

*Dutiable goods – Attempt to satisfy officers that they were for use of importer and family – Seizure of goods and vehicle – Refusal to restore – Presumption of commerciality – Commissioners' discretion – Interviews – Reasonableness – Proportionality – Appeal allowed*

**LONDON TRIBUNAL CENTRE**

**DAVID & CHRISTINE ROBERTS Appellant**

**- and -**

**THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents**

**Tribunal: MR PAUL HEIM CMG (Chairman)**

**MR R D CORKE FCA**

**MR M L JAMES**

**Sitting in public in Cardiff on 10 December 2001**

**The Appellant in person**

**Ms Z Taylor of counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents**

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**DECISION**

1. Mr and Mrs Roberts appeal against a decision taken by the Commissioners on 23 April 2001 maintaining an earlier decision not to restore certain excise goods and a Peugeot motor vehicle registration number P 491 SGB seized by officers of HM Customs & Excise on 19 January 2001.
2. At the hearing of this appeal Mr David Roberts appeared for both Appellants. The Commissioners were represented by Ms Taylor of counsel.
3. The history of the matter is not in dispute. Mr and Mrs Roberts are the parents of Mr Jason Roberts. On 19 January 2001 in the afternoon Mr Jason Roberts was driving the motor vehicle in question. He was accompanied by his mother Mrs Christine Roberts. At Coquelles in France in the UK control zone they were stopped by an officer of Customs and Excise. He asked them a number of questions. Notes were taken. The officer asked them in particular where they had

been. They replied that they had been to Calais. They said that they had bought 800 cigarettes from the duty free shop. According to the Appellants' case, although there is no evidence on this, Mrs Roberts would then have given further information had the officer not interrupted her and asked to look in the boot of the vehicle. It is not in dispute that there were excise goods in the boot, and other such goods on the back seat of the vehicle. It is not in dispute that these goods were 13,200 cigarettes, 5 kilos of hand-rolling tobacco, 100 cigarillos, 36 litres of beer, 3 litres of mixed spirits, and 6.6 litres of vodka.

4. The officer then read to them a "commerciality statement" which made it clear that they were required to satisfy the Commissioners that the goods were not imported for a commercial purpose. They were then advised that they were not under arrest but were free to leave, in which case they would have to abandon the car and goods, but they could also stay and answer further questions. Apparently both agreed to remain to answer questions, and they were questioned separately.

5. Mr Jason Roberts is recorded as having said that the goods "belonged to both Mr Roberts and Mrs Roberts, some for him, some for his mother, some for his dad, two sisters, gran and mum's stepdad". He explained that some of the cigarettes would be for himself, some for his father, 800 cigarettes for his mother, that no one had given him money for any of the cigarettes or tobacco, that his mother had paid for all the goods except for the cigars which were a present for his girlfriend, that he was present when his mother purchased the goods and that the goods were purchased in a small shop in Belgium for cash. He had not given his mother any money for the cigarettes. He was a student. He further said that the goods for him were a present from his mother because he did bits for her and running around. There was no real reason for not saying that they had been to Belgium. There was nothing wrong in going there. He smoked cigarettes. He had made three trips across the Channel in the last twelve months he brought back some wine and beer. The cigarettes were in a box because they did not want to leave them in view.

6. Mr Jason Roberts then signed the officer's notebook.

7. The officer was not satisfied that the goods were intended for a non-commercial purpose. His reasons were:

An excess over the Minimum Indicative Level;

Misleading the officer over initial questions;

Concealed goods;

Using goods as payment;

Not all goods declared.

The goods and vehicle were then seized.

8. A second officer recorded an interview with Mrs Roberts in which she stated that all the goods belonged to her and that she had paid for them. They had been purchased mainly in Belgium, for about £1,300. No one had assisted with the purchase. She did not expect to receive any money for the goods. She both smoked and drank. The Silk Cut were for one daughter, and the Bensons were for

her daughter's partner. The tobacco was for her stepfather and it was in a way payment for odd jobs in the flats they rented out. She said that she earned £60,000 to £70,000 a year, that she had previously travelled abroad, and bought beer and assorted bottles of spirits, that she had made three to four trips in the last twelve months.

9. The officer then issued a seizure information form to Mrs Roberts and Mr Jason Roberts, together with a seizure of vehicle letter and a warning letter.

10. Mr David Roberts, by letter of 22 January 2001 wrote to the Commissioners explaining the circumstances of the trip made by his wife and son, following this by further letters in particular one of 1 February 2001 stating that it was not the intention of himself, his wife or his son to import goods for commercial gain or to break any laws. The goods were entirely for the use of the Roberts family.

