IN THE UPPER TRIBUNAL **Appeal No. UA-2021-001099-CPIP**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

G.J.

Appellant

- v -

Secretary of State for Work and Pensions (SSWP)

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 15 December 2022
Decided on consideration of the papers

Representation:

Appellant: In person
Respondent: Ms Anna Woods, DMA, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This is another appeal arising out of a decision taken in a LEAP exercise. 'LEAP' is shorthand for Legal Entitlements and Administrative Practices. The Department for Work and Pensions (the DWP) from time to time undertakes LEAP exercises where claimants may have been underpaid social security benefits based on their true entitlements, e.g. because of departmental error.[1]

2. One such LEAP exercise, and the context for the present appeal, has been undertaken in recent years in relation to claimants' entitlement to Personal Independence Payment (PIP). This LEAP exercise was prompted by two decisions by three-judge panels of the Upper Tribunal, followed by an unsuccessful attempt by the DWP to change the law in respect of one of those decisions via secondary legislation (for a convenient summary of the background, see *YA v Secretary of State for Work and Pensions* [2022] UKUT 143 (AAC)).

3. My decision, in brief, is that the First-tier Tribunal was correct in this case to find it had no jurisdiction to hear the claimant's appeal. There were two reasons for the Tribunal's conclusion. The first was that the LEAP decision in 2020 had involved looking again at an original decision in 2017, which had refused the Appellant's PIP claim, with a view to seeing whether that earlier decision could be revised for official error. As no official error in the original decision could be identified, the LEAP decision was a refusal to revise and as such carried no direct right of appeal. It followed that the Appellant could only succeed if he could challenge the original 2017 decision. However, the second reason was that he was out of time to do so and there were no exceptional circumstances justifying an extension of the usual 13-month time limit for bringing an appeal against the original decision as not revised. I conclude for the following reasons that the First-tier Tribunal did not misdirect itself in law on either issue. It follows that the claimant's appeal to the Upper Tribunal must be dismissed.

4. I appreciate that this decision will be a considerable disappointment to the Appellant, who has now been involved in this saga for more than five years. He may well feel that he has been let down by both the DWP and the tribunal system. However, for the reasons that follow his challenge to the First-tier Tribunal's decision cannot succeed. Making a successful claim for PIP is not just a question of showing that one has difficulties with the requisite daily living and/or mobility activities. It also depends on making a claim for benefit and may depend thereafter on pursuing appeal rights against specific decisions in a timely fashion.

An outline sketch of the Appellant's PIP claims

5. In summary, and very much in the barest outline, the claimant made an unsuccessful claim for Personal Independence Payment (PIP) in 2017. He did not appeal that adverse decision at the time. However, his claim was later reviewed as part of the LEAP exercise in 2020, but the 2017 disallowance decision was not changed. The claimant sought to appeal the LEAP decision. Around the same time as lodging that appeal, he made a fresh claim for PIP, which resulted in an award of benefit. His argument, in short, is that his

[1] For a detailed analysis see R. Thomas, 'Legal Entitlements and Administrative Practices: LEAP Exercises and Benefits Administration' (2022) 29 *Journal of Social Security Law* 49-73.

entitlement to PIP should have commenced from 2017, and not just from 2020, as his condition was the same throughout. A more detailed chronology of the key events follows.

The detailed chronology of the Appellant's PIP claims

6. On 23 May 2017 the claimant applied for PIP. Following an assessment by a health care professional (HCP), a decision-maker refused his claim on 15 August 2017, finding that the claimant scored just 2 points for daily living descriptor 7b (Communicating), which was on account of his hearing loss. The claimant applied for a mandatory reconsideration but this resulted (on 12 October 2017) in no change to the decision. Although he complained about the HCP report, the claimant did not lodge an appeal against that disallowance decision.

7. On 1 March 2019 the claimant again applied for PIP, which the Department again refused (on 10 April 2019), this time because he had failed to provide information as requested (this disallowance was for failing to return the PIP claim form).

8. On 14 January 2020 the Department, acting on its own initiative, identified the earlier decision on the claimant's 2017 claim as falling within the scope of the LEAP exercise for PIP cases, as it might have been affected by the Upper Tribunal decisions in *MH v Secretary of State for Work and Pensions (SSWP) (PIP)* [2016] UKUT 531 (AAC); [2018] AACR 12 and *RJ, GMcL and CS v SSWP (PIP)* [2017] UKUT 105 (AAC); [2017] AACR 32. In the event, although the 2017 decision was looked at again, a LEAP decision-maker declined to change it, deciding it was not affected by the Upper Tribunal case law and so there was no official error. The claimant's MP wrote to the DWP on his behalf, asking for his claim to be reassessed. On 19 February 2020 the Department issued a mandatory reconsideration notice confirming the decision of 14 January 2020. The claimant then promptly lodged an appeal on 20 February 2020, adding that "the appeal has been going on since May 2017" and that he was about to be made homeless. It is the First-tier Tribunal's decision on this appeal which is the subject of the present proceedings in the Upper Tribunal.

9. Meanwhile, on 16 January 2020, the claimant made another new claim for PIP. On 15 April 2020, having considered a new HCP assessment, a decision maker awarded the claimant the standard rate of the daily living component (a total of 10 points for descriptors 1b, 4b, 5, 6b and 7b) and the enhanced rate of the mobility component (12 points for descriptor 2e). The award was for the period from 16 January 2020 to 30 March 2022. On mandatory reconsideration this award was increased to the enhanced rate of both components, as a result of 4 points being awarded (rather than 2 points) for the preparing food daily living activity. The period of the award was not altered. Presumably entitlement under this PIP award has since been extended or is subject to a decision on a renewal claim. Either way this more recent award is not affected by the current appeal.

10. The Appellant's statement in his notice of appeal in 2020 that "the appeal has been going on since May 2017" needs to be unpacked a little. It is entirely understandable that he sees the question of his entitlement to PIP as being a single discrete issue starting with his original claim for benefit. However, the benefits appeals system takes a different approach, which focusses more on specific decisions than just on the claimant as an individual. Mr Commissioner Powell explained the decision-based system in the unreported Social Security Commissioner's decision *CA/1020/2007* (at paragraph 12) as follows:

> "What is meant by this is that the system proceeds, or is based, on formal decisions being given. If a benefit is awarded it must be awarded by a formal and identifiable decision. If that decision is to be altered by, for example, increasing or decreasing the amount involved, it can only be done by another formal and identifiable decision. Likewise a decision is required if the period of the award is to be terminated, shortened or extended."

