EXCISE DUTY – Restoration of excise goods and vehicle – Importation of quantities of excise goods in excess of amounts set out in Schedule to Personal Reliefs Order – Decision not to restore upheld on review – A ground of decision that Appellant's expenditure incommensurate with income- Failure of Commissioners to take into consideration Appellant's other financial resources – Whether decision reasonable – Appeal allowed – Excise Duties (Personal Reliefs) Order 1992 (SI 1992/3155) art 5(2), (3)-(3C) – FA 1994 s 16(4)

LONDON TRIBUNAL CENTRE

BARRIE PAUL COOPER Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: ANGUS NICOL (Chairman)

S K DAS

Sitting in public in London on 20 September 2001, 18 and 19 February 2002

The Appellant in person

Mr Owain Thomas, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

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DECISION

1. This is an appeal against a review of a decision not to restore to the Appellant certain excise goods imported by him and a Ford Sierra motor car, all of which were seized from him at Coquelles in France on 13 December 2000. The Appellant was travelling with a Mrs Monica Bee, who has not appealed. The amount of excise goods found in the car was 8,800 cigarettes, 3 kg of hand rolling tobacco, 31.4 litres of spirits, 51 litres of wine, 30 litres of beer, and 1 litre of other alcohol. The cigarettes, tobacco, and spirits were all in quantities which exceeded the amounts set out in the Schedule to the Excise Duties (Personal Reliefs) Order 1992 ("the 1992 Order"). The Appellant appealed on the ground that the goods were for his own use and that of Mrs Bee.

The evidence

2. The evidence relating to seizure came from the notebooks of the officers who stopped the Appellant and interviewed him and Mrs Bee. The review officer, Mr Paul Devlin, gave evidence in person. The officers whose notes were referred to had not been required to attend to give evidence. Also in evidence were the decision letter, dated 13 January 2001, and the review letter, dated 25 March 2001.

3. The notes made at Coquelles by Mr Stapleton, an officer of Customs and Excise, say that the Appellant's vehicle was stopped at 8.0 a.m. on 13 December 2000. He asked both the Appellant and Mrs Bee where they were returning from, and the Appellant said that they had been to Calais and Adinkerke, and that the purpose of the trip had been to do some shopping. Mr Stapleton asked how much tobacco they had and was told, "100 pouches". After that, there were questions relating to prohibited goods. The notes then record that Mr Stapleton located 4,400 Benson and Hedges and 4,400 Superkings cigarettes in the boot of the car. At that point, both the Appellant and Mrs Bee countersigned the notes as being a true account. That was timed at 8.34 a.m.

4. At 8.36 a.m. Mr Stapleton interviewed Mrs Bee. The interview is recorded as having begun with the reading to her of the "commerciality statement", in which she was required to satisfy Mr Stapleton that the goods she was importing were not imported for a commercial purpose. Mrs Bee consented to answer questions. She said that she had bought 4,400 cigarettes and 50 pouches (500 gm) of tobacco, for which she herself had paid about £700. She said that she smoked about 400 a week, and expected the cigarettes to last for "ages". She said that the last time she had been to France was a couple of weeks before, when she had bought ten cases of beer and six of wine, all of which she had drunk in the interim. She said that she had made six trips in the previous three months. She said that she was receiving sickness benefit of £44.50 a week, and rent (from the Appellant) of £35 a week. She was asked how she had purchased the goods on this occasion, and answered that she had saved up, and that her savings were kept in a drawer. She said that no-one had paid her to buy the goods. The notes record that the goods were seized at 9.20 a.m. for the following reasons: (1) in excess of MILS; (2) expenditure does not equal income; (3) previous trips x 20.

5. Starting at 8.40 a.m., the Appellant was interviewed by another officer, Mr Whybrow. It is to be noted that the notes do not record that any "commerciality statement" was read to him, nor that he was required to satisfy the officer that the goods were not imported by him for a commercial purpose. However, the review letter alleges that immediately after the Appellant and Mrs Bee had signed Mr Stapleton's notebook "a statement was read to both of you. It was a formal requirement to satisfy Customs that the excise goods you were importing qualified for relief from UK duty by being for own use." Again, it is to be noted that it was not otherwise alleged in that review letter that the Appellant had been required to satisfy the officer that the goods were not imported for a commercial purpose.

6. In answer to questions, the Appellant said that the Benson and Hedges and 50 pouches belonged to him. He said that he had spent about £129 at Pidou cash and carry, £960 for the tobacco goods, and £200 in the passenger terminal building. He said that he had paid for all the goods by cash, and that Mrs Bee would reimburse him in the UK. He said that he was not a revenue trader and that no-one had contributed towards the purchase, nor did he expect to receive any money for any of the goods. He said that he smoked about 300 a week, and

he was not going to supply other people. He was asked what he was doing with the goods, and said that he was smoking them and drinking them. He said that he was a greyhound trainer, earning about £300 a week, though it varied. His financial commitments were his rent, of £35 a week to Mrs Bee and £200 a month into a pension scheme which he would not be able to touch until he was 65. The purchase the subject of the appeal was, he said, financed out of his wages. He said that he had seen Notice 1 and was aware of the MILS. He said that he had last been abroad in November, on his own. He had made about five trips abroad within the previous twelve months. One of these was to Dubai, and four were to France. In August he and Mrs Bee had also purchased excise goods, about 50 tobacco and about 22 sleeves of cigarettes, he said. He had consumed all those goods. The Appellant countersigned these notes as being a true account.

