



TC04532

Appeal number: TC/2013/01810

EXCISE DUTY – seizure of vehicle – whether decision not to restore was unreasonable – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ZANETA ZELAZOWSKA

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE ANNE REDSTON
MRS SHAMEEM AKHTAR**

Sitting in public at the Royal Courts of Justice on 17 April 2015

Mr Cezary Giermak for the Appellant

**Mr Richard Evans of Counsel, instructed by the Cash, Forfeiture and
Condemnation Legal Team of the Home Office, for the Respondents**

DECISION

Introduction

1. This is Ms Zelazowska's appeal against the refusal of the Border Force to restore a car which had been used for smuggling tobacco. The driver of the car was Mr Giermak, who at the time was Ms Zelazowska's partner.

2. We begin by explaining the legal background. When a vehicle is seized by the Border Force there are two separate issues:

(1) Has the vehicle been lawfully seized, for instance because it has been used for smuggling?

(2) If the vehicle has been lawfully seized, should it nevertheless be restored to the owner, perhaps on payment of a fine?

3. The Tribunal does not have the jurisdiction (broadly speaking, that means the power) to decide the first issue. If a person wants to challenge the seizure, he must do so in the Magistrates' Court. If the seizure is not challenged, then the vehicle is treated as having been lawfully seized and any facts which form part of the seizure decision are also deemed to be true. In this case, Ms Zelazowska did not challenge the seizure in the Magistrates' Court.

4. In relation to the second issue, the Tribunal also does not have the jurisdiction to tell the Border Force that a vehicle must be restored. We can only decide whether the decision of the Border Force not to restore the vehicle was unreasonable. If we decide that it was unreasonable, for instance, because the Officer making the decision did not consider all relevant factors, we can require the Border Force to look at the matter again and make a new decision.

5. In Ms Zelazowska's case, for the reasons set out below, we decided that the Officer's decision was not unreasonable and dismissed Ms Zelazowska's appeal.

The Permitted Issues

6. On 21 August 2014 Judge Berner held a hearing to decide two applications relating to this case: Ms Zelazowska's application for a direction that she be allowed to inspect the car which had been forfeited, and the Border Force's application to strike out Ms Zelazowska's appeal.

7. Judge Berner decided to refuse Ms Zelazowska's application. He also decided to strike out her appeal other than in the following respects ("the Permitted Issues"):

(1) whether she was the sole legal and beneficial owner of the vehicle and whether Mr Giermak has any legal or equitable interest in the vehicle;

(2) whether Ms Zelazowska was or was not aware that the vehicle was to be used for smuggling;

(3) whether she had, or had not, taken reasonable steps to prevent the vehicle from being used for smuggling;

(4) as to the relationship between Ms Zelazowska and Mr Giermak and whether to restore the vehicle would be tantamount to restoring it to the person involved in the smuggling; and

5 (5) whether Ms Zelazowska would suffer exceptional hardship if the vehicle was not restored.

8. Judge Berner's directions mean that, when deciding whether or not the Border Force's decision was unreasonable, this Tribunal can only consider the Permitted Issues, because all other aspects of her appeal have been struck out.

The Evidence

10 9. On 25 March 2014 Mr Giermak sent the Tribunal documents about (a) Ms Zelazowska's tax credit awards and (b) a loan to purchase the car. The Tribunal copied these documents to the Border Force.

10. Shortly before this hearing, the Border Force provided the Tribunal and Ms Zelazowska with a bundle of documents, which included:

15 (1) the correspondence between the parties (with attachments) and between the parties and the Tribunal;

(2) extracts from the notebook of the Border Force Officer who seized the vehicle; and

20 (3) the related Goods Tally sheet, Seizure Information Notice and Seizure of Vehicle Notice, all issued on 11 October 2012.

11. Before proceeding with the hearing, we considered four preliminary issues:

(1) the absence of both the Border Force witness and of Mr Evan's instructing solicitor;

25 (2) the fact that certain documents sent to the Tribunal by Mr Giermak on behalf of Ms Zelazowska had not been seen by Mr Evans;

(3) Mr Giermak's failure to provide a witness statement; and

(4) whether Ms Zelazowska and/or Mr Giermak should be allowed to give oral evidence.

