TC03646

Appeal number: TC/2013/07145

Customs duty – restoration – strike-out application on basis that legality of seizure not contested in condemnation proceedings and goods therefore deemed duly forfeit – restoration application based on various matters not explicitly or implicitly disputing legality of seizure – strike-out application refused – preliminary general comments on appeal given

FIRST-TIER TRIBUNAL
TAX CHAMBER

RIDA ZAHRA **Appellant**

-and-

THE HOME OFFICE **Respondent**

TRIBUNAL: **JUDGE KEVIN POOLE**
MR ALBAN HOLDEN

Sitting in public in Priory Court, Bull Street Birmingham on 2 May 2014

Mohammed Zaman Khan, the Appellant's stepfather, for the Appellant

Amrisha Parathalingam of counsel, instructed by the Cash Forfeiture and Condemnation Legal Team of the Home Office, for the Respondent

DECISION

Introduction

1. This appeal relates to the Respondent's rejection of an application for restoration of some seized goods (gold jewellery) and its confirmation of such rejection following a statutory review.

2. This decision does not deal with the substantive appeal. It concerns an application made by the Respondent to strike out the appeal without a substantive hearing, essentially on the basis that the decision of the Court of Appeal in *HMRC v Jones and Jones* [2011]EWCA Civ 824 precluded the Tribunal from hearing any of the arguments intended to be put forward by the Appellant.

3. As it appears to be becoming the Respondent's common practice to make such applications, we felt it appropriate to issue a full decision on the application so that the reasoning of this particular Tribunal on the matter could be publicly clarified.

The facts

4. The Appellant is a young woman of Pakistani origin. She came to the UK for the first time in about 2005 when she was about 12 years old. She came to live with her mother, who had remarried and moved to the UK in 2004. She made visits to Pakistan a number of times thereafter to visit relatives.

5. On her return from Pakistan on 30 May 2013, the Appellant and her mother were stopped in the "green" channel at Birmingham airport. Officers seized six items of gold jewellery from the Appellant, four bangles and two necklaces (one of the necklaces bearing the Appellant's name). The four bangles were being worn by the Appellant.

6. The details of what was said at the seizure are disputed, but the Appellant does not appear to dispute that the jewellery had a value, in aggregate, of more than £390, and she does not assert that customs duty and VAT has ever been paid on the jewellery, which originated in Pakistan.

7. There is dispute about what was said at Birmingham airport by the Appellant and her mother concerning the origin and history of the jewellery. It was not necessary or appropriate for us, in the context of hearing this application, to make detailed findings of fact as we should assume, solely for the purposes of considering the Respondent's strike-out application, that the facts asserted by the Appellant are correct.

8. The broad thrust of the Appellant's assertions was that:

(1) the four bangles had been refashioned from gold owned by her mother in Pakistan for many years before she had come to the UK with it in 2004. The refashioning was carried out in Pakistan in 2010 during a visit there and the bangles were given to the Appellant as a surprise 18th birthday gift in November

2010. She wore them in Pakistan and brought them back to the UK in 2010, before taking them to Pakistan and back on two more occasions;

(2) the necklace bearing her name had been made in Pakistan in 2003 using £100 given by her stepfather on the occasion of his marriage to her mother. She had brought it with her when she came to the UK in 2005. We are not clear as to the precise origin of the other necklace, but the Appellant appears to suggest that this was also owned by her mother in Pakistan from many years ago (though we are unclear whether it has remained in its original form or has been refashioned at any stage);

(3) it was misleading to talk of any of the jewellery as belonging specifically either to her or to her mother (except, presumably, the necklace with the Appellant's name on it). Culturally, mother and daughter share gold jewellery and the concept of clear ownership by one or the other is alien. Thus when officers interpreted her vagueness about who actually owned the jewellery as evasiveness or mendacity, they were doing so on the basis of a fundamental cultural misunderstanding.

