Neutral Citation Number: [2021] EWCA Civ 799

Case No: A3/2020/0499

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
UT Judge Cannan and UT Judge Greenbank
UT/2018/0157

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/05/2021

Before :

THE RT HON LORD JUSTICE LEWISON
THE RT HON LORD JUSTICE ARNOLD
and
THE RT HON LORD JUSTICE EDIS

- -

Between :

SAQIB MUNIR	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -
- -

Rashid Ahmed and Farhan Asghar (instructed by **Asghar & Co**) for the **Appellant**
Howard Watkinson (instructed by **HMRC Solicitors Office**) for the **Respondent**

Hearing dates : 19 May 2021

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Approved Judgment

Lord Justice Edis:

Introduction

1. The issue in this appeal is how the First-tier Tribunal ("the FTT") may treat a conviction which is said to prove that an appellant was either holding or involved in holding excise goods on which no duty had been paid for the purposes of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593) ("the HMDP Regulations").

2. This is an appeal from the Upper Tribunal (Tax and Chancery Chamber)[1] who allowed an appeal by the Respondent to the present appeal ("HMRC") against the refusal by the FTT to strike out the appellant's appeal against an assessment to excise duty in the sum of £22,044 made on 21 July 2017 ("the Assessment"). The FTT's decision was released on 11 September 2018, and the Upper Tribunal decision was published on 13 September 2019. I have set out the link to the Upper Tribunal judgment in a footnote below.

The facts

3. The appellant was seen on 3 September 2016 driving a Fiat van on Bury New Road, Manchester. When the police tried to stop him, he drove away at speed. The police did manage to stop the van, at which point the appellant ran away. The back of the van was locked, and no key to open it was recovered from the appellant. When the police opened it, they found 44,734 non-UK duty paid cigarettes and 54kg of non-UK duty paid tobacco. The appellant was arrested on suspicion of the fraudulent evasion of excise duty. When he was searched, he was found to have on his person £4,065 in cash and two mobile phones.

4. In interview, the appellant said that he did not know what was in the back of the van and had been told he would be paid £30 if he drove it from one place to another. He named Mr. Hama Hussein as the person he said he had been working for, and said that the van and the cash which was found on him belonged to that person.

5. On 4 May 2017 he pleaded guilty before the Magistrates' Court to two offences arising out of his arrest.

   i) An offence contrary to section 170(2) and (3) of the Customs and Excise Management Act 1979 of being knowingly concerned in the fraudulent attempt at evasion of any duty chargeable on the cigarettes and tobacco.

   ii) An offence contrary to sections 329(1) and 334 of the Proceeds of Crime Act 2002, of acquiring, using or having possession of criminal property, namely the £4,065 in cash. In order to commit this offence, the offender must know or suspect that the property is criminal property, see section 340(3)(b) of the Proceeds of Crime Act.

6. The appellant was represented by solicitors both at the interview and again at the hearing before the Magistrates' Court. On the same day as he entered his pleas, he was sentenced to concurrent community orders with unpaid work requirements, he was

[1] https://www.gov.uk/tax-and-chancery-tribunal-decisions/the-commissioners-for-hm-revenue-and-customs-v-saqib-munir-2019-ukut-0280-tcc. [2019] UKUT 0280 (TCC).

ordered to pay a total of £170 in surcharge and costs, and a deprivation order was made in respect of the cash.

7. The Assessment was reviewed by an HMRC Appeals and Reviews Officer on 20 September 2017. In seeking that review, the appellant made two points:-

   i) He claimed that he had already been charged with a criminal offence arising out of the finding of the cigarettes and tobacco.

   ii) He said he did not own the cigarettes and tobacco.

8. The review upheld the Assessment, and informed the appellant about his right of appeal to the FTT, pointing him to two websites where he could find information about what was required of him if he wished to appeal. The basis of the Assessment was that the appellant was "the person holding the Excise goods at the time they were released for consumption by virtue of sub-paragraph 6(1)(b)" of the HMDP Regulations. A person "holding" the goods is liable to be assessed under Regulation 10(1) of the HMDP Regulations.

9. The appellant appealed to the FTT setting out the following Grounds of Appeal:-

   i) He had already been charged and punished for the offence;

   ii) The goods did not belong to him and the van was locked from the back door;

   iii) He could not afford to pay the assessment.

