TC02964

Appeal number: TC/2012/07197

Excise duty – claim to contest legality of seizure – para4 Sch 3 CEMA 1979 – whether requirement to give name of UK solicitor to act in the case of a person not in the UK compatible with Article 21 of TFEU – held: no.

Excise duty – s 1(1) Tobacco Products Duty Act –whether dried loose leaf tobacco a "tobacco product"- held: no

Excise duty – reasonableness of decision not to restore – decision unreasonable- Director of Border Revenue directed to remake decision on the basis that the goods were not liable to duty.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARIUSZ WNEK **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE CHARLES HELLIER
ELIZABETH BRIDGE

Sitting in public at 45 Bedford Square WC1B 3DN on 27 August 2013

The Appellant was not present or represented

Edward Culver, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

© CROWN COPYRIGHT 2013

DECISION

1. Article 21 of the Consolidated Version of the Treaty on the Functioning of the European Union provides:

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by measures adopted to give them effect."

2. This appeal arises from the seizure of a Volkswagen van and a quantity of loose leaf tobacco by the Respondent's[1] officers on 30 November 2011, and concerns their decision of 11 April 2012 not to exercise their power to restore the vehicle.

3. If the Respondent's officers seize goods, Schedule 3 Customs and Excise Management Act 1979 ("CEMA") provides a means for the owner to require the legality of the seizure to be adjudicated by a Court in the UK. Paragraphs 3 and 4 of that schedule set out the procedure for instigating that process:

> "3. Any person claiming that anything seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise.
>
> "4 (1) Any notice under paragraph 3 above shall specify the name and address of the claimant and, in the case of a claimant who is outside the United Kingdom and the Isle of Man, shall specify the name and address of a solicitor in the United Kingdom who is authorised to accept service of process and to act on behalf of the claimant.
>
> "(2) Service of process upon a solicitor so specified shall be deemed to be a proper service upon the claimant."

4. Paragraph 5 of the schedule provides that if the owner does not give such notice or if any requirement of paragraph 4 is not complied with, "the thing in question shall be deemed to have been duly condemned as forfeited."

5. Section 152 CEMA gives the Respondent a power to restore, subject to any conditions it thinks proper, things which have been forfeited or seized. Section 14 Finance Act 1994 requires the Respondent to conduct a review of any decision in relation to that restoration power if so required by the owner, and section 16 of that Act permits the owner to appeal to this tribunal against any decision made (or deemed to have been made) on that review.

---

1. [1] (The Respondent officers were known as the UK Border Agency ("UKBA"))

6. Mr Wnek, who had been driving the van when it was seized, applied for its restoration. The Respondent declined to restore it. Mr Wnek sought a review of that decision. The result of the review was confirmation of the decision not to restore the van. Mr Wnek appeals under section 16 to this tribunal against that decision.

7. Section 16(4) FA 1994 limits this tribunal's power on such an appeal to a consideration of whether or not the Respondent's decision was reasonable, and also limits the tribunal's powers, if it decides that the decision could not reasonably have been arrived at, to direct that the decision be remade, or remade subject to particular directions.

8. If proceedings are brought under paragraphs 3 and 4 of Schedule 3 to contest the seizure, and the court before which they are brought decides that the things were properly forfeit, that finding, and the findings of fact necessary to it, are binding on this tribunal, and the tribunal consequently has to consider whether or not any decision in relation to restoration is unreasonable on the basis of those findings.

9. If the owner does not give the notice required by paragraphs 3 and 4 Schedule 3 requiring the adjudication of the matter by a court, then the effect of paragraph 5 is that, because the statute provides that the thing is duly condemned as forfeit, this tribunal must address the reasonableness or otherwise of the Respondent's restoration decision on the basis that the thing was duly forfeit.

10. That basis means that such findings as would be necessary for such a conclusion must also be taken to have been made: thus if goods potentially liable to duty have been seized on the basis that they are liable to duty, the tribunal must work on the basis that they were in fact and law liable to such duty - because otherwise they could not have been duly forfeit. Thus for example where the liability of goods to duty is, in the circumstances, dependent upon a conclusion that the goods were not for the owner's own use, then this tribunal must judge the reasonableness or otherwise of the Respondent's decision against the background that they were not for his own use - that question cannot be reopened (see *HMRC v Jones* 2011 EWCA 824, but also *HMRC v Mills* [2007] EWHC 2241, which was not considered in *Jones*, where a finding of not for own use was, on the particular facts of that case, not a necessary requirement for legal seizure, so that the issue was open for adjudication by the tribunal).

11. However if the owner gives notice under paragraphs 3 and 4, the deeming provisions of paragraph 5 Schedule 3 do not take effect, and so, unless there has been a decision of the relevant court, this tribunal must judge the reasonableness of the Respondent's decision untrammelled by any presumptions as to the legality of the seizure, the liability of the goods to duty, or the actions or intentions of the owner.

12. In this appeal the Respondent says that Mr Wnek did not give the notice required by paragraph 3 and 4 of Schedule 3 (or that the notice he gave was defective) and that accordingly the goods and the van are to be treated as duly forfeit. In its statement of case the Respondent says that although Mr Wnek gave a notice of claim, he was a non-UK resident and did not give the name and address of a solicitor in the UK to act for him in accordance with the requirements of paragraph 4.

