



TC03359

Appeal number: TC/2013/03272

CUSTOMS DUTY AND VAT– gold seized from appellant traveller as liable to duty on importation on her failure to declare it as so liable – no condemnation proceedings brought – gold therefore condemned as forfeit – whether respondents refusal to restore gold to appellant reasonable – yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KHALIDA HOSSEINI

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE DAVID DEMACK
MR DEREK SPELLER**

Sitting in public in London on 24 October 2013

The Appellant in person assisted by Ms Resali-Ahadi as interpreter

David Griffiths of counsel instructed by the general counsel and solicitor of HM Revenue and Customs for the Respondents

DECISION

1. By letter of 25 February 2013, the appellant, Mrs Khalida Hosseini, was informed by the UK Border Force that 31 pieces of gold jewellery which were seized
5 as liable to forfeiture on 24 November 2012 on her entering the UK from Afghanistan would not be restored to her. The gold was seized because by entering the Green Channel she had failed to declare goods in excess of her allowance. The gold was later valued at £9979, whilst the duty free allowance for the importation of “other goods” provided for by Article 45 of Council Regulation 918/83/EEC and the
10 Travellers’ Allowances Order 1994 was £390.

2. Mrs Hosseini required the Director of Border Revenue to review the decision not to restore the gold to her. The review was carried out by Mr Raymond Brenton, an officer who had played no part in the original decision not to restore the gold. By letter of 10 April 2013, Mr Brenton confirmed that the gold should not be restored,
15 and it is against his decision on review that Mrs Hosseini now appeals.

3. In his letter on review Mr Brenton set out his understanding of the facts out of which the seizure arose in the following way. At 8.25.p.m. on the evening of 24 November 2012, on arrival at Gatwick Airport Mrs Hosseini entered the Green Channel (“Nothing to Declare” for persons arriving from certain third countries, i.e.
20 countries outside the European Union where the EU provisions on VAT or excise duty, or both, do not apply)), having arrived on a flight from Afghanistan via Dubai. She was carrying the gold in locked suitcases.

4. Mrs Hosseini was asked by officer Osborn of the Border Force whether she was aware of the restrictions on importing certain goods into the UK. He or she explained
25 the restrictions to her and asked whether she had any such goods. She indicated that she was aware of the restrictions, had no such goods, but that she was unaware of her statutory allowances.

5. We should explain that by s.78(1) of the Customs and Excise Management Act 1979 (“the Act”) Mrs Hosseini was required to enter the UK through the Red
30 Channel, declare any dutiable goods worth in excess of £390, and pay the appropriate duty. (Section 78(1) of the Act, and the other relevant sections thereof are set out in the Schedule to our decision).

6. The officer recorded that Mrs Hosseini “spoke no English but did appear to understand what was being said”. It was established that Mrs Hosseini did not have
35 the keys to her locked suitcases. The officer then broke, or arranged to have broken, the locks on the cases. He found the gold inside and, whilst he was not able to put a value on it at the time, he was satisfied that its value exceeded the allowance for “other goods” of £390.

7. The officer seized the goods on the basis that Mrs Hosseini, by entering the
40 Green Channel, had failed to declare goods in excess of her statutory allowances. She was handed a Form 156 “Seizure information notice” and Notice 12A “What you can

do if things are seized by HM Revenue and Customs or UK Border Agency”. The latter explains that the legality of seizure of goods can be challenged in the magistrates’ court by the service of a notice within one month of the date of seizure.

5 8. At 9.p.m. the same evening the officer attended the airport information desk where he spoke to Mrs Hosseini’s husband in her presence. Mr Hosseini speaks fluent English. Mr Hosseini was told that the gold had been seized, and was to be sent for valuation.

10 9. By letter of 18 December 2012, Mrs Hosseini’s solicitors, SJ Solicitors, wrote to the Border Force on her behalf. They requested return of the gold saying that their client had not been aware of the rules relating to the declaration of imported goods and import tax; that she accepted that the gold had been lawfully seized; and included a statement by Mrs Hosseini that “I can confirm that these items were bought from Afghanistan for my personal use”.

15 10. Restoration of the goods was refused by the letter of 25 February 2013. Thereupon the solicitors asked for the non-restoration decision to be reviewed, in their letter adding “The items were gifted to our client by her brothers, father and her father-in-law and uncles ...our client made an honest mistake in not declaring the goods”.

