TC02135

Appeal number: TC/2011/06369

Strike-out Application – late Notice of Appeal – jurisdiction – Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – CEMA 1994 Sections 49(1) and 139(1) – Application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROSS HELMY **Appellant**

- and -

UNITED KINGDOM BORDER AGENCY **Respondents**

TRIBUNAL JUDGE: KENNETH MURE, QC

Sitting in public at George House, 126 George Street, Edinburgh on Monday 11 June 2012

The Appellant in person

Kevin Clancy, for the Respondents

DECISION

Preliminary

1. This is a strike-out application at the instance of the Respondent, the UK Border Agency ("UKBA"). It was represented by Mr Kevin Clancy, Solicitor. The Appellant appeared in person, assisted by his wife.

2. A consignment of knives, batons and other items addressed to the Appellant was seized by the Respondents at Croydon on about 5 March 2010. The Appellant was advised of the seizure of the goods as being prohibited offensive weapons by letter from the UKBA dated 5 March 2010. He purported to challenge the legality of the seizure, challenging as incorrect UKBA's classification of the items. The statutory basis for seizure is set out in Section 49(1) Customs and Excise Management Act 1979, which provides –

> "(1) where –
>
> (b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment …
>
> … those goods shall … be liable to forfeiture".

Further, Section 139(1) directs that –

> "(1) any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's Armed Forces or Coastguard."

3. The correspondence from the UKBA indicated to the Appellant that he could challenge seizure by way of an action of condemnation in the local magistrates court. Otherwise the goods would be deemed to have been forfeited. Alternatively and additionally he could seek a review of UKBA's refusal to restore the items before this Tribunal (Finance Act 1994, Section 14(1)). Although he instructed a local solicitor, Mr Helmy chose apparently for reasons of expense not to pursue condemnation proceedings in England to challenge the legality of the seizure. (See Grounds of Appeal set out on p28 of the First List of Productions.) Rather, he lodged an Appeal to this Tribunal dated 16 (and received 18) August 2011, one year or so after the final Review by UKBA..

Respondent's Submission

4. In his submission Mr Clancy emphasised that the course adopted by the Appellant was clearly one of review of the refusal to restore, rather than a challenge to the competency of the seizure. The latter course would not be competent before this Tribunal. He noted the terms of Mr Helmy's letters to UKBA dated 10 and 22 March and 19 May 2010 (Second Inventory of Productions nos. 1, 2 and 4).

5. The Respondent's application is based on Mr Helmy's delay in seeking restoration, and in any event on the appeal being unlikely to succeed. The terms of UKBA's letter of 30 June 2010 (page 4 – p10 of the First Inventory) stress that an appeal to this Tribunal must be made within 30 days. This has statutory authority in terms of FA 1994 Section 16(1). The Notice of Appeal by Mr Helmy is dated 16 August 2011 and was received on 18 August. That falls over a year after the expiry of the 30 day period. Mr Clancy noted the decision in *Aston Markland* v *HMRC* [2011] UKFTT 559, which indicates that only exceptional circumstances might excuse the delay. The statutory provisions do not provide for such an exigency. The delay in *Aston Markland* was only of five months and that precluded an appeal. In the present case the delay was longer. Mr Clancy referred to the final paragraph of UKBA's letter of 30 June 2010 (page 11 of the First Inventory) which referred to standing over "any hearing". That could not excuse a belated Notice of Appeal, as Mr Helmy seemed to argue.

6. In any event, according to Mr Clancy, the Appeal had no reasonable prospect of success, and so should be struck out under Regulation 8(3)(c). The appeal could not challenge the legality of the seizure. That was clear from the decision of the Court of Appeal in *HMRC* v *Jones & Jones* [2011] EWCA Civ 824. Mr Clancy noted in particular paras.66 – 73. In particular para. 71(5) narrates –

> "The deeming process limited the scope of the issues that the Respondents were entitled to ventilate in the First-tier Tribunal 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 legally 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 Respondent's failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use."

Mr Helmy's stance seemed to be limited to an attack on the competency of the seizure: he was seeking to argue that the seized goods had been wrongly classified. By contrast the basis of the review as set out in UKBA's letters of 30 June and 30 July 2010 (First Inventory nos. 2 and 4) seemed to be beyond reproach. It satisfied the *Wednesbury* criteria. The sum total of Mr Helmy's submission was that the seizure had been illegal. That was beyond this Tribunal's jurisdiction and so the Appeal ultimately was bound to fail.

Appellant's Submissions

7. In reply Mr Helmy stressed that it had now emerged clearly that the goods seized had not fallen into the prohibited categories asserted by UKBA (I allowed him to develop this argument subject to all questions of competency and relevancy. From a

lay person's perspective the correct classification of the goods was of obvious importance and Mr Helmy did not have the benefit of professional representation.)

8. Mr Helmy had explained the nature of the goods to UKBA in correspondence in March and May 2010 (see nos. 1, 2 and 4 of the Second Inventory) and a possible prosecution by the Procurator Fiscal in Lanark had not been pursued (see her letter of 15 August 2011). He produced an affidavit from an expert on weapons, a Mr Harriman, but this (as Mr Clancy observed) post-dated the review by UKBA and presumably that could not have been considered by it. Mr Helmy claimed that the seizure had caused the local police to raid his house. His computers had been taken for scrutiny and his family life as well as his business interests had been seriously disrupted.

9. Moreover, he had understood on the basis of the final paragraph of UKBA's letter of 30 June 2010 (noted *supra*, para.5) that there was no urgency in lodging an appeal with the Tribunal.

Decision

10. I consider Mr Clancy's stance well-founded.

11. Firstly, there is the matter of the delay. I agree that there is a 30 day limit. Even if there is a discretion to extend this, I do not consider that there are "exceptional reasons" (as desiderated in *Aston Markland*) to do so. The two courses of a challenge in the magistrates' court and an appeal to this Tribunal, and their respective functions were explained clearly by UKBA in their correspondence. The final paragraph of its letter of 30 June 2010 refers to standing over "the hearing", not delaying the time for the inception of proceedings, ie the necessary written procedures.

12. In any event I agree too that there is insufficient information before me to challenge the basis of UKBA's review. Significantly the review letter states in terms that it did not extend to aspects of the legality of the seizure. Mr Helmy has prayed-in-aid matters of classification of the seized items. That relates to the legality of the seizure, which is not, of course, appropriate for me to consider. At the material time Mr Helmy had instructed a local solicitor, yet chose not to pursue challenging the legality of the seizure. (It appears that the value of the consignment was significantly less than the solicitor's fee).

13. For these reasons I allow UKBA's application. The Appeal is struck out in terms of Rule 8(2) and (3) of this Tribunal's Rules. The Notice of Appeal was lodged too late, and given this Tribunal's jurisdiction, it could not entertain the Grounds of Appeal set out and so there is no reasonable prospect of the Appeal succeeding.

14. 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.

KENNETH MURE, QC
TRIBUNAL JUDGE

RELEASE DATE: 17 July 2012