NCN [2026] UKUT 00261 (TCC)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Applicant: Kashif Javaid	**Tribunal Ref: UT/2025/000036**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

APPLICATION FOR PERMISSION TO APPEAL

DECISION NOTICE
Decision following oral hearing on permission to appeal – 2 July 2026

Background

1. The applicant, Mr Javaid applies to the Upper Tribunal (Tax and Chancery) for permission to appeal against the decision of the First-tier Tribunal ("FTT") released on 17 December 2025 published as *AA Com Limited, Victory Telecom Limited and Kashif Javaid Limited v HMRC* [2025] UKFTT 01601 (TC) ("the FTT Decision") following a hearing which took place on 12-15 and 19 May 2025.

2. The FTT Decision concerned, amongst other matters, Personal Liability Notices ("PLNs") issued to Mr Javaid under paragraph 19 of Schedule 24 to the Finance Act 2007 ("paragraph 19"). Paragraph 19 permits HMRC, where a company is liable to a penalty for a deliberate inaccuracy attributable to an officer of the company, to make that officer personally liable for such proportion of the penalty, up to 100%, as HMRC specifies by notice. HMRC issued three PLNs to Mr Javaid: two in respect of penalties assessed on Victory Telecom Limited, and one in respect of a penalty assessed on AA Com Limited. These attributed 100% of the penalties to Mr Javaid and came to a total of £3,212,815. The FTT dismissed the appeals against the PLNs. It found that the Schedule 24 penalties imposed on the companies arose from deliberate inaccuracies in their VAT returns, that those deliberate inaccuracies were attributable to Mr Javaid as an officer of the relevant companies, and that HMRC had correctly exercised the power conferred by paragraph 19 to attribute 100% of the relevant penalties to him.

3. Mr Javaid who was not represented at the hearing subsequently instructed counsel who advanced a new ground of appeal that had not been advanced before the FTT. (This concerned the proportionality of attributing the full amount of the penalties to Mr Javaid when, applying

s3 of the Human Rights Act 1998 ("HRA 1998"), paragraph 19 was read to comply with Article 1 Protocol 1 ECHR). Following the FTT's refusal of permission to appeal on 20 March 2026, the appellant applied for permission to appeal on 15 April 2026. HMRC filed an objection to permission on 20 May 2026, on the basis the proportionality issue had not been raised before, following which I directed the matter be listed for an oral hearing. Pursuant to my direction the appellant filed brief reply submissions on 25 June 2026 in advance of the oral hearing which took place by remote video hearing on 2 July 2026. At that hearing the applicant was represented by David Tipping counsel and HMRC by Christopher Foulkes, counsel. I was grateful for both their submissions.

Upper Tribunal's jurisdiction on appeal

4. An appeal to the Upper Tribunal from a decision of the First-tier Tribunal can only be made on a point of law (s11 of the Tribunals, Courts and Enforcement Act 2007). It is therefore the practice of the Upper Tribunal in this Chamber only to grant permission to appeal where the grounds of appeal disclose an arguable error of law in the FTT's decision which is material to the outcome of the case.

Grounds of appeal

5. The proposed ground proceeds on the basis that the attribution to Mr Javaid of 100% of the Schedule 24 penalties under paragraph 19 constitutes an interference with his possessions for the purposes of Article 1 Protocol 1 ECHR ("A1P1") and that, pursuant to s3 HRA, paragraph 19 should be interpreted and applied in a manner which avoids a disproportionate interference with that right.

6. In line with the approach to assessing proportionality suggested by the Supreme Court in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 the court is to consider:

> "(i) whether the objective of the measure is sufficiently important to justify limiting a fundamental right; (ii) whether the measure is rationally connected to that objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising achievement of the objective; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance had been struck between the right of the individual and the interests of the community."

7. It is argued the FTT erred in law because:

> "…it should have given effect to section 3 HRA 1998 by interpreting para 19 Sch 24 FA 2007 so that the amount of the penalty attributed to Mr Javaid could not exceed an amount which would be proportionate in respect of Mr Javaid's A1P1 rights".