11. By letter of 2 February 2001 Mrs Roberts and Mr Jason Roberts asked for restoration of the seized goods, stating that the reasons for travelling were to exchange certain goods that had been wrongly purchased, to buy 21<sup>st</sup> birthday present for her daughter, and to shop for the family.

12. On 23 February 2001 the Commissioners informed Mrs Roberts and Mr Jason Roberts that the goods would not be offered for restoration giving the following reasons:

"The goods were in excess of the minimum indicative levels, they misled the officer during initial questioning, they were using the goods as payment, they concealed the goods, and not all the goods were declared. There was no reason to depart from the Respondents' stated policy."

13. On 8 March 2001 Mrs Roberts wrote replying saying that the goods were for the family's own use, that there was no intention to mislead the officer if that had happened, that the goods were not to be used for payment, that the goods were concealed for security reasons and that the goods were declared. That letter amounted to an appeal against the refusal to restore. On 10 March 2001 the Commissioners informed Mr David Roberts that the vehicle would not be offered for restoration, stating that the Commissioners' efforts were directed towards deterring and detecting fraud, failure to pay excise duty that was due, irregularities and to encourage compliance with procedures established to control movements of excise goods, and that no exceptional circumstances had been found to justify a departure from the policy.

14. On 15 March 2001 Mr David Roberts again wrote, making the point that the goods had been bought for the family's enjoyment, and that the loss of the vehicle was causing considerable distress. On 23 April 2001 Mrs Roberts was informed that the reviewing officer confirmed the original decision not to offer restoration of the seized excise goods, and on the same date Mr David Roberts was informed that the original decision not to offer the seized vehicle for restoration was also confirmed.

### **The Appellants' case**

15. It is the Appellants' case that the Commissioners' refusal to restore the vehicle and the goods is unreasonable. The purpose of the trip to Belgium was to exchange a present bought on an earlier occasion. Mrs Roberts and Mr Jason Roberts went to Belgium to buy excise goods for the family. The children were

going back to university. They would have taken some of these goods to university with them. While the Commissioners said that the amount of goods was unreasonably high, they were all going to the family with the exception of some 10% which would go to Mrs Roberts' stepfather. The amount of £1,300 which the goods cost was no embarrassment to the family. Documentary evidence was produced to show this was the case. Under article 8 of Directive 92/82 travellers have the right to bring back any amount of goods for their own use, without having to declare them where duty had been paid in the country of purchase. Mr Roberts said that he recognised the United Kingdom's government's rights to protect its own internal market but that these rights stopped short of interfering with the right of free trade. The Commissioners' policy was more rigorous than the 1979 Customs and Excise Management Act allowed. No consideration was given to the relative value of a vehicle seized and the amount of duty due.

16. The Appellants consider that the Commissioners had not taken into account all the facts. The Appellants' rights under Article 1 of the First Protocol to the European Convention of Human Rights and Article 6 of that Convention had not been taken into account. With regard to the interview of Mr Jason Roberts and Mrs Roberts no advice as to their rights had been given. They had had no legal representation. They had not been given copy of the statements. The way the statements were taken amounted to intimidation. The value of the vehicle was £5,995. It had now been sold. He had however been informed earlier that once there was an appeal the vehicle would not be released from the Commissioners custody. He had been notified of his right to recourse to the Magistrates court against seizure or to seek restoration of the vehicle by appealing, but not that if he did not have recourse to the Magistrates court against seizure the vehicle would be sold. There was hardship on his son through the deprivation of the vehicle, the vehicle being for his use, because he now had to walk or take buses. His complaint that golf clubs and other personal property have been lost in the vehicle and not been properly dealt with.

17. The Appellant's case contains the following specific points.

18. The goods were not for commercial purposes. They were purchased entirely for family use. They amounted to no more than six to eight weeks of consumption for the family. There was no limit on importing goods for personal use under European law. There was no intention to mislead any officer. The officers were in fact looking for a reason to make a seizure. The goods were in boxes for security reasons as vehicles had been broken into by asylum seekers in Calais. In fact Mr Roberts had seen such an attempt himself. There was no truth in the suggestion, and no proof, that the goods were to be used for payment. The Commissioners' case on this point was guess-work. The interview with Mrs Roberts took place in cold conditions. It lasted an hour and forty minutes. The notes of Mrs Roberts' statement were illegible. When seizure notices were issued no enquiries were made to see whether Mrs Roberts and her son had money to get home. When Mrs Roberts enquired about personal possessions she was told to carry them.

