



Neutral Citation Number: [2019] EWHC 3564 (Admin)

Case No: CO/3006/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2019

Before :

MR JUSTICE NICOL

Between :

Philip Stephen Sunman
- and -
Environment Agency

Appellant

Respondent

The Appellant in person

Nicholas Ostrowski (instructed by **Environment Agency Legal Services**) for the **Respondent**

Hearing dates: 11th December 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE NICOL

Mr Justice Nicol :

1. This is an appeal by case stated from a decision of the Crown Court in Cambridge handed down on 8th March 2019.
2. The Appellant had been charged with an offence of keeping or using as the owner or master, a vessel on the Great Ouse without registering it for the year 2017-18 with the Environment Agency contrary to Environment Agency (Inland Waterways) Order 2010 ('the 2010 Order') Articles 4(1) and 18(1).
3. This is a summary offence. By Article 18(4) it is punishable by a fine not exceeding level 3 on the standard scale (i.e. £1,000).
4. The Appellant pleaded guilty before the Cambridge magistrates' court on a full facts basis. He was sentenced by that court to a fine of £360. He was also required to pay a victim surcharge of £36, costs of £300 and a compensation order of £878.71. The compensation was the amount of the registration fee which was the loss that the Environment Agency ('EA') said it had incurred due to the Appellant's failure to pay.
5. Magistrates Court 1980 s.108 gives a person who pleaded guilty before a magistrates' court the right to appeal against sentence to the Crown Court. The Appellant exercised that right and appealed to the Cambridge Crown Court. The Appellant was aggrieved at the compensation order and it was this which was the focus of his appeal against sentence. Essentially, the Appellant argued that the Magistrates Court had no power to require him to pay the registration fee by way of a compensation order.
6. The Crown Court appeal was heard by HHJ Jonathan Cooper and an (unnamed) Justice of the Peace. The Court gave a written judgment on 8th March 2019. The Court rejected the Appellant's challenge to the power to impose a compensation order in the sum of the registration fee. It did however, make a modest reduction in the fine, requiring the Appellant to pay £300 instead of £360 as a fine. The compensation order and costs ordered by the magistrates' court remained the same. The Appellant was not required to pay any costs of the appeal.
7. By Senior Courts Act 1981 s.28, the decision of the Crown Court (not being a decision relating to a trial on indictment) may be questioned by any party on the ground that it is wrong in law. On 24th March 2019 the Appellant invoked this procedure and applied to the Cambridge Crown Court to state a case for the opinion of the High Court.
8. On 22nd July 2019 Judge Cooper acceded to the application and stated the following questions for the High Court:
 - i) Whether on an appeal against sentence for such an offence [as the Appellant had admitted committing] the appellant can challenge whether the agency has the power in principle to impose any fee/charge for the registration of a vessel. The appellant said that the charge is not appropriate because the law does not allow for it.

- ii) Whether on an appeal against sentence for such an offence the appellant can challenge the amount or quantum of the registration fee. The appellant said the fee is unreasonable.
 - iii) Whether it is fair for the agency to pursue a criminal allegation for what is contended to be essentially a civil debt.
 - iv) Whether a criminal court has any power, in principle to impose a compensation order in the sum of the unpaid registration fee. The appellant said that the non-payment of the fee is remote from the offence to which he has pleaded, namely keeping an unregistered boat.
 - v) Whether the court would be right to impose compensation on the merits of the case.
9. The Appellant lodged his notice of appeal on 31st July 2019. He appeared in person before me and he presented his arguments with (I hope he will not consider me patronising for saying so) commendable skill. EA was represented by Nicholas Ostrowski. I am grateful to them both for their assistance.

The power to make a compensation order

10. The power to make a compensation order (indeed, the duty to do so in some circumstances) is now contained in Powers of Criminal Courts (Sentencing) Act 2000 s.130. It provides (so far as material),
- ‘(1) A court by or before which a person is convicted of an offence, instead of or in addition to dealing with him in any other way, may on application or otherwise, make an order (in this Act referred to as a “compensation order”) requiring him (a) to pay compensation for any personal injury, loss or damage resulting from that offence ...
- (2A) A court must consider making a compensation order in any case where this section empowers it to do so.
- (3) A court shall give reasons, on passing sentence, if it does not make a compensation order in a case where this section empowers it to do so.
- (4) Compensation under subsection (1) shall be of such amount as the court considers appropriate, having regard to any evidence and any representations that are made by or on behalf of the accused or the prosecutor.
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- (11) In determining whether to make a compensation order against any person, and in determining the amount to be paid by any person under such an order, the court shall have regard to his means so far as they appear or are known to the court.
- (12) Where the court considers -

(a) that it would be appropriate both to impose a fine and to make a compensation order, but

(b) that the offender has insufficient means to pay both an appropriate fine and appropriate compensation,

The court shall give preference to compensation (though it may impose a fine as well).’

