Neutral Citation Number: [2012] EWCA Civ 1741

Case No: A3/2012/0532

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Upper Tribunal Judge Bishopp
TCC/JR/05/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st December 2012

Before :

LORD JUSTICE RIX

LORD JUSTICE TOMLINSON
and
MR JUSTICE MORGAN

- -

Between :

Paul Daniel	**Appellant**
- and -	
The Commissioners for Her Majesty's Revenue and Customs	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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Philip Coppel QC, Keith Gordon and Ximena Montes Manzano (instructed by **Winston and Strawn London**) for the **Appellant**
Akash Nawbatt and **Christopher Stone** (instructed by **Solicitors Office, HMRC**) for the **Respondent**

Hearing date : 19 July 2012

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Judgment

Lord Justice Tomlinson :

1. The Appellant taxpayer challenges a case management decision made by Upper Tribunal Judge Bishopp on 12 January 2012. I should emphasise at the outset that nothing I say in this judgment is intended to express any view in relation to the merits of the underlying dispute between the taxpayer and HMRC. My observations are intended to be restricted to matters of case management.

2. On 8 December 2009 HMRC issued to the Appellant a determination to the effect that he had been resident and ordinarily resident in the UK during the tax year 1999/2000. On 21 December 2009 HMRC issued to the Appellant a "Discovery Assessment" to tax in the sum of £10,004,998 in respect of that year. HMRC concluded that the time limit for making a Discovery Assessment was extended by reason of negligent conduct of the taxpayer who should have known that his residence status was in doubt when completing his 1999/2000 tax return and in declaring himself non-resident.

3. It is the Appellant's case that he left the UK on 5 March 1999 in order to take up full time employment abroad. In March 2000 he sold shares in Morgan Stanley Dean Witter, by an associate company of which he had been employed before March 1999, thereby realising a very substantial gain. He accepts that he was resident and ordinarily resident in the UK in both the 1998/1999 and 2000/2001 years of assessment. His dispute with HMRC concerns the year 1999/2000 in which the disposal took place.

4. The Appellant requested a review of both decisions. By decision letter of 3 February 2011 an Inspector of Taxes announced that she had reviewed both decisions and had determined that they should be upheld.

5. The Appellant thereupon issued two sets of proceedings challenging the decisions. He issued a statutory appeal which falls within the jurisdiction of the First tier Tribunal. Separately, he issued proceedings in the Administrative Court seeking permission to proceed with a claim for Judicial Review of the decision of 3 February 2011, and thereby of the two underlying decisions. He contended that he had had a legitimate expectation that HMRC would apply to his case the provisions of its general guidance booklet, IR 20, published in October 1996, which sets out general guidance as to the approach to be taken to decisions concerning a person's residence status for tax purposes. He contended that HMRC had in his case failed properly to adhere to and to apply the relevant guidance.

6. On 3 August 2011 His Honour Judge Thornton QC, sitting as a Deputy Judge of the Administrative Court, acting pursuant to powers given by s.31A of the Senior Courts Act 1981, transferred the Judicial Review proceedings to the Tax and Chancery Chamber of the Upper Tribunal.

7. On 9 December 2011 there took place a combined case management hearing in respect of both the statutory appeal and the application for permission to proceed with the claim for Judicial Review. It was heard by Upper Tribunal Judge Bishopp sitting as both a judge of the Upper Tribunal and as a judge of the First tier Tribunal, of which he is as it happens President.

8. Upper Tribunal Judge Bishopp granted the Appellant permission to seek Judicial Review and there is no appeal against that decision.

9. Upper Tribunal Judge Bishopp was asked to stay the statutory appeal until after determination of the claim for Judicial Review. He declined to do so. Rather he stayed the claim for Judicial Review until 28 days after the release of the First tier Tribunal's decision in the statutory appeal, and gave directions intended to lead to a hearing of that appeal in the period May to July 2012.

