[2016] UKFTT 0759 (TC)

# TC05486

**Appeal number: TC/2016/02785**

***PROCEDURE – Excise – seizure of sword under s 139(6) CEMA 1979 – request for restoration refused – late request for review – request refused – late notice of appeal to Tribunal – application for admission of late appeal – consideration of criteria in Data Select and BPP – whether time limit applicable under s 14A FA 1994 – no – consideration of circumstances – order given for review***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ROBERT SUH** **Appellant**

**- and -**

**THE DIRECTOR OF BORDER REVENUE** **Respondent**

**TRIBUNAL: JUDGE JOHN CLARK**

**Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 18 October 2016**

**The Appellant in person**

**Tom Rainsbury of Counsel, instructed by the Respondent**

## DECISION

1. The Appellant, Mr Suh, who is a Commander in the United States Navy, seeks leave to make a late appeal against a decision of the Respondent ("Border Force") to refuse an out of time request for a review of an earlier decision to refuse restoration of a Samurai curved blade sword 71.5 cm in length, seized as liable to forfeiture pursuant to section 139(6) of the Customs and Excise Management Act 1979 ("CEMA 1979") and the Criminal Justice Act 1988 (Offensive Weapons) (Amendment) Order 2008 (Curved Blade Swords). This decision relates solely to Mr Suh's application for the admission of a late appeal, and does not concern the substantive issues raised in his Notice of Appeal.

*Background to the application*

2. Mr Suh gave sworn evidence as to the reasons for the delay in serving his Notice of Appeal. I take that evidence into account in arriving at the underlying facts. I was also provided with a copy of the witness statement and exhibits made by Helen Perkins, a Higher Officer of Border Force currently employed as a Review Officer; these set out other matters relevant to the application. Where there may be differences between the parties concerning the evidence, I consider those at a later point in this decision.

3. Mr Suh arrived in the UK on 19 May 2015, having been ordered to take up a role with Allied Maritime Command in Northwood. (I had sight of, but did not keep a copy of, the email message to him dated 31 March 2015 setting out the order.)

4. Arrangements were made for his household goods to be transported to the UK from the United States.

5. On 12 June 2015 Border Force seized the sword on inspection of those household goods following their arrival in the UK, and gave written notice of that seizure.

6. According to Mr Suh, he wrote to Border Force on 14 July 2015 seeking restoration.

7. Although Border Force had stated that they wrote to him on a date which he referred to as 14 August 2015, he did not receive that letter. (A copy of the letter, of which the actual date was 18 August 2015, was exhibited to Mrs Perkins' witness statement; I refer as necessary below to the question whether the letter was sent to the correct address.) As he had not heard from Border Force after six months, he contacted them and was provided with a copy of their letter (not the original). He had verified the address with Border Force; he submitted that he had never received their letter.

8. An exchange of email correspondence had occurred between him and Border Force in January and February 2016. On 3 March 2016, Border Force had decided that their decision would not be reviewed.

9. Mr Suh explained that he had been away from the UK for a series of periods in March, April and early May 2016, and had military duties and training which had kept him busy. He had filed his Notice of Appeal on 19 May 2016. In that Notice of Appeal he had proposed that the sword should be shipped back at his expense to his home of record in the USA.

10. I consider below the evidence set out in paragraph 9 above, together with points arising from his cross-examination by Mr Rainsbury.

*Mr Suh's arguments*

11. Mr Suh had been under the impression that the hearing would determine the substantive issue relating to the sword. He had been confused by the procedural questions.

12. He emphasised that he had not sought to conceal the sword. He showed me a statement setting out the inventory of the household goods, among which was an entry referring to a set of three decorative swords.

13. He referred to his proposal in the "Result" section of the Notice of Appeal. He had hoped that it would save time for the sword to be shipped back to the United States at his expense. He did not want the sword to be destroyed; it was part of a set. This had been acquired during his service in Japan. He had had over 20 years of dedicated service to the US Government; he would not have been seeking to conceal the existence of the sword. He submitted that his proposal was a reasonable solution to end the situation.

*Arguments for Border Force*

14. Mr Rainsbury stated that it was not in dispute that the appeal had been notified out of time. The period for making an appeal was 30 days. It had in fact been lodged one month and 17 days late.

15. The Border Force decision was a review under section 15 of the Finance Act 1994 ("FA 1994"). The sole issue was whether or not Mr Suh should be allowed to make a late appeal.

16. The Tribunal was provided with a general discretion under s 16(1A) FA 1994. It had to exercise that discretion in accordance with the overriding objective as set out in Rule 2 of the Tribunal Rules.

