



**TC03220**

**Appeal number: TC/2013/03611**

***CUSTOMS DUTY – CITES - Whether refusal of restoration of red alligator skin handbag reasonable- On facts and deemed circumstances yes – Appeal dismissed***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PUTRI PROJOSUJADI**

**Appellant**

**- and -**

**THE DIRECTOR OF BORDER REVENUE**

**Respondent**

**TRIBUNAL: JUDGE ADRIAN SHIPWRIGHT  
PHILIP GILLET FCA**

**Sitting in public at 45 Bedford Square, London WC1B 3DN on 17 December 2013**

**Dr Eric Metcalfe, Counsel, instructed by Blavo & Co, Solicitors for the Appellant**

**Rupert Jones, Counsel, instructed by The Director of Border Revenue, for the Respondents**

## DECISION

### Introduction

1. This decision concerns the appeal of Putri Projosujadi (“the Taxpayer”) against the decision of the Respondent, The Director of Border Revenue (“BR”), not to restore an alligator skin handbag (“the Goods”) which had been seized. The decision not to restore the handbag was notified by letter dated 4 March, 2013.
2. BR decision not to restore the Goods was the subject of a review. The original decision not to restore the Goods was upheld on review. This was notified by letter dated 9 April, 2013. It is this review decision that is the subject of this appeal.
3. The Taxpayer appealed to the Tribunal against the decision not to restore the Goods on 22 May, 2013. It may be that the appeal was not within time. BR told us that they do not wish to take any point on this. We give such permission as may be necessary for the appeal to be brought out of time to allow this appeal to continue.

### The Issue

4. The essential issue in this case is whether the decision not to restore the Goods is one that could not reasonably have been arrived at by a properly instructed decision maker. In other words is the decision outside the range of possible reasonable decisions that such a person could reasonably make. It does not matter whether or not we would have reached the same decision rather the question is whether broadly the decision not to restore the goods is within “Wednesbury reasonableness”.
5. The legality of the seizure and whether or not the goods are personal effects and related matters are very interesting but are not matters over which we have any jurisdiction. Accordingly they are not considered in any detail in this decision. As explained below we are required in the circumstances to treat the goods as properly forfeited goods that were illegally imported. This is the consequence of the time limit for bringing condemnation proceedings having expired. This necessarily limits the issues that can be of our concern in this appeal.
6. A number of questions arise for consideration in deciding this case which include the following.
- (1) Can the Tribunal consider the legality of the seizure?
  - (2) Is the Seizure to be treated as lawful?
  - (3) If as a result of the legislation the legality of the Seizure is not a matter for the Tribunal but for condemnation proceedings are the Goods to be treated as illegally imported into the UK in the Tribunal’s and Review Officer’s deliberations?
  - (4) If Yes are there any exceptional circumstances here?
  - (5) If the Goods are to be treated as duly condemned is the decision not to restore the Goods within the range of possible reasonable decisions that a decision maker could reach?
  - (6) Was the decision not to restore done in a way that raises issues that are within the Tribunal’s jurisdiction?

### Abbreviations and Dramatis Personae

7. The following abbreviations and references to persons are used in this decision but as ever are subject to the requirements of the context.

	“The Appellant”	the Taxpayer
	“BR”	Border Revenue including the Director of Border Revenue, the Respondent
	“CEMA”	Customs and Excise Management Act 1979
5	“CITES”	the Convention on International Trade in Endangered Species of Wild Fauna and Flora which came into force 1 January, 1975
	“The decision not to restore”	the decision not to restore the goods notified by letter dated 9 April, 2013 which is the subject of this appeal
10	“The EU”	the European Union
	“FA”	Finance Act
	“Greg Munoz”	the individual who brought the Goods into the UK who is a friend/acquaintance of the Taxpayer
15	“The Goods” subject of the Seizure	the handbag described at paragraph 33 below which was the
	“The Respondent”	Border Revenue, more particularly the Director of Border Revenue
	“The Seizure” seq below	the seizing of the Goods described at paragraph 51 et
20	Sunny Reksono	the individual who purchased the Goods who is a friend of the Taxpayer
	“the Taxpayer”	Putri Projosujadi

**Common ground**

8. The factual matters as to the goods and what had occurred at Heathrow were broadly agreed. It was the legal consequences of such matters which were the area of dispute.

