



Neutral Citation: [2023] UKFTT 00415 (TC)

Case Number: TC08816

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Decided on the papers

Appeal reference: TC/2018/04768

PROCEDURE – application for Tribunal to appoint a lawyer fluent in Polish to act for Appellant, a Polish lorry driver challenging an excise duty assessment and penalty – Human Rights Act considered – legal aid – application refused

Decided on the papers on 4 May 2023

Judgment date: 10 May 2023

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

ANDRZEJ NIEC

Appellant

and

**THE COMMISSIONERS FOR
HIS MAJESTY’S REVENUE AND CUSTOMS**

Respondents

DECISION

INTRODUCTION

1. Mr Niec is a Polish lorry driver. On 21 February 2018, HMRC issued him with an excise duty assessment of £48,820 and a wrongdoing penalty of £29,292. On 14 March 2023, Mr Niec applied for the Tribunal to appoint a Polish-speaking “ex-officio attorney” to represent him in his dispute with HMRC (“the Application”). On 13 April 2023, HMRC provided a brief response.

2. The Application was made on the basis that Mr Niec is a foreigner who “does not speak English” and his financial situation “does not allow [him] to pay an attorney of [his] choice”. It is implicit in the Application that Mr Niec is asking the Tribunal to direct that HM Courts and Tribunals Service (“HMCTS”) provide him with free legal representation.

3. The Application is **refused** for the reasons explained in this decision. In summary:

(1) In the UK, assistance with legal representation is given via legal aid; this has a number of eligibility restrictions.

(2) Legal aid operates independently of the Tribunal system. It is for Mr Niec to establish whether he is entitled to legal aid.

(3) The Tribunal has no power to order HMCTS to provide him with free legal representation outside of the legal aid system, see the case law discussed at §33.

(4) Article 6 of the European Convention on Human Rights (“the ECHR”) gives a person charged with a criminal offence certain rights, including “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

(5) The excise duty assessment is a civil and not a criminal matter. Although the penalty is “criminal” for the purposes of the ECHR, it does not follow that Mr Niec is entitled to free legal representation. Instead, he is entitled to a fair hearing, see the case law summarised at §24.

(6) There is no reason to think that lack of legal representation means that Mr Niec will not have a fair hearing. The Tribunal is used to hearing cases where the appellant does not have a lawyer, and takes that into account in conducting proceedings. In addition, a professional interpreter fluent in the Polish language will be provided free of charge by HMCTS for the hearing of Mr Niec’s appeal.

4. The Tribunal also issued further directions (instructions) about the hearing; these have been sent out separately at the same time as this Decision.

BACKGROUND

5. This background section does not constitute findings of fact, but is a summary derived from the documents provided to the Tribunal in relation to the proceedings.

6. Mr Niec is a lorry driver. Before the events with which this case is concerned, he had worked for a company called ISO Tank delivering cross-border goods. He was never responsible for preparing the related paperwork. There is no previous history of him being involved in smuggling; instead he “went through many checks at the border and never had any issues with [his] documents, car or items that [he] had in [his] car”. He describes himself as “a person that has always followed the rules and the law”.

7. In May 2017, a friend called Mariusz Siwczuk introduced Mr Niec to a person called Joe, who hired him for £500 cash to drive a tractor unit and trailer to the UK for a company called Riverway Express.

8. Mr Niec entered the UK on 2 June 2017 as the driver of the tractor unit and trailer carrying beer. He was not responsible for preparing the documentation and he was “completely unaware that there was anything wrong with the company or with their documents” but as the result of these events has realised that the people involved were “a criminal gang”.

9. The CMR for the beer was found to be invalid. HMRC checked the information on the CMR but were unable to trace the named consignee, the consignor or the haulier. The registered keeper was named as CPR Commercials Ltd. That company provided information to HMRC that it had sold the vehicle on 16 March 2016 to a company called Trans Express 2016 Ltd; HMRC wrote to that company but received no reply.

10. Mr Niec contacted Riverway Express and was told there must have been a “miscommunication”. He also provided information to HMRC, including names and telephone numbers for Joe and “his boss”, and the licence plate number of one of the people involved. HMRC followed up but did not get a response when they called the numbers. They located the vehicle for which Mr Niec had provided the licence plate number and identified the registered owner. However, HMRC then concluded that they had “insufficient information to substantiate” what Mr Niec had told them.

11. HMRC went on to decide that they were “unable to link” the beer to any person or organisation other than Mr Niec. On 21 February 2018, they issued Mr Niec with an excise duty assessment of £48,820 and a wrongdoing penalty of £29,292 on the basis that his behaviour had been “deliberate and concealed”. The penalty was reduced on statutory review to £20,504 on the basis that it had been “deliberate but not concealed”.

