Neutral Citation Number: [2020] EWCA Civ 51

Case No: C1/2019/0894

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Dove
[2019] EWHC 749 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 January 2020

Before:
LORD JUSTICE DAVID RICHARDS
LORD JUSTICE PHILLIPS
and
SIR STEPHEN RICHARDS

- - - - - - - - - - - - - - - - - - - -

Between:

Abdullah Al Ahmed	**Appellant**
- and -	
The Mayor and Burgesses of the London Borough of Tower Hamlets	**Respondent**
- and –	
Shelter	**Intervener**

- - - - - - - - - - - - - - - - - - - -

Richard O'Sullivan (instructed by **Tyrer Roxburgh**) for the **Appellant**
Mark Baumohl (instructed by **Legal Services, LB of Tower Hamlets**) for the **Respondent**
Liz Davies and **Connor Johnston** (instructed by **Freshfields Bruckhaus Deringer LLP**, all acting *pro bono*) for the **Intervener**

Hearing date: 15 January 2020

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

Sir Stephen Richards:

1. This case concerns the approach to be adopted by the court towards the assessment of a "good reason" for delay in bringing an appeal under s.204 of the Housing Act 1996 ("the 1996 Act") against an adverse review decision under the homelessness provisions of that Act, in circumstances where the reason put forward for the delay is that the applicant was unrepresented and was seeking legal aid.

The County Court proceedings

2. Following an application by Mr Al Ahmed, the appellant in this court, to the respondent authority ("the Council") under the homelessness provisions of the 1996 Act, the Council decided that he was not in priority need. The solicitors then acting for him requested a review of that decision. The decision on the review, dated 23 March 2018, upheld the original decision.

3. Section 204 of the 1996 Act provides that an applicant who is dissatisfied with the decision on a review may appeal to the County Court on any point of law arising from the decision. By s.204(2), an appeal must be brought within 21 days of his being notified of the decision. By s.204(2A), however, provision is made for the possibility of an appeal out of time:

> "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 –
>
> (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
>
> (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."

4. The review decision in this case was notified to Mr Al Ahmed on either 4 or 6 April 2018. Any appeal should therefore have been brought by 27 April 2018 at the latest. An appellant's notice was not lodged until 25 May 2018. It included an application for permission to appeal out of time, together with two substantive grounds of appeal: (1) breach of regulation 8(2) of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999, in that a "minded to" letter requesting further representations was not received by the appellant and in any event an insufficient period was allowed to enable an unrepresented lay person an opportunity to make meaningful representations; and (2) failure to comply with the duty of inquiry under s.149 of the Equality Act 2010 into the question of the appellant's disability.

5. The application for permission to bring the appeal out of time was heard by HHJ Hellman in the County Court at Central London.

6. The evidence before the judge included a short witness statement by Mr Al Ahmed, exhibiting a letter to the court from his support worker at Crisis and documents relating to his medical condition. The evidence also included emails and letters

passing between Mr Al Ahmed and the Council which were attached to the Council's statement of reasons in opposition to the application for permission.

7. In his witness statement Mr Al Ahmed explained that initially he had instructed solicitors to handle the review but owing to "miscommunication" he had stopped instructing them. He was getting help from Crisis, whose efforts on his behalf were set out in the letter from the support worker, Ms Caroline Harte. The letter read in material part as follows:

> "I am aware that there is a thirty-five-day delay in appealing the council's decision while writing to you but there were several issues that stopped us putting in an appeal sooner and I want to try to explain why the delay occurred.
>
> I started covering for my colleague Steve Barnes in March 2018, Steve had been supporting Abdullah and it took me a couple of weeks to set up an initial meeting with Abdullah and to become familiar with his case. Steve and myself work as part of the rough sleeper's progression team at Crisis.
>
> Crisis is a homeless charity providing learning and employment opportunities and advice and guidance for homeless clients. Abdullah had been linked in with our service since October 2016.
>
> 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 not redeemable.
>
> 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 trailling [*sic*] through the list calling companies only to be told 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.
>
> 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 [*sic*] who kindly looked through the documents and after meeting with Abdullah and myself decided to grant emergency legal aid on our behalf."

8. The evidence was that matters moved very swiftly once Tyrer Roxburgh became involved. A legal adviser saw Mr Al Ahmed on 23 May, counsel was instructed and an appellant's notice containing an application for leave to appeal out of time and grounds of appeal was lodged on 25 May.