11. The present appeal shows the importance of identifying the precise nature of the decision under appeal.

The First-tier Tribunal tries to get some sense out of the Department

12. One reason why this case has unfortunately taken so long to be decided is that regrettably the First-tier Tribunal received very little assistance from the Department in resolving the issue of jurisdiction.

13. The Department's letter about the outcome of the LEAP reconsideration stated that the claimant could ask it to look at his case again and that he could not appeal to the tribunal without a mandatory reconsideration notice. In turn, the mandatory reconsideration notice stated that it carried appeal rights. However, the Department's written response to the claimant's appeal stated that "the decision dated 14/01/2020 and subsequent reconsideration dated 19/02/2020 both decided not to supersede the original decision in light of the change in the [Upper Tribunal] judgments". Rather confusingly, the response then went on to refer to the absolute time limits for applications for revisions and for appeals. The distinction between a refusal to supersede an earlier decision and a refusal to revise an earlier decision is important as the direct right of appeal lies against the former type of decision but not against the latter.

14. Faced with this confusion, on 2 June 2020 the First-tier Tribunal issued directions requiring both parties to make representations within 14 days. The Department took three months to respond, only to make a submission which the First-tier Tribunal politely characterised as "unsatisfactory". The Tribunal issued further directions on 3 September 2020, requiring a "supplemental submission outlining the legal framework upon which the decision of 14 January 2020 was made" to be lodged within 7 days. Remarkably, given the sorry history of delays in this appeal, this particular deadline was met. The Department's supplementary submission now characterised the decision of 14 January 2020 as a refusal to revise the 2017 decision, rather than a refusal to supersede it. On 1 October 2020 the First-tier Tribunal directed an oral hearing to determine the issue of jurisdiction in the first instance, and directed a presenting officer to attend.

15. On 6 November 2020 the First-tier Tribunal held a telephone hearing. It adjourned, giving two reasons for doing so. The first was that the claimant did not have a set of the appeal papers. The other reason was that there was no presenting officer in attendance, despite the earlier direction. The Tribunal, perhaps rather generously, recognised that the timetable may have been too tight for the Department to make the necessary arrangements in that respect. The Tribunal accordingly repeated the direction for a presenting officer to attend. It also directed that within 28 days, addressing the Department, "you are to clarify whether the decision under appeal is a refusal to revise, or a refusal to supersede. Your submissions so far have been inconsistent on this point".

16. The 28 days came and went. Not a peep from the Department.

17. On 7 January 2021 the first-tier Tribunal held a further hearing. The Tribunal expressed the view that it appeared it did not have jurisdiction to hear the claimant's appeal, but in the event decided to adjourn again, directing the Department to respond to a series of more specific and detailed questions, principally about the jurisdictional basis for the appeal. The Tribunal also observed as follows (bold emphasis as in the original):

> 6. The Respondent has wholly ignored or dealt summarily with the reasonable requests of the Tribunal in this matter. It has sent an unsatisfactory response in relation to previous decision notices and has ignored requests for a presenting officer to attend hearings. Notwithstanding the current public health crisis this is wholly unacceptable.
>
> **7. Unless a full and proper response is provided to the matters raised in this decision notice and confirmation is received that a presenting officer will be made available for the next hearing within 14 days then this appeal is to be passed to a District Judge for consideration of the issue of a witness summons.**

18. It is not clear as to whom the threat of a witness summons was directed, but it had the desired effect in as much as a fuller supplementary submission was received from the Department dated 13 January 2021. It stated categorically that the LEAP decision was a refusal to revise for official error. This submission included an apology for the absence of a presenting officer and an undertaking to arrange for one to attend the next hearing. For good measure the Tribunal's final case management directions notice, issued on 24 March 2021, yet again directed the attendance of a presenting officer.

19. The final hearing took place by telephone on 14 April 2021. The claimant attended. There was, surprise, surprise, no presenting officer in attendance.

20. By any reckoning the Department's conduct of this appeal before the First-tier Tribunal constituted a comprehensive failure to "help the Tribunal to further the overriding objective", which of course includes the avoidance of delay, so far as is compatible with the proper consideration of the issues, as well as a failure to "co-operate with the Tribunal generally" (Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685, rule 2(4)).

21. I would like to be able to say the lack of co-operation from the Department in this case was a one-off. However, both anecdotal reports and my experience of determining other Upper Tribunal appeals suggests the problem is more systemic.

22. I now turn to consider what the First-tier Tribunal decided, albeit without much assistance from the Department.

The First-tier Tribunal's decision

23. The First-tier Tribunal's decision notice was short and to the point. The relevant passage read:

> 1. The appeal is dismissed.
>
> 2. The administrative exercise undertaken by the respondent in relation to the appellant's claim for PIP on 23/05/2017 resulted in a refusal to revise

> that decision as the respondent does not accept that an official error was made.
>
> 3. Therefore, the Tribunal does not have jurisdiction to hear the appeal as the decision is not one that can be appealed to the Tribunal as it is outside the absolute time limit.

24. Reading somewhat between the lines, and backfilling the reasoning from its subsequent statement of reasons, the First-tier Tribunal therefore had two principal reasons for dismissing the Appellant's appeal.

25. The first reason was that the LEAP decision of 14 January 2020, properly analysed, was a refusal to revise the earlier decision of 15 August 2017 (which had refused entitlement to PIP as from 23 May 2017). It was a refusal to revise because the First-tier Tribunal found there had been no official error on the part of the Department (it is clear from the Tribunal's statement of reasons that it made an express finding to that effect, rather than simply relying on the Respondent's assertion that this was the case, as the phraseology used in the decision notice rather unfortunately implied). As a refusal to revise, it carried no right of appeal.

26. The second reason was that the Appellant could therefore succeed only if he could challenge the original decision dated 15 August 2017, disallowing his claim to PIP. However, he was out of time to do so, being beyond the 13-month absolute time limit for an appeal against that decision. Furthermore – as was explained in the Tribunal's statement of reasons – he could not show sufficient exceptional circumstances such as would enable him to bring a late appeal on human rights grounds, applying the principle confirmed in *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818.

27. The First-tier Tribunal expanded more fully on both of these two reasons in its subsequent statement of reasons.

28. I should perhaps add that technically the First-tier Tribunal should have struck out the claimant's appeal for want of jurisdiction, rather than have dismissed it, but the distinction is not a material error of law. Indeed, even if the decision notice on the day used the language of dismissal, the subsequent statement of reasons correctly referred to the appeal being struck out for lack of jurisdiction.

The decision to give the claimant permission to appeal

29. The District Tribunal Judge who sat on the original appeal gave the Appellant permission to appeal on the following limited basis:

> If the FtT has correctly interpreted and applied the law to determine that it does not have jurisdiction to hear the appeal, is the result that there is unequal access to justice to differing categories of appellants and therefore a breach of natural justice?

