



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2021-000695-UOTH

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

Between:

M.Z.

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 29 September 2022

Decided on consideration of the papers

Representation:

Appellant: In person

Respondent: Ms Emma Fernandes, Decision Making and Appeals, DWP

DECISION

I grant permission to appeal. Furthermore, the decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 29 April 2021 under number SC124/21/01043 was made in error of law. Under section 12(2)(a) and (b)(i) 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 re-hearing.**
- 2. The new First-tier Tribunal (FTT) should not involve the tribunal judge who considered this appeal on 29 April 2021.**
- 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.**

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

REASONS FOR DECISION

1. The Appellant's appeal to the Upper Tribunal succeeds; but there will need to be a re-hearing of the original appeal before a new First-tier Tribunal.
2. The First-tier Tribunal's decision in this case involves a legal error. I therefore set aside the Tribunal's decision. The decision may or may not have been right on the facts.
3. The case now needs to be reheard by a new, different First-tier Tribunal (FTT). I cannot predict what will be the outcome of the re-hearing. So, the new tribunal may reach the same, or a different, decision to that of the previous Tribunal. It all depends on the findings of fact that the new Tribunal makes when applying the relevant law.
4. On 29 April 2021 the FTT struck out the appeal on the basis that the appeal had been lodged outside the 13 month time limit. The Appellant, via her husband, then applied for permission to appeal.
5. I directed the Secretary of State to make a submission on the application for permission to appeal, stating:
 1. This is an application for permission to appeal by the Appellant against the First-tier Tribunal (FTT)'s decision striking out her appeal. On the face of it the prospects for the application do not look good. I say that as it appears to be conceded that the appeal was lodged more than 13 months after the date of the mandatory reconsideration notice. If so, it would seem the tribunal lacked the jurisdiction (the legal power) to deal with the appeal: see rule 22(8) of the Tribunal Procedure (FTT) (SEC) Rules 2008. However, there are two matters that should be explored before a decision on the application is made.
 2. First, should the FTT have considered whether there were exceptional circumstances such that the 13 month otherwise absolute time bar could be relaxed? See e.g. *Adesina v NMC* [2013] EWCA Civ 818 and *KK v Sheffield CC (CTB)* [2015] UKUT 367 (AAC). I recognise that the bar for exceptionality is set very high by those cases.
 3. Second, and possibly on a related matter, did the actions (or omissions) of the Department and/or the JobCentre materially contribute to the reasons why the appeal was lodged late? This might have a bearing on whether the circumstances were truly exceptional.
6. Ms Emma Fernandes, the Secretary of State's representative in these proceedings, supports the appeal to the Upper Tribunal on both grounds.

7. On the former point, she argues that “the FtT have not considered their discretion, or explained how they exercised it if they did, in considering whether an oral hearing should be held in order to determine whether permission to appeal should be granted”. This is a reference to the principle set out in *KK v Sheffield City Council (CTB)* [2015] UKUT 367 (AAC). That case confirmed that the tribunal has a discretion to admit an appeal that was submitted outside the maximum time limit. This discretion would only arise in exceptional circumstances where the appellant can show that they have personally done all they could to bring the appeal in time.

8. On the latter point, Ms Fernandes submits as follows:

“30. Overall, the appellant was waiting on DWP to award UC to the appellant in light of her settled status in the UK and requested updates on multiple occasions within the 13-month time limit, but DWP have seemingly failed to action this in a timely manner. As such, I submit that the FtT have erred in law by failing to exercise their discretion in considering whether it was appropriate to hold an oral hearing of the application for permission to appeal in which to assess whether the circumstances are exceptional.”

9. I agree that the Tribunal’s decision involves an error of law for the reasons outlined above. I therefore allow the appeal and set aside the previous Tribunal’s decision.

10. I grant permission to appeal. I also conclude that the decision of the First-tier Tribunal involves an error of law, as both parties agree. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 29 September 2022