UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case No: RAP/14/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD & TENANT – rent determination – landlord's notification of increased rent for a dwelling under section 13(2) of the Housing Act 1988 – whether the First-tier Tribunal had no jurisdiction to deal with a tenant's referral of that notice made out of time

IN THE MATTER OF APPEALS AGAINST DECISIONS OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

Between:

Mr Christopher Robertson

Appellant

and

Mrs R Gordon Webb

Respondent

Re: 16 Honley Road
Catford,
London,
SE6 2HZ

Before: The Hon. Mr Justice Holgate, Chamber President

Sitting at The Royal Courts of Justice, Strand, London WC2A 2LL
on
27th June, 2018

The Appellant in person

Mr Mark Dencer instructed by Whitehead Monckton for the Respondent

The following cases are referred to in this Decision:

Adesina v Nursing and Midwifery Council [2013] 1 WLR 3156
Gilchrist v Revenue and Customs Commissioners [2015] Ch 183
Pomiechowski v District Court of Legnica, Poland [2012] 1 WLR 1604
PR (Sri Lanka) v Home Secretary [2012] 1 WLR 73
R (Cart) v Upper Tribunal [2012] 1 AC 663
R (Kadhim) v Brent LBC Housing Benefit Review Board [2001] QB 955
R (Lester) v London Rent Assessment Committee [2003] 1 WLR 1449
Secretary of State for Justice v RR [2010] UKUT 454 (AAC)
Tadema Holdings Ltd v Ferguson 32 HLR 866

DECISION

Introduction

1. This is an application by the Applicant Mr Christopher Robertson for permission to appeal to the Upper Tribunal (Lands Chamber) against the decision of the First-tier Tribunal (Property Chamber) ("FTT") on 9th July 2017 that it had no jurisdiction to deal with his application to determine the rent for the dwelling at 16 Honley Road, Catford, London, SE6 2HZ under section 14(1) of the Housing Act 1988 ("the 1988 Act").

2. The application falls to be redetermined by this Tribunal because on 19th April 2018 His Honour Judge Blackett (sitting as a judge in the High Court) granted Mr Robertson permission to apply for judicial review of the Upper Tribunal's decision on 2 November 2017 refusing him permission to appeal. The Tribunal did not request a substantive hearing of the claim for judicial review to take place under CPR 54.7A(9). Accordingly, on 11 May 2018 Master Gidden made an order quashing the Tribunal's refusal of permission to appeal.

3. The Applicant is the tenant of the property. The tenancy was originally granted in 1954 to the Applicant's mother. When she died in 2011 he succeeded to an assured periodic tenancy. Whilst his mother was alive, Mr Robertson assisted her to deal with rent increases proposed by the landlord. After he became the tenant he "appealed" twice against further notices to increase the rent payable. He says that he is familiar with the procedure involved, including the time limit set for a tenant to be able to pursue such an appeal. In 2014 the rent was duly increased to £1,100 pcm.

4. On 2 March 2017 the Respondent landlord, Mrs Rosemarie Gordon-Webb, caused a notice to be served under section 13(2) of the 1988 Act proposing that the rent should be increased to £1,500 pcm with effect from 7 April 2017.

5. On 24 April 2017 the Respondent wrote to the Applicant to point out that he was still paying rent at the old rate and asking him to pay the difference. On 1 May 2017 the Applicant replied saying that he had not seen the notice. By way of explanation he stated that he had been very ill for well over a year and assumed that one of the people who had been "house-minding" while he had been ill had discarded the letter containing the notice along with "junk mail". He stated that he would contest the increase by applying to the tribunal.

6. On 11 May 2017, the Respondent's agent replied, explaining that the notice had been put through the letterbox of the front door of the property. In Tadema Holdings Ltd v Ferguson (2000) 32 HLR 866 the CA held at p. 873 that in this context: –

> ""Serve" is an ordinary English word connoting the delivery of a document to a particular person. It does not seem to me to imply that the document has to be understood by the person to whom it is delivered. It does not have to be read by the person to whom it is delivered. Indeed, it may not even be known to have been delivered to that person if it is delivered to the proper address for service."

7. The matter proceeded before the FTT, and in the hearing before me, on the basis that it is common ground that:

   (i) The notice to increase the rent was duly served for the purposes of s.13(2) of the 1988 Act;

   (ii) The notice served was in the appropriate prescribed form (form 4);

   (iii) The notice was a valid notice for the purposes of increasing the rent to £1,500 pcm with effect from 7 April 2017 unless before that date the Applicant referred the notice to the FTT for it to determine the rent under s.14(1);

   (iv) The Applicant did not refer the landlord's notice under s. 13(2) to the FTT before 7 April 2017.