30. It follows that the first issue to be determined is whether the First-tier Tribunal did indeed correctly interpret and apply the law to decide that it did not have jurisdiction to hear the Appellant's appeal. Only then does the District Tribunal Judge's rhetorical question about potentially unequal access to justice arise.

The submissions in the proceedings in the appeal to the Upper Tribunal

31. The Appellant's position is refreshingly simple. As noted above, he argues that he should be entitled to PIP from the date of his original claim on 23 May 2017.

He further contends, echoing the grant of permission to appeal, that the Department's refusal (as affirmed by the First-tier Tribunal) to allow his claim from that original date means that there is unequal access to justice for differing categories of appellants and so a breach of natural justice. In addition, he refers to his various longstanding health problems and claims that he had "done everything humanly possible" to contest the 2017 decision. Understandably enough, his submissions do not engage with the more technical legal issues arising out of his appeal.

32. Ms Anna Woods, who now acts for the Secretary of State in these proceedings, opposes the claimant's appeal. In outline, her submissions run as follows. The LEAP reconsideration on 14 January 2020 involved looking again at the original disallowance decision taken on 15 August 2017. This took place because the original decision-maker had failed to take account of the two Upper Tribunal decisions in *MH v SSWP* and *RJ v SSWP*. The LEAP decision-maker decided on 14 January 2020 that there were no grounds to make an any time revision of the original decision. There was, in short, no official error. This was, accordingly, a refusal to revise the decision of 15 August 2017. However, there is no right of appeal against a refusal to revise an earlier decision. Instead, any challenge has to be brought by appealing against the original decision as not revised (Social Security Act 1998, section 12(1)(a) and *R(IB) 2/04*). Furthermore, there were no exceptional circumstances to warrant extending time under the *Adesina* principle.

The Upper Tribunal's analysis

Introduction

33. It will be evident from the preceding summary of the parties' arguments that this appeal raises two main issues – the refusal to revise for official error point and the *Adesina* point.

The refusal to revise for official error point

The legal framework

34. The general principles were helpfully summarised by Upper Tribunal Judge Poole QC (as she then was) in *PH and SM v Secretary of State for Work and Pensions (DLA) (JSA)* [2018] UKUT 404 (AAC); [2019] AACR 14:

> 3.1 Social security appeals to the tribunal are only competent if the tribunal has jurisdiction to hear them. Where a claimant has delayed requesting mandatory reconsideration for more than 13 months after the SSWP's original decision, in many cases the tribunal will have no jurisdiction to entertain an appeal. This follows from provisions in the Social Security Act 1998 (the "**1998 Act**") and the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the "**1999 Regulations**") which define the extent of the tribunal's jurisdiction. In "any ground" applications for mandatory reconsideration (for example those where the claimant's disagreement is simply that the SSWP got it wrong and there should have been a higher award) within Regulation 3(1) of the 1999 Regulations, and cases within Regulation 3(3), the tribunal will have no jurisdiction unless an application for mandatory reconsideration was submitted within 13 months of the original decision (subject to small extensions where statements of reasons have been requested). There are exceptions to this general position. A tribunal will have jurisdiction to hear an appeal even if the request

> for mandatory reconsideration has been made over 13 months after the original decision of the SSWP in cases where the substance of the mandatory reconsideration request falls within Regulation 3(5) of the 1999 Regulations. This covers cases where the ground for the mandatory reconsideration request is official error, as defined in Regulation 1 of the 1999 Regulations.
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> 3.2 Even where there is jurisdiction to hear an appeal, limitation periods must be complied with. The right of appeal will only be exercisable if the appeal is brought within the time limits in the Tribunal Rules. In cases where mandatory reconsideration applies, in terms of the Rules this is within one month after the date on which the appellant was sent notice of the result of the mandatory reconsideration (which includes notice that the SSWP has declined to consider mandatory reconsideration (***CJ and SG***), extendable by the tribunal by a maximum period of 12 months (Rule 22 of the Tribunal Rules)).
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> 3.3 These time limits may be extended only in very limited circumstances, under the principle in the case of *Adesina v Nursing and Midwifery Council* [2013] 1 WLR 3156 ("***Adesina***"). However, discretion to extend time limits will only arise in exceptional circumstances and where the appellant personally has done all they can to bring the appeal timeously. The Adesina principle is likely to have extremely limited application to extend time limits in the present context, given the length of the existing periods and the existing discretions to extend them.

35. Ms Woods for the Secretary of State submits that these principles under the 1999 Regulations apply in equal measure to the parallel provisions in the companion Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381; 'the 2013 Regulations'). I agree, not least as both regimes are made under the authority of the Social Security Act 1998.

36. The LEAP decision involved a reconsideration of the original 2017 decision refusing benefit with a view to establishing whether that decision could be revised. As this reconsideration took place beyond the normal time limits, it could only be on the basis of an 'any time' revision. Furthermore, the only viable basis for an any time revision was if the original decision was infected by an official error. Regulations 8 and 9(a) of the 2013 Regulations provide that a PIP decision can be revised at any time for official error.

The approach of the First-tier Tribunal

37. The First-tier Tribunal in the instant case directed itself correctly on the relevant law on this point, expressly referring to the decision in in *PH and SM v Secretary of State for Work and Pensions (DLA) (JSA)*. Its consideration included the following observations:

> 11. … The Tribunal's understanding of the law, is that for in order to establish whether the Tribunal has jurisdiction, the Tribunal has to be satisfied that there was an official error or other ground for an anytime revision. The Tribunal's view was that the Tribunal must find that there was an official error rather than the point being arguable, in order for jurisdiction to be established.

> 12. … The appellant's appeal of the refusal to revise did not raise issues in relation to *MH* and *RJ* and only raised that the respondent had not considered the effects of how his disabilities affect him more generally. The unanimous decision of the Tribunal was that on a primary consideration of all of the evidence, was that there was no official error on the part of the respondent. The LEAP exercise has not failed to detect an error in the original decision.
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> ….
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> 15. … For the reasons given above, the Tribunal found that it did not have jurisdiction to consider the appeal as the appeal relates to a refusal to revise the original decision made by the respondent on 15/08/2017. Furthermore, there was no official error, in order for jurisdiction to be established, to hear an appeal of the decision refusing to revise the original decision made on 14/01/20. The appeal was accordingly struck out under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008."

