



Neutral Citation: [2023] UKFTT 377 (TC)

Case Number: TC08798

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Application decided on the papers

Appeal reference: TC/2022/11426

EXCISE DUTY – procedure – application to admit late appeal – appeal against refusal to restore vehicle – Appellant in Croatia – evidence of positive Covid test provided to demonstrate ill health as reason for delay – whether to admit appeal – yes – appeal admitted and Directions issued for appeal to proceed

Judgment date: 18 April 2023

Decided by:

TRIBUNAL JUDGE BAILEY

Between

ANTE MIKALIC

Appellant

and

THE DIRECTOR OF BORDER FORCE

Respondent

The Tribunal determined the application to make a late appeal on 13 April 2023 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 having first read the Notice of Appeal (with enclosure) dated 4 April 2023, Border Force's objections to the late appeal being admitted dated 21 September 2023, the Appellant's Reply (with enclosure) dated 4 January 2023 and the correspondence on the Tribunal file.

DECISION

INTRODUCTION

1. This decision is in respect of the Appellant's application to make a late appeal to the Tribunal against a decision of Border Force, made on 4 February 2022, not to restore a vehicle that had been seized.

2. Both parties have requested that this application be heard on paper. While it is unsatisfactory in many ways, I have agreed to a paper determination of this application. This agreement has been given because there are only four ways a hearing can take place: (1) face to face with attendees in a tribunal room, (2) by video with attendees appearing by video link, (3) a hybrid hearing combining attendees in a tribunal room and attendees appearing by video link, or (4) on paper where there are no attendees other than the judge. A video hearing would usually be the appropriate method of deciding this type of preliminary application but the Appellant currently resides in Croatia. At present, decisions by the Croatian government about whether a person in Croatia may give evidence by video link to a UK court or tribunal are made on a case by case basis. It may be several months before a decision is received for this application, and to await such a decision would delay this appeal unnecessarily. While the Appellant could travel to the UK for a face to face hearing in a tribunal room (and it is likely that he will have to travel to the UK for any substantive hearing), I accept that travel to the UK could seem disproportionate for the hearing of this application when both parties would prefer a paper hearing. Although there is relatively limited information on the Tribunal file, I have concluded that there is sufficient for a paper hearing to take place and for a decision to be taken.

FACTS

3. On the basis of the documents before me I find as follows:

4. In late September or early October 2021, the Appellant was intercepted in Coquelles, France, by Border Force when driving a vehicle with the registration ST30440 (the "Vehicle"). The Appellant was found to be carrying \$3,000. The Respondents were not satisfied that the Appellant had provided them with a credible explanation for carrying that sum of money but no seizure was made.

5. On 14 October 2021, the Appellant was intercepted at the Port of Dover, driving the Vehicle. The Vehicle was towing a trailer. Border Force conducted a search of the Vehicle. During the course of that search Border Force moved the lower bunk, fridge and storage drawer to reveal a metal framework. There was a space beneath the floor containing three black taped packages. These packages were connected to wires and a tracker. The packages and tracker were removed and the Appellant was arrested on suspicion of smuggling controlled drugs.

6. Border Force seized the Vehicle from the Appellant, and the Appellant did not challenge the legality of the seizure within one month. The law provides that it is no longer possible for that challenge to be made.

7. The packages were later found not to contain controlled drugs; I am not told what was in those packages. The Appellant sought restoration of the Vehicle from Border Force. On 8 December 2021, Border Force refused to restore the Vehicle to the Appellant. On 23 December 2021, Border Force received the Appellant's request for a review of the refusal.

8. On 4 February 2022, Border Force issued a Review Decision, upholding the earlier refusal to restore the Vehicle. At the conclusion of that Review Decision Border Force stated that if the Appellant wished to appeal then he should file an appeal with the Tribunal within 30 days of the date of the Review Decision, i.e., by 6 March 2022.

9. On 22 February 2022, the Appellant tested positive for Covid-19.

10. On 4 April 2022, 29 days after the deadline, the Tribunal received the Appellant's appeal against Border Force's refusal to restore the Vehicle to him. The Appellant provided a copy of the Review Decision, and his grounds of appeal against that Review Decision. As the Appellant was resident in Croatia, Border Force had emailed the Review Decision to him, and so the Review Decision bore the email address to which it had been sent, rather than the Appellant's postal address.