**Jurisdiction**

9. We remind ourselves that the Tribunal has a limited jurisdiction here. It can only do what is permitted by section 16 FA1994. In particular we note that we have no power to order the restoration of the Goods.

10. The Tribunal only has the jurisdiction given to it by statute and has no inherent jurisdiction as to fairness etc. This has recently been confirmed by the Upper Tribunal in *Hok* and *Total Engineering*.

11. We also note that the legality of the seizure is not a matter for us to consider. The legislation/case law requires us to treat the Goods as having been lawfully seized and as illegally imported. This would also be true of the reviewing officer as the period for the bringing of condemnation proceedings had expired by the time of the review.

**The Law**

12. The law in this area is found in a number of places with respect to what this Tribunal was concerned with. It is essentially in CEMA and in particular section 16 FA 1994.

13. There is also some case law on this area some of which we were referred to. *Statute etc.*

14. Section 16 FA 1994 is headed “Appeals to a tribunal”. Insofar as relevant here it 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– [emphasis supplied]

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

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

15. Under this provision the onus is on the appellant to show that the grounds on which any such appeal is brought have been established.

16. Section 139 CEMA allows “... anything liable to forfeiture ...” to be seized or detained. The BR position is seemingly strengthened by the FA 2013 changes for the future.

17. Section 49 (1) (b) CEMA provides that goods imported contrary to any prohibition or restriction in force may be seized.

18. Alligator products fall within Appendix II to CITES as restricted matters and so require certain matters to be obtained in particular certain certificates or licences where the items cross international borders. It was accepted by the parties that if the provisions in question applied then the paperwork produced did not meet the requirements. The Taxpayer argued that those provisions were ousted by the personal effects derogation. Whether this is something within our jurisdiction is dealt with below in considering how far matters which go to the legality of the seizure can be considered if at all.

19. The important legislation in this case is found in Schedule 3 CEMA. Insofar as is relevant to this case it provides as follows.

*“Notice of claim*

[3] Any person claiming that any thing 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 at any office of customs and excise....

*Condemnation*

[5] If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim [one month from seizure] in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited...”

20. This provides the mechanism to test the legality of the seizure in the Magistrates and Higher Courts. It does not include the Tribunal in this mechanism.

21. The legislation provides for the goods in question to be deemed “... to have been duly condemned as forfeited...” as illegally imported goods on the expiry of the one month period if no condemnation proceedings are brought.

22. The onus of proof is on the Taxpayer.

*Case law*

23. We were provided with copies of the following decisions.

(1) *Lindsay c CCE* [2002] EWCA Civ 267

(2) *Gora v CCE* [2004] QB 93

(3) *Gascoyne v CCE* [2005] Ch 215

(4) *Taylor and Lodge v HMRC* [2009] UKFTT 228

(5) *HMRC v Jones* [2011] EWCA Civ 824

(6) *R(Cart) v Upper Tribunal* [2011] UKSC 28

(7) *Vernon Yip v Director of Border Revenue* [2012] UKFTT 165

- (8) *R (Eastenders Cash and Carry Plc) v HMRC* [2012] EWCA Civ 15  
(9) *Talbot v Director of Border Revenue* [2012] UKFTT 381  
(10) *Pash v Director of Border Revenue* [2013] UKFTT 100  
(11) *HMRC v First Stop Wholesale Ltd* [2013] EWCA Civ 183  
5 (12) *Nicholas Race v HMRC* [2013] UKFTT 489  
(13) *B & G Liquor Store Ltd v HMRC* [2013] UKFTT 450  
(14) *Marek Orzechowski v HMRC* [2013] UKFTT 450  
(15) *James Amps v Director of Border Revenue* [2013] UKFTT 570  
(16) *Darren Tallon v Director of Border Revenue* [2013] UKFTT 606

10 *Other Matters*

24. We were referred to many other interesting matters including matters such as the European Convention on Human Rights, certain United Nations matters and societies and related amendments and resolutions. Given our limited jurisdiction and powers in cases such as this they are not engaged here.