The Upper Tribunal's analysis

38. It follows that the First-tier Tribunal applied the relevant principles in accordance with the analysis in *PH and SM v Secretary of State for Work and Pensions (DLA) (JSA)* and concluded that official error was not made out on the facts of the case. There was nothing in the original claim or the relevant HCP assessment report to suggest that there were any safety issues involved in undertaking daily living activities. That being so, the Upper Tribunal three-judge panel decision in *RJ* did not apply. With regard to the other three-judge panel decision in *MH*, and while there was evidence of the claimant's mental health issues, there was also contrary evidence that the Appellant could manage to plan and follow journeys to unfamiliar places. The Appellant can undoubtedly point to a generalised disagreement with both the original decision and the LEAP decision but what he was unable to show the First-tier Tribunal was that there was any official error as such in the original decision.

39. That being so, and the LEAP decision being a refusal to revise on the basis of official error, the First-tier Tribunal could only have jurisdiction if the Appellant could bring himself within the very narrow scope of the *Adesina* exception as a means of challenging the original 2017 decision.

<u>The *Adesina* point</u>

The absolute time limit for bringing a social security appeal

40. The general rule is that a claimant cannot appeal to the First-tier Tribunal without first going through the mandatory reconsideration procedure (Social Security Act 1998, section 12(2)(b) and (3A)-(3C), along with regulation 3ZA of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991) and regulation 7 of the 2013 Regulations. The standard time limit for appealing is then one month from the date on which the claimant was sent the mandatory reconsideration notice (Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685; 'the 2008 Rules'), rule 22(2)(d)(i)).

41. The First-tier Tribunal has a discretionary power to "extend or shorten the time for complying with any rule, practice direction or direction" (rule 5(3)(a) of the 2008 Rules), a power which must be exercised with a view to giving effect to the overriding objective of dealing with cases fairly and justly (rule 2 of the 2008 Rules). The exercise of this discretion involves a three stage test, namely (i) assessing the seriousness and significance of the failure to comply with the time limit; (ii) considering why the default occurred; and (iii) evaluating all the circumstances of the case, so as to enable the tribunal to deal with the matter justly (*R (Kigen) v Secretary of State for the Home Department* [2015] EWCA Civ 1286; [2016] 1 WLR 723; see also *R(CJ) and SG v Secretary of State for Work and Pensions (ESA)* [2017] UKUT 324 (AAC) [2018] AACR 5 at paragraph 73). It follows that issues such as the length of the delay, the consequences of the delay, the merits of the case and the applicant's health and other personal circumstances may all be relevant to the exercise of this discretion.

42. There is, however, a statutory maximum to the power to extend the time limit in social security appeals. Rule 22(8) of the 2008 Rules provides as follows:

> (8) Where an appeal in a social security and child support case is not made within the time specified in paragraph (2)—
>
> (a) it will be treated as having been made in time, unless the Tribunal directs otherwise, if it is made within not more than 12 months of the time specified and neither the decision maker nor any other respondent objects;
>
> (b) the time for bringing the appeal may not be extended under rule 5(3)(a) by more than 12 months.

43. There is, therefore, a statutory maximum time limit for appealing of 13 months – one month 'as of right' from the date of issue of the mandatory reconsideration notice followed by a further 12 months, with such an extension being either in the absence of any objection (rule 22(8)(a)) or on a discretionary basis under rule 5(3)(a) (rule 22(8)(b)).

44. However, this absolute time limit is in principle subject to human rights considerations under the *Adesina* principle. But in practice this may provide very little real assistance, for the reasons that follow.

The Adesina jurisprudence

45. The *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818 jurisprudence has been exhaustively analysed by Fordham J in *Rakoczy v General Medical Council* [2022] EWHC 890 (Admin) ('*Rakoczy v GMC*'), to which this discussion is indebted. Although *Rakoczy v GMC* is not technically binding on the Upper Tribunal (*Gilchrist v Revenue and Customs Commissioners* [2014] UKUT 169 (TCC); [2015] Ch 183) it is right that I should follow it as a matter of judicial comity (and, in any event, I respectfully agree with Fordham J's analysis).

46. As Fordham J observes, the starting point is Article 6 of the European Convention on Human Rights, which protects the fundamental right of access to the court (or, in this context, a tribunal). At paragraph [6], Fordham J holds as follows:

> 6. … The first key passage is in *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, where (at §59) the Strasbourg Court said this (numbering added):

> ***The Court reiterates that the right of access to the courts secured by Article 6(1) may be subject to limitations in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied, [1] firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. [2] Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.***
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> For ease of reference, I am going to use the phrase "the Dual Principles" as a shorthand for the requirements described at [1] and [2] of this passage.

47. The next stop in the *Adesina* line of authority is *Pomiechowski v Poland* [2012] 1 WLR 1604, a Supreme Court decision in the context of a 14-day time-limit in extradition cases, where it was held that an apparently absolute time limit may, in some circumstances, have to yield to the requirements of Article 6 of the ECHR. Lord Mance defined those circumstances as follows (emphasis added):

> 39. In the present case, there is no reason to believe that Parliament either foresaw or intended the potential injustice which can result from absolute and inflexible time limits for appeals. It intended short and firm time limits, but can only have done so on the basis that this would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time. In these circumstances, I consider that … the statutory provisions concerning appeals can and should all be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time …, where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under Article 6.1 in *Tolstoy Miloslavsky*. **The High Court … must have power to permit and hear an out of time appeal which a litigant personally has done all he can to bring … timeously.**

48. In *Rakoczy v GMC* Fordham J used the phrase “the Mance Observation” as shorthand for the final sentence of paragraph 39 in *Pomiechowski v Poland*.

49. Moving on to *Adesina* itself, the Court of Appeal held that the *Pomiechowski v Poland* approach to apparently absolute time limits was not restricted to extradition cases. According to Maurice Kay LJ (again, with emphasis added):

> 14. Are these differences sufficient to leave the *Mitchell*/*Reddy* line of authority untouched by *Pomiechowski*? In my judgment, they are not. The context, exclusion from a profession, is still one of great importance to an appellant. There is good reason for there to be time limits with a high degree of strictness. However, one only has to consider hypothetical cases to appreciate that, without some margin for discretion, circumstances may cause absolute time limits to impair "the very essence" of the right of appeal conferred by statute. Take, for example, a case in which a person, having received a decision removing him or her from the Register, immediately succumbs to serious illness and remains in intensive care; or a case in which notice of the disciplinary decision has been sent by post but never

> arrives and time begins to run by reason of deemed service on the day after it was sent (Nursing and Midwifery Council (Fitness to Practice) Rules 2004, rule 34(4)). In such cases, the nurse or midwife in question might remain in blameless ignorance of the fact that time was running for the whole of the 28 day period. It seems to me that to take the absolute approach in such circumstances would be to allow the time limit to impair the very essence of the statutory right of appeal.
>
> 15. 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.

