal as quickly as possible, rather than waiting for 42 days.

The court will generally make an order for service of the appeal on the respondent, and on any other person it thinks fit, and for answers to the appeal. Within 14 days after the expiry of the period allowed for lodging answers to an appeal the appellant must apply to the Inner House of the Court of Session for orders for further procedure. The appeal may be heard by the Inner House, but there is also provision for remit to an Outer House judge in terms of rule 41.44. Thus far most appeals under the 2004 Act have been remitted to the Outer House. The chief benefit of a remit is that there is more chance of the appeal being heard earlier by one judge in the Outer House than by three in the Inner House. The decision of the Outer House judge can be reclaimed (ie appealed, see rule 41.45). This means that difficult matters receive very full consideration in both Houses. Appeal to the Inner House may however introduce material delay. Thus far two decisions have been taken from the Outer House to the Inner House. Appeals to the House of Lords are pending in both.

The 2004 Act is silent on the effect on the decision of the Tribunal of a pending appeal. The general rule is that an appeal suspends the effect of the decision appealed against, so that the decision need not be implemented until the appeal had been disposed of. This rule has been applied in the context of the children's hearing (*Kennedy v M*, 1995 SLT 717; *Stirling v D*, 1995 SLT 1089). It is a logical rule to apply in the present context as it would be unfortunate for a pupil for a decision relating to his or her education to be put into effect, and then potentially reversed. This does however mean that it is important to try and progress appeals quickly. Expedition can be difficult, but the Court administration have done their best to respond speedily in these cases.

Where the Court of Session allows an appeal under section 21 it may remit the matter to the Tribunal, or to a differently constituted Tribunal to be considered again. The Court may give the Tribunal directions about the consideration of the case. It may also make such ancillary orders as it considers necessary or appropriate. It is important to note that the Court of Session cannot substitute its own decision for that of the Tribunal. Decisions on the merits of the reference remain the province of the Tribunal, albeit they may have the benefit of the Court's directions on matters of law or procedure. The power to make ancillary orders has not been explored, but given the limitations on the powers of the Court in relation to the merits, it is likely that such orders will be restricted to the sort of orders that could be made in judicial review, ie orders for reduction, declarator, suspension, interdict and implement.

A word about legal aid. The person who made the reference to the Tribunal has the right to appeal. Section 18(2) specifies the persons who may make a reference. In the case of a child, the parent may make a reference. Once a pupil is over the school leaving age, he or she counts as a "young person" and as such may make a reference. If the young person lacks capacity then the parent may make the reference. There is no legal aid for a Tribunal hearing, but there may be legal aid for an appeal under section 21. The case of *NS and FS v Scottish Legal Aid Board* 2007 SLT 711, 2007 FamLR 98 indicates that parents who are exercising their own right to appeal are not acting in a representative capacity, and cannot apply for legal aid in the name of the child, on the basis of the child's resources rather than their own. A child has no right to make a reference, and so no right to appeal to the Court of Session. There may be scope for argument when a parent is exercising the right of appeal in place of a young person who lacks capacity that the litigation is brought on behalf of the child. Appeals to the Court of Session involve significant expense and may be confined to those who are eligible for legal aid or whose means are great enough to bear the cost involved. Any potential appellant, or respondent, must also be advised that an appeal carries a material risk of being found liable for the expenses of the opponent.

### **Jurisdiction**

The first question in looking at any decision of the Tribunal is to ask whether there was jurisdiction to hear the case in the first place. This is less straightforward than may at first

appear. The decisions that may be referred to the Tribunal are set out in section 18(3) of the 2004 Act. Broadly speaking the Tribunal may hear an appeal in respect of:

- (a) a decision that a pupil requires, or continues to require, a co-ordinated support plan;
- (b) a decision that a pupil does not require, or no longer requires a plan;
- (c) failure by an education authority to prepare a plan within the timescale mentioned in regulations;
- (d) statements in the plan of the education authority's conclusions as to the factor or factors from which the pupil's additional support needs arise, the educational objectives to be achieved, the additional support required and the persons who are to provide the support; failure to carry out a review; failure to complete a review timeously; and refusal of a request for an early review;
- (e) refusal of a placing request.

Section 18(4) of the 2004 Act allows the Tribunal to consider a placing request appeal where at the time the placing request is refused one of three sets of circumstances apply. These are where:

- (a) a co-ordinated support plan has been prepared (and not discontinued);
- (b) no such plan has been prepared, but it has been established by the education authority that the child requires such a plan;
- (c) the education authority have decided that the child does not require a plan and that decision has been referred to the Tribunal.