8. It is submitted that the appropriate amount that would be proportionate is nil. As regards the *Bank Mellat* tests, the applicant argues the objective of attribution is penal in nature and that that while it is accepted paragraph 19 is rationally connected to that objective it is submitted:

> "c. The attribution of penalties went further than was necessary in this case to achieve that objective. Penalties have been issued to the Companies. This also punishes Mr. Javaid who is the sole shareholder of both Companies and has a direct financial interest in the Companies' success. Punishment and deterrence could therefore have been achieved without attributing the penalties to Mr. Javaid.
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> d. In all the circumstances, the attribution of the Companies' penalties to Mr. Javaid does not strike a fair balance between Mr. Javaid's individual rights and the interests of the community. The severity of attributing the penalties to Mr. Javaid is excessive. The quantum of the penalties attributed to Mr. Javaid is wholly disproportionate in light of the very slim profit margins that the Companies generated. Further, the attribution of the penalties took no account of Mr. Javaid's specific circumstances or his financial situation, contrary to the proportionality assessment required by A1P1 (*NKM v Hungary* (2013) 62 EHRR 1082 at para. [42])."

9. An attribution "cap" up to the level of what was proportionate was thus to be read into the legislation (akin to the statutory cap already in the legislation that the attribution of penalty should not exceed 100%).

10. At the hearing Mr Tipping helpfully clarified that the appeal was solely that of Mr Javaid. No appeal was brought against the FTT Decision by the corporate appellants against HMRC's decisions to assess Schedule 24 penalties on AA Com Limited and Victory Telecom Limited (which formed the basis for the Personal Liability Notices), nor against the amounts of those company penalties.

Whether permission should be given to argue new point

11. The Court of Appeal in *Singh v Dass* [2019] EWCA Civ 360 set out the legal principles which will apply where party seeks to raise a new point on appeal which was not raised below as follows (cited authorities omitted):

> "16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
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> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the.
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> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs."

12. On the basis of the earlier Court of Appeal decision of *Jones v Governors of Burdett-Coutts School* [1998] IRLR 521, HMRC argue that an appeal tribunal will not entertain a new point of law that was not taken below save in exceptional circumstances.

13. There was some debate before me whether the general test requires exceptional circumstances[1] however it was common ground that in cases which fell under the second point under *Singh v Dass* (i.e. those necessitating new evidence or the trial being conducted differently) that exceptional circumstances would be required. Mr Javaid's submission is that his case did *not* require new evidence so was *not* such a case.

14. Mr Tipping argued that the factual material necessary to undertake the proposed proportionality assessment was already available from the evidence before, and findings made by, the FTT. It was accepted that the proposed ground had not been argued before the FTT and Mr Tipping did not criticise the FTT for not dealing with it. The FTT Decision was nevertheless wrong in law however because it had not interpreted paragraph 19 compatibly with A1P1. That required a proportionality assessment to be read into paragraph 19.

15. Mr Tipping relied in particular on the FTT's findings concerning the conduct giving rise to the penalties and Mr Javaid's role in that conduct, noting that the tribunal had made extensive findings as to the operation of the businesses, the circumstances in which the penalties arose and Mr Javaid's knowledge and involvement. He referred specifically to the findings recorded at [95] to [119] of the FTT decision and submitted that these findings provided the factual framework against which any proportionality assessment would be undertaken. He further relied on [12] of the FTT decision, where the tribunal recorded that Mr Javaid was the sole shareholder of the relevant company, and submitted that this was relevant to his argument that penalties imposed on the companies themselves already had a direct punitive effect upon him. In addition, he placed particular reliance on the FTT's findings relating to the profitability of the businesses. He referred to [115] of the decision, and also to the evidence recorded elsewhere by the FTT, including evidence that margins were typically below 1% and sometimes as low as 0.25% to 0.75%. He also relied on the material before the FTT concerning the likely impact of the penalties on the companies, including HMRC's position that insolvency was likely and the Appellant's position that, whether or not insolvency ultimately followed, the liabilities would have a significant financial impact. During oral submissions Mr Tipping accepted that the FTT had made no express findings concerning Mr Javaid's personal means and that there was no finding that he would be rendered insolvent by the PLNs. While he referred to evidence given to the FTT (mentioned at [8] of the decision) that Mr Javaid had needed to sell a property to instruct counsel it is accepted the FTT made no material finding of fact on Mr Javaid's personal circumstances.

