

EXCISE DUTY – Restoration of seized goods – Review of decision not to restore – Whether review decision based on correct evidence – Function of review officer not to determine whether decision not to restore "reasonable" – Whether review officer carried out proper function – Whether decision "reasonable" – Excise Duties (Personal Reliefs) Order 1992 art 5 – CEMA 1979 ss 121(1), 152, 141(1)(b) – Appeal allowed

LONDON TRIBUNAL CENTRE

FERAL BIRDANE Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: ANGUS NICOL (Chairman)

PENNY JONAS

Sitting in public in London on 10 May 2002

The Appellant in person

Mr Andrew O'Connor, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

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DECISION

1. The Appellant, Mr Feral Birdane, is appealing against the decision on review of the Commissioners not to restore to him certain excise goods imported by him. He and two others were stopped at Dover, and quantities of tobacco, beer, and cigarettes were seized, as also was a Renault Master minibus, which was not the property of the Appellant, nor was he the driver.

The facts

2. There is a dispute as to some of the facts in this case, in particular as to what transpired when the Appellant and his companions were stopped. The evidence is contained in the officers' notebooks, and in witness statements made by the officers a considerable time after the events took place.

3. It is common ground, however, that the Appellant, together with a Mr Hussein Ozkoyliu and a Mr Burhanettin Aydin, arrived in the vehicle at Eastern Docks, Dover at about 8.30 a.m. On 27 May 2001. One of the officers, Mr Gary Nicholls, made a statement on 25 February 2002. The statement begins by relating that he spoke first to the Appellant and asked him if he had any cigarettes. The Appellant said that he had, and exhibited a bag containing 800 cigarettes. Asked if he had any other tobacco goods, the Appellant is recorded as saying, "No." The officer's

notebook records that all three of them had replied "No." In his evidence in chief he said that he addressed the question to each of the men in the vehicle, though not each of them individually. But the answer came from each, he said, as he looked at them individually. Having spoken to all three, Mr Nicholls said that he asked them to unload all the beer and put it in three piles so that he could see what belonged to each of them. His evidence was that the Appellant began carrying cases of beer from the vehicle, as did the other two. He then asked for the tobacco to be unloaded and placed on the individual piles according to what belonged to each of them. Each of the three put one box of tobacco on his pile of cases of beer. His evidence was that Mr Ozkoyliu had denied having bought any of the tobacco, and when this was mentioned to him, Mr Ozkoyliu moved the box of tobacco from his pile to that of Mr Aydin. Apparently Mr Ozkoyliu also denied that any of the beer was his, and he left the Customs office. This conversation began at about 8.50 a.m., and ended at about 9.19 a.m., at which time Mr Nicholls began making his notes.

4. The Appellant was interviewed by Miss Julie Aldred, at about 9.20 a.m. She began by requiring him to satisfy her that the goods were not imported for a commercial purpose. He admitted to ownership of one box of Golden Virginia tobacco and 23 cases of beer of several brands, and 800 cigarettes. He said that he had paid a total of £552 for all the goods, all of which he had paid himself, and that nobody else had paid anything towards the purchase. He said that he smoked a lot, mainly hand-rolling tobacco, and got through a packet in two to three days. He was asked how long the tobacco would last him. The conversation continued:

A: "Quite a long time. I never before had so much in one go."

Q: "Roughly how long do you think?"

A: "Quite a long time, maybe a year. I didn't work it out. That's if it doesn't go bad."

The Appellant was asked about his finances. He was asked, and said again, that he was receiving no money towards the purchase. He was also asked when he had last travelled across. He said that he had been two to three months previously, and bought only a couple of boxes of Stella and four packets of cigarettes on board the ferry. He said that he had not seen a Notice 1 before, nor had he had dealings with Customs and Excise before.

5. There then appears in Miss Aldred's notes a passage which is not included in her statement. Surprisingly, in view of its importance, she said in evidence that it was not part of the interview, and yet it appears from her notebook to be part of the interview, though apparently asked by another officer, Mr Phil Shepherd. It is noted in Miss Aldred's writing. The passage runs:

PS: "I've been honest with you. Your friend has gone, he said none of the goods are his, you can also go if none of the goods are yours you can go."

FB: "Everything I told you is true."

PS: "Does it all belong to you?"

FB: "It just belongs to the 2 of us. The goods I tell you about are mine. I bought that tobacco and that cigarettes. I not lie."

