Neutral Citation Number: [2019] EWHC 749 (QB)

Case No: QB/2018/0238

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2019

Before :

MR JUSTICE DOVE

- -

Between :

Mayor and Burgesses of the London Borough of Hamlets	**Appellant**
- and -	
Abdullah Al Ahmed	**Respondent**

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- -

Mark Baumohl (instructed by **Marcia Pinnock**) for the **Appellant**
Richard O'Sullivan (instructed by **Tyrer Roxburgh**) for the **Respondent**

Hearing dates: 12th February 2019

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Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Dove :

1. On the 12th June 2017 the Respondent requested a review of the decision which the Appellant had reached that he was not a person in priority need in accordance with section 202(1) of the Housing Act 1996. The decision on the review was made in a letter dated the 23rd March 2018. For the reasons set out in that letter, which are not directly germane to the issues in the appeal, the Appellant declined to change its decision following the review, and upheld their earlier conclusion that the Respondent was not in priority need. At the end of the decision the Appellant's Housing Review Officer pointed out that pursuant to section 204(2) of the 1996 Act the Respondent

   could bring an appeal to the County Court on the basis of an error of law within 21 days of the date on which the Respondent was notified of the decision.

2. It appears from the evidence before the court that in fact the Respondent was not in receipt of the decision until either the 4th or the 6th April 2018, meaning that it was necessary for him to bring any appeal against that decision by either the 25th or 27th April 2018. It is an agreed position that nothing turns on the difference between those two days. It also appears from evidence before the court that at the time when the review was initially on foot the Respondent had instructed solicitors to act on his behalf. However, owing to miscommunication, he withdrew his instructions from those solicitors.

3. He was getting assistance from the charity Crisis, and he had a support worker who was assisting him with his housing problems. In about March 2018 his care worker changed to a Ms Harte, and she set up an initial meeting with the Respondent to become familiar with his case. In a letter which Ms Harte wrote on the 24th May 2018 she explained the efforts which she had gone to in order to assist the Respondent and identified reasons why his appeal should be considered by the County Court. She stated as follows:

> "Abdullah had been linked in with Myles and Partners who were representing him in the initial appeal but the relationship of trust and confidentiality between the client and their service broke down and was no redeemable.
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> We have a list of legal advice providers in close proximity to E1 that we call on to support our clients with their legal matters and I spent a few weeks trailing through the list calling companies only to be told by their client housing caseloads were full or that they would get back to me. I rang TV Edwards, Duncan Lewis, Aden and Co, Edwards Duthie and Tower Hamlets Law Centre to name but a few and no one was in a position to take the case on.
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> It was only when I contacted Malcolm and Co who deal with private clients that I got to speak at length to a solicitor Sally Goldman about the case. She advised me to speak with Sean Shanmuganathan at Tyrerroxburgh who kindly looked through the documents and after meeting with Abdullah and myself decided to grant emergency legal aid on our behalf.

> I am submitting the last two doctor's letters to Sean one of which states Abdullah's medical conditions he would undoubtedly become more vulnerable to deterioration being homeless, despite his doctor's opinion he has been sleeping in a park since his eviction on the 4th May and is fasting for Ramadan he is becoming weaker with the stress and exposure of sleeping outdoors.
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> We would really appreciate if you could excuse our delay and take on his appeal, that way we may be able to secure some emergency accommodation in the short term and grant him the support he desperately needs."

4. It will be noted that there are references in the letter from Ms Harte to the Respondent's medical difficulties. Contained within the material before the court is medical evidence which demonstrates that the Respondent suffers from a severely underactive thyroid (causing depression and lethargy); lower back pain affecting his ability to sit for any length of time and causing burning and numbness of the shins and pain in his knees; dizziness and unusual bodily sensations for which he has been referred to a neurologist.