13. The Respondent says that, as a result, paragraph 5 Schedule 3 applies and the goods and the van are to be treated as duly forfeit. That, in the circumstances of this case, carries with it the conclusion necessary to such forfeiture i.e. that the goods were liable to duty: for otherwise they could not have been legally seized. Thus they say that the tribunal must proceed on the basis that the goods were in fact liable to excise duty.

14. In this context the question arises as to whether the obligations in paragraph 4 Schedule 3 to provide the name and address of the UK solicitor to act on the owner's behalf is compatible with the Treaty and in particular with Article 21.

The absence of Mr Wnek.

15. The hearing took place in the absence of Mr Wnek. We were satisfied that he had been given proper notice of the hearing. On 23 February 2013 Mr Wnek, who lives in Poland, wrote to the tribunal explaining that he could not afford to travel to the tribunal or appoint a representative. We concluded that it was just to proceed in his absence.

The facts.

16. We had before us a bundle of documents which included copies of the notebooks of the officer involved with the seizure of the van and the tobacco from Mr Wnek. We also had copies of letters from the appellant both to the Respondent and to the tribunal. We find as follows.

17. On 13 November 2011 Mr Wnek was stopped by a UK Border Agency officer at the UK Control Zone in Coquelles France. He was driving a van in which were loose bales containing in total either 900 or 966 kg of what was described by the officer as "loose tobacco leaves marked Virginia Gold". Mr Wnek was accompanied by his son Patrick Wnek (who was 15 at the time) who answered the officer's questions.

18. Mr Wnek's son confirmed that Mr Wnek owned the van. He said that:

(1) Mr Wnek was aware of importation restrictions;

(2) Mr Wnek had no restricted goods in the van;

(3) they had travelled from Poland;

(4) there were Virginia tobacco leaves in the back of the van;

(5) they were delivering them to Disotto Foods, 26 Park Road, NW10 7JW, an address on a bit of paper they had with them;

(6) Mr Wnek normally delivered furniture;

(7) someone whose van had broken down had asked Mr Wnek to deliver the goods in this case.

19. Mr Wnek or his son provided the officer with a document written in Polish. We were not provided with a translation of this document nor could Mr Culver help us with its translation. But after the hearing, and with the help of Google's Polish - English translator, we were able to conclude that it comprised:

(1) a notice translated as: -

> "Virginia Gold tobacco leaves raw [then an untranslated word] intended solely for collectors unsuitable for smoking or ingestion without further industrial processing."

(2) A VAT invoice from Lock - Pick Artur Anthosiewicz, as seller, to X Press Limes i Malmo, as buyer, for 900 kg of raw tobacco leaves, signed by the said Artur Anthosiewicz as a person authorised to issue a VAT invoice.

20. There appeared also to have been another document, not in Polish, which suggested the leaves originated in Lebanon.

21. The UKBA officer seized the tobacco leaves and the van.

22. In its statement of case the Respondent says

> "The UKBA officers were satisfied that none of the proper methods of removing goods to the UK were used and therefore seized them pursuant to the provisions of section 139(1) of CEMA as liable to forfeiture under section 170(B) of CEMA. This was incorrect because raw leaf tobacco is liable to UK excise duty and thus liable to forfeiture pursuant to both Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and section 49 (1) (a) of CEMA and not 170(B). The vehicle was also seized under section 139 (1) as being liable to forfeiture under section 141 (1)(a) because it was used for the carriage of goods liable to forfeiture."

23. The evidence before us did not indicate the reasons for which the officer had seized the vehicle. The "seizure information notice" said simply that the things were liable to forfeiture under section 139 CEMA, and we could find nothing in the officer's notebook which indicated the reasons he had for the seizure. We return to this issue at the end of this decision, but make no finding as to the officers' reasons for the seizure.

24. On the seizure the officer gave Mr Wnek a "seizure information notice" which indicated that "loose tobacco leaves marked Virginia Gold" in a "loose bale" and the van had been seized. The officer's notebook indicated that the leaves were in "numerous white sacks".

25. The notice shows the quantity of tobacco as 966 kg, but this appeared to us to have been altered from an initial figure on the notice of 900 kg. The notebook indicates that there were 23 bales one of which weighed 42 kg. The figure of 966kg appears premised on the assumption that the bales were of equal weight. It seems to us likely that the bales contained the 900 kg of raw tobacco leaves referred to in the VAT invoice from Artur Anthosiewicz

26. We conclude that the goods seized were untreated dried tobacco leaves in bales.

27. The seizure information notice indicated that Mr Wnek had been given a copy of UKBA's notice 12A which, we were told, informed him that the legality of seizure could be contested in a Magistrates' Court by giving notice to UKBA within one month of seizure.

28. On 15 November 2011, two days after the seizure, Mr Wnek wrote to the Respondent saying:

> "As the owner of the vehicle affiliated with the case I'm kindly asking for the possibility of retrieving the above vehicle as soon as it is only possible. It is necessary for me to be able to work, and right now I'm just losing my income.
>
> "I was just simply on the way to visit my wife, who is currently in Liverpool and someone I don't even know very well simply asked me for a favor to deliver the stuff to some place not far from where I was heading to, besides I've had with me all the documents necessary to transport the stuff, as the man naturally gave it to me. I was travelling with a child my son, the vehicle was taken away from me and we were left in a huge trouble, without any transport that could take us back to Poland. I see that kind of situation clearly is not compliant with the law and human rights.
>
> "[He then gives the details of the van]
>
> "I'm kindly asking for a soon response on the case."