15 25. Our view on the relationship of Articles 57.3 and 57.5 of Commission Regulation 865/2006 might be of interest but is not relevant in deciding this case because of the structure governing the masses legislated for by parliament.

**Evidence**

20 26. There was [one] volume of agreed documents produced. None of the documents were objected to and all were admitted in evidence.

27. Witness statements were provided for

- 25 (1) The Taxpayer;  
(2) Sonny Reksono;  
(3) Greg Munoz;  
(4) Graham Crouch.

28. We heard oral evidence from Officer Graham Crouch. He was cross examined.

29. The other persons providing witness statements did not attend the hearing and were not cross examined. The Tribunal makes no criticism of them for not attending the hearing. However, as their evidence was not tested by cross examination it is hard to know what  
30 weight to put on their evidence.

**Findings of Fact**

30. From the evidence we make the following findings of fact.

*The Taxpayer*

31. The taxpayer is a UK National. At the time in question she was resident in the UK and  
35 so a resident of the EU. She has since moved to Singapore.

32. Her mother was in Jakarta, Indonesia at the relevant time and not a resident of the EU.

*The Goods*

33. The Goods in question are a lady's handbag.

34. The handbag is an orange or red Hermes birkin handbag.

40 35. The handbag is made from alligator skin.

*The Purchase*

36. In the grounds of appeal it is said that in November 2012 the Taxpayer arranged with her family to purchase a red Hermes handbag made of alligator skin as a Christmas present for the Taxpayer's mother. The Taxpayer's mother lived in Jakarta as noted above. It would  
45 have to be transported there.

37. It was arranged that the handbag would be purchased in the United States of America by a friend Sunny Reksono. We did not have the benefit of hearing oral evidence from Ms Reksono.

38. The purchase was made on 1 December, 2012 in suburban Washington, DC. There was  
50 limited evidence on this matter.

*Payment and reimbursement?*

39. There was no clear evidence before us from which we could make findings as to how payment was made for the purchase price using what funds provided by whom. We believe it was paid for by Sonny Reksono. It was apparently intended that Sunny Reksono should be reimbursed. There was no definitive evidence before us to show that Sunny Reksono had been reimbursed and if so by whom or when.

40. There was no evidence before us that showed that the Taxpayer paid the full price.

*Ownership of the goods*

41. As it was not entirely clear from the information in front of us who actually paid for the Goods and at what time it was hard to determine who had legal title to the Goods at the time of the Seizure.

42. Since we did not have evidence as to payment and/or the law on sale of goods in Washington, DC it is hard for us to make findings as to title or ownership of the Goods.

43. We make no findings as to ownership of the goods. Whilst this might have been relevant to whether the Goods might have been personal effects, for the reasons set out below this is not an issue over which we have jurisdiction and so not a difficulty with this decision.

*44. Transport of the Goods*

45. The Goods had to be transported from the USA to the Taxpayer in the United Kingdom. The Taxpayer could then have sent the goods to her mother in Jakarta.

46. Sunny Reksono who had purchased the Goods handed the Goods to Greg Munoz to transport the Goods to the Taxpayer.

47. Greg. Munoz was another friend of the Taxpayer. He had to travel to London for business purposes at about that time. He agreed to take the Goods to the Taxpayer.

48. Greg Munoz flew to London in December 2012.

49. Greg Munoz brought the Goods into the UK on 6 December, 2012. He went through the "Red Channel" and declared the Goods to Customs on his arrival at Heathrow Terminal 3.

50. Greg Munoz presented the receipt obtained by Sonny Reksono and a CITES certificate from the manufacturer but no export/import documentation.

*The Seizure*

51. The Goods were seized as the relevant US export and UK import certificates were not produced at the time of import into the UK.

52. The person importing the goods was not the owner. This is the case even if it is not clear who the owner actually was that the relevant time. It was clear that the owner was not Greg Munoz.

53. The person (Greg Munoz) actually physically importing the Goods was not usually resident in the EU.

54. The Goods were not the personal effects of the person importing them into the UK.

55. When the Goods were seized Notice 12A Goods and/or Vehicles seized by Customs and a Seizure Information Notice were given to Greg Munoz.

