IN THE UPPER TRIBUNAL **Appeal No. UA-2021-001557-II**
ADMINISTRATIVE APPEALS CHAMBER (formerly CI/160/2021)

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

Ms K.D.

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 3 August 2021
Decided on consideration of the papers

Representation:
Appellant: Miss J Brunt
Respondent: Mr W Spencer, DMA, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to allow the Appellant's appeal. The decision of the First-tier Tribunal made on 29 September 2020 under file number SC188/20/01192 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing (this may be a remote or virtual hearing, e.g. by telephone or CVP).**

2. **The new First-tier Tribunal should not involve the tribunal judge previously involved in considering this appeal on 29 September 2020.**

3. The file should be passed to Regional Tribunal Judge Maddox for him to determine which judge is best placed to take over conduct of this matter.

4. The Respondent (the Secretary of State) should provide a written response to the First-tier Tribunal which should have annexed to it copies of any other documentation she holds relating to the decision taken on 26 March 2018 (and which was the subject of the mandatory reconsideration notice dated 1 August 2018 (p.36)); this written response should be sent to the HMCTS regional tribunal office in Cardiff within one month of the issue of this decision.

5. If the Appellant has any further written evidence to put before the tribunal and, in particular, further medical evidence, this should be sent to the HMCTS regional tribunal office in Cardiff within one month of the issue of this decision.

6. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

This appeal to the Upper Tribunal: the issue in dispute

1. There is no disagreement between the parties as to whether the Appellant's appeal to the Upper Tribunal should succeed. They agree that it should succeed. The remaining area of dispute is whether the matter should be remitted to the First-tier Tribunal for re-hearing or rather retained and re-decided in the Upper Tribunal. For the reasons that follow, I have decided on the former course of action. But first I must explain why the First-tier Tribunal went wrong in law.

The background to this appeal to the Upper Tribunal

2. I gave the Appellant permission to appeal for the following reasons, as set out in the grant of permission:

> *The First-tier Tribunal's decision*
>
> 3. The Appellant's notice of appeal was lodged about 22 months after the 1 month time limit for making an appeal. There is a statutory maximum of 13 months. The FTT decided it could not admit the late appeal and struck it out without requesting a response from the DWP.

The relevant legal framework

4. All references below are to the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685). These Rules deal with the relevant Tribunal procedures in the FTT. In this ruling I call them the Tribunal Procedure Rules 2008.

5. The basic rule is that any DWP decision must be appealed to the FTT within 1 month of the mandatory reconsideration notice (see rule 22(2)(d) of the Tribunal Procedure Rules 2008). The Rules provide for that 1-month time limit to be extended by a year, i.e. to 13 months in all, on a discretionary basis (see rule 5(3)(a) and rule 22(8) of the Tribunal Procedure Rules 2008).

6. It had been generally assumed that the 13-month backstop rule was absolute: see *LS v London Borough of Lambeth (HB)* [2010] UKUT 461 (AAC); [2011] AACR 27 at [130]. However, the Supreme Court in *Pomiechowski v Poland* [2012] UKSC 20 decided that apparently absolute time limits may, in some limited circumstances, have to yield to the requirements of Article 6 of the ECHR (following its incorporation into UK law by the Human Rights Act 1998). This discretion to extend an absolute time limit can only arise "in exceptional circumstances" and where the appellant "personally has done all he can to bring [the appeal] timeously" (see also the Court of Appeal's decision in *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818). This is a very recognised as being a very narrow test to have to meet.

7. District Tribunal Judge Bennett, in her statement of reasons for the FTT, refers to several of the key authorities, such as *Adesina* and also a case within the social entitlement jurisdiction (*KK v Sheffield City Council (CTB)* [2015] UKUT 367 (AAC)).

8. A further helpful decision is that of UT Judge Rowland in a war pensions case, *PM v SSSD (AFCS)* [2015] UKUT 647 (AAC), a context where the same basic principles apply. Judge Rowland's helpful analysis in that case was as follows:

> "3. … I gave permission to appeal with the following explanation –
>
> > "[I]t is arguable that where the effect of that absolute time-limit would be so unfair as to be a breach of Article 6 of the European Convention on Human Rights, the First-tier Tribunal has the power to extend the time for appealing as far as is necessary to avoid the breach (see *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818; [2013] 1 W.L.R. 3156). Potentially, either a mental illness or non-receipt of the letter of 25 August 2009 could give rise to a breach of Article 6 but there are significant difficulties in the claimant's way. His mental illness appears not to have been totally incapacitating and if it had been one might have expected that someone would have been appointed to manage his affairs in which case that person's failure to act might be material. Even if the claimant did not receive the letter of 25 August 2009, he knew

> of the increase in the award, which he had attributed to the Boyce Review (see doc 17)."

