First-tier Tribunal Care Standards

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

NCN: [2022] UKFTT 435 (HESC)
[2021] 4420.INS

Hearing held Birmingham Civil Justice Centre on 21, 22 and 23 November 2022

BEFORE
Tribunal Judge McCarthy
Specialist Member Ms J Heggie
Specialist Member Ms H Reid

BETWEEN:-

The Proprietor of Home School

Appellant

-v-

The Secretary of State for Education

Respondent

DECISION

The Appeal

1. Mr Colin Rankine is the Appellant. He appeals against the Respondent's decision of 21 July 2022 to remove Home School from the Register of Independent Educational Institutions in England.

2. Although unusual for this Tribunal, it was appropriate for us to announce our decision at the end of the hearing. As a result, the parties are already aware of the outcome. We reserved our reasons, which we set out in this written decision.

Restricted Reporting Order

3. The Tribunal makes a restricted reporting order under Rule 14(1) (a) and (b) of the 2008 Rules, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify the users of the service in this case so as to protect their private lives.

Attendance

4. Mr Colin Rankine, the Proprietor of Home School, attended and represented himself.

5. Mr Dominic Howells, Counsel, represented the Respondent. He was accompanied by Ms Alex Christie, Solicitor from GLD.

6. The Secretary of State proposed calling three witnesses: (1) Mrs Sue Whitehouse, Deputy Director and Head of the Independent Education & School Safeguarding Division, DfE; (2) Ms Philippa Darley, HMI, Ofsted, and (3) Mr Martin Pye, former HMI, Ofsted. However, for the reasons described below, only Mrs Whitehouse and Mr Pye attended the hearing.

7. The Secretary of State applied for the following to attend remotely: (1) Ms Rachel Hoyle, GLD case holder, (2) Gemma Benson, GLD case holder, and (3) Claire Evans, Senior Regulatory and Casework Officer.

Procedural matters

Appeal bundle

8. Prior to the hearing, the parties complied with case management directions and the Respondent provided a joint appeal bundle. There were 539 pages in the electronic version, although the last numbered page is 489. Throughout the hearing, when reference was made to a document, we checked we were all looking at the same document as some of those present were using printed bundles and others an electronic version.

Absence of legal representation for the Appellant

9. At the start of the hearing, we acknowledged that Mr Rankine was without legal representation and explained how we would ensure he was not disadvantaged by a lack of knowledge of the relevant law or the Tribunal's procedures. We did so by explaining to him the legal tests he had to meet, and by giving him a wide range of latitude to answer questions without interruptions, except where necessary to bring him back to a point.

Reasonable adjustments

10. We noticed that Mr Rankine did not have the appeal bundle with him. He explained that he suffered a head injury in 2008 and since then he has had difficulties with his vision, which makes it hard for him to read documents. He added that the difficulty is worse when stressed.

11. Although we have no medical evidence to corroborate his disability, we suggested – and the parties agreed – that we should have regular breaks in the proceedings. We agreed that a break of 15 to 20 minutes after a block of evidence of 45 minutes would be appropriate, with a longer lunch break. Mr Rankine was happy with this arrangement, and we are grateful to the way Mr Howells conducted his questioning to take account of this arrangement.

12. We also suggested – and the parties agreed – that we would ensure that where reference was being made to a document in the bundle, the relevant parts would

be read out to refresh Mr Rankine's memory. We were satisfied that Mr Rankine was aware of the contents of the documents in the bundle because he said they had been read to him by his wife, and therefore it was only necessary to remind him of the documents as they were referenced during the hearing.

Technical problems

13. Although a hybrid hearing was arranged so those attending remotely could observe the proceedings, it was not possible for those attending remotely to hear the proceedings. We attempted to resolve the difficulties with microphones but could not do so.

14. We explained the difficulties to the parties and asked Mr Howells what we might do. After taking instructions, Mr Howells said it was not essential for those attending remotely to observe the hearing as they are not being called to give evidence. Rather than delay the proceedings by seeking technical assistance, he suggested we proceed without the remote link, which is what we did.

