Proposal to amend the Practice Statement regarding panel composition in the First-tier Tribunal (Special Educational Needs & Disability)

Conclusion of the pilot to test the composition of a panel in the First-tier Tribunal (Health Education and Social Care Chamber)

Contents

Background

In January 2013, the then SPT (my predecessor, Sir Jeremy Sullivan) published a consultation seeking views on the proposal to change the composition of panels in the Special Educational Needs and Disability jurisdiction [SEND] of the Health, Education and Social Care Chamber of the First-tier Tribunal.

The proposed change to the Panel Composition Practice Statement aimed to strike the necessary balance between providing judicial resources more flexibly and tailoring the composition of the panel to the complexity of the case.

Respondents to the consultation raised a number of concerns, in particular about the complexity of cases. There was also a suggestion that evidence did not yet exist to demonstrate that smaller panels would offer advantages or be able to maintain the same standards of decision making.

A pilot scheme was set up to test the approach to introducing greater flexibility with panel composition in SEND appeals. It began in October 2013 and concluded in March 2014 and was restricted to appeals against a local authority's refusal to assess cases [RTA]. The judges and members sitting on the two person panels had considerable experience (having sat on at least 25 hearings within the jurisdiction.)

At the end of the pilot, Sir Jeremy concluded that the Panel Composition Statement should be amended as follows:

"A decision that disposes of proceedings, made at or following a hearing, must be made by

a. One judge and:

b. Two other members where each other member has substantial experience of educational, child care, health or social care matters.

c. In appeals concerning refusals to arrange an assessment of a child's Special Educational Needs, the decision may be made by one judge and one other member where the other member has substantial experience of educational, child care, health or social care matters and both the judge and member have sat on at least 25 hearings within the jurisdiction."

At the end of the pilot, Sir Jeremy extended the process to all RTA cases in the SEND jurisdiction on a permanent basis with immediate effect. (See the conclusions document published on 21 July 2014). He further considered that the pilot principles should be extended, to test the approach to introducing greater flexibility in panel composition in ***all*** case types in the SEND jurisdiction in a further six month pilot.

Sir Jeremy (in recognising the concerns raised by those responding to RTA pilot consultation) acknowledged that case type does not necessarily determine complexity. He therefore proposed an alternative approach, leaving decisions on panel composition to the discretion of SEND Judges, with decisions being taken on the basis of the individual facts of each case.

The pilot commenced on 31 October 2014 and ran until 30 April 2015. The success of the pilot led to the continuation of the pilot, initially to the end of the academic year to encompass phase transfer appeals and then pending the decision on the composition of panels in the longer term. As the current SPT, it now falls to me to make that decision.

Pilot results

The SEND jurisdiction received a total of 1,173 appeals in the period from October to April (excluding RTA appeals which are already heard by a two person tribunal and Education Health and Care appeals which are heard before a panel of three). 322 of those appeals (approximately 28%) proceeded to a hearing. All were listed for a two person panel.

A third panel member was requested by the parent/representative in 2 of the 322 appeals which proceeded to hearing. That request was refused on one occasion as the SEND judge concluded that the evidence did not support the submission that the case was sufficiently complex to require a three person panel. The issue was raised unsuccessfully before the Upper Tribunal [UT] in a renewed application for permission to appeal.

A further 32 requests (about 10%) for a third panel member were received from the nominated judges on the basis that the appeals were complex and required the additional expertise on the panel. All of the requests were sent to the judicial lead with an explanation of the complicating factors and approved. The requests, together with the ASENT responses to the pilot mentioned below, suggest that there are a number of complicating factors but that the nominated judge or case managing judge in each case is best placed to decide whether the panel requires additional expertise.

One request was received from a specialist member, but was refused by the nominated judge in the case.

Of the 167 appeal hearings adjourned during this period, none were related to panel composition, although in some cases the directions issued on adjournment were used to direct a second member because unforeseen complications had arisen in the case (eg where the grounds of appeal were changed causing the adjournment and the case became more complex).

During the period of the pilot 8 applications sought permission to appeal to the UT. As mentioned above, one UT decision refers to the issue of composition. None of the other applications were linked to panel size. Permission to appeal was not granted in any case.

No formal complaints or queries have been received regarding the panel composition pilot since it started in October 2014 (although a formal complaint was received about a judge's conduct in a post pilot two person panel appeal.)

The pilot resulted in financial savings in fees alone of £75,816.

Feedback

As part of the monitoring and reviewing process SEND administration prepared a feedback survey for completion after every hearing by parents and representatives, together with Judges and Members. Some of the headlines are captured below.

Judges and Members

Thirteen judges and members responded to the survey and, overall, most felt the hearings went well. There were some suggestions, however, that a second specialist member would have been beneficial to properly interrogate the issues and to make it easier to listen and take notes at the same time. In addition, some specialist members commented that they felt under pressure and that the onus was on them to lead on inquisitorial issues.