56. There was no clear evidence before us that the Taxpayer received these documents.

However, she is deemed to know the law and could easily have informed herself as to the position. We find as a fact that the Taxpayer did have an opportunity to decide whether or not to exercise her right to seek condemnation proceedings. The context and correspondence indicates that she was fully aware of her legal rights. No evidence was led to show that this was not the case.

57. We find that the taxpayer has not discharged the burden of showing that she did not have a proper opportunity to decide how to exercise her right to seek Condemnation Proceedings. To the extent that we can we find this is a fact.

58. The taxpayers e-mail to the border force on 7 December, 2012 supports this.

*Condemnation proceedings*

59. The Goods were not the subject of Condemnation Proceedings.

60. As no Condemnation Proceedings were brought the Goods were duly condemned and forfeit as illegally imported goods on the expiry of the one month period. This is the state of affairs from which statute requires us to proceed. It is effectively part of the factual matrix in the case. Accordingly, we proceed on this basis and have included it here for the sake of completeness.

### **Submissions of the Parties**

#### **61. *The Taxpayer's submissions in outline***

62. In essence, the Taxpayer argued that the Goods were personal effects within the derogation for personal effects and so should be restored. The Taxpayer considered that the Tribunal had jurisdiction to do this so as to correct an error of law and to protect the Taxpayer's Human and other rights.

63. In more detail it was submitted on behalf of the Taxpayer as follows.

(1) As the Goods were personal effects that fell within the derogation no permit or certificates were required for import and they should not have been seized as there was no authority to seize them.

(2) The Tribunal has sufficient jurisdiction to determine the legality of the Seizure of the Goods. This was on the basis that:

(a) No genuine choice had been made by the Taxpayer not to pursue condemnation proceedings. There was simply a deeming provision that conflicted with human rights and other requirements;

(b) There is a distinction between matters of fact and law for this purpose and the matter here was solely one of law.

(3) There is a jurisdiction in the Tribunal to correct errors of law.

(4) Here there was no genuine decision not to challenge the Seizure and there was an error of law as the goods were personal effects and so not liable to Seizure. The Tribunal should correct this.

64. In the alternative it was unreasonable not to restore the Goods particularly when they should not have been seized in the first place.

65. It was also originally argued that forfeiture was in any event disproportionate. However, this was not pursued. This was confirmed to us at the hearing.

#### **66. *BR's submissions in outline***

67. In essence, BR argued that the decision not to restore fell within the range of possible reasonable decisions that a reasonable decision maker could make and so must be upheld.

That was the only issue before the Tribunal as the legality of the Seizure was not within the Tribunal's jurisdiction. This issue was whether the decision not to restore the Goods fell within the range of possible decisions that could be considered reasonable. Here it plainly was.

68. In more detail, it was submitted on BR's behalf as follows.

(1) The Goods were imported into the EU by a person not normally resident in the EU (i.e. Greg Munoz) without the necessary certificates.

(2) The Goods are deemed lawfully seized as no Condemnation Proceedings were brought by the Taxpayer and the Goods are to be treated as having been imported illegally as the one month period to bring Condemnation Proceedings had expired.

(3) Further, the Taxpayer has not been shown to be the owner of the Goods.

(4) Having considered the facts of the particular case BR decided to apply its policy to refuse restoration as there were no exceptional reasons to disapply it having regard to all the circumstances.

69. Accordingly, the appeal must be dismissed.

70. It was irrelevant whether or not the goods were personal effects within the meaning of Article 57 of Commission Regulation 865/2006 as that went to the legality of the seizure.

## **Discussion**

### *Introduction*

5 71. We set out at the start of this Decision our view of the issue and some questions relevant to deciding the case.

72. As noted above the essential issue in this case is whether the decision not to restore the Goods is one that could not reasonably have been arrived at by a properly instructed decision maker. In other words, is the decision outside the range of possible reasonable decisions. It does not matter whether or not we would have reached the same decision rather the question is whether broadly the decision not to restore the goods is within “Wednesbury Reasonableness”.

73. We consider this raises a number of questions (including the following) which need to be considered to reach a decision on this appeal.

15 (1) Can the Tribunal consider the legality of the seizure?

(2) Is the Seizure to be treated as lawful?

