Neutral Citation No: [2023] NICA 4 ***Judgment: approved by the court for handing down (subject to editorial corrections)****	***Ref:*** **McC12048** ***ICOS No:*** ***Delivered:*** **27/01/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (JUDICIAL REVIEW)

BETWEEN:

OMAR MAHMUD

Appellant:

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

Mr Frank O'Donoghue KC and Mr Robert McTernaghan (instructed by MacElhatton & Co, Solicitors) for the Appellant
Mr Aidan Sands (instructed by the Crown Solicitor's Office) for the Respondent

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Before: Keegan LCJ and McCloskey LJ

McCLOSKEY LJ (*delivering the judgment of the court*)

Background

[1] Omar Mahmud ("the appellant") a foreign national, applied unsuccessfully for asylum in the United Kingdom. He subsequently provided "further submissions" (in the language of the Immigration Rules). These were rejected. Both this rejection decision and a consequential decision rendering the appellant homeless were challenged by the initiation of judicial review proceedings. The appellant ultimately secured a partially favourable decision of the Northern Ireland High Court by the judgment of Deputy High Court Judge Friedman delivered on 22 January 2021: see [2021] NIQB 6.

[2] The extent of the appellant's success is gauged by the terms of the declaration made by the court:

> "The failure of the respondent to provide accommodation and ancillary support to the applicant [pursuant to section 4 of the Asylum and Immigration Act 1999] between the 24 August 2018 and the 7 February 2019, on the facts of this case as found by this court and as set out at paras [136] and [137] amounted to and constituted inhuman and degrading treatment of the applicant contrary to his rights pursuant to article 3 of the European Convention on Human Rights."

As this text indicates, the appellant's challenge to the "further submissions" rejection decision was unsuccessful. The author of the impugned decisions was the Secretary of State for the Home Department ("the Secretary of State").

[3] The adjudication of the High Court continued, giving rise to a further judgment delivered on 31 March 2021: see [2021] NIQB 37. By this judgment the court determined the appellant's claim for damages. The court decided that an award of £1750 damages should be made to him. The ensuing final order of the High Court is dated 1 April 2021. This is a composite order encompassing both of the judgments delivered.

This Appeal

[4] By his Notice of Appeal dated 27 April 2021 the appellant seeks to challenge before this court only that element of the first of the two High Court decisions whereby his challenge to the Secretary of State's rejection of his further submissions was dismissed by the High Court. In the case management phase of these appeal proceedings the question has arisen whether this appeal is out of time and, if so, whether this court should exercise its discretion to extend time. The parties concurred with the court's suggestion that the judicial determination of this issue be undertaken on the basis of written submissions: see, in this context, the recent decision of this court in *Haire v Industrial Temps* [2023] NICA 1, para [2].

The Rules

[5] There are three material provisions of the Rules of the Court of Judicature. First, by Order 59, rule 4(1)(c):

> "Subject to the provisions of this rule, every notice of appeal must be served under rule 3(4) within the following period (calculated from the date on which the judgement or order of the court below is filed), that is to say … six weeks."

Second, by virtue of Order 59, rules 10(1) and 15 and Order 3, rule 5, in conjunction, this court has a discretionary power to extend the foregoing time limit. Order 3, rule 5(1) provides:

> "The court may, on such terms as it thinks just, extend or abridge the period within which a person is required or authorised by these Rules, or by any judgement, order or direction, to do any act in any proceedings."

Rule 5(2) makes clear that this power is exercisable even where the application to extend time is not made until after expiry of the relevant period. Third, Order 59, rule 15 provides, under the rubric "Extension of Time":

> "Without prejudice to the power of the Court of Appeal under Order 3, rule 5 to extend the time prescribed by any provision of this Order, the period for serving notice of appeal under rule 4 ... may be extended by the court below on application made before the expiration of that period."

[6] Summarising, the time limit for serving the Notice of Appeal was 13 May 2021, it was served (and filed in court) on 15 November 2022 and it was, therefore, 18 months out of time. Thus, the appellant is driven to apply for an extension of time. As the time limit in play is not enshrined in a statutory provision containing no dispensing power but is, rather, prescribed by rules of court this court has a discretionary power to extend time: supra.

[7] In Order 59, rule 4(1) the focus is on two key events, namely:

(i) The date when the judgment or order of the court was filed.

(ii) The date when the notice of appeal is served under rule 3(4).

