



Appeal number: UT/2014/0068

5 *EXCISE DUTIES – duty suspended movements of goods – movements not*
 correctly discharged - First-tier allowed appeal of guarantor of movements –
 Commissioners’ appeal allowed by Upper Tribunal on a casting vote of the
 presiding member – application by guarantor to set aside Upper Tribunal
10 *decision - presiding member duly selected – application dismissed*

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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THE COMMISSIONERS FOR HER MAJESTY’S Appellant
REVENUE & CUSTOMS

- and -

SDM EUROPEAN TRANSPORT LTD Respondent

TRIBUNAL: MR JUSTICE BIRSS

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Sitting in public in the Rolls Building on 19 April 2016

25 Jessica Simor QC and Isabel McArdle, instructed by the General Counsel and
 Solicitor to HM Revenue and Customs, for the appellant

Mr Richard Barlow, representative, for the respondent

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DECISION

1. This case relates to duty of some £6.3 million which HMRC contends must be paid by SDM as guarantor. The liability arises from the transport of various consignments of spirits by or on behalf of SDM. Duty on the goods was suspended but in each case, probably involving fraud by a Belgian customs official who has now been convicted and imprisoned, the goods were diverted and no duty paid on them. HMRC contended that under the relevant rules SDM was liable to the duty.

2. SDM was assessed for duty and appealed to the First Tier Tribunal. The FTT heard the evidence and gave its decision in March 2011, in favour of SDM. On appeal by HMRC the Upper Tribunal sitting as a panel of two judges decided the case should be remitted to the FTT for failure to give adequate reasons. However by then the judge of the FTT who had heard the evidence had retired and was no longer able to hear it. A differently constituted FTT dealt with the matter on paper and also found in favour of SDM. HMRC appealed to the Upper Tribunal, consisting of Judge Bishopp and Judge Cannan. The judgment of the Upper Tribunal is [2015] UKUT 0625 (TCC). As the judgment explains at paragraphs 28 to 30, the judges were divided as to the outcome. Judge Bishopp exercised his casting vote as the presiding member of the tribunal pursuant to Article 8 of the First-tier and Upper Tribunal (Composition of Tribunal) Order 2008/2835 (“the CoT Order”) and allowed the appeal.

3. SDM wrote to the Chamber President about the appointment of Judge Bishopp as presiding member and received a reply from Mrs Justice Rose in a letter dated 30th November 2015. The Chamber President when the matter was heard in June 2015 had been Warren J but by November 2015 Rose J had succeeded Warren J as Chamber President. The letter explains how the judges were allocated to the case. Warren J directed the tribunal staff to allocate a full time tribunal judge to the case and then, in consultation with that judge, to allocate a second part time or fee paid judge. The full time judge allocated was Judge Bishopp. The letter also explains that there is a convention operated in the tribunal that the senior judge is the presiding member. Accordingly Judge Bishopp was the presiding member and had a casting vote.

4. Following the letter from Rose J, SDM applied to set aside the Upper Tribunal decision under Rule 43 of the Tribunal Procedure (Upper Tribunal) Rule 2008. The representatives are the same as were before the Upper Tribunal. SDM is represented by Richard Barlow and HMRC is represented by Jessica Simor QC and Isabel McArdle. Mr Barlow had appeared for SDM in the first FTT hearing as a practising barrister but since then he has retired. Despite retiring Mr Barlow has continued to represent SDM in this matter and appeared before me pro bono. I am grateful to him for his assistance in this application.

5. There are two requirements which must be satisfied under r43 before a decision may be set aside. It must be in the interests of justice to do so (r43(1) (a)) and one of the conditions in r43(2) must be satisfied. In this case the relevant one is in r43(2)(d), that there must have been some “other” procedural irregularity in the proceedings.

6. The procedural irregularity alleged to exist is about Judge Bishopp's status as presiding member. SDM submits that there was no effective appointment or selection of Judge Bishopp as the presiding member. SDM also submits that rule 8 of the CoT Order which provided for a casting vote, is ultra vires. SDM submits that the reason it is in the interests of justice to set aside the decision is not least because out of six judges who have heard this case, only one (Judge Bishopp) held in HMRC's favour.

7. SDM submits that if it prevails in its application the outcome should be that the appeal is dismissed, on the basis that if SDM's submissions about the selection of Judge Bishopp are correct neither judge had a casting vote, and so since the two judges were divided the appellant had failed to satisfy the Upper Tribunal to allow the appeal.

