



TC06805

Appeal number: TC/2017/04526

EXCISE DUTY – Appeal against decision to restore vehicle seized on entry into the UK for a fee – Whether the decision could reasonably have been reached – No – Appeal allowed – Further review directed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HOLLY CLARK

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

TRIBUNAL: JUDGE PAULENE GANDHI

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 11 October 2018

The Appellant, Holly Clark, in person

Sophie Murray, counsel, instructed by the Home Office, for the Respondents

DECISION

1. This is an appeal by Holly Clark against the decision of the UK Border Force (“UKBF”), contained in a letter dated 4 May 2018, in which they notified Ms Clark, after conducting a review, they would restore her Vauxhall Corsa (the “Vehicle”) that had been seized on 2 February 2017 when it was used by her father to carry 200 cigarettes and 7½ kilograms of hand rolling tobacco (“the Goods”), the duty on which is £1,541.20, for a fee of £1,350.

2. The first issue is that Ms Clark did not appeal within the time limit required by s16 of the Finance Act 1994 of 30 days. UKBF did not object to the appeal being heard out of time and in these circumstances I allowed the appeal to proceed.

3. I next need to consider the jurisdiction of the Tribunal which, in an appeal such as this, is limited. I adopt the explanation of Judge Hellier in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC) which states:

“4. We must explain at the outset that the role of this tribunal in an appeal of this nature is unusual and is limited. There are two aspects to this.

5. First, in relation to the question of whether or not a car should be returned, we are not given authority by Parliament to make a decision that it should or should not be restored. The decision as to whether or not to restore the car is left in the hands of [the UKBF]: only they have the power or duty to restore it. Instead we are required to consider whether any decision they have made is reasonable. If it is not reasonable we can set the decision aside and require them to remake it; we can give some instructions in relation to the remaking of the decision, but we cannot take the decision ourselves. If we set aside a decision and [UKBF] make a new decision, then the taxpayer may appeal against that decision and the same process follows.

6. It is important to remember that a conclusion that a decision is not unreasonable is not the same as a conclusion that it is correct. There can be circumstances where different people could reasonably reach different conclusions. The mere fact that we might have reached a different conclusion is not enough for us to declare that a conclusion reached by [UKBF] should be set aside.

7. The second limitation in our role follows from the fact that Parliament has decreed that it is for the magistrates’ court or the High Court to decide upon whether or not goods are legally forfeit. The Customs and Excise Management Act 1979 (“CEMA”) sets out the required procedure: if the subject disputes the legality of the seizure he can require [UKBF] to bring proceedings (unhappily they are called condemnation proceedings) in the magistrates’ court to determine the legality of the seizure. If the magistrates’ court decides that the goods are properly forfeit then the tribunal cannot overturn that decision or take a different view. Further we must proceed on the basis that any finding of fact which was necessary for the magistrates’ court to have

come to this decision is to be taken as having been determined by the magistrates and, before us, is therefore to be treated as proved.

8. If the subject does not require condemnation proceedings to be taken in the magistrates' court, he effectively concedes the legality of the seizure. That is because Schedule 3 CEMA provides:

'5. If on the expiration of the [one month period for giving notice that something is asserted not to be liable to forfeiture] no such notice has been given to the commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeit.'

9. The effect of this deeming is that any facts which would have been necessary to the conclusion that the goods are forfeit must also be assumed to have been proved. It would be an abuse of process to permit such conclusions to be reopened in this (see para [71(7)] *HMRC v Jones* [2011] EWCA Civ 824: "Deeming something to be the case carries with it any fact that forms part of that conclusion").

...

11. There is one other oddity about this procedure. We are required to determine whether or not the [UKBF's] decision was "unreasonable"; normally such an exercise is performed by looking at the evidence before the decision maker and considering whether he took into account all relevant matters, included none that were irrelevant, made no mistake of law, and came to a decision to which a reasonable tribunal could have come. But we are a fact finding tribunal, and in *Gora and Others v Customs and Excise Commissioners* [2003] EWCA Civ 525 Pill LJ approved an approach under which the tribunal should decide the primary facts and then decide whether, in the light of the tribunal's findings, the decision on restoration was in that sense reasonable. Thus we may find that a decision is "unreasonable" even if the officer had been, by reference to what was before him, perfectly reasonable in all senses."

