

DECISION NUMBER: 17739

*PRACTICE – Civil penalty proceedings – Human rights – Disclosure of Commissioners' material – Disclosure of unused material – Implications of classification of civil penalties as "criminal charges" – Application of article 6.3 of ECHR – Appellants' applications for immediate disclosure prior to being required to lodge their Defence – Applications refused*

LONDON TRIBUNAL CENTRE

MR Y L LAI & MRS M Y LAI

Appellants

-and-

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

Tribunal: STEPHEN OLIVER QC (Chairman)

Sitting in public in London on 7 May 2002

Andrew Young, counsel, instructed by Vincent J Curley, Consultants, for the Appellants

Hugh McKay, counsel, instructed by Solicitor for the Customs and Excise, for the Respondents

## DECISION

1. This is an application by the Lais, the Appellants in a civil penalty appeal, for disclosure of material. The application refers to it as "unused material needed to enable the Appellants to prepare their defence."

2. The Commissioners' Statement of Case and List of Documents were both served in June 2001. The Lais, through their representative, asked to inspect the documents so listed and copies were provided under cover of a letter dated 12 October 2001. On 15 October the Commissioners received a letter from the Lais' representative seeking specific disclosure of various documents and information, referred to in that letter as "unused material". The Lais then requested an extension of time in which to serve a Defence, saying that the unused material was needed to enable them to prepare their defence.

3. The Commissioners served a Notice of Objection on the Tribunal dated 3 December 2001, their grounds being (i) that the request was a "fishing expedition", (ii) that the Commissioners had disclosed on their List all documents in their possession relevant to the determination of the appeal and (iii) the lack of explanation given for the requests made it unclear in any event why such material would be necessary for the preparation of a Defence.

4. The case for the Commissioners as presented in the Statement of Case refers to the following:

- The Lais have been registered since 1984. During the period to which this appeal relates, they have been operators of a restaurant and of takeaway outlets at three establishments.
- The Commissioners decided to investigate the establishments because declared outputs appeared to be low for the size and turnover of business.
- An invigilation exercise was conducted on 29 June 1999, test meals were taken, security videos were examined and original till rolls were compared with declared till rolls. It appeared to the Commissioners that outputs had been undervalued.
- The same day Mr Lai agreed for an invigilation exercise to be carried out and expressed a willingness to co-operate and make a written disclosure.
- Following Mr Lai's disclosure, the Commissioners concluded that for the purpose of evading tax the Lais had failed to disclose the full amount of output tax on their returns and that their conduct involved dishonesty.
- On 12 May 2000 the Commissioners assessed the Lais to £136,081 of tax for periods from 1994 until 1999 and issued a penalty notice under VAT Act 1994 section 60 for £40,813.

5. The Statement of Case identifies six "matters and facts" relied on to show evasion and dishonesty. These are –

- the underdeclaration of £136,081,
- genuine till rolls found among seized records showed significant suppressions of meals when compared with declared till rolls,
- recovered till slips showed actual takings as higher than declared takings,
- observations by customs officers showed suppressions of sales,
- video tapes taken on 29 June 1999 indicated suppression of sales for five days and
- admissions made and a voluntary declaration by the Lais.

6. The Commissioners' List sets out 32 documents that they intend to produce at the hearing. These are offered as available for inspection. They cover –

- officers' notes, unspecified,
- VAT returns,
- remittance advice,
- summary of trading activities and 1992 report on visit,
- summary of test purchases and observed meals,
- 13 letters through and from the Commissioners plus enclosures,
- till rolls,
- video tape and
- 12 sets of officers' notes relating to their activities on particular days.

7. The Lais in their notice of appeal admitted that there had been an underdeclaration but they disputed that the suppression was at the level alleged by the Commissioners. They contended that the methodology used by the Commissioners to calculate the arrears was flawed. On the basis that the section 60 penalty was to be regarded as a "criminal charge" for purposes of article 6 of the Convention on Human Rights, the Lais contended that any unlawfully obtained evidence should not be adduced before the Tribunal.

