

Tobacco products – Appellant unable to satisfy Commissioners that they were for his own use – Refusal to restore – Presumption of commerciality – Lindsay v Commissioners of Customs and Excise considered – Commissioners’ decision not unreasonable – Appeal dismissed

LONDON TRIBUNAL
CENTRE

PATRICK JOHN WHITE Appellant

- and -

THE COMMISSIONERS OF
CUSTOMS AND EXCISE Respondents

Tribunal: MR PAUL HEIM CMG (Chairman)

MISS A WEST FCA

Sitting in public in Plymouth on 1 May 2002

The Appellant in person

Mr Richard Smith of counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

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DECISION

1. Mr White appeals against a decision of the Commissioners taken on 1 May 2001, to refuse to restore to him 12.5kgs of hand-rolling tobacco, which was seized as liable to forfeiture under section 139 of the Customs and Excise Management Act on 21 January 2001 at the Hover Port at Dover.
2. At the hearing of this appeal Mr White represented himself with the assistance of a friend, Mr D Harris. The Commissioners were represented by Mr Richard Smith of counsel.
3. It is not in dispute between the parties that on 21 January 2001 the Appellant was stopped by officers of Customs and Excise at the Hover Port at Dover and in response to questions said that he was carrying 12.5 kilos of hand-rolling tobacco. In reply to question from the officers, a note of which was kept by them, the Appellant said that he was travelling alone, that he had been to Ostende for the day, and that he had bought tobacco for himself, his son and his daughter who would pay him for the goods when they got them. He would make no profit from this transaction.
4. Mr White had in his possession a Customs information notice which sets out the guide levels for the importation of excise goods.

5. The goods were then seized and a seizure information document given to the Appellant.

6. On 25 January 2001 the Appellant wrote to the Commissioners stating that he wished to appeal. He said:

"I accept that I may have suffered from the child in a sweet shop in the quantity purchased however as it is the first time I have ever stepped into Europe I feel I could be excused. The products were legally purchased and tax paid and for my personal use. Your officer used very experienced questioning and was somewhat artful in his approach. I have no complaint in this regard. I incorrectly gave the impression that I would recover the cost from my son and daughter this is not correct I was attempting to justify to him the quantity I had. Also I had travelled some 350 miles to get to Dover and was tired ..."

7. On 3 February 2001 the Appellant replied to a letter from the Commissioners, and asked for the restoration of the goods seized to be considered. The reasons he gave were that it was the first time that he had ever travelled to Europe, that he had inadvertently said that his son and daughter would pay the cost of any goods he gave them, that he had said this out of nerves and that he had travelled up from Plymouth and was nervous and tired.

8. On 1 May Mr McEntee, review officer at Dover informed the Appellant that he had reviewed his case under the system of reviews and appeals created by the Finance Act 1994. He had considered the evidence put before him, his subsequent correspondence, legislation and current departmental policy he informed him that the decision not to restore the goods would be maintained.

9. It is against that decision that the Appellant now appeals, stating in his notice of appeal that the decision was unfair and unreasonable insofar as he had never travelled abroad before therefore did not realise that the notice sent to his partner by the DVLC i.e. the minimum indicative levels, was legally enforceable. He had been "led by the nose" into making an untrue statement by the Customs officer.

10. Giving evidence Mr White said that he had bought the tobacco for himself and his children. His son was a registered drug addict who smoked a lot. When asked by the officer whether his son would pay for the tobacco he had replied yes, and the officer then said that he would seize the tobacco as he would be selling it. In fact he would not have sold it to his son. There was no chance of getting money out of his son. Asked whether he had not given several different versions of the matter, Mr White said that this was not so. He had said that his son would pay for the tobacco he received so as to help him keep it.

11. Evidence was given for the Commissioners by the reviewing officer Mr McEntee, who said that the duty on the goods would have been £1,189 without VAT on that duty. He said that in his view this was a large amount of tobacco, far too much for one person. Normally one would expect it to go stale before it could be consumed.

12. In reply to questions Mr McEntee stated that the Commissioners' general policy was not to restore improperly imported goods unless there were exceptional circumstances. He looked at all the evidence to see if there were exceptional circumstances. This could be any matters, not only legal matters. There was no record that the Appellant had crossed the Channel before. Asked whether this amount of tobacco was excessive if bought for a family unit the

witness said that this was not the explanation which the Appellant had given, and that had he given it he would have been asked further questions for example about his earnings. He made his decision on the facts presented to him.

