

EXCISE DUTY - Seizure of vehicle and goods - Commissioners refusal to restore - Reasonableness of decision - Proportionality - Balance - Nature of decision on review - Remitted to Commissioners for further review - s.16 4(b) FA 1994

LONDON TRIBUNAL CENTRE E00201

SUKHDEV SINGH Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: MR PAUL HEIM CMG (Chairman)

Sitting in public in London on 2 October 2001

The Appellant in person assisted by his brother Mr Baldev Singh

Ms Zoe Taylor, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

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DECISION

1. Mr Sukhdev Singh appeals against a decision by the Commissioners made on 22 December 2000 refusing to restore to him a quantity of seized excise goods and the vehicle which he used to transport them from France, and the confirmation of 28 February 2001 by the officer appointed to review that decision on behalf of the Commissioners.
2. At the hearing of this appeal Mr Sukhdev Singh represented himself, with the assistance of his brother Mr Baldev Singh. The Commissioners were represented by Ms Zoe Taylor of counsel. She produced a bundle of documents.
3. It appears that the Commissioners statement of case dated 1 June 2001 was in fact out of time, as the notice of appeal had been filed on 4 April 2001. An application for a thirty day extension to file it was made by the Commissioners on 2 May 2001.
4. The Tribunal saw no prejudice to the Appellant in the delay and allowed an extension of time to allow the statement of case to be validly filed.
5. The facts of the matter are not in dispute.
6. On 17 December 2000 the Appellant, driving a Ford car with the registration number M742 SKP, was stopped by officers of HM Customs and Excise at the UK control zone in Coquelles. He had cigarettes and beer in the car. He was asked by one of the officers to satisfy him that the excise goods he was importing qualified for relief from duty as being for "own use" and not for a commercial purpose. According to the Commissioners the Appellant said that he had bought these

goods in Calais. He was importing them for himself and for members of his family. The cigarettes were for friends. They were also for the staff of his business. Some of these persons had paid him for the goods and some of the money used was his own. The goods amounted to 3000 cigarettes, 255.84 litres of beer and 14 litres of spirits. This information was recorded in the officer's notebook, and signed by Mr Sukhdev Singh as correct. The vehicle and the excise goods were then seized.

7. On 22 December 2000 the Appellant's solicitors wrote to the Commissioners saying that the vehicle had been seized without good cause, stating:

"Our client is what we consider to be an honest straightforward client and when he assures us he was returning to the UK with various merchandise for and on behalf of himself and his three brothers (and families) we fully believe him. Your officer question our client and he explained that five cases only of the beer were for his personal use and obviously when he explained that the balance were for his family, his integrity was questioned.

Our client categorically states that he was not returning with the alcohol and tobacco products for sale in the UK and our client does not accept that the Customs have seized his goods legitimately. ."

8. The Commissioners replied on the same day (the Appellant's solicitor's letter having been sent by fax). The officer signing the letter, Mr D S Marwood stated that he recommended that the goods and the vehicle be not offered for restoration for the following reasons:

the Appellant had 3000 cigarettes, when the Minimum Indicative Level for cigarettes is 800 per person; he had 255 litres of beer when the Minimum Indicative Level for beer is 110 litres;

the Appellant stated that he did not smoke and that the cigarettes were for friends some of whom had already given him money and that most of the beer was for family and friends again some of whom had given him money;

accordingly the Appellant was not the owner of the goods bought on behalf of other people and, as the owners had not transported them they did not qualify for relief from excise duty;

the Commissioners' policy were aimed at deterring and detecting fraud, to collect excise duty that was due, to avoiding irregularities and to encourage compliance that procedures established to control the movement of excise goods.

9. The Appellant's solicitors replied on 15 January reinforcing the explanation of the Appellant's good faith, suggesting that as the Appellant was purchasing "the cigarette allocation" for three members of his family he was only slightly over the permitted indicative limit and that similarly if the limit for beer was taken to be 4 times 110 litres he was below that limit. The Appellant was not aware of the strict interpretation of the Channel Tunnel (Alcoholic Liquor and Tobacco Products) Order 2000, and in any event there was no element of a commercial operation involved.

