



TC04828

Appeal number: TC/2015/6256

EXCISE DUTIES – refusal to restore seized vehicle – no request for review of decision with permitted time limit – ss 14 & 14a FA 1994 – appeal against refusal of request for late review

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mr HUBERT KOLODZIEJSKI

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

TRIBUNAL: Judge Peter Kempster

Sitting in public at Centre City Tower, Birmingham on 15 January 2016

The Appellant in person

Mr Joseph Millington of counsel, instructed by the Home Office Legal Team, for the Respondents

DECISION

Facts

1. On 26 July 2014 the Appellant (“Mr Kolodziejski”) was apprehended at Dover entering the UK in possession of 6,840 cigarettes being carried in his Seat Leon car (“the Vehicle”). Some or all of the cigarettes were stowed in the spare wheel area of the Vehicle. The Respondents (“UKBA”) seized the cigarettes and also the Vehicle, pursuant to s 141(1)(a) Customs & Excise Management Act 1979. The legality of the seizure of the Vehicle has not been challenged, and thus the Vehicle has been condemned as forfeit.

2. On 26 August 2014 Mr Kolodziejski sought restoration of the Vehicle, citing in particular the financial hardship caused. On the same date UKBA acknowledged receipt of the request and stated “We will now begin processing your case, and will request further information from you if required. ... We will process your case as quickly as possible ...”.

3. On 8 April 2015 UKBA gave their decision, refusing restoration on stated grounds (“the Decision Letter”). The Decision Letter was sent to Mr Kolodziejski’s address in Salford (“the Salford Address”). The Decision Letter explained the right to request a formal review (s 14 Finance Act 1994 refers) and stated:

“A request for a statutory review must be received by Border Force (not just posted or sent) within 45 days. However, Border Force allow an additional 5 days for the receipt of our letter by post (7 days if it is posted to an address outside of the UK): your request must therefore be received by 28/05/2015.”

4. On 27 August 2015 Mr Kolodziejski, writing from an address in Wem, Shropshire (“the Wem Address”), requested a review of the Decision Letter, stating:

“I didn’t answer your last letter because on January when I living at Manchester was attacked and as a result suffered a serious eye injury. The treatment continues today. Recently I moved to the address indicated above and found a job.”

5. Two consultant’s letters from Manchester Royal Eye Hospital stated:

(1) In a letter dictated on 2 February 2015, that Mr Kolodziejski described an alleged assault “some two days ago” – ie around 31 January 2015.

(2) In a letter dictated on 31 March 2015, that Mr Kolodziejski was “off treatment” but was due a further examination in four weeks time.

6. On 3 September 2015 UKBA wrote to Mr Kolodziejski at the Salford Address to acknowledge the review request but noted that it was outside the statutory 45 day limit and stated:

“... if you believe you have a reasonable excuse for the lateness of your request .. please send *evidence* of that to [UKBA at given address]

within 14 days of the date of this letter. Any information should be submitted *in English*.”

7. On 23 September 2015 Mr Kolodziejski wrote from the Wem Address acknowledging UKBA’s response (ie the 3 September letter), stating that he depended on his car and asking that correspondence be sent to the Wem Address.

8. On 25 September 2015 UKBA wrote to the Wem Address apologising for the 3 September letter being sent to the Salford Address and stating “you did clearly receive this as confirmed by the letter we received from you [ie the 23 September letter]. I am in receipt for (*sic*) the reasons that you set out in [the 27 August letter] and I have based my decision on that information.” UKBA refused the request for a review out of time, stating:

(1) The request was received 101 days after the Decision Letter.

(2) The medical report from the hospital stated that the eye injury was sustained on 26 January 2015, which was over two months before the Decision Letter.

(3) No evidence had been provided of the date of change of address.

(4) Per Laddie J in *C&E Commissioners v Angliss* [2002] All ER (D) 25 (Jul) (at [35]) the 45 day time limit for requesting a review was not unfair or restrictive, but rather was generous.

(5) There was a 30 day time limit for appealing to the Tribunal.

9. On 3 October 2015 Mr Kolodziejski appealed to the Tribunal.

Law

10. Section 14 Finance Act 1994 provides (inter alia) that a person who has received a decision refusing restoration of a seized vehicle “may by notice in writing to the Commissioners require them to review that decision”; and states:

“(3) The Commissioners shall not be required under this section to review any decision unless the notice requiring the review is given before the end of the period of forty-five days beginning with the day on which written notification of the decision, or of the assessment containing the decision, was first given to the person requiring the review.”

