[2016] UKUT 0359 (TCC)

Appeal number: UT/2015/0135

EXCISE DUTY – penalty for handling goods subject to unpaid excise duty – FA 2008, Sch 41, para 4(1) – whether penalty assessment is a "criminal charge" for the purpose of Article 6, European Convention on Human Rights – whether reverse burden of proof in s 154 CEMA is incompatible with the presumption of innocence in Article 6(2)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

EURO WINES (C&C) LIMITED **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE BIRSS
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 7 July 2016

David Bedenham, instructed by TT Tax, for the Appellant

Richard Evans, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal, by Euro Wines (C&C) Limited ("Euro Wines"), raises issues on the application of Article 6 of the European Convention on Human Rights ("the Convention") to a penalty assessment, under paragraph 4(1) of Schedule 41 to the Finance Act 2008 ("FA 2008"), imposed on Euro Wines as a person which acquired possession of excise goods, after the excise duty point, on which duty had not been paid.

2. The First-tier Tribunal ("FTT") (Judge John Clark and Ms Gill Hunter) dismissed Euro Wines' appeal against the penalty. In doing so, they considered, and rejected, arguments put forward by Euro Wines in relation to Article 6 of the Convention, as well as other human rights arguments and questions of reasonable excuse and special circumstances. Euro Wines made a wide-ranging application for permission to appeal, but in the event permission was given by this Tribunal (Judge Sinfield) on two grounds only. Ground 1 is that the FTT erred in its approach to and its finding that the "penalty does not amount to a criminal charge, and therefore that Article 6 is therefore not engaged" (FTT decision, at [60]). Ground 2 is that the FTT was wrong to hold (at [64]) that: "if we had concluded that Euro Wines' Article 6 rights were engaged we could only deal with the question of the burden of proof under s 154 CEMA 1979 by declaring it to be incompatible with those rights …".

3. We can deal with Ground 2 very shortly. It was common ground before us that the FTT erred in that respect, although it was of course the case that the point was not relevant to the FTT's decision as it had determined that Article 6 had not been engaged. And in fairness to the FTT, the only argument addressed to it on the question of its jurisdiction in the event that Article 6 had applied was one of declaration of incompatibility of the relevant domestic provision.

4. The position, which before us was common ground, is that to the extent that Article 6 applies in the circumstances of Euro Wines' case, the FTT had been correct to conclude that it was not a "court" for the purpose of s 4(5) of the Human Rights Act 1998 ("HRA"), and accordingly that it had no jurisdiction to make a declaration of incompatibility. But that is not, contrary to what the FTT said at [64], the extent of that tribunal's jurisdiction. Section 3 HRA provides that "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." That applies to the FTT as it does to any court. Were the FTT to have decided that Article 6 had been infringed, it would then have been required to apply, to the extent it was possible to do so, a conforming construction to the relevant domestic provision (see *Ghadian v Ghodin-Mendoza (FC)* [2004] UKHL 30, per Lord Nicholls at [30] - [33]).

5. There is, accordingly, no dispute on Ground 2. But the appeal before us resolved itself into two issues. The first is Ground 1 itself, namely whether the penalty assessment amounts to a criminal charge for Article 6 purposes. The second, is whether, on the assumption that Article 6 is engaged, the reverse burden of proof in s 154(2) of the Customs and Excise Management Act 1979 ("CEMA") (which, as a

matter of domestic law, places the burden on Euro Wines in relation to the question of payment of duty on the relevant goods) can apply in the context of Euro Wines' Article 6 rights.

Background

6. The background facts were set out by the FTT at [2] - [18]. The FTT also made a number of findings of fact when considering the questions before it of reasonable excuse and special circumstances. For present purposes we can confine ourselves to the following brief description.

7. On a number of dates between March 2012 and January 2013, Euro Wines purchased various excise goods from Galaxy Cash & Carry Limited ("Galaxy"). HMRC subsequently established that the goods had been supplied to Galaxy by "Vanguard Breweries", although on a visit to the latter's premises HMRC discovered that the address was wasteland. There had at one time been a pub at that address, but it had burned down. HMRC concluded that excise duty had not been paid on the goods.