30 12. These issues are inter-related, so we set each of them out before explaining our decisions.

Absence of Border Force witness and solicitor

35 13. Officer Anthony Rayden had carried out the review decision in Ms Zelazowska's case. On 26 August 2014 the Tribunal was informed that Officer Rayden was "no longer available" to give evidence but that Officer Harris, another Border Force review officer, would "be available to answer questions." However, Officer Harris did not attend the hearing. Mr Evans was unable to explain his non-attendance but apologised on behalf of his client.

14. Mr Evans's instructing solicitor was also not present. Mr Evans said he had been expecting some representative of the Border Force to attend the hearing.

Documents not received

5 15. Judge Berner's directions had required that witness statements and all documents relied upon by Ms Zelazowska be provided to the Border Force within fourteen days of the date of issue of the directions.

16. Within that time limit, Mr Giermak sent the Tribunal a very short letter from s Zelazowska which she told us was a witness statement. It had the following attachments:

- 10 (1) a page from Ms Zelazowska's cash ISA statement and a page from her Lloyds bank account statement;
- (2) a letter dated 7 May 2014 from Morely Brown & Co, the solicitors who acted for Mr Giermak and Ms Zelazowska in the purchase of their house;
- 15 (3) a council tax bill for Mr Giermak dated 30 April 2014 relating to a different property

17. Mr Giermak was sure that he had sent these documents to the Border Force on behalf of Ms Zelazowska, but did not remember when they had been despatched. Because no-one from the Border Force attended the hearing, it was not possible to establish whether they had been received. However, Mr Evans had seen neither Ms 20 Zelazowska's witness statement nor the attachments.

Whether Mr Giermak and Ms Zelazowska should be allowed to give oral evidence

18. Judge Berner had directed that all witnesses should provide a witness statement by the date set out in the directions, and that no further witness evidence could subsequently be provided without the permission of the Tribunal. He also directed 25 that Mr Giermak be allowed to act as Ms Zelazowska's representative

19. Mr Giermak thought that this direction meant he could put his side of the story to the Tribunal. He did not understand that this would constitute witness evidence, and so he was required to comply with the direction to provide a witness statement. He told the Tribunal that neither he nor Ms Zelazowska really understood what a 30 witness statement was.

Submissions

20. Mr Giermak asked that he and Ms Zelazowska be allowed to give oral evidence. Mr Evans submitted that no oral evidence be permitted: the purpose of Judge Berner's 35 directions was to allow the Border Force to consider the witness evidence in advance of the hearing.

21. Mr Evans also asked that this hearing be postponed, so that Ms Zelazowska's witness statement and the attached documents could be considered by the Border Force; he said that the postponement was necessary given the absence of any Border Force representative.

22. Mr Giermak told the Tribunal that he and Ms Zelazowska had travelled for three hours to reach the hearing and would have to travel another three hours to get home. They had both taken time off work to attend the hearing and had lost a day's pay in consequence.

5 23. Mr Giermak submitted that the Border Force was not treating the hearing seriously: neither the original officer nor the substitute officer had attended, and their own Counsel had not been provided with the documents he had sent.

Decision on preliminary issues

10 24. We considered the overriding objective and Judge Berner's directions. Although he had directed that witness statements be provided, he also emphasised the need for the hearing to be conducted flexibly, and had allowed extra evidence to be provided if the Tribunal gave permission. There was no direction that the witness statements stand as evidence in chief.

15 25. We accepted that neither Ms Zelazowska nor Mr Giermak had fully understood the directions. We decided to allow Mr Giermak to give oral evidence at the Tribunal, and we allowed Mr Giermak to ask Ms Zelazowska further questions.

20 26. In relation to Mr Evan's application for a postponement, we decided that the unexplained absence of Border Force representatives carried little weight against the very considerable inconvenience and cost to Ms Zelazowska and Mr Giermak of postponing the proceedings. While the latter could be compensated for by making a costs order, the former could not.

27. However, we agreed it was clearly important for Mr Evans to have time to consider the documents he had not seen, and we directed a short adjournment.