9. Judge Hellman's reasons for finding good reason within s.204(2A)(b) and for granting permission to appeal out of time are contained in the last two paragraphs of his *ex tempore* judgment:

> "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 lengthy 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 Ahmed that, notwithstanding their assistance, that is something which he had to do.
>
> 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."

<u>The appeal to the High Court</u>

10. The Council appealed to the High Court against Judge Hellman's order granting permission to appeal out of time. It argued that he had applied the wrong test, had taken into account an irrelevant consideration and had reached a conclusion not reasonably open on the evidence before him. The appeal was heard by Dove J, who gave judgment allowing the appeal and holding that the s.204(2A) application for permission to appeal out of time should be refused.

11. After summarising the parties' submissions, Dove J's judgment set out at [12]-[13] a number of uncontentious points, to some of which I will return in due course, about the power in s.204(2A). He then referred in [13]-[14] to an argument for the Council

based on *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, [2015] 1 WLR 2472 ("*Hysaj*") at [43]-[45], and *Nata Lee Limited v Abid* [2014] EWCA Civ 1652, [2015] P&CR 3 at [53], that the mere fact that a person is unrepresented could not amount to a good reason for delay in bringing an appeal. As to that point, the judge concluded at [14]:

> "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."

12. The judge's main reasons for finding that Judge Hellman had misdirected himself were then set out at [15]-[17]:

> "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) [are] 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."

13. The judge went on to consider further arguments advanced in a respondent's notice to the effect that good reason would arise from the need to be granted legal aid in order both to prosecute the appeal and to be properly protected from any adverse costs decision. He said that there was some degree of read across between his observations in respect of litigants who do not have professional representation and the contention that time should be extended and discretions exercised so as to enable them to have legal representation by way of legal aid. He referred to *R (Kigen) v Secretary of State for the Home Department* [2015] EWCA Civ 1286, [2016] 1 WLR 723 ("*Kigen*"), in which it was held, consistently with the reasoning in *Hysaj*, that the fact that a claimant had applied for legal aid and had been waiting for a decision from the Legal Aid Agency was not a good reason for failure to comply with the time limit in the Upper Tribunal rules for the making of an application for reconsideration of a decision refusing permission to apply for judicial review. He concluded at [20]:

> 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 that 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."

<u>The appeal to the Court of Appeal</u>

14. Mr Al Ahmed now appeals to this court against the order of Dove J. Permission for a second appeal was granted by Males LJ. Permission was subsequently granted for Shelter to intervene in the appeal by way of written and oral submissions and to adduce evidence in the form of a witness statement by Ms Polly Neate, its chief executive.

15. The essence of Mr O'Sullivan's submissions for Mr Al Ahmed is that Judge Hellman directed himself correctly and made findings of fact that were reasonably open to him on the evidence, and that there was therefore no basis for Dove J to interfere with the judgment and to substitute a different conclusion on the issue of good reason.

16. For the Council, Mr Baumohl supports Dove J's decision and reasoning. By a respondent's notice he seeks in addition to put forward a different reason why the decision is said to have been correct. He argues that Judge Hellman dealt only with whether there was good reason for the appellant's failure to bring the *appeal* in time and did not deal with the separate question in s.204(2A)(b) as to whether there was good reason for the delay in applying for *permission* for the appeal to be brought out of time. No such argument was, however, addressed to the courts below, where the two elements of s.204(2A)(b) were simply run together as a single issue concerning good reason for the delay. In my judgment it is far too late to raise the argument for the first time now on this second appeal, and I say no more about it.

17. Shelter does not take any position on the decision reached in Mr Al Ahmed's particular case. Its intervention is prompted by concerns about the reasoning in Dove J's judgment which in its submission is inconsistent with the statutory scheme under the 1996 Act and sets a concerning precedent that fails to take into account the frailties of homeless applicants and the particular barriers they may face in obtaining legal assistance and that will result in inconsistent outcomes across the country. As to the setting of a precedent, Shelter points to *Emambee v London Borough of Islington* [2019] EWHC 2835 (QB) as indicating that Dove J's judgment is being relied on as establishing principles of general application. Shelter submits that this court should find that difficulties in obtaining legal advice and representation may constitute a good reason for failing to lodge an appeal within the 21 day time limit and that it frequently will do so, provided that the applicant has acted diligently in seeking advice. There is no limit or fetter on the circumstances that may constitute a good reason under s.204(2A). Each case should be judged on its merits.

