Neutral Citation Number: [2019] EWCA Crim 20

Case No: 201804447 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM WOOD GREEN CROWN COURT
HIS HONOUR JUDGE AUERBACH
T20180022

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 January 2019

Before:

Lord Justice Davis
Mr Justice Jay
and
His Honour Judge Dean Q.C. (sitting as a Judge of the Court of Appeal)

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Between:

R.	**Respondent**
- and -	
Biffa Waste Services Limited	**Appellant**

- -
- -

David Travers QC and Richard Banwell (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Appellant**
Sailesh Mehta and Howard McCann (instructed by **the Environment Agency**) for the **Respondent**

Hearing date: 18 December 2018

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Approved Judgment

Judgment Approved by the court for handing down

Lord Justice Davis:

Introduction

1. This is an appeal by the defendant company against a ruling given in the Wood Green Crown Court on 18 October 2018 at a hearing designated as a preparatory hearing. Leave to appeal against the ruling was granted by the Crown Court Judge (Judge Auerbach). The appeal involves consideration of the true meaning and effect of Article 36(1) of what may be called the Waste Shipment Regulation: Regulation (EC) No 1013/2006 ("the Regulation"). Notwithstanding the ostensible complexity of the points initially raised there perhaps has proved to be rather less to this appeal than first met the eye.

2. There were and are in this case very significant disputes as to the facts asserted by the prosecutor (the Environment Agency). In the ordinary way, those are matters for the jury. But an issue was raised as to what the law requires for the purpose of this prosecution satisfying the requirements of Article 36 of the Regulation. It was considered advantageous that that issue be resolved in advance so that the trial could, from the outset, proceed on the proper legal basis and so that there could be clearly identified just what the jury was to be required to decide.

3. In the result, the judge's ruling was essentially in accordance with the way in which the prosecution had argued that the case should proceed.

4. In the circumstances, the trial initially scheduled to start on 15 October 2018 has had to be adjourned, without a jury being sworn. At the conclusion of the hearing in this court, all three members were of the clear view that the appeal should be dismissed. We so announced, indicating that the matter should now be relisted for hearing in the Crown Court at the first practicable date. We stated that we would give our reasons in due course. These are those reasons.

Background facts

5. The defendant is a company in a substantial way of business, engaged in waste recycling. It operates from (among other facilities) a large recycling facility in Edmonton, North London. Part of its operations involves collecting mixed recyclable waste from households and sorting it for onward export or other use.

6. In May 2015, two waste consignments left the Edmonton facility. One consignment comprised two containers. The other consignment comprised five containers. The consignments were destined for two separate recovery facilities located in China. The total weight involved was some 175 tonnes. The consignments were described in the transportation documentation as "mixed waste paper"; we were told that such consignments would be further recycled and converted into paper products at the relevant facilities in China. It was and is common ground that if the consignments were indeed properly described as "mixed waste paper" then there was nothing unlawful involved.

7. The containers in question were to form part of a larger consignment of containers (448 in total) destined for China. In May and early June 2015 they were the subject of interception and examination at the port of Felixstowe by officials of the Environment

Agency. It is asserted that such examination revealed that these particular containers, or some of them, included significant contamination by items which were not mixed paper items at all; for example, soiled nappies and sanitary wear, sealed bags of excrement, clothing, food packaging, plastic bottles and so on. It is asserted that this was indicative of the consignments being mixed household waste rather than mixed paper waste: it being common ground that household waste, as such, could not be lawfully exported in this way to China. In due course, an indictment was preferred containing two counts of transporting waste contrary to Regulation 23 of the Transfrontier Shipment of Waste Regulations 2007.

8. As is well known, waste recycling not only has environmental benefits it also presents commercial opportunities as well. It was precisely the function of a waste recycling facility such as the one at Edmonton that it should process mixed recyclable wastes so as to extract separate, reusable wastes; be it paper or glass or plastics or metals and so on. There is an international market for such waste streams: China being one significant importer. The policy requirements for the effective sorting of mixed recyclable waste before any export are obvious: failure to do so would simply transfer to a third country the environmental and health and safety hazards inherent in undifferentiated waste.

