IN THE UPPER TRIBUNAL **Case No.** V/1195/2019
ADMINISTRATIVE APPEALS CHAMBER

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Applicant: BB
Respondent: Disclosure and Barring Service
DBS Reference: 00893962351

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

I extend time so as to admit to consideration the application received on 7 May 2019.

I direct that a copy of this ruling is to be placed on the Chamber's website.

REASONS

1. The applicant, born in 1997, sought permission to appeal against a decision to include him in the children's barred list (and initially the adults' barred list also, but that decision has now been reversed.)

2. The decision letter was dated 21 January 2019 and the application received on 7 May 2019. Under rule 21(3) of the Upper Tribunal's rules of procedure, the time limit for applying for permission to appeal is 3 months. That would have expired on 21 April, Easter Sunday, so by virtue of r.12(2) was extended until 23 April. The application was thus 14 days late.

3. The initial grounds in support of an application for time to be extended were less than compelling. Indeed, in some respects they appeared less than candid, in particular in their reliance on the applicant's stated need to find a direct access barrister over Easter who could help him fill in the form when the evidence showed he had already found a barrister and received the necessary advice and could simply have proceeded to submit the form.

4. I emphasise the need for parties seeking an extension of time to be open and specific in the reasons they give to the Upper Tribunal. With some hesitation, I gave the applicant a chance to provide a fully reasoned and evidenced application, which he did.

5. The case was listed for an oral hearing of the application for extension of time and for permission to appeal. The hearing was held in Leeds on 30 October. The applicant was represented by counsel; the respondent had not been directed to attend and was not represented.

6. The applicant does not have the means to pay for legal assistance. On 21 February counsel was instructed, at the expense of the applicant's great-uncle. On 21 March, a letter was sent to the respondent, evidently drafted by counsel, which was fully reasoned, albeit in part predicated on what is now acknowledged to have been a factual error regarding the date of a caution received by the applicant, and seeking a review of the decision. On 3 April the respondent replied, indicating that they would need more time to investigate regarding the caution. On 11 April the applicant wrote asking the respondent to confirm, in view of the impending deadline of 21 April, that they would not object to an extension of time and seeking their reply by 16 April. The respondent did not reply until 30 April, indicating that while they would not oppose an application for extension of time, it was a matter for the Upper Tribunal judge. Meanwhile, with slight delays caused by the holidays of both counsel and the great-uncle, on 25 April, the great-uncle had put counsel in funds, the drafting of the application was completed on 30 April, conveyed via the great-uncle to the applicant and returned to counsel for posting on 3 May. 4-6 May was a bank holiday weekend and the application was received on 7 May. The application closely follows the content of the letter of 21 March.

7. The authorities on whether to extend time were reviewed by Upper Tribunal Judge Lane in *JP v SSWP and LB Brent* [2017] UKUT 0149 (AAC). She adopted the three-stage approach summarised in *R(Onowu) v First-tier Tribunal (Immigration and Asylum Chamber)* [2016] UKUT 185 (IAC), which had drawn together the learning from recent Court of Appeal authorities. In brief, the approach was:

> Stage 1: identify and assess the seriousness or significance of the failure to comply with the rules.
> Stage 2: consider why the failure occurred i.e. was there a good reason for it
> Stage 3: evaluate all the circumstances of the case.

The Court of Appeal had indicated, in *Secretary of State for the Home Department v SS(Congo) and Others* [2015] EWCA Civ 387 that:

> "The focus should be on whether the breach has been serious or significant. If a judge concludes that a breach is not serious or significant, then relief will usually be granted, and it will usually be unnecessary to spend much time on the second or third stages…"

8. Was, then, the breach this case "serious or significant"? In favour of the view that it was not, 14 days is a relatively short delay (and three of those days represented a bank holiday weekend); there was no objection from the respondent; and the substantive matters relied upon by the respondent are not the subject of factual dispute, so there appears no risk of evidence

becoming stale. Further, if the applicant were to remain barred for 14 days longer than would otherwise be the case because of his delay in submitting the application, while he would be out of the relevant workforce for two additional weeks, most of the associated loss from that would be his own.

9. Against that, the period allowed for making an application (3 months) is a relatively generous one. The applicant had with help accessed legal services 2 months before the deadline. Further, the interests of justice go beyond the matters in any individual case, as the Senior President of Tribunals observed, giving the judgment of the Court of Appeal in *BPP Holdings v Commissioners for HM Revenue and Customs* [2016] EWCA Civ 121 at [9]. He added (at 38] that:

> "the correct starting point is compliance unless there is good reason to the contrary…".

10. In general, the inability to pay for legal representation is not to be regarded as providing a good reason for delay: *R(Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633. In the present case, thanks to the good offices of the great-uncle, there was not even an inability to pay, merely a disinclination, however understandable, to do so if the matter could be resolved without appeal proceedings. However, the forms needed to commence proceedings in the Upper Tribunal are not elaborate or complex; in any event the substantive work legal work had been done for the letter of 21 March; there was no reason why the application could not have been lodged in time, in accordance with the Rules. A protective application could even have been lodged, with grounds to follow.