18. Ms Neate's witness statement for Shelter is a lengthy document. It covers the practical difficulties involved in a homeless applicant issuing a notice of appeal in person; the wider difficulties and circumstances that homeless persons often have to contend with; and the difficulties that homeless applicants face in finding solicitors who are able to advise and represent them in homeless appeals, and the lack of capacity in the housing advice sector. It also sets out the limited results of an exercise under the Freedom of Information Act 2000 seeking to establish the advantages to homeless applicants of being represented when bringing a s.204 appeal, and the impacts on court time and costs. I stress that this evidence was not before the courts below and that it does not therefore bear directly on Judge Hellman's decision as to good reason or on Dove J's criticisms of that decision. But it has not been challenged and it underpins Shelter's concerns about aspects of Dove J's judgment and its effect on future cases. I therefore think it helpful to provide a somewhat fuller summary of some of the matters covered.

19. As to practical difficulties in bringing an appeal, the witness statement points to the limited information provided in review letters regarding the right to bring an appeal and how to go about it; and to Shelter's experience that review letters are hard for homeless applicants to understand and do not clearly indicate what issues might be open to appeal. Further, applicants who lack legal advice and are themselves without knowledge or experience of housing law are more likely to focus on the facts of their case rather than the law when faced with a negative decision; and it is very rare to find a homeless applicant who is without legal advice or assistance but is able to focus appropriately on how housing law and public law principles apply to the facts of their case in order properly to assess and formulate a point of law for the purpose of bringing an appeal. Those who have been placed in temporary accommodation will tend to focus on the imminent loss of that accommodation and the need to undertake a number of stressful and time/resource heavy tasks in a short period of time, rather than on the need to bring an appeal. It is said that a number of common difficulties or shared characteristics of those experiencing homelessness (poverty, mental ill health, etc.) contribute to delaying or preventing them from being able to cope with life events and to manage their affairs; and that it does not necessarily follow that because someone who is homeless is articulate and can express himself or herself verbally and on paper, he or she therefore has the ability to take and implement a decision to issue a complex court appeal.

20. Also in relation to the practical difficulties of bringing an appeal, the witness statement refers to the limited information freely available which might assist applicants in working out how to issue an appeal and how to formulate grounds of appeal. It provides evidence that accessing information on the internet for applicants who are without accommodation or are living in temporary accommodation and with very limited financial resources can be incredibly difficult; and examples are given of the difficulty of identifying any useful material even if an applicant is able to access the internet. Reference is made to the difficulties in finding a solicitor; to the fact that parts of the notice of appeal, Form N161, are not at all suited to the circumstances of a s.204 appeal, which makes it difficult for homeless applicants to understand and complete the form; and to the need to find access to a computer and printer and to draft, complete, print, photocopy, post (and pay for recorded delivery) or physically take to the local county court a covering letter, the notice of appeal, the grounds of appeal and the fee or fee exemption form (with attached evidence of income), and to provide copies of the documents to the local authority.

21. One section of the witness statement deals with the serious diminution in the provision of advice for housing law matters under legal aid contracts as a result of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). Homeless applicants should still qualify for a full legal aid certificate to cover the work necessary for a County Court appeal, provided that they meet the Legal Aid Agency means and merits tests. But many housing cases were taken out of the scope of legal aid, and the resulting shrinkage in the number of providers means that there are now areas of the country where it is almost impossible to get face to face legal advice in housing law – there are housing advice deserts throughout the country. Even those who are still entitled to legal aid will often not be able to find someone to provide the service they need. Those housing advice providers that are still left are facing increased demand and often do not have the capacity to assist everyone who approaches them for help.

The correct general approach to the assessment of "good reason"

22. Prior to the insertion of s.204(2A) into the 1996 Act by the Homelessness Act 2002, the 21 day time limit in s.204(2) was absolute. In *R v Brent LBC, ex parte O'Connor* (1998) 31 HLR 923 at 925, Tucker J described it in these terms:

> "[T]he time limit fixed by Parliament under the Housing Act 1996 was draconian, as some might think. It was certainly short and it gave no discretion to the judge either of this court or the county court to extend it."

