NCN: [2025] UKUT 390 (AAC)
Appeal No. UA-2025-000630-PIP

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

SC

Appellant

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: Upper Tribunal Judge Stout
Decided on consideration of the papers

Representation:
Appellant: Kingston Carers' Network
Respondent: Waasif Razzaq, DMA Leeds

On appeal from:

Appellant:	SC
Respondent:	The Secretary of State for Work and Pensions
Tribunal:	First-Tier Tribunal (Social Entitlement Chamber)
First-tier Tribunal Case No:	SC154/25/00084
First-tier Tribunal Digital Case No:	1717-4184-2330-8671
First-tier Tribunal Venue:	Sutton (on the papers)
First-tier Tribunal Decision Date:	14 November 2024

SUMMARY OF DECISION

PERSONAL INDEPENDENCE PAYMENT (41)

The First-tier Tribunal had properly directed itself as to the principles in *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818, as further explained in *Stuewe v Health and Care Professions Council* [2022] EWCA Civ 1605, that an appeal brought after the maximum 12-month extension permitted by rule 22(8) of the First-tier Tribunal procedure rules could only be admitted in exceptional circumstances where refusal would impair the essence of the right of appeal. It may be relevant, but is not always necessary, to consider in answering that question whether the appellant 'has done everything they can to lodge an appeal within the time limit'.

Although rule 27(3) permits the Tribunal to strike out an appeal under rule 8 without holding a hearing, the First-tier Tribunal in this case erred in law by proceeding without holding a hearing. The First-tier Tribunal should have considered whether it was fair, just and appropriate to proceed without holding a hearing. The fact that a decision could be made on the papers did not mean that it should be and the fact that a hearing would have been unlikely to make a difference to the outcome was not a reason why a hearing should not be held.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

DIRECTIONS

1. **This case is remitted to the First-tier Tribunal for reconsideration by a judge who has had no previous involvement with this matter.**

2. **If the appellant has any further written evidence to put before the First-tier Tribunal, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision.**

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

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

REASONS FOR DECISION

Introduction

1. The appellant appeals against the First-tier Tribunal's decision of 14 November 2024 refusing the appellant's appeal against the decision of the Secretary of State that was subject to a mandatory reconsideration decision (MRN) on 21 April 2023.

2. The First-tier Tribunal struck the appellant's appeal out for being out of time as it was received on 3 June 2024, which was outside the maximum 13 months from the date of the MRN (which expired on 21 May 2024).

3. The First-tier Tribunal refused permission to appeal on 25 March 2025 and the appellant's appeal to the Upper Tribunal was filed on 10 June 2025. I extended time to admit the appeal to the Upper Tribunal and granted permission to appeal in a decision sent to the parties on 4 August 2025.

4. The Secretary of State has responded to the appeal and supports it. Both parties invite me to make a decision on the papers and to remit the case for re-determination by a fresh tribunal. I am satisfied that, in the light of the parties' agreement, and the nature of the issues, I am able fairly and justly able to determine the appeal without a hearing and that it is appropriate for me to do so.

The approach of the Upper Tribunal

5. The Upper Tribunal may only allow an appeal under section 12(1) of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) if it finds that the making of the decision by the First-tier Tribunal involved the making of an error on a point of law.

6. Errors of law include misunderstanding or misapplying the law, taking into account irrelevant factors or failing to take into account relevant factors, procedural unfairness or failing to give adequate reasons for a decision.

7. An error of fact is not an error of law unless the First-tier Tribunal's conclusion on the facts is perverse. That is a high threshold: it means that the conclusion must be irrational or wholly unsupported by the evidence. An appeal to the Upper Tribunal is not an opportunity to re-argue the facts of the case.

8. These principles are set out in many cases, including *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[13].

9. In scrutinising the judgment of a First-tier Tribunal, the Upper Tribunal is required to read the judgment fairly and as a whole, remembering that the First-tier Tribunal is not required to express every step of its reasoning or to refer to all the evidence, but only to set out sufficient reasons to enable the parties to see why they have lost or won and that no error of law has been made: cf *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672 at [57]. That case also makes the point (at [58]) that where the First-tier Tribunal has correctly stated the law, the Upper Tribunal should be slow to conclude that it has misapplied it.