8. As a result, on 20 May 2013, HMRC assessed Euro Wines to excise duty in the sum of £353,453. Euro Wines appealed against that assessment, and provided evidence of the delivery of the goods to it by Galaxy. The excise duty assessment was withdrawn on 22 July 2013. According to HMRC's evidence, this was on the basis that Euro Wines had not been the first person to have physically held and controlled the goods in question (at least, we infer, at a time when an excise duty point would have arisen in respect of the goods).

9. Following further correspondence, on 6 March 2014 HMRC issued the notice of penalty assessment which is the subject of these proceedings. The penalty was assessed at 20% of the "potential lost revenue" of £159,322 (reduced from the earlier amount of £353,453), namely £31,864.41.

The law

10. Under domestic law, the penalty was assessed under FA 2008, Sch 41, para 4(1) which provides as follows:

> "**Handling goods subject to unpaid excise duty**
>
> 4.—
>
> (1) A penalty is payable by a person (P) where—
>
> (a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
>
> (b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred.

(2) In sub-paragraph (1)—

"excise duty point" has the meaning given by section 1 of F(No 2)A 1992, and

"goods" has the meaning given by section 1(1) of CEMA 1979."

11. Section 154 CEMA makes provision for the burden of proof in cases which include appeals against penalty assessment under FA 2008, Sch 41, para 4(1). Section 154 provides, so far as material:

"**Proof of certain other matters**

(1) An averment in any process in proceedings under the customs and excise Acts—

…

(d) that the Commissioners have or have not been satisfied as to any matter as to which they are required by any provision of those Acts to be satisfied;

…

shall, until the contrary is proved, be sufficient evidence of the matter in question.

(2) Where in any proceedings relating to customs or excise any question arises as to the place from which any goods have been brought or as to whether or not—

(a) any duty has been paid or secured in respect of any goods;

…

then, where those proceedings are brought by or against the Commissioners, a law officer of the Crown or an officer, or against any other person in respect of anything purporting to have been done in pursuance of any power or duty conferred or imposed on him by or under the customs and excise Acts, the burden of proof shall lie upon the other party to the proceedings."

12. Article 6 of the Convention has effect for domestic law purposes in accordance with the HRA. It is, as we have said, common ground that, by virtue of s 3 HRA, the domestic legislation with which we are here concerned must be construed in a way which is compatible with that Article. Article 6 provides:

"(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights—

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Discussion

Is the penalty assessment a "criminal charge" within Article 6 of the Convention?

13. We turn to the first issue before us, which is whether the penalty assessed on Euro Wines amounts to a criminal charge for the purposes of Article 6.

14. It has been held by the European Court of Human Rights ("ECtHR"), in *Ferrazini v Italy (Application no 44759/98)* [2001] STC 1314 that tax disputes fall outside the scope of civil rights and obligations within Article 6. However, *Ferrazini* was confined to such rights and obligations. Tax penalties, although not within the scope of such civil rights and obligations, may nonetheless fall within the scope of Article 6 if the assessment of such a penalty may be regarded as a criminal charge for Convention purposes (see *Customs and Excise Commissioners v Han and another* [2001] STC 1188).

15. There was no dispute as to the factors to be considered in determining whether a penalty amounts to a criminal charge for convention purposes. Those factors are well-established through successive judgments of the ECtHR, most notably *Engel and others v The Netherlands (No 1)* (1976) 1 EHRR 647. They are, in summary, (a) the classification of the penalty in domestic law; (b) the nature of the offence; and (c) the nature and degree of severity of the penalty that the person concerned risked incurring. It may be noted, therefore, that the domestic classification of the penalty is but one of the factors, and not decisive; "criminal charge" in Article 6 has an autonomous meaning.

16. The position is well-summarised in *Öztürk v Germany* [1984] ECHR 8544/79, at [49] – [50]:

> "49. The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law and drawing the dividing line, but it does not follow that the classification thus made by the States is decisive for the purposes of the Convention.
>
> By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual (see, mutatis mutandis, the above-mentioned *Engel and others* judgment, ibid., p. 33, para. 80) as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of prosecuting and punishing contraventions – which are numerous but of minor importance – of road traffic rules. The Convention is not opposed to the moves towards 'decriminalisation' which are taking place – in extremely varied forms – in the member States of the Council of Europe. The Government quite rightly insisted on this point. Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as 'regulatory' instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.
>
> 50. Having thus reaffirmed the 'autonomy' of the notion of 'criminal' as conceived of under Article 6, what the Court must determine is whether or not the 'regulatory offence' committed by the applicant was a 'criminal' one within the meaning of that Article. For this purpose, the Court will rely on the criteria adopted in the above-mentioned *Engel and others* judgment (ibid., pp. 34-35, para. 82). The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law; next, the nature of the offence and, finally, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6, to the ordinary meaning of the terms of that Article and to the laws of the Contracting States."