50. The formulation that “A discretion must only arise ‘in exceptional circumstances’ and where the appellant ‘personally has done all he can to bring [the appeal] timeously’” in paragraph [15] is described for shorthand purposes by Fordham J in *Rakoczy v GMC* as “the Kay Observation”.

The Adesina jurisprudence reviewed in Rakoczy

51. Drawing the threads of his analysis together, Fordham J set out the following principles:

> 21. In my judgment the correct legal analysis is as follows:
>
> i) What Pomiechowski decides is that the High Court in an extradition case should apply the statutory provisions so as to extend time for an appeal in "exceptional circumstances", meaning circumstances in which refusing to extend time would "operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under Article 6.1 in Tolstoy" (Pomiechowski at §39). That means, where refusing to extend time would conflict with the Dual Principles (which Lord Mance had identified earlier, at §§22, 33). That was the legal test.
>
> ii) What Lord Mance was doing at the end of §39 in Pomiechowski was explaining that an expected essential characteristic of such a case is "an out of time appeal which a litigant personally has done all [they] can to bring and notify timeously". This was not merely an example. Its value was as a

description which could serve as a guide as to what, in essence, the High Court could expect to be looking for. It was intended to be a valuable encapsulation. The focus remained on "operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under Article 6.1 in Tolstoy", which is why Lord Mance said "if and to the extent that it would do so". The Mance Observation was not laying down a test, in the nature of a legal litmus test, still less as if it were a statutory test. It is revealing that – as Mr Mant accepted – if the Mance Observation were being applied by this Court, it would be necessary to adjust the words used by Lord Mance to add "reasonably", so that the Court is asking whether the litigant has "done all [they] reasonably can to bring and notify timeously".

iii) The position is illuminated by the concurring judgment of Lady Hale who agreed with Lord Mance's reasons (see §42), and agreed about the application of the discretion to extend time in the case of Mr Halligen, saying (see §50): "I … agree that to insist upon the time limit for service in the particular circumstances of his case is a disproportionate limitation upon his right of access to the appeal process". Lady Hale's encapsulation of the central and decisive reasoning, which she saw as entirely consistent with giving effect to the statutory provisions in the manner which Lord Mance had suggested at §39, was referable not to the language of the Mance Observation, but rather to the language of the Dual Principles. She focused on the second of the Dual Principles.

iv) What Adesina decides is that the approach in Pomiechowski is applicable to the disciplinary and regulatory statutory context. The analysis in Adesina involved recognising the Dual Principles (see §§4, 10). The decisive reasoning of the Court of Appeal was that what was required in the disciplinary and regulatory appeal context was the "adoption of the same approach" as taken by Lord Mance in Pomiechowski at §39 (Adesina §15), which included the key passage about granting an extension of time where refusing one would "operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under Article 6.1 in Tolstoy" (quoted in Adesina at §10). The Kay Observation explicitly emphasised the particular significance of the Mance Observation. But, like the Mance Observation, it was not laying down a legal litmus test, still less to be read as a statute. Again, were it otherwise, there would be no room for implying "reasonably", as it is common ground in the present case is necessary and appropriate. Maurice Kay LJ was emphasising the Mance Observation, and adopting it, as a valuable encapsulation describing what, in essence, the High Court could expect to be looking for.

v) The authoritative, practical guidance derived from Adesina (and Pomiechowski) includes the references to "exceptional circumstances", to the discretion arising only in a "very small number of cases", and to the appellant having "personally … done all [they] can to bring the appeal timeously". These stand as a practical description of a solid expectation which the appellate courts have, and which reliably guides the High Court, in relation to the approach to the statutory power to extend time read compatibly with Article 6. I can detect no material practical dissonance

between them and the Four Strasbourg Cases. And of course they fit with the approach in granting the extension to Mr Halligen in Pomiechowski, and the approach to refusing the extensions of time in Adesina.

vi) However, if the High Court were satisfied in the application of the Dual Principles that – absent an extension of time – the statutory time limit would "operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under Article 6.1 in Tolstoy" (Pomiechowski at §39, adopted in Adesina at §15), the grant of an extension of time would be a faithful application of the decisive reasoning of the appellate courts in those cases, not a departure from it. And, ultimately, that would be so, whether or not the facts and circumstances would fit within the description of the appellant having "personally … done all [they] can to bring the appeal timeously".

vii) When in Gupta, Julian Knowles J came to Adesina and its discussion of Pomiechowski (see §45), what he saw as the principled position was that the discretion "can only be exercised in exceptional circumstances" and that the "Court would only do so where to take an absolute approach would 'impair the very essence of the statutory right of appeal, in the language of the Strasbourg caselaw'" (Gupta §44). Just as Lady Hale's encapsulation of the central and decisive reasoning in Pomiechowski was referable not to the language of the Mance Observation, but rather to the language of the Dual Principles (she focused on the second of them); so too Julian Knowles J's encapsulation of the central and decisive reasoning in Adesina was referable not to the language of the Kay Observation, but rather to the language of the Dual Principles (he focused on the first of them). I interpose that, although I did not hear argument on Daniels, I consider it appropriate to record that Davis LJ in his judgment in that case there described Pomiechowski as having "established that an absolute statutory time limit may need to be read down in order to comply with article 6 of the European Convention on Human Rights" (§25); and Adesina as having "held that the principle established in Pomiechowski was applicable to the time limit", with Maurice Kay LJ having "held that time could be extended in exceptional circumstances, namely where enforcing the 28 day limit would impair the very essence of the statutory right of appeal" (§27).

viii) So, in a case in which it mattered – and this is not such a case – if there were ever a difference between the High Court's faithful adherence to the Dual Principles on the one hand, and the Mance Observation and Kay Observation on the other, the Court's application of the Dual Principles must prevail.

ix) Finally, although the language of "discretion" and "power" is used throughout the caselaw to describe the narrow and residual function of extending time, my view is that it would be more correct to speak of "duty". In a case where refusing to extend time would involve an Article 6 breach – which is the only situation in which the function of extending time is appropriately exercised – there is the power to act, but there is the necessity

to exercise it, and so the Court would be under a duty to grant the extension of time.

The Adesina jurisprudence in the social security case law

52. How then does the *Adesina* jurisprudence apply in the context of social security and other related benefits? The *Adesina* principle has been considered in several Upper Tribunal decisions, of which three are of particular note. It may be telling that all three of them pre-date the detailed analysis of Fordham J in *Rakoczy v GMC*.