An unwelcome result may be eliminated if the Tribunal had no jurisdiction, as Mrs Gordon found in *Gordon, Appellant* 2007 FamLR 76. Her son had additional support needs. She made a placing request for him to attend the Camphill Rudolf Steiner School in Aberdeen. Argyll & Bute Council refused the request, and told her she could appeal to the council's appeal committee. She was all set to go to the committee on 7 June 2006, when two days before the hearing she received a letter telling her that the council had decided that her son needed a coordinated support plan in terms of section 9 of the 2004 Act. The council cancelled the appeal committee hearing and told Mrs Gordon to appeal to the Tribunal. She did so and the Tribunal refused her appeal. Unhappy with the outcome she sought advice, and was told that she should have been allowed to press on with the appeal committee hearing as the Tribunal had no jurisdiction.

Mrs Gordon's proposition was simple. At the time her placing request was refused none of the three conditions in section 18(4) was present. The education authority did not oppose her appeal. Instead the Scottish Ministers stepped in and argued that the intention of the Scottish Parliament was that where there was a co-ordinated support plan the Tribunal should be involved, and that the 2004 Act should be read in a way that achieved this objective. Their argument was rejected.

The result for Mrs Gordon was that she could argue her appeal all over again, but this time in the sheriff court. The appeal committee was “deemed” to have refused her appeal, because they had failed to hear it timeously. This is the result of the Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005, SSI 2005/515, paragraph 4. That allowed her to proceed to the sheriff court. Her appeal to the sheriff was late, but she had a good argument to show cause why it was late (2004 Act, schedule 2, paragraph 7). As a result of the appeal to the Court of Session she was able to bring her case to before the sheriff.

The appeal is interesting in so far as the argument employed the classic tools of statutory construction. The starting point is the ordinary natural interpretation of the words used. Adopting a “strained” interpretation, as the Scottish Ministers urged, would have involved rewriting the statute. The second schedule to the 2004 Act makes express provision for the appeal committee to transfer a case to the Tribunal in other circumstances. A transfer has to take place where there is an appeal of a decision that the child does not require a co-ordinated support plan. There is no provision for transfer where it is recognised that the child does require a plan after the placing request has been refused. Lady Dorrian, who heard the case, recognised that if the Ministers were right, then Mrs Gordon would lose the right to appeal to the sheriff. Further, there is no provision in the Act to indicate what would happen to the process already pending before the appeal committee. These factors persuaded her that the Tribunal had no jurisdiction to refuse the placing request.

That is all very well, but it becomes clear on reading the judgment that the 2004 Act is seriously unsatisfactory in that it maintains two parallel appeal routes, one to the Tribunal for children with co-ordinated support plans and the other to appeal committees and sheriffs for all other children, including those with additional support needs who do not require a plan. The interface between the two systems is unclear and unsatisfactory. The confusion inherent in the 2004 Act makes it more difficult to respond to children’s needs within an appropriate timescale.

Mrs Gordon was lucky in that she had an alternative appeal route. Mrs D was less lucky. In *D v Glasgow City Council* 2007 SLT 881 a mother made a placing request for her severely disabled child to attend a school over the boundary in the area of a neighbouring education authority. That authority refused her request and she appealed. It had been established that her son required a co-ordinated support plan. Her appeal went to the Tribunal. The Tribunal found themselves faced with a problem. Who was the proper respondent to the appeal? Was it the authority for the area in which the child lived, or the authority that had refused the request? The Tribunal solved the problem by deciding they had no jurisdiction. Lord Clarke agreed. He held that there was no appeal at all open to a parent of a child requiring a co-ordinated support plan where a placing request was refused by an authority who were not responsible for the child’s education, nor the authority for the area where the child lived. Children who do not have coordinated support plans have a right to appeal against a placing

request refusal for a school in another area, but the 2004 Act does not afford such appeal rights to children with plans. The Inner House agreed (unreported opinion, 11 October 2007). They reached their decision after a lengthy review of the terms of the 2004 Act. They held that the Tribunal did not have jurisdiction to hear an appeal against refusal of a placing request by an education authority which was not responsible for the child's education. An appeal to the House of Lords is pending.

### **Conditions for requirement of a co-ordinated support plan**

The Tribunal is involved only with pupils who have a co-ordinated support plan. The conditions in which a pupil requires a plan are therefore of crucial significance. They are set out in section 2(1) of the 2004 Act, which provides a child or young person requires a co-ordinated support plan if:

- (a) an education authority are responsible for the school education of the child or young person,
- (b) the child or young person has additional support needs arising from -
  - (i) one or more complex factors, or
  - (ii) multiple factors,
- (c) those needs are likely to continue for more than a year, and
- (d) those needs require significant additional support to be provided either –
  - (i) by the education authority in the exercise of any of their other functions as well as in the exercise of their functions relating to education, or
  - (ii) by one or more appropriate agencies as well as the education authority themselves.