9. The Appellant was given a Seizure Information Notice when the jewellery was seized at Birmingham Airport.

10. On 3 June 2013 the Appellant wrote to the UKBA (the Respondent's predecessor agency) requesting restoration of the jewellery "because they are my personal property for my personal use and have been accumulated over 20 years with the changing of design over the years."

11. On 17 July 2013, the Respondent replied, refusing to restore the goods and informing the Appellant of her right to request a review of that decision.

12. On 8 August 2013 the Appellant replied, requesting a review of the decision not to restore. In this letter, she provided a reasonably detailed explanation of the origin and history of the jewellery, including 15 photographs which were said to show it (or other jewellery from which it had been refashioned) at various stages since 1990 in the possession of the Appellant, her mother or aunt.

13. On 18 September 2013 the Respondent wrote to the Appellant with their formal statutory review letter. In it, they confirmed their decision not to restore the goods. This letter included a lengthy passage quoting from the notebook kept by the seizing officer. The reviewing officer stated, on the basis of the extracts from the officer's notebook that the Appellant had been "evasive". This clearly influenced the reviewing officer's decision. He went on to say that the Appellant had admitted to the seizing officer that she "had already smuggled it into the UK on a previous occasion or occasions" whereas the officer's notebook did not record any such admission made by the Appellant.

14. The review letter went on to reject the application for restoration, restating the Respondent's general policy not to restore unless there were "exceptional circumstances".

The Appeal and the Strike Out Application

15. The Appellant then notified her appeal to the Tribunal on 14 October 2013. In it, she did not contest the legality of the seizure but she did contest the accuracy of the extracts from the seizing officer's notebook that had been included in the review letter. Her grounds of appeal were given as follows:

> "Border Force of HMRC decision is wrong because the full facts of the case have not been taken into consideration. The initial questioning by the officer as per the letter dated 18th September 2013 is incorrect and my request for a review was based on that questioning. The Border Force officer wearing a uniform was expected to report truthfully and honestly. He did not do that. Most of the questions are wrong and so are the answers. They were designed to make me and my mother appear to be evasive and guilty. It is only fair that I should be given the chance to put my case to the Tribunal with the full facts at a hearing and to be questioned by the officer and for me to question him too.
>
> Unless I am given a hearing, a serious injustice would have been done, because my mother and I are innocent – we did not know anything."

16. In the section on the appeal form inviting the Appellant to detail the result she was seeking, she said this:

> "The decision of the Border Force should have been to give me back my jewellery and without me paying anything because when I came into this country for the first time I could not read, write or speak English. My mother and I did not know any law or regulation on green/red lane. If I am to be penalised, then I should be allowed to pay the duty and be given back my jewellery. They are important to me because my real Dad gave them to my mother and my mother gave them to me."

17. She also appears to have pursued the question of the availability of obtaining retrospective relief for the original importation of the jewellery when her mother and she came to the UK with it in their personal effects in 2004/05. Whilst the availability of such relief is not formally under consideration as part of this appeal, we would observe that HMRC wrote to the Appellant's stepfather on 10 February 2014 providing more details of the relief available for "Bringing Personal Belongings to the UK upon a Transfer of Residence". In that letter, they listed the requirements for such relief, and except for the requirement for the goods to be declared to the Respondent, it would appear that the jewellery could have satisfied all the listed requirements.

18. Having delivered their Statement of Case in the appeal on 29 November 2013, the Respondent then applied to strike out the appeal in an application dated 22 January 2014. This is the application which we heard on 2 May 2014.

19. The application gave the following grounds:

"1. The Appellant's argument is based on matters which are not within the Tribunal's jurisdiction.

2. There is no reasonable prospect of the Appellant's case succeeding in relation to her grounds of appeal.

3. The argument raised by the Appellant in her Notice of Appeal is based on the assertion that the goods imported by Ms Rida Zahra had been owned for several years, were for personal use and that neither she nor her mother were aware of the rules when the goods were first brought into the country.

4. Ms Rida Zahra did not seek to challenge the legality of the seizure in the Magistrates' Court. The goods are therefore condemned as forfeit to the Crown by the passage of time.

