



Appeal number: UT/2019/0157

RESTORATION– Permission to make late appeal – whether FTT’s exercise of discretion vitiated by error of law - yes

**UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)**

THE DIRECTOR OF BORDER REVENUE

Appellant

-and-

JACEK TUREK

Respondent

TRIBUNAL

**JUDGE JONATHAN RICHARDS
JUDGE ASHLEY GREENBANK**

Sitting in public by way of video hearing treated as taking place in London on 13 May 2020

Michael Newbold for the Appellant

The Respondent did not appear and was not represented

DECISION

1. The Appellant, to whom we will refer as the “Border Force”, appeals against a decision of the First-tier Tribunal (Tax Chamber) the (“FTT”) allowing the Respondent, Mr Turek, permission to make a late appeal against the Border Force’s refusal to restore a seized vehicle to him. The hearing before the FTT took place on 1 May 2019 and the FTT reserved its decision, providing summary reasons on 10 May 2019. The Border Force subsequently required the FTT to provide full reasons for its decision which the FTT provided in a document issued on 11 July 2019 (the “Decision”).

Procedural matters

2. Neither Mr Turek nor a duly appointed representative attended the hearing before us. Moreover, prior to the hearing, Mr Turek had not replied to letters and emails from the Tribunal. In order to check whether the Tribunal was sending communications to the correct address, we asked staff to review the hard copy file and from that we deduced as follows:

(1) Initially, Mr Turek instructed a Polish law firm (“CSK”). While CSK were instructed, the Tribunal sent correspondence relating to these proceedings to them.

(2) In January 2020 (before the hearing was fixed), CSK explained to the Tribunal that they were no longer instructed. They provided the Tribunal with an email address for Mr Turek.

(3) After CSK ceased acting, the Tribunal corresponded with Mr Turek by sending correspondence to both (i) the address that the Border Force had on file for Mr Turek (which was set out in the Notice of Appeal provided to the Tribunal) and (ii) the email address that CSK had provided.

(4) The Notice of Hearing was sent by both of these two methods. Staff checked the Notice of Hearing for any typographical errors with the addresses used and confirmed that there were none.

3. We acknowledge that there is some risk that, after his lawyers ceased acting, Mr Turek no longer received correspondence from the Tribunal. For example, CSK might mistakenly have given the Tribunal an incorrect or out of date email address. The address on the Border Force’s Notice of Appeal has not been independently confirmed by Mr Turek and he may have moved. However, the Tribunal does not have the resources to locate Mr Turek itself. It has to rely on information provided to it by the parties. Moreover, Mr Turek must have known since January 2020 that CSK were no longer acting for him and should have taken steps then to provide the Tribunal with new contact details (or details of any new representative he appointed).

4. We concluded that it was reasonable for the Tribunal to correspond with Mr Turek in the manner outlined at [2]. Accordingly, we consider that reasonable steps were taken to notify Mr Turek of the hearing and, having concluded that it was in the interests of justice to do so, we decided to proceed in his absence as permitted by Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Relevant background

5. Neither Mr Turek, nor his representative attended the hearing before the FTT. However, Mr Turek had obtained advice from CSK who prepared his Notice of Appeal to the FTT.

6. Perhaps because Mr Turek did not attend the hearing, the Decision contains few express findings of fact although in paragraph 3 the FTT set out a high level summary of the relevant background. We have read the key documents that were in evidence before the FTT and have ourselves prepared the following fuller summary of the background:

(1) Mr Turek is a Polish national. He leased a tractor and trailer unit (the “Vehicle”) as part of a haulage business.

(2) On 28 March 2017, the Vehicle was intercepted by officers of the Border Force at Dover while being driven by Rafal Rostek. Carriage documents described the Vehicle’s load as “hygiene towels”. However, Border Force officers who searched the vehicle found a large quantity¹ of cigarettes in the Vehicle.

(3) Border Force officers exercised their power under s139 and s141 of the Customs and Excise Management Act 1979 to seize the Vehicle and the cigarettes (“CEMA”). The legality of that seizure was not challenged in condemnation proceedings.

(4) On 5 July 2017, Mr Turek’s then representative, Mr Pawel Gluchowski wrote to the Border Force to request that the Vehicle be restored to Mr Turek. Some correspondence ensued, and on 3 October 2017, Mr Gluchowski demonstrated to the Border Force evidence of his appointment as Mr Turek’s agent.