23. The insertion of s.204(2A) ameliorated the position but did so on a relatively narrow basis. The time limit for bringing an appeal remains at 21 days. The court's discretion to permit an appeal to be brought out of time arises for consideration *only* if the court is satisfied that there is or was a good reason for the delay. As Tugendhat J put it in *Short v. Birmingham City Council* [2005] EWHC 2112 (QB), [2005] HLR 6 at [26], "if the judge is not satisfied that there was good reason for an applicant's failure to bring an appeal in time and for any delay in applying for permission, then he cannot go on to consider the merits."

24. In itself, however, the requirement of "good reason" provides a straightforward statutory test to which no gloss is or should be applied. That has been the consistent, and in my judgment correct, approach of the courts to s.204(2A) prior to the present case. Thus, in *Barrett v The Mayor and Burgesses of the London Borough of Southwark* [2008] EWHC 1568 (Comm), at [23]-[24], Sir Thomas Morrison held that "whether a reason or conjunction of reasons amounts to a good reason is a question of fact and value judgment", and that "the question whether a reason, or combination of reasons, is to be categorised as 'good' can be considered at large and without any preconceptions as to what may qualify and what may not qualify as a contributor to the ultimate decision as to whether a reason is good". He also observed at [24] that "good reason is a phrase in common parlance, which, in my judgment, does not need elaboration". That approach was followed by Lewis J in *Peake v London Borough of Hackney* [2013] EWHC 2528 (QB) and by Jay J in *Poorsalehy v London Borough of Wandsworth* [2013] EWHC 3687 (QB). In the latter case Jay J added at [16] that "good reason is not a matter of law or presumption. Its existence depends on all the circumstances of the case as known to the court by direct and inferential evidence; and, thereafter, secondary evaluative conclusions derived from that evidence".

25. Shelter's submission, which I accept, is that by his reasoning in relation to unrepresented parties Dove J has departed from the approach in those previous cases and has introduced an unjustified restriction on the circumstances that can be taken into account in deciding whether an applicant has a good reason within s.204(2A). Reference is made in particular to the passage at [14] of his judgment where Dove J states that "[i]t is clear … 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". In the middle of [16] he refers to that proposition as the first of his reasons for finding that Judge Hellman misdirected himself in relying on the view that Mr Al Ahmed needed legal representation. Thus he treats the point as one of general application which limits what may qualify as a good reason for the purposes of the statutory test.

26. In adopting that approach the judge was heavily influenced by the reasoning in *Hysaj*, and in relation to a specific argument about delay in obtaining legal aid he was similarly influenced by *Kigen* (see his judgment at [13]-[14] and [19]-[20]). He did not have the benefit, however, of the submissions made to us by Shelter as to why such cases are distinguishable and should not be followed in the present context.

27. *Hysaj* concerned an application under CPR 3.1(2)(a) to extend the time limit under CPR 52.4 for filing an appellant's notice. The court held that the principles to be derived from *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795 ("*Mitchell*") and *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 ("*Denton*"), relating to applications under CPR 3.9 for relief from sanctions, should be applied by analogy to applications for an extension of time under CPR 3.1(2)(a). Those principles, set out most clearly in *Denton*, reflected the stricter approach to be taken towards failures to comply with the Civil Procedure Rules following the reforms resulting from Sir Rupert Jackson's review of civil litigation costs. In considering how the principles applied to litigants in person, Moore-Bick LJ stated at [44]:

> "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 …. 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."

28. *Kigen* concerned an application under the Tribunal Procedure (Upper Tribunal) Rules 2008 for an extension of the time limit prescribed by those rules for applying for reconsideration of a decision refusing permission to apply for judicial review. The court held that the situation was analogous to filing a notice of appeal under CPR 52.4 and that in such a case the court should adopt the approach set out in *Denton*, applying the guidance given in *Hysaj*. The fact that the claimant had applied for legal aid and had been waiting for a decision from the Legal Aid Agency was held not to be a satisfactory explanation for failure to comply with the time limit in the rules.

29. There are several reasons why the *Mitchell*/*Denton* principles, as adopted by analogy in *Hysaj* and *Kigen*, should not be applied to the assessment of whether there is a good reason under s.204(2A) of the 1996 Act.