5. The jurisdiction of the Tribunal to consider arguments relating to own use and the legality of seizure was recently considered in the judgment of the Court of Appeal in HMRC v Jones and Jones [2011] EWCA Civ 824. The Respondent refers the Tribunal to the comments of Lord Justice Mummery at Paragraph 73 "*…..the FTT erred in law; the UTT should have allowed the HMRC's appeal on the ground that the FTT had no power to re-open and re-determine the question whether or not the seized goods had been legally imported for the respondents' personal use; that question was already the subject of a valid and binding deemed determination under the 1979 Act; the deeming was the consequence of the respondents' own decision to withdraw their notice of claim contesting the condemnation and forfeiture of the goods and the car in the courts; the FTT only had jurisdiction to hear an appeal against a review decision made by HMRC on the deemed basis of the unchallenged process of forfeiture and condemnation; and the appellate jurisdiction of the FTT was confined to the correctness or otherwise of the discretionary review decision not to restore the seized goods and car. No Convention issue arises on that outcome, as the process was compliant with Article 6 and Article 1 of the First Protocol; there is no judge-made exception to the application of paragraph 5 according to its terms; the respondents had the option of contesting in the courts forfeiture on the basis of importation for personal use; they had decided on legal advice to withdraw from their initial step to engage in it; and that withdrawal of notice gave rise to the statutory deeming process which was conclusive on the issue of the illegal purpose of the importation…*"

6. As the Court of Appeal has ruled that the Tribunal has no power to consider own use or the legality of the seizure, the Appellant's arguments may not be ventilated before the Tribunal which has no jurisdiction to consider such matters.

7. The Respondent therefore submits that in accordance with the Rule 8(2)(a) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the Tribunal has no jurisdiction in relation to the whole or part of the proceedings."

Discussion and decision

20. Ms Parathalingam, in her submissions, effectively followed up the line of argument set out in the application before us. She pointed out that the Appellant had chosen not to avail herself of the opportunity to challenge the legality of the seizure in condemnation proceedings, and should not be able to do so "through the back door" in restoration proceedings before the Tribunal. It was not open to the Appellant to argue before us that she had imported the goods lawfully and therefore her restoration appeal must fail.

21. She referred us to *Jones*, in which the Court of Appeal stated quite clearly that

> "[t]he deeming process *[i.e. the fact that failure to challenge the seizure in condemnation proceedings resulted in the goods being deemed to have been duly condemned as forfeited as illegally imported goods]* 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 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."

22. By reference to that paragraph, Ms Parathalingam submitted that we were also precluded from considering the Appellant's arguments in this case.

23. We must disagree.

24. We fully accept that the Tribunal is required to accept that the goods have been lawfully seized, and it is not open to us to make any finding of fact in the context of the restoration appeal which would be inconsistent with that state of affairs. But that is a very long way short of saying that the Tribunal has no jurisdiction to consider the restoration appeal at all.

25. In a case such as *Jones*, where the only issue in dispute was whether the goods involved were for personal or commercial use, that dispute went to the legality of the seizure and accordingly once it had been decided (whether in actual condemnation proceedings or by virtue of the statutory deeming provisions), there was no scope for the Tribunal to re-open it on a restoration appeal. There were no other matters apparently raised in the restoration appeal. But in the present case, the basis of the seizure was non-declaration of goods to a value exceeding £390 on importation from a third country (Pakistan) and the consequent non-payment of the relevant duty. The effect of the Appellant's decision not to challenge the seizure through the courts is that this Tribunal must accept, in the context of the restoration appeal, that the goods in question were indeed lawfully seized, and it must therefore also accept the facts that underpinned that seizure – i.e. that that the goods were not properly declared on importation, were valued at more than £390, and the relevant duty was not paid.

26. The Appellant does not seek to dispute any of those facts in this appeal. She seeks simply to persuade us that no reasonable reviewing officer could have reached a decision not to restore the goods in the light of the wider circumstances. Those wider circumstances are far outside the scope of the "deeming" effect referred to in *Jones*.

