Neutral Citation Number: [2022] EWHC 890 (Admin)

Case No: CO/2076/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

13th April 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

GYORGY RAKOCZY	**Appellant**
- and -	
GENERAL MEDICAL COUNCIL	**Respondent**

- -
- -

Alan Bates (acting pro bono, instructed by Advocate) for the **Appellant**
Peter Mant (instructed by GMC) for the **Respondent**

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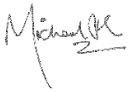
Hearing date: 1/4/22
- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This was the in-person hearing of the Appellant's application to set aside an Order, made on 20 December 2021 by HHJ Pearce ("the Judge"), striking out his appeal. That Order was made of the Court's own motion and so the application to set it aside is by way of a rehearing pursuant to CPR 3.3(5). In deciding whether I think it was "wrong" to strike out the appeal, I am to give "due weight" to the Judge's assessment (Kutzentsov v Camden LBC [2019] EWHC 3910 (Admin) at §24). The Judge, moreover, clearly had in mind the leading case of Adesina v Nursing and Midwifery Council [2013] EWCA Civ 818 [2013] 1 WLR 3156. He did not, however, have the benefit of the entirety of the materials placed before me, nor of the authorities cited to me, nor of legal submissions developed in writing and orally before me. In the particular circumstances of the present case, I am satisfied that it is appropriate for me to look at the questions raised entirely afresh.

Extension of time

2. In substance, what I have to decide is whether to exercise this Court's power (which it is common ground that I have) to extend time for the appeal, in circumstances where (as is also common ground) the appeal was not properly filed, in the legally compliant manner, within the statutorily-prescribed 28 day time limit. The function of extending time is one which arises exclusively in the context of securing compatibility with Article 6 of the ECHR as scheduled to the Human Rights Act 1998, as applicable to this context. It is a function discussed in Adesina at §§14-15 and, more recently, in Gupta v General Medical Council [2020] EWHC 38 Admin at §§44 to 47. The line of cases involving refusals to extend time are set out in Gupta at §§46-47.

> ***46. In her Skeleton Argument for the GMC Ms Emmerson referred to a number of first-instance cases which she rightly said demonstrate the strictness with which the Court has applied the Adesina test. These include Adegbulugbe v Nursing and Midwifery Council [2013] EWHC 3301 (Admin); Pinto v Nursing and Midwifery Council [2014] EWHC 403 (Admin); Parkin v Nursing and Midwifery Council [2014] EWHC 519 (Admin); Darfoor v General Dental Council [2016] EWHC 2715 (Admin); Kabba v Nursing and Midwifery Council [2016] EWHC 3677 (Admin). The earlier of these cases were cited with approval by the Court of Appeal in Nursing and Midwifery Council v Daniels [2015] EWCA Civ 225.***
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> ***47. In these decisions a wide range of circumstances were rejected by the Court as amounting to exceptional circumstances justifying an extension of time to comply with Article 6. These include (a) difficulties in obtaining legal advice or legal aid (Adesina; Kabba); (b) inability to raise funds to pay the court fee in time (Daniels); (c) a degree of ill health or stress (Pinto); (d) where the delay in question was very short, ie, one or two days after the deadline (Adesina; Adegbulugbe; Parkin; Darfoor).***

With one exception, Counsel told me they had not uncovered any case in which an extension of time had been granted in the 9 years since Adesina, where extensions of time were also refused. The exception is Daniels (cited in Gupta at §46), where an extension had been granted by this Court, only to be overturned on appeal by the Court of Appeal.

Background and context

3. What had happened in this case is that the Medical Practitioners Tribunal ("MPT"), on conducting a review of a previously-imposed order imposing conditions on the Appellant's registration as medical practitioner, reached a decision on 27 April 2021 and the Medical Practitioners Tribunal Service ("MPTS") communicated it the following day. The MPT found an "impairment" as to Appellant's "fitness to practise". It decided that it was appropriate to replace the previous conditions order with a 12-month suspension. That suspension was to take place from 2 June 2021. It would be reviewed when the 12 months had expired, though the Appellant could ask for an early review. The suspension would not take effect if the Appellant exercised his right of appeal to the High Court pursuant to section 40 of the Medical Act 1983. The Appellant wanted to appeal. In particular, he wanted to argue before this Court that English language testing relied on by the MPT constituted unlawful and unjustifiable age discrimination. I have heard and considered no submissions on either side about the merits of the appeal.

4. The following points were all common ground for the purposes of the hearing before me. (1) The final day for the filing of an appeal by the Appellant was Wednesday 26 May 2021. (2) An appeal was not properly commenced unless the Appellant's Notice (a "Form N161") was accompanied by the requisite fee (£240) or – at that time when the fee was required to be paid – an application for fee remission made by filing the application (a "Form EX160"). As it was put in Gupta at §57: "an Appellant's Notice requires a fee, or an application for remission of the fee". (3) Given the arrangements during the pandemic, it would have sufficed for the N161 to be filed – at least in London – by email and the accompanying EX160 to be submitted through the online portal. (4) The Appellant filed a Form N161 by email on 21 May 2021. (5) No Form EX160 was filed by the Appellant at any time prior to the deadline on 26 May 2021. (6) His first step to supply the EX160 was when he used the online portal on 6 June 2021.