19. With regard to the Minimum Indicative Levels they did not apply where goods were imported from another Member State for personal use. Personal use included gifts. The minimum levels were not to be taken as the maximum levels above which duty was to be paid. The burden of proof could not be laid on the traveller. With regard to the alleged misleading of the officer during questions there was no such intention. It was irrelevant whether the goods were bought in Belgium or in France. There was no obligation to declare goods brought back for own use.

20. With regard to the Appellants' human rights, they considered that when the Customs officer told Mrs Roberts and Mr Jason Roberts that they could either walk away and leave the goods and the car or answer questions at interview, this implied that he had reached a decision of guilt, that the goods were being brought in for commercial purpose, and that therefore there was a sufficient intent to commit a criminal offence. However in the case of a criminal offence they were entitled in accordance with Article 6(2) of the European Convention on Human Rights to be presumed innocent. Further, following the case of *Engel v Netherlands* (1979) 1 EHRR 647, the fact that the civil offence of evading excise duty involved dishonesty meant that a criminal offence was involved. The function of the penalty was both to deter and punish. The nature of the offence pointed to penalties ranking as a criminal charge. It followed that the interview should have been conducted in accordance with the conditions of the Police and Criminal Evidence Act 1994. Also the seizure of the goods amounted to a violation of the right of property expressed in Article 1 of Protocol 1 to the European Convention on Human Rights, and involved in violation of Article 6, and Article 7 of that Convention. The seizure of the vehicle violated the same rights.

21. Further, the Commissioners neglected the principle of proportionality. The punishment was out of proportion to the relevant misconduct. The Appellant had not had the necessary information about the matters held against them and no opportunity to reply.

22. The Appellants say that the seizure of the goods and the vehicle are unlawful. The Commissioners have the right to protect the United Kingdom market where goods are wrongly imported for a commercial purpose, but not where they are imported for personal use. The tactics used were oppressive and unlawful.

23. The unreasonableness of the Commissioners' conduct is alleged to be in not considering all the facts of the matter, in particular that the Appellants have shown that they could have funded the purchase of these goods with ease, and that there was no evidence that a third party had commissioned them, that the Appellants and their family were all smokers, and could have consumed these goods within a relatively brief space of time and made gifts of some of them, that there was no evidence at all of a commercial intention, and that no consideration was taken of the Appellants' true income.

### **The Commissioners' case**

24. The Commissioners' case is based on the evidence of the reviewing officer Mr McEntee. He said that in taking a decision on review of the decision not to restore the vehicle and goods he sought to make sure that there was evidence for the original seizure. He had before him the officer's notebook, the ticket, the seizure notice, and the letters between 22 January to 15 March 2001.

25. In carrying out his review he applied the Commissioners' policies. In accordance with these he had restored vehicles in the past where there were exceptional circumstances, for example that the seizure was not proper or that courtesy cars were involved, or where the property in the seized vehicle remained with an owner who was not the person from whom it was seized. In the present case he saw no exceptional circumstances to justify departure from the policy. The application of the policy did not treat the Appellants more or less leniently than others. He was satisfied that the seizure was correct. The basis of his decision not to restore were that there was evidence of commercial purpose and that there was evidence that the persons involved knew that what they were doing was wrong because they said that they had only gone to Calais and only

had 800 cigarettes. The revenue value of the goods was £2,271.57 in excise duty on the tobacco, cigarettes and spirits. He did not know the value of the vehicle but he thought that it was worth between £5,000 and £6,000. The way he understood the policy was that vehicles used for improper imports were liable to seizure so that if the goods were seized so would be the vehicle. The policy did not allow officers to look at the value of the goods and the value of the vehicle and automatically restore expensive vehicles. He saw nothing to warrant a departure from the policy which would have led to a restoration of the vehicle and the goods.

26. In answer to questions Mr McEntee said that the policy was that even on a first offence the policy of non-restoration applied. He understood that the Appellants have funded the purchase themselves. He did not know of their means. Asked whether the Appellants could not have paid the duty he said that this was not part of the policy. Asked about the minimum indicative levels he said that these were levels above which under the 1992 Personal Reliefs Order persons importing the goods had to satisfy the officers that the importation was for their own use. He considered that £180 worth of tobacco was to be given to Mrs Roberts' stepfather as payment in kind. He did not think that the amount of goods to be imported was reasonable. He applied the policy to this. The policy was robust and had to be applied across the board in as fair a way as possible. Asked what proof of commerciality existed the witness said that he applied the Personal Reliefs Order. Asked about personal goods left within the vehicle he said that he understood that the policy was that there was a post-seizure visit. Persons whose vehicles had been seized could take their property away either immediately or later if necessary.

