Neutral Citation Number [2024] UKUT 00321 (TCC)

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Applicant: Rytis Makvicius	**Tribunal Ref: UT/2023/000111**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

APPLICATION FOR PERMISSION TO APPEAL

Oral hearing: 22 July 2024

DECISION NOTICE

JUDGE TRACEY BOWLER

1. This was an oral hearing conducted by the CVP video system. I was satisfied that it was in the interests of justice to hold the hearing remotely given the nature of the hearing and the fact that the Applicant could not attend in person.

2. The hearing was to consider the application (the "Application") for permission to appeal against the decision of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 4 August 2023 ("the Decision") following my previous refusal of the paper application for permission to appeal. The FTT had previously refused permission to appeal in a decision dated 20 October 2023.

3. The hearing was attended by the Applicant who was unrepresented. No representative of HMRC attended.

<u>When can an appeal be made?</u>

4. An appeal to this Tribunal can be made only on a point of law: section 11 of the Tribunals, Courts and Enforcement Act 2007. It must be shown that it is arguable that the

FTT made an error of law in reaching its decision. "Arguable" means that the argument stands a realistic as opposed to fanciful prospect of success.

The Decision

5. References to paragraphs of the Decision are in the form [x].

6. In the Decision the FTT refused the application made by the Applicant to appeal out of time. It was found that the Applicant was three years late in seeking to appeal a decision made by HMRC that he was liable to duty assessment of £31,885 and a £20,725 penalty following seizure of 304kg of concealed hand rolling tobacco in 2 wooden crates in the load of the vehicle driven by him.

7. The FTT recognised that the starting point was the need to give effect to the overriding objective to deal with cases just and fairly [12]. The FTT then set out the approach to determining an application to make a late appeal as described in the case of *Martland* [14], noting that while it was necessary to consider any obvious strengths and weaknesses in the Applicant's case, this did not involve a full analysis of its prospects of success. The FTT noted that the amount at stake and the consequences of an appellant not being allowed to pursue an appeal are not of great weight in deciding whether to admit a late appeal.

8. The FTT found that HMRC had written to assess the Applicant on 16 March 2018; the Applicant's representative at the time (Dr Van Dellen) wrote to HMRC in January 2021 and then requested a review on 24 June 2021; and the appeal was not brought until 16 August 2021 [18]. The FTT did not accept that the first notification received by the Applicant was in January 2021 as claimed in the appeal, explaining that there was no evidence that earlier letters sent by HMRC had not been received [20]. Instead, the FTT found that in the light of the evidence overall there was a delay of more than three years in seeking to appeal the 16 March 2018 assessment. Such delay was found to be serious and significant [19]. However, the FTT identified the even if the delay in bringing the appeal were to be measured from January 2021 it would still be serious and significant [22].

9. The FTT described the Applicant's case as being "very weak indeed", given, in particular, the lack of challenge to the evidence from HMRC. It was stated that it is "certainly not a compelling case which would weigh heavily in the balance against long and unexplained delay".

Grounds of appeal

10. The grounds for which permission is sought were set out by Dr Van Dellen in the paper application as follows:

> (1) the FTT erred by taking into account the merits of the appeal;
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> (2) the FTT applied too high a threshold by referring to the need for a "compelling" case which is higher than the threshold of "more than just arguable";
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> (3) the Applicant's case is not rather weak;

(4) an appeal would need to consider whether HMRCs' decision-making was proportionate;

(5) the FTT has failed to take into account the large amount of the penalties and has granted HMRC a windfall; and

(6) until the FTT examines the particulars of the Applicant's exceptional hardship it cannot substantively determine the merits of that hardship; and the ground of exceptional hardship has good merit in this case.

11. At the hearing the Applicant modified and supplemented these grounds, and I will deal below with the additional points which he raised orally. He is a litigant in person and it was not appropriate to ask him to make an application to amend his grounds of appeal.

My decision

12. A case management decision, such as the admission of a late appeal, involves weighing up competing considerations for which there is not one answer. To succeed with his challenge to such a case management discretion, the Applicant would have to establish that no reasonable tribunal, directing itself properly as to the law, could have exercised discretion in the way the FTT did. The Applicant has not put forward an arguable case that, in making the Decision, the FTT stepped outside the generous margin of case management discretion afforded to it. I explain this in more detail with regard to each of the Grounds advanced by the Applicant.

Consideration of the Grounds

13. Turning to the Grounds in more detail, I start by setting out the key passages from the case of *Martland* which provide the framework for consideration of the admission of late appeals:

> "44.When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in Denton:
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> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
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> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. […] The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.
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> 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal [...]
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> 47.Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay[…] Nor should the fact that the applicant is self-represented […] HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."”

Ground 1: the FTT erred by taking into account the merits of the appeal

14. *Martland* (to which the FTT referred and which it applied in the Decision) requires consideration of any obvious strengths or weaknesses of the appeal without descending into a full consideration of them. It was in line with that authority for the FTT to carry out the exercise that it did. I do not consider that Ground 1 raises any arguable error of law. I refuse permission to appeal on this ground.

Ground 2: the FTT applied too high a threshold by referring to the need for a "compelling" case which is higher than the threshold of "more than just arguable"

15. In the case of *Martland* it was decided that a balancing exercise needs to be carried out which assesses the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission; recognises the particular importance of the need for litigation to be conducted efficiently and at proportionate cost and for statutory time limits to be respected; and has regard to any obvious strength or weakness of the case.

