[2015] UKFTT 0377 (TC)

TC04559

Appeal number: TC/2014/5148

CUSTOMS DUTIES – seizure of wedding jewellery – reasonableness of decision to refuse restoration

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mrs SUKHJIT KAUR HUNDAL **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: Judge Peter Kempster
Mr Simon Bird

Sitting in public at Priory Courts, Birmingham on 19 March 2015

The Appellant in person

Mr Joseph Millington of counsel, instructed by the Solicitor for UKBA, Home Office, for the Respondents

DECISION

1. The Appellant ("Mrs Hundal") appeals against a formal internal review decision of the Respondents ("UKBA") dated 22 August 2014 ("the Disputed Decision") refusing to restore items of jewellery seized at Birmingham Airport on 29 March 2014.

Background

2. On 29 March 2014 Mrs Hundal arrived at Birmingham Airport on a flight from India. She was stopped by a Border Force officer in the Green Channel and the officer identified three items of jewellery (a necklace, a ring, and a pair of earrings) ("the Jewellery"), which had an aggregate value in excess of the maximum allowance of £390 (Travellers' Allowance Order 1994 (SI 1994/955) refers). The Jewellery was seized and Mrs Hundal was issued with the appropriate information notices.

3. On 21 April 2014 Mrs Hundal wrote to UKBA requesting restoration of the Jewellery. She did not challenge the legality of the seizure by appeal to the magistrates' court. On 12 June 2014 UKBA refused restoration. On 8 July 2014 Mrs Hundal requested a formal review. On 22 August 2014 the decision not to restore was upheld by the Disputed Decision.

Law

4. The Tribunal's jurisdiction in relation to this dispute is set by s 16(4) FA 1994 which states, so far as relevant:

> "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
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> (c) in the case of a decision which 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."

5. That jurisdiction is a supervisory one and, from the caselaw in *Customs and Excise Comrs v J H Corbitt* (*Numismatists*) *Ltd* [1980] STC 231, *Customs and Excise Comrs v Peachtree Enterprises Ltd* [1994] STC 747 and *Kohanzad v Customs and*

6. *Excise Commissioners* [1994] STC 967, we derive the following approach, which we understand is uncontroversial:

(1) The jurisdiction of the Tribunal in this matter is only supervisory.

(2) The Tribunal cannot substitute its own discretion for that of UKBA.

(3) The question for the Tribunal is whether UKBA's decision was unreasonable in the sense that no reasonable adjudicator properly directing himself could reasonably reach that decision.

(4) To enable the Tribunal to interfere with UKBA's decision it would have to be shown that UKBA took into account some irrelevant matter or had disregarded something to which they should have given weight.

(5) In exercising its supervisory jurisdiction the Tribunal must limit itself to considering facts and matters which existed at the time the challenged decision of UKBA was taken. Facts and matters which arise after that time cannot in law vitiate an exercise of discretion which was reasonable and lawful at the time that it was effected.

(6) The burden of proof lies on an appellant to satisfy the Tribunal that the decision of UKBA was unreasonable.

7. In particular, the legality of the seizure under is not a matter for this Tribunal: *Revenue and Customs Commissioners v Jones and Jones* [2011] EWCA Civ 824, per Mummery LJ (at [73]):

> "To sum up: 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 [ie Customs & Excise Management Act 1979]; 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 [Human Rights] Convention issue arises on that outcome, as the process was compliant with art 6 and art 1 of the First Protocol: there is no judge-made exception to the application of para 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."

Respondents' case

8. For UKBA Mr Millington submitted as follows.

9. Mrs Hundal's actions rendered her liable to prosecution (pursuant to s 78(3) Customs & Excise Management Act 1997) but UKBA had restricted any offence action to seizure of the goods only. UKBA's general policy is that seized goods

should not be restored. That policy had been judged to be a reasonable one by the Tribunal in *Clear plc v Director of Border Revenue* [2011] UKFTT 11 (TC) (at [53]). However, each case is considered on its own merits to determine whether there are exceptional reasons to support restoration.

10. The Disputed Decision took into account all relevant matters and disregarded all irrelevant matters.

(1) Travellers entering the Green Channel would see the notices and posters advising clearly of limits and instructions. Thus Mrs Hundal was aware of the significance of entering the "nothing to declare" Green Channel but chose to do so when she had about her person and in her luggage jewellery with a value in excess of the maximum allowance.