11. Section 14A Finance Act 1994 provides (so far as relevant):

“Review out of time

(1) This section applies if—

(a) a person may, under section 14(2), require HMRC to review a decision, and

(b) the person gives notice requiring such a review after the end of the 45 day period mentioned in section 14(3).

(2) HMRC are required to carry out a review of the decision in either of the following cases.

(3) The first case is where HMRC are satisfied that—

5 (a) there was a reasonable excuse for not giving notice requiring a review before the end of that 45 day period, and

(b) the notice given after the end of that period was given without unreasonable delay after that excuse ceased.

(4) The second case is where—

10 (a) HMRC are not satisfied as mentioned in subsection (3), and

(b) the appeal tribunal, on application made by the person, orders HMRC to carry out a review.

...”

Appellant’s case

12. Mr Kolodziejcki (speaking through a court-appointed interpreter) submitted as follows.
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13. He had required help to translate correspondence from UKBA and had needed the assistance of his girlfriend to do this.

14. The Decision Letter (sent 8 April 2015) had been sent to the Salford Address. However, Mr Kolodziejcki had moved from that address in early November 2014.
20 The Salford Address was a flat in a block of flats and it was only when a friend telephoned him to tell him about the letter that he first knew of it. The friend found the letter, together with lots of other post, on the communal hall table when he returned from a two months absence in Poland. Mr Kolodziejcki could not remember exactly when his friend told him about the letter but he had responded quickly to UKBA on 27 August 2015.
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15. In December 2014 Mr Kolodziejcki had paid an acquaintance £35 to call UKBA to find out what was happening on the application, to give the new address details and to sort everything out; his acquaintance had told him that UKBA had said he could expect a reply within 14 days. The next he heard was when his friend told him about
30 the Decision Letter that had been received at the Salford Address.

16. He was very sorry for the trouble that had been caused.

Respondents’ case

17. For UKBA, Mr Millington submitted as follows.

18. In deciding whether to order a late review the Tribunal should follow the
35 approach set out by the Upper Tribunal in *Data Select Ltd v HMRC* [2012] STC 2195. The tribunal had a full appellate jurisdiction under s 14A(4).

19. A person dealing with UKBA should reasonably notify UKBA of any change of correspondence address. UKBA had no record of information being received between the August 2014 request for restoration and the April 2015 Decision Letter. The hearing was the first time the alleged December 2014 telephone call to UKBA, allegedly notifying a change of address, had been mentioned, and UKBA could not comment on it; there was no reference to it in any of Mr Kolodziejski's letters to UKBA. Mr Kolodziejski, as appellant, bore the burden of proof on this and had produced no evidence beyond his assertion, made for the first time at the hearing.

20. The information about Mr Kolodziejski's medical problem with his eye was a red herring. The assault took place in late January 2015 and Mr Kolodziejski's consultant reported that he was "off treatment" by the end of March 2015. That had no relevance to the receipt of the Decision Letter, which Mr Kolodziejski said did not come to his attention until August 2015.

21. Mr Kolodziejski's failure to keep UKBA informed of his changes of correspondence address had resulted in him missing the 45 day deadline imposed by s 14(1)(b), which time limit the High Court in *Angliss* (at [34]) had described as "generous". In all the circumstances it would not be fair and just to order UKBA to carry out a late review.

Consideration and Conclusions

20 *Approach*

22. I agree with Mr Millington that the Tribunal's jurisdiction under s 14A (4) is a full appellate one – ie not confined to a supervisory jurisdiction over UKBA's conduct in making their decision to refuse to carry out a late review.

