IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Case No: AC-2024-LON-001229
Neutral Citation Number: [2024] EWHC 3140 (Admin)

The Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 29 October 2024

BEFORE:
MR JUSTICE LINDEN

BETWEEN:

THE KING
(on the application of AHLUWALIA)

Claimant

-and-

(1) THE COMMISSIONERS OF HM REVENUE AND CUSTOMS

Defendants

MR SAM GRODZINSKI KC (instructed by Fieldfisher LLP) appeared on behalf of the Claimant.
MR COLM KELLY (instructed by His Majesty's Revenue and Customs Legal Department) appeared on behalf of the Defendants.

JUDGMENT

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Lower Ground, 46 Chancery Lane, London WC2A 1JE
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(Official Shorthand Writers to the Court)

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MR JUSTICE LINDEN:

Introduction

1. This is a renewed application for permission to claim judicial review, permission having been refused on the papers by Lavender J on 29 May 2024.

Background

2. In very broad outline, the claimant is a successful businessman, who built up a global business known as Euro Car Parts. In December 2011, HMRC opened an enquiry into his tax returns for the 2011/2012 tax year and, by letter dated 13 December 2013, they notified him that the enquiry would encompass his domicile status. On 28 February 2016, HMRC confirmed that it accepted that his domicile of origin was India but consideration of whether he had acquired a UK domicile of choice continued.

3. On 21 September 2023, HMRC notified the claimant in a draft "view of the matter" letter that it considered that he had acquired a domicile of choice in the United Kingdom at an unspecified point prior to the 2009/2010 tax year. The letter went on to say that, as a result of this conclusion, he was ineligible to account to the Revenue on the remittance basis or to avail himself of the concessions available to deemed domiciled persons in the years since then. Accordingly, information relating to his worldwide income and gains for the years from 2009/2010 was required: as I understand it, a total of ten tax years. The letter made various requests for information and documents, including asking the claimant to produce revised tax computations on an arising basis to include all worldwide income and gains covering the years 2009/2010 to 2021/22.

4. Earlier in the process, in June 2022, HMRC had raised the possibility of a joint referral of the domicile question to the First-tier Tribunal ("FTT"), pursuant to section 28ZA(1) of the Taxes Management Act 1970. Section 28ZA(1) provides that, at any time when a relevant enquiry is in progress, "any question arising in connection with the subject-matter of the enquiry may be referred to the tribunal for its determination". However, section 28ZA(2) effectively provides that the referral may only be made jointly by the

taxpayer and HMRC. Section 28ZE provides that the decision on the referred question is binding on the parties to the referral as a decision on a preliminary issue in an appeal and it is required to be taken into account by HMRC in reaching its conclusions on the enquiry.

5. It appears from a document that Mr Grodzinski showed me in the course of the hearing this morning which, as I understand it, was recently disclosed by HMRC, that there was a telephone call or a meeting on 17 November 2023 between Officer Jennifer Eve of the HMRC and Dawn Register of BDO LLP, the accountants who act for the claimant. At that meeting it appears that Ms Eve was favourably disposed towards the possibility of a referral pursuant to section 28ZE.

6. Following HMRC's draft "view of the matter" letter, the possibility of a joint referral was then pursued with HMRC by email dated 27 November 2023 from BDO. The email suggested that a referral would potentially result in a very considerable saving of time and cost. It said that the further information which HMRC required would require a vast amount of work, which would be largely wasted if the FTT found that the claimant had not acquired a UK domicile.

7. It appears, although the evidence on this point is thin, that Officer Eve then had a call or meeting on 8 December 2023 with unspecified persons described in her witness statement as "internal stakeholders" and it may be that one reading of paragraph 6 of her first witness statement is that notes of that meeting were made by her. It may also be that it is at that point that the decision to which I will come in a moment was made. Mr Grodzinski tells me, and I accept, that, although there appear to have been notes of that meeting, they have not at this stage been disclosed by HMRC.