(5) In a letter dated 1 December 2017, the Border Force refused to restore the Vehicle. We have not seen that letter, but Mr Gluchowski evidently saw it because on 12 January 2018, the Border Force received a letter from Mr Gluchowski requesting a review of that decision.

(6) On 19 February 2018, the Border Force concluded their review deciding that they would not restore the Vehicle to Mr Turek. In evidence before the FTT was a review decision letter from the Border Force dated 19 February 2018 (addressed to Mr Gluchowski) and a covering email dated 20 February 2018 apparently sending that letter to Mr Gluchowski by email. The Border Force addressed their review decision to Mr Gluchowski in response to a review request that Mr Gluchowski had himself submitted as part of a

¹ The Border Force considers that 8 million cigarettes were in the Vehicle although the Decision refers to 6 million.

continuum of correspondence with the Border Force. There is, therefore, an inference, that the Border Force would have used Mr Gluchowski's contact details as set out in that correspondence. However, the evidence before the FTT did not demonstrate clearly that the review decision was actually sent to Mr Gluchowski, that it was sent to the correct address or that Mr Gluchowski ever received it. We will return to this issue later in our decision.

(7) The Border Force review decision of 19 February 2018 contained the customary statement to the effect that Mr Turek had 30 days from the date of the decision to appeal to the FTT.

(8) At some point Mr Turek dispensed with Mr Gluchowski's services and instructed CSK to act for him. The evidence before the FTT did not demonstrate when CSK were first instructed. However, they must have been instructed before 15 June 2018 because on that date, CSK drafted a detailed letter to the Border Force explaining that Mr Turek was not involved with the smuggling of goods and the smuggling must have been undertaken by the driver (Rafal Rostek) possibly involving a criminal gang. That letter revealed that the author had a detailed understanding of the background to the seizure, enclosed a number of attachments (including a document that had been translated) that must have taken time to assemble, and concluded with a request for an update on the position.

(9) On 26 June 2018, CSK sent the Border Force the letter they had drafted under cover of an email requesting details on the progress of Mr Turek's request for restoration of the Vehicle.

(10) On 27 June 2018, the Border Force sent CSK a copy of the review decision.

(11) On 19 September 2018, CSK emailed a Notice of Appeal to the FTT in which Mr Turek sought to appeal against the Border Force's refusal to restore the Vehicle.

Relevant statutory provisions

7. Mr Turek's right to appeal to the FTT against the refusal to restore the Vehicle is set out in s16 of Finance Act 1994 ("FA 1994"). Section 16(1) imposes a time limit for making appeal as follows:

(1) An appeal against a decision on a review under section 15 (not including a deemed confirmation under section 15(2)) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.

8. Section s16(1) does not, at least expressly, invite a consideration of when a document is communicated, or served. Rather, the deadline for making an appeal runs from the date of "the document notifying the decision to which the appeal relates". We return to this point later.

9. If an appeal is made after the deadline, s16(1F) of FA 1994 permits the FTT to extend time as follows:

(1F) An appeal may be made after the end of the period specified in subsection (1), (1A), (1B), (1C)(b), (1D)(b) or (1E) if the appeal tribunal gives permission to do so.

The Decision

10. In this section, references to numbers in square brackets are to paragraphs of the Decision unless we state otherwise.

11. At [5] to [9], in a section headed “Relevant principles”, the FTT noted that it had discretion to exercise and set out excerpts from various authorities dealing with the principles to be applied in exercising that discretion. In particular, at [9] it set out an extract from the decision of the Upper Tribunal in *William Martland v HMRC* [2018] UKUT 0178 (TCC) which stated that the FTT should follow the “three-stage” approach outlined in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 of considering (i) the length of delay, (ii) the reasons for the delay and (iii) all other relevant circumstances and gave some guidance on how those various issues should be approached. The FTT then analysed the three stages identified in *Martland* in turn.

12. At [8], the FTT concluded, as regards the first stage in *Martland*, that:

[Mr Turek’s] notice of appeal was given three months after HMRC’s² decision, i.e. approximately twelve weeks late.

In the “Discussion” section below we will consider the Border Force’s argument that this factual finding was flawed and that the appeal was actually six months late.

13. At [4(6)], the FTT concluded, at the second *Martland* stage, that the reason for the delay was:

the need for the second agent [CSK] to get up to speed with the issues and the appeal process

14. At [12], the FTT concluded that the reasons for the delay, as they had found them, did not:

connote such a degree of culpability as, of itself, to dictate that the [application for permission to make a late appeal] should fail.