5. There is a domestic statutory underpinning for the requirement that an application for remission of a fee must be made at the time when the fee is otherwise payable (here, 26 May 2021) with the consequence that, if that application is duly made, the date for payment of the fee is then disapplied. Express provision to this effect is made in Schedule 2 §15 to the Civil Proceedings Fees Order 2008 (SI 2008 No. 1053). This aspect of the present case can therefore be contrasted with one of the features of the Strasbourg case of Frida v Ukraine App. 24003/07 (8 December 2016) which concerned insistence on conditions relating to the form of an application for an extension of time, default in the provision of which had been treated by the Ukraine court as a basis for dismissing the appeal. In that case, one point which the Strasbourg Court held against the Ukraine authorities in finding a breach of Article 6 was that the conditions insisted on "were not formalised explicitly in the domestic law and were relegated to the level of domestic practice which did not ensure sufficient guarantees against arbitrariness" (see Frida at §38). Frida is one of Four Strasbourg Authorities to which I will be returning.

Three key passages

6. It will aid my discussion of the legal arguments if I first set out some key passages from the case-law. What underpins them all is Article 6 (Adesina at §4), which protects the fundamental right of access to the court. The first key passage is in Tolstoy Milaslavsky v United Kingdom (1995) 20 EHRR 442, where (at §59) the Strasbourg Court said this (numbering added):

> ***The Court reiterates that the right of access to the courts secured by Article 6(1) may be subject to limitations in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied, [1] firstly, that the limitations applied do not 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 is impaired. [2] Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.***

For ease of reference, I am going to use the phrase "the Dual Principles" as a shorthand for the requirements described at [1] and [2] of this passage. The Dual Principles are referenced in Pomiechowski v Poland [2012] UKSC 20 [2012] 1 WLR 1604 at §§22 and 33; and in Adesina at §4. The Dual Principles also feature in the Four Strasbourg Cases on which Mr Bates has relied, to which I will return. As can be seen from Adesina (at §§5-6), the Dual Principles govern not only the Article 6 compatibility of a statutory provision but also the Article 6 compatibility of the application of that provision.

7. Secondly, there is this key passage from the judgment of Lord Mance (for the Supreme Court) in Pomiechowski at §39:

> ***In the present case, 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 that 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.***

This passage was cited in Adesina (at §10) and applied in that case (at §15) in another key passage, to which I will shortly turn. For ease of reference, I am going to use the phrase "the Mance Observation" as a shorthand for this phrase, at the end of §39:

> ***The High Court … 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.***

I interpose at this point that what the Supreme Court decided in Pomiechowski, having regard to the Dual Principles (derived from Tolstoy), was: (i) that it was appropriate and permissible, pursuant to section 3 of the HRA, to "read in" words to the absolute and inflexible statutory time limit for extradition appeals (see §§38-39, 50) and (ii) that a decision to exercise the resultant power to extend time was appropriate in Mr Halligen's case (see §§38-39, 41, 50). Mr Halligen – one of the requested persons in Pomiechowski – was an extradition appellant who was detained and whose solicitors had "let him down" in defaulting on the duty to serve his appeal on the other parties (see §15); hence Lord Mance's reference to "and service".

8. Thirdly, there is a key passage from Adesina at §§14-15. I interpose here that what the Court of Appeal decided in Adesina, having regard to Pomiechowski and the Dual Principles (derived from Tolstoy), was: (i) that it was appropriate and permissible (departing from the rigidity of the prior approach found in the prior Mitchell/Reddy line of cases) to "read in" words to the absolute and inflexible statutory time limit for

regulatory and disciplinary cases; and (ii) that a decision declining to exercise the resultant power to extend time was appropriate in the cases of the two appellants, who had "simply left it too late" (§16). At the heart of the analysis in Adesina, having discussed (at §13) the "contextual differences" between extradition appeals (as in Pomiechowski) and appeals in regulatory and disciplinary cases (as in Adesina), Maurice Kay LJ (for the Court of Appeal) said this (at §§14-15):

> ***14. Are these differences sufficient to leave the Mitchell/Reddy line of authority untouched by Pomiechowski's case? In my judgment, they are not. 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 … 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.***
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> ***15. The real difficulty is where to draw the line. Mr Pascall, on behalf of the claimants, does not contend for a general discretion to extend time. Parliament is used to providing such discretions, often circumscribed by conditions: see, for example, section 111(2) of the Employment Rights Act 1996 in relation to unfair dismissal. The omission to do so on this occasion was no doubt deliberate. If article 6 and section 3 of the 1998 Act require article 29(10) of the 2001 Order to be read down, it must be to the minimum extent necessary to secure compliance with Convention. In my judgment, this requires adoption of the same approach as that of Lord Mance JSC in Pomiechowski's case [2012] 1 WLR 1604, para 39. A discretion must only arise "in exceptional circumstances" and where the appellant "personally has done all he can to bring [the appeal] timeously". I do not believe that the discretion would arise save in a very small number of cases. Courts are experienced in exercising discretion on a basis of exceptionality. See, for example, the strictness with which the discretion is approached in relation to the 42-day time limit and the discretion to extend in connection with appeals from employment tribunals to the Employment Appeal Tribunal: United Arab Emirates v Abdelghafar [1995] ICR 65 and Jurkowska v Hlmad Ltd [2008] ICR 841.***

For ease of reference, I am going to use the phrase "the Kay Observation" as a shorthand for the following sentence, found in the middle of Adesina §15:

> ***A discretion must only arise "in exceptional circumstances" and where the appellant "personally has done all he can to bring [the appeal] timeously".***

The Four Strasbourg Cases

9. I turn next to the Four Strasbourg Cases on which Mr Bates relied. They are cases drawn from different contexts. They are all cases in which the Strasbourg Court concluded that domestic courts' dismissal of applications or appeals, based on a rigid insistence on adherence with domestically-recognised procedural preconditions, involved a violation of Article 6. They are all cases which had the Dual Principles at their heart.