10. It is against that latter decision that the Appellant now appeals, with permission of the Upper Tribunal Judge. Upper Tribunal Judge Bishopp considered that "The manner in which these Chambers should handle applications for Judicial Review when there is a related appeal against an assessment is unclear and of sufficient importance to warrant consideration by the Court of Appeal, and I accordingly give permission."

11. Judge Bishopp gave succinct reasons for his case management decision, as follows:-

> "2. The appellant, by Mr Philip Coppel QC, argued vigorously that he should be given permission, and that his judicial review application should be heard first. A judicial review hearing would take no more than two days, and could be determined on the facts as they are set out in the appellant's witness statement. The only question to be determined was whether, on those facts (which would be assumed to be correct for that purpose) the Commissioners had failed to apply their own published guidance, IR20, correctly. An outcome favourable to the appellant would compel the respondents to think again, and therefore make a fresh decision. This was the most economical and effective course.
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> 3. The respondents, through Mr Akash Nawbatt, argued equally vigorously that the judicial review application could not be decided on assumed facts, since the appellant had, as a necessary pre-condition, to show that he fell within the terms of IR20. That was an issue of fact which had to be determined after hearing live evidence; it could not be done on assumed facts when those facts were disputed. It was nothing to the point that the judicial review might take no more than two days on assumed facts; the matter simply could not proceed on assumed facts. A detailed enquiry into the facts could not be avoided and it was for the First-tier Tribunal to undertake that enquiry. Indeed, the Commissioners go further in arguing that I should not even give permission for judicial review since unless the appellant can show that the impugned decision was irrational (which he does not even attempt) his application is bound to fail.
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> 4. I was referred by both parties to observations of the Court of Appeal and the Supreme Court in *R (Davies) v Revenue and Customs Commissioners and R (Gaines-Cooper) v Revenue and Customs Commissioners* ([2010] STC 860 and [2011] STC

> 2249 respectively) about the sequence in which hearings should take place in cases of this kind. It does not seem to me that any of the judges was seeking to lay down a hard and fast rule. There will inevitably be some cases in which there is no dispute about any relevant fact, and others in which the facts are hotly disputed, and yet more in between. The appropriate course must inevitably be determined on a case-by-case basis.
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> 5. Assuming permission to seek judicial review is to be granted (a topic with which I shall deal shortly) I have come to the conclusion that the appropriate course in this case is for the tax appeal to be heard first. I am not unmindful of Mr Coppel's argument that a judicial review hearing would be shorter, which I am sure is correct provided there is no significant dispute about the facts. But I am persuaded that there is a significant factual dispute, which the Upper Tribunal will be unwilling to resolve itself, and that there is in consequence a real risk that, if I adopted Mr Coppel's preferred course, the Upper Tribunal would either be embarrassed by a factual dispute, or, having taken greater stock of its scale than I am able to do in the context of this application, feel obliged to revisit the order of proceeding and direct after all that the tax appeal should be heard first. There would be substantial wasted costs. I recognise that there are cogent arguments on both sides, but in balancing them on a pragmatic basis I am satisfied that the scales fall in favour of disposing of the tax appeal first."

12. I consider that Judge Bishopp came to entirely the right conclusion. Even had I not formed that view, I would still conclude that his decision falls well within the range of reasonable decision making and that it is not a decision with which this court should interfere – cf *G v G* [1985] 1 WLR 647. Notwithstanding Judge Bishopp's observation that the manner in which the Upper Tribunal should handle such applications is unclear, I consider that the judge correctly identified that there can be no hard and fast rule and that the appropriate course must inevitably be determined on a case by case basis.

13. At the conclusion of the hearing before this court on 18 July 2012 we announced that we would uphold Judge Bishopp's case management decision in the light of which the parties were able to agree amended directions with a view to a hearing of the statutory appeal by the First tier Tribunal in the period January to March 2013. My reasons for upholding Judge Bishopp's case management decision can be shortly expressed.

