



Neutral Citation: [2023] UKUT 106 (TCC)

Case Number: UT/2020/000398

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Royal Courts of Justice
Rolls Building
London

LATE APPEAL – Notice of Requirement – security for PAYE and NICs – Appellant likely to be convicted of a criminal offence if leave to appeal refused – FTT refusing permission to appeal out of time – whether decision wrong in law – whether contrary to Article 6 ECHR – appeal dismissed

Heard on: 25 April 2023
Judgment date: 11 May 2023

Before

MR JUSTICE MILES
JUDGE GUY BRANNAN

CHARLES HORDER

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Andrew Young, Counsel, instructed by Lex Law.

For the Respondents: Joshua Carey, Counsel, instructed by the General Counsel and Solicitor to His Majesty’s Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal by Mr Horder against the decision (“the Decision”) of the First-tier Tribunal (Judge Mosedale) (“the FTT”) refusing to extend the time for him to appeal against the imposition of a Notice of Requirement (“NOR”) to provide security for PAYE and National Insurance contributions (“NICs”).
2. The NOR made Mr Horder jointly and severally liable to deposit money as security in respect of PAYE and NICs together with a company called Quadragina Ltd (“Quadragina”). Quadragina was also an appellant before the FTT, but is not an appellant before this Tribunal. In summary, a NOR was issued to Mr Horder by HMRC because he was a director of Quadragina, which owed amounts in respect of PAYE and NICs to HMRC arising from employment income paid to Quadragina’s staff.
3. Mr Horder sought to bring his appeal against the NOR 14 months after the expiry of the statutory 30 day time limit to appeal. The FTT considered both the question of Mr Horder’s application for a late appeal and the substantive appeal against the NOR, reserving its decision on both issues. In the event, the FTT refused permission to appeal out of time.
4. Mr Horder now appeals with the permission of this Tribunal. Permission was granted on two Grounds of Appeal.
5. At the end of the hearing, Mr Joshua Carey, appearing for HMRC, requested that we give an indication of our decision on Mr Horder’s appeal because this would be relevant to related proceedings before the Magistrates’ Court the following week. We indicated that our decision was to dismiss the appeal and we now set out our reasons for that decision.

RELEVANT FACTUAL BACKGROUND

6. References in square brackets are to the relevant paragraphs of the Decision, unless the context otherwise requires.
7. Mr Horder, who is a qualified accountant, was introduced to a Mr Yakub Yousuf by a third party. Mr Horder understood that Mr Yousuf’s business was brand creation, particularly in the cosmetics industry. Mr Yousuf’s clients would be the manufacturers of products; Mr Yousuf’s expertise was, by use of advertising, to create customer awareness of a new brand or product name. Mr Horder understood that Mr Yousuf had very successfully created the brand (i.e. customer demand) for a new alcohol-free perfume which had gone on to become a top-selling product.
8. Mr Yousuf asked Mr Horder to set up a UK company for him to carry on this business. He also asked Mr Horder to be the director of the company and Mr Horder agreed. He arranged for himself and his sister, Ms Jane Horder, to become directors and shareholders of Quadragina. It appears that, in the event, Ms Horder played little or no role in the running of Quadragina.
9. Mr Horder was not paid for his role as director of Quadragina. It took very little of his time. He opened and operated the company’s bank account; he paid the staff their salaries and expenses, he also paid rent on the company’s premises and (at the start) paid some tax to HMRC. Mr Horder also made (at least for a time) VAT, PAYE and NIC returns on behalf of the company and drew up its accounts.
10. Quadragina’s accounts filed at Companies House showed that as at 31 December 2015 its debt to HMRC for VAT and PAYE/NICs was £16,982. Draft accounts for the year to 31 December 2017 showed that at the end of 2016 its creditors amounted to £50,998 and at the end of 2017 amounted to £95,485. The breakdown showed that these two figures comprised

almost entirely PAYE/NICs and VAT. Quadragina's outgoings were rent, salaries and expenses. Thus, from the outset, Quadragina accumulated liabilities to HMRC but did not pay them. It was paying its rent and salaries but not its tax.

