[2018] UKFTT 645 (TC)

TC06793

Appeal number: TC/2017/06626

EXCISE DUTY - seizure of imported tobacco - tobacco deemed condemned as forfeit - request for restoration of tobacco - application to strike out - application refused - whether the decision not to restore was reasonable - no - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JACQUELINE WEBBER **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE NIGEL POPPLEWELL
NORAH CLARKE

Sitting in public at Cardiff on 10 October 2018

The Appellant in person

Mr Matthew Jackson, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Introduction

1. This is an excise goods case. The appellant has appealed against the respondents (or "Border Force") decision not to restore 5.5kg of hand rolling tobacco ("the Tobacco") which was confiscated from her at Dover on 12 April 2017 on her return to the UK from Belgium.

Applications

2. Border Force have applied to strike out the appellant's appeal on the bases that:

> (1) Her grounds of appeal relate exclusively to a submission that she had imported the Tobacco for personal use, and since it had been lawfully condemned by dint of the appellant's failure to challenge the seizure in the Magistrates Court, we have no jurisdiction to hear her appeal;
>
> (2) Alternatively, the appellant's appeal has no reasonable prospect of success;

3. We consider that her grounds of appeal do not relate exclusively to the condemnation issue. In particular, the appellant's insistence that she wanted to be interviewed goes to the reasonableness of the decision not to restore, and not to the use of the goods.

4. It is our view, too, that the Gora principle (defined for the purpose of this decision in [26] below) applies. We can, therefore, consider the facts adduced at the hearing when considering the reasonableness of the reviewing officer's decision not to restore. So we need to hear the evidence to consider whether the appellant has a reasonable prospect of succeeding.

5. The law relating to the strike out is set out in more detail at [10-16] below. Our discussion on this issue and the reasons why we have not struck out the appeal are set out at [44-45] below.

6. We have considered the reasonableness of the reviewing officer's decision not to restore. Our decision on that matter is at [56-57] below.

Facts

7. The appellant gave oral evidence as did her two companions on the trip to Belgium, Mrs Alexander and Miss Page. Officer Brenton gave oral evidence for the respondents. We were provided with a bundle of documents.

8. From the evidence we find the following facts:

(1) On 12 April 2017 the appellant returned to Dover as part of a coach party which had been on a 24 hour trip to Belgium. She had been to Adinkerke, where she had bought 5.5 kg of handrolling tobacco (i.e. the Tobacco).

(2) A Border Force officer boarded the coach and asked everyone to leave it taking with them their goods and receipts.

(3) The appellant was approached by a Border Force officer whose first name was Kelly. We are uncertain of her surname. We refer to her as Officer Kelly in this decision.

(4) Officer Kelly took the appellant into a room off the main hall and engaged her in conversation. It took the form of an interview and the notes of that interview ("Officer Kelly's notes") are in the bundle. They seem to give the impression that they were made at the same time as the interview, but it is clear that they were not. No contemporaneous notes of this interview were compiled by Officer Kelly.

(5) Officer Kelly emptied the appellant's bag and so saw the Tobacco and the receipts. The appellant told Officer Kelly that the Tobacco was for personal consumption apart from two packets which were for her two sons birthdays. She was asked by Officer Kelly whether she realised that she was over the permitted limit, to which she replied that she did not realise that.

(6) Officer Kelly read the appellant the commerciality statement and then asked if she would stay for an interview. The appellant had been told that the coach would only wait for 45 minutes. She asked Officer Kelly how long the interview would take and was told 1-2 hours. She therefore declined the interview.

(7) The appellant was not offered or given the appropriate seizure paperwork at the time but it was subsequently sent to her. This included Notice 12A.

(8) She returned to the coach. Officer Kelly had confiscated the Tobacco.

(9) Following her return to South Wales, she telephoned Border Force in Plymouth on 13 April 2017 and spoke to an officer who told her that she was entitled to make a statement within 30 days of the date of the seizure.

(10) She also telephoned Dover Border Force and spoke to a lady who confirmed that she was entitled to go back to Dover within 30 days for an interview.

(11) Sometime after that the appellant spoke to Officer Kelly on the telephone who told her that she had no right to return to Dover to be interviewed.