5. As stated in Ms Harte's letter the Respondent's case was taken on by his present solicitors, who first saw him on the 23rd May 2018. Legal aid was secured and counsel was instructed on the 24th May 2018; on the same date Counsel provided the grounds for the appeal. Those grounds were, firstly, that the Appellant had asserted in its decision that it had provided the Respondent with a "minded" letter, seeking further representations from him, on the 15th March 2018, and that the letter had never been received by the Respondent thereby preventing him from making any further representations and impeding his access to justice. The second ground of the appeal was that the Appellant had failed to properly enquire into the Respondent's medical condition and thereby properly engage with its duty under section 149 of the Equality Act 2010. The appeal, including the Grounds of Appeal and a witness statement in support signed by the Respondent, were issued on the 25th May 2018. The appeal was therefore lodged approximately one month too late.

6. Within the grounds the Respondent sought permission to bring his appeal out of time. In the present case the discretion to bring the appeal out of time was provided within section 204(2A) (b) which provides as follows:

> "204(2A) The court may give permission for an appeal to be brought after the end of the period allowed by subsection (2), but only if it is satisfied—
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> (a)where permission is sought before the end of that period, that there is a good reason for the applicant to be unable to bring the appeal in time; or
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> (b)where permission is sought after that time, that there was a good reason for the applicant's failure to bring the appeal in time and for any delay in applying for permission."

7. Having rehearsed the factual background to the application the Judge decided to grant the extension of time which the Respondent sought. His reasons for granting the extension were as follows:

> "14. I stand back and look at all the relevant circumstances. Whereas it is true that Mr Al Ahmed could have filed an appeal in time- there was no mental impediment to him doing so, and there was no logistical impediment because he had access to a computer and the review letter stated very clearly what he had to do – he sought assistance with the preparation of this technical legal document. In my judgment he probably had no idea what it needed to say. Aware of his limitations, he sensibly sought assistance from Crisis. He trusted them to do what was necessary to get his appeal up and running, including filing it in compliance with any time limits. This was a reasonable position for him to take. Crisis took the view, which was also reasonable, that Mr Al Ahmed needed legal representation. The wisdom of that course is borne out by comparing what Mr Al Ahmed wrote in his length emails to the Council with what is set out very succinctly in the grounds of appeal filed, albeit out of time, by his legal representatives. It is, however, unfortunate, that Crisis did not either ensure that the appeal was filed in time or explain to Mr Al Ahemd that, notwithstanding their assistance, that is something which he had to do.
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> 15. This is a borderline case, but where there is a borderline case in my judgment the court should err in favour of granting permission to appeal out of time and that is what I propose to do. I say err, but I am satisfied that on the particular facts of this case, given the particular capabilities of this appellant and the particular course of conduct he had taken, seeking and relying upon the guidance which he had obtained from Crisis, it was reasonable for him to wait for Crisis to find him a legal representative because without a legal representative this appeal was never going to go anywhere. Whether it goes anywhere now that he has got one remains to be seen and I express no view on that question, but I am going to give permission to appeal out of time."

8. I wish to place on record my gratitude to counsel for the care with which they constructed their written and oral arguments, which have been of considerable assistance to me in reaching my conclusion. On behalf of the Appellant Mr Mark Baumohl advanced the appeal on three grounds. Firstly, he submitted that the Judge had applied the wrong test in concluding that the Respondent had demonstrated there was good reason to extend time to bring the appeal. He submitted that the test applied by the Judge was to consider whether the Respondent was able to conduct the appeal by himself, rather than able to bring the appeal before the court. Since the statutory test required an examination of whether or not there was good reason "to bring the appeal in time", the Judge had applied the wrong test and his decision could not stand. Secondly, Mr Baumohl submitted that the Judge had taken into account an irrelevant

consideration when exercising his discretion namely whether or not it was reasonable to conclude that the Respondent had the ability to conduct the appeal by himself. Again, that was not the test which fell to be applied, and therefore the Judge had erred. The third ground of appeal was that the decision the Judge reached was one which was irrational and not open to him, on the basis that there was no evidence from which the Judge could have concluded that there was good reason for the Respondent not bringing the appeal in time. Indeed, the evidence was to the contrary, namely that his medical condition did not amount to an impediment to him bringing the appeal, and that he had the necessary equipment and materials to be able to undertake the essentially administrative task of commencing the appeal by issuing the necessary documentation.

