



**TC04868**

**Appeal number: TC/2016/00009**

*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 GEORGE ASUMANING**

**Appellant**

**- and -**

**DIRECTOR OF BORDER REVENUE**

**Respondents**

**TRIBUNAL: Judge Peter Kempster**

**Sitting in public at Centre City Tower, Birmingham on 8 February 2016**

**The Appellant did not appear and was not represented**

**Mr David Griffiths of counsel, instructed by the Home Office Legal Team, for the Respondents**

## DECISION

### Background

1. On 6 April 2013 the Respondents (“UKBA”) seized at Dover a Nissan Pathfinder car (“the Vehicle”) belonging to the Appellant (“Mr Asumaning”) on the grounds that it was transporting prohibited or restricted goods, pursuant to s 141(1)(a) Customs & Excise Management Act 1979. Mr Asumaning sought restoration of the Vehicle, citing in particular the financial hardship caused.

2. On 15 December 2014 UKBA gave their decision, refusing restoration on stated grounds (“the Decision Letter”). The Decision Letter was sent to Mr Asumaning at HMP Coldingley, where he was serving a custodial sentence. 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 29/01/2015.”

3. On 11 November 2015 Mr Asumaning’s barrister Mr Victor Ogunbusola (who is also Mr Asumaning’s Rule 11 representative in these proceedings) wrote to UKBA requesting a review of the Decision Letter, stating:

“We note that an application for a review ought to have reached your offices by the 29/01/2015 however there where a combination of circumstances that prevented any such request being brought to the reviewing officers attention. We request in the circumstance that our request be viewed exceptionally.”

4. On 12 November 2015 UKBA requested formal authority to act from Mr Ogunbusola, stating:

“... 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*.”

5. Mr Ogunbusola sent the authority on 25 November 2015, stating:

“[Mr Asumaning] instructs us that a number of incidents caused the delay in seeking for a review of such incidence is the change of legal representation and the general family upheaval caused by the sole breadwinner being incarcerated for a lengthy period and consequential deterioration in the welfare of our client’s family.

Furthermore instructed counsel was also taken seriously ill following food allergy that required medication. In the circumstances the above reasons must be deemed reasonably sufficient for the lateness of [Mr Asumaning’s] request.”

6. On 30 November 2015 UKBA refused the request for a late review, stating:

(1) The request was received 332 days after the Decision Letter.

(2) UKBA's 12 November 2015 letter had invited evidence of any reasonable excuse for lateness but no reply had been received.

5 (3) The circumstances stated in Mr Ogunbusola's 11 November 2015 did not satisfy the review officer that there was a reasonable excuse.

(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.

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

7. On 17 December 2015 Mr Asumaning appealed to the Tribunal. His grounds of appeal repeat the points made in Mr Ogunbusola's letter to UKBA and also state:

(1) "I was moved from prison, to prison, to other prison and did not get my mails on time, and the deadline for submission passed by."

15 (2) UKBA's refusal breached his human rights.

### Law

8. 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:

20 "(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."  
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9. Section 14A Finance Act 1994 provides (so far as relevant):

#### "Review out of time

(1) This section applies if—

30 (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.

35 (3) The first case is where HMRC 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.

(4) The second case is where—

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

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

...”

### **The Hearing**

10 10. Prior to the hearing the Offender Management Unit at HMP Maidstone emailed the Tribunal acknowledging notification of the hearing; stating that Mr Asumaning was still serving a custodial sentence; and he would not be produced for the hearing.

11. Prior to commencement of the hearing the Tribunal’s clerk telephoned Mr Ogunbusola’s chambers, who confirmed that neither Mr Ogunbusola nor Mr Asumaning intended to attend the hearing.

15 12. I was satisfied that reasonable steps had been taken to notify the Appellant of the hearing and considered that it was in the interests of justice to proceed with the hearing, pursuant to Tribunal Procedure Rule 33.

### **Consideration and Conclusions**

#### *Approach*

20 13. In a recent decision on another appeal in *Hubert Kolodziejski v Director of Border Revenue* [2016] UKFTT 035 (TC) I analysed the Tribunal’s jurisdiction under s 14A(4) FA 1994, and the appropriate test. For the reasons set out there at [22-24] (which I will not repeat here) I concluded:

25 (1) The jurisdiction 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.

30 (2) Given the specific wording of s 14A(4), 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?

(3) 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].

35 (4) In case I was wrong on that approach, I should also consider the appeal on the basis of the approach set out by the Upper Tribunal in *Data Select Ltd v HMRC* [2012] STC 2195.

14. At the hearing Mr Griffiths for UKBA did not cite *Kolodziejski* but addressed me on the basis that I should decide whether the Appellant had a reasonable excuse for the lateness of his application – which is in accordance with my proposed approach above.

5 *Consideration*

15. Before addressing Mr Asumaning’s stated reasons for not meeting the 45 day deadline to request a review of the Decision Letter, I must deal with one point. UKBA’s 30 November 2015 letter refusing the request for a late review stated that UKBA’s 12 November 2015 letter had invited evidence of any reasonable excuse for  
10 lateness but no reply had been received. In fact a reply had been made by Mr Ogunbusola on 25 November 2015. For the hearing the officer who wrote the 30 November 2015 letter refusing the request (Ms Karen Norfolk) had prepared a formal witness statement (dated 19 January 2016) stating:

15 “I did not mention in my decision the letter from the appellants representative dated 26 November 2015 however I did consider those reasons and was satisfied that this did not provide a reasonable excuse for the delay as the request was 287 days late. I considered the submission that the reason for the delay was the fact that Mr  
20 Asumaning was in prison during this period and the other explanation that his instructed counsel suffered from a food allergy did not give a reasonable and credible explanation for the late request.”

16. I am satisfied that UKBA did consider all the reasons put forward by Mr Asumaning when UKBA decided to refuse the late request.

17. Mr Asumaning’s grounds of appeal can be restated under four heads:

25 (1) *His imprisonment had caused upheaval in his family life, including possible homelessness for his wife and children.* While I accept Mr Asumaning’s assertion, it does not explain why there was a delay of over nine months. The 45 days time limit has been described by the High Court (in  
30 *Angliss* at [34]) as “generous” and the explanation provides no reasonable excuse for this very long delay.

(2) *He had lost legal aid for representation and had changed legal adviser, who had become ill with a food allergy.* The onus of proof is on the Appellant and I have no firm evidence as to when Mr Ogunbusola was appointed, when  
35 and for how long he was incapacitated, or what steps were taken to deal with matters while he was unavailable. Again, the explanation provides no reasonable excuse for this very long delay.

(3) *He had been moved between prisons, did not get his mail promptly, and had missed the deadline for a review request.* It is clear that Mr Asumaning did receive the Decision Letter at some point and I have no evidence about when  
40 that happened. I would have expected any delay in forwarding mail between prisons to be less than the 45 day application period, but in any event the explanation again provides no reasonable excuse for this very long delay.

(4) *UKBA's decision breached his human rights.* This point was considered and dismissed by the High Court in *Angliss* (at [34]).

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

19. I add (in case this matter goes further) that if my analysis of the test to be applied ([13] 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 over nine months on a time limit (described by the High Court in *Angliss* (at [34]) as “generous”) of 45 days.

(2) From my findings at [17] above, there was no good reason for the delay.

15 **Decision**

20. The appeal is DISMISSED.

21. 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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**PETER KEMPSTER  
TRIBUNAL JUDGE**

**RELEASE DATE: 10 FEBRUARY 2016**