    i) In Walchli v France App. No. 35787/03 (26 July 2007) the Strasbourg Court applied the Dual Principles (which it set out at §28) to a situation in which the French court had rejected an application for a declaration of nullity, because of

a default as to a procedural requirement. The default was in not having obtained a signed declaration from the registrar when filing the application. The Strasbourg court reasoned that domestic courts must, in applying procedural rules, avoid an "excess of formalism" which could "undermine the fairness" of the proceedings. In the "particular circumstances" of the case, the rejection of the appeal suffered from "excessive formalism" and imposed a "disproportionate burden", "upsetting the right balance" between "the legitimate concern to ensure compliance with formal conditions for bringing proceedings before the courts" and "the right of access to the court": see §§29, 32 and 36. The "circumstances" included that the applicant (and their lawyer) had in substance done everything that was required, and the French court could itself reasonably have been expected to provide the lawyer filing the application with the requisite registrar's declaration: see §§33 and 35.

ii) In Evaggelou v Greece App. No. 44078/07 (13 January 2011) the Strasbourg Court applied the Dual Principles (which it set out at §17) to a situation in which the Greek court had rejected an appeal on the basis that the legal representative, in filing the appeal, had not filed an attached proof of authority to act. The Court concluded that, in all the circumstances of that case, that was an "overly formalistic" approach which "imposed a disproportionate burden", "upsetting the fair balance" between "the legitimate concern to ensure compliance with the procedural requirements surrounding the lodging of the appeal" and "the right of access to the court": see §§19, 23 and 24. The features of the case included these facts: that it would have been acceptable to the Greek court if the legal representative had explicitly mentioned that they had acted for the appellant in the lower court (see §22); that this acceptable alternative means of compliance was an informal practice not embodied in the Greek law (see §23); and that the consequences of finding the appeal inadmissible was that an appeal could not be heard on its merits in the context of conviction at a criminal trial (see §24).

iii) In Frida (8 December 2016) the Strasbourg Court again applied the Dual Principles (which it set out at §32), this time to a situation in which the Ukraine court had rejected an appeal by a company on the basis that there had been a failure to file the requisite application for an extension of time (see §21). The Court concluded that the Ukraine court had "showed excessive formalism" and that the applicant company's rights to have its case reviewed on points of law was restricted disproportionately (see §38). The circumstances included: that the applicant company had filed a letter which in substance constituted an application for the extension of time, containing all the relevant substantive content, and lacking only the document title announcing it as a procedural application (see §38); and that the requirement for the application for an extension of time to be in a particular form was one which had arisen from practice and not explicitly in domestic law (see §38).

iv) In Shuli v Greece App. No. 71891/10 13 July 2017 the Strasbourg Court applied the Dual Principles (which it set out at §24) to a situation where the Greek court had dismissed an appeal on the basis that there had been a failure to include a description of grounds for appeal in the form, as required by Greek law (see §10). The Court concluded that the Greek court had declared the appeal to be inadmissible as a result of "excessive formalism", failing to "strike a fair balance

between the means employed and the aims pursued". The Court emphasised the importance of the appeal and what was at stake for the appellant who was appealing against conviction in a criminal case where he had been convicted and sentenced to a long term of imprisonment (see §29). The circumstances included: that the appellant had been led, handcuffed and in person, to the registry to sign the appeal form, the contents of which form could not have led him to think that more was needed (see §§30-31); that there was a single-sentence, generic description of grounds of appeal habitually used in the form and accepted by the Greek courts (§32); and that it was to be expected that if the registrar were not including that generic sentence in the form this would have been brought to the appellant's attention (§32).

Essence of the arguments as to the law

10. Having identified these building blocks, I can now turn to the arguments on the law. There was clear divergence between the position advanced by Mr Bates for the Appellant and the position advanced by Mr Mant for the Respondent. The argument advanced by Mr Mant for the Respondent, in essence as I saw it, is as follows.

i) There is no general discretion to extend time and no general "reasonableness" test. The correct question for this Court to ask is the one which was described in the Mance Observation, and which was adopted in the Kay Observation.

ii) To that formulation, there is one qualification only: the word "reasonably" needs to be implied, so that the Court asks whether there are "exceptional circumstances" in which the out of time appellant "personally has done all he reasonably can to bring and notify timeously". This qualification is appropriate because there may be actions which it would have been "possible" for the putative appellant to take but which it would be unreasonable to expect them to have taken.

iii) Subject to that single (and obvious) qualification, the Mance Observation – adopted and restated in the Kay Observation – authoritatively provides the legal test which the High Court must apply in deciding whether to grant an extension of time. It does not therefore assist for an appellant to refer to the Dual Principles, which are in truth two features of a single concept which requires the 'essence of the statutory right of appeal to be impaired'. Nor does it assist for an appellant to refer to the Four Strasbourg Cases, or any others, which apply the Dual Principles. Their application is context-specific and the cases necessarily involve a series of different contexts.

iv) True, the Dual Principles were the starting point, but they needed to be applied in the relevant domestic context, and through the principled framework of the Human Rights Act 1998 as applicable to the domestic primary legislation. Pomiechowski was concerned with specific questions about the way in which the Dual Principles took shape and effect (a) in the specific context of extradition appeals and (b) as the "possible" interpretation (HRA s.3) going "with the grain" of the domestic primary legislation. The Mance Observation gave the answer, as the principled embodiment of the appropriate approach, articulated as a clear test for the High Court to apply. Adesina then adopted Pomiechowski, (a) in the specific context of disciplinary and regulatory appeals

and (b) as the "possible" interpretation (HRA s.3) going "with the grain" of that legislation.

v) In fact, the position is even more straightforward. The Kay Observation is part of the decisive reasoning in Adesina, which makes it binding on the High Court. In the Kay Observation, the Court of Appeal has authoritatively explained its understanding of the Mance Observation; and it has authoritatively given its formulation of the test as applicable in regulatory and disciplinary appeals. This is clear from the language which was used in the Kay Observation. It is also clear from the context in which the Kay Observation is found, in a passage specifically identifying "where to draw the line". The High Court has authoritatively been told where to draw the line.

vi) For all these reasons, the sole and straightforward question for this Court is whether there are "exceptional circumstances" in which "the Appellant personally has done all that they reasonably could to bring and notify the appeal timeously".

