

EXCISE DUTY - Restoration of car - Restoration of excise goods - Excise goods imported in car - Small proportion of cigarettes and tobacco (between 1-3% in value) concealed - Whether decision not to restore car unreasonable and disproportionate - Yes - Whether decision not to restore excise goods unreasonable - No - Appeal allowed in part
LONDON TRIBUNAL CENTRE

COLIN JOHN RICHELL Appellant
- and -
THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: STEPHEN OLIVER QC (Chairman)
LYNNETH SALISBURY
SUNIL DAS ACIS

Sitting in public in London on 30 April 2002

The Appellant in person

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

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DECISION

1. Mr C J Richell appeals against the decision of the Commissioners, made pursuant to Customs and Excise Management Act 1979 ("CEMA") section 152(b) not to restore a quantity of seized excise goods and a seized Ford Mondeo. The decision, taken on a review, is dated 13 May 2001.
2. Mr Richell is a private individual residing in Palmers Green, London. He is retired and living on a company pension. At the material time he was the owner of a Ford Mondeo vehicle, registration number M720 WEW ("the car").
3. On 7 March 2001 Mr Richell and two colleagues took a trip to France. He and his colleagues purchased hand-rolling tobacco, cigarettes, cigars, beer, wine and some spirits. On their return they were stopped by Customs officers in the "car hall" in Dover. The car was, at the time, being driven by Mr Richell.
4. On being interviewed he told the Customs officer, who was taking a verbatim note, that -
 - He had nothing to declare,
 - He had been to Calais and Belgium,
 - The car belonged to him and he had owned it for two years,
 - He had not been stopped by Customs before,
 - He had travelled across the Channel every five or six weeks,
 - Of the excise goods purchased, 40 pouches of hand-rolling tobacco, the "Royals" cigarettes and the King Edward cigars belonged to him,
 - Of the excise goods purchased, some Silk Cut cigarettes belonged to one of his colleagues and some Super Kings belonged to another and,
 - There were no other excise goods in the vehicle apart from wine and spirits.

The other two gentlemen were questioned and they stated that they had not been stopped by Customs before.

5. A Customs officer then removed the excise goods that were in the boot of the vehicle. These comprised 24 litres of beer, 4½ litres of wine, 1 litre each of Vodka, Gin, Bacardi and Baileys, 3 litres of Whisky, 50 cigars, 6 kilos of hand-rolling tobacco, 6,100 cigarettes and 380 cigarillos. The flooring was then lifted up and this revealed the spare wheel-well into which 10 loose packets of Benson & Hedges cigarettes (200 cigarettes in all) had been placed.

6. Mr Richell's explanation in a letter to the Customs was that he had placed the cigarettes in the spare wheel-well. The reason he had done so was that he had accidentally purchased too many at Adinkerke in Belgium. By the time he had come to pay for them by credit card, it had been too late to reverse the payment arrangements. He went on to say that he had spoken to someone on the ferry who had made him worried that he was over the limits allowed.

7. Following checks made by Customs officers, it was found that Mr Richell travelled more frequently than he stated that he had. Further, it was found that, contrary to what one of Mr Richell's colleagues had said, that colleague had been stopped by Customs on a previous occasion.

8. The Customs officer then seized all the excise goods and the car.

9. The same day (7 March 2001) Mr Richell wrote to the Customs requesting the restoration of the excise goods and of the car. In that letter he said that when asked how often he had travelled to France he could not remember because, at the time of the interview, he had been in a state of shock. He said that the reason he had too many cigarettes was because the sales assistant had mis-heard him and sold him too many cigarettes which he could not return because he had already paid by credit card. He said that the person he had spoken to on the ferry had advised him to hide the cigarettes because of the amounts that he had had and that, foolishly, he had done so. The letter went on as follows:

"This was stupid, I had never done it before, and it is obviously dishonest, but as it took some time for the car to leave the ferry I had time to do this."

He also made the point that he suffered from arthritis and needed the vehicle but could not afford to replace the vehicle as he was retired.

10. There then followed correspondence and on 26 March 2001 the Commissioners wrote to Mr Richell in response to his request for the restoration of the seized excise goods and of the car. The letter explained that restoration, even on fairly stringent terms, would undermine the Commissioners' objective of reducing the incidence of fraud, failure to pay excise duty that is due and irregularities. The normal policy in these cases, the letter stated, is to refuse to restore seized goods. There being no exceptional circumstances that would justify a departure from this policy, the excise goods and the car would not be restored.

