Illegal waste exports: misdescription at point of export

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Case Commentary

Illegal waste exports: misdescription at point of export

HA:R v Biffa Waste Services Ltd
[2020] EWCA Crim 827
Court of Appeal (Criminal Division), Holroyd LJ, Lavender J and Judge Chambers QC (July 2020)

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Introduction

Hazardous waste exports are, rightly, the subject of a significant and complex legal regime operating at levels from international through to domestic law. A murky history of developed countries exporting waste to their less developed counterparts prompted the development and agreement of the Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal.[1] This Convention has a broad constituency for an international environmental law instrument, having almost universal membership.[2] Amendments and protocols to enhance the basic obligations in the Convention have been adopted, including the Liability Protocol and the Basel Ban amendment, which applies in the main to countries within the Organisation for Economic Cooperation and Development (OECD).[3] The Basel Ban is incorporated into the EU's own measure, Regulation 1013/2, which both implemented the basic Convention as well as incorporating additional layers, such as the Basel Ban, for the Member States to comply with.[4] The detail of the EU Regulation is replicated in UK law. At its heart, the regime is about preventing hazardous waste shipments to non-OECD countries for disposal, as well as and reuse and recycling, unless the waste falls within certain categories. For a long time, recyclables exempt from the prohibited categories have been exported to countries in Africa, South-east Asia, Latin America and, more recently, Turkey, for processing.[5] With depressing regularity, shipments have been intercepted and/or returned from destination countries having been mislabelled as recyclables when in fact the materials were contaminated and/or effectively destined for disposal in situations where that would be in neither the interests of human health nor the environment. The English courts have been involved in a number of cases in recent years, determining the application of the Transfrontier Shipment of Waste Regulations 2007 (the TSF Regulations), as the Environment Agency has been in the vanguard of efforts to target waste export offences.[6] The significance of waste offence and impacts of improper management or disposal this year became the subject of a government task force, the Joint Unit for Waste Crime.[7] While the principal focus is organised criminality, the serious nature of waste crime is reflected in the statement of its operational aims. It is against the backdrop of this regulatory regime that the instant case was determined.

Facts

In mid-May 2015, Biffa, the appellant company, despatched close to 175 tonnes of waste material, described as paper waste, from a recycling facility it operated in Edmonton, north London. The intention was for the waste paper to be sent to two processing plants in China, but it only made it as far as the Port of Felixstowe. The authorities carried out inspections of samples and determined the presence of various contaminants in the consignments destined for both Chinese facilities. The contaminants included sanitary products, used nappies, plastics, wood and food packaging, amongst others.[8] Biffa was charged with two offences of transporting waste for recovery in a country to which the OECD Decision does not apply. This is in contravention of regulation 23 of the Regulations, which provides that: 'A person commits an offence if, in breach of Article 36(1), he transports waste specified in that Article that is destined for recovery in a country to which the OECD Decision does not apply'.[9] Following a jury trial in June 2019, Biffa was convicted of both offences. It was sentenced to £350,000 in fines, as well as a confiscation order and costs, bringing the total cost to Biffa in the region of £600,000. Biffa sought and was given leave to appeal by the trial judge.

1 Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel (22 March 1989) 1673 UNTS 126, in force May 1992. Some interesting background to the rationale behind the development of the measure and an NGO perspective can be accessed via the Basel Action Network https://www.ban.org/.

2 At the time of writing there are 188 parties to the Convention; see http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx.

3 The ban came in to force in 2019; see http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx. The liability Protocol has not yet made it into force at the time of writing. For information on the current position of ratifications, see http://www.basel.int/Countries/StatusofRatifications/TheProtocol/tabid/1345/Default.aspx.

4 Regulation EC/1013/2006 on shipments of waste [2006] OJ L190/1, as amended by Regulation EC/660/2014 [2014] OJ L187/57.

