TC02518

Appeal number: TC/2011/2679

FORFEITURE OF GOODS – inaccurate grounds for forfeiture given by UKBA – no presumption goods duly condemned - UKBA's decision not to restore unreasonable – UKBA directed to reconsider – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

W PASH **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUES **Respondent**

TRIBUNAL: JUDGE BARBARA MOSEDALE

The Tribunal determined the appeal on 3 December 2012 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 with the consent of the appellant and UKBA.

The appellant was unrepresented but made a number of submissions, the last received 10 December 2012;

Mr Rupert Jones, Counsel, instructed by the solicitor to the Director of Border Revenue, for the Respondents

DECISION

1. On 1 September 2010, a package sent to the appellant from the USA via UPS and which arrived at East Midlands Airport was intercepted by the UK Border Agency ("UKBA"). The declaration on the outside of the package was that it contained "vitamins/books/mags".

2. The package contained four containers, each labelled as containing 1 kg of 'Enhanced Life Extension Protein'. The label on the packages said that this product contained 100% whey protein isolate plus added lactoferrin. The ingredients label showed that each container included milk and soybeans.

3. On 14 September 2010 the UK Border Agency ("UKBA") wrote to Mr Pash and notified him that they had seized the package under s 49(1)(b) of the Customs & Excise Management Act 1979 as liable to forfeiture under the Products of Animal Origin (Import and Export) Regulations 1996. He was told that he had to give notice within one month if he claimed the goods were not liable to forfeiture in which case UKBA would take legal proceedings to have the goods condemned.

4. The appellant replied on 23 September 2010, within the 1 month allowed. It was a long letter mainly explaining the appellant's medical history and the reason why he considered that the 'Enhanced Life Extension Protein' would alleviate some of his health problems. It concluded with the words:

> "Do not carry out your threat to destroy the consignment of LEF enhanced protein that you have impounded. You can see how important taking it daily is in my situation, that consignment cost me £88 sterling which is a sizeable chunk out of my pension- and I can't get it anywhere else!"

5. UKBA did not treat this letter as a claim that the goods were not liable to forfeiture and did not take action to have the goods condemned. Instead, UKBA treated the appellant as someone who had not challenged the forfeiture and they treated his letter of 23 September 2010 as a request to restore the goods to him. On 17 February 2011, the UKBA refused to restore the goods to the appellant; and on 29 March 2012 Mr Aston, a different UKBA officer, upheld this decision on review.

6. It is not in dispute that the appellant is a pensioner and that he purchased the goods for his own consumption. He wished to combat muscle loss as a result of an enforced diet change for health problems from which he suffered. It was his view that he was unable to source this product or a suitable substitute within the UK, and considers it essential to prevent further deterioration in his health. From the many letters Mr Pash has written both the the UKBA and Tribunal Service it is apparent he considers that the food supplement is very important to him.

Decision on papers

7. Although this is a standard case and would normally have been decided at a hearing, in accordance with both parties wishes the matter was decided on the papers. Dealing with the case has taken longer than the appellant might have expected as it was apparent when I first came to decide the matter in September 2012 that the area of law at issue in this case changes frequently and HMRC's Statement of Case unfortunately did not deal with the version of law in force at the time of the seizure. I was also concerned (as explained below) whether HMRC's application to strike out was well-founded on the case of *Jones v Jones* (cited below), and therefore for both these reasons it was necessary to ask for further written submissions. These have now been received from both parties and I have proceeded to decide the case. The UKBA's further submissions were made by Mr Rupert Jones of Counsel who had, so far as I am aware, no previous involvement in the case and in particular no involvement in the UKBA's strike out application and Statement of Case.

My jurisdiction

8. It may come as a surprise to Mr Pash, but this Tribunal does not have jurisdiction to overturn UKBA's decision to forfeit the goods. That jurisdiction lies solely with the Magistrates Court.

9. What this Tribunal does have jurisdiction to do is review UKBA's decision not to restore the forfeited goods to Mr Pash. The reason for this is as follows. HMRC (and now UKBA) have power under s 152 of Customs & Excise Management Act 1979 ("CEMA") to restore anything forfeited or seized subject to such conditions as they see fit:

> "**s 152 Powers of Commissioners to mitigate penalties, etc**
>
> The Commissioners may, as they see fit –
>
> ….
>
> (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts."

10. In this case, as I have said in paragraph 5 above, UKBA refused to exercise its discretion to restore the forfeited goods, and Mr Aston upheld that refusal on review. Mr Pash appealed Mr Aston's decision to this Tribunal.

11. The jurisdiction of this Tribunal to hear Mr Pash's appeal derives from the Finance Act 1994. However, by section 16(4) of the Finance Act 1994 the jurisdiction is limited to one which simply reviews the reasonableness of the decision made by UKBA. This Tribunal does not have power to substitute its own decision:

> "(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 review or further review as appropriate] 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 review or further review as appropriate], 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.
> ….

9. This appeal falls into S 16(4) because it is an "ancillary matter" as defined in Section 16(8) Finance Act 1994 and Schedule 5 paragraph 2(1)(r) which provides that an "ancillary matter" is:

> "any decision under section 152(b) as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored"

12. The effect of this provision is that I am limited to considering the reasonableness of HMRC's decision on review to uphold the original officer's decision not to restore the goods to Mr Pash.

13. Before looking at the reasonableness of Mr Aston's decision, I consider first UKBA's application to have Mr Pash's appeal struck out. And before moving on to that question, I mention one other matter in relation to my jurisdiction, which is Mr Pash's request for compensation.

Compensation?

14. Mr Pash asks this Tribunal to give him compensation for a number of matters including keeping his much wanted medical supplement from him for what is now over two years.

