



George Elkington v Law Officers of the Crown
Royal Court
17th August, 2015

JUDGMENT
41/2015

Appeal against conviction by the Magistrate's Court on 24th March, 2015 for a TV licensing offence.

Approved Text
27.08.2015

IN THE ROYAL COURT OF GUERNSEY

Appeal from the Magistrate's Court
(Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988, Section 1)

Between

GEORGE ELKINGTON

Appellant

and

THE LAW OFFICERS OF THE CROWN

Respondent

Appeal heard on: 17th August 2015

Judgment handed down: 27th August 2015

Before: John Russell Finch Esq., Judge of the Royal Court

Counsel for the Appellant: Advocate P T R Ferbrache

Counsel for the Respondents: Crown Advocate C G Dunford

Cases and materials referred to in the Judgment:

The Communications Act, 2003, Sections 363 – 367;
The Communications (Bailiwick of Guernsey) Order, 2003;
The Communications (Bailiwick of Guernsey) Order, 2004;
The Wireless Telegraphy and Related Matters (Deemed Registration and Validation) (Bailiwick of Guernsey) Law, 2012.

The Human Rights (Bailiwick of Guernsey) Law, 2000;
The European Convention on Human Rights, Articles 8 and 10, and Article 1 of Protocol 1.

Loi relative aux Causes présentement poursuivies aux Petit Criminel of 1861;
The Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950.

The Order of HM Privy Council on Smuggling dated 7th May, 1806.

Bach and Bach v Law Officers 2007-8 GLR 354;

Smith v Harvey [1981] Court of Appeal, Civil Appeal No. 9;

Jersey Fishermen’s Association v States of Guernsey (JCA/62, 2005).

Marmont v Secretary of State for Culture, Media and Sport [2004] EWCA Civ 363; also [2004] EWCA Civ 96;

R (on the application of Stone) v S W Surrey Magistrate’s Court [2012] EWHC 2515 Admin.

Kretzschmar v Germany (app 26907/95)

Human Rights Practice (Sweet & Maxwell), paragraph 10.107;

The Oxford Dictionary (“tax” and “fee”)

DECISION

Introduction and Background

1. This is an appeal by Mr Elkington (“A”) against conviction by the Magistrate’s Court on 24th March, 2015 for a TV licensing offence, set out in the following terms:

“That you, on 20th May, 2013, in the Island of Guernsey used a television receiver without that use having been authorised by a licence under Part 4 of the Communications Act, 2003, as extended to the Bailiwick of Guernsey by the Communications (Bailiwick of Guernsey) Order, 2003 (UKSI 2003/3195), as amended, and the Communications (Bailiwick of Guernsey) Order, 2004 (UKSI 2004/307), as amended, contrary to section 363 of the said extended Act.”

2. There is no factual dispute on the evidence. All the elements of the offence are made out, subject to the points of law now arising (see the Admissions, dated 17th March, 2015, pages 525–526 of the main bundle (“the bundle”) to which all page numbers will refer).
3. By Notice of Appeal dated 7th April, 2015 two main Grounds are advanced (pages 2 and 3):
 - (i) compatibility of the legislation with the Human Rights (Bailiwick of Guernsey) Law, 2000 (the principal argument); and/or
 - (ii) registration of the 2004 Order referred to in the charge and the Wireless Telegraphy and Related Matters (Deemed Registration and Validation) (Bailiwick of Guernsey) Law, 2012 (“the 2012 Law”), importing “strict liability” for the “non-payment of a UK tax” is contrary to customary law.

The question of incompatibility cannot be dealt with by the Magistrate’s Court, so the matter was dealt with there in an accelerated fashion and then referred to the Royal Court.

4. The written submissions that cover the arguments adduced at the appeal hearing are found at pages 5-10, 283-294 and 493-498 (Law Officers, hereafter “R”); and pages 103-110 (on behalf of A). A large number of other materials can be seen in the bundle, ranging from reported English and Guernsey cases, extracts from textbooks and Convention-related items to States of Guernsey documentation.