5 The issue with Turkey in respect of plastic 'recyclable' material was highlighted by NGOs and found its voice in several media outlets including the BBC. See eg https://www.bbc.com/news/av/uk-53181948. Turkey has become a destination of choice for plastics sent for recycling since China prohibited imports in 2017.

6 SI 2007/1711.

7 See eg Defra 'Clock is ticking for waste criminals as new taskforce launched' (16 January 2020) https://www.gov.uk/government/news/clock-is-ticking-for-waste-criminals-as-new-taskforce-launched.

8 Lord Justice Holroyde provides a fuller list at para 16.

9 Article 36(1) of the 2006 Directive specifies a number of waste types which may not be exported.

The substance of the appeal was based on two principal questions. The first was whether the judge had erred in excluding certain expert evidence as inadmissible and irrelevant; the second was whether the judge had been in error to accept the prosecution's application that bad character evidence could be admitted in respect of the defendant. The first question – on the expert evidence – related to the extent to which the waste the subject of the dispute was in compliance with Chinese standards for recyclable paper and had been recoverable by China as paper for recycling. An allied dimension was the extent to which the waste could be recovered in an environmentally sound manner in China. The second question was one of balance in that the judge had allowed bad character evidence by reference to section 101(1)(f) of the Criminal Justice Act 2003 to counter an apparent false impression of Biffa's probity created by its chief operating officer.

Judgment

Lord Justice Holroyde gave the judgment, dismissing Biffa's appeal and the reasoning is set out below. He first set out the legal context noting the development of the Basel Convention and the OECD decision. The EU's Regulation incorporated the Basel Ban, before the measure came into force in 2019, meaning that waste cannot be exported to non-OECD decision countries.[10] China is not included as one of the countries to which exports may be made. It is clear from the EU Regulation that it is an environmental as opposed to a trade-inspired measure.[11] Article 2 provides a series of definitions including that of recovery, which includes the recovery of paper.[12] In all operations there is a requirement of environmentally sound management: essentially that all practicable steps are taken to protect human health and the environment against possible adverse effects arising from the waste.[13]

The EU Regulation prohibits exports of certain wastes to which the OECD decision does not apply. These include those wastes listed as hazardous, and so far as was material to the case those wastes of a type listed in Annex V Part 3 to the EU Regulation.[14] Article 36(g) also includes a prohibition on the export of wastes in circumstances where the competent authority in the country of dispatch has a reason to believe that the wastes will not be managed in an environmentally sound manner in the destination country.[15]

The introductory explanation in Annex V of the EU Regulation indicates that wastes should be checked to determine their categorisation, relative to the three parts of Annex V. If the waste is hazardous or not on the list covered by the export prohibition, certain rules are applied. It continues that wastes that would not otherwise be covered by the export prohibition can be made so if they are contaminated by other materials to an extent which, broadly, increases the risks associated with the waste or prevents the recovery of the waste in an environmentally sound manner.[16] The categorisations in Annex V permit for paper, paperboard and paper product wastes to be exempt, if – crucially – they are not mixed with hazardous waste.[17] Conversely, in Annex V Part 3 waste collected from households is subject to the prohibition on export.

As above, the EU Regulation was made effective in UK law by means of the TSF Regulations, which formed the basis of the charge against Biffa. The regulation 23 offence is one of strict liability and Lord Justice Holroyde noted that it was settled law, and common ground in the appeal, that an 'export' begins at the start of its journey, as was confirmed in an earlier Court of Appeal judgment in the case of *R v KV*.[18] He concluded the point, stating that: '[i]n circumstances such as this case, if waste is being exported in breach of Article 36, the offence is committed when it leaves the recycling facility, even though it is still in the United Kingdom'.[19]

It is possible for waste collected from households to become so-called 'green-list' waste – that is, waste not subject to the export prohibition. However, in the judgment of the European Court of Justice in order to make that transition it would need to be collected separately and properly sorted. For the same reason, 'green-list' waste can be subject to an export prohibition if it is contaminated to the point it gains the characteristics contemplated in Annex V.[20] Referring also to English authority on the point, it was noted that there is scope for wastes to change characteristics and that the point is sometimes difficult to appreciate.[21]