11. Wrong, says Mr Bates for the Appellant. The argument which he advanced, in essence as I saw it, is as follows.

i) It is true that there is no general discretion to extend time and no general "reasonableness" test. The correct question for this Court involves the Court applying the Dual Principles, as illustrated by the Article 6 caselaw, exemplified by the Four Strasbourg Cases. The question for the Court – as formulated for a case concerning a time limit in a statutory right of appeal – is whether in the circumstances of the individual case enforcement of the time limit (i) would impair the very essence of the statutory right of appeal or (ii) would involve the absence of a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

ii) In answering those questions, as the Four Strasbourg Cases demonstrate, the High Court is looking to see whether rigid insistence on the statutory time-limit (and provisions regarding what steps are required within that time-limit) involves excessive formalism, imposes a disproportionate burden on the appellant, and fails to strike a proper and fair balance.

iii) It was the Dual Principles which were being identified in Pomiechowski (see §§22, 33 and 39), and again in Adesina (see §§4 and 39). It is those Dual Principles which the Supreme Court was adopting in the extradition appeals context in Pomiechowski at §39, and in the regulatory and disciplinary appeals context in Adesina at §15.

iv) The Mance Observation was not in the nature of a legal litmus test. Rather, it was a statement of an example of a situation when the Dual Principles would be answered in favour of extending time for the appeal. If the Kay Observation was adopting the Mance Observation as a legal litmus test it was wrong to do so and, since that was not a decisive part of the Court of Appeal's reasoning, it is not binding on this Court.

v) What the Supreme Court in Pomiechowski and the Court of Appeal in Adesina were doing was identifying a discretion to extend time where to do so is necessary to avoid a breach of Article 6. They were interpreting the domestic legislation compatibly with Article 6: no more, but no less. If the High Court is satisfied that refusal to extend time would involve a breach of Article 6, the Court should extend time.

12. Those are the arguments as to the approach that the Court should take. Each Counsel submits that, on their suggested legal analysis, they should succeed on the facts of this case. However – and as is often the case – each Counsel also submits as a 'fallback' that they should succeed on the facts, even if the other is right as to the law.

13. I am going to turn next to examine Mr Bates's argument on the facts. But I deal with one point immediately, relating to the law. In my judgment, Mr Mant (with whom Mr Bates agrees on this point) must be right to accept that the Mance Observation and the Kay Observation would need, on any view, adjustment to include "reasonably". To take the example in Pomiechowski, Mr Halligen could personally have written to his solicitors every day to remind them to notify his appeal, or he could personally have written to the other parties telling them about his appeal. That was possible, but it was unreasonable to expect this of him. In relying on his solicitors to notify the appeal timeously, he was doing all he reasonably could. To take another example, in Maurice Kay LJ's 'blameless ignorance' example, it may have been possible for the putative appellant to have been in daily contact with the MPTS to check whether there is an unpromulgated decision. But it would be unreasonable to expect that of them.

The Appellant's argument on the facts

14. The essence, as I saw it, of Mr Bates's argument on the facts is as follows.

i) The Appellant submitted his appeal notice on Friday 21 May 2021. That was filing the notice of appeal in the requisite form (Form N161), by a legally permissible means (email). It was well before the actual statutory deadline (Wednesday 26 May 2021) and even more prompt viewed against the deadline which the MPTS had mistakenly calculated and told him was applicable (1 June 2021).

ii) The Appellant made the mistake of not filing a Form EX160 as a document – or by the online portal – with the appeal notice. As his witness statement explains, the Appellant "knew that I had to … pay a fee to the court within the 28 day time limit", but being unable "to afford the fee due to my financial situation … I believed that I was entitled to waiver of the court fee based on my income". It was in those circumstances that he made clear, on the face of the appeal notice, that he was requesting a fee waiver. His appeal notice said "I respectfully request the High Court to accept this case free of charge", underneath which he gave an outline of his income. He also stated in the covering email: "If you need any other document, please let me know". It was, and is, obvious to anyone that he intended to apply for a fee waiver. It is also the case that he was entitled to a fee waiver and would have received one, had he filed Form EX160 at the outset.

iii) Within one working day of being alerted to the problem by the Administrative Court, he took corrective action. The Court wrote to him on Friday 4 June 2021

by email at 15:45, alerting him to his failure to file Form EX160. By Sunday 6 June 2021 he had filed the EX160 by a legally permissible means (the online portal). That was 11 days late viewed against the actual statutory deadline (Wednesday 26 May 2021) and 5 days late viewed against the date which MPTS mistakenly gave him (1 June 2021).

iv) Although he made a mistake in not filing the Form EX160, and clearly got confused when using the "Aarhus Convention" section of the Form N161 to ask for a fee waiver and provide supporting information, he was an unrepresented litigant doing his level best. He made an honest mistake, just as the MPTS made an honest mistake when they gave him the wrong date (1 June 2021).