(12) On 16 April 2017 the appellant wrote to Border Force asking for the Tobacco to be restored. In that letter she said that an officer had asked whether she would be willing to return to Dover to make a full statement and she had said (at that time) no, but "thinking about it I will return"

(13) By letter dated 1 July 2017 Border Force wrote to the appellant refusing restoration. In that letter they say that the date of seizure was 19 April 2017 and that the quantity of tobacco seized was 6 kg.

(14) By letter dated 13 July 2017 the appellant wrote requesting a review of the decision not to restore. She stated, in the letter that:

(a) No correspondence was asked for.

(b) She was twice refused an interview within the 30 day guideline.

(c) Her passport shows travel once a year.

(d) The dates of the seizure are wrong.

(e) The quantity of tobacco is wrong.

(f) The handbook page 6 states unlimited.

(g) She is Mrs not Miss.

(h) Officer Kelly was very rude and made her out to be a liar.

(i) Other people got on the bus with a vast quantity more than her.

(j) Officer Kelly lied.

(k) She was badly treated.

(15) On 22 July 2017 Border Force wrote to the appellant explaining the review process and inviting any further information in support of the review.

(16) On 27 July 2017, Officer Hodge wrote to the appellant setting out the result of her review (the "review letter"). She concluded that there were no exceptional circumstances which would justify the restoration of the Tobacco and confirmed that it would not be restored.

(17) The appellant appealed against that decision on 21 August 2017.

(18) The grounds of her appeal are:

(a) She did not say that she had been to Ostend for four days. That had been said by another passenger.

(b) The officer did not tell her that the coach would not wait; it was she who told the officer.

(c) She was never offered the paperwork which Officer Kelly's notes suggest that she had been offered. It was another passenger who was very upset and had told Border Force officers not to bother with the paperwork.

(d) She is not happy with the decision that the goods were held for a commercial purpose.

(e) She has proof that the quantities on the form are wrong.

(f) She is aggrieved other people's comments made have been used against her and put into her case.

(g) She twice phoned to ask for an interview within 30 days but was refused on both occasions. She needed to be interviewed to explain the irregularities of the mistakes made by Border Force officers and putting other people's statements into her appeal.

(h) She did not have 6 kg and had receipts to prove this.

(19) At some stage during the correspondence between the parties, Border Force had written to the appellant enclosing with that letter a pro forma which the appellant returned, duly signed (but undated) to Border Force. It seems to have been received by Border Force on 10 August 2017. In that response, the appellant indicated that she wished to withdraw/discontinue her claim to challenge the legality of the seizure. The notes to that pro forma clearly indicate that the "proper place for claiming that the seizure was illegal is in the Magistrates Court. Any claim that excise goods were for own use and not commercial will not be considered when BF makes any restoration decision or review of that decision and it will normally be an abuse of process to make such a claim at any appeal to a tribunal".

The Relevant Law

Striking out

9. The respondents have applied to strike out the appellants appeal. The relevant law on this point is set out below.

10. Rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules ("Rules" each a "Rule") provides a mandatory direction that the Tribunal must strike out the whole or a part of the proceedings if it does not have jurisdiction in relation to the proceedings or that part of them.

11. The principles set out in *Jones* (see [28-29]) are highly relevant to the obligation to strike out if the Tribunal has no jurisdiction.

12. Rule 8(3)(c) gives the Tribunal a discretionary power to strike out an appeal if it "considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

13. In *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf MR said, in relation to the similar power at Rule 24.2 of the Civil Procedure Rules:

> "The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or…they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

14. In *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16 [2001] ("*Three Rivers*") the House of Lords gave further guidance on how a court or tribunal should approach an application made on the basis that a claim has no real prospect of success. Lord Hope said:

> "94…..I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial

> importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?
>
> 95 I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be taking that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

15. On this point, the Tribunal's powers and obligations to find facts in the strike out appeal has been considered in the Upper Tribunal case of *HMRC v Race* [2014] UKUT 0331 (TCC). At paragraph 44(b), Warren J:

> "Secondly, the Judge was not obliged to do what he did and to take it that Mr Race would have had a reasonable prospect of establishing that the events referred to by the Judge did happen. It was open to him to make an assessment of the factual position and to test, within reasonable limits, what Mr Race was telling him."

