EXCISE AND CUSTOMS DUTIES – Detention of excise goods – Refusal to release – Excise goods detained but not yet seized as liable to forfeiture – Whether appeal lies to tribunal against refusals to restore – No – FA 1994 s.16 and Sch 5 para 2(r) – Whether detention violates right to peaceful enjoyment of property within article 1 of First Protocol to ECHR - No

APPEAL – Human rights – Fair Trial – Independent and impartial tribunal – Criminal charge – Seized and forfeited goods – Refusal to restore – Right to fair trial – Whether appeal concerns a criminal charge within Art 6.2 and 6.3 – No – Whether appeal engages civil rights and obligations within Art 6.1 – Yes – Whether tribunal's review jurisdiction affords a fair hearing – Yes – FA 1994 s.16(4) and ECHR Art 6

LONDON TRIBUNAL CENTRE

B S GORA
HAMER & PERKS LTD
PARTY BOOZE (LIVERPOOL) LTD - Appellants

- 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 J Curley, VAT, Excise & Customs Duties consultant, for the Appellants

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

DECISION

1. This decision covers preliminary points arising in three appeals. All three appeals are against decisions taken on reviews. Mr B S Gora's first appeal is against the Commissioners' refusal to restore excise goods while they were being detained but prior to seizure. His second appeal is against the refusal of the Commissioners to restore the excise goods to him after they had been seized.

The Hamer & Perks Ltd and the Party Booze (Liverpool) Ltd appeals are against the refusal by the Commissioners to restore goods after they had been seized.

2.. All these appeals raise common issues. These are:

- Does article 6 of the European Convention on Human Rights apply?
- If so, do the circumstances of the appeals fall within the "criminal charge" limb of article 6? Is there an appeal to an independent and impartial tribunal?
- Is the "review" jurisdiction of the VAT and duties tribunal sufficiently broad to satisfy the requirements of article 6?

In addition to the above issues, the appeal of Mr Gora raises the question of whether the Commissioners' refusal to release goods while detained, but before they have been formally seized, is an appealable matter. I shall deal with this aspect first.

Mr Gora's appeal against the refusal to restore detained goods : the facts

3. Mr Gora owns an off-licence. He is a "revenue trader" who deals in goods liable to excise duty.

4. On 30 December 1999, a transit van driven by an employee of Mr Gora was stopped. It was found to contain excise goods consisting of 75 cases of Bells Whisky, 80 cases of Special Brew lager and 6 cases of Heineken lager.

5. Mr Gora attended the scene. He was interviewed under caution. He produced all such purchase invoices and a delivery notes that were in his possession at the time.

6. The officers decided that they were not satisfied that duty had been paid correctly on the excise goods. They detained those goods pursuant to section 139 of the Customs and Excise Management Act 1979*. On Mr Gora's calculation the detained goods are worth £10,362 (exclusive of VAT). Mr Gora has no liability for any duty that may be due on the goods.

7. On 8 January 2000 Mr Gora's representative wrote applying for restoration of the goods. On 14 January the representative wrote providing copies of other purchase invoices. The officers refused to restore the detained excise goods. Mr Gora appealed against this decision.

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* All references in this decision are to the Customs and Excise Management Act 1979 unless otherwise

stated.

8. On 14 April 2000 the Commissioners served notice of seizure of the excise goods pursuant to section 139(6) and paragraph 1 of Schedule 3. The notice records that the goods were seized as liable to forfeiture under –

Section 49 (Forfeiture of goods improperly imported),

> Section 100(2)(c) (Goods unlawfully removed from an approved warehouse),
>
> Section 100(2)(e) (Goods removed from a warehouse with permission but not delivered to permitted destination) and
>
> Section 141(Forfeiture of vehicles used in connection with goods liable to forfeiture).

9. To complete the picture (though this material is not relevant to the appeal against refusal to restore the goods while in a state of detention) Mr Gora's representative applied on 10 May for restoration of the seized goods. Mr Gora did not serve a notice of claim in relation to condemnation proceedings taking place in pursuance of Schedule 3. The Commissioners refused to restore them. Mr Gora asked for a review. On 1 August 2000 the decision was upheld following a review.

Mr Gora's appeal against the Commissioners' refusal to return the goods while detained : law, arguments and conclusions

10. It was argued by Mr Roderick Cordara QC that sections 14(2) and 16 of and paragraph 2(r) of Schedule 5 to Finance Act 1994 gave Mr Gora the right to appeal. Section 14(2) provides that any person "in relation to whom … such a decision [to which this section applies] has been made" may require the Commissioners to review that decision and, under section 16, may appeal to the tribunal against that decision (or the decision on review). Section 14(1)(d) provides that section 14 applies to "any decision by the Commissioners or any officer which is of a description specified in Schedule 5 to this Act". Schedule 5 paragraph 2(r) specifies as one of the decisions falling within Schedule 5 –

> "(r) Any decision under section 152(b) as to whether or not any thing forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is to be restored."

The detention of the excise goods, it was argued for Mr Gora, fell within the expression "forfeited or seized". That argument was supported by EC Customs law and the non-discrimination provisions of the Convention. I shall return to these.

11. The response of the Commissioners was that there is no statutory appeal to the tribunal against the detention of goods (as distinct from the subsequent seizure of those goods) and, notwithstanding this, no violation of Mr Gora's Community or Convention rights.

12. It is necessary at this stage to map out the relevant powers and procedures contained in the Customs and Excise Management Act and to identify how they apply here.

13. The power to detain is given by section 139. Subsection (1) reads as follows:

> "(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of her Majesty's armed forces or coastguard."

The excise goods detained on 30 December 1999 were "liable to forfeiture". That liability, according to the notice of seizure subsequently issued on 14 April 2000, arose under one or more of the four heads of liability referred to in paragraph 8 above.

Section 139(6) introduces "condemnation" proceedings:

> "(6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the customs and excise Acts."

Schedule 3, so far as is material, provides:

> "(1) The Commissioners shall … give notice of the seizure of any thing as liable to forfeiture and of the grounds therefor to any person who to their knowledge was at the time of the seizure the owner or one of the owners thereof."

