[2017] UKFTT 15 (TC)

TC05581

Appeal number: TC/2015/06745

EXCISE DUTY - Application for strike-out – Jurisdiction of Tribunal – Refusal to restore seized motor-vehicle – Rule 8(2)(a) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

STUART RICHARD DUNCAN **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE KENNETH MURE

Sitting in public at George House, 126 George Street, Edinburgh on Tuesday 20 September 2016

Appellant:- appearing in person

Respondents:- Phillip MacLean, OAG

DECISION

1. This dispute is of some vintage. It relates to the seizure of the appellant's vehicle, on 20 September 2000 by the respondents ("HMRC") in relation to suspected cigarette smuggling. On 25 September 2000, the appellant's solicitors requested restoration of the vehicle and by letter dated 10 October 2000 HMRC declined to restore the seized vehicle and a quantity of cigarettes. That decision was upheld on review on 13 December 2000.

2. A Notice of Appeal dated 8 January 2001 was lodged with the VAT & Duties Tribunal and on 23 March 2001 the appeal was sisted. The appellant's solicitor resigned agency on 4 May 2001. On 7 June 2016, HMRC lodged a strike-out application in terms of Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") on the grounds that the Tribunal does not have jurisdiction in relation to the proceedings.

2. Although the appellant had been represented earlier by a solicitor he represented himself at this hearing. He complained that not all of the papers which he had had earlier had been produced. Notwithstanding, having discussed the matter with both the appellant and Mr MacLean, it became clear that the essence of the dispute was the legality of the seizure. The appellant confirmed the Grounds of Appeal recorded in the Notice of Appeal to the effect that the forfeiture of the vehicle was incompatible with Human Rights legislation and European Law, and that the refusal to restore was illegal and unreasonable. It was accepted that there was no record of any challenge to seizure in the Sheriff Court.

3. Having been addressed generally on the dispute by the appellant, Judge Mure then invited Mr MacLean to speak to his application for strike-out on the basis of jurisdictional difficulties. He had lodged earlier a skeleton argument, which Judge Mure found helpful. He referred to the relevant provisions of the Customs & Excise Management Act 1979 ("CEMA"). He noted two procedures which an aggrieved party might follow. Firstly, the legality of seizure could, on notice, be challenged in the Sheriff Court or Court of Session. However, seizure was not challenged in the Courts and the goods had been condemned as forfeited, all in terms of CEMA.

4. Secondly, under Section 152 CEMA, HMRC had a discretion to restore goods, customarily on payment of duty, but in the present case they did not exercise this, hence this appeal.

5. Mr MacLean then considered the scope of this Tribunal's jurisdiction. He founded on two Court of Appeal decisions, namely *Revenue & Customs Commissioners v Jones* [2011] EWCA Civ 824 ("Jones") and *European Brand Trading Ltd v HMRC* [2016] EWCA Civ 90. Crucially he submitted that this Tribunal could not consider whether the seizure of the vehicle was lawful. That was the issue raised by the appellant, and while it could have been considered in Court proceedings, it fell outwith the scope of the Tribunal's powers. Mr MacLean referred

in particular to the decision of Mummery LJ in *Jones* at para 71, a copy of which is annexed at Appendix A. He argued that, in the present case the motor vehicle fell to be deemed as lawfully seized and that was the legal reality which the Tribunal could not alter.

6. As the Grounds of Appeal only challenged the lawfulness of the seizure and sought restoration, that fell outwith the Tribunal's jurisdiction. Accordingly, Mr MacLean submitted the appeal should be struck out under Rule 8(2)(a).

7. In his concluding remarks to the Tribunal the appellant moved that the appeal be allowed. He had been in correspondence with HMRC, a process which he had found frustrating. He had understood that his solicitor hoped that the vehicle might have been recovered. He was now at a disadvantage in that certain papers relevant to the appeal were missing.

8. Due to the elapse of time it has simply not been possible for either party to retrieve any further papers so it is only possible to proceed on the basis of the available papers. Whilst Judge Mure sympathised with the appellant, nevertheless the issue to be decided was a technical point and would not have turned on any papers or correspondence beyond that which had been lodged.

Conclusion

9. Essentially the decision for Judge Mure to determine was whether this Tribunal can consider the appellant's complaint as recorded in the Notice of Appeal, namely that forfeiture of the motor vehicle is incompatible with European and Human Rights Law and that therefore the decision refusing restoration is illegal and unreasonable.

10. Under Schedule 3 CEMA, in order to challenge the legality of the seizure a person is required to give notice of his claim to HMRC within a month of a Notice of Seizure being served on him. A failure to do so, as was the case in this instance, will, by virtue of paragraph 5 of Schedule 3, result in the vehicle being "deemed to have been duly condemned as forfeited".

11. The effect of this deeming provision, as clarified by the Court of Appeal in *Jones* and the Upper Tribunal in *HMRC v Race* 2014 UKUT 331 (TCC) is that it is no longer open for the appellant to challenge the lawfulness of the seizure. This Tribunal is bound by the decisions in *Jones* and *Race.* The fact that the legality of the seizure of the motor vehicle was not challenged in the appropriate *forum,* namely the Sheriff Court or Court of Session means that the vehicle falls to be regarded as condemned and Judge Mure could not interfere with that.

12. For these reasons the appeal falls to be struck out in terms of the application by HMRC in terms of Rule 8(2)(a) of the Rules.

13. Judge Mure died very suddenly, having already drafted this decision. I have reviewed it and corrected some clerical errors. I have added the procedural history and detail of the case law to which Judge Mure referred. I now therefore authorise the release of the decision.

14. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 29 DECEMBER 2016

APPENDIX A

HMRC v Jones [2011] EWCA 824

71. I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.

(1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UTT are statutory appellate bodies that have not been given any such original jurisdiction.

(2) The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.

(3) The respondents in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.

(4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

(5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.

(6) The deeming provisions in paragraph 5 and the restoration procedure are compatible with Article 1 of the First Protocol to the Convention and with Article 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods. The notice of claim procedure was initiated but not pursued by the respondents. That was the choice they had made. Their Convention rights were not infringed by the

limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.

(7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora* and as approved by the Court of Appeal in *Gascoyne*. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion.

(8) The tentative *obiter dicta* of Buxton LJ in *Gascoyne* on the possible impact of the Convention on the interpretation and application of the 1979 Act procedures and the potential application of the abuse of process doctrine do not prevent this court from reaching the above conclusions. That case is not binding authority for the proposition that paragraph 5 of Schedule 3 is ineffective as infringing Article 1 of the First Protocol or Article 6 where it is not an abuse to reopen the condemnation issue; nor is it binding authority for the propositions that paragraph 5 should be construed other than according to its clear terms, or that it should be disapplied judicially, or that the respondents are entitled to argue in the tribunal that the goods ought not to be condemned as forfeited.

(9) It is fortunate that Buxton LJ flagged up potential Convention concerns on Article 1 of the First Protocol and Article 6, which the court in *Gora* did not expressly address, and also considered the doctrine of abuse of process. The Convention concerns expressed in *Gascoyne* are allayed once it has been appreciated, with the benefit of the full argument on the 1979 Act, that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner.

(10) As for the doctrine of abuse of process, it prevents the owner from litigating a particular issue about the goods otherwise than in the allocated court, but strictly speaking it is unnecessary to have recourse to that common law doctrine in this case, because, according to its own terms, the 1979 Act itself stipulates a deemed state of affairs which the FTT had no power to contradict and the respondents were not entitled to contest. The deeming does not offend against the Convention, because it will only arise if the owner has not taken the available option of challenging the legality of the seizure in the allocated forum.