17. Not only is the domestic law classification not decisive, it carries relatively less weight than the other factors of the nature of the offence and the nature and degree of severity of the penalty (*Öztürk*, at [52]). Those latter two criteria are alternative, and not cumulative; it is sufficient if the offence in question is by its nature criminal from the point of view of the Convention, or that the nature and degree of severity of the penalty places the sanction in general in the criminal sphere. However, a cumulative approach is equally permitted if it is not possible to reach a conclusion by reference to the individual criteria.

18. That latter proposition is derived from the case of *Janosevic v Sweden* [2002] ECHR 34619/97, at [67]. That case concerned surcharges levied on a taxpayer with respect to certain incorrect information provided by the taxpayer in his tax returns and an increase under a discretionary assessment procedure of the turnover of the

business. The surcharges amounted to 20% or 40% of the increased tax liability, depending on the type of tax involved.

19. The ECtHR noted, at [68], that there was a public financial interest in ensuring that the tax authorities have adequate and correct information when assessing tax. But that information was secured by requirements laid down in the Swedish legislation to which were attached the threat of a considerable financial penalty for non-compliance. Those penalties were civil under domestic law, although the Court also noted that the system of tax surcharges had replaced earlier purely criminal procedures. Those earlier procedures had required intentional or negligent conduct, whereas the new system, for reasons of greater efficiency, was based on objective factors.

20. Referring to its earlier judgment in *Salabiaku v France* [1988] ECHR 10589/83, the Court noted that the lack of subjective elements, the tax surcharges being imposed on objective grounds without the need to establish any criminal intent or negligence, did not necessarily deprive an offence of its criminal character. It regarded it as material that the tax surcharges in question were not intended as pecuniary compensation for any costs that might have been incurred as a result of the taxpayer's conduct. The main purpose of the relevant provisions was to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations. The penalties were thus both deterrent and punitive. That latter characteristic is the customary distinguishing feature of a criminal penalty. The Court accordingly found, having regard to the general character of the legal provisions on tax surcharges and the purpose of the penalties, being both deterrent and punitive, that this was sufficient for the taxpayer to be regarded for Article 6 purposes as having been charged with a criminal offence.

21. The Court then went on to say, at [69], that the criminal character of the offence was further evidenced by the severity of the potential and actual penalty. The Court said:

> "The criminal character of the offence is further evidenced by the severity of the potential and actual penalty. Swedish tax surcharges are imposed in proportion to the amount of the tax avoided by the provision of incorrect or inadequate information. The surcharges, normally fixed at 20% or 40% of the tax avoided, depending on the type of tax involved, have no upper limit and may come to very large amounts. Indeed, in the present case the surcharges imposed by the Tax Authority's decisions were very substantial, totalling SEK 161,261. It is true that surcharges cannot be converted into a prison sentence in the event of non-payment; however, this is not decisive for the classification of an offence as 'criminal' under art 6 (see *Lauko v Slovakia* [1998] ECHR 26138/95 at para 58)."

22. It is by reference to this case law of the ECtHR that the penalty in this appeal falls to be considered. The FTT referred to the relevant authorities. It found that the assessment of the penalty was not a criminal charge for the purpose of Article 6. It rejected the argument, put forward by counsel for Euro Wines, that the penalty was both a deterrent and punitive. Having described, at [41], the purpose of the penalty as being to "encourage compliance by ensuring that duty has been paid before

possession is acquired or some other activity is undertaken in relation to the goods", the FTT, referring to the reference in *Janosevic*, at [68], to the purpose of the surcharges in that case as being both to exert pressure on taxpayers to comply with their legal obligations and to punish breaches, drew a distinction between that and the penalty in this case, saying at [43]:

> "The effect of the penalty is not to deter persons from handling excise goods; instead, it provides a means of encouraging a person involved in doing so to take appropriate steps to establish that duty has been paid on those goods. No specific form of compliance with legal obligations is involved."