10. There followed the procedure of review. In his decision on review the subject of this appeal, Mr P A Devlin, the review officer, stated that before considering the issue of restoration he had examined whether or not the vehicle was

appropriately seized in the first place. The seizure of the vehicle was consequent upon the seizure of the goods which were being transported in it. Because of the volume of the goods enquiries were made to establish whether they qualified for relief from excise duty as being for "own use". He was satisfied that the goods were not for "own use". The Appellant was buying goods for other people. The goods were therefore outside the definition of "own use" in the Excise Duties (Personal Reliefs) Order 1992. The goods and the car were thus liable to forfeiture. He was satisfied that both were properly seized. He said that in the absence of a rebuttal of the presumption of commerciality the Commissioners considered that the goods were held for a commercial purpose and it was their policy not to restore them. As regards the car, the Commissioners' policy was that as it was privately owned it should not be restored. He had considered the correspondence to see if the Appellant had made out a case for disapplying that policy, including the allegation of hardship. That was not a matter which the Commissioners accepted as an indication that restoration was appropriate. That was a matter for consideration by the Appellant. Mr Devlin's letter goes on to state:

"The Commissioners do restore private vehicles in circumstances such as Mr Singh's for sums of money".

Subsequent evidence does give the impression that the word "not" has been omitted in this statement, but the sentence is reproduced as it stands.

11. However, the letter goes on to say that Mr Devlin did not consider that the decision given to the Appellant on 22 December 2000 was one which a reasonable body of Commissioners could not have reached, and confirmed the refusal to restore. He also said that it was not correct to suggest that the Appellant had not reached the Minimum Indicative Levels. He had in fact exceeded them by a considerable amount. In other words Mr Devlin was saying that the minimum levels could not be applied to each of the persons for whom the goods were intended, as had been suggested by the Appellant's advisers.

12. Mr Sukhdev Singh confirmed in evidence that he was simply getting goods for himself and his family. He had said when questioned that it was his brother's car and confirmed that this was so. He said he had been stopped on a previous trip when he was bringing in twenty cases of beer. He said he was not aware of the guidelines levels for excise goods, although he had said in interview that he was aware of them. He said it was not easy when one was stopped in the way in which he had been.

13. Mr Baldev Singh, the Appellant's brother said that there were no signs indicating the quantities of imports allowed. It was unjust to have the car and goods seized.

14. For the Commissioners evidence was given by the reviewing officer Mr Paul Devlin. He was shown a statement by another officer Mr Gerry Dolan and confirmed that it contained the Commissioners' policy to deter the smuggling of excise goods into the United Kingdom. The Commissioners sought to ensure that their policy on the involvement of vehicles in excise fraud was sufficiently robust to provide an adequate deterrent to smugglers. Since 13 July 2000 vehicles detected as being used in smuggling would have been seized and not restored, even on the first attempt that they were so detected. The message for fraudsters using their vehicles to commit excise fraud was thus "use it and you will lose it". Owners who were not present at the time of detection would also not have their vehicles restored, unless they could demonstrate that the decision not to offer the

vehicle for restoration was unreasonable. The current policy had been widely publicised in the national press. A Customs leaflet on it was sent out to every registered vehicle keeper with the reminder to pay the road fund licence. This leaflet set out the guidelines for amounts of tobacco and alcohol regarded as reasonable for personal use, the need to convince an officer of no commercial intent if these were exceeded and the penalties for smuggling. Individual applications for restoration were considered on their merits and officers bore in mind the need for proportionality. It was not the intention of the Commissioners to penalise the genuinely honest traveller or to dissuade travellers from shopping in other EU countries when making purchases for their own use, but to deter those who were intent on regularly smuggling tobacco and alcohol into the United Kingdom.