11. Although the power to make compensation orders is now contained in the 2000 Act, earlier legislation dating back to the Criminal Justice Act 1972 s.1 contained very similar powers. In *R v Thomson Holidays Ltd* [1974] 1 QB 592 at p.599 CA the Court said of the 1972 Act that Parliament had not intended to introduce into the criminal law the concepts of causation as they applied in the laws of contract and tort. The Court had rather to ask itself whether loss or damage could fairly be said to have resulted from the offence. In *Rowlston v Kenny* (1982) 4 Cr.App.R.(S) 85, at 87 the Divisional Court said that it was implicit in *Thompson Holidays* that the matter had to be approached in a common-sense way. That said, it is only in clear cases that compensation should be ordered – see *R v Vivian* [1979] 1 WLR 291; *R v Chappell* [1984] Crim LR 574; and *R v Horsham JJs ex parte Richards* [1985] 1 WLR 986.
12. Powers of Criminal Courts (Sentencing) Act 2000 s.134 makes clear that a compensation order does not affect any subsequent civil claim and any loss or damage is to be assessed without regard to the compensation order. However, the claimant cannot obtain double recovery. Any such judgment may only be enforced for the balance after giving allowance for any compensation actually paid.

The legislative background to the registration of vessels

13. The 2010 order Article 4 imposes a requirement for registration, subject to immaterial qualifications.
14. Article 6 of the 2010 Order says:

‘The requirements for registration of a vessel are –

 - (a) Presentation to the Agency -
 - (i) in such manner as it may require of the particulars set out in Schedule 2;
 - (ii) of such additional information as the Agency may require respecting the characteristics and location of the vessel; and
 - (b) payment of the registration charge applicable under any enactment in respect of the registration of the vessel by the Agency.’
15. The 2010 Order recited that it was made pursuant to the Transport and Works Act 1992 (‘the 1992 Act’). Section 3 of the 1992 Act allowed the Secretary of State to make orders, among other things, for the operation of an inland waterway in England

and Wales. By section 5 of the 1992 Act, the subject matter of an order could include matters set out in Schedule 1 of the 1992 Act. Paragraph 12 of Schedule 1 says [an Order can include],

‘The charging of tolls, fares, (including penalty fares) and other charges, and the creation of summary offences in connection with the non-payment ...’

16. Furthermore, by s.5(3) and (4),

‘(3) An order under section ... 3 above may –

(a) apply, modify or exclude any statutory provision which relates to any matter as to which an order could be made under ... section 3,

and

(b) make such amendments, repeals and revocations of statutory provisions of local application as appear to the Secretary of State to be necessary or expedient in consequence of any provision of the order or otherwise in connection with the order;

And for the purposes of this subsection “statutory provision” means provision of an Act of Parliament or an instrument made under an Act of Parliament.

(4) The provisions that may be made by an order under ...section 3 include-

(a) any provision that appears to the Secretary of State to be necessary or expedient for giving full effect to –

(i) any other provision of the order....’

17. Section 6 of the 1992 Act provided for applications to be made to the Secretary of State for an order under section 3. The 2010 Order recited that such an application had been made to the Secretary of State and he made the 2010 Order, as I have said pursuant to his powers under the 1992 Act.

18. I have noted above that the 1992 Act s.5 allowed the Secretary of State to amend primary legislation by his orders under the 1992 Act. In the 2010 Order the Secretary of State exercised this power to amend the Anglian Water Authority Act 1977 – see 2010 Order Article 29 and Schedule 5.

19. As amended the Anglian Water Authority Act 1977 s.17 now reads,

‘(1) In its application to charges in respect of the use by vessels of recreational waterways section 30 of the Act of 1973 shall have effect as if the exercise of the functions of the Authority in relation to the use of those waterways for navigation under this Part of this Act and under the Environmental Agency (Inland Waterways) Order 2010 were services performed or facilities provided by the Authority for or in respect of all users of those waterways ...’

20. I understand that ‘section 30 of the 1973 Act’ has now been replaced by Environment Act 1995 s.43. That legislation established the Environment Agency which was one of

what were called ‘the new Agencies’. By s. 43 of the 1995 Act each new agency was empowered ‘to fix and recover charges for services and facilities provided in the course of carrying out its functions.’