10. It is unnecessary to say anything about his first and third grounds except that they raise matters which are irrelevant to the Assessment and could not conceivably justify any interference with it by the FTT. His means are irrelevant, and the Assessment is not a civil penalty, only an assessment of the amount of duty payable in respect of the tobacco and cigarettes.

11. HMRC applied to the FTT under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the 2009 Rules") for a direction that the appeal be struck out. This provides that the tribunal may strike out a party's case if it considers that there is no reasonable prospect of the appellant's case, or part of it, succeeding. That was plainly true of the first and third grounds of appeal. In relation to the second ground of appeal, HMRC said that by pleading guilty to the first of the criminal charges, the appellant had admitted that he knew what was in the back of the van and that he knew no duty had been paid on the tobacco and cigarettes. It was therefore submitted that the appeal had no real prospect of success.

12. The FTT judge refused to strike out the appeal.

HMRC's powers

13. The right to make an assessment of duty of excise arises under section 12 of the Finance Act 1994. In deciding whether the appellant was a person from whom an amount of duty of excise had become due, HMRC were required to apply the HMDP Regulations. Regulation 10 provides for liability to excise duty when excise goods are released for consumption in the United Kingdom. It provides as follows:

> "10(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) (holding of excise goods outside a duty suspension arrangement) is the person holding the excise goods at that time.
>
> (2) Any other person involved in the holding of the excise goods is jointly and severally liable to pay the duty with the person specified in paragraph (1)."

14. The circumstances in which excise goods are treated as "released for consumption in the United Kingdom" are described in regulation 6 of the HMDP Regulations. It provides, so far as relevant:

> "6(1) Excise goods are released for consumption in the United Kingdom at the time when the goods—
>
> ……
>
> (b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, …;

15. Mr. Howard Watkinson, on behalf of HMRC, assisted us with a review of the current state of the law in relation to the meaning of "holding" for the purposes of the HMDP Regulations. These authorities culminate in the decision of this court in *The Commissioners for HM Revenue and Customs v. Perfect* [2019] EWCA Civ 465, and its reference to the European Court of Justice. It is enough for our purposes to record that HMRC's case on the strike out application which led to this appeal is that the evidence that the appellant knew what was in the back of the van, and that it was duty unpaid, is overwhelming. That is why it sought to strike out the appellant's appeal to the FTT. It says that even on the most favourable view of the law possible, the appellant has no reasonable prospect of persuading the FTT that he was ignorant of the contents of the van, and of the fact that were not duty paid. It is not submitted that the Assessment should be upheld without a full hearing on the merits of the appeal to the FTT if HMRC fails to make good this case on the facts.

16. I record therefore that I have considered the authorities to which we were referred, and that for the purposes of this appeal I need say nothing about them. The FTT judge and the Upper Tribunal directed themselves in accordance with the decision of the Upper Tribunal in *McKeown v. HM Revenue and Customs* [2016] UKUT 479 (TCC) where the term "holding" was considered by reference to Regulation 13(2)(b) of the HMDP Regulations. This is the most favourable view of the law on the question to the appellant, and is reflected in HMRC's approach to this appeal as explained in the previous paragraph. The passage relied upon is this:-

> "65. There is no question that the Appellants had physical possession of the goods but that is neither necessary nor, by itself, enough to constitute 'holding' for the purposes of reg 13. In order to be 'holding the goods', a person must be capable of exercising de jure and/or de facto control over the goods, whether temporarily or permanently, either directly or by acting through an agent. In this case, as the tribunals found, the drivers

> had control over the goods. That was, in our view, obviously correct. The Appellants, as drivers, had custody of the goods and were responsible for them during their transportation. The fact that the drivers had obligations to others, who had engaged them to transport the goods, and those others had control over the drivers does not mean that the drivers did not also have de jure and de facto control, albeit subject to obligations owed to and direction by the others.
>
> 66. A person who has de jure and de facto control of goods but who lacks both actual and constructive knowledge of them and the fact that duty is payable on them, cannot be said to be 'holding' the goods for the purposes of reg 13. …"

The FTT Decision

17. The appellant's only possible ground of appeal, was his second, namely that he did not know what was in the back of the van and did not have a key to access it. That raised a matter of fact. By Rule 15(2)(a) of the 2009 Rules, it is provided that The Tribunal may admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom. This meant that the convictions of the appellant were before the FTT, and also the Crown Prosecution Service file of witness statements from the criminal proceedings, which includes the transcript of the interview under caution of the appellant, in the presence of his solicitor, which was conducted in English and without an interpreter. The appellant's solicitor did not say at any point that he thought an interpreter was necessary.