### **The Lais' arguments based on the Tribunal Rules**

8. The Lais, through Mr Andrew Young, argued at the present hearing that the information listed in their Application and set out in the Appendix to this Decision is required in order to enable them to prepare their defence properly. They say that the evidence obtained from observations may prove, as in some appeals in the past it has proved, unreliable. Hence the request for items 1–6 which relate to test meals evidence, observation logs and invigilation sheets. They say they need details of the methodology and calculations (other than

those referred to in the Commissioners' list of documents) determining their tax liability (item 8). Generally, they claim, they need all available information that will enable them to test the reliability of the Commissioners' evidence, e.g. internal instructions and details of criminal and disciplinary offences committed by the witnesses for the Commissioners (item 10).

### **Conclusions on the Lais' arguments based on the Tribunal Rules**

9. Before addressing the underlying human rights arguments presented by Andrew Young for the Lais, I should deal with the Lais' request by reference to the existing rules found in the VAT Act and the Tribunals Rules. These are set out in some detail in the Tribunal's decision in *Nene Packaging Ltd & Others v Customs and Excise Commissioners* (released on 18 August 2001). The application in that case (a section 60 penalty appeal) had, as here, been for immediate disclosure of so-called "unused material". It was said that the appellants in those appeals were entitled to this at or before the time of the lodging of the Statement of Case because it was necessary under article 6 to ensure a fair trial. The tribunal reviewed the rules and concluded that the existing rules were adequate to ensure a fair trial. The procedure for providing a list of documents at the time when the Commissioners' Statement of Case was lodged sufficiently enabled the Appellants to understand "the nature and cause of the accusation against them" (article 6.3). Once the issues were identified (usually following the service of his defence by the appellant in question) the parties were able to seek disclosure under rule 20 of all further documents that were seen to be relevant to the issues; such further documents could, the tribunal concluded, include relevant "unused material".

10. On this aspect of the case (and without going into the human rights points not already addressed in *Nene Packaging*) I start by restating some basic features of procedure.

11. Rule 7(1)(a) of the Tribunals Rules requires the Commissioners to serve a statement of case setting out "the matters and facts on which they rely" for the making of the penalty assessment and (when also disputed) the making of the assessment for the tax alleged to have been evaded by the same conduct. (On 21 June 2001 the Commissioners, as already noted, served their statement of case accompanied by a list of 32 categories or documents.)

12. In the normal course of events, and in the absence of this application (if successful), the next step in the proceedings would be for the Lais to serve their defence setting out the matters and facts on which they rely for their defence : rule 7(1)(b). Subject to any protection against a self-incrimination (afforded on the strength of the "criminal charge" limb of article 6), the Lais will at that stage firm up on the issues between them and the Commissioners. They will deny or not admit and, where appropriate, they will admit the relevant parts of the Statement of Case. To the extent that they set out to prove positively that their original records and returns were accurate, the information will or should be within their own knowledge or possession. To the extent that the "matters and facts" referred to in the Statement of Case and the Commissioners' List of

Documents are or may be disputed, the Defence will deny these or not admit them. There again the reasons for denial or non-admission will come from the Lais' own knowledge. If they think the accuracy of the observations or the invigilations are wrong they can say so in their Defence and the Commissioners will then be put to proof. The same goes for the Commissioners' own calculations and methodology on which they are based. The Defence will identify the issues as they are seen by the Lais and their advisors. The Commissioners and the Tribunal will then know what is going to be relevant and why it is thought to be relevant.

13. At that stage rule 7(1)(c) enables the Commissioners to serve a reply on the Lais. The terms of rule 7(1)(c) place a broad obligation on the Commissioners as follows:

"(c) The Commissioners may within 21 days of the date of notification of such defence serve at the appropriate tribunal centre a reply to a defence and shall do so if it is necessary thereby to set out specifically any matter or any fact showing illegality, or

- (i) which they allege makes the defence not maintainable; or
- (ii) which, if not specifically set out, might take the appellant by surprise; or
- (iii) which raises any issue of fact not arising out of the statement of case."

14. Then comes the lodging of witness statements. These will refer to all documents relied on including ones not already disclosed in the List of Documents already lodged.