What happened in this case

10. By regulation 22(2)(d) of the *Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008/2685* (the FTT Rules) an application for permission to appeal against a decision of the Secretary of State in cases where mandatory reconsideration applies (like this one) must be received by the First-tier Tribunal within one month of the date that the claimant was sent notice of the mandatory reconsideration decision. By regulation 22(8) and regulation 5(3)(a), time may be extended subject to a maximum of 12 months.

11. In this case the MRN was issued on 21 April 2023, but the appeal was not received by the Tribunal until 3 June 2024, some 14 days outside the maximum 12-month extension permitted by regulation 22(8)(b).

12. In directions issued to the parties on 4 June 2024, the First-tier Tribunal identified the appeal as having been lodged outside that time limit, but explained:

> 4. There have been cases in which it has been held that an appeal may be admitted even if it was received outside the maximum time for appealing, but only in exceptional circumstances: when the appellant has done everything they can to lodge an appeal within the time limit and only if the effect of the time limit would be 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 (of appeal) is impaired'. [See *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818 and *Rakozy v General Medical Council* [2022] EWHC 890 (Admin).]

13. The Tribunal then gave directions to the parties as follows:-

> **To [the claimant]:**
> 5. Please write to the Tribunal, as soon as possible, within 4 weeks after the issue of this Notice, with the following information:
> a) Did you previously send an appeal to HM Courts and Tribunal Service regarding your Personal Independence Payment decision? If so when was that?
> b) Was your Personal Independence Payment decision reconsidered by the DWP again after 21/03/2023? If so, when as that?
> c) Please enclose copies of the DWP decision and mandatory reconsideration notice, any later correspondence between you and the DWP and any other evidence you would like the Tribunal to consider on the issue of whether your appeal was made in time.
> d) If you are asking that your appeal should be admitted even though it was received outside the maximum time limit, you need to:
> • Say what you did to try to submit your appeal in time;
> • Explain why your circumstances were exceptional, and what they were;
> • provide any evidence to support what you have said.
> 6. If you fail to comply with these directions, your appeal may be struck out in accordance with Rule 8(3) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008 (TPR).
> …
> 8. In accordance with Rule 8(4) of the TPR, the Tribunal is giving you here the opportunity to make representations in relation to any proposed striking out.
>
> **To the DWP:**
> 9. Please provide a Response to the appeal, within 4 weeks after the issue of this notice, which is to include the following matters:
> a) Did [the claimant] notify you that she wished to appeal before 03/06/2024?

> b) Was there a further request for revision by or on behalf of [the claimant] after the issue of the Mandatory Reconsideration Notice on 21/03/2023 or any further communication challenging that decision? If so, please provide details and any relevant documents.

14. In response to those directions, the appellant's representative made handwritten submissions which were summarised by the Tribunal in its decision as follows:

> a. It is believed that an earlier appeal was submitted to HMCTS. A copy of a handwritten appeal dated 21 April 2023 was enclosed, which referred to a mandatory reconsideration notice (MRN) of the same date: 21 April 2023.
> b. The reason why the initial appeal was outside of the permitted period was that the advocate who had initially lodged the appeal had passed away; paperwork was then resubmitted but may not have been followed through; and [the advisors] cannot now find the initial appeal application.

15. DWP also provided submissions in response, including copies of records of calls with the appellant.

16. The Tribunal then made a decision on the papers striking out the appeal under rule 8 for the following reasons:

> 6. The DWP has also provided its records of calls with [the claimant], in which it appears she called the DWP four times from 9 June 2023 to 29 April 2024, asking for information on how to appeal, explaining that she was waiting for support to appeal, and asking for a copy of the MRN.
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> 7. While some of the above submissions are slightly contradictory ([the claimant's representative] both states that an appeal was made earlier and that the initial appeal was out of time), I am satisfied that I may safely conclude that:
> a. The MRN was received by the appellant – the date of the MRN of 21 April 2023 is referred to in the handwritten appeal of the same date.
> b. No earlier appeal was received by HMCTS. There is no record of it on the Tribunal's computer systems; and the calls recorded by HMCTS imply that [the claimant] had not yet appealed.
> c. The reason for the delay in appealing was that [the claimant] wished to have support to do so, and her initial adviser sadly and unfortunately passed away.
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> 8. In the circumstances, the Tribunal finds that only one appeal was made by [the claimant], on 3 June 2024, and that this appeal was made out of time, being after the 13-month deadline.
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> 9. The Tribunal has considered whether there are exceptional circumstances that would permit the Tribunal to extend the 13-month time limit. While the Tribunal has sympathy for [the claimant] in wishing