Approach to the Case

5. The large bundle referred to is only one of several items of bulky material in this case. Even allowing for duplication there is a lot to go through on what is, whatever its importance to those involved, a simple matter. This is not a case where, in my opinion, an ornate judgment is called for. No problems of jurisdiction are involved, it is not a large commercial dispute involving reams of contracts; it is not even a criminal case where questions of joinder of

charges or admissibility are raised. Accordingly, without disrespect to those who have industriously and carefully produced the documentation, it is proposed to follow the path set out by William of Ockham: “It is futile to do with more things that which can be done with fewer”. In more modern language this can be rendered as “Other things being equal, simpler explanations are generally better than more complex ones”. Brevity in a judgment is normally a virtue, so long as those who read it can follow why it is right or wrong.

6. Before embarking on an examination of the legal arguments produced it is necessary to get some bearings. At page 11 there is a “Summary of TV Licensing Law as it applies to the Bailiwick of Guernsey”. The route followed is by way of Section 363 of the Communications Act, 2003 (“the 2003 Act”) extended to the Bailiwick. Specific provisions are found in The Extending Communications (Bailiwick of Guernsey) Order, 2004 (“the 2004 Order”) registered on the records of the Royal Court on 29th March, 2004. The Communications (Bailiwick of Guernsey) Order, 2003 (“the 2003 Order”) is only relevant as it substituted the Guernsey nomenclature of “Uniform Scale” for fines for the English “Standard Scale”. The legislation is reproduced in the bundle, pages 13-22. A further piece of legislation is the 2012 Law found at pages 39-46, which tidied up a number of omissions in the registration of annual UK regulations on licensing fees. All of this legislation is subject to scrutiny on the Human Rights grounds principally relied upon on behalf of A.
7. The issues emerging from the documentation were:
 - (i) the application of UK legislation to the Bailiwick;
 - (ii) customary law; and
 - (iii) Human Rights.

Point (i) was not argued, it is accepted the 2003 Act was lawfully extended. Point (ii) is really better regarded as subsidiary to (iii), which is A’s main contention in this appeal.

Application of the Legislation

8. This is mentioned for the sake of completeness. The 2003 Act was not passed by the States of Deliberation, but was extended by the 2004 Order, with effect from 27th February, 2004. The position is as set out simply in the Privy Council case of Jersey Fisherman’s Association Ltd v States of Guernsey (JCA/62/2005), attached to R’s last written submission. At paragraph 2, Lord Mance says:

“It is accepted that Her Majesty in Council could in theory legislate without any initiative from the Bailiwick, but, in practice there would be prior consultation with the Bailiwick.”

Whether registration is strictly necessary remains contentious, see e.g. the Order of the Privy Council on smuggling legislation, dated 7th May, 1806. The balance of opinion indicates that it is not. However, for the purposes of the present appeal, the position set out by Lord Mance is accepted and not subject to argument. When looking at the legislation the contents of the Billet d’Etat have to be considered, but it is the terms of the legislation itself which is the main concern.

Customary Law

9. Paragraph 14 of A’s skeleton (page 105) states:

“It is submitted that the imposition on Guernsey citizens of a requirement to pay a UK tax, particularly in circumstances where failure to pay is a strict liability criminal offence, is contrary to customary law.”

This can be read together with paragraph 11:

“However, the issue here is that Guernsey is a separate jurisdiction, with its own Parliament and is responsible for the creation of its own law, it has its own independence and autonomy and, in particular, is, and always has been responsible for the creation of its own laws in relation to tax.”

10. A recent Guernsey Court of Appeal case, Bach and Bach v Law Officers 2007-8 GLR 354 is worth considering here. On a criminal appeal relating to planning violations, it was suggested various customary periods of prescription applied which time-barred prosecution. This argument failed. Beloff JA, at paragraph 21 of the judgment, stated – “The planning regime is statutory. There is no limitation period enacted”. The burden was on the appellants there to demonstrate that the prescription periods applied to the relevant legislation, and they failed to do so. To put it plainly, and hopefully without undue oversimplification, statutes over-ride the custom or common law. The earlier civil appeal of Smith v Harvey [1981] Court of Appeal, Civil Appeal No. 9 was referred to by Beloff JA at paragraph 14 of his judgment. This, too, is relevant. The customary law procedure known as “Causes en adjonction”, found back in Terrien was modified by statute in 1861 (the “Loi relative aux Causes présentement poursuivies aux Petit Criminel”) and abolished by the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950. Thus ancient custom was first altered, and then abrogated by statute. Any relevant customary law has therefore been supplanted by legislation.
11. Is the imposition of the licensing fee a “tax”? It all depends on what definitions are favoured. The Oxford Dictionary states that a “tax” is:

“A compulsory contribution to state revenue levied by the government on workers’ revenue and business profits, or added to the cost of some goods, services and transactions.”

