

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

CO/3406/2019

[2020] EWHC 1729 (Admin)

Courtroom No. 45
Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Tuesday, 10th March 2020

Before:
THE HONOURABLE MR JUSTICE KERR

B E T W E E N:

THE QUEEN on the application of
MARTIN WILLIAM CLAYTON

Claimant

and

HER MAJESTY'S COURT SERVICE

Defendant

and

THE DIRECTOR OF BORDER REVENUE

Interested Party

THE CLAIMANT appeared in person
THE DEFENDANT did not appear and was not represented
MR JOSHUA CAREY appeared on behalf of the Interested Party

APPROVED JUDGMENT

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MR JUSTICE KERR:

1. The claimant, Mr Clayton, seeks an order quashing or setting aside a decision of the Crown Court at Maidstone given on 5 July 2019, dismissing his appeal against an order for condemnation, in respect of some 25 kilograms of hand rolling tobacco.
2. The Crown Court upheld a decision by the Folkestone Magistrates Court, given on 8 July 2018, to grant an application for an order for condemnation in respect of that tobacco. The claimant's case is that the tobacco was unlawfully seized on the claimant's return from France, because it had been purchased as a gift for six of his brothers.
3. At the hearings in the Magistrates Court and Crown Court, it was contended on behalf of Her Majesty's Border Force or the Director of Border Revenue, the interested party in this judicial review, that the tobacco had been purchased for a commercial purpose, and with the intention of evading excise duty.
4. The background was briefly as follows. On 23 October 2017, the claimant and a companion entered this country from France at Dover Eastern Docks. They were travelling in a camper van. On inspection, 25 kilograms of hand rolling tobacco was found in the van and seized. On 8 July 2018, the Magistrates Court at Folkestone granted the interested party's application for an order of forfeiture in respect of the tobacco. The claimant appealed against that decision unsuccessfully and, as I have said, the Crown Court at Maidstone upheld the decision in a ruling given on 5 July 2019.
5. In his judicial review application, the claimant contends that the Crown Court's decision on his appeal is flawed, irrational and unlawful. He argues that there was no proof to support the contention that the tobacco was not for his own use; that it was, on the evidence, a gift for his brothers; and that the interviewing customs officer had given incorrect evidence. The claim was brought against Maidstone Crown Court, which in the usual way, did not take part in the proceedings.
6. The claim was also served on the interested party, the Director of Border Revenue, who lodged an acknowledgement of service in October 2019. In that document, it was contended, first, that the claimant should have proceeded by way of appeal by case stated. However, at

the hearing before me, that proposition was not advanced and, although the matter has proceeded by way of judicial review, the effect is in practice no different from proceeding on appeal by case stated.

7. The interested party contended, further, that the Crown Court's decision was correct and lawful. Alternatively, he contended that if there had been any error and the matter had to be remitted, the result would be highly likely to be the same, given the strength of the evidence. The interested party relied, in that regard, on Section 31(3C) of the Senior Courts Act 1981.
8. The matter came before Julian Knowles J on the papers on 28 October 2019. He granted permission to apply for judicial review and stayed the order condemning or forfeiting the tobacco in question, pending the outcome of the application that is before me today. He gave his reasons as follows:

“Although not clearly pleaded as such, I have granted permission on the question whether where (as the Crown Court found) there is an arrangement between the Claimant and his brothers that each year one brother would buy tobacco abroad and gift to the other brothers in the expectation (but without legally enforceable obligation) that in the years to come the Claimant might be the recipient of a similar gift from another brother, this counts as a transfer for, ‘money or money’s worth’, as found by the Crown Court, and hence not ‘own use’ under regulation 13(5)(b) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593).”

