

Importation of large quantities of dutiable goods - Seizure of vehicle - Vehicle belonging to driver's partner - Restoration offered subject to conditions - Reasonableness - Presumption of commerciality, appeal dismissed

LONDON TRIBUNAL CENTRE

HELEN TAYLOR Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: MR PAUL HEIM CMG (Chairman)

MR P D DAVDA FCA

Sitting in public in London on 14 January 2002

The Appellant not represented

Miss Zoe Taylor of Counsel for the Respondents

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DECISION

1. Miss Taylor appeals against a decision on review taken by the Commissioners on 22 September 2000 in which the Commissioners decided to vary the amount which they had originally imposed as a fee for restoring to her a motor car number K387 VTA, from £1,000 to £656.
2. At the hearing of this appeal Miss Taylor did not appear and was not represented. The Commissioners were represented by Miss Zoe Taylor, of counsel. In the absence of the Appellant, Miss Taylor asked for the Tribunal to proceed under Rule 26(2) the Tribunal agreed to hear the case in the Appellant's absence.
3. The Commissioners then produced a bundle of documents.
4. Evidence for the Commissioners was given by Mr Ian McEntee, Review Officer, South East, stationed in Canterbury.
5. His evidence was not contradicted. He said that he had taken the decision under appeal. He had undertaken this review at the request of the Appellant's solicitors.
6. In the absence of other representations on behalf of the Appellant the Tribunal quotes from the letter written by her solicitors on 18 August 2000:

"We act on behalf of Miss H Taylor the owner and registered keeper of a Renault Clio index number K 387 VTA. On our client's behalf we wish to appeal against the decision to permit restoration of the above vehicle upon payment of the sum of £1000.

Miss Taylor resides at 8 Whitebeam Close, Paignton with her common law husband Mr James Polding, and their three children aged 11, 7 and 6. Miss Taylor works on a part-time basis earning £100 per week. In addition the family receives working family tax credit of £110 per week and family allowance of £40.

In the Spring of this year Mr Polding informed Miss Taylor that he wished to travel to France with the intention of buying tobacco products for his own use. Miss Taylor was informed that the savings made in purchasing the products in France would cover the cost of the trip and would justify the initial outlay. Our client understands that Mr Polding intended to use his savings and money which had been given to him in lieu of birthday and Christmas presents etc. Miss Taylor consented to Mr Polding having the use of her vehicle but was not aware that Mr Polding intended to purchase the actual quantities brought back into this country.

It is understood that Mr Polding was detained by Customs and the following quantities of goods were seized: - 25 kgs of hand-rolling tobacco, 2600 cigarettes, 110 cigarillos, 75 cls of still wine, the decision having been made that Mr Polding did not intend to use the goods for his own use. Our client now understands that Mr Polding had purchased quantities far in excess of those envisaged by Miss Taylor. Whilst it is not within our remit to make representations on behalf of Mr Polding, we have received assurances from Mr Polding that notwithstanding the fact that the quantity of goods considerably exceeded the quantities set out in the Schedule to the Excise Duties (Personal Reliefs) Order 1992 the goods were not intended for commercial purposes and were intended for his own use. It appears that Mr Polding was assured by the vendor of the goods that tobacco will keep in good condition indefinitely provided that it is stored correctly.

Our client's position in this matter is that she lent her vehicle to Mr Polding in total ignorance of the intention to purchase goods in such quantity. Had she been aware of Mr Polding's intention she would not have given her consent to the use of the vehicle. Miss Taylor did not stand to benefit from the purchase of the goods other than indirectly in that Mr Polding would otherwise have purchased tobacco for his own use at UK prices.

Our client is heavily dependent upon use of her vehicle to transport herself and her young children and is finding it extremely difficult without a car at present. She is not in the position to raise the sum of £1000 demanded for release of the vehicle".

7. Mr McEntee gave evidence that in reviewing Miss Taylor's request, made through her solicitors, he had before him the notebooks of the officers who had stopped the car, a copy of the notice of seizure of the vehicle and seizure information, the solicitor's letters, and a printout relevant to the Commissioners' records on the seizure.