16. And then again at paragraph 50:

> "50. Mr Race has not, as I have said, engaged with this appeal either by attending the hearing or by involving himself in the issues which I have raised since the hearing. I appreciate, of course, the difficulties faced by Mr Race as a litigant in person and that it is appropriate for me to raise points in his favour which he has not thought of, giving HMRC a proper opportunity to respond to them. But there are limits. I consider that I am entitled to take account of the prospects of his being able to establish the facts on which he needs to rely to have even an arguable case."

Restoration

17. We set out in the Appendix to this decision the relevant statutory provisions relating to the seizure and the restoration of the Tobacco, the right to seek a review of

the decision not to restore, the right to appeal to the Tribunal against the review decision and the power of the Tribunal on determination of such an appeal.

18. It is important to bear in mind the limitations of the Tribunal's jurisdiction as set out in s 16(4) FA 1994. By virtue of s 16(8) and Schedule 5 of FA 1994, a decision under s 152(b) CEMA whether or not to restore any item is a "decision as to an ancillary matter" as referred to in s 16(4) FA 1994. Therefore in essence, our powers are limited to considering whether Officer Hodge's decision not to restore the Tobacco could not reasonably have been arrived at. If we find that it could not have been reasonably arrived at, our powers are limited to making directions of the type referred to at s 16(4)(a) to (c) FA 1994. We have no power to order the respondents to return the Tobacco to the appellants. Nor do we have any power to award compensation.

The section 16(4) jurisdiction

19. The court of Appeal in *Customs and Excise Commissioners* v *J H Corbett (Numismatists) Ltd* [1980] STC 231 set out the correct approach for the Tribunal to follow where it has a supervisory (as opposed to a full merits) jurisdiction as it does in this case. In essence the Tribunal has the power to review the exercise of the discretion exercised by Officer Hodge and in so doing should answer the following questions:

(1) Did she reach a decision which no reasonable Officer could have reached?

(2) Does the decision betray an error of law material to the decision?

(3) Did she take into account all relevant considerations?

(4) Did she leave out of account all irrelevant considerations?

20. However, *John Dee Ltd* v *Customs and Excise Commissioners* [1995] STC 941 is authority for the proposition that, if Officer Hodge's decision failed to take into account relevant considerations, we may nevertheless dismiss the appeal if we are satisfied that, even if she had taken into account those considerations, her decision would "inevitably" have been the same.

21. The case of *Gora & Others v Customs & Excise Commissioners* [2003] EWCA Civ 525 (Court of Appeal Decision) ("*Gora*") (another Court of Appeal decision) dealt with a number of points (including those covered by *Jones* regarding the jurisdiction of the Tribunal when goods are lawfully seized, and with the fact finding powers of the Tribunal.

22. The facts in *Gora* were similar to those in *Jones*. HMRC had seized imported dutiable goods on the ground that duty on them had not been paid. There were proceedings in the Tribunal for restoration of the goods which HMRC refused to restore. The question arose on an appeal under section 152(b) of the Customs and Excise Management Act 1979 whether the Tribunal had jurisdiction to determine

whether duty had been paid and whether the goods were forfeit, even where they were deemed forfeit.

23. Pill LJ at paragraph 38 of his judgment said this:

> "38. In the course of argument, it emerged that the respondents took a broader view of the jurisdiction of the Tribunal than might have at first appeared. They were invited to set out in writing their views upon the jurisdiction of the Tribunal and Mr Parker provided the following written submission:
>
> 3. The Commissioners accept:
>
> (e) Strictly speaking, it appears that under s 16(4) of the 1994 Act, the Tribunal would be limited to considering whether there was sufficient evidence to support the Commissioners' finding of blameworthiness. However, in practice, given the power of the Tribunal to carry out a fact-finding exercise, the Tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. The Commissioners would not challenge such an approach and would conduct a further review in accordance with the findings of the Tribunal".
>
> 39. I would accept that view of the jurisdiction of the Tribunal subject to doubting whether, its fact-finding jurisdiction having been accepted, it should be limited even on the "strictly speaking" basis mentioned at the beginning of paragraph 3(e). That difference is not, however, of practical importance because of the concession and statement of practice made by the respondents later in the sub-paragraph."

