Case No: C4/2010/2740

Neutral Citation Number: [2012] EWCA Civ 689
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
THE HON MR JUSTICE SALES
CO/15215/2009
CO/1142/2010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2012

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE ELIAS
and
LORD JUSTICE DAVIS

- -

Between :

EASTENDERS CASH & CARRY PLC & ANR	**Appellants**
- and -	
THE COMMISSIONERS OF HER MAJESTY'S REVENUE & CUSTOMS	**Respondent**

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- -

MR GERAINT JONES QC and **MR MARC GLOVER** (instructed by Rainer Hughes Solicitors) for the Appellants
MR JONATHAN SWIFT QC and **MR NEIL SHELDON** (instructed by HMRC Solicitors) for the Respondents

Hearing date: 15th March 2012

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Judgment

Lord Justice Mummery:

Post-judgment issues

1. It was apparent, even before the court formally handed down judgment on 20 January 2012 and allowed the Claimants' appeal, that there was an issue about the court's power to make the normal costs order against the unsuccessful party. When the Claimants, as successful appellants, submitted that the court should order HMRC to pay their costs of the appeal and of the case heard by Sales J below, HMRC pointed to s.144 of the Customs & Excise Management Act 1979 (the 1979 Act), which provides:-

> "(2) Where any proceedings, whether civil or criminal, are brought against the Commissioners, a law officer of the Crown or a person authorised by or under the Customs and Excise Act 1979 to seize or detain any thing liable to forfeiture under the customs and excise Acts on account of the seizure or detention of any thing, and judgment is given for the plaintiff or prosecutor, then if either-
>
> (a) a certificate relating to the seizure has been granted under subsection (1) above; or
>
> (b) the court is satisfied that there were reasonable grounds for seizing or detaining that thing under the customs and excise Acts,
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> the plaintiff or prosecutor shall not be entitled to recover any damages or costs and the defendant shall not be liable to any punishment."

2. The problem facing the Claimants is that, as Sales J stated in his judgment, there was no serious dispute that there were reasonable grounds for HMRC to believe that there was a real possibility that duty might not have been paid on the goods in question, having regard to the discrepancies in the available documentation in relation to those goods: see [43] of the judgment. HMRC did not detain the goods simply because they wished to investigate whether duty had been paid. That there were reasonable grounds for temporary detention of the goods in question was not challenged by the Claimants before Sales J or on the appeal. The evidence of reasonable grounds on which HMRC based their decision to detain the goods was not disputed. The issue in the litigation was the criterion for detention pursuant to s.139 of the 1979 Act, not the absence of reasonable grounds.

3. The "costs shield" question was not argued below, because HMRC won. They obtained an order for their costs against the Claimants, who now submit that, because they have won the appeal, they should be granted an order for costs against HMRC. Costs normally follow the event. The "goose and gander" principle would usually apply, so that if HMRC got a costs order when they won, the Claimants could reasonably expect to get a costs order when they won.

4. Counsel for the Claimants submitted a draft order providing that HMRC should be ordered to pay the Claimants' costs here and below to be subject to a detailed assessment, if not agreed. The draft proposed an interim payment of £50,000. The Claimants initially sought an order that their claim for damages should be transferred to the Queen's Bench Division, but they no longer pursue the damages claim.

5. Counsel for HMRC submitted a draft order simply allowing the appeal with a declaration that the detention of the Claimants' goods was unlawful. There was no mention of costs. Each side would pay their own. HMRC applied for permission to appeal to the Supreme Court, which was opposed.

6. The court directed that an inter partes hearing was necessary to determine the costs issue and whether permission to appeal should be granted. Skeleton arguments were submitted. A hearing took place on 15 March 2012. That was not the end of the matter, as the court received "Additional Submissions on Disposal" in writing from the Claimants dated 28 March 2012 followed by further submissions in writing from HMRC on 10 April 2012, just before the Easter Vacation.

A. COSTS

HMRC submissions

7. Mr Jonathan Swift QC accepts on behalf of HMRC that costs would normally follow the event in accordance with CPR Part 44, but for the statutory bar on awarding damages or costs in s.144(2). The most that the Claimants can be granted by way of relief is a declaration that, notwithstanding that there were reasonable grounds for detaining the Claimants' goods, the detention of them was unlawful.