15. Mr Devlin's evidence was that he reviewed Mr Marwood's decision of 22 December 2000, and that in carrying out his review he saw all the documents presently before Tribunal with the exception of the notice of appeal. He considered the background which led up to the decision to seize the goods and the car, to satisfy himself that this had been properly done. He saw no obvious errors. He then considered the reasonableness of the decision not to restore the goods and the vehicle, and what led up to that decision. He considered the notes of interview; he considered also the documents giving seizure information issued to Mr Sukhdev Singh at the time of seizure. He considered also the sales receipts produced by the Appellant on the day, and examined the correspondence from the Appellant's advisers. He then issued his decision on review which set out his understanding of the legislation, and the matters to be considered, including the appropriateness of the seizure and the reasons in favour of returning the vehicle. He pointed out that there was an error in the last paragraph of the "consideration" set out in his letter where the figure by which the Appellant had exceeded the minimum level was given at 3200 when in fact he had exceeded that figure by 2200 cigarettes.

16. Having considered these matters he was satisfied that the goods were correctly seized. The Appellant said that he was not a smoker. The cigarettes were imported for others. He had said that only four or five cases of the beer were for him and that the rest were not. It was necessary to consider whether the imported articles were for the traveller's "own use". That term was defined. He did not consider that these goods were for the Appellant's "own use". They were therefore liable to forfeiture. The Appellant had had the opportunity to acquaint himself with the guidelines for such importations. He had been stopped before. He could have asked. The Commissioners had given considerable publicity to their policy. They had given copies of it to the Ferry and Tunnel operators. There were advice centres available. The information was there.

17. Mr Devlin said he looked at the representations made by the Appellant in particular that hardship was caused by the loss of the vehicle. It was not clear who was feeling the hardship. The vehicle was said to belong to the Appellant's brother. There was no provision in the policy for restoring vehicles on these grounds. The policy was given to him as a guideline in his decision making. The policy was fairly stringent but he was open to argument. He had asked when the policy could be waived. It was not to be waived in such a case as this. It was the Commissioners' view that the Appellant had lost his brother's car by using it in this way. There was no reason not to apply the policy. He decided that there was no reason to overturn the decision, and therefore upheld it. There was nothing unreasonable in the decision to refuse to restore the vehicle or the goods.

18. Mr Devlin agreed that in the seizure information document the number of cigarettes was given as 2000, but said that the inventory of the goods seized attached to the officer's notes showed that there were in fact 3000 cigarettes seized, and he was satisfied that that was the total amount.

19. Asked about hardship he said that the seizure of vehicles was bound to cause hardship to the families concerned, but this was all the more reason to be careful not to risk them. He accepted that there was some hardship but not more than would be caused to others in the same circumstances. It was not therefore exceptional. The Appellant had offered to pay the duty, but this had been refused. It was not the policy to restore goods on payment of the duty. There was no system for payment in such circumstances. He accepted that the importation was largely for the family and that the Appellant had spoken the truth in his statement. However, there was no relief from duty in those circumstances. The goods came outside the scope of the relief in the 1992 Order. He sympathised with the Appellant but it was not open to him to waive policies out of sympathy. He agreed that there were enticements to buy goods, but said that information on how much could be imported free of duty was also available.

20. It is thus the Appellant's case that there were special circumstances justifying restoration. These were the Appellants honesty, his lack of knowledge of the limits, the absence of signs showing what was the permitted importation, the fact of importation for the ... , of no commercial interest and the hardship caused by the seizure. He had offered to pay the duty. The refusal to restore amounted to harsh treatment. The vehicle was worth about £3500.

21. The Commissioners say that their decision not to restore the vehicle and the goods was made under section 152(b) of the Customs and Excise Management Act 1979 which provides that the Commissioners "may, as they see fit, . restore . any thing forfeited or seized" under the Customs and Excise Management Acts. They have carried out the review required by section 15 of the Finance Act 1994.

22. The basis for the Tribunal's jurisdiction is section 16 of that Act which provides:

"(1) Subject to the following provisions of this section, an appeal shall lie to an appeal tribunal with respect to any of the following decisions, that is to say -

(a) any decision by the Commissioners on a review under section 15 above (including a deemed confirmation under subsection (2) of that section; and
(b) any decision by the Commissioners on such review of a decision to which section 14 above applies as the Commissioners have agreed to undertake in consequence of a request made after the end of the period mentioned in section 14(3) above.