8. The Applicant did not purport to refer the s. 13(2) notice to the FTT until 19 May 2017, nearly a month after the Respondent's letter of 24 April, and well after the last date for referring the landlord's notice to the FTT, albeit that the Applicant says that from his previous experience he had been well aware of the time limit for applying to the FTT (see Statement of Facts and Grounds in support of application for judicial review).

9. On 8 June, the FTT wrote to Mr Robertson, to say that the tribunal's preliminary view was that it lacked jurisdiction to determine the rent because he had not referred the notice of increase to it within the statutory time limit. Although the FTT suggested that the matter be dealt with as a preliminary issue on written representations and the Applicant agreed to that procedure, the tribunal did in fact hold a hearing at which the parties attended and evidence was given.

10. The FTT issued its written determination dated 9 July on 12 July 2017.

> "**1. Decision:** The Committee (sic) does not have jurisdiction to determine this application for the reasons stated below.
>
> **3. The Law**
> [The FTT set out the key statutory provisions]
>
> **4. Facts Found:** The Applicant tenant has an assured periodic tenancy by succession, which commenced on the death of his mother on or about 10th August 2011. The Applicant's rent is payable monthly.
>
> The landlord sent a completed prescribed notice of increase dated 1st March 2017 to the tenant by hand on 2nd March 2017, specifying 7th April 2017 as the date for commencement of new rent.
>
> The tenant, in a letter dated 19th May 2017 accepted that the Section 13(2) notice had been posted through his letter box by hand.

> The landlord's son also gave evidence at the hearing that he had put the notice through the letterbox at about 09:10 a.m on 2nd March 2017. The tenant did not dispute that, but believed that the letter might have been accidentally destroyed by someone assisting him in the house.
>
> The first he knew of the matter was when he received a letter from the landlord dated 24th April 2017 enquiring as to why he had not paid the new rent. After some correspondence with the landlord, he applied to the Tribunal on 19th May 2017 (received on 22nd May 2017).
>
> The tenant is very ill, and he is financially unable to pay the rent increase. He is likely to lose his home of many years.
>
> **5. Reasons for Decision:** The Committee (sic) considered the evidence and submissions. It concluded that despite the tenant's very difficult personal circumstances, there was no suggestion that the landlord had acted improperly. The application had been served well outside the time limit imposed by statute. The Tribunal decided that it had no discretion to accept the application.
>
> The Tribunal decided that the application for the Tribunal to fix a new rent was received out of time, and that it had no jurisdiction to determine it."

The applications for permission to appeal

11. The Applicant applied to the FTT for permission to appeal to the Upper Tribunal and for the FTT to review its decision, stating:-

> "The grounds of my appeal are based on note number 5 in the Tribunal's guidance notes, where it states that in considering whether to review its decision (the Tribunal) "will take into account the overriding objective of dealing with cases fairly and justly."

12. The objective to which that note referred is contained in rule 3 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No.1169. As the title suggests rule 3 forms part of a set of rules governing the procedure followed within the Property Chamber. It does not purport to affect the determination of substantive rights. More to the point, rule 2 provides: -

> "Nothing in these Rules overrides any specific provision that is contained in an enactment which confers jurisdiction on the Tribunal."

Thus, the "overriding objective" could not help Mr Robertson to overcome the FTT's lack of jurisdiction to deal with his application for the FTT to determine his rent. The

Applicant also contended that the FTT's process had been unfair because of his illness and the potentially serious effect that the rent increase would have on him.

13. On 9th August 2017 the FTT issued its decision refusing to review its decision on jurisdiction or to grant permission to appeal to the Upper Tribunal. Essentially the FTT relied upon its earlier analysis as to why it lacked jurisdiction to entertain the late referral of the notice to increase the rent.

14. On 22 August 2017, the Upper Tribunal received an application from Mr Robertson for permission to appeal against the FTT's decision on jurisdiction. He advanced essentially the same points as before. Although I bear in mind the fact that Mr Robertson was acting as a litigant in person, he did not address the legal issues concerning the FTT's lack of jurisdiction in any way.