7. The Seizure Information, which lists the goods seized, directs the recipient to the notes on the reverse which tell him how he may be able to get his property back, and what to do if he considers the seizure to have been wrong. Part 2 of the notes, relating to action to be taken if the seizure was considered to be wrong, was crossed out.

8. There was also correspondence between the Appellant and the Commissioners, which contained some factual matter and contentions made by the Appellant as to why the goods and vehicle should be restored to him. The first of these was dated 14 December 2000, and complained that the officer concerned had seized the goods on the ground that the Appellant had said that the last time on which he had travelled to France he was on his own, but Mrs Bee had said in interview that she was with him. The Appellant went on to say that reference to Mrs Bee's passport would have shewn that she had left on that day by air for Africa. There was a second letter of the same date containing the same information. The Commissioners replied on 18 December 2000, asking whether the Appellant was claiming restoration or that the seizure was wrongful. On 22 December 2000 the Appellant replied, claiming restoration of both goods and vehicle. The refusal letter was dated 13 January 2001, and gave the following grounds of refusal:

> "1. The excise goods (tobacco and cigarettes) were in excess of the Minimum Indicative Levels, which for tobacco is 1 kilogram and cigarettes 800 in number.
>
> 2. You have made at least ten journies [*sic*] recently and so would have no need to purchase a large quantity of excise goods on this occasion.
>
> 3. You did not declare the cigarettes to the officer when given the opportunity to do so.
>
> 4. It is considered that the expenditure on the goods is incommensurate with your disposable income."

9. The Appellant wrote again on 5 February 2001 saying that he wished to appeal against the decision not to restore the goods and car. Also in that letter he said, first, that he and Mrs Bee had broken no law, and none of the goods were for resale. Secondly, he said that he had been to Belgium only twice in his life, though he did not deny that he had been to France on ten occasions. He had been to Belgium in August 2000 and on 13 December 2000, and had brought back cigarettes and tobacco on those occasions. Thirdly, he said that he had not been given an opportunity to declare the amount of goods that he had brought. Lastly, he was aged 59 and had his own haulage business and a 50 per cent

share in a club, and the day on which he could not find £1,500 was "the day to put me in my box". That letter was treated as a request for a review, and was passed to Mr Devlin for that purpose.

10. The appeal was adjourned at the request of the Appellant for officer Mark Stapleton to be called, and continued with his evidence on 18 February 2002. He confirmed that the "commerciality statement" includes the requirement to satisfy the officers that the goods are not for a commercial purpose. He had issued the seizure information, but said that he did not know who had crossed out paragraph 2, and knew of no reason why he should have done so. After issuing the seizure information, the officer would carry out a tally of the goods, and that was the end of his involvement. He explained the "previous trips x 20" allegation, by saying that Mrs Bee said that she had made six trips in three months, and the Appellant had made five, so that there were ten return trips, which amounted to twenty trips. When cross-examined by the Appellant, Mr Stapleton said that he could not remember if the Appellant had said that he had not given him the opportunity to mention the goods which he had in the boot. He agreed that he should have asked more specifically about the amount of tobacco and cigarettes. He had no reason to suppose that the Appellant was trying to conceal what he had. He had not considered it relevant to ask Mrs Bee whether she had worked before going on sick benefit; there was a list of questions which they asked, a guide for Customs officers, and he had asked the questions on the list. One of these questions is, "What is your employment?" She answered, "I am sick." The next question was "How much is your benefit?" And Mrs Bee had answered "£44.50." She had made no mention of any redundancy money or bonus from the railway; she had had the opportunity to say where her funds had come from. Lastly, the other officer who had been on duty at Coquelles, Mr Whybrow, was called, and said that he had interviewed the Appellant. He was not cross-examined.

11. The Appellant declined to give evidence, nor did he call Mrs Bee to give evidence.

The review

12. In the review letter, dated 25 March 2000 (the 45th day after receipt by the Commissioners of the request), Mr Devlin set out the background and the relevant law. Under the heading "Consideration", he said,

> "It is for me to determine whether or not the contested decision is one which a reasonable body of Commissioners could not have reached."

We pause at this point to observe that that is not the function of the review officer at all. His duty is to consider the facts and evidence in the case and to determine on those facts whether it would be proper to restore the goods and vehicle or not. He may substitute his own decision for that of the officer who refused restoration in the first place. The review officer must reach an original decision of his own, and that is the decision which is under appeal.