Unavailability of a witness

15. Mr Howells raised another procedural matter in that Ms Philippa Darley was not well enough to participate in the first day of hearing. As indicated, she was to be called as a witness. Mr Howells said that he would monitor the situation to see if it would be possible for her to attend – either in person or remotely – by the end of the hearing as it was listed over several days. As matters turned out, we did not need to hear from the Respondent's witnesses, apart from some evidence from Mrs Whitehouse on a specific issue.

Conduct of the hearing

16. Mr Howells commented at paragraph 6 of his skeleton argument of 14 November 2022, that because of the lack of engagement with the legal issues to be considered in the appeal, the Respondent, "approaches the five-day hearing in some uncertainty as to the nature of the case which it has to meet and the evidential basis of that case."

17. We decided that it was fair and just to enable Mr Rankine to present his case so that the Respondent was able to identify the nature of the case and the evidential basis of the case. This had to be done at the outset of the hearing and therefore we heard from Mr Rankine and allowed Mr Howells to ask him questions after we had explored the issues we wished to explore. Our intention was to hear from the Respondent's witnesses thereafter, and then to recall Mr Rankine if he had any further evidence he wished to give.

18. However, as can be seen from what we record below, matters turned out differently. After hearing from Mr Rankine, we thought it best to hear "half-time submissions" to decide whether we needed to proceed further. We heard submissions from Mr Howells and Mr Rankine on the afternoon of the second day and conducted our deliberations on the morning of the third day, when we announced our decision to the parties.

Preliminary matter

19. In his skeleton argument of 14 November 2022, Mr Howells applied for a direction confirming that the findings made by the Tribunal in its decision (appeal number [2019] 3857.INS) dated 3 August 2020, which involved the same parties, should bind us. Mr Howells relied on the principle of *res judicata*.

20. Despite the discussions on the matter during the hearing and, meaning no disrespect to Mr Howells' admirable analysis of the case law and his arguments, we decline to make such a ruling for two reasons.

21. Our primary reason is that such a ruling is not necessary because no evidence has been adduced to disturb the previous findings. As they were made by an independent Tribunal, they are strong and persuasive evidence, particularly as the Upper Tribunal upheld the decision, and the Administrative Court did not given permission for judicial review. We would have to have very good reason, such as very cogent evidence, to disturb such findings.

22. Our secondary reason is that we would have to step into the arena to ensure an equality of arms because it was not reasonable to expect Mr Rankine to make submission on a legal concept, however well established. Such intervention might cause us to enter the arena by constructing counter arguments to those presented by Mr Howells. In general, we exercise caution before doing so, and will only do so where necessary.

The Appellant's case

23. Mr Rankine, under oath, answered our questions about the allegations made by the Respondent, as well as questions put to him by Mr Howells. We used the Scott Schedule to structure our questions. We draw the following points from his testimony.

24. Mr Rankine was concerned that no one had explained to him why the Respondent proposed to close the school when nothing has changed since it was first registered. In so doing, he challenged the rationality of the decision to deregister the school. He did not find the decision-making process to be transparent or clear, and when he sought clarity was not given any. He believed his explanations to the inspectors were ignored. As a result, he believed that there were "unsaid reasons" for the decision, including in his view that they were racially motivated.

25. Mr Rankine told us that he had updated the curriculum and other policy documents to meet the independent schools standards, but these had been rejected by the Respondent as being inadequate. Mr Rankine was concerned that those who rejected his updates were not suitably qualified or experienced to make that assessment. Mr Rankine argued that some of the requests for written documents were unrealistic because the Respondent failed to consider that the school was for disadvantaged children who had fallen through gaps in the education system and who required bespoke education. Mr Rankine referred to the school as, variously, a black school, a faith school, and as a special needs

school.

26. Mr Rankine accepted that the appeal bundle did not contain any written evidence of compliance. Mr Rankine was concerned that he had been prevented by the Respondent from re-submitting evidence that was before the First-tier Tribunal in July and August 2020 when it heard his appeal against a relevant restriction. Mr Rankine said that the evidence dated after that appeal was decided was among the documents he sought to have included in the appeal bundle, along with the older documents, and that it was rejected in its entirety.

