



TC04041

Appeal number: TC/2014/03664

Appeal against decision not to restore seized vehicle used for the transportation of cannabis to the United Kingdom – Application for permission to bring a late appeal — Application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ARUNAS BUTKUS

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MRS SHAMEEM AKHTAR**

Sitting in public in London on 26 September 2014

No appearance by or on behalf of the Appellant

Mr Paul Sharkey for the Respondent

DECISION

Introduction

1. The Appellant seeks to appeal against a decision of the Respondent dated 15 March 2013, maintained in a review decision dated 29 April 2013, not to restore to
5 him a vehicle seized by the Respondent.

2. The 30 day time limit for appealing against this decision was 29 May 2013. The Appellant sought to bring this Tribunal appeal after that time limit had expired. His notice of appeal accordingly included an application for permission to appeal outside the relevant time limit.

10 3. A hearing was held in London on 26 September 2014 in respect of that application only. There was no appearance by or on behalf of the Appellant, who lives in Ireland, and who had earlier sent a letter to the Tribunal dated 9 September 2014 stating that he could not attend due to financial difficulties. The Respondent was represented at the hearing by Mr Sharkey. At the end of the hearing, the Tribunal
15 reserved its decision.

Background

4. The following background facts stated in the 29 April 2013 review decision appear not to be in dispute.

5. On 13 December 2012 in the UK control zone in Coquelles, France, the
20 Appellant was intercepted while driving the vehicle in question. Border Force officials searched the vehicle, and recovered 13 packages of cannabis from the fuel tank weighing a total of 1.972 kilograms, which the Respondent says has a street value of £19,730.

6. When interviewed, the Appellant said amongst other matters as follows. He hid
25 the packages in the fuel tank as he was aware that it was illegal to import drugs. He bought the cannabis for his own medicinal use. He purchased the cannabis with his own money from a man in a pub for £6,000. No one else had contributed any money towards the trip and he had not been placed under any duress. He had bought the vehicle three to four months previously cheaply at an auction and it had been off road
30 for repairs until the previous month.

7. On 2 April 2013, the Appellant was sentenced to 12 months' imprisonment.

8. The vehicle was seized by an officer of the Respondent under s 139(1) of the Customs and Excise Management Act 1979 ("CEMA") as liable to forfeiture under s
35 149(1)(a) CEMA on the ground that it was used for the carriage of goods liable to forfeiture. The Appellant did not challenge the legality of the seizure, and the vehicle was condemned as forfeit to the Crown by passage of time under paragraph 5 of Schedule 3 CEMA.

9. On 21 and 28 January 2013, the Appellant wrote requesting that the vehicle be restored.

10. By a decision dated 15 March 2013, an officer of the Respondent refused to restore the vehicle.

5 11. On 2 April 2013, the Appellant requested reconsideration of that decision. The Appellant made further representations in support of the request on 5 and 23 April 2013.

12. In the review decision dated 29 April 2013, an officer of the Respondent confirmed the decision that the vehicle not be restored. As noted above, the time limit
10 for appealing to the Tribunal against that decision was 29 May 2013.

13. The Appellant sent to the Tribunal a notice of appeal against that decision. The notice of appeal is stamped as having been received by the Tribunal on 18 June 2013. The precise date on which the Appellant sent the notice of appeal to the Tribunal is unclear, but it must have been after the deadline had expired, since in section 6 of the
15 notice of appeal form the Appellant has correctly stated the deadline for appealing, has marked the box indicating that he is seeking permission for a late appeal, and has entered text in the box for giving reasons why the appeal is late.

14. From a letter from HMCTS dated 27 August 2014, it appears that even on 18
20 June 2013, a valid appeal had not yet been made. That letter indicates that on 19 June 2013, the notice of appeal was returned to the Appellant as the decision appealed against had not been provided, and that a further notice of appeal submitted by the Appellant on 26 June 2014 was returned to the Appellant for the same reason. However, at the hearing, Mr Sharkey accepted that the Tribunal should treat the notice of appeal as having been filed on 18 June 2013, such that it was submitted 20
25 days after the deadline.

Applicable legislation

15. Section 14 of the Finance Act 1994 relevantly provides that:

(1) This section applies to the following decisions ...—

30 (a) any decision under section 152(b) of the Management Act [CEMA] 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

35 (b) any relevant decision which is linked by its subject matter to such a decision under section 152(b) of the Management Act.

[The remaining sub-sections deal with a procedure for review of decisions taken under s.152(b) of CEMA.]

16. Section 15 of the Finance Act 1994 further deals with the procedure for review of such decisions.

17. Section 16 of the Finance Act 1994 deals with appeals to the Tribunal, and relevantly provides that:

5 (1) An appeal against a decision on a review under section 15 ... may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.

...

10 (1F) An appeal may be made after the end of the period specified in subsection (1) ... if the appeal tribunal gives permission to do so.