24. One ratio of *Gora*, therefore, is that when this Tribunal is considering whether HMRC's review decision was unreasonable, we can consider (subject to the restrictions set out in *Jones*, mentioned above) facts as at the date of the hearing. We are not restricted to considering only those facts which were either available to, or specifically put before, the reviewing officer, when considering the reasonableness of her decision.

25. As was pointed out by Judge Hellier in the case of *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC)

> "11. There is one other oddity about this procedure. We are required to determine whether or not the UKBA'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 & 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 a decision is "unreasonable" even if the Officer had been, by reference to what was before him, perfectly reasonable in all senses."

26. We describe the principle set out above as the "Gora principle".

The commercial use jurisdiction

27. The jurisdiction of this Tribunal relating to appeals or applications to strike out and which depend on the use of the goods was considered in detail in *The Commissioners for Her Majesty's Revenue & Customs* v *Lawrence Jones and Joan Jones* [2011] EWCA Civ 824 ("*Jones*").

28. In *Jones*, Mr and Mrs Jones were stopped at Hull and large quantities of tobacco and alcohol were seized. Initially they challenged the legality of the seizure by issuing condemnation proceedings, but were subsequently advised by their solicitors to withdraw from those proceedings. They sought restoration of the car that had been seized along with the goods. The FTT made findings of fact that the goods were for personal use and allowed the restoration. The Upper Tribunal upheld this decision, and HMRC appealed to the Court of Appeal. The ground for this appeal was that the FTT were not entitled to make findings of fact inconsistent with the deemed forfeiture of the goods. It was bound by the deeming provisions that the goods were illegally imported for commercial use.

29. The Court of Appeal agreed. At paragraph 71 of their decision, Mummery LJ said as follows:

> "71. I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.
>
> (1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UTT are statutory appellate bodies that have not been given any such original jurisdiction.
>
> (2) The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.
>
> (3) The respondents in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.
>
> (4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were

deemed by the express language of paragraph 5 to have been condemned *and* to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

(5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.

(6) The deeming provisions in paragraph 5 and the restoration procedure are compatible with Article 1 of the First Protocol to the Convention and with Article 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods. The notice of claim procedure was initiated but not pursued by the respondents. That was the choice they had made. Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.

(7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora* and as approved by the Court of Appeal in *Gascoyne*. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion."

Distillation of the relevant legal principles

30. The legal principles which we distil from the foregoing legislation and cases are as follows.

(1) We must strike out the appellant's appeal if we have no jurisdiction in relation to it.

(2) This will be the case if the only issue raised by the appellant is the legality of the forfeiture.

(3) Where goods have been condemned in the Magistrates Court (or, indeed, deemed to have been so condemned) we have to treat the goods as lawfully seized (ie that the forfeiture is legal).

(4) The Tribunal's role in the appeal is to consider whether the Respondent's review decision following its decision not to restore the goods is a reasonable one on judicial review principles.

(5) The role of the Tribunal in the strike out application, where it has jurisdiction (and thus a discretion as to whether to strike out), is to carry out a balancing act. The issue is whether the appellant can establish that she has sufficient grounds for a successful claim that the review decision was unreasonable. We must be able to say that her prospects of success at the hearing have substance and are better than fanciful. In a nutshell, does the appellant have an arguable case?

(6) In considering this, we must consider the relevant facts. We can do so at the time of the hearing (we are not restricted to looking at the facts which were before the reviewing officer at the time of his review) but if the goods are deemed to be legally forfeit, we are bound by (and cannot reopen an inquiry into) any facts which form part of that deemed legal forfeiture.

Submissions

Respondents submissions on the strike out.

31. Mr Jackson's submissions in relation to strike out are firstly that we have no jurisdiction in relation to the proceedings since the grounds of appeal put forward by the appellant all relate to the use of the Tobacco. We are bound by *Jones* to find that the Tobacco was condemned as forfeit, and it is not open for the appellant or ourselves to consider whether or not the Tobacco was for private as opposed to commercial use. Alternatively the appellant has no reasonable prospect of success.