9. In the present case, it is the contention of the prosecution that there had been inadequate and insufficient sorting such that the two consignments in question were not in truth paper waste (which could be legally exported) but were household waste (which could not be legally exported). It is the defendant's case that the waste in question had been the subject of rigorous mechanical and manual sorting processes at its Edmonton facility, which had achieved a high degree of separation of the relevant elements; and that any remaining degree of contamination was residual and minimal.

The legal context

10. The overarching principles and objectives in this field are to be found in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989. That Convention highlights the potential damage to human health and to the environment of hazardous wastes and their transportation. Likewise, various Articles in the Treaty on the Functioning of the European Union stress the importance of environmental protection.

11. The Regulation itself is designed to further these objectives, as various of its recitals spell out. Of particular specific relevance for present purposes is Recital (28) which provides as follows:

> "It is also necessary, in order to protect the environment of the countries concerned, to clarify the scope of the prohibition of exports of hazardous waste destined for recovery in a country to which the OECD Decision does not apply, also laid down in accordance with the Basel Convention. In particular, it is necessary to clarify the list of waste to which that prohibition applies and to ensure that it also includes waste listed in Annex II to the Basel Convention, namely waste collected from households and residues from the incineration of household waste."

Recital (37) specifically provides for the adoption of Annexes.

12. Article 2 of the Regulation contains various definitions. "Environmentally sound management" is defined to mean:

> "… taking all practicable steps to ensure that waste is managed in a manner that will protect human health and the environment against offences which may result from such waste."

13. Article 18 imposes certain requirements as to the provision of specified information to categories of waste which is intended to be shipped, as identified in Articles 3(2) and (4). Those categories extend to waste listed in Annex III or IIIB, over a certain weight.

14. Article 36 (which is central for present purposes) relates to exports to non-OECD decision countries. It is common ground that China is such a country. Article 36(1) provides as follows:

> "**Exports prohibition**
>
> 1. Exports from the Community of the following wastes destined for recovery in countries to which the OECD Decision does not apply are prohibited:
>
> (a) wastes listed as hazardous in Annex V;
>
> (b) wastes listed in Annex V, Part 3;
>
> (c) hazardous wastes not classified under one single entry in Annex V;
>
> (d) mixtures of hazardous wastes and mixtures of hazardous wastes with non-hazardous wastes not classified under one single entry in Annex V;
>
> (e) wastes that the country of destination has notified to be hazardous under Article 3 of the Basel Convention;
>
> (f) wastes the import of which has been prohibited by the country of destination; or
>
> (g) wastes which the competent authority of dispatch has reason to believe will not be managed in an environmentally sound manner, as referred to in Article 49, in the country of destination concerned."

15. Annex III to the Regulation relates to Green Listed Waste, the list originating from the OECD Decision, Appendix 3:

> "**LIST OF WASTES SUBJECT TO THE GENERAL INFORMATION REQUIREMENTS LAID DOWN IN ARTICLE 18**
>
> **('GREEN' LISTED WASTE)**
>
> Regardless of whether or not wastes are included on this list, they may not be subject to the general information requirements laid down in Article 18 if they are contaminated by other materials to an extent which

(a) increases the risks associated with the wastes sufficiently to render them appropriate for submission to the procedure of prior written notification and consent, when taking into account the hazardous characteristics listed in Annex III to Directive 91/689/EEC; or

(b) prevents the recovery of the wastes in an environmentally sound manner.

Part 1

The following wastes will be subject to the general information requirements laid down in Article 18:

Wastes listed in Annex IX to the Basel Convention ([2]).”

Footnote (2) explains that Annex IX to the Basel Convention is listed in the Regulation as Annex V, Part 1, List B.