21. I turn now to the questions posed by Judge Cooper.

Whether on an appeal against sentence for such an offence [as the Appellant had admitted committing] the appellant can challenge whether the agency has the power in principle to impose any fee/charge for the registration of a vessel. The appellant said that the charge is not appropriate because the law does not allow for it.

22. This, the first question posed by Judge Cooper, can be usefully divided into two:

- i) Is it open to a defendant who has pleaded guilty to the charge to allege that the EA does not have power to levy the registration fee?
- ii) If this open to such a defendant, is the Appellant correct to say that the law does not allow the EA to charge this registration fee?

23. It is implicit in Judge Cooper’s judgment that he considered that it was not open to the Appellant to challenge the legal validity of the registration fee. He said that there were two obstacles in the way of Mr Sunman doing so. First, he had pleaded guilty on a full facts basis, namely keeping a vessel on a river without registering it. Having done so, it was not open to him to argue that the EA had erected an unlawful barrier to registration by charging an unlawful and excessive fee. The second obstacle was that the correct forum for challenging the legality of the EA’s registration fee was the High Court on a claim for judicial review.

24. I do not find Judge Cooper’s first objection persuasive. It was obviously the case that the Appellant had pleaded guilty to the offence. He had not pleaded guilty on a basis other than the facts as presented by the prosecution. However, if the Appellant is right and the EA had no power to levy the registration fee which had been required to register his boat, the EA would have suffered no loss and the criminal courts would not have been justified in making a compensation order.

25. I turn to Judge Cooper’s second objection. It is certainly correct that an alternative course would have been for Mr Sunman to challenge the legality of the registration fee by way of judicial review. But I do not agree that this was the exclusive method of proceeding which was open to him. In *Boddington v British Transport Police* [1999] 2 AC 143 a smoker was prosecuted for smoking on a train in violation of Railways Byelaws. He tried to argue that the byelaw was *ultra vires* but was told that any such challenge had to be by way of judicial review. The House of Lords held that that was wrong and he could, in principle, argue that the byelaw was unlawful in response to a criminal prosecution. However, the challenge to the legality of the bylaw failed on its merits.

26. Mr Ostrowski, for the EA argued that it was different where a defendant pleaded guilty and the issue was the nature of the penalty which could be imposed. I do not accept that distinction. If a compensation order is not paid, ultimately and subject to proof of means to pay, the defaulter can be sent to prison (see Magistrates Courts Act 1980 s.76). I see no distinction in principle as to why a person should be potentially

exposed to such consequences if the sum ordered to be paid is not lawfully due from him than if he is prosecuted under an offence which has not lawfully been created.

27. Thus, in principle, I agree with the Appellant that the issue of whether the registration fee was lawfully due from him could be raised by him following his guilty plea.
28. I turn to the question of whether the Crown Court was obliged to find that the registration fee was unlawful.
29. Mr Sunman's argument in this respect had two parts:
 - i) He argued that the registration charge was not 'applicable under any enactment' and therefore it could not lawfully be levied pursuant to Article 6(b) of the 2010 Order.
 - ii) In any event, the amount of the registration fee was excessive and unreasonable.
30. As to the first argument, I have shown how the 2010 Order also amended the Anglian Water Authority Act 1977. The Secretary of State was empowered to include such a provision in his Order by the 1992 Act s.5. With the amendment to the Anglian Water Authority Act 1977, there was sufficient statutory authority to justify the registration fee under Article 6(b) of the 2010 Order. Thus, I reject the first of Mr Sunman's contentions.
31. As to the second, I canvassed with the parties as to whether there might be a distinction between challenges to the validity of secondary legislation which could be considered without evidence and those where evidence would be required. Having looked again at *Boddington* I do not think that any such distinction would be justified. The House of Lords was clear that distinctions of that kind could no longer be maintained after the decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
32. However, I agree with Mr Ostrowski that there is a simpler answer to this way of mounting the challenge: there was no evidence on which the Crown Court could conclude that the registration fee was excessive. A court which is required to consider the legality of any measure is *not* the primary decision maker. In this case the primary decision maker, entrusted with the task of deciding the size of the registration fee, was the EA. The court's task is confined to considering whether the EA was legally entitled to do what it did. The decision will be unlawful if the size of the fee was irrationally high – see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 CA. That test sets a high hurdle. The fee set by the EA was, of course, much larger than the £2 registration fee which had previously been levied. However, it was also plain that the EA had moved from a scheme of making two charges – for registration and for use of the waterway to a combined and single charge which covered both. Such a change was not inherently unreasonable, even if it meant that users such as Mr Sunman faced a much larger cost. *Boddington* emphasises that the burden of establishing illegality lies on the party asserting that the instrument is *ultra vires*. Mr Sunman has not satisfied that burden.