32. Mr Jackson made the following observations on this point:

(1) Whether the appellant travelled from Ostend or some other location in Belgium is largely relevant. She came from somewhere within the EU so the same test must be applied.

(2) Even if the weight of the goods is 5.5kgs rather than 6kgs, it doesn't matter. Questioning the weight was a matter for consideration in the condemnation proceedings and not here.

(3) Who told whom about the coach not waiting, another passenger being too upset and saying don't bother with the paperwork (something attributed by

Officer Kelly to the appellant) makes no difference to whether the appeal can succeed. It is only relevant to whether the goods were properly seized.

(4) The appellant's dissatisfaction with sections of the review letter related to sections of the review letter which deal with the purpose for which the goods were held.

(5) Other people's comments being attributed to the appellant are equally irrelevant, or if relevant, are only relevant to the purpose for which the goods were held.

(6) The appellant's request for interview which in her words was to "explain the irregularities of the mistakes made by Border Force officer and putting other people's statements into my appeal" could only be relevant to the lawfulness of the seizure.

33. Mr Jackson put the same points forward in support of his secondary strike out submission; namely that the appeal has no reasonable prospect of success.

The review decision

34. Having heard the evidence Mr Jackson submitted as follows:

(1) HMRC's policy not to restore goods in exceptional circumstances is a reasonable one.

(2) The reviewing officer was guided by policy was not fettered by it. The case was considered on its merits and the decision was considered afresh including the circumstances of the seizure so as to decide if any mitigating or exceptional circumstances existed and to consider whether the decision was fair reasonable and proportionate in the circumstances.

(3) The quantity of the goods imported was large.

(4) The reviewing officer addressed the points raised in correspondence with the appellant. There were no exceptional circumstances and that it was reasonable and proportionate not to restore the goods.

(5) The issues raised by the appellant in her grounds of appeal all go to the purpose for which the goods were held i.e. the lawfulness of the seizure.

(6) There is nothing of substance in the complaints that the appellant makes regarding the errors made by the respondents; incorrect dates; incorrect amounts; the fact the coach would not wait; the fact that someone else was treated differently; the fact that she was refused a right to an interview. All these go to the point as to fairness of the seizure and not to the reasonableness of the decision.

(7) Even if Mrs Webber had been given a second interview, there is nothing that she would have said which would have made a difference. In her evidence all the appellant has said is that she wanted to have an interview, she has not given any information as to what she would have said during it which would have been germane had it been available to the officer when considering her review decision.

(8) It is not Wednesbury unreasonable for Officer Hodge to have come to the conclusion that she did on the evidence available to us.

(9) Under section 16(4) FA 1994 we must consider the evidence available to the reviewing officer and cannot consider evidence adduced in the hearing.

Appellant's submissions.

35. The appellant made the following submissions:

(1) She repeated her grounds of appeal set out at [8(18)] above.

(2) She is not a street seller; she made the trip once a year, and that every week she puts money buys to cover her journey.

(3) She did not break the law, and that the handbook which deals with the amount of tobacco that can be imported without confiscation sets no limits on the amount of tobacco that can be so imported.

(4) She considers that she has done nothing wrong. She is also angry and frustrated that other people who imported more tobacco and she did, had not had that tobacco confiscated; yet she has been punished.

Review Letter

36. We set out below the significant elements of the review letter.

(1) The commerciality statement which had been read to the appellant is as follows: "you have excise goods in your possession (or control) which appear not to have borne UK duty. Goods may be held without payment of duty provided they are held for your own use. I intend to ask you some questions to establish whether those goods are held for a commercial purpose. If no satisfactory explanation is forthcoming, or if you do not stay for questioning, it may lead me to conclude that the goods are held for a commercial purpose and your goods may be seized as liable to forfeiture. You are not under arrest and are free to leave at any time. Do you understand?"

(2) Officer Hodge recorded the key points set out in the appellant's letter of 13 July 2017 as being:

(a) No correspondence was asked for.

(b) You were twice refused an interview.