15. I find that there have been delays and misunderstandings. It is clear from correspondence that he did not understand that his letter of 23 September failed to clearly challenge the forfeiture; he did not understand the difference between the Magistrates Court and the First-tier Tribunal, and was indeed puzzled why the question of his importation of a health supplement would end up in front of the *tax* chamber of the Tribunal.

16. I also find UKBA have been less than helpful as they have looked at out of date versions of the law and failed to bring the correct law to the attention of Mr Pash or of this Tribunal, as I explain below.

17. Nevertheless, this Tribunal is a creature of statute. I only have jurisdiction in so far as Parliament has given it to the Tribunal. My jurisdiction is, as I have said, limited to reviewing UKBA's exercise of discretion not to restore the goods to Mr Pash. I have no power to award Mr Pash compensation.

Strike out application

18. UKBA applied on 10 April 2012 to have Mr Pash's appeal struck out on the basis that his arguments were based on assertions of personal use and that the Tribunal does not have jurisdiction to consider arguments relating to own use and legaility of seizure, citing the Court of Appeal decision in *HMRC v Jones & Jones* [2011] EWCA Civ 824.

19. The Tribunal decided to deal with the strike out application simultaneously with the appeal: in other words, if the strike out application failed, the Tribunal immediately would go on to deal with the appeal itself. And that is what I will do.

20. I note that in any event, UKBA's strike out application was made without reading the file carefully: Mr Pash's appeal was not based on assertions of personal use. That the goods in question were for Mr Pash's own use was not in doubt. The goods, on the contrary, had been forfeited as being of animal origin prohibited from importation.

21. Nevertheless, all Mr Pash's grounds of challenge were grounds which challenged the legality of seizure. In summary they were (as ascertained from the many letters Mr Pash has written):

(a) UKBA did not submit the goods to veterinary checks and they should have done before deciding they were unlawful imports (I reach a conclusion on this in paragraph 86);

(b) He was entitled to the exemption from restrictions on imports contained in Regulation 4(7)(a) of the 2006 Regulations (set out below) (I reach a conclusion on this in paragraph 102-108)

(c) This was his second importation and his first importation of Enhanced Life Extension Protein had been unchallenged by UKBA. However, I find an earlier failure to forfeiture does not make a later forfeiture unlawful so I reject this point and do not mention it again;

(d) Only milk products are prohibited from importation not products derived from milk, such as the goods in question in this appeal (I reach a conclusion on this in paragraph 91);

(e) The goods are a medical supplement and not a food and therefore not banned from importation (I reach a conclusion on this in paragraph 92).

(f) the milk in the goods was treated and therefore harmless. It was not raw (I reach a conclusion on this in paragraph 92).

Can I consider whether the goods were correctly forfeited?

22. UKBA's position is that I cannot consider whether the goods were correctly forfeited in the first place, and indeed must strike out the appeal, because Mr Pash's grounds of appeal were all related to the question of whether the forfeiture was lawful. CEMA 79 Schedule 3 provides as follows:

> "(3) Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners….
>
> (5) If on the expiration of the relevant period under paragraph 3 above for giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, ….the thing in question shall be deemed to have been duly condemned as forfeited."

I will refer to these paragraphs below as Paragraph 3 and Paragraph 5 respectively.

23. The critical words here are that the goods in question shall "be deemed to have been duly condemned as forfeited". This was considered in the recent Court of Appeal case of *HMRC v Jones & Jones* [2011] EWCA Civ 824. It was held in that case that:

> "[71(5)] ….The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.
>
> …
>
> (7) …The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to 'reality'; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion.
>
> …
>
> (9) ….there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as the reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner."

24. It is clear to me from this that where Paragraph 5 refers to goods being "duly condemned" as forfeit this must be taken to mean that this Tribunal does not have the jurisdiction to re-open any question of fact *or law* that would have been for the Magistrates Court to decide. In *Jones & Jones* the issue was one of fact: were the goods for personal import? In this case, the question would have been one of law as the facts were not in dispute: were the goods as a matter of law "products of animal origin" and did any exemption apply?

25. But *Jones & Jones* make it clear that Paragraph 5 must be taken as applying to any question that would have been decided in the Magistrates Court. So in any case where an appellant, having been given proper notice of forfeiture, did not then give notice under Paragraph 3 to challenge the forfeiture, the Tribunal must take it that the goods at issue in any such appeal were *duly* condemned. It must assume that they were lawfully forfeited.

Further submissions

26. The points in respect of the strike out application on which I asked for further submissions were:

(1) whether the decision in *Jones & Jones* applied in a case whether UKBA did not give proper notice of forfeiture; and

(2) whether UKBA did give proper notice of forfeiture in this case.

Effect of failure to give proper notice of forfeiture

27. Schedule 3 Paragraphs 1 & 2 of CEMA provides:

> (1)The Commissioners shall, except as provided in sub-paragraph (2) below, give notice of the seizure of any thing as liable to forfeiture and of the grounds therefor to any person who to their knowledge was at the time of the seizure the owner or one of the owners thereof.
>
> (2)Notice need not be given under this paragraph if the seizure was made in the presence of—
>
> (a)the person whose offence or suspected offence occasioned the seizure; or
>
> (b)the owner or any of the owners of the thing seized or any servant or agent of his; or
>
> (c)in the case of any thing seized in any ship or aircraft, the master or commander.

I shall refer to these paragraphs as Paragraph 1 and Paragraph 2 respectively.

28. What is the position if UKBA seizes an item but fails to state the grounds therefore?

29. UKBA's position is that this makes no difference to the jurisdiction of the Tribunal: the Tribunal is unable to consider whether the seizure was lawful as this

would be to usurp the jurisdiction of the Magistrates Court. While a failure to state the grounds of the seizure would be grounds on which the lawfulness of the seizure could be challenged, that challenge can only be made in the Magistrates' Court.