15. The decision refusing permission to appeal was given by a judge of this Tribunal on 2 November 2017:

> "2: The FTT heard evidence at a hearing. The FTT found that the respondent (landlord) had sent a completed prescribed notice of increase dated 1 March 2017 to the applicant by hand (by putting it through the letterbox) – the applicant did not seek to dispute this and the FTT received evidence that the notice was served in this manner.
>
> 3. The beginning of the new period specified in the respondent's notice was 7 April 2017.
>
> 4. The applicant did not make his application to the FTT until 19 May 2017.
>
> 5. The FTT found that the applicant's application under section 13(4) had been made well outside the time limit imposed by statute.
>
> 6. No question was raised (nor could any such question have been raised) to the effect that the respondent had waived the time limit.
>
> 7. There is no prospect that the applicant could hope to persuade the Upper Tribunal that the FTT erred in law in concluding that in these circumstances it had no discretion to ignore the statutory time limit and had no power to determine a rent on the basis of the applicant's application."

Mr Robertson's application for judicial review

16. On 17 November 2017 Mr Robertson filed an application for permission to apply for judicial review of the Upper Tribunal's refusal of permission to appeal. This procedure was potentially available to him as a result of the decision of the Supreme Court in R (Cart) v Upper Tribunal [2012] 1 AC 663.

17. CPR 54.7A gives effect to the decision in Cart on the limited ambit of judicial review where the claimant seeks to challenge a decision of the Upper Tribunal to refuse permission to appeal by restating in sub-para. (7) the "second appeal" test which the High Court must apply:-

> "(7) The court will give permission to proceed only if it considers –
>
> (a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and
>
> (b) that either –
>
> (i) the claim raises an important point of principle or practice; or
>
> (ii) there is some other compelling reason to hear it."

There is well-established case law on these provisions, including what may, or may not be considered to be "some other compelling reason" (see eg. PR (Sri Lanka) v Home Secretary [2012] 1 WLR 73).

18. Mr Robertson's Statement of Facts and Grounds did not pay any attention to the principles in Cart or in CPR 54.7A (which are also summarised at pp. 40-41 of the Administrative Court Judicial Review Guide 2017). He repeated essentially the same points he had previously made when seeking permission to appeal from the FTT and from this Tribunal. He simply contended that it had been unreasonable and unfair not to allow his application to the Property Chamber to proceed. He still did not address the jurisdiction issue. He did not purport to identify any error of law in the decision of the Upper Tribunal to refuse permission to appeal, let alone apply the Cart tests.

19. The matter came before Judge Blackett on the papers. He ought to have had available to him Volume 2 of the White Book which helpfully sets out sections 13 and 14 of the 1988 Act. The accompanying note states that the Property Chamber has no jurisdiction to deal with a tenant's application disputing a notice to increase his rent unless it is made before the date specified in the notice as the beginning of a new period of the tenancy, citing R (Lester) v London Rent Assessment Committee [2003] 1 WLR 1449.

20. The Judge merely gave the following reasons for granting permission to apply for judicial review:-

> "
>
> - The judge in the First Tier Tribunal (Property Chamber) refused to consider the merits of the Claimant's appeal against a rent rise and rejected the application solely on the basis that the appeal was out of time. The Upper Tribunal rejected the appeal because there had been no error of law.

- Clearly time limits must be strictly adhered to. However, in this care there is a reasonable explanation for the delay and it is arguable that it is unreasonable and unfair not to allow the Claimant to argue the merits of the case before the Property Chamber"

21. The Judge did not address either the relevant legislation or the jurisdictional issue referred to in the reasoning of the FTT and this Tribunal. He did not identify any error of law in that reasoning. he did not apply the second appeal test required by Cart and by CPR 54.7A(7). The judge merely repeated the Applicant's assertion that it was "unreasonable and unfair" for him not to be allowed to reargue the merits of his case before the Property Chamber, without identifying any legal principle (or legal authority) which would entitle this Tribunal to depart from the absolute language used by Parliament when laying down the time limit in section 13(4). These omissions from his decision were unfortunate, to say the least.

22. Where an order is made in the High Court granting permission to apply under CPR 54.7A, the reasoning expressed by the judge is very important, particularly where the applicant is a litigant in person and has failed to identify any legal error, let alone one satisfying CPR 54.7A(7). Where that reasoning does not address these issues the Upper Tribunal and the parties are placed in difficulty. The Tribunal is faced with having to make a rapid decision as to whether the claim for judicial review should proceed to a substantive hearing in the High Court in order to obtain further clarification, but with possible implications as to costs. The decision to grant permission may encourage the claimant to have false hopes of success, particularly if the underlying proceedings are doomed to fail through lack of jurisdiction. A problem of that kind cannot be ignored, because a statutory tribunal cannot arrogate to itself jurisdiction which Parliament has not conferred on it. There is also the position of the respondent who faces uncertainty and delay.