9. Mr Clayton represented himself before me today, as he did in the Crown Court. He spoke ably and courteously but, at times, he did try to re-argue the case in the Crown Court; for example, referring to written statements from his brothers that were not in evidence before the Crown Court. He has sought to attack as irrational and perverse the finding of the Crown Court that he had an expectation of something from his six smoker brothers that was, “money’s worth” in return for the tobacco.
10. I have considered carefully the decision of the Crown Court and, in addition, I was shown today a transcript of the answers given by the claimant in his oral evidence on oath at the hearing of his appeal in the Crown Court. Those answers, in turn, referred to answers given by him in interview, when interviewed on the occasion of the seizure of the tobacco. The transcript of the ruling of the Crown Court shows the following.

11. The learned judge, His Honour Judge St John-Stevens sat with two magistrates, although they are not identified on the transcript. The judge recited the undisputed facts relating to search of the van and seizure of the tobacco on 23 October 2017. He went on as follows (transcript at 2D):

‘What is clear [is] that the appellant was interviewed and has also given evidence in this court explaining that he has seven brothers and in interview said that one of them didn’t smoke, but the effective arrangement was that once a year one of them would buy tobacco sufficient to give to the others as a gift and that would normally, and to quote, ‘We call it a Christmas present’ and they would take it in turns.’
12. Pausing there, I have noted that the claimant did indeed in his oral evidence use the expression “my turn”. The learned judge continued (2F):

“He made it clear that no money would be exchanged for the purchase of those cigarettes or be given to purchase the cigarettes. Mr Clayton gave evidence and was helping in explaining that situation that he would buy - he bought the cigarettes in anticipation to give them to gift to his siblings as it happened before and in the future... .”
13. The judge continued a little further on (at 3A):

“In short, the case is set out, and the main issue for our determination which has taken some time is whether the buying of the tobacco and gifting it is a gift and simply a gift with no for laymen's view no strings attached, or whether it was for money or money’s worth”.
14. The learned judge then set out the relevant provision in the 2010 Regulations, regulation 13. He continued (at 4B):

“‘Own use’ includes a personal gift but does not include the transfer of goods to another person for money or money’s worth, including reimbursement or [of] expenses incurred in obtaining them. In effect, it is the appellant’s case that they were for his own use and were personal gifts to his siblings. The question for us to decide is whether the Border Force have made us sure – have made it that it’s more likely than not that they were for money or money’s worth”.
15. A little further on in considering the issue of “money’s worth” the learned judge returned to the claimant’s evidence and said this (between 4C and 4D):

“They take it in turns year on year to buy tobacco and give it to each other in the expectation that they have or would not be given it by another brother the next year or - and they had by a previous brother in the former year. The question about that expectation is that in return for giving tobacco to one brother, this appellant would

receive tobacco back or has received it in the past, in effectively, is paying back in that regard... .”

16. On the basis of that factual position the judge recorded the court’s decision: that the arrangement was one involving “money’s worth”; that the magistrates’ decision had therefore been correct and that the appeal failed.
17. Despite the claimant’s protest that the Crown Court lacked any proper basis for those findings, I am satisfied that it did have a proper basis for making them; and the basis was the evidence of the claimant himself, given on oath to the Crown Court, and accepted at face value by the members of the Crown Court.
18. I therefore agree with Julian Knowles J that the issue is essentially one of law. It is whether the court’s findings of fact support the conclusion that the tobacco was not for the claimant’s “own use” because he envisaged that there would be a “transfer of the goods to another person for... money’s worth” within regulation 13(5)(b) of the 2010 Regulations.
19. The claimant submitted that the proposed transfer of the tobacco to his brothers was not for money’s worth but would be an outright gift. He said that he did not mean to say in evidence to the Crown Court that it was his, “turn” and that he had never before received any tobacco from any of his brothers; nor did he expect to ever in the future; at the most, he might do.
20. I note that this contention is not the same as the evidence that he gave to the Crown Court, in the course of which, as I have said, he used the phrase that it was his “turn”. I reminded him that I could not retry the evidence in the Crown Court, and that my role is confined to considering whether its decision was flawed by any error of law or approach.
21. For the interested party, Mr Joshua Carey in his skeleton argument set out in detail the relevant EU law background to what is now regulation 13 of the 2010 Regulations. For the purposes of this application for judicial review, I do not find it necessary to set out that body of law which underlies the current regime for the collection of excise duty and the prevention of fraudulent evasion thereof.
22. Mr Carey made two main points. First, he submitted that the expression “money’s worth”, in the context of personal use, ought to be interpreted broadly so as to avoid frustrating the

objective of the statutory regime which includes, importantly, the protection of excise revenue and prevention of fraud, evasion or abuse. Secondly, he submitted that the arrangements in place, on the claimant's evidence, fell within the ordinary meaning of the words "money or money's worth" and that the Crown Court, therefore, decided the appeal correctly.