27. The witness was asked about the relevance of the Appellants' means. An absence of means would have been considered as relevant to the issue of commerciality. Logically the existence of means would be relevant to the issue of commerciality.

28. The witness was asked whether it was not so that only some of the goods were in excess of the limits and replied that the policy was that the goods were treated as one consignment. In fact the limits were exceeded only in the case of cigarettes and tobacco. He agreed that there was no evidence of payment and none of damage to trade. The only evidence of commerciality was that of quantity. However the relief from duty was only for travellers. There was also the attempt to mislead. He saw Mrs Roberts' words at interview as indicating a commercial aspect. He did not find what she said was credible. He only went on the statement. It had been signed. This was a civil matter, not a criminal matter where judges' rules would apply. She was given the notebook to read, and had a chance to amend it. That is how he understood it. If she had refused to sign the matter would have been referred to a senior officer, the senior officer would have said that he was not satisfied that the goods were not for a commercial purpose.

29. The Commissioners also relied on a witness statement by a senior officer of Customs and Excise Mr Dolan, in which the Commissioners' policy was set out.

30. On this evidence the Commissioners say that their decision not to restore the vehicle and 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 Act. Their power to forfeit excise goods was extended by section 141 of the same Act to any vehicle which have been used for the carriage, handling, deposit or concealment of any thing. Under paragraph 1 of Schedule 3 to the Act the Commissioners were

required to give notice of the seizure of any thing liable to forfeiture to any person who was at the time of seizure the owner of it. Section 139 of the Act provided that "any thing liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer ...".

31. The legality of the seizure of any thing liable to forfeiture could be challenged by the entry of a notice of a claim within 30 days. Where such a notice was entered the Commissioners were obliged to institute proceedings for condemnation in the High Court or the Magistrates Court. No such notice of claim was entered in this appeal.

32. Article 3A of the Excise Duties (Personal Reliefs) Order 1992 excise goods were liable to forfeiture if the conditions set out are not fulfilled.

33. It is under these provisions that the goods and the vehicle were seized and forfeited.

34. The decision against which this appeal is brought is that of the Commissioners, taken on review by Mr McEntee, to refuse to exercise the powers set out in section 152(b) of the Customs and Excise Management Act 1979 to restore the goods and the vehicle.

35. The Commissioners' decision falls within the description specified in Schedule 5 to the Finance Act 1994 and is thus to be treated as an ancillary matter.

36. The Tribunal's jurisdiction in relation to such matters is set out in the body of the Finance Act 1994.

37. Section 14 of that Act applies to any decisions of the Commissioners specified in Schedule 5. Decisions under section 152(b) of the 1979 Act fall within paragraph 2(1)(r) of Schedule 5. They are thus subject to review and appeal under the procedure specified in section 14(2) of the Finance Act 1994. Such a review was carried out by the Commissioners in accordance with the provisions of section 15 of that Act. Accordingly an appeal lies to the Tribunal under section 16 of the Act. Section 16(4) to (7) states:

" (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 future.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(6) On an appeal under this section the burden of proof as to –

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,

(b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and

(c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid),

shall lie upon the Commissioners, but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.

(7) An appeal tribunal shall not, by virtue of anything contained in this section, have any power, apart from their power in pursuance of section 8(4) above, to mitigate the amount of any penalty imposed under this Chapter.

38. The Commissioners therefore say that the only jurisdiction which the Tribunal can exercise is a supervisory one in terms of section 16(4) of the Finance Act 1994 and that the Tribunal must consider whether it is satisfied that the Commissioners could not reasonably have arrived at the decision taken on review. The Commissioners refer the Tribunal for the definition of reasonableness to the appeal of *Hopping v Commissioners of Customs and Excise* (LON/01/8003) at paragraph 23, and to *Bowd v Customs and Excise Commissioners* (1995) V&DR 212 where reasonableness is defined as "*Wednesbury* reasonableness".

39. The Commissioners say that their decision can only be found to be unreasonable if the Appellants can show to the Tribunal that the Commissioners have acted in a way in which no reasonable panel of commissioners could have acted, that they have taken into account some irrelevant matter or disregarded something which they should have given weight, or made some other error of law.

40. The Commissioners refer the Tribunal to their stated policy in this matter, as set out in the witness statement of Mr Dolan, on the restoration of vehicles used in the improper importation of excise goods and the restoration of such goods.



