

EXCISE - Restoration refusal - Tobacco and alcohol - Concealment - 5 kg of tobacco concealed in spare wheel well in boot - Other excise goods also in boot - Whether "packed or found with" concealed goods - Yes - Use for concealment - Other tobacco concealed in glove box and handbag - Secondary reason for non-restoration that goods paid for by cousin - CEMA 1979 s 49(1)(f), 141(1)(a)(b) - Excise Duties (Personal Reliefs) Order 1992, Art 5(1) - Appeal dismissed

LONDON TRIBUNAL CENTRE

MUSTAFA MEVLANA Appellant  
- and -  
THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: MR THEODORE WALLACE (Chairman)  
MR J N BROWN, CBE, FCA, ATII  
MR S K DAS

Sitting in public in London on 7 May 2002

Mrs Envar, daughter, for the Appellant

Miss Caroline Neenan, Counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

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DECISION

1. This was an appeal against the refusal to restore tobacco, cigarettes and excise goods seized from the Appellant after a day shopping trip to Calais on 21 February 2001. The vehicle was initially seized but was restored immediately on humanitarian grounds because of the ill-health of his wife who was a passenger.
2. The Appellant, who is Turkish having been born in Cyprus, speaks little English.
3. At the outset Miss Neenan suggested that the matter be adjourned for the Tribunal to provide an interpreter. This is however no provision for the Tribunal to provide interpreters except in criminal proceedings within Art 6 of the European Convention on Human Rights. These proceedings were not criminal, c.f. *Goldsmith v Commissioners of Customs and Excise* [2001] 1 WLR 1673. The Commissioners did not offer to pay for an interpreter. If a formal application was made for an interpreter at Tribunal expense, the matter would have to be referred to the Lord Chancellor's Department.
4. The Appellant's daughter, Mrs Envar, who represented the Appellant, does speak good English. She agreed to take the interpreter's oath and did so. She was thus both interpreter and advocate, an unsatisfactory situation but the only way out.
5. The Commissioners were aware of the language problem and had had a draft of their counsel's skeleton argument in the week before the hearing. Unfortunately it was not served on the Appellant who only saw it on arrival at the hearing. Mrs Envar did not however seek further time to read it.

6. When opening the Appellant's case, Mrs Envar made some statements which were not consistent with the notes of the intercepting and interviewing officers on which the Reviewing officer relied. After consulting her father, she said that he was not giving evidence : he was not here to fight the case but only to give his side of the story; he knew that he had done wrong.

7. At the Tribunal's request, Miss Neenan then read out the notes after which Mrs Envar stated that they were not challenged. The notes can be summarised as follows.

8. At 1752 hours on 21 February 2001 the Appellant was stopped at Dover driving a Vauxhall Cavalier. He said that he had been to Calais to do some shopping; his wife did not get out much because she was disabled. He had bought "some cigarettes and some alcohol."

9. The Appellant said that he had last travelled to France just before Christmas and had not been stopped by Customs before. He opened the boot at Officer Pickup's request. The officer saw cigarettes and tobacco and asked whether they were all for him. He said, "No, my family has given me money to buy some for them." The officer found 5kg of tobacco concealed under and around the spare tyre.

10. The officer recorded the following : 18.6 kgs of hand-rolling tobacco, 10,000 cigarettes, 50 cigarillos, 96 ¼ litre cans of Stella and 7 bottles of Jack Daniels.

11. Officer Overall asked the Appellant's wife to get out of the front passenger seat; she had walking sticks. This she did, but looked unstable and suddenly made a cry and began to fall backwards. The officer caught her and with the Appellant's help assisted her back to her seat.

12. Mr Overall asked the Appellant to pass out the bags. He opened the glove compartment and pulled out some tobacco. There was more tobacco in Mrs Mustafa's handbag, making 1.4 kg with that in the glove compartment.

13. The Statement of Case stated that 22 kg of tobacco was seized : the arithmetic does not add up and the seizure information exhibited was illegible. It seems that 20kg was seized, of which 6.4kg was in the glove compartment, bag and wheel compartment together.

14. Officer Pickup read the commerciality statement. She noted, "Cannot conduct any more questioning due to language barrier. Did not understand what I was telling him. Explained as best I could. Kept saying I don't understand." She advised him that he would have to come back at a later date with an interpreter of his own accord.

15. Officer Pickup then noted that she asked him, "Could you tell me why you concealed 5 kg of tobacco in the wheel well?" He replied, "Put it there because I know I had too much."