23. However, I do not agree with Mr Millington that the test I should apply is that set out in *Data Select*. While that test is usually appropriate to applications for an extension of time to comply with a time limit, I construe s 14A as adopting a different approach. Section 14A(3) sets the test for when UKBA *must* (s 14A(2): "required to carry out") carry out a late review: "[UKBA] are satisfied that (a) there was a reasonable excuse for not giving notice requiring a review before the end of that 45 day period, and (b) the notice given after the end of that period was given without unreasonable delay after that excuse ceased." Section 14A(4) then provides that if UKBA are not so satisfied then the Tribunal may order UKBA to carry out a review. I consider that requires the Tribunal to adopt the same test as that imposed on UKBA by s 14A(2). That approach is different from the one usually applicable to late applications (where I agree the *Data Select* test is appropriate – see for example the Upper Tribunal in *Romasave (Property Services) Ltd v HMRC* [2016] STC 1 at [88-92]) but it follows, I think, from the specific (and rather unusual) wording in s 14A(4). That may possibly be explained by the history of the provision. Before 2009 the Tribunal and its predecessor VAT & Duties Tribunal had no jurisdiction whatsoever where HMRC (as then had responsibility) refused a late review – see *Angliss* at [20-22]. As Mr Millington guided me at the hearing (for which I am grateful), that was changed with effect from April 2009 by the insertion of s 14A by para 200 sch 1 of

The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56). In conferring a new jurisdiction on the Tribunal s 14A has, I think, applied the reasonable excuse test for the Tribunal as well as UKBA. For completeness, that contrasts with the general position where the test for exercise of discretion to permit late applications is *not* one of reasonable excuse – see the Upper Tribunal in *O'Flaherty v HMRC* [2013] STC 1946 at [58-59].

24. Given the specific wording of s 14A(4), I consider the test for me to adopt is that in s 14A(3): was there was a reasonable excuse for not giving notice requiring a review before the end of the 45 day period, and, if so, was the notice given after the end of that period without unreasonable delay after that excuse ceased?

Consideration

25. What is Mr Kolodziejski's excuse for not meeting the 45 day deadline to request a review of the Decision Letter? When he requested the review in his letter of 27 August 2015 (see [4] above) he said two things.

26. First, he referred to his eye injury. I agree with Mr Millington that the information about Mr Kolodziejski's medical condition is irrelevant to the delay in applying for a review. The assault took place in late January 2015 and Mr Kolodziejski's consultant reported that Mr Kolodziejski was "off treatment" by the end of March 2015, although I accept that outpatient follow-ups continued after then. Mr Kolodziejski says that as soon as his friend alerted him to the Decision Letter, he wrote to UKBA (the 27 August 2015 letter). So Mr Kolodziejski's injury, while unfortunate, has no bearing on his not making a review request within the 45 day window. Thus I do not consider this can amount to a reasonable excuse.

27. Secondly, he said "Recently I moved to the [Wem Address] indicated above and found a job." The letter does not protest that UKBA sent the Decision Letter to the wrong address because Mr Kolodziejski had earlier informed them of a change of address. That, I consider, is what a person would do if, as Mr Kolodziejski now claims, he had had an acquaintance telephone UKBA in December 2014 to inform them of a change of address. Mr Kolodziejski explained that he said "recently" because the Wem Address was new but he had moved from the Salford Address on 19 April 2015 to live with his sister in Old Trafford. At no point before the hearing did Mr Kolodziejski contend that a change of address had been notified to UKBA in December 2014, and the fact that the Decision Letter was sent to the Salford Address indicates that UKBA were unaware of any change. On balance I do not accept that UKBA were informed of a change of address until Mr Kolodziejski's 27 August 2015 letter. Mr Kolodziejski should have kept UKBA up-to-date on his correspondence address, or at least made arrangements (such as a Royal Mail mail redirection) for mail addressed to the Salford Address to be forwarded to his subsequent address or addresses. My conclusion is that he did not do so and thus the fact that the Decision Letter was sent to an address from which he had already moved (and so did not come to his attention until later) does not constitute a reasonable excuse.

28. For those reasons I conclude that Mr Kolodziejski did not have a reasonable excuse for not giving notice requiring a review before the end of the 45 day period. Accordingly, I shall not order UKBA to carry out a late review.

5 29. I add (in case this matter goes further) that if my analysis of the test to be applied ([23-24] above) is incorrect and the correct test is instead that set out in *Data Select* then I would still reach the same conclusion not to order UKBA to carry out a late review, for two reasons:

10 (1) Statutory time limits should be upheld and enforced as important legislative provisions, and the length of the delay here was serious and significant, being a delay of 56 days on a time limit (described by the High Court in *Angliss* (at [34]) as “generous”) of 45 days.

(2) From my findings at [26-27] above, there was no good reason for the delay.

Decision

15 30. The appeal is DISMISSED.

20 31. 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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Peter Kempster

**TRIBUNAL JUDGE
RELEASE DATE: 20 JANUARY 2016**