



TC04043

Appeal number: TC/2013/08110

EXCISE DUTY – excise goods seized from the appellant – decision refusing restoration of goods – appellant successful in condemnation proceedings – jurisdiction of the tribunal to award compensation or other redress – application to strike out – declaration that review decision unreasonable – remaining grounds of appeal struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WILLIAM YOUNG

Appellant

- and -

HOME OFFICE

Respondents

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Belfast on 8 August 2014

The Appellant appeared in person

Ms Yvonne Mullen of counsel instructed by the Home Office Cash Forfeiture & Condemnation Legal Team for the Respondent

DECISION

Background

1. This is an application by the Home Office to strike out the appeal on the ground
5 that the tribunal does not have jurisdiction in relation to issues raised by the Appellant.
2. There is no dispute as to the following underlying facts.
3. On 4 July 2013 the Appellant returned to the UK at Heathrow Airport following
a trip to Spain. During the course of border checks he was found to be importing
10 7,600 cigarettes. An officer of the Border Force considered that the cigarettes were held for a commercial purpose and they were seized.
4. The Appellant subsequently challenged the lawfulness of the seizure in condemnation proceedings at Uxbridge magistrate's court. At the same time he sought restoration of the goods.
- 15 5. By letter dated 21 August 2013 the Border Force refused to restore the goods. The Appellant asked for a review of that decision and it was confirmed in a letter dated 16 October 2013. For the purposes of that review the review officer assumed that the legality of the seizure would be confirmed in the condemnation proceedings.
6. On 8 November 2013 the Appellant appealed to this tribunal against the
20 decision refusing restoration. His grounds of appeal were that the decision was made on the basis that the goods were held for commercial purposes, whereas in fact they were imported for personal use by the Appellant. He also relied upon various human rights arguments to which I refer below.
7. At some stage prior to the tribunal appeal, it is not clear when, the Border Force
25 destroyed the goods.
8. On 7 March 2014 the condemnation proceedings were concluded in favour of the Appellant. Uxbridge magistrate's court held that the goods were for personal use and had been unlawfully seized.
9. On 15 April 2014 the Border Force made a without prejudice offer of
30 compensation to the Appellant of £1,425 for the loss of his goods. That offer was made by reference to the cost of purchasing equivalent goods in Spain, rather than the replacement cost in the UK. The excise duty chargeable on the goods would have been some £2,080. The Appellant has rejected the offer and considers that he ought to be compensated by reference to the cost of purchasing the same goods in the UK.
- 35 10. The Home Office has invited the Appellant to withdraw his appeal on the basis that it is in the process of compensating him. The Appellant has declined to do so.
11. The position of the Home Office is that given their offer to compensate the Appellant there is no longer any appealable decision. They have conceded the appeal

and accept that the decision refusing restoration was unreasonable. The amount of any compensation payable to the Appellant is not a matter within the jurisdiction of the tribunal. As such the appeal ought to be struck out.

5 12. The position of the Appellant is that he seeks a direction from the tribunal that the Home Office deliver up the goods, alternatively their value which he says is £2,933.60 together with interest thereon. He also seeks a declaration that the decision not to restore was unreasonable and a direction that the Home Office should take steps to secure that repetitions of the unreasonableness do not re-occur.

Statutory Framework

10 13. The relevant provisions in the Customs and Excise Management Act 1979 (“CEMA 1979”) provide as follows:

"139(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer...

...

15 *152 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]..."

14. *Paragraph 3 Schedule 3 CEMA 1979 then states:*

20 *“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 ...”*

15. Where notice of a claim is given under paragraph 3, condemnation proceedings are commenced usually in a magistrate’s court.

25 16. Where perishable goods have been seized, the Border Force has a discretion to destroy those goods. If goods are destroyed but it is found in condemnation proceedings that they were not liable to forfeiture at the time of seizure then there are provisions for compensation. Paragraphs 16 and 17 Schedule 3 CEMA 1979 provide as follows:

30 *“ 16. Where any thing has been seized as liable to forfeiture the Commissioners may at any time if they see fit and notwithstanding that the thing has not yet been condemned, or is not yet deemed to have been condemned, as forfeited –*

35 *(a) deliver it up to any claimant upon his paying to the Commissioners such sum as they think proper, being a sum not exceeding that which in their opinion represents the value of the thing, including any duty or tax chargeable thereon which has not been paid;*

(b) if the thing seized is a living creature or is in the opinion of the Commissioners of a perishable nature, sell or destroy it.

5 17(1) If, where any thing is delivered up, sold or destroyed under paragraph 16 above, it is held in proceedings taken under this Schedule that the thing was not liable to forfeiture at the time of its seizure, the Commissioners shall, subject to any deduction allowed under sub-paragraph (2) below, on demand by the claimant tender to him—

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(a) an amount equal to any sum paid by him under sub-paragraph (a) of that paragraph; or

(b) where they have sold the thing, an amount equal to the proceeds of sale; or

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(c) where they have destroyed the thing, an amount equal to the market value of the thing at the time of its seizure.