14. It is undesirable that I should stray too far into the merits of the underlying dispute. The gravamen of the complaint made by the taxpayer is that the impugned decision does not even mention IR 20 and that the decision-maker has instead applied sections 334 and 335 of the Income and Corporation Taxes Act 1988 which are, he submits, concerned with the common law rules of residence and ordinary residence. Since the current jurisprudence suggests that the First tier Tribunal, on a statutory appeal such as this, cannot give effect to public law principles, it follows, submits the taxpayer, that the enquiry in the First tier Tribunal will be of no relevance to the determination of the claim for judicial review. For that purpose, he suggests, no further findings of

fact are required – either HMRC has reached a lawful decision by application of IR 20 or it has not.

15. In my view the taxpayer takes too narrow a view of the ambit of the dispute between himself and HMRC. I can understand that from his point of view obtaining an order quashing the decisions would be a valuable result, but it would not without more resolve the issue whether the taxpayer has a further tax liability in respect of the year 1999/2000.

16. Paragraph 2.2 of IR 20 reads:-

> "If you leave the UK to work full-time abroad under a contract of employment, you are treated as not resident and not ordinarily resident if you meet all the following conditions
>
> - your absence from the UK and your employment abroad both last for at least a whole tax year
>
> - during your absence any visits you make to the UK
>
> - total less than 183 days in any tax year, and
>
> - average less than 91 days a tax year. (The average is taken over the period of absence up to a maximum of four years – see paragraph 2.10. Any days spent in the UK because of exceptional circumstances beyond your control, for example the illness of yourself or a member of your immediate family, are not normally counted for this purpose.)"

17. Thus in order to bring himself within the ambit of IR 20, the taxpayer needs a finding that he left the UK in order to work full time abroad under a contract of employment and that his full time employment abroad thereafter continued for at least a whole tax year. A similar point arises under paragraphs 2.7 - 2.9 of IR 20 which deals with "leaving the UK permanently or indefinitely". In *R (Davies) v Revenue and Customs Commissioners* [2011] 1 WLR 2625 it was held by the Supreme Court that an enquiry whether an equivalent finding relevant to paragraphs 2.7 - 2.9 is justified requires a multifactorial evaluation of the taxpayer's circumstances by reference to the ordinary law of residence and that the guidance in IR 20 does not allow for any less stringent test than that required by the ordinary law. The same may prove to be true of paragraph 2.2.

18. Much of the taxpayer's criticism of the determinations is directed towards the treatment by HMRC of long periods during which he was, he says, working in an office at his holiday home in St Tropez as part of his full time employment based in Brussels. During the year in question the taxpayer spent 106 nights at St Tropez. This is I suspect an unfair criticism since HMRC had been invited to consider the taxpayer's case upon the footing that he had left the UK in order to work full time in Brussels. However whether it is a well-founded criticism or not, the fact remains that it has, for the time being, been determined by HMRC (i) that the earliest date at which

the taxpayer may have left the UK for full time work abroad was 20 April 1999 (which would be too late for the tax year 1999/2000) and (ii) that the employment taken up in Brussels was not full time. The Upper Tribunal exercising its judicial review jurisdiction may be in a position to determine that in reaching those conclusions HMRC has or has not properly applied IR 20, but if it reaches the conclusion that IR 20 has not been properly applied, it will not be in a position to substitute therefor findings of fact which will enable the taxpayer to bring himself within IR 20. HMRC has made no finding as to what the taxpayer was doing in St Tropez other than that he was not, during those periods, working full time in Brussels. HMRC accepts that if the Appellant succeeds in proving that he was employed full time abroad under a contract of employment throughout the relevant tax year, he is likely to be found to be non-resident at common law and HMRC will, in any event, treat him as non-resident under paragraph 2.2. However such a finding can only be made in the First tier Tribunal and not in the Upper Tribunal exercising its judicial review jurisdiction.