4. I also commented that –

> "There is no evidence before me that, within one year of the date that his service ended, the claimant wrote any letter to the Service Personnel and Veterans Agency that might be taken to have been an application for a review under article 55. If there was such a letter, the parties will know of it."

Neither party has suggested that there was any such letter.

5. As the Secretary of State points out in his helpful submission drafted by Mr Adam Heppinstall of counsel, the Court of Appeal in *Adesina* was following the decision of the Supreme Court in *Pomiechowski v Poland* [2012] UKSC 20; [2012] 1 WLR 1604. The Court of Appeal said –

> "The real difficulty is where to draw the line. Mr Pascall, on behalf of the appellants, does not contend for a general discretion to extend time. Parliament is used to providing such discretions, often circumscribed by conditions (see, for example Employment Rights Act 1996, section 111(2), in relation to unfair dismissal). The omission to do so on this occasion was no doubt deliberate. If Article 6 and section 3 of the Human Rights Act require Article 29(10) of the Order to be read down, it must be to the minimum extent necessary to secure ECHR compliance. In my judgment, this requires adoption of the same approach as that of Lord Mance in *Pomiechowski*. A discretion must only arise "in exceptional circumstances" and where the appellant "personally has done all he can to bring [the appeal] timeously" (paragraph 39). I do not believe that the discretion would arise save in a very small number of cases. Courts are experienced in exercising discretion on a basis of exceptionality. See, for example, the strictness with which the discretion is approached in relation to the 42 day time limit and the discretion to extend in connection with appeals from Employment Tribunals to the Employment Appeal Tribunal: *United Arab Emirates v Abdelghafar* [1995] ICR 65; *Jurkowska v HLMAD* Ltd [2008] EWCA Civ 231."

The Secretary of State also refers to *Heron Brothers Ltd v Central Bedfordshire Council* [2015] UKHC 604 (TCC); [2015] PTSR 1146, in which the approach taken in *Pomiechowski* and *Adesina* was applied and the strictness of the approach was emphasised.

6. Nonetheless, in the light of those authorities, the Secretary of State concedes that the First-tier Tribunal erred in law in the present case because it did not consider whether, in the light of the claimant's mental illness, it would be a breach of Article 6 of the European Convention on Human Rights not to extend the time for appealing and determine his appeal. I accept that concession, which

I consider has been rightly made in view of the information that was before the First-tier Tribunal."

Turning to this case

9. The FTT in the present case cannot be accused of ignoring the *Pomiechowski v Poland* line of authority in the way that the tribunal in that war pensions case did. There is, however, an apparent contradiction between para 4 of the FTT's decision notice (p.71) and paras 6-11 of the statement of reasons (p.74). The first states the FTT had no discretion whereas the latter expressly discusses whether such a discretion should be exercised.

10. In addition, it may be arguable that the FTT did not adequately explain why it reached the decision it did. The Appellant's representative had provided a considerable body of documentary evidence in support of admitting the late appeal, including medical evidence. It could perhaps be not unfairly argued that the FTT did little more than say the circumstances were not exceptional because they were not exceptional. It is fair to say that this case was dealt with summarily, as a jurisdictional issue, but the adequacy of the FTT's fact finding and reasoning may still be questionable. That is sufficient for me to consider it right to give permission to appeal.

11. If the Secretary of State's representative supports the appeal to the Upper Tribunal, which remains to be seen, s/he should express a view as to whether the Upper Tribunal should re-decide the substantive issue of whether to admit the late appeal itself or remit the matter to a fresh FTT for rehearing. It would also assist if the Secretary of State were able to provide with her response copies of any other documentation she holds relating to the decision taken on 26 March 2018 and which was the subject of the mandatory reconsideration notice dated 1 August 2018 (p.36) which the Appellant seeks to appeal.

The proceedings before the Upper Tribunal

3. Mr. Wayne Spencer, the Secretary of State's representative in these proceedings, supports the appeal to the Upper Tribunal for three reasons in his helpful and comprehensive written response dated 12 May 2021.