13. The review letter continued by saying that because of the volume of excise goods brought in the officers had made proper inquiries for the purpose of establishing whether or not they qualified for relief under the 1992 Order by being for the Appellant's and Mrs Bee's own use. Mr Devlin went on to say that the officers were of the view that the Appellant had not rebutted the statutory presumption of commerciality. By that we take him to mean that they formed the view that the Appellant and Mrs Bee had failed to satisfy them that the goods

were for their own use. Mr Devlin pointed to certain inconsistencies in what the officers had been told. First, that the Appellant had said that he had paid for all the goods and would be repaid by Mrs Bee later, whereas Mrs Bee had said that she had paid for her own goods. Secondly, that Mrs Bee had said that she smoked 400 cigarettes a week, and that those which she had bought would last her for ages. At that rate, Mr Devlin pointed out, they would last her only eleven weeks, which in his view was not "ages". He did not accept that she smoked so many. Mrs Bee had also said that two weeks earlier she had imported six cases of wine and ten of beer, and had drunk the lot; this he did not believe, as it would involve her drinking 36 bottles of wine and 105 pints of beer a week. Thirdly, he did not believe that Mrs Bee could have saved some £700 with an income of £79.50 a week in two weeks. He therefore concluded that the officers correctly seized the goods and the car.

14. The basis of the seizure, Mr Devlin continued, was that the goods had been imported for a commercial purpose. He went on to say,

> "Commerciality is a criterion which precludes restoration under the Commissioners' policy and I am satisfied that the refusal to restore the goods was in line with that policy."

He then said,

> "As the vehicle was privately owned, policy is that it too should not have been restored. I have therefore read your correspondence to see if the Appellant had made out a case for dis-applying that policy. The thrust of what you have written is that the goods you were importing were for own use. As I have not accepted that, for the above reasons, I do not consider that the decision regarding the car should not be maintained."

Although Mr Devlin asked himself the wrong question, he appears to us to have come to his decision on the facts though he reverted to that wrong question at the end. It is thus not wholly clear on what basis his decision is founded. We go on to consider whether that decision was otherwise reasonable.

15. In cross-examination, Mr Devlin said that the expression "ages" meant a long time, and was open-ended. In the circumstances of the frequency of Mrs Bee's travelling, he was of the opinion that they would last longer than the interval between trips, and eleven weeks did not seem to him to be "ages". He accepted that the Appellant may have been given no opportunity to declare the amount of goods in the car. He gave no weight to that point in the review, since he was interested only in the use to which the goods would be put. He did give weight to what was said after the goods had been located. Mr Devlin said that he considered only what was said at the time and in the letters. He agreed that there was no evidence of previous smuggling, nor that the Appellant and Mrs Bee knew that what they were doing was wrong, nor that they had been paid to make the journey, and he did not consider that the amount was exceptionally large and might damage legitimate trade. However, he considered that there was evidence of a commercial purpose, and that the goods were not for the personal use of the Appellant and Mrs Bee. He added, "The Commissioners never restore such goods", i.e. goods brought in for a commercial purpose. He stressed that the Appellant had been asked specifically whether he wished to initiate condemnation proceedings, and the Appellant had said that he did not. He did not know why the question relating to condemnation proceedings on the seizure information had been crossed out. He agreed that it was not always clear to people what the

difference was between condemnation proceedings and restoration, and that was why letters were usually sent making it clear, as had been done in this case. He said that it was nothing to do with him that the officer Stapleton was not being called to give evidence, it was a matter that was decided by the solicitor's office. He said that he was aware that the Appellant was maintaining that Mrs Bee had been browbeaten, but each of them had signed the notes to the effect that they were a true record. He agreed that the reference to twenty previous trips was clearly incorrect, and he had ignored it. He had also not given any weight to the allegation that the Appellant had made ten previous trips. In fact the number of journeys that the Appellant and Mrs Bee had made did not figure in his review. He said also that the review decision would have been the same if the amount of beer mentioned by Mrs Bee had amounted to 52½ pints a week, or 7 pints a day.

The Commissioners' policy on restoration

16. Another officer, Gerry Dolan, was called to give evidence about the Commissioners' policy as to restoration of goods and vehicles. He said that because the loss of revenue resulting from evaded excise duty on goods imported, and the increased use of vehicles for this purpose, the issue of vehicle involvement was under constant review and more robust methods of dealing with the question had been brought into force in April 1998. At that stage, usually vehicles were restored on payment of 50 per cent of the duty due on the goods seized on the first occasion, and on a second or subsequent occasion the amount would be £1,000 or the whole of the duty due on the goods, whichever was the greater. Since this had made little difference, the policy was reviewed again. The current policy was introduced on 13 July 2000, which, Mr Dolan said,

> "…means that vehicles will be seized and not restored on the first attempt they are detected being used in smuggling. The message for fraudsters now using their vehicles to commit excise fraud is very simple, use it and you will lose it: there will be no second chances. The policy applies to all types of motor cars and light commercial vehicles, except those which are rented, such as vans, pick ups, transits and similar vehicles. Vehicles which belong to owners who are not present at the time of detection will also not have their vehicles restored, unless they can demonstrate that they are totally innocent or it would be disproportionate or inhumane not to restore….
>
> This new 'get tough' policy is part of the massive £209 million clampdown on tobacco smugglers announced on 22 March by the Paymaster General, the right Honourable Dawn Primarolo MP and reaffirms the Government's commitment to ensure that smugglers face the toughest possible sanctions and penalties available. The current policy has been widely publicised in the national press and a custom leaflet is currently being sent out to every registered vehicle keeper with the reminder to pay their road fund licence (tax disc). This leaflet sets out the guidelines for amounts of tobacco and alcohol regarded as reasonable for personal use, the need to convince an officer of no commercial intent if these are exceeded and the penalties if caught smuggling. Where vehicles are seized and not restored, individual applications for restoration are considered on their merits and officers bear in mind the need for proportionality."

