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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY C SHORT LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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John Larkin KC & Joseph O'Keeffe (instructed by Tiernans) for the Applicant
Joseph Kennedy (instructed by the Crown Solicitor's Office) for the Proposed Respondent

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HUMPHREYS J

Introduction

[1] The applicant is a limited liability company which has traded as a Money Service Business ('MSB') since 2008. Cathal Short is the sole director and shareholder of the company.

[2] This application for leave to apply for judicial review arises out of decisions made by His Majesty's Revenue and Customs ('HMRC'), the proposed respondent, on 18 July 2023, whereby it was determined that:

(i) Cathal Short was not a Fit and Proper Person ('FPP') to hold a relevant position within an MSB; and

(ii) The registration of the applicant company as an MSB be cancelled.

[3] Both these decisions have been appealed to the First-tier Tribunal (Tax Chamber) ('FTT') by way of notices of appeal dated 19 July 2023. Expedition has been sought in respect of the appeals, but no dates yet fixed for hearing.

[4] Following the filing of these notices, the solicitor acting for the applicant wrote to HMRC stating that there appeared to be no impediment to the company continuing to trade pending the appeal. HMRC replied on 8 September 2023:

> "This letter is to inform that despite the decision being under appeal, it remains that, effective 18 July 2023, C. Short Ltd is no longer registered with HMRC for Anti-Money Laundering Supervision (AMLS). Therefore, C. Short Ltd is not supervised for AMLS and it must not carry out relevant activity."

[5] This quickly prompted pre-action correspondence from the applicant's solicitor and in the absence of a reconsideration by HMRC, an application for leave to apply for judicial review was issued on 19 September 2023. This seeks to impugn both the FPP decision and the decision to cancel the applicant's registration, and also the refusal to permit the applicant to trade pending the outcome of the appeals to the FTT.

Operation Concentric

[6] Between 2009 and 2012, an organised crime gang ('OCG') was responsible for a tax fraud which exploited the Construction Industry Scheme ('CIS') to enable sub-contractors to evade the payment of tax. The fraud involved the creation of sham companies which would receive payment in respect of construction works carried out but then become insolvent before any tax was paid to HMRC. The applicant's premises were searched in March 2012 by the criminal investigation team and a number of documents seized.

[7] After an extensive investigation, known as Operation Concentric, some 37 individuals were charged in July 2018 with offences arising out of and connected with the fraudulent scheme. Cathal Short was not charged with conspiracy to cheat the public revenue but with two counts under the Proceeds of Crime Act 2002, namely converting criminal property and failing to disclose money laundering by a nominated officer. The latter charge was dismissed by Colton J and Mr Short pleaded not guilty to converting criminal property.

[8] The charges against all other defendants have now been dealt with, only the case against Mr Short remains and a date for his trial has not yet been fixed. He maintains that he is not guilty of the offence alleged.

[9] The circumstances of the alleged offending relate to the cashing of cheques by the applicant MSB for and on behalf of various Belfast-based construction contractors. Through a mutual business acquaintance, Mr Short was introduced to Francis Devlin who carried out accountancy and pay roll functions for subcontractors. The companies in question drew cheques on major retail banks and the applicant cashed these and provided the funds to Mr Devlin or his

representative. It is his case that he has no reason to believe that this was part of a fraud being perpetrated on HMRC but that all tax would be accounted for by Mr Devlin. The service carried out by the applicant was charged at 1.5% per transaction.

[10] The total value of the cheques encashed by the applicant was £1,188,520, thereby generating fees for the business of £17,827.

The impugned decisions

[11] The HMRC decisions were communicated by letters dated 18 July 2023. The FPP decision relied upon evidence which emerged from the criminal investigation and the proposed respondent declared itself satisfied that the actions of Mr Short exposed the business to the risk that it may be used for money laundering or terrorist financing and that he had not acted with probity.

[12] Reliance was placed on the fact that members of the OCG had pleaded guilty to various charges in connection with the fraud and that Mr Short had relationships with a number of these individuals. The evidence was also said to demonstrate that Mr Short had failed to ensure customer due diligence was carried out.

