



TC04371

Appeal number:TC/2013/04374

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 remedy – appeal allowed – declaration that review decision unreasonable – no further remedy

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MICHAEL GUY GRIMSHAW

Appellant

- and -

HOME OFFICE

Respondents

TRIBUNAL: JUDGE JONATHAN CANNAN

The Tribunal determined the appeal on paper without a hearing with the consent of both parties pursuant to Tribunal Rule 29

DECISION

Background

1. This Appeal has a complicated procedural history which for present purposes I do not need to record. Both parties have consented to the appeal being determined on the basis of written submissions without a hearing and I am satisfied that I am able to do so pursuant to Tribunal Rule 29.

2. On 5 February 2013 the Appellant returned to the UK at the Port of Hull following a trip to Belgium. He was importing 6.95kg of hand rolling tobacco (“the Goods”). A UK Border Force officer stopped the Appellant and he was interviewed in relation to the Goods. The interviewing officer concluded that the Goods were being imported for commercial purposes and they were seized. The Appellant has made serious criticisms of the circumstances of his interview and the circumstances in which the Goods were seized.

3. On 11 February 2013 the Appellant gave a notice of claim challenging the lawfulness of the seizure. At the same time he sought restoration of the Goods.

4. By letter dated 16 April 2013 the Border Force acknowledged the notice of claim and stated that they would commence condemnation proceedings.

5. By letter dated 19 April 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 18 June 2013. For the purposes of the decision refusing restoration and the review of that decision the relevant officers assumed that the seizure of the Goods had been lawful.

6. On 28 June 2013 the Appellant appealed to this tribunal against the decision refusing restoration. His grounds of appeal may be summarised as follows:

- (1) the decision was not reasonable;
- (2) no specific reasons for refusing restoration had been given;
- (3) the review officer should not have assumed that the seizure was lawful;
- (4) the refusal to restore was a breach of the Appellant’s rights pursuant to Article 1 of the First Protocol of the European Convention on Human Rights (protection of property)

7. The remedy sought by the Appellant in his Notice of Appeal was a direction for a further review of the decision refusing restoration.

8. Following an application by the Respondent, now the Home Office, the Tribunal directed that its Statement of Case should be served no later than 42 days following the Magistrates’ Court decision in the condemnation proceedings. The Appellant objected to that direction but it was confirmed following an oral hearing by a direction released on 17 October 2013.

9. On 28 October 2013 the condemnation proceedings at Hull Magistrates' Court were concluded in favour of the Appellant. The magistrates heard evidence from the UK Border Force and decided that there was no case the answer. However at the same time the court certified that there had been reasonable grounds for the seizure pursuant to section 144(1) Customs and Excise Management Act 1979 (see below).

10. At some stage prior to the determination of the condemnation proceedings the Border Force had destroyed the Goods. Following the Appellant's success in the condemnation proceedings he agreed compensation for the Goods, albeit reluctantly, together with a sum in respect of his costs of the condemnation proceedings.

11. The Appellant seeks further remedies in this appeal. I set out his position in detail below and the position of the Home Office

Statutory Framework

12. 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...

...

(5) Subject to ... Schedule 2A and 3 to this Act, any thing seized or detained under the customs and excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct.

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]..."

13. Section 152(a) also provides that the Commissioners may compound (settle) proceedings for condemnation.

14. Paragraph 3 Schedule 3 CEMA 1979 then states:

"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 Magistrates' Court.

16. Section 144 CEMA 1979 provides as follows:

(1) Where, in any proceedings for the condemnation of any thing seized as liable to forfeiture under the customs and excise Acts, judgment is given for the

claimant, the court may, if it sees fit, certify that there were reasonable grounds for the seizure.

(2) Where any proceedings, whether civil or criminal, are brought against the Commissioners, a law officer of the Crown or any person authorised by or
5 *under the Customs and Excise Acts 1979 to seize or detain any thing liable to forfeiture under the customs and excise Acts on account of the seizure or detention of any thing, and judgment is given for the plaintiff or prosecutor, then if either –*

10 *(a) a certificate relating to the seizure has been granted under subsection (1) above; or*

(b) the court is satisfied that there were reasonable grounds for seizing or
15 *detaining that thing under the customs and excise Acts,*

the plaintiff or prosecutor shall not be entitled to recover any damages or costs and the defendant shall not be liable to any punishment.

20 *(3) Nothing in subsection (2) above shall affect any right of any person to the return of the thing seized or detained or to compensation in respect of any damage to the thing or in respect of the destruction thereof.”*

17. Where perishable goods have been seized, the Border Force is specifically given discretion to destroy those goods. If goods are destroyed but it is found in
25 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.

40 *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—*

45 *(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
(c) where they have destroyed the thing, an amount equal to the market value of the thing at the time of its seizure.