29. The letter was written in capital letters. The language of the letter shows that it is clearly written by someone who is not familiar with English. We draw attention to the last sentence of the second paragraph of that letter: "I see that kind of situation clearly as *not compliant with the law* and human rights."

30. The Respondent took this as an attempt to appeal against the legality of the seizure and as an application for restoration. On 25 November 2011 Mrs S Harvey-Wyatt at the Respondent's National Post Seizure Unit [LB1] wrote to Mr Wnek:

> "I am writing to you with regards to your appeal against the legality of the above seizure.
>
> "In order for your appeal against the legality of the seizure to be valid you must appoint a UK solicitor; this is a requirement as you are not a resident of the United Kingdom. You must instruct them to submit the appeal on your behalf within one month of the date of the seizure i.e. by 13 December 2011 otherwise your claim will not be valid.
>
> "You have also requested restoration which has been accepted as a valid request. [The letter then continues to ask for any further information which Mr Wnek may wish to provide].".

31. On 26 January 2012 UKBA wrote to Mr Wnek refusing to restore the vehicle.

32. On 9 March 2012 Mr Wnek wrote to ask for a review of the decision. In that letter he said that he was on his way from Poland to London to take his wife back because she was there at the time. We take that to mean that she was in London and that he was going to use the van to take her back either to Poland or to Liverpool. He also said that tobacco leaves in unmanufactured form were allowed to be circulated between countries in the EU. He said he was unemployed and the van was part owned by his mother and was needed to transport his disabled sister.

33. On 16 March 2012 UKBA wrote to Mr Wnek explaining the review process and inviting further information.

34. On 11 April 2012 Mr Crouch of UKBA wrote with his review of the decision. He concluded that the vehicle should not be restored.

35. In his letter of 5 July 2012 to the tribunal Mr Wnek explains the hardship that the seizure has caused him and says that the van "in some part belongs to my mother as well, she's the owner too". In his letter of 9 March 2012 to UKBA he explains that he had reported the consignor of the tobacco to the police in Poland and attaches documents evidencing that and the gift of the van to his mother by a deed which appears to be dated 3 October 2011.

36. We accept that:

(1) Mr Wnek needed the car for his work. Its absence caused considerable financial hardship;

(2) He and his wife live in Poland with his mother and disabled sister; and

(3) Mr Wnek reported Artur Anthosiewicz to the Polish police for the offence of misleading Mr Wnek about the lawfulness of the carriage of the tobacco to London.

37. We find the evidence on the ownership of the van difficult. On 30 November 2011 Mr Wnek's son said that it was owned by Mr Wnek; Mr Wnek's letter of 5 July 2012 said he was part owner with his mother; but the deed of gift appears to be dated 2 October 2011, a month before the seizure. We concluded that it was likely that Mr Wnek had a property interest in the van at the relevant times, sufficient for the purposes of Sch3 CEMA, and the restoration provisions.

38. Finally we should note a copy of a print out from an internet site for Disotto foods, the business to which the leaves were to be delivered.. This indicated that it was involved in the manufacture of ice cream. We accept that it is likely that ice cream manufacture was its main business.

The review

39. The review of the decision not to restore the van was carried out by Mr Crouch, who gave evidence to us. We found him open and honest. His letter of 11 April 2012 is the subject of this appeal.

40. In that letter he starts with a fair summary of the background. Then he notes that:

> "Loose leaf tobacco is liable to UK excise duty and was therefore liable to forfeiture under both Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and section 49(1)(a) of CEMA and not 170 (B). The vehicle was seized under section 139(1) as being liable to forfeiture under section 141(1)(a) because it was used for the carriage of goods liable to forfeiture."

41. (We note that section 49(1)(a) CEMA makes liable to forfeiture goods which were chargeable with excise duty on importation and which were imported without payment of that duty; and that Regulation 88 makes goods which are dutiable and on which duty has not been paid liable to forfeiture if there is a breach of those regulations. Section 170B CEMA provides that if a person is knowingly concerned in the taking of any steps with a view to the fraudulent evasion of excise duty on any goods, he commits an offence, and that the goods in respect of which the offence was committed shall be liable to forfeiture. All these provisions are dependent upon the goods being liable to excise duty.)

42. He finishes this section by saying:

> "You challenged the legality of seizure but did not appoint a UK solicitor to act on your behalf within the allotted time. Therefore, your appeal was considered to be "out of time" and the seizure [of] the things are duly condemned as forfeit to the Crown by the passage of time under paragraph 5 schedule 3 of CEMA and any excise goods are confirmed as improperly imported."

43. Mr Crouch and then summarises Mr Wnek's letters and sets out the UKBA's policy on the restoration of commercial vehicles; he notes that he would be guided, but not fettered, by the policy and that he would consider each case on its individual merits.

44. He says that he has not considered the legality or correctness of seizure because if Mr Wnek had been contesting the legality of the seizure he "should have appointed a UK solicitor and continued your appeal to a Magistrate's Court as no one else has the jurisdiction to consider such a claim."

45. He then says that the restoration policy depends upon who is responsible for smuggling attempt. The policy distinguishes between the driver and the operator. In this case Mr Crouch treats Mr Wnek as the operator of the van for the purposes of the policy. He then says:

> "In this instance you were importing into the UK 966 kg of raw leaf tobacco. The address that you were given to deliver this tobacco is in fact a manufacturer of mainly ice cream products. What they would want with such a large quantity of tobacco is beyond reason. In fact to date nobody has come forward to claim that tobacco, giving me no doubt that this was an illicit importation.