11. In his covering email the Appellant included the following explanation for his lateness:

I apologise for running late with the report but I was suffering Covid and post Covid complications.

12. The Tribunal did not acknowledge the Appellant's appeal until 13 June 2022. On that date the Tribunal emailed the Appellant to ask him to provide his postal address to them within seven days. The Appellant replied by email on 18 June 2022, providing his postal address to the Tribunal.

13. On 27 July 2022, the Tribunal notified the appeal to Border Force, directing Border Force to provide either a Statement of Case, or a formal objection to the late appeal, within 60 days (i.e., by 26 September 2022). On 21 September 2022, Border Force provided a formal Notice of Objection to the late appeal.

14. On 19 December 2022, the Tribunal asked the Appellant to provide his full reasons for the lateness of the appeal, and to provide a copy of any evidence he relied upon (including medical evidence) to support his explanation. That was to be provided within 21 days, i.e., by 9 January 2023.

15. On 4 January 2023, the Appellant emailed the Tribunal with a copy of a Microbiology Test Report that showed the Appellant had taken a PCR test for Covid-19 on 22 February 2022 and had tested positive. In his covering email the Appellant wrote:

I am attaching a certificate of a positive Covid-19 test, it was a more severe form and unfortunately, due to complications during recovery, I was not able to respond to the decision in a timely manner.

16. The Tribunal forwarded the Appellant's email and attachment to Border Force, and asked if they still opposed the Appellant's lateness. On 31 March 2023, Border Force confirmed they still did oppose the Appellant's application to make appeal.

TEST TO BE APPLIED

17. The Tribunal has the power to grant a person an extension of time to make an appeal, but must decide, in each case, whether it would be appropriate to do so given the particular circumstances. In *Martland v HMRC* [2018] UKUT 178 (TCC), concerning a late appeal against an excise duty assessment, the Upper Tribunal set out what the First-tier Tribunal should consider when deciding whether an extension of time should be granted where an appeal is made late. The Upper Tribunal stated:

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*:

(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.

(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.

18. Following that guidance, my starting point is that permission should not be granted unless the Appellant persuades me that, on balance, permission should be granted. I will consider the extent of the delay and whether there are reasons for all or part of that delay. I will then consider and weigh all the circumstances of the case to decide whether this appeal should be admitted out of time. The onus of proof is on the Appellant to explain the reasons for his delay and to make the case for being given relief from their failure to comply with the relevant time limit. The standard of proof is the balance of probabilities.

Length of the delay

19. In Paragraph 27 of their Notice of Objection, Border Force argue:

... the Respondent further submits that, although the Tribunal only wrote to request the missing information as late as 13 June 2022 and did indeed receive a reply with the stipulated seven days therein, the Tribunal letter of 13 June 2022 was correct to observe the Notice of Appeal *must meet the criteria set out in Rule 20*. The appeal was therefore not fully and correctly submitted until 18 June 2022.

20. If Border Force are arguing that the Appellant should be considered to be responsible for the delay occasioned by the Tribunal then I reject that submission. In considering the extent of the delay I take notice only of period of delay for which the Appellant is responsible.

21. The Appellant filed his appeal 29 days after the 30 days provided by statute for him to make an appeal. However, as the Appellant had emailed the Tribunal rather than completing a notice of appeal form, the Appellant had omitted to provide his postal address. (If the Appellant had been a UK resident his postal address would have been on the decision letter he provided and so it would have been available to the Tribunal but, as it was directed to a non UK resident, the decision bore only an email address.)

22. The Tribunal took from 4 April 2022 to 13 June 2022 to acknowledge receipt of the appeal. The Appellant was then asked to provide his postal address within seven days. The Appellant replied to the Tribunal, providing his postal address, five days later.

23. As the Tribunal was not in possession of a complete appeal until the postal address had also been provided, the Appellant’s delay is 34 days in total.