Users – Parents, Representatives, Local Authorities

Sixteen parents/representatives responded to the survey during the period 31 October to 30 April and of those 10 of the 13 who answered the question thought the two member panel was "about right". Very few of the additional comments provided by parents/representative related specifically to the composition of the panel though one respondent said:

"Judges are neither educationalists nor an expert in SEN. In a three member panel there will be at least two educationalists; who would be able to ask the right inquisitive questions ……."

Another questioned whether the panel had the right expertise to deal with the issue at hand: most (ten out of thirteen) rated their overall hearing experience as good or very good. They understood the guidance that had been issued to all parties explaining the two person panel composition, and most commented that they felt the hearing had lasted about the right length of time.

Judicial Office Holders

ASENT, the association of judicial office holders in SEND/CS and PHL also conducted a survey of their membership in response to the pilot and prepared a short report summarising the responses received. The questions asked by ASENT were not the same as those asked in the Pilot Response Questionnaire but invited members to provide feedback for the purposes of the pilot. I have considered the full ASENT report. In summary, the

substance of concerns raised was similar to those by judges and members in response to the SEND administration survey above. I note in particular the concern that a judge might override a member if there is a disagreement during a two person panel.

Other considerations

In February 2015, the Court of Appeal considered an appeal against an Upper Tribunal IAC decision where it had considered the issue of a split decision in a two person hearing in the case of PF (Nigeria) v The Secretary of State for the Home Department [2015] EWCA Civ 251 (25 March 2015). The Court of Appeal, before dismissing the appeal, concluded:

36. "In my judgment, the submissions on behalf of the Appellant fail to distinguish between the power conferred on the presiding member of the Tribunal by Article 8 of the 2008 Order and the discretion whether or not to exercise that power. Indubitably, the presiding member has a casting vote. It does not follow that he may properly exercise it irrespective of the nature and extent of the disagreement between the members of the panel.

37. Here, the differences between the presiding member and the lay member could scarcely have been greater. They were not differences as to the applicable law, which in general may justify the exercise of the casting vote by the judge, or even as to the evaluation of the Article 8 claim. They included such fundamental primary factual issues as the nature and extent of the relationship between the Appellant and MP and the children to whom I have referred, and whether or not the Appellant was genuinely on the way to rehabilitation. If the lay member's views on either of those issues were well founded, there could be no question of his appeal succeeding.

38. In my judgment, in these circumstances, the power to cast a casting vote could not properly be exercised. To cast it involved an error of law. I also consider that the justification for the exercise of the casting vote in paragraph 93 of the determination disclosed a legal error. The differences between the lay member and the Judge were not confined to the Judge's "assessment and interpretation of the law", but, as I have pointed out, went much further.

39. For this reason alone, the Upper Tribunal was right to set aside the determination of the First-tier Tribunal. "

In the SEND situation, in the unusual event that the two person panel is divided in its conclusions, it would be preferable to provide a right for the nominated judge to direct a rehearing before a newly appointed three person panel, as the issues are clearly not straightforward in nature. This would obviate the need to appeal to the UT and ensure, in the very unlikely situation where there is a clear difference of opinion, that the appeal is dealt with fairly and justly in compliance with the overriding objective.

On the 1 June 2015, SEND commenced a Review of Recommendations Pilot pursuant to s79 of the Children and Families Act 2014, where the Tribunal's jurisdiction has been extended to make non-binding recommendations about health and social care needs and provision in certain appeals made under s51 of the Act. The pilot will run for 18 months and a report will be presented to Parliament by the end of March 2017 about the review of redress.

For the purposes of that pilot, the Tribunal will select two specialist members with different specialism, one with substantial experience of special educational needs and/or disability and the other with substantial experience of health and/or social care matters. The composition statement should also reflect the ability to adapt the composition to match the issues in the case.

Conclusion

I have taken into account the results of the pilot, the data and feedback provided. I am satisfied that there is no difference in the standard of decision making between two person and three person panels in cases within the SEND jurisdiction. I am also confident that sufficient safeguards are in place to enable a party to the process to present a case to increase the size of the panel when this is necessary.

Additionally, I am reassured that the Judge can direct a change to the panel composition if it becomes apparent that the particular issues in a specific case require the input of an additional member. Indeed, if there is a disagreement (except on a matter of law) between a judge and member sitting on a two person panel then the judge must direct a rehearing before a newly appointed three person panel as the issues are clearly not straightforward in nature.

I will extend this process to all SEND cases on a permanent basis with immediate effect. This will allow the Tribunal to further embed and refine the process to make full use of the judicial resource pool.

The SPT's Practice Statement on composition will be amended to reflect this permanent change:

"A decision that disposes of proceedings, made at or following a hearing, must be made by one judge and

a) one specialist member where the member has substantial experience of special educational needs and/or disability and both have sat on at least 25 hearings within the jurisdiction, or

b) in complex appeals, designated as such by a SEND judge, two other members with substantial experience of special educational needs and/or disability, and where the content of the appeal demands, one member with substantial experience of special educational needs and disability and a second member with specialism in health and social care matters.

Where there is a clear disagreement (except on a matter of law) between a judge and a member sitting as a two person panel, then the judge must direct a hearing before a newly appointed three-person panel."

The Right Honourable Sir Ernest Ryder
Senior President of Tribunals

18 December 2015