27. Mr Rankine was concerned that the Respondent's decision was unfair because it failed to consider the circumstances arising from the national emergency relating to the pandemic. He explained that he had had to change his priorities from the provision of education to serving his community and the room previously used as a classroom was being used as storage for a forklift truck and supplies for a food bank. As a result of these changed priorities, the school could not be functional. Mr Rankine admitted that he had not attempted to operate the school after the previous Tribunal decision and was not in a position to run the school at the current time.

28. Mr Rankine confirmed that he had explained this to the Ofsted inspectors when they tried to carry out inspections in March 2021 and February 2022. He was concerned that he had been treated unfairly because other schools were given greater flexibility than him.

29. Mr Rankine confirmed to us that it would take him about six months to re-establish the school. Although he was ready to start the process immediately if the restriction on taking new students is lifted, it would take about four weeks for the premises and facilities to be restored, and about six months to restore staffing levels and administrative processes, including adherence to the independent schools standards.

Legal framework

30. The Appellant is the proprietor of an independent school and is bound by the standards described in Schedule 1 to the Education (Independent Schools Standards) Regulations 2014.

31. The Respondent alleges there is failure by the Appellant to meet the standards and has taken enforcement action under section 116(1)(b) of the Education and Skills Act 2008 to remove the institution from the register. Those standards are supported by non-statutory guidance.

32. The appeal is brought under section 124(1)(d) of the 2008 Act.

33. We recall that it is for the Appellant to show that it is more likely than not that the standards in issue are met as at the date of hearing, as indicated in *Marshall v Commission for Social Care Inspection* [2009] EWHC 1286 (Admin), which was applied by the FTT in the context of an ISS case in *Beis Aharon Trust v Secretary of State for Education* [2016] UKFTT 0270 (HESC) (at §9), and in *Cityside*

Primary Trust v Secretary of State for Education [2016] UKFTT 0587 (HESC) (at §33)

34. On appeal, the Tribunal has the power under section 124(3) of the 2008 Act to: (a) confirm the decision, (b) direct that the decision is of no effect, or (c) … direct that the decision is of no effect and make an order imposing a relevant restriction on the proprietor of the institution.

Our findings

35. We remind ourselves and those reading this decision that we are considering whether Mr Rankine as the Appellant is meeting the independent schools standards as at the date of hearing. Although the parties have provided background information to put the decision to deregister the school in context, we have no jurisdiction to make any findings on factors such as the motivation of the parties when making or challenging the decision.

36. With this in mind, we remind those reading this decision that we are not assessing the work Mr Rankine does in the community, or his qualifications as a teacher, or the issues which have been dealt with through other litigation.

The status of the findings made by the previous Tribunal

37. We begin by considering the status we should afford to the Tribunal decision of 3 August 2020. That decision was made by a panel of judicial office holders independent of both parties and neutral about the evidence and arguments presented to it. It carried out its functions to assess and evaluate the evidence so as to arbitrate between the parties, which it did. We note that it did so in a way that was upheld by the Upper Tribunal and not successfully challenged in the Administrative Court.

38. We are satisfied the decision is strong and persuasive evidence about the situation as at that time. There is nothing in Mr Rankine's oral testimony, his witness statement, or the other documents in the appeal bundle that disturbs the findings set out in that decision. We use those findings as our starting point, which means that we are satisfied that as of 3 August 2020, the school was not meeting the independent schools standards.

39. We mention, in case it is not clear, that it is because we make this finding that we have not needed to make a decision on the *res judicata* point discussed in the preliminary issue. As we indicated to the parties at the hearing, this would be the position we would take if no very good reason existed to disturb the earlier findings, such as very cogent evidence that the situation was not as understood by the earlier Tribunal. We have not been given any such evidence.

40. We add that although we recognise that Mr Rankine was not content with the findings of the previous Tribunal, his oral testimony cannot be treated as the type of evidence that might disturb those findings. This is because we do not find his oral testimony to be reliable for the following reasons.

The quality of Mr Rankine's evidence

41. Mr Rankine sought to rely on his assertions denying the alleged failures and stating that he did provide relevant documentary evidence. It is well established that mere assertion cannot discharge the burden of proof because an assertion without more is not evidence. A person is likely to make an assertion that is in their own interest, which undermines the weight that can be placed on it. The Tribunal is impartial and will need to have clear and cogent evidence before being able to apply the balance of probabilities standard of proof.