25 28. When Mr Evans returned after considering the documents, he said he was content to continue with the hearing, but asked that the Border Force have the opportunity to make further submissions on the oral evidence and the new documents after the hearing. We gave directions to that effect, but in the event, the Border Force did not make any further submissions.

30 29. Ms Zelazowska gave her evidence in Polish, and the Tribunal had the benefit of a Polish interpreter, who also translated the rest of the hearing for Ms Zelazowska's benefit.

The facts

30. From the evidence provided, we find the following facts.

35 31. By June 2012, Ms Zelazowska and Mr Giermak had lived together as a couple for several years and had two children. Ms Zelazowska worked packing fruit and vegetables and Mr Giermak was a lorry driver. They lived in a property which had been purchased in their joint names.

32. In June 2012, Ms Zelazowska visited John Peat Motors with a friend who was buying a car. Ms Zelazowska saw a Citroen Nemo and liked it. The Citroen was purchased on 20 June 2012. The invoice was made out to Mr Giermak but the registered keeper was Ms Zelazowska. The deposit of £2,029 was paid by Ms
5 Zelazowska but Mr Giermak took out a loan to pay the balance of £7,000. Ms Zelazowska was unable to obtain a loan because her income was too low.

33. Ms Zelazowska used the car to go to and from work, and often gave her colleagues lifts. She also used the car to take the couple's children to school. Mr Giermak had his own car, but could also use the Citroen.

10 *The reason why the car was purchased and its number plate*

34. When Ms Zelazowska was asked in cross-examination why the vehicle had been purchased, she said "My old car breaking down and I needed to buy a new car." However, Mr Giermak told the Tribunal the vehicle was "an early birthday present [for Ms Zelazowska]. Her car was old, and one of the major reasons for buying this
15 one was her birthday." Mr Giermak agreed that Ms Zelazowska's birthday was on August 12, almost two months after the car was bought.

35. Soon after the purchase, the car's registration number was changed to a "cherished plate." Mr Giermak owned this number plate, and its letters and numbers approximate to his first name. He told the Tribunal he had been unable to find a
20 number plate which represented Ms Zelazowska's name. Mr Evans challenged this in cross-examination and invited the Tribunal to reject it.

36. We agree with Mr Evans. Although Ms Zelazowska's first name, Zaneta, is unusual, registration numbers are a random mix of numbers and letters. It is also commonplace for the number "5" to be read as the letter "Z". We do not accept that
25 Mr Giermak transferred the car's registration number to one representing his own name because he was unable to find a number plate representing Ms Zelazowska's name.

37. We further find that the car was bought to replace Ms Zelazowska's existing car. We therefore reject Mr Giermak's evidence that it was a birthday present, both
30 because this was inconsistent with Ms Zelazowska's evidence and because it was also inherently less probable, given the date the vehicle was purchased and the use of a number plate reflecting Mr Giermak's first name.

The seizure

38. At midnight on 10 October 2012, Mr Giermak drove the Citroen to Dover and crossed to Belgium, where he spent less than 24 hours. Ms Zelazowska told the
35 Tribunal that he had gone to see a Polish friend who needed help; Mr Giermak told the Border Force Officer when he was stopped that he had gone "just to the first petrol station in Belgium...to meet a man about a long light bulb recycling machine." He followed the man to another location. When asked for the name of the man, and the
40 location, he told the Officer that he was unable to remember.

5 together at the same address. Mr Giermak was driving the car when it was seized, I can only assume he was insured to do so and he had your permission to use it. I find it probable that Mr Giermak had unrestricted access to the vehicle and will again if it was restored to you. I therefore consider that to restore the vehicle to you would be tantamount to restoring it to Mr Giermak, the person involved in the offence.”

10 47. Ms Zelazowska asked for a review of that decision, which was provided on 5 February 2012 by Officer Rayden. His letter sets out the Border Force policy on restoration, as follows (emphases in original):

15 “The general policy is that private vehicles used for the improper importation or transportation of excise goods should not normally be restored. The policy is intended to be robust so as to protect legitimate UK trade and revenue and prevent illicit trade in excise goods...