17. Until recently Tribunals had applied the guidance in *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC), [2012] STC 2195. However, there had been two very recent developments. There had been changes to Civil

Procedure Rules ("CPR") 3.9. There was now a direction for courts to enforce compliance with rules, practice directions and orders. Following the changes, the cases of *Mitchell v News Group Newspapers Ltd* [2014] 2 All ER 430 and *Denton v TH White Ltd* [2015] 1 All ER 880 had shown that there was a three stage test:

> (1) The seriousness and significance of the "failure to comply with any rule practice direction or court order";
>
> (2) The reason why the default had occurred;
>
> (3) The evaluation of all the circumstances of the case, so as to enable [the court] to deal justly with the application, including factors (1) and (2).

18. The other development was the decision of the Court of Appeal in *Revenue and Customs Commissioners v BPP Holdings Ltd and others* [2016 EWCA (Civ) 121, [2016] STC 841. In the judgment, Ryder LJ had referred to the stricter policy in *Mitchell* and *Denton*. The Court of Appeal had declined to comment on *Data Select*.

19. Mr Rainsbury referred to what he understood to be the only decision of the First-tier Tribunal in which the approach referred to by the Court of Appeal had so far been considered. This was *Nirmal Singh Sunner v Revenue and Customs Commissioners* [2016] UKFTT 511, TC05621. Mr Rainsbury referred to that decision at [23]-[29]. At [34]-[35] Judge Kempster had separately applied both the approach in *Data Select* and the approach in *BPP*.

20. Mr Rainsbury queried whether it was right to treat these approaches as separate. The gist of *BPP* was that CPR 3.9 should be applied by analogy. He queried whether the two part approach had the benefit of simplicity and coherence.

21. He suggested that the Tribunal should consider the following approach. In *Data Select*, there were five questions. Rather than considering the *Denton* approach separately, he submitted that it should be considered together with the five *Data Select* questions.

22. Thus in relation to seriousness, when looking at the length of the delay in accordance with question (2) in *Data Select* at [34], the seriousness should be considered in the context of that question.

23. In the same way, when looking at question (3) in *Data Select* concerning the explanation for the delay, the reason for the breach should be examined as part of that question.

24. The other circumstances and the need for compliance could be looked at when considering the consequences of the decision (*Data Select* questions (4) and (5)).

25. There was a question as to how much weight should be attached to the matters within the *Data Select* questions.

26. Mr Rainsbury returned to the facts of Mr Suh's case, and suggested that the circumstances weighed firmly against permission to make a late appeal.

27. The first point was the purpose of the time limit. This had been prescribed by law, to provide finality and certainty as well as proper organisation of the Tribunal system and the administration of the system of justice. As a general rule, time limits should be respected.

28. The next question was the length of the delay. This was a further factor against giving leave for a late appeal. The delay had been one month and 16 days, over twice the statutory limit. In *Denton* terms, the delay was serious and significant.

29. The third question was the reason for the delay. In Mr Rainsbury's submission, this weighed against giving leave. The burden was on Mr Suh as Appellant to show the reason. Until the day of the hearing, his only reason had been as shown in his appeal notice, saying just that he had had numerous work and travel commitments, without providing further evidence. He had given evidence at the hearing. Mr Rainsbury referred to factual issues, which I address in the final section of this decision.

30. Mr Rainsbury then referred to the guidance in the White Book as to *Denton* being limited; at page 98 there were examples following *Mitchell*, and he mentioned points (2) and (4). At page 105 at 3.9.6.9 an idea was set as to threshold. He invited the Tribunal to say that here the reason given by Mr Suh was not a sufficient one.

31. As to the consequences of extending time, Mr Rainsbury submitted that the balance weighed in favour of refusing permission; the Tribunal would not be enforcing compliance and related requirements, and Border Force would be required to revisit and defend in circumstances where it had been assumed that the matter was over. The only prejudice to Border Force was that it would have to resist this appeal.

32. On the final limb, the consequences of refusing extension, Mr Suh had pleaded for leniency and stressed the importance of the sword to him; he would pay for it to be returned to the United States. Mr Rainsbury had no knowledge whether such an arrangement would be allowed.

33. As to the merits of the case, he submitted that this was not material to the merits of what the Tribunal had to decide. The merits should only be addressed if they were very strong or very weak. He referred to the White Book at pages 109-110, 3.9.11, and in particular to the discussion of *R. (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, [2015] 1 WLR 2472.

34. He asked the Tribunal to find that this was not one of those cases, given the material provided to the Review Officer at the time. Even if Mr Suh had not received the letter dated 18 August 2015, he had waited six months. Thus the merits of his case should be discounted unless they were very strong.

35. Mr Rainsbury acknowledged that Mr Suh wanted finality. Mr Suh accepted that he had difficulties in the light of *Data Select*.

