

C00138

RESTORATION OF GOODS - Refusal to restore - Reasonableness - Trailer found to be adapted for the purpose of concealing goods - Trailer seized at the point of entry - Commissioners refused to restore - Whether refusal reasonable - Yes - CEMA 1979 ss 80 and 152

LONDON TRIBUNAL CENTRE

KRZYSZTOF DEREZENIK Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: STEPHEN OLIVER QC (Chairman)

MICHAEL SILBERT FRICS

Sitting in London on 10 May 2001

No appearance for the Appellant

G Tack of the Solicitor's Office of HM Customs and Excise, for the Respondents

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#### DECISION

1. Mr Krzysztof Derezenik appeals against the decision of the Commissioners (in a letter of 15 May 2000, upheld on review in a letter of 6 September 2000) not to restore a vehicle. The vehicle, a refrigerated trailer, had been seized on 25 March 2000 in pursuance of Customs and Excise Management Act 1979 section 88 because, when inspected, it appeared to the Commissioners that it had been "adapted, altered or fitted . for the purpose of concealing goods".

2. Mr Derezenik has not attended this hearing, nor is he represented. Until 26 February 2001 he had been represented by solicitors whose names were on the Tribunal's record. On 8 January 2001, following a preliminary review of the file, I directed that, if any Human Rights Act arguments were going to be raised, the Tribunal should be notified. On 26 February the solicitor on the record wrote stating that he had himself written to Mr Derezenik terminating his retainer and was no longer acting for him. He supplied the Tribunal with Mr Derezenik's address. On 22 March the Tribunal notified Mr Derezenik, by post to his address in Poland, that the hearing would take place on 10 May. When the appeal was called on for hearing Mr Derezenik was not present; nor have we received any indication that any Human Rights points would be taken in support of his case.

3. We are at liberty to hear and determine an appeal in a party's absence. But that person has the right to apply, within 14 days, to have our decision set aside on such terms as is just and reasonable: see regulation 26(3) of the Tribunals Rules. The person making such an application must however be present at the

application's hearing, either in person or through a representative. We decided to go ahead and hear the appeal. Otherwise we might have had to put it off indefinitely. But, bearing in mind that Mr Dereczenik has an address in Poland and that we dismiss his appeal, we now direct that he has 42 days from the date of this Decision (and not the normal 14 days) in which to apply to the Tribunal, if he sees fit, to have this decision set aside.

4. Evidence was given by Mr James Allen, an officer of Customs and Excise based at Dover and by Mr Paul Devlin, the Customs and Excise officer at Dover who reviewed the decision not to restore the trailer, i.e. the decision appealed against. Mr Allen referred to notes in giving his evidence; those notes had been made within 2-3 hours of the events referred to below.

5. At 7.10am on 25 March 2000 James Allen was on duty at the "freight selection point" at Dover Port. A vehicle from Poland had come through the EC lane. He directed it into another lane and spoke to the driver who appeared to be Polish and whose English was very limited. There was a passenger, also from Poland as it turned out. When Mr Allen had ascertained that the trailer contained frozen goods, the vehicle was directed into the cold storage examination bay. The cab and the exterior and the interior of the trailer were examined. The trailer appeared to be loaded full with frozen cauliflower. The cauliflower were then off-loaded. The Customs officer then examined the interior and found an area at the front of the trailer, about three foot and three inches deep, extending the whole way across the trailer and up to the roof. It had been walled off with horizontal slats lying one above the other and held in place by racks at each side. The officers examined the refrigeration motor. The slats did not, they decided, have any function in protecting the motor which formed an integral part of the front of the trailer and extended forwards. At the top of the trailer was ducting that led over the slats and through which cold air passed into the main part of the trailer.

6. The officer could see no normal "commercial" reason for creating a three foot three inch space at the front of the trailer. Mr Allen said that he had come across similar spaces in other trailers and those spaces had, in his experience, been used to conceal goods.

