



TC02087

Appeal number:TC/2011/05413

EXCISE DUTY –Restoration of seized vehicle –whether appellant suffered exceptional hardship through vehicle not being restored due to medical and other reasons– Whether refusal to restore was a decision UKBA could not reasonably have arrived at– No – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JURIJS VOLKOREZS

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE SWAMI RAGHAVAN
LESLEY STALKER**

Sitting in public at Bedford Square, London on 6 June 2012

the Appellant in person assisted by Mr I.L. Platski

Mr A. Edge, counsel, instructed by Director of Border Revenue

DECISION

Introduction

5 1. This appeal concerns Mr Volkorezs' appeal against the decision of the UK
Border Agency ("UKBA") not to restore his car following its seizure by the
Respondents. The Respondents' decision was set out in a letter of Officer Graham
Crouch dated 15 June 2011. The car, an Audi 80E registration number L435WGO
10 was seized on 18 April 2011 following the seizure of 9,860 cigarettes upon which
excise duty of £1,877.59 had been evaded. The appellant, who suffers from type 1
diabetes, argues that for various reasons connected with his medical condition he
would suffer exceptional hardship if his vehicle was not restored. The UKBA disagree
their refusal to restore the car gives rise to exceptional hardship.

Evidence

15 2. We had before us a bundle of documents produced by UKBA. This included
UKBA's notes of the initial interception and interview of the appellant and
correspondence between the appellant and UKBA. The enclosures to the appellant's
correspondence included medical documents and a copy of the appellant's gym
subscription and Tae kwon do membership card. We heard oral evidence from Officer
20 Crouch.

Background

3. On 18 April 2011 UKBA Officers intercepted the appellant at Dover Eastern
Docks while he was driving the car.

25 4. The appellant told the UKBA officer that he had been home for the week for a
holiday, the car was his, that he lived in Southampton and was employed in a factory.

5. The appellant declared that he had 9 small packs of cigarettes.

6. The Officer searched the vehicle and noticed that the two rear passenger doors
sounded solid when tapped and that the windows on them did not retract. When the
30 interior rim was removed from the doors the officers found concealed within them
9,860 cigarettes believed to be of Russian origin.

The officer was satisfied the cigarettes were held for a commercial purpose and seized
them as being liable to forfeiture under sections 49 and 139 of the Customs and
Excise Management Act 1979 ("CEMA"). The car was also seized as being liable to
35 forfeiture because it was used for the carriage of goods liable to forfeiture under
section 141(1)(a) of CEMA.

7. In a letter received by UKBA on 26 April 2011 the appellant asked for the vehicle to be restored. He wrote:

“I recognize that I’m guilty with that fact which was happened in Dover (sic)”.

5 8. He went on to explain how much the car meant to him and that for him it was more than a car.

9. On 16 May 2011 the UKBA wrote to the appellant to inform him that the vehicle would not be restored. The letter informed the appellant he could have the decision reviewed and if he wanted to do this he should give reasons and include any
10 information or evidence that he required to be considered.

10. In a letter received by UKBA on 23 May 2011 the appellant set out the following additional reasons why he needed the car back:

(1) It was too far to go to work by foot or took too long by bus

15 (2) He suffered from diabetes. He needed to buy food from the supermarket which was not near him and needed the car to buy 4-5 bottles of 5 litre bottles of water each week.

(3) He was a sportsman (he practised Tae kwon do) and trained at the gym. It was a long journey back with wet hair and being tired from his training.

(4) He was unable to socialise with friends.

20 11. In a letter dated 24 May 2011 UKBA informed the appellant that a review would take place and that there was a further last opportunity to provide any further evidence or information in support of the appellant’s request.

12. On 15 June 2011 Officer Crouch informed the appellant that Mr Crouch had completed the review and concluded that the vehicle should not be restored.