8. The meaning and effect of s.144(2) were, he said, clear: the Court had no power to make any order for costs against HMRC in the circumstances, as the Claimants' proceedings were on account of the detention of goods on reasonable grounds .

Claimants' submissions

9. Mr Geraint Jones QC disagreed for the following reasons.

Civil proceedings

10. The first point taken in the Claimants' written submissions was that s.144(2)(b) does not apply to a claim for judicial review, because it is not a civil claim. The expression "civil proceedings", as used in that section, means "ordinary" civil proceedings, such as proceedings for the return of the goods or for damages for conversion and does not extend to proceedings of a supervisory character seeking judicial review of an abuse of public power by HMRC.

11. I cannot accept that submission. The reference in general terms to civil or criminal proceedings indicates that the section has a broad scope. No sensible suggestion has been advanced as to why a claim for judicial review in the Administrative Court should be treated differently from tort proceedings when considering costs. The issue of the lawfulness of the detention would be the central issue in the proceedings whether they were criminal, a damages claim in tort, or a claim for judicial review.

Article 6 of the ECHR

12. The next point was that s. 144 (2) should be read down and given effect so as to be compatible with Article 6 of the ECHR. Articles 14 and Article 1 of the First Protocol were also mentioned in the written submissions, as was a declaration of incompatibility under s. 4 of the Human Rights Act 1998. The argument focussed on Article 6.

13. As stated recently in *Thomas v. Bridgend County BC* [2011] EWCA Civ 862 at [63] s. 3 of the 1998 Act requires the court to read legislation in a way that is compatible with convention rights "so far as it is possible to do so." It is not, however, a judicial power to amend legislation in a way that would depart substantially from a fundamental feature of the legislative scheme.

14. The submission on Article 6 starts from the point that, for there to be a fair trial, there should be a level playing field between the protagonists. Costs should not be awarded on a discriminatory basis, as would be the case if a party is given special protection from an order for costs, even if it has acted unlawfully. Section 144 (2) imposed a one-sided blanket bar on the award of costs against HMRC, irrespective of the merits. In this case there was manifestly unfair inequality of treatment on costs: HMRC were granted their costs when they won in front of Sales J, but were seeking to deny the Claimants their costs when they won their appeal. Such inequality of treatment impacts on the court as an effective tribunal for the determination of the Claimants' civil rights and affects their right to a fair hearing.

15. The decision of the Strasbourg Court in *Stankiewicz v. Poland* [2006] ECHR 360 was cited for the proposition that a legislative bar to recovering costs of civil proceedings can be a breach of Article 6 and Article 1 to the First Protocol. It was held in that case that the Polish Court's refusal to order costs against a public prosecutor, who had lost civil proceedings against the applicants, violated Article 6.

16. I am unable to agree with the submissions based on Article 6.

17. First, the Claimants have not been denied access to a court contrary to Article 6.

18. Secondly, Article 6 does not require Member States to have costs shifting rules, so that a successful litigant should be able to recover costs from the unsuccessful party.

19. Thirdly, the ruling of the Strasbourg Court in *Stankiewicz* is of marginal relevance and limited assistance. It is correct that the Court found that there had been a violation of Article 6.1 in relation a decision of the court of the member state (Poland) not to order a public prosecutor to reimburse the costs of civil proceedings to the successful party. However, the decision was expressly based on particular considerations and circumstances of that case that are absent from this case.

20. The complaint against the Republic of Poland arose from an appeal court decision refusing to re-imburse the costs that the applicants had incurred in defending a civil claim for "Unjustified Enrichment at the Expense of the State Treasury." The proceedings had been lodged against them by the District Prosecutor. The claim was made in connection with the purchase of real property by the applicants from the District Office. It was alleged that the purchase was "within the framework of a

compensatory scheme for persons who had abandoned their property" in territories that had belonged to Poland before the Second World War. The prosecuting authorities claimed that the applicants were liable to re-imburse an amount, having regard to the correct basis for calculating the value of the property purchased and to the fact that an error had been made in the calculation of the sum payable by them.