"... Had you been successful in this smuggling attempt the cost to the UK Exchequer in evaded excise duty would have been in the region of £82,090. ... the consequential VAT loss would have been in the region of £405,000.

"You transported these goods without proper documentation for the importation of excise goods into the UK and the accompanying CMR ... which is mandatory unless any of the exceptions set out at appendix C apply, in this case they do not.

"You took this work from someone you hardly knew and appeared not to have carried out any checks on the consignor or consignee of these goods. At the very least I consider your actions to be reckless.

"Having considered the evidence provided and concluded that you are responsible or complicit in the smuggling attempt, paragraph C of the policy applies and as the potential revenue is £50,000 or more, paragraph C(2) of the policy applies so that the vehicle should not be restored."

46. Mr Crouch then considers the proportionality of the refusal to restore the van and, in the course of that consideration he pays attention to the hardship which would arise from a failure to restore. He does not regard the hardship or the inconvenience or expense of the loss of the van as exceptional. He concludes that there is no reason not to apply the policy and that the vehicle should not be restored.

Does paragraph 5 Schedule 3 apply?

47. Paragraph 5 deems the items to be duly forfeit if within the period for giving notice no such notice has been given or any requirement paragraph 4 has not been complied with.

48. At the very end of his submissions Mr Culver did raise the question as to whether the letter of 15 November 2011 was a notice contesting the legality of the seizure, but he made no express representations on the point save an argument that Mr Wnek should have replied to the letter of 25 November 2011 saying that "he wanted to represent himself and oppose the seizure". Had he done that Mr Culver said that Mr Wnek could then say that he came with clean hands to represent himself.

49. The letter of 15 November was treated as a notice of claim that the van was not liable to forfeiture (albeit defective) by:

(1) Mrs S Harvey-Wyatt of UKBA's National Post Seizure Unit in a letter of 25 November 2011;

(2) Mr Crouch in his letter of review of 11 April 2012 (see the extract quoted above); and

(3) The director of Border Revenue in the statement of case before the tribunal.

50. It seems to us that this perception of the nature of the letter was right. The letter says, as we have highlighted above, "I see that kind of a situation clearly as not compliant with the law and the human rights". The letter is written by someone

unfamiliar with English language and procedure. The statement that the seizure of goods is not in accordance with the law must be a claim that the van was not liable to forfeiture under the law.

51. But the letter does not give the name and address of a solicitor to accept service, and act, for Mr Wnek in the UK.

52. The form of paragraph 4(1) raised in our minds two questions. First, what was meant by "who is outside the UK". Did it refer to a person who was outside the UK at the time of giving notice or at another particular time, or did it refer to a person who was not for some period resident in the UK? Our second concern was whether it constituted a restriction on freedom of movement given by Article 21 or on freedom of establishment given by Article 49 of the Treaty; we consider only Article 21 below.

53. Mr Culver had not come prepared to answer these questions but provided some helpful submissions in relation to each of them. At the end of the hearing we asked whether the Respondent wished to make further written submissions on these issues. The invitation was declined.

54. Before us Mr Culver argued:

(1) That paragraph 4(1) did not discriminate on the grounds of residence. That was because either;

(a) the context of Regulation 4 is the institution of proceedings, so the time at which the test must be conducted is when the Commissioners bring the proceedings before the Magistrate's Court under paragraph 6; or

(b) because the context is a period of one month from the seizure, it refers to the time at which the notice is given.

and thus that the provision should not be construed as referring to residence in the UK, and so could not be said to discriminate on the grounds of residence;

(2) although the UKBA's letter to Mr Wnek of 25 November 2011 treats the words of paragraph 4 meaning that they apply to a person who "is not a resident of the United Kingdom" (the same approach as Mr Crouch adopted in his review letter), that was not misleading, or determinative;

(3) even if the effect of paragraph 4 is to distinguish between UK residents and non-UK residents:

(a) the question is not whether paragraph 4(1) could hinder the exercise of a fundamental freedom, but whether, on the facts of the case, it did. In fact paragraph 4(1) did not hinder Mr Wnek's right to move to the UK or his freedom of establishment here or otherwise;

(b) had Mr Wnek responded to UKBA's letter of 25 November in terms such as "I want to represent myself and oppose the seizure", that would have engaged the rights he had under the treaty, but he had not done that. Implicitly those rights were not engaged.

(c) Any discrimination against non residents or hindrance to the exercise of the right of freedom of movement or establishment which arose from regulation 4 was justified. It had a legitimate object: the efficient management of the court process. It enabled documents to be served on non-UK residents.

(d) In pursuit of that legitimate aim any modest hindrance occasioned by paragraph 4(1) was a proportionate response. Whilst it was true that the tribunal's own rules do not require such an appointment, this tribunal had power to direct that an appellant attend the hearing. The Magistrates had no such powers: he referred to section 122 of the Magistrates Court Act 1980 which provides:

> 122 Appearance by counsel or solicitor.
>
> (1)A party to any proceedings before a magistrates' court may be represented by a legal representative.
>
> (2)Subject to subsection(3) below, an absent party so represented shall be deemed not to be absent.
>
> (3)Appearance of a party by a legal representative shall not satisfy any provision of any enactment or any condition of a recognizance expressly requiring his presence.