The law

17. Relief from excise duty is afforded to cross border shoppers by the Excise Duties (Personal Reliefs) Order 1992 ("the 1992 Order"), as amended so as to apply to imports through the Channel Tunnel by the Channel Tunnel (Customs and Excise) Order 1990 and the Channel Tunnel (Alcoholic Liquor and Tobacco Products) Order 2000. So far as is relevant to this appeal, the 1992 Order provides as follows:

> "3. **Relief from duty of excise - cross-border shopping**
>
> Subject to the provisions of this Order a Community traveller entering the United Kingdom shall be relieved from payment of any duty of excise on excise goods which he has obtained for his own use in the course of cross-border shopping and which he has transported.
>
> . . .
>
> 5. **Relief from duty of excise - conditions**
>
> (1) The reliefs afforded under this Order are subject to the condition that the excise goods in question are not held or used for a commercial purpose whether by the Community traveller who imported them or by some other person who has possession or control of them; and if that condition is not complied with in relation to any excise goods, those goods shall, without prejudice to article 6 below, be liable to forfeiture.
>
> (2) In determining whether or not the condition imposed under paragraph (1) above has been complied with, regard shall be taken of—
>
>> (a) his reasons for having possession or control of those goods;
>>
>> (b) whether or not he is a revenue trader;
>>
>> (c) his conduct in relation to those goods and, for the purposes of this sub-paragraph, conduct includes his intentions at any time in relation to those goods;
>>
>> (d) the location of those goods;
>>
>> (e) the mode of transport used to convey those goods;
>>
>> (f) any document or other information whatsoever relating to those goods;
>>
>> (g) the nature of those goods including the nature and condition of an package or container;
>>
>> (h) the quantity of those goods;
>>
>> (i) whether he has personally financed the purchase of those goods;

(j) any other circumstances which appear to be relevant.

(These are often colloquially referred to as "the (a) to (j) factors".)

(3) Paragraphs (3A) to (3C) below apply to a person who has in his possession or control any excise goods afforded relief under this Order in excess of any of the quantities shown in the Schedule to this Order.

(3A) The Commissioners may require a person to whom this paragraph applies to satisfy them that the excise goods afforded relief under this Order are not being held or used for a commercial purpose.

(3B) Where a person fails to satisfy the Commissioners that the excise goods in question are not being held or used for a commercial purpose the condition imposed by paragraph (1) above shall, subject to paragraph (3C) below, be treated as not being complied with.

(3C) Paragraph (3B) above shall not apply where a court or tribunal is satisfied that the condition imposed by paragraph (1) has been complied with."

SCHEDULE

QUANTITIES OF EXCISE GOODS SPECIFIED FOR THE PURPOSE OF

PARAGRAPH (3) OF ARTICLE 5

Tobacco products

(a) 800 cigarettes

(b) 400 cigarillos (that is to say cigars weighing nor more than 3 gm each);

(c) 200 cigars

(d) 1 kg of tobacco products other than in a form mentioned in (a), (b) or (c) above.

18. Forfeiture of excise goods is provided for by the Customs and Excise Management Act 1979 ("CEMA"), which provides, so far as applies to this appeal:

"49.-(1) Where -

(a) except as provided for under the Customs and Excise Acts 1979, any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty -

(i) unshipped in any port,

. . .

those goods ... shall be liable to forfeiture.

139.-(1) Any thing liable to forfeiture under 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;

141.-(1) Without prejudice to any other provisions of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the Customs and Excise Acts -

(a) any ship, aircraft, vehicle, animal, container (including any article of passenger's baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purpose of the commission of the offence for which it became so liable; and

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

Schedule 3 to CEMA provides for the issue of a notice of seizure to the owner, unless the seizure was effected in the presence of the owner. Paragraph 3 of that Schedule provides,

"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 5 provides that if no such notice is given, the thing in question is deemed to have been duly condemned as forfeit.

19. Power to restore seized goods is contained in section 152 of CEMA, which provides,

"The Commissioners may as they see fit -

(a) stay, sist or compound any proceedings for an offence or for the condemnation of any thing as being forfeit under the Customs and Excise Acts; or

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts."

20. Section 14 of the Finance Act 1994 provides for the review of any decision made by the Commissioners which falls within Schedule 5 to that Act, which includes in paragraph 2,

"(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 so restored."

Subsection (2) provides that a person in relation to whom such a decision has been made may, by notice in writing, require the Commissioners to review that decision, and subsection (3) provides that such a request must be made within 45 days beginning with the day upon which written notification of the decision was given. The review procedure is set out in section 15, which provides,

> "(1) Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may on that review either -
>
> (a) confirm the decision; or
>
> > (b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate."

21. Section 16 of the Finance Act 1994 provides for appeals to the Tribunal by the person who required the Commissioners' decision to be reviewed. The powers of the Tribunal on appeal are set out in section 16(4):

> "(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be 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 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 the future."