30. First, s.204(2A) lays down a statutory test, "good reason", the content and effect of which cannot have been changed by the strict approach adopted in recent years by the courts towards failures to comply with the CPR or with the corresponding rules of the Upper Tribunal. Although appeals under s.204 are brought in accordance with the procedural rules in the CPR, those rules do not define the test of good reason; and neither changes to the rules themselves nor changes in the court's approach towards failure to comply with them can alter the statutory test. I have referred above to the consistent approach taken previously by the courts towards that statutory test, to the effect that all the circumstances are to be taken into account without applying any particular presumptions. That approach should not be qualified by importing the *Mitchell*/*Denton* principles into it. In *Short v Birmingham City Council* (cited above) at [26], Tugendhat J observed that "on the wording of the 1996 Act s.204(2A) it is not open to a judge to have regard to the criteria set out in CPR 3.9, or any criteria, other than those specified in terms in the section". He was referring to an earlier version of CPR 3.9 than that considered in *Mitchell* and *Denton*, but his observation has equal validity in relation to the principles laid down in those cases and applied in analogous contexts under the CPR and the Upper Tribunal rules.

31. The inappropriateness of applying the *Mitchell*/*Denton* principles to the statutory test in s.204(2A) is underlined by the fact that under those principles the question of good reason is only one factor, and not necessarily a determinative factor, in the assessment to be made. The *Mitchell*/*Denton* approach, as set out in *Hysaj* at [38] is this:

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default

> occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application …'".

It is at the second stage that the question of good reason arises. A strict approach towards the question of good reason can more readily be justified in a situation where the potential for unjust consequences can be mitigated at the third stage, where the court evaluates all the circumstances. By contrast, there is no scope for a three-stage analysis under s.204(2A), where consideration of the merits and any other matters can arise only if good reason is established. To restrict, by reference to the *Mitchell*/*Denton* approach, the circumstances that can be taken into account in the assessment of good reason under s.204(2A) would therefore open the door to unjust outcomes, which Parliament cannot have intended.

32. That different approaches may be taken in different contexts is illustrated by *Green v Mears Ltd* [2018] EWCA Civ 751, [2019] ICR 771, in which it was held that the even stricter approach previously applied to applications for an extension of time for appealing to the Employment Appeal Tribunal was not to be treated as superseded by the *Mitchell*/*Denton* principles. As Underhill LJ said at [40], "[h]ow strict an approach should be taken to non-compliance with time limits is not a question to which one answer is necessarily better or worse than another …. A balance has to be struck between two interests which weigh on opposite sides …. Different courts or tribunals may legitimately choose to strike the balance differently." In this case the point is an even stronger one, in that the test of good reason in s.204(2A) has been laid down by Parliament and it is not open to the courts to strike a different balance by reading limitations into that test.

33. The same point may be made about *Barton v Wright Hassall llp* [2018] UKSC 12, [2018] 1 WLR 1119, which concerned an application by the claimant, a litigant in person, for an order under CPR 6.15 validating service of the claim form retrospectively. Lord Sumption stated at [18] that a lack of representation will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. He pointed to the "disciplinary factor" in the cases on relief from sanctions, a factor which was less significant in the case of applications to validate defective service of a claim form. He continued:

> "There are, however, good reasons for applying the same policy to applications under CPR r.6.15(2) simply as a matter of basic fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent …. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

Again, the reasoning relates to the balance to be struck by the courts in relation to compliance with rules of court. It cannot be read across to the context of s.204(2A) so as to alter the content or effect of the test laid down by Parliament.

34. The context of s.204(2A) is, moreover, materially different from that under consideration in the cases where it has been held to be reasonable as a general rule to expect litigants in person to comply with relevant rules of court. I have summarised the evidence placed before this court by Shelter. It presents a bleak picture of the difficulties faced by homelessness applicants in bringing an appeal under s.204 of the 1996 Act without legal advice and representation, and of the difficulties they may face in finding someone to provide those services under legal aid, especially as a result of the post-LASPO shrinkage of the housing advice sector. Everything will of course depend on the circumstances of the individual case, but it would be both surprising and unfair if difficulties of that kind could not be taken fully into account and given appropriate weight in the assessment of whether there was a good reason for failure to bring an appeal in time and, to the extent that it arises as a separate issue, for delay in applying for permission to bring an appeal out of time.

