Appeal Nos. CG/2203/2016, CG/2206/16, CIS/3679/2016, CIS/3677/2016, CIS/3674/2016, CIS/3669/2016, CH/3681/2016 CJSA/3683/16 & CJSA/3685/16

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Name:	JP
Tribunal:	First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case Nos:	SC242/12/15249, 15251,15467,15473,15476,15481,15482,15483 & SC/242/13/05692
Tribunal Venue:	Fox Court
Hearing Date:	3rd – 6th November 2015

NOTICE OF DETERMINATION OF AN APPLICATION FOR PERMISSION TO APPEAL

The late application for permission to appeal to the Upper Tribunal is NOT admitted. I am not satisfied that it is in the interests of justice to do so.

REASONS

1. This is an application for permission to appeal to the Upper Tribunal in respect of 9 cases relating to entitlement and overpayment of a number of means-tested benefits. The applications are significantly late. Accordingly, the first question I had to decide was whether I should extend time and admit the applications under the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI.2008/2698).

2. In deciding that I should not exercise my power to extend time and admit the applications I have followed *R (on the application of Onowu) v First-tier Tribunal (Immigration and Asylum Chamber)* [2016] UKUT 185 (IAC) ('*Onowu*'), a case decided by the Upper Tribunal (Immigration and Asylum Chamber). *Onowu* consolidates the learning in several Court of Appeal decisions relating to extending time for late applications for permission to appeal. I consider the basic three stage approach in those cases to be appropriate to resolve questions regarding the admission of late appeals in the Upper Tribunal (AAC) and its First-tier Tribunals. But as explained in due course, not all of the guidance set out in paragraph 14 of *Onowu* is appropriate in the social entitlement setting.

3. The main principles in *Onowu* are at [13], with [14] – [17]:

> '13. At [93] of its decision in *Secretary of State for the Home Department v SS (Congo) & Others* [2015] EWCA Civ 387, the Court drew together the learning from *Mitchell, Denton* and *Hysaj*[1], in these terms:
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> > "...a Judge should address an application for relief from sanction in three stages, as follows:

[1] *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; *Denton v White* [2014] EWCA Civ 906.

(a) The first stage is to identify and assess the seriousness or significance of the failure to comply with the rules. The focus should be on whether the breach has been serious or significant. If a judge concludes that a breach is not serious or significant, then relief will usually be granted and it will usually be unnecessary to spend much time on the second or third stages; but if the judge decides that the breach is serious or significant, then the second and third stages assume greater importance.

(b) The second stage is to consider why the failure occurred, that is to say whether there is a good reason for it. It was stated in *Mitchell* (at para. [41]) that if there is a good reason for the default, the court will be likely to decide that relief should be granted. The important point made in *Denton* was that if there is a serious or significant breach and *no* good reason for the breach, this does not mean that the application for relief will automatically fail. It is necessary in every case to move to the third stage.

(c) The third stage is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application. The two factors specifically mentioned in CPR rule 3.9 are of particular importance and should be given particular weight. They are (a) the need for litigation to be conducted efficiently and at proportionate cost, and (b) the need to enforce compliance with rules, practice directions and court orders..."

14. The following further guidance can also be distilled from the judgment in Hysaj:

(i) There is no merit in constructing a special rule for public authorities; they have a responsibility to adhere to the court's rules even if their resources are 'stretched to breaking point' [42];

(ii) A solicitor or public body having too much work will rarely be a good reason for failing to comply with the rules [42];

(iii) Particular care needs to taken in appeals concerning claims for asylum and humanitarian protection to ensure that appeals are not frustrated by a failure by a party's legal representatives to comply with time limits. The nature of the proceedings and identification of responsibility for a failure are matters to be considered at the third stage of the process [42];

(iv) The inability to pay for legal representation cannot be regarded as providing a good reason for delay [43];

(v) In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process [46].

...