Paragraph 3 of Schedule 3 provides:

> "(3) Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise."

Paragraph 6 provides:

> "Where notice of claim in respect of any thing is duly given in accordance with paragraphs 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited."

Paragraph 8 provides:

> "Proceedings for condemnation shall be civil proceedings and may be instituted … (in England or Wales either in the High Court or in a magistrates' court; …"

14. As noted above the Commissioners issued a Notice of Seizure on 14 April 2000. Mr Gora, on advice, chose not to resist the condemnation proceedings; instead he sought to obtain a formal refusal to restore the goods while they were in a state of detention and to obtain a review of that decision. The request for a review was contained in a letter of 18 May 2000 and the Commissioners responded in a letter of 24 May as follows:

> "It is not current policy for a Departmental Review to be conducted with regard to detained goods. The procedure is that detained

> goods are either released without further action being taken or that detention becomes a seizure. The act of seizure itself is not appealable other than through condemnation proceedings and I note your client's wish to withdraw his recently lodged appeal against seizure."

15. In the scheme of the Customs and Excise Management Act the power to detain goods is separate and distinct from the power to seize. Section 139(1) confers these powers by the words "may be seized or detained by any officer". The exercise of both powers is subject to the overriding condition that the goods in question be "liable to forfeiture". That condition imposes the requirement that the Customs officer should have grounds for regarding the goods as liable to forfeiture. Those grounds must be sufficient to be justified by him, if required to do so, as "reasonable" in the "*Wednesbury*" sense. At that stage, and whether the power is exercised as a seizure or a detention, the goods in question are simply "liable to forfeiture". The next stage, if the Commissioners decide to proceed to it, is to get those goods condemned as liable to forfeiture. That requires them, if they have not already done so, to seize the goods and to give notice of the seizure and "of the grounds therefor": see Schedule 3 paragraph 1(1). That step will lead on to condemnation within a month, unless " a person" claims that the "thing seized as liable to forfeiture is not so liable" and notifies his claim; in that case condemnation proceedings ensue and it will be for the relevant court to decide whether "the thing was at the time of seizure liable to forfeiture" and, if so, to condemn it : Schedule 2 paragraph 5.

16. At any time following the issue of a notice of seizure (whether or not followed by forfeiture) the Commissioners have a statutory power to restore the "thing" by reason of section 152(b). This enables the Commissioners to override the legal proceedings commenced by a notice of claim given under Schedule 3 paragraph 3 and, if the court has condemned the thing under paragraph 6, to override the forfeiture itself . Without such a power the court proceedings would oust the Commissioners' freedom to drop the matter and restore the thing to the claimant. Attached to that power is the claimant's right to request the restoration of the thing and to appeal (under Finance Act 1994 sections 14, 16(4) and Schedule 5 paragraph 2(r)). By contrast the power to detain a thing, given by section 139(1), requires no statutory authority enabling the Commissioners to release something that has "merely" been detained. There being no statutory procedure comparable to Schedule 3 paragraphs 3-8 that engages the court, the Commissioners remain free to detain or release until they exercise their power of seizure and issue a notice of seizure. Of course an excessive or abusive exercise of the power to detain would expose the Commissioners to proceedings for judicial review, or to a non-judicial maladministration enquiry. (On 13 November 2001 the Commissioners issued an internal guideline (see 4/131) on the matter.)

17. Support for the conclusion that there is in law a distinction between detention and seizure is found in *Jacobsohn v Blake* (1844) 6 MAN & G 919. There the Commissioners "with force and arms" took possession of goods liable to duty (i.e. 2000 dozen scissors on cards) and detained them on the misapprehension that they were prohibited and liable to forfeiture. Noting that there had been no actual seizure and that the Commissioners had detained the scissors to determine whether they were actually liable to forfeiture "under a real and honest doubt that they were liable to forfeiture", there could, concluded Tindal CJ, be no action in trespass. But "an action in another form" might have arisen had there been an abuse of authority or had the goods been detained for an unreasonable time". Cresswell J expressed the point as follows:

> "There was no trespass in the first instance, or anything that could be called a seizure. The goods were taken by the plaintiff's agent to the proper place for the examination of them by the defendants in the regular discharge of their duty as Custom house officers. Upon their examination, all that the defendants did was to detain them, till it could be ascertained whether or not they were liable to forfeiture."

So far, therefore, I am against Mr Gora's claim that there is a right of appeal to this tribunal against the act of detention and the refusal to retore goods that have been detained without more.

18. I was asked to defer releasing my decision in these appeals until the release of some Court of Appeal decision (referred to later in this decision). A decision of the Administrative Court (Harrison J) issued on 11 December 2001 came to light after the present hearing had concluded. That decision ruled on the distinction between "detention" and "seizure" for the purposes of section 139(1). There the Court construed the subsection and accepted the Commissioners' contention that "seized" and "detained" have separate meanings in the scheme of the Customs and Excise Management Act. It further held that only seizure sufficed to trigger the mechanism set out in Schedule 3. The Commissioners' appeal in that case (*Customs and Excise Commissioners v Venn, Mather and Marquis Publication* (CO/3142/01) [2001] EWHC Admin 1055) was unopposed. Unlike the Tribunal, therefore, the Court did not have the benefit of argument of leading counsel on both sides. I am, of course, bound by that decision and note that it reaches the same result on the domestic law as I here. However the Court was not addressed with contentions based on the possible existence of enforceable Community rights and Convention rights available to Mr Gora.

19. Advancing the case for Mr Gora based on European Community law, Mr Cordara QC pointed to the two-tier appellate structure imposed by Article 243 of Council Regulation No.2913/92 establishing a Community Customs Code. Article 243(1) provides that:

> "Any person shall have the right to appeal against decisions taken by the Customs authority which relate to the application of Customs legislation, and which concern him directly and individually".