They say that they are entitled to have such policies, which pursue the legitimate aim of deterring the importation of goods for commercial purposes without payment of duty and encouraging compliance, also allow for consistency in the decision-making of their officers. They point to the fact that the policy states the principle that privately owned vehicles used for the improper importation of excise goods will not be restored, even on the first occasion. Improperly imported excise goods seized will also not be restored. However, each case is examined on its merits. Specifically the presence of any of the following factors will militate against restoration; any evidence of previous smuggling or failure to comply with legal requirements; any evidence that the person involved knew what they were doing was wrong; any evidence that the person was paid to make the journey; large quantities of goods which might damage legitimate trade; any evidence that the goods were for commercial purposes.

41. The Commissioners say that Mr McEntee examined all the matters before him, and concluded that there were no reasons to depart from these policies.

42. As regards the importation of excise goods, the Commissioners say that EEC Directive 92/12 has been implemented into national legislation by the Excise Duties (Personal Reliefs) Order 1992. That Order contains the basis for relief from excise duties.

43. Article 3 of the 1992 Order provides:

"Relief from duty of excise – cross border shopping

Subject to the provisions of this Order a community traveller entering the United Kingdom shall relieve from payment of any duty on excise goods which he has obtained for his own use in the course of cross border shopping and which he has transported."

44. Article 3A of the Order provides:

**3A Relief from duty of excise – conditions – shuttle train goods**

(1) In relation to shuttle train goods, this article shall have effect for the purpose of determining whether relief has been treated as having been afforded under article 3 above.

(2) No relief shall be treated as having been afforded if the goods are held for a commercial purpose.

(3) Where the shuttle train goods exceed any of the quantities shown in the Schedule to this Order the Commissioners may require the person holding the goods to satisfy them that the goods are not held for a commercial purpose.

(4) In determining whether or not any person holds shuttle train goods for a commercial purpose regard shall be taken if the factors listed in sub-paragraphs (a) to (j) of article 5(2) below.

(5) If the person holding the goods is required so to do but fails to satisfy the Commissioners that he does not hold them for a

commercial purpose, it shall be presumed that the goods are held for a commercial purpose.

(6) Where a person holding the goods so fails to satisfy the Commissioners that he does not hold them for a commercial purpose, for the purpose of any proceedings instituted in accordance with paragraph 8 of Schedule 2 to the Customs and Excise Management Act 1979 or any appeal under section 16 of the Finance Act 1994, his failure shall cause the goods to be treated as "goods held for a commercial purpose" and, accordingly, section 154(2) of the Customs and Excise Management Act 1979 shall apply."

45. The Commissioners say that while in the appeal of *Hodgson v Commissioners of Customs and Excise* [1996] V&DR 200 the Tribunal held that community travellers have a primary law right to bring tobacco into the United Kingdom for own use without further payment, the seizure and forfeiture of goods can be tested by condemnation proceedings.

46. In the present case the Commissioners say that they were entitled under the 1992 Order to reach a decision in relation to commerciality. The review officer was not satisfied that the goods were for own use and gave his reasons for doing so. That decision was not unreasonable.

47. With regard to Human Rights the Commissioners say that the present proceedings are not criminal and therefore Article 6 of the European Convention on Human Rights has no application, that matter having been decided in the appeal of *Goldsmith v Commissioners of Customs and Excise* [2001] 1 WLR 1673 at paragraphs 20-25 and further that the Appellants have had access to an independent court for a decision on the merits of seizure, but have chosen not to pursue that recourse.

48. The Commissioners say that if the Appellants' rights and Article 6 have been breached no remedy is available, as the Tribunal does not come within section 4 of the Human Rights Act 1998.

49. They further say that as no criminal sanctions have been imposed, article 7 of the European Convention on Human Rights cannot have any application.

50. With regard to the right to property expressed in Article 1 of the First Protocol to the Convention the Commissioners submit that the proper analysis is that made by the European Court in *Sporrong and Lonroth v Sweden* (1982) 5 EHRR 35 at paragraph 61, that the second and third rules contained in article 1 of the First Protocol must be construed in the light of the first rule and that the proper test to be applied is the "fair balance test" applied by the European Court in that case in the following terms:

"... the court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of article 1".

51. In the appeal of *Derezenik* (LON/00/7067) that matter was considered in the light of the decision of the European Court in *Air Canada v UK* 20 EHHR 150 and it

was found that the Commissioners had taken steps to achieve the necessary balance in those circumstances.

52. The last point which the Commissioners addressed was the issue of proportionality where they rely on the decision of this Tribunal in the appeal of *Hopping v Commissioners of Customs and Excise* (LON/01/8003) where it was held that the aim of the Commissioners was legitimate and the means employed to achieve that aim proportionate in all the circumstances.