v) The fact is that the Court itself took 11 days, from receipt of the N161 (unaccompanied by a Form EX160) on Friday 21 May 2021, to writing the letter on Friday 4 June 2021. If the Court had acted promptly, the Appellant would have filed his Form EX160 in time. He had asked the Court to let him know if any further document was needed. In other cases, appellants have been contacted very promptly (on the same day) to alert them to the defect: see Naqiub v GMC [2013] EWHC 1766 (Admin) at §9 and Gupta at §§23, 25.

vi) Had he been contacted by the Court on Monday 24 May 2021 or Tuesday 25 May 2021, action within one working day – which is what he later took – would have been action within time. Moreover, there were, in the period after 21 May 2021, email communications after 21 May 2021 between the Appellant and the Administrative Court in London and Manchester.

vii) After Form EX160 was provided by the Appellant a number of things have happened to consolidate the position: the appeal was issued by the Court; the remission was processed and was granted; the appeal was acknowledged by the Respondent; the Respondent confirmed that the suspension on the Appellant's registration would not take effect in light of the appeal; the Court proceeded to deal with the case; the parties were notified by the Court that the case was entering the warned list; the Court made a minded to transfer order (from London to Manchester); and the Court made a transfer order.

viii) This avenue of appeal is important. The implications of suspension of a medical professional's registration are serious. There is no conceivable prejudice. In all the circumstances, for the Court to dismiss the Appellant's appeal, on grounds of his failing to file Form EX160, would constitute excessive formalism, would impose a disproportionate burden, and would fail to strike a fair balance. The Strasbourg Court would find an Article 6 breach in this case, as is illustrated by the Four Strasbourg Cases. Time should be extended.

ix) In fact, even if the test is that there must be "exceptional circumstances" in which "the Appellant personally has done all that they reasonably could to bring and notify the appeal timeously", that test is met on the facts. The Appellant did, personally, do all he reasonably could. Time should be extended.

Discussion: the facts

15. I begin my discussion of the factual aspects of the case by making clear that I accept the following points, in the Appellant's favour, on the evidence.

    i) I am satisfied – so far as concerns the filing of a Form EX160 – that the Appellant took an appropriate and sufficient step on 6 June 2021, by providing the requisite Form EX160 digitally, by uploading the required information to the Administrative Court Office in London through use of the permissible alternative mechanism of the "Help With Fees" ("HWF") online portal. There has been some discussion as to whether the application for fee remission was only in fact filed on 9 June 2021. That is what the Judge thought. I am satisfied, on the evidence before me, that it is appropriate to take a different view, in the Appellant's favour. The Appellant has filed witness statement evidence which states that he submitted an application for remission of fees in that way, on 6 June 2021. There are also contemporaneous documents. His email of 9 June 2021 to the Court said he had "completed the form electronically". His earlier email of 7 June 2021 had recorded the fact of his having received, through use of the online portal, an HWF reference number. The contemporaneous documents show that he then inserted that HWF reference number in a further copy of Form N161 which he refiled on 9 June 2021.

    ii) I am satisfied that if, within one or two working days of the email submission of the Appellant's Form N161 on 28 April 2021, the Court had alerted the Appellant by writing the letter that was sent on 4 June 2021 – on the balance of probabilities – the Appellant would have provided Form EX160 in time for the actual deadline (26 May 2021), and well ahead of the deadline which he had been given by MPTS (1 June 2021). That finding is based on the fact that the Appellant did, on receipt of the letter, act within one working day. And, if anything, a prompt response from the Court would have been likely to give a clear impression of urgency.

    iii) I am satisfied that it is appropriate to approach the circumstances of this case, as on the basis of assuming, in favour of the Appellant, that the practical implications of my refusing his application to set aside the Judge's order striking out his appeal are these. The 12 months suspension of his registration would be treated by the Respondent as beginning to run from the date of my Order. Before expiry of the 12 months there would be the further MPT review decision, which would be appealable if adverse, as was the decision of 27 April 2021.This means the Appellant would not be able to trigger a new appealable decision until around a year from now. The Appellant could request an early review of his suspension, and a decision taken after an early review hearing would be appealable. But an early review is not available as of right and the relevant rule refers to an early review being triggered by "information [being] received that, in the opinion of the Registrar, which makes an early review hearing desirable". The implications are therefore that the Appellant would be shut out, for more than a year from now, from being able to try again to advance the substance of the points which he is seeking to advance now in his appeal. There is an enduring and significant detriment to him for at least a period of the next 12 months. These are practical points that I raised with both Counsel at the hearing and on which I received written observations promptly after the hearing.

16. Having considered all the circumstances of the case, I am not going to grant an extension of time in the present case. If I take the legal position at its highest and most beneficial from the Appellant's perspective, directly applying the Dual Principles, and doing so having regard to the Four Strasbourg Cases, this is not in my judgment a case in which the refusal of an extension of time would be incompatible with Article 6. On a view of the law which is most favourable to the Appellant, I would not extend time in this case. Nor therefore can the Appellant succeed in obtaining an extension of time if the correct legal position is more restrictive. In my judgment, holding to the 28 day time limit and holding to the requirement to pay a fee or make a Form EX160 application within the 28 days, does not in all the circumstances of this case involve the very essence of the statutory right of appeal being impaired; it does pursue a legitimate aim and involve a reasonable relationship of proportionality between the means employed and the aim sought to be achieved; it does not constitute excessive formalism; it does not impose a disproportionate burden; and it does not fail to strike a fair balance. Nor, to be clear, can the Appellant satisfy the formulation which is found in the Mance Observation and the Kay Observation. As the Court of Appeal has observed (Daniels at §§38, 43), the Court does not – unfortunately – have a general discretion to extend time in all the circumstances.