There have thus far been two reported cases on these conditions. The first related to whether an education authority were responsible for the school education of the child. Section 29(3) sets out that this will be the case where the child or young person is, or is about to be, provided with school education –

- (a) in a school under the management of the education authority, or
- (b) in pursuance of arrangements made or entered into by the authority.

In *RB v Highland Council* 2007 SLT 844, 2007 FamLR 115 C was exceptionally gifted in music and talented in languages. Gifted children may now have additional support needs. Her parents were responsible for devising an educational programme for her, but the education authority paid for the programme. C was enrolled part-time at the local high school. Her parents sought a coordinated support plan. They argued that the authority were responsible for C's education because they paid for it. The authority claimed to be exercising a discretionary power under section 5(4) to provide additional support. Lord Brailsford declined to find that payment was sufficient to mean that the authority were responsible for C's education. He held that the issue was whether the authority controlled the education. The Tribunal had failed to address the issue of control. Their findings in fact were "incomplete and inadequate". The appeal was allowed and the case remitted back.

The Inner House were required to examine the meaning of the word “significant” in *JT v Stirling Council* 2007 FamLR 88. In that case the child had learning difficulties, dyscalculia and was registered blind. She satisfied all the requirements for a plan, subject to the question of whether section 2(1)(d)(ii) applied. All the support she received was provided by the education authority, save for some speech and language therapy provided by the health board, which is an “appropriate agency” within the meaning of section 23. The question for the Tribunal was whether the speech and language therapy provided to her was “significant”. The speech and language therapist was to be directly involved for only a short period. The Tribunal declined to find this was “significant”. Lord Glennie disagreed. He held that “significant” meant “not insignificant” and should be judged by reference to the effect on the child. An Extra Division reversed his judgment and refused the appeal. They decided that “significant” imports more than “not insignificant”, and relates to the frequency, nature, intensity and duration of the support. If support would be of limited duration then there could be little useful purpose in establishing a plan as no co-ordination would be required. The decision of the Extra Division may not be the last word in this case.

There is an interesting contrast between the opinion of Lord Glennie, who was prepared to infer from the Tribunal’s decision that they must have made an error of law in the way in which they had interpreted “significant” and the decision of the Inner House who were prepared to allow the Tribunal a degree of latitude in their decision. Further, the Inner House decision is to be welcomed for its treatment of the Code of Practice published under section 27 of the 2004 Act. The Code is required to address a number of matters, including the nature of the additional support required as a condition of a co-ordinated support plan. Ministers are required to consult on the Code and to lay it before Parliament. The Tribunal must take account of the Code (section 19(7)). Lord Glennie was somewhat dismissive of the Code, but the Inner House noted that the Tribunal was bound to use it as an aid to construction, and approved the Tribunal reaching a view that was consistent with the Code. One matter to be considered in an appeal under section 21 will be whether the Tribunal has taken account of the Code. The Tribunal are not required to follow the Code in every case, but if they depart from the Code without good reason, then they may be exposed to appeal.

### **Conditions for refusal of placing request**

One useful function of the new right to appeal is that it has allowed the Court of Session to interpret certain statutory provisions carried forward into the 2004 Act from the 1980 Act. Placing requests under the 1980 Act have been considered by sheriffs whose decision has been final. Apart from one or two judicial reviews (*Dundee City Council, Petitioners* 1999 FamLR 13; *Aberdeen City Council v Wokoma* 2002 SLT 878) there has been no guidance from the Court of Session in relation to the circumstances in which an education authority may refuse a placing request.

In particular there has been no guidance as to the interpretation of what is now paragraph 3(1)(f)(iii) of schedule 2 to the Education (Additional Support for Learning) (Scotland) Act 2004 which relieves an education authority from the duty to place a child with additional support needs in a school specified by a parent where;

“... (i) the specified school is not a public school, (ii) the authority are able to make provision for the additional support needs of the child in a school (whether or not a school under their management) other than the specified school, (iii) it is not reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in the specified school and in the school referred to in paragraph (ii), to place the child in the specified school, and (iv) the authority have offered to place the child in the school referred to in paragraph (ii) ...”