> to obtain advice, and that her first adviser passed away, [the claimant] could still have appealed herself, or with another adviser. The Tribunal finds that, by refusing to extend the deadline beyond the 13 months, the Tribunal is not impairing the essence of her right of appeal (Stuewe v Health and Care Professions Council, [2022] EWCA Civ 1605, para 49). There is a high bar for extending the 13 month deadline.
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> 10. The Tribunal decided not to hold an oral hearing on the question of jurisdiction: but [the appellant] and her adviser had made their submissions about why the appeal was late and, for the reasons above, the Tribunal has been able to make findings on the key facts by reviewing the papers. It is unlikely a hearing would affect the result.

My decision in this case

17. In granting permission to appeal, I identified three arguable errors of law in the First-tier Tribunal's decision. Having considered the further submissions of the parties, I am satisfied that each of those arguable errors is made out in this case. In the light of certain additional arguments raised by the appellant in her submissions, however, I should first say why I am satisfied that the First-tier Tribunal did not err in law as to the legal principles to apply to cases that are received outside the maximum 12-month limit for extensions under regulation 22(8)(b).

<u>What the Tribunal got right: principles applicable to extensions of time for appeals brought outside the 12-month extension permitted by rule 22(8)</u>

18. The First-tier Tribunal was in my judgment broadly correct in its directions to the parties of 4 June 2024 in informing them that the effect of the Court of Appeal's decision *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818 and the decision of Fordham J in *Rackoczy v General Medical Council* [2022] EWHC 890 (Admin) is that an appeal may be admitted even if it was received outside the maximum time for appealing, but only in exceptional circumstances: when the appellant has done everything they can to lodge an appeal within the time limit and only if the effect of the time limit would be 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 (of appeal) is impaired'. I say 'broadly' because, as will be seen, it is not actually a requirement that the appellant 'has done everything they can to lodge an appeal within the time limit'. It is merely a relevant factor. It is apparent from [9] of the First-tier Tribunal's decision, however, that it properly directed itself in that respect too.

19. When applying this case law, it is important to remember, as this Tribunal evidently did, that it has never been held that the maximum 12-month limit for an extension of time provided in regulation 22(8)(b) is in itself problematic in Article 6 terms. Indeed, as Judge Wikeley noted in *GJ v Secretary of State for Work Pensions* [2022] UKUT 340 (AAC) at [61], the Court of Appeal specifically upheld that time limit in the child support context in *Denson v SSWP* [2004] EWCA Civ 362 (reported as R(CS) 4/04). As Judge Wikeley observed at [71] in that case,

the effect of *Adesina* and *Rackoczy* is not to create a general discretion to extend time beyond 12 months in all cases. Rather, as the Court of Appeal held in *Stuewe v Health and Care Professions Council* [2022] EWCA Civ 1605 (the other case to which the First-tier Tribunal in this case referred), the power to extend time arises only where not doing so in the particular case would be inconsistent with a person's rights under Article 6 of the European Convention on Human Rights (ECHR).