11. In relation to Quadragina's tax returns, Mr Horder commenced making RTI¹ returns for PAYE for the month to 5 June 2015; the last return he filed was for the month to 5 February 2018; thereafter the company was assessed on the basis of HMRC's estimate. Its monthly liability had commenced at £152 and steadily increased; its last return (February 2018) was for £9,284 PAYE and NIC. The last recorded payment of PAYE/NIC liability was on 26 May 2016; Mr Horder had originally intended to pay the early amounts out of his own money but this had not happened. No PAYE/NIC was paid by the company for two years from May 2016 to mid-2018 and Mr Horder was aware of this. Some of its outstanding PAYE/NIC liabilities were treated as paid in mid-2018, as explained below.

12. Mr Horder also reimbursed expense claims out of company funds but, over time, the expense claims became larger and were no longer accompanied by evidence of the expenses. He continued to cause the company to pay them.

13. Mr Horder's explanation for how he allowed this state of affairs to come to pass was that he was frequently assured by Mr Yousuf that the company had substantial work-in-progress and that Mr Yousuf was in the process of collecting the money and the company would shortly have the funds to pay the tax.

14. Mr Yousuf was in charge of the business of the company: he had the ideas and contacts and met the clients. He selected the staff for employment and gave them their instructions. He carried out the work with the help of the employees. Mr Horder acted on the instructions of Mr Yousuf as regards Quadragina and to all intents and purposes Quadragina was Mr Yousuf's company. The FTT found at [19] that Mr Yakub Yousuf was a "shadow director" of Quadragina.

15. HMRC issued a NOR for PAYE/NICs to Quadragina, Mr Horder and Ms Jane Horder², on 27 February 2018. The NOR required £78,593.47 to be paid to HMRC by 8 April 2018.

16. On 6 April 2018, HMRC wrote to Quadragina and reminded it of the obligation to make payment in respect of the NOR. It expressly observed that as no payment had been made, Quadragina was liable to prosecution because it had committed a criminal offence. It was further observed that this would result in Quadragina having a criminal conviction if found guilty of the offence. It provided a final opportunity to make payment within 7-days at which point, if no payment had been made, HMRC would consider commencing a criminal investigation.

17. On 17 April 2018, Mr Horder and Quadragina were each sent a letter extending time to request a review of the NOR explaining: (i) the joint and several nature of the outstanding NOR, (ii) the revised compliance date, and (iii) a warning that a criminal offence would be committed if the security was not paid.

18. On 3 May 2018, further reminder letters were sent to Mr Horder and Quadragina which gave them until 27 May 2018 to pay the security. The letter to Mr Horder again explained that if he failed to give security, he would be committing an offence.

19. On 31 May 2018, Quadragina was lent money by a company called Notamvis Ltd, which was apparently controlled by Mr Yousuf. The terms of the loan were that £100,000 would be lent: £25,000 on the day of signing, and further payments of £15,000 on the last day

¹ Real Time Information

² The NOR issued to Ms Horder was eventually withdrawn on the basis that she had little or no active involvement in Quadragina's business.

of the 5 subsequent months. The terms were extremely beneficial to Quadragina. No interest was to be charged and no security was required. The money was to be repaid in stages falling due in 2019.

20. The first three instalments were paid to Quadragina (totalling £55,000). Quadragina was in no position to repay it and has defaulted under the terms of the loan but Mr Horder received no demand from Notamvis for repayment. The FTT concluded at [42] that this indicated the loan was not at arm's length and that it was more likely than not that Mr Yousuf controlled Notamvis and organised the loan from it in an attempt to persuade Mr Horder to let the status quo continue and Quadragina continue trading.

21. The date of the loan and the amount of the first instalment were too late and too little to meet the NOR, which required over £78,000 to be paid by 27 May 2018. Nevertheless, Mr Horder on behalf of Quadragina and out of the funds loaned to it, paid £24,001 to HMRC on 1/6/18; a further £10,000 on 9/7/18 and a further £15,000 on 3/9/18. In total, the company paid £49,001 to HMRC.

22. HMRC's position was that Mr Horder had paid it to HMRC under the wrong reference number and so it had been applied to the company's outstanding PAYE and NIC debt to HMRC and not in part payment of the security. Mr Horder did not accept that it had been paid under the wrong reference number. His point was that the NOR was his prime concern and he had been careful to make the payments under the right reference. The FTT did not find it necessary to resolve this point.

23. On 7 June 2018, HMRC issued a letter known as a final reminder to each of Mr Horder and Quadragina which stated that the NOR had not been complied with and that Mr Horder was liable to a criminal prosecution and that if the full amount of security was not paid within 7 days of the date of the letter HMRC would consider starting a criminal investigation.