Law

4. Under s 2(1) of the Tobacco Products Duty Act 1979:

There shall be charged on tobacco products imported into or manufactured in the United Kingdom a duty of excise ...

5. Regulation 13 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides that:

(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person:

(a) making the delivery of the goods; and (b) holding the goods intended for delivery; or (c) to whom the goods are delivered.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held --

(a) by a person other than a private individual; or

(b) by a private individual ("P"), except in the case where the excise goods are held for P's own use and were acquired in, and transported to the United Kingdom from, another member State by P.

(4) For the purpose of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of:

(a) P's reasons for having possession or control of those goods;

(b) whether or not P is a revenue trader

(c) P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;

(d) the location of those goods;

(e) the mode of transport used to convey those goods;

(f) any document or other information relating to those goods;

(g) the nature of those goods including the nature or condition of any package or container;

(h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities --

... 3,200 cigarettes of any other tobacco products [1 kg from 1 October 2011]

(i) whether P personally financed the purchase of the goods;

(j) any other circumstances that appear to be relevant.

(5) For the purposes of the exception in paragraph (3) (b)-

(a) "excise goods" does not include any goods chargeable with excise duty by virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or of any order made under section 10 of the Finance Act 1993;

(b) "own use" includes use as a personal gift but does not include the transfer of the goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them).

6. Regulation 88 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides:

If in relation to any excise goods that are liable to duty that has not been paid there is –

- (a) a contravention of any provision of these Regulations, or
- (b) a contravention of any condition or restriction imposed by or under these regulations,

Those goods shall be forfeiture

7. Section 139(1) of the Customs and Excise Management Act 1979 (“CEMA”) provides that:

Anything liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable, or any member of Her Majesty’s armed forces or coastguard.

8. Under s 141(1) CEMA: where anything has become liable to forfeiture under the Customs and Excise Acts-

(a) any ship, aircraft, vehicle, animal, container (including any article of passengers’ baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and

(b) any other thing mixed, packed or found with the fittings so liable, shall also be liable to forfeiture.

9. Section 152 CEMA establishes that:

The Commissioners may, as they see fit –

(a) ...

(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts.

10. Section 14(2) of the Finance Act 1994 provides that:

Any person who is –

(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,

(b) a person in relation to whom, or on whose application, such a decision has been made, or

(c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied, may by notice in writing to the Commissioners require them to review that decision.

11. Section 15(1) of the Finance Act 1994 states:

Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either –

(a) confirm the decision; or

(b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

12. Section 16(4) to (6) of the Finance Act 1994 sets out the powers of the Tribunal on an appeal against a decision as follows:

(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 -

(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 further review of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, 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.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal;

(6) On an appeal under this section the burden of proof as to –

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above;

Facts

13. Mr Clark, on 2 February 2017, was driving the vehicle which belonged to his daughter. He was stopped at the port of Dover. He stated when stopped that the purpose of the trip was to purchase tobacco. In interview he stated that the goods amounted to 2kg of Amber, 2kg of Golden Virginia, 1½ kg of Cutlers and 2kg of Dram plus the cigarettes. He brought a similar amount every three months. The tobacco was for his four children and their partners and the cigarettes were for his fishing ‘pal’s’ wife. He made regular trips every three months to buy tobacco products for his children and friends. He had been given money by his family and friends to buy all the goods. The officer was satisfied that the goods were held for a commercial purpose and not for own use and they were therefore seized under s139 CEMA as they were liable to forfeiture under s49(1)(a)(i) CEMA and regulation 88 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010. The vehicle was also seized under s139(1) CEMA as it was liable to forfeiture under s141(1)(a) because it was used for the carriage of goods liable to forfeiture.

14. Although Ms Clark was given a form ENF156 Seizure Information Office and a Notice 12A explaining the procedure for challenging the legality of the seizure there was no challenge to the legality of the seizure of the goods and/or vehicle in the magistrate's court and the goods were duly condemned. On 14 August 2017 the vehicle was destroyed.