9. In response to these submissions Mr Richard O'Sullivan on behalf of the Respondent, submitted that there was, on the facts of this case, a good reason for the delay, as the Judge found. The Respondent had sought assistance from Crisis in relation to the adverse decision which he faced following the review, and efforts had been made to find other solicitors to act for him following the breakdown of trust between himself and his first solicitors. As soon as solicitors had been found who were prepared to act progress was made very rapidly, and shortly after those solicitors met with the Respondent the appeal was launched. Furthermore, Mr O'Sullivan submitted that the Judge's factual conclusions in respect of the exercise of his discretion were unassailable. He submitted that there was no distinction between the bringing of an appeal and the conducting of an appeal of the kind relied upon by the Appellant. Bearing in mind that an appeal can only be brought on the basis of an error of law, it was entirely understandable that legal assistance was required by the Respondent before a claim could be formulated.

10. In addition, by way of a Respondent's Notice Mr O'Sullivan submitted that permission should be granted to bring this appeal late because it was not unreasonable for an Appellant, who by virtue of his or her financial resources would qualify for legal aid, to await the securing of that entitlement to legal aid prior to commencing proceedings. Without the protection of a legal aid certificate the proposed Appellant would expose himself of herself to adverse costs consequences. Furthermore, the need to have regard to the financial position of each party arose from CPR 1.1(2), which made reference to the financial position of each party in determining whether a court's case management decisions were proportionate. Again, on the basis that homelessness law is complex, Mr O'Sullivan submitted that it is reasonable to expect that a person in the position of the Respondent would be permitted to await the grant of legal aid before being required to issue an appeal.

11. A number of important points need to be taken into account when approaching the exercise of discretion under section 204(2A) (b) and considering whether in a case where permission to appeal is sought after the 21 day time limit there is "good reason" for the failure to bring the claim in time. The first point is that the merits of the substance of the appeal are no part of the consideration of this question. This was made clear by Tugendhat J in Short v Birmingham City Council [2005] EWHC 2112; [2005] HLR 6 at paragraph 26. Secondly, as concluded by Sir Thomas Morison in Barrett v The Mayor and Burgesses of the London Borough of Southwark [2008] EWHC 1568 the phrase good reason "is a phrase in common parlance, which, in my judgment, does not need elaboration" (see paragraph 24 of the judgment).

12. As was also observed in the Barrett case, and endorsed by Jay J in the case of Poorsalehy v London Borough of Wandsworth [2013] EWHC 3687, there is no general principle in cases of this kind which fixes a party with the procedural errors of his or her representative, nor is there a general principle which enables a litigant to shelter behind the mistakes of their legal advisors. As Jay J was astute to observe, in particular in paragraph 28 of his judgment, the approach to be taken to the responsibility of a litigant and his advisors must always depend upon the particular facts and the available evidence in any given case. In short, there are no bright lines in deciding whether or not there is a good reason for the delay in bringing an appeal of this kind. All of the factual circumstances have to be carefully examined and scrutinised. No doubt there may be common themes in cases of this kind, such as the involvement of default or inactivity on the part of legal representatives, or the circumstance that the proposed Appellant suffers from ill-health of some kind which may impede or obstruct their ability to prosecute the appeal. These, and no doubt other common features of cases of this kind, are all factors which are relevant to the question of whether or not there has been good reason, and the weight to be attached to them will depend upon the particular evidence before the court in that case.