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

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19. *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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20. *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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“ 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

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(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;

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(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

5 (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.*”

The Position of the Parties

10 21. The Appellant has set out his position on this appeal in emails dated 24 October 2014 and 26 February 2015. In summary the Appellant contends as follows:

- (1) The decision of the Hull Magistrates’ Court does not necessarily lead to a conclusion that the review decision refusing restoration was unreasonable.
- (2) The review decision remains unreasonable for the reasons given in the original Notice of Appeal.
- 15 (3) The condemnation proceedings did not provide a remedy for the refusal to restore the Goods.
- (4) The refusal to restore the Goods was not adequately remedied by the agreed compensation.
- 20 (5) The actions of the Border Force at the time of seizure were in breach of the Appellant’s convention rights and EU law. Article 13 of the convention provides that national courts must provide an effective remedy for breaches of convention rights.

22. In the light of those submissions the Appellant contends that the Tribunal should grant the following remedies:

- 25 (i) A declaration that the review decision refusing restoration was unreasonable.
- (ii) Directions for securing that the unreasonableness does not re-occur.
- (iii) A decision as to whether the Home Office’s discretion under section 152(b) includes power to award compensation in lieu of restoration and if so whether the Tribunal has jurisdiction over the amount of that compensation including compensation for loss of use of the Goods.
- 30 (iv) Findings of fact in relation to the seizure which might indicate a breach of the Appellant’s convention rights and EU law.
- (v) In so far as possible a transfer of the appeal proceedings to another court or tribunal pursuant to Tribunal Rule 5(3)(k)(i).
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23. The position of the Home Office is set out in an email dated 3 December 2014. In the light of the Magistrates’ Court decision that the Appellant had no case to answer the Home Office does not seek to defend this appeal. They have invited the Tribunal to exercise its power under section 16(4)(a) FA 1994 directing that the decision refusing restoration should cease to have effect but going no further than that.

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Discussion

24. I am principally concerned in this appeal with the jurisdiction of the Tribunal. The 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
5 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.

25. In the present case, the Home Office has accepted that jurisdiction arises under section 16(4(a) to direct that the decision on restoration should cease to have effect. It
10 is implicit therefore that they are accepting that the decision making officer could not reasonably have arrived at the decision refusing restoration. I shall therefore make a declaration to that effect pursuant to section 16(4)(c) FA 1994 and allow the appeal. There is nothing to be gained from a direction that the decision should cease to have effect because the Goods have already been disposed of.

15 26. I must still consider the Appellant's submissions and the remedies he seeks set out in paragraphs 21 and 22 above.

27. I accept the Appellant's submission at paragraph 21(1) that it is not the fact that the goods were unlawfully seized that rendered the reviewing officer's decision unreasonable. I dealt with similar circumstances in the case of *Young v Home Office*
20 [2014] UKFTT 930 where I said as follows:

*"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
25 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.*

*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
30 [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 be inconsistent with the
35 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.*

*34. Once a request for restoration has been made, in theory the Border Force could postpone making a decision until after condemnation proceedings had
40 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.

5 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.*

10 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.*

15 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."*

20 28. For the same reasons I consider that the review officer in the present case was entitled to assume for the purposes of the restoration decision that the goods had been lawfully seized. At the time of her decision the condemnation proceedings had not been determined either in the Magistrates' Court or by way of compounding.

25 29. I must next consider whether it is necessary for me to make findings as to what made the review officer's decision unreasonable. It would be unfair of me to make such findings without hearing from the review officer. However in the circumstances of this case it is unnecessary for me to make such findings. For the reasons which follow the remedies sought by the Appellant do not depend on why the decision was unreasonable.

30 30. The Appellant seeks directions to secure that the unreasonableness does not re-occur. The specific directions the Appellant seeks are as follows:

30 (1) In reviewing a decision on restoration a review officer should consider whether he is in possession of information not available at the time of seizure and/or the time of the original decision refusing restoration which would be relevant to the liability of the goods to forfeiture.

35 (2) On the basis of all relevant information the review officer should then make a reasoned decision on the status of the goods, ie whether they were liable to forfeiture.

(3) Only if the review officer is satisfied that the goods remain liable to forfeiture should he assume for the purposes of his review that the goods were liable to forfeiture.

40 (4) In any event a review officer should consider whether proper procedures were followed when the seizure was made.

(5) A review officer must address the question of whether at least some of the goods were for the individual's own use as part of the issue of proportionality.

31. I am satisfied that whatever findings I might make as to the reason for the unreasonableness of the review officer's decision, such directions would not be appropriate.

32. In relation to directions (1) to (3), the proper forum to consider the lawfulness of the seizure is the condemnation proceedings. As stated above, it would be inconsistent with the statutory schemes for restoration and condemnation if the Border Force were required to consider as part of the restoration decision whether the goods had been lawfully seized.

33. Further, in relation to direction (4) the question whether proper procedures were followed at the time of seizure is of no relevance to the question of restoration. Either the Goods were lawfully seized or they were unlawfully seized. That is to be resolved in the condemnation proceedings. Any question of abuse of powers or procedural unfairness must be dealt with either as a matter of complaint or by way of judicial review (see *Commissioners of HM revenue & Customs v Race [2014] UKUT 0331 (TCC) at [35]*).