16. The vehicle and goods were seized at 1850 hours. At 1900 Mr Horsler, senior officer, decided to restore the vehicle on humanitarian grounds because of Mrs Mustafa's condition : she had had a triple by-pass and tracheotomy.

17. As already stated Mrs Envar said that the Appellant did not challenge the notes.

18. On 26 February 2001, the Appellant wrote a letter. This included:

"The reason why I bought so much alcohol, cigarettes and tobacco [is] my daughter is getting married.

As for the tobacco I was requested to buy for my family. The reason why I bought so much I thought there was no limit of what you could buy for our wedding ceremony."

He enclosed a copy of an invitation for 4 March.

19. On 16 March Mr Horsler wrote refusing restoration stating that a quantity of tobacco was concealed in the spare wheel well and glove box and that he was to receive money for some of the goods. There were no exceptional reasons for restoration.

20. A letter on the Appellant's behalf referred to a Turkish custom to supply wedding guests with alcohol and tobacco at each table. It said that he was not planning to profit and had hidden some because "he was trying to salvage some of the goods in case of being stopped" and acknowledged that this was unacceptable. The letter stated that "on the way home from France when noticing the price of things he decided to purchase the items seized for his daughter's wedding."

21. In a decision letter on 17 May, Paul Devlin confirmed that the vehicle would not be restored. The decision gave no information whatever about the case. Mr Devlin said that this was on instructions from senior management, given orally. He had kept short notes of his reasons and a file on which he based his evidence. His witness statement was dated 29 June 2001 just six weeks later : he did not know why it was not served until 26 November.

22. Such a practice gives rise to major problems in the event of an appeal and is most unsatisfactory in any event. He assured us that it has been discontinued.

23. Mr Devlin told the Tribunal that he had considered whether it had all been genuine personal shopping in which event the goods should not have been seized.

24. The Appellant had not made any initial mention of tobacco. The officers had found tobacco in the glove box, handbag and wheel compartment. At best the latter was an unusual place to put tobacco. He understood that this tobacco was concealed. The explanation that if he was stopped he would have some left was unacceptable. Mr Devlin referred to a summary of Customs policy which had been sent with the Review Decision as Annexe 2:

"Restoration Policies

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Goods

It is this Department's general policy that seized excise goods are not restored. However, each case is examined on its merits to determine whether or not restoration may be exceptionally offered. In conducting this examination the presence of any one of the following factors will militate against restoration:

- Any evidence of previous smuggling or failure to comply with legal requirements;
- Any evidence that the person involved knew what they were doing was wrong;
- Any evidence that the person was paid to make the journey;
- Large quantities of goods which might damage legitimate trade;
- Any evidence that the goods were for a commercial purpose."

He said that the Appellant's statement was an admission that he knew he was doing something wrong. It is clear from Mr Devlin's witness statement made in June 2001, long before Lindsay that the primary reason for forfeiture and non-restoration was the concealment of part of the tobacco.

25. Mr Devlin also considered that the goods were liable to forfeiture because the Appellant's cousin had paid for them. He was aware of the wedding, however that did not account for the tobacco. 440 pouches must have cost over £900. It was unlikely that the tobacco was for his own use. The cigarettes would have cost another £900 or so. He estimated the total duty involved on all the goods as over £3000, excluding VAT.

26. Mr Devlin was not cross-examined for the Appellant.

27. Miss Neenan said that under Article 5(1) of the Excise Duties (Personal Reliefs) Order 1992 the goods were liable to forfeiture if the condition that they were not held for a commercial purpose was not complied with. A commercial purpose was the opposite to own use within Article 3. The Appellant had not made a claim against forfeiture and the goods had accordingly been condemned as forfeit.

28. In this case there was an additional factor in that part of the tobacco had been concealed rendering it liable to forfeiture under section 49(1)(f) of the Customs and Excise Management Act 1979. Under Section 141(1)(b) anything "packed or found with" anything liable to forfeiture was also liable to forfeiture. It was sufficient that the other goods were in the same vehicle as the concealed goods; they were found with the concealed goods even if not packed with them.

29. She said that the Tribunal must consider whether it was satisfied that the decision on review was unreasonable, applying the test in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, CA, see *Bowd v Commissioners of Customs and Excise* [1995] V&DR 212. Here the decision was not unreasonable; the Commissioners had taken account of all relevant considerations and had left out irrelevant matters. Mr Devlin's mind had not been closed; however he considered that there was no reason to return the goods.

