



Neutral Citation Number: [2024] EWHC 1470 (Admin)

Case No: CO/4528/2022  
CO/4674/2022

**IN THE HIGH COURT OF JUSTICE**  
**KING’S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/06/2024

Before :

**LADY JUSTICE WHIPPLE**  
and  
**MR JUSTICE HILLIARD**

-----  
Between :

**THE KING**  
on the application of  
**(1) MCML Limited (Formerly ED&F Man Capital Markets Limited)**  
**(2) Victoria Foster**

**Claimants**

- and -

**Southwark Crown Court**

**Defendant**

**The Commissioners for His Majesty’s Revenue and Customs**

**Interested Party**

-----  
-----  
**Clair Dobbin KC** (instructed by **Rosenblatt**) for the **First Claimant**  
**Andrew Bird KC** (instructed by **Blackfords LLP**) for the **Second Claimant**  
**Nicholas Chapman, Tom Rainsbury and Joanna Buckley** (instructed by **HMRC**) for the **Interested Party**

-----  
**Approved Judgment**

This judgment was handed down remotely at 10.30am on 14 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

ON PERMISSION TO APPEAL APPLICATION

## Lady Justice Whipple and Mr Justice Hilliard:

### Introduction

1. On 17 April 2024 we dismissed the First and Second Claimants' applications for judicial review. The background, facts and arguments are set out in the judgment handed down on that date under neutral citation number [2024] EWHC 861 (Admin) ("the Judgment") and will not be repeated here.
2. On 15 May 2024, the First Claimant made applications for (1) certification of two questions of general public importance; and (2) leave to appeal to the Supreme Court. Those applications were accompanied by submissions drafted by Ms Dobbin KC, counsel for the First Claimant, dated 12 May 2024. On 22 May 2024 and 3 June 2024 Mr Chapman for HMRC (as the Interested Party) filed submissions in response to the First Claimant's application.
3. It is common ground that this is a criminal cause or matter to which section 1(2) of the Administration of Justice Act 1960 applies:

"No appeal shall lie under this section except with the leave of the court below or of the Supreme Court; and such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the Supreme Court, as the case may be, that the point is one which ought to be considered by the Supreme Court.

..."

### Certification

4. We deal first of all with the First Claimant's request for certification of two questions. The issue for us is whether any part of either of those questions raises a point of law of general public importance. Relevant guidance on the meaning of that phrase (i.e., "a point of law of general public importance") was offered by the Court of Appeal in *R (McAtee) v Secretary of State for Justice* [2018] EWCA Civ 2851, [2019] 1 WLR 3766 at [42] where the Court (Sir Brian Leveson P, Davis and Lewison LJ) said this:

"If a case is a criminal cause or matter then the only route of appeal is to the Supreme Court. Not only is that complex and expensive for litigants but also (and importantly) such an appeal is only possible if the court has first certified that a point of law of general public importance arises. That is a high bar to cross; many, indeed most, cases are not likely to be able to cross it."

5. In *In re McGuinness* [2020] UKSC 6, [2021] AC 392 Lord Sales JSC said at [66] that Parliament chose to erect this high bar in recognition of "the need to ration access to the highest court, which has to deal with appeals across the whole range of cases in the three jurisdictions in the United Kingdom", with the consequence that "there will be many cases in which an appellant may have a meritorious complaint about a decision made by the High Court which is not corrected because it happens not to raise a point

of law of general public importance”. He said at [67] that this stands in contrast with the ordinary run of cases, where appeal rights “are directed to ensuring that errors at first instance in individual cases can be rectified”.

6. The First Claimant suggests two questions for certification. In our judgment, there is a point of law of general public importance contained within each question, but both questions extend beyond the certifiable point of law to other issues which are not of general public importance. The questions cannot be certified in the form proposed.
7. The feature of this case upon which Ms Dobbin focusses is that HMRC’s applications for warrants were based on requests by two Requesting Authorities, namely the Danish state prosecutor (SEIC, see [1] and [23] of the Judgment) and the Public Prosecutor in Cologne, Germany (OPPC, see [1] and [24] of the Judgment). These were requests for mutual legal assistance, or “MLA”. We accept that the MLA context to these applications could be said to give rise to points of law of general public importance when it comes to establishing the test for disclosure (proposed Question 1) and the interpretation of paragraph 2(b)(ii) of Schedule 1 to PACE (the “bound to fail” test which is the subject of proposed Question 2). The issue of general public importance common to both of those questions is whether it is HMRC’s or the Requesting Authority’s state of knowledge or belief which is material.
8. However, Ms Dobbin does not limit the questions to that common issue.