11. Following a request for a review, a letter was received by Mr Richell from Mr P Devlin (a review officer who gave evidence). In that letter Mr Devlin stated "I have considered the evidence put before me, your subsequent correspondence, the legislation and current Departmental policy [annexed]. Accordingly, I can advise you that the decision which you are contesting has been confirmed. The vehicle and the goods will not be restored." That was the review letter against which Mr Richell appealed on 21 May 2001. Mr Richell's Notice of Appeal stated

that he and his colleagues "do not resell goods and would have no facilities to do so". Not every trip to France had been for the purpose of purchasing tobacco and cigarettes; his trips by car had sometimes been to visit the Carrefour Supermarket to purchase food, light bulbs, soap powder and sometimes beer.

12. The Commissioners' decision not to restore the vehicle and the excise goods was made under section 152(b) of CEMA which provides that they "may, as they see fit ... restore ... any thing forfeited or seized" under the Customs and Excise Acts.

13. Section 49(1)(f) of CEMA renders liable to forfeiture by the Commissioners "any imported goods concealed or packed in a manner appearing to be intended to deceive any officer".

14. Pursuant to section 141 of CEMA "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 ... and ... any other thing mixed, packed or found with the thing so liable ... shall also be liable to forfeiture." Section 139 provides that "any thing liable to forfeiture under the Customs and Excise Acts may be seized and detained by any officer ...".

15. The basis on which the decision to seize both the car and the goods was taken was pursuant to section 141 of CEMA. The car had been used for the concealment of the 200 cigarettes. The rest of the excise goods being carried were seized on the grounds that they were packed or found with the 200 cigarettes.

16. This is a decision on an "ancillary" matter. Our jurisdiction is defined by section 16 of the Finance Act 1994. This states that our powers -

"... shall be confined to a power, where the tribunal is satisfied that the Commissioners or other person making the decision could not reasonably have arrived at it, to do 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 ... 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."

17. There are now plenty of decisions of this Tribunal on this topic. We have to consider whether we are satisfied that the Commissioners could not reasonably have arrived at the decision on the review; see the recent decision of the Court of Appeal in *Lindsay v Customs and Excise Commissioners* [2002] STC 588 at 601. Reasonableness in this context has the same meaning as is found in the decision of the House of Lords in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231 at 239. It follows that the Commissioners' decision can only be found to be unreasonable if Mr Richell can show that they 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.

18. We now turn to the "reasonableness" of the decision. In considering whether to restore the car and the excise goods to Mr Richell, the reviewing officer applied the Commissioners' policies on the restoration of vehicles used in the improper importation of excise goods and the restoration of excise goods that have been improperly imported. We heard evidence on these from Mr Devlin and from a witness statement provided by Mr Gerry Dolan of the Commissioners. The Commissioners are, we accept, entitled to have policies. Those policies, we think, pursue the legitimate aim of deterring the importation of goods for commercial purposes without payment of duty and encourage compliance. They enable consistency in the decision-making of officers of Customs and Excise. The current policy was introduced on 13 July 2000. The effect of this is that vehicles will be seized and not restored on the first attempt they are detected being used in smuggling. The Commissioners will in exceptional circumstances depart from that policy.

19. One issue is whether the Commissioners have fettered their discretion by refusing to listen to an application that the policy be not applied in any given case (see *British Oxygen Co Ltd v Minister of Technology* [1991] AC 610 at pages 624-625). In the present circumstances, it was argued by Zöe Taylor for the Commissioners, they have indeed applied the policy after due consideration of all the facts and matters surrounding the seizure of the car and the representations made by Mr Richell. Mr Devlin, the reviewing officer, had properly concluded that there were no reasons to depart from the policies; thus, it was argued for the Commissioners, Mr Richell had not made out a case for doing so and in the circumstances the decision was one which the Commissioners could reasonably have arrived at.

20. Mr Richell's case was, in essence, that the Commissioners have acted in a way in which no reasonable panel of Commissioners could have acted; this was so despite the fact that they had not wrongly taken any irrelevant considerations into account or disregarded any relevant ones.

21. We revert to the facts. Mr Richell's car has been seized because 10 single packets each containing 20 cigarettes were, admittedly dishonestly, concealed. We are concerned with a concealment of 200 cigarettes out of a total load of 6,300 cigarettes, 6 kilogrammes of hand-rolling tobacco, 380 cigarillos, 50 cigars and a quantity of beer and spirits. The concealed goods represented a tiny proportion of the total value of the goods being carried in the car; as the proportion of the cigarettes carried they were about one-thirtieth of the total and as a proportion of all the tobacco carried they were a much smaller fraction.