15. I turn now to examine the contents of the Application for Disclosure. Items 1, 3, 4 and 8 will be covered by the officers' notes (in the List of Documents) and by the witness statements of the officers involved in the observations, the test meals and the invigilation exercises. To the extent that they have not yet been disclosed they will be disclosed either as exhibits to the witness statements or following a specific request disclosure made under rule 20(3) of the Tribunals Rules. Mr McKay, as I noted him, indicated that item 9 would also be disclosed. So far, therefore, the Lais can expect disclosure in due course. If, as is likely, a pre-trial review will be held after the service of the Defence and the Reply (if any), the Tribunal will be in a position to set up a time-frame to cover matters such as the lodging of witness statements and exhibits and further disclosure so as to provide the Lais with sufficient time to prepare their case to best effect.

16. Passing on to items 2, 5, 6 and 7, these all relate to internal instructions given to customs officers regarding test eating, observation logs, invigilations and interview procedures. Nothing in the Notice of Appeal and nothing accompanying the application indicates why they are regarded as relevant. The only clue is that the information obtained at the interview may have been may have been obtained unlawfully. The information that items 2, 5 and 6 refer to is

information which will normally be taken into account in the best of judgment exercise required by section 73. The fact that a penalty falling within the ambit of the criminal charge limb of article 6 is involved here does not make the information requested into information to which article 6.3 applies. It has no immediate relevance to the question of whether the Lais have been dishonest. It is not information that informs them of the nature and cause of the accusation against them. The information in item 7 may well go to the questions of whether an admission made in the course of an interview is to be excluded or given limited evidential weight. If it has become apparent that this information is a necessary "facility for the preparation of (the Lais') defence" (article 6.3), the tribunal will make the required direction. But at present there is no positive suggestion that it is.

17. The Lais must, of course, have the opportunity to present their case. But until the issues have been identified the relevance or otherwise of the information comprised in items 2, 5, 6 and 7 will not be apparent. The time for determining their relevance will be, at the earliest, the lodging of the Lais' defence. If that challenges the accuracy of the information obtained by the observations, invigilations, test meals or interviews, the manner in which the relevant process was conducted and its conformity with standing instructions will be an issue. At that stage the Tribunal may, on application under rule 20(3), direct disclosure. At present the relevance or otherwise of that information is a matter of pure conjecture.

18. The same goes for the information contained in item 10. The Lais cannot allege a criminal offence against any particular customs officer unless they already have something in their own knowledge or possession upon which to base such an allegation. Moreover the criminal law disciplinary offence in question must be one that is relevant to the present issue. If the Lais propose to make any such allegation, they should do so at an early stage and certainly not later than the defence stage. The records relating to the particular officer may then be relevant. At that stage the tribunal will be able to form a view as to whether disclosure should be ordered. Issues of public interest immunity, confidentiality and rights to privacy will then arise. But at present the request for the information referred to in item 10 is a "fishing expedition".

19. The conclusion reached so far is essentially in line with the contentions of the Commissioners and it applies the principles set out in the decision of this tribunal in *Nene Packaging & Others*.

### **The Lais' contention that they have already been charged and convicted of a criminal offence**

20. I move on now to the Lais' other argument. This is based on the proposition that the Lais were charged, tried and convicted in the course of proceedings leading up to the making of the assessments and the issue of the penalty notices. These all took place, it is said, in violation of their rights as individuals facing criminal charges conferred by article 6. Thus, as I understand the argument, this tribunal should approach its appellate function by

determining the criminal charge against the Lais without regard to any unlawfully obtained evidence; and if it appears to the tribunal that the Commissioners failed to take account of all the information before them prior to issuing their disputed decisions, the appeal should be allowed. The tribunal rules must, it is argued, be read in a way that enables the tribunal to meet these objectives.

21. Mr Andrew Young's approach was to contend that the procedures contained in the VAT Act and the Tribunals Rules are not article 6 compliant. Nor do they conform with the principles of EC law which embody article 6. The tribunal should therefore give effect to the Lais' directly effective EC rights and order disclosure of the material. This follows from the proposition that those EC rights incorporate "fundamental rights" (see paragraph 4 of the Luxembourg Court decision in *International Handelsgesellschaft v Einfuhr und Vorratsstelle fur Getreide* [1970] ECR 1125. Paragraphs 2-4 of the judgment in the opinion of the Advocate General (Dutheil de Lamothe) at pages 1146-1147 establish that rights of a fundamental nature must be ensured to individuals under the Community legal system. Those rights in turn include article 6 rights : see the advice of the Advocate General (Geelhoed) in *Marks & Spencer Plc v Customs and Excise Commissioners* (Case C-62/00) who, at paragraph 76 observed that there is now an extensive body of case law in which the Court has held that human rights form part of the general principles of Community law.