17. In arriving at these conclusions, I have had regard to all the circumstances, including all of the features emphasised on behalf of the Appellant, but also including features of the case which were emphasised by Mr Mant. I would emphasise the following points:

    i) The requirement to file the appeal notice and pay a fee within the statutory 28 days and the requirement to file the Form EX160 instead of paying the fee, but within the statutory 28 days, are all clear, prescribed in legal instruments, and described in the guidance available online. Also clear and described online are the required contents which the Courts required to be supplied in an application (or online portal submission) for a fee waiver.

    ii) The Appellant did not file an application for a remission of fees using the appropriate form (EX160) or its online portal equivalent, until 11 days after the statutory deadline and 5 days after the deadline as the MPTS described it to him.

    iii) Nor did the Appellant provide the substantive content required by the Court to be submitted by an applicant for a fee remission. What he did was to include, within the "Aarhus Convention claim" (environmental claims) section of Form N161, in making reference to his appeal as "an Aarhus Convention claim", a reference to requesting the High Court to "accept" his case "free of charge" or "under the lowest possible cost capping". He did this, saying that the reasons were the public interest in him advancing his age discrimination challenge and his financial situation. In that context, he gave a description of his position as a pensioner and some figures for his NHS and state pension describing it as his only income and referring to a mortgage on his house. But these were not adequate details of disposable income and savings required for the purposes of making a decision on fee waiver. They were not provided in the right means, and nor were they the appropriate content. They could not be said to provide the same substantive content as would a form EX160 or online portal equivalent. The default was therefore not simply as to the form of the document.

iv) The Appellant was aware of the need for an appeal notice (Form N161). He was aware of the payment of a fee being required within the 28 days, as is recognised in his witness statement. And he was alive to the idea of waiver of the fee, as is also reflected in his witness statement and is reflected in the reference in his N161 to the Court being invited to "accept this case free of charge". There was very good reason why he should have been fully aware and fully able to make sure he did what was needed and in the right way, as I shall now explain.

v) MPTS had promptly sent the Appellant an Information Note, flagging up all the key points and providing clear signposts to sources of straightforward information. That was a helpful and appropriate step, given the strict 28 day time limit and the importance of the requirements relating to filing an appeal. There were designated weblinks with clear labelling, where all the answers were to be found. What happened was that, when the decision was served on him by the MPTS on 28 April 2021, it was accompanied by a two-page "Note for the information of practitioners on the suspension of registration by direction of a Medical Practitioners Tribunal". That Note explained that under section 40 of the 1983 Act it was open to the Appellant to appeal at any time within 28 days of the date on which notification of the direction was deemed to have been served on him. The Note stated that the appeal must be filed at Court any time within 28 days. The Note went on to say: "The rules, procedure and practice directions governing appeals, including provisions as to costs, found in the Civil Procedure Rules 1998. The online version of the civil procedure rules can be found at the following website [website]". The Note then said that the appeal should be made to the High Court in England and Wales. It clearly told the Appellant:

> ***For further information please see the following websites: appeals to the High Court of Justice in England and Wales [weblink given].***

The Note concluded by saying that, if the Appellant was in any doubt about his rights or the contents of the note or required any further information, he should contact a solicitor, professional organisation or citizens advice bureau.

vi) The webpage which the Appellant was specifically given in the Information Note, "for further information", was the guidance at the gov.uk website on "Administrative Court: bring a case to the Court". That webpage is clear and readily navigable. Its contents described the Administrative Court as dealing with statutory appeals, explained that there may be "strict time limits for some types of appeal" and stated that in order to "start a case" an appellant needed to fill in the relevant form. There was then a further series of weblinks given, the third of which was for 'starting a statutory appeal' (it gave access to the Form N161 which was the Form accessed by the Appellant because he used it). The guidance went on to refer to payment of the court fee stating: "you will usually have to pay a court fee to start your case". That was a clear and explicit reference to the fact that the timing for paying the fee was linked to starting the case, which was needed within the strict time limit. Within the section about paying the court fee there was then a weblink to the list of fees, from which the appellant could see what fee was payable. There was then a reference to the ways in which the fee could be paid. And then this:

> ***If you are on benefits or low income you may be able to get help with your court fees [weblink given]***

That weblink was to the gov.uk website page "Get Help With Fees". It was at that HWF webpage that the answer would be found to the questions of what information to provide and in what format. It was there that Form EX160 was to be found, as well as access to the option for submission via the online portal (which was the option that the Appellant belatedly ultimately took).

vii) The appeal was important to the Appellant. He wanted and intended to appeal and he wanted and intended to achieve a fee waiver. He was acting in person. But the fact is that, just as he was signposted to Form N161 which needed to be filed within the 28 days, so he was signposted to the need within the same time-frame to deal with the fee, and he was signposted to the ways of dealing with the fee to "start" the appeal, specifically including the fee waiver information. He had the means to click on the link that was given in relation to Help With Fees. He was able to find out what substantive information was needed by the Court and, had he looked into it, he would also have found clear guidance as to the way in which he should go about providing it.