### **The law**

53. The Tribunal proceeds on the basis of its jurisdiction set out in section 16 of the Finance Act 1994 quoted earlier. It proceeds further to examine the decision under appeal in the light of the criteria relating to reasonableness, or rather unreasonableness, set out in the cases of *Hopping* and *Bowd* to which reference has been made earlier. The Commissioners' decision can only be found to be unreasonable if the Appellants can show that the Commissioners have acted in a way in 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.

54. The Commissioners have set out the policy under which they have acted, and which, in the view of the Tribunal, has a legitimate aim. It is not for the Tribunal to assess the details of the policy further, save insofar as they are incorporated in the individual decision regarding the Appellant. Their rights of appeal are not affected by the Commissioners' classification of their reasons as reasons of policy or as individual reasons. The Appellant has against the Commissioners' decision refusing restoration the right of appeal which legislation affords.

55. The Commissioners say that each case is considered on review on its merits and that they consider whether there are exceptional reasons to lead them to depart from their policy of non-restoration. The Tribunal does not take these two statements to be intended to be or to be contradictory. It accepts the evidence that each case is considered on its merits. The Commissioners have stated with clarity the reasons for their decision not to restore. As far as the policy is concerned there will militate against restoration the presence of any of the following factors:

"Any evidence of previous smuggling or failure to comply with legal requirements;

Any evidence that the person involved knew what they were doing was wrong;

Any evidence that the person was paid to make the journey;

Large quantities of goods which might damage legitimate trade;  
and

Any evidence that the goods were for a commercial purpose."

### **The Facts and Findings**

It is not in dispute that the two travellers were stopped, were found to have the quantity of excise goods stated, were interviewed after a commerciality statement had been read to them, that their answer failed to satisfy the interviewing officer that the goods were for own use, and that the goods and the car were seized.

On the facts before the Tribunal in the present case there was no evidence of previous smuggling or failure to comply with legal requirements. The evidence that the person involved knew that what they were doing was wrong depends on whether or not the explanation that some of the goods were in boxes was accepted. There is no evidence that anyone was paid to make the journey. There was evidence of large quantities of goods but the question of whether these might damage legitimate trade depends on the answer to the last point which was whether there was evidence that the goods were for a commercial purpose. The Tribunal deals with that point further on.

56. Reviewing the decision not to restore Mr McEntee relied on the interpretation of the officers, as noted by them, and expressed in their letter of 23 February 2001 namely:

"The goods that you were carrying were in excess of the minimum indicative levels; You misled the officer during initial questioning;

You are using goods as payment;

You concealed goods; not all the goods were declared."

57. Mr McEntee rightly examined the circumstances of seizure in relation to his review for the very good reason that if the seizure was improper it could not be cured by a refusal to restore taken on review. He would therefore have considered in his review the minimum indicative levels. Mrs Roberts and Mr Jason Roberts had between them less than the minimum indicative levels for cigarillos, cigars, spirits, wines and beer but very much more in the way of cigarettes, 13,000 cigarettes as opposed to the minimum indicative level of 800, presumably each, and 5 kilos of hand-rolling tobacco as opposed to the minimum indicative level of 1 kilo, presumably each. The Tribunal thinks it relevant that the excess was limited to those two categories of goods, and that explanations were offered in relation to them.

58. The second point relied on by the officer is that he was misled over initial questions. That is presumably a reference to the statement that the travellers had 800 cigarettes, for which an explanation is now given in relation to the method of questioning.

59. The fourth point "concealed goods" must have required some assessment in the reviewing officer's mind as the cigarettes were in wine boxes, but to a large extent in plain view on the back seat.

60. The third point using goods as payment can only refer to two answers, one in relation to tobacco for Mrs Roberts' stepfather and the other Mr Jason Roberts' statement that "his goods were a present from his mother because he did bits for her and running around". The first statement might give rise to a question but as far as the second is concerned the Tribunal thinks that on any reasonable view, a mother giving a present to her 18 year old son cannot in these circumstances support a presumption of commerciality.

61. The fifth ground that not all the goods were declared is, insofar as the Tribunal can gather, either a repetition of the second ground or depends on whether the goods were for own use or not. If they were for own use, there was no obligation to declare them.

62. It would have been incumbent on the reviewing officer in view of the explanations given to consider whether some of the goods were not bona fide gifts to members of the family. There is no reference to that in the review decision. However the Excise Duties (Personal Reliefs) Order 1992 provides that "own use" includes use as a personal gift, provided that if the person making the gift receives in consequence any money or moneys worth (including any reimbursement of expenses) this shall not be regarded as own use. It is not suggested here that anybody receive reimbursement of expenses. There is no suggestion that the person making the gift received "in consequence" any money or moneys worth. The expression "in consequence any money or moneys worth" does not appear to the Tribunal to include the kind of gift which is made in acknowledgement of small services previously rendered.