24. On 23 November 2018, the Crown Prosecution Service ("CPS") issued a postal requisition to Mr Horder and Quadragina. The requisitions each contained two charges laid pursuant to section 684(4A) of the Income Tax (Earnings and Pensions) Act 2003 for separate offences in respect of PAYE and NICs.

25. On 25 March 2019, Quadragina filed a late Notice of Appeal with the FTT, more than 10 months out of time.

26. Mr Horder's Notice of Appeal was filed on 19 June 2019, more than 14 months out of time.

27. Proceedings before the Magistrates' Court in respect of the charges laid against Mr Horder are proceeding in parallel with the appeals before the FTT and this Tribunal.

THE FTT'S DECISION

28. The FTT at [2] stated that the hearing was, first, to consider an application by Quadragina and Mr Horder for permission to make late appeals to HMRC. The FTT noted that the parties were informed that the hearing would also hear the evidence and submissions relating to the appeal itself, and determine that matter if permission to appeal late were granted.³ Specifically, at [3] the FTT noted that it had suggested and the parties' representatives agreed at the hearing that they would make submissions on both aspects of the hearing and that the FTT would reserve its entire decision.

29. The FTT considered at [49] when Quadragina ceased to trade. The FTT noted that substantial sums were being paid up to September 2018 which indicated that members of

³ There is some doubt whether Mr Horder's representatives received the letter from the FTT making this clear – they told us they had not received it.

staff were still working. The FTT found that Quadragina was trading up to at least 21 September 2018 and that it had stopped trading by the date of the hearing, but did not know when its trade stopped.

The Martland test

30. At [63] the FTT considered, and both parties agreed, that *Martland v HMRC* [2018] UKUT 178 (TCC) (“*Martland*”) set out the principles to be applied in dealing with applications for leave to make a late appeal, noting that it was a three stage process, the last of which was a balancing exercise considering all of the circumstances.

31. **Stage 1: Is the delay serious?** The FTT considered that the delay of approximately 14 months was serious and significant [65].

32. **Stage 2: Reasons for the delay?** The FTT considered the reason for Mr Horder’s delay in lodging a notice of appeal, viz his illness as evidenced by a doctor’s letter. At [67] the FTT considered that Mr Horder’s illness had not been shown to be the cause of the delay. The medical report was unspecific about the effect his illness might have on his ability to conduct his affairs. The FTT also considered at [68] other evidence which indicated that Mr Horder was making decisions about the conduct of the company’s affairs in March 2018 and that he wrote to HMRC at the start of April 2018 and telephoned them at the end of April 2018, signed a loan agreement in May 2018 and made payments from the company’s accounts in June-September 2018. He also attended court in January 2019. In addition, throughout the period concerned, Mr Horder had run his own accountancy practice as a sole practitioner [69].

33. Whilst accepting that Mr Horder had a significant health problem, the FTT considered that he was able to function relatively normally and that he was, therefore, fit enough to lodge an appeal on his own behalf at any time in 2018-19 [70]. Accordingly, the FTT found that the appeals were not lodged late because of Mr Horder’s ill health [71].

34. The FTT also rejected the submission that Mr Horder appealed late because of his naiveté in such matters, that he was not represented and had not realised that he needed to take advice [72]-[73], noting that the letters in relation to the NOR sent by HMRC warned him of the risk of a criminal conviction.

35. Moreover, Mr Horder clearly understood the importance of the NORs because he contacted HMRC and successfully persuaded HMRC to withdraw the NOR issued to Ms Horder [74].

36. The FTT concluded at [75] that Mr Horder did not have a good excuse for lodging a late appeal, particularly one as late as the current appeal.

37. **Stage 3: All relevant circumstances** The FTT agreed at [76] with the need for time limits to be respected regarding this point as “very important”.

38. The FTT then considered the effect of a refusal of permission on the parties. It considered at [79] that there would be some duplication as regards the hearing of evidence between the FTT and the Magistrates’ Court because certain matters were fundamental to whether an offence had been committed. However the FTT considered at [80] that the main part of the evidence related to the question whether the NOR was excessive. The right of appeal against a NOR on this issue was only to HMRC and then to the FTT – there was no right of appeal to the Magistrates’ Court (which could only consider whether the NOR had been unlawfully breached). Only the FTT could decide whether it was unreasonable to issue the NOR or whether it should be varied. Therefore, refusing leave to appeal out of time would not lead to the matter being entirely re-heard.