[13] The only incident which did not date from the period 2010-2012 related to a compliance visit on 7 September 2017 when an HMRC officer was alleged to have found a failure to identify the beneficial owners of customers, and this resulted in a letter being written. Mr Short denied that any such letter had been received following that visit and points out that no follow up action was taken by HMRC.

[14] The letter outlining the decision to cancel the applicant's registration followed from the finding that Mr Short was not an FPP. The same evidence was relied upon, and the conclusion was that the registration be cancelled. The author further stated that it was in the public interest for the decision to be given immediate effect.

[15] It is the applicant's case that the company cannot trade without being registered and having a FPP person exercising control of it. Cathal Short's wife, Teresa Short, sought FPP status but this was refused. She had also faced a charge arising out of the Operation Concentric investigation, but this was dismissed by Colton J. The core business of the applicant company is the encashment of cheques, and it carries out some 500 transactions per week. If it cannot trade, then business will go elsewhere and it is unlikely to recover. A cessation of business for a prolonged period of time will cause the company to cease trading permanently.

The legal framework

[16] The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ('the 2017 Regulations') define a 'money service business' as:

> "an undertaking which by way of business operates a currency exchange office, transmits money (or any representations of monetary value) by any means or cashes cheques which are made payable to customers."

[17] Regulation 54 provides that 'the Commissioners' (being the Commissioners of HMRC) must keep a register of all MSBs which are not regulated by the Financial Conduct Authority (such as the applicant) and a business may only act as an MSB if it is on this register by virtue of regulation 56.

[18] Regulation 58 prescribes the FPP test:

> "(1) The registering authority must refuse to register an applicant for registration in a register maintained under regulation 54 as a money service business or as a trust or company service provider, if it is satisfied that—
>
> (a) the applicant;
>
> (b) an officer or manager of the applicant;
>
> (c) a beneficial owner of the applicant; or
>
> (d) where the applicant is a money service business—
>
> (i) any agent used by the applicant for the purposes of its business; or
>
> (ii) any officer, manager or beneficial owner of the agent,
>
> is not a fit and proper person to carry on that business.
>
> (3) A person who has been convicted of a criminal offence listed in Schedule 3 is to be treated as not being a fit and proper person to carry on the business for the purposes of paragraph (1).
>
> (4) If paragraph (3) does not apply, the registering authority must have regard to the following factors in determining the question in paragraph (1)—
>
> (a) whether the applicant has consistently failed to comply with the requirements of –

(i) these Regulations;

(ii) the Money Laundering Regulations 2001,

(iii) the Money Laundering Regulations 2003, or

(iv) the Money Laundering Regulations 2007; and

(b) the risk that the applicant's business may be used for money laundering or terrorist financing;

(c) whether the applicant, and any officer, manager or beneficial owner of the applicant, has adequate skills and experience and has acted and may be expected to act with probity.

(5) Where the applicant is a money service business, the registering authority may, in determining the question in paragraph (1), take account of the opinion of the applicant as to whether any person referred to in paragraph (1)(d) is a fit and proper person to carry on the business.

(6) Where the registering authority is not the supervisory authority of the applicant, the registering authority must consult the supervisory authority and may rely on its opinion as to whether or not the applicant is a fit and proper person to carry on the business referred to in paragraph (1)."

[19] Regulation 60 deals with the cancellation and suspension of registrations:

"(1) If paragraph (2) applies, the registering authority may suspend (for such period as it considers appropriate) or cancel—

(a) the registration of a money service business or a trust or company service provider in a register maintained under regulation 54; or

(b) the registration of an Annex 1 financial institution in a register maintained under regulation 55 (including the registration of an Annex 1 financial institution previously included in a register maintained under regulation 32 of the Money Laundering Regulations 2007).

(2) This paragraph applies if, at any time after registration, the registering authority is satisfied that—

(a) the money service business, trust or company service provider, or Annex 1 financial institution (as the case may be); or

(b) any other person mentioned in regulation 58(1) in relation to that business, provider, or financial institution,

is not a fit and proper person for the purposes of regulation 58.