(2) The Border Force officer's notebook was a contemporaneous record of events and although its accuracy had been challenged by Mrs Hundal, UKBA did not accept that the notebook was incorrect. Where seized goods were deemed to have been duly condemned as forfeited under Customs & Excise Management Act 1979 ("CEMA") it is inappropriate for the Tribunal to investigate the correctness of the established fact: *HMRC v European Brand Trading Ltd* [2014] UKUT 266 (TC). This will include the correctness of the Border Force officer's notebook as this forms part of the deemed condemnation. Thus in *Nazia Saleem v Home Office* (TC/2013/6185 - unreported) the Tribunal had stated (at [16]): "… as the Appellant did not challenge the lawfulness of the seizure by requiring the Respondent to commence condemnation proceedings in the Courts, we are bound by the legal presumption that the goods were lawfully seized, and we must accept as true the facts upon which such seizure was based." The notebook recorded the following exchange:

Officer	Are these your bags?
Mrs Hundal	Yes.
Officer	Did you pack them yourself?
Mrs Hundal	Yes.
Officer	Are you fully aware of the contents of your bags?
Mrs Hundal	Yes.
Officer	Are you carrying anything for anyone else today?
Mrs Hundal	No.
Officer	Are you aware it is illegal to bring certain items into the UK such as drugs, weapons, firearms and indecent or obscene material?
Mrs Hundal	Yes.
Officer	Was your trip business or pleasure?
Mrs Hundal	I got married.
Officer	Pleasure then. Where is your wedding jewellery?
Mrs Hundal	I left it there. I have a security box there.
Officer	But your (*sic*) a UK resident – don't you want to wear it here?

Mrs Hundal	I just want it to be safe.
Officer	Where did you get the rings and the earrings?
Mrs Hundal	In India.
Officer	Who gave them to you?
Mrs Hundal	My relations.
Officer	Where did they buy them?
Mrs Hundal	In India.
Officer	Madam, do you have a necklace under your scarf?
Mrs Hundal	Yes.
Officer	Was that bought in India too?
Mrs Hundal	Yes, they are a set.
Officer	Where (*sic*) they from this empty jewellery box in your suitcase?
Mrs Hundal	Yes.
Officer	Madam, you have exceeded your tax free allowance of £390. These goods weigh approximately 40 grammes and are now seized as forfeit to the Crown.
Mrs Hundal	But I didn't know.
Officer	Madam, there are posters before you enter the Green Channel, there are leaflets and you could have asked at the Customs Enquiry Point. You also covered your necklace with a scarf and told me your wedding jewellery was in India.
Mrs Hundal	This is other wedding jewellery.
Officer	It's still in excess of your duty free allowance and is seized. I will give you a booklet explaining our appeals procedure.

(3) The review officer (Officer Brenton) had noted that Mrs Hundal's account of the conversation with the Border Force officer was at variance to the account in the notebook. As stated clearly in the Disputed Decision, the review officer had concluded that:

> (a) She would have been aware of the Red and Green Channel system. By entering the Green Channel she was in effect stating that she had nothing to declare and thus had no intention of paying the duty legally due on the Jewellery.
>
> (b) As she was stopped by a uniformed Border Force officer she must have known that she was expected to answer questions truthfully and disclose the Jewellery.
>
> (c) The questions and answers were clear and unequivocal. When asked about the wedding jewellery she told the officer that she had left it in India in a security box. That explanation was disingenuous.

(d) By failing to declare the jewellery she misled the officer. If she had nothing to hide then she had no need to mislead the officer. She had felt it necessary to lie to the officer and so clearly knew she was misleading the officer. Her responses were wholly implausible and were a knee-jerk reply on being caught in dishonesty.

(4) None of the factors mentioned by Mrs Hundal in her notice of appeal constituted exceptional circumstances, such as to warrant a restoration of the Jewellery. In particular, what she had described as the "traditional and symbolic significance of my wedding jewellery" was not relevant. If that had been important to Mrs Hundal then it should have been at the forefront of her mind and she should have gone through the Red Channel.

11. Thus the Disputed Decision had been reasonably arrived at, and the appeal should be dismissed.

Appellant's case

12. Mrs Hundal submitted as follows.

13. She was an honest, law-abiding citizen as evidenced by the testimonial from her employer, Queen Elizabeth Hospital Birmingham. If she had realised that she had to declare the Jewellery or that there was duty to pay on the Jewellery then she would have declared it at the airport. She was an infrequent traveller and so was not familiar with the procedures. She had been tired and emotionally drained when she arrived in the UK after leaving behind her new spouse and family. She had co-operated with UKBA throughout.

14. The conversation at the airport was misreported in the Border Force officer's notebook. She had been unaware of the report in the notebook until passages had been quoted in the Disputed Decision. Had she been asked to sign the notebook then she would have objected to the incorrect report. She had been asked, "Have you brought any goods from India, for example sarees?". She had answered, "I have got married in India and my in-laws have gifted me gold jewellery at my wedding which I am wearing the ring and necklace and a pair of earrings which are in my handbag. I removed the earrings as I went to sleep on the aeroplane." The scarf that had been referred to was a thin fashion accessory and did not cover or hide the necklace. She had voluntarily taken the earrings out of her handbag and put them on the counter. She also disclosed, "I am wearing a gold ring which is brought from the UK." The officer conferred with his Duty Manager and then said, "Leave that ring on from the UK but take off what was gifted to you. Do you have any other jewellery or goods from outside the UK in your luggage?" She replied, "No but there is an empty jewellery box in my suitcase for the jewellery which I have taken off." She did not have any form of security box in India. She had apologised to both the officer and the Duty Manager for being unaware of the law and offered to pay the tax due but was told that it was too late for that.