16. Annex V to the Regulation provides at the outset as follows:

“**WASTE SUBJECT TO THE EXPORT PROHIBITION IN ARTICLE 36**

Introductory notes

1. This Annex applies without prejudice to Directives 91/689/EEC and 2006/2/EC.

2. This Annex consists of three parts, Parts 2 and 3 of which apply only when Part 1 is not applicable. Consequently, to determine whether specific waste is listed in this Annex, an initial check must be made to ascertain whether the waste is listed in Part 1of this Annex, and, if it does not, whether it is listed in Part 2, and, if it does not, whether it is listed in Part 3.

   Part 1 is divided into two sub-sections: List A lists wastes which are classified as hazardous by Article 1(1)(a) of the Basel Convention, and therefore covered by the export prohibition, and List B lists wastes which are not covered by Article 1(1)(a) of the Basel Convention, and therefore not covered by the export prohibition.

   Thus if a waste is listed in Part 1, a check must be made to ascertain whether it is listed in List A or in List B. Only if a waste is not listed in either List A or List B of Part 1, must a check be made to ascertain whether it is listed either among the hazardous waste listed in Part 2 (i.e. types of waste marked with an asterisk) or in Part 3, and if this is the case, it is covered by the export prohibition.

3. Wastes listed in List B of Part 1 or which are among the non-hazardous waste listed in Part 2 (i.e. wastes not marked with an asterisk) are covered by the export prohibition if they are contaminated by other materials to an extent which
   (a) increases the risks associated with the waste sufficiently to render it appropriate for submission to the procedure of prior written notification

and consent, when taking into account the hazardous characteristics listed in Annex III to Directive 91/689/EEC; or

(b) prevents the recovery of the waste in an environmentally sound manner."

17. In Part 1, List B (which corresponds to Annex IX of the Basel Convention) there is included item B3020, described as follows:

> "Paper, paperboard and paper product waste."

18. In Annex V, Part 3, there is included as hazardous waste item Y46, which is thus described:

> "Waste collected from households(2)."

Footnote (2) states: "Unless appropriately classified under a single entry in Annex III".

19. Domestic effect was given to the Regulation by the Transfrontier Shipment of Waste Regulations 2007: SI 2007/1711 ("the 2007 Regulations"). It is, as recorded above, by reference to the 2007 Regulations that the indictment is framed. For present purposes, it suffices to refer only to regulation 23 of the 2007 Regulations. That provides as follows:

> "**Prohibition on export of certain waste for recovery to non-OECD Decision countries**
> A person commits an offence if, in breach of Article 36(1), he transports waste specified in that Article that is destined for recovery in a country to which the OECD Decision does not apply."

Two points may here be noted. First, the offence under the 2007 Regulations is one of strict liability. Second, the offence is in terms drafted by reference to breach of Article 36(1) of the Regulation itself.

20. The essential workings of the Regulation, and the objective behind Article 36 itself, are self-evident enough. A very full and detailed exposition of the underpinning objectives and of the whole scheme can be found helpfully set out in the judgment of a constitution of this court (delivered by Cranston J) in the case of *KV and others* [2011] EWCA Crim 2342. That decision also makes clear, in accordance with settled interpretative principles, that the Regulation is to be read purposively (or "teleologically" as it is sometimes put).

21. There will be cases – of which the present is one – whereby there is a dispute as to whether waste is or is not prohibited from transportation as being hazardous: in particular, depending on the degree of contamination involved. Such a case was *I, N and B* [2011] EWCA Crim 3237. In that case, rather as in the present case, the issue was whether what was being exported was within category B3020 ("paper, paperboard and paper product wastes"), as it purported to be, or whether it was within category Y46 ("waste collected from households").