Article 243(2) then provides for the two-tier appellate system by which an appellant is given a right of review followed by a right of appeal. It was clear, observed Mr Cordara, that the decision to detain goods was a "decision taken by the Customs authorities", that that detention was an "application of Customs legislation" and that that decision concerned Mr Gora "directly and individually" because it deprived him of substantial parts of his property for a potentially substantial period. The result, it was argued, was that he should have an appeal against the Commissioners' refusal to return the detained goods.

20. The problem with that argument is that the Community Customs Code does not apply to excise duty. There is an Excise Directive (Council Directive 92/12/EEC). But there is nothing in that Directive that Mr Cordara could point to that operates as a direction to the Member States to have in place an appeal system of the same nature as that applicable to customs duty; still less is there anything that requires a Member State to give a claimant the right of appeal to a Tribunal against a decision to restore goods while those goods are in a state of detention. The evident purpose of the power of detention is, as Tindal C J

observed, to enable the Commissioners to examine the detained goods and to check their supporting documentation in order to determine whether they are liable to forfeiture. During the detention period the "owner" has no means, statutory or otherwise, to recover them, unless of course the Commissioners can be shown to have acted excessively or abusively, in which case High Court judicial review proceedings are then available.

21. Reference was then made to Mr Gora's right to property within Article 1 of Protocol 1 to the European Convention on Human Rights. The detention and the refusal to restore Mr Gora's goods are prima facie violations of his rights under Article 1. Article 1 is headed "Protection of property" and reads as follows:

> "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 the law and by general principles of international law.
>
> The proceeding 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."

The failure by the UK to provide access to a Tribunal to review the refusal to restore constitutes, it was argued, a disproportionate response to the demands of the control and management of the excise. The Tribunal should, therefore, seek to give Finance Act 1994 Schedule 5 paragraph 2(r) a construction that affords a right of access to justice. That approach calls for a construction of the expression "refusal to restore any thing … seized …" as covering "any thing detained."

22. That approach is not in my view required by the present circumstances. I do not think that there is anything disproportionate about either the existence of a power to detain for a reasonable time to enable the goods to be examined and their credentials to be checked or the reasonable exercise of such a power. There is no need to adopt such a strained construction so as to widen the Tribunal's jurisdiction. The test applied by the Strasbourg Court in *Chassagnou v France* (2000), 29 EHRR 613 at paragraphs 89 and 91 is whether the power in question given to the State and the manner in which it is exercised are "objectively" and "reasonably" justifiable. In the present context the Commissioners have to take reasonable steps to protect the excise. Inevitably they need to be able to check the paperwork on consignments of liquor or beer which they have reason to believe have not borne duty. The power to detain is, in essence, a necessary administrative power; and judicial review by the Administrative Court is, in all the circumstances, an adequate control.

23. In this connection I should mention the explanation given by the Commissioners for the length of time between Mr Gora's goods being detained and the notice of seizure being issued. This is contained in a letter from the Commissioners of 1 August 2000. That letter explains that the original detention of the goods had been made because adequate evidence that the goods were duty paid had not been produced. Invoices had admittedly been made available for the Bells Whisky (provided on the night of the detention), the Special Brew and the Heineken. However this had been insufficient to satisfy the Commissioners that duty had in fact been paid. The Commissioners had doubts as to whether the Bells Whisky detained on 30 December was the same whisky as to that which the particular invoice related. The letter goes on to say that the

explanation given to the officer at the time of detention had been that the goods in question had been borrowed from Mr Gora and were being returned. The Commissioners had some difficulty in understanding this and various other discrepancies. What was more, Mr Gora had not been available for interview and the Commissioners had had to make additional enquiries which had been quite time consuming. Those features, on the face of it, explain the length of time between detention and seizure. The power has, in the circumstances, been reasonably exercised.

24. It was then argued for Mr Gora that a construction of Schedule 5 paragraph 2(r), which denies a right of appeal to a claimant whose goods have been detained while allowing such a right to a claimant whose goods have been seized, is discriminatory. It violates Article 14 of the Convention taken in conjunction with the property rights contained in Article 1 of the First Protocol. I cannot accept this argument. In the first place if there were any discretion, the Commissioners' powers to detain, as explained above, are necessary to enable them to control the movement of excise goods in order to secure proper payment of excise duty. Second, I cannot see that there is any discrimination. The person whose goods have been temporarily detained, pending seizure or return, cannot be compared with the person whose goods have been seized with a view to their being condemned.

25. The remaining contention peculiar to Mr Gora's appeal against the Commissioners' refusal to restore his excise goods while detained is that the decision to refuse restoration shall be treated as if it were a criminal charge. On this basis he should be entitled to a fair hearing, the burden of establishing the grounds for non-restoration should be placed on the Commissioners and the safeguards in Article 6.3 should be available to him. The short answer to this lies in the decision of the Administrative Court in *Goldsmith v Customs and Excise Commissioners* [2001] EWHC Admin 285 and [2001] WLR 1673. There the Lord Chief Justice (Lord Woolf of Barnes) decided that the forfeiture and condemnation proceedings were not within the criminal charge limb of Article 6. I shall refer to that decision in more detail later. For present purposes it seems to me inescapable that, if forfeiture and condemnation proceedings are not of a criminal nature, then the refusal to return detained goods will not be so either. Detention and refusal to return are antecedent steps in the same proceedings; they are generically indistinguishable from the forfeiture and condemnation proceedings.

26. For those reasons I am against Mr Gora in his contention that this Tribunal has the right to entertain an appeal against the refusal by the Commissioners to restore his goods to him while they are detained by the Commissioners.

Article 6 and the appeals against the Commissioners' refusals to restore forfeited or seized goods

27. This part of the decision covers all three Appellants. It raises four issues :

- Does the refusal to restore under section 152(b) fall to be treated as if it amounted to a criminal charge?
- If so, what are the consequences?
- If not, does it affect the civil rights and obligations of the three Appellants?
- If article 6 is engaged to that extent, what are the consequences?

Before addressing those questions I need to summarize the policy background to the disputed review decisions. I shall also refer to the evidence about the standards expected by the Commissioners of a revenue trader. I shall then set out the circumstances of each of the three Appellants.