23. We do not consider that the FTT was right to seek to draw this distinction. First, we can see no principled distinction between mere encouragement towards compliance and deterrence from non-compliance. They are essentially two sides of the same coin. Any difference depends on the process adopted to encourage or deter; a warning or guidance might be regarded as falling on the side of encouragement, whereas in our judgment a penalty is clearly on the side of deterrence. Secondly, the penalty in this case is in our view a deterrent. Its deterrent nature does not relate to the handling of excise goods; it is clearly not intended to deter that, but it is a deterrent to acquiring such goods without taking reasonable steps to be satisfied as to the payment of duty. Thirdly, the fact that a penalty is not related to a specific legal compliance obligation is not, with respect to the FTT, a pointer in the direction of it not being criminal in nature. A penalty which applies in circumstances where no breach of an obligation arises may equally represent a deterrent against a person placing itself in such a situation, and punitive, as a penalty for breach of a legal obligation. The reference by the ECtHR in *Janosevic*, at [68], to such a legal obligation merely reflects the particular circumstances of that case, and did not introduce any further principle or condition.

24. We disagree therefore with the FTT's conclusion that the penalty in this case was not deterrent in nature. We also disagree with its conclusion that the penalty was not punitive. In this regard, we consider that the FTT failed to place sufficient weight on the fact that, as the FTT itself considered, the penalty is not compensatory in nature. The FTT, in deciding that in spite of this fact the penalty was not punitive relied again on its conclusion, with which we disagree, that the penalty was intended to encourage behaviour rather than deter. That in our judgment was wrong, and it in turn led the FTT into the further error of deciding that the penalty was not punitive. In our judgment, it clearly was. It sought both to deter taxpayers from acquiring excise goods in respect of which duty was unpaid, and to punish them if they found themselves in possession of such goods, even through no fault of their own (subject only to defences of reasonable excuse and special circumstances).

25. Nor do we consider the FTT was right in its analysis of the significance of the rate of the penalty in question. The FTT correctly identified that the maximum penalty in the circumstances of Euro Wines, namely where the act or failure on the part of Euro Wines was non-deliberate, was 30% of the potential lost revenue (FTT, at [47] – [50]). However, in our judgment, the FTT was wrong to take the view (as it did at [57]) that in *Janosevic* the view taken by the ECtHR that the surcharges were

criminal in nature was conditioned by those surcharges, at 20% and 40% depending on the particular tax involved, being somehow being considered as an "amalgam", such that a 20% surcharge could not, if considered alone, be regarded as involving a criminal charge. The FTT was wrong, as a result, to conclude that there was no authority of the ECtHR for a penalty of 30% or less being regarded as a criminal charge for Convention purposes.

26. As appears from the Court's judgment in *Janosevic*, at [69], no such amalgamation of the different rates of surcharge was contemplated. The Court was concerned, instead, to note that the surcharges, even at the rates of 20% and 40%, had no upper limit and might come to very large amounts. The same is true of the penalty in this case. Such a penalty is calculated as a percentage of the potential lost revenue, which is the amount of duty on the goods (FA 2008, Sch 41, para 10). There is accordingly no upper limit as the penalty depends on the duty due and unpaid, and if the unpaid duty is a large amount, so too will the penalty be large.

27. In reaching its conclusions on the nature of the penalty, the FTT had regard to the guidance set out in HMRC's Compliance Handbook Manual at CH300200 in which HMRC accept that penalties are "criminal" for Article 6 purposes where the maximum potential penalty is 70% or more of the amount used to calculate the penalty. Although we do not accept the submission that the FTT placed undue weight on this guidance in reaching its own conclusion, it is clear to us that by focusing on the percentage level of the penalty rather than the existence or lack of an upper limit and the possibility of a significant penalty, that guidance does not properly reflect the law as ascertained from the judgments of the ECtHR.