63. In answer to a question from the Tribunal Mr McEntee said that he supposed that the officer thought that the goods were for resale. It is difficult to see in the light of the evidence before the officers, as noted by themselves in answer to their own questions, that the concept of resale was at all in evidence. What the evidence before the officers was, and this can only have been obvious to Mr McEntee, was that this was a family shopping trip where some goods in excess of the minimum indicative limits were bought for members of the family. There can have been no indication that there was a commercial purpose in the acquisition of the goods, if the word commercial purpose means that the goods should enter into commerce.

64. It appears clear therefore that, as Mr McEntee said, the sole evidence which led to the presumption of commerciality was the quantity and possible attempt to mislead.

65. Of the ten conditions set out in the Excise Duties (Personal Reliefs) Order 1992 at 5(2) to which regard must be taken, several would not support any presumption that the goods were held for a commercial purpose. The reason for having possession or control of the goods was explained, the travellers were not revenue traders, their conduct in relation to the goods including their intentions were explained, the location of the goods has been dealt with, the mode of transport used in conveying those goods represented nothing abnormal, the nature of the goods including the nature in condition of any package or container have been dealt with, the quantity of the goods certainly exceeded for some of them the minimum indicative levels, there was no doubt that Mrs Roberts had personally financed them and as to point (j) "any other circumstances which appears to be relevant", none has been advanced.

66. It follows that when under paragraph 3A of that Order the Commissioners required the two travellers to satisfy them that the excise goods were not being held or use for a commercial purpose the preponderance of the evidence available was that they were not being held for such a purpose, but were the object of a journey for family shopping..

67. The Appellants rely on a number of other points which required to be examined.

68. They advance the provisions of article 6 of the European Convention on Human Rights. The decision in the appeal of *Goldsmith v Customs and Excise Commissioners* (2001) WLR 1673 decides that forfeiture and condemnation proceedings do not involve the determination of a criminal charge. It seems to follow logically that decisions on restoration of seized goods or vehicles also do not involve criminal proceedings within the concept of article 6 of the European Convention for the protection of human rights and fundamental freedom.

69. As far as the obligation of fair trial contained in article 6 of that Convention for the determination of civil rights and obligations is concerned, the Appellants have had access both to condemnation proceedings, had they so chosen, and to this court. The Commissioners appear to say that if the Appellant has not had access to a fair trial that is not a matter with which this tribunal can deal because it is not a court within the contemplation of the Human Rights Act for the purpose of declarations of incompatibility. That is a narrow view. The right to a fair trial is a right inherent in judicial proceedings, and certainly not reduced by the existence of the Human Rights Act. The proceedings before this Tribunal are far ranging and that no restriction is placed on the Appellants possibilities of adducing argument. According to Mr McEntee's correct view of the matter, his review and this appeal include the circumstances of the original seizure. The Appellants do face a difficult task, on the one hand of disproving a presumption which is alleged against them, and on the other of being obliged to prove unreasonableness of the decision supporting that presumption. However, no specific allegation of the infringement of their right to a fair trial in these proceedings has been made. The Tribunal sees none.

70. The Appellants alleges that a retrospective penalty has been imposed on them. This is not the case. The facts do not bear out that submission.

71. The Appellants criticise the circumstances in which the statements were taken by the officers who intercepted Mrs Roberts and Mr Jason Roberts. The Tribunal has no evidence about that and can make no findings about it. The circumstances of seizure could best have been tested in condemnation proceedings. The statements were made after a commerciality statement indicating that the onus lay on the travellers was read out to Mrs Roberts and Mr Jason Roberts. Thereafter they were told that if they wished not to answer the questions which resulted from the commerciality statement the goods and vehicle would be seized but that they could stay and answer questions if they wished. That certainly is a statement which contains the threat of seizure. Coupled with the commerciality statement it does make it clear that seizure would be the result of the travellers not being able to satisfy the officers that the goods were for own use. It is difficult to see how duty free importation can be justified without information being given.

72. The proceedings are not criminal. The provisions of the Police and Criminal Evidence Act do not therefore directly apply to them. The finding in the appeal of *Goldsmith* was that the burden on a member of the public importing more than a specified amount of goods to establish that these were for non-commercial purposes would be proportionate, reasonable and justifiable provides an answer to the submission that the rules applicable to criminal proceedings should have been followed. However, reviewing the circumstances in which such interviews are conducted to ensure that they are reliable does add to the already heavy burden which a reviewing officer carries when assessing the circumstance of seizure.