The policy background to the disputed review decisions

28. Party Booze's goods were detained on 24 March 1999 and the review decision upholding the decision not to restore was issued on 15 July 1999. Hamer & Perks' goods were detained on 7 May 1999. The seizure took place on 30 July 1999 and the review decision appealed against is dated 1 October 1999. Mr Gora's goods were detained on 30 December 1999 and the review decision appealed against is dated 1 August 2000. The published policy statements covering the period of those three appeals are found in Customs and Excise News Releases.

29. A News Release of 12 October 1998 refers to "Operation Mistletoe : Customs Crackdown as Christmas approaches". This reads as follows:

> "Customs are launching a seasonal slam on retailers selling alcohol and tobacco which has been smuggled or obtained through fraud.
>
> . Head of Operations Anti-Smuggling said:
>
> "Activity steps up right now – teams of officers will be making repeated raids on shops, pubs and clubs across the UK. We are determined to cause widespread disruption to people involved in this crime. It is unfair to honest retailers, and is costing the taxpayer millions.
>
> Smugglers and fraudsters will find that not only may their goods be seized immediately by Customs, but that we will be using all options available to prosecute or revoke licenses."

On 19 November 1998 a News Release included these words:

> "Customs continue to record increasing success in their efforts against the smugglers. In the first six months of this financial year … illegal goods with a tax value of £63 million was seized compared to £29 million for the same period last year. Vehicle seizures in the same period increased from 568 to 1520."

In letters to V J Curley, the Appellants' adviser, of 5 August 1999 and 26 June 2000, Customs officers stated the Commissioners' policy. The letters are substantially similar. I quote from the latter:

> "Where the revenue and legitimate trade are threatened by failure to pay excise duty, it is the Commissioners' policy to refuse restoration. The objectives of such a policy of non-restoration of seized excise goods are:
>
> - maximising the deterrent value of seizure
> - ensuring that excise goods not normally available in the UK from legitimate outlets are not made commercially available in the UK

- demonstrate that even "innocent" failures to pay excise duty cannot be condoned (because of the potential severe effect on legitimate trade) and that it is every citizen's duty to comply with the law

- demonstrate that smuggling is a very serious matter and must not be allowed to become socially acceptable

- deterring the development of a "smuggling culture"

- protection of both UK revenues and legitimate trade."

On 26 April 2000 the Paymaster General wrote to Tim Boswell Esq MP as follows:

> "Customs' normal policy is, wherever possible, to return (restore) seized goods to the person concern, on appropriate terms and conditions. In certain circumstances, however, restoration is not offered. I note from Mr Curley's letter that he represents traders in the alcoholic goods sector. As part of the Government's response to the serious problem of alcohol and tobacco smuggling it is Customs' policy not to restore any properly seized commercial quantities of goods of this nature. This does not affect the person's right to appeal either against the seizure or against the refusal to restore goods, or both."

The standards expected by the Commissioners

30. In February 1999 the Commissioners were asked, on behalf of the client of Mr Curley, what reasonable precautions should be taken in purchasing goods in the future. The letter named three suppliers and asked for confirmation that none of these was suspected by Customs and Excise of being a "missing trader". "Missing trader" was "defined" by Customs and Excise in a letter of 1 April 1999 as follows:

> "A VAT registered trader is missing when they can no longer be contacted at the VAT registered address of the business and has not provided Customs Excise with a new address. Other traders may use false VAT numbers, addresses and phone numbers in order that they cannot be traced. From experience, the customers of these traders can often supply little or no details regarding their dealing with these types of suppliers. The concerns about missing traders are that they trade in this way to avoid any payments of duties or tax."

31. On 2 May 1999 Customs confirmed that the three suppliers named in Mr Curley's letter were not missing traders. The letter goes on to say:

> "To avoid dealing with missing traders there are some checks which you can carry out yourself on a potential supplier as follows:
>
> > 1. Before a transaction takes place obtain confirmation on headed paper which should show the full name and address, telephone number and VAT number of the company. Obtain the full name of the

person you contacted. If these details are not present, ask for them.

2. Telephone the number on the headed paper to ensure it belongs to that company and your contact works there.

3. Telephone the Royal Mail Advice Centre … who will tell you if the address exists.

4. Contact me or the VAT Help Desk … to check the VAT number."

32. On 6 April 1999 Mr Curley on behalf of his client sent the Commissioners a list of all his client's current suppliers and asked whether any of these were missing traders or suspect in any way. The Commissioners responded on 11 August 1999:

> "We are unable to respond to your request to advise whether any of your clients' suppliers are suspect. All information held, and enquiries made by this Department, are confidential. You will appreciate it will be improper and unlawful to divulge any information in this respect."

33. Drawing the threads together so far, it is clear from the extracts set out above that the Commissioners have taken a policy decision not to restore properly seized goods. There are no exceptions to this. Even innocent failures to pay excise duty will not qualify as exceptions to the policy. The Commissioners regard themselves as exercising that power to deter illegal activities and to stamp out smuggling.

34. To give some idea of the circumstances in which the power to restore falls to be exercised, I shall summarize the correspondence between the Appellants and the Commissioners leading to each of the disputed decisions.

Mr Gora

35. As mentioned above, the Commissioners detained 75 cases of Bells Whisky, 80 cases of Special Brew and 6 cases of Heineken on 30 December 1999. Mr Gora produced invoices (using the Commissioners' words) "purporting to relate to the purchase of the detained whisky." In the letter of 24 May 2000 the Commissioners explained that the goods had been seized "due to lack of evidence supporting the UK duty payment". The letter of 1 August 2000 announcing the decision on review explains the basis on which the decision was taken as follows:

> "The fundamental issue is whether duty has been paid. If the Commissioners are not satisfied that duty has been paid on seized goods, then it is not their policy to restore those goods, until such evidence is made available which is sufficient to satisfy them of proof of duty payment.
>
> The Commissioners would argue in a VAT and Duties Tribunal that the question of whether the goods were correctly seized is solely a matter of condemnation proceedings in the Magistrates' Court, and not the Tribunal".