36. Mr Rainsbury submitted that Mr Suh's application for a late appeal should be refused.

*Consideration and conclusions*

37. Mr Rainsbury referred to s 16(1F) FA 1994 as the relevant provision. Having examined the legislation, I do not consider that this is correct. I do not accept that the Border Force decision was a review under s 15 FA 1994; the decision was to refuse a request for review made out of time. There is a separate section (namely s 14A FA 1994) providing for a review to be made out of time:

> "**14A 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—
>
> (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
>
> (b) the appeal tribunal, on application made by the person, orders HMRC to carry out a review.
>
> (5) . . .
>
> (6) . . ."

This section was inserted with effect from 1 April 2009. Under later enabling legislation, to which I do not need to refer here, the references to HMRC are to be read as extending to Border Force.

38. As Border Force did not accept that Mr Suh had a reasonable excuse for not giving notice with the 45 day period, the relevant provision is s 14A(4). The question is whether it is appropriate for me to order Border Force to carry out a review.

39. Mr Rainsbury's further submission is that Mr Suh's Notice of Appeal was submitted late. This raises the question of the time limit, if any, which applies to an application made by a person under s 14A(4) FA 1994.

40. There does not appear to be any specific provision setting a time limit for such an application. Mr Rainsbury referred to a 30 day period, but this was based on the assumption that the relevant statutory provision was s 16 FA 1994. The latter applies to "an appeal against a decision on a review under section 16". This therefore

presupposes that there has been a review. Mr Suh's application, being made under s 14(4) FA 1994, is not an appeal against a review, as he has asked for a review to be carried out and Border Force have refused to do so, the grounds being that they do not consider that he had a reasonable excuse for not giving notice requiring a review before the end of the 45 day period.

41. In her review letter dated 3 March 2016, Mrs Perkins stated:

> **"**If you wish to contest my decision, you may now, within 30 days of the date of this letter, lodge an appeal with a Tribunal that is independent of Border Force."

There was no indication of the statutory authority for specifying a time limit of 30 days, nor any reference to the particular statutory provision (ie s 14A(4) FA 1994) under which it was open to Mr Suh to ask the Tribunal to order Border Force to carry out a review.

42. As these Tribunals are statutory ones, general provisions as to time limits are not included in the Tribunal Rules. Time limits have to be found by reference to the statutory provisions in question in particular proceedings.

43. The other difficulty with s 14A(4) FA 1994 is that an application under it is not strictly an appeal. However, the only formal method of opening proceedings in the Tribunal appears to be by giving a Notice of Appeal. Rule 1(3)(a) of the Tribunal Rules defines "appellant" as—

> "the person who starts proceedings (whether by bringing or notifying an appeal, by making an originating application, by a reference, or otherwise)"

This implies that there are or may be other ways of starting proceedings without giving a Notice of Appeal. Despite this, I have not been able to discover any alternative forms for such purposes.

44. In the absence of any specific provision for a time limit, I am not satisfied that it would be correct to assume by analogy that an application for an out of time review should be made within a 30 day period. I accept that such a time limit may have been assumed to be applicable by those responsible for inserting s 14A FA 1994, but that is not sufficient justification for seeking to imply words in that section or surrounding provisions imposing restrictions on potential applicants for late reviews.

45. It follows that, although Mr Rainsbury took me through the various cases concerning the need for strict compliance with time limits, I am not satisfied that those cases assist with the present issue. However, I am grateful for his useful, thorough and detailed analysis of the relevant cases and references to the White Book, which may well prove useful in the context of applications by other parties.

46. Mr Rainsbury described Mr Suh's Notice of Appeal as having been one month and 17 days late. In order to establish that his attempt to commence proceedings was late, it is necessary to have the yardstick of a specified period for compliance with the

relevant obligation. Due to what appears possibly to be a lacuna in the legislation, it seems to me for the reasons that I have given that there is currently no time limit applicable to applications under s 14A(4) FA 1994.

47. Any views which I might have as a result of the general approach set out in the various cases to which Mr Rainsbury referred are of no relevance to a situation in which the provision in question does not specify a time limit. It is certainly not open to me to arrive at any conclusion as to whether Mr Suh did or did not have a reasonable excuse for the length of time which he took before commencing proceedings by lodging a Notice of Appeal.

48. In advance of the hearing, I was provided with copies of correspondence from the Tribunal file. I note that on 8 August HM Courts & Tribunals Service wrote to the parties in the following terms:

> "The Tribunal is now preparing to list the application whether to compel Border Force to conduct review out of time for hearing. . . ."

In the light of the conclusions which I have reached, that is the correct description of the nature of the hearing before me; it is not an application for permission to make a late appeal.