Order 53, rule 4(1) contemplates that either the judgment or the order of the court may be "filed." It is the long-established practice in this jurisdiction that only the order of the court is filed. This means that, in practice, there is frequently some delay between the promulgation of judgment and the filing of the final consequential order of the court, typically because ancillary issues such as costs or the terms of the final order have to be addressed by the parties.

[8] The second of the key events highlighted above is that of service of the Notice of Appeal. Order 59, rule 3(4) provides:

> "A notice of appeal must be served on all parties to the proceedings in the court below who are directly affected

> by the appeal; and, subject to rule 8, it shall not be necessary to serve the notice on parties not so affected."

Rule 8 empowers the Court of Appeal to require service of a notice of appeal on any party to the proceedings at first instance upon whom it has not been served or on any non-party. As the language of Order 59, rule 4(1) makes clear, the critical date is that of service of the notice of appeal and not its filing in court.

Chronology

[9] Based on the materials compiled by the appellant's legal representatives the material events during the 18 months period under scrutiny were the following:

(a) Counsel settled the grounds of appeal and an accompanying skeleton argument (presumably designed to support an application for legal aid) within four weeks of the final order of the High Court.

(b) The Notice of Appeal was compiled by the appellant's solicitor within the same period.

(c) An application for legal aid, rendered necessary by the appellant's impecuniosity, was made on 27 April 2021.

(d) On 11 May 2021 the Legal Services Agency ("LSA") refused the application for "procedural reasons" and advised the appellant's solicitor to make an emergency legal aid application. The appellant's solicitor did so on the same date. Furthermore, again on the same date, this development was communicated by the solicitor to the Court of Appeal Office.

(e) By its certificate issued on 26 May 2021, LSA granted legal aid for solicitor and junior counsel.

(f) The exclusion of senior counsel from the certificate was challenged by an appeal lodged on 1 June 2021.

(g) On 25 June 2021 the Civil Legal Services Appeals Panel dismissed the appeal.

(h) The latter decision was challenged by judicial review, culminating ultimately in the judgment of the High Court delivered on 19 October 2022 quashing the impugned decision.

(i) On 14 November 2022 the Notice of Appeal was served.

(j) On 15 November 2022 the Notice of Appeal was filed, accompanied by the requisite payment of £652.

Governing Principles

[10] In *Davis v Northern Ireland Carriers* [1979] NI 19 this court, in its consideration of a different time limit prescribed by the Rules of the Supreme Court, stated at page 20A/D:

> "Where a time limit is imposed by rules of court which embody a dispensing power the court must exercise its discretion in each case and the relevant principles are:
>
> 1. whether the time is already sped: a court will look more favourably on an application made before the time is up;
>
> 2. when the time limit has expired, the extent to which the party applying is in default;
>
> 3. the effect on the opposite party of granting the application and in particular whether he can be compensated by costs;
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> 4. whether a hearing on the merits has taken place or would be denied by refusing an extension;
>
> 5. whether there is a point of substance to be made which could not otherwise be put forward;
>
> 6. whether the point is of general, and not merely particular significance; and
>
> 7. that the rules of court are there to be observed."

[11] Many practitioners in this jurisdiction and, one would add, probably every serving member of the Court of Judicature have had occasion to consider the judgment of Lord Lowry LCJ. To embark upon an analysis of how this judgment has been applied in subsequent cases would be inappropriate. However, it is opportune to make clear the following. First, Lord Lowry did not purport to formulate an exhaustive code of principles. The second observation, related to the first, is that in doctrinal terms this is unsurprising – indeed entirely appropriate – given the breadth of the judicial discretion in play in every case where a possible extension of a time limit prescribed by rules of court falls to be considered. The third observation is that the advent of the overriding objective post-dated the decision in *Davis*. The significance of this is that, per Order 1A, rule 3(a) the court "*must*" seek to give effect to the overriding objective – namely everything contained in

paragraphs (1) and (2) of the Rule – when exercise any power contained in the Rules. The overarching imperative in the overriding objective is the application of the Rules "… to enable the court to deal with cases justly." The outworkings of this overarching requirement are set forth inexhaustively in para (2) of the Rule.

[12] As appears from the immediately preceding analysis, extension of time determinations in any of the judicial organs of the Court of Judicature should not be dictated by the mechanistic application of the *Davis* code. Rather a somewhat broader and more sophisticated judicial exercise may be required, with alertness to the particular context. Furthermore, paras [14]–[15] infra must be reckoned in appropriate cases.

