Neutral Citation Number: [2014] EWHC 3669 (Admin)

Case No: CO/2969/2014
and CO/2971/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2014

Before :

MR JUSTICE TURNER

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Between :

The Queen on the Application of **1. PHILIP MORRIS BRANDS SARL** **2. PHILIP MORRIS LIMITED** **3. BRITISH AMERICAN TOBACCO UK LIMITED**	**Claimants**
- and -	
THE SECRETARY OF STATE FOR HEALTH	**Defendant**
1. IMPERIAL TOBACCO LIMITED **2. BRITISH AMERICAN TOBACCO UK LIMITED** **3. JT INTERNATIONAL SA** **4. GALLAHER LIMITED**	**Interested Parties in Claim CO/2969/2014**
1. TANN UK LIMITED AND TANNPAPIER GMBH **2. V. MANE FILS** **3. DEUTSCHE BENKERT GMBH & CO KG AND BENKERT UK LIMITED**	**Interveners in Claim CO/2969/2014**
1. JOH. WILH. VON EICKEN GMBH	**Intervener in Claim CO/2971/2014**

PARTY	COUNSEL	SOLICITORS
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Secretary of State for Health	Mark Hoskins QC Sarah Abram Oliver Jones	Treasury Solicitors
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JT International SA Gallaher Limited	David Anderson QC Victoria Wakefield	Freshfields Bruckhaus Deringer LLP
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V. Mane Fils	Martin Chamberlain QC Fred Hobson	Hill Dickinson
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Joh. Wilh. Von Eicken GMBH	Anneli Howard	Irwin Mitchell

Hearing dates: 3rd November 2014

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Approved Judgment

The Hon Mr Justice Turner:

INTRODUCTION

1. These proceedings arise from two claims for judicial review: the first brought by British American Tobacco UK Limited ("BAT") and the second brought by Philip Morris Brands Sarl and Philip Morris Limited ("PM"). The formal object of the claims is the intention and obligation of the Secretary of State to implement Directive 2014/40/EU of 3 April 2014 (the Second Tobacco Products Directive, or "TPD2"). In effect, however, the parties by these proceedings challenge the validity of TPD2 itself.

PROCEDURAL BACKGROUND

2. The Secretary of State served summary grounds of defence in each set of proceedings on 18 July 2014. The Secretary of State, however, agreed that permission to seek judicial review should be granted and that this Court should seek a preliminary ruling from the Court of Justice of the European Union ("CJEU") in relation to the validity of TPD2, subject to the terms of the reference being agreed by the parties and by the Court.

3. By an order dated 30 July 2014, Supperstone J. granted permission in both cases, ordered that the cases be joined, made case management directions and directed that the present hearing take place in order for the Court to determine whether to seek a preliminary ruling and, if so, in what terms.

4. In particular, Supperstone J. directed that the claimants cooperate to produce a joint draft order, schedule and series of proposed questions for referral, to be provided to the Secretary of State and, thereafter, that the parties seek to agree the contents of the draft. This they have done.

5. The Draft Order for Reference provides, *inter alia*, that:

   i) for the reasons set out in Schedule B to the order, the questions set out in Schedule A to the order would be referred to the CJEU forthwith; and

   ii) in accordance with standard practice, all further proceedings would be stayed until the CJEU has given its preliminary ruling on those questions, with costs reserved.

6. It is, therefore, common ground that the question of the validity of TPD2 should be referred to the CJEU for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union ("TFEU"), since only the CJEU has jurisdiction to declare measures of European Union law invalid.

7. In other proceedings, Pillbox 38 (UK) Limited (t/a "Totally Wicked") v Secretary of State for Health, an electronic cigarette wholesaler and retailer has challenged the validity of Article 20 of TPD2, which deals with electronic cigarettes. At a hearing on 6 October 2014, this Court ordered that a reference should be made in those proceedings. Accordingly, the CJEU will in due course be resolving questions relating to the validity of TPD2 in any event.