8. It is apparent from these documents that on 2 May this vehicle was stopped at Eastern Docks in Dover, while being driven by Mr Polding. He was asked questions by an officer of Customs and Excise, who then noticed three bags on the back seat of the car. He asked what they were. He was told that they contained a few clothes. They turned out to contain a quantity of tobacco. He was then questioned by another officer who first recorded that it had been explained to Mr Polding that he had goods in excess of guidance levels and that the officer wanted to ascertain what the goods were for and explained that he was not under arrest and asked him whether he wished to leave to which he replied no. He said that the tobacco was for his own use. The cigarettes were for when he could not be bothered to roll one. He smoked two or three pouches of tobacco a week, obtaining 80 cigarettes from a pouch. The goods would last him for a good 18 months to two years. He had no smoking equipment on him. He funded the purchases from his savings since Christmas. He was aware of guidance levels. He knew he was doing something wrong and thought he would chance it. The car

was his partner's. It was not a joint car. She knew that he had borrowed it. She knew that he was crossing the channel.

9. Following on this interview the officer was not satisfied that the goods were for own use because of the quantity, because the tobacco was not declared, because the driver was aware of the indicative limits and admitted that he was doing something wrong, and that the consumption rates were inconsistent. There was no evidence of smoking in the vehicle. The goods were then seized, and a seizure form and warning letter were issued.

10. It was noted on the seizure form that Mr Polding had 25 kgs of hand-rolling tobacco, 2600 cigarettes, 110 cigarillos and a small amount of still wine. The Appellant was interviewed. She said she had lent the vehicle to Mr Polding because he said he was going across to get some tobacco for himself. He was insured for the vehicle. He always had access to the keys. He did not say how much he was going to buy but he had been saving up. She had had the vehicle for two to three months and had paid £1500 for it.

11. On 24 July 2000 Mr Oliver acting team leader of the Excise Verification Team of HM Customs and Excise at Dover wrote to the Appellant's solicitors confirming that the restoration fee set on Miss Taylor's vehicle was £1000. Following the letter of 18 August 2000 from the Appellant's solicitors, which has been quoted earlier, Mr McEntee reviewed the decision to restore the vehicle on payment of that sum. He explained to the Tribunal that having considered the documents available to him he first examined whether the vehicle was appropriately seized. He took account of the fact that Mr Polding had lied to the officers when intercepted, of the amount that he had spent on the tobacco goods, and agreed with the officers that he had failed to rebut the statutory presumption of commerciality, with the consequence that the goods and the vehicle were liable to seizure. Mr McEntee referred to the Commissioners' policy at the time of the importation of the goods in question, which was that where an owner of a vehicle was deemed to be "innocent but blameworthy" the vehicle was to be restored only after the payment of a minimum sum of £75, or a sum equivalent to 25% of the duty due on the forfeited goods, whichever was the greater, subject to a maximum sum equivalent to the trade buying and price determined from Glass's Guide. The Commissioners' policy had since changed and it was now policy not to restore any private vehicle.

12. Mr McEntee said that the Appellant had agreed to lend the vehicle, knowing that the purpose was to cross the Channel to buy tobacco goods. The Appellant thus have some blame for the events. It was not the case that she was completely innocent of the purpose as she might have been if the car had been lost or she had been duped about its use. He considered the value of the duty, and the information he received about the value of the vehicle, £1475. The value of the duty was £2642, so 25% of that was £656.20. It was open to him to reduce the amount required for restoration if there were genuine reasons to do so. However there were no reasons in the present case to depart from the policy. The Appellant had allowed her vehicle to be used to import excise goods without insisting on some care in the use of the vehicle. She had accepted the risk. She knew that Mr Polding had been saving up his funds for the purpose of buying tobacco products. The decision was proportionate to the value of the goods seized.

13. The Commissioners say that the seizure was the result of the Appellant's partner having transported such a large amount of goods. He had been asked to satisfy the officers that there were for his own use and had failed to do so. The

goods and the vehicle had been appropriately seized, in accordance with Article 5(1) of the Excise Duties (Personal Reliefs) Order 1992 which provided that excise goods were liable to forfeiture were the requisite conditions were not fulfilled. Under section 141 of the Customs and Excise Management Act 1979 when any thing became liable to forfeiture any vehicle which had been used for the carriage of it also became liable to forfeiture. Schedule 3 of the Act obliged the Commissioners to give notice of the seizure of any thing liable to be forfeited and the grounds of it. The Commissioners had done so. The legality of seizure could be challenged under that Schedule, by a notice made within 30 days of the notice of seizure. No such challenge had been entered. It was open to the Commissioners to restore the vehicle on condition of payment under section 152(b) of the Customs and Management Act 1979 which provided that they "may, as they see fit ... restore, subject to such conditions (if any) as they think proper any thing forfeited or seized" under the Customs and Excise Acts.