16. Mr Foulkes accepted that proportionality may involve a legal question, but contended that the present proportionality challenge could <u>not</u> be determined without further evidence. He submitted that the Appellant's case relied upon matters such as the financial consequences of the PLNs for Mr Javaid, the significance of the companies' profitability, the extent to which punishment and deterrence had already been achieved and the overall balance between the interests of the individual and those of the community. Those, he argued, are inherently fact-

[1] Mr Foulkes argued *Notting Hill* in so far as it rejected a requirement that a case needed to be exceptional was per incuriam because the court had not taken account of earlier Court of Appeal decisions *Glennie v Independent Magazines UK Ltd* [1999] IRLR 719, *Jones v Governors of Burdett-Coutts School* and *Leicestershire County Council v UNISON* [2006] IRLR 810which had stipulate an exceptionality requirement. Mr Tipping in turn argued those decisions were themselves *per incuriam* as they had not been referred to the foundational authority of *Pittalis v Grant* [1989] QB 605 and related case law. Given my view that this *is* a case where further evidence is required I do not need to resolve that issue for the purposes of this application.

sensitive questions. Had proportionality formed part of the case before the FTT, HMRC would have sought evidence concerning Mr Javaid's personal financial circumstances and would have explored those matters through disclosure and cross-examination. He submitted that this case therefore falls squarely within the category of cases where determination of the new ground would require factual enquiries that were never undertaken below.

17. I accept HMRC's submissions on this issue. While there appears to me no dispute that (putting aside its prospects of success) the question of how paragraph 19 should be interpreted in the light of s3 HRA 1998 and A1P1 is an issue of statutory interpretation and therefore a question of law, that does not answer the question whether the issue can be determined on the facts found by the FTT. The sort of "pure point of law" contemplated in my view by the third paragraph of *Singh v Dass* is one whose *application* does not require additional evidence or findings, or which would not have entailed the hearing being run differently. Here the ground of appeal is not (as it must be to be of any avail to Mr Javaid) that the FTT got the law wrong but that if it had got the law right the amount attributed would be nil (based on the application of the proportionality argument). The proposed challenge is directed principally to the third and fourth stages of the proportionality assessment identified in *Bank Mellat* namely whether a less intrusive measure could have been used and whether a fair balance has been struck between the rights of the individual and the interests of the community. Those questions (in line with Mr Javaid's case in this application) demonstrate the factual nature of the enquiry he seeks to undertake. He relies upon the alleged severity of the financial consequences for himself, upon the limited profitability of the businesses, upon the proposition that punishment and deterrence had already substantially been achieved through the penalties imposed upon the companies, and upon the contention that, given those matters, the attribution should have been nil. Whether those propositions are correct cannot sensibly be evaluated and then determined without evidence. The difficulty for the Appellant is that the FTT made no findings directed to those matters. There are no findings concerning Mr Javaid's personal assets, liabilities, income, resources or ability to satisfy the liabilities imposed by the PLNs.

18. Mr Tipping submitted that the significance of those findings lay not in any absolute proposition that low profit margins necessarily render the attributed liability disproportionate, but in the relationship between the penalties imposed and the nature of the businesses concerned. He highlighted that VAT is, in substance, a tax charged by reference to turnover rather than profit and in essence that where a business operates on very small margins, liabilities calculated by reference to turnover may bear little relationship to the financial benefit derived by those controlling the business. He argued that this was a factor capable of supporting the conclusion that attributing the entirety of the penalties to Mr Javaid was disproportionate. At most, however, the point only tends to show that there may have been a disparity in relative terms between the profitability of the businesses and the penalties imposed. However, it is the attribution of penalty to Mr Javaid rather than amount of penalty on the companies which is under challenge. As regards the attribution of the company penalty to Mr Javaid, the small profit margins of themselves plainly do not establish the financial consequences of the PLNs for Mr Javaid personally when viewed against his own assets, income or overall financial position (which was not the subject of evidence).

19. In those circumstances I conclude that determination of the proposed new ground would have required further evidence and further factual enquiry. This is therefore not the sort of case

in which a new ground can properly be characterised as a self-contained point of law capable of determination solely by reference to the facts already found by the FTT.

20. That the new point would require further evidence is a powerful factor in my view against allowing the new point to be argued. Although the parties agreed that in cases where new evidence is required, permission should only be granted exceptionally, the fact new evidence is required is not determinative and I recognise that the overall question remains whether permitting the new point to be argued would be fair and just taking account of all relevant factors. As the Court of Appeal discussed in *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, (at [26]):

> "…Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken."