(3) If as a result of the legislation the legality of the Seizure is not a matter for the Tribunal but for condemnation proceedings are the Goods to be treated as illegally imported into the UK in the Tribunal’s and Review Officer’s deliberations?

20 (4) If Yes are there any exceptional circumstances here?

(5) If the Goods are to be treated as duly condemned is the decision not to restore the Goods within the range of possible reasonable decisions that a decision maker could reach?

25 (6) Was the decision not to restore done in a way that raises issues that are within the Tribunal’s jurisdiction?

74. Before turning to consider these questions we need to note the important guidance to the tribunal that was given in *HMRC v Lawrence Jones and Joan Jones* [2011] EWCA Civ 824. That case concerned an application for the restoration of a car and the goods that the authorities had seized. The issue on the appeal was did the first Tier Tribunal (“the FTT”) err in law in allowing the respondents’ appeal from the HMRC review decision on the basis of its finding that the respondents were importing the goods for their own use? HMRC’s case was that the FTT made a fundamental legal error on the limits of its appellate jurisdiction. HMRC relied principally on deeming provisions in the 1979 Act (CEMA Schedule 3 Paragraph 5). The Court of Appeal agreed with HMRC that the decision on the basis of her own use could not stand as it was outwith the FTT’s jurisdiction.

75. The same provisions are engaged here. Accordingly it is important to understand what the FTT is and is not empowered to do in this context.

76. Lord Justice Mummery (with whom Lord Justice Moore-Bick and Lord Justice Jackson agreed) summed up the position in *Jones* as follows:

40 77. “... 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”.

78. This is binding on us and tell us that the legality or otherwise of the importation is not a matter which we can consider and/or in respect of which we have jurisdiction. In essence we have to start from the position that the Goods were illegally imported and consider whether on that basis the decision to refuse restoration was within the range of possible reasonable decisions. It is irrelevant in these proceedings on that basis whether or not the Goods were personal effects and should not have been seized.

79. His Lordship then made the following remarks with which we respectfully agree. These remarks expand on the summing up but they are an important guide for us in this case and so we set them out for convenience here. We have carefully considered these remarks and adopt them for the purposes of this decision.

80. “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.

5 (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.

10 (8) The tentative obiter dicta of Buxton LJ in *Gascoyne* on the possible impact of the Convention on the interpretation and application of the 1979 Act procedures and the potential application of the abuse of process doctrine do not prevent this court from reaching the above conclusions. That case is not binding authority for the proposition that paragraph 5 of Schedule 3 is ineffective as infringing Article 1 of the First Protocol or Article 6 where it is not an abuse to reopen the condemnation issue; nor is it binding authority for the propositions that paragraph 5 should be construed other than according to its clear terms, or that it should be disapplied judicially, or that the respondents are entitled to argue in the tribunal that the goods ought not to be condemned as forfeited.

15 (9) It is fortunate that Buxton LJ flagged up potential Convention concerns on Article 1 of the First Protocol and Article 6, which the court in *Gora* did not expressly address, and also considered the doctrine of abuse of process. The Convention concerns expressed in *Gascoyne* are allayed once it has been appreciated, with the benefit of the full argument on the 1979 Act, that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner.

20 (10) As for the doctrine of abuse of process, it prevents the owner from litigating a particular issue about the goods otherwise than in the allocated court, but strictly speaking it is unnecessary to have recourse to that common law doctrine in this case, because, according to its own terms, the 1979 Act itself stipulates a deemed state of affairs which the FTT had no power to contradict and the respondents were not entitled to contest. The deeming does not offend against the Convention, because it will only arise if the owner has not taken the available option of challenging the legality of the seizure in the allocated forum".

25 81. The Court of Appeal makes it plain beyond peradventure that this Tribunal has to start from the premise that the Goods were illegally imported goods in what it says in the decision in *Jones*. This is the position from which we start in this decision.

30 82. The Court of Appeal tells us that the question as to whether or not the goods in *Jones* were for personal use was not a matter that the Tribunal could address as it went to the legality of the seizure. This was not in breach of the Human Rights Act and related matters. We see no difference between personal use and personal effects in this context. Accordingly, whether or not the Goods were personal effects is not a matter within our purview.