53. The first Upper Tribunal case is *KK v Sheffield City Council (CTB)* [2015] UKUT 367, in which the appellant, who lodged his appeal three months after the expiry of the 13-month limit, claimed he had not received the decision when it had been first issued. Upper Tribunal Judge Hemingway then helpfully summarised the position as follows:

> 15. … in *Adesina v Nursing and Midwifery Council* [2013] EWCA 818, in line with *Pomiechowski v Poland* [2012] WLR 1604, it was held that Article 6 of the European Convention on Human Rights and section 3 of the Human Rights Act required the reading down of an absolute time limit to give discretion for an appeal to be admitted even after the expiry of an absolute time limit though any such reading down was to be to the minimum extent necessary to secure compliance with the ECHR. It was also held, in effect, that such discretion would only arise in exceptional circumstances and where an appellant had personally done all he could to bring an appeal timeously. There have been a number of subsequent cases which have illustrated how sparingly the discretion should be exercised such as *Parkin v Nursing and Midwifery Council* [2014] EWHC 519 (Admin) and *Gyurkovits v General Dental Council* [2013] EWHC 4507 (Admin), but the discretion is there. The F-tT did not realise it had it and did not, therefore, consider whether to exercise it or not or whether hearing from the appellant would assist it in deciding whether to exercise it or not.
>
> 16. I suppose if the respondent … had appreciated there was this limited discretion it might have been contended that it is to be used so sparingly that the F-tT would have inevitably decided that it was not appropriate for it to be used in this case. However, notwithstanding what is said in the above cases, it might be that genuine non-receipt of a notice of decision might be regarded as a factor of some significance in considering whether the required exceptional circumstances apply.
>
> 17. On the basis of the above reasoning, therefore, I would conclude the F-tT erred in, at least, failing to appreciate the extent of its discretion and failing as a consequence to adequately consider whether it was necessary to hold an oral hearing prior to striking out the appeal. I do, therefore, set its decision aside.

54. In the light now of *Rakoczy v GMC*, two further observations might be made about this passage. The first is that the language of 'duty' should perhaps be preferred to 'discretion' (see *Rakoczy v GMC* paragraph [21(ix)]). The other is to recognise that a case will need to be very exceptional indeed in order to benefit from the *Adesina* principle. As Fordham J explained, "With one exception, Counsel told me they had not uncovered any case in which an extension of time had been

granted in the 9 years since Adesina, where extensions of time were also refused. The exception is Daniels (cited in Gupta at §46), where an extension had been granted by this Court, only to be overturned on appeal by the Court of Appeal."

55. The second Upper Tribunal case concerns an appeal brought under the Armed Forces Compensation Scheme (AFCS). The AFCS, being for serving personnel and veterans, is subject to markedly more generous time limits than the social security system – an AFCS claimant has 12 months in which to bring an appeal 'as of right', with a long-stop of a further 12 months (so making potentially two years in total) if time is extended as a matter of discretion (Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 (SI 2008/2686), rule 21(1) and (4)). In *PM v Secretary of State for Defence (AFCS)* [2015] UKUT 647 (AAC) the appeal was lodged just over 2½ years outside the two-year time limit. Upper Tribunal Judge Rowland gave the claimant permission to appeal as potentially either his mental health problems or his (alleged) non-receipt of the original decision letter could give rise to a breach of Article 6, but noted that "there are significant difficulties in the claimant's way" (at paragraph 3). The Secretary of State for Defence conceded that the First-tier Tribunal had not considered the *Adesina* point, so the appeal was effectively allowed by consent and remitted to a fresh tribunal for reconsideration.

56. The third decision, and the only reported (as opposed to merely published) decision of the three, is *PH and SM v Secretary of State for Work and Pensions (DLA)* [2018] UKUT 404 (AAC); [2019] AACR 14. Upper Tribunal Judge Poole QC referred to the observations in *KK v Sheffield CC (CTB)* and then noted as follows (at paragraph 22):

> In the case of *Adesina* itself, nurses who were subject to serious adverse decisions of the Nursing and Midwifery Council were time barred from challenging those decisions because they missed a 28 day deadline in rules, compatibly with Article 6. In the present situation, there is a one month deadline for bringing an appeal to a tribunal, extendable up to 13 months, from the date the claimant has been sent notice of the result of the application for mandatory reconsideration (Rule 22(2)(d)(i) of the Tribunal Rules, subject to any extension in accordance with Rule 22(8) with 5(3)(a)). There is therefore already considerable scope for extensions under the Tribunal Rules way beyond the 28 day limit found compliant in *Adesina*. In my opinion the scope for further extensions under the application of the *Adesina* principle is very limited indeed.

57. Upper Tribunal Judge Poole QC went on to explain in some detail why the *Adesina* principle did not assist the appellant (known as PH) in the circumstances of that case:

> 31. *Exceptional circumstances.* Even if the *Adesina* principle could operate to extend the 13 month period in the jurisdictional provisions of the 1999 Regulations and 1998 Act (which as explained in paragraph 23 above it is not necessary for me to decide), I find that no extension could be granted in the circumstances of this case. First, PH did not do everything he could to request mandatory reconsideration timeously (*Adesina* paragraphs 14-15). His position was that he had been ignorant of the law about DLA in the 13 month period after the original decision about his DLA, but after he had found out he had done everything he could to bring it to the DWP's attention

within the quickest time possible. However, it is clear from the papers that PH received a letter dated 28 February 2014 from the SSWP which told him clearly that he was receiving only the lower rate of the mobility component of DLA. That letter also on the third page had a section entitled "What to do if you think this decision is wrong" and informed him in bold he needed to make contact within one month of the date of the letter. But PH did nothing in response to this, although it would have been possible for him to dispute only receiving the lower rate of the mobility component much earlier than he did. Second, I do not consider that the circumstances count as exceptional within the meaning of the *Adesina* principle. I have already noted above the very limited scope for application of this principle. In this case what is being asked is that a 13 month limit for requesting mandatory reconsideration be extended by almost 5 further months under the jurisdictional provisions. But in *Adesina* itself Convention rights did not justify extending a far shorter period of 28 days. Being a party litigant in the context of social security tribunals is not an exceptional circumstance; many appellants represent themselves. PH listed a number of very difficult circumstances in his life. In 2000 he was evicted from his home leading to various legal proceedings. His JSA was terminated in 2004/2006 due to disagreements over his level of savings and he had to borrow £15 a week from his mother for 2 years. By December 2006 the stress of his situation had resulted in mental health problems to the extent that he had required to be sectioned and was in hospital for 2½ years. Although clearly distressing, these are all historic matters and do not give rise to exceptional circumstances for PH having failed to submit a request for mandatory reconsideration within a 13 month period following a decision taken on 28 February 2014. PH referred at various points to the different cases he has brought in the Court of Session and Sheriff Court to try to right the wrongs he considers he has suffered, some of which appear to be ongoing, and the difficulties that litigating these cases as well as dealing with a DLA claim posed to him. But these are also not exceptional circumstances justifying non compliance with jurisdictional time limits. If the claimant is capable of litigating in the courts, it is difficult to see why he was not capable of acting on the information in the letter of 28 February 2014 and contacting the SSWP timeously.