(3) The registering authority may suspend (for such period as it considers appropriate) or cancel a person's registration in a register maintained by it under regulation 54 or 55 if, at any time after registration—

(a) it appears to the authority that any of paragraphs (a) to (e) of regulation 59(1) apply; or

(b) the person has failed to comply with any requirement of a notice given under regulation 66.

(7) Where the Commissioners decide to suspend or cancel a person's registration they must give that person notice of—

(a) their decision and, subject to paragraph (10), the date from which the suspension or cancellation takes effect;

(b) if appropriate, the period of the suspension;

(c) the reasons for their decision;

(d) the right to a review under regulation 94; and

(e) the right to appeal under regulation 99.

(10) If the registering authority –

(a) considers that the interests of the public require the suspension or cancellation of a person's registration to have immediate effect; and

(b) includes a statement to that effect and the reasons for it in the notice given under paragraph (7) or (9), the suspension or cancellation takes effect when the notice is given to the person."

[20] It is noteworthy that where the FPP test is not met, HMRC is obliged to refuse an application for registration under regulation 58 but has a discretion whether or not to cancel an existing registration under regulation 60. Any decision to cancel may take effect immediately where the interests of the public so require.

[21] As referenced in regulation 60, HMRC is obliged to offer a review of its decision under regulation 94. An appeal lies to the FTT under regulation 99 and that tribunal is entitled to substitute its own decision for any decision quashed on such appeal.

[22] As a matter of first principle, judicial review is a remedy of last resort and where there is available an adequate and effective alternative remedy, this can be grounds alone to refuse an application for leave to apply for judicial review. In *R (ex parte Watch Tower Bible) v Charity Commission* [2016] EWCA Civ 154, Lord Dyson MR stated:

> "It is only in a most exceptional case that a court will entertain an application for judicial review if other means of redress are conveniently and effectively available. This principle applies with particular force where Parliament has enacted a statutory scheme that enables persons against whom decisions are made and actions taken to refer the matter to a specialist tribunal."

[23] Whilst an appeal on the merits lies in this instance to the FTT, there is authority for the proposition that a person aggrieved by such a decision may exceptionally seek relief by way of an application for judicial review. In *CC&C*

Limited v HMRC [2014] EWCA Civ 1653, Underhill LJ reviewed the authorities and stated:

> "39. The starting-point seems to me that Parliament has enacted a self-contained scheme for challenging `relevant decisions' by HMRC in relation to (broadly) excise management issues, which covers, *inter alia*, decisions to revoke the registration of registered excise shippers and dealers. It is trite law that where such a scheme exists it would normally be wrong for the High Court to permit decisions of the kind which it covers to be challenged by way of judicial review. The effect of the authorities is conveniently summarised in the judgment of the Privy Council, delivered by Lord Jauncey, in *Harley Development Inc v Commissioner of Inland Revenue [1996] 1 WLR 727* , at pp 736–7:
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> > In *Reg v Inland Revenue Commissioners, ex parte Preston [1985] AC 835* Lord Scarman said, at p. 852:
> >
> > > 'My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision.'
>
> This proposition was elaborated in *Inland Revenue Commissioners v Aken [1990] 1 WLR 1374* , 1380, by Fox LJ in the following passage:
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> > In *In re Vandervell's Trusts [1971] AC 912* , 933, Viscount Dilhorne said: 'but where the correctness of an assessment, and so the liability to pay income tax or surtax, is

> challenged, that can only, in my opinion, be decided by the special or general commissioners.' I refer also to the speech of Lord Diplock in that case, at p 944. That then is the true principle applicable in these cases, namely, that the statutory machinery is exclusive machinery for an appeal from a notice of assessment. There is normally no other. However, I do not say there are no cases in which, exceptionally, a challenge by way of judicial review or otherwise to a decision of the revenue would be possible. There may be cases where, for example, there has been some abuse of power or unfairness, which would justify the intervention of the court: see for example *Reg v Inland Revenue Commissioners, ex parte Preston [1985] AC 835*. But that is exceptional. Normally the statutory machinery under the Taxes Management Act 1970 is the exclusive machinery for challenge to an assessment by a taxpayer. In my judgment there is nothing in the present case which comes near to such impropriety by the revenue as to justify departure from the normal procedure.'