21. The District Court dismissed the District Prosecutor's claim as unfounded, and ordered that the State Treasury re-imburse the applicants the costs of the litigation. On the Prosecutor's appeal, which was dismissed, the Krakow Court of Appeal partly amended the order of the District Court and refused the applicants their legal costs, having regard to the special position of the prosecutor in bringing a civil action in favour of a third party. The Polish Code of Civil Procedure, while normally providing in Article 98 for costs to follow the event (as in CPR Part 44), contained an exception to that principle in Article 106 for cases in which the prosecutor participated in civil proceedings in the capacity of "guardian of legal order."

22. The Strasbourg Court noted the case law of the Supreme Court of Poland, which laid down that Article 106 did not apply where the prosecutor had instituted the civil proceedings, that an order for costs was not excluded in situations where the prosecutor was acting in a civil case representing the financial interests of the State Treasury and that the privileged position of the prosecuting authorities could be mitigated in the circumstances of individual cases.

23. The Strasbourg Court recognised at [60] that "there may be situations in which the issues linked to the determination of litigation costs can be of relevance for the assessment whether the proceedings in a civil case seen as a whole have complied with the requirements of Article 6.1" However, it did not purport to lay down any principle of general application in the context of Article 6 about protection of a state official or body from an order for costs. The decision in that case was particularly influenced by the fact that the costs rules of the Member State had not been correctly applied by the Krakow Court of Appeal in accordance with the provisions of domestic law. The Strasbourg Court referred to its limited power to review compliance with domestic law as one of the considerations and circumstances of the case as a whole: see [65] and [76]. It held that in that case the treatment of the privileged position of the prosecuting authority on costs resulted in putting the opposing party at an "undue disadvantage" vis-à-vis the prosecuting authorities: see [69]. The provisions of the Code of Civil Procedure, as interpreted by the Polish Supreme Court, had not been correctly applied by the Krakow Court of Appeal when refusing costs to the successful party.

24. In the case of s. 144(2) the protection of HMRC against costs and damages is not absolute. It only applies if HMRC satisfy the court that, although they have acted unlawfully in detaining goods, there were reasonable grounds. The provisions of s.144(2) appear to strike a fair balance which is consistent with access to a court and is within the margin of discretion afforded to a member state. It does not seem to be unreasonable to require a party to bear their own costs when that party has acted so as to give HMRC reasonable grounds for detaining goods pending investigations, which would not have been necessary if the party had supplied proper evidence that duty had been paid in respect of the goods.

Belief in lawful reason for detention

25. In the additional submissions of 28 March 2012 the Claimants raised a wholly new point based, they said, on the analysis recently adopted by Singh J in deciding a similar case in the Administrative Court on 27 March 2012. The case is *First Stop Wholesale v. HMRC* in which Mr Geraint Jones QC appeared for the claimant and successfully contended, in reliance on the judgment in this case, that goods had been unlawfully detained by HMRC. No transcript of the judgment or those proceedings has been supplied. The court is informed that the decision on costs in that case has been adjourned pending this judgment.

26. The point taken is that, when deciding whether HMRC have lawfully detained things under the 1979 Act, the issue of lawfulness has to be tested against the *reason* for the detention. The detention is only lawful if the reason for the exercise of the discretionary power to detain is *potentially lawful*, such as where things are detained by an officer of HMRC acting in the reasonable belief that he is acting lawfully, even though it subsequently turns out to be wrong. Whereas protection against costs would be available in that kind of case, it would not be available in a case where the detention is for a reason that is *unlawful per se*, which is said to be the case here. Section 144(2) should be read down and construed as referring only to situations in which the HMRC officer reasonably believed that a lawful detention on a permitted ground had taken place, but was subsequently found to be unlawful.

27. I can see no basis in s.144(2) for the distinction on which Claimants rely in their additional submission. The only condition stipulated by s.144(2) is the objective one that there were reasonable grounds for detaining the goods. That stipulation assumes that the detention was unlawful, as, if the detention was lawful, there would be no occasion for HMRC to invoke s.144(2). Nothing is said in the section about whether the reason relied on at the time of detention is a potentially lawful reason or a reason which is unlawful per se. In any event, it is difficult to see what difference in substance there is between the existence or non-existence of reasonable grounds for detention of the goods and the different kinds of reason for the detention of the goods. The reasonable grounds in this case were the reason for detention.