30. I agree with this as far as it goes. My jurisdiction is solely to consider the reasonableness of UKBA's decision to refuse restoration. But when reviewing UKBA's decision on restoration, I need to consider whether UKBA should have considered the lawfulness of the seizure when considering restoration. If something should not have been seized, it stands to reason it ought to be restored.

31. Therefore, apart from paragraph 5 of CEMA 79, contrary to UKBA's submissions, this Tribunal would have jurisdiction to consider the lawfulness of the seizure as part of its consideration of whether UKBA were reasonable to refuse restoration. While this Tribunal has no jurisdiction to actually order goods to be restored, the fact that the Magistrates Court would also consider the question of the lawfulness of the seizure in its determination had it been called to make one, does not mean that this Tribunal cannot make a ruling on the same question. In a situation where there has been no prior judicial determination of the matter, this Tribunal would, apart from Paragraph 5, be able to make such a determination.

32. As there has been no prior judicial determination, only the deeming effect of Paragraph 5 could remove my jurisdiction to consider the lawfulness of the seizure. And does it do so?

33. The Court of Appeal's decision in *Jones v Jones* is quite clear that neither UKBA nor this Tribunal has any jurisdiction to re-open questions which were deemed to be decided by the Magistrates Court. So the question is whether, in a case where HMRC fails to give proper notice of the grounds of the seizure, if this is not challenged in the Magistrates Court, the issue is deemed to have been decided against the appellant?

34. Paragraph 5 applies where "on the expiration of the relevant period under paragraph 3 for the giving of notice of claim…no such notice has been given." However, paragraph 5 requires expiration of the relevant period under paragraph 3. The relevant period under paragraph 3 is "one month of the date of the notice of seizure". So the question is when and whether UKBA gave "the notice of seizure".

35. UKBA's position is that the appellant was given notice of seizure, and it makes no difference whether that notice was accompanied by the grounds of the seizure as required by paragraph 1 CEMA 79 (see paragraph 27 above). Their position is that a failure to state the grounds of the seizure is a ground on which the validity of the seizure could be challenged but it does not mean that no notice of seizure was given.

36. As cited above, UKBA are required when seizing something in the absence of its owner to "give notice of the seizure of any thing as liable to forfeiture and of the grounds therefore". Is "notice of seizure" merely the notice of seizure or is it "notice of the seizure …and of the grounds therefore"? In other words is the Notice referred

to Paragraph 3 merely a notice that seizure has taken place or is the Notice referred to in Paragraph 3 incomplete unless it includes the grounds of the seizure?

Does notice of seizure include the grounds of seizure?

37. This is not an entirely straightforward exercise in statutory construction: it is ambiguous whether "notice of seizure" means just notice of the fact of seizure or the notice required to be given by paragraph 1 CEMA 79 which would require notice of both the fact of seizure and the grounds of it.

38. From a purposive point of view, it is clear that Parliament intended that persons should be told *why* their goods were being seized; and without that knowledge it is difficult to challenge a seizure. UKBA's position, on the other hand, appears to be that a failure to state the grounds would itself enable the appellant to successfully challenge the seizure and in that sense, not knowing the grounds, actually assists the appellant's position as it gives them grounds of challenge.

39. However, as the provision is ambiguous, it should be interpreted consistently with what Parliament is likely to have intended. It no doubt wished appellants to be informed of the grounds of seizure for fairness so that the appellant could effectively challenge the seizure if it wished, but also to avoid unnecessary challenges by requiring UKBA to explain why the seizure took place. It is clear that paragraph 1 in is not complied with by UKBA until it both notifies the seizure and the grounds therefore.

40. In my view, as time runs against the appellant under Paragraph 5, it therefore makes sense that "notice of seizure" in paragraph 3 should be interpreted as referring to the notice issued in compliance with Paragraph 1. In other words, time only runs against an appellant after he has been informed of both the fact of seizure and the grounds therefore.

41. Therefore, a notice of seizure without grounds is not notice within paragraph 3. Does that mean that the deeming provisions of paragraph 5 will not apply, or at least will not apply unless and until UKBA has given notice of the grounds of seizure?

Does such an interpretation make the appellant a person without notice?

42. But if that interpretation is correct, does that mean the deeming provision won't apply? Paragraph 3 contemplates the positions of both an appellant who has been given notice of seizure and one who has not. So would a finding that notice of seizure *without* grounds is not "notice of seizure" merely put the appellant in the position of a person "where no such notice has been served" and leave him with a shorter time limit in which to challenge the forfeiture and still engage the deeming provision?

43. This is because an appellant in the position of someone "where no such notice has been served on him" has only one month to challenge the forfeiture from the date of actual forfeiture and is in a worse position than someone who is given notice. However, the reason for this shorter time limit must have been because drafter of this

paragraph clearly anticipated that the person who had no notice would be someone who was present at the time of forfeiture and to whom HMRC did not have to give notice under paragraph 1. Nevertheless, the wording is unrestricted and is also apt to apply to someone who was not present at the seizure and whom UKBA failed to notify in accordance with their duty to do so under Paragraph 1.

44. The unfortunate effect of such an interpretation is that someone who should have been given notice under Paragraph 1 but was not given notice in breach of UKBA's duty under paragraph 1, and who therefore remains unaware of the forfeiture, has only one month from the date of actual forfeiture to challenge it before the goods become duly condemned as forfeit. This would be a very unfair outcome allowing UKBA to benefit from its own failure to undertake its duty to give notice under paragraph 1 and is absurd. It is clear that Parliament intended that UKBA would give notice as required under Paragraph 1 as it used the word "shall" and only made specific exceptions to that duty. It would be absurd if paragraph 3 should be read in such a way to contradict the duty on UKBA in paragraph 1. I find that "where no such notice has been served on him" ought to be read as meaning "where no such notice should have been served on him".