23. The importance of proper reasons being given for the grant of permission in a Cart case is reinforced by the respective positions occupied by the Upper Tribunal and the High Court under our legal system. Parliament established the Upper Tribunal as a "superior court of record" and therefore able to create precedent: see s.3(5) of the Tribunals Courts and Enforcement Act 2007 ("the 2007 Act"). Appeals lie from the Upper Tribunal to the Court of Appeal, not the High Court. Except for the Cart jurisdiction, the Upper Tribunal is treated as having an equivalent status to that of the High Court. Thus, a judge of the Upper Tribunal is not obliged to follow an earlier decision in the High Court if he or she is convinced that that decision was wrong (see Secretary of State for Justice v RR [2010] UKUT 454 (AAC); Gilchrist v Revenue and Customs Commissioners [2015] Ch 183).

24. The effect of the order made by the High Court in this case is that the previous refusal of permission to appeal by the Tribunal has been quashed and the decision on whether to grant permission to appeal has to be retaken. However, the jurisdictional issue, with which the judge sitting in the High Court did not deal, has not gone away.

25. On 1 June 2018 the Deputy President, Mr Martin Rodger QC, gave directions for the determination of this application. He ordered that if permission to appeal were to be granted, the substantive appeal could be considered at the same hearing; in other

words a "rolled-up" hearing. At the beginning of the hearing both parties confirmed that they were content to proceed on that basis and had prepared accordingly.

Relevant statutory provisions

26. Section 13(2) provides:

> "For the purpose of securing an increase in the rent under a tenancy to which this section applies, the landlord may serve on the tenant a notice in the prescribed form proposing a new rent to take effect at the beginning of a new period of the tenancy specified in the notice, being a period beginning not earlier than –
>
> (a) The minimum period after the date of the service of the notice, and;
>
> (b) Except in the case of a statutory periodic tenancy -
>
> (i) in the case of an assured agricultural occupancy, the first anniversary of the date on which the first period of the tenancy began;
>
> (ii) in any other case, on the date that falls 52 weeks after the date on which the first period of the tenancy began; and
>
> (c) if the rent under the tenancy has previously been increased by virtue of a notice under this subsection or a determination under section 14 below -
>
> (i) in the case of an assured agricultural occupancy, the first anniversary of the date on which the increased rent took effect;
>
> (ii) in any other case, the appropriate date."

27. Section 13(3) provides:

> (3) The minimum period referred to in subsection (2) above is:
>
> (a) in the case of a yearly tenancy, six months;
>
> (b) in the case of a tenancy where the period is less than a month, one month; and
>
> (c) in any other case, a period equal to the period of the tenancy."

28. Section 13(4) provides:

> "Where a notice is served under subsection (2) above, a new rent specified in the notice shall take effect as mentioned in the

notice unless, before the beginning of the new period specified in the notice, -

(a) The tenant by an application in the prescribed form refers the notice to the appropriate tribunal; or

(b) The landlord and the tenant agree on a variation of the rent which is different from that proposed in the notice or agree that the rent should not be varied."

29. Section 14(1) provides:

"Where under subsection 4(a) of section 13 above, a tenant refers to the appropriate tribunal a notice under subsection (2) of that section, the appropriate tribunal shall determine the rent at which, subject to subsections (2) and (4) below, the appropriate tribunal consider that the dwelling-house concerned might reasonably be expected to be let in the open market by a willing landlord under an assured tenancy –

(a) which is a periodic tenancy having the same periods as those of the tenancy to which the notice relates;

(b) which begins at the beginning of the new period specified in the notice;

(c) the terms of which (other than relating to the amount of the rent (are the same as those of the tenancy to which the notice relates; and

(d) in respect of which the same notices, if any, have been given under any of Grounds 1 to 5 of schedule 2 to this Act, as have been given (or have effect as if given) in relation to the tenancy to which the notice relates."

30. It is important to note that the legislation does not simply impose a time limit, expressed in absolute terms, within which a tenant may challenge a landlord's notice to increase rent by referring the matter to the FTT. It goes further, by mandating that if, within that time limit, the landlord's notice is not so referred (or the parties do not reach agreement on an alternative figure), the rent stated in the landlord's notice becomes the rent legally payable. The legislation operates by altering the rent the tenant is obliged to pay under the tenancy. Unlike many other statutory time limits, section 13(4) lays down the consequence which will follow if specified action is not taken within the period of time explicitly laid down.