15. At [13], the FTT directed itself on a number of factors that were relevant to its examination of all the circumstances of the case (the third of the *Martland* stages). It went through those in turn concluding, so far as relevant for present purposes:

² In places, the FTT referred to “HMRC” when it obviously meant to refer to the Border Force.

(1) The grant of permission to make a late appeal after a “three month delay” would not result in litigation being conducted disproportionately or at excessive cost ([14]).

(2) While it was important for statutory time limits to be observed, the failure to meet those time limits was not due to Mr Turek failing to take reasonable care and consequently that there had been no “neglect or disrespect by the Applicant of the need to respect statutory time limits”. ([15]).

(3) The version of events that Mr Turek was putting forward in the substantive appeal was “plausible” ([16]).

(4) If Mr Turek was not granted permission to make a late appeal, he would lose all prospect of having a large and expensive vehicle restored to him. By contrast, if he was allowed to appeal out of time, the Border Force would simply suffer “operating inconvenience” in having to defend an appeal that they thought could not be brought. Evaluation of competing prejudices therefore pointed in favour of allowing Mr Turek to make his appeal late particularly since prejudice to the Border Force would be mitigated if Mr Turek’s appeal was successful so that they could retain the Vehicle ([17] and [18]).

16. The FTT’s ultimate conclusion at [19] was that Mr Turek should be given permission to make a late appeal.

The Grounds of Appeal

17. With the permission of the FTT, the Border Force appeal against the Decision on the following grounds:

(1) Ground 1 – The FTT erred when calculating the length of Mr Turek’s delay in appealing. The delay was six months, not 12 weeks.

(2) Ground 2 – The FTT erred in law when concluding that the reason for the delay was to enable CSK to “get up to speed”.

(3) Ground 3 – The FTT erred when conducting its balancing exercise by giving insufficient weight to some factors and undue weight to others. As a result, its overall exercise of discretion was flawed.

Discussion

Approach to an appeal against the FTT’s exercise of a discretion

18. In these proceedings, the Border Force is challenging the FTT’s exercise of a statutory discretion. Although that is not strictly a “case management” discretion (see [18] and [19] of *Martland*), we should nevertheless be slow to interfere with the proper exercise of the FTT’s discretion. Like the Upper Tribunal in *Martland*, we will apply by analogy the well-known statement of principle set out by Lawrence Collins LJ in *Walbrook Trustee (Jersey) Limited v Fattal* [2008] EWCA Civ 427:

an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.

Ground 1

19. The decision against which Mr Turek was seeking to appeal was the Border Force's review decision which bore the date of 19 February 2018. As we have observed, the time limit for making an appeal against that decision was, by s16(1) of FA 1994, 30 days after the "date of the document notifying the decision". The date falling 30 days after 19 February 2018 was 21 March 2018. Mr Turek submitted his appeal to the FTT on 19 September 2018. Therefore, on the face of matters, his appeal was six months late.

20. Unfortunately, the FTT did not, in the Decision, explain how it reached the conclusion that Mr Turek's appeal was just 12 weeks late. It did not set out a chronology of relevant events and did not refer to s16(1) of FA 1994 in its decision.

21. We have considered whether, in making the finding it did, the FTT was accepting a suggestion raised in Mr Turek's Notice of Appeal to the effect that Mr Gluchowski never received the Border Force's review decision of 19 February 2018 so that, for the purpose of exercising its discretion, in calculating the "real" delay in making an appeal, it could treat time as starting to run from 27 June 2018 when the Border Force sent a further copy of that decision rather than the statutory deadline. For example, it is possible that the FTT saw that the Border Force had sent a copy of their review decision letter to Mr Turek's new advisers, CSK, on 27 June 2018, that Mr Turek's appeal was emailed to the FTT on 19 September 2018 and calculated the interval between these two dates as being around three months.

22. There is, however, no suggestion on the face of the Decision that this was the basis for the FTT's conclusion. First, there is no finding as to whether Mr Gluchowski did, or did not, receive the review decision (or indeed any reference to the suggestion that he might not have received it). Second, there is no analysis as to how, if at all, Mr Gluchowski's receipt, or non-receipt, of the review decision had any bearing on the statutory deadline imposed by s16(1) of FA 1994. Furthermore, even the possible interpretation set out at [21] above does not explain the FTT's finding since, if the FTT had treated time as only starting to run from 27 June 2018, Mr Turek would have had 30 days after that date (i.e. until 27 July 2018) to make an appeal so that an appeal on 19 September would be less than two months late.