One aspect of this provision that has caused particular difficulty has been the interpretation of “respective cost”. Comparing a fee-paying independent special school with a education authority maintained school does not involve comparing like with like.

In *SM Appellant 2007 FamLR 2* parents complained that the Tribunal had left out of account the cost of provision of therapy services by the health board in the public school, whereas the cost of the same services was included in the fee of the independent school to which they wished to send their daughter. The education authority maintained that “cost” meant cost to the authority, rather than to the public purse generally. The authority further argued that the cost to them of providing a place at an existing public school was not the school budget, divided by the number of pupils it could accommodate. The cost was limited to any additional costs of the pupil taking up the place. If the place was already there, then there might be no additional costs. Lord Glennie found for the authority on this point.

As was recognised in the press at the time of this decision, the effect is that the cost of a place at an independent special school will often be much more than the cost of a place at a school maintained by the local authority, making it more difficult for a parent to justify a placing request. What was not appreciated was that an education authority has to satisfy the Tribunal of two conditions. The first is that there is a statutory ground to refuse the placing request and the second is that it is in all the circumstances appropriate to refuse the request (section 19(5)). The Tribunal must consider both of these matters. At the second stage it is open to a parent to argue that it is appropriate to send the child to the independent special school, notwithstanding the cost. The authority bears the burden of satisfying the Tribunal that there is both a statutory ground for refusal of the placing request and that refusal is appropriate in all the circumstances. In practice this means that once the parent has raised issues relevant to the second stage of the test, the authority must establish that it is appropriate to refuse the placing request. Failure to address the second stage of reasoning would be an error of law on the part of the Tribunal, and would as such generally result in a successful appeal under section 21.

### **Point of law**

Appeals to the Court of Session are restricted to points of law. “Point of law” can however be given a wide interpretation, as may be seen from the similar jurisdiction exercised by the Court of Session in appeals from the children’s hearing under section 51(11) of the Children (Scotland) Act 1995. Early indications are that there may be a similarly wide interpretation of “point of law” for the purposes of the Education (Additional Support for Learning) (Scotland) Act 2004. In *SM Appellant* Lord Glennie characterised the Tribunal’s treatment of certain evidence as an error of law. The Tribunal attached no weight to a particular report because they were not told the qualifications and expertise of the author. At first sight this has the appearance of a classic issue of fact. The Lord Ordinary noted that the role of the Tribunal was at least to some extent inquisitorial. The rules for the Tribunal (Additional Support Needs Tribunals for Scotland (Practice and Procedure) Rules 2006, SSI 2006/88) set out a procedural code with the overriding objective of enabling the Tribunal, with the assistance of parties, to deal with references fairly and justly. He held that the Tribunal’s treatment of the report was in conflict with its duty under the rules. The appellant should have been offered the opportunity to deal with the qualifications of the author of the report, or the Tribunal should have made its own inquiries, possibly asking the author of the report to give evidence. This could have been done by remote means. Lord Glennie imposes on the Tribunal, under guise of a point of law, a high standard of inquiry into fact. He did so under reference to the Tribunal’s own rules.

### **Tribunal Rules**

If the Tribunal fails to act in terms of its own rules, then there will be a basis for appeal to the Court of Session. For example, provided a case falls within its jurisdiction then the Tribunal should generally hold a hearing before deciding a reference. There are some limited circumstances where a case may be decided without a hearing, such as where there is no response to the reference or the reference is not opposed, or there is agreement to dispense with a hearing. If a Tribunal were to decide the reference without a hearing, in circumstances other than those permitted by the rules, they may expect an appeal. The same goes for any other failure to follow the rules.

### **Proposed extension to jurisdiction of the Tribunal**

There is currently a UK review of discrimination law. Proposals have been made for extension of the jurisdiction of the Tribunal to cover disability discrimination. The sheriff court currently has jurisdiction in relation to discrimination in education. If a disabled pupil is excluded from school as a result of discrimination, the sheriff may be asked to reduce the decision to exclude the pupil under the Disability Discrimination Act 1995 s. 28N, inserted by the Special Educational Needs and Disability Act 2001. Such claims are not numerous but they are complex (see *A v East Ayrshire Council* 2006 FamLR 112). If education discrimination is moved to the Tribunal, there is a case for bringing exclusion appeals relating to disabled children to the Tribunal. In both discrimination and exclusion, the child may initiate proceedings in his or her own right. Disability discrimination law extends to



private schools. If disability discrimination cases are added to the Tribunal's repertoire, the position of proprietors of independent school will require to be considered. Extension of the Tribunal's jurisdiction does raise the prospect of further interesting appeals to the Court of Session.

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