20 11. In his decision on review, Mr Brenton explained that he was required to determine whether the contested decision should be upheld, varied or cancelled. He added that he had considered the decision afresh, including the circumstances in which the seizure had been made and the related evidence, in order to decide whether there were any mitigating or exceptional circumstances that he ought to take into account. He also said that he had taken account of the representations made on Mrs
25 Hosseini’s behalf.

30 12. Mr Brenton particularly stressed that, whilst he had looked at all the circumstances surrounding the seizure, he had not considered the legality or the correctness of the seizure itself. He noted that, as Mrs Hosseini had not challenged the seizure of the gold, it was condemned as forfeit to the Crown by the passage of time under para.5 of Schedule 3 to the Act. In order to make Mrs Hosseini’s position clear, Mr Brenton added “Having had an opportunity of raising the lawfulness of the seizure in the magistrates’ court, one does not have a second chance of doing so at tribunal or statutory review because the tribunal does not have jurisdiction to consider it and the review officer should not do so either”. In an Appendix to his letter, Mr Brenton
35 noted, quite correctly, that the Court of Appeal had determined that the tribunal lacked jurisdiction to restore goods in *HMRC v Lawrence Jones and Joan Jones* [2011] ECWA Civ 824.

40 13. Paragraph 5 of Schedule 3 to the Act provides that where a person has not challenged the seizure of goods as being liable to forfeiture within three months of the seizure they are deemed to be condemned as forfeit to the Crown by the passage of time. Such challenge is required to be made by requiring the Border Force to bring condemnation proceedings in either the Crown Court or the magistrates’ court.

14. Next Mr Brenton said that Mrs Hosseini had not provided him with details of any exceptional circumstances that might have allowed him to recommend that the gold be restored. He went on to record a number of what he described as “positive additional reasons” for concluding that the gold should not be restored.

5 15. The first reason he gave was that Mrs Hosseini entered the Green Channel at Gatwick Airport having been confronted by very large signs directing travellers to whichever Channel was appropriate in their particular case. In entering the Green Channel Mrs Hosseini failed to declare goods that had value in excess of the £390 allowance, and which were liable to forfeiture under s.78(4) of the Act; “by walking
10 through the Green Channel she automatically made a declaration that she had nothing in excess of her allowances. Therefore her actions rendered her liable to prosecution under section 78(3) of [the Act]. However, in this case the [Border Force] have restricted any offence action to the seizure of the goods only”.

15 16. Mr Brenton then pointed out that in Mrs Hosseini’s solicitors submissions they had given great weight to Mrs Hosseini’s inability to speak English, and that she had made an “honest mistake”. He observed that she had appeared to officer Osborn to understand that there were restrictions on the importation of goods, notwithstanding that she was unaware of her allowances. The Red and Green Channels were recognised features of customs controls, and ignorance of the law was no excuse.
20 Further, Mr Brenton noted that Mrs Hosseini was carrying luggage for which she had no keys, despite the fact that she held the receipts for the gold.

25 17. Although Mrs Hosseini confirmed that the gold was brought from Afghanistan for her “personal use”, Mr Brenton challenged the use of that expression to indicate its ownership, saying “I am of the opinion that this is an explanation in hindsight in an attempt to give credence to the quantity of jewellery contained with Mrs Hosseini’s baggage. I am not convinced that the reasoning for the jewellery being in your client’s handbag to be credible. Nor am I convinced that entering the Green “Nothing to Declare Channel” was an “honest mistake”.

30 18. The next point Mr Brenton dealt with was that of Mrs Hosseini’s directorship of an English company, Salih Pasa Ltd, he saying that “on the balance of probabilities I am of the opinion that to conduct business within the UK one would have to have a reasonable understanding of English even if she, as it is alleged, had little ability to speak it. Also, having lived in the UK for several years it is probable that this was not her first experience at international travel or experience at re-entering the UK via
35 [Border Force] controls”.

19. Mr Brenton concluded his letter saying that he was of the opinion that the application of the Border Force’s policy in Mrs Hosseini’s case treated her no more harshly or leniently than anyone else in similar circumstances, and that he could find no reason to vary its policy not to restore in her case.