58. There are also two other Upper Tribunal decisions, both of which happen to be by myself, which might be mentioned in passing for the purposes of completeness, although both turn on their own facts and neither provides any extended discussion of the issues. In *MZ v SSWP (UC)* [2022] UKUT 292 (AAC) the First-tier Tribunal had failed to consider whether the 13-month time limit could be extended. In *KD v SSWP* [2021] UKUT 329 (AAC) the First-tier Tribunal had not provided adequate reasons for its decision and had not put the appellant on notice as to the issue of jurisdiction (as required by rule 8(4)). Furthermore, although *MZ v SSWP (UC)* was decided after *Rakoczy v GMC*, Fordham J's decision had not been drawn to my attention. Had it been so, I might well have emphasised even more strenuously the truly exceptional nature of the *Adesina* principle.

Summing up the Adesina jurisprudence

59. Moreover, and to sum up, the *Adesina* case law in the courts demonstrates how very difficult it is to identify a case with truly exceptional circumstances that meets the criteria. As Fordham J explained in *Rakoczy v GMC* (at paragraph 2):

> … The function of extending time is one which arises exclusively in the context of securing compatibility with Article 6 of the ECHR as scheduled to the Human Rights Act 1998, as applicable to this context. It is a function discussed in Adesina at §§14-15 and, more recently, in Gupta v General Medical Council [2020] EWHC 38 Admin at §§44 to 47. The line of cases involving refusals to extend time are set out in Gupta at §§46-47.
>
> > ***46. In her Skeleton Argument for the GMC Ms Emmerson referred to a number of first-instance cases which she rightly said demonstrate the strictness with which the Court has applied the Adesina test. These include Adegbulugbe v Nursing and Midwifery Council [2013] EWHC 3301 (Admin); Pinto v Nursing and Midwifery Council [2014] EWHC 403 (Admin); Parkin v Nursing and Midwifery Council [2014] EWHC 519 (Admin); Darfoor v General Dental Council [2016] EWHC 2715 (Admin); Kabba v Nursing and Midwifery Council [2016] EWHC 3677 (Admin). The earlier of these cases were cited with approval by the Court of Appeal in Nursing and Midwifery Council v Daniels [2015] EWCA Civ 225.***
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> > ***47. In these decisions a wide range of circumstances were rejected by the Court as amounting to exceptional circumstances justifying an extension of time to comply with Article 6. These include (a) difficulties in obtaining legal advice or legal aid (Adesina; Kabba); (b) inability to raise funds to pay the court fee in time (Daniels); (c) a degree of ill health or stress (Pinto); (d) where the delay in question was very short, ie, one or two days after the deadline (Adesina; Adegbulugbe; Parkin; Darfoor).***

60. Furthermore, the *Adesina* case law has developed in the context of a short and strict 28-day time limit for lodging an appeal. If it difficult in practice to find cases that can benefit from the *Adesina* principle in this context, it is surely going to be that much more difficult to find them in the social security context with a standard one-month time limit but subject to an outer limit of 13 months. As Upper Tribunal Judge Poole QC put it (see paragraph 56 above), "There is therefore already considerable scope for extensions under the Tribunal Rules way beyond the 28 day limit found compliant in *Adesina*. In my opinion the scope for further extensions under the application of the *Adesina* principle is very limited indeed."

61. Against this, it might be objected that the two contexts are very different – *Adesina* and the related cases arise in a professional regulatory jurisdiction which is effectively adversarial in nature, whereas the Secretary of State rarely takes an adversarial approach in social security cases and so a more flexible culture may operate. However, drawing such a distinction finds little support in the case law. In particular, the absolute 13-month time limit was found to be consistent with Article 6 in the child support context (where the rules mirror those in social security) in *Denson v Secretary of State for Work and Pensions* [2004] EWCA

Civ 462 (reported as *R(CS) 4/04*; the 28-day limit is now a one month limit but it makes no difference to the analysis):

> 23. So the first question is whether the essence of Mr Denson's right of access to the court has been impaired. The answer is of course it has not been impaired. Here, the very essence of the right is fully protected because he can apply for permission to appeal. He has 28 days to do it under the 1992 Regulations. He could have applied for an extension of time if special reasons had been shown. He did not exercise that right under the new Regulations. There is a cut-off point 12 months after his time expired. That gives him 13 months in which to apply and, in my judgment, that length of time adequately protects the essence of his right to go to a court.
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> 24. The second question is whether the period of limitation pursues a legitimate aim and, again, the European jurisprudence is absolutely solidly of the view that time limits are necessary because they enable the States to ensure that there is legal certainty and finality to all litigation.
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> 25. This case before us cries out for a reinforcement of the need for certainty and finality. It would be astonishing if Mr Denson were able in April or May 2001 to proclaim some continuing right to appeal a decision made as long ago as June 1998 or even December 1998.
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> 26. The next question is whether there is a reasonable relationship of proportionality between the means employed and that aim of certainty. In my judgment, the answer is that of course there is proportionality. A period of 13 months is ample enough time to assert the given right of appeal. The next argument advanced on Mr Denson's behalf is that because he was a litigant in person floundering through a deep dark wood of legislative provisions, and so ignorant of the remedies available to him, he should be granted an indulgence. I have a sneaking sympathy for his predicament because it has taken us some time to work out precisely what rights of appeal are available. But in this field he was a player of some experience. He had already appealed the June decision. He was warned in the letter of 1 December that he had a right of appeal. For my part, I do not accept that he laboured under such a severe handicap that exception should be allowed in his particular circumstances. A period of 13 months is, in my judgment, by no means disproportionate even for a litigant in person. There has to be a reasonable time given; it has been. The fact that it may throw up a hard case - and I am not for a minute saying that this is a hard case - does not, in my judgment, enable this court to disapply the time limit imposed by the 1999 regulations.

62. The next step is to consider how this First-tier Tribunal applied the *Adesina* principle in practice.

The First-tier Tribunal's decision

63. Having found that there was a refusal to revise for official error, and so no jurisdiction on that basis, the First-tier Tribunal turned to consider the possibility that time could be extended to permit a late appeal against the original 2017 decision, outside the 13-month absolute time limit, on the application of the *Adesina* principle.