18. On 6 March 2018, the FTT wrote to the appellant at the direction of a Tribunal Judge and pointed out that his double jeopardy ground was hopeless and that the other, lack of knowledge of what was in the van, was problematic because of his conviction. The significance of the conviction was explained in non-technical language. In reply the appellant wrote a letter to the FTT on 9 March 2018 in which he confirmed that he wished to continue with his appeal, and expanded on his lack of means to pay the Assessment which he said was "harsh". He said that he is an immigrant in the United Kingdom and seeking asylum and that his English is not good. He raised the double jeopardy question again, and repeated his assertion that he did not own the goods. Apart from that, he added only this about the convictions which were the burden of the case against him:-

> "So far as the criminal act is concerned, I admitted that I have moved the vehicle from that place without having knowledge of the contents of the vehicle."

19. In a subsequent email to the FTT, dated 5 April 2018, he replied to HMRC's response to his letter. He made the same points again, but added this about the conviction:-

> "I was only a mule for the trafficking of these goods having no nexus with the ownership and this fact is evident from the history of criminal case against me."

20. The FTT judge held that

> "it could not be assumed from the wording of section 170(2) or the wording of the charge, that the specific offence of which the appellant was convicted and to which he pleaded guilty necessarily had the consequence that he had handled the goods in the sense of the regulations 6 and 10 of the HMDP Regulations."

21. He continued:-

> "29. But even if it is accepted that his offence did involve him being accused of and convicted of "handling", the appellant denied in his interview and continues to deny (as he did at the hearing) that he knew what the goods were in the back of the van and that he had no access to the back. HMRC say that his denials are irrelevant as he pleaded guilty."

22. The judge then set out section 11 of the Civil Evidence Act 1968 and continued:-

> "31. ……at any appeal hearing against the assessment the appellant would be permitted to put forward evidence to show that he did not commit the offence of which he was convicted, and by sub-section (1) he is permitted to do that even if he pleaded guilty.
>
> "32. He would be able, as far as I can see, to produce evidence from the solicitor who advised him to plead guilty to an offence under section 170-(2) CEMA to explain why he was advised so to plead.
>
> "33. And as I have explained he was not in fact charged with or convicted of handling goods on which duty had not been paid. He might then be able to make play of the fact that he was not charged under section 170(1) CEMA which seems to describe conduct much closer to the conduct which gives rise to liability under the HMDP Regulations."

23. The FTT judge then cited the passage from *McKeown* which I have set out above, and continued:-

> "35. On the basis of his replies in his interview and subsequent assertions including in his statements to us I do not think it is unrealistic or fanciful to say that the appellant may be able to show that he was not holding the goods in the sense given by regulation 10 HMDP. Indeed in the absence of a presumption that his conviction shows that he must be treated as holding the goods, I consider it would be verging on the unrealistic to suggest that his appeal would fail."

24. The FTT judge then went on to make his only reference to the evidence which explained what the conviction actually meant in this case. He did not do this in order to explain his reason for ignoring it on that question, but to extract from it a point which he thought

the appellant may be able to take about the Assessment which the appellant had never taken, and still does not take now. The witness statement of a police officer described the goods seized and says that a significant quantity of them were marked "UK duty paid" but this was suspected by the officer to be counterfeit.

The Upper Tribunal

25. The Upper Tribunal identified errors of law by the FTT decision and allowed the appeal. It went on to re-make the decision and dismissed the appeal. No separate challenge is before us to the decision as re-made by the Upper Tribunal. The issue is whether it was right to identify errors of law and to allow the appeal. The paragraph identifying the errors reads:-

> "36. We are satisfied therefore that the FTT erred in law. It failed to find in light of Mr Munir's conviction that unless he could establish at the final hearing that he did not have knowledge that the vehicle contained excise goods on which duty had not been paid then his appeal would inevitably be dismissed. It further erred in law in failing to take into account and give weight to the fact of Mr Munir's conviction and the undisputed facts more generally in its consideration of whether he had a reasonable prospect of establishing at the final hearing that he did not have knowledge that the vehicle contained excise goods on which duty had not been paid."