31. In Lester, the landlord served a notice increasing the rent payable with effect from 20 March 2002. The tenant completed a prescribed form (form 5) objecting to the proposed increase and posted it to the tribunal on 18 March. It was received by the tribunal on 20 March. Consequently, the tribunal held that because it had not received the notice before 20 March, the matter had not been "referred" by the tenant to the tribunal before the date specified as the date on which the increase would take effect in accordance with s.13(4) and therefore the tribunal had no jurisdiction to deal with

the matter. In the tenant's appeal to the Court of Appeal, it was not disputed that a tenant's failure to refer the proposed increase within the relevant time limit deprived the tribunal of jurisdiction under s.14(1). Instead, the sole issue was what was meant by "referred", the giving of the tenant's notice or its receipt by the tribunal. The Court of Appeal did not question the tribunal's view that a failure to serve a tenant's notice in time resulted in the tribunal having no jurisdiction. That was assumed to be correct. Proceeding on that basis, the Court held that "referred" meant the *receipt* of the tenant's notice and so the appeal was dismissed.

32. Because the jurisdictional effect of the time limit in section 13(4) was not an issue in the appeal in Lester and so did not form part of the *ratio* of its decision, the Court's tacit acceptance of the tribunal's view is not binding on this Tribunal (see eg. Cross and Harris: Precedent in English Law (4th ed) at pp. 158-161 and R (Kadhim) v Brent LBC Housing Benefit Review Board [2001] QB 955). Nevertheless, it is plain from the reasoning of the judgments in the Court of Appeal that they too considered that the tribunal had no jurisdiction if the tenant's notice was "referred" out of time. That view is entitled to great respect. It has not been challenged since 2003 and was not challenged in these proceedings. Given the explicit language of s. 13(4) and s. 14(1) and, in particular, the provision that a tenant's failure to make an application in accordance with s. 13(4) results in the rent payable being altered to that specified in the s. 13(2) notice from the date stated therein, I conclude that the FTT has no jurisdiction under s.14(1) of the 1988 Act to deal with a purported referral received by the tribunal outside the time limit in s. 13(4).

33. The significance of the legislative requirement for the service of the tenant's notice was referred to by Sedley LJ in Lester at para 40:-

> "I find difficulty in agreeing that "refer" in its present context has an ordinary or natural meaning. As used, it seems to me to be a protean and problematic word. What in my view determines its present meaning is the fact that referral in this statutory scheme does more than initiate a consideration of the rent by the committee. It freezes the legal right generated by service of the landlord's notice to recover the increased rent. Yet if posting is enough to constitute referral, the effect must be the same whether the form is delayed in delivery or lost altogether. It must also be enough, on this hypothesis, to hand the form to someone else to deliver, with the same risks of loss or non-delivery. If so, not only might the RAC [rent assessment committee] become legally seized of an application of which it had no knowledge, but both the tenant's and the landlords' legal rights would be altered by it, again without the latter's knowledge. Not least in the interests of legal certainty, none of this is acceptable."

34. In this case there is no dispute that the Respondent's notice was in the proper form and was served correctly at the premises. There is also no dispute that it took effect on 7 April 2017 so as to increase the rent to £1,500 pcm unless the Applicant caused a referral notice to be received by the Property Chamber before that date. It is agreed

that as a matter of fact he did not. On these facts I have reached the firm conclusion that the Property Chamber lacked jurisdiction because of the clear language used in the 1988 Act which does not allow for any different outcome and does not provide for any discretionary enlargement of the time limit. I am reinforced in that view by the approach taken in Lester by the Court of Appeal. Because this is a matter going to the statutory jurisdiction of the FTT, the absolute nature of the time limit in section 13(4) cannot be disregarded. It is the duty of the Tribunal to give effect to it. Accordingly, the FTT and the Judge in the Upper Tribunal were correct to refuse permission to appeal against the FTT's decision that it had no jurisdiction to consider the rent. I reach the same conclusion and should therefore refuse permission to appeal. The only remaining question is whether there is any legal basis outside the express language of the 1988 Act which would authorise a more flexible application of section 13(4) and 14(1). The only provision or principle suggested at the hearing was Art. 6(1) of the ECHR.

Article 6.1 of the European Convention on Human Rights

35. The Court in Lester went on to consider s. 3 of the Human Rights Act 1988 and Article 6.1 of the ECHR. Article 6.1 reads:

> "In the determination of his civil rights and obligations …. everyone is entitled to a fair and public hearing, within a reasonable time by an independent and impartial tribunal established by law.

The tenant submitted that in order to comply with Art. 6.1 the word "referred" in section 13(4) of the 1988 Act should be interpreted as simply requiring that the notice had been given by the tenant rather than received by the tribunal.