7. Mr Dereczenik was informed through an interpreter that the trailer was being seized because of the alterations. He replied through the same interpreter that he disagreed with that course of action. The space at the front of the trailer had, he said, been empty at the time and its purpose had not been for smuggling. The Customs officers explained the legal basis for seizing the trailer. Mr Dereczenik and his companion were then refused entry to the United Kingdom by the immigration officers at Dover and were returned to France.

8. On 25 April 2000 Mr Dereczenik's solicitor in England wrote on his behalf requesting that the trailer be restored. The letter contained a contention that no unlawful use had been made of the trailer and that there had been no "unlawful matter found in the trailer". The letter stated that the adaptation had been made by Mr Dereczenik's brother and that this had been done unknown to him. Mr Dereczenik's brother, who (it was said) was also his employee, had been due to make the trip to the UK but had had to be replaced due to unforeseen circumstances. The seizure, it was said, was resulting in hardship to Mr Dereczenik who offered to remove the concealment and to take steps to avoid any repetition.

9. In response to that letter the Commissioners issued a formal refusal to restore on 15 May 2000. The refusal was followed by a letter of 16 June in which the

Customs Officer notified Mr Dereczenik of his right to have that decision reviewed. Mr Dereczenik exercised that right. In doing so it was asserted on his behalf that the contested decision had not taken note of the points that had previously been raised in his favour.

10. We now set out the applicable legislation. Customs and Excise Management Act 1979 sets out, in section 88, a liability to forfeiture of means of transport in the following words:

"Where -

(c) a vehicle is or has been within the limits of any port or at any aerodrome or, while in Northern Ireland, within the prescribed area,

while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods, that . vehicle shall be liable to forfeiture".

Section 152 of the same Act establishes that:

"The Commissioners may, as they see fit -

(a) .

(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under those Acts; ."

The Finance Act 1994 establishes the system of formal reviews and the subsequent rights of appeal to the VAT and Duties Tribunal

11. Following the review, the Commissioners wrote to Mr Dereczenik's solicitor on 6 September 2000. In that letter they stated that they had adopted standard policies regarding restoration or otherwise so far as seized vehicles were concerned. Those policies, it was said, were implemented throughout the United Kingdom in order to ensure equality of treatment. The policy, it was said, varies dependent upon the circumstances which have led to the seizure. Where a vehicle has been seized pursuant to section 88 of the 1979 Act, the policy is that it shall not be restored. Having set out that summary of the Commissioners' position, the review letter went on to state that it had been for the reviewing officer to determine whether or not the contested decision had been one which a reasonable body of Commissioners could not have reached. The vehicle which had been seized had been altered by the installation of a concealment. Its seizure had not been contested and it had become forfeit by the passage of time. The letter said that the officer had taken into account the contention advanced for Mr Dereczenik that the Commissioners had found no "unlawful matter" in the trailer. The review officer said that he could not accept that this had been the case. The concealment itself had caused the seizure and the fact that alterations had been made to the trailer brought the seizure within section 88. The letter explained that the review officer could see no valid reason for such an adaptation to be made to the trailer and that whilst it had been contended that it was not made for the purpose of smuggling, no alternative explanation had been offered.

12. The letter explained that the liability to forfeiture was not dependent upon the concealment containing any goods.

13. The letter went on to refer to the contention that Mr Dereczenik claimed to have been unaware of his employee's actions. This, the letter said, was not accepted. The letter explained that the review officer had seen photographs at the concealment. When empty, it was patently obvious to the naked eye that the front bulkhead of the trailer was not in the form it would have been according to the original commercial construction. The review officer explained that he would have expected this to have been immediately apparent to anyone involved in the freight transport trade. The letter said that other than offer a contention of ignorance and a further "incorrect" contention that no contravention had occurred, Mr Dereczenik had offered no substantive case for disapplying the Commissioners' policy applicable to the circumstances of the case. The review officer, the letter said, did not propose to depart from the established policy. He therefore confirmed the contested decision and had directed that the trailer should not be restored.