20. It is apparent from the judgment of Lady Justice Carr in that case (giving the judgment of the court in *Stuewe*) that the principles to be applied when considering whether or not time can be extended beyond the expiry of a legislative time limit will be the same in all contexts, since they derive from generally applicable principles under the Human Rights Act 1998 (HRA 1998) and the ECHR. It is worth setting out the whole of the relevant passage as follows:-

> 45. This decision led the Supreme Court in *Pomiechowski v Poland* [2012] UKSC 20; [2012] 1 WLR 1604 ("*Pomiechowski*") to depart from the earlier line of domestic authorities. In the context of extending the time limit for appeal as prescribed in s. 26(4) of the Extradition Act 2003, Lord Mance, giving the majority judgment, stated:
>
> > "33…In so far as the proceedings involve under the statute a right of appeal against any extradition decision, article 6.1 also requires that it be free from limitations impairing "the very essence" of the right, pursue a legitimate aim and involve a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved" in accordance with the standard identified in *Tolstoy*…
> >
> > 39. …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, in the case of a citizen of the United Kingdom like Mr Halligen, **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 for both filing and service, 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 in any individual case to determine whether the operation of the time limits would have this effect. If and to the**

> **extent it would do so, it must have power to permit and hear an out of time appeal which a litigant personally has done all he can to bring and notify timeously**." (emphasis added)

46. The Supreme Court went on to "read down" the relevant time limit, in accordance with s. 3 of the Human Rights Act 1998.

47. In *Adesina,* the Court of Appeal held that the same approach should be adopted in professional disciplinary matters. Maurice Kay LJ stated:

> "14…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 Practise) 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…**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.**" (emphasis added)

48. Both courts in *Pomiechowski* and *Adesina* spoke in terms of the court's "discretion" or "power". It may, as Fordham J pointed out in *Rakoczy v General Medical Council* [2022] EWHC 890 (Admin) ("*Rakoczy*") at [21(ix)], be more accurate to speak in terms

of the court's duty, not discretion or power, given the positive obligation of the domestic court under s. 3 of the Human Rights Act 1988 (so far as possible) to read and give effect to legislation in a way which is compatible with Convention rights. The difference may not matter in real terms, not least since the courts in *Pomiechowski* and *Adesina* were at pains to emphasise that they were not speaking of a general discretion to extend time, but only a narrow discretion that arises in exceptional circumstances (see for example *Adesina* at [15]).

49. Thus, there is a discretion (or duty) to extend time for the bringing of a statutory appeal but only in exceptional circumstances, namely where to deny a power to extend time would impair the very essence of the right of appeal. That is the key question. Once the discretion (or duty) arises, it must then be exercised to the minimum extent necessary to secure ECHR compliance.

50. As set out above, Lord Mance at [39] in *Pomieschowski* identified the power to permit and hear an out of time appeal if statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access under Article 6 as identified in *Tolstoy*. He went on (in the same sentence) to add that the appeal would be one "which a litigant personally has done all he can to bring and notify timeously." Maurice Kay LJ adopted this sentence in *Adesina* at [15], as have other courts subsequently (see for example *Anixter Ltd v Secretary of State for Transport* [2020] EWCA Civ 43; [2020] 1 WLR 2547 at [67]).

51. Care needs to be taken in relation to this additional statement. The reference to a litigant doing all that they personally could to bring and notify timeously appears to have been treated in some of the cases as an independent requirement for the discretion (or duty) to arise (see for example *Gupta v General Medical Council* [2020] EWHC 38 (Admin) ("*Gupta*") at [58] to [60]). Fordham J in *Rakoczy* [21(ii)], on the other hand, appears to have doubted that it was. There he stated that it was not "laying down a test, in the nature of a legal litmus test" (albeit that he also described it as an "expected essential characteristic"). He stated that it was instead "intended to be a valuable encapsulation", "a guide as to what, in essence, the [court] could expect to be looking for". He also stated at [13] that the obligation on the appellant (to do all that they could to bring and notify timeously) would have to be tempered by reference to reasonableness.

52. I do not consider that Lord Mance in [39] of *Pomiechowski*, having referred to the relevant test by reference to *Tolstoy*, was then imposing an additional condition (beyond the need for the existence of "exceptional circumstances") by reference to the efforts made (or not) by an appellant to appeal in time. Rather, he was simply

identifying the type of situation in which exceptional circumstances sufficient to give rise to the discretion (or duty) may arise. Put simply, and without being in any way prescriptive, exceptional circumstances are unlikely to arise where an appellant has not personally done all that they could to bring the appeal in time. There is no independent jurisdictional requirement that a litigant must have done personally all that he could.