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20. In the Notice of Appeal Mrs Hosseini's solicitors identified four reasons for appealing, namely:

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- i) It was procedurally unfair of the seizing officer, in dealing with a lady who "spoke no English" to conclude that she "did appear to understand what was being said", and to make decisions without her having the benefit of an interpreter. It was also unfair to reject assertions by Mrs Hosseini that she could not find, as opposed to not hold, the key to the cases containing the gold, and that the gold was a gift to her by her family. Basing the decision not to restore the gold to her on those reasons was one unreasonably arrived at.
 - ii) It was irrelevant that Mrs Hosseini was a director of an English company, and her position could not be said to mean that she understood English.
 - iii) The decision of the reviewing officer was one which no reasonable reviewing officer could have arrived at because, inter alia:
 - a) It was irrational to conclude whilst Mrs Hosseini spoke no English and did not have access to an interpreter she could understand complex prohibitions and restrictions relating to the importation of goods, communicate her understanding to the questioning officer and to indicate that she had no dutiable goods prior to the inspection of her baggage.
 - b) It was irrational in the same circumstances for the officer to conclude that, because Mrs Hosseini could not find a key to her cases, she never had a key.
 - c) The fact that Mrs Hosseini could not find a key was not evidence of concealment.
 - d) The fact that Mrs Hosseini was a director of an English company did not mean that she would have had a reasonable understanding of English.
 - iv) The reviewing officer failed to consider or give proper consideration to Mrs Hosseini's assertion that the gold was a gift to her by her family following her marriage and the birth of her children "and/or proportionality". The gifts were of a customary nature, and in Afghanistan because of their relatively high value it was the practice to include the receipts for them. Because of its nature, the gold jewellery should be treated exceptionally and should be restored to Mrs Hosseini on payment of the duty due on it. In that respect, failure to restore was disproportionate.

21. Before us, Mrs Hosseini added to, or perhaps confirmed is a more accurate description, the facts on which Mr Brenton concluded that the gold should not be restored to her. First she claimed that she was unable to read and write. She

maintained that the gold was the subject of family gifts to her and had been given to her at a goodbye party to celebrate her departure to the UK. She said that she was not aware of any rules and regulations requiring importations of gold to be declared, or there being any restrictions on importations. It was the first time she had travelled
5 abroad without her husband, and on arrival at Gatwick Airport she had simply followed the majority of the travellers into the Green Channel. She had also misplaced a bunch of keys, thus preventing her from opening the cases containing the gold. Essentially, Mrs Hosseini claimed that we should accept her claim that she was an honest person, and that the whole incident had been a mistake.

10 22. She explained that although she was a director of an English company, she knew nothing about the company or the way in which it operated, her role being to receive rent from a shop.

23. In his closing submissions, Mr Griffiths observed that, as a result of Mrs Hosseini not having challenged the validity of the seizure, the tribunal was required to
15 deal with the appeal on the basis of the seizure having been lawful.

24. He maintained that there were no exceptional factors to support a case for restoration, and the evidence pointed to the decision not to restore as being reasonable. In so claiming, he advanced a number of points:

20 a) It was common ground that Mrs Hosseini should have declared the gold at Gatwick Airport. Mrs Hosseini had ignored the signs at the Airport; she had deliberately entered the Green Channel and, in doing so, she had failed to make a true declaration of the goods she was importing when under a legal obligation to do so.

25 b) The tribunal might wonder how, if Mrs Hosseini did not understand English, as was implicitly claimed, she had managed to find herself in the Green Channel.

c) Although it was accepted that Mrs Hosseini may have had difficulty in speaking English, she seemingly understood what was said to her.

30 d) The cases in which the gold was found were locked, and Mrs Hosseini was unable to find the keys, resulting in the Agency having to cut the locks off the cases.

e) Mrs Hosseini has lived in the UK for a number of years, and it may be that she understood English better than she pretended.

35 f) It was noteworthy that the receipts for purchase of the gold were found with it. The tribunal would be justified in asking why the receipts would be kept with the gold; if it had been bought and transported for someone else their presence might be expected, as would the absence of the keys.

g) In correspondence with the Border Agency, Mrs Hosseini's solicitors had not raised the question of the gold being a gift until some five months after

it had been seized. Such a delay in making the point raised a question as to its genuineness.

