



TC07260

Appeal number:TC/2018/02472

PROCEDURE – *application to set aside decision – criticism by appellant of his representative – whether procedural irregularity – application refused*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PAUL ASKEW

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 7 June 2019

Ms Victoria Young for the Appellant

Mr Matthew Mason of HM Revenue & Customs for the Respondents

DECISION

BACKGROUND

5 1. On 18 September 2018 I heard an application by the appellant for permission to notify a late appeal (“the Hearing”). The appellant was present and was represented by Mr C Urquhart of UWM Accountants. By a written decision released on 6 November 2018 (“the Decision”) I refused the appellant’s application for permission to notify a late appeal. This decision should be read together with the Decision.

10 2. On 21 December 2018 Ms Young, who is a friend of the appellant, emailed the Tribunal on behalf of the appellant and asked for a review the Decision. The grounds for the application were in summary that Mr Askew is severely dyslexic and struggles with his reading and writing. He entrusted all his dealings with HMRC to Mr Urquhart who told him that everything was in hand. Mr Askew considers that he was
15 misled and misinformed by Mr Urquhart and that he was not aware until the hearing that his appeal had been notified late.

3. I should express my gratitude to Ms Young who has very helpfully assisted the appellant despite having no experience of tribunal proceedings.

4. It is not alleged that there is any error of law in the Decision. There is therefore
20 no basis on which I could review the Decision pursuant to Tribunal Rule 41. Further, *section 11 Tribunals, Courts and Enforcement Act 2007* provides that rights of appeal to the Upper Tribunal arise only on a point of law so I cannot grant permission to appeal. In those circumstances I decided to treat this application as an application to set aside the Decision and gave case management directions on 8 February 2019.

25 5. The jurisdiction to set aside a decision is in Tribunal Rule 38 which provides as follows:

“ (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if--

- 30 (a) the Tribunal considers that it is in the interests of justice to do so; and
(b) one or more of the conditions in paragraph (2) is satisfied.

(2) The conditions are--

- 35 (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
(b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
(c) there has been some other procedural irregularity in the proceedings; or
(d) a party, or a party's representative, was not present at a hearing related to the
40 proceedings.

(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.”

5 6. The only condition of rule 38(2) which might be satisfied is (c). The issue I must decide therefore is whether there was a procedural irregularity in the proceedings and if so whether it is in the interests of justice to set aside the Decision.

THE APPELLANT’S CASE

10 7. The appellant’s case is that he was shocked to find out when he attended the Hearing that Mr Urquhart had not been handling his tax affairs correctly. When he attended on 18 September 2018 he believed that it was for the hearing of his appeal, not an application for permission to notify a late appeal. Further, he did not appreciate until the Hearing that the tax charged related, at least in part, to payments made to the two MOT testers referred to in the Decision.

15 8. The appellant told me that until the Hearing he genuinely and honestly believed that his tax affairs had been properly dealt with by Mr Urquhart. Following the Hearing he realised that Mr Urquhart was not acting in his best interests. He was in a state of shock and he challenged Mr Urquhart. When the Decision was released, Mr Urquhart told the appellant that he would take steps to appeal the Decision. The appellant then sought assistance from Ms Young and in December 2018 they
20 discovered that no appeal had been lodged. Ms Young then made the present application on 21 December 2018.

25 9. On 27 December 2018 with the help of Ms Young, the appellant wrote to Mr Urquhart to complain about what he considered to be Mr Urquhart’s gross misconduct in dealing with his tax affairs. There was no response to that letter. On 21 March 2019 the appellant wrote to the Financial Reporting Council (“FRC”) attaching a copy of his letter to Mr Urquhart. It is not clear that the FRC was the appropriate body to lodge a complaint with, but they at least confirmed that Mr Urquhart and UWM Accountants were not members of the Association of Chartered Certified Accountants, the Chartered Institute of Management Accountants, the Chartered
30 Institute of Public Finance and Accountancy or the Institute of Chartered Accountants in England and Wales. It does not appear therefore that there was any professional body with which the appellant could pursue his complaint.