Discussion and decision

26. This is a second appeal under section 13 of the Tribunals, Courts and Enforcement Act 2007 on a point of law. Permission was granted by this court, and two important points identified by the judge who granted it:-

    i) Whether the FTT was right to hold that since he was convicted under section 170(2) rather than section 170(1) of CEMA (which covers possessing or dealing with goods) HMRC's application to strike out Mr. Munir's appeal against the assessment should not succeed.

    ii) Whether Mr. Munir was entitled to rely on the fact that he was advised to plead guilty to the criminal charge is something he can rely on for the purpose of showing that he did not commit the offence. The judge granting permission felt that this point may give rise to questions of legal professional privilege.

27. Mr. Rashid Ahmed and Mr. Farhan Asghar have appeared for the appellant before us and we are grateful for their written and oral submissions.

28. In my judgment, the FTT was clearly wrong to view the conviction in isolation from the other relevant evidence about the facts which gave rise to it. The FTT judge was free to consider all the relevant material before him and that was what was required of him in law. The conviction itself was proved by an extract from the Magistrates' Court record which recorded the offence, the guilty pleas, and the presence of a defence solicitor. The witness statements and interview record were admissible to show what had happened, and what the appellant was accepting by his pleas. He did not dispute

any of that evidence. The FTT judge allowed himself to be side-tracked by the undoubted truth that it is possible, in very many ways, for a person to commit the offence of being knowingly involved in the fraudulent evasion of duty chargeable on goods without ever "holding" them in the sense used in the HMDP Regulations. The question, however, is not a theoretical one. It is: what was this appellant convicted of actually doing? He was convicted of being the sole occupant of the van as he drove it on a road with a large quantity of cigarettes and tobacco in the back. By his plea he accepted that he was "knowingly" involved in this "fraudulent evasion", to use the key words in section 170(2). That means he accepted that he knew that the goods were in the back of the van and that no duty had been paid on them.

29. It is true that there is a more specific offence created by section 170(1) of the 1979 Act. The relevant parts of the provision are as follows:-

> **170.— Penalty for fraudulent evasion of duty, etc.**
>
> (1) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person—
>
> (a) knowingly acquires possession of any of the following goods, that is to say—
>
> (i) goods which have been unlawfully removed from a warehouse or Queen's warehouse;
>
> (ii) goods which are chargeable with a duty which has not been paid;
>
> (iii) goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force under or by virtue of any enactment; or
>
> (b) is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any such goods,
>
> and does so with intent to defraud Her Majesty of any duty payable on the goods or to evade any such prohibition or restriction with respect to the goods he shall be guilty of an offence under this section and may be arrested.
>
> (2) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion—
>
> (a) of any duty chargeable on the goods;

30. The FTT judge's suggestion that the appellant might be able to "make play of the fact" that he was not charged under section 170(1) seems to me to reveal a misunderstanding of the law. It is not uncommon for the same conduct to constitute offences under different statutory provisions. In such cases, the prosecutor may select which offence

or offences to charge, and does not thereby accept that the person charged is not guilty of the offences not selected. The appellant in this case could equally well have been charged under section 170(1) and the fact that he was not has no consequences for his prosecution and conviction under section 170(2) or for the evidential significance of that conviction.

31. Spencer J in *CXX v. DXX* [2012] EWHC 1535 (QB) helpfully summarises the law on the weight which should properly be given to a conviction, which, in a court, would be admitted under section 11 of the Civil Evidence Act 1968. He reviews a difference of opinion between Buckley LJ and Lord Denning MR in *Stupple v. Royal Insurance Co Ltd* [1971] 1 QB 50. Lord Denning held that a conviction was a "weighty piece of evidence of itself". Buckley LJ preferred the view that the conviction was simply a trigger which reversed the burden of proof but had no weight of its own. Spencer J followed the view of the editor of *Phipson on Evidence,* now found in the 19th Edition at 43-87 to 43-89. I agree with Spencer J as a matter of principle, but do not regard the question as fundamental to the resolution of this appeal. This conviction was entered by way of a guilty plea, by a person who had the benefit of legal advice and representation throughout the proceedings. The FTT judge had access to the underlying material, which set out the strength of the prosecution case as well as what criminal conduct was alleged. Whether as a matter of the law of evidence a conviction has a weight of its own is not decisive where, as here, the court has all the material necessary to assess its weight. The guilty plea was an admission against interest, and, even now, no aspect of the prosecution case is challenged. This could only rationally be regarded as weighty evidence.