73. The Appellants raise the issue of proportionality, that is to say, the relation between their fault and their loss, between the revenue lost and the value of the car. Clearly the value of the car greatly exceeded the value of the goods. The Commissioners say that there is a proportion between their objects, and the general measures which they take to apply these measures. That may well be the case. However, the obligation of proportionality does not end there. The measures taken in any particular case must be proportionate. As the European Court of Human Rights stated in the case of *Air Canada v United Kingdom* (1995) 20 EHRR 150 the second paragraph of Article 1 of the First Protocol must be construed in the light of the principle laid down in the Article's first sentence. "Consequently, any interference [with the right to property] must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and aim pursued."

74. That case concerned the seizure of an aircraft which amounted to a temporary restriction on its use and did not involve the transfer of ownership. The owners of the aircraft were required to pay an amount of £50,000. The court held that taking into account the large quantity of cannabis found in it, the street value of that quantity and the value of the aircraft seized, the requirement to pay £50,000 was not disproportionate to the aim pursued, namely the prevention of the importation of prohibited drugs into the United Kingdom. A fair balance had been achieved in the circumstances of that case.

75. Two matters follow; the first is the court clearly considered that there needed to be a balance between the general interest and the protection of the individual's fundamental rights, not only a balance in a general way between aims and measures. The court considered precisely the value of the aircraft seized and the value of the prohibited goods, together with the general purpose. It is worth noting also that the £50,000 was only a small fraction of the aircraft's value and indeed of the "street value" of the illegally imported substance.

76. It follows that proportionality is a principle of law to which regard must be had. In the appeal of *Hopping* the tribunal found that the loss of a car to a person who knew that it was to be used for bootlegging trips was not disproportionate. That decision was no doubt taken on the facts of that case. However in other tribunal cases, in particular that of *Williams v Commissioners of Customs and Excise* (LON/01/8018) and *Lindsay v Commissioners of Customs and Excise* (LON/00/8053) (since upheld on appeal) as well as *Phillip J Lett v Commissioners of Customs and Excise* (LON/00/8052), tribunals have found that the issue of proportionality requires to be taken into account by the Commissioners with regard to their specific effect. It clearly was not in this case.

77. The Appellants further say that had they known that the vehicle would have been sold by the Commissioners while this appeal was pending, and they had indications to the contrary, they would have taken condemnation proceedings. The Tribunal understands the reasons why the Commissioners proceed to sale, although the result is clearly unsatisfactory as far as an appellant is concerned. It was of course open to the Appellants to take legal advice on the respective advantages and disadvantages of the courses of action which were open to them. There is no evidence of undertakings by the Commissioners, but if such were given they should have been kept.

78. Hardship is alleged on the Appellant's son through the loss of the vehicle. Obviously loss of a vehicle must cause inconvenience and oblige the person who has lost it to seek alternatively forms of transport. That does not seem to the Tribunal to come within the definition of hardship. It is more within the definition of inconvenience. It is not a ground on which the Tribunal thinks it can interfere with the Commissioners' decision.

79. Having considered the evidence before it the Tribunal concludes that there was overwhelming evidence before the Commissioners on review which would lead them to the conclusion that there was no commercial element involved. The word commercial must, if it is to have any meaning at all, be subject to limits. "Commerciality" must mean having some relation with commerce. It need perhaps not mean selling the goods at once, but it must mean using them in a way which gives them commercial value. It cannot mean simply using them for own consumption as a family. Two statements on which the Commissioners rely, one by Mrs Roberts and the other by Mr Jason Roberts, are a flimsy basis for supporting a presumption of commerciality, especially in the light of the weight of the evidence against them. The weight of the evidence is that this is a normal shopping trip for family purposes where in two respects the minimum indicative amounts were exceeded but in the others they were not reached. It was unreasonable for the Commissioners to accept the presumption of commerciality against the weight of the evidence.

80. The second point is that the principle of proportionality was not followed in the way in which tribunals have indicated that it should be.

81. This appeal succeeds. The Commissioners' decision on review was not reasonably arrived at. That was because the evidence against the presumption of commerciality was not considered and because the requirement of proportionality between the value of the goods and the value of the vehicle not restored was not considered. Accordingly under its powers in section 16(4)(b) the Tribunal requires the Commissioners to conduct a further review of the original decision to take into account the two matters which should have been considered.

**PAUL HEIM CMG**

**CHAIRMAN**

**RELEASED:**

LON/01/8054-ROB.HEIM