(4) In relation to any decision as to an ancillary matter, or any decision under review of such a decision, the powers of the appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making the decision could not reasonably have arrived at it, to do any one or more of the following, that is to say -

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

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23. The present appeal falls within section 152(b) of the Customs and Excise Management Act 1979, in accordance with paragraph 2(1)(r) of Schedule 5.

24. The Commissioners say that the Tribunal must consider whether it is satisfied that the Commissioners could not reasonably have arrived at the decision taken on review. They rely on the decision in *Bowd v Customs and Excise Commissioners* [1995] V&DR 212 to the effect that the Commissioners' decision has to be examined under the rules for "Wednesbury reasonableness", that is to say that to succeed the Appellant must show that the Commissioners have acted in a way in which no reasonable panel of Commissioners could have acted, that they have taken into account some irrelevant matter or disregarded something to which they should have given weight, or made some other error of law.

25. The Commissioners say that the reviewing officer applied the Commissioners' policies on the restoration of vehicles used in the improper importation of excise goods. They say that they are entitled to have such policies, and these policies pursue the legitimate aim of deterring the importation of goods for commercial purposes without payment of duty, and encouraged compliance with the legislation for the importation of goods liable to excise duties, and also have the advantage of consistency in decision making.

26. The Commissioners say that they have not fettered their discretion in that they are prepared to listen to arguments that the policy should not be applied, see *British Oxygen Company Ltd v Minister of Technology* [1971] AC 610 at pp 624-625 and the appeal of *Dereczenik v Customs and Excise Commissioners* C00138 at paragraph 15. They have in the present case applied the policy after proper consideration of all the facts and matters surrounding the seizure, and the representations made by the Appellant. The Appellant had not shown that the Commissioners' decision on review was one that the Commissioners could not reasonably have reached.

27. The Commissioners say that the Tribunal does not have any jurisdiction in relation to the legality of the seizure, in spite of the provisions of the Excise Duties (Personal Reliefs) Order 1992, as the Tribunal's jurisdiction is limited by sections 14-16 of the Finance Act 1994. They say that Schedule 3 of the Customs and Excise Management Act 1979 provides for an appeal to the High Court or the Magistrates Court on the merits of seizure.

28. In any event the Commissioners say that the goods imported are dutiable under section 2 of the Tobacco Products Duty Act 1979 and section 36 of the Liquor Duties Act 1979. The excise duty point is at the time of importation. The duty is the liability of the importer under regulations 4 and 5 of the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992. Relief from excise duty was conferred, under section 13 of the Customs and Excise Duties (General Reliefs) Act 1979 by the Excise Duties (Personal Reliefs) Order 1992, in the terms set out by article 3 of that Order namely:

"Relief from duty of excise - cross border shopping

Subject to the provisions of this Order a Community traveller entering the United Kingdom shall be relieve from payment of any duty on excise goods which he has obtained for his own use in the course of cross border shopping and which he has transported".

29. Articles 2 and 3 of the Channel Tunnel (Alcoholic Liquor and Tobacco Products) Order 2000 apply the 1992 Order to goods imported through the Channel Tunnel, known as "shuttle train goods".

30 Article 3A of the 1992 Order, inserted by the 2000 Order provides for relief from excise duty. It states:

"3A-(1) In relation to shuttle train goods, this article shall have effect for the purpose of determining whether relief has been treated as having been afforded under article 3 above.

(2) No relief shall be treated as having been afforded if the goods are held for a commercial purpose.

(3) Where the shuttle train goods exceed any other quantities shown in the schedule to this Order the Commissioners may require the person holding the goods to satisfy them that the goods are not held for a commercial purpose.

(4) In determining whether or not any person holds shuttle train goods for a commercial purpose regard shall be taken of the facts as listed in subparagraphs (a) to (j) of article 5(2) below.

(5) If the person holding the goods is required to do so but fails to satisfy the Commissioners that he does not hold them for a commercial purpose, it shall be presumed that the goods are held for a commercial purpose.