49. Under s 14A(4)(b) FA 1994, there are no specific restrictions on the Tribunal's discretion to order Border Force to carry out a review. I do not consider that I am specifically required to consider the question of the delay between the issue by Border Force of the letter dated 18 August 2015 refusing to restore the sword and Mr Suh's enquiry on 22 January 2015, first by telephone and then by email. Nor am I specifically required to consider whether the Border Force letter did or did not reach Mr Suh. What is at issue is the decision of Mrs Perkins, the Border Force Review Officer in the present case, dated 3 March 2016, in which she refused Mr Suh's late request for a statutory review.

50. For the reasons which I have already given, the question of the time interval between the date of that letter and the date on which Mr Suh made his application to the Tribunal is not a factor which I am required by the relevant legislation to take into account. Nevertheless, I do not consider it to be irrelevant to the exercise of the Tribunal's discretion to order Border Force to carry out a review; it is merely one of the factors to be taken into account in the context of all the circumstances.

51. Standing back and viewing all the circumstances, the position is that Mr Suh has been prevented from resolving the issue of restoration of the sword. It was clear from his evidence that he had been travelling abroad, both on military duties and for personal vacation, for the period from 19 March 2015 to approximately 29 March 2015. He travelled back to the United States from 6 to 16 April 2015, and from 17 to 22 April 2015 to Tallinn, Estonia. From 30 April to 5 May 2015 he had travelled back to Germany. In the intervals between all these dates, military duties and training had kept him busy.

52. He accepted that the Review Officer's decision letter dated 3 March 2016 refusing a review had been sent to Jason Lawrance, a Paralegal Specialist in the local US Region Legal Service Office. Mr Suh remembered seeing that letter. He was not sure whether he had been aware of the deadline at that stage.

53. The discretion given to the Tribunal under s 14A(4)(b) does not appear to be limited in any way; it is wider than s 14A(3) in the manner that the latter applies to HMRC and Border Force. To the extent that it is necessary for me to make such a finding, I am narrowly persuaded that in all the circumstances Mr Suh had a reasonable excuse for not giving notice requiring a review within the 45 day period, as referred to in s 14A(3) FA 1994. The issue of the service of the letter dated 18 August was not examined before me, as Mr Rainsbury considered this to be a matter for a substantive appeal. However, whether or not that letter reached the premises to which it was sent, I am satisfied on the balance of probabilities that Mr Suh did not see the letter until a copy was sent to him after he contacted Border Force in January 2016. Having heard his evidence, and given his concern as to what had happened to the sword, I consider it improbable that he would have left it so long before contacting Border Force if he had seen the letter in August 2015.

54. On balance, I consider that it is appropriate to take more account of the consequences of not ordering a review. Mr Suh would be prevented from taking any further steps to seek restoration of the sword. It would be open to Border Force to destroy it or dispose of it. I have noted Mr Suh's comments concerning the importance of the sword to him, in particular because it was part of a set which he obtained in the course of his service in Japan. He would be precluded from continuing any discussion with Border Force.

55. If a review is ordered, Mr Suh should note that it would be open to Border Force to arrive at the same decision on review as originally made, namely to refuse restoration. In those circumstances, he would be in a position to appeal to the Tribunal. However, under s 16(4) FA 1994, the Tribunal's powers in restoration cases are limited. If the Tribunal were to allow his appeal, all that the Tribunal could do would be to require Border Force to carry out a further review; normally the Tribunal would set out findings which Border Force would have to take into account in carrying out the further review. The result of the review would not necessarily differ from that of the original review.

56. My decision on Mr Suh's application is to order Border Force to carry out a review of the decision to refuse restoration of the sword. In carrying out the review, I consider it appropriate for Border Force to take account of the following findings:

(1) The sword was brought to the UK as part of Mr Suh's household possessions transported from the United States following the order that he should take up duties in the UK;

(2) Mr Suh did not intentionally contravene the restriction on importation of the sword, and did not consider it to be a weapon. He described it as decorative on the customs form. He had never intended or planned to use it as an offensive weapon;

(3) He has proposed as a means of resolving the matter that the sword should be shipped back to the United States at his expense.

57. I acknowledge that the question of returning the sword to him in that way is entirely a matter for negotiation between him and Border Force, and not within the jurisdiction of the Tribunal. However, it appears to me that doing so would enable the matter to be resolved without the need for a review and so would avoid possible appeal proceedings before the Tribunal following such review. I leave the matter to be discussed between the parties.

58. I grant Mr Suh's application and pursuant to s 14A(4)(b) FA 1994 I order Border Force to carry out a review of the decision not to restore the sword.

*Right to apply for permission to appeal*

59. 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.

**JOHN CLARK**
**TRIBUNAL JUDGE**

**RELEASE DATE: 14 NOVEMBER 2016**