[2015] UKUT 0630 (TCC)

Appeal number: FTC/148/2014

PROCEDURE – costs – whether the Tribunal has power to order a payment in respect of pro bono costs – s 194, Legal Services Act 2007; s 29, Tribunals, courts and Enforcement Act 2007 – held: no such power in the Tribunal – application refused

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DR VASILIKI RAFTOPOULOU **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ROGER BERNER
JUDGE SWAMI RAGHAVAN

Sitting in chambers at The Royal Courts of Justice, Strand, London WC2 on 12 November 2015

After considering written representations from:

Michael Thomas, acting pro bono for the Appellant; and

Christopher Stone and Matthew Sellwood, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. We have before us an application for pro bono costs to be awarded against the Respondents, HMRC, consequent upon the successful appeal of the Appellant, Dr Raftopoulou, which is reported at [2015] UKUT 0579 (TCC), in which Dr Raftopoulou was represented pro bono by Mr Thomas, instructed by the Bar Pro Bono Unit following assistance from the Revenue Bar Association. The application raises an important question as to whether this tribunal has the power to make such an order. We are grateful, therefore, for the written submissions we have received from both parties.

2. The expression "pro bono costs" does not in fact describe costs as such. It is used as a convenient short expression to refer to payments in respect of pro bono representation which are authorised to be made by s 194(3) of the Legal Services Act 2007 ("LSA"). Section 194 (as amended) provides, so far as is material:

> "**194 Payments in respect of pro bono representation**
>
> (1) This section applies to proceedings in a civil court in which—
>
> (a) a party to the proceedings ("P") is or was represented by a legal representative ("R"), and
>
> (b) R's representation of P is or was provided free of charge, in whole or in part.
>
> …
>
> (3) The court may order any person to make a payment to the prescribed charity in respect of R's representation of P (or, if only part of R's representation of P was provided free of charge, in respect of that part).
>
> (4) In considering whether to make such an order and the terms of such an order, the court must have regard to—
>
> (a) whether, had R's representation of P not been provided free of charge, it would have ordered the person to make a payment to P in respect of the costs payable to R by P in respect of that representation, and
>
> (b) if it would, what the terms of the order would have been.
>
> …
>
> (7) Rules of court may make further provision as to the making of orders under subsection (3), and may in particular—
>
> (a) provide that such orders may not be made in civil proceedings of a description specified in the rules;
>
> (b) make provision about the procedure to be followed in relation to such orders;

(c) specify matters (in addition to those mentioned in subsection (4)) to which the court must have regard in deciding whether to make such an order, and the terms of any order.

…

(10) In this section—

…

"civil court" means—

(a) the Supreme Court when it is dealing with a relevant civil appeal,

(b) the civil division of the Court of Appeal,

(c) the High Court, or

(d) the county court;

"relevant civil appeal" means an appeal to the Supreme Court—

(a) from the High Court in England and Wales under Part 2 of the Administration of Justice Act 1969,

(b) from the Court of Appeal under section 40(2) of the Constitutional Reform Act 2005, or

(c) under section 13 of the Administration of Justice Act 1960 (appeal in cases of contempt of court) other than an appeal from an order or decision made in the exercise of jurisdiction to punish for criminal contempt of court;

…"

3. The distinction between an order for costs and a payment in respect of pro bono representation formed the background to the introduction of section 194. Until the introduction of this provision, in a case where a party had been represented pro bono, there was no power, even in the case of civil courts which enjoyed a very wide discretion in making such awards, to award costs in that respect against another party, because no such costs had been incurred. As the explanatory note to s 194 explained:

> "This section enables a court to make an order in civil cases requiring a person to make a payment where a party to the proceedings was represented by a legal representative whose services were provided pro bono (i.e. free of charge). Under the previous costs law, an unsuccessful party would not have been required to pay any amount in respect of that representation because the services were provided free of charge and so there were no costs. Under this section, awards will be at the discretion of the court and will be paid directly to a designated charitable body, established to administer and distribute the monies to organisations who conduct pro bono work."

4. Mr Thomas submits that this tribunal has the power to make an order for a payment in respect of pro bono representation, and that, as Dr Raftopoulou succeeded in her appeal, such an order should be made in this case for a payment in favour of the Access to Justice Foundation, a prescribed charity for the purpose of s 194. He bases this submission, not on the express powers of this tribunal to make orders in respect of

costs, which derive from s 29 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") and rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008, or on any supposed inherent jurisdiction of the tribunal in this respect, but on the effect which he argues should be given to s 25 TCEA.