(6) Where the person holding the goods fails to satisfy the Commissioners that he does not hold them for a commercial purpose, for the purpose of any proceedings instituted in accordance with paragraph 8 of schedule 3 to the Customs and Excise Management Act 1979 or any appeal under section 16 of the Finance Act 1994, his failure shall cause the goods to be treated as "goods held for a commercial purpose" and accordingly, section 154(2) of the Customs and Excise Act 1979 shall apply".

31. Article 5 of the 1992 Order provides for relief from excise duty and in particular states in paragraph 2 of that article:

"(2) [In determining whether or not the conditions imposed in paragraph (1) above have been complied with], regard shall be taken of -

- (a) his reasons for having possession or control of those goods;
- (b) whether or not he is a revenue trader;
- (c) his conduct in relation to those goods and, for the purposes of this subparagraph, conduct includes his intentions at any time in relation to these goods;
- (d) the location of the goods;
- (e) the mode of transport used to convey those goods;
- (f) any document or other information whatsoever relating to those goods;
- (g) the nature of those goods including the nature and condition of any package or container;

- (h) the quantity of those goods;
- (i) whether he has personally financed the purchase of those goods; and
- (j) any other circumstance which appears to be relevant."

32. "Own use" is defined as including "use as a personal gift provided that if the person making the gift receives in consequence any money or moneys worth (including any reimbursement of expenses incurred in connection with obtaining the goods in question) its use shall not be regarded as own use for the purpose of this Order".

33. So in simple terms where excise goods exceed the level specified the person holding them may be required to satisfy the Commissioners that they are not held for a commercial purpose, and if he fails to do so it shall be presumed that they are held for a commercial purpose, and in consequence not relieved from duty, as they would be if they were for his "own use".

34. Section 49 of the Customs and Excise Management Act 1979 provides that goods chargeable to duty may be forfeited.

35. Section 141 provides:-

"Where any thing has become liable to forfeiture under the Customs and Excise Acts . any . vehicle . which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture . shall also be liable to forfeiture."

36. Section 139 Act provides:

". any thing liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer .".

37. Section 139(6) refers to Schedule 3 of the same Act for the conditions for forfeiture, and the requirement that the Commissioners must give notice of the seizure of anything liable to forfeiture and the grounds for such action to any person who at the time was to their knowledge the owner. The Commissioners say that this requirement has been complied with by the two notices of seizure which were issued, in particular by the passage on the seizure of vehicle form which states:

"If the vehicle does not belong to you then you must pass this form to the owner of the vehicle as soon as possible"

38. Schedule 3 further provides that the legality of the seizure can be challenged, by entering a notice of claim within 30 days of the notice of seizure. Such a notice of claim requires the Commissioners to institute proceedings for condemnation in the High Court or the Magistrates Courts. No such notice of claim was entered in this case.

39. The legislative provisions applicable to this appeal are those set out above.

40. The Tribunal finds the facts to be as stated in the Commissioners' statement of case. The Commissioners considered that the goods imported by the Appellant were not for his own use, that they and the vehicle were liable to seizure and forfeiture. They then refused to restore them to the Appellant at his request, and maintained this refusal on review, on the basis of Mr Devlin's considerations of the Commissioners' policy and the matters advanced to him.

41. Mr Devlin considered the circumstances leading up to seizure and forfeiture, to ensure that the seizure and forfeiture had been proper. Had the goods and vehicle been illegally seized, the illegality could not have been cured on review. The Tribunal, considering the decision on review, is therefore obliged to consider it in its entirety, that is in both the stages carried out by Mr Devlin.

42. Under the legislation applicable, it was for the Appellant to satisfy the officers that the importation of the goods came within the duty free concession, in other words that they were for his own use, or as a personal gift not involving receipt of money or moneys worth including reimbursement and expenses. The Appellant was plainly unable to do that, because on his own honest admission the goods were for the most part not for his own use and that there was a financial element in his obtaining them.

43. There was advanced on his behalf the argument that the indicative limits set out in the schedule to the 1992 Order, namely, 800 cigarettes, 10 litres of spirits and 110 litres of beer could be applied not only to the Appellant but to other persons for whom he was making the importation. That is plainly not so. "Own use" is defined to exclude that argument. The Commissioners' decision cannot be impugned on the ground that they rejected that argument.