28. For these reasons, we do not accept the submission of Mr Evans, for HMRC, that the FTT correctly identified and applied the relevant principles. Nor do we accept his submission that *Janosevic* should be distinguished. We have already considered the respective levels of surcharge in *Janosevic* against the rate of the penalty in this case. That is not, for the reasons we have given, a distinguishing feature. It is correct, as Mr Evans argued, that in *Janosevic* the ECtHR noted, at [68], that there had been a change in domestic classification of the procedures from criminal to regulatory. But it was not the earlier classification as criminal that was decisive in determining the nature of the surcharges in that case under the Convention. As the Court recognised in *Öztürk*, at [49], the Convention is not opposed to moves towards decriminalisation, of which the Swedish processes in *Janosevic* were an example, but neither the present nor former domestic classification carry as much weight as the nature of the offence and the nature and degree of severity of the penalty. In similar vein, the fact that in *Janosevic* the Swedish courts had expressed the view that the surcharges in that case were to be regarded as within Article 6 is nothing to the point.

29. We conclude therefore that, notwithstanding its classification under UK law as a civil penalty, the nature of the offence and the nature and severity of the penalty in this case render it criminal in nature for the purposes of Article 6 of the Convention.

Is the reverse burden of proof in s 154 CEMA incompatible with Article 6?

30. What then is the effect of that conclusion? Article 6 contains a number of requirements going to the fairness of a hearing to determine a criminal charge within the scope of the Article. Of those the only issue that arises in this case is that in Article 6(2), namely the presumption of innocence. It is on that basis that Mr Bedenham argued that the reversal of the burden of proof provided for by s 154 CEMA contravenes Article 6, and that s 154 should be construed so as to be compatible with the requirement of the presumption of innocence that the burden be on HMRC.

31. Mr Evans submitted that this question was academic. He pointed to the discussion by the FTT at [78] – [80] of the issue of fact whether duty was outstanding. He argued that the FTT had found as a fact that no excise duty had been paid on the relevant goods, and that accordingly questions of the burden of proof did not arise. Although permission to appeal had been sought by Euro Wines in relation to that finding, it had been refused by Judge Sinfield.

32. We do not consider that, in the circumstances in which we have found, contrary to the FTT, that the penalty was criminal in nature and accordingly that Article 6 is engaged, the FTT's finding in this respect can render the argument on burden of proof academic. At [78] – [79], the FTT summarised the evidence of Mr Gowrea, the HMRC officer, concerning Galaxy and Vanguard Breweries. At [80] it accepted that evidence. But it went on to say:

> "As s 154 CEMA 1979 places the burden of proof in relation to the question whether or not duty has been paid on Euro Wines as the party bringing the present proceedings, and as there is no evidence to suggest that excise duty was paid on the goods, we find that the excise duty was not paid."

33. It is clear to us that this finding was based, at least in part, on the reverse burden of proof in s 154 CEMA. It is not a finding that could preclude, were it to be the appropriate course, the setting aside of the FTT's decision. The consideration of the effect of the application of Article 6 in this case is not therefore academic. The question is whether in this particular case the reverse burden of proof in s 154 CEMA operated so as to infringe the presumption of innocence in Article 6(2), and if so whether s 154 may be conformably construed to eliminate that infringement and alter the approach to be taken with respect to the factual position of payment of duty.

34. As has been made clear in *Salabiaku,* at [28], the Convention does not prohibit presumptions of law or fact, which operate in every legal system. On the other hand,

> "Article 6(2) does not … regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

35. The test depends on the circumstances of the individual case. As Lord Bingham said in *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264, at [12], having considered *Salabiaku*, "… the question in any case must be whether, on the facts, the

reasonable limits to which a presumption must be subject have been exceeded". Lord Bingham went on to emphasise this point at [21] when he said: "The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied to the particular case."

36. The commentary offered by Lord Bingham in *Sheldrake* on the decision of the ECtHR in *Janosevic* is particularly illuminating. At [20], Lord Bingham noted that in *Janosevic* the Court had rejected a complaint that the imposition of the surcharges in that case was incompatible with Article 6(2) because "an almost insurmountable burden of proof" was imposed on the taxpayer (*Janosevic*, at [99]). The surcharges in that case were, as we have noted earlier, imposed on objective grounds, in other words without any requirement of intent or negligence on the part of the taxpayer. The starting point for the tax authorities and the courts was that the inaccuracies found during the tax assessment were due to an inexcusable act attributable to the taxpayer and that it was not manifestly unreasonable to impose a tax surcharge as a penalty for that act. The Swedish tax system thus operated with a presumption, which it was up to the taxpayer to rebut (*Janosevic*, at [100]).