45. I also note that a purposive interpretation has been given to these provisions in the High Court: as discussed below, Mr Justice Harrison in the *Venn* case read into paragraph 1 a duty to state the grounds to a person who was present at seizure even though there is no express provision to this effect in paragraph 1. This fortifies my conclusion that paragraph 3 should not be read literally in such a way to contradict the intention of paragraph 1.

46. Where does that leave an appellant who had notice of the fact of seizure but not notice of the grounds of seizure? I consider that, for the reasons stated above, the correct interpretation is that notice under paragraph 3 must be notice as required under paragraph 1 and that therefore it must be notice of the fact of seizure and the grounds therefore. And that time under Paragraph 3 and 5 does not run until such notice has been given, and the deeming effect of paragraph 5 does not apply until that time is expired.

47. So I have to go on and consider whether, as a matter of fact in this case, the appellant was given notice of the grounds of seizure.

Was notice given of the grounds of seizure?

48. In this case, Mr Pash was not present at the time of seizure as the goods were posted to him, so UKBA was bound to give him notice of the seizure. And as I have said in paragraph 3, UKBA wrote to Mr Pash to that effect on 14 September 2010. However, Sch 3(1) requires UKBA to both give notice of seizure and "the grounds therefor". UKBA's letter of 14 September 2010 gave the grounds of seizure as:

> "[the goods] has been seized as liable to forfeiture…on the grounds that they [ie the goods] have been imported contrary to the prohibition

> imposed by the Products of Animal Origin (Import and Export) Regulations 1996."

49. However, at the time this letter was written the Products of Animal Origin (Import and Export) Regulations 1996 had been repealed (by various statutory instruments) and the actual authority for the seizure was contained in the Products of Animal Origin (England) Regulations 2006 as amended.

50. UKBA's case is that this was proper notice and the mistake it made does not affect this because:

(a) It is not required to state correct legislation;

(b) It is only a minor mistake;

(c) It did correctly cite s 49(1)(b) CEMA;

(d) It did refer to to animal products

(e) The mistake caused the appellant no prejudice.

(f) UKBA is entitled to change its grounds.

51. Required to state correct legislation? UKBA's position on this is that UKBA is not required to state the correct legislation provisions when forfeiting goods. The reason for this view appears to be that Mr Justice Harrison's decision in *Venn & Others v HMRC [2001] EWHC Admin 1055* was that a person who was present at the time of forfeiture should be given the grounds of forfeiture in the same way that someone (like Mr Pash) who was not present, has the right to be told the grounds of seizure. Therefore, runs UKBA's argument, as an officer on the ground making a seizure in person must state the reason for the forfeiture but can't be expected to cite chapter and verse, it follows UKBA notifying a seizure by letter does not have to state the correct legislation under which the seizure was made.

52. In support of this position Mr Jones also cited *R (oao First Stop Wholesale Ltd) v HMRC* (5 October 2012). In that case Mr Justice Singh was reported as saying:

> "the notice was sufficient if it was clear to the recipient that the goods had been seized because of alleged absence of payment of duty".

53. I agree with UKBA's position that it is not necessary to cite the legislative basis of the seizure if the reason for the seizure is made clear. However in this case the *only* ground given by UKBA was a reference to the wrong legislation. It is incumbent on UKBA, if it refers to legislation, to refer to the correct legislation; and while perhaps a reference to incorrect legislation could be excused if an accompanying explanation of the grounds for seizure were given, in this case no other explanation was given.

54. Minor mistake? UKBA might consider it a minor mistake to refer to the Products of Animal Origin (Import and Export) Regulations 1996 rather than the Products of Animal Origin (Third Country Imports) (England) Regulations 2006 ("the 2006 Regulations"). UKBA consider that what was said that their letter of 14 September 2010 was enough to put the appellant on notice that the seizure was

because the product contained animal products. By comparison with what Mr Justice Singh said in the case of *First Stop Wholesale* in relation to a forfeiture for non-payment of excise duty, UKBA consider that this was sufficient. The appellant knew (or should have known) that the goods were forfeit because they were or contained animal products, even if the letter failed to identify the legislative provision which made them liable to forfeiture. This was enough, says UKBA, to fulfil its obligations under paragraph 1 of CEMA.

55. I find that 1996 regulations are not the same as the 2006 Regulations: the later version does not re-enact the earlier version. The provisions are different. Further, even when UKBA in its Review letter and Statement of Case referred to the 2006 regulations they made other errors in the legislative provisions which, as I said, put me to some trouble researching the correct provisions, and would have been unhelpful to the appellant.

56. Nevertheless, in principle I agree with UKBA that the letter notifying forfeiture does not have to be the equivalent of pleadings. It is enough to state the reason for forfeiture, without reference to legislative authority. UKBA's case is that the appellant could guess from the title of the repealed legislation that the reason for forfeiture was that the goods contained animal products. This implies that UKBA consider it would have been sufficient "grounds" within paragraph 1 to state that the goods were forfeit as containing animal products.

57. I am not persuaded that this is correct: many animal products can be imported. I think UKBA would have had to have gone further and stated why this particular animal product was forfeited. In any event, the only ground given was a reference to repealed legislation, and I consider that is insufficient as "grounds" even if the appellant might be able to "guess" the actual reason for forfeiture from the name of the repealed legislation.

