**IN THE UPPER TRIBUNAL** **JR/2674/2017**

**ADMINISTRATIVE APPEALS CHAMBER**

**Before: Upper Tribunal Judge Wright**

## DECISION

**I grant the application for judicial review of the decision of the First-tier Tribunal of the Social Entitlement Chamber dated 25 July 2017 under the tribunal case reference CI017/17/00009.**

**The Upper Tribunal's order is:**

**(i) to QUASH the decision of the First-tier Tribunal (Social Entitlement Chamber) (Criminal Injuries Compensation) of 25 July 2017; and**

**(ii) to REMIT to a different judge of the First-tier Tribunal (Social Entitlement Chamber) (Criminal Injuries Compensation) for a fresh reconsideration entirely afresh of whether the applicant's appeal ought to be admitted, in accordance with the law as set out below.**

## REASONS FOR DECISION

1. This is a judicial review of a decision of a judge of the First-tier Tribunal made on the 25 July 2017 ("the tribunal"). The decision was concerned with whether to admit the applicant's late appeal for consideration by the tribunal. It followed a decision on the same issue made by someone who was termed a 'Tribunal Caseworker' (someone who may by now be titled a 'Registrar') on 19 May 2017 refusing to admit the out of time appeal notice.

2. Under rule 22(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the SEC Rules) an "appellant must start [the appeal] proceedings by sending or delivering a notice of appeal to the Tribunal so that it is received in criminal injuries

compensation cases, within 90 days after the date of the decision being challenged". Rule 22(6) of the SEC Rules then provides:

> "If the appellant provides the notice of appeal to the Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 5(3)(a) (power to extend time)—
> (a) the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time; and
> (b) …….. unless the Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Tribunal must not admit the notice of appeal."

There is no maximum period within which a criminal injuries compensation appeal must be brought to the First-tier Tribunal.

3. There is no question that the appeal in this case was late. It was in fact well over a year late. However, the applicant put forward two reasons she said explained and excused the lateness. First, she relied on her long standing ill-health. Second, she placed reliance on her previous representatives having held on to documents relevant to her appeal.

4. The Upper Tribunal has addressed relevant considerations to be taken into account by the First-tier Tribunal in deciding whether to extend time for a late appeal to admitted as an appeal to that tribunal. In *R(YT) v First-tier Tribunal and CICA* (CIC) [2013] UKUT 201 (AAC), Upper Tribunal Judge Wikeley stated (in paragraph 42) that relevant considerations include: (i) the length of the delay, (ii) the reasons for the delay, (iii) the consequences of the delay (e.g. in terms of witness recollection), (iv) the merits of the case, (v) any alternative remedy, and (vi) the applicant's health and personal circumstances.

5. The Tribunal Caseworker addressed some but not all of these considerations. In particular, he failed in his decision to weigh in the balance the reasons the applicant had advanced for the lateness in making her appeal.

6. Two other rules from the SEC Rules are of relevance on this judicial review. Rule 27 deals with whether decisions can be made without a hearing. It provides as follows.

> "27.— (1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—
> (a) each party has consented to, or has not objected to, the matter being decided without a hearing; and
> (b) the Tribunal considers that it is able to decide the matter without a hearing.
> (2) This rule does not apply to decisions under Part 4.
> (3) The Tribunal may in any event dispose of proceedings without a hearing under rule 8 (striking out a party's case).
> **(4) In a criminal injuries compensation case—**
> **(a) the Tribunal may make a decision which disposes of proceedings without a hearing; and**
> **(b) subject to paragraph (5), if the Tribunal makes a decision which disposes of proceedings without a hearing, any party may make a written application to the Tribunal for the decision to be reconsidered at a hearing.**
> **(5) An application under paragraph (4)(b) may not be made in relation to a decision—**
> **(a) not to extend a time limit**;
> (b) not to set aside a previous decision;
> (c) not to allow an appeal against a decision not to extend a time limit; or
> (d) not to allow an appeal against a decision not to reopen a case.
> (6) An application under paragraph (4)(b) must be received within 1 month after the date on which the Tribunal sent notice of the decision to the party making the application."