8. The questions set out in Schedule A to the agreed draft Order fall into four categories:

i) questions relating to whether the EU Legislature has identified an adequate legal basis within the TFEU for the adoption of TPD2;

ii) questions relating to whether TPD2 complies with the principle of proportionality (a general principle of EU law) and the EU Charter of Fundamental Rights;

iii) questions relating to whether TPD2 or any of its provisions is invalid by reason of the infringement of rules set out in the TFEU governing the delegation of powers and the conferral of implementing powers on the Commission; and

iv) a question as to whether TPD2 is invalid for failure to comply with the principle of subsidiarity.

9. These questions are aimed at ascertaining whether TPD2 is invalid in whole or in part. In addition, the Secretary of State has suggested that a question relating to the interpretation of TPD2 be referred to the CJEU, to which the parties have agreed.

10. The national court stage of the preliminary reference procedure is governed by CPR Part 68, the Practice Direction to which cross-refers to Article 94 of the CJEU's Rules of Procedure ("*Content of the request for a preliminary ruling*") and to the CJEU's *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*. The draft Order for Reference agreed by the parties complies with the requirements set by these rules.

THE REFERENCE

11. Having read the written submissions relied upon by BAT and PM and the evidence upon which they rely, I am satisfied that their claims are arguable and, subject to one amendment, with which I propose to deal in greater detail, make the reference in the terms of the draft agreed between the parties.

OTHER PARTIES

12. Less straightforward than the issue of whether or not a reference should be made is that concerning the status of a number of organisations ("the organisations") who wish to be categorised as parties for the purposes of presenting their cases to the CJEU. These organisations are: Tann UK Limited and TANNPAPIER GmbH (together "Tann"), Deutsche Benkert GmbH & Co. KG and Benkert UK Limited ("Benkert"), V. MANE FILS ("Mane") and Joh. Wil. Von Eicken GmbH ("von Eicken").

13. Before considering the substantive merits of the contentions raised on behalf of the organisations, it is necessary to deal with the general principles to be applied in determining whether those wishing to intervene in judicial review proceedings should be categorised as parties thus entitling them to participate in the reference to the CJEU.

14. Article 97 of the Rules of Procedure of the CJEU provides a definition of who is or is not a party to the main proceedings for the purpose of participation in the reference:

> "Parties to the main proceedings
>
> 1. The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure.
>
> 2. Where the referring court or tribunal informs the Court that a new party has been admitted to the main proceedings, when the proceedings before the Court are already pending, that party must accept the case as he finds it at the time when the Court was so informed. That party shall receive a copy of every procedural document already served on the interested persons referred to in Article 23 of the Statute.
>
> 3. As regards the representation and attendance of the parties to the main proceedings, the Court shall take account of the rules of procedure in force before the court or tribunal which made the reference. In the event of any doubt as to whether a person may under national law represent a party to the main proceedings, the Court may obtain information from the referring court or tribunal on the rules of procedure applicable."

15. The question arises as to whether a person who has been given permission to be heard in the judicial review proceedings pursuant to CPR 54.17 is automatically to be categorised as a party for the purposes of the operation of Article 97.

16. I have recently ruled at the last hearing in this case that such permission does not automatically have that effect (see R (on the application of British American Tobacco UK Ltd) v Secretary of State for Health [2014] EWHC 3515 (Admin)). This decision related to an application for permission to be heard under CPR 54.17 made by Krajowy Związek Plantatorów Tytoniu (KZPT), an association of Polish tobacco growers. I refused permission and went on to hold that even if I had acceded to it I would not have accorded to KZPT the status of "party" for the purposes of the judicial review proceedings or reference to the CJEU. For convenience I will refer to this decision as "the KZPT case".

17. Those appearing before me on this application understandably wished to advance further arguments on this issue of whether a successful application under CPR 54.17 automatically conferred the status of party on the applicant. My ruling in the KZPT case had caused particular anxiety to some of the organisations who had assumed that earlier orders of Leggatt J. had afforded them the status of "intervener" under CPR 54.17 which had thus already given rise to an entitlement to be treated as a party. My judgment threatened to make their passage to Luxembourg rather less smooth than they had been expecting it to be.

18. Having considered these further submissions, however, my view on the issue of the interrelationship between CPR 54.17 and the status of "party" remains unchanged. Nevertheless, I would wish to deal specifically with one particular contention which was not relied upon in the KZPT application.