Turning then to the factual context, it was noted that Biffa provides household and commercial waste management services, which deals with all aspects of the waste chain from collection through to recycling and disposal. Alongside this, it sells certain wastes, including paper, to be recycled, with a significant proportion being sold overseas. Biffa had made clear that sales to overseas customers is an important part of the overall management of paper wastes in the UK as it produces more waste than it had the capacity to recycle. Biffa had maintained a relationship with Chinese paper mills since 2010 and inspections were carried out in England by agents of the mills and in China

10 See n 4.
11 EU Regulation recital (1).
12 Article 2(6), which cross-references to the definition in Directive 2006/12/EC on waste [2006] OJ L114/9.
13 EU Regulation art 8.
14 EU Regulation art 36(a)–(b).
15 EU Regulation art 49 provides detail, including art 49(2)(b), which states that: 'Environmentally sound management may, inter alia, be assumed as regards the waste recovery or disposal operation concerned, if the notifier or the competent authority in the country of destination can demonstrate that the facility which receives the waste will be operated in accordance with human health and environmental protection standards that are broadly equivalent to standards established in Community legislation'.
16 EU Regulation Annex V para 3.
17 EU Regulation Annex V Part 1 List B.
18 [2011] EWCA Crim 2342.
19 Judgment para 10.
20 Case C-192/96 *Beside BV & Besselsen v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* ECLI:EU:C:1998:315.
21 Citing Pill LJ in *R v Ideal Waste Paper Co Ltd* [2011] EWCA Crim 3237, particularly paras 42–44.

by the relevant authorities. The paper had to reach a certain content threshold by weight, which was the basis of the supply contracts.

The materials in the instant case had been collected from a number of local authority areas. Some of the materials had been collected as mixed recyclables; others had been separated for collection purposes. There is always a proportion of the waste that is not correctly separated. Biffa had a sorting facility at Edmonton, so as to separate the divide the collected household waste into different waste streams, including waste paper, and to remove contaminants – described by Holroyde LJ as '[a]nything which should not form part of the relevant stream'.[22] The paper waste was then packaged into 1-tonne bales, put into a shipping container and transported to docks ready for export. At Felixstowe, as noted above, Environment Agency inspection uncovered the contaminated bales.

The criminal proceedings

Next, the detail of the criminal prosecution was set out. Biffa was charged with the offences as noted above and the question for determination for the jury was whether the bales that were prepared at the recycling facility still comprised household wastes which could not lawfully be exported. It was noted that there was no disagreement that there was not a '0% contamination' requirement if material classes as household wastes is to be otherwise categorised as 'paper': '…after proper sorting, the waste may correctly be designated as B3020 paper even though it contains a small amount of contaminants'.[23] The basis to the prosecution's case was that the contaminants present in the consignments were above a permissible minimal level, such that the '…household waste received at the Edmonton facility had either not been sorted at all, or had been sorted so ineffectually that it remained in the category of Y46 household waste and could not lawfully be exported'.[24] The defence centred on the assertion that the waste had been appropriately sorted so that the material being exported should be properly categorised as paper.

A preparatory hearing established that that<?> the prosecution could succeed if it proved that the consignment was correctly categorised as household waste. If the jury concluded that the consignment was or might have been paper waste, it could potentially be argued that the waste was contaminated by other material which prevented the recovery of the waste in an environmentally sound manner. Biffa contested that point in a separate appeal, although that was dismissed.[25] The basis of the dismissal was that the prosecution sought to rely solely on the question as to whether the consignment was household waste. It did not seek to rely on the measure in Article 36(1)(g) – which concerned the contamination of an otherwise 'green list' waste. This meant, in the view of Lord Justice Davis, who delivered the judgment of the Court of Appeal: 'Accordingly, whether there was sufficient household waste contamination for these consignments properly to be styled as Y46 household waste (rather than the B3020 mixed paper designation given in the export documentation) was a matter of fact and degree for the jury'.[26]