Miss Aldred said that she was writing the notes as the interview took place, and it was an accurate record. She did not know what was meant by "I've been honest with you".

6. In a letter dated 5 June 2001, the appellant requested the restoration of his share of the goods. He mentioned in the letter that it was the first time he had made a trip to Calais and purchased goods, the only reason he had gone being that he was offered the ride if he covered his own ferry fare. He said that he felt that he had been penalised for the excessive shopping of the other two. The letter was answered by Mr P Diton of the Post Seizure Unit in Dover. He refused to return the goods, giving the following reasons:

1. You were carrying Excise goods in excess of the Guidelines as per Article 5 of the Excise Duties (personal Reliefs) Order 1992.
1. You were unsure of how long the tobacco would last you.
1. You were not sure of the exact quantities of goods that belonged to you.
1. Mr Hall did not declare the goods that he had purchased.

The letter then said that there were no exceptional circumstances which would justify departure from the Commissioners' policy.

7. The Appellant requested a review, and this was carried out by Gloria Elizabeth Hepburn, a review officer. Her review letter, dated 20 August 2001, begins by thanking the Appellant for his letter of 9 April 2001 asking for a review of a decision dated 3 April 2001. Both these dates were wrong, and were more than a month before the seizure. The background section begins with the correct date of seizure, but makes another mistake about the time of the Appellant's arrival at Dover, putting it at 9.20 a.m. instead of 8.30 which was the evidence of the officers. The review letter continues, under the heading "Background" with a summary of the facts. This included an officer (unnamed) asking Mr Ozkoyliu whether he had any tobacco goods, and receiving a negative answer. It includes the question to the Appellant, whether he had any tobacco, that the Appellant shewed a bag containing 800 cigarettes, and that the had no other tobacco goods. The letter later related that Mr Aydin had said that the tobacco was to be shared between the three in the vehicle, and that Mr Aydin had borrowed some money from Mr Ozkoyliu, though he did not know how much. Mr Aydin went on to say that he had purchased one box of tobacco, that Mr Ozkoyliu had paid for the rest and they would share it, and that the Appellant had bought one box. The background also related that the Appellant had said that of the beer in the vehicle, 23 cases were his, and one box of tobacco. It also said that when told that Mr Ozkoyliu had left, the Appellant had said that all the goods were owned between himself and Mr Aydin. The review letter stated that the officer's reasons for seizure were that the goods were in excess of the guide levels, that there were inconsistencies in the accounts of who owned which goods, and that Mr Ozkoyliu had denied ownership of any of the goods and had left the Customs controls.

8. After summarising the relevant legislation, the Customs' restoration policy was briefly referred to. It was stated that it was the Commissioners' policy not to restore seized goods, that each case was looked at on its merits to determine

whether there were exceptional circumstances in which restoration may be offered. Five factors were mentioned that would militate against restoration:

1. Any evidence of previous smuggling or failure to comply with legal requirements
1. Any evidence that the person involved knew what they were doing was wrong
1. Any evidence that the person was paid to make the journey
1. Large quantities of goods which might damage legitimate trade
1. Any evidence that the goods were for a commercial purpose

9. The review letter then went on to consideration of the request for restoration. That part began,

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

The review officer then went on to examine whether the goods and vehicle had been properly seized. She stated that at the time of the officer's initial questions he was shown a bag containing one kilogramme of hand rolling tobacco and was told that that was all there was in the vehicle; there were in fact 25 kg. When the officer asked the Appellant what he had bought, he declared 800 cigarettes and said that that was all, later changing this account of his purchases. The letter stated that both Mr Aydin and the Appellant had said that the beer had been purchased between the three of them, that Mr Aydin had first said that the tobacco was to be shared equally between the three of them, and later said that it was to be shared between himself and the Appellant. The Appellant was said first to have claimed one box of tobacco, and amended that to one and a half. That left 5 kg unaccounted for. The letter said that it was found to be incredible that the Appellant had purchased so large a quantity on this occasion and none on the previous occasion two to three months earlier. There was apparently commercial information available that Mr Aydin had travelled "on several previous occasions", which in fact were stated to be two occasions in January 2001. The review officer said that the Appellant had failed to rebut the statutory assumption of commerciality. For those and other evidential reasons, the review officer considered that the goods and vehicle had been appropriately seized. That section of the review letter concluded:

"Turning now to the issue of restoration, it is for me to decide whether or not the goods should have been restored to you. I have therefore considered your correspondence to ascertain whether there are exceptional circumstances in this case and I have decided that there are not. The Commissioners' policy with regard to seized excise goods has been set out previously. I am satisfied that this decision is in line with policy."