The information provided by Mr Gora is summarized in paragraph 20 above. The letter concludes as follows:

> "Based on the limited information provided by your client, the Commissioners cannot be satisfied that duty has been paid on the seized goods. The decision on this review is that, unless the Commissioners are provided with satisfactory of duty payment on the seized goods, the seized goods cannot be restored."

As I see it there has been no dispute that all the goods belonged to Mr Gora. That letter discloses a number of features that apparently troubled the Commissioners. Mr Gora, if anyone, had the information with which to answer those questions. In the absence of answers the Commissioners have, on the face of it, grounds for concern.

Hamer & Perks

36. The detention on 7 May 1999 came about because the Customs officers who had inspected Hamer & Perks' stock were not satisfied that the invoices produced then and subsequently were sufficient to cover all the stock on the premises. The lager and wine detained had, the officers concluded, been supplied by "suspect" suppliers. They had been bought from two suppliers, Just Beer Ltd and Unipex, both of which had VAT registration numbers, business premises and telephone numbers. The seized goods (seizure was on 30 July 1999) were said to be worth £57,360. The Summons for Condemnation of 27 January 2000 sets out the sequence of events between 7 May and 28 July 1999. It is said that Hamer & Perks had continued to purchase stock from Just Beer and Unipex after the date of detention. Just Beer, it is said, obtained beer from Phoenix International which had obtained supplies from Aldan Ltd (a missing trader): and Phoenix had not produced an Aldan invoice. On that basis, it is said, the stock detained should be seized due to lack of invoices. On 29 July the goods purchased by Hamer & Perks from Unipex were seized "due to a lack of purchase invoices to cover sales to Hamer & Perks, and because the purchase invoices produced showed that goods had been sourced from missing traders".

37. The review decision gave the following reasons for upholding the decision not to restore:

> "From examination of the papers to hand and the sequence of events, I consider that a clear audit trail for the goods has not been established, and that there is no satisfactory evidence of duty payment.
>
> After careful consideration, the Commissioners are of the opinion that the Officer acted reasonably in not allowing the restoration of the goods. Therefore, your application for the restoration of these seized goods has been refused."

38. The conclusion that I draw from this information and the rest of the correspondence is that the Commissioners have refused to restore the goods to Hamer & Perks solely because Hamer & Perks have not been able to produce satisfactory evidence that duty was paid on the goods. The possible innocence of Hamer & Perks and the fact that Hamer & Perks may have taken all reasonable

steps available to them are not, apparently, considerations that have been taken into account.

Party Booze

39. The detention of Party Booze's goods on 24 March 1999 was because the officers "were not satisfied that the invoices that Party Booze was immediately able to purchase were sufficient to cover all the stock in the premises. The officers were not satisfied as to the duty status of some of the stock on the premises". These words are extracted from an agreed summary of the facts. On 4 May 1999 (after seizure had taken place) the Customs officer wrote as follows:

> "Further to my visits to your premises … when you would not supply me with details of your dealings with the missing traders Aldan Trading and Sturrock Trading.
>
> It is reasonable to ask you, as the sole person responsible for purchases, for details of your suppliers. I fail to understand your reluctance to provide this information. Putting such questions in writing does hinder our duties because of the amount of time this will inevitably take. When I uplifted your records I found a number of invoices from Aldan and Sturrock. These appear to be your largest suppliers. Please explain why you did not mention these. I specifically advised you that Aldan Trading was a missing trader at my visit on 24 March 1999 and Mr Curley certainly knew before that date. You have also dealt with them after that date and have not given an explanation for that."

Mr Curley replied on 14 June 1999 stating :

> "The seized goods were purchased in good faith and my clients were in possession of purchase invoices for the goods. …
>
> The purchase price paid for the goods was market value which included payment of any excise duties."

Following a request for a review of the decision not to restore the goods (calculated by Party Booze to be worth £40,751) the review officer responded on 15 June 1999 using exactly the same words as are found in the review officer's letter to Hamer & Perks.

40. From those features I conclude that the review officer approached the question of whether to restore in exactly the same way as he had approached it in the Hamer & Perks case. He gave no weight to the professed innocence of Party Booze or to the steps that they had taken (if any) to satisfy themselves that excise duty had been paid on the excise goods.

Is the refusal to restore to be classed as a "criminal charge" for Article 6 purposes?

41. The case for the Appellants was that the circumstances behind the refusal to restore gave it the character of a criminal charge. These can be summarized as follows:

(i) All three appellants were innocent and were being penalised for another's failure to pay the duty; in the Hamer & Perks and the Party Booze appeals this was the "fault" of a common missing trader (i.e. Aldan Trading), three links away in the chain of supply, which had possibly failed to pay the duty. And all three Appellants had complied with the tests suggested by the Customs but still could not detect the fact that duty had not been paid.

(ii) In the case of Party Booze, there was a double punishment. Not only were all the goods in question seized and not returned to Party Booze, thereby causing them significant loss, but they also found that input tax thought to be reclaimed by them in relation to the transactions concerning the disputed goods was disallowed.

(iii) The public pronouncements of the Paymaster General and the Commissioners, set out above, emphasized the deterrent and penal nature of the seizures and the refusals to restore.

42. The Commissioners argued that there was no criminal charge in the refusal to restore or to restore on terms. There was no more a criminal charge in those decisions (or their implications) than there had been in the forfeiture and condemnation proceedings. In *Goldsmith v Customs and Excise Commissioners*, supra, the Administrative Court had ruled (in 2001) that such proceedings should not be categorized as criminal.