...

15 (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;

20 (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

25 (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.

18. For purposes of s.16 of the Finance Act 1994, an “ancillary matter” includes
30 “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”: Finance Act 1994, s.16(8) and Schedule 5, paragraph 2(1)(r).

19. Rule 5(3) of the Tribunal’s Rules relevantly provides that:

35 (3) ... the Tribunal may by direction—

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit; ...

40 20. Rule 20(4) of the Tribunal’s Rules provides that:

(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the

enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal—

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(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.

Submissions of the Appellant

21. In the box in section 6 of the notice of appeal form, where the Appellant is asked to give reasons why the appeal is made late, it is stated: “I have appealed before, however my appeal was refused but I do think I have grounds to appeal again as I think the decision made against my appeal was unfair”.

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22. In the box in section 7 of the notice of appeal, where the Appellant is required to set out his substantive grounds of appeal, he states as follows:

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My grounds for appeal is the fact that my circumstances is greatly difficult without my vehicle. I am registered disabled and this causes me great ongoing difficulties. My disability allowance only covers a small part of my living expenses making it very difficult to get by. I have included evidence for you to see and I really hope you will understand my difficulties with my vehicle that has been seized by you. And please return my vehicle which is in your [possession]. I realise I made a great mistake and I have been punished enough by the time I have had to be away from my family during my time in prison. I have reflected upon my mistake and I sincerely regret ever deciding to commit the offence that I did. I would ask that please you consider this and kindly allow me to have my vehicle back because I rely on my car to travel to and from my doctors and hospital appointments. And perhaps if it is possible I am even willing to pay a penalty just to have my car back so when I get out of prison I can sort my life out. Thank you in advance.

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23. In the box in section 8 of the notice of appeal, where the Appellant is required to set out the result that the Appellant is seeking, he states as follows:

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I really do think the decision should have been that I get my car back as any understanding human being would understand that a car is important to a disabled person with a low income such as myself.

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24. The Tribunal has also had regard to the letter from the Appellant to the Respondent dated 22 April 2013, which makes similar submissions, adding that the Appellant requires the vehicle to drop off and pick up his daughter from school and pick up prescriptions. That letter states that it is including evidence of the disability. The evidence referred to is not in the papers before the Tribunal, but from the letter, and from the 29 April 2013 review decision, it appears that this evidence consisted of a copy of the Appellant’s disability allowance form. Submitted with the Appellant’s letter dated 9 September 2014 there is also a letter from the Irish Social Welfare Services Office dated 1 July 2014 stating that following an appeal by the Appellant,

he is entitled to disability allowance at a stated rate from 14 August 2013, as well as bank statements which the Appellant says show his limited financial means.

Submissions of the Respondent

5 25. The Respondent's main submission was that the Appellant has given no reasons why the appeal was not made in time. In the box in section 6 of the notice of appeal form the Appellant has only addressed what he claims are the substantive merits of the proposed appeal. The Appellant has therefore not complied with Rule 20(4)(a) of the Tribunal's Rules. In the absence of any justification by the Appellant for a late appeal, the application should not be granted. The Respondent also submitted that the
10 merits of the proposed appeal were weak.

The Tribunal's findings

26. In *Data Select v HMRC* [2012] UKUT 187 (TCC), it was said by the Upper Tribunal at [34]-[37] that:

15 34. ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

25 35. The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker* [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the VAT & Duties Tribunal to the
30 High Court: see *Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc* [2007] STC 1196.

35 36. I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 at [23]-[24] which is in line with what I have said above.

40 37. In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in

5 many other cases. Some of the above cases stress the importance of
finality in litigation. Those remarks are of particular relevance where
the application concerns an intended appeal against a judicial decision.
The particular comments about finality in litigation are not directly
applicable where the application concerns an intended appeal against a
determination by HMRC, where there has been no judicial decision as
to the position. Nonetheless, those comments stress the desirability of
not re-opening matters after a lengthy interval where one or both
parties were entitled to assume that matters had been finally fixed and
settled and that point applies to an appeal against a determination by
HMRC as it does to appeals against a judicial decision.

10 27. The Tribunal considers that this remains the correct approach: *Leeds City Council v Revenue and Customs* [2014] UKUT 0350 (TCC) at [19].

15 28. The Tribunal takes into account all of the matters identified in this quote,
including the public interest in the finality of revenue and customs matters and in the
finality of litigation, and that time limits for bringing appeals or for requesting
reviews exist for a good reason. Indeed, that can be considered the starting point of
any consideration of an application to bring a late appeal. It is for the Appellant to
show reasons why an application for a late appeal should be granted. The burden is
not on the Respondent to establish reasons why the extension should not be granted.
20 (See *Mond v Revenue & Customs* [2011] UKFTT 374 (TC) at [14]; *Hakim v United Kingdom Border Agency* [2013] UKFTT 118 (TC) at [32]; *Romasave (Property Services) Ltd v Revenue & Customs* [2014] UKFTT 549 (TC) at [92].)