Discussion

55. We consider: (a) the meaning of outside the UK in para 4(1); (b) whether the requirements of para 4(1) should be disapplied in the case of an EU citizen; (c) if they are disapplied, what is the effect of Sch 3; and (d) on the basis that para 5 Sch 3 does not apply whether the goods were liable to duty. We then turn to whether Mr Crouch's decision was reasonable.

(a) The meaning of "outside the UK" in para 4(1)

56. It seems to us that the words "who is outside the UK" are intended to connote a certain continuum of presence outside the UK. It would be absurd if a Frenchman resident in Calais who pops across the Channel to post his notice, is not "outside the UK" because he was here when he posted the notice; and it would be absurd if a Londoner who posts his notice in the course of the weekend break in Paris is to be treated as someone "outside the UK".

57. It seems to us that the context of these words is the progress of the litigation which the notice instigates, and that what they are concerned with is whether in the probable period of that litigation the person will have an address in the UK at which he will be present for sufficient amounts of time to deal timeously with correspondence sent to him there. That indicates that the words should be taken as meaning residence for such a period.

(b) Is the requirement of para 4(1) to be treated as not applicable in the case of a citizen of the EU?

58. The requirement that a person without adequate residence in the UK must appoint a solicitor in the UK to accept service and to act on his behalf means that such a person must incur the additional effort and expense of finding and appointing the UK solicitor to act for him.

59. Thus the provision distinguishes between a resident and non-resident, but it also makes it more difficult, albeit in a minor way, for a person resident elsewhere in the EU to exercise his right to freedom of movement if he is not established in the UK.

60. It therefore appears to us to paragraph 4(1) hinders the freedom of movement given by Article 21 so that in general a national of a Member State other than the UK is subject to less favourable treatment when exercising that right than a national of the UK.

61. In *Commerzbank* [1993] STC 605, a case concerning the freedom of establishment, and UK legislation granting a repayment supplement to UK companies in connection with overpaid tax, the ECJ held in relation to the rules governing equality of treatment for nationals:

> "Moreover, it follows from the Court' s judgment in Case 152/73 Sotgiu v Deutsche Bundespost [1974] ECR 153 (at paragraph 11) that the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.
>
> 15 Although it applies independently of a company's seat, the use of the criterion of fiscal residence within national territory for the purpose of granting repayment supplement on overpaid tax is liable to work more particularly to the disadvantage of companies having their seat in other Member States. Indeed, it is most often those companies which are resident for tax purposes outside the territory of the Member State in question.

62. A distinction based on residence is liable to operate to the detriment of nationals of other Member States, as non residents are in the majority of cases foreign nationals (see eg *Ciola* -224/97 [1999] ECR I-2517 para 14, *Neukirchinger [2011]* ECR I-139 para 34 and *Commission v Netherlands para 38).* In order for a measure to be treated as indirectly discriminatory it is not necessary for the measure to have the effect of placing only nationals of the Member State at an advantage or the placing at a disadvantage of only nationals of the state in question

63. It seems to us that the discrimination inherent in para 4(1) leads to discrimination on the grounds of nationality. If it is not overt discrimination it must be covert discrimination, and falls to be addressed in the same way.

64. In *Pusa v Osuupankkien Keskinäinen Vakuutusyhtiö, [2004] STC 1066* the ECJ said in a case involving the freedom of movement:

> 16. "As may be seen from the Court's case-law, Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy within the scope *ratione materiae* of the Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (see, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 28, and Case C-148/02 *Garcia Avello* [2003] ECR I-0000, paragraphs 22 and 23).
>
> 17. The situations falling within the scope of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC (see, inter alia, as cited above, *Grzelczyk*, paragraph 33; *D'Hoop*, paragraph 29, and *Garcia Avello*, paragraph 24).

The Court's judgement then continues with the following paragraphs, which, although written in the context of discrimination arising in the citizen's home state, are instructive.

> 18. In that a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement (*D'Hoop*, paragraph 30).
>
> 19. Those opportunities could not be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles raised to his residence in the host Member State by legislation of his State of origin penalising the fact that he has used them (see, by analogy, *D'Hoop*, paragraph 31).
>
> 20. National legislation which places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another Member State would give rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move (*D'Hoop*, paragraphs 34 and 35). Such legislation could be justified only if it were based on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions (*D'Hoop*, paragraph 36).
>
> 21. It is therefore necessary to establish whether, in a situation such as that in the main proceedings, the Law on enforcement introduces, as between Finnish

nationals who continue to reside in Finland and those who have established their residence in Spain, a difference of treatment which places the latter at a disadvantage simply because they have exercised their right to move freely and whether, if proved, such a difference of treatment can, where appropriate, be justified in the light of the criteria noted in paragraph 20 of this judgment.

65. And in *Schwarz v Finanzamt Bergisch Gladbach***,** [2008] STC 1357, which concerned a German tax provision which gave tax relief for the payment of school fees if the school was in Germany, the ECJ, having repeated the content of [16] to [19] of *Pusa*, held:

> 90. "The Schwarz children, by attending an educational establishment situated in another Member State, used their right of free movement. As is shown by the judgment in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 20, even a young child may make use of the rights of free movement and residence guaranteed by Community law.
>
> 91. National legislation such as that at issue in the main proceedings introduces a difference in treatment between taxpayers subject to income tax in Germany who have sent their children to a school in Germany, and those who have sent their children to a school established in another Member State.
>
> 92. In so far as it links the granting of tax relief for school fees to the condition that those fees be paid to a private school meeting certain conditions in Germany, and causes such relief to be refused to payers of income tax in Germany on the ground that they have sent their children to a school in another Member State, the national legislation at issue in the main proceedings disadvantages the children of nationals solely on the ground that they have availed themselves of their freedom of movement by going to another Member State to attend a school there.
>
> 93. National legislation which places at a disadvantage certain of the nationals of the Member State concerned simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union (*DeCuyper*, paragraph 39; Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 31).
>
> 94. Such a difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions (*D'Hoop*, paragraph 36; *DeCuyper*, paragraph 40; *Tas-Hagen and Tas*, paragraph 33)