8. On 10 January 2024, a telephone call took place between Officer Eve, Ms Register and Robert Langston and Emily Hektor of Saffery LLP, who are tax advisors to the claimant. Mr Langston, who is a partner at Saffery, has made a witness statement in support of the claim, dated 5 April 2024, in which he gives an account of what was said in this call. He says that Ms Eve explained that HMRC had had internal discussions and no longer considered that a section 28ZA referral was appropriate for domicile enquiries. He says that the claimant's representatives were told that the decision was

not specific to their particular client, but that HMRC have a "better understanding" of situations where such a referral would be appropriate and the claimant's case no longer fitted the criteria. He said that he interpreted this to mean that HMRC had a policy which determined the situations in which a section 28ZA referral would be appropriate. Secondly, he says that they were told that it was a decision taken by Mr Rob Holmes, a domicile technical lead, with colleagues from the policy team. He says that it was clear from the call that it was a policy decision. Thirdly, he says that he spoke with Ms Register after the call to check that they had both correctly heard what they thought they had heard and, fourthly, he says that he then prepared a contemporaneous note of the call and Ms Register also sent an email to the wider advisory team setting out what had happened on the call.

9. Mr Langston produces his own contemporaneous note of the call and Ms Register's email to the wider advisory team, which is dated 12 January 2024. The former supports the account in his witness statement. Ms Register's email states, so far as material, as follows:

> "HMRC will NOT support an application Section 28ZA. This is from a recent internal call with all stakeholders at HMRC including policy and 'framework'. When I questioned further,[Officer Eve] said that this is not specific to [the claimant's case] and instead 'reflects recent domicile case decisions'. HMRC are not ruling out Section 28ZA on all cases but in the current environment it is unlikely on any domicile case".

10. On 2 February 2024, Fieldfisher LLP, who were instructed on behalf of the claimant, wrote to Officer Eve. They express disappointment that HMRC had reversed its position of June 2022 and that she had chosen to communicate what they described as such an important decision informally rather than providing an appropriate written record of the decision. They requested confirmation of the reasons for the decision and notified HMRC that the reasons would be considered by leading counsel to determine whether it was appropriate to begin proceedings for judicial review.

11. On 16 February 2024, Officer Eve then wrote to Fieldfisher responding to their 2 February letter. The fourth paragraph of her letter stated:

> "I have considered whether, on the specific facts of this case, a Joint Referral is appropriate and my decision is that it is not. My reasons are as follows".

She then went on to set out reasons for the decision.

The claim for judicial review

12. Against this background, on behalf of the claimant, Mr Sam Grodzinski KC advances four grounds of challenge in relation to HMRC's refusal to refer the domicile issue to the FTT. First, he contends that HMRC have adopted an unpublished policy which fetters its discretion under section 28ZA of the 1970 Act. Despite the joint referral process being suitable in principle for the resolution of issues as to domicile, as HMRC accepts it is, Mr Grodzinski contends that they have decided that, as a matter of policy, they will not consent to the referral of such questions. That is the effect of what Officer Eve told the representatives of the claimant on 10 January 2024, when informing them of the decision which had been taken, albeit a different spin was placed on the matter in the letter of 16 February 2024 once lawyers had become involved and judicial review was threatened.

13. Under Ground 2, Mr Grodzinski contends, effectively in the alternative, that, even assuming that the 16 February 2024 letter genuinely reflects the decision which was notified to the claimant's representatives five weeks earlier, it is irrational in that it stated, in terms, that "the time spent preparing for and attending a joint referral hearing and the costs incurred would be the same as if it were the hearing of an appeal against a final closure notice". Mr Grodzinski points out that it manifestly was not the case that the costs of the two options would be the same. A referral to the FTT would involve a determination of the domicile issue and, save in respect of a relatively less significant part of the enquiry, if it was resolved in the claimant's favour it would be unnecessary to spend hundreds of hours working up the information which HMRC required to work out the claimant's additional tax liabilities on the assumption that HMRC was right that he had acquired a UK domicile of choice. There would then be the further costs of a hearing before the FTT, which, if HMRC was wrong on the domicile point, would have

been wasted or, if the finding was that he acquired a UK domicile at a later point than HMRC thought, reworked.