16. Although none of the decisions cited above were made in the specific context that presents itself in the instant matter, we can see no good reason, and none was advanced by the parties, as to why the approach commended in *Mitchell, Denton* and *Hysaj* should not equally be applied to the First-tier Tribunal's, and Upper Tribunal's, consideration of an application for an extension of time to apply for permission to appeal (assuming of course that the notice of appeal was actually filed out of time). Nothing in the approach rehearsed above is in discord with the overriding objective of either the 2014 FtT Rules or 2008 UT Rules to deal with cases *justly and fairly;* indeed, it is the aspiration of achievement of these very objectives which was identified by the court in *Hysaj*, at [24], as underpinning the rationale for the third stage of the process of consideration. '

4 Paragraph 14 (i), (ii) above are robustly disapproving of delays attributed to overworked and underfunded legal services and public bodies. That is not necessarily a view that advances

the interests of justice in relation to legal services and public bodies involved in the social entitlement sphere. Legal services in this sphere are commonly provided by unpaid welfare advisors working with organisations that rely on public funding. It is no secret that their services are oversubscribed and underfunded. The environment in which social entitlement cases are dealt with is, in addition, non-adversarial. In these circumstances, a more flexible approach to delay may be needed if justice is to be done. But this appeal does not provide an example of that need.

Background to the application for an extension

5 The F-tT heard these 9 cases on 3rd – 6th November 2015. The tribunal comprised a district tribunal judge and a financial member. At the hearing, the appellant was represented by counsel, who prepared detailed written submissions and attended the hearing before the F-tT. During the course of the hearing, counsel made certain concessions. There is nothing to lead me to think that these were made other than with the appellant's instructions. To do otherwise would have been a breach of counsel's duty to his client. The appellant also made certain admissions on facts during the hearing.

(a) The F-tT's decision notice was issued on **3 December 2015 (issued on 8 December 2015).** The summary of reasons in the decision notice ran to 3 pages.

(b) On **23 December 2015** the appellant made an in-time request for a full Statement of Reasons.

(c) On **24 February 2016** the F-tT's Statement of Reasons was issued (signed 13 February). It ran to some 215 paragraphs of careful analysis of the evidence and made all necessary findings of fact to support the decision on the basis of that evidence. Its findings were rational, as were the extensive reasons it gave. The decision dealt with all the points raised by counsel.

(d) In **April 2016** the appellant was sent a duplicate of the Statement of Reasons.

(e) **On 9 April 2016** the appellant wrote to thank the F-tT for the duplicate Statement of Reasons and explained her reasons for wishing to appeal. Many of the issues she raised were disputes about facts rather than raising arguable issues of law. However, she raises very explicitly what she perceives to be an error of law in the 5th paragraph on the first page of her letter. This relates to 'closed period supersession' and how the tribunal is required to approach changes in a pattern of work. These are obviously issues of law.

(f) On **21 April 2016** the First-tier Tribunal Judge accepted the late application but refused permission to appeal. The refusal was issued the same day. Permission was refused. because the appellant had not at that stage raised any arguable errors of law in the F-tT decision.

(g) On **3 May 2016** the appellant was referred by a citizens' advice bureau to Paddington Law Centre. Her initial appointment was on 11 May 2016. In the meantime, she had requested a copy of the Record of Proceedings, which was sent to her on 20 May 2016.

(h) On **18 May 2016** the representative wrote by email to the Upper Tribunal on requesting an extension of time limit for appealing to the Upper Tribunal. He wrote a 2-page letter explaining why he would be delayed: there were 9 appeals and 9 decision notices, the

Statement of Reasons ran to 27 pages, there were some 1400 pages of documents in the bundles, the appellant's rejected application for permission to appeal was 15 pages long, there was a witness statement of 19 pages and a supporting appeal submission of 16 pages. The representative said he did not have sufficient time to read and digest all these documents and take further instructions before the imminent deadline. He felt that the cases concerned complex questions about the appellant's work as a self-employed person and her earnings. The representative acknowledges, however, that at the end of the day, he might advise that there were no errors of law.

(i) On **21 May 2015** the time for lodging an application for permission to appeal to the Upper Tribunal expired (i.e. one month after the F-tT's notice of refusal was sent [rule 21(3)(b), Tribunal Procedure (Upper Tribunal) Rules 2008 ('Upper Tribunal Rules'

(j) On **14 July 2016** the representative's application for permission to appeal was lodged with the UT. As time expired on 21 May, the application was just short of 2 months late.