43. Applying the three part test formulated in *Engel* (1976) 1 EHRR 647 and adopted by the Court of Appeal in *Customs and Excise Commissioners v Han* [2001] STC 1188, I should have to conclude that these appeals against refusals to restore did not involve criminal charges for article 6 purposes. The decision not to restore in section 152(b) and the appeal under Finance Act 1994 section 16(4) are civil under the domestic law. They are concerned with the exercise of an administrative power and its review. The events that led to the goods being in a state of detention and subsequently being seized may have involved offences on someone's part. But it will not necessarily be the person affected by the refusal to restore who committed the offences; indeed all the present appeals proceed on the basis that none of the Appellants has committed an offence. Thus there is no offence to which the second test, "the nature of the offence", can be applied. I accept that the Commissioners are, on their own admission, using the power contained in section 152(b) to stamp out crime. Its effect, even on the innocent owner who is refused restoration, will be penal. However, that feature alone cannot transform an appeal against a decision reviewing the exercise of an administrative power into proceedings involving a criminal charge. The missing link is the offence. In *Han* and in the recent decision of the Court of Appeal in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 the Court decided that the charges to be determined were criminal, notwithstanding the "civil" description given to the offence. Here the proceedings involved no offence, civil or criminal. With that, I turn to the Strasbourg cases.

44. *AGOSI v UK* (1986) 9 EHRR 1 involved the Commissioners' refusal to restore to their owner (in exercise of the predecessor of section 152(b)) gold coins smuggled into the UK by two rogues. In the Strasbourg Court AGOSI, the owner, complained that the decision taken by the English court in the condemnation proceedings and by the Commissioners on a request for restoration of the coins amounted to a determination of a criminal charge. The Strasbourg Court rejected this. In paragraph 65 of the judgment they described both sets of proceedings as

"measures consequential upon" the act of smuggling committed by the two rogues. They observed that criminal charges under domestic law had been brought against the rogues but not against AGOSI in respect of the act of smuggling. The decision goes on as follows:

> "The fact that measures consequential upon an act for which third parties were prosecuted affected in an adverse manner the property rights of AGOSI cannot of itself lead to the conclusion that, during the course of the procedures complained of, any "criminal charge" for the purposes of Article 6, could be considered as having been brought against the applicant company."

45. Then came *Air Canada v UK* (1995) 20 EHRR 150. Did the Commissioners' decision to restore an aircraft owned and operated by Air Canada on payment of £50,000 amount to the determination of a criminal charge against Air Canada? The aircraft had been seized as liable to forfeiture when the Commissioners found a consignment of cannabis resin in the cargo hold. Air Canada contended before the English courts in condemnation proceedings that the forfeiture and condemnation procedures were in effect if not in form criminal and so reasonably required an element of guilty knowledge on the airline's part as a precondition of any determination against the airline. The Court of Appeal [1991] 2 QB 446 rejected that. At page 467 Purchas LJ emphasized firstly that the forfeiture on condemnation procedure is by description a civil process and second that the procedure amounted to a process in against the vehicle, aircraft or container used in the process of smuggling.

46. The Commission in *Air Canada* was divided. Two members advised that Air Canada had in fact been faced with a criminal charge and that the guarantees under article 6 had not been available to it. The Strasbourg Court concluded that the forfeiture and condemnation proceedings were not of a criminal nature for the same reason as those of the English Court of Appeal, see paragraph 52 on page 176. In paragraphs 53 and 54 (page 177) the Court referred to AGOSI and observed:

> "It is further recalled that a similar argument had been made by the applicant in the AGOSI case. On that occasion the court held that the forfeiture of the goods in question by the national court were measures consequential upon the act of smuggling committed by another party and that criminal charges had not been brought against AGOSI in respect of that act. The fact that the property rights of AGOSI were adversely affected could not of itself lead to the conclusion that a "criminal charge" for the purposes of article 6, could be considered as having been brought against the applicant company.
>
> Bearing in mind that, unlike the AGOSI case, the applicant company had been required to pay a sum of money and that its property had not been confiscated, the Court proposes to follow the same approach."

47. *Air Canada* and other Strasbourg authorities were considered by the Administrative Court in *Goldsmith*. That appeal, as noted above, raised the question of whether forfeiture proceedings were criminal. It required a decision on the "confiscation" point left open by the Strasbourg Court in *Air Canada* : see the last sentence in the above extract. The Lord Chief Justice (Lord Woolf) and Poole J addressed the issue and decided that they were not criminal. They

recognized that full weight must be given to the consequences of forfeiture and condemnation. But nonetheless the proceedings were categorized as civil and did not result in criminal convictions or findings of guilt.

48. The Strasbourg decisions and *Goldsmith* confirm the view that I have reached. The powers to seize and to restore (or to refuse to restore) are deployed by the Commissioners in their war against crime. Their policy is summarized in paragraph 28 above. The exercise of those powers produce severe financial consequences for the owner of the seized or forfeited goods. That owner may have been innocent of, or not aware of, the non-payment of excise duty on the goods at an earlier stage. But those considerations go to the proportionality issue to which I shall turn shortly. Here the issue turns on the question of whether the Commissioners have exercised their power to restore without proper regard to the criminal safeguards contained in the "criminal charge" limb of article 6. However, the exercise of the power to restore no more involves a determination of a criminal charge than do the forfeiture and condemnation procedures considered in *AGOSI, Air Canada* and *Goldsmith*. They are powers that come into effect and decisions that have to be taken consequential on the committing of a crime at an earlier stage.

Is the jurisdiction of the tribunal sufficiently broad to satisfy the requirements of article 6?

49. The power to which this question relates is that conferred on the Commissioners by section 152(b) in these terms. It enables the Commissioners –

> "… to restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under the customs and excise Acts".

It is one of four specific powers given to the Commissioners to enable them to discharge their duty of "collecting and accounting for, and otherwise managing, the revenue of customs and excise" : see section 6(2). The section 152(b) power, in common with the others, may be exercised by the Commissioners without reference to any court or tribunal.

50. Once the power is exercised it ranks, for appeal purposes, as a "decision as to an ancillary matter" : see paragraph 2(r) of Schedule 5 to Finance Act 1994. The person affected by the decision, whether it takes the form of a positive decision to restore on terms or a refusal to restore, has a right of appeal. The appeal is exclusively to this tribunal whose powers are limited in the terms set out in section 16(4) of Finance Act 1994. That subsection provides that the powers of the Tribunal are –

> "confined to a power, where the tribunal are satisfied that the Commissioners or other person making that 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, 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 that 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."

