Neutral Citation Number: [2018] EWCA Civ 2408

Case No: C1/2017/2865

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The High Court, Queen's Bench Division
Administrative Court
(MR JUSTICE HOLMAN)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 2 October 2018

Before:
LORD JUSTICE UNDERHILL

(Vice-President of the Court of Appeal (Civil Division))

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Between:

SEABROOK WAREHOUSING LTD

Applicant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondent

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Mr Alistair Webster QC (instructed by **Morrisons Solicitors LLP,** London Road, REDHILL RH1 1LQ) appeared on behalf of the **Applicant**.

Mr Ben Hayhirst (instructed by **The Commissioners for Her Majesty's Revenue and Customs**) appeared on behalf of the **Respondent**.

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Judgment

(Approved)

LORD JUSTICE UNDERHILL:

1. I have decided to grant permission to apply for judicial review in this case. I need not set out the background. I need only record two points at the outset. First, the claimant no longer pursues the grounds relating to the refusal of interim relief or temporary approval or any application for interim relief in this court. I understand that the parties have reached a mutually satisfactory arrangement, though I have not enquired about its nature. Secondly, although Mr Kinnear for the Commissioners did describe the claimant's pleaded grounds of challenge as "weak", he disavowed any submission that they were not sufficiently arguable to justify the grant of permission on the merits. His objections to the grant of permission depended only on the basis on which he had succeeded before Holman J, namely that the claimant had an adequate alternative remedy in the form of its statutory rights of appeal, though wrapped up in that submission was an argument about delay with which I will deal separately.

2. I should also say by way of preliminary that Mr Webster for the claimant accepted that if his claim were limited to the challenge represented by head (vi) in the relief sought he could not contend that such a claim could not be determined in the context of an appeal under section 16 of the Finance Act 1994: if the policy regarding FITTED checks incorporated in EN 196 were unlawful, he accepted that the FTT would have jurisdiction to hold that a decision to revoke the claimant's approval for non-compliance with those checks was not one that the Commissioners should reasonably have arrived at. But he said that the position was different as regards the other live grounds of challenge, namely those represented by heads (ii)-(iv) of the relief sought. These heads do not, as such, challenge the revocation decision. Rather, they challenge the regime which in practice renders this part of the claimant's business impossible without having an authorised duty

representative, whether because none is authorised in the first place or because the authorisation has been revoked – that is, in the absence of an authorised duty representative the warehouse in question would not be authorised and the deposit of goods in it will give rise to an excise duty point. The argument is that such a challenge is not, as such, a challenge to a decision of the Commissioners falling within the terms of section 16 at all. A purist might say that that argument is not clearly reflected in the terms of section 3 of the claim form, which identifies the decision challenged. This begins by referring to "revocation of the claimant's approval as a duty representative", and although it then goes on to refer to "various decisions, publications, omissions and failures, as detailed in the attached grounds" that is hardly very specific. But it is nevertheless clear from the grounds, as elucidated in submissions both here and before Holman J, that the challenge goes beyond the revocation decision and challenges the regime itself.

3. My strong provisional view is that that submission is well-founded – that is to say, that the jurisdiction granted by section 16 does not extend to determination of the grounds in question. I do not believe that I need say definitively that that is the case since, although I have had the benefit of brief oral submissions, the issue has not been as fully explored as it would have been at the hearing of a full appeal, and I am in any event sitting alone. (Indeed, even if I did express a wholly concluded view, it would have no status as authority because this is a permission decision only.) All, therefore, that I need say is that I have reached a sufficiently clear view for permission purposes. The alternative of giving permission to appeal in order to allow the point to be decided definitively by the full court many months hence seems to me in no-one's interest.

4. If, therefore, an appeal under section 16 is not available to the claimant in respect of these grounds of challenge, the Commissioners' objection based on the existence of an adequate alternative remedy under that section falls away. But that is not the end of the matter, and Mr Kinnear made two further points.