The contentions

22. Mr Thomas, for the Commissioners, submitted a helpful skeleton argument, which he expanded at the hearing. He began by setting out the relevant legislation, and dealing with the question of whether the Appellant had originally contested the lawfulness of the seizure and had intended to initiate condemnation proceedings in the Magistrates' Court. The Appellant had said that he had not gone ahead with condemnation proceedings because he had been prevented from doing so by paragraph 2 of the seizure information having been struck out. Mr Thomas contended that the Commissioners' letter of 18 December 2000 clearly dispelled any misapprehension that the Appellant may have had, by asking him in terms whether he wished condemnation proceedings to be begun or whether he

wished restoration of his goods and car. The Appellant had, therefore, had the opportunity to challenge the legality of the seizure, and had chosen not to take it.

23. Mr Thomas dealt with the statutory source of the Tribunal's jurisdiction, and its supervisory nature, under section 16 of the Finance Act 1994. He then dealt with the effect of article 5(3C) of the 1992 Order (as amended) (see paragraph 17 above), which appears at first sight to modify the powers of the Tribunal as set out in section 16 of the Finance Act 1994. Mr Thomas contended that paragraph 5(3C) did not operate so as to confer on the Tribunal any jurisdiction in relation to the legality of the seizure, since the Tribunal's jurisdiction is conferred on it by primary legislation, namely sections 14 to 16 of the 1994 Act, and is limited as therein provided. Secondary legislation, he contended, cannot grant jurisdiction to the Tribunal which is denied by primary legislation. Further, CEMA, in Schedule 3, provided a jurisdiction to the High Court or the Magistrates' Court, as tribunals the function of which is to find the facts as to whether the importation of the goods was for the Community traveller's own use and not for a commercial purpose, and to determine the legality of seizure in condemnation proceedings. Mr Thomas argued that the decision of the Tribunal in *Hodgson v Customs and Excise Commissioners* (1996) (Decision E 17) was distinguishable from the present case, because, first, the new paragraph (3C) of article 5 did not raise an irrebuttable presumption that goods were imported for a commercial purpose as had the former paragraph (3), and in *Hodgson*, a case concerning a penalty under section 170A of CEMA, the Tribunal's jurisdiction arose under section 16(5) of the Finance Act 1994, not, as here, under section 16(4). Section 16(5) gives jurisdiction to the Tribunal to substitute its own decision.

24. Mr Thomas contended that the Commissioners were entitled to reach the decision which they had reached as to commerciality having regard to the quantity of goods imported, and were entitled to take into account the version of events which the Appellant and Mrs Bee had given. Mr Devlin had relied in his review on the information given by the Appellant and Mrs Bee in interview. The facts upon which he had relied were borne out by the evidence, and the inferences which he had drawn were not rebutted by any contrary evidence. The Tribunal should not look at the facts relating to the seizure, because by the time of the review the goods were deemed to have been seized lawfully.

25. Mr Thomas referred to a number of other authorities besides *Hodgson*, some of them, upon which the Commissioners did not rely, in order to draw the attention of the Appellant, who was not represented, to them. He referred to *Wednesbury Corporation v Associated Provincial Picture Houses Ltd* [1948] 1 KB 223, *Customs and Excise Commissioners v J A Corbett (Numismatists) Ltd* [1982] 1 WLR 653, and *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941, and the exposition of the approach to reasonableness in *Bowd v Customs and Excise Commissioners* [1995] V&DR 212. He referred to *Berry v Customs and Excise Commissioners* [1995] V&DR 204, *Lennon v Customs and Excise Commissioners* (2000) (Decision E 138), *Hanks v Customs and Excise Commissioners* (2000) (Decision E 145) as examples of decisions dealing with "own use". In *Williams v Customs and Excise Commissioners* (2001) (No E 171), Mr Thomas submitted that the Tribunal had been wrong to find on the evidence that the goods imported were not for the appellant's own use, which was inconsistent with a supervisory jurisdiction. Further, in the same case, the Tribunal had considered proportionality, and had decided the appeal in the appellant's favour on that ground. That was wrong also, Mr Thomas contended, since proportionality was irrelevant, and the review officer had not been asked to consider it. His failure to do so was, therefore, not unreasonable. The Commissioners' policy was further considered in *Hopping v Customs and Excise*

Commissioners (2001) (No E 170), in which the Tribunal also said that the matter of proportionality was introduced by consideration of the appellant's property rights under Article 1 of Protocol 1 of the Convention on Human Rights. In *Moon v Customs and Excise Commissioners* (2001) (No E 183) the Tribunal had held that it was entitled to consider the decision not to restore based upon the earlier decision to seize, since if there had been an improper seizure it cold not be cured by a review decision confirming refusal to restore based upon such an improper seizure. *Lindsay v Customs and Excise Commissioners* [2001] V&DR 219 was distinct in that there was positive evidence relating to the value of the vehicle and of the goods and the question of proportionality was specifically raised. Lastly, the case of *Dereczenik v Customs and Excise Commissioners* (2001) (No C 138), in which the appellant neither appeared nor was represented, the Tribunal held that the Commissioners had not allowed their policy to prevent them going through a proper decision-making process. Referring to *Air Canada v United Kingdom* 20 EHHR 150, at paragraph 36, the Tribunal found that the decision not to restore the vehicle was proportionate.