53. The need to import the notion of reasonableness, as suggested in *Rakoczy*, underscores the importance of adhering to the approach identified above. It is both undesirable and counter-intuitive for there to be potentially intricate and nuanced debate as to the reasonableness of a litigant's conduct in the context of an examination of whether the "exceptional circumstances" jurisdiction exists.

54. As set out above, therefore, the central and only question for the court is whether or not "exceptional circumstances" exist, namely where to deny a power to extend time would impair the very essence of the right of appeal. Any gloss is unhelpful. Answering the question may or may not include consideration of whether or not the litigant has done everything possible to serve within time, depending on the facts of the case. Once the discretion (or duty) arises, it must then be exercised to the minimum extent necessary to secure compliance with Article 6 rights.

55. There are several examples of the approach laid down in *Adesina* being deployed on the facts of individual cases: *Pinto v Nursing and Midwifery Council* [2014] EWHC 403 (Admin) (some ill health and stress and attending court office with insufficient funds to pay the court fee); *Nursing and Midwifery Council v Daniels* [2015] EWCA Civ 225 (three day delay arising out of an inability to find funds to pay the court fee); *Darfoor v General Dental Council* [2016] EWHC 2715 (Admin) (one working day late in filing, having attended on the final day of the time limit without correct documentation); *Gupta* (almost a week's delay in circumstances where a litigant in person attempted to file notice of appeal on the final day of the appeal period by email when filing was required by post or in person). In none of these cases was it was held that the high threshold triggering the jurisdiction had been met. However, ultimately, each case will turn on its own facts and the assistance to be drawn from the outcomes on the facts of other cases may be limited.

21. Accordingly, the correct approach in each case is for the tribunal to ask whether or not “exceptional circumstances” exist such that denying a power to extend time would impair the very essence of the right of appeal. It may be relevant to consider in answering that question whether a litigant has personally done all that they can reasonably be expected to do to bring the appeal in time.

22. In the present case, the First-tier Tribunal seems to me to have taken that legal approach so there was no misdirection of law in that respect.

What the Tribunal got wrong: (i) the facts

23. However, the First-tier Tribunal has in my judgment erred in law in its decision. I identified three errors when granting permission, but in reality two of them run together as a composite error as follows.

24. *First*, it has based its decision on a perverse misunderstanding of the evidence. A key plank in its reasoning was (at [6]) that the appellant called DWP four times from 9 June 2023 to 29 April 2024. However, as the Secretary of State accepts, the record of calls at p 9 states that she called on 9 June 2023, 11 July 2023 and 1 December 2023. Her last call to DWP therefore seems to have been before she was informed on 12 December 2023 that her advisor had died and that she would be allocated another advisor (p 16). It appears that, for some reason, this did not happen, although the handwritten submissions from the appellant's advisors suggest that some action may have been taken by them after this, though what is not clear as they were unable to find the documentation.

25. The appellant's case is, in summary, that she left matters with her advisors and they failed to take action. If the Tribunal had been right that she personally called DWP on 29 April 2024, then I can see that would weaken her case that she personally had done what she could because it would show that she was taking action on her own behalf during the period after the death of her advisor. However, as that appears to have been a perverse finding on the Tribunal's part, it is unclear what the position was during the period after the death of the appellant's first advisor and there are insufficient remaining facts in the Tribunal's decision to support its conclusion that refusing an extension of time would not impair the essence of the appellant's right of appeal.

What the Tribunal got wrong: (ii) not holding a hearing

26. *Secondly,* the Tribunal in this case in my judgment erred in law in proceeding without a hearing.

27. The general rule in rule 27(1) is that the Tribunal must hold a hearing before making a decision which disposes of proceedings unless (a) each party has consented, or not objected, to the matter being decided without a hearing and (b) the Tribunal considers that it is able to decide the matter without a hearing. There is an exception to that general rule in in that rule 27(3) provides the Tribunal with a discretion to dispose of proceedings without a hearing when striking out a case under rule 8.