Conclusions

28. The court has no power to order the HMRC to pay the Claimants' costs. Section 144(2) operates as a statutory bar on the court making such an order. These are "civil proceedings" within that section and they were brought on account of the detention of the Claimants' goods, but in circumstances in which it was not disputed that there were reasonable grounds for detaining the goods pending investigation.

29. In my judgment, the position is that the Claimants have not been denied access to the courts contrary to Article 6 or in violation of any other principle of law. They took a commercial decision to bring judicial review proceedings in circumstances where they did not provide HMRC with evidence of duty paid in respect of a consignment of goods most of which were liable to forfeiture, and having had returned to them the goods, which HMRC decided not to forfeit. The detention of the goods pending investigation would not have occurred, if the Claimants had supplied proper evidence to HMRC that duty had been paid. There were discrepancies in the available documentation in relation to the goods detained.

30. I would add that, on the hearing of the appeal, the Claimants in fact relied on s. 144(2) in support of their claim for judicial review, which they now submit should not be applied in respect of their claim for costs. They successfully relied on the protection afforded to HMRC by s.144(2) as a key part of their case on the meaning and effect of s.139 and for their submission that a power of HMRC to act on reasonable grounds should not be implied, because that would render the s.144(2) protection otiose. Having won on that point, it now suits them to take a contrary position in order to recover their costs, by contending that the provision does not apply to these proceedings and should not be given the effect for which they argued at the substantive hearing.

31. I would make an order in the terms of the draft submitted by HMRC so that each side bears their own costs of the proceedings here and below.

B. PERMISSION TO APPEAL

32. The Claimants oppose HMRC's application for permission to appeal on the ground that the proposed appeal has no real prospect of success, does not raise any point of public importance and is made on the basis that the decision of this court leaves HMRC "without a power it would like to have." Even if there is prejudice to HMRC, which is not accepted, it is not for the courts to fill the possible lacuna. HMRC's submissions are on policy rather than statutory construction.

33. It is also submitted that, if permission is given on the ground that the case raises issues of wide importance, it should be on terms that HMRC do not seek costs against the Claimants either above or below. It does not lie in the mouth of HMRC to claim the protection of s.144(2) in order to avoid costs when they lose and yet keep open the Claimants' potential risk of adverse costs orders if HMRC win.

34. The Claimants submit that, if they are not awarded their costs of the case, they apply for permission to appeal to the Supreme Court on the construction of s.144(2) and its application to this case, because it raises a point of general importance that needs to be settled at the highest level.

35. I recognise the force of HMRC's points that (a) the issues raised in this appeal on their statutory powers are of practical importance in the discharge of their public functions and are in that sense matters of public interest and (b) there is a serious difference of judicial opinion about the interpretation of the expression "liable to forfeiture" in s.139(1) of the 1979 Act.

36. The Supreme Court should, by reason of its supremacy, be left in most cases to decide appellate priorities. Only that court knows the quantity of cases seeking to join the queue in Parliament Square. It cannot possibly take all of them, however important they may be to the parties involved. It is for that court to assess the comparative importance of the cases clamouring for its attention and the demands that they would make on that body's limited resources.

37. I would therefore refuse to grant either side permission to appeal to the Supreme Court.

Lord Justice Elias:

38. I agree that the Claimants should not be given their costs and that we should leave it to the Supreme Court to determine whether either side should be permitted to appeal, essentially for the reasons given by Lord Justice Mummery,. I wish to add only a few brief observations.

39. The submission that section 144(2) does not apply to judicial review proceedings as a matter of statutory construction is of no merit, for the reasons given by Mummery LJ. That particular argument is also unattractive, being inconsistent with the way in which the Claimants argued the substantive appeal. They relied upon the fact that section 144(2) precluded them from recovering costs or damages, at least if HMRC had reasonable grounds for their actions, to support their submissions as to the proper construction of section 139. They are now resiling from that position. However, I do not think that their Convention arguments can be subject to the same criticism. The contention is that whatever the proper interpretation of the 1979 Act applying traditional principles, that must now give way, where possible at least, to a construction which respects Convention rights. Any necessary modification of section 144(2) required since the implementation of the Human Rights Act does not impinge on the proper construction of section 139.