66. Both *Pusa* and *Schwarz* relate to the situation in which the citizen's own State discriminated against his exercise of the right of freedom of movement. But the principle plainly applies the other way around as well – as can clearly be seen in [18] in *Pusa*. A Member State may not place at a disadvantage citizens of another Member State because they have chosen to remain resident in that other State or to exercise their right to move between that State and the other State unless such treatment can be justified.

67. In each of these and other cases, the concern of the ECJ has not been that a particular person has been disadvantaged, but that the relevant provision may disadvantage such a person. It matters not that Mr Wnek might have escaped the disadvantage by complying with the provision or that for many persons the provision is never relevant. The issue is whether the provision may hinder the exercise of the freedom. .

68. For that reason we reject Mr Culver's suggestion that Treaty rights should be ignored in the application of paragraph 4(1) because Mr Wnek could have made his reliance on them explicit.

69. In *ICI v Colmer [1999]* STC 1089 Lord Nolan explained the effect of section 2 of the European Communities Act 1972 when a provision of national legislation was precluded by the directly enforceable rights of a citizen. The case related to the definition of a holding company in the UK Taxes Acts which discriminated against companies with subsidiaries in other member states and thus could militate against the right to freedom of establishment in the treaty. The ECJ had held that legislation which had such an effect was precluded by the Treaty. Lord Nolan said:

> " It remains to consider the question of disapplication in accordance with the provisions of section 2(1) and (4) of the European Communities Act 1972. Explaining the effect of the section in *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 AC 85, Lord Bridge of Harwich said, at p. 140B-D:
>
> > "By virtue of section 2(4) of the Act of 1972 Part II of the Act of 1988 [the Merchant Shipping Act] is to be construed and take effect subject to directly enforceable Community rights, and those rights are, by section 2(1) of the Act of 1972, to be recognised and available in law, and . . .enforced, allowed and followed accordingly. . . . This has precisely the same effect as if a section were incorporated in Part II of the Act of 1988 which in terms enacted that the provisions with respect to the registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any member state of the E.E.C."
>
> So, in the present case, the effect of section 2 of the Act of 1972 is the same as if a subsection were incorporated in section 258 of the Act of 1970 which in terms enacted that the definition of "holding company" was to be without prejudice to the directly enforceable Community rights of companies established in the Community. As the concluding paragraphs of the judgment of the Court of Justice make plain, this in no way affects the application of the definition to companies established outside the Community; cf. in this connection the comments of Lord Keith of Kinkel on the effect of the *Factortame* decision in *Reg. v. Secretary of State for Employment, Ex parte Equal Opportunities Commission* [1995] 1 AC 1 at 27D-E.

70. See also *Autologic Holdings plc v IRC* [2005] STC 1357, 1365 and *Fleming/Conde Nast* [2008] 1 WLR 195, 216.

71. There is no doubt that the rights to freedom of establishment and freedom to move within the EU are directly enforceable rights.

72. Thus, unless the difference in treatment can be justified, Article 4(1) must be read as subject to the right of an EU citizen not to have to comply with the requirement to appoint a UK solicitor.

Can the difference in treatment be justified?

73. We accept that the efficient conduct of litigation is a legitimate aim; the issue is thus whether the restriction imposed by paragraph 4(1) is proportionate to that aim - in other words whether it goes beyond what is necessary to attain that aim.

74. We find it difficult to believe that it is proportionate. In an age: in which it is easier to travel from Calais to Dover than from Aberdeen to Dover, in which postal services remain efficient, and in which e-mail is an almost universal speedy tool of communication, there is nothing to be gained in the efficient conduct of the litigation of a claim to adjudicate the legality of seizure from requiring a claimant to have UK solicitor act for him.

75. Nor can we see any legitimate need to ensure the presence of the claimant or a party appearing on his behalf at the trial of the issue. If the appellant is not present or represented at the condemnation hearing then UKBA are a free to put their evidence and make their case.

76. As noted above this tribunal's rules do not require an appellant to appoint a UK solicitor or any other sort of UK representative, and that is the case whether the appeal involves small or large amounts of tax, or vast or negligible penalties. Nor can we see the relevance of the inability of the Magistrates Court to compel attendance. In theory this tribunal might direct the attendance of an appellant, but not only are we not aware of the tribunal (or its predecessors) ever having done so, but we cannot see how the existence of that power makes the need to appoint a UK solicitor necessary compensation for its absence. (Nor could we quite see how section 122 of the Magistrates Court Act had the effect which Mr Culver claimed for it., or how that argument was relevant to proceedings in the High Court under Sch 3 (see para 8 thereof).

77. We conclude that the discrimination occasioned by Regulation 4(1) is not justified. As a result we conclude that regulation 4(1) is precluded in the case of citizens of the EU by the Treaty. It is plainly impossible to construe that provision in conformity with the Treaty. Thus it must be this applied in relation to a citizen of the Union "without prejudice to his community law rights".