35 10. Ms Young effectively submitted that all the appellant is seeking is a first opportunity to argue in a fair and just way that he should be given permission to notify a late appeal. So far, he has not had that opportunity because Mr Urquhart did not present the appellant’s case properly. Effectively it is said that at the Hearing the appellant was denied the opportunity to explain to the Tribunal his severe dyslexia and to present oral evidence that Mr Urquhart had kept him in the dark about his dealings with HMRC on behalf of the appellant. The appellant’s case is that this
40 amounted to a procedural irregularity.

DISCUSSION

11. I accept that the appellant is severely dyslexic and that he relied on Mr Urquhart to act for him and to keep him informed of his dealings with HMRC. I was not made
5 aware at the Hearing that the appellant was severely dyslexic and there was no indication that was the case. It would clearly have been a relevant if not a determinative factor in deciding whether the appellant should be given permission to notify a late appeal. As to whether the appellant was kept in the dark by Mr Urquhart, for present purposes I have only heard the appellant's account of his dealings with Mr
10 Urquhart. I have not heard anything from Mr Urquhart himself. In any event, HMRC contend that what is alleged by the appellant, even if accepted, does not amount to a procedural irregularity so as to engage rule 38. They also submit that that it would not be in the interests of justice to set aside the Decision.

12. I was referred to a decision of the Upper Tribunal Administrative Appeals
15 Chamber (Judge Edward Jacobs) in *SK v Secretary of State for Work and Pensions [2016] UKUT 529 (AAC)* which was concerned with an application to set aside a decision refusing permission to appeal to the Upper Tribunal. The application was made under rule 43 of the Upper Tribunal Rules which is in substance equivalent to rule 38, and in particular rule 43(d) which is the equivalent of rule 38(2)(c).

20 13. Judge Jacobs had refused permission to appeal in part because it was based on a claim to be self employed which had not been before the First-tier Tribunal. The application to set aside that decision asserted that evidence as to the appellant's self employment, or at least from which it could be inferred she was self employed, had been before the First-tier Tribunal. Judge Jacobs considered that such evidence was
25 not before the First-tier Tribunal but in any event he held that these matters were outside rule 43:

“7. I now explain why these matters are outside the scope of rule 43. This is because that rule is limited to matters of procedure and what the claimant says is a matter of
30 substance. In other words, the rule is concerned with how the Upper Tribunal handled the claimant's application for permission to appeal. It does not provide a means of challenge to the decision itself or the reasons on which it is based. The points the claimant makes in respect of her self-employment do not relate to how this tribunal dealt with her application. Rather, they challenge the correctness of my decision on the merits of her application.

35 8. Powers like that conferred by rule 43 have been consistently interpreted as applying only to procedural irregularities and not as including challenges to the substance of the tribunal's decision or reasons...”

14. I was also referred to a decision of the Upper Tribunal in *Tager v HM Revenue & Customs [2015] UKUT 0663 (TCC)* which was also referred to by Judge Jacobs in
40 SK. That case concerned an alleged failure by the Tribunal to understand the evidence and allegedly making a finding which was not supported by the evidence. The basis of the application was very different to the present application. However, Judge Bishopp did make the following general comment:

5 “17. While I agree that the phrase [some other procedural irregularity], by its own terms, invites a wide interpretation, and makes it clear that what appears in paras (a) to (c) does not represent an exhaustive list, it is apparent from the manner in which the conditions are set out that para (d) must be read in its context, and be interpreted consistently with what precedes it. The prior paragraphs provide examples of errors affecting the conduct of a hearing: thus paras (a) and (b) do not relate to a document which a party has omitted to produce because he did not then realise its evidential significance, but which he now, belatedly, wishes to introduce, but to one which was not available to the tribunal, or to one party, because of a transmission error...”

10 15. HMRC submit that the challenge in the present application is a challenge to the substance of the Decision. With some reluctance I must accept that submission. On the appellant’s case the Decision is incorrect not because there was some mix up over documents or because a party or representative was not present, but because evidence which could have been put before the Tribunal was not put before the Tribunal. It cannot be said that the failure to put that evidence before the Tribunal arose because of any procedural error or irregularity. The explanation as to why it happened may lie in the negligence or misconduct of Mr Urquhart. Without hearing from Mr Urquhart, I cannot say. But even if it does, the present application amounts to a challenge to the substance of the Decision and does not identify anything which could be described as a “procedural irregularity”.