During the trial the judge gave three rulings which formed the basis of the appeal. First, the judge refused to allow the appellant to rely on factual and expert evidence as to whether the waste met the Chinese thresholds of what was acceptable to be otherwise included in recyclable waste paper; and whether the Chinese paper mills to which the waste was being sold could successfully recycle it in an 'environmentally sound manner'.[27] As the Court of Appeal had already ruled the categories of household waste and paper waste were mutually exclusive – it was not relevant that there was uncertainty over whether it could be recycled in an environmentally sound manner; and was not relevant to put that to a jury. The second ruling was related in that it concerned detail in respect of measurement of the contamination in the paper bales. Under cross examination, Biffa's chief operating officer was unable to demonstrate with figures that the level of contamination would be over 1.5%, as he was unable to answer a question to that effect without disclosing the findings of the agent's inspections, which had been ruled out, in respect of the first ruling. Finally, the judge permitted an application by the prosecution to bring evidence of Biffa's previous convictions in order to correct a false impression. The basis of that application was section 101(1)(f) of the Criminal Justice Act 2003. Section 105(1) of that Act provides that for the purposes of section 101(1)(f), a defendant gives a false impression 'if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant'. Further, section 105(6) provides that evidence is admissible under section 101(1)(f) –'only if it goes no further than is necessary to correct the false impression'.[28]

Biffa's chief operating officer had in evidence suggested that it was in the company's best interests to comply fully with the law; that it was award winning; and that it would not be in existence were it not for the extensive environmental law regime established to deal with effective waste management. It transpired that Biffa had been convicted of 18 previous offences, including four for health and safety offences, three of which involved fatalities. The judge's view was that the officer's evidence:

> had been apt to give a false impression about the appellant's environmental track record: the evidence about the awards received by the company would not alone have created a false impression, but the evidence about

22 At para 15.
23 At para 18.
24 ibid.
25 *Biffa Waste Services v R* [2019] EWCA 20.
26 ibid para 34, cited at para 21 of the judgment.
27 It was stated to be no more than 1.5% by weight of other recyclable wastes such as metal, glass or plastic, at para 25.
28 Cited at para 29.

> the company taking its environmental responsibilities seriously was apt to convey to the jury the implied assertion that it would be at odds with those business standards and ethics for the appellant to have committed environmental offences.[29]

In that case, evidence to correct that false impression would be admissible. The judge did, though exclude the evidence of the health and safety convictions on the basis of fairness as they related to the trail. Lord Justice Holroyde noted that no criticism was made of the terms in which the judge later directed the jury about the limited relevance of this evidence.

The appeal

In respect of the first part, it was reiterated that the EU Regulation and the corresponding TFS Regulations prohibit the export of proscribed wastes to non-OECD countries. As a result, the correct categorisation of that waste becomes important. That categorisation must be determined at the place where the export begins: in this case the Edmonton sorting facility. If at that point the waste is best categorised as household waste, its export to a non-OECD country is unlawful. This would be so 'regardless of what might happen to it when it reaches its destination'.[30] Here, the waste was originally household waste and could only become 'paper' waste by proper sorting. In order to be 'proper sorting', it needed to be 'sufficient to remove contaminants to the point where any contamination which remains is "so small as to be minimal and not preventing waste from becoming waste paper under B3020"'.[31] Where that reduction to a minimal level of contamination had not been achieved by the beginning of the export, it would remain household waste and thus subject to the prohibition – despite what might happen in terms of sorting when it reached its destination. In that regard, Holroyde LJ noted that:

> Neither the destination of the waste, nor any standard applied by the recipient of the waste or by the country to which it was to be exported, is relevant to the jury's task… The opinions of mill owners, or foreign legislatures or environmental agencies, as to how to determine what constitutes paper waste are irrelevant to the application of that standard.[32]