44. The Appellant was therefore not able to rebut the presumption of commerciality created by article 3A of the 1992 Order. The combination of articles 3 and 3A give relief from payment of duty on excise goods which a person has "obtained for his own use in the course of cross border shopping and which he has transported" but under the terms of article 3A(2) "no relief shall be treated as having been afforded if the goods are held for a commercial purpose". Article 3A(5) creates the presumption that "if the person holding the goods is required to do so but fails to satisfy the Commissioners that he does not hold them for a commercial purpose, it shall be presumed that the goods are held for a commercial purpose". Furthermore, in accordance with article 5 of the 1992 Order relief from excise duty is subject to the conditions set out in article 5(2).

45. The Appellant thus faced the problem of satisfying the officer that the goods were for his own use, when plainly they were not, and thus of being unable to rebut the presumption of commerciality which follows from the inability to convince the officer that they were for his own use.

46. The Commissioners referred the Tribunal to the appeal of *Hodgson v Commissioners of Customs and Excise* (LON/95/8023) on the primary Community law right to import goods from other Member States. The decision was taken on the basis of an earlier version of article 5(3) of the 1992 Order. The Appellant's Community law right to bring dutiable goods into the United Kingdom for own use without payment of duty remains in existence, subject to the condition that he must be able to show that the importation was in effect for his own use. This the Appellant was not in the circumstances of the present appeal able to do.

47. A further issue raised by the Commissioners was whether the Tribunal's limited jurisdiction would constitute a violation of article 6 of the European Convention on Human Rights in relation to the Appellant's rights to a fair trial. The Commissioners submit that these proceedings do not constitute criminal proceedings and refer here to the appeal of *Goldsmith v Customs and Excise Commissioners* [2001] 1 WLR 1673 at paragraph 25. The Appellant has had access to an independent court in relation to condemnation proceedings, and, subject to the Tribunals' limited jurisdiction, to the present proceedings.

48. The proceedings under appeal were not criminal in nature. They do affect his civil rights.

49. The Tribunal finds that the Appellant has had the required access to court in condemnation proceedings and moreover, its own jurisdiction does allow, indirectly, of a review of the circumstances of seizure, these being incorporated in the review decision under appeal.

50. The Commissioners further raise the question of a possible breach of article 1 of the First Protocol of the European Convention on Human Rights which provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

51. The European Court of Human Rights has construed the rules set out in article 1 of the First Protocol by saying that they are not distinct but connected in the sense that the second and third rules must be construed in the light of the first rule. The Court has said in *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35 at para 61:

"That Article comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the State are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph. The court must determine, before considering whether the first rule was complied with, whether the last two are applicable."

52. At paragraph 69 of the same judgment the European Court held:

"For the purposes of the latter proposition [whether the interference with the right to violates the rule contained in the first sentence of the first paragraph] the court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of article 1".

53. In considering whether this balance has been struck the Commissioners rely on the case of *Air Canada v United Kingdom* [1995] ECHRR page 130. The European Court there construed the proportionality of interference with the protection of property in the same way as in the case of *Sporrong* cited above. However, there was a distinction between the facts in the *Air Canada* case and of that in the present case in that the case of *Air Canada* referred to the seizure of an aircraft which only amounted to a temporary restriction on its use and did not

amount to a transfer of ownership. Condemnation of the aircraft as forfeited did not have the effect of depriving Air Canada of ownership.

54. In the appeal of *Dereczenik v Commissioners of Customs and Excise* ((2001) C00138) the Tribunal considered the "fair balance" test between the demands of the general interest of the community and requirements of the protection of the individual's fundamental rights and considered that the Commissioners had taken steps to achieve the necessary balance in that appeal. That was a case where a trailer was found to have been modified to create a space apt for concealment of goods. That was no doubt relevant to the "fair balance" test in that case. In the present case the circumstances are different, in that there was no evidence of concealment and indeed the Appellant has behaved with frankness throughout in his explanation of the intention of the purchase of the goods.