22. It must not be overlooked that the decision to seize the vehicle and the goods was taken because of the concealment. It was not taken on the grounds that the tobacco was considered by the Commissioners to have been in excess of the amounts required by the three gentlemen for their own use and was therefore being imported for a commercial purpose. The same goes for the original decision not to restore. With those features in mind, and without reference to the Human Rights Convention, we think that the decision not to restore the car was unreasonable in the sense that it was a decision that no reasonable panel of Commissioners could have taken. It might have been reasonable to seize and not restore the relatively large quantity of unconcealed excise goods (as well as the 200 concealed cigarettes); and a decision not to restore those could have been

impregnable. But to refuse to restore the car as well is in our view, quite simply, unreasonable.

23. The associated question is whether there has been a breach of Article 1 of the First Protocol of the Convention on Human Rights. Article 1 of the First Protocol provides:

"Every natural 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 a 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."

24. That Article contains three rules but are not distinct but are connected in the sense that the second and third rule must be construed in the light of the first rule. The Article in its proper construction were analysed by the Strasbourg Court in *Sporrong and Lonroth v Sweden* (1982) 5 EHRR 35 at para 61 as:

"The first rule, which is of a general nature, enhances 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 recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general rule, 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."

25. The proper test to be applied when considering whether the Appellant's rights under Article 1 have been breached is the "fair balance test" applied by the Strasbourg Court in *Sporrong* at paragraph 69:

"... 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."

26. The Commissioners' policy concerning the restoration of vehicles used in the improper importation of excise goods has been examined as to proportionality by the Court of Appeal in *Lindsay*. The Court of Appeal found that the Commissioners must draw a distinction when applying the policy to a given case between those where there is evidence of commercial smuggling (giving those words their ordinary meaning) and those where goods in excess of the maximum indicative limits are being brought back at cost price for family and friends. Where there is evidence of commercial smuggling the policy was not criticized: see paragraph 63 of the judgment. Where however there is no such evidence then a number of factors must be considered to achieve a proportion of result: see paragraph 64 of the judgment. The burden is on the Appellant to satisfy the Commissioners that goods are not being purchased for the purposes of commercial smuggling: see paragraph 65 of the judgment.

27. The present case is quite different from the circumstances found in Lindsay. Here the excise goods and the car were seized under section 49(1)(f), section 141(1)(a) and (b) and section 139 of CEMA. In Lindsay, by contrast, the goods became liable to forfeiture because the Appellant had failed to satisfy the Commissioners that the goods were not held for commercial purposes in accordance with Article 5(1) of the Excise Duties (Personal Reliefs) Order 1992. Further, in the present case there is no suggestion that the goods were being brought back for family or friends at cost price. In the present case the excise goods and the vehicle have been seized because 200 cigarettes were found concealed in the spare wheel-well. It seems to us that in the circumstances of the present case the interference with Mr Richell's property rights, so far as his car is concerned, is unreasonable and out of all proportion to the legitimate aim of the Commissioners which, as noted above, is to adopt a consistent approach to deterrence and prevention of the improper importation of excise goods and compliance with importation rules. Of course we recognize that Mr Richell acted dishonestly; he admitted as much in the letter he wrote to the Commissioners the same day as the car and the goods were seized. But there are inevitably going to be many levels of dishonesty in bootlegging circumstances as there are when it comes to sentencing for criminal offences. The dishonesty here is at a low level. There is a total lack of balance here. To refuse to restore the excise goods is as we have already indicated, one thing; but to refuse to restore the car as well on the strength of the very small concealment is disproportionate to the point of extravagant.

28. Moreover, it is not clear that either the officer who took the original decision (referred to in paragraph 10 above) or Mr Devlin (the review officer, see paragraph 11) took into account the fact that only a very small proportion of the excise goods had been "concealed". The letters give no clue as to what factors they took into account, except of course "Departmental policy".

29. For the reasons already given we allow the appeal so far as the refusal to restore the car is concerned. We direct that the Commissioners shall conduct a further review of the original decision taken into account the tribunal's conclusions as to the unreasonableness and the disproportionality of that decision. We dismiss the appeal so far as concerns the decision not to restore the excise goods.

STEPHEN OLIVER QC
CHAIRMAN

RELEASED:

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