22. Specifically, Mr Young argued, the Lais are to be regarded as having already been summarily charged and convicted, at first instance, of the offence of civil dishonesty which, for ECHR purposes, is a criminal charge (see *Customs and Excise Commissioners v Han* [2001] EWCA Civ 1040 and [2001] STC 1188). This happened in the course of the quasi-judicial process when the Lais were investigated by the Commissioners following which the penalty notice was issued. This step in the argument is based on *Adolf v Austria* (1982) 4 EHRR 313 where, in paragraph 89, the Strasbourg Court said:

"The prominent place held in a democratic society of the right to a fair trial favours a "substantive" rather than a "formal" conception of the "charge" referred to by article 6. It impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a "charge" within the meaning of article 6".

Article 6.2, it was argued, operated to preserve the presumption of the Lais' innocence at that first instance stage and the Lais should, also at that stage, have been afforded the other protections given by article 6.3. One of the rights that the Lais were denied at that first instance stage was "to be informed properly ... and in detail, of the nature and cause of the accusation against (them)". At that stage they were not given disclosure of the matters listed in the present application. The relevant information should, subject to the constraints of PII, have been supplied to the Lais. Failure to disclose at that first instance stage deprived them of a fair trial : see *Rowe and Davis v United Kingdom* (16

February 2002) and *Foucher v France* (1997) 25 EHRR 234. Once the Lais' trial has progressed to the appeal stage before the tribunal, the Lais must, it is argued, have disclosure of all the material sought in the Applications so as to enable them to prepare for the tribunal hearing and to present their "defence". In support of this Mr Young (for the Lais) points to the EC principles of "equivalence and effectiveness". To give the Lais equivalent protection to a taxable person being prosecuted before a criminal court, they should be allowed equivalent facilities of advanced disclosure. To be an "effective" protection of the Lais' rights, Mr Young argued that they should not be required to set out specific requests for documents when, at the time of making the application, it was impossible for them to know what documents existed.

### **Conclusions on Remaining Issues**

23. To what extent, if at all, can the steps leading up to the issues of the assessment and the penalty notice be regarded as the quasi-judicial process of charging and convicting the Lais of a criminal offence? It is well established that article 6, when speaking of a "fair trial", is concerned with the fairness of pre-trial proceedings, including investigation and the obtaining of evidence. See for example *R v Strafford Justices ex parte Imbert* [1999] EWHC 81 per Buxton LJ. But that does not, for purposes of article 6.1, make the investigatory stage part of the process in the determination of a criminal charge against the individual who has been issued with a penalty notice under section 60. Of course, the Commissioners have to act to best judgment when they raise an assessment and they have to act properly in an administrative law sense in the investigation and when they come to issue a penalty notice. Neither of these features, however, gives them the quasi-judicial function of charging and convicting the taxable person in question of a criminal offence as contended for by Mr Young.

24. In the first place, the Commissioners are not independent of the State for whom they are acting in the care and management of VAT. Investigating, assessing (under section 73), deciding whether to issue a penalty notice (under section 60) or to charge a person of a criminal offence (under section 72) are administrative functions conferred on the Commissioners by Parliament. The United Kingdom system (and I suspect the tax systems of all other EU countries) proceeds on the basis that those acts are administrative in nature. Liabilities, whether civil or criminal, will be determined by the appropriate tribunal or court. It is the determination of those matters, but not the earlier administrative activities, which engage the rights conferred by article 6.