8. HMRC submits that the application should be dismissed. The manner in which the tribunal was constituted was entirely regular, including Judge Bishopp's status as the presiding member of the tribunal. He had a casting vote and was entitled to exercise it. The relevant parts of the CoT Order which provide for a casting vote are not ultra vires but in any case, the Upper Tribunal has no jurisdiction to quash the statutory instrument. To quash it would require an application for judicial review, which has not been made. So the application should be dismissed. Even if there has been a procedural irregularity of some kind, any error is a technical one since Judge Bishopp would inevitably have been the presiding member. So the outcome would have been the same in any event and it is not in the interests of justice to set aside the decision. Finally, if SDM's application to set aside was well founded, the correct result would be for the Upper Tribunal to remake the decision. That is what rule 43(1) provides for. That would require the matter to be re-heard.

25 *Assessment*

9. In my judgment HMRC is correct that the Upper Tribunal has no jurisdiction to quash an instrument like the CoT Order. SDM did not suggest otherwise. So before the Upper Tribunal the CoT Order applies as it stands and therefore, by article 8, the presiding member has a casting vote if the votes are equally divided. A challenge to the *vires* of article 8 has to be brought by judicial review. It has not been. Mr Barlow suggested that it was unreal to think that SDM should have brought a judicial review before the appeal was called on. I do not need to be concerned with that, however I will add the following on the merits of the *vires* question, since it was argued.

10. In my judgment there is, at the lowest, a strong case that power to make the order exists in the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007). The key provisions are Paragraph 15 of Schedule 4 and Section 145. Paragraph 15 relates to the composition of tribunals. It is the section which was mentioned in the letter of 30th November from Rose J. Paragraph 15(1) expressly provides that the Lord Chancellor may make provision for determining the number of members of the Upper Tribunal (or FTT) who are to decide the matter. Mr Barlow correctly pointed out that neither this sub-section nor any other part of paragraph 15 refers expressly to a casting vote. However, as HMRC pointed out, section 145 (1) confers on the Lord Chancellor a power to make "*any supplementary, incidental, consequential, transitory, transitional or saving provision he considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this*

Act.” HMRC submitted that this was very wide and an ample basis for the provision about a casting vote.

11. SDM relied on two cases and a textbook:

5 (1) **Daymond v South West Water Authority** [1976] AC 609 per Viscount Dilhorne at 644-C to 645-A. In that case the question was the ambit of s245 of the Local Government Act 1972. That section was in similar terms to s145(1) of the TCEA 2007. Viscount Dilhorne said:

10 “In that section ‘supplementary’ means, in my opinion, something added to what is in the Act to fill in details or machinery for which the Act itself does not provide – supplementary in the sense that it is required to implement what was in the Act.”

15 (2) **R v Customs & Excise Commissioners, ex parte Hedges & Butler Ltd** [1986] 2 All ER 164 per Mustill LJ (as he then was) at p171 c-j. There Mustill LJ applied Viscount Dilhorne’s statement quoted above and rejected a submission that the word “supplementary” in a provision akin to s145(1) and 245(1) conferred sufficient authority to create a regulation which conferred powers which went beyond those contemplated by the relevant primary legislation.

20 (3) Craies on Statute Law (10th Ed 2012) paragraph 3.4.10. This addresses the scope of express powers to make incidental or supplemental provision. It cites the two cases mentioned and proposes that “supplemental” mean something along the lines of required to supplement the provisions of the instrument in order to make it work, while “incidental” means something that is a necessary or expedient incident of the principal business of the instrument,
25 something that is required to make it work.

12. HMRC submits that these two authorities are not on point because the power in s145(1) is couched in wider terms than the powers considered in those decisions. I do not have to address that because it seems to me that this case would satisfy Viscount Dilhorne’s test anyway. Paragraph 15 of Sch 4 of the CTEA 2007 expressly provides
30 that the Lord Chancellor will make provision for the number of members of the tribunal. SDM, rightly in my view, does not challenge article 3 of the CoT Order. This provides that the number of members in the Upper Tribunal may be one, two or three. It is a provision which was plainly the result of a proper exercise of the power conferred by Paragraph 15. So a proper exercise of the relevant power provides for
35 tribunals with an even number of members. With two members, the problem of what to do if the two members are divided naturally and inevitably presents itself. Perhaps the appeal should be reheard, which would be very unwelcome, or perhaps, as SDM submit, the appeal should fail in such a case. Note that in analogous circumstances in the Court of Appeal s54(5) of the Senior Courts Act 1981 provides for a rehearing on
40 the application of a party. In any event something has to be done to provide for the possibility of a division between two members. Provision for a casting vote by the presiding member is an obvious and practical way of dealing with it. Such a provision fills in a detailed mechanism for which the Act itself does not provide but which is required to implement what was in the Act. It is something required to make
45 the primary business of paragraph 15 work in a particular circumstance. SDM’s

argument was that providing for a casting vote was not a necessary way of dealing with a two member panel and so the provision was *ultra vires* following Viscount Dilhorne's approach. That is much too narrow. No particular way of addressing the issue of a two member panel is necessary in that narrow sense but what is necessary is that something has to be done. In my judgment if a proper exercise of a power creates a situation for which some provision ought to be made then providing for it in some sensible way is a proper exercise of a power to make a supplementary provision relating to that power.