16. Given that the delay in appealing was found by the FTT to be serious and significant and there were no good reasons found to have existed for that delay, the obvious merits of the case would need to be substantial to outweigh the other elements in the balancing exercise. Whether that very substantial categorisation should be identified as "compelling" or by some other term, the sense was correctly conveyed by the FTT that the obvious merits of the Applicant's case would have to be significantly more than the "just arguable" level suggested by the Application.

17. At the hearing before me the Applicant sought to argue that the delay was not as substantial as the FTT had found it to be. However, the Applicant failed to address the findings of fact made by the FTT as to what correspondence was sent to him and when. The Applicant has not identified evidence which the FTT failed to consider or any other basis to

challenge the findings made by the FTT. At the hearing he also said that he had received correspondence from HMRC via the Lithuanian authorities in December 2019 and then directly from HMRC in April 2020, although these dates were not in the evidence before the FTT. However, the FTT considered the possibility that the delay was in fact from January 2021 and found that the delay between from that date until the submission of the appeal in August 2021 was still serious and substantial and without any explanation. The Applicant's evidence at the hearing before me that he had received a letter from HMRC in April 2020 therefore does not call into question those conclusions of the FTT.

18. Accordingly, I refuse permission to appeal on the basis of Ground 2 or on the basis that the FTT's finding regarding the seriousness of the delay was wrong.

Ground 3: the Applicant's case is not rather weak

19. There was no explanation of this ground in the Application or by the Applicant at the hearing before me. There is no basis provided to show that the finding that the Applicant's case was "rather weak" should be disturbed. The FTT explained that there was no indication that the Applicant would seek to dispute the evidence proffered by HMRC. This has not been challenged. Furthermore, the Applicant has not sought in his attempted appeal (for which he was represented) to indicate that he was not the person on whom the excise duty should have been assessed because he was not the person who was, or should be, treated as "holding" the goods at the time of their seizure. Instead, the Applicant focussed at the hearing before me on the amount of the penalties which he says are disproportionate (and to which I turn next).

20. Ground 3 is therefore unarguable and I refuse permission to appeal on this ground.

Ground 4: an appeal would need to consider whether HMRCs' decision-making was proportionate

21. The Applicant has not identified any basis on which it is said that the penalties breach the approach to be taken in considering proportionality The principles which have been applied by the courts in addressing proportionality, in the context of penalties imposed in the context of legislation based upon European Directives (such as customs duty and VAT), are in summary that: (i) that penalties must not go beyond what is strictly necessary for the objectives pursued, and (ii) that a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to, the underlying aims of the directive (see *Paraskevas Louloudakis v Elliniko Dimosio* (Case C-262/99) [2001] ECR I-5547). The Applicant has not engaged with such principles. The fact that a penalty may be severe or harsh in a particular person's circumstances does not, without more, mean that the principles of proportionality are breached.

22. Furthermore, in the case of *HMRC v Trinity Mirror Group PLC* [2015] UKUT 0421 (TCC) the following principles were set out (at para 15):

"A wide discretion is conferred on the Government and Parliament in devising a suitable scheme for penalties, and a high degree of deference is due by courts and tribunals when determining its legality. The state has a wide margin of appreciation, so wide as to allow the imposition of taxes, contributions and penalties unless the legislature's assessment of what is necessary is devoid of reasonable foundation: see

Gasus Dosier-und Fördertechnik GmbH v Netherlands (1995) 20 EHRR 403, [1995] ECHR 15375/89, ECt HR, at [60]. A court or tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed."

23. The Applicant has not identified any basis on which the FTT should have engaged in an analysis of the proportionality of the penalties which were imposed under the statutory rules introduced by Parliament.

24. I therefore refuse permission to appeal on this ground

Ground 5 - the FTT has failed to take into account the large amount of the penalties and has granted HMRC a windfall

25. The penalties are prescribed by statute. There is no jurisdiction for the FTT to have found them to be excessive, although they may have been reduced if the appeal was admitted and what are described in the legislation as "special circumstances" are found to exist. However, the FTT found no basis to conclude that special circumstances exist in the Applicant's case and given the other unchallenged findings of fact I see no basis on which that conclusion could be challenged. There is no windfall in HMRC imposing penalties which are prescribed in legislation.

26. Ground 5 is therefore unarguable and I refuse permission to appeal on this ground

Ground 6 – exceptional hardship

27. The Applicant is seeking to say that the fact that he is unable to pay the duty and penalties should have been taken into account. That is not something which in these circumstances, the FTT could take into account. As it correctly identified in the Decision, the authority of *Katib* makes that clear when it stated:

"The core point is that (on the evidence available to the FTT) Mr Katib would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that again is a common feature which could be propounded by large numbers of appellants, and in the circumstances we do not give it sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them."

28. In just the same way the delay was significant in this case and there was found to have been no good reason for it. The hardship which the Applicant says he will face does not counteract those elements weighing against him in deciding whether to admit the late appeal. In particular, the Applicant has failed to provide any good reason for the delay in seeking to make the appeal.

29. I therefore refuse permission to appeal on this ground

Conclusion

30. For the reasons given, permission to appeal is refused.

Signed:

	Date: 07 October 2024
Judge Tracey Bowler	
Issued to the parties on: 08 October 2024	