24. Previous decisions of this Tribunal and of other courts and tribunals have described the length of delay in different cases, and the labels of “serious” and “significant” appear in *Martland* (above), the same term having been used by the Court of Appeal in *Denton v TH White Ltd* [2014] 1 WLR 3926.

25. Border Force have submitted:

Therefore, the Respondent submits that the Appellant’s appeal to the FTT is seriously and significantly out of time at whichever date the Tribunal decides to accept as the date of submission.

26. Neither “serious” nor “significant” are defined terms. In *Romasave (Property Services) Limited v HMRC* [2015] UKUT 0254 (TCC), the Upper Tribunal stated:

Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant. We note, although judgment was given only after we had heard this appeal, that in *Secretary of State for the Home Department v SS (Congo) and others* [2015] EWCA Civ 387 the Court of Appeal, at [105], has similarly described exceeding a time limit of 28 days for applying to that court for permission to appeal by 24 days as significant, and a delay of more than three months as serious. Although each case must be considered in its own context, we can find nothing in this case which would alter our finding in this respect.

27. In the relevant passage in *Secretary of State for the Home Department v SS (Congo) and others* [2015] EWCA Civ 387, the Court of Appeal held:

105. As to the first stage, the time limit for filing an appellant's notice in the Court of Appeal is 28 days from the date when the Upper Tribunal's decision on permission to appeal is given (CPR Practice Direction 52D, paragraph 3.3). It seems to us that to exceed that time limit by 24 days, as in *AC (Canada)*, was at the least a significant breach; and to exceed it by well over 3 months, as in *KG (India)*, was on any view a serious breach. In *Hysaj* a delay of 42 days in filing an appellant's notice was considered not to be significant in the sense of having an effect on the proceedings, but that was because of the particular circumstances of the case as explained at para. [51] of the judgment of Moore-Bick LJ, including the fact that for part of the period the parties were awaiting a decision by the first instance judge who in fact then granted permission to appeal. A party who delays by several weeks or months in applying to this court for permission to appeal can generally expect to have the delay treated as significant or serious.

28. I agree with Border Force that delay of 34 days, in the context of a 30 day time limit, is significant. I do not consider that delay of 34 days has reached the seriousness of a delay of "well over three months". Therefore, I conclude that the delay here is in the significant range but it is not serious.

29. For the avoidance of doubt, I do not consider that delay of 34 days is anywhere near being so minimal that I do not need to spend much time considering the reasons for the delay or evaluating all the circumstances.

Reasons for that delay

30. The Appellant's reason for his delay is as set out in his email of 4 January 2023: he had tested positive for Covid-19, his illness had been more severe and there had been complications during his recovery. As the Appellant tested positive on 22 February 2022, and the appeal was filed on 4 April 2022, I calculate that just under six weeks passed between the Appellant's positive test and the Appellant feeling sufficiently well to file an appeal.

31. In paragraph 24 of their Objection Notice, Border Force have argued:

The Appellant states that the reason for this significant initial delay of 29 days is because they had been suffering from post-Covid complications. However, no evidence or further details as to the nature, length and scope of these complications are given to establish how that would have precluded an appeal from being submitted within the statutory timeframe. Thus, no good reason for the delay has been established.

32. That was written at a time when Border Force had not seen the Appellant's positive Covid-19 test result. After seeing that medical evidence, Border Force argued in their email of 31 March 2023:

We further posit that the information supplied by the Appellant containing the positive Covid test (which we had not seen previously) does not answer those points as raised at paragraph 24 of our written objections, in that there is no evidence as to the nature, length and scope of those post-Covid complications given to establish how they would have precluded an appeal being submitted within the statutory timeframe. Thus, it remains that no good reason for the delay has been established or evidenced.