15. The Jewellery was of traditional and symbolic significance and was passed down the generations. It was irreplaceable and the only memory she received from her husband's family. It represented her as a person, as part of their family and as a wedded wife. It was traditional for a groom's family to dress the bride in jewellery made for the occasion and given by them, and this was the reason she was wearing the Jewellery at the airport.

16. The Jewellery should be restored to her. She was still willing to pay the tax and duty on the Jewellery.

Consideration and Conclusions

17. We do not accept UKBA's contention that Mrs Hundal's earlier decision not to challenge the legality of the seizure means that we are bound to accept the correctness of the Border Force officer's notebook. The first authority cited by UKBA is *European Brand Trading*. There the Upper Tribunal held that the effect of a magistrates' court order was that duty had not been paid on certain seized goods (at [57]) and that had to be recognised by the review officer when considering restoration: (at [60])

> "At the present time, and therefore as at the date of the further review decision, the established position is that duty was not paid on any of the seized goods. The review officer should therefore consider what HMRC should do in this case in the light of that, and all other, material considerations. The review officer is certainly not required to make a decision based on a finding that duty was paid on some or all of the seized goods. The same applies to any suspicion which the review officer may form as to the possibility that duty had been paid on some or all of the seized goods. If the review officer was to make a decision based on a finding that duty had been paid, or might have been paid, on some or all of the seized goods, that finding would be contrary to the established position that duty has not been paid on any of the seized goods."

The second authority cited by UKBA is *Nazia Saleem* (an unpublished decision) where this Tribunal noted that it was "bound by the legal presumption that the goods were lawfully seized". Both those authorities follow directly from the Court of Appeal decision in *Jones* (see *European Brand Trading* at [3]). In the context of the current appeal, both the review officer and this Tribunal are bound to treat the Jewellery as having been lawfully seized. Thus (in the present appeal) neither the review officer nor this Tribunal (nor, of course, the appellant) can take any view other than that the Jewellery was imported into the UK without proper declaration and had a value in excess of the duty free limit of £390 – see s 78 CEMA. Those are, as the Tribunal in *Nazia Saleem* put it, "the facts upon which such seizure was based". But that is, we consider, as far as the presumption runs; it does not oblige us to accept unquestioningly any collateral evidence that goes beyond (and does not contradict) those assumed facts – such as, here, the details of the conversation in the Green Channel. We have noted, of course, the discrepancies between the two versions of events. Our understanding is that Mrs Hundal was not shown the notebook report and invited to comment on it before the Disputed Decision was made; she says (and this appears to be the case from the correspondence we were shown) she only became aware of the reported conversation when extracts were quoted in the Disputed Decision (and of course the notebook extract was subsequently fully disclosed in the preparation for this hearing). It suffices for us to find that we accept Mrs Hundal's statement that she was an inexperienced traveller and was exhausted after a long flight after leaving her new husband and family, and we further accept that she was not deliberately and covertly smuggling the Jewellery into the UK.

18. The Tribunal in considering this appeal has the limited jurisdiction conferred by s 16(4) Finance Act 1994; we must decide only whether Officer Brenton's decision to uphold the refusal of restoration of Mrs Hundal's wedding jewellery was

unreasonable. We have found this to be a difficult case but on balance have decided to allow the appeal. We would emphasise that our decision looks at a very narrow point on this particular case, rather than any criticism of UKBA's general policy and its application.

19. Officer Brenton was present at the hearing and we asked him to elaborate on why he had considered that the particular sentimental value of the Jewellery had not constituted an exceptional circumstance in this case. He explained that alleged emotional or sentimental value of gifts was a common factor, and this was not a special case; it would be a difficult task for UKBA to attempt to evaluate such factors and would undermine the general policy; even with high value or rare items, replacements could be purchased.

20. Although the Disputed Decision does not expressly mention the issue of proportionality (see the Court of Appeal decision in *Lindsay v Customs and Excise Commissioners* [2002] STC 588) we are satisfied from Mr Brenton's explanations at the hearing that he did bear this factor in mind when reaching the Disputed Decision. However, we have concluded that on these particular facts his decision was unreasonable.

21. The policy applied by Officer Brenton was that seized goods should not be restored unless there are exceptional circumstances. Although he did take into consideration the fact that the seized goods were jewellery with a strong sentimental attachment, he considered that the goods could be replaced by similar items; he did not take into account that the particular items were unique in their significance to the Appellant, being the wedding items from her groom's family. We take that as a factor that should have been considered by the review officer and it was not, and for that reason only, we hold that the decision to refuse restoration was unreasonable.

22. We have decided that a further review of the decision not to restore should be undertaken, with possible consideration of restoration subject to payment of an appropriate penalty as well as the unpaid VAT and import duty.

Decision

23. The Tribunal decided that the appeal is ALLOWED. As communicated to the parties by the summary decision issued on 28 April 2015, the Tribunal DIRECTED that the Respondents shall conduct a further review of the decision to refuse restoration of the goods, the result of such further review to be communicated to the Appellant no later 9 June 2015.

24. This document contains full findings of fact and reasons for the decision, and replaces the summary decision issued on 28 April 2015. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 7 AUGUST 2015