#### *Question 1*

9. Question 1, as suggested, extends to an examination of the test as it was applied in the Judgment. The test itself is a matter of law and was recited as common ground at [22(g)] of the Judgment: “... where there is a failure to make full disclosure the question on judicial review is whether the information which should have been given to the court might reasonably have led the judge to refuse to issue the warrant”. We are of the view that we applied that test correctly. However, Ms Dobbin argues otherwise and for the purposes of this part of our reasoning, we must assume she might be right about that. Even on that assumption, however, no issue of law of general public importance is discernible. Whether we made a mistake in the application of the agreed legal test to the facts of the particular case would be a classic issue of first-instance error, of relevance only to the individual case (noting Lord Sales’ distinction in *In Re McGuinness*, see above). That issue would not be certifiable.
10. By reference to Ms Dobbin’s submissions on Question 1 (see paragraphs 11-16 of her submissions): we are satisfied that her second point (paragraphs 13-14) gives rise to a certifiable question, namely whether the duty to disclose should have been tested by reference to HMRC’s or the Requesting Authority’s knowledge of certain information; we consider that the first point (paragraphs 11-12, which challenge our interpretation of *In re Stanford International Bank* [2010] EWCA Civ 137, [2011] Ch 33), is so closely connected to that second point as also to be certifiable; we do not consider the third point (paragraph 15, whether we correctly applied the correct test) to be certifiable.

#### *Question 2*

11. In addition to questioning whose state of mind is relevant for the purpose of paragraph 2(b)(ii), Question 2 as currently drafted suggests that references in the Judgment to the

“genuineness” of the applicant’s belief that lesser measures were bound to fail disclose an error of law. We do not agree with that suggestion. References to genuine belief are a shorthand for the approach set out in paragraphs [92] and [93] of *R (Newcastle United Football Club Ltd) v HMRC* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187, cited at [69] of the Judgment, which approach was not disputed, at least as a matter of domestic law outside the MLA context; further, the words “genuine belief” reflected the language used by HMRC in its submissions (summarised at [66] of the Judgment) which was not challenged as inaccurate by Ms Dobbin, until now. If we were to assume for present purposes, however, that there might be some merit in her argument that references to “genuine belief” disclosed an error of law, still we would not be persuaded that the argument was one of general public importance; at its highest, it would amount to an argument about first-instance error in the form of a misapplication of the agreed legal test, of relevance only to the individual case (noting again Lord Sales’ distinction in *In Re McGuinness*, see above).

12. By reference to Ms Dobbin’s submissions on Question 2 (see paragraphs 18-20 of her submissions), we are satisfied that her second point (paragraphs 18 and 20, namely whether the relevant belief is that of HMRC which is making the application or of the Requesting Authority which has sought MLA) gives rise to a certifiable question; we do not consider her first point (paragraph 19, relating to the use of the phrase “genuine belief”) to be certifiable.

### **Leave**

13. We refuse leave to appeal in this case. We consider the merits of any appeal to be poor.
14. We dealt in the Judgment with the arguments which we now certify: we held that there was no different standard or test for disclosure in an MLA case (see paragraph [77]) and that lawfulness at the point of issue of the application(s) turned on whether HMRC genuinely believed that lesser measures were bound to fail (see paragraph [72]). We are not persuaded by Ms Dobbin’s submissions that we were or might have been wrong in either conclusion.
15. Further, we do not consider that this case raises any point which ought to be considered by the Supreme Court. These are not points which to our knowledge have troubled other courts dealing with MLA requests.
16. The following passage from paragraph [138] of the Judgment relates to disclosure failures but is applicable more generally in response to the current application for leave:

“The overarching point which outweighs all the challenges made under this ground is that there were very grave suspicions about the past conduct of ED&F, by its officers and Ms Foster. It is naïve to suggest that production orders might have been effective and sufficient in the circumstances. The judge was clear that coordination and compulsion were required. Her reasons for reaching that view would have been unaltered by these points, to the extent that there is merit in them.”

17. We conclude that the warrants were undoubtedly justified in this case. The outcome of any appeal would be no different.

### **Conclusion**

18. We are willing to certify two questions, limited in their scope to the common issue identified at paragraph 7 above. We invite Ms Dobbin to redraft the questions with that limitation in mind and to seek to agree them with Mr Chapman for HMRC before re-submitting them to this Court for certification. We refuse leave to appeal.