39. Next, the FTT considered at [81]-[82] the risk of conviction of Mr Horder of a criminal offence for breach of the NOR. This was a serious matter, particularly since Mr Horder was an accountant and a conviction is likely to be a disciplinary matter for him. The FTT considered, having heard all the evidence and submissions relating to the substantive issue, that it was in a position to take an informed view of the strengths and weaknesses of Mr Horder's case before the Magistrates' Court.

40. In relation to the argument put forward on behalf of Mr Horder that the NOR issued to him had been withdrawn, the FTT concluded at [84] that Mr Horder's case appeared very weak.

41. Next, in relation to the issue whether the NOR was void (as not properly re-issued), the FTT concluded at [90] that Mr Horder's case was also very weak.

42. In relation to the question whether Mr Horder had complied with the NOR by providing security, although this was within the exclusive jurisdiction of the Magistrates' Court, the FTT considered at [91]-[92] that Mr Horder's prospects of success were weak.

43. Therefore, the FTT concluded [93] that if it refused leave to appeal, it seemed very likely that Mr Horder would be convicted – a serious matter for Mr Horder. From HMRC's perspective, such a conviction would reinforce HMRC's position that taxpayers must comply with NORs or make timely appeals against [94].

44. The FTT then considered at [97]-[99] the effect of the grant of leave to appeal on the parties. In particular, the FTT considered that the effect of allowing the application for leave to appeal out of time was very likely to result in Mr Horder *not* being convicted. Referring to Regulation 97V of the Income Tax (Pay As You Earn) Regulations 2003 (the "PAYE Regulations"), the FTT held that the implication of that provision was that the normal effect of an appeal against a NOR issued in respect of PAYE/NICs was to defer the due date of payment of the security until 30 days after the date of the Tribunal's determination. Since the offence was only committed if the security was not paid by the due date, the acceptance of a late appeal was very likely to have the effect of meaning that no offence would have been committed until at least 30 days after the determination of the appeal. Furthermore, the FTT considered at [101], applying *D-Media Communications Ltd v HMRC* [2016] UKFTT 430 (TC) at [20]-[21], that the fact that the NOR was only payable 30 days after the FTT's decision indicated that the FTT should re-make the decision on the basis of the information available to the FTT at the date of the hearing. The FTT took the view that it had something akin to full appellate jurisdiction over the amount of the NOR.

45. At [105], the FTT considered that any appeal based on defects in the original issue of the NOR had a poor prospect of success. The relevant legislation (section 97N(1)) clearly anticipated that security could be required for future and past liabilities.

46. Next, at [106] the FTT addressed the question whether, if leave to appeal out of time was given, would the FTT vary the NOR? As the information available to the FTT was that the company was *now* insolvent and had *now* ceased trading, the FTT considered that Mr Horder had a very good case that no security was necessary at that time in order to protect the revenue. On the contrary, HMRC should protect the revenue by taking steps to place the company in liquidation.

47. Therefore, granting leave to appeal out of time seemed to the FTT at [107] very likely to result in the decision that it was no longer appropriate for any security to be required and it was very likely the appeal would succeed. Therefore, giving leave to appeal out of time would be very advantageous to Mr Horder who, in the FTT's view, would be saved from a criminal conviction. Mr Horder would no longer be in breach of the NOR as (a) the date for

compliance would move to 30 days after the FTT's hearing and (b) it would most likely be reduced to nil in any event.

48. At [108] the effect of granting leave to appeal out of time on HMRC appeared to be minimal – the purpose of a NOR was to protect the revenue. In this case, the NOR was likely to be reduced to nil as at the date of the hearing because the NOR would not protect the revenue as the company was insolvent and not trading.

Should leave to appeal out of time be given?

49. At [109] the FTT noted that it took into account all the above factors and those mentioned at the hearing.

50. The FTT continued:

“110. The appeals are lodged very late; but the effect on the appellants of granting or refusing leave to appeal late is very stark. Either they will very likely be convicted of an offence if leave is refused, or very likely not be convicted if leave to appeal out of time is granted. So far as HMRC is concerned, a NOR from this company will no longer protect revenues as it is insolvent and not trading and in that narrow sense HMRC are not really disadvantaged by leave to appeal being granted. Moreover, while of lesser importance, I also note that granting leave to appeal will also probably cut down the number of legal hearings in this dispute.