- 5 h) There were too many inconsistencies in Mrs Hosseini's evidence. She may have deliberately attempted to mislead officers of the Agency in which case, as Judge Bishopp explained in the case of *Gordon Grimshaw v The Border Agency* (MAN/04/8070):

10 "In our view it cannot be an unreasonable inference that travellers, who conceal trips they have made abroad, give conflicting information and provide unconvincing explanations are not telling the whole truth, and are attempting to conceal the true reason for the importation of goods."

15 25. As Mummery LJ pointed out in the final paragraph of his judgment in the Jones case, the tribunal has no power to re-open and re-determine the question whether or not the seized goods were legally imported for Mrs Hosseini's personal use; that was the subject of the deemed determination under the Act. We are confined to considering the review decision of the Border Force, and deciding whether it was proportionate or resulted in hardship.

26. No evidence was adduced to indicate that non-restoration of the goods would cause hardship to Mrs Hosseini and, in its absence, we are satisfied that it did not cause hardship.

20 27. As the seizure of the gold was lawful, we have no alternative but to proceed on the basis that the jewellery was imported for a commercial purpose. To quote Mummery LJ at 71(6) of his judgment in Jones, "In brief, the deemed effect of [Mrs Hosseini's] failure to contest condemnation of the goods by the court was that the goods were being illegally imported by [her] for commercial use."

25 28. We did not find Mrs Hosseini's evidence of events to be credible. Her inability to provide officer Osborn with a key to her cases coupled with the receipts for the gold jewellery being found with it bear some, if not all, the hallmarks of a commercial importation.

30 29. It is quite plain that Mr Brenton took great care in carrying out his review of the original decision not to restore the jewellery to Mrs Hosseini. We are quite satisfied that he took into account in doing so all the representations Mrs Hosseini and her solicitors made. We too have taken account of all those representations and draw the same inference as did Judge Bishopp in the *Grimshaw* case, but we are unable to find in the representations anything to justify our overturning the review decision. We are therefore unable to conclude that the gold should be restored to Mrs Hosseini. We dismiss her appeal.

35 30. 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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**DAVID DEMACK
TRIBUNAL JUDGE**

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RELEASE DATE: 26 February 2014

THE SCHEDULE

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Customs and Excise Management Act 1979

10 49. (1) Where—

(a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty—

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(i) unshipped in any port,

(ii) unloaded from any aircraft in the United Kingdom,

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(iii) unloaded from any vehicle in, or otherwise brought across the boundary into, Northern Ireland, or

(iv) removed from their place of importation or from any approved wharf, examination station or transit shed; or

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78. (1) Any person entering the United Kingdom shall, at such place and in such manner as the Commissioners may direct, declare any thing contained in his baggage or carried with him which—

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(a) he has obtained outside the United Kingdom; or

(b) being dutiable goods or chargeable goods, he has obtained in the United Kingdom without payment of duty or tax,

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and in respect of which he is not entitled to exemption from duty and tax by virtue of any order under section 13 of the M1 Customs and Excise Duties (General Reliefs) Act 1979 (personal reliefs).

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In this subsection “chargeable goods” means goods on the importation of which value added tax is chargeable or goods obtained in the United Kingdom before 1st April 1973 which are chargeable goods within the meaning of the Purchase Tax Act 1963; and “tax” means value added tax or purchase tax.

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(4) Any thing chargeable with any duty or tax which is found concealed, or is not declared, and any thing which is being taken into or out of the United Kingdom

contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment, shall be liable to forfeiture.

...

- 5 139(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

...

- 10 152 . The Commissioners may, as they see fit—

(a) ...

- 15 (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts; or

(c) after judgment, mitigate or remit any pecuniary penalty imposed under those Acts; or

- 20 (d) order any person who has been imprisoned to be discharged before the expiration of his term of imprisonment, being a person imprisoned for any offence under those Acts or in respect of the non-payment of a penalty or other sum adjudged to be paid or awarded in relation to such an offence or in respect of the default of a sufficient distress to satisfy such a sum;

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but paragraph (a) above shall not apply to proceedings on indictment in Scotland.

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- 30 167.(1) If any person either knowingly or recklessly—

(a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners or an officer, any declaration, notice, certificate or other document whatsoever; or

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(b) makes any statement in answer to any question put to him by an officer which he is required by or under any enactment to answer,

- 40 being a document or statement produced or made for any purpose of any assigned matter, which is untrue in any material particular, he shall be guilty of an offence under this subsection and may be detained; and any goods in relation to which the document or statement was made shall be liable to forfeiture.