19. It is of course the case that the judicial review claim could be dealt with much more quickly and cheaply than the statutory appeal. However resolution of the judicial review claim will not dispose of the dispute between the taxpayer and HMRC. If the taxpayer loses his judicial review claim, he will then have to pursue his statutory appeal. If the taxpayer wins his judicial review claim, HRMC will have to make its determination afresh, possibly with the guidance of the Upper Tribunal as to how IR 20 is to be applied, on the question whether the taxpayer had made himself non-resident before 6 April 1999 and whether he was in full time employment abroad after that date. If such determinations when made in accordance with IR 20 are adverse to the taxpayer, he will again have to appeal.

20. If on the other hand the taxpayer wins his statutory appeal, that seems likely to be conclusive of his status and of his liability to pay the tax in question. If he loses the appeal, he can if he wishes proceed with the judicial review. Were he then to win his judicial review claim, a fresh determination would be made in the light of the findings of fact made by the First tier Tribunal.

21. Mr Philip Coppel QC for the taxpayer submitted that it would be wrong to make a procedural decision upon the basis that if the judicial review claim succeeds, a fresh determination will be to the same effect. I agree with that, and in any event it is inherent in the grant of permission to pursue the judicial review claim that Judge Bishopp has not taken that approach. Standing back from the dispute however, it might be thought unrealistic to imagine that the taxpayer will now secure from HMRC a determination in his favour without there first taking place the sort of forensic exercise which the statutory appeal will in any event involve – that is to say disclosure of documents and the giving and testing of evidence,

22. There is an underlying factual dispute between the taxpayer and HMRC which can only be conclusively resolved by the First tier Tribunal. Proceeding first with the judicial review claim risks delay and the ultimately fruitless expenditure of costs. The statutory appeal has the potential finally to resolve the dispute concerning the taxpayer's residence status for the relevant year, and thus his liability to pay further tax. It was these reasons which persuaded me that it is appropriate that the judicial review claim should be stayed whilst the statutory appeal proceeds to a determination.

23. This was also the course taken by Kenneth Parker QC, as he then was, sitting as a Deputy High Court Judge in *R (On the application of Hankinson) v Revenue and Customs Commissioners* [2009] STC 2158. In giving his decision he observed:-

> "In the judicial review proceedings it is essential that the fact of full-time employment abroad is established by the applicant, either as a finding by the tribunal hearing the case or by agreement. That is a condition on qualification laid down by IR 20. At present, according to the papers before me, HMRC are not agreeing that fact."

We were told that in that case the claim for judicial review was withdrawn after the facts had been found by the First tier Tribunal. In *R (on the application of Lower Mill Estate Ltd and Conservation Builders v HMRC* [2008] BTC 5743, Blake J recognised that it was the normal course of events for a statutory appeal to precede a judicial review hearing, with necessary findings of fact made in the more appropriate fact finding jurisdiction. At paragraph 33 of his judgment Blake J observed that, in that case, the findings of fact might be decisive to a determination of whether there was any legitimate expectation at all; without the necessary facts being found, the court hearing the judicial review claim "would be moving somewhat blindly in a sensitive field of public law administration". I do not say that that would always be the case. The position will be different where the Judicial Review claim requires no resolution of disputed facts and has the potential finally to dispose of the underlying dispute between the taxpayer and HMRC. Lord Wilson thought that that was the position in relation to the case of Mr Gaines-Cooper – see *R (Davies) and Gaines-Cooper v Revenue and Customs Commissioners* [2011] 1 WLR 2625 at 2630, paragraph 6. Had Mr Gaines-Cooper's contention in his claim for judicial review prevailed, to the effect that he had only to show that he had kept his day count in the UK below 91 days, the ten day hearing of his appeal before the Special Commissioners (which would now be heard by the First tier Tribunal Tax Chamber) would have been unnecessary. Beyond this, I do not think that it is possible to give useful guidance. Despite his own protestation as to the lack of clarity concerning the correct approach, Upper Tribunal Judge Bishopp seems to me to have approached his task in exactly the manner which I would have expected, and in the manner which seems to me appropriate.

Mr Justice Morgan :

24. I agree.

Lord Justice Rix :

25. I also agree.