(2) Where the amount to be tendered under sub-paragraph (1)(a), (b) or (c) above includes any sum on account of any duty or tax chargeable on the thing which had not been paid before its seizure the Commissioners may deduct so much of that amount as represents that duty or tax.

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(3) If the claimant accepts any amount tendered to him under sub-paragraph (1) above, he shall not be entitled to maintain any action on account of the seizure, detention, sale or destruction of the thing.

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(4) For the purposes of sub-paragraph (1)(c) above, the market value of any thing at the time of its seizure shall be taken to be such amount as the Commissioners and the claimant may agree or, in default of agreement, as may be determined by a referee appointed by the Lord Chancellor (not being an official of any government department or an office-holder in, or a member of the staff of, the Scottish Administration), whose decision shall be final and conclusive; and the procedure on any reference to a referee shall be such as may be determined by the referee.”

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17. The review and appeals procedure in relation to decisions concerning restoration of goods is contained in *Finance Act 1994*.

18. *Section 14 Finance Act 1994* makes provision for a person to require a review of a decision under *section 152(b) CEMA* not to restore anything seized from that person.

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19. *Section 16 Finance Act 1994* sets out the jurisdiction of the tribunal on an appeal against the review carried out in the present case. The decision to refuse restoration and confirm it on review is an ancillary matter. As such the jurisdiction of the tribunal is limited to considering whether the decision of the review officer was reasonable. *Section 16(4)* provides as follows:

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5 “ 16(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

10 (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

15 (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
20 future.”

20. In contrast, where appeals do not concern ancillary matters, section 16(5)
provides for a full appellate jurisdiction as follows:

25 “ (5) In relation to other decisions, the powers of an appeal tribunal on an
appeal under this section shall also include power to quash or vary any
decision and power to substitute their own decision for any decision quashed on
appeal.”

Discussion

30 21. The application to strike out this appeal is made pursuant to Tribunal Rule
8(2)(a) which provides as follows:

“8(2) The Tribunal must strike out the whole or a part of the proceedings if the
Tribunal –

35 (a) does not have jurisdiction in relation to the proceedings or part of
them

...”

40 22. I am concerned in this application with the jurisdiction of the tribunal. That
jurisdiction derives solely from statute, in particular section 16(4) Finance Act 1994.
The powers of the tribunal where there is an appeal against a review decision on
restoration are exhaustively set out in section 16(4). Those powers only arise where

the tribunal is satisfied that the person making the decision could not reasonably have arrived at it.

23. In the present case, the Home Office has accepted that the decision making officer could not reasonably have arrived at the decision not to restore. That
5 concession was made on the basis that Uxbridge magistrate's court subsequently held that the goods were for personal use and should not be condemned as liable to forfeiture.

24. In the ordinary course that would be the end of the matter. In those
10 circumstances an appellant would either withdraw the appeal, or there would be a consent order under Tribunal Rule 34 for example finding that the decision was unreasonable and making such other appropriate provisions as the parties had agreed.

25. In the present appeal the Appellant seeks relief from the tribunal as follows:

- (1) a direction that the Home Office deliver up the goods, alternatively
- 15 (2) a direction that the Home Office pay the Appellant the value of the goods plus interest
- (3) a declaration that the decision not to restore was unreasonable, and
- (4) a direction that the Home Office should take steps to secure that repetitions of the unreasonableness do not re-occur.

20 26. It is clear beyond any doubt that this tribunal has no jurisdiction to grant the relief sought by the Appellant at (1) and (2) above. Those remedies do not fall within the powers of the tribunal set out at section 16(4). Even if the goods still existed the tribunal has no power to direct delivery up of the goods. The most it can do is to direct a further review of the decision refusing restoration.

25 27. Further, there is no power for the tribunal to award compensation or damages in these circumstances. Where goods have been destroyed because they are perishable, which is the case here, and subsequent condemnation proceedings are concluded in favour of the owner of the goods, Parliament has laid down a scheme whereby
30 compensation can be awarded. The scheme is contained in paragraph 17 Schedule 3 CEMA 1979. Where the parties cannot agree on the level of compensation it is to be determined by a referee in accordance with paragraph 17. This tribunal has no jurisdiction in relation to that scheme.

28. It may be that the Appellant has further remedies outside the provisions of
35 paragraph 17, for example in county court proceedings. In my view however this tribunal has no jurisdiction.

29. During the course of his submissions the Appellant relied on section 16(5) Finance Act 1994 in relation to the tribunal's jurisdiction. However that section does not apply to restoration decisions and therefore has no application on the present appeal.

30. No human rights issues arise in this respect, either pursuant to Article 6 of the European Convention on Human Rights (right to a fair trial) or Article 1 of the First Protocol of the Convention (protection of property). The Appellant has a remedy to obtain the market value of the goods under paragraph 17 or in other proceedings.