26. The Appellant referred briefly to the cases cited by Mr Thomas, and sought to distinguish them from his own case on their facts. In *Moon*, the appellant had lied to the Customs officers when asked where he had been, as also had the appellant in *Lennon*. Also in *Hopping,* the appellant said that she had been only to Calais, when in fact she had been to Belgium. In *Williams*, there had been notes found in the car which were apparently lists of goods to be obtained for others. *Air Canada* was a case of smuggling cannabis. In *Berry* the goods had been concealed, which was clearly smuggling. *Goldsmith*, *Hanks*, *Bowd*, and *Hodgson* were also distinguished on their facts and, the Appellant said, had no application to his case. He had been co-operative with the officers. The Appellant said that he had not lied, nor was he importing goods for which other people had paid. If the quantity of goods were divided between the two people concerned, the excess over the minimum indicative levels was greatly reduced. If he was earning £300 a week, the Appellant said, why was it unlikely that he should have a few hundred to spare? He had minimal financial commitments: he had no mortgage and was not married. The Appellant made a number of assertions relating to his finances about which no evidence had been given. He said that he considered his finances to be personal and private, but stated, "I am not skint."

28. The Appellant dismissed as nonsense two of the reasons for seizure, namely that his expenditure on the excise goods did not equal his income, and that he had made twenty previous trips. The second of those reasons, which were the initial reasons for seizure, was, he contended, weakened still further by the officer's changing the number later to ten. He said that he and Mrs Bee had handed their receipts for the goods to the officers. Whatever the officers said that Mrs Bee had told them, the Appellant said that he had bought the goods, and it was their intention to sort it out when they got home. He said that the Customs officers do not listen to what you have to say; they make up their minds first to seize goods and vehicles, and then do not listen. He said that he had never been stopped by Customs before, and was not importing the goods commercially, and could well afford to buy the goods. Mrs Bee had not come to the hearing, as she was frightened of it. No allowance had been made for her feeling frightened by the interview, which had been under pressure, nor had any inquiry been made as to what her financial means really were.

Conclusions

29. The jurisdiction of the Tribunal in this type of appeal is limited by statute to supervision of the review decision. We have, therefore, no jurisdiction to

determine whether the seizure was lawful, nor may we substitute our own decision for that of the review officer. The Appellant has the task, therefore, of satisfying the Tribunal that the Commissioners' review decision was one at which they could not reasonably have arrived. The word "reasonably" in this context has the meaning used in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. In that case Lord Greene, MR, said, at page 229,

> "A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matter which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v Poole Corporation* [1926] Ch 66 gave the example of the red-haired teacher dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all those things run into one another."

The same concept, as it should be approached by the Tribunal reviewing the exercise by the Commissioners of their discretion, was expressed by Lord Lane in *Customs and Excise Commissioners v J H Corbett (Numismatists) Ltd* [1980] 2 WLR 653, at page 663:

> "It could only properly [review the Commissioners' exercise of their discretion] if it were shown that 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."

30. Therefore, we have to determine whether Mr Devlin's decision was reasonable in this sense (often referred to as "the *Wednesbury* sense"). That does not mean that we may not consider the evidence surrounding the seizure of the goods and vehicle. But we may only consider it in so far as it bears upon the review decision. If, for instance, a significant factor which was taken into consideration, as a fact, in the review had no basis in the evidence of the officer or officers who had seized the goods or vehicle, that might tend to shew that the decision was unreasonable as including an irrelevant matter. Or if a significant factor which arose in interview was ignored or not given its proper significance in the review, again that might tend to shew that the decision was not *Wednesbury* reasonable. That would be so whether the review officer knew the truth or not. The review decision is the decision of the Commissioners acting by the review officer; the Commissioners are in possession of the true facts through the interviewing or seizing officers. We therefore consider the review decision and the reasons for it as amplified or explained by Mr Devlin in evidence and in the context of the evidence upon which that decision is based.

31. The principal grounds upon which Mr Devlin reached his decision are set out in paragraph 14 above. In the second part of that paragraph, Mr Devlin stated that he had not accepted that the goods were for the Appellant's and Mrs Bee's own use. His reasons for not accepting that contention were, first, the quantity of the goods. There is no dispute that between the two of them the Appellant and Mrs Bee had imported eleven times the number of cigarettes given in the

Schedule to the 1992 Order, and three times the quantity of hand-rolling tobacco, though he did not consider that the amounts were exceptionally large and such as might damage legitimate trade.

32. Secondly, Mr Devlin said that the officers were of the view that the Appellant had not rebutted the statutory presumption of commerciality. That is the presumption set out in Article 3A(5) of the 1992 Order, relating to shuttle train goods. The officers did not, however, say, in their notes, in express words, that the goods and vehicle had been seized because they were not so satisfied. Mr Stapleton's notes record that he read the "commerciality statement" to Mrs Bee. However, Mr Whybrow's notes do not record that any such statement was read to the Appellant, nor that anything was said to him which required him to satisfy that officer that the goods imported by him were not for a commercial purpose. Further, in the review letter, Mr Devlin stated that a requirement had been made to both Mrs Bee and the Appellant "to satisfy Customs that the goods you were importing qualified for relief from UK duty by being for own use." That does not appear in the notes of either officer. Nor does it appear that any such requirement was made of the Appellant at all. That being so, he was under no obligation so to satisfy the officers. Mr Devlin appears to have been misinformed.