111. These factors are in favour of granting leave to appeal. Is there anything against it? I think that there is.

112. Compliance with time limits is very important; time limits for appeals with NORs are particularly important because NORs are there to protect revenues. NORs are intended to prevent companies continuing to trade without paying over the tax they collect on HMRC's behalf (in this case, PAYE and NIC).

113. Where a company's response to a NOR is to cease trading, then time may not be quite so much of the essence. But that is not the situation which existed here. The appellants' response in April 2018 to the NOR was, at best, a half-hearted attempt to cease to trade and a half-hearted attempt to comply with the NOR. Mr Horder ceased making RTI returns and ceased the issue of invoices. But I have found the company did continue to trade and payments were still being made to its staff; I do not know when it ceased to trade and pay its staff but it was not until the end of September 2018 at the earliest and quite possibly for some time after that.

114. I recognise that it did pay a significant amount of money to HMRC in mid-2018 albeit it was insufficient to cover the NOR and paid too late; and while it was treated as reducing the arrears, substantial PAYE/NIC arrears remain.

115. Moreover, its continued trading left HMRC at risk. Indeed, it appears Mr Yousuf operated the company in a manner that left it unable to pay the tax liabilities arising out its trading. I find this because Mr Horder's evidence was that Mr Yousuf made the decisions on payments and receipts. The company was VAT registered and invoiced for work including VAT but never paid the VAT to HMRC. It employed and paid workers and collected the PAYE and NIC and, except for small amounts at the outset, never accounted for it. It seems the money received by the company was, at Mr Yousuf's choice, spent entirely on rent, wages and expenses so that none was left to pay HMRC. It is now insolvent. After the NOR was received, it continued to trade but no longer issued invoices nor made RTI returns,

which, while it would make it harder for HMRC to assess actual liability does not mean there was no liability and I find that there would, at the least, have been some PAYE and NIC liability up to at least September 2018.

116. The appellants clearly considered Mr Yousuf a shadow director of the company and I find he was. His decision to operate the company in a way which left the company unable to pay its tax is therefore attributable to the company. Granting the company leave to appeal late would in effect legitimise the decision of the company (a) not to appeal the NOR and (b) to continue to trade, leaving HMRC at risk and (c) to only part-pay HMRC and do so late.

117. Mr Young described Mr Horder as a patsy and Mr Horder accepted that that was a valid description of himself. He had, for whatever reason, allowed the company to trade without paying its taxes for some years and was now left, as director, with responsibility for that situation. And while Mr Horder may well have intended the company to cease trading in April 2018, he did not put his decision into practice because he continued to make payments out of company funds on Mr Yousuf's instructions and thereby allowed the company to continue to trade. And while, as I have said, a significant sum was paid to HMRC, it was insufficient to discharge the NOR or accrued liabilities and was in any event paid late.

118. In these circumstances, on balance, I do not think that either of the appellants has justified their application to be allowed to make a late appeal. While permission to appeal late is probably the difference between being convicted and not being convicted, permitting a late appeal would endorse the appellants' decision not to challenge the NOR, nor to fully comply with it, but to continue to trade with HMRC at risk. Taking into account the importance of complying with time limits and with notices of requirement, I do not think in these circumstances it is right to extend time to appeal."

51. The FTT therefore refused Mr Horder's application as well as that of Quadragina.

THE RELEVANT STATUTORY PROVISIONS

52. The relevant statutory provisions are found in in Part 4A to the Income Tax the PAYE Regulations in relation to PAYE and Part IIIB of Schedule 4 to the Social Security (Contributions) Regulations 2001/1004 ("SSCR") in relation to NICs.

53. The provisions are materially the same, and for simplicity, we refer only to the PAYE Regulations.

The PAYE Regulations

54. In relation to unpaid PAYE, Regulation 97N provides for the requirement for security. So far as material, it provides:

"97N.— Requirement for security

(1) In circumstances where an officer of Revenue and Customs considers it necessary for the protection of the revenue, the officer may require a person described in regulation 97P(1) (persons from whom security can be required) to give security or further security for the payment of amounts in respect of which an employer described in regulation 97O (employers) is or may be accountable to HMRC under regulation 67G [as adjusted by regulation 67H(2) where appropriate], 68 or 80 (payments to HMRC and determination of unpaid amounts)."

55. As a director of Quadragina (the employer), Mr Horder was a person from whom security could be required by virtue of Regulation 97P(1)(b)(i).

56. Regulation 97P(2)(b) permits HMRC to require more than one person to give security – and where HMRC does so, those persons shall be jointly and severally liable.