12. Mr Niec lives in Poland, and he speaks very little English. He is married with three small children and his wife does not work; he is also responsible for caring for his father who is seriously unwell. As a result of these events:

- (1) he resigned from his job;
- (2) his career as a lorry driver was “ruined”;
- (3) his standard of living and that of the family who are dependent on him has been significantly reduced; and
- (4) his mental health is suffering; he is unable to sleep because of stress and depression.

The appeal

13. Mr Niec appealed to the Tribunal; he was represented by Aneta Maziarz Ltd, a firm of solicitors in London; that firm filed his Notice of Appeal on 20 July 2018. Mr Niec paid the firm £7,300 in legal fees; most of this money was borrowed. He has no savings.

14. Mr Niec’s case was “stayed” or delayed behind a similar appeal by another lorry driver, Mr Martyn Perfect. The CJEU judgment in Mr Perfect’s case was published on 10 June 2021 under reference C-279/19; the Court of Appeal judgment followed on 15 March 2022, under reference [2022] EWCA Civ 330.

15. Ms Maziarz told Mr Niec that a further £3,000 was required if the firm was to continue to represent him. Mr Niec could not afford that fee. On 18 May 2022, Ms Maziarz informed the Tribunal that her firm was no longer Mr Niec’s representative.

16. On 31 August 2022 HMRC applied to strike out Mr Niec’s appeal. On 23 January 2023, I refused that application, and issued directions for HMRC to provide a supplementary

Statement of Case and to supply various documents to which Mr Niec had made reference. At the same time, I informed Mr Niec that he would be contacted again by the Tribunal once HMRC had responded to the directions, and also told him that:

- (1) he did not need to instruct another lawyer (although he could if he wished);
- (2) Tribunals are used to hearing cases where the person appealing does not have a lawyer, and takes that into account; and
- (3) a professional interpreter fluent in the Polish language would be provided free of charge by the Tribunal for the hearing of his appeal.

17. HMRC responded on 8 March 2023; the Application was then made on 14 March 2023.

THE ECHR

18. I first considered the implications of Article 6 of the ECHR. So far as relevant, it provides:

- “(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....
- (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- (3) Everyone charged with a criminal offence has the following minimum rights:
- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

19. I note in particular that a person subject to a “criminal charge” has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”. The right to free legal advice is thus not absolute, but depends on the individual’s means and is subject to the requirement that its provision satisfies “the overall interests of justice”.

The excise duty assessment

20. Mr Niec has been issued with an excise duty assessment and a penalty. The former is not a criminal charge, but a civil matter. The Upper Tribunal summarised the position in *McKeown and others v HMRC* [2016] UKUT 0479 TCC at [73]:

“the appeals concerned assessments for excise duty and were not criminal proceedings for the purposes of the ECHR because they did not meet the three criteria for proceedings to be considered criminal outlined by the European Court of Human Rights (‘ECtHR’) in *Engel and Others v. The Netherlands* [1976] 1 EHRR 647 at [82] and [83] (see also *Ezeh and Connors v. United Kingdom* ECHR Cases 39665/98 and

40086/98). Further, as Ms Simor submitted [for HMRC], tax (including excise duty) disputes are outside the scope of article 6 of the ECHR as they are civil rights and obligations (see *Ferrazzini v Italy* ECHR Case 44759/98, [2001] STC 1314.”

The penalty

21. In *Engel v Netherlands* [1976] ECHR 100/71 the European Court of Human Rights (“the ECtHR”) said that when deciding whether a penalty is “criminal” for Article 6 purposes, the starting point was its classification under the law of the relevant country – ie whether it was part of the criminal code. However, that is not determinative: the nature of the offence and the severity of the penalty are also relevant factors.

22. An excise duty penalty such as is in issue here, is not classified as criminal under UK law, but it is punitive and deterrent in nature, and so falls to be classified as “criminal” for Article 6 purposes.

23. In *Jussila v Finland* [2007] 45 EHRR 39 the ECtHR considered a small penalty for an under-declaration of VAT, and said at §43:

“Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly “criminal charges” of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a “criminal charge” by applying the *Engel* criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties (*Öztürk v. Germany*), prison disciplinary proceedings (*Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A, no. 80), customs law (*Salabiaku v. France*, judgment of 7 October 1988, Series A no 141-A), competition law (*Société Stenuit v. France*, judgment of 27 February 1992, Series A no. 232-A) and penalties imposed by a court with jurisdiction in financial matters (*Guisset v. France*, no. 33933/96, ECHR 2000-IX). Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency (see *Bendenoun* and *Janosevic*, §46 and §81 respectively, where it was found compatible with Article 6 §1 for criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body: *a contrario*, *Findlay v. the United Kingdom*, cited above).”