36. The Court of Appeal rejected that argument. At paragraph 33 Waller LJ held:

> "Thus the argument has to be that by construing section 13(4) as "receipt" rather than "despatch" the court will be preventing the determination of the civil rights of the tenant. The tenant however does not have a right to have her rent determined other than by contract or by statute. The tenant has no right by virtue of any contract and she only has the right by virtue of the statute if the procedure laid down by the statute is adopted. To have a procedure which has to be followed to obtain a right is not a denial of a right. Section 3 cannot assist the tenant."

The Court of Appeal in Lester was not asked to consider an alternative argument, namely whether Art. 6.1 might require section 13(4) to be applied subject to a discretion to allow the receipt of a tenant's notice in exceptional circumstances.

37. More recently, the possible effect of Art. 6.1 on a very short statutory time limit affecting personal liberty has been considered by the Supreme Court in Pomiechowski v District Court of Legnica, Poland [2012] 1 WLR 1604. There the Court had to consider the 7 day time limit within which a person ordered to be extradited might appeal to the High Court provided that his notice of appeal had been filed and served within that time. The Supreme Court held that a person's common law right to enter

and remain within the UK engaged Art. 6.1 and that extradition proceedings involved "the determination" of such a right. His entitlement to a fair hearing of the determination of that right affected the extradition proceedings and any right of appeal therefrom. According to established case law, this right of appeal had to be free of limitations impairing "the very essence of the right", and any limitations had to pursue a legitimate aim and involve a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (para. 33). It was held that the operation of the very short, strict time limit had infringed those principles in the circumstances under consideration. Accordingly, the statutory time limit had to be read as being subject to a discretion in exceptional cases for the court to extend time for filing and serving a notice of appeal in order to prevent the very essence of the right of appeal being undermined. Plainly Pomiechowski did not confer a broad discretion to extend time. The ambit of the discretion acknowledged in that case was confined to satisfying the Art. 6.1 principles identified by the Supreme Court.

38. In Adesina v Nursing and Midwifery Council [2013] 1 WLR 3156 the Council had made orders against two nurses striking them off the register. The Court of Appeal held that the 28 day time limit laid down by the legislation for making an appeal against an order which had the severe effect of excluding someone from their profession, was by virtue of Art. 6.1, and applying the principles laid down in Pomiechowski, subject to the Court's discretion.

39. The Court had regard to the seriousness of the consequences which the orders in question would have. In Pomiechowski extradition carried with it loss of liberty and involuntary removal to a different country. In Adesina removal from the register, although not as serious, was still of great importance to each appellant. The Court accepted that a person might in some cases be unable to deal with an appeal because, for example, notice of a disciplinary decision had been lost in the post or, although served, the recipient was in intensive care and unable to do anything (para. 14). The Court decided that the legislation should be read down to the minimum extent necessary to secure compliance with Art. 6.1. It held that the discretion could only be exercised in exceptional circumstances where the appellant "personally has done all he can to bring the appeal timeously" (para. 15). The scope for departing from the time limit was extremely narrow (para. 18). In the result, it was held that the nurses had failed to justify the grant of any extension of time. They had been present when the orders were pronounced and had failed to do all that they could have done to bring their appeals timeously.

40. In the interests of justice, I thought it appropriate to refer the parties to Pomiechowski and Adesina. No other authorities have been cited on the application of Art. 6.1. The issue has not been fully argued. There are potentially two questions. First, should the 1988 Act be read down so as to incorporate a "Pomiechowski discretion" to extend time in sufficiently exceptional circumstances? Second, if that question is answered yes, should the Applicant be granted an extension of time?

41. I do not consider that Pomiechowski could apply in the present statutory context for a combination of reasons.

42. First, the statutory imposition of a time limit for the service of a notice, in this instance by a tenant, is commonly found in legislation dealing with private law,

contractual relationships between individuals and entities, such as the letting of residential, agricultural and business premises. Non-compliance with a time limit often affects the respective rights of landlord and tenant. One party may gain and become entitled to exercise and enforce a right or benefit, whereas another may become subject to a liability or disbenefit which they are obliged to discharge or suffer. There are many examples in property legislation of timetabled machinery of the present kind which determines whether the alteration of a legal relationship (or its terms) may or may not take place, with or without a hearing before a court or tribunal. One objective of such machinery is to achieve legal certainty for the parties to a contract. The introduction of a "Pomiechowski discretion" into legislation of this type would substantially undermine that certainty, even allowing for the very narrow and highly exceptional nature of the discretion (see above).That is a powerful consideration.