13. Mr McEntee said that if he had disagreed with a decision not to restore he could overturn it.

14. The Appellant maintains that the decision not to restore the 12.5 kilos of hand-rolling tobacco was unreasonable. The Commissioners say that it is necessary to consider the material before Mr McEntee when he made the decision under appeal. He had before him the interview notes which contained the evidence of proposed payment, he had the letters which gave different versions, and he had the evidence that the Appellant had a copy of a notice issued by the DVLC Office, which was produced to the Tribunal, and which warned persons against smuggling tobacco, and gave indicative levels of the amounts which should not be exceeded. The amount for smoking tobacco was 1 kilo. The Commissioners suggested that the Appellant was being wise after the event. He had given three explanations, contradictory as to their nature, and had produced no exceptional circumstances justifying restoration. The Commissioners were entitled to have a policy to deter the improper importation of excise goods; the decision to refuse to restore them was in the circumstances reasonable.

15. There is no dispute about the legal provisions governing this case.

16. The Commissioners' decision not to restore the excise goods was made under section 152(b) of the Customs and Excise Management Act 1979, which provides that they "may, as they see fit ... restore ... any thing forfeited or seized" under the Customs and Excise Acts.

17. Section 139 of the same Act provides that "any thing liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer ...".

18. Article 3 of the Excise Duties (Personal Reliefs) Order 1992 provides that excise goods are liable to forfeiture where the required conditions are not fulfilled.

19. Schedule 3 to the Act requires the Commissioners to give notice of the seizure of anything liable to forfeiture, and the grounds for this, to any person who was at the time of seizure to their knowledge the owner of it. However, paragraph 2 of Schedule 3 provides that this need not be done if the owner is present at the time of seizure.

20. Under paragraph 4 of schedule 3 the legality of the seizure by the Commissioners can be challenged. Where no challenge is entered within the proper time the thing seized is deemed to have been duly condemned as forfeited. No such challenge was made in this case.

21. It is therefore for the Tribunal to consider whether the Commissioners' decision not to restore the goods to the Appellant should stand.

22. The Tribunal's jurisdiction is limited by sections 14 –16 of the Finance Act 1994 and in particular by the provisions of section 16(4) that "in relation to any decision as to an ancillary matter [and this is such a matter] or any decision on the review of such a decision, the powers of the appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied

that the Commissioners or other persons making the decision could not reasonably have arrived at it, to do one or more of the following, that is to say –

"(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the commissioners to conduct, in accordance with the directions of the tribunal, of further review of the original decision and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

23. The Commissioners have referred the Tribunal to a number of decisions in particular *Hopping v Commissioners of Customs and Excise* (LON/01/8003) at paragraph 23, *Bowd v Customs and Excise Commissioners* [1995] V&DR 212 quoting *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1981] AC 22, and *Lindsay v Commissioners of Customs and Excise* (as yet unreported).

24. It follows from these decisions that to succeed the Appellant must show that the Commissioners' decision is unreasonable because they have acted in a way which no reasonable panel of commissioners could have acted, that they have taken into account some irrelevant matter or disregarded something to which they should have given weight or made some other error of law.

25. It is not suggested that the Commissioners have committed any error of law; there is no indication that they have done so apparent on the evidence before the Tribunal.

26. As far as the reasonableness of the Commissioners' decision is concerned the Tribunal considers first that it is not unreasonable for them to have a policy on seizure of goods improperly imported, and that the Excise Duties (Personal Reliefs) Order 1992 clearly indicates the scope of the reliefs from duty available in the case of personal imports.

27. While the Commissioners' decision is in principle not to restore goods seized, unless there are exceptional circumstances, the evidence is that every case is examined on its merits and that the reviewing officer in this case would reverse decisions not to restore if he thought they were incorrect. He was cross-examined robustly on this point but there is no reason to doubt his evidence that he carried out a review of all the facts in each case coming before him. There is no reason therefore to believe that the Commissioners have fettered their discretion to restore by refusing to consider applications to review decisions not to restore. The Tribunal was referred in this regard to the appeal of *Hopping v Commissioners of Customs and Excise* (LON/01/8003) in which appeal the tribunal was satisfied, as is the Tribunal in the present case, that the officer responsible for the decision was prepared to listen to relevant explanations that the Commissioners' policy should not be applied.