13. Mr Baumohl sought to establish a further proposition to be applied in cases of this kind namely that the mere fact that a person is unrepresented and acting as a Litigant in Person could not amount to a good reason for delaying bringing the appeal. In support of that proposition he placed reliance upon the case of R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633; [2015] 1 WLR 2472. The case concerned an application for an extension of time in appealing to the Court of Appeal an order of the High Court rejecting Mr Hysaj's judicial review. In giving the leading judgment in the Court of Appeal Moore-Bick LJ addressed some questions of general relevance arising from the several cases that were before the Court of Appeal on that occasion. In relation to the themes of shortage of funds and litigating persons he observed as follows:

> "*(b) Shortage of funds*
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> Mr. Benisi sought to explain part of the delay that had occurred in his case by asserting that he did not have sufficient funds at his disposal to enable him to instruct solicitors to file a notice of appeal at the right time. In my view shortage of funds does not provide a good reason for delay. I can well understand that litigants would prefer to be legally represented and that some may be deterred by the prospect of having to act on their own behalf. Nonetheless, in the modern world the inability to pay for legal representation cannot be regarded as providing a good reason for delay. Unfortunately, many litigants are now forced to act on their own behalf and the rules apply to them as well.
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> *(c) Litigants in person*
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> At the time when the decisions which they now seek to challenge were made Mr. Benisi and Mr. Robinson were both acting in person. It is therefore convenient to consider whether the court should adopt a different approach in relation to litigants in person. The fact that a party is unrepresented is of no

> significance at the first stage of the enquiry when the court is assessing the seriousness and significance of the failure to comply with the rules. The more important question is whether it amounts to a good reason for the failure that has occurred. Whether there is a good reason for the failure will depend on the particular circumstances of the case, but I do not think that the court can or should accept that the mere fact of being unrepresented provides a good reason for not adhering to the rules. That was the view expressed by the majority in *Denton* at paragraph 40 and, with respect, I entirely agree with it. Litigation is inevitably a complex process and it is understandable that those who have no previous experience of it should have difficulty in finding and understanding the rules by which it is governed. The problems facing ordinary litigants are substantial and have been exacerbated by reductions in legal aid. Nonetheless, if proceedings are not to become a free-for-all, the court must insist on litigants of all kinds following the rules. In my view, therefore, being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules.
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> The Civil Procedure Rules are available free on line on the web site of the Ministry of Justice and to that extent are widely available. What the ordinary person requires, however, is more help in discovering and understanding the rules and some basic guidance about the way in which proceedings should be conducted. If, as seems inevitable, the courts can expect to see an increasing number of litigants in person, assistance of that kind will become essential if the administration of justice is not to be undermined."

14. This approach was endorsed by Briggs LJ in giving the leading judgment in the case of Nata Lee Limited v Abid [2014] EWCA Civ 1652; [2015] 2 P&CR 3 at paragraph 53. It is clear, therefore, that the fact that a party is not professionally represented could play only a very limited, if any, part in the assessment of whether or not there was good reason for a departure from the time limit in bringing the appeal in cases of this sort. Whilst references were made in the course of argument to the cases of Lewis v Ward Hadaway [2015] EWHC 3503 (Ch); [2016] 4 WLR 6 and Liddle v Atha and Co. Solicitors [2018] EWHC 1751 (QB); [2018] 1 WLR 4953 I have not found these authorities, or the subject matter which they bear upon, to be particularly illuminating in relation to the questions which are raised in the present appeal.