5. It is clear, in our judgment, that the only possible argument in this connection must rest on the effect of s 25. There is no inherent jurisdiction in this tribunal, which is, as has been stated on many previous occasions, a creature of statute. Nor can any power to award costs, whether in s 29 TCEA or in the tribunal's rules, be construed so as to provide power, in a case where there are no costs incurred by a pro bono party, to make an order for payment such as that in s 194.

6. It is accepted too that the jurisdictional limitation in s 194 excludes reliance on s 194 directly. The expression "civil court" is, as Mr Stone and Mr Sellwood point out, restrictively and exclusively defined by s 194(10), and it is not possible to construe that sub-section to include the Upper Tribunal. Mr Thomas does not seek to argue otherwise.

7. This position was recognised by the Costs Review Group in their report, Costs in Tribunals, to the Senior President of Tribunals (December 2011), when they stated, at paragraph 175:

> "The power [to make pro bono costs awards] is circumscribed by the provisions of section 194 and is subject to Rules of Court. We recommend that the provisions of section 194 be extended to tribunals and that the power thereby conferred be subject to Tribunal Procedure Rules and other procedural rules for tribunals."

8. That recommendation has not yet been implemented.

9. We turn, therefore, to s 25 TCEA. This provides as follows:

> "(1) In relation to the matters mentioned in subsection (2), the Upper Tribunal—
>
> (a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court, and
>
> (b) has, in Scotland, the same powers, rights, privileges and authority as the Court of Session.
>
> (2) The matters are—
>
> (a) the attendance and examination of witnesses,
>
> (b) the production and inspection of documents, and
>
> (c) all other matters incidental to the Upper Tribunal's functions.
>
> (3) Subsection (1) shall not be taken—
>
> (a) to limit any power to make Tribunal Procedure Rules;
>
> (b) to be limited by anything in Tribunal Procedure Rules other than an express limitation.

> (4) A power, right, privilege or authority conferred in a territory by subsection (1) is available for purposes of proceedings in the Upper Tribunal that take place outside that territory (as well as for purposes of proceedings in the tribunal that take place within that territory)."

10. Mr Stone and Mr Sellwood referred us to the explanatory notes to s 25, which read:

> "Section 25 provides the Upper Tribunal with the powers of the High Court or Court of Session to require the attendance and examination of witnesses and the production and inspection of documents, and all other matters incidental to the Upper Tribunal's functions. These are similar powers to the Employment Appeal Tribunal's powers under section 29 of the Employment Tribunals Act 1996."

11. The argument of Mr Thomas stems from the creation of the Upper Tribunal, so far as it relates to tax appeals. Mr Thomas referred to the previous history of tax appeals, prior to 1 April 2009, at which time appeals from the then first instance tribunals, the general and special commissioners and the VAT and Duties Tribunal, went to the High Court. He argued that, although the Upper Tribunal was different from the High Court, it operates in essentially the same way in a tax appeal. Thus, the Upper Tribunal is a superior court of record (TCEA, s 35), and in common with the High Court, and unlike the First-tier Tribunal (Tax Chamber), the Upper Tribunal has full discretion to make awards of costs.

12. Mr Thomas referred us to certain observations of the Court of Appeal in *R (on the application of Cart) v Upper Tribunal (Secretary of State for Justice and others, interested parties) (Public Law project intervening)* [2010] STC 2556 as to possible explanations for s 25. Giving the judgment of the court, and responding to the submission that s 3 TCEA (providing that the Upper Tribunal is a superior court of record) and s 25 make the Upper Tribunal a body of equal power and standing to the High Court, Sedley LJ said, at [16]:

> "The problem with s 25 is that it is equally explicable as a badge of status and as a recognition that, but for the express provision it makes, the UT would lack the inherent powers enjoyed by the High Court."

13. Mr Thomas submits that s 25 avoids the need for Parliament to have to legislate expressly to transfer the High Court's powers to powers to the tribunal in matters which will only arise from time to time. Into this category he places s 194 LSA, which he argues does not need to be updated to include the Upper Tribunal because of the effect of s 25.

14. We have concluded that s 25 cannot have the effect which Mr Thomas submits it has. The power of the High Court to make an order for payment in respect of pro bono representation has its basis in statute, and is thus conditioned by statute. The power afforded to the High Court by s 194 LSA is therefore confined by the limitations inherent in s 194 itself, in particular the jurisdictional limitation which Parliament has seen fit to impose. Section 25 TCEA cannot be construed so as to permit an extension beyond those express jurisdictional boundaries.