30. The decision was not contrary to proportionality or a fair balance between the individual's rights and the interests of the community, see *Sporrong and Lonroth v Sweden* (1982) 5 EHRR 35 at paragraph 61. £3.8 billion of excise revenue had been lost in tobacco smuggling in 2000.

31. The Appellant had at first not mentioned the tobacco. The tobacco was not for the wedding and it was knowingly concealed. It was also relevant that the car had been restored.

Conclusions

32. We do not accept the submission that the Tribunal is not concerned with the liability of goods to forfeiture once they have been condemned. The facts giving rise to the seizure are basic to any decision on restoration. If those facts are wrong the decision is flawed. If a fact is wrong it cannot be relevant to the decision whether to restore. Provided the facts are correct, the correct legal test is applied and the correct principles, including proportionality, then the Tribunal cannot interfere with the exercise by the Commissioners of their powers. Those powers do not however include the power to decide the facts.

33. In the present case, perhaps unusually, there was no dispute as to the facts, or at least as to the interview. The Appellant produced no contrary evidence, except the invitation for the wedding which was not mentioned at the interview. It was fortunate that there was no dispute because the interviewing officer was not present at the hearing.

34. The Appellant admitted that part of the tobacco was deliberately concealed and this was confirmed in a letter. 5 kg was in the spare wheel well in the boot, presumably under a cover. That 5 kg was liable to forfeiture under section 49(1)(f). Apart from the tobacco in the glove compartment and the handbag, the rest of the excise goods were in the boot.

35. Section 141 of CEMA provides,

"(1) ... where any thing has become liable to forfeiture under the Customs and Excise Acts -

(a) any ... vehicle, ... container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, ... or concealment of the thing so liable to forfeiture; and

(b) any other thing mixed, packed or found with the thing so liable,

shall also be liable to forfeiture."

36. It is clear from the officers' notes that the rest of the tobacco, cigarettes and alcohol were in the boot. They were not "mixed" with the tobacco in the wheel well but they were also in the boot and must have filled it. 96 cans of beer must have taken up considerable space, quite apart from 10,000 cigarettes or 500 packets of 20 cigarettes and the tobacco. They were clearly packed into the boot, albeit not packed in the same container within the boot. Here the boot was the container. The concealed 5 kg was also found in the boot. We find as a fact that the goods not in the wheel well but in the boot were "packed or found with" goods which were concealed, notwithstanding that they were not themselves concealed. The goods in the boot had the effect of adding to the concealment of the tobacco in the wheel well and were thus part of the concealment within section 141(1)(a).

37. We would not however accept that everything in the car fell within section 141(1). Other items in the glove compartment or the handbag where tobacco was hidden would be covered, but not things on the back seat or roof rack if there was one. There must be sufficient propinquity for section 141(1)(b) or use for concealment for section 141(1)(a).

38. Mr Devlin also relied on the fact that the tobacco was not for the Appellant's use but had been paid for by a relative. If this had been the sole or main reason that would have been a matter for concern since it is not clear that this would itself have meant that the tobacco was for a commercial purpose within Article

5(1). In *Lindsay v Customs and Excise Commissioners* [2002] STC 588, Lord Phillips MR pointed out the confusion surrounding the confusion as to the commercial test.

39. The legislation is defective in assuming that excise goods are either for own use or for commercial purposes with no provision for purchases on behalf of another but not for profit. Because *Lindsay* had not been decided, Mr Devlin did not address this aspect.

40. The fact is however that the tobacco in the wheel well, the glove compartment and the handbag were concealed "in a manner appearing to be intended to deceive an officer" rendering them liable to forfeiture under section 49(1)(f) and the rest was in the boot in which the wheel well was situated and was part of the concealment. The amount concealed was over six times the guidelines. There was no error of fact or law on this aspect.

41. Given the concealment of a substantial amount, it would require powerful reasons to make the refusal to restore unreasonable. No reasons were advanced. There is nothing disproportionate in not restoring excise goods which are concealed or packed or found with concealed goods and particularly when the goods are many times the limit and a large part is admittedly not for the Appellant's own use. The fact that the car was restored makes it all the more difficult to attack the refusal to restore the goods. The Appellant's relative tried to get tobacco without UK duty without going to buy it himself; he has only himself to blame that the goods have been forfeit. The Appellant himself has suffered because he concealed part of the goods.

42. The appeal is dismissed.

THEODORE WALLACE  
CHAIRMAN

RELEASED:

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