33. I do not agree with Border Force that no good reason for the delay has been established or evidenced. There is a positive Covid-19 test demonstrating that the Appellant had Covid-19 on 22 February 2022. The documents on the Tribunal file show that the Appellant is middle aged, and I take judicial note of the fact that, the older a person is, the more likely it is that they will be adversely affected by Covid-19. I also consider it to be well-established that many people do suffer significant ill health after contracting Covid-19, and that there are people who do not appear to recover fully from Covid-19 years after first becoming infected. I agree with Border Force that the Appellant has not explained the precise nature of the symptoms he suffered, and I accept that Covid-19 is an illness with many symptoms. However, unless the Appellant had become so ill that he required hospital treatment (which is not suggested), I do not know what further medical evidence would be expected in a case of a slow recovery from an illness that is known to have no treatment. I do not see any reason to doubt that the Appellant was ill, as he stated, and that his ill health was such that he was prevented from making an appeal (in a language other than his mother tongue) until he had sufficiently recovered from Covid-19. In making this assessment, I have taken into account that the Appellant appears to have met other deadlines in time, both when he appealed to Border Force and when he sought a review from Border Force, and also in meeting the deadlines set by the Tribunal. That timeous action on other occasions adds credibility to the Appellant's implied argument (which I accept) that he would have met the appeal deadline of 6 March 2022 had he not been taken ill on 22 February 2022 and remained ill for a time thereafter.

34. With regard to the five additional days for the Appellant to provide his postal address I note that the Tribunal clerks had asked the Appellant to provide the information within seven days. The Appellant met what he presumably believed to be the deadline for him to act. Therefore, although I consider that the clock resumed again for the purposes of calculating the Appellant's overall delay in filing his appeal, I also conclude that the Appellant would have understood he had seven days to comply and so has a good reason for taking five days (or any period of time within the seven days stipulated).

Discussion and decision

35. In weighing the circumstances of this case, I take into account what will happen if I either dismiss, or allow, the Appellant's application to make a late appeal.

36. If the Appellant's application to make a late appeal is dismissed then the Appellant will suffer prejudice because that will be the end of his appeal and so he will have lost the opportunity to have the challenge the decision not to restore the vehicle to him. It is not appropriate for me to conduct an intensive investigation of the merits of the appeal but I do not consider the Appellant's case to be obviously weak, and so there would be some prejudice to the Appellant in losing his opportunity to challenge Border Force's decision.

37. Looking at the reverse situation, if this application is allowed then there will be prejudice to Border Force who will have to respond to a matter they may have considered closed. In this case I consider that prejudice is relatively minor given that the delay is not so lengthy that Border Force would reasonably have been expected to have destroyed relevant documents or be otherwise less able to defend this appeal. However, admission of this appeal would also cause some prejudice to other taxpayers and other tribunal users who expect the deadlines that

they respect and observe to be upheld by the Tribunal, and it would add to the overall burden of the Tribunal and lessen its capacity to deliver timely justice.

38. Drawing these factors together, I remind myself that the onus is on the Appellant to explain the reasons for his delay in making an appeal, and to make the case for being given an extension of time. As Border Force have rightly noted, it is important that the statutory time limits prescribed by Parliament are respected. However, the Appellant has provided evidence that he was infected with Covid-19 and I have accepted the Appellant's explanation that he took time to recover from that illness. I consider that the Appellant's ill health provides him with a good reason for 29 of the 34 days of delay in this case. The Appellant acted promptly in meeting deadlines before he was ill, and he has again acted promptly once he had recovered his health. With regard to the remaining five days of delay, I have noted above that I consider the Appellant would have considered he had met the Tribunal deadline provided he provided his postal address within the seven days the Tribunal directed. There is no reason to suppose that the Appellant understood he was further delaying the date on which his appeal would be treated as being filed if he did not provide his address on the same day that the Tribunal asked for it.

39. I accept that as a result of my decision, Border Force will be prejudiced by having to divert resources to respond to this appeal, and that will also result in more delay for other taxpayers and for other tribunal users who have complied with all time limits. However, I consider that this prejudice to Border Force and other tribunal users is outweighed by the prejudice that would have been caused to the Appellant if I had decided to refuse this application. The period of delay is significant but the Appellant has provided a good reason for at least 29 of the 34 days of delay and I consider there is an explanation for the remaining five days. I have concluded that the balance of factors is in favour of the Appellant, and that he should be granted permission to make a late appeal.

CONCLUSION

40. This appeal is admitted out of time.

41. The Director of Border Force is directed to produce their Statement of Case within 60 days of the date of this Decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

42. 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.

**JANE BAILEY
TRIBUNAL JUDGE**

Release date: 18th APRIL 2023