58. Correctly stated grounds of forfeiture. The notice of seizure did correctly state that the goods were forfeited under s 49(1)((b) CEMA which is the legislative provision which gives UKBA and HMRC power to forfeit imported goods. UKBA state that on a "narrow basis" this fulfilled the requirement of paragraph 1 of CEMA for the grounds of seizure to be stated.

59. I do not accept this: it is not so much "narrow" as removing all meaning from the requirement of paragraph 1 for grounds to be stated. As the forfeiture has to be under s 49 CEMA in all cases, Parliament cannot have intended such a statement to fulfil the requirement to give the owner of the goods the grounds of forfeiture. It tells them nothing informative.

60. I find UKBA did not correctly state the grounds of forfeiture by referring to s 49 CEMA.

61. No prejudice? UKBA's case is also that although their letter of XXX did incorrectly state the legislative provision under which the seizure was made, nevertheless in fact the appellant suffered no prejudice from this.

62. I consider this, even if true, irrelevant. The requirement for grounds in paragraph 1 is mandatory in all cases. There is nothing to release UKBA from this duty if they could show the appellant was not prejudiced by their failures.

63. UKBA entitled to change grounds for forfeiture. It was also UKBA's case that the grounds stated under paragraph 1 did not have to match the grounds relied on by UKBA in any condemnation proceedings in the Magistrates Court: *R (oao Hoverspeed ltd) v HMCE* [2002] EWCA Civ 1804. While this is true, assuming the grounds actually relied on were properly pleaded, it does not obviate UKBA's requirement to state the grounds in paragraph 1 of CEMA.

64. Another way of putting UKBA's case on this seems to be that it is their case that even if they forfeit the goods on wrong grounds, they are entitled to plead in the Magistrates Courts other grounds to justify the forfeiture. Therefore, it does not matter if in the notice under Paragraph 1 refers to incorrect grounds. This is, it appears true, so far as proceedings in the Magistrates Court are concerned: but if notice under Paragraph 1 is not correctly given, then Paragraph 5 cannot create a deeming effect as explained above.

65. Parliament intended finality: Of much more significance is that Paragraph 5 was intended to provide finality. Parliament's clear intention was to put the issue of the lawfulness of the forfeiture beyond question once the month after the notice had passed without challenge. Any interpretation which prevents that objective being achieved is inconsistent with Parliament's intention. In any case where UKBA forfeit goods where it could later be demonstrated that the goods were not liable to forfeiture, it inevitably means the "wrong" grounds must have been stated under Paragraph 1. The goods were not liable to forfeiture so there were no "right" grounds. But if stating the "wrong" grounds means that the necessary notice is not given under Paragraph 1 and therefore Paragraph 3 and 5 do not come into play, Parliament's intention will be defeated as it is just such a situation in which Parliament did intend the deeming provision to apply.

66. Therefore I find that it does not matter whether, when stating the grounds of forfeiture under Paragraph 1, UKBA are right to forfeit the goods under that provision or not, as long as that is the provision under which the goods were actually forfeited. If the owner of the goods considers that the forfeiture was unlawful, he must challenge it within the stated time or it will be deemed to have been a lawful forfeiture (even though it may not have been).

67. So there is a balance to be drawn. Parliament clearly intended the owner of the goods to be given sufficient information to decide whether to challenge the forfeiture: but the fact that the reason for the forfeiture is correctly stated but wrong in law will not prevent it being a valid notice.

68. On which side of this line does the notice given to Mr Pash fall? I conclude that the fact it refers to the wrong legislation is by itself insufficient to mean it is not notice within Paragraph 1: its failure to say any more, however, such as that the goods were forfeited as milk products imported from the USA, is in fact a failure to state

what appear to have been UKBA's grounds of forfeiture. I find it is not notice within Paragraph 1 and therefore the deeming provision of Paragraph 5 does not apply.

69. On this review of HMRC's decision to refuse to restore, I can therefore consider the lawfulness of the seizure.

Did Mr Pash challenge the seizure within one month?

70. Further, and in case I am wrong on my above conclusion, the deeming effect of Paragraph 5 only applies where the owner of the goods does not give "notice of claim". The notice of claim is defined in Paragraph 3 as a claim:

> "that any thing seized as liable to forfeiture is not so liable"

71. UKBA gave notice of seizure on 14 September 2010. Well within one month, on 28 September 2010, Mr Pash wrote back a long letter, mostly explaining what the product was and why he wanted it but also stating, as quoted above in paragraph 4:

> "Do not carry out your threat to destroy the consignment…."

72. This was treated by HMRC as a request for restoration. This was presumably on the basis that HMRC did not consider that anywhere in Mr Pash's long letter did he at any point state that he considered the consignment was not lawfully forfeit. However, I find that he did say, right at the start of the letter, that its list of ingredients was such that:

> "there is little reason for a layman like myself to think he is guilty of bringing an ordinary food product into the UK."

73. While UKBA may not have considered that sentence amounted to a challenge to the lawfulness of the forfeiture, it seems to me that it is. While it is no more grounded in the law that UKBA's stated reason for forfeiting the product in the first place, I do not find it is incumbent on the owner to correctly state grounds at this early point. He is only required to state that he did not consider the goods liable to forfeiture. This is a statement in which, however ill-informed on the law, Mr Pash is making it clear that he did not consider the goods to have been lawfully forfeited.

74. I find it is a claim within Paragraph 3 and one made within the necessary one month. For this reason too, Paragraph 5 and its deeming effect is not in point. I can consider the legality of the seizure when considering the reasonableness of HMRC's decision to refuse restoration.

75. I refuse to strike out the appeal and go on to consider its merits.

Was UKBA's decision not to restore reasonable?