Nature of proceedings and new point

21. As regards the nature of the proposed point I did not understand it to be in dispute that to the extent the proposed ground raised a legal issue of statutory interpretation concerning the relationship between paragraph 19 and s3 HRA 1998 and A1P1, the ground constituted a point of law.

22. Relying on the Supreme Court's decision in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505 at [30] Mr Tipping sought to argue in effect that the exercise of proportionality as a whole is ordinarily treated as a legal question and in effect that special considerations applied regarding proportionality such that the Upper Tribunal was capable of determining the issue for itself. That case concerned a reference from the Attorney General for Northern Ireland in relation to penal sanction in a Bill for breach of abortion clinic safe zones and whether it involved a disproportionate interference with ECHR freedom of conscience, speech and assembly rights of anti-abortion protestors (given the offence was unqualified by any defence of lawful or reasonable excuse in the legislation). The human rights charity JUSTICE intervened arguing no such defence was needed; the assessment of proportionality was a question of fact to be carried out at the trial or each individual case. Having considered various cases that had decided proportionality as a matter of general principle rather than on the circumstances in each case the Supreme Court explained (at [30]):

> "Those cases also demonstrate the related point that the determination of whether an interference with a Convention right is proportionate is not an exercise in fact-finding. It involves the application, in a factual context (often not in material dispute), of the series of legal tests set out at para 24 [*the Bank Mellat tests*] above, together with a sophisticated body of case law, and may also involve the application of statutory provisions such as sections 3 and 6 of the Human Rights Act, or the development of the common law..."

23. This extract does not address however the distinct question regarding whether the proportionality exercise in a particular case on appeal can be undertaken without further

evidence. Moreover, the Supreme Court in fact explicitly recognises that the application of the series of (*Bank Mellat)* legal tests will take place in a factual context. Mr Javaid's own case is that his particular circumstances are relevant to explaining why in his view the PLN attribution should have been nil.

24. Mr Tipping also referred me to the Supreme Court 's decision *In re JR123* [2025] UKSC 8 at [35]) for the proposition that appellate courts have a "responsibility to assess whether there is a breach" of a Convention right, "including in particular by reference to the issue of proportionality of a measure having regard to its legitimate aim." In that case the appellant argued the failure of an Order setting out a rehabilitation scheme allowing for spent convictions, but not for the most serious category of offences violated his Article 8 ECHR rights because it failed to make provision for individual assessments. One of the issues was the role of an appellate court in proportionality assessments.

25. This case does not equally assist Mr Javaid's case. The context concerned the appellate court's role in relation to appeals against proportionality assessments conducted by first instance courts. The Supreme Court explained the two possible approaches. The first approach, where the case turned on the factual assessment of the circumstances, entailed the appellate court considering whether the lower court had misdirected itself or had due to regard to relevant matters. The second approach, where matters of general principle were in issue, entailed the appellate court approaching the matter for itself without deferring to the lower court's assessment. The Supreme Court concluded the particular case before it was in the second category. The reasoning relied on *In reJR123* was thus about the nature of the appellate court's role where the first instance court had made a proportionality assessment (in effect whether it was to review the lower court decision or remake it). While the reasoning confirms there can be situations where the appellate court should approach the matter for itself, it cannot be taken to imply any general expectation that where the first instance court or tribunal has not made any assessment, that the appellate court or tribunal must do so. The fact that Mr Javaid's own case for why he should ultimately succeed depends on an evaluation of the particular circumstances of his case suggests, in any case, that the first type of appellate approach mentioned above (review as opposed to remaking) would be relevant.

Prejudice to other party and other factors

26. Mr Foulkes submitted there would be real prejudice if the point were permitted to be advanced. Had proportionality formed part of the case before the FTT, HMRC would have been entitled to investigate matters such as the applicant's financial circumstances. The preparation of the case, the evidence adduced and the conduct of the hearing (HMRC indicate they would have wanted to cross-examine any evidence on means) may all have been materially different. I accept those submissions.