35. In no way does that view give *carte blanche* to delay. The basic rule remains the 21 day time limit, with which Parliament must have intended applicants in general to comply. Compliance may present little difficulty in practice if an applicant already has a solicitor acting for him in relation to the review (as might have been the position in Mr Al Ahmed's case had it not been for a breakdown in the relationship between him and his solicitor). Where an applicant relies on the fact that he was unrepresented and was seeking legal aid as a reason for non-compliance, the circumstances will need to be examined with care, including scrutiny of the diligence with which he acted in seeking legal aid. And even if the court is satisfied as to good reason, that simply opens up a *discretion* to give permission for an appeal to be brought out of time. At that stage the court is able to take into account all other relevant considerations, including the position of the local authority, in deciding how to exercise its discretion.

<u>The present case</u>

36. I turn to consider the circumstances of the present case. Judge Hellman's assessment that there was a good reason within s.204(2A) for Mr Al Ahmed's delay in bringing the appeal was an evaluative judgment with which an appellate court should be slow to interfere. For the reasons given below, I do not think that there was any proper basis for Dove J to interfere with it.

37. As appears in particular from [16] of his judgment, Dove J's finding that Judge Hellman misdirected himself is based on two main strands of reasoning: (1) the general point that the fact that Mr Al Ahmed was unrepresented "had little, if any, part to play in providing good reason"; and (2) his view that "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 the court to understand the errors of law which were relied upon".

38. I have already made clear my disagreement with the first strand: the fact that Mr Al Ahmed was unrepresented and was seeking legal aid was a factor properly taken into account by Judge Hellman.

39. The second strand rests, in my judgment, on a misunderstanding of Judge Hellman's reasoning or errs in rejecting that reasoning; and it goes against findings of fact reasonably made by the judge on the evidence before him.

40. At [14]-[15] of his judgment, Judge Hellman accepted in terms that the appellant could have filed a notice of appeal in time. His point, however, was that Mr Al Ahmed "probably had no idea what it needed to say" and reasonably sought assistance from Crisis which took the view, also reasonably, that he needed legal representation. Judge Hellman clearly did not accept that Mr Al Ahmed was able to identify without legal representation even the substance of the two grounds of appeal that were advanced once he did have legal representation. He pointed to the contrast between what Mr Al Ahmed wrote in his lengthy emails to the Council (which got nowhere near to identifying the relevant points of law) and what was set out succinctly in the grounds of appeal actually filed. Thus, the judge was looking, perfectly reasonably, at the practicalities of the matter. In his view there was no useful purpose in filing a notice of appeal until Mr Al Ahmed had legal representation and knew what, if any, points of law could be advanced: "without a legal representative this appeal was never going to go anywhere". There was no error of law in any of this, and it was based on factual findings for which there was an adequate evidential foundation in the material to which the judge referred.

41. At [17] of his judgment, Dove J criticises Judge Hellman's findings as to the extent of Mr Al Ahmed's reliance on Crisis and states that Mr Al Ahmed could not rely on Crisis to draft and issue the appeal for him. All this leads back in to Dove J's view that it was for Mr Al Ahmed to ensure compliance with the time limit and that it was within his capabilities to do what was necessary to bring the appeal in time. Again, however, Judge Hellman's findings as to the extent and reasonableness of Mr Al Ahmed's reliance on Crisis were in my view properly open to him on the evidence; and the question whether Mr Al Ahmed could have brought a meaningful appeal in time has been sufficiently covered above.

42. Whilst I have concentrated on the specific circumstances of Mr Al Ahmed's case and on Judge Hellman's findings in that regard, I think it right to add that if and in so far as Dove J was basing himself on a wider proposition that homelessness applicants are able as a general rule to draft a notice of appeal and adequate grounds of appeal without legal representation (cf. "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", at [15] of his judgment), such a proposition is in my judgment mistaken. It is not supported by the evidence before Judge Hellman and it is contradicted by the evidence placed before this court by Shelter.

43. Whilst counsel's submissions raised the question of what is technically required in order to bring a competent or valid appeal under s.204, in particular whether it would suffice to lodge a bare notice of appeal without any grounds of appeal (or any grounds raising any point of law), I regard that as an arid dispute which in any event does not need to be resolved in this case.

Conclusion

44. I would allow the appeal and reinstate Judge Hellman's order.

Lord Justice Phillips:

45. I agree.

Lord Justice David Richards:

46. I also agree.