40. As to the article 6 point, I accept that *Stankiewicz* supports the submission that there will be situations where differential rules on costs may engage the requirements of article 6, although I confess that I have difficulty in understanding from the decision precisely when that will be the case. I can understand an argument that the denial of costs might in some cases inhibit access to the courts in a similar way to the denial of legal aid or the imposition of court fees, so that something akin to the principles applied in *Airey v Ireland* (1979)2 EHRR 305 and *Kreuz v Poland* (2001) 11 BHRC 456 could be engaged. However, the Court in *Stankiewicz* said in terms in paragraph 60 that these were not the relevant principles in play:

> "The Court is well aware that in the circumstances of the present case neither the court fee nor the applicants' access to the court is concerned."

In any event the Claimants in this case were not in fact denied access. So if article 6 is engaged, it must be for some other reason. Paragraph 60 of *Stankiewicz* goes on to recognise that there may be such situations:

> "… There may also be situations in which the issues linked to the determination of litigation costs can be of relevance to the assessment whether the proceedings in a civil case seen as whole have complied with the requirements of Article 6(1) of the Convention".

41. The court noted that the prosecution in that case had a privileged position with respect to costs. That of itself would not, however, necessarily involve a breach of article 6 because the privilege might be justified (para 69):

> "It is true that such a privilege may be justified for the protection of the legal order. However, it should not be applied

> to put a party to civil proceedings to unfair disadvantage vis a vis the prosecuting authorities."

The court concluded that article 6 was infringed by the particular application of the rule in that case. As Mummery LJ has pointed out, the facts in *Stankiewicz* were unusual and very different from those arising here. In particular, the successful litigant was taken to court by the prosecutor in what was found to be a complex matter warranting legal representation. He did not choose to engage in the litigation.

42. It is difficult to avoid the conclusion that the ECrHR found article 6 to be engaged because the costs orders operated in what the court considered was a manifestly unfair and disproportionate way. How that creates an "unfair disadvantage" in relation to the trial process is more difficult to discern but we must assume that there are exceptional cases, of which *Stankiewicz* itself is one, where it does so and involves a breach of article 6.

43. Mr Jones submits that the costs' rule in this case is disproportionate, creates an unfair disadvantage, and therefore constitutes such a breach. The rule operates unfairly because of the element of discrimination. HMRC pays nothing if it loses and recovers costs if it wins.

44. Even assuming that there may be exceptional situations where article 6 is infringed by unfair discrimination in costs' rules, I agree with Mummery LJ that this is not such a case. Section 144 does not deprive the successful applicant for judicial review from obtaining costs, or indeed damages, in all cases. It has that effect only where the Revenue has acted reasonably. As the majority of this court held in the substantive appeal, it is the structure of the legislation which compels the conclusion that a reasonable detention of goods will be unlawful if the goods detained were not actually subject to forfeiture. It will generally only be with hindsight that the Revenue will know for sure whether they have acted unlawfully or not, even where they have acted reasonably. There is a clear public interest in the Revenue, if it acts reasonably, not being liable for damages for the unlawful detention of goods pending a determination as to whether duty has been paid on those goods or not. The costs' rule can be similarly justified. This is especially so given that it is usually the failing of the taxpayer to keep proper records of its transactions which creates the uncertainty as to whether the appropriate taxes have been paid and which causes HMRC to detain the goods pending investigation in the first place. A rule which protects and benefits the HMRC only where they have acted reasonably is in my view a proportionate rule in all the circumstances.

45. In my judgment that alternative Convention argument touched on in submissions, namely that the rule infringes article 14 when read with article 1 protocol 1, is also doomed to fail. That submission also relies upon the alleged unfair discrimination. But article 14 only applies where the discrimination is on the grounds of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status." The only conceivable basis for saying that article 14 is engaged here is if the discrimination falls within the concept of "other status". The relevant status would have to be defined as the status of being "a litigant in dispute with the HMRC" since all such persons are potentially the subject of this discrimination. In my judgment, however broadly the

concept of "other status" might be said to extend, I do not see how it could possibly stretch to include that category of persons.

46. For these reasons, therefore, I would also reject the claim for costs.

Lord Justice Davis:

47. I agree with both judgments.