15. In my judgment the starting point for analysing whether or not in this case there was "good reason" for the Respondent's delay is an understanding of what is required in order for an appeal to be brought before the court. It is common ground between the parties that the requirements of the CPR are that what is required is an Appellant's Notice, accompanied by the appropriate fee or application for fee remission together with Grounds of Appeal. In my judgment there is force in the submission made by Mr Baumohl that these requirements are not especially sophisticated or taxing. Whilst Mr O'Sullivan is entitled to point out that the jurisdiction is based purely on contentions

that there has been an error of law, that is not unusual. For instance, applications for judicial review and other forms of statutory appeal or review proceed upon the same basis. I am unable to accept the contention that it is necessary for a lawyer to be instructed before adequate grounds of appeal, sufficient to bring the appeal before the court, can be drafted. For instance, in the present case the two grounds which are raised by the Respondent are ones which in substance (as opposed to the precise legal detail) obvious sources of complaint, namely the failure to provide him with the "minded" letter and thereby afford him the opportunity to respond to it, and the failure to properly examine and take account of his medical difficulties. The grounds of appeal would have been no less adequate had they been expressed in those simple terms. They have benefited from, but did not require, the added legal sophistication provided by Mr O'Sullivan's drafting. I have no doubt that an application to strike out grounds drafted by an unrepresented party along these lines would be met with short shrift, since the essence of the errors of law complained of would be capable of being easily identified from the pleading.

16. Seeking to analyse the basis of the Judge's conclusion that there was "good reason" in the present case it appears that in paragraphs 14 and 15 of his judgment he reached upon the conclusion that it was reasonable for the Respondent to rely upon the guidance he had obtained from Crisis and wait for a legal representative "because without a legal representative this appeal was never going to go anywhere". This was in the light of the Respondent's "limitations", in that what was required was a "technical legal document", in respect of which "he probably had no idea what it needed to say". In reaching the conclusion that these matters amounted to a good reason for the appeal being brought out of time in my view the Judge very clearly went wrong and misdirected himself as to what was required in order to bring this appeal. Firstly, as set out above, the fact that the Respondent was unrepresented had little, if any, part to play in providing good reason. In so far, therefore, as the Judge relied upon that position, and suggested that the Respondent "needed legal representation", his approach was illegitimate. In reality, as set out above, what was required was the issuing of an Appellant's Notice and then the provision of grounds setting out the basis of the Respondent's complaint that there was an error of law in his case. There was evidence before the Judge (and in the material before this court) demonstrating that the Respondent not only had access to a computer, but also that he was more than capable of expressing himself in writing and articulating his concerns. In my view there was no basis for the Judge to conclude that the appeal could not be commenced without legal representation, and that in the particular circumstances of this Respondent he was unable to provide a document expressing his complaints in relation to the decision reached in a manner that would enable to court to understand the errors of law which were relied upon.

17. Whilst the Judge suggested that the Respondent's reliance upon the guidance from Crisis was a good reason for the delay in bringing the proceedings the Judge seems to have exaggerated the role which Crisis were playing in the Respondent's case. The Judge suggested that the Respondent "trusted them to do what was necessary to get his appeal up and running, including filing it in compliance with any time limits". This appears to have led the Judge to the conclusion that in effect the Respondent was relying upon Crisis as his representative in prosecuting the appeal. In truth, however, the role of Crisis was far more limited, and was to try to identify a lawyer to enable the Respondent to bring his appeal. They were not the organisation which was going to

draft proceedings and issue them on the Respondent's behalf. No doubt they did their best to obtain legal assistance for the Respondent, but the Respondent could not rely upon Crisis to draft and issue the appeal for him. This observation distracted the Judge from the reality of the position, which was that this is the Respondent's appeal and he must bear some of the responsibility for ensuring that it is brought in time. For the reasons I have already given I am satisfied that it was within the Respondent's capabilities to do what was necessary to bring the appeal and get it started. As the Judge observed there was no mental or logistical impediment to him filing the appeal in time.

18. It follows from what I have set out above, and subject to the Respondent's Notice, I am satisfied that the conclusion which the Judge reached was based upon a misdirection as to the correct approach to be taken to the question of whether or not there was "good reason" in this case, and was wrong. By the Respondent's notice as set out above it is contended that good reason would arise from the need for the Respondent to be granted legal aid in order to both prosecute the appeal and also be properly protected from any adverse costs decision. Having considered these submissions I have formed the view that they do not lead me to a different conclusion to the one which I have already reached on the basis of the Appellant's submissions.