76. When considering whether UKBA's decision not to restore the goods was reasonable, I have to consider whether UKBA took into account all that they should have done and that they did not consider irrelevant matters.

77. So what did Mr Aston consider?

(1) The goods contained milk;

(2) all goods from the US containing milk cannot be imported whether in personal luggage or by post.

(3) Restrictions on importations of goods of animal origin exist for reasons of safeguarding human and animal health in the UK by avoiding the risk of disease from abroad.

(4) Mr Pash would have known this had he consulted DEFRA's website which said all milk imports from the US were banned.

(5) Mr Aston had consulted DEFRA and been informed that the legislation banning imports of animal products must be strictly adhered to.

78. What did Mr Aston not consider?

(1) He did not consider the legality or correctness of the seizure – and it is apparent from his letter that he did not consider the current version of the 2006 Regulations at all;

(2) He did not consider that (as I have found) that UKBA failed to give Mr Pash proper notice of seizure and that therefore he ought to have considered whether to restore the goods if he found the forfeiture was unlawful;

(3) He did not consider that DEFRA's website contained inaccurate information – which, as I explain below – it did.

79. I have said that Mr Aston ought to have considered the legality of the seizure. However, if it is inevitable, that had he done so he would have arrived at the same conclusion (that the goods should not be restored) in any event, I would be unable to conclude that, despite this omission, his decision was one which could not reasonably have been arrived at.

80. So I must consider the legality of the seizure.

Were the goods lawfully forfeited?

81. The Customs and Excise Management Act s 49(1)(b) provides as follows:

> "**Section 49** (1)Where –
>
> (a) [irrelevant]
>
> (b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; ….
>
> …..
>
> those goods shall …..be liable to forfeiture."

82. This is the provision under which the goods were forfeited by UKBA. Was their importation contrary to any prohibition or restriction?

83. The Products of Animal Origin (Third Country Imports) (England) Regulations 2006 ("the 2006 Regulations") state as follows:

> **Regulation 15 Prohibition of non-conforming products**
>
> No person may bring a non-conforming product into England from a third country, ….. unless –
>
> (a) it is a transit product;
>
> (b) its destination establishment is a warehouse in a free zone…..
>
> (c) its destination establishment is a cross-border means of sea transport….."

None of the exceptions at (a)-(c) apply: Mr Pash brought the goods into the country for his own use. The question is simply whether the goods were a non-conforming product.

Non-conforming product?

84. The Article 2 on Interpretation of the 2006 Regulations defines "non-conforming product" as:

> "a product which does not comply with the import conditions"

85. Import conditions. Import conditions were contained in Schedule 1 of the Products of Animal Origin (Third Country Imports) (England) (Amendment) Regulations 2010 No 1758 with effect from 29 July 2010. Those related to milk and milk products are in Part 4. To be within these conditions, the goods would have to be within either paragraph 1 or 2 of Part 4. They are not within paragraph 2 which relates to Commission Decision 97/252/EC and does not apply to any products from the US. Nor are they within paragraph 1 which relates to milk based products subject to certain treatment which are accompanied by a health certificate issued in country of export. The goods were not accompanied by such a health certificate.

86. It is part of Mr Pash's case that UKBA should have undertaken a veterinary inspection of his goods and provided them with the appropriate certification. He is mistaken. The importer must provide the relevant certification, not UKBA. I find the goods did not meet with import conditions.

87. Product? But were the goods 'products' at all within the meaning of the Regulations? In the 2006 Regulations a 'product' was defined as:

> "(a) any product of animal origin listed in the Annex to Commission Decision 2002/349/EC…..
>
> ……
>
> But does not include composite food products as specified in Article 3 of Commission Decision 2002/349/EC"

88. But the 2006 Regulations were later amended numerous times, although as I have said this was not drawn to Mr Pash's or this Tribunal's attention. The Products of Animal Origin (Third Country Imports) (England) (Amendment) Regulations 2007 no 1605 gave a new definition of "product" with effect from 7 June 2007:

> **Regulation 2(3)**
>
> 'product' means any product of animal origin listed in Chapter 2,3,4,5,12,15,16,17,19,20,21,23,30,31,35,41,42,43,51, or 97 of the Table in Annex I to Commission Decision 2007/275/EC ….but does not include –
>
> (a) composite products and foodstuffs listed in Annex II to Commission Decision 2007/275/EC; or
>
> (b) composite products not containing meat or meat products, where less than half of the product is processed product of animal origin, provided that such products are –
>
> (i) shelf-stable at ambient temperature or have clearly undergone, in their manufacture, a complete cooking or heat treatment process throughout their substance, so that any raw product is denatured;
>
> (ii) clearly identified as intended for human consumption;
>
> (iii) securely packaged or sealed in clean containers; and
>
> (iv) accompanied by a commercial document and labelled in an official language of a member State, so that the document and labelling give information on the nature, quality and umber of packages of the composite products, the country of origin, the manufacturer and the ingredient."

89. Chapter 4 includes within it products within CN code 0404 which is:

> "whey, whether or not concentrated or containing added sugar or other sweetening matter; products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, nor elsewhere specified or included."

90. Chapter 21 (miscellaneous) covers:

> Ex 2106 Food preparations not elsewhere specified or included. Includes those preparations containing meat or products of animal origin in accordance with this Decision; or
>
> Ex 2106 10 Protein concentrates and textured protein substances. Includes those preparations containing products of animal origin in accordance with this Decision; or
>
> 2106 90 (98) Other. Includes those preparations containing meat or products of animal origin in accordance with this Decision.