There are other dicta of high authority to the same effect. Their Lordships consider that, where a statute lays down a comprehensive system of appeals procedure against administrative decisions, it will only be in exceptional circumstances, typically an abuse of power, that the courts will entertain an application for judicial review of a decision which has not been appealed.

The authority to which Lord Jauncey refers first – *R v Inland Revenue Commissioners, ex p Preston [1985] AC 835* – contains at pp 862–7 a full discussion by Lord Templeman of the concept of `fairness' in this context. I need not reproduce it here, but I should note that the context was allegations of conduct by the Commissioners `equivalent to a breach of contract or breach of representations'.

41. However, I understand Mr Jones's real submission to be that what the Appellant is in substance seeking in these proceedings is not to challenge the revocation decision itself but only to obtain interim relief while the statutory appeal procedure operates: that is not, he says, going behind the procedure provided by Parliament but supplementing it. That point is more arguable, but I think it is wrong. Parliament could have provided for the First-tier Tribunal to have power to make suspensory orders pending the outcome of an appeal, but it did not do so. I do not think that it is open to the Court to provide remedies or procedures for which the statute does not provide – particularly so when, as I have pointed out above, care was obviously taken to specify precisely what the Tribunal could and could not do. Where it is intended that the powers of the Court, including the power to grant interim relief, may be deployed `in aid of' (to use Mr Jones's phrase) another tribunal, that is typically done by express provision: see for example section 44 of the Arbitration Act 1996.

42. The absence of any power under the statute to suspend the effect of a relevant decision pending appeal may be capable of operating harshly in the case of decisions to revoke the registration of registered excise dealers and shippers, but it is not incomprehensible. The statute describes the right to trade in duty-suspended goods as a `privilege', and the nature of the business is such that it is a privilege that should only be accorded to those whom HMRC believe they can trust. There would be an obvious awkwardness in the Tribunal, or indeed the Court, being able to require HMRC to continue, for an indefinite period pending the outcome of an appeal, to confer that privilege on traders who they have ceased to believe are fit and proper persons. Parliament could reasonably have regarded the loss of registration pending an appeal as simply a risk of the business which traders must accept.

43. I do not therefore believe that the Court is entitled to intervene to grant interim relief where the registration of a trader in duty-suspended goods is revoked simply on the basis that there is a pending appeal with a realistic chance of success. But it does not follow that there are no circumstances in which the Court may grant such relief; and, as noted above, HMRC do not in fact so contend.

The correct principle seems to me to be this. If a `relevant decision' is challenged only on the basis that it is one to which HMRC could not reasonably have come the case falls squarely within section 16 of the Act, and the Court should not intervene. However, where the challenge to the decision is not simply that it is unreasonable but that it is unlawful on some other ground, then the case falls outside the statutory regime and there is nothing objectionable in the Court entertaining a claim for judicial review or, where appropriate, granting interim relief in connection with that claim. A precise definition of that additional element may be elusive and is unnecessary for present purposes. The authorities cited in Harley Development refer to `abuse of power', `impropriety' and `unfairness'. Mr Brennan referred to cases where HMRC had behaved `capriciously' or `outrageously' or in bad faith. Those terms sufficiently indicate the territory that we are in, but I would sound a note of caution about `capricious' and `unfair'. A decision is sometimes referred to rhetorically as `capricious' where all that is meant is that it is one which could not reasonably have been reached; but in this context that is not enough, since a challenge on that basis falls within the statutory regime. As for `unfair', I am not convinced that any allegation of procedural unfairness, however closely connected with the substantive unreasonableness alleged, will always be sufficient to justify the intervention of the Court: Mr Brennan submitted that cases of unfairness would fall within the statutory regime to the extent that the unfairness impugned the reasonableness of the decision. As I have noted above, the types of unfairness contemplated in Preston – which is the source of the use of the term in Harley Development – were of a fairly fundamental character. But since procedural unfairness is not relied on in this case I need not consider the point further.