14. On 5 October 2000 Mr Dereczenik's solicitor wrote setting out the grounds of appeal. These were as follows:

"1. HMCE restoration policy was too rigidly applied to the case and deprived (Mr Dereczenik) of the trailer without taking into account the particular facts. Question: whether there was a breach of the Appellant's rights to the property in his charge on this ground.

2. HMCE policy assumed as proved that the compartment was for concealing goods. (Mr Dereczenik) (speaking through an interpreter) sought to explain that the compartment was empty and not for smuggling. I am instructed that the reason was so as not to overload the trailer for the return journey to Poland (the trailer would have been loaded with fruit in Belgium) as the Polish Customs imposed large fines for overloaded vehicles.

3. The trailer was leased to the Appellant by Volvo Leasing of Warsaw. The Leasing company have lost their trailer and (Mr Dereczenik's) business and livelihood are seriously affected. Question: whether there was a breach of the Appellant's rights to carry on his lawful business by the application of HMCE policy.

1. (Mr Dereczenik) gave a credible explanation to HMCE (so far as through an interpreter) but HMCE acted rigidly in line with policy (see ground 1)."

15. Our jurisdiction in this appeal is confined to the question of whether the decision not to restore was unreasonable. We have no jurisdiction to substitute our decision for that of the review officer. We have to be satisfied whether the decision was perverse or whether the review officer took into account irrelevant considerations or failed to take into account relevant considerations. Looked at overall, we are satisfied that the Commissioners have not acted perversely or capriciously and they have taken all relevant factors into account. We are satisfied that the Commissioners have not allowed their established policy (summarized in paragraph 10 above) to prevent them from going through a proper decision making process. The Commissioners, in common with any other branch of the administration, are entitled to maintain policies. This course of action can only be impugned if the administration fetters the exercise of its own discretion by refusing to listen to an application for its discretion to be exercised in a manner that does not conform with these strict terms of the policy. See *British Oxygen Co Ltd v Minister of Technology* [1970] 3 All ER 165. Here we are satisfied that the officers responsible for the decision were prepared to listen to

any relevant explanation. But nothing the officer or officers heard or saw suggested to them that this was a case where the policy should not be applied. The officer's evidence was that no reason for the concealment space, other than to conceal contraband, had been provided; he also said that in his experience there were plenty of opportunities for buying cigarettes etc. more cheaply in Poland or in Belgium, Holland or France and selling them at a profit in the United Kingdom.

16. The officer who took the decision not to restore took into account the points made by Mr Dereczenik's solicitor in correspondence. The review officer did likewise; we refer to the summary of his decision-making process in paragraphs 11-13 above.

17. We cannot fault the decision on those grounds.

18. Was there then a violation of Mr Dereczenik's rights to property? We note that the review officer's decision was taken on 5 September 2000 (i.e. before the Human Rights Act came into force). However we still address the question whether the interference with Mr Dereczenik's property rights was in conformity with the rights of the United Kingdom, under the second part of Article 1 of Protocol number 1, "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest." The principle is set out in paragraph 36 (on page 173) of the decision of the European Court of Human Rights in *Air Canada v UK* 20 EHHR 150. That reads as follows:

"According to the Court's well-established case law, the second paragraph of Article 1 must be construed in the light of the principle laid down in the Article's first sentence. Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued."

We think that the Commissioners have taken steps to achieve the necessary balance in the present circumstances. Mr Dereczenik did not, we note, appeal against the seizure. The law gave him the right to seek a review of the decision not to restore. He took it and has exercised his right to appeal to the Tribunal. The result achieved is, we think, proportionate. (In this connection we observe that the Commissioners have not exercised the power which they arguably have to seize the "tractor" as well as the trailer.)

19. For all those reasons we are satisfied that the Commissioners have acted reasonably in refusing to restore the trailer to Mr Dereczenik. We therefore dismiss the appeal.

STEPHEN OLIVER QC

CHAIRMAN

RELEASED: 8<sup>th</sup> June 2001

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