42. Mr Rankine was unable to give clear or consistent answers to the questions put to him and as a result his oral evidence lacks accuracy. For example, he was unable to identify any particular document he provided to Ofsted, the Respondent, or the Tribunal, that was submitted to remedy one or more of the failures identified in the decision, merely stating that he had updated documents, or that his wife had updated documents, or that he had sent in documents that had been ignored. In this way his evidence was vague, evasive, and lacked cogency.

43. When answering questions, Mr Rankine routinely sought to rely on the situation before the Respondent's restriction in 2020 was enforced. He did so because he wanted us to understand the circumstances that pertained at that time. However, as we frequently reminded Mr Rankine, we are concerned with the current circumstances and he provided no documentary evidence to show that he had remedied any of the failures identified by the Respondent.

44. Instead of providing evidence about how he had sought to remedy the failures identified, or otherwise showing he took responsibility for those failures, Mr Rankine sought to blame others. For example, he sought to undermine the inspectors in the belief they did not have the same level of experience, qualifications or expertise that he did. Several of his answers included allegations that the inspectors had refused to look at his evidence even though the inspectors indicate there was no documentary evidence because they were not admitted to inspect the school in March 2021 or February 2022.

45. Mr Rankine gave inconsistent evidence, indicating to use that he was not giving accurate evidence but trying to establish facts that would assist his case. For example, after telling us that he had written lesson plans in place for each child, he said these were updated at the end of each day, and that the school had a flexible approach to meet the needs of the children. Mr Rankine had to backtrack on a number of his initial answers when inconsistencies were pointed out.

46. We were not persuaded that Mr Rankine understood the requirements of the relevant standards. For example, in response to our questions he appeared not to understand the difference between the provision of a curriculum and an action plan. He seemed unaware of changes in the Secretary of State's guidance, which had changed twice since August 2003. He seemed unaware of what a school improvement plan was.

47. Mr Rankine repeatedly moved the topic from what we were asking to some other

point he wanted to make, such as when asked to confirm an attempted inspection, after giving a convoluted answer, concluded by alleging that the inspectors had sought a bribe, for which there was no previous indication or basis. On another occasion, when asked about his ability to allow inspectors to carry out an inspection, he said he did not have the funds to pay for an inspection and spoke at length about not selling out to become an academy. Mr Rankine's responses gave us cause for concern that he is and would be unable to work with or engage constructively with the regulator.

48. Although we recognise from our specialist knowledge that an independent school is liable to pay inspection fees, that does not give Mr Rankine any rights over when a progress monitoring inspection might take place. It was for Mr Rankine to be able to show at all times that it meets the relevant school standards.

Half-time submissions

49. This takes us to why we moved to "half-time submissions". We were concerned that Mr Rankine's account clearly showed that he realised that he could not meet the independent schools standards in March 2021 or February 2022 because this is why he did not let the inspections happen. Of course, whilst we do not condone his refusal to permit the inspections, it is not a matter on which we can make any finding. What we take from Mr Rankine's testimony is that he wanted to avoid the inspection because he knew the independent schools standards were not being met and thereby, he wanted to avoid the fees he would otherwise be charged.

50. In addition, we have recorded that Mr Rankine confirmed to us that were we to decide the Respondent's decision was of no effect, it would take him about four weeks to rearrange his projects to get the school premises and facilities to an operational state, and that it would take him about six months to address the administrative matters to reopen the school, and to recruit staff. This is persuasive evidence that the school is not currently meeting the independent schools standards.

51. We explained our proposal for "half-time submissions" to the parties. Both parties agreed with the proposal. We offered the parties time to prepare submissions. Initially, Mr Howells said he did not need time. However, we thought it was appropriate to ensure Mr Rankine had time to collect his thoughts and gave a 15-minute break, which is what he requested.

52. After listening to the submissions of both parties, we conclude that Mr Rankine, has admitted that the independent schools standards have not been fully met at any time since the Tribunal previously decided in August 2020 that they were not being met. Nor do we find that Mr Rankine has sought to make effective remedies to the failures.

53. Furthermore, we find it is unrealistic to expect Mr Rankine to be able to meet the independent schools standards within a reasonable period of time.