19. My attention was drawn to section 151 of the Senior Courts Act 1981 which provides:

> "Interpretation of this Act, and rules of construction for other Acts and documents.
>
> (1) In this Act, unless the context otherwise requires—
>
> "party", in relation to any proceedings, includes any person who pursuant to or by virtue of rules of court or any other statutory provision has been served with notice of, or has intervened in, those proceedings;…"

20. Although section 151(1) (in contrast to section 151(4)) refers specifically to the Act and not to other legislation, I am prepared, for the sake of argument to accept that the interpretation is, at least, relevant to the approach of the interpretation of the concept of "party" within the Civil Procedure Rules (see Pye v GP Noble Trustees [2006] EWHC 2764 (Ch)).

21. However, the application of the definition is subject to the condition that the context does not otherwise require a different interpretation. I have reached the view that the context in this case does indeed require a different interpretation.

22. Firstly, section 151 was enacted at a time when civil procedure was governed by the Rules of the Supreme Court 1965 and not the Civil Procedure Rules 1998. As I observed in the KZPT case, the presently worded Part 54.17 is very different from its closest antecedent relative in the old rules, Order 53 rule 9. Under the old rule, none of the organisations appearing before me as proposed interveners would have fallen within its parameters because it was limited in scope to those who wished to be heard in opposition to the motion or summons and did not include those who wished to be heard in support. Further, the old rule was limited to the granting of permission to be heard before the court and did not cover the mere filing of evidence as is now specifically permitted under the CPR. It is to be noted that in Alcohol Focus Scotland v Scotch Whiskey Association [2014] CSIH 64, in which the applicant had filed evidence under Chapter 58 of the Court of Session Rules, Lord Eassie firmly rejected the suggestion that such a limited contribution was such as to generate an entitlement to participate in the reference to the CJEU.

23. Secondly, the learned authors of the notes to the White Book Service 2014 state, at 54.1.13:

> "The parties to a judicial review claim will be the claimant, the defendant and interested parties…The courts also have power to allow any other person to file evidence or appear at a judicial review hearing."

To the extent that this approach might be interpreted as suggesting that a person heard under CPR 54.17 can never be characterised as a party I do not endorse it. I do, however, agree with the suggestion that such a person is not automatically a party for the purpose of a preliminary reference.

24. Thirdly, for reasons already set out in the KZPT case, this Court should avoid taking a mechanistic approach to resolving the issue of who should be regarded as a party and

the context of the European reference is one that requires a more flexible approach than would follow if the definition of party in the 1981 Act were held to apply to all interveners.

THE MERITS

25. Having found that the organisations before me were not automatically parties as a result of the orders of Leggatt J. or otherwise by the operation of CPR 54.17, I must go on to consider whether they ought to be categorised as parties on the substantive merits of their respective positions.

26. I have concluded that, in contrast to KZPT, the organisations in this case are able to demonstrate that there are grounds upon which they should be permitted to participate in the reference. The main grounds of distinction are as follows:

    i) There was little or no evidence to connect KZPT to the UK. Each of the organisations in this case was able to demonstrate, to a greater or lesser extent, a firmer relationship with the UK;

    ii) In the case of Von Eicken, whose connection to the UK was more limited than the others there was, in contrast to KZPT, an element of competition with the claimants which introduced doubts that their own specific concerns would be given fair priority in Europe if they were unable to participate;

    iii) The organisations were able to bring a higher level of experience and expertise to bear on the issues to be determined than had been demonstrated on behalf of KZPT.

27. I have not prolonged this judgment with a detailed appraisal of the merits of the respective cases of the organisations but suffice it to say that I have read carefully the contents of the witness statements upon which they rely in support of their applications to become parties and am persuaded that they have a sufficiently strong interest in the outcome to be so categorised.

28. Accordingly, I have amended the draft reference to make it expressly clear that this court considers the organisations to be parties for the purposes of their participation.

29. I will request the European Court if at all practicable to list this reference to be heard at the same time as the CO/3234/2014 R (on the application of Pillbox 38 (UK) Limited) and another direct action which has been initiated by the Polish government under Article 263 TFEU and, although not as a matter of formal expedition, encourage the Court to deal with the matter as promptly as possible so as to achieve a determination before the provisions of TPD2 would otherwise need to be transposed into Member States' national law in 2016.