27. Mr Tipping argues that to the extent any prejudice might arise, it could be addressed through case management measures of the type discussed by the Court of Appeal in *Altrad Services Ltd v HMRC* [2023] EWCA Civ 474. He relied in particular on the court's observation that prejudice resulting from a newly advanced argument may sometimes be mitigated through procedural directions, including allowing the opposing party to rely on additional material that would have been deployed had the point been raised earlier and, where appropriate, proceeding on factual assumptions adverse to the party seeking to advance the new argument. He submitted

that similar measures would be available in the present case. However, as Mr Foulkes pointed out, the prejudice in *Altrad* was of a much narrower character. The issue there concerned the impact of an expert report which had not been challenged at trial. The Court of Appeal contemplated measures such as permitting the opposing party to rely on additional documents which it said it would have deployed had the point been raised at trial, together with the making of evidential assumptions adverse to the party seeking to advance the new argument. The consequences of having to make adverse assumptions (here effectively that Mr Javaid had resources sufficient to satisfy any liability) illustrate that the proposed proportionality challenge could not sensibly be determined without proper evidence. I agree with HMRC that case management of the sort used in *Altrad* would not mitigate the prejudice. If proportionality had been raised below, it would likely have generated disclosure requests, further witness evidence and cross-examination. This is not a situation in which the prejudice can realistically be addressed through the introduction of a limited category of additional documents or by the making of evidential assumptions.

28. I also reject the appellant's suggestion that any prejudice falls on him and that it is therefore open to him to incur that. HMRC might well have adduced and/or challenged evidence on financial means. The lack of evidence means that his case on nil attribution would not be made out such that any permission to run the new point academic to the outcome of the proposed appeal.

29. I have also taken into account that Mr Javaid appeared before the FTT without professional representation, however, I regard it as carrying only limited weight here. Tribunal procedure is designed to accommodate litigants in person and, while the absence of representation may explain why the point was not taken, it does not diminish the significance of the fact that determination of the point would require additional evidence and factual investigation.

30. Mr Tipping also raised points regarding the public policy/interest arguments in the ground involving A1P1 rights being afforded greater weight, and the public interest in taxpayers paying the right amount of tax. Neither of these points alter the analysis materially in my view. There was no basis to conclude that cases involving A1P1 issues (which will be engaged by definition in any number of taxing provisions) are treated differently. The Court of Appeal's decision in *BlueCrest Capital Management (UK) LLP v HMRC* [2025] STC 247, which the applicant relies on, itself makes clear (by reference to the Supreme Court's observations in *Tower MCashback LLP 1 v HMRC* [2011] UKSC 19), that such public interest is "subject always to requirements of fairness and proper case management…" (at [107]).

31. Finally, I have regard to the wider interests of justice, including the importance of finality in litigation. As Mr Foulkes clarified at the hearing, the point is not that Mr Javaid is out of time rather it is that parties are ordinarily expected to identify and advance their cases before the fact-finding tribunal and that appeals proceed by reference to the issues determined below. The appellate tribunal's control over the introduction of new arguments reflects that important procedural principle. Where, as here, the proposed new ground would require a factual inquiry that was never undertaken before the FTT, the interests of justice weigh against permitting it to be raised for the first time on appeal.

32. Drawing these matters together, I conclude that it would not be in the interests of justice to permit the applicant to advance the proposed new ground. The new ground would necessitate

new evidence, and although it raises a point of law there would be prejudice to the other party which is not realistically resolvable through case management and also policy concerns regarding the finality of litigation. Permission to advance the new ground is accordingly refused.

Would permission have been granted?

33. While the parties each made submissions on the arguability of the ground it is not necessary to determine that given the conclusion above that permission should not be granted to advance the new ground. If, contrary to that conclusion permission to advance the proposed new ground had been granted, I would nevertheless not have granted permission. This would have been on the basis that, assuming the ground met the arguability threshold, I would not have been satisfied the arguable error of law was material to the outcome of the appeal. As explained above, the proposed proportionality challenge depended upon matters such as the effect of the PLNs upon Mr Javaid personally, and his particular circumstances. Those were not matters investigated before the FTT and no findings were made about them such that Mr Javaid would not ultimately be able to show that the attribution to him under the PLN was incorrect when paragraph 19 was read in conformity with his A1P1 rights. Thus for essentially the same reasons as to why the ground involves a points of law that would require further evidence apply to explain why, any arguable error would not be material to the outcome.

Conclusion

34. Permission to run the new ground is refused. It follows that permission to appeal the ground is also therefore refused.

Signed: **SWAMI RAGHAVAN** **JUDGE OF THE UPPER TRIBUNAL**	**Date: 8 July 2026**
Issued to the parties on: 08 July 2026	