14. Under Ground 3, which Mr Grodzinski accepts has some overlap with Ground 2, it is contended that HMRC failed to take into account relevant considerations, namely the very considerable amount of additional work which would need to be undertaken by the claimant in working out what his additional liabilities should be, assuming that HMRC was right as to his domicile; by HMRC assessing that information and making further enquiries to assess the quantum of tax which might be payable; and then by both parties in preparing for and attending a FTT hearing on the question of domicile and all of the consequential issues in relation to the quantification of tax in relation to each relevant year.

15. Under Ground 4, Mr Grodzinski argues a *Padfield* point. His contention is that HMRC's decision frustrated the purpose of section 28ZA of the 1970 Act and of the 1970 Act as a whole. This purpose was to promote certainty, finality and transparency, including early resolution and finality on particular questions arising in the course of a relevant enquiry.

16. On behalf of HMRC, Mr Colm Kelly submits that permission should be refused in relation to all of these grounds and, somewhat optimistically, that I should certify the claim as totally without merit. He contends that the policy alleged under Ground 1 does not exist; that the decision made by HMRC was both rational and correct; that HMRC took account of all relevant matters; and that the decision did not frustrate the purpose of the relevant statutory provision.

17. Having considered the oral and written arguments of counsel, I have come to the following conclusions.

Ground 1

18. I have decided to grant permission on Ground 1. I agree with Mr Grodzinski that it appears that the relevant decision was taken on an unspecified date, perhaps 8 December 2023, and before 10 January 2024. The 16 February 2024 letter purports to be an explanation of that decision rather than a fresh decision. It seems to me that, on the evidence as it currently stands, the claimant has an arguable case that there was the policy alleged and that the decision to refuse to refer the matter to the FTT was based on this policy. The evidence of Mr Langston, Ms Register's email of 12 January 2024 and Officer Eve's own note of the 10 January conversation provide substantial support for the contention that the decision was not based on the specifics of the claimant's case and/or that there are or were criteria applied and/or that these provided or had the effect that domicile cases would not be referred to the FTT and/or would not be referred once a case had reached a particular stage: for example, when HMRC had reached its own view on the question in issue.

19. I note that Officer Eve's first witness statement said that it had not been possible to locate her note of the 10 January 2024 call and the Summary Grounds of Defence make no reference to it, although it was, in fact, included in the accompanying bundle. It does not appear from Lavender J's order that he had seen this document when he refused permission; certainly it was not specifically drawn to his attention. I appreciate that the expectation in judicial review proceedings would be that, notwithstanding this, the court would generally be willing to accept the statement in Officer Eve's letter of 16 February 2024 that she had considered the specific facts of the case in coming to her decision, as well as the evidence in her witness statement dated 7 May 2024 that she did so, and that the policy alleged by the claimant does not exist in either published or unpublished form, as far as she is aware. Indeed, that may ultimately be the outcome on Ground 1. But I regret to say that there are sufficient concerns about HMRC's case, as set out in its pre-action protocol response dated 22 March 2024, its Summary Grounds of Defence and Officer Eve's two witness statements, for me to be unwilling to say at this stage that HMRC's factual case is bound to be accepted or that it would be right to forestall any further enquiry into who made the decision and on what basis by refusing permission.

20. I do not propose to run through all of the inconsistencies which there have been in HMRC's explanations of the decision and of its case, but suffice it to say they are concerning. Officer Eve's account of what she said in the 10 January 2024 call, including HMRC's pre-action protocol response at paragraph 23, the third bullet point, and in her witness statements, does not appear consistent with the contemporaneous evidence, including her own note of the call. There also appear to be marked inconsistencies in HMRC's case as to who made the decision and who was consulted in relation to it, including as to whether anyone from policy was consulted, and the way in which Officer Eve's note of the call has been addressed by HMRC is also surprising.