57. Regulation 97Q contains the rules in relation to NORs. It provides so far as material:

“97Q. Notice of requirement

(1) An officer of Revenue and Customs must give notice of a requirement for security to each person from whom security is required and the notice must specify—

- (a) the value of security to be given,
- (b) the manner in which security is to be given,
- (c) the date on or before which security is to be given, and
- (d) the period of time for which security is required.”

58. Regulation 97V makes provision in relation to appeals, and relevantly provides:

“97V. Appeals

(1) A person who is given notice under regulation 97Q may appeal against the notice or any requirement in it.

....

(3) Notice of an appeal under this regulation must be given—

(a) before the end of the period of 30 days beginning with—

(i) in the case of an appeal under paragraph (1), the day after the day on which the notice was given, ...

(b) to the officer of Revenue and Customs by whom the notice was given or the decision on the application was made, as the case may be.

(4) Notice of an appeal under this regulation must state the grounds of appeal.

(5) On an appeal under paragraph (1) that is notified to the tribunal, the tribunal may—

- (a) confirm the requirements in the notice,
- (b) vary the requirements in the notice, or (c) set aside the notice.

...

(7) On the final determination of an appeal under this regulation—

(a) subject to any alternative determination by a tribunal or court, any security to be given is due on the 30th day after the day on which the determination is made, or

(b) HMRC may make such arrangements as it sees fit to ensure the necessary reduction in the value of security held.”

Permission to allow an appeal out of time

59. In this case, HMRC offered Mr Horder a review of HMRC’s decision to issue an NOR but no response was received.

60. The relevant statutory provision in section 49H Taxes Management Act 1970 (“TMA”) which provides:

“49H Notifying appeal to tribunal after review offered but not accepted

- (1) This section applies if—
 - (a) HMRC have offered to review the matter in question (see section 49C), and
 - (b) the appellant has not accepted the offer.
- (2) The appellant may notify the appeal to the tribunal within the acceptance period.
- (3) But if the acceptance period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.
- (4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.”

European Convention on Human Rights: Article 6

61. Article 6 of the European Convention on Human Rights provides:

1. In the determination of his/her civil rights and obligations or of any criminal charge against him/her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proven 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/she understands and in detail, of the nature and cause of the accusation against him/her;
 - (b) to have adequate time and the facilities for the preparation of his/her defence;
 - (c) to defend himself in person or through legal assistance of his/her own choosing or, if he/she 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/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her;
 - (e) to have the free assistance of an interpreter if he/she cannot understand or speak the language used in court.

GROUNDS OF APPEAL

62. Mr Horder applied for permission to appeal to this Tribunal on four grounds. Permission was only granted in respect of two grounds which are set out below. In considering the application, Judge Herrington noted that it had been difficult to identify from the application with precision the grounds of appeal in respect of which permission to appeal was sought. Judge Herrington sought to identify the grounds of appeal and summarise them by reference to the numbered paragraphs of the application for permission to appeal. For ease of reference, we set out below the two grounds of appeal for which permission was granted together with the paragraphs (in italics) in the application for permission to appeal to which Judge Herrington refers. The grounds of appeal are as follows:

“Ground 2: The FTT acted unlawfully in breach of principles of domestic, community and ECHR law in hearing the evidence and arguments of the parties in full and finding that the Applicants’ appeals would have succeeded save for their failure to file appeals in time but then failing to grant an extension of time to file the appeals (paragraphs 9 and 24).

“Application for permission to appeal

9. It is submitted that it is one thing not to hear an appeal because of a breach of a time limit, it is quite another to actually hear an appeal in full and decide it would succeed but then refuse to allow the appeal when the FTT had a discretion to do so and on the facts before it could have done so. This defeats the aim of the overriding objective. There is a plain injustice.

24. In pronouncing that the Applicants appeals would have succeeded save for the Applicants failure to file appeals in time and despite the fact that the evidence in the appeal was heard and full argument was given, the Applicants say that the FTT acted unlawfully and breached principles of domestic, community and ECHR law.”

Ground 4: The FTT erred in failing to recognise that it had a lesser latitude over the exercise of its discretion to extend time when dealing with a case with criminal consequences (paragraph 37).