(c) If para 4(1) is effectively disapplied , what is the effect of Sch 3;

78. As a result, the notice which Mr Wnek gave contesting the legality of seizure on 15 November 2011 must be taken as a valid notice given for the purposes of paragraph 5 and the requirements of paragraph 4(1) as satisfied.

79. As a result of the deeming provisions of paragraph 5 do not apply.

80. The Respondent had argued that the effect of the Court of Appeal decision in *Jones* meant that the legality of the seizure could not be tested by this tribunal. However *Jones* was a case which proceeded on the basis that paragraph 5 Schedule 3 applied. See for example Mummery LJ's summary at [71]: subparagraphs (4), (5) and (6) of that summary address the situation in which "the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure".

(d) Were the goods liable to duty?

81. There is an argument that this issue is a matter of law which could be questioned by this tribunal even if para 5 Sch 3 applied. We do not however consider the issue on that basis; we address it on the basis of our conclusion above that para 5 does not apply and accordingly that this issue is not one which is deemed to have been determined.

82. Mr Crouch told us that he had been advised that the tobacco transported by Mr Wnek was a "tobacco product" within section 1(1) Tobacco Products Duty Act 1979.

83. Section 1 and 2 of that Act provide:

> "1. (1) In this Act "tobacco products" means any of the following products, namely --
>
> (a) cigarettes;
>
> (b) cigars;
>
> (c) hand rolling tobacco;
>
> (d) other smoking tobacco; and
>
> (e) chewing tobacco,
>
> which are manufactured wholly or partly from tobacco or any substance used as a substitute for tobacco, but does not include herbal smoking products.
>
> (2) ...
>
> (3) The Treasury may by order made by statutory instrument provide that in this Act references to cigarettes, cigars, hand rolling tobacco, or other smoking tobacco and chewing tobacco shall or shall not include references any product of a description specified in the order, being a product manufactured as mentioned in subsection (1) above but not including herbal smoking products; ...
>
> 2. Charge and remission or repayment of tobacco products duty
>
> (1) There shall be charged on tobacco products imported into or manufactured in the United Kingdom the duty of excise as the rates shown in the Table Schedule 1 to this Act. ..."

84. Mr Crouch explained to us that raw undried leaf tobacco, if kept in an un-dried state, quickly loses its structure and goes mouldy. Therefore before transport it is dried and compressed into bales.

85. Mr Crouch told that when hand rolling tobacco is made, the tobacco in the bales is chopped and usually mixed with other chopped tobaccos and certain chemicals.

86. At the hearing we discussed with Mr Culver (i) whether the dried tobacco leaves were properly described as "manufactured from tobacco" within the words of the tailpiece of section 1(1); and (ii) if they were, under which heading, if any, of section 1(1) they fell.

"Manufactured".

87. We noted at the hearing that the tailpiece of section 1(1) might be construed as imposing the condition that in order to fall within any of the sub paragraphs of that subsection the products must be "manufactured wholly or partly from tobacco [etc]": so that even if a product could be classed as, for example hand rolling tobacco, it would not be a "tobacco product" unless it was manufactured from tobacco.

88. Mr Culver suggested that the closing words of the subsection might be read simply as requiring that the products be constituted from tobacco rather than that some manufacturing process had been applied to them.

89. To our minds that does not give proper weight to the use of the word "manufactured". The same word apply appears in subsection 3 and connotes to us something more than simply "comprised".

90. "Manufactured" to our minds connotes the application of a process which results in a product materially different from those products which entered process. Thus the washing of potatoes would not be the manufacture of washed potatoes, but the squashing of grapes to produce wine would be the manufacture of wine; and it would not in our view be proper to call grain which had been dried by a farmer after harvest "manufactured" since the grain would be recognisably be the same after drying even though, as a result of the drying process it would have a lesser moisture content. Nor would the mere packing of a product make it “manufactured”.

91. It seemed to us that dried tobacco leaves fell close to the borderline. A process had been applied to the leaves - drying them in the sun or a furnace. That process would have changed the appearance of the leaves but would leave them recognisable as leaves. The process of drying however would no doubt have changed the cellular composition of the leaves making it impossible to restore them to their previous state by the simple addition of water. On balance these considerations incline us to the view that the process of drying the leaves resulted in a product which might properly be said to have been "manufactured from tobacco".

The headings in the sub paragraphs of section 1(1).

92. At the hearing we had some debate as to whether the dried tobacco leaves could be "other smoking tobacco" within para (d) or "hand rolling tobacco" within para (c). It seemed clear that none of the other paragraphs applied. That debate however was superceded by a little research conducted by the tribunal after the hearing. The Tobacco Products (Description of Products) Order 2003 (2003/1471) (as later amended by 2010/2852) was made under subsection (3) of section 1. Relevantly this order provides:

"**Hand-rolling tobacco**

6. - (1) References to hand-rolling tobacco in the Act include any product that would, but for the reference to hand-rolling tobacco in article 7(1) below, be other smoking tobacco and -

(a) in which more than 25% by weight of the tobacco particles have a cut width of less than 1 millimetre, or

(b) that is sold or intended to be sold for making into cigarettes by hand, or

(c) that is of a kind used for making into cigarettes by hand.

(2) In this regulation -

(a) the references to "making into cigarettes by hand" in paragraph (1)(b) and (c) above include making into cigarettes by hand with the aid of a mechanical device, and

(b) the use for making into cigarettes referred to in paragraph (1)(c) above must amount to more than occasional use but need not amount to common use.