19. There is, of course, some degree of read across between the observations set out above in respect of litigants who do not have professional representation and the contention that time should be extended and discretions exercised under the rules so as to enable them to have legal representation by way of the grant of legal aid. Further, Mr Baumohl drew attention to the case of R (Kigen) v Secretary of State for the Home Department [2015] EWCA Civ 1286; [2016] 1 WLR 723. That case concerned an application for reconsideration of a decision of the Upper Tribunal (Immigration and Asylum Chamber) which was made out of time, on the basis that an application had been made for legal aid but had not been resolved at the time when the time limit for making the application had run out. Giving the leading judgment of the Court of Appeal Moore-Bick LJ expressed the following views:

> "17. The question then arises whether the fact that the appellants had applied for legal aid and were awaiting a decision from the Legal Aid Agency is a factor which should lead to a different conclusion. This question did not arise in *Hysaj*, but, consistently with the approach adopted in that case, this court in *ZP (South Africa) v The Secretary of State for the Home Department* [2015] EWCA Civ 1273 held that it should not normally be regarded as providing a good reason for delay. A litigant who has applied for legal aid is in essentially the same position as any litigant who is unable to afford legal representation. As such, he has an unenviable choice between representing himself and abandoning his claim. If he is granted legal aid, he will, of course, be in the same position as any other represented party, but unless and until he is and is able to instruct a solicitor, he retains the right to act on his own behalf.
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> 18. The decision of this court in *ex parte Jackson* was based on the assumption that a distinction can be drawn between private law and public law proceedings. The court expressed the view that in judicial review proceedings there is no true lis inter

> partes, thereby suggesting that the issues raised in public law cases are necessarily of public interest. In my view, that may or may not be the case; it will depend on the nature of the issues to which the proceedings give rise. There has been a very significant increase in the number of claims for judicial review, many of which are in substance little more than private proceedings between the claimant and the relevant public body rather than proceedings which raise issues of importance to the public at large. Moreover, the change in the climate of litigation which has come about since that case was decided makes it no longer appropriate to treat delay in obtaining legal aid as a complete answer to a failure to comply with procedural requirements. It may still be a factor that can be taken into account (see *Sacker v H.M. Coroner for West Yorkshire* [2003] EWCA Civ 217), but no more. To hold otherwise would place those who apply for and obtain legal aid in a better position than those who, through no fault of their own, are forced to represent themselves. For similar reasons I am not impressed by Miss Radford's submission that the fact that the appellants were granted legal aid shows that they could not reasonably be expected to act on their own behalf. Whether that was so or not depends to a large extent on the steps they had to take."

20. Mr O'Sullivan is correct to point out that the overriding objective which applies to the Upper Tribunal by virtue of rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 does not include, unlike the CPR, explicit consideration of the financial position of the parties. Plainly, in an immigration case, given that one of the parties to the litigation will be the Government, in all cases, it is obvious that the Appellant and the Respondent are likely to present in very different financial circumstances. Furthermore, it is correct to observe that Moore-Bick LJ in Kigen did not engage with the concern raised by the Respondent in the present case that without legal aid in place he would be without costs protection. Whilst this factor is not irrelevant to the evaluation of whether there was a good reason for delaying the issuing of the appeal in this case, it could not in my judgment be remotely decisive of that issue. Having examined the particular circumstances of the present case I am unable to conclude that the Respondent had good reason for the issuing of the appeal out of time for all of the reasons which I have already given. Against the backdrop of the authorities of Hysaj and Kigen I am unable to conclude the Mr O'Sullivan's point in relation to costs protection from the grant of Legal Aid adds materially to the considerations in the present case.

21. It follows that I am satisfied that the appeal in this case must be allowed and the Respondent's application to extend time for the bringing of his appeal should be refused.