43. Second, action of the kind taken in the present case by the landlord, namely to increase rent, is nowhere near as serious as deprivation of liberty, or removal from the UK, or permanent exclusion from a profession. It is a normal incident of a landlord and tenant relationship that the rent may be increased from time to time in accordance with the legislation. Sometimes that may give rise to issues of affordability for a current tenant. But even if he or she finds it necessary to move out because they can no longer afford the accommodation, it does not follow that they will become homeless or that less expensive alternatives will be unsuitable or even less suitable.

44. Third, the time limits laid down by the 1988 Act for the tenant to take action are not onerous. Fourth, the legislation requires forms to be used which make it plain what action needs to be taken, in particular by the tenant (see for example the Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 2015 SI 2015 No 620, as amended). Fifth, that action is relatively straightforward, namely the sending by the tenant of a notice in form 5, to the FTT (contrast the more intensive action required by extradition legislation for persons in custody the subject of Pomiechowski). Sixth, in the interests of legal certainty, the legislation not only prescribes a time limit for the tenant's action but also the consequences of a failure to take such action, namely the substitution of the increased rent specified in the landlord's notice from the date given in that notice.

45. In my judgment neither the legislation in the present case, nor the considerations involved, are remotely analogous to the statutory regimes addressed in Pomiechowski and Adesina. Accordingly, I am not persuaded that it is arguable that a "Pomiechowski discretion" should be read into section 13(4) and 14(1). For these reasons, the application for permission to appeal must be refused.

46. However, if I had reached the opposite conclusion, the next question would have been how should that discretion be exercised in this case? By definition the FTT has not exercised any such discretion because they decided, rightly in my judgment, that they lacked jurisdiction to entertain Mr Robertson's application. In this situation it would be permissible for me to determine how that discretion should be exercised, rather than sending the matter back to the FTT (see s. 12(2)(b)(ii) and (4) of the 2007 Act). The parties agreed that I should consider this second issue on the material now before the Tribunal.

47. After having given the Applicant ample opportunity during the hearing to bring to the Tribunal's attention any matters which might assist him, I have reached the firm conclusion that it would be wholly inappropriate for any "Pomiechowski discretion" to be exercised by extending time in this case.

48. Where the discretion is potentially applicable, its scope is "extremely narrow" and only arises in a very small number of exceptional cases (see Adesina). It is limited to preventing the impairment of the very essence of a person's right to a hearing, and where he or she demonstrates that they did all they could to bring the appeal timeously.

49. The order made by the High Court merely said that it was arguable that the Applicant should have been allowed to put his case before the Property Chamber. However, the judge's reasoning did not identify any legal basis for departing from the clear words used in the legislation, or address Pomiechowski or Adesina or consider the scope of any putative discretion to extend time. At all events it was plain from the directions made on 1 June 2018 that Mr Robertson should provide any additional documents or representations upon which he might wish to rely, so that they could be taken into account at this hearing.

50. At the hearing I asked Mr Robertson whether he wished to add anything to support his contention that an extension of time should be granted. He responded that all he wanted to say was already contained in the documentation he had previously provided and he did not to wish to take up time at the hearing by repeating himself.

51. In summary, the Applicant stated in his Statement of Facts and Grounds before the Administrative Court that he had previous experience of the procedure for challenging a statutory notice to increase the rent and that it would have made no sense for him to ignore the Respondent's notice served on 2 March 2017. He said that he had been "extremely ill" at the time. However, the nature of that illness or how its effects impaired Mr Robertson's ability to deal with any notice was not further elaborated. No medical report, such as a letter from a doctor was provided. No evidence was provided to explain and substantiate the economic consequences for the Applicant of the rent being increased to £1,500 pcm on his four bedroom house.

52. Mr Robertson's decision not to provide any further material was of some concern to me because on the material before the High Court and the Upper Tribunal (which included the material before the FTT), no proper basis could be identified, in accordance with the principles in Pomiechowski and Adesina, for granting the necessary extension of time of some 6 weeks (ie to 19 May 2017). No evidence was provided to show that the Applicant had personally done all that he could to bring the appeal timeously. There was no evidence about the nature of the medical issues and their effect. Mr Robertson merely *assumed* that a "house-minder" had destroyed the letter, after having confused it with "junk mail". But he did not identify the names of the persons involved or obtain any evidence from them as to whether they had handled any mail and if so how. He did not even suggest that he had ever had any conversation with any these unnamed individuals about the subject. It was simply a matter of assumption.

53. In these circumstances, and in order to assist Mr Robertson present any additional argument reasonably open to him, I asked him some questions about his

circumstances in March and April 2017. Unfortunately for him, the additional information which Mr Robertson provided in his candid answers did not improve the merits of his request for an extension of time.