33. I should mention that Mr Sunman also stressed that he owned the river bank on which his boat was moored. He therefore relied on his riparian rights. However, those rights, like all property rights, they are subject to the statutory restrictions and they do not relieve him of the obligation to comply with the 2010 Order.
34. Accordingly, I conclude that neither of the Appellant's challenges to the legality of the registration fee succeeds.

Whether on an appeal against sentence for such an offence the appellant can challenge the amount or quantum of the registration fee. The appellant said the fee is unreasonable

35. My answer to this question will already have been apparent. In principle it is open to someone in Mr Sunman's position to argue that the size of the fee was so large that no reasonable decision maker could have imposed a fee of that amount. However, there was no, or no sufficient, evidence before the Crown Court for it to reach the conclusion that that was so in this case.

Whether it is fair for the agency to pursue a criminal allegation for what is contended to be essentially a civil debt

36. Article 18(1)(a) of the 2010 Order creates an offence of operating a vessel without the requisite registration. There is no manifest unfairness in the EA prosecuting an offence which had plainly been committed. Had Mr Sunman wished to argue that there was some impropriety in the prosecution, the right course would have been for him either to challenge the decision to prosecute him by way of judicial review or, in the criminal court, to argue that the prosecution was an abuse of process and should therefore be stayed. I do not suggest that either course would have been likely to succeed, but, in any event, having instead pleaded guilty, it is not now open to the Appellant to argue that the prosecution of him was unfair.

Whether a criminal court has any power, in principle to impose a compensation order in the sum of the unpaid registration fee. The appellant said that the non-payment of the fee is remote from the offence to which he has pleaded, namely keeping an unregistered boat

37. Mr Ostrowski drew my attention to the Sentencing Council's Definitive Guideline on Environmental Offences. One of the steps recommended by the Council is that sentencers should,

‘ensure that a combination of financial orders (compensation, confiscation if appropriate, and fine) removes any economic benefit derived from the offending.’

One such benefit specifically contemplated is ‘avoided costs’. As the Sentencing Council says ‘Any costs avoided will be considered as economic benefit’.

38. Mr Sunman was obliged to pay the registration fee. He had failed to do so. The fee which he had saved was without doubt an economic benefit.
39. Mr Sunman's argument is flawed. The benefit he obtained was not remote from the offence. On the contrary it flowed directly from the offence. What I think he meant

was that he was 'only' keeping his boat; he was not using the waterway. However, that is to ignore the change in the charging structure which has occurred. There is now but a single charge which covers both the registration fee and use of the waterway. If Mr Sunman chooses not to use the waterway, that is his choice, but it is not a reason why the fee he has to pay is reduced. It is not a reason why the court lacks power to make a compensation order.

Whether the court would be right to impose compensation on the merits of the case

40. On an appeal by case stated it is not for the High Court to say whether the lower court was 'right' to take the course that it did 'on the merits of the case'. This court's jurisdiction is to decide questions of law. I would therefore answer Judge Cooper's final question by saying that the Crown Court was entitled to take the course that it did and there was no legal barrier to the imposition of the compensation order which it made.

Conclusion

41. In summary I would answer the questions posed (with amendments as explained above) as follows:
- i) It was open to Mr Sunman to argue that the EA did not have the power in law to impose the registration fee which they would have charged, but his challenge to the legality of the charge does not succeed.
 - ii) It was, in principle, open to Mr Sunman to argue that the registration fee was wholly excessive and, therefore, beyond the power of the EA, but there was not the evidence on which his challenge could succeed.
 - iii) Having pleaded guilty to the offence, it was not open to Mr Sunman to argue that his prosecution was unfair. In any event, it is not apparent that he would have had cause to argue that the prosecution was unfair.
 - iv) A criminal court faced with a prosecution for non-payment of a registration fee is entitled to impose a compensation order equivalent to that fee and, assuming that the offender had sufficient means, a financial penalty equivalent to the unpaid fee would be in accordance with the Guidance of the Sentencing Council.
 - v) The Crown Court was entitled to make the compensation order which it did. There was no legal barrier to it doing so.
42. It follows that this appeal is dismissed.