55. The Commissioners have explained the reasons behind their policy, which is the legitimate aim of preventing and deterring the improper importation of excise goods and compliance with the rules for their importation. The importance of that policy, and the admittedly severe measures taken thereunder, must therefore be balanced against the interference with the Appellant's right to a property. It is relevant that the duty on the goods is estimated by the Appellant's representative at £675, a figure which appears not to be contested by the Commissioners, and the value of the vehicle at over £3000. It is relevant also that the intended import was several times larger than the Minimum Indicative Level, 3½ times the level for cigarettes and more than double that for beer.

56. The Tribunal, in considering whether the Commissioners' decision not to restore the vehicle is unreasonable, within the definition of that term explained earlier, decides that the proportionality of the interference with the Appellant's right to property which is the consequence of the refusal of the right to restore must form a part of the reasonableness or otherwise of the Commissioners' decision. If they neglected the fair balance which is required before an interference the right to property can be justified they would be acting, no doubt, on a misapprehension of the law, and moreover might be led into an unreasonable decision. It is clear that the Commissioners have considered the exercise of their powers, involving depriving the Appellant of the vehicle, in the light of their policy, and indeed their obligation to collect duties due, and to deter improper importations. They have not drawn an express balance between the values of the goods and the values of the vehicle, but there is some regard paid to that in the Commissioners' letter of 22 December 2000. The Tribunal considers that in taking into account the offer to make payment made by the Appellant's representative, there was material before the Commissioners, which would have allowed a proportion to be established between these monetary evaluations. It was not established. The Tribunal does not think that it has been shown that a fair balance was sought to be achieved. It should, as a matter of law, have been considered.

57. There is a further point which it is necessary to make although it does not in the Tribunal's view affect the result. It is that the Commissioners are obliged by section 15 of the Finance Act 1994 to "review the decision" not to restore the vehicle and the goods. The Commissioners have carried out such a review, but have expressed it not in the terms of that section, which obliges them simply to "review the decision," but as a question of whether the decision was one which "a reasonable body of Commissioners could not have reached". There is doubt in the Tribunal's mind about whether that was the proper question to ask. It is not so stated in section 15. However, the decision was in any event against the Appellant and he has appealed against that negative result.

58. The Appellant has advanced reasons why the refusal to restore the vehicle creates adverse effects, but the Tribunal has no facts to allow it to justify the allegations of "extreme distress" or hardship, and does not think that that is an argument which has been substantiated sufficiently to show that the Commissioners' decision was unreasonable in that respect. The Tribunal does not accept that drivers are generally unaware, or that the Appellant was quite unaware, of the fact that imports of excise dutiable goods were the subject of rules.

59. The matter for decision is affected by the fact that the Appellant was not the owner of the car. That is a relevant fact. The Commissioners considered it, but maintained their decision not to restore. They maintained, in the instant case, their position of principle not to restore vehicles seized in such circumstances. Their decision is based on powers conferred on them by legislation, powers of long standing. The Tribunal does not think that their decision was rendered unreasonable by the fact that the Appellant was using a borrowed vehicle.

60. In the result, the Tribunal finds that in one respect the Commissioners' decision was based on an error of law, that is, the necessity to consider the proportionality of their decision, or, in the terms used in the case of "Air Canada" the "fair balance" between the demands of the general interest of the community, that is to say their duty to collect tax and to deter smuggling, and the protection of the individual's right to property. The proportionality of the loss to the revenue, which represents the magnitude of the offending conduct, must be related to the interference with the right to property represented by the value of the car. The Commissioners can consider the general interest, that is to say the broader problem of illicit imports, but must perform the exercises of proportionality and balance, which, if neglected, go to the reasonableness of their decision. Without those exercises, they will leave out something to which, in the exercise of their discretion, they should give weight.

61. Accordingly, under s.16 4(b) of the Finance Act 1994, the Commissioners are required by the Tribunal to carry out a further review of their decision, to take into account the matters in the preceding paragraph.

PAUL HEIM CMG
CHAIRMAN

RELEASED:

LON/01/8024-SIN.HEIM