She therefore exercised her option to confirm the decision not to restore.

10. The Appellant, who appeared in person, said that one of his friends had telephoned and asked if he would like a trip to Calais. He said that he would, and was told that it would cost him £40. Mr Aydin, the driver, said that he would pay for everything and they would settle when they got back. They took the ferry

from Dover to Calais, went to a shop and bought some tobacco and beer, and took the ferry back. They were stopped by Customs at Dover. The Appellant's account of what transpired differed in some respects from that of the officers.

11. The Appellant said that the officer checked the van, and then said "You've got quite a few things in there. Do you know about the guidelines?" The Appellant answered, "No, what's that?" He or they were given a copy of Notice 1. The officer asked Mr Aydin who the tobacco belonged to, and Mr Aydin said that it was his. Mr Hussein (the Appellant referred to Mr Ozkoyliu thus) said that he had some whisky. The officer asked Mr Aydin if there was any more tobacco, and Mr Aydin said that there was. The officer then told them to unload the van and each could put his goods in a separate pile. The Appellant said that he had recently had an operation and was unable to lift things, so he stayed in the van and pushed things towards the door for the others to take out. There was one box of tobacco and 23 cases of beer that belonged to him, which the other two put on one side as being the Appellant's. He was then asked if he agreed to be interviewed, and he agreed. He said that the 23 cases of beer, the one box of tobacco, and 800 cigarettes were his. He answered all the questions which the officer put to him. About an hour and a half later he and Mr Aydin were told that Mr Ozkoyliu had left. Mr Aydin then said that he would leave too. The Appellant asked what was to happen to his goods, and was told that they would be seized, together with the van. The Appellant said that he asked why his goods were being taken, as he had not lied or anything. He was told that the other two had lied, and that it was not satisfactory. He said that he had signed a paper, and had then left. The Appellant said that he had no idea who Mr Hall was, but that he had nothing to do with him. He agreed that he had said that the tobacco might last him a year, and that he added, if it does not go bad. He said that he had never really thought about it going bad until he was asked how long it would last. He maintained that he had never said either that the goods belonged to "the two of us", referring to Mr Aydin and himself, nor that the goods were bought to be shared between Mr Aydin and himself. He said that he was not working at the time, but was receiving sick pay following his operation for hæmorrhoids. He agreed that he had been to France once before, but not to buy goods, and he only came back with very little. He had bought several kinds of beer, because he wanted to try them. They would probably last a year, and he could afford it. He said that he had been asked if he had any cigarettes, and had shewn the 800. He had not been asked if he had any other tobacco, that question had been put to Mr Aydin.

The law

12. Relief from excise duty in the case of cross-border shopping is afforded by the Excise Duties (Personal Reliefs) Order 1992, in respect of goods which a Community traveller has obtained for his own use and which he has transported. The conditions are set out in article 5:

"(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 [*sic*] of—

- (a) his reason for having possession or control of the 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 any package or container;
- (h) the quantity of those goods;
- (i) whether he has personally financed the purchase of those goods;
- (j) any other circumstance which appears to be relevant.

(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.

(4) . . .

The Schedule to the Order sets out the quantities of goods specified for the purpose of article 5(3), and includes 800 cigarettes, 1 kg of tobacco, and 110 litres of beer.

14. The Customs and Excise Management Act 1979 ("CEMA"), in section 121(1) provides that any vehicle which has been used for the carriage, handling, deposit, or concealment of anything liable to forfeiture is also liable to forfeiture, and also that "any other thing mixed, packed or found with the thing so liable shall also be liable to forfeiture." Section 152 of CEMA empowers the Commissioners to restore, subject to such conditions as they think proper anything forfeited or seized.

15. The Finance Act 1994, in section 16, prescribes the jurisdiction of the Tribunal on appeal:

"(4) In relation to any decision as to an ancillary matter, or any decision on any 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 of 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 direction 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."

The present appeal falls into the definition of "ancillary matters" within Schedule 5 of the Finance Act 1994.