5 31. That is not the end of the matter, because the Appellant also seeks the remedies set out at (3) and (4) above. He first sought those remedies in his skeleton argument served for the purposes of this application.

10 32. Part of the Appellant's complaint is that the Border Force assumed that the seizure was lawful in making its restoration decision. He suggested that it should not do so, and that the decision making officer and the review officer should consider whether the seizure was lawful. Apart from declaring the decision to be unreasonable the Appellant sought a direction that in future the Border Force should not assume the seizure to have been lawful when making a decision on restoration.

15 33. I consider that the Border Force took the right approach. The proper forum for considering the lawfulness of the seizure is in the condemnation proceedings (See *Commissioners of Revenue & Customs v Jones & Jones [2011] EWCA Civ 824*). The Border Force at the point of importation concluded that the goods were held for a commercial purpose. That conclusion can only be challenged in condemnation proceedings. The decision on restoration is a completely separate decision. It would
20 be inconsistent with the statutory schemes for restoration and condemnation if the Border Force were to consider as part of the restoration decision whether the goods had been lawfully seized.

25 34. Once a request for restoration has been made, in theory the Border Force could postpone making a decision until after condemnation proceedings had been finally determined. However that may prejudice an owner of goods because his grounds for restoration will often extend beyond a claim that the goods were unlawfully seized. If the lawfulness of the seizure is the sole ground for seeking restoration, which is the case in relation to this Appellant, the request for restoration would serve no purpose. The lawfulness of the seizure would be determined in the condemnation proceedings.

30 35. In cases where there are other factors relied on to justify restoration, the owner is entitled to pursue remedies through restoration as well as condemnation proceedings. There is no reason to delay the decision making process in relation to restoration simply because there are parallel condemnation proceedings taking place.

35 36. If the Border Force does make a decision in relation to restoration, assuming the seizure to have been lawful, there are then strict time limits within which the request for a review and the review decision itself must be made. At that stage the Border Force cannot await the outcome of condemnation proceedings. Once an appeal is made to the tribunal there may be merit in standing the appeal over until after the condemnation proceedings have been heard and that often happens.

37. In the light of these factors I do not consider that there is any merit in the Appellant's complaint that the restoration decision wrongly assumed the lawfulness of the seizure.

5 38. The Appellant was also concerned that the Border Force had destroyed the goods before the tribunal appeal and the condemnation proceedings had been concluded.

10 39. The decision to destroy the goods is separate to the decision refusing restoration. It is not the subject of this appeal. In any event I do not consider that there is anything in the Appellant's complaint. The Border Force was entitled to destroy the goods pursuant to paragraph 16 Schedule 3 CEMA 1979. The Appellant did not suggest that tobacco products were not perishable, they clearly are. He did not suggest any reason, known at the time of destruction, which should have caused the Border Force not to destroy the goods. I can see that the existence of condemnation proceedings might be relevant to that decision, but it would not be determinative.

15 40. I must consider whether there is any remedy I can give in the present circumstances which falls within section 16(4). Section 16(4)(c) is engaged where there is a decision which has already been acted on or taken effect and cannot be remedied by a review or further review.

20 41. The decision in question is the decision refusing restoration. It is not the decision to destroy the goods. The decision refusing restoration has been acted upon in that a decision has subsequently been taken to destroy the goods. The decision refusing restoration cannot therefore be remedied by a further review. I am satisfied that in these circumstances section 16(4)(c) is engaged.

25 42. The Home Office accepts that the decision was unreasonable. I do not propose to go behind that concession and I shall therefore declare the decision to have been unreasonable.

30 43. For the reasons given above the unreasonableness lies not in assuming that the goods had been lawfully seized. The reviewing officer was entitled to make that assumption for the purposes of the restoration decision. The unreasonableness lies in the fact that ultimately it was determined that the goods were not condemned as liable to forfeiture. In other words they were imported by the Appellant for personal use.

35 44. I must therefore consider whether in those circumstances the tribunal would have jurisdiction to give directions as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future. I do not consider that in circumstances such as this the tribunal could give such directions. This is one of those thankfully rare cases where restoration is refused but the goods are subsequently not condemned. That situation does not arise because of an unreasonable approach by the Border Force to the question of restoration. If anything it arises from the dichotomy inherent in CEMA 1979 and Finance Act 1994 between the scheme for restoration and the scheme for condemnation.

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45. On the facts of this case therefore I do not consider that this tribunal could give any further directions pursuant to section 16(4)(c).

46. In the light of these conclusions it is not appropriate for me to strike out the appeal as a whole. Instead I shall make a declaration pursuant to section 16(4)(c) that
5 the decision refusing restoration was unreasonable, and strike out the remaining grounds of appeal.

47. I am not without sympathy for the Appellant. He imported cigarettes for his own use which were wrongly seized and then destroyed. For the reasons given above his remedy for that wrong by way of damages or compensation lies elsewhere.

10 48. 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
15 "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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**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 3 October 2014

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