64. The First-tier Tribunal, deciding that the *Adesina* principle did not apply, concisely explained its reasoning on this point as follows:

> 14. Therefore, the only remedy available to the appellant was to appeal the earlier decision. The appellant is outside of the absolute time limit to appeal the earlier decision as he first notified the respondent of his desire to appeal on 14/11/2018, 15 months after the original decision of 15/08/2017 and 13 months and 2 days after the mandatory reconsideration of that decision was undertaken by the respondent on 12/10/17. He was informed by the respondent that he was out of time to appeal. The appellant told the Tribunal at this hearing that he did not know he could appeal to the Tribunal, but he had also left this the [sic] appeal up to his MP who had left office. The appellant did submit a complaint to DWP about the decision and the treatment of his claim by the healthcare assessor. However, as the complaint was responded to by letter from the respondent dated 29/09/2017, the Tribunal considered that the appellant was still within time to appeal the decision after that date. Furthermore, the correspondence provided between the appellant and his MP show that he was advised that he would need to send his paperwork off to the DWP, once he has all the evidence in place for his appeal, on 18/10/2017. The Tribunal did not accept that the delay in appealing the original decision fell within a truly exceptional case or that the appellant had done everything possible to act within time after being informed he would need to submit his paperwork to DWP, in October 2017. Therefore, the Tribunal could not extend the time limit for appealing the original decision beyond the absolute time limit of 13 months.

65. The proper application of the *Adesina* principle necessarily involves appropriate fact-finding, and in this passage the First-tier Tribunal finds relevant facts and explains why the circumstances are not truly exceptional. The Tribunal could equally have relied on other factors, such as the fact that the decision letter of 15 August 2017 included clear information about the mandatory reconsideration and appeals process. This was reinforced by further information in the mandatory reconsideration notice itself. In addition, the Tribunal's reference to a delay of "13 months and 2 days" needs to be seen in its full context. The Tribunal was referring there to the period between the date of the original disallowance decision and the Appellant's e-mail to Capita (not to the Department) on 14 November 2018 in which he asked about the process for appealing the decision. The actual appeal proper was not lodged until February 2020, so was substantially more than 13 months and 2 days late.

66. In these circumstances there is no material error of law by the First-tier Tribunal in refusing jurisdiction, having applied the *Adesina* principle. It was entitled to find on the facts that the Appellant had not personally done all he could do to bring his appeal timeously.

The broader point raised by the grant of permission to appeal

67. The District Tribunal Judge, when giving permission to appeal, asked whether the result of finding that the First-tier Tribunal lacked jurisdiction meant that there is unequal access to justice for differing categories of appellants and therefore a breach of natural justice.

68. The short answer is that differing outcomes for differing categories of appellants does not necessarily mean there is unequal access to justice. It may simply be a

reflection of materially different circumstances of the respective cases. I am reluctant to explore this point further in any great detail, and make an already overlong decision even lengthier, in the absence of detailed submissions on the issue. It is sufficient to say that the rules on time limits for social security appeals apply to all appellants equally, although the actual effect of those rules will inevitably depend on the individual facts of each case. The District Tribunal Judge observed that "an appellant whose original decision date falls after both the relevant determinations in *MH* and *RJ* has a more limited scope of appeal to those whose original decision dates fall before those determinations, especially if the decision is one which is a refusal to revise". But this is not the same as saying that there is unequal access to justice. A claimant in such a case has the same reconsideration and appeal rights in relation to the original decision as any other appellant. In addition, the absence of a right of appeal against a refusal to revise is mandated by primary legislation (Social Security Act 1998, section 12(1) and (2)) and recognised by authoritative case law (*R(IB) 2/04*). Likewise, the differing scope of any appeal may simply be the consequence of the working through of the requirements of section 27 of the Social Security Act 1998 (as explained by DWP guidance in ADM Memo 16-18, *PIP Mobility Activity 1 – Effect of UT decision MH v SSWP (PIP) [2016] UKUT 531(AAC)*).

Final reflections

69. I make two final observations.

70. First, any rules involving time limits necessarily involve drawing a line and some people will then fall on the 'wrong side' of that line. But as Upper Tribunal Judge Poole QC observed in *PH and SM v Secretary of State for Work and Pensions (DLA) (JSA)*:

> 6. I acknowledge that time limits can appear harsh to appellants who fall foul of them. However, time limits are a normal feature of legal systems, and arise because of wider considerations of justice. Where decisions are made by public bodies, it is recognised that the public interest in good administration requires that public authorities, third parties and others are not kept in suspense as to the legal validity of decisions for longer than necessary (*King v East Ayrshire Council* 1998 SC 182 p196). In social security appeals, the focus is on circumstances as they existed at the time of the SSWP's decision under appeal (Section 12(8)(b) of the 1998 Act). Given the difficulty of looking back in time to determine cases once a considerable time has elapsed, and consequent adverse effects on justice, time limits operate to prevent stale cases proceeding. Time limits also operate to safeguard a system in which vulnerable claimants of subsistence benefits can apply to tribunals for decisions close in time to the original decision. There are three mitigating factors for benefit claimants adversely affected by time limits. First, new claims for the benefits in the appeals before me, disability living allowance ("DLA") or Jobseekers' Allowance ("JSA"), may be made at any time. This may not completely redress effects of adverse time barred decisions ... Nevertheless, rights to these benefits are not lost for all time if an appeal against one particular decision is time barred. Second, there is a very limited ability in the tribunal to extend at least time limits under the Tribunal Rules in truly exceptional circumstances under the *Adesina* principle. Third, there is a residual right in any litigant to apply for judicial review. …

71. Second, the moral of *Rakoczy v GMC* is that the *Adesina* principle is very narrowly drawn indeed. It might be tempting to characterise *Adesina* as just requiring stronger reasons than would normally be sufficient for an extension of time in the initial 13-month period under rule 5(3)(a). To do so would be a complete misconception. *Adesina* is about the right of access to the justice system and can only apply if the effect of a time limit is to "restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired". As to the second of Fordham J's Dual Principles – a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved – the answer is provided in the affirmative by *Denson*. Both the Mance Observation – that the court or tribunal may "permit and hear an out of time appeal which a litigant personally has done all he can to bring … timeously" – and the Kay Observation – "a discretion must only arise "in exceptional circumstances" and where the appellant "personally has done all he can to bring [the appeal] timeously" must be applied with what Fordham J characterises as the Dual Principles firmly in view.

Conclusion

72. Accordingly, I dismiss the Appellant's appeal (section 11 of the Tribunals, Courts and Enforcement Act 2007).

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 15 December 2022