The Commissioners' policy on restoration

16. An undated statement by Mr Gerry Dolan was in evidence, which contains the Commissioners' policy as to the restoration of vehicles used for "smuggling". It does not deal specifically with restoration of excise goods. This appeal is concerned only with restoration of goods. The statement ends:

"It is not our intention to penalise the genuinely honest traveller or to dissuade travellers from shopping in other EU countries when making purchases for their own use, but to deter those who are intent on regularly smuggling tobacco and alcohol into the UK.

Mr Diton's decision letter set out the following policy statement:

"The departments efforts are directed towards deterring and detecting fraud, failure to pay excise duty that is due, irregularities and encouraging compliance with procedures established to control movements of excise foods. In this way protection will be given to both Revenue and the legitimate trade in the UK. It is appropriate that this objective should be applied consistently throughout the UK. The creation of the single market meant the removal of fiscal frontiers, this significantly increases opportunities for smuggling and irregular movements of goods with less risk of detection. Thus routine restoration, even on fairly stringent terms, would thoroughly undermine the Departments objective of reducing the incidence of fraud, failure to pay excise duty that is due and irregularities. To maximise deterrent and encourage compliance, the normal policy in these cases is to refuse to restore seized goods."

The Commissioners' contentions

17. Mr O'Connor, for the Commissioners referred first to section 16(4) of the Finance Act 1994, and submitted that the Tribunal's jurisdiction was confined to determining whether the review decision was reasonable on the grounds set out in *Associated provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. Any findings of fact which the Tribunal made must be determined in the

context of that jurisdiction. Miss Hepburn relied upon two statements which the Appellant was said to have made: that he had no tobacco goods other than his 800 cigarettes, and that the goods were to be shared between him and Mr Aydin. If the Tribunal found that those two statements were made by the Appellant there was no reason why she should not use them as part of her decision. Mr O'Connor said that the goods were liable to seizure on two grounds: first, that the Appellant had more than 1 kg of hand rolling tobacco, in fact he had at least 6 kg, and had failed to discharge the burden of satisfying the Commissioners that they were not for a commercial purpose. Secondly, they fell under section 141(1)(b) of CEMA, and were infected by the reasonableness of the seizure of the goods imported by those who were holding their goods for a commercial purpose.

18. Mr O'Connor relied on the initial deception by the Appellant as mentioned by Mr Nicholls. Mr Nicholls's evidence was a clear account and recollection. The burden of proof was upon the Appellant, whose evidence was not strong enough to displace that of Mr Nicholls. The Appellant's evidence, Mr O'Connor contended, was not credible, and should be doubted because of his change of story. His uncertainty as to the length of time that the tobacco would last, and the disparity about how little he had bought on the previous occasion were factors considered by Miss Hepburn, as was the confusion as to the quantities. He contended that the second issue of fact, whether the Appellant had said that the goods were to be shared between him and Mr Aydin, was not so important, and was only relied upon in the calculation of the number of pouches. It was permissible for Miss Hepburn to take into account the conduct of Mr Ozkoyliu and Mr Aydin in considering whether to restore the Appellant's goods. In all the circumstances, Miss Hepburn's review decision was *Wednesbury* reasonable. Even if it were not, the matter still fell within section 141(1)(b) of CEMA.

The Appellant's contentions

19. The Appellant stressed that his account of the evidence, where it differed from that of the officers, was correct. He referred to the end of the first paragraph of the third page of the review letter, which refers to Mr Ozkoyliu saying that he and Mr Aydin would share the goods, not that the Appellant and Mr Aydin would. He said that he knew nothing about the guidelines, but was aware that you could bring in any quantity if it was for personal use, and that is what he had done.

Conclusions

20. Our jurisdiction is confined to determining whether the review decision was reasonable, in the *Wednesbury* sense, that is, that the decision is not taken in considering matters which are not relevant, nor have matters which are relevant been omitted from consideration. In order to do that, it is necessary, first, to look at the evidence of what occurred when the goods and a vehicle were seized in order to determine, if there is any dispute about that evidence, what facts are correct. It seems to us that a review decision based upon incorrect facts cannot be a reasonable decision, even if the incorrectness of them was unknown to the review officer. The decision is that of the Commissioners, who act, in the first place, through their officers who seized the goods and vehicle, and later through those other officers who made the original decision and then the decision on review. Each of those officers or groups of officers is "the Commissioners" for the purposes of the Commissioners' acts. If, therefore, for some reason, incorrect evidence is fed to the review officer, that incorrect evidence has come from one limb of the Commissioners to another. But it also has to be considered whether that incorrect evidence is of such importance that it renders the review decision

unreasonable, or is only a mere detail which does not affect the reasonableness of the decision.