(c) Your passport proves you travel once a year.

(d) The quantity of tobacco was wrong.

(e) The handbook states unlimited.

(f) You are Mrs not Miss.

(g) Border Force Officer was very rude.

(h) Other people on the coach had more tobacco than you.

(i) You think you have been badly treated - the seizing officer lied.

(3) Officer Hodge summarised the Border Force restoration policy. The general policy is that seized excise goods should not normally be restored. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally.

(4) She had considered the decision afresh on its own merits including the circumstances of the events on the date of seizure and the related evidence.

(5) She had examined all the representations and other material that was available to the Border Force both before and after the time of the decision.

(6) Since the appellant had supplied no further information in support of her request for a review, Officer Hodge had to make her decision based on the evidence that she already had.

(7) In considering restoration she had not considered the legality or the correctness of the seizure itself since that could only be dealt with in the Magistrates Court. Having had an opportunity of raising the lawfulness of the seizure in the Magistrates Court, the appellant had no second chance of doing so either before a tribunal or in a statutory review.

(8) The starting point is that the seizure of the goods was legal and that they were held in the UK for a commercial purpose.

(9) She had examined the circumstances of this case to determine whether there are exceptional circumstances that should result in restoration and whether the result is fair reasonable and proportionate in all of the circumstances.

(10) In considering those, she had taken into account the following:

(a) The principal ground for seeking restoration is that they were for the appellant's own use and that this could not be taken into account on the basis of *Jones*.

(b) The amount of tobacco (6 kg) would have lasted the average smoker about two years. Tobacco becomes stale when kept for more than about a year.

(11) She dealt in cursory fashion with the points set out at [36(2)] above.

(12) Importantly, however, she stated as follows:

> "You chose not to stay to answer further questions and you chose not to take the seizure paperwork. You therefore did not demonstrate that the goods were for own use. In my opinion, with the small amount of information available to me, the goods, or a significant proportion of them, were in fact to be sold for profit and in coming to this conclusion I placed particular importance on your failing to stay for interview and the quantity you purchased. I have not found any exceptional circumstances in your case: therefore non-restoration is fair, reasonable and proportionate in the circumstances" (emphasis added).

(13) Officer Hodge came to the opinion that the application of Border Force policy in the appellant's case treats her no more harshly or leniently than anyone else in similar circumstances; and there were no sufficient or compelling reasons to offer restoration. She considered the decision to be both reasonable and proportionate in relation to the seriousness and circumstances of the case, and in consequence upheld the original decision not to restore.

Discussion

37. The issue in this case is the reasonableness of the reviewing officer's decision and the conclusion that she reached in the review letter not to restore the Tobacco. Officer Hodge based that refusal on two main grounds. The first was that the Tobacco was deemed to be held for a commercial purpose and any arguments raised by the appellant to the contrary could not be considered by her in the review.

38. The second is that the Tobacco, or a significant proportion of it, was "in fact to be sold for profit". In coming to that conclusion she placed particular importance on "your failing to stay for an interview and the quantity you purchased".

39. We are bound by the decision in *Jones* and (like Officer Hodge) cannot consider any arguments raised by the appellant as to the lawfulness of the seizure. We are bound (as was Officer Hodge) to accept that the Tobacco was held for a commercial purpose. This brings with it any facts that form part of that conclusion. In other words, any facts which go to the lawfulness of the seizure are facts which we cannot consider when assessing the reasonableness of the review.

40. But her decision for non-restoration rests not just on the legality of the seizure. It is also based on a conclusion that the Tobacco was to be sold for a profit. This in turn was based on the amount of the Tobacco and the appellant's failure to stay for an interview.

41. We accept Mr Jackson's submissions that the vast majority of the appellant's grounds of appeal must be disregarded since they go to the legality of the seizure. But her submission that she wanted to be interviewed and was not permitted to do so goes to the point of whether the Tobacco was to be sold for a profit. Finding that the Tobacco was held for a commercial purpose does not automatically bring with it a finding that it was to be sold for a profit.