20 If the vehicle was owned by a third party, who was not present at the time of the seizure, and can show that they were both *innocent* of and *blameless* for the smuggling attempt, then consideration may be given to restoring the vehicle for a fee. If, in addition to being both *innocent* and *blameless*, the third party demonstrates that they have taken *reasonable steps to prevent the smuggling in the vehicle* then consideration may be given to restoring it free of charge. However, a vehicle will not normally be restored to a third party in a situation where that would be tantamount to restoring it to the person responsible for the smuggling attempt.

25 A vehicle adapted for the purposes of smuggling will not normally be restored.”

30 48. Officer Rayden’s letter said that Border Force policy is to consider restoring vehicles where only small amounts are smuggled, but that he has not applied that practice “because of the aggravating factors of the car being adapted for concealing the tobacco and Mr Giermak’s persistent lies to the Officer.”

49. Although Ms Zelazowska was car’s registered keeper, Officer Rayden decided she was not the owner of the vehicle because:

- 35 (1) the registration document says on its face that it “is not proof of ownership”;
- (2) the invoice for the car was made out to Mr Giermak; and
- (3) he was paying off the remaining £7,000 balance of the purchase price.

40 50. Officer Rayden also said that restoring the car would be “tantamount to restoring it to him, your partner, the person involved in the attempt at smuggling.” Finally, he considered whether the refusal to restore would cause “exceptional hardship” to Ms Zelazowska and said that neither the financial cost of a acquiring a

replacement vehicle or the difficulties in taking children to school or going to work, met that threshold.

51. After the seizure Ms Zelazowska acquired a replacement vehicle, a 2002 Peugeot which frequently breaks down.

5 52. Ms Zelazowska and Mr Giermak separated at some point before May 2014, after which they purchased a second property for Ms Zelazowska and the children to live in; this property is also jointly owned. The mortgage is paid by Mr Giermak, who remained at the original house and has formed a new relationship.

The permitted issues

10 53. We next consider each of the permitted issues in the light of the facts we have already found, and in so doing we make further findings of fact.

Ownership of the vehicle

54. The first issue is whether Ms Zelazowska was the sole legal and beneficial owner of the car, or whether Mr Giermak has any legal or equitable interest in it.

15 55. Ms Zelazowska was the registered keeper, but as Officer Rayner has stated, that is different from being the legal owner. We have found as facts that the greater part of the purchase price was paid by Mr Giermak (£7,000 compared to £2,029), the invoice was in his name and the registration number was changed to reflect his first name. Ms Zelazowska accepted that he had an interest in the car when she wrote to
20 the Border Force on 21 October 2012, saying (emphasis added) “although he is allowed to drive my car, *after all it is our car.*”

56. We find that the car’s legal owner was Mr Giermak, and that Ms Zelazowska had an equitable interest by virtue of contributing part of the purchase price. This is a legal way of saying that the couple shared the ownership of the car.

25 *Whether Ms Zelazowska was aware that the car was to be used for smuggling*

57. Mr Evans put to Ms Zelazowska and Mr Giermak that she had consented to Mr Giermak using the car for smuggling; both denied that this was the case.

30 58. We have found as a fact that Ms Zelazowska did say to Mr Giermak before he left: “if you get pulled over and have too much then just pay the duty” or words to that effect. From this we find that Ms Zelazowska was clearly contemplating the possibility that he would deliberately bring “too much” tobacco to the UK.

35 59. We further find that the instruction to pay the duty if he was pulled over carries the clear implication that, if Mr Giermak had purchased too much tobacco, he would only pay the duty if stopped and challenged. Had he not been pulled over he would simply have entered the UK with the excess tobacco. That is smuggling.

60. Ms Zelazowska therefore knew that the car might be used for smuggling and consented. As a result, the next issue falls away: there is no need for us to consider whether she took “reasonable steps” to ensure it was not used for smuggling.

The relationship between Ms Zelazowska and Mr Giermak

61. It was not disputed that at the time the car was seized, Ms Zelazowska and Mr Giermak were living as a family unit with their two children. Since then, the couple have split up; they live separately and Mr Giermak has a new partner. The exact date
5 of the separation was unclear, but the new property (where Ms Zelazowska lives with the children) was not purchased until May 2014.