There was no problem in a defendant bringing evidence of its sorting process and/or any evidence as to the extent to which it is effective at removing contaminants. However, the jury must be directed that there is no specific point at which the level of contaminants is so low that it means that it is able to be classified as paper waste. Regardless, categorisation cannot depend on where the waste was being exported to, nor how it would be processed in the destination country. The waste has to be of a particular description when it starts its journey, meaning that the prohibition on exports applies (or not) from the beginning of the journey regardless of destination. However, Holroyde concluded the point at paragraph 46, stating that '[a]ny other approach would be inconsistent with the aims and intentions of the Basel Convention and of the legislation flowing from it, and would also be likely to render an essentially simple prohibition unworkable and unenforceable in practice the outset of the journey'.

There is no simple means for a jury to decide whether the waste was one category or another. The previous case law had indicated that quantity, nature and quality of the contaminating materials remaining after the sorting process was a factor, as was the fact that it should be of a very small scale. If it is more than a small quantity it would suggest the waste was not properly sorted and that household waste could not then be transformed into a 'green list' waste. The quality aspect would be relevant to the determination as to whether the materials could be recovered – although it may be that a very small amount of an unpleasant contaminant could sway a jury. To counter that possibility it would be open to a defendant to provide evidence that demonstrated, regardless of destination, the sorting process produced bales of paper that could be safely recycled. So evidence of a general process which would enabled waste paper to be recycled could be brought so as to show that 'however out of place a particular contaminant might appear in a consignment of paper, its presence could not have any significant effect on the processing of the waste, in an environmentally-sound manner, into recycled paper'.[33] However, this did not provide a means by which evidence as to the treatment at a particular destination would be admissible. This was because, as stated, the jury must determine the categorisation of the waste before the export and regardless of destination. If a defendant is to rely on such an approach, however, it would have to be indicated in the defence case statement, so that if necessary the prosecution could consider whether Article 36(1)(g) then became relevant in framing its case.

It was not open to a defendant to seek to introduce evidence of testing, either that it took place at all or the results of it, undertaken by the purchaser of the material. That did not matter whether it was done in the UK or at destination. The reason for this would be that to do so would be to introduce an irrelevance – the standards of the country of import were not relevant to the categorisation of the waste upon export.

In applying what had been determined to the appeal questions, Lord Justice Holroyde stated that the trial judge was right to rule evidence related to the compliance with Chinese standards was inadmissible. The jury did hear that tests had been carried out, that there were certain processes undertaken at the Chinese mills and that they had heard from Biffa's chief operating officer that the contamination was at a particular level. Alongside that, Biffa

29 ibid para 30.
30 ibid para 43.
31 ibid para 44.
32 ibid para 45.
33 ibid para 50.
34 ibid para 54.

had not been prevented from presenting evidence as to how waste paper was, in general, recycled; and evidence as to why contaminants found in the bales which had been inspected would not have prevented the waste from being recycled in an environmentally sound manner. There was no undue prejudice to Biffa and the judge had not erred, as had been contended.[34]

The second ground was 'fact specific' in respect of whether a defendant had given a false impression of itself.[35] In the judgment of the Court of Appeal, the chief operating officer's evidence '[c]ould convey the impression that the appellant was not the sort of company which would commit an offence'.[36] That evidence alone was not justified in order to counter the prosecution claim that the waste had not been sorted at all. On that basis, the judge was correct to permit the prosecution to put forward evidence that would counter that impression and the judge had been careful to limit the extent of bad character evidence so as not to create prejudice. On that basis, again, the trial judge had not fallen into error and the conviction was held to be sound.

Commentary

An inbuilt frustration for those subject to environmental regulation can be the perception – widely studied and the subject of considerable commentary – that offences are overly administrative or bureaucratic in nature. An erroneous categorisation of a consignment is on its face not the most heinous of environmental crimes. When, however, the material is collected, sorted, categorised and sold as premium recyclate/raw material, which ultimately, owing to its *actual* nature, will have to be disposed of, the position changes. This is especially so in a sub-optimal situation where the aims of protecting human health and the environment cannot be guaranteed; and the applicable regimes appear not to have been reflected in spirit or letter.