32. Given that section 11 of the Civil Evidence Act 1968 does not strictly apply, it is open to the FTT to adopt the same approach to evidence of a conviction if it thinks it right. That is what occurred in *Atlantic Electronics Ltd. v. HMRC* [2013] EWCA Civ 651, [23]. It was necessary to enact this common-sense approach to the evidential value of criminal convictions in order to modify the rule in *Hollington v. Hewthorn &Co Ltd* [1943] K.B. 587 in civil proceedings. No equivalent legislation is required where the strict rules of evidence do not apply. Criminal convictions are the result either of a confession by the entering of a guilty plea before a court, or proof to the criminal standard. There is a right of appeal, and a person may also apply to vacate a guilty plea to the trial court. On the face of it, a criminal conviction is compelling evidence of guilt in cases where the civil standard of proof is engaged, unless there is some compelling evidence to show that it would be wrong to accept it as such. That is particularly true in this case, for the reasons given in the previous paragraph. The FTT and the Upper Tribunal were not, therefore, wrong to apply the machinery of section 11 of the 1968 Act.

33. In this case, there are suggestions that Mr. Munir has said that he pleaded guilty because he was advised to do so by his solicitor and was told that he would not be sent to prison if he did. He has never set out in writing exactly what he says about this, although it must have been obvious to him that his conviction was important, and that was carefully explained to him by the FTT in March 2018. There is nothing from his solicitor to explain how her client came to plead guilty to an offence of which he was not guilty, if that is what happened. The FTT judge said this when summarising part of HMRC's submission:-

> "13. ……The only important factor is that he pleaded guilty and not the reasons for doing so (which were the appellant had said that his solicitor advised him to so that he would get the kind of sentence he did and not go to jail)."

34. The Upper Tribunal said this:-

> "47. During the course of the hearing before us Mr Munir stated that he had told the FTT that his solicitor had advised him that he was guilty of the offence because he had driven the van without checking what was inside the van. It seems unlikely that the FTT would not have referred to such evidence from Mr Munir if that is what he had said. It also seems unlikely to us that any solicitor would give advice in such terms but of course it may be that Mr Munir misunderstood the advice he was being given. We take into account the possibility that Mr Munir misunderstood the advice he was given in our consideration of all the evidence."

35. I understand the last part of this passage to mean that the Upper Tribunal was having regard to a possibility, namely that the appellant did not understand the legal advice he received, which it then discounted in making its finding that he would have no reasonable possibility of showing that he was wrongly convicted. It appears that the explanation of the plea recorded by the FTT judge must have come to him during the hearing, because it is not written down anywhere, although the judge does not say that. It is not what the appellant said he had said when appearing before the Upper Tribunal. What the FTT judge has recorded does not involve a denial of guilt. People often plead guilty to offences where they recognise their chances of acquittal are slim and they hope for a lighter sentence. That does not mean that the conviction is unsafe or not probative of guilt in subsequent civil proceedings. What emerged for the first time before the Upper Tribunal is a denial of guilt, and a short account of the faulty advice which is said to have led to the pleas. The Upper Tribunal's first observation, namely that it seems unlikely that the FTT judge would have written down something so different from what the appellant was saying, seems to me to be the most telling. That observation would justify a finding that the appellant's case as to why he had pleaded guilty had changed between the FTT and the Upper Tribunal. At all events, it appears that the appellant never said in terms to the FTT judge that he was innocent, but had pleaded guilty anyway because of advice from his solicitor. Had he done so, I would expect the judge to have ensured that full details of what he said about that advice were recorded in the judgment. As I have said, there is nothing at all in his representations to the Review or in his written materials prepared for the appeal which deals with this, and so care was required in establishing exactly what was being said before reliance could be placed on it. The FTT judge failed to record what was being said, it seems, and certainly failed to subject it to any real scrutiny. Given that he was being asked to decide whether the appellant had anything to say of sufficient credibility which might undermine the probative effect of the conviction, these were serious failures. When considering whether a defence has a real prospect of success, a judge must not abandon his critical faculties and is not obliged to accept what a defendant says without analysis: *Calland v. Financial Conduct Authority* [2015] EWCA Civ 192, [28]-[29].