viii) It is true that the Court could have written the letter of 4 June 2021 earlier than it did. However, as the Judge rightly pointed out, the primary responsibility remained throughout with him. It is true that the Appellant, when filing his Form N161 with the Administrative Court in London on 21 May 2021, had said: "If you need any other document, please let me know", and it is also true that in the period subsequent to that filing there had been email communication between him and the Court. But what happened was this. The Administrative Court in London ("ACL") emailed the Appellant on Tuesday, 25 May 2021 at 13:56 to say that his application had been "reviewed by our case progression officer" who had advised that the Appellant should file the case at his nearest venue in Manchester and that he should send his application to the Administrative Court Manchester ("ACM") email address. Later on 25 May 2021 at 21:59 the Appellant emailed the ACM, attaching his appeal and also his response to the High Court in London explaining that he preferred for the case to stay in London if possible. By an email at 09:39 on Wednesday, 26 May 2021 the ACM told the Appellant that if he was pursuing his appeal in Manchester, ACM would require the documents related to the appeal in hardcopy. The ACM email went on as follows:

> ***You will also need to include the fee for issuing the appeal or a completed Help With Fees form.***

The response of the AMC (26 May 2020 09:39), bearing in mind that it was responding to an email from the Appellant which he had sent the previous evening at 21:59 is conspicuous in its promptness as well as its clarity.

ix) The Appellant replied at 10:39 on 26 May 2021, telling the ACM that he wanted the case to stay in London, as he had informed ACL. He told the ACM: "You presumably had no time to read the financial request in my appeal". He went on to explain that, given that he wanted the case to stay at ACL and given what he had said in his financial request in Form N161, he had "not sent any fee". The Appellant says in his witness statement that "the London office had not

mentioned anything about completing a 'Help with Fees' Form, and so I had no reason to think the London court office had not accepted my appeal". But the problem with that is this. The Appellant knew he was being invited to issue his case in Manchester. He knew he was making a request to London to accept his appeal, and he had not received anything to confirm that the appeal had been accepted. He was also now, again, on notice that there was a HWF mechanism – including an HWF Form – which needed to be complied with. He was in email contact with both Administrative Courts – ACL and ACM – on that day (26 May 2021). He did not provide the HWF Form, nor the alternative HWF online submission. He had the Information Note and the further information which it signposted. If he had checked, he would have found that the HWF Form was needed in London too. He had at no stage been told by ACL that a HWF Form was not needed by that office. At no stage did he ask ACL whether a HWF Form was needed to start an appeal at ACL. At no stage did he ask ACM whether the HWF Form, which it had described as necessary to start an appeal, was a requirement only of ACM and not of ACL.

x) In all these circumstances, the letter that came from the ACL on 4 June 2021, telling the Appellant that he did need to pay the fee or file Form EX160 (Help With Fees) was not a 'bolt from the blue'. Rather, it was in line with the information that was publicly available; the information that had specifically been made accessible to him in the Information Note (28 April 2021); and the requirement which had been reiterated by the ACM (at 09:39 on 26 May 2021).

18. The Four Strasbourg Cases are context- and fact-specific illustrations of the sorts of features and combinations of features that can justify the conclusion that there is excessive formalism in the strict insistence on a precondition as to access to the court, so as to constitute an impairment of the very essence of the right of access to the court, or to constitute the absence of a reasonable relationship of proportionality and the failure to strike a fair balance. When I put the facts and circumstances of the present case alongside, I cannot accept that the present case calls for the grant of an extension of time so as to avoid an Article 6 violation, in the application of the Dual Principles.

19. I add this. I have mentioned that when the decision was sent by email to the Appellant (28 April 2021) the letter sent by MPTS referred to the Appellant's final date for filing the appeal as having been calculated as "1 June 2021". A similar situation was encountered in Gupta where (at §57) Julian Knowles J described the appellant as having been "wrongly advised" about the date, saying that he would very likely have granted an extension of time had the appellant made his fee remission application by the date which the MPTS had communicated. I take an equivalent view. If the Appellant had filed the documents which were needed, by 1 June 2021, I would have extended time. But, as with the appellant in Gupta, he did not do so.

Discussion: the law

20. I have found against the Appellant even assuming the most favourable approach, from his perspective, as to the law. In those circumstances, it is not necessary – in determining this application – for me to resolve the contested arguments about the correct legal approach. However, having heard full argument on the legal position, I will say what I made of the case law in the light of the competing arguments about it.

21. In my judgment the correct legal analysis is as follows:

i) What Pomiechowski decides is that the High Court in an extradition case should apply the statutory provisions so as to extend time for an appeal in "exceptional circumstances", meaning circumstances in which refusing to extend time would "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" (Pomiechowski at §39). That means, where refusing to extend time would conflict with the Dual Principles (which Lord Mance had identified earlier, at §§22, 33). That was the legal test.

ii) What Lord Mance was doing at the end of §39 in Pomiechowski was explaining that an expected essential characteristic of such a case is "an out of time appeal which a litigant personally has done all [they] can to bring and notify timeously". This was not merely an example. Its value was as a description which could serve as a guide as to what, in essence, the High Court could expect to be looking for. It was intended to be a valuable encapsulation. The focus remained on "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", which is why Lord Mance said "if and to the extent that it would do so". The Mance Observation was not laying down a test, in the nature of a legal litmus test, still less as if it were a statutory test. It is revealing that – as Mr Mant accepted – if the Mance Observation were being applied by this Court, it would be necessary to adjust the words used by Lord Mance to add "reasonably", so that the Court is asking whether the litigant has "done all [they] reasonably can to bring and notify timeously".

iii) The position is illuminated by the concurring judgment of Lady Hale who agreed with Lord Mance's reasons (see §42), and agreed about the application of the discretion to extend time in the case of Mr Halligen, saying (see §50): "I … agree that to insist upon the time limit for service in the particular circumstances of his case is a disproportionate limitation upon his right of access to the appeal process". Lady Hale's encapsulation of the central and decisive reasoning, which she saw as entirely consistent with giving effect to the statutory provisions in the manner which Lord Mance had suggested at §39, was referable not to the language of the Mance Observation, but rather to the language of the Dual Principles. She focused on the second of the Dual Principles.

