Neutral Citation Number: [2017] EWHC 1587 (Admin)

Case No: CO/631/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2017

Before :

MR JUSTICE GREEN

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Between :

Glencore Energy UK Ltd	**Claimant**
- and -	
Commissioners of HM Revenue and Customs	**Defendant**

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Sam Grodzinski QC, James Henderson and James Segan (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
Timothy Brennan QC and Georgia Hicks (instructed by the **General Counsel and Solicitor to HMRC**) for the **Defendant**

Hearing date: 29th June 2017

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Approved Judgment

MR JUSTICE GREEN :

Ruling: Application for Permission to Appeal

A. Introduction

1. I have given judgment in a case [2017] EHWC 1476 (Admin) whereby the taxpayer (GENUK) sought permission to apply for judicial review of a decision of HMRC imposing a charge for diverted profits tax under the Finance Act 2015. I refused permission upon the basis that there were alternative remedies available to the taxpayer under the review and appeal procedures set out in sections 101 and 102 Finance Act 2015. I also refused permission on wider discretionary grounds and under section 31(3C) – (3D) Senior Courts Act.

2. GENUK seeks permission to appeal. A dispute has arisen between the parties as to the power of the High Court to grant permission.

B. The Scope of CPR 52.3.2 and 52.8

3. This raises a discrete point of law upon which there is no authority: Once the High Court has refused permission to apply for judicial review after a hearing can the High Court determine an application for permission; or is the only course then open to an applicant to apply to the Court of Appeal for permission?

C. HMRC Submissions

4. HMRC argues as follows. There is no jurisdiction to grant permission to appeal. CPR 52.3(2)(a) provides the general rule on applications for permission to appeal, and stipulates that permission may be granted by the lower court or the appeal court. However, there is a specific rule for appeals against refusals of permission to apply for a judicial review, after a hearing, contained in CPR 52.8(1). This makes clear that there is no right on the part of the High Court to grant permission and that permission must be sought specifically from the Court of Appeal. This rule is also reflected in the Administrative Court Judicial Review Guide (October 2016) at section 26.3.

5. Further, under CPR 52.8(4) there is a very restrictive timescale for making the application to the Court of Appeal (7 days). This runs from the date of the "*decision"* to refuse permission, not a decision refusing permission to appeal. This, HMRC argues, supports the conclusion that once the High Court has taken a *decision* to refuse permission it is *functus* and the applicant must move quickly in applying to the Court of Appeal. No leeway is provided in the timetable for any additional application to the Judge making the decision to refuse permission, for permission to appeal. It is then exclusively for the Court of Appeal alone to decide upon permission.

D. Taxpayer's Submissions

6. GENUK argues to the contrary that the right of a party to seek permission from the lower court (CPR 52.3(2)(a)) is expressed in general and unqualified terms, unlike other rules in CPR Part 52 such as rule 52.6(1)). CPR 52.3(2)(a) does not say "*<u>Subject to rule 52.8</u>... an application for permission to appeal may be made (a) to the lower court...*".

7. Likewise, the words in parentheses at the end of CPR 52.3(2) refer to rule 52.12; they do not refer to rule 52.8. Had the Civil Procedure Rules Committee wished to preclude the right to ask the lower court for permission to appeal, they could have done so here, but they did not.

8. GENUK further argues that the notes to the 2017 White Book at paragraph [52.3.6], page 1774, do not suggest that there is any such limitation. The notes give 5 reasons as to why it is generally preferable to ask the lower court for permission to appeal in the first instance. Those reasons apply in a case such as the present and it makes no sense to prevent a Judge at first instance from considering whether to grant permission.

9. Finally, it is said that nothing in the Administrative Court Guide (which is not in any event part of the CPR or Practice Directions) states that the Administrative Court has no power to grant permission to appeal of its decision to refuse permission. Nor is there any logical inconsistency in its doing so. The judgment in the present case may have wider significance beyond the facts of the present case and could impact upon the position of other taxpayers seeking to challenge in public law the decisions of HMRC, and even outside the field of tax. A Judge might logically consider that a judgment is correct yet, in such a case, recognise that the ruling raises points of wider importance, which merit being considered by the Court of Appeal.

E. Conclusion

10. It is my view that HMRC is correct. CPR 52.3(2) is a general rule whereas CPR 52.8 is a special rule applicable to judicial review. There would be no point in CPR 52.8 having been drafted had it been intended that the general rule should govern cases where permission to apply for judicial review had been refused after a hearing.

11. It is true that CPR 52.8 does not expressly state the negative, i.e. that the High Court, having refused permission, has no power to grant permission to appeal. But that it the silent premise upon which it is drafted.

12. The logic behind these rules must be understood in the context of the regime governing judicial review in CPR 54. A litigant cannot bring *proceedings* for judicial review unless permission is granted and if no permission is granted there are no *proceedings* on foot: CPR 54.4. Where the High Court has refused permission *on paper* then the litigant can renew the application before the High Court but cannot appeal that refusal: CPR 54.12. Where the applicant has been refused permission after an oral hearing then there is a specific rule (CPR 52.8) enabling the disappointed litigant the chance to request the Court of Appeal to grant permission to bring proceedings. CPR 54.4, 54.12 and 52.8 thus provide a complete code which governs the bringing of proceedings for judicial review.

13. In my judgment, I therefore have no power to grant permission.

14. If I am wrong in this I would in any event have refused permission. On the facts of this case by the time any appeal was heard (absent a high degree of expedition, which I cannot assume would be granted in these circumstances) the review process under section 101 Finance Act 2015 will almost certainly have run its course and all the issues that GENUK wishes to dispute will either have been resolved in its favour or, if

still live, give rise to a right of statutory appeal to the specialist tribunal under section 102 Finance Act 2015. I can therefore see no practical utility in granting permission to appeal.

15. I am reinforced in this conclusion by the fact that I have also refused permission on two additional discretionary grounds namely (a) that HMRC was *in fact* reconsidering its decision and hence the judicial review had become academic or premature and (b) that the outcome would not be different, under section 31(3C) – (3D) Senior Courts Act.

16. It might well be the case, as GENUK cogently argues in its written submission on the point, that the judgment has wider implications, but if so then the Court of Appeal can determine for itself whether this is a case in which it wishes to provide wider guidance. My refusal to grant permission does not prevent GENUK from advancing such arguments before the Court of Appeal.

17. In conclusion GENUK should now seek permission from the Court of Appeal itself under CPR 52.8 if it wishes to seek permission to appeal.