25 29. The Tribunal finds that each application turns on its own particular facts and
circumstances. The Tribunal will consider the circumstances as a whole, and not
merely the soundness of the reasons for the lateness of the appeal.

30 30. While the burden is on the Appellant to show reasons why permission should be
granted to appeal out of time, the strength of the considerations that must be
established by the Appellant to justify permission being granted will depend on the
strength of the countervailing considerations militating against the grant of
30 permission.

35 31. The Tribunal takes into account that a notice of appeal was received by the
Tribunal 20 days after the applicable time limit. This case is distinguishable from
other cases where permission has been sought for a late appeal after much longer
periods. Nevertheless, the Tribunal does not consider that a 20 day delay can be
considered insignificant or *de minimis*.

32. The Tribunal also takes into account that there is no suggestion that the delay in
bringing the appeal has caused any particular prejudice to the Respondent. However,
that is not decisive.

40 33. The starting point in the Tribunal's consideration is set out in paragraph 28
above. The difficulty in the present case is that the Appellant gives no reasons at all
why the appeal was not brought within the applicable time limit, and gives no reason

why an extension of time should be granted other than to say that he considers that his appeal has merit (see paragraphs 21-24 above).

34. The Tribunal has tried to make due allowance for the fact that the Appellant is a litigant in person. The Tribunal has also asked itself whether the fact that the Appellant was in prison might have been a reason why the appeal could not be brought within the time limit. However, the Tribunal has concluded that this would be mere speculation on its part. Section 6 of the notice of appeal form contains a box in which the Appellant is asked, in very plain and simple language, to state “reasons why the appeal is made or notified late”. If that had been the reason why the appeal was late, even an unrepresented Appellant would be expected simply to say so. Ultimately, the Tribunal is not entitled to assume that there are reasons for lateness in bringing an appeal, when none are given by an Appellant. Furthermore, the Tribunal notes that according to the 29 April 2013 review decision, the Appellant was sentenced to 12 months’ imprisonment on 2 April 2013, and was in prison at the time of the review decision. Despite this, according to that decision, the Appellant was able while in prison to send the Respondent a letter dated 22 April 2013 (in response to a 9 April 2013 letter from the Respondent) enclosing a copy of his disability allowance.

35. In an application for permission to bring a late appeal, the Tribunal is not called upon to consider the merits of the substantive appeal that the Appellant is seeking to bring. However, if *prima facie* the Appellant had a strong case on the merits, that might be a consideration weighing in favour of granting permission. Conversely, a *prima facie* weak case may weigh against a grant of permission.

36. In this respect, the Tribunal notes that if the Appellant were permitted to bring this appeal, he would in order to succeed need to persuade the Tribunal that the officer making the 29 April 2013 review decision “could not reasonably have arrived at it” (section 16(4) of the Finance Act 1994, quoted above). In other words, the Appellant would need to establish that no reasonable decision maker could have decided not to restore the vehicle.

37. The Appellant’s main argument is that non-restoration of the vehicle is causing him particular hardship due to his disability and limited finances, and that he is remorseful. The 29 April 2013 review decision sets out the documents that were considered by the decision maker, which included letters from the Appellant dated 21 and 28 January, 5 and 13 March, and 2 and 23 April 2013, as well as the “copy Disability Allowance form” submitted with the last of these letters. The review decision then refers to *Lindsay v Customs and Excise Commissioners* [2002] EWCA Civ 267, [2002] 1 WLR 1766, in which it was said that “Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose those vehicles”, but that “due consideration” would be given to cases of “exceptional hardship”. The decision maker was evidently satisfied that the Appellant was smuggling the cannabis for a profit. That appears to be an entirely reasonable conclusion, given that the cannabis was found to have a street value of nearly £20,000, and given that the Appellant himself is recorded as having admitted

paying £6,000 for it, despite his claimed limited financial resources. The review decision also considered that it was an aggravating factor that the vehicle had been adapted to conceal the drugs and was therefore integral to the smuggling attempt.

5 38. The review decision concluded that the Appellant had not suffered exceptional hardships over and above what one would expect when losing a car. It is true that the review decision at this point did not expressly refer again to the Appellant's disability. However, it also seems that there was nothing before the decision maker that indicated that the precise nature of the Appellant's disability was such that the loss of a car would cause him such exceptional hardship that this could outweigh an offence
10 of this nature and the aggravating circumstance.

39. It does not appear to the Tribunal that the Appellant has a *prima facie* strong case for contending that the decision maker "could not reasonably have arrived at" the decision that he did.

15 40. The Tribunal concludes that in the totality of the circumstances, the balance is against granting permission to appeal out of time in this particular case.

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
20 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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**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

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RELEASE DATE: 30 September 2014