91. I therefore find that the goods are a product of animal origin within Commission Decision 2007/275/EC under either Chapter 4 or 21. Mr Pash challenges this: he says only products such as milk butter cheese and yoghurt are banned whereas his goods

were merely a product derived from milk. It is clear that Chapter 4 includes whey and the goods imported by Mr Pash were described as "100% whey protein isolate plus added lactoferrin". And if, because of the added lactoferrin, the why protein is not within Chapter 4 I find it would be in Chapter 21.

92. I also reject Mr Pash's argument that because the goods were a supplement and not a food, it was not within these provisions. Both "preparations" and "food preparations" are covered. Similarly it makes no difference that the product was treated and not raw: these Chapters contain no such exemption for treated products.

93. So I move on to consider whether any of the exceptions apply.

94. Composite product? The goods do not appear to be within the exception (a). Annex II is a list of 'composite products or foodstuffs' (see Article 6(1)(b)) and the only possibly applicable item in that Annex is:

> "food supplements packaged for the final consumer, containing small amounts of animal product, and those containing glucosamime, chondrotitin, or chitosan."

95. From the labelling, I find that the goods do not contain glucosamime, chondrotitin, or chitosan and I find that milk products accounted for a substantial part of the product and cannot therefore be described as "small amounts." So exception (a) does not apply. What about exception (b)?

96. To be within (b) the goods would have to comprise less than 50% milk and be accompanied by the necessary commercial document. It seems unlikely the consignment was accompanied by the specified commercial document and in any event on the evidence I have from its labelling there was 19.44g of "whey protein isolate" to every 20g of the product. Exception (b) did not apply.

97. However, what is clear is that UKBA neither at the time they made the decision, nor when Mr Aston reviewed it, considered whether the goods were a composite product within the meaning of these regulations. UKBA's decision to seize and forfeit these goods appears to have been based on an assumption that *any* product from the US containing milk was banned from import. As can be seen from the above provisions, this is not the case.

98. Nevertheless, even had UKBA considered the correct law, they would have reached the conclusion that they did, which was that the goods Mr Pash sought to import were a non conforming product.

Exception for personal imports

99. There is in any event an exception to the ban on importation of non-conforming products. This is contained in Regulation 4 of The Products of Animal Origin (Third Country Imports) (England) Regulations 2006.

100. As enacted, Regulation 4 provided as follows:

Regulation 4

(1) Parts 3 to 9 do not apply to products brought into England from a third country with the previous authorisation of the Secretary of State…..

(2)-(6) [more provisions dealing with products brought in with authorisation of the Secretary of State]

(7) Part 3, with the exception of Regulation 25, and Parts 4-9 do not apply to –

(a) powdered infant milk, infant food, or special foods required for medical reasons containing meat, meat products, milk or milk products from a third country if –

(i) they form part of a traveller's personal luggage and are intended for his personal consumption or use;

(ii) they do not exceed in quantity that which could reasonably be consumed by an individual;

(iii) they do not require refrigeration before opening;

(iv) they are packaged proprietary products for direct sale to the final consumer;

(v) their packaging is unbroken, unless they are in current use.

(b) Meat, meat products, milk or milk products from the Faroe Islands, Greenland, the Republic of Iceland, Liechtenstein, or Switzerland if –

[and there follows various conditions]

101. The effect of this would be to exempt an import from Regulation 15 (cited above) which prevents the importation because Regulation 15 is in Part 3 of the 2006 Regulations.

102. There is no suggestion that Mr Pash could have claimed the benefit of clause 4(1) as it was implemented. His importation was not authorised by the Secretary of State. Nor could Mr Pash have been within clause 4(7)(b) as the goods he imported were from the US.

103. However, when UKBA drew these provisions to his attention, Mr Pash claimed he was within exception 7(a). But he would not have been: to be within the exception, he needed to meet all sub-clauses (i) to (v). He failed to meet sub-clause (i). The goods did not form part of a traveller's personal luggage. On the contrary they were sent to the UK through a postal service.

104. But what is disturbing is that the UKBA were mistaken to refer Mr Pash to the Regulation 2006 as implemented. The regulations were later amended. They were amended with effect from 1 May 2009 by the Products of Animal Origin (Third Country Imports) (England) (Amendment) Regulations 2009 No . Regulation 4(7) read at the time of Mr Pash's importation:

(7) Part 3 (with the exception of regulation 25) and Parts 4 to 9 do not apply in relation to the products of animal origin specified in Article 2

of Commission Regulation EC No 206/2009 on the introduction into the Community of personal consignments of animal origin.

105. Article 2 of Commission Regulation EC No 206/2009 provided:

> "Personal consignments of products of animal origin, for personal human consumption, as referred to in Article 16(1)(a), (b), and (d) and in Article 16(4) of Directive 97/78/EC, shall not be subject to the rules set out in Chapter I of that Directive, provided that they belong to one or more of the following categories:
>
> (a) products listed in Part 2 of annex I and their combined quantity does not exceed the weight limit of 0 kg;
>
> (b) products listed in Part 1 of Annex II and their combined quantity does not exceed the weight limit of 2 kg;
>
> (c) [not relevant – relates to fish products]
>
> (d) products other than those referred to in paragraphs (a), (b), (c) or in Article 6(1) of Decision 2007/275/EC and their combined quantity does not exceed the weight limit of 2 kg.

106. Art 2(2) deals with pet food and is not relevant. Art 2(3) deals with products from Croatia, Faeroe Islands, Greenland and Iceland and is not relevant.

107. Article 1(1) defines personal consignments as those which form part of a traveller's luggage or are sent as a small consignment to a private individual or are ordered remotely (eg by telephone, mail or internet) and delivered to the consumer. Unlike the rules in 2006, by the time of Mr Pash's purchase, personal consignments included goods ordered remotely and posted to the UK. Mr Pash's purchase was therefore a personal consignment.

