



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal Reference: EA/2020/0355

**Heard remotely by CVP
On: 29 January 2020**

Before

Upper Tribunal Judge O'Connor

Between

CHRISTOPHER JAMES HASTINGS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: In person
For the Respondent: Ms Nicholson

DECISION ON PRELIMINARY ISSUE

Introduction

1. On 4 December 2020, Mr Hastings lodged a notice of appeal against a Decision Notice (referenced FS0567020) issued by the Information Commissioner on 22 April 2015. That Decision Notice considered a complaint made by Mr Hastings against a response by the BBC to a request made by Mr Hastings for documentation held by the BBC relating to the 1995 edition of Panarama, which included an interview with the Princess of Wales. In short, the Information Commissioner considered that the BBC was correct to confirm that it did not hold "*any further information under section 1(1)(a) of the Freedom of Information Act 2000.*"
2. It is not in dispute that the notice of appeal was lodged significantly outwith the time period required by rule 22(1) of the Tribunal Procedure (First-tier Tribunal) (General

Regulatory Chamber) Rules 2009 (the 2009 Rules), which provides that a notice of appeal must be received by the Tribunal *“within 28 days of the date on which the notice of the act or decision to which the proceedings relate was sent to the appellant.”*

3. This decision relates to Mr Hastings’ application for an extension of time within which to lodge to the notice of appeal. The application was heard remotely by video using the Cloud Video Platform. There were no connection issues with the video hearing platform and both parties were able to fully participate in the hearing.

Legal landscape

4. Rules 2, 5 and 7 of the 2009 Rules bear heavily on my consideration. They materially read as follows:

“Overriding objective and parties’ obligation to cooperate with the Tribunal:

2. (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly
- (2) Dealing with a case fairly and justly includes -
 - (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it -
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction... .

Case management powers

5. (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
- ...
- (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may -
 - (a) extend or shorten the time for complying with any rule, practice direction or direction ...;

Failure to comply with rules, practice directions or tribunal directions

7. ...
- (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction the Tribunal may take such action as it considers just, which may include:-

- (a) waiving the requirement;
 - (b) requiring the failure to be remedied;
 - (c) exercising its power under rule 8 (striking out a party's case)
 - ...
 - (e) barring or restricting a party's participation in the proceedings."
5. The 2009 Rules do not identify a specific 'test' to be applied when the Tribunal is considering whether to extend time, but rather such consideration is aligned with the overriding objective of the Rules to deal with cases '*fairly and justly*'.
6. There are three relatively recent and pertinent decisions of the senior courts which also bear on such consideration. The first in time is Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537, [2014] 1 WLR 795. The Court of Appeal therein upheld a Master's decision that a claimant who had served a costs budget six days late required relief from sanctions under CPR 3.9. before the costs budget could be considered by the court.
7. The decision in Mitchell was followed shortly thereafter by that of Denton v White [2014] EWCA Civ 906, [2014] 1 WLR 3926, which concerned three conjoined appeals each of which involved the application of CPR 3.9. to cases where the claimants had failed to comply with court orders or rules. For the purposes of my decision it is only necessary to draw attention the following passages from the Court of Appeal's judgment:
- "[35] [The court] will take account of the seriousness and significance of the breach (which has been assessed at the first stage) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is good reason for it. Where there is good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.
- [36] But it is always necessary to have regard to all the circumstances of the case. The factors that are relevant will vary from case to case. As has been pointed out in some of the authorities that have followed Mitchell, the promptness of the application will be a relevant circumstance to be weighed in the balance along with all the circumstances. Likewise, other past or current breaches of the rules, practice directions and court orders by the parties may also be taken into account as a relevant circumstance."
8. The decisions in Mitchell and Denton had as their contextual setting private law civil proceedings. In R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1663, the court concluded that the same approach should be adopted in the public law arena; acknowledging when doing so that a public law claim may raise important issues for the public at large and that this should be a factor taken into account when considering whether to extend time.

Discussion

9. I turn first to consider the seriousness and significance of the failure to comply with the 2009 Rules. In my conclusion, there has clearly been a very significant failure in

the instant case, in that there has been substantial delay of many years in lodging the notice of appeal.

10. Moving on to the second stage, a consideration of the explanation for the delay. Mr Hastings states that at the time the Decision Notice was issued he had no reason to think that it was wrong and, consequently, he had no reason to bring an appeal in relation to it. He continues, however, by observing that “[t]he BBC has recently – in the face of considerable public pressure – conceded that it holds dozens of pages of documents relating to the broadcast. These include a letter from the Princess of Wales to the Corporation and documents in relation to an internal enquiry into tactics employed by the Panarama reporter Martin Bashir to secure the interview. ...” This recent turn of event, asserts Mr Hastings, led him to believe that “...the Decision Notice was based on a false premise” - thus, he now seeks to pursue an appeal in relation to it. Prior to lodging the notice of appeal he unsuccessfully sought to persuade the Information Commissioner to re-open the complaint.
11. Ms Nicholson did not seek to dispute the factual premise underpinning the explanation for the delay and, in all the circumstances, there is no reason for me to do so either. In my view, Mr Hastings has provided a good explanation for the delay.
12. I, finally, turn to consider whether in all the circumstances of the case I should grant relief from sanctions i.e. extend time for the lodging of the notice of appeal. The provision of a good explanation for the delay is undoubtedly a weighty factor in such an assessment, as is the fact that the underlying appeal raises important issues for the public at large public. However, these are only two of the factors which must be placed in the balance and there are others which weigh heavily against extending time.
13. The first, which I find to be of great significance, is the fact that “*given the passage of time the Commissioner no longer has the case investigation materials relating to this matter.*” The Commissioner is the respondent to the instant appeal, and it is her decision which is under challenge. Whatever the merits of the challenge, the Commissioner is entitled to have a fair opportunity to consider her position and defend it, if thought appropriate. It cannot properly be disputed that in order to do this effectively, the Commissioner would need access to the materials she considered when reaching her decision of 22 April 2015, including the “*case investigation materials*”. It is difficult to see how there can be even a semblance of procedural fairness in allowing the appeal to proceed in circumstances where access to such materials has been lost as a consequence of the delay in the lodging of the notice of appeal. In response to this point, Mr Hastings properly asserted that it might be possible for the Commissioner to obtain such material from the BBC, and he may be correct about this. However, at this point is time this is purely speculative.
14. The aforementioned procedural fairness issue also has to be set firmly in the context of the alternative mechanism by which Mr Hastings could achieve ostensibly the same result that he seeks to achieve by pursuing this appeal. It is open to Mr Hastings to make a further Freedom of Information Act request of the BBC. If Mr Hastings is not satisfied with the BBC’s response, he can make a complaint to the Information Commissioner in relation thereto and, ultimately, if he believes the response from the

Information Commissioner to be wrong then the possibility of an appeal to the First-tier Tribunal against such decision would again present itself.

15. Looking at the circumstances of the case as a whole including, but not limited to, the length of the delay, the explanation for the delay, the importance of the issues raised in the underlying appeal and, in my view the most important considerations of all, the consequences for the parties of extending/not extending time, I conclude that time should not be extended for the filing of the notice of appeal by the appellant.

Decision

The appeal is not admitted.

Signed

**Judge Mark O'Connor
Upper Tribunal Judge O'Connor**

Date of Decision: 08 February 2021

Date Promulgated: 11 February 2021