62. We find, on the balance of probabilities taking into account this evidence, that at the time of the review decision on 5 February 2013, Ms Zelazowska and Mr Giermak were still together and that restoring the car to Ms Zelazowska would have been
10 tantamount to restoring it to Mr Giermak.

63. Although the couple are now separated, their financial and personal affairs remain closely linked. They are co-parenting their two children.

64. Again, on the balance of probabilities, we find that if the car were restored, it is more likely than not that Mr Giermak would have access to it on request. Although
15 this is not the same as saying that restoration to Ms Zelazowska would be tantamount to restoring it to Mr Giermak, it is a relevant factor.

Exceptional hardship?

65. Ms Zelazowska has another car, albeit one which is older and more prone to breakdowns than the Citroen. She is able to use that car to go to work and to take the
20 children to school. She and Mr Giermak have together found the money to put down a deposit on a second residential property. We find that the loss of the car does not cause her exceptional hardship.

The law

66. The statutory provision under which Ms Zelazowska required the Border Force to review the decision not to restore the car is Finance Act 1994 (“FA 1994”) s 15. The Customs and Excise Management Act 1979 s 152(b) says that the Border Force’s
25 decision not to restore the car is what is known as an “ancillary matter.”

67. FA 1994, s 16(4) sets out the Tribunal’s powers in relation to ancillary matters:

30 “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,
35 that is to say -

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as
40 appropriate of the original decision; and

5 (c) in the case of a decision that 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.”

68. We have already explained the effect of this provision in the opening paragraphs of this decision. In deciding whether or not the Border Force’s decision was unreasonable, we have followed the classic approach summarised by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223:

15 “The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.”

69. As Lady Hale has recently said, in *Braganza v BP Shipping* [2015] UKSC 17 at [24], this test has two limbs:

30 “The first limb focusses on the decision-making process - whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome - whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the *Wednesbury* principle, but without necessarily excluding the former.”

70. We have also considered *Lindsay v C&E Commrs* [2002] STC 508, where Lord Phillips MR said at [63]:

40 “Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars would be rendered liable to forfeiture cannot reasonably be heard to complain if they lose their vehicles. ...Cases of exceptional hardship must always of course be given due consideration.”

Whether the Border Force’s decision was unreasonable

71. Officer Rayner decided not to restore the vehicle, even though the amounts involved were relatively small, because:

- (1) the vehicle had been adapted for smuggling;
- (2) Ms Zelazowska was not its owner;
- (3) restoring the car would be tantamount to restoring it to Mr Giermak;
- (4) there was no “exceptional hardship” to Ms Zelazowska from the decision not to restore.

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72. As already explained, the first of these points is deemed to be true. In making our findings of fact, we have agreed with Officer Rayner on the second and fourth points: the car was owned by Mr Giermak and that the decision not to restore would not cause Ms Zelazowska exceptional hardship.

10 73. In relation to the third point, we have found that, at the time of Officer Rayner’s decision, restoring the car to Ms Zelazowska would have been tantamount to restoring it to Mr Giermak, the position has now changed because the couple are estranged. However, as Mr Giermak continues to be able to access the car, the difference is not significant.

15 74. One factor not considered by Officer Rayner is that Ms Zelazowska had consented to the vehicle being used for smuggling.

75. Applying the first limb of the *Wednesbury* principle, we find that the matters taken into account by Officer Rayner were all relevant, and the fact which was not known to him would only have strengthened his conclusion.

20 76. Applying the second limb of the *Wednesbury* principle, it follows that we do not find that Officer Rayner decision was “so outrageous that no reasonable decision-maker could have reached it.”

Decision and appeal rights

25 77. We find, taking into account all the facts and circumstances of this case, that the decision not to restore was not unreasonable and we uphold the decision. Ms Zelazowska’s appeal is dismissed.

30 78. 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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**ANNE REDSTON
TRIBUNAL JUDGE**

RELEASE DATE: 13 July 2015