23. Given the absence of reasons for FTT's finding that the appeal was 12 weeks late, we can only conclude that the FTT simply overlooked the original review decision of 19 February 2018. That involved the FTT ignoring a relevant consideration and, thereby

making an error of law. Accordingly, Ground 1 is made out: the FTT erred in law in concluding that Mr Turek's appeal was just 12 weeks late.

Ground 2

24. As we have noted, the FTT concluded at the second *Martland* stage that the reasons for the delay in appealing was attributable to the need for CSK to "get up to speed with the issues and the appeal process".

25. The Border Force makes two essential criticisms of this conclusion:

(1) The FTT's finding did not deal with the whole period of delay since it covered only delay arising after CSK's appointment.

(2) In any event, the FTT's conclusion was not supported by the evidence.

26. We accept the Border Force's first criticism. As we have noted in our discussion of Ground 1, the appeal was made 6 months later than the statutory deadline with the period of delay spanning 22 March 2018 to 19 September 2018. The FTT's explanation can only deal with delay arising after CSK were appointed. However, there was no evidence as to when Mr Gluchowski's services were dispensed with, or when CSK were appointed, and so the FTT was in no position to (and did not) make any finding as to the date of their appointment.

27. As we have noted, Mr Turek's Notice of Appeal contained a suggestion that Mr Gluchowski never received the Border Force's review letter. The Notice of Appeal contained the following sentence:

Probably the reason why Mr Turek's prior agent was not provided with the decision 19/02/2018, might have been unspecified technical problems.

28. It may be, therefore, that the FTT was accepting that Mr Gluchowski never received the review decision of 19 February 2018 and so concluding that there was a good reason for the failure to appeal that continued up until the time that CSK were appointed and received a copy of the decision on 27 June 2018. However, if that was the finding the FTT intended to make it would have needed to give fuller reasons. We acknowledge that the FTT's task was made more difficult by the fact that neither Mr Turek nor a representative attended the hearing. However, if the FTT did wish to find that the delay was in part excused by Mr Gluchowski's non-receipt of the review decision, it should at the very least have explained why it was accepting as true a vague statement in the Notice of Appeal that was not obviously corroborated by any first-hand evidence from witnesses. It should also have tested the relatively weak evidence of non-receipt against evidence pointing in the other direction (for example the apparently successful prior correspondence with Mr Gluchowski, summarised at [6(4)] and [6(5)] above, that was referred to in the Border Force's review decision). The FTT could also usefully have taken into account the obvious self-interest that Mr Turek had in stating that Mr Gluchowski did not receive the review decision of 19 February 2018.

29. If the FTT had gone through that process, it might perhaps have legitimately reached a conclusion that Mr Gluchowski did not receive the review decision of 19 February 2018 (although as we will explain when remaking the Decision, we would not ourselves reach that conclusion on the limited evidence available). However, since the FTT did not do so, the explanation for the delay that it gives at [12] of the Decision involves an error of law in that it fails to take into account all relevant factors by providing an explanation of the entire period of delay.

30. Even if the focus is on the period after 27 June 2018, when CSK obtained a copy of the Border Force review decision, the FTT's conclusion that the entirety of that period of delay was explicable by CSK's need to "get up to speed with the issues and appeal process" was not available to it on the evidence. The evidence before the FTT demonstrated that, by 15 June 2018, CSK was sufficiently acquainted with the issues to write a detailed letter to the Border Force. We can quite accept that the process of appealing against Border Force determinations might have been unfamiliar to a law firm, such as CSK, which is based in Poland. However, CSK received a copy of the Border Force's review decision on 27 June 2018 and the final section of that letter explained the deadline and process for appealing and included both the FTT's contact address and a link to its website. Neither Mr Turek nor CSK had given any direct evidence that they needed over 3 months to acquaint themselves with how to appeal against the Border Force's determination.

31. For the reasons we have given, we consider that Ground 2 of the Border Force's appeal is established.

Ground 3

32. As Ground 3, the Border Force challenged the way in which the FTT weighed matters in the balance at the third *Martland* stage. For example, it criticised what it considered to be the FTT's conclusion to the effect that Mr Turek should not suffer for the delays of his advisers. It submitted that the FTT had approached the question of prejudice wrongly by overstating the prejudice that Mr Turek would suffer if he was refused permission to appeal out of time and understating the prejudice that the Border Force would suffer if he was granted permission.