iv) What Adesina decides is that the approach in Pomiechowski is applicable to the disciplinary and regulatory statutory context. The analysis in Adesina involved recognising the Dual Principles (see §§4, 10). The decisive reasoning of the Court of Appeal was that what was required in the disciplinary and regulatory appeal context was the "adoption of the same approach" as taken by Lord Mance in Pomiechowski at §39 (Adesina §15), which included the key passage about granting an extension of time where refusing one would "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" (quoted in Adesina at §10). The Kay Observation explicitly emphasised the particular significance of the Mance Observation. But, like the Mance Observation, it was not laying down a legal litmus test, still less to be read as a statute. Again, were it otherwise, there would

be no room for implying "reasonably", as it is common ground in the present case is necessary and appropriate. Maurice Kay LJ was emphasising the Mance Observation, and adopting it, as a valuable encapsulation describing what, in essence, the High Court could expect to be looking for.

v) The authoritative, practical guidance derived from Adesina (and Pomiechowski) includes the references to "exceptional circumstances", to the discretion arising only in a "very small number of cases", and to the appellant having "personally … done all [they] can to bring the appeal timeously". These stand as a practical description of a solid expectation which the appellate courts have, and which reliably guides the High Court, in relation to the approach to the statutory power to extend time read compatibly with Article 6. I can detect no material practical dissonance between them and the Four Strasbourg Cases. And of course they fit with the approach in granting the extension to Mr Halligen in Pomiechowski, and the approach to refusing the extensions of time in Adesina.

vi) However, if the High Court were satisfied in the application of the Dual Principles that – absent an extension of time – the statutory time limit would "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" (Pomiechowski at §39, adopted in Adesina at §15), the grant of an extension of time would be a faithful application of the decisive reasoning of the appellate courts in those cases, not a departure from it. And, ultimately, that would be so, whether or not the facts and circumstances would fit within the description of the appellant having "personally … done all [they] can to bring the appeal timeously".

vii) When in Gupta, Julian Knowles J came to Adesina and its discussion of Pomiechowski (see §45), what he saw as the principled position was that the discretion "can only be exercised in exceptional circumstances" and that the "Court would only do so where to take an absolute approach would 'impair the very essence of the statutory right of appeal, in the language of the Strasbourg caselaw'" (Gupta §44). Just as Lady Hale's encapsulation of the central and decisive reasoning in Pomiechowski was referable not to the language of the Mance Observation, but rather to the language of the Dual Principles (she focused on the second of them); so too Julian Knowles J's encapsulation of the central and decisive reasoning in Adesina was referable not to the language of the Kay Observation, but rather to the language of the Dual Principles (he focused on the first of them). I interpose that, although I did not hear argument on Daniels, I consider it appropriate to record that Davis LJ in his judgment in that case there described Pomiechowski as having "established that an absolute statutory time limit may need to be read down in order to comply with article 6 of the European Convention on Human Rights" (§25); and Adesina as having "held that the principle established in Pomiechowski was applicable to the time limit", with Maurice Kay LJ having "held that time could be extended in exceptional circumstances, namely where enforcing the 28 day limit would impair the very essence of the statutory right of appeal" (§27).

viii) So, in a case in which it mattered – and this is not such a case – if there were ever a difference between the High Court's faithful adherence to the Dual Principles on the one hand, and the Mance Observation and Kay Observation on the other, the Court's application of the Dual Principles must prevail.

ix) Finally, although the language of "discretion" and "power" is used throughout the caselaw to describe the narrow and residual function of extending time, my view is that it would be more correct to speak of "duty". In a case where refusing to extend time would involve an Article 6 breach – which is the only situation in which the function of extending time is appropriately exercised – there is the power to act, but there is the necessity to exercise it, and so the Court would be under a duty to grant the extension of time.

Conclusion

22. For the reasons which I have given, the applications to set aside the Judge's order, and for an extension of time to appeal, are refused.

Costs

23. Following circulation of this judgment as a confidential draft, the Respondent applied for its costs, based on an updated costs schedule (8 April 2022) of £6,874.10 including VAT, submitting that: (i) there was no reason to depart from the general rule of costs following the event; and (ii) although not successful on every point most of the work done would have been required in any event. The Appellant invited me to make no order as to costs, or alternatively to assess the costs in a proportionate sum substantially below the costs claimed, in light of these features: (a) the Court had of its own motion struck out an appeal which the Respondent was treating as valid and as to which the Respondent could have adopted a neutral or passive position; (b) the Respondent's arguments (in particular on the legal litmus test) had not been successful; (c) the Appellant has limited means, is surviving on a low income and low level of disposable capital (hence the fee remission), and was seeking in the public interest to pursue an age discrimination challenge to the use of unadapted English language tests; and (d) the Respondent's previous costs schedule (23 February 2022) had given a far lower projection (£3,360.60 including VAT) as a pre-estimate of costs including an attended oral hearing. I decided that the just, appropriate and proportionate costs order, in the exercise of my discretion and judgment, is that the Appellant should pay the Respondent's costs, summarily assessed at £3,000 (including VAT). The Appellant took the decision to apply to set aside the Judge's order, it being foreseeable and appropriate that the Respondent would actively resist, and he maintained his application in the face of that active resistance. On the other hand, the Respondent prepared and maintained a sustained argument – which did not persuade me – in support of a legal litmus test; and the costs ultimately claimed very significantly exceed the projection of costs that was provided. In arriving at a just, appropriate and proportionate costs order I had regard to the background context and all the circumstances.