44. In short, therefore, I believe that the Court may entertain a claim for judicial review of a decision to revoke the registration of a registered excise dealer and shipper, and may make an order for `interim re-registration' pending determination of that claim (subject, no doubt, to such conditions as it thinks fit), in cases where it is arguable that the decision was not simply unreasonable but was unlawful on one of the more fundamental bases identified above. Such cases will, of

> their nature, be exceptional. That approach may seem unfamiliar inasmuch as it involves making a distinction which it is not normally necessary to make between `mere' unreasonableness and other grounds of public law challenge of the type identified above: indeed there are plenty of observations in the authorities to the effect that the various ways of formulating such a challenge tend to blur into one another (including, famously, by Lord Greene MR in Wednesbury itself – see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223*, at p 229). But I see no conceptual difficulty about making such a distinction where the circumstances call for it; and here it arises naturally from the way in which the jurisdiction of the Tribunal is defined in section 16 of the 1994 Act."

[24] I am therefore satisfied that whilst the appeal to the FTT will represent an effective and adequate remedy in the preponderance of cases, a judicial review court exercising its supervisory jurisdiction may, in certain circumstances, hear a collateral change to the decision.

The test for leave

[25] In this jurisdiction it is well-established that the test for leave to apply for judicial review requires an applicant to show "an arguable ground for judicial review on which there is a realistic prospect of success", per McCloskey LJ in *Re Ni Chuinneagain's Application* [2022] NICA 56.

The grounds for judicial review

(i) Procedural fairness

[26] The applicant relies strongly on the well-known dicta of Lord Mustill in *R -v- Home Secretary ex parte Doody* [1994] 1 AC 531 relating to procedural fairness:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of

> a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

[27] The applicant submitted that the decisions in relation to FPP and the cancellation of the registration were matters which had serious adverse consequences for the applicant, particularly in the context of an appeal system where there was no right to trade pending determination. As a result, the decisions in question were of the most profound significance.

[28] The applicant was never informed that HMRC was considering its invoking its powers under regulation 60. No notice was given to it of the case which it had to answer. No opportunity was afforded, prior to the decision being made, to make representations.

[29] Equally, the applicant points to the passage of time. HMRC began its investigation in 2012 and, at that stage, documents were seized from the applicant's premises. The criminal proceedings were instigated in 2018 but no regulatory action was taken in respect of the applicant's status until July 2023. There is nothing in the evidence to suggest that new information came to light in that five year period.

[30] Indeed, for over a decade since the investigation began, the applicant had been subject to regular compliance checks carried out by HMRC as well as personal investigation into the affairs of Cathal Short. None of this led to any action being taken, save for the one disputed letter in 2017.

[31] In her evidence, Ms Kavanagh, an HMRC officer, has taken issue with the claim that there has been delay in this case. She explains that the Fraud Investigation Service ('FIS') is a directorate within HMRC which has a number of divisions, including Organised Crime ('OC') and Economic Crime Supervision

('ECS'). OC is the unit which conducted the criminal investigation whilst ECS exercises HMRC's responsibilities under the 2017 Regulations. She specifically deposes:

> "ECS is not automatically aware of all information held by the department (including the existence, let alone substance, of criminal investigations conducted by HMRC)".

[32] This generic point sits uneasily with the fact that the evidence reveals that those responsible for money laundering compliance visited the applicant's premises in August 2012, five months after the search was conducted by the criminal investigation team. Mr Short discussed this fact with an HMRC officer McInerney and pointed out that many of his records had been seized as part of the criminal investigation. It is untenable to contend in this case that one arm of the HMRC did not know what the other was doing.

[33] Ms Kavanagh goes on to explain that, as a result of disclosure requests made by Mr Short in the criminal proceedings, OC approached ECS in February 2022 for documentation connected with historic compliance visits. Whilst the fact and existence of criminal charges was discussed, it is averred that:

> "OC did not provide any information on what those charges were or the facts upon which those charges were based."

[34] No explanation is given for the apparent failure, by those whose job it is to monitor the suitability of individuals to be engaged in MSBs, to make any further enquiries about the nature of such criminal charges and their impact upon the statutory responsibilities which HMRC is obliged to fulfil.