The precondition to the Tribunal's exercise of one or more of its three powers, i.e. that the person making a decision could not reasonably have arrived at it, falls within the guidance given by Lord Lane in the decision in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231. There he said (at 239) that the tribunal could only exercise its powers of "review" –

> "… if it were shown the Commissioners had acted in a way in which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight."

51. The question, stated in terms of article 6 is whether the Appellants can obtain "a fair hearing" of their appeal against the Commissioners' refusal to restore the forfeited goods when the jurisdiction of the tribunal under section 16(4) is limited in that manner. (In view of my conclusion that no criminal charge is involved in a decision not to restore, or to restore on condition that the person in question makes a payment to the Commissioners, I am not here concerned with the standard of "fair hearing" demanded by the "criminal charge" limb of article 6.)

52. The Appellants contend that the tribunal's jurisdiction under section 16(4) fails to meet the requirements of article 6. The particular circumstances of the case require that the tribunal should have a "full jurisdiction". "Full jurisdiction" as interpreted in the Strasbourg and the United Kingdom case law requires more than a review jurisdiction. The tribunal must, it is argued, be able to make findings of primary fact and to determine issues arising from the primary facts. To quote from the Appellant's skeleton argument, the tribunal must have the power – "to effectively `determine' an appellant's civil rights by being empowered to quash in all respects, whether fact or law, the decision of the Commissioners." Reliance was placed on the decisions of the Strasbourg court in *Kingsley v UK* (2001) 33 EHRR 13 at page 288 and *Bryan v UK* (1995) 21 EHRR 342 and of the Court of Appeal in *Adan v Newham London BC* [2002] 1 All ER 931.

53. Subsequently written submissions were made in the light of the Court of Appeal's decision in *Runa Begum v Tower Hamlets LBC* [2002] 2 All ER 668. *Runa Begum*, as in *Adan*, concerned the question whether a County Court hearing on appeal from a reviewing officer's decision possessed a "full jurisdiction" so as to guarantee compliance with the right to a fair hearing. The County Court's jurisdiction was limited to an appeal under law. In *Runa Begum* Laws LJ (with whom the Lord Chief Justice (Lord Woolf) and Dyson LJ agreed) distinguished *Adan* on the basis that the Court of Appeal in *Adan* had not, on account of concessions made, conducted "a more specific examination of the statutory scheme" issue. Laws LJ saw a distinction between what might be called fact-intensive and policy-laden decision-making situations. I quote from paragraph 40 on page 689:

> "As I have shown, the extent to which the first instance process may be relied on to produce fair and reasonable decisions is plainly an important element. But it is not to be viewed in isolation. The matter can only be judged by an examination of the statutory scheme as a whole; that is the necessary setting for any intelligent view as to what is fair and reasonable. Where the scheme's subject matter generally or systematically involves the resolution of primary fact, the court will incline to look for procedures akin to our conventional mechanisms for finding facts : rights of cross-examination, access to documents, a strictly independent decision-maker. To the extent that procedures of that kind are not given by the first instance process, the court will look to see how far they are given by the appeal or refuse; and the judicial review jurisdiction (or its equivalent in the shape of a statutory appeal on law) may not suffice. Where however the subject matter of the scheme generally or systematically requires the application of judgment or the exercise of discretion,, especially if it involves the weighing of policy issues or regard being had to the interests of others who are not before the decision-maker, then for the purposes of article 6 the court will incline to be satisfied with a form of inquisition at first instance in which the decision-maker is more of an expert than a judge (I use the terms loosely), and the second instance appeal is in the nature of a judicial review. It is inevitable that across the legislative board there will lie instances between these paradigms, sharing in different degrees the characteristics of each. In judging a particular scheme the court, without compromise of its duty to vindicate the ECHR rights, will pay a degree of respect on democratic grounds to Parliament as the scheme's author."

Laws LJ went on to consider the particular decision at issue in that case, observing that the issues which may fall for a decision "lie across a spectrum between questions of facts and questions of judgment or discretion" : paragraph 42. He observed that the question of compliance with article 6 could not vary on a case by case basis, but "judged as a whole, the statutory scheme lies towards the end of the spectrum where judgment and discretion, rather than fact finding, play the predominant part" : paragraph 43 . He accordingly concluded that the statutory scheme on grounds of error of law at issue in that case was sufficient to amount to a tribunal of "full jurisdiction".

54. The Appellants contend that the "scheme" under consideration, i.e. the forfeiture and restoration scheme contained in Part X1 of the Customs and Excise Management Act and the appeal provisions of section 16 of Finance Act 1994, fall within the first category described by Laws LJ. A finding of primary fact, namely whether duty has been paid, is inevitably involved. By contrast, the Appellants contend, they do not systematically involve the exercise of discretion: nor do they involve the "weighing of policy issues" (even though they necessarily involve the application of policy, the decision-maker is not required to conduct the weighing up between two or more conflicting policies) or the interests of third parties before the decision-maker. For those reasons, it is argued, the statutory scheme under consideration in the present appeal fails to meet the requirements of article 6 for determination by a tribunal with "full jurisdiction". The Commissioners contended that the statutory scheme in issue here involved the exercise of an administrative power. It was one where, to adopt Laws LJ's words "judgment or the exercise of discretion, rather than fact finding, play the predominant part.

55. As I see it, the decision involved in the exercise of the Commissioners' power in section 152(b) breaks down into distinct and separate features. There is the policy aspect. In the alcoholic sector properly seized goods will not be restored (see the News Release of 12 October 1998). Even innocent failure to pay excise duty cannot be condoned and will not cause the Commissioners to restore the goods (see the Commissioners' letters set out in paragraph 28 above). Unquestionably the decision is policy-driven.