25. Secondly, it is part of the tax system of the United Kingdom that there has to be an administrative act of assessment before there can be any liability to tax. When the Commissioners make the assessment, that act creates the liability. When the individual taxable person carries out his statutory obligation and files his own return, that likewise creates the liability. Both ways there are no "civil rights and obligations", for article 6 purposes, until the assessment has been made. By the same reasoning there will have been no "criminal charge" against a taxable person until the Commissioners have taken the appropriate

step of either issuing a civil penalty notice (under section 60) or instituting criminal proceedings under section 72. I recognize in this connection that *Adolf v Austria, supra*, requires me to examine the realities of the procedure in question in order to determine whether there has been a "charge" within article 6. Were I here concerned with an actual criminal charge made under section 72 in relation to the same circumstances as here give rise to the present section 60 proceedings, nothing would have led me to conclude that the Lais had been charged and convicted before the section 72 charges had been made against them. It will be irrational in the extreme if *Adolf* required me to conclude that there had been a criminal charge because the Commissioners had decided to go for civil penalties. I should also mention in this connection that even in *Rowe and Davies, supra*, the Strasbourg Court recognized (in paragraph 45) that even in criminal cases full disclosure is not required at the outset. It is not required until at least a formal charge has been laid.

26. For those reasons the Tribunals Rules and procedures do not have to be read as if the Lais had already been summarily charged and convicted at first instance and therefore as if the present appeal were truly appellate. Nothing therefore requires me to depart from the principles summarized in *Nene Packaging*. The material requested in the Application can be the subject of fresh applications for disclosure after the Defence has been lodged; the Tribunal will then deal with it (to the extent that it has not already been provided by the Commissioners) as an exercise in relevance.

27. Since *Nene Packaging* was issued the Court of Appeal's decision in *Customs and Excise Commissioners v Han* was published. This further reinforces my decision that the Lais' application is at least premature and in any event misconceived. The term "unused material" is, as the Commissioners argue in this case, inappropriate. It is, I agree, a term more relevant to criminal proceedings (in the strict sense) and does not properly describe the material being sought here (if indeed it exists). The judgment of Potter LJ (in paragraph 84) is in point:

"It by no means follows from a conclusion that article 6 applies that civil penalty proceedings are, for other domestic purposes, to be regarded as criminal and, therefore, subject to those provisions of the Police and Criminal Evidence Act 1984 and/or the codes produced thereunder, which relate to the investigation of crime and the conduct of criminal proceedings as defined by English law. Any argument as to whether and how far that Act and the codes apply is one which will have to be separately considered if and when it is advanced. In this context, however, the specific provisions of section 60(4) of the VAT Act 1994 are plainly of considerable importance. I would merely add my view that if matters are made clear to the taxpayer on the lines indicated in paragraph 77 above at the time when the nature and effect of the inducement procedure are also made clear to him (whether by Customs and Excise Notice 730 or otherwise), it is difficult to see that there would be any breach of article 6. It also seems to me that, even if the

Police and Criminal Evidence Act 1984 were applicable, it is most unlikely that a court or a tribunal would rule inadmissible under section 76 or section 78 any statements made or documents produced as a result, at any rate in the absence of exceptional circumstances. On the other hand, it follows from this decision that a person made subject to a civil penalty under section 60(1) of the VAT Act 1994 will be entitled to the minimum rights specifically provided for in article 6.3."

That being so, it does not necessarily follow that all aspects of a VAT appeal against a section 60 penalty should be treated as aspects of a criminal trial. The overriding test for the admissibility of evidence is, as I have already stated, that of relevance and in accordance with the Tribunals Rules the material has to be relevant to any question in issue in the appeal.

28. To conclude, the issues in this appeal appear to me to be (a) best judgment, (b) quantum and (c) dishonesty. The methods for disputing these issues are well known and are usually deployed on the evidence that the Commissioners choose to put before the tribunal in support of their case (the burden of proof being on them). Without more, I cannot tell how the matters asked for (even if they exist) and, in particular, training and/or instructions given to Customs officers are supposed to be relevant. Such instructions are properly to be kept confidential in any event, rather than disclosed.

29. In the light of those comments, I agree with the Commissioners that they have disclosed everything that they are obliged to disclose in the nature of the proceedings and, consequently, it cannot be said, without more from the Lais, that their right to a fair trial is likely to be breached without the disclosure that they seek.

30. I dismiss the application.