15. On 6 February 2017 Ms Clark wrote to the UKBF asking for her seized vehicle to be restored to her. She also completed a questionnaire which was received by UKBF on 2 March 2017. On 7 March 2017 UKBF refused to restore the seized vehicle. On 28 March 2017 Ms Clark asked for a review of that decision.

16. The review was undertaken by Mr Harris, an officer of the Border Force. Ms Clark spoke to him on 3 May 2017 and stated that she had not asked her father why he was taking her car to France. She has three other siblings and her car had not been to France before.

17. By letter of 4 May 2017 Mr Harris, having reviewed the decision, stated the following: It was accepted that Mr Clark had not made the trip for profit but had made the trip for a commercial reason as he had been given money to buy the goods and they were not being brought for his own use. Further he was regularly making such trips. The general policy is that private vehicles used for improper importation or transportation of excise goods should not normally be restored. The policy is intended to be robust. However vehicles may be restored at the discretion of UKBF subject to such conditions as UKBF see fit e.g. for a fee. As it was a first offence the decision was to restore the vehicle for a fee equal to 100% of the revenue involved subject to the maximum of the trade buying price of the vehicle in Glass' Guide (which in this case was less than the duty owed on the goods). Mr Harris stated he had paid attention to the degree of hardship but hardship is a natural consequence of having the vehicle seized and only exceptional hardship would be a reason not to apply the policy of a fee for the restoration of the vehicle. Ms Clark chose not to ask some additional questions concerning the use to which her vehicle would be put and in that sense she was taking a risk as to how the vehicle would be used. The inconvenience or expense of not having a car is not exceptional hardship over and above what one should expect.

18. In her grounds of appeal to the Tribunal dated 2 June 2017 Ms Clark stated she gave her permission to her father to use her car to go to France. She did not enquire why he was going there. Her father signed documents without being able to read them as he was refused the opportunity to get his glasses. She does not smoke. It is the respondent's policy to restore vehicles owned by third parties who are not present and who are innocent or who have undertaken reasonable steps to prevent smuggling. She fits these criteria. She has a seven month old son and would not have given her father permission to use the vehicle if she had known what it was to be used for. She suffers anxiety and mental health issues. She has suffered exceptional hardship.

Discussion and Conclusion

19. As the Tribunal noted *Harris v Director of Border Revenue* (see above) my jurisdiction in an appeal such as this is limited. The issue for me to determine is not whether the vehicle should be restored to Ms Clark for a fee of £1,335, a lower sum, or no fee at all (and it is not sufficient that I might myself have reached a different conclusion) but whether, having regard to my findings of fact, the decision taken by the UKBF to restore it for that amount is one that could reasonably have been reached.

20. Lord Phillips of Worth Matravers MR (as he then was) said in *Lindsay v Commissioners of Customs and Excise* [2002] STC 508 at [40]:

“... the Commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters”

21. Both Mr Harris and Ms Clark gave evidence before me.

22. The basis of UKBF’s case is that although Ms Clark was an innocent third party and not present when the vehicle was seized she could have made reasonable checks of her father and asked him why he wanted to use her vehicle to ensure her vehicle was not used for smuggling. It may be hard to have to get three buses to travel to her therapy sessions but this is not exceptional hardship. This decision was based on the fact Mr Clark had said all his children had given him money for tobacco.

23. Mr Harris in evidence said that despite Ms Clark’s mental health he did not consider it an exceptional hardship. It is clear however Ms Clark’s mental health was not considered in the review decision because it was not known to Mr Harris at that time. He also said in oral evidence that if Ms Clark wanted to provide evidence of her mental health he would be happy to consider it. He additionally stated that when considering hardship he had taken into account Ms Clark had a baby and needed a car to transport her baby but that this was not exceptional hardship. I note there is no mention of this factor in the review decision.

24. Ms Clark’s unchallenged evidence is that she and her partner do not smoke and she did not give her father money to buy tobacco products. She sees her father once or twice a month. She does not live with him and so does not know how often he goes abroad to buy cigarettes. She has no control over him and cannot stop him doing as he wants. Even if she had asked her father why he wanted her car he would not have told her. Nothing like this has happened before and she trusted her father. He drives her car on his own insurance.