Discussion

The request for extension of time

6 The contents of the letter requesting a extension of time clearly cannot be construed as an application for permission to appeal.

7 The representative stated in the application for permission to appeal that a request for extension had been refused as '**extensions of time are only considered once the appeal deadline has expired. It is then a matter for the applicant to explain the delay'.** I have now seen a copy of the UT's response to the representative's request for an extension of time. It said **'the Upper Tribunal does not give extensions of time to apply to the Upper Tribunal. If you send the application outside of the time limit you must explain the reasons for that and the Judge will decide whether or not it is acceptable. Please see section D of the Upper Tribunal application form (UT1).'**

8 The Upper Tribunal is seized of a matter when an application is lodged, and extensions of time are not granted before the application is received. If such requests were accepted, the demands on the administration arising from having to record and track these requests, which might never mature into applications, would be unduly burdensome.

The three stage approach

9 **Stage 1** requires the assessment of the seriousness or significance of the failure to comply with the rules. The background set out above shows very substantial delay by an appellant who had the advantage of legal representation with her these appeals as well as with the criminal case arising from her claims. She had been provided with HMCTS instructions on how to appeal a decision by a F-tT. Her applications both to the F-tT for permission to appeal to the Upper Tribunal and to the Upper Tribunal were nevertheless late.

10 I consider that this delay of this magnitude cannot be seen as anything other than a serious and significant failure to comply with the rules. It is accordingly necessary to move onto stage 2.

11 **Stage 2** requires consideration of why the failure occurred. It is better to have a good reason for a delay, but a bad reason does not mean that the application for relief will automatically fail.

12 In my view, the reasons for the delay were bad.

13 Even assuming in the appellant's favour that she had not received the Statement of Reasons that was first issued on 24 February, the chronology shows that a duplicate was sent to her by 9th April, the date on which she wrote to thank the F-tT for accommodating her request. There followed a four week gap during which we are not told what action she took to pursue an application. The delay cannot, I note, be attributed to the Easter holiday, which fell at the end of March in 2016.

14 In addition to this delay, we must add the very lengthy delay by the representative, the reasons for which leave a great deal to be desired. I therefore turn to the next stage.

15 **Stage 3** is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application. *Onowu* places particular importance on rule 3.9 of the Civil Procedure Rules, but that rule is a statement of the well known: plainly, cases should plainly be dealt with fairly, litigation should be conducted efficiently and at proportionate cost, and courts are entitled to expect compliance with rules, practice directions and orders. The same is true for tribunal proceedings, subject to a heightened need for flexibility to facilitate the overriding objective in in rule 2 of the Tribunal Procedure Rules:

> **Rule 2(2)** Dealing with a case fairly and justly includes–
>
> a. dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> b. avoiding unnecessary formality and seeking flexibility in the proceedings;
> c. ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> d. using any special expertise of the Tribunal effectively; and
> e. avoiding delay, so far as compatible with proper consideration of the issues.

16 The representative's reasons for delay do not, in my view, stand up to scrutiny. An application for permission to appeal need only identify an arguable error or errors of law. The appellant herself had clearly identified the main legal points in dispute in her letter in April 2016; and these points had already been made on her behalf by counsel. His written submission was in the papers. It would have been sufficient for him to repeat those grounds.

17 It was not necessary for the representative to have mastered the mass of factual documentation in the bundles. Indeed, the representative did not seek to do so in the application ultimately presented. At the end of a further two months of delay, the grounds amounted to little more than identification of the same points the appellant made about closed periods of supersession, the method on which income was to be established, a rather general dissatisfaction with the tribunal's rejection of the appellant's evidence, and general assertions that the tribunal failed to explain itself properly and act fairly.

18 As a final matter, I turn to the extent to which it is appropriate to consider the merits of the case. As stated in *Onowu* (citing *Hysaj*) in most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In my view, the investigation of the merits of the appellant's arguments on closed periods and an attack on the method adopted by

the tribunal, which is based on the Regulations, would require extensive investigation making it inappropriate to consider them further.

19 In my view, this is a case which, if the application were admitted, would seriously undermine the authority of the Rules.

(Signed on original)

S M Lane
Judge of the Upper Tribunal
(Dated) 29 March 2017