37. As Lord Bingham observed, the Court in *Janosevic* acknowledged that it was difficult for the taxpayer to rebut the presumption in question, but he was not without means of defence (*Janosevic*, at [102]). The ECtHR had regard to the financial interests of the state in tax matters and its dependence on the provision of correct and complete information by taxpayers ([103]). On that basis, the Court had concluded, at [104], that the presumption was confined within reasonable limits.

38. At [21], Lord Bingham summarised the principles to be derived from the case law of the ECtHR. He said:

> "From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

39. In this case, in contrast to that of *Janosevic*, there is no requirement on the part of a person in the position of Euro Wines to provide information. What there is, however, is an effective requirement, having regard to the sanction of the penalty, for the recipient of goods to take reasonable steps to check that those goods are duty paid. That is reinforced by the defence of reasonable excuse. As well as that defence, there is an opportunity, according to the express terms of s 154 CEMA, for the person concerned to rebut the presumption that duty has not been paid. The penalty is also subject to reasonable mitigation, reflecting the "quality of the disclosure", namely whether the disclosure was prompted or unprompted, and the timing, nature and extent of the disclosure (see FA 2008, Sch 41, paras 12 and 13).

40. Although we accept, as submitted by Mr Bedenham, the difficulty of a trader in a chain of transactions in seeking to ascertain whether duty has been paid in all cases, such a difficulty is not, according to *Janosevic*, necessarily decisive of the question of incompatibility with Article 6(2). That difficulty has to be considered in the context of the scheme of the penalty provisions as a whole.

41. Mr Bedenham sought to contrast the facts of this case with those in *Sheldrake*, where the question was as to the absence of likelihood of the defendant driving a vehicle whilst over the alcohol limit. There, as Lord Bingham described it at [41], the House of Lords found that it was not objectionable to criminalise a defendant's conduct without requiring a prosecutor to prove criminal intent. The likelihood of the defendant driving was "a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecutor to prove, beyond reasonable doubt, that he would."

42. It is not in every case that the question resolves itself into which of the parties is best placed to prove a particular fact. The whole scheme of the relevant provisions must be considered. It is not possible, in our judgment, to conclude with the clarity that was available in *Sheldrake*, which out of HMRC or a trader in the position of Euro Wines, would be the appropriate party to prove the question of duty payment. It might in some cases be HMRC, and in others the trader. Nevertheless, it is the trader who is in the best position, when carrying out its own trade, to know the circumstances of that trade. In every case a trader who is at the point of acquiring dutiable goods has the opportunity to take steps in order to satisfy itself about whether duty has been paid before going ahead. A trader who goes ahead without being satisfied knows or ought to know it is at risk. A trader in that situation can avoid the risk entirely by refusing to take such goods.

43. Parliament has determined that in all cases the burden should be on the relevant person and not on HMRC. It has done so whilst at the same time enabling the relevant person to rebut the presumption of non-payment of duty, and to raise defences of reasonable excuse, in particular, and special circumstances. This, we consider, strikes an appropriate balance in the circumstances. In our judgment, the penalty provisions as a whole represent a proportionate scheme and accordingly the imposition in that context of the burden of proof on the relevant person as to payment of duty does not go beyond what is necessary for the protection of the revenue. We

find accordingly that the reverse burden of proof in s 154 CEMA is not incompatible with Article 6 of the Convention. There is accordingly no need for a conforming construction of s 154.

Summary

44. We have found:

(1) that the assessment on Euro Wines of the penalty under FA 2008, Sch 41, para 4(1) was a criminal charge for the purpose of Article 6 of the Convention; but

(2) the reverse burden of proof in s 154 CEMA is not incompatible with Article 6.

45. Thus, although we have found that the FTT erred in law in deciding that the penalty was not criminal in nature, that error did not affect the FTT's conclusions, and the decision of the FTT should stand and not be set aside.

Decision

46. We dismiss this appeal.

MR JUSTICE BIRSS

UPPER TRIBUNAL JUDGE ROGER BERNER

RELEASE DATE: 4 August 2016