25. Without her car she has not been able to go to her therapy for her mental health problems. Using public transport to do the journey is difficult with a young child particularly as she would have to drop him off first with childcare as he is not allowed in her therapy sessions. Her partner works 5-6 days a week so cannot assist her. Her siblings cannot come to her house to look after her son as they have children of their own and work. Her father works three jobs and so cannot lend her his car as he uses it to travel to the yard where he picks up his HGV lorry. Her therapy is during work

hours. To go there she would have to change buses three times. She has not enquired about getting transport from the NHS as she didn't think she'd be eligible. Even if they picked her up they wouldn't drop off and pick up her son. As she did not attend her therapy she was discharged and now has to go on the waiting list again as she cannot afford to go private. This is despite telling them she was struggling to find childcare.

26. I find that the decision to refuse restoration without a fee being paid, in the light of the facts as I have found them, did not take into account all relevant matters which ought to have been taken into account.

27. The UKBF policy states *inter alia*:

Vehicles may be restored at the discretion of the Commissioners subject to such conditions (if any) if the vehicle was owned by a third party who was not present at the time of the seizure and was either innocent or had taken reasonable steps to prevent smuggling in the vehicle.

28. Mr Harris accepted that if the above circumstances applied the vehicle would be restored without a fee being imposed.

29. It is clear that the issue of taking reasonable steps to prevent smuggling has been considered on the limited information available to Mr Harris at the time he made his review decision.

30. However having heard oral evidence from Ms Clark it is clear that UKBF have not considered all of the evidence I have before me now in relation to the reasonableness of the steps Ms Clark took to ensure her vehicle was not used for smuggling. Neither Ms Clark nor her partner smoked and her father incorrectly stated he was given money by them to buy tobacco products. Further Ms Clark does not live with her father and only sees him once or twice a month. She therefore has little control of the use he puts her car and it was reasonable for her to trust her father because he is her father and because nothing like this has happened before. In any case she knew, even if she had questioned him, he would not have told her why he was using her car due to the type of person he is.

31. Further in my view no consideration whatsoever has been given to the fact the policy states the third party was either innocent OR [emphasis added] had taken reasonable steps to prevent smuggling. Being innocent or taking reasonable steps to prevent smuggling cannot mean the same thing otherwise there would be no point in the policy stating both of these outcomes in the alternative. In fact Mr Harris in oral evidence stated that he considered innocent AND [emphasis added] taking reasonable steps whereas the two in my view should not be conflated.

32. Additionally, Ms Clark's mental health was not taken into account by Mr Harris when reviewing the decision because he did not have any details of it at that time. From her oral evidence it is clear the full impact and consequences of not having a car

on Ms Clark's mental health and the hardship this would cause as set out above has not been considered by UKBF.

33. It therefore follows that I find the decision to restore the vehicle for a fee is not reasonable and proportionate having regard to all the circumstances of the case.

34. As such, and for the above reasons, the appeal is allowed.

Conclusion

35. I make the following order in accordance with s16(4) of the Finance Act 1994:

(1) The decision not to restore Ms Clark's vehicle unless a fee is paid shall cease to have effect from the date of release of this Decision.

(2) UKBF shall conduct a further review of the decision to restore the vehicle and serve the same on both Ms Clark and the Tribunal within 28 days of release of this Decision and this review shall be on the basis of the conclusions reached in this Decision.

(3) The Review Officer shall take account of all material before this Tribunal and any further material or representations made by Ms Clark within 14 days from release of this Decision. I note after the hearing Ms Clark provided medical evidence which was sent to the Tribunal on 20 October 2018. As this evidence was not before the respondent who were therefore not in a position to comment on it I have not taken it into account. Ms Clark may however wish to send this and any other documents she has to the UKBF for their reconsideration.

(4) Ms Clark will have a further right of appeal to the Tribunal if dissatisfied with the outcome of the further review.

Right to Apply for Permission to Appeal

36. 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.

**PAULENE GANDHI
TRIBUNAL JUDGE**

RELEASE DATE: 8 NOVEMBER 2018