24. The appellant in *Booth v HMRC* [2022] UKUT 217 (TCC) had been issued with a VAT penalty of £1,444,813.71. The UT held at [58]:

“In our judgment, the essential requirement of Article 6 is that in the current proceedings the Appellant has a right to a fair trial, bearing in mind that fiscal penalties do not fall within the hard-core of the criminal law and that the “criminal-head” requirements of Article 6 do not (as the ECtHR found in *Jussila*) apply with their full stringency. The exact requirements necessary to ensure a fair trial will depend on the nature of the issue to be tried, its seriousness and all the circumstances of the individual case. What is required is a broad assessment of whether the particular charge brought against the Appellant is dealt with in a manner which provides a fair hearing when the proceedings are viewed as a whole.”

25. Although both *Jussila* and *Booth* concern tax penalties, in my judgment the position is the same for excise penalties such as that charged on Mr Niec. Although “criminal” for Article 6 purposes, they are not part of the “hard core of criminal law”.

Interlinked issues

26. In *Georgiou v United Kingdom* [2001] STC 80, the ECtHR considered Mr Georgiou’s appeal against VAT assessments and penalties. The Court found that the penalties, but not the assessments, were “criminal”, and then said at p 89:

“As to whether the assessments themselves should also be seen as 'criminal charges' for the purpose of the art 6 guarantees, the applicants argue that since the penalty procedures rely on the assessments for their validity, it would be wrong not to look at the proceedings as a whole. The court accepts that it is not possible, given the various matters which were being determined by the tribunal, to separate those parts of the proceedings which determined a 'criminal charge' from those parts which did not. It will consider the proceedings to the extent to which they determined a 'criminal charge' against the applicants, although that consideration will necessarily involve the 'pure' tax assessments to a certain extent.”

Application to Mr Niec

27. It follows from the case law set out above that:

- (1) the duty assessment issued to Mr Niec is not “criminal” for the purposes of the ECHR;
- (2) the penalty charged on Mr Niec is “criminal” for the purposes of the ECHR;
- (3) the penalty is inextricably linked with the facts of the duty assessment, so the Article 6 protections extend to the proceedings as a whole; but
- (4) those protections do not “apply with their full stringency”; what is required is that Mr Niec has a fair hearing.

A FAIR HEARING

28. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 reads as follows:

- “(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly includes—
 - (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it—
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.

- (4) Parties must—
 - (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.”

29. The Tribunal is well used to having litigants in person (ie appellants without legal representation) and will take particular care in such a case to ensure that the overriding objective is met, see *HMRC v Hill* [2018] UKUT 45 (TCC) (“*Hill*”) at [34]. The Equal Treatment Bench Book at paras 10 and 11 reminds Tribunals that:

“Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may well be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.

The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.”

30. The following passage from *Aleena Electronics v HMRC* [2011] UKFTT 608 (TC) at [60] was referred to with approval by the Upper Tribunal in *Hill* at [15]:

“It is the ethos of the Tribunal system and certainly that of the Tax Chamber of the First-tier Tribunal that a taxpayer can bring an appeal to a tax-expert Tribunal without the expense of instructing representatives. The Tribunal hearing a substantive appeal will be expert: it will know the law and will take the legal points at the hearing that an unrepresented appellant may not. Where the Appellant is unrepresented the Tribunal panel will take on a more inquisitorial role and will ask witnesses questions which an unrepresented Appellant may not think to ask.”

31. If Mr Niec does not obtain legal representation, the Tribunal panel which is listed to hear Mr Niec’s appeal will apply the above principles to ensure he has a fair hearing. In addition, a professional interpreter fluent in the Polish language will be provided free of charge by HMCTS for the hearing of his appeal.

LEGAL AID

32. A person subject to a criminal charge may be entitled to legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”). In April 2001 the Lord Chancellor signed a direction under the earlier Access to Justice Act 1999, s 6(8) to the effect that where a tribunal is dealing with penalties which the courts have decided are criminal within the terms of ECtHR, or where the appellant reasonably argues that the penalties are criminal, legal aid will be provided where the interests of justice require it.

33. Legal aid operates independently of the Tribunal system, and an applicant may need to meet eligibility and means tests. In *Re K&H (Children)* [2015] EWCA Civ 543, the Court of Appeal considered whether a judge had the power to require HMCTS to provide free legal representation in circumstances where this was not provided under the legal aid scheme. The Court held at [31] that “LASPO provides a comprehensive code for the funding of litigants whose case is within the scope of the scheme” and that judges have no power to direct that HMCTS provide funding for cases which are not within LASPO.

34. Thus, it is a matter for Mr Niec to establish whether he has any entitlement to legal aid. The Tribunal cannot assist with that, and if he has no entitlement under LASPO, the Tribunal cannot order HMCTS to provide Mr Niec with a lawyer free of charge.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

35. 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.

**ANNE REDSTON
TRIBUNAL JUDGE**

Release Date: 10th MAY 2023