33. Thirdly, Mr Devlin did not accept that the goods were for the Appellant's and Mrs Bee's own use because of inconsistencies in what the officers had been told and certain claims made by Mrs Bee. (see paragraph 13 above). Mr Devlin was saying, in effect, that he did not believe what Mrs Bee and the Appellant had said specifically and for that reason did not believe them when they maintained that the goods were for their own use; he disbelieved certain things that had been said, and appears thereafter to have considered that nothing else that they had said was believable. Among those things was the inconsistency relating to the matter of who paid for what goods. Seemingly it did not occur to Mr Devlin that one of those accounts was likely to be right and the other wrong. The receipts handed to the officers by Mrs Bee and the Appellant might have revealed which was right. These were not produced by the Commissioners at the hearing, nor was it disputed that they had been handed to the officers. Another was Mrs Bee's statement that the cigarettes would last her "ages". Again, Mr Devlin does not appear to have contemplated the possibility that Mrs Bee's idea of "ages" and his own, or that of the officer, might differ considerably. Mr Devlin did not appear to believe Mrs Bee when she said that she smoked 400 a week; saying that "if she were active for 10 hours a day" she would smoke 60 a day. Many people rise at 8.0 in the morning and go to bed at 10.0 at night, or even later. Why an active day of ten hours was assumed was not clear and was unexplained. If it were fourteen hours a day, the number would be a little over four an hour. There are many other unknown factors, and it seemed to us that to make such an assumption was rash. Yet another inconsistency was Mrs Bee's statement that she had bought a considerable quantity of alcoholic goods a fortnight before, all of which she had consumed. Mrs Bee did not say that she had used it for entertaining friends.

34. The refusal letter gave as the fourth and last ground that the Appellant's expenditure on the excise goods was "incommensurate with his disposable income". Mr Whybrow had certainly asked the Appellant about his earnings, and had been told that the Appellant earned on average £300 a week (or £15,600 a year). But he made no inquiry as to any other resources that the Appellant might have had. There was, therefore, nothing before the officer who refused restoration to say that the Appellant may have had ample funds, perhaps from savings, perhaps from some other legitimate source, from which to fund this expenditure. But Mr Devlin had read the Appellant's letter of 5 February 2001

(see paragraph 9 above), in which he made it clear that he had little or no financial responsibility and could easily lay his hands on £1,500. Again, Mrs Bee was asked only what her job was and, when she said she was sick, what her benefit was. She was apparently not asked how she had funded her purchases. The officer had asked her questions which he had down on a list from which, he said, he had not departed.

35. It follows that, in considering the reasons given for refusing restoration, Mr Devlin considered the first (excess MILS) and the last (funds). The first he was bound to accept. The last was followed by an answer from the Appellant which, presumably, Mr Devlin did not believe, though he did not say so, nor did he refer to it at all. It is implicit in the second of the two paragraphs from the review letter quoted in paragraph 14 above that Mr Devlin ignored that answer, since his disbelief that the goods were for the Appellant's own use was based upon what was said in interview. In saying that he did not believe that Mrs Bee could not have saved £700 in two weeks with an income of £79.50 a week, he did not take into account the fact that Mrs Bee had never said that she had saved it in so short a time.

36. The review decision is based, therefore, upon the fact that the goods exceeded the quantities in the Schedule, and the "inconsistencies" referred to by Mr Devlin. It seemed to us to be entirely reasonable that he should disbelieve Mrs Bee's allegation that she had consumed 36 bottles of wine and 105 pints of beer a week for two weeks. Mrs Bee had made no mention of the wine and beer having been drunk by any friends or guests, or that she had thrown a party. Nor did Mr Devlin believe that Mrs Bee smoked 400 cigarettes a week (or 57 a day, which amounts to four or five an hour assuming a 12-hour day), though he gave no reason for that. Mr Devlin did not consider eleven weeks to be "ages". But that is an indefinite word and must be a subjective concept. Perhaps Mrs Bee does consider eleven weeks to be ages. She was never asked to be more specific. The real inconsistency between what the Appellant and Mrs Bee had said was over who had paid for what and when.

37. Mr Devlin clearly based his review decision upon those factors, appearing from the notes of the officers, which was the foundation of the decision to seize the goods and the vehicle. Mr Devlin seems then to have gone straight to the conclusion that, because (it is implied) the seizure was lawful, restoration should be denied. He made certain statements regarding the Commissioners' policy as to restoration. In the review letter he said,

> "Restoration Policy
>
> 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:
>
> > i. any evidence of previous smuggling or failure to comply with legal requirements;
> >
> > ii. any evidence that the person involved knew what they were doing was wrong;
> >
> > iii. any evidence that the person was paid to make the journey;

> iv. large quantities of goods which might damage legitimate trade;
>
> v. any evidence that the goods were for a commercial purpose.
>
> The Commissioners' policy regarding private vehicles seized as a result of their use in the improper importation of excise goods is that they will not be restored even on the first occasion that they are so used. That policy applied at the time of the seizure of the vehicle...."