108. Mr Pash's goods weighed 4kg as they comprised 4 1kg bottles of the Enhanced Life Extention Protein. They were therefore *not* within this exemption.

109. The importation was unlawful and, even though I have found that Paragraph 5 did not apply and that UKBA ought to have considered the lawfulness of the seizure, this does not help Mr Pash as the seizure was lawful.

110. But that is not the end of the matter. I am not deciding whether or not the forfeiture was lawful but whether HMRC's decision not to restore the goods was reasonable.

Was the decision to restore unreasonable?

111. The mere fact the seizure is lawful does not justify HMRC's refusal to restore: if that were the case HMRC would never have discretion to restore. But they do. So despite the lawfulness of the seizure, HMRC should have considered if there were any reasons nevertheless to make restoration.

112. In summary, Mr Aston's reason was that importation of all animal products from the US are banned on grounds of safety. This was wrong. Had he considered

the correct law, he would have known that in some cases importation of animal products from the US is lawful and that therefore in some cases it is not considered unsafe for such products to be imported.

113. In particular, I find he should have considered whether, but for weighing 4 rather than 2kg, the product would have been lawfully imported.

114. So would the product have been lawfully imported if Mr Pash had only imported 2 packets rather than 4?

115. As a dairy based product they would be within (a) of Article 2 (see paragraph 105 above) for the reasons explained above.. However (a) has a 0kg weight limit so this is no help to Mr Pash. But because they are within (a), they could not be within (d). But were they within (b)?

116. In respect of (b), Part 1 of Annex II which provides as follows:

> "**Annex II**
>
> **Part 1**
>
> **Personal consignments of products of animal origin as referred to in Article 2(1)(b)**
>
> Powdered infant milk, infant food and special foods required for medical reasons, under the conditions that these products:
>
> (i) do not require refrigeration before opening;
>
> (ii) are packaged proprietary brand products for direct sale to the final consumer; and
>
> (iii) that the packaging is unbroken unless in current use."

117. So 2kg of the Enhanced Life Extension Protein could be brought into the UK as a personal consignment *if* it was a "special food" and required for medical reasons. Mr Aston did not consider this.

118. I consider that it is a special food in the sense that it was a food supplement and meant to be eaten. It was not a medicine. UKBA's position is that it was not a "special" food because (they say) alternatives were easily available in the UK. Putting aside the question of fact, I find that in law there is nothing in the words "special foods" that implies that it must not be easily available in the UK. Powdered infant milk and infant food are easily available in the UK too but that would not prevent their importation under this provision.

119. I find that "special food" in this sense means that it is a food, or at least a supplement to food and not of a kind generally consumed: this interpretation of "special" is reinforced by the qualification that it must be for medical reasons.

120. This means that I do not need to determine whether alternatives to the product are readily obtainable in the UK. However, I comment in passing that Mr Pash's

evidence is that he has extensively investigated this and failed to find a suitable product available in the UK. HMRC's only challenge to this evidence is the bald statement that similar products are widely available. So were it necessary, I would accept Mr Pash's evidence on this.

121. So I consider that it is a special food, but is it required for medical reasons?

122. UKBA's position is that, in the absence of a doctor's certificate, the Tribunal has no evidence that the product was required for medical reasons. All that the Tribunal has evidence of is that Mr Pash believed that he required it for medical reasons.

123. I find that "medical reasons" will be an objective test: it is not enough that Mr Pash believes that they are required for his good health.

124. Mr Pash's evidence in his letter of 28 September 2010 is that he was given medical advice to abstain from dairy fats which led him to seek out a product containing milk protein but no milk fat; he also refers in the second page of that letter to a recommendation from his oncologist consultant to continue his "diet medications" although he does not make it clear whether this was a reference to taking a whey protein supplement.

125. I therefore unable to reach a conclusion on this: but I do not need to.

126. Mr Aston's main ground for considering that restoration should not take place was that all goods from the US containing milk were banned from import and that restoration should be refused on the grounds of risk to public health. Yet had he considered these rules, he would have been aware that Mr Pash could have imported 2kg of Enhanced Life Extension Protein if required for medical reasons. Therefore, I find it was not reasonable to consider that 4kg of the goods was necessarily a risk to public health. At the very least the decision was unreasonable for failing to consider whether all or at least 2kg of the goods should be restored to Mr Pash, on proof of medical need, on the basis that this was the first time UKBA had forfeited his goods and Mr Pash may not have been aware of the rules (it seems clear UKBA were not aware of the rules).

127. Mr Aston also referred to DEFRA's website and criticised Mr Pash for not referring to it himself before seeking to import the goods. I find this was unreasonable as the copy of DEFRA's website shown to me was inconsistent with the law, and Mr Pash should not have been criticised for failing to refer to an incorrect source of information.

128. I find, therefore, that Mr Aston's decision took into account matters he should not: in particular he mis-stated the law and, secondly, he criticised Mr Pash for failing to refer to DEFRA's *incorrect* website.

129. I also find that he failed to consider things that he should have considered:

130. Because Mr Aston did not apply the correct law, he did not consider that, contrary to what DEFRA said, not all milk products from the US are banned and therefore they are not all treated as a danger to public health. In particular, he did not consider that Mr Pash would have been entitled to bring in 2kg of Enhanced Life Extension Protein on proof of a medical need, and therefore, as this was the first time Mr Pash had had goods forfeited, it might have been appropriate to restore all or at least half of the goods to Mr Pash.

131. I find that Mr Aston failed to consider matters he should have considered and that had he considered such matters he may have reached a different conclusion, and for that reason, I uphold the appeal and direct that UKBA reconsider its decision not to restore the goods, or part of them, to Mr Pash.

132. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 27 December 2012