28. However, a discretion must be exercised lawfully. The overriding objective in rule 2(1) always applies. It is well established (see eg *BV v Secretary of State for Work and Pensions* [2018] UKUT 444 at [30]) that although the First-tier Tribunal has power to determine a case in a party's absence, the question it must consider

is whether it is both fair, just and appropriate for it to determine the case without a hearing. This requires consideration of:

a. *The nature of the case*. The Tribunal needs to consider whether the nature of the case is such that holding a hearing is necessary in the light of the nature of the case and the issues that need to be decided, including in particular whether oral evidence or argument is required in order for the Tribunal to do justice in the particular case, whether because there are gaps in the documentary evidence or other complexities that cannot fairly and justly be determined on the papers.

b. *Fairness to the parties*. The Tribunal needs to consider whether it will be fair to proceed in a party's absence. This is a matter of both common law procedural fairness and that party's rights under Article 6 of the ECHR. What is fair will vary depending on the nature of the individual litigant, whether they want a hearing and whether they are likely to be able to put their case better at a hearing or not. A hearing will also be required if the Tribunal is minded to make adverse findings about the party or their case that fairness requires they have an opportunity to answer. As Judge Poynter put it in *BV* at [29]-[30]:

> 29 It will often not be possible to decide whether it is fair to proceed to a decision in a party's absence without knowing what that decision will be. It is not difficult to think of circumstances in which it would be in the interests of justice to decide an appeal in favour of an absent party when it would not be in the interests of justice to decide it against her.
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> 30 In other words, the question that rule 31 requires the Tribunal to ask itself is not "Can we make a decision in the party's absence?" but "Would it be fair for us to make this particular decision in the party's absence?".

c. *The wider interests of justice, including participation and the open justice principle.* Part of the purpose of an oral hearing is so that justice is not only done, but seen to be done. The Supreme Court in *R (Osborn) v The Parole Board* further explained (at [88]) that the question as to whether or not to hold a hearing is not answered by simply considering whether a hearing might make any difference, or whether the party's case stands a reasonable prospect of success. Rather, it is necessary to consider the party's legitimate interest in being able to participate in a decision with important implications for them (ibid at [82]). In other words, the question is not whether holding a hearing might make a material difference to the outcome, but whether it would make a material difference to the fairness of the proceedings or is otherwise necessary in the interests of justice.

29. In this case, it seems to me that the Tribunal overlooked all these principles. The nature of the case was such that the Tribunal needed to make findings of fact about why the appellant had not put in her appeal within the 12-month period that

it could not make on the papers. The papers do not tell the whole story in this case. It is unclear from the papers whether the failure to put the appeal in within time was wholly the fault of the appellant's advisers, upon whom she had reasonably relied, or not. In this case, this was a relevant factor that the First-tier Tribunal needed to consider. An opportunity to give oral evidence was plainly required in order to enable the First-tier Tribunal to make the necessary findings of facts to do justice in this case.

30. Further, fairness required that the appellant be given an opportunity at an oral hearing to address the concerns that the Tribunal had about the evidence. As her case had been put in writing only on a poor and self-evidently incomplete basis by her representatives, fairness required that she be given an opportunity to address the Tribunal at a hearing. That is particularly so given that she had indicated in her application to the Tribunal that she was willing to attend a hearing (p 30).

31. Yet further, the Tribunal when giving directions to the parties on 6 June 2024 did not ask the parties whether they wished to have an oral hearing or not. As such, the decision to proceed without a hearing was taken without receiving representations from the parties on that issue, which adds an additional element of unfairness.

32. Finally, the Tribunal's reasons at [10] for proceeding without a hearing commit two clear errors. First, the Tribunal explains that it has decided that it "has been able to make" key findings by reviewing the papers, but (as Judge Poynter explained in *BV* at [30]), that is not the question, the question is whether it can fairly to do so in the circumstances of the case. Secondly, the Tribunal states that it does not consider a hearing would make a difference to the outcome, but, as is clear from *Osborn*, that is not the question either. The Tribunal needed to ask itself whether holding a hearing would make a material difference to the fairness of the proceedings or was otherwise necessary in the interests of justice.

Conclusion

33. For all these reasons, I conclude that the decision of the First-tier Tribunal involved the making of errors of law. I set that decision aside and remit it for re-determination.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 20 November 2025