54. The chronology shows that the school was registered on 3 October 2014, that it

admitted its first pupil in mid-March 2016, that it was inspected by Ofsted in April 2016 and found to be inadequate. Thereafter, Mr Rankine was served with a number of enforcement notices. A progress monitoring inspection carried out in March 2017 concluded that the school met the independent schools standards.

55. A full inspection in November 2018 concluded that the school did not meet the standards and further enforcement notices were served. On 26 September 2019, following a further progress monitoring inspection on 21 May 2019, which assessed the school as not meeting the independent school standards, the Respondent imposed a relevant restriction on the admission of new pupils to the school. This is the decision Mr Rankine appealed, and which was the subject of the Tribunal's previous decision.

56. Since 3 August 2020, the Respondent has sought to undertake a progress monitoring inspection on two occasions, first in March 2021 and second in February 2022. Those inspections did not proceed for reasons already discussed. That left the Respondent without evidence about whether the school was meeting the required standards. The Respondent was entitled to infer that the standards were not being met.

57. Following the March 2021 attempted inspection, the Respondent made her decision to deregister the school.

58. We are satisfied this chronology identifies the efforts made by the Respondent to enable the independent schools standards to be met. We find that Mr Rankine has been afforded reasonable opportunities to remedy the identified failures. Even accounting for the pandemic, he has had sufficient time and opportunity to effect changes. We find he has failed to do so. This pattern of failing to provide effective change or to engage with the failures identified leads us to conclude that Mr Rankine has not shown that it is more likely than not that if he had more time, he would be able to remedy the failures.

The Respondent's witnesses

59. Because of these findings, there has been no need for us to examine the evidence from the Respondent's witnesses other than in respect of how proportionality featured in the decision-making process. In this regard, we heard limited evidence from Mrs Whitehouse, under oath. Her evidence was to the effect that the Respondent applied a proportionality test when deciding on what enforcement action would be appropriate.

Assessing proportionality

60. We have to make our own assessment of whether the Respondent's decision was proportionate. This involves a four-stage test.

61. The first question is what objective the Respondent was seeking to pursue, and whether it was sufficiently important. Throughout this process, the Respondent has been looking to ensure the independent schools standards are met by the school. This is an important objective because those standards have been set

by government to ensure children receive an appropriate education, which is of course one of the rights of a child.

62. The second question is whether the enforcement action is rationally connected to the objective. The chronology set out above indicates how the decision to deregister arose from the Respondent's efforts to promote the objective of schools meeting objective standards. It follows that the enforcement action is directly and rationally linked to the Respondent's objective.

63. The third stage when assessing proportionality is whether the enforcement action was no more than necessary to achieve the objective.

64. Given the chronology, and taking account of our findings, we conclude there was no other reasonable steps the Respondent could take. The Respondent had sought to address the concerns about the school not meeting the independent schools standards initially through enforcement notices, then through the imposition of a relevant restriction. In so doing, we are satisfied the Respondent has acted over time in a graduated manner.

65. The failure of Mr Rankine to address the identified failures in any meaningful way means that the graduated response has reached the final step in the enforcement process. To that extent, the evidence shows the decision to deregister is necessary as there is no lesser reasonable alternative action that can be taken.

66. The final stage of the proportionality assessment is whether when balancing all the factors together, is the impact on Mr Rankine disproportionate to the likely benefits.

67. Mr Rankine has identified a number of impacts. He raises concerns about the impact on the community, indicating that he has been providing education to disadvantaged children who would otherwise be out of education. He raises concerns about his own livelihood, although he has not dwelt on that aspect other than to assert in this appeal that he is owed £5 million in damages arising from the restrictions placed by Ofsted on the school.

68. The benefit to the Respondent lies in the fact that it will not have to allocate its limited resources to further monitoring and inspection of the school. In addition, deregistering the school will ensure that children are not educated in an institution that is unable to meet the independent schools standards.

69. Balancing these factors, and having regard to the evidence as a whole, we are satisfied the decision is proportionate and that it should be confirmed by us.

Decision:

The appeal is dismissed.

We confirm the decision of the Secretary of State for Education to remove Home School from the register.

Judge John McCarthy

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

Date Issued: 29 November 2022