22. The court in that case, in a judgment delivered by Pill LJ, gave valuable guidance as to the required approach. It noted the decision of the European Court of Justice in *Beside BV v Minister van Volkshuisingvesting* [1993] Env LR 328, which among other things stated that municipal household waste did not come within the green list unless it "has

been collected separately and properly sorted." The Court of Appeal went on to hold that there was no imprecision in the language used: it was a matter of fact and degree in each case as to whether or not a particular consignment was properly to be designated as household waste for the purposes of the Regulation. The court rejected an argument that the Regulation had left matters so uncertain and so insufficiently precise as for it to be an abuse of process for there to be a prosecution in that case. The court said that "a very high standard is required of operators in this field" (paragraph 42). It acknowledged the potential difficulties in the task of the jury and of the trial judge in summing up the case; but went on at paragraph 44 to say this:

> "Having said that, we are quite unpersuaded that to proceed with a trial as to whether this particular consignment is proved to be household waste is an abuse of the process of the court. The judge will have regard to the 2006 Regulation and the 2007 Regulations when giving his directions to the jury. We would contemplate his raising the possibility of a breach being so small as to be minimal and not preventing waste from ceasing to be household waste and becoming waste paper under B3020. That will depend on the circumstances, including the nature and the quality, of the contamination and the amount of it. We are confident that a judge will be able to give sufficient directions to a jury to enable them to make the decision as to whether a particular consignment is properly described as household waste and for them to perform their task by applying that test to the facts."

The arguments

23. That being the legal framework, one might have thought that in the present case it was then a matter for the jury to determine, on the facts, as to whether they had been made sure that the consignments in question were, as the prosecution was contending, household waste, in breach of Article 36(1). That was on the face of it the only issue; for it was otherwise common ground that the defendant had been engaged in transportation of waste for recovery in a country to which the OECD Decision does not apply. It was also common ground that the transportation commenced when the consignments in question left the defendant's facility in Edmonton. Further, the prosecution have throughout made it clear (and as is particularised in the indictment) that they rely solely on an alleged breach of Article 36(1)(b), contending that the waste in question was listed in Annex V, Part 3: namely as Y46. That is their case: no more, no less.

24. It was also common ground, and as the judge found, that the accepted fact that the waste had originally been collected from households did not necessarily mean that it remained household waste when transportation thereafter commenced. As the judge said, the original source of the waste could not of itself be determinative of what the jury had to decide. Indeed, the prosecution had conceded that waste arriving at the facility could be processed or sorted in such a manner as thereafter to acquire a different categorisation status for export purposes (and as accords with the *Beside* case).

25. On that basis, the judge held that categories B3020 and Y46 were, as he put it, "mutually exclusive". If, in view of its nature and content when it left the facility, a consignment was fairly to be described as B3020 paper waste it could not appropriately be described as Y46 waste; and vice versa. "It cannot be both", as he in terms held (at paragraph 63 of his ruling). He went on to hold that footnote (2) to Y46 in Annex V, Part 3 simply was confirmatory of that; and was consistent with the underlying broad policy that if waste

was household waste at the point of export then it was prohibited but if, at that point, it was, rather, appropriately described as B3020 waste paper then export was lawful (paragraph 75 of his ruling).

26. One final point nevertheless remained. The defence had sought to argue that, in addition to being required to prove to the criminal standard that these consignments were of Y46 household waste, the prosecution *also* were required to prove that the waste was contaminated by other materials to an extent which prevented the recovery of waste in an environmentally sound manner. Thus it was and is said that paragraph 3 of the Introductory Notes (styled in the court below and before us as "the chapeau") formed a fundamental part of the elements which the prosecution had to prove both in this case and indeed in every such case: albeit reliance was placed by the defence for the purposes of this particular case on paragraph 3(b), but not paragraph 3(a), of the chapeau. It was and is said that the chapeau could not be "disaggregated" from the approach required.

27. The judge rejected that argument for the purposes of the case before him. The prosecution had throughout made clear that its case was, and was only, that the consignments were properly to be described and categorised as Y46 (household waste), a waste listed in Annex V, Part 3. It had and has not sought to rely on, for example, Article 36(1)(g). On that basis, as the prosecution had said and as the judge agreed, if the prosecution proved to the criminal standard that this was Y46 household waste the case succeeded without more. If, on the other hand, the jury were to conclude that this *was* (or may have been) B3020 paper waste then the chapeau could only potentially apply if the consignment was contaminated by *other* material in a way contravening the chapeau. Since the prosecution had always disclaimed such a case, the chapeau was irrelevant for the purposes of this case (see paragraph 89 of his ruling).