25 13. The letter explained UKBA’s policy for restoration of private vehicles. This included a statement to the effect that where the excise goods were destined for supply for profit vehicles might, at the discretion of UKBA and subject to conditions e.g. a fee, be restored if the quantity of excise goods was small and it was a first occurrence.

30 14. The letter indicated that Officer Crouch had had records made available to him that showed the car had travelled on 3 other occasions: 11 March 2010, 1 September 2010 and 7 November 2010 and that the officer was of the view that the April 2011 incident was not the first time the appellant had imported excise goods into the UK in a similar manner to the current incident. The amount of 9,860 cigarettes did not
35 qualify as a small quantity.

15. The officer in the letter considered the trade value of the car to be about £206 and stated that in comparing the value with the revenue involved in the smuggling attempt (£1,877.59) a refusal to restore was proportionate and would be proportionate even if the aggravating circumstances in this case had not been present. The

aggravating circumstances were stated to be that the cigarettes were of Russian origin with no evidence of duty payment within the EU and the cigarettes were concealed in the vehicle.

5 16. In relation to the degree of hardship caused by loss of the car, Officer Crouch expressed sympathy with the difficulties in travelling to work, shopping and socialising but explained that such inconveniences did not amount to exceptional hardship over and above what one should expect.

10 17. On 13 July 2011 the appellant filed a notice of appeal with the Tribunal. His grounds of appeal stated the officer conducting the review did not appreciate the extent of the appellant's medical condition. The grounds were as follows:

15 "I suffer from diabetes Type 1 insulin dependence for the last 5 years. I have to have self-injections at the very least 5 times a day. I need my motor car to obtain prescriptions and repeat prescriptions the surgery is 35 minutes away and there is no public transport direct. Similarly I have hospital appointments and again the journey is 30-35 minutes with no direct public transport. By motor car 10 minutes surgery, 5 minutes nearest pharmacy, hospital 10-15 minutes...the officer...has not placed sufficient weight on exceptional hardship and merely considered inconvenience of not having a motor car. I also have to attend a fitness centre which is 25 minutes away up to 10 minutes by car on a regular basis (at least 3 times a week) sometimes 5 times a week recommended by consultant / encronologist (sic)."

20 18. On 13 September 2011 Officer Crouch replied to the appellant on the point that the UKBA had not appreciated the extent of the appellant's medical condition and on the other grounds mentioned as follows:

25 "You not [sic] provided any evidence to indicate that your condition is such as to cause the loss of the vehicle to be an exceptional hardship. In fact you have stated that you attend two separate fitness centres which indicates to me that you are perfectly mobile.

30 You live in a major city and public transport is readily available, Google maps shows that there are several bus stops close to your address. You state that you cannot get a bus direct to work; to your doctor's surgery to obtain prescriptions or to attend your fitness centres. That in my view is an inconvenience not hardship never mind exceptional hardship.

35 There is nothing contained within your grounds of appeal that leads me to change the decision not to restore your vehicle contained within my letter dated 15 June 2011."

Powers of the Tribunal

5 19. Under section 16(4) of Finance Act 1994 the powers of the tribunal on appeals against decisions refusing to restore are confined to situations where:

“the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it...”.

10 20. It is not for the tribunal to re-make the decision afresh but to consider whether in reaching its decision UKBA took account of all relevant matters, did not take into account irrelevant matters and did not make an error of law.

15 21. In doing this we think we should consider the reasons given not only in Officer Crouch’s letter of 15 June 2011 but also the reasons in his letter of 13 September 2011 for his refusal to change his decision in the light of the further arguments made by the appellant in his notice of appeal.

Appellant’s arguments

20 22. The officer gave insufficient weight to the appellant’s medical condition in reaching his conclusion that there was no exceptional hardship. The appellant suffered from type 1 Diabetes, and had to self-inject 5 times a day. The requirements for fitness centre visits, picking up prescriptions, visits to the doctor and the hospital and to the supermarket for special / bulky groceries meant he suffered extreme hardship by not having his car restored.