54. About one year before the landlord's notice was served in March 2017, Mr Robertson had been diagnosed with cancer. No details of this illness or treatment were given. In March 2017 the Applicant says that he was very ill, but he was living at home, remaining day and night in the downstairs living room. He also told me that he had limited vision in one eye.

55. In his letter to the FTT dated 19 May 2017, Mr Robertson said that because of the cancer his condition fluctuated radically from day to day. There were periods when he could "get out of the house at least once a day" and others when he was "totally dependent on whoever is able to come to the house." Mr Robertson told me that that description of his fluctuating circumstances also applied to the period between March and April 2017.

56. I also note that in his letter of 19 May he told the FTT that "recently" he had lost nearly all vision in his "good eye", although that was "now starting to revive", and this problem had coincided with a period when none of his helpers had been able to visit the house "and hence the delay in writing *this* letter" (emphasis added). However, in an answer to a question from me, Mr Robertson stated that this additional problem with his eyesight had not applied before the beginning of May 2017. He told me that he had been aware of the contents of the landlord's letter dated 24 April 2017 soon after it was sent to him. Indeed, it caused him to send his letter in reply dated 1 May 2017.

57. I asked Mr Robertson how his financial affairs were run during March and April 2017. He confirmed that he had had bills to pay, for example for credit cards and utility services. During this period, he himself had been operating his bank account using the internet. Mr Robertson added that when occasionally he had been too unwell to do this, he had relied upon one helper or friend whom he trusted to access and operated his bank account on his behalf.

58. On the material before the Tribunal I am wholly unpersuaded that the Applicant did all he reasonably could to serve a referral notice within the statutory time limit or even timeously thereafter, or that he was unable to do so for reasons which would amount to "exceptional circumstances" satisfying the principles in Pomiechowski and Adesina.

59. The starting point is that this is a case where the landlord's notice was properly served, and not merely treated as having been served by virtue of a statutory deeming provision (cf. Adesina at para. 14). There is no doubt that the letter was put through Mr Robertson's letter box. Furthermore, this is not a case where there is evidence that throughout the period between 2 March and 6 April 2017 Mr Robertson was unable to deal with the landlord's notice because of ill health. Instead, he stated that he was he able to, and did, deal with his affairs from time to time during March and April. Given these circumstances, Mr Robertson's explanation for not referring the notice to the FTT before 7 April 2017 is crucially dependent upon his bare *assumption* that one of the persons who provided him with assistance at home took the step of tearing up a

letter addressed to him, confusing it with junk mail. This is a bare assumption because it is unsupported by any real evidence (see para. 52 above).

60. However, the matter does not end there. Even assuming that Mr Robertson had no awareness of the landlord's notification of an increased rent before he received the letter dated 24 April 2017, he did not act timeously at that stage. He sent a letter to the landlord's agent on 1 May 2017 stating that he would refer the rent increase to the FTT, but despite the obvious need for this to be done urgently (something that was plain to Mr Robertson from his previous experience of the procedural requirements), he did not take that relatively simple step at the same time. By 1 May 2017 any notice from Mr Robertson under section 13(4) would already have been some 3½ weeks out of time. In fact, Mr Robertson's notice of referral was not sent for a further 18 days. He candidly said to me that he could not profer an explanation for this overall delay between 24 April and either 1 May or 19 May 2017.

61. Looking at the matter overall, the points relied upon by Mr Robertson fall very far short of the sort of exceptional circumstances which could justify an extension of time in accordance with Pomiechowski and Adesina, even if, contrary to the view I have reached, that jurisdiction is applicable to sections 13(4) and 14(1) of the 1988 Act. For these additional reasons, permission to appeal must be refused.

62. As the law currently stands, it would be inappropriate for a party to ask this Tribunal to accept, without full argument, that a time limit in property legislation of the kind with which this case has been concerned is subject to a "Pomiechowski discretion". In that event, the assistance of a "friend of the Tribunal" would very likely be necessary, to ensure that the implications for this and similar legislation (including statutory codes applied in the County Court) are properly addressed. Any attempt to argue that a discretion to extend time limits should be read into such legislation, where Parliament has not seen fit to confer that power, would have to grapple with the very real issues that would arise. In the present case there was no justification for adjourning the application for permission to appeal for further legal argument on this point of principle, because it was plain that even if, contrary to my conclusion, the FTT had any discretion to extend time, it could not possibly be exercised in the Applicant's favour on the material before this Tribunal.

Friday the 20th of July, 2018