56. But the policy aspect does not stand alone. There are underlying matters of primary fact. One is whether the goods were properly seized in the first place. That was recognized by the Paymaster-General in his letter of 26 April 2000 (see paragraph 29 above). Another matter of primary fact is whether the "owner" (i.e the person who has suffered the forfeiture) has been innocent and diligent. This was highlighted by the Strasbourg Court in *AGOSI, supra.* In that case AGOSI, a coin dealer in Germany, sold 1,500 krugerrand coins to two rogues. The sale agreement reserved ownership with AGOSI until full payment was made. The cheque tendered for payment was dishonoured. The rogues were arrested and convicted of attempting to smuggle the coins into the United Kingdom. The coins were seized by Customs. Condemnation proceedings took place and they were declared forfeited as condemned. The application to the Strasbourg Court was directed at the forfeiture of the coins and the subsequent refusal by the Commissioners to restore them in exercise of the power now contained in section 152(b). The Strasbourg Court concluded that the forfeiture had been an interference with AGOSI's article 1 right of peaceful enjoyment of possession; and the requirements of proportionality demanded that their conduct, including the degree of fault or care displayed and their relationship to the crime, were relevant factors that should be taken into account by the Commissioners in deciding to restore the coins. Of direct relevance to the present issue, the Strasbourg Court decided (in paragraph 56 of its judgment) that AGOSI's innocence and diligence were relevant factors to be considered when deciding whether to exercise the statutory discretion to restore

57. Whether the goods have been properly seized and whether the particular Appellant has or has not been innocent or acted with diligence are all real and substantial considerations based on primary facts to be taken into account by the person taking the decision. The tribunal cannot decide whether the decision qualifies as reasonable in the relevant sense unless it examines the facts asserted by both parties and substantiates whether those facts exist. The issue of whether the goods have been properly seized and so are liable to forfeiture may have been already determined by a court in condemnation proceedings. If so, there is no further room for fact-finding by the tribunal. Mr Gora did not engage condemnation proceedings (see paragraph 9 above). He did not give notice under Schedule 3 paragraph 3 and as a result the law took its course and the goods were treated as properly seized and so liable to forfeiture. No finding of fact resulted. A deemed fact is not a real fact. It cannot consequently rank as a consideration relevant to the subsequent decision on restoration until determined by the tribunal or conceded to exist. Thus where the tribunal addresses the question whether the decision-maker has taken all relevant considerations of fact into account or left any such considerations out of account, the fact that Mr Gora's goods have been treated as liable to forfeiture will still not determine the question of fact of whether they were properly seized in the first place.

58. It follows from what I have said so far that if the hearing under section 16(4) of Finance Act 1994, properly construed, is to be article 6 compliant the tribunal must have the capacity both to find all relevant primary facts and to determine the issue on reasonableness grounds. In this class of case there will usually if not

always be both substantial elements of policy and substantial elements of primary fact involved in the decision-making process. I recognize Laws LJ's observation in paragraph 43 that the statutory scheme in question is either compliant with article 6 or it is not and that its compliance or otherwise cannot vary case by case according to the degree of factual dispute arising. That, he said, "would involve a wholly unsubstantiated departure from the principles of legal certainty". However it is in the nature of cases involving decisions under section 152(b) that most if not all involve both fact and policy. Thus a decision that the tribunal's jurisdiction is article 6 compliant in "restoration" appeals because it has this dual capacity to weigh the disputed decision on both reasonableness grounds and by reference to the accuracy of the underlying facts will not compromise legal certainty.

59. There is nothing in the wording of section 16(4) of Finance Act 1994 which prevents the tribunal from examining the underlying and primary facts. The tribunal has been given a flexible procedure which enables it to do so. The following points are relevant in this connection:

- Since the Human Rights Act 1998 came into force the tribunal has approached decisions where the decision-maker is an officer and is constrained by a published policy of the commissioners, such as the present refusals to restore goods, by requiring to be satisfied that the policy coupled with any exceptions to it satisfy the "proportionality" test found in, for example, the Strasbourg Court decision in *Air Canada*, paragraph 36. The practice of the Tribunal has been to examine the circumstances of the decision and, without trespassing on the role of the Commissioners, to satisfy itself (or not as the case may be) that the decision reached within the constraints of the policy is no more than is necessary to achieve the legislative objective (i.e. the care and management of the excise). This has been endorsed by the Court of Appeal in *Customs and Excise Commissioners v Lindsay* [2002] EWCA Civ 267 and [2002] STC 588.

- The tribunal has in practice always been astute to examine all the relevant facts. It hears evidence from both sides. It satisfies itself that the primary facts upon which the Commissioners have based their decision are correct. The rules of the tribunal and its procedures are designed to enable it to make a comprehensive fact finding exercise in all appeals. If, for example, one of the primary facts is whether the goods were properly seized and so properly liable to forfeiture, the tribunal will, unless the issue has been actually determined by a court in condemnation proceedings or formally conceded by the individual, consider the circumstances of the seizure. For this purpose it will use its powers to obtain information as necessary. If the tribunal is satisfied on the evidence that the seizure took place on a wrong factual basis it may then conclude that the refusal to restore was unreasonable as having been based on an erroneous consideration. It may then quash the decision, making a direction setting out its own findings of fact and send the decision back to the Commissioners requiring them to conduct a further review in the light of those findings.

- Subject to being satisfied as to the correctness of the primary facts, the Tribunal cannot (and does not), where the appeal is "in relation to any decision on an ancillary matter", seek to substitute its own

decision as to the exercise of the relevant power for that of the Commissioners.

On that basis, it seems to me that the Tribunal has, to use Lord Hoffman's expression in *R (In the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and Regions* [2001] 2 All ER 929 (paragraph 87), "a full jurisdiction to deal with the case as the nature of the decision requires". The jurisdiction of the tribunal under section 16(4), properly construed, is sufficiently wide to satisfy the requirements of article 6.

60. I should add for completeness that the Commissioners did not seek to argue that the exercise of the power to restore did not engage the civil rights and obligations of the Appellants. It was common ground therefore that the matter came within article 6. Further, the question whether the VAT and Duties Tribunal is an independent and impartial tribunal has already been decided in the decision in *Ali and Others*.

STEPHEN OLIVER QC

CHAIRMAN

RELEASED:

LON/2000/8032-GORA.OLI