Later in the review letter, he said,

> It remains for me to decide whether or not the seized things should have been restored. The basis of the seizure of the goods was that they were for a commercial purpose in the absence of any satisfaction to the contrary. Commerciality is a criterion which precludes restoration under the Commissioners' policy and I am satisfied that the refusal to restore the goods was in line with that policy.
>
> As the vehicle was privately owned, policy is that it too should not have been restored. I have therefore read your correspondence to see if you have made out a case for disapplying that policy. The thrust of what you have written is that the goods you were importing were for your own use. As I have not accepted that, for the above reasons, I do not consider that the decision regarding the car should not be maintained.
>
> I have not been able to conclude that the decisions contained in the letter of 13 January 2001 were ones which a reasonable body of Commissioners could not have reached."

38. The decisions in the letter of 13 January 2001 were not to restore and that there were no exceptional circumstances which would justify a departure from the policy not to restore (see paragraph 8 above). It would therefore appear that Mr Devlin is either adopting the four reasons given in that letter, notwithstanding that he said that he had ignored the second and third of them, or upholding a decision in spite of there being two reasons which he considered should not be given any weight.

39. During cross-examination, Mr Devlin said, when being asked about the five numbered factors set out in the quotation from the review letter in paragraph 37 above, that there was no evidence relating to factors i to iv. As to factor v, he said that there was evidence of a commercial purpose, and that the goods were not for the Appellant's own use. He continued, "The Commissioners never restore such goods." But it appears, from the review letter and other evidence given by him, that Mr Devlin has concluded that there was a commercial purpose only on two grounds: that the quantities of goods exceeded the Schedule, and that the expenditure was not commensurate with the income of either the Appellant or Mrs Bee.

40. It is clear that an amount of goods in excess of the quantities set out in the Schedule, unless a vast amount, is not by itself evidence of a commercial purpose. That is simply the fact which triggers off the requirement (if any) to

satisfy the officers that the goods are not held for a commercial purpose. The 1992 Order contemplates that a Community traveller may bring in greater quantities, and that is the reason for the requirement so to satisfy the Commissioners. Something more is therefore required. In this case, it was, first, the comparison between expenditure and disposable income. But the officers, and in his turn Mr Devlin, ignored the possibility that either or both of the Appellant and Mrs Bee may have had funds available other than their incomes. In the case of the Appellant, Mr Devlin knew that he had said that he had other available funds. We do not forget that Mr Devlin also referred to inconsistencies, which included the matter of finances.

41. We have concluded that to ignore the possibility of there having been funds available to both the Appellant and Mrs Bee for the purchase, when that factor was given such prominence, was to ignore a matter of relevance and importance in the review of the decision not to restore. It would not be enough, in our view, for the Commissioners to seek to answer this by saying that the Appellant and Mrs Bee had the opportunity to explain fully how they had funded their purchases. In the first place, Mrs Bee was asked questions from a list from which the officer did not depart. Secondly, the Appellant, not having been required to satisfy the officers as to the question of commerciality, was not asked how he had funded the purchases, merely what his income was. Further, the assumption, or the mistake of fact, that the Appellant had been required to satisfy the Commissioner that the goods were not held for a commercial purpose appears also to us to have influenced the review decision. In those circumstances, we have come to the conclusion that the review decision was not reasonable in the *Wednesbury* sense.

42. Accordingly, we direct, in accordance with section 16(4) of the 1994 Act, that the Commissioners should carry out a further review of the decision not to restore the goods and the vehicle, taking into consideration:

(a) the fact that the Appellant was not required to satisfy the Commissioners that the goods were not held for a commercial purpose;

(b) the possibility that Mrs Bee may have had funds, in the form of savings (as she stated), other than her weekly income, which were available if she chose for the purchase of the goods;

(c) the fact, as stated by the Appellant in his letter of 5 February 2001, that he had funds available for such purpose as he might choose, in addition to his income;

(d) that the function of the review officer is to come to a decision in the light of all the circumstances, and not to consider whether the decision under review was one which no reasonable body of Commissioners could have reached.

43. In the circumstances, we have decided this appeal without reference to article 5(3C) of the 1992 Order. On the face of that paragraph it might appear that the Tribunal was given power to determine on the facts whether or not the seizure of goods and vehicle was lawful, notwithstanding the limited jurisdiction with which the Tribunal is invested by section 16(4) of the 1994 Act. Mr Thomas argued that that construction of article 5(3C) was incompetent, as, to put it briefly, secondary legislation could not overrule primary legislation, and that paragraph could be construed as meaning that a person could take the matter of seizure to the

magistrates' court, by way of condemnation proceedings, to challenge the validity of the seizure, and could then appeal to the Tribunal. However, this is not a point which we ought, in our view, to decide without proper argument on both sides. The Appellant unsurprisingly, since he was not represented, did not mount a contrary argument.

44. At the end of the hearing both parties stated that they did not wish to apply for costs. We therefore give no direction as to costs.

ANGUS NICOL

CHAIRMAN

RELEASED:

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