I have placed in bold the parts of rule 27 that were of central importance on the decision whether to extend the appeal time limit in this case. The Tribunal Caseworker also erred by not considering the exception found in rule 27(5)(a). He proceeded on the wrong basis that the applicant could under rule 27(4)(b) ask for the refusal to admit the late appeal decision to be reconsidered at an oral hearing.

7. The other relevant provision in the SEC Rules is rule 4, which deals with delegation of some decision making functions to staff members of the First-tier Tribunal who are not judges. Rule 4 provides as follows.

> "4.—(1) Staff appointed under section 40(1) of the 2007 Act (tribunal staff and services) may, with the approval of the Senior President of Tribunals, carry out functions of a judicial nature permitted or required to be done by the Tribunal.
> (2) The approval referred to at paragraph (1) may apply generally to the carrying out of specified functions by members of staff of a specified description in specified circumstances.

> (3) Within 14 days after the date on which the Tribunal sends notice of a decision made by a member of staff under paragraph (1) to a party, that party may apply in writing to the Tribunal **for that decision to be considered afresh by a judge**." (emphasis supplied by me)

8. At the relevant time paragraph 3 of the Senior President of Tribunals' Practice Statement on *Delegation of Functions to Tribunal Caseworkers First-tier Tribunal (Social Entitlement Chamber)* provided that a Tribunal Caseworker "may make all decisions that a judge assigned to the Social Security and Child Support/Criminal Injuries jurisdiction may make under the [SEC Rules] save those which are substantive final decisions". Whatever the exact reach of the phrase "substantive final decisions", I can see no arguable basis upon which a decision refusing to extend time to admit a late appeal notice can constitute a substantive final decision. Paragraph 4 of the Practice Statement went on:

> "In accordance with rule 4(3) of the [SEC Rules], within 14 days after the date that the Tribunal sends notice of a decision made by a Tribunal Caseworker pursuant to an approval under paragraph 1 above that party may apply in writing to the Tribunal for the decision to be considered afresh by a judge."

9. As I have indicated above, the Tribunal Caseworker's decision not to admit the late appeal notice was flawed because it failed to address the reasons the applicant had given for the delay. Having summarised those reasons and the factors to consider as identified in *YT*, the Tribunal Caseworker's reasons consisted of the following:

> "In considering the application I find that the [Applicant] has failed to demonstrate that she had good reason for not submitting her notice of appeal within the prescribed time limit of 90 days from the date of the decision being challenged.
> I further find that in considering the facts of this case that there to be no reasonable prospect of success to the appeal. While the incident will have been distressing there is no evidence to support her assertion that the injuries sustained were as a result of the dog in question being used with intent to cause her injury…"

Nothing in this reasoning addresses the reasons for the delay. Further, for the reasons I give below, the reasons as to the merits of any appeal are also in my judgment flawed.

10. However, as rule 4(3) of the SEC Rules shows, the operative decision in terms of any judicial review challenge to a refusal to admit a late appeal notice will not usually be that of the Tribunal Caseworker. It will be the decision of the First-tier Tribunal judge considering that decision afresh. (I say 'usually' because there may be some cases where the application for the decision to be considered afresh by a judge is not made within the 14 days specified and that time limit is not extended.)

11. The Tribunal Caseworker's decision was dated 19 May 2017. When it was issued to the applicant is not clearly set out, though the indication is that it was communicated in a letter dated 21 June 2017. However, it has never been argued that the applicant exercised her rule 4(3) right after more than 14 days. The substance of what the applicant sought on her rule 4(3) application was a "request for an oral hearing as indicated in your letter of the 20/6/17. I never got the chance to be called into court and testify both as a witness and victim, the neighbour was trespassing at the time of the dog attack. Given these facts I ask you to grant this request and for justice to be done".