14. The Commissioners say that the Tribunal's jurisdiction is as set out in sections 14-16 of the Finance Act 1994, as decisions made under section 152(b) of the Customs and Management Act 1979 fell within paragraph 2(1)(r) of Schedule 5 of the Finance Act 1994. Section 15 of the Finance Act 1994 required the Commissioners to review their decision to restore the Appellant's vehicle and that review had been properly carried out and had led to a reasonable conclusion. The Commissioners say that under section 16 of the Finance Act 1994 the Tribunal's power is confined to a power to decide whether the Commissioners or other person making the decision could not reasonably have arrived at it, and it is only if the Tribunal finds that to be the case that it can either direct that the decision is to cease to have effect or require the Commissioners to conduct a further review, or give directions regarding the future.

15. The Commissioners direct the Tribunal's attention to the definitions of reasonableness deriving from past decisions, namely that reasonableness in this context has the meaning defined in *Bowd v Customs and Excise Commissioners* [1995] V&DR 212, as "Wednesbury reasonableness". It followed from that decision that the Commissioners' decision could only be found to be unreasonable if the Appellant could show that they had acted in a way which no reasonable panel of Commissioners could have acted, that they had taken into account some irrelevant matter or disregarded something to which they should have given weight, or made some other error of law.

16. The Tribunal was also directed to the decision in the appeal of *Hopping v Commissioners of Customs and Excise* released on 9 October 2001 and in particular to the following passage at the end of the decision:

"Our overall conclusion is that Mrs Hopping's knowledge and acceptance of the trips could reasonably have been inferred by the officer. It is not our function to decide whether the officer was right or not; all we are allowed by the 1994 Act to do is to determine whether he could reasonably have reached the conclusions that he did. Mrs Hopping has suffered the severe penalty of losing her car. But she was close to the action and must be taken to have known the implication of allowing her car to be used for this bootlegging trips. The published stakes were high: use it and lose it. They were widely known. She allowed her car to be used and her loss of it is not, we think, a disproportionate consequence".

17. On the other hand in the appeal of *Williams v Customs and Excise Commissioners*, decision of 11 October 2001, the Tribunal directed that the decision be remitted to the Commissioners because the reviewing officer had wrongly excluded the matter of relative values when considering the decision to

seize the motor vehicle. By doing so he had shut his mind to the possibility of restoring the vehicle subject to conditions as allowed by section 152 of the Customs and Management Acts 1979. Further the matter of hardship had not been considered. It is now for the Tribunal to consider whether it has been shown that the Commissioners' decision was unreasonable within the definition set out above, so that one of the remedies provided for in the Tribunal's jurisdiction under section 16 of the Finance Act 1994 should be applicable.

18. In reaching its decision the Tribunal considers the Commissioners' policy, as stated to it by Mr McEntee, and its application in the case of this Appellant. The Commissioners are entitled to have such policies. Their aim is the legitimate one of deterring the importation of goods in contravention of the conditions laid down. Among these conditions are those relating to personal reliefs on imports. It is not disputed that tobacco goods are upon import liable to duties under section 2 of the Tobacco Products Duty Act 1979 subject to the reliefs established by the Excise Duties (Personal Reliefs) Order 1992. That Order provides that there should only be relief from payment of duty on excise goods which a community traveller entering the United Kingdom has obtained for his own use in the course of cross border shopping and which he has transported. Article 5 of that Order provides that among the matters relevant in deciding that those conditions are satisfied are the person's conduct in relation to the goods, the location of the goods, and the quantity of the goods. It is further relevant that paragraph 3A allows the Commissioners to require a person to satisfy them that the goods are not being held for a commercial purpose. Under paragraph 3B where a person fails to satisfy the Commissioners that the goods in question are not being held or used for a commercial purpose the conditions of importation with relief from duty must be treated as not complied with.

19. The Schedule to the 1992 Order sets out limits of 800 cigarettes, 400 cigarillos and 1 kg of tobacco products as indicative levels for duty free importation.