The Court of Appeal's rejection of Biffa's attempt to have the conviction overturned follows generally accepted understandings of the law related to exports. The fact that it should fall into the correct category for recycling and that the categories depend on the satisfaction of certain quality standards related to the character of the waste, which, if not met, can mean the waste being reclassified, has been well rehearsed through the case law – domestically, and before the European Court of Justice. Mixing waste types will likely mean that the regime applicable to the more environmentally challenging substances will then apply to the shipment as a whole. Attempting to introduce evidence of how it would be treated upon arrival in China was correctly held to be irrelevant. The law attaches at the point of export and, as confirmed in *R v KV*, export is a process that begins from the point at which the waste is destined for a non-OECD country.[37] To reflect the purpose of the law it has to be that way, as an export of a type of waste must be agreed to and capable of being recycled safely in the destination state. If it is 'different' to what it should be, it is difficult to establish that the shipment has been agreed to, hence Lord Justice Holroyde's observations at paragraphs 45 and 46. It is understood that the offences are strict liability and so exporters bear the burden here.[38]

Much has been written on attitudes to environmental offences by regulators, courts and perpetrators alike.[39] The rejection of Biffa's claim that noting previous regulatory transgressions upset the balance in what was presented to the jury was unequivocal. Claims as to virtue should rightly be contextualised in a criminal trial, and the finding that the judge's approach was proportionate and appropriate is difficult to take issue with.

This has been coming, though. China's policy decision to ban waste imports for a number of materials, including paper, from January 2018 will continue to have significant impact in developed countries' approaches to waste management and markets from recyclable materials.[40] China's decision was rooted in policy to stimulate domestic recycling markets as well as the fact that Chinese agencies had 'found that large amounts of dirty wastes or even hazardous wastes are mixed in the solid waste that can be used as raw materials'.[41] It has resulted in the displacement of exports to other countries but, ultimately, countries such as the UK with limited capacity to recycle their own waste means that investment will have to be made to alleviate the pressures to outsource.[42] If this does not happen, then the outsourced environmental costs of sharp practice in the export of materials abroad so as to keep the problems out of sight and out of mind for the consumer will continue to undermine moves to redress the current situation faced in many destination countries.[43] Biffa made reference to the importance of such waste sales abroad on the basis of the lack of capacity within the UK's recycling infrastructure. It remains to be seen as to the extent to which a more Green New Deal approach could stimulate investment in such capacity.

35 ibid para 55.
36 ibid.
37 *R v KV and Others* (n 18).
38 *R v Ezeemo and Others* [2012] EWCA Crim 2064.
39 An interesting take on the area, although a little dated now is in P de Prez 'Excuses, excuses: the ritual trivialisation of environmental prosecutions' (2000) *12 Journal of Environmental Law* 65.
40 The so-called National Sword policy. For an account considering potential UK impacts see https://resource.co/article/uk-recycling-industry-braced-impact-chinese-crackdown-begins-12325.
41 WTO Committee on Technical Barriers to Trade G/TBT/N/CHN/1211 (18 July 2017) s 7 https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBTN17/CHN1211.pdf&Open=True.
42 A positive move in this direction was the announcement of a unique WEEE recycling facility using less environmentally intrusive methods to extract precious metals from e-waste. See eg Caroline Palmer 'Britain to get first commercial refinery for extracting precious metals from e-waste' *The Guardian* (22 August 2020) https://www.theguardian.com/environment/2020/aug/22/britain-first-commercial-refinery-extracting-precious-metals-e-waste-mint-innovation.
43 That this remains an issue was reported by Agence France-Presse 'Sri Lanka returns illegal waste to Britain' *The Guardian* (28 September 2020) https://www.theguardian.com/environment/2020/sep/27/sri-lanka-returns-waste-to-britain.