12. The First-tier Tribunal judge in his 'consideration afresh' decision of 25 July 2017 said the following in his **Summary of Reasons for Tribunal's Decision**.

> "I regret that the decision of 19 May 2017 by the Tribunal Caseworker was made in error insofar as it purported to give the [applicant] the opportunity to apply for the decision to be reconsidered at an oral hearing.
>
> Rule 27(5)(a) clearly states that an application for an oral hearing may not be made in relation to a decision not to extend a time limit. That was exactly what the [Applicant] was asking for and the Caseworker refused to do.
>
> In these circumstances, the decision of 19 May 2017 is final. In my judgment that decision was clearly correct."

13. I must, of course, bear in mind that the above were intended only to be the summary reasons of the judge. Moreover, as far as I have been able to identify the applicant never sought the full reasons of the judge for

his decision. Notwithstanding these considerations, in my view the summary reasons the judge did give are so flawed as not to be capable of rescue by any full reasons. They must in my judgment lead to the judge's decision of 25 July 2017 being set aside and the rule 4(3) 'consideration afresh' request in respect of the late appeal notice being remitted to another judge of the First-tier Tribunal for consideration entirely afresh (i.e. de novo). Whether that consideration should take place at and after an oral hearing will be a matter for that judge to decide. My reasons for concluding that the judge's summary reasons are irremediably flawed are as follows.

14. Most importantly, I do not understand how the Tribunal Caseworker's decision in any respect can be said to have been "final".

15. If it was the substantive decision of the caseworker on whether to admit the late appeal notice, manifestly the terms of rule 4(3) of the SEC Rules show that it cannot have been the final decision because rule 4(3) gave the applicant a right to have the decision whether to admit the late appeal notice considered afresh by a judge of the First-tier Tribunal. The language of "considered afresh" must mean, in my judgment, that the judge considers for herself or himself on the evidence whether to admit the late appeal notice, rather than in any sense limiting themselves to reviewing the correctness of the Tribunal Caseworker's decision; though even in the latter context the caseworker's decision would not be final.

16. Alternatively, if what the judge meant by 'final' was the 'decision' on whether to afford the applicant an oral hearing, what the judge says simply makes no sense because the Caseworker's 'decision' here was that the applicant **could** have an oral hearing. The Caseworker did not, indeed could not, refuse a request by the applicant for an oral hearing because no such request was made to the Caseworker. The request for the oral hearing first arose in the rule 4(3) application made by the applicant on 21 June 2017 (prompted by the Caseworker's

(wrong) statement that she could apply for such a hearing). But that request was made, per rule 4(3), to the judge.

17. I am also troubled that the language of 'finality' in respect of the Tribunal Caseworker's decision about an oral hearing, with its clear connotation of such a decision not being able to be reopened or reviewed, shows that the judge wrongly had a closed mind as to whether he could nonetheless direct an oral hearing on the rule 4(3) 'consideration afresh' of whether to admit the late appeal notice. Rule 27(5)(a) of the SEC Rules precludes a party (here, the applicant) from applying for a decision to be reconsidered at an oral hearing but that does not preclude a hearing being held on whether to extend a time limit in any circumstances, it simply precluded the applicant from applying for (and thereby having a right to) such a hearing.

18. In the absence of the judge's full reasons for his decision, it would be wrong for me to decide that he also erred in law in holding that the Tribunal Caseworker's decision was "clearly correct". Had the judge been asked for and then supplied full reasons that went no further than this statement then he would in my judgment have erred in law by adopting a decision which failed to give any adequate reasons addressing the applicant's reasons for being late in making the appeal. He would also have erred in law in adopting as clearly correct a decision that focussed too narrowly on the lack of corroborative evidence when considering the prospects of success on the appeal. The applicant's evidence on its own, if believed, could have substantiated a case that the dog had been used with intent to injure her. These are matters which will, however, be subsumed in the issues the new First-tier Tribunal will have to consider.

**Signed (on the original) Stewart Wright**
**Judge of the Upper Tribunal**

**Dated 14th December 2018**