4. First, Mr Spencer accepts that the First-tier Tribunal failed to provide adequate reasons for its conclusion. As such he contends the Tribunal erred in law – but he is not expressing any view one way or the other on the merits as to whether the appeal(s) should have been admitted and so treated as in time.

5. Second, Mr Spencer contends that the First-tier Tribunal failed to comply with rule 8(4) of the Tribunal Procedure Rules. He argues that the Appellant was not put properly on notice as to the basis of the proposed striking out, amounting to a breach of the principles of natural justice. As he says, "the claimant only discovered the factors that would determine the fate of her appeal *after* a decision was given on it". There is no reason why this flawed procedure should be repeated if the matter were to be remitted.

6. Third, Mr Spencer submits that the First-tier Tribunal erred in law by failing to consider whether it could properly admit appeals in respect of four earlier

decisions on the Appellant's claim to disablement benefit (and especially the level of the disablement assessment arrived at in each decision). The jurisdictional decision on whether appeals can be treated as being in time is one that only the First-tier Tribunal can take. The Secretary of State, or Mr Spencer on her behalf, has no power to make that decision for the tribunal.

7. In short, Mr Spencer has (very fairly) identified two additional reasons why this appeal should succeed to the one I had originally identified when giving permission to appeal.

8. I am satisfied that the First-tier Tribunal erred in law for the three reasons set out above. I therefore allow the Appellant's appeal to the Upper Tribunal and set aside (or cancel) the Tribunal's decision.

The issue in dispute: remittal to the FTT or re-deciding in the UT?

9. I formally find that the Tribunal's decision involves an error of law on the grounds as outlined above. The question then is whether I should re-decide the underlying appeal myself or remit (in other words send back) the appeal for re-hearing to a new First-tier Tribunal, which must make a fresh decision. The Appellant's representative has advanced detailed reasons why she believes the best way forward is for the Upper Tribunal to retain control of this matter and re-decide it for itself. I have considered those reasons carefully but have come to the opposite conclusion for the following reasons. I refuse the request for an Upper Tribunal oral hearing for essentially the same reasons, and not least as that will only delay matters unnecessarily.

10. The first is that as a general rule the First-tier Tribunal is best placed to deal with issues of fact. The focus of proceedings in the Upper Tribunal is on legal issues. I recognise that is a general rule, and can be displaced with good reason, but I consider there are no such good reasons here.

11. The second is that there is no guarantee that a hearing in the Upper Tribunal could be arranged any sooner than in the First-tier Tribunal. In addition, for the fourth and final reason below, this matter needs active case management, which is best undertaken at the First-tier Tribunal level.

12. The third is that there is, of course, no guarantee that the Appellant would succeed before the Upper Tribunal if the matter were to be re-decided here. In that event, her only route of further appeal would be to the Court of Appeal. The criteria for giving permission to appeal from the Upper Tribunal to the Court of Appeal are much more restrictive than those that apply for appeals from the First-tier Tribunal to the Upper Tribunal. The Appellant could therefore be at a significant disadvantage in the event that the Upper Tribunal retained conduct of this matter.

13. The fourth and final reason concerns the third reason identified by Mr Spencer for allowing this appeal. There is the outstanding matter of whether appeals should be admitted against the other four decisions in respect of the mandatory reconsideration notices issued on 15 July 2020. Given the way that the legislation is structured, the Upper Tribunal has no jurisdiction over those issues unless and until the First-tier Tribunal has made a decision on whether to admit each appeal. It is therefore by far the more efficient way forward for this case to

be remitted so that the First-tier Tribunal, with appropriate case management, can consider all relevant matters together.

What happens next: the new First-tier Tribunal

14. There will therefore need to be a fresh hearing of the question as to whether the Appellant's late appeal should be admitted before a new First-tier Tribunal. I have every confidence that District Tribunal Judge Bennett would apply her mind to this task conscientiously and independently. However, I am also conscious that justice should not only be done, but should be seen to be done. On that basis I direct that the case be allocated to a different District Tribunal Judge.

15. It is not for me to determine who that District Tribunal Judge should be. However, given the complexity of this case, I am taking the rather unusual step of directing that the file should be passed to Regional Tribunal Judge Maddox for him to determine which judge is best placed to take over conduct of this matter going forward. He is far better placed than me to make such directions given his knowledge of the available judicial resources in his Region.

Conclusion

16. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 3 August 2021