Application for permission to appeal

*37. Having correctly recognised the identifiable consequences, it is respectfully submitted that the FTT erred in law in that it failed to recognise that it had a lesser latitude over the exercise of its discretion when dealing with a case with criminal consequences. It went on to deal with the case as a purely civil case concerning rights and obligations when it should not have done so, see *Dombo Beheer BV v The Netherlands: ECHR 27 OCT 1993.*”*

SUBMISSIONS AND DISCUSSION

Ground 2

63. Mr Andrew Young, appearing for Mr Horder before the FTT and before us, accepted that the FTT had been correct to apply the principles set out in *Martland*. The Upper Tribunal in that case set out a three-stage test for considering applications for permission to appeal out of time (*Martland* [44]). In summary, that test requires consideration of: (1) whether the breach of directions or rules or delay was significant or serious; (2) whether there was a good reason or explanation for this breach or delay; and (3) all the circumstances of the case. The balancing exercise in the third stage of this test 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 (*Martland* [45]).

64. Mr Young submitted that the FTT’s Directions for the hearing created an impression that the FTT had already given permission to appeal out of time under section 49(2)(b) TMA. Accordingly, at the hearing before the FTT those representing Mr Horder were unprepared to argue the preliminary issue relating to the application for leave to appeal out of time. This was, Mr Young argued, a breach of the overriding objective to deal with appeals fairly and justly.

65. In our view, there is nothing in this point. It is clear from HMRC’s Statement of Case that they objected to Mr Horder’s appeal being brought out of time. Whilst the FTT’s standard-form Directions referred to the “appeal” being heard, there is nothing which could fairly be taken to have indicated to Mr Horder and his representatives that the FTT had given permission prior to the hearing before the FTT, as required by section 49H(3) TMA, for an appeal to be brought out of time. It is clear from the Decision at [2]-[3] that, at the outset of

the hearing, Judge Mosedale proposed to consider both the application for permission to appeal out of time and the substantive appeal against the NOR together. The FTT said:

“Subject matter of the hearing

2. Neither the company nor Mr Horder made a timely appeal to HMRC. Having required HMRC to conduct a review, neither of them took any further steps to challenge the NOR until appeals were lodged with the Tribunal many months later. Therefore, today’s hearing was, firstly, to consider an application by both appellants for permission to make late appeals to HMRC. The parties were informed that the hearing would also hear the evidence and submissions in the appeal itself, and determine that matter if permission to appeal late were granted.

3. It was suggested by me and agreed with the parties’ representatives at the hearing that they would make their submissions on both aspects of the hearing and the Tribunal would reserve its entire decision.”

66. No objection to this course of action and no application for an adjournment was made by Mr Young at the hearing before the FTT. On the contrary, the manuscript notes of the hearing taken by Mr Horder’s instructing solicitors indicated that when Judge Mosedale said that she intended to hear submissions on both the application to appeal out of time first, then move to the substantive appeal, Mr Young is recorded as saying:

“That would be an excellent way of proceeding ma’am.”

67. Furthermore, those notes record Mr Young making submissions in relation to *Martland*.

68. On that basis, therefore, there was no unfairness to Mr Horder in the course of action proposed and adopted by the FTT. Indeed, it seemed to us that Judge Mosedale’s course of action of, so to speak, rolling up the issue of the application for permission to appeal out of time with the substantive appeal and hearing both together, was fair to Mr Horder. It gave the FTT a better understanding of the substantive appeal and of Mr Horder’s prospects of success when it came to consider whether to grant permission for a late appeal.

69. We would not wish to be taken to be indicating that the hearing of an application for permission to appeal out of time should always or usually be heard together with the substantive dispute under appeal. It may be considered appropriate, and more efficient, to hear such an application as a preliminary matter in an entirely separate hearing. Alternatively, an application for a late appeal may be heard as the first issue with the parties being ready to proceed with the substantive appeal if the application is successful. It is for the FTT to decide which of these approaches is appropriate in any particular case. That is a case management decision for the FTT and it is well-established that this Tribunal will be reluctant to interfere with any such decision. What we can say is that, in the present case, there was no unfairness and no error of law in the way in which the FTT dealt with this issue.

70. We should also deal with Mr Young’s argument that, because the FTT found that it was “very likely” that Mr Horder would succeed in his substantive appeal, the interests of justice and the overriding objective of dealing with cases fairly and justly required the FTT to grant Mr Horder’s application for permission to appeal out of time.