Other smoking tobacco

7. - (1) Subject to paragraph (2) below, references to other smoking tobacco in the Act include any product that is not cigarettes, cigars, or hand-rolling tobacco and *comprises* -

(a) tobacco that has been cut or otherwise split, twisted or pressed into blocks, and is capable of being smoked without further industrial processing,or

(b) tobacco refuse put up for retail sale that can be smoked.

(2) References to other smoking tobacco in the Act include products consisting in whole or in part of substances other than tobacco that otherwise conform to a description in paragraph (1) above, unless they are herbal smoking products .

(3) For the purposes of paragraph 1, “tobacco refuse” means the remnants of tobacco leaves and the by-products of the processing of tobacco or the manufacture of tobacco products.”[our italics]

Chewing tobacco

8. - (1) Subject to paragraph (2) below, references to chewing tobacco in the Act include any product that -

(a) is not cigarettes, cigars, hand-rolling tobacco , or other smoking tobacco ,

(b)consists of or includes tobacco , and

(c) has been prepared so that it can be chewed.

(2) References to chewing tobacco in the Act include any product prepared for chewing that does not include tobacco but consists in whole or in part of a substitute for tobacco , except for such a product that is intended solely as an aid to persons to give up smoking.”

93. Although the words of regulation 6 are words of inclusion, when taken together with Mr Crouch’s description of the normal process for producing tobacco for smoking, to our minds they suggest that a degree of mixing or chopping is required before tobacco leaves can be said to be hand rolling tobacco. We therefore concluded that the dried loose leaves were not hand rolling tobacco.

94. The word "comprises” in the opening words of regulation 7 and the provisions of 7(1)(a) makes it plain that dried tobacco leaves are not "other smoking tobacco".

95. We considered that the dried leaves would not normally be chewed and had not been prepared so that they could be chewed. We concluded that they were not chewing tobacco within section 1(1)(e).

96. We therefore conclude that the dried tobacco leaves in Mr Wnek's van were not tobacco products within section 1(1) of the Act. As a result that Act does not impose excise duty on their importation.

Appraisal: the letter of review.

97. Putting to one side for the moment the issues raised in the preceding parts of this decision in relation to notice of claim and to liability to duty, we could not detect in Mr Crouch’s letter any irrelevant considerations which had been taken into account or any relevant considerations which he had failed to consider. Nor, whilst we believe that his decision to apply UKBA’s policy bore harshly on Mr Wnek, did we find any element of his decision unreasonable on this basis.

98. As a result if we were precluded from considering whether the leaves were liable to duty we would not set aside his decision.

99. However we have concluded, because paragraph 5 of Schedule 3 does not apply, that whether or not the van was duly forfeit and whether or not the leaves were liable to duty are issues which are not deemed to have been concluded and on which we are permitted to conclude. We have concluded that the leaves were not liable to excise duty.

100. A decision is not reasonable for the purposes of section 16 FA 1994 if it takes into account irrelevant considerations, if it fails to take in to account relevant considerations, if it is tainted by a material error of law or is one which no reasonable tribunal could have reached on the material before it.

101. UKBA's restoration policy expressly links the question of restoration – unconditionally or subject to conditions - to the amount of excise duty which should have been paid and was not. Mr Crouch took into consideration (see the passages quoted above) the duty which would have been forgone. Thus it seems to us that the question of the amount of duty properly payable is a relevant consideration in addressing whether the van should have been restored. By taking the leaves as liable to duty Mr Crouch made a mistake of law or took into account an irrelevant consideration. That consideration clearly fundamentally affected his decision and it could not be said that his decision would inevitably have been the same if had he not made that mistake. As a result the decision should be set aside on these grounds.

102. Mr Crouch also proceeded on the basis that paragraph 5 Schedule 3 applied so that he should make his decision on the basis that the forfeiture was legal. If paragraph 5 did not apply then Mr Crouch was not required to assume that the leaves had been validly forfeit; and whether or not the leaves and the van were legally forfeit was clearly a relevant consideration in making a decision as to whether or not to restore the van. Thus Mr Crouch failed to take into account a relevant consideration. The decision must therefore be set aside for this reason too.

103. If the leaves were not liable to duty then they would not have been liable to seizure under the provisions quoted by Mr Crouch in his letter. It may be that the conveyance of the leaves into the UK in the manner Mr Wnek adopted infringed other statutory provisions. Whether or not it did would be a relevant consideration in making a decision as to whether the leaves or the van were legally forfeit. We were not addressed on the detail of any such provisions but our decision cannot be taken as a conclusion that there was or was not any such infringement.

Conclusion

104. At the commencement of the hearing the Respondent applied for the appeal to be struck out as having no reasonable prospect of success. We refuse that application.

105. We DIRECT that:

(1) Mr Crouch's decision be set aside;

(2) a new decision be made taking into account our conclusion that the leaves were not liable to excise duty as tobacco products, and all relevant consequences of that conclusion.

A Reference to the ECJ

106. We raised with Mr Culver the possibility of referring the question of the compatibility of paragraph 4(1) with the treaty to the CJEU. He was not enthusiastic about the idea. Having given some thought to the issues we were not convinced that we should make a reference. Although we did not hear full argument on the question we were satisfied with our conclusions; and if the Respondents appeal our decision, there might be fuller argument which would enable more informed consideration to be given to the question of whether or not a reference is necessary.

Rights of Appeal

107. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 17 October 2013