15 16. If what the appellant says as to Mr Urquhart’s conduct is right then I have considerable sympathy for the position the appellant finds himself in. However, there must be finality in the proceedings. If the appellant has not had a fair opportunity to present his case it is because of the negligence or misconduct of his representative, and not because of any procedural irregularity associated with the Hearing. The remedy for that negligence or misconduct lies elsewhere, either in a claim against UWM Accountants and/or as the FRC have suggested possibly with a reference to Trading Standards if the firm is not a member of a professional body.

30 17. If I am wrong, and there was some procedural irregularity, then the question remains whether it would be in the interests of justice to set aside the Decision. It seems to me that I would at least have to be satisfied that:

- 35 (1) there was incompetence on the part of the representative to such a degree that no reasonable representative might have been reasonably expected to act in that way.
- (2) that the conduct affected the fairness of the process to such an extent that it is in the interests of justice to set aside the decision.

40 (See my decision in *Girotra v Commissioners for HM Revenue & Customs [2014] UKFTT 775 (TC)* where unlike the present case it was not argued that the incompetence of a representative could not amount to a procedural irregularity.)

18. In this case I take into account that the appellant was present at the time of the Hearing and was aware at that time of the case being put forward on his behalf. He did not say anything at the time to give me cause for concern as to the conduct of his

representative, and he did not contact the Tribunal in the weeks following the hearing before the decision was released to express any concerns. I also note that the appellant gave evidence to me at the Hearing that certain letters sent to him had not been received. He expressed no uncertainty as to whether they had been received. I accept
5 that the appellant may have found it embarrassing to say that he was unable to read or write, however he could have said that he did not know whether the correspondence had been received, which would have been the truth. He could also have said, if such was the case, that he passed all correspondence to Mr Urquhart without reading it. There are also letters from UWM Accountants to HMRC dated 17 November 2017
10 and 5 March 2018 which indicate firstly that Mr Urquhart contacted the appellant in writing and secondly that they had discussions with the appellant about the determinations. Those letters are inconsistent with the appellant's case on this application that he was kept in the dark by UWM Accountants.

19. I cannot find on the evidence available to me that the appellant was kept in the
15 dark or that there was incompetence on the part of UWM. It would be unfair of me to do so without hearing from Mr Urquhart. I have considered whether I should issue a witness summons to Mr Urquhart in order to resolve this application fairly. However, given my finding that there has been no procedural irregularity I do not consider that would be appropriate or necessary.

20. Ms Young referred me to a decision of the First-tier Tribunal in *Hicharms (UK) Ltd v HM Revenue & Customs [2011] UKFTT 432 (TC)* in which the FTT had allowed an appeal against a penalty for late filing of returns. In doing so the FTT stated that even if the appellant had filed its returns late, it genuinely and honestly believed that it had filed the returns on time which would have given it a reasonable
25 excuse. That case does not help the appellant here. The reasons why the appellant failed to appeal on time were considered based on the evidence at the Hearing. The question on this application is whether the Decision based on that evidence should in the interests of justice be set aside because of a procedural irregularity which resulted in the evidence available at the Hearing being deficient. For the reasons I have given I
30 do not consider that there was any procedural irregularity. Further, given that the appellant was present at the Hearing and had an opportunity to explain at least that he had not read the material items of correspondence I am not satisfied that it would be in the interests of justice to set aside the decision.

21. Since the hearing of this application the Upper Tribunal has released its decision
35 in *HM Revenue & Customs v Katib [2019] UKUT 0189 (TCC)*. That decision concerned an application for permission to appeal a decision of the FTT on an application for permission to make a late appeal. It is relevant for present purposes for what is said in relation to reliance on an incompetent representative. There was a striking degree of incompetence in that case which bears some similarity to that
40 alleged by the appellant in the present application. The Upper Tribunal found that as a general rule a litigant must bear the consequences of the incompetence of his advisers, although it recognises that there may be exceptions to that rule. The decision does not cause me to revisit my conclusions that there has been no procedural irregularity in the present case and that it is not in the interests of justice to set aside the Decision.

22. For the reasons given above the application to set aside the Decision is refused.

23. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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TRIBUNAL JUDGE CANNAN
RELEASE DATE: 12 JULY 2019

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