Disposition

28. Some points need to be stripped away.

29. For example, the written arguments of the defendant on this appeal went into very great detail as to the true meaning and effect of footnote (2) to Y46. But this is nothing to the point. It was common ground before us (even if it had not been below) that the judge had been right to find categories B3020 and Y46 as mutually exclusive. That being so, debate about the descriptive or legal status of the footnote is arid. But in any event it is clear enough that the footnote is intended to be explanatory and that it is, in the judge's words, "confirmatory" of the position in any event arising. Thus to the extent that Ground 2 of the written Grounds of Appeal queries the true status of the footnote that ground is of no true substance or relevance.

30. Thus the only real point arising on this appeal is whether (contrary to the judge's approach) the prosecution was to be required, in addition, to prove the matters set out in paragraph 3(b) to the chapeau as well as proving that the consignments comprised Y46 household waste; and whether the jury was to be instructed in the summing-up accordingly.

31. The chapeau is undoubtedly part of Annex V. At the same time, it is prefaced by the words "Introductory Notes". It can nevertheless be said that paragraph 1, viewed objectively, is designed to be of substantive, even if clarificatory, effect. Paragraph 2 is

perhaps more of descriptive effect; but paragraph 3, it can be accepted, is again more obviously of substantive, even if clarificatory, effect.

32. We are prepared for present purposes to accept, as was the judge, that paragraph 3 of the chapeau may, in a particular case, come into play and may properly be the subject of evidence and of a summing-up. But we agree with the judge that this is not such a case.

33. Here, the prosecution have never sought to say that these were consignments which were indeed essentially B3020 waste paper but nevertheless contaminated by other materials not collected from households (for example, corrosive fluids or dangerous metals etc). so as to prevent recovery of the waste in an environmentally safe manner: it being recalled that paragraph 3 of the chapeau in this regard replicates the language of Annex III. In the present case, the prosecution had not relied on Article 36(1)(g) but relied solely on Article 36(1)(b). For that purpose, it had relied solely on Y46 as the relevant waste listed in Annex V, Part 3. The question for the jury was thus, in our judgment, simply whether that was proved. If it was, then the waste in question could not be B3020 waste paper (which is within in the "green" list of waste which may legitimately be exported). If it was proved that the relevant consignments were indeed Y46, then that was within Article 36(1)(b) of the Regulation and that was the end of the matter. If, on the other hand, the prosecution failed to prove that the relevant consignments were indeed Y46, then that too was the end of the matter and the defendant was entitled to be acquitted. That approach, moreover, accords implicitly with the approach approved by the court in the case of *I, N and B*; accords with the policy and objectives of the Regulation; and involves no unfairness to the defendant. Indeed, the approach of the defendant in this case would, as we see it, in fact if anything tends to undermine the objective of Article 36(1)(b) in providing a specific list of prohibited wastes and the objective of Annex III in providing, by Annex V, Part 1, List B, a list of permitted green wastes.

34. Accordingly, whether there was sufficient household waste contamination for these consignments properly to be styled as Y46 household waste (rather than the B3020 mixed paper designation given in the export documentation) was a matter of fact and degree for the jury. To seek further to introduce the subject-matter of the chapeau into a case of this particular kind, given the nature of the prosecution here undertaken, would in our view be to introduce an irrelevant and complicating distraction (we note in fact that Mr Travers QC rather struggled in argument to formulate appropriate jury directions when pressed on the point). The judge, we consider, was right to reject the argument.

Conclusion

35. It is for these reasons that we have dismissed this appeal.

36. We would not wish to part with this appeal without paying tribute to the ruling of Judge Auerbach. In a matter which is by no means the common currency of Crown Courts, he speedily produced a comprehensive reserved written ruling which set out in full detail the legislative background and authorities; fully analysed and discussed the competing arguments; and explained the reasons for his conclusion with crystal clarity. It is just because of the care and detail underpinning his ruling that this court has been able to approach matters rather more succinctly than otherwise might have been the case.

Note: Reporting restrictions on this judgment were lifted on 26 June 2019.