

PROCEDURE - Disclosure - European Commission Letter of Formal Notice - Appeal against decision to restore car on payment of restoration fee - Formal Letter opens enquiry into UK's response to bootlegging leading possibly to infraction proceedings against UK - Issue in present appeal is whether UK's policy on restoration of cars used for bootlegging is so disproportionate as to be unreasonable - Application dismissed

LONDON TRIBUNAL CENTRE E00199

MRS DANNATT Appellant
- and -
THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: STEPHEN OLIVER QC (Chairman)

Sitting in public in London on 17-21 December 2001

Roderick Cordara QC and Tim Eicke, counsel, instructed by Vincent Curley & Co (Consultants) for the Appellant

Kenneth Parker QC and Tim Ward, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

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DECISION

1. This decision concerns a Notice of Application by the Appellant, Mrs Dannatt, dated 12 December 2001. This requests a Direction by this tribunal requiring that the Commissioners should disclose to Mrs Dannatt's representative the Letter of Formal Notice sent by the European Commission to the United Kingdom.

2. The procedures set out in Rule 20(3) to (6) of the Tribunals Rules, SI 1986/590, enable this tribunal to make a direction to produce documents not covered by privilege. Before making such a direction the tribunal needs to be satisfied that the documents contain information that is relevant to the issues raised in the appeal proceedings.

3. The Letter of Formal Notice was accompanied by a Press Notice issued by the Commission (IP/01/1482) on 24 October 2001. The Letter has not yet been published. Mrs Dannatt's adviser has suggested that two possible inferences can be drawn about the contents of the Letter from that Press Notice. The first is that the Commission has concerns about the current practices of the United Kingdom in connection with the manner in which the indicative guidelines as to the quantities of tobacco and alcohol products set out in article 9.2 of Directive 92/12 are being applied by Customs and Excise; these guidelines being treated effectively as an irrebuttable presumption rather than a merely evidential indication of the intent of the importer. The second inference is that the Commission has concern about the UK's practice in connection with the degree of severity of the sanctions being imposed by Customs in connection with cases where importers are apprehended with goods in excess of indicative guidelines. The severity of the response by Customs in such situations may be disproportionate. The Commissioners do not dispute the accuracy of those inferences.

4. As indicated above, Mrs Dannatt's advisers asked for disclosure of that Letter. The Commissioners apply for a direction that they do not have to disclose this letter. The grounds for the Commissioners' application are that the contents of the Letter are not relevant to these proceedings. They claim that the Letter is not a public document and is not therefore in the public domain. In any event, they say, that disclosure of a document of this nature is governed by European Commission Regulations and by case law which, the Commissioners submit, entitle them not to disclose it.

5. The original application made on behalf of Mrs Dannatt is based on the assertion that the Commission's letter supports the analysis that what is at issue in her case is the determination of a "criminal charge"; relevant to this is the fact that regulation 5(1) of the Excise Duty (Personal Reliefs) Order 1992 imposes a significantly more stringent penalty for non-compliance with the relief conditions than is envisaged by article 9 of Directive 92/12/EEC.

6. Article 9.1 of 92/12 provides:

"... excise duty shall become chargeable where products for consumption in a Member State are held for commercial purposes in another Member State ..."

Under the Directive, this is the only consequence envisaged for failure to fulfil the condition that goods are to be held for the individual's own use.

7. By contrast, regulation 5(1) of the Personal Reliefs Order provides -

"... if that condition is not complied with in relation to any excise goods, those goods shall, ..., be liable to forfeiture ... "

Regulation 5(1) is, it is argued for Mrs Dannatt, applied in such a manner that the Commissioners not only seize the excess quantity of goods but seize all the goods imported despite the fact that, at least on one reading, the presumption must be that all the goods below "guide levels" set out in article 9.2 of the Directive and the Schedule to the Personal Reliefs Order are for personal consumption. It is said that, irrespective of the legality of regulation 5 of the Personal Reliefs Order as a matter of EC law, there can be no explanation for what is described as the "legislative overkill" in the Personal Reliefs Order other than an intention to punish and/or deter.

8. In dealing with this application I bear in mind that Mrs Dannatt's case does not involve any question of seizure of goods. Her appeal is against the Commissioners' refusal to restore the vehicle to her, being the vehicle that was used by Mr Dannatt when seizure took place. However, to judge from the Press Release, the interest of the Commission goes wider than just seizure of goods. It covers the whole range of sanctions currently imposed by the Commissioners. I quote from the Press Notice:

"The Commission is concerned that the controls currently being applied at UK Ports and Airports, and the sanctions being applied when UK excise duty law is breached, may breach the EU rules which give travellers the right to buy abroad."

At a later stage in that Notice is this passage:

"Member States are also, in principle, free to determine the sanctions applicable when excise duty law is breached. However, these sanctions must conform with the general principles of EU law, in particular with the principle of proportionality. This means that sanctions applied must not be disproportionate to the gravity of the infringements."

9. WWF UK v Commission (Case T-105/95) was concerned with access to information with particular reference to Commission Decision 94/90 on public access to Commission documents. The decision of the Court of First Instance was concerned with the refusal to the World Wildlife Fund of access to documents on the grounds that they related to the examination by the Commission of a possible infringement of Community law by a Member State. The decision of the Court recognized that the confidentiality owed to a Member State by the Commission warranted, under the heading of protection of the public interest, a refusal of access to documents relating to investigations that might lead to an infringement procedure. The exercise of the power to give access or to refuse access must however be conducted by striking a genuine balance between the interest of the citizen in obtaining access to those documents on the one hand and the Commission's own interest in protecting the confidentiality of its deliberations. Nonetheless, I observe, if those documents are relevant to proceedings before this tribunal, it has power in its Rules to require disclosure despite their confidentiality.

10. I do not see that the contents of the Formal Notice would be relevant to the case which she is putting forward this Tribunal. I recognize that the Commission is concerned that the United Kingdom may be acting disproportionately. And I recognize that there could be a lack of compatibility between regulation 5(2) of the Personal Reliefs Order on the one hand and article 9.2 of Directive 92/12 on the other. I cannot, however, see how these features impact on the question of whether the exercise by the Commission of their power under section 152(b) (i.e. to restore her car on payment of a £1,100 fee) is criminal in character for purposes of Article 6 of the Human Rights Convention. In particular, the fact that the Commission, like Mrs Dannatt's advisers, is concerned about the matters referred to at the start of this Decision does not, in my view, help her advance her case that she, in effect, stands charged with a criminal offence. Nor, in my view, does the view of the Commission affect the other possible issue here, namely whether the Commissioners have acted disproportionately in having a policy about restoration and in the manner in which they implement that policy. At this stage the Commission is no better a judge of these points than is the Tribunal. The admission of the Letter as evidence in these proceedings would, I think, assist the Tribunal in carrying out its statutory function of determining whether the Commissioners have acted reasonably.

11. For those reasons I do not think that it is relevant or necessary to make an order requiring disclosure of the Formal Letter.

STEPHEN OLIVER QC
CHAIRMAN

RELEASED:

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