42. Officer Hodge places particular importance on the appellant's failure to stay for interview. Frankly, we cannot see why the failure to stay for interview is relevant to the issue of whether goods are sold for a profit. The commerciality statement dealing with an interview, suggests that if the appellant did not stay for questioning it may lead to the conclusion that the goods are held for a commercial purpose. It says nothing about a conclusion that the goods are held with a view to sale at a profit.

43. Furthermore, if failure to attend is relevant, then so too must be the appellant's desire to attend an interview after the seizure. This desire was clear to Officer Hodge since it was set out in the appellant's letter of 16 April 2017. "The officer asked would I be willing to return to Dover to make full statement I said no but thinking about it I will return". No credit appears to have been given for the appellant's willingness to attend nor (admittedly this came out only in the evidence before us) nor the calls she made to the Border Force shortly after the goods have been seized.

44. Given the importance attributed by Officer Hodge to the appellant failing to stay for an interview, and the fact that this one of the grounds for appeal, and that it potentially goes to the sale for a profit point, rather than to the legality of the seizure, we consider that we do have jurisdiction to consider the appeal on that ground and we cannot strike out the appellant's appeal under Rule 8(2).

45. We have then considered whether this ground has a realistic chance of success. Commonly in these sorts of cases, strike out is considered at a preliminary hearing. In such cases, litigants in person are often ignorant of the procedure and indeed (rightly or wrongly) of the deeming provisions relating to the legality of the seizure. In such circumstances the courts are often willing to allow an appellant to maintain an appeal on grounds which he or she might not have considered or realised might be relevant to a challenge to the reasonableness of the reviewing officer's decision. Mrs Webber has not submitted, specifically, that the failure to stay for an interview is irrelevant. But it goes to her prospects of success. We think that the appellant in this case should be given the opportunity for it to be considered by this Tribunal. And as can be seen from our decision at [57] below, we have decided this appeal in her favour.

46. Turning now to the substantive issue, namely the reasonableness of the review decision reached by Officer Hodge, it is our view that it is flawed for two reasons. Firstly, as mentioned at [42] above, we cannot see the relevance of, nor indeed why Officer Hodge placed particular importance on, the appellant failing to stay for an interview. The appellant has explained that she needed to catch the coach which would only wait for 45 minutes having been told by Officer Kelly that the interview would last 1-2 hours. This is a thoroughly reasonable explanation. The commerciality statement gives no hint that failure to submit to questioning might lead

to a conclusion that the goods were held to be sold for a profit. Indeed failing to stay for an interview deprived the appellant of the opportunity of justifying the importation of 5.5kgs of tobacco. It would have been to her advantage to stay for an interview. Why would that failure bring with it a presumption that she intended to sell the Tobacco at a profit? If Officer Hodge suspected that failing to submit to an interview made the appellant in some way "guilty" of a misdemeanour, then we fail to see how she concluded that that misdemeanour was to sell the Tobacco at a profit. It is our view, therefore, that Officer Hodge has taken into account an irrelevant matter.

47. We also think that she has compounded that error by failing to take into account a relevant matter (namely the appellant's willingness to return to Dover for an interview the day after the seizure).

48. Dealing with the second of these first.

49. Mr Jackson has pointed out that all the appellant has said is that she wanted another interview so that she could "explain the irregularities of the mistakes made by Border Force officer…..". We have no evidence that, if Mrs Webber had been given the opportunity of having a further interview, she would have given any information to the interviewing officer which would have been relevant to the not for profit point. The points she wanted to make go to the legality of the seizure and so we cannot consider them in our review of Officer Hodge's decision. These facts include Mrs Webber not being a street seller, the fact that she intended to smoke nine packets herself, and that she was going to give the other two packets to her sons for their birthdays.

50. As we have explained above, we are bound by *Jones* to find that the Tobacco was not for personal use. It is deemed to be imported for commercial use. We have also said that this deeming brings with it any facts which form part of that conclusion. The aforesaid facts do form part of that conclusion.

51. It is difficult for an appellant in these circumstances to establish that a sale for profit conclusion is flawed. It might be possible for an appellant to adduce evidence that he or she intends to pass the goods on to someone on a reimbursement basis. Alternatively it is open for an appellant to challenge an analysis that a certain weight of tobacco would last more than twelve months. Obviously if an appellant could show that he or she in fact smoked more that the average smoker so that the tobacco would have lasted for less than twelve months, then that would have a material impact on the reasonableness of a reviewing officer's decision.