28. In deciding whether it has been shown that the Commissioners' decision not to restore the goods was unreasonable the Tribunal refers specifically to two facts. The first is that an amount of 12.5 kilos of hand-rolling tobacco is, on the evidence, a substantial amount, for a holiday maker to bring back for his own

use. To benefit from the reliefs in the Excise Duties (Personal Reliefs) Order 1992 the Appellant must show that the goods were for his own use. If he is not able to do so, there is a presumption that he was holding them "for a commercial purpose". The reasoning underlying that presumption was criticised in the recent Court of Appeal decision of 20 February 2002 in *Lindsay v Commissioners of Customs and Excise* in the following terms:

"So far as the 1992 Order is concerned, I cannot accept that a holiday maker who is bringing back some cigarettes for his sister, in anticipation that she will reimburse him the purchase price, can properly be said to be holding the cigarettes for a commercial purpose. The holiday maker will be liable to pay duty on the cigarettes by reason of the provisions of the Tobacco Products Duty Act 1979. He will not be entitled to relief because he has not obtained the cigarettes for his own use".

29. Apart from the doubt about whether this was a personal importation created by the quantity of goods, the Appellant faces the difficulty that he has given several versions of his case. At interview he did not say that all the goods were for his own use. He said that they were for his son and daughter and that they would pay him when they took the tobacco. In his letter of 14 March 2001 however he said that the goods were for his personal use and gifts for members of his family. He said that he had not seen the guidelines before the seizure of the goods, although he did have those guidelines with him. In his notice of appeal however he said that he did not realise that the notice sent to his partner contained legal enforceable levels. In the same letter he said that the crux of the matter was that his son was not able to pay as he was unemployed. However in his letter of 25 January the Appellant said that the goods were for his own use. In his letter of 3 February he said that he had inadvertently said that his son and daughter would pay the cost of any goods he gave them. He said that he had said this out of nerves. He gave as further reasons that this was the first time he had ever travelled to Europe and that he was both nervous and tired.

30. It may well be that he was nervous and tired but nevertheless it is the fact that the Appellant has given several inconsistent explanations for his purpose in importing these goods.

31. These matters were before the reviewing officer and the question is whether in the light of these matters, seen with all the facts there were before Mr McEntee, it can be said that his decision to refuse to restore the goods was unreasonable, in the way in which that term has been defined. Considering that definition the Tribunal is bound to say that the reviewing officer has not taken into account any irrelevant matter or disregarded any matter brought to his attention. Then the question is whether he should have given more weight to the Appellant's explanations of the inconsistencies in his statements, and to the allegations that he was "led by the nose". However the Appellant has had ample opportunity to comment on the interviews, and his comment in his letter of 25 January 2001 that he had no complaint about the questioning has reduced the value of any criticism. The Commissioners clearly disbelieved his explanations. It was not unreasonable that they should reach that conclusion.

32. The Tribunal takes account of the comments of the Court of Appeal quoted earlier. The Tribunal takes the facts of this case to be different. It was not unreasonable for the Commissioners to conclude from the facts before them that this was not a case of a holiday maker bringing back cigarettes for members of his family, but a case to which, in the absence of grounds satisfying the officers as to own use, the presumption of commerciality applied.

33. Considering the matter in as favourable a light as possible for the Appellant, the Tribunal is not able to find any ground on which the decision of the reviewing officer has been shown to be unreasonable. The officer was entitled to consider the quantity of the goods, and to consider the Appellant's claim to be entitled to relief in the light of the inconsistencies in his statements.

34. The statute has given the Commissioners a discretion on restoration, and has limited the power of the Tribunal to interfere with the exercise of that discretion to cases where it can be shown that that discretion was unreasonably exercised. The Tribunal is satisfied that it has not been shown to be so in this case and therefore this appeal must be dismissed.

PAUL HEIM CMG

CHAIRMAN

RELEASED:

LON/01/8067-WHI.HEIM