25 23. UKBA had already seized the cigarettes which would cover the excise duty and the car was only worth £500.

30 24. At the hearing Mr Platski on behalf of the appellant took issue with the claim by UKBA that the appellant was a persistent smuggler. It was not the case that the appellant had been smuggling on the 3 previous occasions mentioned by UKBA. The appellant had lost his job on 10 March 2011 and had an opportunity to go to Latvia to get cigarettes at a £380 profit. The appellant had already been punished through the loss of that profit and the loss of the cigarettes. Mr Platski emphasised the exceptional hardship caused to the appellant by not having his car. In particular as a type 1 diabetic it was difficult for the appellant to use public transport. He needed to be able to self-inject in the car. Mr Platski acknowledged that this particular point had not
35 been raised in the correspondence to date.

Respondents’ arguments

25. The decision refusing restoration of the vehicle was one that could reasonably be arrived at.

26. The excise goods were deceptively concealed in the vehicle, and were held for profit, the quantity of goods was not small. The value of the vehicle was not relevant but in any event it was not disproportionate to seize it.

27. The inconvenience and expense caused to the appellant was not exceptional
5 hardship over and above what one should expect in the circumstances.

28. The decision of Judge Khan in *David Arthur Hemms* [2009] UKFTT 355 (TC) in particular at [22] was instructive:

10 “Where people attempt to evade excise duty and try to deceive HMRC officers, with conflicting explanations as to why items were purchased and proceed to give half truths and feeble explanations for the reason for the importation of goods, in such circumstances, those people would not have a right to complain when the vehicle being used for smuggling is confiscated.”

Discussion

15 29. The issue in dispute between the parties centres principally around the UKBA’s decision that the circumstances of the appellant do not amount to extreme hardship such that it would be unreasonable to refuse to restore the car. Before dealing with that point we consider the disputed issue around whether the appellant had smuggled previously and its relevance to this appeal.

20 *Disputed issue: Previous trips*

30. In giving evidence Officer Crouch explained that he had considered that given the circumstances of concealment of cigarettes in the vehicle it was reasonable to conclude on the balance of probabilities that it was highly likely the previous trips on
25 11 March, 1 September and 7 November 2010 had been used for smuggling. Mr Platski disputed this was the case mentioning the appellant had not lost his job until March 2011 and only then been presented with the opportunity to earn profit on cigarettes to be bought in Latvia.

31. It was not apparent to the Tribunal that the appellant had been told about the previous dates of travel (which we were told by Officer Crouch had been picked up
30 through recording systems the UKBA had access to) and given the opportunity to explain the circumstances of those trips. That would in our view have been desirable prior to UKBA reaching the view it did in relation to the previous trips mentioned in its letter of 15 June 2011. Nevertheless the Tribunal noted that having received the letter the appellant had not raised an issue with the point until today’s hearing and he
35 did not give evidence on the matter which was subject to cross-examination.

32. While there is a dispute between the parties on whether the earlier trips were smuggling it does not appear to the Tribunal that this point was a relevant factor in the UKBA’s reasoning or under its restoration policy.

33. It was not in dispute that the goods were intended to be supplied for profit. UKBA's policy sets out the vehicle may, at UKBA's discretion, be restored if the quantity of excise goods is small and it is a first occurrence. UKBA's willingness to consider restoration in such circumstances is reflected in Officer Crouch's review letter but he then goes on to clarify that because the amount of cigarettes (9,860) is not small he did not apply that provision. Neither the policy or the approach Officer Crouch took to applying it in relation to the quantities in this case, (being over three times the guideline amount for importation from the EU of 3200 cigarettes) strike us as being unreasonable.

34. Given the issue of whether the smuggling was a first occurrence was not a relevant factor in the decision or a factor under the policy that needed to be taken into account given the quantity of cigarettes seized, it is not in the Tribunal's view essential for the Tribunal to make a finding on this point. We are satisfied that although the previous trips are mentioned in UKBA's letter, the fact they were mentioned in the letter is not material on the facts of this appeal to our consideration of whether UKBA's decision took into account an irrelevant factor or failed to take into account a relevant factor.