21. We turn, therefore, to the evidential disputes. It was contended that the Appellant's evidence was not credible. We disagree. Not only that, but parts of his evidence appear to have been misrepresented. First, we consider whether or not he took part in carrying the goods out of the van. He said that he did not, and could not as a result of recent surgery. We see no reason why such a story should be invented, since it did not really matter who took the goods out of the vehicle. We found that to be believable. It follows that that part at least of Mr Nicholls's evidence was not to be believed. It may be that when he made his notes, Mr Nicholls did not remember that the Appellant had remained within the vehicle. We are also inclined to accept, on the balance of probabilities, that the Appellant did not deny having any further tobacco products. That is because Mr Nicholls's evidence, from his recollection of a year before, not contained in his notes, was vague about that part of the initial questioning. He said that he addressed each of the men, but not individually. He then said that he "would have asked the question of all occupants", but was clearly unable to say definitely that he had done so. It was said that the Appellant was confused as to the quantities belonging to each of the three men. Yet the evidence shews that the Appellant was the only one of the three who was not confused, and who said more than once that he had bought one box of tobacco, 23 cases of beer, and 800 cigarettes. Then again it is said that he admitted that the goods were to be shared between him and Mr Aydin, and that Miss Hepburn relied upon that statement. Miss Hepburn, however, overlooked the following words: "The goods I tell you about are mine: I bought that tobacco and that cigarettes. I not lie." It is plain to us that the Appellant was not saying that the whole of the goods were to be shared equally between them, though that appears to be the construction put upon those words by Miss Hepburn, notwithstanding that he has said clearly to Miss Aldred exactly which goods were his. It also appeared to us that that piece of evidence was not relied upon purely in the calculation of the number of pouches, but as part of the reason for the seizure of the Appellant's goods. In our judgment, a decision based upon such errors of fact is one which fails to take into account matters of relevance, and which were clearly considered to be of importance in the decision.

22. The uncertainty as to how long the tobacco would last did not appear to us to be a point of any real cogency. There seemed to be no reason why the Appellant should know. Also, he was asked to say "roughly" how long he thought. He also said that he had not worked it out. The matter of the disparity about the small quantity of tobacco that he had bought on his previous trip again was a point of no substance. That it was not credible that the Appellant should have bought so much in the present occasion and none on the previous occasion was no more than an opinion based upon no evidence. To the extent that they played a part in the making of the decision, they appear to us to be matters, at best, of dubious relevancy.

23. Both the original decision letter and the review letter contained errors. Who the intrusive Mr Hall was, we shall probably never know. That he had nothing to do with the case is obvious. It occurred to us that Mr Diton may have confused two cases. It was clear also that Miss Hepburn had confused two cases in inserting the wrong dates. However, the rest of her review letter suggests that those were errors which had no real bearing upon the reasonableness of the decision. However, there was a much more important error in her decision. The opening sentence of the "Consideration" section she states that "It is for me to determine whether or not the contested decision is one which a reasonable body

of Commissioners could not have reached." That was not her function at all. Her function was to review the decision, and to come to a decision of her own on all the available material. That she clearly did not do, as the end of her decisions shews (see paragraph 9 above). Having decided, on evidence which was not all correct, that the seizure was appropriate, she did no more than look to see if there were any exceptional circumstances, and to apply the Commissioners' policy. That, in our judgment, is not a reasonable decision.

24. Accordingly, we declare that the review decision was unreasonable. We direct that a further review be conducted, taking into account the matters set out above.

25. We would have been inclined to say that the fact that one person among several who is in possession and ownership of certain goods which he can identify precisely, and which he has imported for his own use, may be in a vehicle with others whose importing of further goods in the same vehicle may be for a commercial purpose may not necessarily infect the goods of that first person so that they are caught under section 141(1)(b) of CEMA. However, we make no decision on that point, since it would be necessary to hear proper argument on both sides before coming to any such conclusion.

26. The Appellant made an application at the hearing for his costs. We consider that costs should follow the event, and direct that the Commissioners pay his costs of and incidental to the appeal. If there should be any dispute about costs, or in default of agreement, we grant liberty to both parties to apply to the Tribunal on costs. Any such application should be made not later than 42 days after the date of release of this decision.

ANGUS NICOL

CHAIRMAN

RELEASED:

LON/01/8163-BIR.NIC