71. We reject that submission. Certainly, an applicant’s prospects of success in its substantive appeal constitute a relevant factor. We do not, however, accept the proposition that because an applicant has a strong or even a very strong case, permission to appeal late should always or usually be given. The strength of an applicant’s substantive case is a matter

to be taken into account in the balancing exercise which forms the third stage of the *Martland* analysis. It is necessary then, as the FTT did in this case, to consider whether there are countervailing considerations which would require that permission to appeal late should be refused. In this case, the FTT considered that there were such countervailing considerations and refused the application. We see no reason to interfere with that conclusion.

72. We therefore dismiss the appeal on Ground 2.

Ground 4

73. Mr Young submitted that this was what he described as a “mixed” case which involved a criminal charge and a determination of Mr Horder’s civil rights for the purposes of Article 6 of the European Convention on Human Rights (“the Convention”). The criminal charge was the likelihood that Mr Horder would be convicted in the Magistrates’ Court of the offence of failing to comply with the NOR. The FTT, he argued, had fallen into error by failing to appreciate that when dealing with a criminal charge, for the purposes of the Convention, it had a more restricted discretion in considering whether to refuse permission to appeal out of time. That this was a matter which involved a criminal charge was, according to Mr Young, clear: it was very likely, if Mr Horder’s application for permission for a late appeal was refused, that the direct result would be that Mr Horder would suffer a criminal conviction.

74. Mr Carey submitted that Article 6 of the Convention had no application in the present case. *Ferrazzini v. Italy* [GC], no. 44759/98, § 29, ECHR 2001 VII was authority for the proposition that the assessment of tax and the imposition of surcharges (i.e. penalties) fall outside the scope of Article 6 under its civil head.

75. Mr Young countered that the requirement to give security for the payment of taxes imposed by the NOR was not an assessment of tax but rather involved the giving of security by one person in respect of another person’s tax liabilities. This was, therefore, a case which fell within Article 1 of Protocol 1 i.e. the NOR issued to Mr Horder involved the deprivation of his property.

76. In our view, it is not necessary to determine under which provision of the Convention the proceedings before the FTT fell. Even accepting Mr Young’s argument that the NOR did not involve the assessment of tax but was, instead, a security arrangement and involved a criminal charge, we fail to see how the FTT erred in law in its decision to refuse the application. It cannot be correct that the possibility of a criminal conviction flowing from a decision to refuse permission to appeal out of time must always result in permission being granted – a proposition from which we did not understand Mr Young to demur. Indeed Mr Young accepted that the FTT was correct to apply the structured approach in *Martland*. As Mr Young also accepted, his argument in relation to the Convention was effectively one of the weight that should have been attached to the likelihood of Mr Horder facing criminal sanctions when the FTT carried out its balancing exercise as a third stage of the *Martland* analysis. We see no error in the way that the FTT carried out that exercise. It clearly had the likelihood of potential criminal sanctions being suffered by Mr Horder firmly in mind and had also concluded that Mr Horder was likely to succeed in relation to the substantive appeal. As explained above, the FTT gave careful consideration to these issues. The FTT decided, however, that there were countervailing factors (explained at [112]-[118]) which outweighed the importance of the likelihood of criminal sanctions when considering the question whether permission for a late appeal should be granted. We see no error of approach in or reason to disturb the FTT’s analysis. We therefore dismiss this appeal on Ground 4.

RESPONDENTS NOTICE/REPLY

77. HMRC submitted a Reply to Mr Horder’s Notice of Appeal. In short, HMRC contended that the FTT had erred in concluding that Mr Horder’s appeal (if permission for a

late appeal had been granted) would have been “very likely” to have succeeded. HMRC contended that the FTT’s jurisdiction was supervisory only rather than, as the FTT considered, akin to a full appellate jurisdiction. Moreover, the FTT was confined to reviewing the reasonableness of the NOR on the basis of the facts known to the relevant officer at the time the NOR was issued.

78. This issue only arose if we upheld one of Mr Horder’s two Grounds of Appeal. If we dismissed Mr Horder’s appeal on both of those Grounds, HMRC requested that we should not deal with this jurisdictional issue, leaving it to be decided in a future appeal where the issue was live.

79. Because we have decided to dismiss Mr Horder’s appeal on both Ground 2 and Ground 4, the issue of the FTT’s jurisdiction does not arise and, consequently, we consider it would be preferable not to decide the point.

CONCLUSION

80. The FTT’s Decision was meticulous in detail and logical in its structure. It discloses no error. We therefore dismiss this appeal.

**MR JUSTICE MILES
JUDGE GUY BRANNAN**

Release date: 12 May 2023