Whereas a “fee” is:

“Money paid as part of a special transaction, for example, for a privilege or for admissions to something.”

But R is correct in submitting, in effect, that this is a cul-de-sac. Whether or not the licensing fee can be deemed a “tax” is not relevant, provided the legislation is lawfully in force in the Bailiwick (see paragraph 14 of R’s second skeleton, pages 288-289). A lot of ink could be spilt here, but the exercise is unnecessary. It is not necessary for the purposes of this appeal to deal with the issue, and also rather difficult to see if any answer could be given with confidence.

Human Rights

12. A good deal was said on this question and Advocate Ferbrache made his oral submissions with admirable economy and learning. Without any disrespect, it is considered that this can be dealt with quite shortly. The English cases of Marmont v Secretary of State for Culture, Media and Sport [2004] EWCA Civ 363 (pages 67-73) and [2004] EWCA Civ. 96 (pages 75-88) and R (on the application of Stone) v S W Surrey Magistrates’ Court [2012] EWHC 2515 Admin (pages 97-102) are indistinguishable from the Guernsey situation. Articles 8 and 10, and Article 1 of Protocol 1 of the ECHR were cited there without success and the same result follows in the present appeal. In short, they do not avail A. The English cases are not binding upon the Royal Court, but are of high persuasive authority. As they deal with the ECHR, which the legislatures in the United Kingdom and Guernsey have made applicable in each respective jurisdiction, they should be followed in the absence of compelling reasons not to do so. The Royal Court was asked to distinguish them so that they need not be followed. They cannot be so distinguished in any effective way.
13. Also of relevance is the ECHR case of Kretzschmar v Germany (app 26907/95), a decision of the European Commission of Human Rights (First Chamber). (One of the judges, it is noted,

was the eminent Sir Nicholas Bratza). The effect of this unanimous decision is summed up in the textbook “Human Rights Practice” at 10-107, (pages 329-330) as follows:

“Even assuming that the levying of fees for radios used for commercial purposes would constitute an interference with the right to receive information, the Commission did not consider that such charges (used to fund the basic and balanced supply of programmes in a public and private broadcasting system) was disproportionate to the aims pursued.”

Accordingly, Article 10 of ECHR (freedom of expression) was not violated. On the basis of the English cases cited, Article 8 (Right to respect for private and family life) and Article 1 of Protocol 1 (Protection of property) are not engaged either. This decision seems clear and is applicable here.

The Democratic Process in Guernsey

14. The TV licensing regime came before the States of Guernsey in March 2012 (see pages 47-63) after it was discovered that various annual UK regulations on the amount of fees had not been submitted for registration in the Royal Court, principally due to omissions by the UK authorities. It was necessary to validate these items and the 2012 Law (pages 39-45) was passed by the States of Deliberation. The States’ debate included a contribution from a veteran Deputy, which opposed the TV licensing regime in plain terms (pages 321-322). Accordingly, the topic has been aired before the legislature and voted upon. The 2012 Law is, on the basis set out above, compatible with the ECHR, as are the 2004 and 2003 Orders:

Conclusions

15. None of the contentions raised on behalf of A affect the validity of the legislation, which was lawfully in force in the Bailiwick and creates the offence for which A was summoned. A fails on the points of law put forward and the appeal must be dismissed. It is hoped that the approach set out in paragraph 5 above at least makes the decision understandable, without becoming enmeshed in over-lengthy legal reasoning. The issue, as stated, when all is said and done, is not a complex one. Whether the amount in question is a “tax” or not, the remedy for those aggrieved is that common to democratic societies – namely persuading the local legislature to change or replace the law, which it has the power to do.
16. Appeal against Conviction Dismissed.

J R Finch
Judge of the Royal Court