36. It is easy to see why the appellant may have concluded that his chances of being acquitted were slim. When he saw the police he first tried to escape by driving away, and then by running away. His explanation, that he feared nothing worse than being prosecuted for driving without a licence or insurance, is an obvious lie. He had £4,065 cash about his person (not in the back of the van) which belonged to his boss, so he said, and which was the proceeds of crime. That led to the second charge to which he pleaded guilty, and which he explained in interview had been given to him by a friend of his boss whose name he did not know. The money was to be taken to the boss. Even assuming that any of this is true, it is inconsistent with the appellant being merely an innocent dupe who was paid £30 to drive a van from one place to another without any idea what was in it. It generates an inference that he was a highly trusted accomplice of the person who trusted him with the cash. The evidence is silent on the reason why he did not have a key to the back of the van when he was arrested, but the reason does not appear to be that the owner of its contents did not trust him to exercise his control of them in accordance with their agreement. If that were the position, he would not have been trusted with £4,065 in cash. The owner of the cash, according to the appellant, is the same person for whom he was working when driving the van. The appellant told the police that he did not know what sort of work this man does and only knows him because he sometimes offers casual work through the local market. He was not sure that the name he gave, Hama Hussein, was his real name. It is unsurprising that the appellant entered guilty pleas and did not put this forward at a trial. It is also unsurprising, if it is the case, that he was advised he would probably be convicted if he did.

37. For these reasons I conclude that the Upper Tribunal's findings at its paragraph [36], which I have set out at [25] above, were entirely right. The FTT judge had erred in law by failing to take account of all the relevant facts. Had he done so, he would have been driven to the same conclusion which the Upper Tribunal later reached.

38. As I have recorded above, the Review of the Assessment concluded that the appellant was the holder of the goods within HMDP Regulation 10(1). The Upper Tribunal summarised the issue before it as:-

> "The only ground on which Mr. Munir might possibly succeed is that he had no knowledge that the van contained excise goods on which the duty had not been paid. If Mr. Munir were able to establish that fact then he might reasonably argue that he was not holding the goods or involved in holding the goods within regulation 10(1) or regulation 10(2) HMDP Regulations."

39. The potential significance of Regulation 10(2) to this case appears first to have been raised in the HMRC Grounds of Appeal to the Upper Tribunal. An issue might perhaps arise as to whether it is appropriate to uphold an assessment made against a person under Regulation 10(1) as the holder of goods, on the basis that he is liable under Regulation 10(2) on the basis that he is not the holder, but is involved in holding the goods. In this case, in my judgment, that issue does not arise because the Assessment correctly identified the appellant as the holder. He had *de facto* control over the goods, subject perhaps to obligations to his boss in relation to how he exercised that control. He was the driver of the van and in sole control of where they went. The only live issue in this case was whether he knew that they were in the back of the van. That was resolved against him by the conviction which he had no reasonable prospect of showing

was wrong. Accordingly, it is not necessary to decide whether HMRC should be permitted to put its case in the alternative at the appeal stage, having not done so when making and reviewing the Assessment.

40. The second issue which the judge identified when granting permission has not been argued before us. Mr. Ahmed accepts in his skeleton argument that it is open to the appellant to waive privilege in the advice he received prior to pleading guilty if he wishes to rely on it. There is no difficulty in a person who wishes to contend in any forum that he was wrongly convicted in a criminal court on his own plea waiving privilege and placing that advice in evidence. The Court of Appeal Criminal Division frequently encounters cases of this kind, and has a well-established process for securing waivers of privilege and comments from previous legal advisers and representatives, see *R v. McCook* [2014] EWCA Crim 734.

41. If legal professional privilege were waived evidence could be adduced about the circumstances in which the plea was entered in an endeavour to show that the admissions then made were not true. This would be subject to the power of the court to strike out a case which amounted to an abusive collateral attack on a subsisting conviction. The circumstances in which that power might be exercised where the challenge was mounted in defence of a claim, as opposed to by a claimant advancing a case which was inconsistent with a subsisting conviction, have not been authoritatively established, and I do not think that it is necessary for the disposal of this case to deal with that question now. HMRC has not alleged that the appellant should be prevented from adducing his evidence for this reason. They have suggested that he has never produced any indication of what evidence he might be able to supply, and that what little he has said about the conviction is inconsistent and incomplete.

Conclusion

42. For these reasons I would dismiss the appeal.

Lord Justice Arnold

43. I agree.

Lord Justice Lewison

44. I also agree.