5. First, he submitted that even if an appeal was not available under section 16 it was open to the claimant to generate an appealable decision by depositing potentially dutiable goods in a warehouse, which *ex hypothesi* would not be an authorised warehouse, at which point the Commissioners would maintain that a duty point had arisen under regulation 21 and the consequent assessment would be appealable in the usual way. There may be circumstances in which the availability of a remedy by such a route – that is to say, by generating a test transaction for the purpose of allowing a challenge to be advanced – is a sufficient basis for the refusal of permission to apply for judicial review. But I would need to be persuaded that it would be possible in practice as well as in theory to pursue such a route; that there would no be no disadvantage to doing so; and that the Commissioners would co-operate in setting up a test transaction of that kind. It is sufficient to say that I am not so persuaded. Mr Kinnear first advanced this possibility in his oral submissions, and I do not believe it would be safe to refuse permission to apply for judicial review on the basis of this practically untested alternative.

6. Secondly, he submitted that if what we are concerned is a challenge not to a specific decision but to the regime itself that challenge is advanced far too late. The regulations purportedly implementing the 2008 directive have been in place since 2010, and if it is now being said that they fail properly to do so, or go beyond what the Directive authorises, such a challenge should have been raised at the time they were first

introduced. But I do not think it is realistic to say that the claimant should have put up or shut up as soon as the regulations came into force. It was not obliged to confront the question of their lawfulness unless and until the Commissioners took a decision which would result in the provisions now impugned having an adverse impact on its business. It is also important to bear in mind that it is not the Commissioners' case that the lawfulness of the regulations cannot be effectively challenged at this date by any route. On the contrary, they positively assert that they can be, albeit using the mechanism of the statutory appeal; and they further assert that even if the FTT or Upper Tribunal could not as such quash the regulations or make a declaration with generally binding effect they would in practice have to, and would, respect the reasoning of those tribunals or of this court on appeal. But if that is so refusing permission to appeal on the basis that the claimant's application was out of time while allowing the same substantive challenge to proceed by another route would achieve nothing.

7. For those reasons, I do not believe that there is a sufficiently clear or satisfactory suitable alternative route to justify the refusal of permission to apply for judicial review in a case which is otherwise arguable or that permission should be refused on grounds of delay. If the court is to hear the challenges reflected by heads (ii)-(iv), I can see no advantage in hiving off the separate but related challenge reflected by head (vi).

8. I do not think it is necessary to justify in detail my taking a different view from Holman J. The arguments before him were not developed in quite the same way and his reasoning was understandably short. I wish to emphasise that this is a particular decision taken at the permission stage in the particular circumstances of this case. I wish it to be understood that I do not endorse any overly restrictive view about the scope of the

statutory appeal in section 16 or cognate provisions providing for appeals against the decisions of the Commissioners in this field. I was referred by Mr Kinnear to the decision of the FTT in Atom Supplies Ltd v HMRC [2015] UKFTT 388 (TC) and The Learning Centre (Romford) Ltd v HMRC [2017] UKFTT 492 (TC), which deal with the scope of the Tribunal's powers on appeal, and I see no reason to question those particular decisions. I only say that the possibility of such an appeal in the present case does not justify the refusal of permission to apply for judicial review.

9. Neither party asked me to make an order under CPR 52.8(5) retaining the application in this court and I do not do so. The result is that the application will proceed in the High Court, subject to any application for transfer to the Upper Tribunal. (I should say about that that the possibility of transfer was referred to in the submissions, but it was not necessary for me to consider the relevant rules and I express no view about whether it would be possible or appropriate.) The permission to apply for judicial review is on those grounds which remain live, namely those underlying heads (ii)-(iv) and (vi) in the relief sought.

10. It is not for the to direct what consequences this decision has for the pending appeal in the FTT, but I would assume, unless there are factors of which I am unaware, that those proceedings will be stayed by agreement if indeed they are to be pursued at all.

POST-JUDGMENT NOTE:

Following further written submissions it was directed that the application be retained in the Court of Appeal.

Order: Application granted.