35 83. On that basis the question whether the Goods were personal effects is not something that we have jurisdiction to consider. The position is the same as in *Jones* where the issue whether the goods there were for personal use which was not for the FTT. Accordingly, whether the Goods were personal effects or not is of academic interest in this case. It is not considered further in this decision.

40 45 50 *Can the Tribunal consider the legality of the seizure?*

84. On the basis of the guidance given in *Jones* the Tribunal cannot consider the legality of the seizure.

85. Accordingly, we have not considered whether the Goods might be thought of as personal effects such that their seizure was unlawful as we have no jurisdiction to do so.

5 *Is the Seizure to be treated as lawful?*

86. On the basis of the guidance given in *Jones* the Seizure is to be treated as lawful.

Accordingly we treat the seizure as lawful. Its legality cannot be challenged.

10 *If as a result of the legislation the legality of the Seizure is not a matter for the Tribunal but for condemnation proceedings are the Goods to be treated as illegally imported into the UK in the Tribunal's and Review Officer's deliberations?*

87. On the basis of the guidance given in *Jones* the Goods are to be treated as illegally imported into the UK in the Tribunal's and Review Officer's deliberations.

88. The Goods are therefore to be treated as illegally imported in our deliberations in respect of this appeal.

15 *If Yes are there any exceptional circumstances here?*

89. There are no special circumstances here in our view.

*If the Goods are to be treated as duly condemned is the decision not to restore the Goods within the range of possible reasonable decisions that a decision maker could reach?*

20 90. As the goods are to be treated as illegally imported the decision could be said to be within the range of possible reasonable decisions not to restore the goods.

91. It is only "... where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it..." that the tribunal can intervene in the decision.

25 92. Whilst we might not necessarily have reached the same conclusion it has not been shown that the decision not to restore was outside the range of possible reasonable decisions.

93. The Goods are to be treated as illegally imported (see CEMA and *Jones*). It is not unreasonable of itself not to restore illegally imported items.

30 94. Whether the Goods were personal effects does not change the position for the Tribunal as personal use did not change the position in *Jones* in the Court of Appeal. Something more fundamental would be needed to allow intervention. This was likely to be something subject to Judicial Review which is outside our purview.

*Was the decision not to restore done in a way that raises issues that are within the Tribunal's jurisdiction?*

35 95. There is nothing in the evidence before us to show that the decision not to restore was taken in a way that raises issues within our jurisdiction.

96. To the extent we can we find this is a matter of fact.

*General*

40 97. We do not consider that the Tribunal has sufficient jurisdiction to determine the legality of the Seizure of the Goods, on either of the bases urged on us by the Taxpayer, despite Dr Metcalfe's valiant attempts.

98. We consider that a genuine choice had been made by the Taxpayer not to pursue condemnation proceedings. The deeming provision therefore applies.

99. We do not consider the matter here was solely one of law. It is better viewed as a matter of mixed law and fact.

45 100. Whilst we are sympathetic to the Taxpayer's position the Tribunal does not have jurisdiction to correct this.

101. The decision not to restore was not outside the range of reasonable decisions that could be reached by a reasonable decision maker.

**Conclusion**

50 102. We have found that:

- (1) The Goods are to be treated as duly condemned as forfeit and illegally imported;
- (2) The decision not to restore the Goods has not been shown to be outside the range of possible reasonable decisions;
- (3) The Court of Appeal decision in *Jones* tells us that we cannot consider the legality of the seizure and nor issues such as personal use which would include personal effects;
- (4) That decision also tells us that the legislation is Human Rights Act and related matters compliant;
- (5) The decision in *Jones* is binding on us as we readily recognise and we have sought to follow the guidance helpfully laid down by the Court of Appeal in that case.

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103. Accordingly, as the decision not to restore has not been shown to be outside the range of possible reasonable decisions the appeal is dismissed.

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104. We note that this is another example of the infelicities that can arise concerning the interaction of section 16 FA 1994 and condemnation proceedings. This is not a clear and transparent area of law which is readily intelligible to those of many years of experience in the tax field let alone members of the public.

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105. 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.

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**ADRIAN SHIPWRIGHT  
TRIBUNAL JUDGE**

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**RELEASE DATE: 13 January 2014**