21. I also note that, in its pre-action protocol response, HMRC declined to provide disclosure on the ground that it is not relevant. There has been no statement from Mr Holmes, who, on one version of HMRC's case, jointly took the decision with Officer Eve, nor anyone else who was involved in the decision. Nor has Officer Eve herself provided any detail in her account of the decision-making process. Nor, as I have mentioned, has the note of the 8 December conversation or meeting been disclosed at this stage.

22. For all of these reasons, I consider that the claimant has a sufficiently arguable case, and it is appropriate to grant permission on ground 1 as a matter of discretion in any event. This will give an opportunity for the lawfulness of HMRC's decision-making process and its reasoning to be investigated and scrutinised further.

Grounds 2 and 3

23. For similar reasons I have concluded that I will grant permission on Grounds 2 and 3. I accept that, for the reasons given by Mr Kelly in his cogent written and oral submissions, the outcome of the decision-making process could not be said to be irrational. There were arguments for and against a referral to the FTT and, provided its decision-making process was rational, HMRC was entitled to decide not to agree to refer the domicile issue.

24. However, the challenge under Grounds 2 and 3 is to the rationality of the decision-making process. The background to the court's assessment of 16 February 2024 letter is the concerns about the original decision and how they have been addressed by HMRC in its case thus far. The precise relationship between the decision and what is said in the16 February 2024 letter may also need to be clarified but, in any event, the 16 February 2024 letter is not, or at least arguably is not, an impressive piece of work in terms of demonstrating a careful and thorough consideration of the competing considerations. That, of course, is not the test, but, in addition, the letter does contain what on its face is a clear error of reasoning in stating that the time spent preparing for and attending a joint referral hearing and the costs incurred would be the same as if it were the hearing of an appeal against a final disclosure notice.

25. It is true that later, and in a different section of the letter, Officer Eve states. under the heading "Foreign income and gains analysis", that, "whilst I recognise that such analysis would incur some additional costs for your customer, I do not consider there is sufficient justification at this time to agree to a referral under section 28ZA, given the reasons outlined above". However, it seems to me to be highly arguable that this refers to the first part of the work which would potentially be largely wasted, namely the analysis by the claimant's advisors and the HMRC of his tax risk if HMRC is right on the domicile issue. If that is right, Officer Eve's reference to "some additional costs" does not refer to the second stage, preparation for the FTT appeal against a final closure notice, and therefore does not demonstrate that, contrary to what is indicated earlier in the letter, HMRC took into account the risk of substantial additional costs at that second stage which would be potentially wasted. HMRC has attempted to meet this point by asserting that the statement that the costs would be the same if the domicile issues were dealt with in an appeal against a final disclosure notice, rather than a referral under section 28ZA, was made on the assumption that the figures would by then have been agreed, but Officer Eve does not give evidence to support this and, in any event, it appears to be a highly doubtful assumption, in the light of Mr Langston's evidence.

26. In addition to this, it is in my view arguable that Officer Eve's reference to "some additional costs for your customer", in the context of the 16 February 2024 letter as a whole and against the background of what appears to have been said by Officer Eve in the call on 10 January 2024, does not show a proper appreciation or consideration of the implications of the decision which is reached, as explained by Mr Langston in his witness statement.

27. For these reasons, I give permission on Grounds 2 and 3.

Ground 4

28. As far as Ground 4 is concerned, Mr Grodzinski accepted in his oral submissions that this was, in effect, the fifth wheel on the coach. He recognised that the referral mechanism under section 28ZA is one which operates on the basis of a consensus between the parties and he recognised that it was, therefore, at the very least implicit that one party or other could decline a proposal to refer a particular issue to the FTT. His position was that, provided there were no other public law flaws in the decision of HMRC to decline the referral, then it would be permissible for HMRC to decline and the *Padfield* point would fall away. That being so, it seems to me that, as argued by Mr Kelly, there is nothing added by Ground 4: Mr Grodzinski and his client must stand or fall on grounds 1 to 3.

29. I therefore I refuse permission in relation to Ground 4.

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Lower Ground, 46 Chancery Lane, London WC2A 1JE
Email: civil@epiqglobal.co.uk