11. The seriousness or significance attaching to the breach in the present case results less from the impact of the breach of the Rules in the specific case and more from the reasons why it occurred and the apparent indifference to the need to comply with the time limits in the Upper Tribunal's Rules. If, contrary to my view, those are not legitimate factors to take into account in applying the Stage 1 test, then the applicant succeeds at Stage 1.

12. If, however, he does not, there is inevitably an overlap between stage 1 and stage 2 of the *Onowu* tests and I move to stage 3. I am required to apply the overriding objective, expressed in r 2 of the Upper Tribunal's Rules in the following terms:

> "2. (1) The overriding objective of these Rules is to enable the Upper 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;
> (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 Upper Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Upper 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.
>
> (4) Parties must—
> (a) help the Upper Tribunal to further the overriding objective; and
> (b) co-operate with the Upper Tribunal generally."

13. There are two main factors which have led me to extend time in this case. The main one is the nature of the proceedings. The applicant is a young man and the conduct which has led to this case all arose when he was still a child. He has a working life ahead of him. It is preferable that, if possible, whether or not he is indeed to remain barred from working with children is considered on its substantive merits, rather than on a time limit point on which, perhaps, those advising him might have taken a different view. That is particularly so as I am not aware of any case in this Chamber which has looked at the application of the time limit rules to the safeguarding jurisdiction in any detail. In *Hysaj*, the court referred to the need for particular care to ensure in certain categories of public law proceedings that claims are not frustrated by a failure by a party's legal representatives to comply with time limits. While that was said in an extreme context (claims for asylum and humanitarian protection), there is a real public interest in ensuring both that children are protected against those from whom protection is needed, but also that people are not by reason of procedural matters too readily restricted in their ability to earn a living, which points towards an enhanced need for flexibility, mirroring limbs b and c of the overriding objective, in a case such as this.

14. The other factor, which is common to a number of jurisdictions handled by this Chamber, does relate to the access to legal services. In *JP* at [4] Judge Lane referred to circumstances relating to access to legal services in the social entitlement sphere. Much the same can be said about the safeguarding jurisdiction. Often, a person who has been placed on a barring list may experience difficulty in finding work, even in areas unrelated to that from which they have been barred, and will not be in position to pay for legal services. Further, there is relatively little specialist advice available in the field. If a person had been dependent on securing the good offices of a voluntary adviser, such as perhaps Citizens Advice or Bar Pro Bono but there were unavoidable delays in accessing such advice, it is entirely possible that a degree of latitude might have been permitted. In the present case, the applicant has not had to go down such a road, thanks to the generosity and kindness of his great-uncle in assisting him financially. That was how he was able to secure access to the necessary legal services and in my view a degree of latitude is also to be permitted.

15. Accordingly, time is extended.

16. There is one other aspect of this case on which I should comment. The letter of 21 March 2019 had sought a review on the basis that (a) the decision had been based on erroneous background facts – specifically as to the date of the applicant's caution which, it was submitted, was in truth a youth caution; (b) there had been a misapplication of the law and (c) that all relevant considerations had not been taken into account. By letter dated 30 July 2019 the respondent agreed to remove the applicant's name from the Adults' Barred List but said that it refused to carry out a review under para 18A of Schedule 3 of the Safeguarding Vulnerable Groups Act 2006 in respect of the applicant's inclusion in the Children's Barred List. In doing so, it relatively briefly addressed why none of (a), (b) or (c) above was made out. These decisions appeared under the headings "Outcome of Review- Children's Barred List" and "Outcome of Review – Adults' Barred List". Counsel for the applicant submits that that was in substance a review, not a refusal to review, and that as the 3 month period in respect of that decision only ran out on the day of the hearing before me, the applicant would be entitled to appeal against that decision instead. A refusal to review is not within the category of decision appealable under s.4, although a decision under para 18A not to remove a person's name is appealable. While it is no longer necessary to decide the point (in that the applicant has been given an extension of time anyway) and I do not do so, I would not be inclined to accept that every time the DBS, who have a discretion whether or not to carry out a review under para 18A, explain why they do not accept the grounds on which it is argued that they should carry out such a review, they would be taking a new appealable decision. A review is typically a much fuller process, involving fresh rounds of submissions and possible further evidence. It seems to me that a gatekeeping letter refusing to open the gate to a review is conceptually not the same as the review itself. Here the matter is perhaps more finely balanced, given the "Outcome of Review" headings and that, as regards the Adults Barred List, the applicant's name <u>was</u> removed. As I have said, I am not deciding the point, but it may be one which the respondent might wish to reflect upon for greater clarity in other cases.

17. The points in this ruling about extensions of time in the safeguarding jurisdiction and what may constitute a review are of some importance beyond the present case and I therefore have directed that a copy of this ruling be placed on the Chamber's website.

18. Whether or not the applicant should be given permission to challenge the barring decision is dealt within a separate determination.

CG Ward
Judge of the Upper Tribunal
20 November 2019

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