[35] The applicant filed its annual submission for AMLS in November 2022 and sought to add Mrs Short as an FPP. Ms Kavanagh states that by February 2023, ECS started compiling the material to consider the November 2022 applications and this included the OC criminal investigation material. This led ultimately to the decisions which were taken and communicated in July 2023.

[36] Ms Kavanagh also makes the suggestion that:

> "ECS has acted expeditiously in making the decisions of 18 July 2023"

[37] This fails to recognise that HMRC is a single legal entity, regulated by the Commissioners for Revenue and Customs Act 2005. It is no doubt convenient to organise the business of HMRC into directorates and departments, but this cannot detract from the fact of corporate knowledge. The existence and nature of the

criminal investigation was known to HMRC from 2012 onwards. This rather begs the question as to why officers who believed that Mr Short may have committed criminal offences would not be acting in the public interest by referring the matter to their colleagues to address the regulatory issues.

[38] Ms Kavanagh states, correctly, that there is no statutory requirement to afford anyone impacted by a decision under the 2017 Regulations a right to be heard or make representations. She states:

> "I considered it abundantly clear that there is a risk that C Short Ltd's MSB business may be (or may have been or may will be) used for money laundering or terrorist financing, and that C Short Ltd, Mr Short and Mrs Short may not be expected to act with probity, for the reasons set out in the decision letters. I did not consider there was any need to seek further information or clarification from C Short Ltd, Mr Short or Mrs Short before issuing the decisions."

[39] This averment rather misunderstands the purpose of a process whereby one is able to make representations in advance of a potentially adverse decision. It is not for the purpose of the decision maker gathering further information or clarification, it is to enable the person affected the opportunity to explain why the decision maker should take an alternative course.

[40] In argument, the proposed respondent contended that the availability of a review process under regulation 94 provided a route by which the person adversely impacted by a decision could make representations. However, such a review cannot be sought when an appeal has been filed under regulation 99 and it may be that significant damage could be caused to an individual or a business even if the decision was overturned on review.

[41] I am satisfied that it is at least arguable that, in this context, procedural fairness required the proposed respondent to permit the applicant an opportunity to make representations in respect of the decision to cancel registration. As Lord Mustill made clear, context is important in the field of procedural fairness and I am particularly cognisant of the following:

(i) The impact of the decision on the ability of the applicant to carry on business;

(ii) The reputational damage which could also be occasioned;

(iii) The fact that the business was permitted to continue to operate for over a decade from the commencement of the investigation and over five years from the initiation of criminal charges;

(iv) The fact that Cathal Short has advanced a positive case in defence of the criminal proceedings and his trial remains outstanding;

(v) Regulation 60 creates a discretion to cancel registration – it is not a mandatory outcome of any particular process or finding;

(vi) The business was subject to annual AMLS and compliance checks, none of which indicated any reason to restrict its ability to trade.

[42] Leave is therefore granted on this ground.

(ii) Substantive legitimate expectation

[43] The applicant's pleaded case contends that it had a substantive legitimate expectation that Mr Short would continue to be approved as an FPP "until the determination of any appeal to the FTT". This claim is misguided since the effect of a decision under regulation 58 is to remove this status and there is nothing in the language of the decision or the regulations which could possibly give rise to this expectation.

[44] In its skeleton argument, a rather different case is advanced to the effect that the conduct of HMRC has been such as to engender in both the applicant and Mr Short a legitimate expectation that the applicant would remain registered until the determination of the criminal proceedings, or some new ground arose justifying HMRC intervention.

[45] The applicant relies on the House of Lords decision in *R v Inland Revenue Commissioners ex p MFK Underwriting* [1990] 1 WLR 1545 in which Lord Bingham stated:

> "If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen. The revenue's discretion, while it exists, is limited. Fairness requires that its exercise should be on a basis of full disclosure. Mr Sumption accepted that it would not be reasonable for a representee to rely on an unclear or equivocal

> representation. Nor, I think, on facts such as the present, would it be fair to hold the revenue bound by anything less than a clear, unambiguous and unqualified representation."