33. In our judgment, having succeeded on Grounds 1 and 2, the Border Force have demonstrated material errors of law in the Decision that justify it being set aside (see the section that follows). Moreover, since the third *Martland* stage involves considering "all the circumstances of the case", the FTT necessarily made errors of law at that stage by drawing on its earlier flawed conclusions as to the length of the delay and the reasons for it. It follows that we do not need to consider the additional detailed criticisms that the Border Force make of the FTT's weighing up of considerations at the third *Martland* stage and we will not do so.

Setting aside and remaking the Decision

34. We have decided that the Decision contains the following errors of law:

(1) The FTT erred in concluding that the appeal was 12 weeks late when the evidence before it indicated that it was six months late.

(2) The FTT erred in law in concluding that the delay in making the appeal was explicable by CSK's need to "get up to speed with the issues and appeal process".

35. It follows that, under s12 of the Tribunals, Courts and Enforcement Act 2007, we have the power (but not the obligation) to set aside the Decision. If we choose to set aside the Decision, we must either (i) remit the appeal back to the FTT with directions for reconsideration or (ii) re-make the Decision.

36. We are in no doubt that we should exercise our power to set aside the Decision. The errors that the FTT made were both material since, as *Martland* demonstrates, the period of the delay and the reasons for it lie right at the heart of the question whether the FTT should exercise discretion to permit a late appeal.

37. We have available to us the limited evidence that was before the FTT and consider that we are able to remake the Decision and that it would be proportionate for us to do so rather than remitting the appeal back to the FTT. In remaking the Decision we will ourselves apply the three-stage process outlined in *Martland*.

38. We have already determined the outcome of the first *Martland* stage. On the evidence before us and the FTT, Mr Turek's appeal was six months late. That is clearly a serious and significant delay.

39. Turning to the second *Martland* stage, on the evidence before us, we can only conclude that the delay is unexplained or, put another way, that no good reason for the delay has been established for the following reasons:

(1) We are not prepared to conclude that Mr Gluchowski did not receive the Border Force's review decision of 19 February 2018. We acknowledge that Mr Turek's Notice of Appeal to the FTT contained a weak suggestion that he did not receive that letter. However, neither Mr Turek nor Mr Gluchowski (or indeed anyone else) has given any assurance that could be tested in cross-examination to the effect that the letter was not received. We consider that it was more likely that the Border Force used contact details they obtained from previous successful correspondence with Mr Gluchowski to address and send the review decision correctly, so that he duly received that decision on or around 20 February 2018.

(2) No reason at all has been given as to why it took some 3 months after CSK obtained a copy of the review decision on 27 June 2018 for Mr Turek to make his appeal.

40. At the third *Martland* stage, we weigh up all relevant factors as follows:

(1) It is important that time limits prescribed by Parliament are respected. The fact that the delay is significant and no good reason has been advanced for it points strongly against this Tribunal exercising discretion to permit a late appeal.

(2) It is not possible for us to conclude that the merits of Mr Turek's appeal are so obviously strong as to suggest that discretion should be exercised in his favour.

(3) Of course Mr Turek will suffer considerable loss if permission to make a late appeal is refused as he will lose all prospect of having an expensive vehicle restored to him. The prejudice to the Border Force if we granted permission to make a late appeal would arguably be less: Border Force would simply have to devote resource to defending an appeal that they thought could not be brought. However, that is still some prejudice. Border Force has finite resources and being required to devote resources to an appeal that they thought could not be brought necessarily means that resource cannot be devoted to other projects or areas that Border Force consider to be important.

(4) If the delay were shorter, the reasons for that delay better or the merits of Mr Turek's appeal obviously strong we might well have considered that the balance lay in favour of granting permission for a late appeal given the significant cost that Mr Turek would suffer if he lost the Vehicle. However, faced with a long delay which is effectively unexplained and no obviously strong merits, we have reached the clear conclusion that we should not grant such permission.

Disposition

41. Border Force's appeal is allowed. The Decision is remade so that Mr Turek is refused permission to make a late appeal.

JUDGE JONATHAN RICHARDS

JUDGE ASHLEY GREENBANK

RELEASE DATE: 28 May 2020