[13] Having made clear the foregoing, in the present case the extensive written submissions of both parties have focussed exclusively on the four corners of the *Davis* code. Standing back, the application of virtually all of the *Davis* principles is unavoidably to the detriment of the appellant, inclining firmly towards a refusal to extend time. The real issue before this court is whether the application of the fifth and sixth principles of the *Davis* code should, in these circumstances, impel to the exercise of the court's discretionary power to extend time in the appellant's favour.

[14] It is at this point of the analysis that what is highlighted in paras [11]–[12] above comes into play. Every executive and judicial decision having the effect of refusing an application for asylum entails the possibility of the affected person being forcibly returned to their country of origin and thereby exposed to a risk of death or torture or inhuman or degrading treatment. This grave reality overshadows every asylum decision making context and is unavoidably an important feature of this court's extension of time determination in the present case. Furthermore, as this analysis further demonstrates, the legal framework within which this decision must be made includes section six of the Human Rights Act 1998, whereby this court must avoid acting incompatibly with any of the protected Convention rights – and the Convention rights in play are the two most fundamental of all, namely articles 2 and 3 ECHR.

[15] As the immediately preceding analysis demonstrates the contemporary application of the *Davis* code must take into account not only the later advent of the overriding objective but also, and more fundamentally in cases such as the present, the advent of the Human Rights Act.

This Case

[16] Bearing in mind the considerations already highlighted we turn to examine the appellant's challenge to the judge's rejection of the "further submissions" dimension of his case. There are two grounds of challenge. The first is formulated in commendably detailed and focused terms in paras [6]–[17] of the aforementioned skeleton argument. It is not for this court to determine the merits of these extensive

submissions at this stage. Rather, per *Davis* principle [5], the question is whether a "point of substance" is raised.

[17] We consider that an affirmative answer is appropriate. *Davis* principle [5] adds the further requirement that this point of substance "could not otherwise be put forward." This criterion too falls to be resolved in favour of the appellant since the effect of the "further submissions" regime of the Immigration Rules is that he is now effectively, if not theoretically, at the end of the notional road. If time is not extended, and subject to possible developments upon which speculation would be entirely inappropriate, he will be removed from the United Kingdom to his country of origin.

[18] As regards *Davis* principle [6], the second ground of appeal, in brief compass, raises issues relating to the evolution of the jurisprudence of the European Court of Human Rights in the test to be applied in expulsion cases involving asserted breaches of the individual's rights under article 3 ECHR. The critical jurisprudential development occurred in *Paposhvili v Belgium* [2017] IMM AR 867 and the subsequent consideration of this decision by the UK Supreme Court in *AM (Zimbabwe) v Home Office* [2020] UKSC 17. In short, by virtue of these decisions there was a significant shift in the relevant human rights jurisprudence, previously reflected in an earlier decision of the Supreme Court in *N v Secretary of State for the Home Department* [2005] UKHL 31. The first limb of this second ground of appeal challenges the High Court's endorsement of the Secretary of State's rejection of the medical evidence founding the article 3 ECHR case. This raises a point of particular, rather than general, importance. However, in contrast, the second limb raises the broader issue of decisions made on behalf of the Secretary of State which fail to apply the new test devised by the *Paposhvili* and *AM* decisions. This ground also satisfies *Davis* principles [5] and [6].

[19] There is one further consideration in the equation under scrutiny which favours the appellant. This is another illustration of a principle not expressly articulated in the *Davis* code. One striking feature of the chronology rehearsed in para [9] above is that the appellant's legal representatives energetically prepared this appeal during the six weeks period prescribed by the Rules. Both (a) the grounds of appeals and (b) counsels' skeleton argument, generated during this period, are demonstrably the product of assiduous attention by the appellant's lawyers. The *Davis* code does not explicitly recognise this consideration. Eschewing once again any temptation to formulate an exhaustive code of principles to govern the exercise of the judicial discretion in play, it is appropriate to make clear that the conduct of an appellant's legal representatives at every stage of the period under scrutiny will be a material factor to be weighed by the court. Here, this court's evaluation of this factor is favourable to the appellant and, hence, constitutes another consideration impelling towards extending time.

Conclusion

[20] This appeal is incontestably out of time and by some measure. For the reasons given the court exercises its discretion to extend time. An agreed case management directions order consequential upon this decision will be provided within 14 days, with a view to the appeal being heard not later than May 2023. A case management directions listing will follow imminently.