Proportionality

35. Mr Crouch said that the trade valuation of £206 mentioned for the car was derived from extrapolating figures given in Glass's guide. The appellant has stated in his notice of appeal that the car "is only worth £500". The evaded excise duty was £1,877.59. Whether proportionality is approached from the view that the more expensive the car in relation to the duty the more disproportionate the refusal to restore, or conversely, as the appellant seemed to be arguing, that it was disproportionate to refuse to restore a car whose value was small in relation to the duty evaded we can see no issue with proportionality. The refusal to restore a vehicle whether it is worth £206 or £500 in a case such as this where a sizeable amount of seized goods were destined for supply for profit, and where they were concealed in the vehicle strikes us as being in no way disproportionate.

Exceptional hardship

36. It was not contested that the appellant suffered from a medical condition. What was in issue was the effect the loss of the appellant's car had on him given his medical condition. Officer Crouch explained to us how he had checked Google maps to see where the appellant had lived at the time the appellant had written in. He had noted that the appellant's address was in a relatively central area in Southampton. The maps indicated there were bus-stops and a doctor's surgery close by. Officer Crouch had formed the view that the appellant who had mentioned in his letter that he regularly did Tae kwon do and attended a gym was someone who was mobile and able to make use of public transport in the urban area in which he lived and the hardship complained of amounted to inconvenience.

37. His view seems to us to be entirely reasonable. The appellant's claim to hardship in reality discloses nothing more than the fact it took more time to get to

where he needed to get to using public transport rather than the car. It was not that the journeys were impossible, or even that they were inordinately lengthy.

5 38. While Officer Crouch in his correspondence did not individually address each of the points raised by the appellant they are we think are covered by the conclusion
10 that the appellant was mobile, and able to use public transport, and well-situated to do so. Some of the points raised by the appellant e.g. that he had to return back from the gym with wet hair after showering and was tired after his training there were so obviously misconceived as not to warrant a specific response. In relation to the complaint about the appellant's medical condition necessitating bulky supermarket
15 shopping, again we think this is covered by the point that the appellant is mobile and able to use public transport. As was pointed out at the hearing it is also possible if this was a concern that home delivery could be organised.

20 39. At the hearing a new issue was raised, namely that the appellant was not able to use public transport as he needed to be able to carry out his self-injections in the car. Beyond Mr Platski making a submission that this was the case no evidence was
25 offered to support this. Officer Crouch was asked whether it would make any difference to a decision refusing restoration if an appellant suffering from diabetes were to claim there was exceptional hardship because they could not rely on public transport due to the need to make regular self-injections that they would otherwise carry out in their car. He said it would not change his view. If the injections were regular the appellant could be expected to pick suitable times to carry them out. For our part we do not think a refusal to restore in the circumstances of the appellant would be at all unreasonable. The regular journeys the appellant takes are not especially lengthy and there is nothing to suggest the injections could not be planned
30 around the journeys. In any case there are no doubt diabetes sufferers in a similar position to the appellant who manage to get through their day without a car to self-inject in and who have to rely on public transport to get around.

35 40. We conclude that the UKBA's decision refusing restoration of the car was clearly within the range of reasonable decisions that UKBA are authorised to make and the decision does not disclose any error of law. The review officer took into account all the relevant considerations including the personal circumstances of the appellant and we do not think that he took into account any irrelevant factors in arriving at the decision to refuse restoration of the excise goods and the vehicle. The decision appealed against is, in our view, neither unreasonable nor disproportionate and is not a decision that "could not reasonably have been arrived at" within the meaning of section 16(4) of Finance Act 1994. We therefore dismiss the appeal.

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41. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**SWAMI RAGHAVAN
TRIBUNAL JUDGE**

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RELEASE DATE: 18 June 2012