34. In relation to direction (5), there is no suggestion in the present appeal that some of the Goods might have been for personal use with the balance being for commercial use. If there had been evidence to support such a conclusion then that may be a factor a review officer would have to take into account in the restoration decision (see for example *Commissioners for HM Revenue & Customs v Mills [2007] EWHC 2241*). However that is not the facts of this case. The Goods were seized because the Border Force considered they were all for commercial use. The Magistrates' Court dismissed the Home Office's condemnation proceedings because it found that the Goods were for personal use.

35. Returning to the Appellant's submissions at 21(3) and (4) above, the Appellant submits that neither the condemnation proceedings nor the agreed compensation provided an adequate remedy for the unreasonable refusal to restore the Goods.

36. The condemnation proceedings are not intended to provide a remedy for a refusal to restore goods. They effectively provide a remedy for the unlawful seizure because dismissal of the condemnation proceedings carries with it a conclusion that the goods were not liable to seizure and should not be forfeit.

37. The Appellant's remedy for an unlawful seizure may be restricted where the Magistrates' Court certifies that there were reasonable grounds for the seizure. In those circumstances section 144(2) CEMA 1979 provides that the Commissioners (or in the present case the Home Office) are not liable for damages. However that is subject to section 144(3) which preserves an owner's right to the return of seized goods and also to compensation in respect of any damage to the goods or the destruction of the goods. Such claims are within the jurisdiction of the courts and this Tribunal is given no jurisdiction.

38. The compensation offered by the Home Office and accepted by the Appellant relates to the destruction of the Goods. If the Appellant had not accepted

compensation his remedy would have been an action in tort against the Home Office. It would not be in this Tribunal.

39. The remedy for a wrongful refusal to restore the goods under section 152(b) CEMA 1979 is that provided in the Tribunal by section 16(4) FA 1994. Any remedy
5 in relation to loss of use of the goods would be a claim in tort in the courts.

40. As to paragraph 21(5) above, the Appellant submits that the circumstances of seizure breached his convention rights and EU law. His remedy for any such breaches lay in the Magistrates' Court which considered the lawfulness of the seizure or alternatively by way of judicial review.

10 41. I can deal briefly with the remedies sought at 22(iii) to (v) above.

42. Where goods have been destroyed because they are perishable and subsequent condemnation proceedings are concluded in favour of the owner of the goods, Parliament has laid down a scheme whereby compensation can be awarded. The scheme is contained in paragraph 17 Schedule 3 CEMA 1979. Where the parties
15 cannot agree on the level of compensation it is to be determined by a referee in accordance with paragraph 17.

43. This tribunal has no jurisdiction in relation to the scheme under paragraph 17. If the Appellant does not invoke paragraph 17 he has alternative remedies in the law of tort in county court proceedings. Again, this tribunal is given no jurisdiction in
20 relation to those remedies.

44. The position is the same where goods which are not perishable are destroyed. The remedy lies elsewhere.

45. The purpose of this Tribunal is to make findings of fact necessary to determine issues and appeals which fall within its jurisdiction. In the present appeal the
25 jurisdiction is limited to the reasonableness of the decision on restoration. The Tribunal should not make findings of fact simply to support claims which an Appellant might have elsewhere.

46. Finally, the Appellant relies on Tribunal Rule 5(3)(k)(i) which provides that the Tribunal in exercising its case management powers may:

30 *“transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and, because of a change of circumstances since the proceedings were started –*

(i) the Tribunal no longer has jurisdiction in relation to the proceedings; or

35 *(ii) the Tribunal considers that the other tribunal is a more appropriate forum for the determination of the case;”*

47. The power in Tribunal Rule 5(3)(k)(i) arises where this Tribunal no longer has jurisdiction in relation to the proceedings because of a change in circumstances since the proceedings were issued. The Tribunal does have jurisdiction under section 16
40 Finance Act 1994 and I have allowed the appeal granting a declaration that the review

decision was unreasonable. As far as the other remedies are concerned, this Tribunal never had jurisdiction and therefore it has no power of transfer.

Conclusion

5 48. For the reasons given above I allow the appeal and make a declaration that the decision on review dated 18 June 2013 refusing restoration of the Goods was unreasonable. It is not appropriate to grant any further remedy.

10 49. The Appellant has indicated that he wishes to apply for costs against the Home Office pursuant to Tribunal Rule 10(1)(b). Any application should be made in writing to the Tribunal in accordance with Tribunal Rule 10(3) and should be copied to the Respondent. It should be made within 28 days from the date of release of this decision. I should say, because the Appellant asked me to give an indication, that any award of costs would be limited by reference to the Litigants in Person (Costs and Expenses) Act 1975.

15 50. 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)”
20 which accompanies and forms part of this decision notice.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

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RELEASE DATE: 25 April 2015