13. In any event it is very hard to see how the Lord Chancellor could be said to have acted unreasonably in considering it necessary or expedient to provide for this in order to give full effect to paragraph 15.

14. Therefore in my judgment SDM lost nothing by not bringing an application for judicial review. I believe it would have failed.

15. I turn to consider the status of Judge Bishopp in this case. Article 8 of the CoT Order provides for a casting vote to be exercised by the presiding member. SDM submits in this case Judge Bishopp was not properly selected as the presiding member and so had no casting vote to exercise.

16. The place to start is article 7 of the CoT Order. It provides as follows:

20 "The Senior President of Tribunals must select one of the members (the presiding member") to chair the tribunal."

17. SDM submits that this did not occur in the present case; all that happened in terms of selection of members to deal with the appeal was that, as I have explained already, Warren J directed the tribunal staff to allocate a full time tribunal judge and the full time judge allocated was Judge Bishopp. The second judge, Judge Cannan was then allocated in consultation with Judge Bishopp. SDM submits none of this could amount to the selection of Judge Bishopp as the presiding member. SDM does not challenge the authority of the administrative staff to allocate an individual judge or judges to a case, its argument is that the administrative staff did not have the power to select Judge Bishopp as the presiding member. So the two judges had jurisdiction to hear the appeal to the Upper Tribunal but neither of them was the (or a) presiding member.

18. At the hearing there was some debate about whether and to what extent powers had or could have been delegated to the staff and whether, if they had been, other relevant provisions had been complied with. I do not have to get into that issue because it is not relevant. It is not suggested by HMRC nor is it suggested in the letter from the Chamber President, Rose J, that the staff selected Judge Bishopp as the presiding member. The case put against SDM is that there is a convention in the Upper Tribunal that the most senior judge is the presiding judge. That is the sole basis on which the point was argued. SDM's argument is that the convention is not sufficient to comply with article 7 and I will address that below. SDM did not take a point on the source of the convention itself or the basis for it and so the letter of 30th November 2015 did not need to explain its origin. The convention has clearly been

approved by the Chamber President, I infer acting as the delegate of the Senior President of Tribunals under s8 of the TCEA 2007.

5 19. SDM argued that not all judges of the Tribunal have the same expertise in respect of each of the taxes which the Tribunal deals with and only a small number have any extensive experience of fact based litigation (which this is). Therefore the role of the Senior President (or Chamber President) in selecting suitable judges for particular cases is important and is clearly intended to be exercised by the Senior President (or Chamber President) in person. The brackets here reflect the fact that the argument was expressed by reference to the Chamber President whereas in fact the article refers
10 to the Senior President. In the paragraphs below I will use the term Senior President to refer to the Senior President or the Chamber President acting as his delegate.

15 20. I agree that the experience of judges will vary and I agree the selection of a presiding member is an important function. However if SDM's argument was correct then the Senior President would be prohibited by article 7 from operating a convention of the kind which is in place. If SDM is correct then in every case the Senior President would be required to actively name a presiding member for that case before the appeal is heard.

20 21. In my judgment article 7 does not have the meaning contended for by SDM. A convention by which the senior judge is the presiding member is a workable and sensible way of putting article 7 into practice. As a result of the convention, one of the members is selected to chair the tribunal. The fact that there is no active naming of the presiding member by the Senior President does not matter. I can think of no reason why the Order should be interpreted as demanding that such a cumbersome process has to be undertaken in every case. The fact that in a particular case the
25 Senior President might appoint a different member as the presiding member does not undermine the convention and does not indicate it is contrary to article 7.

30 22. It is not right to suggest, as SDM does appear to, that it was the staff who selected Judge Bishopp as the presiding judge. On the instructions of Warren J, the case was allocated to a panel of judges of appropriate availability and seniority. Judge Bishopp was the senior judge and so, in accordance with the convention, Judge Bishopp was the presiding member.

35 23. In my judgment what took place overall meant that Judge Bishopp was lawfully selected as the presiding member for the appeal and no procedural irregularity occurred. Rule 43(2)(d) is not satisfied and the application is dismissed.

MR JUSTICE BIRSS

**UPPER TRIBUNAL JUDGE
RELEASE DATE: 25 April 2016**

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