23. In relation to the first contention that an interpretation should be adopted, which assisted in the prevention of fraud evasion or abuse, he referred me to the decision of the Court of Appeal in *R (Hoverspeed Ltd) v Customs and Excise Commissioners* [2003] 2 All ER 553, a decision made at a time when the previous directive, Council Directive EEC/92/12, was in place rather than the current directive.
24. In the judgment of the court of Mance LJ, at [60]-[65], consideration was given (*obiter*) to the concept of "own use" and "commercial purpose". The court recorded (see at [65], at (iii)) that it was "not concerned with the precise scope of the concept 'for his own use'" but that the commissioners accepted that it should "receive a sensible interpretation". It was common ground that the concept is "not confined to situations where the private individual himself intends to consume the goods". At the end of the paragraph, Mance LJ said:

"So for example, they [the commissioners] accept that a private individual who travels abroad in order to stock up for his or her dinner table or a party which he or she is giving is acquiring for his own use. Likewise, we would suppose, in the case of an acquisition destined as a present for a relative or friend."
25. Mr Carey submitted that the phrase, "money or money's worth" should be interpreted to encompass arrangements where a person is bringing excise goods into this country with an expectation, whether or not it is followed through, that other excise goods will be provided in return. That interpretation was necessary to avoid significant adverse impact on the ability of the interested party and Her Majesty's Revenue and Customs to combat excise fraud.
26. In relation to his second point, Mr Carey focused on the ordinary meaning of the words "money or money's worth". He noted that the Court of Appeal had considered the concept in the different context of the issue of gambling chips in a casino (see *London Clubs Management Ltd v. Revenue and Customs Commissioners* [2019] STC 274). It is only necessary to note that in the leading judgment Gloster LJ at [29] said this:

"...the relevant words have to be construed in their real-world practical context - not

in an artificial world of possible, or philosophical, interpretations of the words ‘value’ or ‘money’s worth’”

27. Although the context there was completely different and the case concerned gaming duty, I respectfully concur that in the present context a “real world” practical approach must likewise be adopted rather than a philosophical one.
28. Mr Carey submitted that the findings of the Crown Court, based as they were on the claimant’s own account, amply justified the conclusion that the arrangements here did involve the proposed transfer of tobacco for money’s worth; and that the Crown Court had approached the issue correctly, with a dose of common sense and a practical outlook. I agree with that submission.
29. Mr Carey also took me to definitions in the standard and legal dictionaries of the word “gift”. These, not surprisingly, focused on the absence of consideration and the absence of any expectation of anything in return for or strings attached to transfer of property from one person to another.
30. It is the expectation of something in return for the “gift” of tobacco that was present here, according to the claimant’s own account given in the Crown Court. I accept the submission of Mr Carey that, for the purposes of regulation 13 of the 2010 Regulations, a personal “gift” cannot have attached to it an expectation of a reciprocal “gift” going the other way in the future, even if that expectation falls well short of certainty and is not legally enforceable.
31. The claimant’s evidence, adopted by the Crown Court, was that it was his “turn” to buy the tobacco. That provided a firm foundation for the finding that the tobacco was not for his own use and that the arrangement involved “money’s worth”.
32. For that short reason, I find no error of law or approach in the Crown Court’s decision. It was right to dismiss the appeal, and I must therefore dismiss this claim. That means it is unnecessary to consider whether, if the matter were remitted back to the Crown Court, the result would as Mr Carey submitted be highly likely to be the same.

End of Judgment

Transcript from a recording by Ubiquis
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