20. It is perfectly clear from the evidence available to the Commissioners and their officers that they had material upon which they could reasonably find that Mr Polding was importing quantities very much in excess of the indicative levels, that he had tried to conceal the importation, and that his suggestions that they were for his own use were not plausible. There appears to be nothing unreasonable in their decision to adopt a presumption of a commercial purpose, and to seize the goods and the vehicle. There seems to the Tribunal further to be nothing unreasonable in their decision to decide to restore the vehicle to the owner. That which is attacked is the condition which they attached to their decision to restore it, that is to make the restoration subject to a payment originally fixed at £1000 and now reduced to the amount of £656. While the Tribunal's decision relates primarily to the decision on review, that decision on review took into account the legality and reasonableness of the seizure so that the Tribunal has regard to those matters also. There appears to the Tribunal to be nothing unreasonable in the Commissioners' decision in those respects.

21. As far as the decision to restore the motor vehicle to the Appellant subject to conditions is concerned, the following matters appear to the Tribunal to be relevant.

22. First it was not the Appellant who was importing the goods subject to duty. She had no direct involvement in that transaction. It was her car, although Mr Polding was free to use it, apparently at will. The Commissioners consider however that those who lend their cars must take the risks inherent in so doing,

especially if, as in the present case, they knew that they were to be used for the purchase and importation of dutiable goods. It appears to be relevant that Mr Polding had the use of the car and on this occasion the use of it for the purpose of buying tobacco products, with which intent he had been saving up money for a matter of months. The only conclusion to be drawn is that the Appellant had an awareness of the purpose of the trip, to buy a considerable amount of dutiable goods. The Tribunal does not consider that it is reasonable to suppose that there is general ignorance that the importation of dutiable goods is subject to conditions and to control. To this extent the Commissioners' categorisation of the Appellant as innocent but blameworthy is not without foundation if that term is explained in the following way that the Appellant is innocent of any direct involvement in the illicit importation, but allowed her car to be used for a purpose where the clear possibility of such illicit importation existed, so that it is reasonable to conclude that she could not have been unaware of the element of risk.

23. The Commissioners' powers to seize vehicles in these circumstances are large. Their power to restore them on conditions is discretionary and therefore very wide. It appears to the Tribunal that such wide powers require careful consideration to ensure that any interference with an appellant's rights are justified. In this case the interference with the Appellant's right is her right to the unrestricted use and enjoyment of her own vehicle. The principle of peaceful enjoyment of property is set out in Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The judgment of the European Court of Human Rights in *Sporrong and Lonroth v Sweden* (1982) 5 EHRR 35 at paragraph 61 is authority for the proposition that a fair balance must be struck between the demands of the general interest of the community and the requirement of the protection of the individual's fundamental rights. In the appeal of *Dereczenik v Commissioners of Customs and Excise* (LON/00/7067) the Tribunal found that it was necessary to achieve that a fair balance, which is in fact an application of the principle of proportionality, in such cases. The coexistence of these two principles derives also from the judgment of the European Court of Human Rights in the appeal of *Air Canada v UK* (20 EHHR 150). The Tribunal considers that fair balance and that relationship of proportionality in particular between the value of the car both in absolute terms, and to the Appellant, and the general interest which the Commissioners seek to protect in their efforts to deter and prevent the improper importation of excise goods and compliance with the rules for their importation. The Tribunal finds nothing unreasonable in the Commissioners' approach to this balance and the need for proportionality in their decision in this case.

24. There is the further point whether the Appellant can fully present her argument to a competent court in the defence of her civil right to the protection of her property. Insofar as this appeal is against the exercise of the Commissioners' discretion, in the reasonableness of their decision in restoring the vehicle to the Appellant only on condition, the Appellant would have had ample opportunity to make her views more fully known before this Tribunal had she wished to do so. The Tribunal has taken fully into account all that she has said in her interview and her notice of appeal, and the arguments advanced on her behalf, and cannot see that her possibilities to make her views known have been in any way restricted.

25. The Commissioners raised on the Appellants behalf the issue of whether a full remedy was available to her and referred to the possibility of recourse to the Magistrates Court to contest seizure. However, the issue in this case relates not to seizure, but to the conditions for restoration.

26. Accordingly on the broader issue, raised by the Commissioners on behalf of the Appellant in relation to her possibilities of seeking a full remedy, the Tribunal is not able to see in the circumstances of this appeal, that any finding requires to be made to impute the Commissioners' decision, and this appeal is accordingly dismissed

PAUL HEIM CMG
CHAIRMAN

RELEASED:

LON/00/8041-TAY.HEIM