27. For example, in giving fair consideration to the arguments put forward by the Appellant, it seems to us that it would be eminently appropriate to consider whether it would have been possible for the goods to have been lawfully imported without payment of duty when the Appellant (or her mother) first arrived with them in the UK. If it were established that the goods were first brought into the UK as part of the personal effects of the Appellant or her mother when first transferring their residence to the UK, the fact that an exemption from duty would or might have been available (if it had been claimed, which clearly it was not) would seem to us to be highly relevant to any consideration of whether the goods should be restored now. *Jones* provides no warrant for saying that this matter could not be considered by the Tribunal, as it would not in any way bring into question the lawfulness of the seizure – the relief was not, as a matter of fact, obtained and therefore it can provide no defence to the seizure. By acceding to the Respondent's strike out application, we would be depriving the Appellant of any opportunity to argue this point.

28. Then again, the Appellant has indicated that she disagrees strongly with the account of the seizure contained in the seizing officer's notebook, extracts of which were provided to her for the first time in the Respondent's final review letter. She was not given the opportunity to respond to the officer's notes until after the reviewing officer had clearly relied on them quite heavily in reaching his decision to uphold the rejection of her restoration request. It would be against all principles of natural justice for the Appellant to be prevented from putting her side of that part of the story before a final decision is reached on her restoration request.

29. The Appellant has also made clear her emotional attachment to the items in question, giving an outline of the cultural background to that attachment. It may be that she is able to make a convincing case for restoration based to some extent on those factors. Again, this is unaffected by the fact that the seizure itself must be accepted as lawful and the facts upon which the seizure was based (as summarised at [25] above) are deemed to be correct. Once more, we see no reason why she should be precluded from putting these arguments by the decision in *Jones*.

30. In short, we consider the strike out application is entirely without merit.

31. The application is therefore **REFUSED**.

32. We consider it also appropriate, in the circumstances, to make some preliminary observations on the appeal itself. As stated above, we did not hear full evidence on all the underlying facts. We are disturbed, however, that the Respondent appears to have reached its decision partially on the basis of evidence (the seizing officer's notebook) which was not shared with the Appellant until after the decision had been taken, thus depriving her of any opportunity to contradict it. We find it hard to see how any decision reached in this way could be justified.

33. This leads on to a wider point, as follows. The Respondent is obviously constrained by the structure of the legislation; it has to make a decision, and (if required) review that decision on the basis of such evidence (predominantly, if not exclusively, documentary evidence) as is made available to it. This means that it has no opportunity to test the evidence of witnesses by seeing the witnesses giving it and being cross examined on it. Of necessity, that can only

take place in the context of an appeal to the Tribunal against a refusal to restore. Thus, taking the present case as an example, the Respondent appears to have formed the view on the basis of the documentary evidence (including some key evidence which it kept confidential to itself until the decision had been made) that the account of the Appellant was not to be believed. In reaching that conclusion, neither the officer who rejected the original application for restoration nor the reviewing officer will have had the benefit of seeing the evidence given orally and tested by cross examination. That could only be done at the hearing of the appeal. Clearly the credibility of the Appellant's account as to the origins and history of the jewellery will be a material factor at the substantive hearing. If doubt is to be cast on her credibility by reference to the evidence of her supposed evasiveness contained in the seizing officer's notebook, the seizing officer should also attend the hearing of the appeal so that his/her evidence can also be tested and evaluated against the Appellant's and her mother's. Failure to do so would undoubtedly result in the Tribunal giving significantly less weight to the content of the notebook as evidence.

34. It may be that in the light of this decision, the Respondent may wish to reconsider its position and carry out a further review of its decision rather than proceed immediately to a hearing of the appeal. We do not propose therefore to give any directions at this stage to progress the substantive appeal to a hearing; such directions will be given on the application of either party if the Respondent wishes to proceed on the basis of the existing review decision.

35. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 27 May 2014