15. We agree in this respect with Judge Jacobs in *IB v Information Commissioner* [2011] UKUT 370 (AAC), sitting in the Administrative Appeals Chamber of this tribunal, when in considering whether s 25 TCEA enabled the Upper Tribunal to give permission to a vexatious litigant to bring proceedings before the First-tier Tribunal and the Upper Tribunal, where that permission was, by s 42 of the Senior Courts Act 1981, capable of being given by the High Court, (at [37]) he held:

> "First, this provision [s 25(2)(c) TCEA] cannot override express statutory provisions that confer powers on the High Court. The Act made numerous amendments to other legislation and authorised the extensive amendments in the Tribunals, Courts and Enforcement Act 2007 (Transitional and Consequential Provisions) Order 2008 (SI No 2683) and the Transfer of Tribunal Functions Order 2008 (SI No 2833). It is inconceivable that, in that context, this general provision could have the effect of overriding statutory provisions that are expressly limited to the High Court."

16. The position is not affected in our view, by what was said by the Court of appeal in *Cart*. The possible rationale for the enactment of s 25 canvassed by the court in that case does not answer the question as to the scope and delineation of the powers to which s 25 can apply. In our judgment, the scope of the relevant power in this case is expressly delineated by s 194 LSA so as not to be capable of being exercised in any jurisdiction other than those within the meaning of "civil court" under s 194(10). As that expression is defined by reference to particular jurisdictions, and does not include the Upper Tribunal, that limits the exercise of any power under s 194. That jurisdictional limitation cannot be overridden by s 25.

17. There is no inconsistency between that finding and the position in respect of the power to order security for costs, where it has been accepted by this tribunal, in *Blada Limited (in liquidation v Revenue and Customs Commissioners* [2013] FTC/64/2010, that s 25 enables this tribunal to make such an order, notwithstanding the absence of an express power to do so under the tribunal's own rules. In contrast to the position of an order for payments in respect of pro bono representation, there is no jurisdictional limitation imposed by statute on orders for security for costs.

18. It follows from this that we conclude that this tribunal does not have the power to make an order for payment in respect of pro bono representation, and that Dr Raftopoulou's application in this respect must be refused.

19. In light of that conclusion it is not necessary for us to consider the alternative argument raised by Mr Stone and Mr Sellwood that s 25(2)(c) TCEA cannot give this tribunal power to make a pro bono costs order because such an order is not a "matter incidental to" the functions of the Upper Tribunal. That issue may be of relevance in other contexts, and it would not be appropriate, in circumstances where we have concluded on another ground that s 25 has not provided this tribunal with the relevant power, for us to express any view on it.

20. We conclude by expressing the hope that urgent consideration can be given to the recommendation of the Costs Review Group to which we have referred. Mr

Thomas' submissions, though unsuccessful in persuading us that we would be able in this case to make an order for payment in respect of his pro bono representation of Dr Raftopoulou, do nonetheless represent a powerful argument why this tribunal should be empowered to make such an order. Appeals to this tribunal are on questions of law, and it would in our view be contrary to the interests of justice if there were anything which discouraged the availability of pro bono representation for self-represented parties who often appear in such cases. There would seem to us to be no reason why, where the tribunal has full costs-shifting powers which could result in a party represented pro bono being ordered to pay the costs of the other, represented, party, the playing field should not be levelled so as to permit an analogous order to be made against the represented party.

21. That there is a public interest in such orders being made where permitted, and where appropriate has received judicial recognition in *Re E* (B4/2014/0146), as referred to by Lady Hale in the Supreme Court in *Re S (a child)* [2015] UKSC 20, at [34]. The Court of Appeal recognised that "[t]here is a public interest in the Bar Pro Bono Unit being compensated on a reasonable basis by an award of costs where such an award is available under the legislation." Although we have decided that such an award is not so available in this case, whether under s 194 LSA or by virtue of s 29 TCEA, we can nevertheless sympathise with the public interest arguments in favour of the granting of such a power.

Decision

22. The application for a payment by HMRC in respect of the pro bono representation of Dr Raftopoulou in this appeal is refused.

ROGER BERNER
SWAMI RAGHAVAN

UPPER TRIBUNAL JUDGES

RELEASE DATE: 13 November 2015