[46] Questions may be raised about the delay in taking regulatory action and the fact that compliance visits were undertaken for several years both before and after the criminal proceedings commenced without any adverse impact on the business. However, there is no evidence of any clear, unambiguous and unqualified representation made by the HMRC which was relied upon by the applicant or Mr Short to their detriment.

[47] In the absence of this, I am not satisfied that an arguable case has been made out in relation to substantive legitimate expectation.

(iii) Irrationality

[48] The applicant alleges that the proposed respondent has taken decisions which are *Wednesbury* unreasonable, both in the sense that no reasonable officer could have made the impugned decisions and that they were infected by a failure to take into account material considerations and/or by taking immaterial considerations into account.

[49] The focus of this attack relates to the failure to take account of the applicant's trading and compliance history. The evidence from the HMRC officer is that the compliance history was taken into account as was the state of play in the criminal proceedings. In light of this, I do not find that any arguable case has been made out in respect of material/immaterial considerations.

[50] In any event, insofar as the substance of the matter is concerned, the applicant and Mr Short have both exercised their rights of appeal to the FTT which can examine the merits of the decisions and, if so minded, quash the HMRC determinations and replace those with its own decisions. In such circumstances, I find that there is an effective and adequate remedy in relation to the substantive merits of the decisions in question.

[51] Leave is refused on this ground.

(iv) Illegality

[52] The applicant's case in the criminal proceedings is that the encashment of cheques did not represent the conversion of criminal property. Whether or not that analysis is correct is properly a matter for the criminal courts and not for the judicial review court exercising its supervisory jurisdiction. I therefore refuse leave on this ground also.

(v) Breach of Article 1 Protocol 1 ECHR

[53] This claim was not advanced with any vigour at the leave hearing. In order to determine whether such a breach had occurred, the court would have to decide whether any interference with the applicant's property rights was a disproportionate. Again, this is a matter which touches directly on the merits of the decision made and is a question which can be considered by the FTT when it comes to hear the appeals.

[54] For this reason, I have decided that there is an effective alternative remedy in respect of the claimed breach of A1P1 ECHR and accordingly leave is refused on this ground.

Interim relief

[55] Having granted limited leave to apply for judicial review, the next question for the court is whether any interim relief should be granted pending the hearing of the substantive application.

[56] The availability of, and the principles which should underlie the grant of, interim relief were recently considered by Bourne J in the High Court in England and Wales in *R (Kingdom Corporate) v HMRC* [2023] EWCA 773 (Admin) in a case which bears some factual similarity to the matter in hand. In summary he found:

(i) The judicial review court could grant an interlocutory injunction, applying *American Cyanamid* principles, even though the FTT enjoyed no power to grant interim relief;

(ii) Such relief will not be granted simply on the basis that there is a pending appeal with realistic prospects of success;

(iii) Where the challenge goes beyond unreasonableness and alleges unlawful conduct on the part of HMRC, the court may entertain an application for judicial review and interim relief;

(iv) A claimant seeking an injunction would need compelling evidence that an appeal would otherwise be rendered nugatory. This would entail more than a narrative from the business owner speaking of the dire consequences of delay, rather it should be supported by financial evidence from an independent professional;

(v) Evidence should be produced of attempts to secure expedition from the FTT and an explanation given as why this would not represent an adequate remedy;

(vi) There is a strong public interest in protecting the HMRC and the public generally.

[57] In this case, no evidence has been produced from an independent professional in relation to the assertions of Mr Short regarding the impact of the cancellation of registration on the applicant's business. I am not prepared to grant any interim relief on the basis of the case advanced to date but I recognise the accuracy of the general principle that the applicant is likely to lose business as a result of the HMRC decision.

[58] I have therefore determined that the appropriate course of action is to proceed to an expedited hearing of the substantive application for judicial review. This can be achieved in the circumstances of this case since the hearing will be limited to a discrete issue and the parties have already submitted detailed evidence and legal arguments.

Conclusion

[59] I therefore order that:

(i) Leave be granted limited to the issue of procedural fairness;

(ii) Interim relief is refused;

(iii) The substantive hearing should be expedited.

[60] I will hear the parties on directions for the expedited hearing.