52. But the appellant has not made any challenge to the sale for profit point, other than to re-emphasise that she did not intend to sell the tobacco. This is something that we cannot take into account since it is "carried with" the conclusion that the tobacco is deemed to be for a commercial use.

53. In light of what we have said above, we think that even if Officer Hodge had taken into account the fact that the appellant wanted to be interviewed, she would inevitably have reached the same conclusion that she did; namely that the Tobacco

was to be sold for a profit. There is nothing that the appellant has told us that she would have said in an interview which would have led Officer Hodge to believe that the Tobacco was not to be sold for a profit.

54. But this conclusion presupposes that failing to attend the interview was a relevant matter. We do not consider that to be the case. And the inevitability mentioned above does not apply to the first ground on which we believe Officer Hodges decision to be flawed (namely the failure by Mrs Webber to attend an interview on the day of seizure).

55. We cannot say that Officer Hodge would inevitably have come to the same decision if she had disregarded this irrelevant matter.

56. We therefore find that Officer Hodge has taken into account a matter which is irrelevant when reaching her conclusion that the decision not to restore the Tobacco is a reasonable and proportionate one; and so we allow the appellant's appeal. We cannot remake the decision or decide whether the Tobacco should be restored to the appellant. Section 16(1) Finance Act 1994 provides that if we are satisfied that the person making the decision could not reasonably have arrived at it, we can only direct that the review decision ceases to have effect and that Border Force conduct a further review subject to any directions that we consider appropriate.

Decision

57. Mrs Webber's appeal against the refusal to restore the Tobacco is allowed. We direct, in accordance with section 16(4) Finance Act 1994 that:

> (1) The Border Force review decision dated 27 July 2017 shall cease to have effect from the date of release of this decision; and
>
> (2) The Border Force shall conduct a further review of the decision not to restore the Tobacco in which they shall disregard the fact that the appellant failed to stay for an interview on the day of the seizure on 12 April 2017.

Appeal rights

58. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE
RELEASE DATE: 03 November 2018

Appendix

Relevant Legislation

Liability to excise duty

59. Section 2 of the Tobacco Products Duty Act 1979 provides that excise duty is payable on tobacco products when they are imported into the United Kingdom.

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

> "13(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;
>
> (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 a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P.
>
> (4) For the purposes of determining whether excise goods referred to in the exception 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 the goods or any refusal to disclose the intended use of those goods;
>
> …
>
> (h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities

...

800 cigarettes

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

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

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

…

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

Seizure of Tobacco and decision not to restore

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

> "88. 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) ...
>
> those goods shall be liable to forfeiture."

62. The Customs and Excise Management Act 1979 ("CEMA 1979") provides as follows:

> "139(1) Anything liable to forfeiture under the customs and excise Acts may be seized or detained by any Officer...
>
> ...
>
> 141(1) ...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 things so liable, shall also be liable to forfeiture."

63. Paragraph 1 Schedule 3 CEMA 1979 provides for notice of the seizure to be given in certain circumstances. Paragraph 3 Schedule 3 CEMA 1979 then states:

> "Any person claiming that anything seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners ..."

64. Where notice of a claim is given under paragraph 1, condemnation proceedings are commenced in the Magistrates' court. In these circumstances, Paragraph 6 Schedule 3 provides:

> "Where notice of claim in respect of anything is duly given in accordance with paragraph 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited."

65. Section 152 of CEMA 1979 provides:

> "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] ... "

66. Sections 14 and 15 of the Finance Act 1994 makes provision for a person to require a review of a decision of HMRC under section 152(b) CEMA not to restore anything seized from that person. By virtue of Section 16(8) and Schedule 5 to FA 1994, a decision under Section 152 (b) of CEMA 1979 is a "decision as to an ancillary matter".

67. Section 16(1) of the Finance Act 1994 provides that a person can appeal against a decision on a review under section 15. Section 16(4) provides:

> "(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 review or further review as appropriate of the original decision; and

(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."