TC03357

Appeal number: TC/2012/10981

Excise duty – seized goods – restoration – application to strike out parts of appeal based on alleged non-compliance with Article 6 ECHR and allegations of unlawfulness of seizure – Jones and other authorities considered – application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

IAN FAIRCLOUGH MARKETING LIMITED **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: **JUDGE KEVIN POOLE**

Sitting in public at 45 Bedford Square, London, on 11 December 2013

Geraint Jones QC, instructed by Rainer Hughes, for the Appellant

Eleni Mitrophanous of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal relates to HMRC's refusal to restore a large quantity of mixed wine to the Appellant, following its seizure by HMRC on 13 April 2012 from the premises of a business known as "Musgrave Market Place" in Belfast, a customer of the Appellant.

2. On 20 August 2012, HMRC refused an application for restoration, essentially on the grounds that no evidence had been produced that excise duty had been paid on the goods.

3. On 8 November 2012, HMRC issued a formal review of that decision. The review upheld the decision not to restore, but on different grounds, essentially that the Appellant had not properly identified and established its ownership of the goods it sought to have restored to it.

4. The Appellant appealed to the Tribunal against HMRC's refusal to restore the goods to it.

5. This decision relates to an application by HMRC to strike out certain grounds of appeal set out in the Notice of Appeal. The grounds in question relate, broadly, to issues arising under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") and to the matter of whether the alleged unlawfulness of the seizure can be taken into account in the restoration appeal.

The facts

6. I was provided with only the sketchiest outline of the facts, because the argument before me was essentially a legal one. The facts that I am able to ascertain are essentially only those that can be gleaned from the correspondence included in the bundle provided to me for the hearing.

7. It appears that a seizure took place on 13 April 2012 of 59,603.25 litres of mixed wine from premises known as "Musgrove Marketplace" in Belfast. I was not provided with any copy of a formal notice of seizure, simply a copy of a letter dated 25 April 2012 from HMRC to "Musgrave Group" of Cork, Republic of Ireland, headed "Notice of Seizure", which contained the statement "I am writing to confirm the seizure of 59603.25 litres of mixed wine on 13th April 2012. Schedule A attached provides a breakdown of the goods seized by product, total number of cases and total litres." The letter then went on to specify the legislation under which the wine had been seized, essentially for non-payment of excise duty.

8. There appears to have been a response by Musgrave Group ("MGL"), a copy of which was not included in my bundle. HMRC wrote again to them on 10 May 2012, specifically in reply to a letter from MGL dated 30 April 2012, supposedly enclosing an "amended Notice of Seizure" in a reduced amount of 59,477.25 litres,

apparently to adjust for some wine that was acknowledged as not being liable to seizure. This letter went on to re-assert the same legal basis for seizure as before, stating that there appeared to be no evidence that UK excise duty had been paid on the goods. There was no copy in my bundle of the Notice of Seizure supposedly enclosed with this letter. There was however a schedule, slightly amended from the schedule enclosed with the earlier letter, which listed "Wine seized at Musgrave on 13.4.12", though it had columns of items included within the total 59,477.27 litre figure which were also headed with the dates 18 and 20 April 2012. The letter also referred specifically to the Appellant, in relation to the change from the previous letter, in the following terms:

> "You advised that 9 cases of "Wolf Blass Yellow Label Chardonnay" had not been purchased from Ian Fairclough Marketing (IFM). The 9 cases were initially identified by Musgrave as being part of a supply from IFM. If this isn't the case I would appreciate if you could provide a purchase invoice from your supplier to indicate that they should not be included."

9. From this passage, I infer that HMRC's original seizure had been aimed at goods supplied to MGL by the Appellant, and they were content to exclude and return any items which could be shown not to have originated from that source.

10. The next document in my bundle was a letter dated 28 May 2012 from Rainer Hughes solicitors to HMRC. This letter (which appears to have been sent first by fax) was headed "Re: Ian Fairclough Marketing Limited & Musgrave Marketplace" and said the following:

> "We write to confirm that we seek restoration of to *[sic]* the goods seized by HMRC from Musgrave Market Place.
>
> We confirm that significant delay has occurred in relation to HMRC not providing us with only *[sic]* the seizure notices, and we further confirm that the goods belong to our client.
>
> No request for information had been made of our client and according *[sic]* we request restoration of the goods immediately, failing which an application for Judicial Review shall be made without further notice. There are strict guidelines in relation to detention and seizure.
>
> We look forward to hearing from you shortly.
>
> Yours faithfully"

11. It can be noted that Rainer Hughes did not identify who was "our client" to whom they asserted the goods belonged.

12. It seems however from another document included in the bundle, a letter from Rainer Hughes to Musgrave Marketplace in Belfast dated 12 April 2012, that Rainer Hughes were acting on behalf of the Appellant. That letter (which predated the seizure by one day) asserted that the Appellant had supplied "certain goods" to

"Musgrave Distribution" between 23 March and 27 March 2012; that invoices had been issued in respect of those supplies which remained unpaid; and that the goods in question remained the property of the Appellant until the invoices were paid. The copy invoices enclosed were for different amounts from the invoice totals mentioned in the letter, and a cursory examination of the items listed on the invoices provided shows that there was a significant degree of overlap (but no more than that) between those items and the items listed on the schedules attached to HMRC's letters dated 25 April and 10 May 2012 referred to above.

13. HMRC treated the Rainer Hughes letter dated 28 May 2012 as a request for restoration of the seized goods. They responded by letter dated 20 August 2012, in which they refused restoration. That letter records that, following the seizure,

> "Mr Fairclough of Ian Fairclough Marketing was advised of this seizure by Musgrave Distribution Ltd. Your letter of 28th May states that Mr Fairclough owns some of the seized goods which were delivered to Musgrave Distribution on 23rd and 27th March.
>
> No evidence was, or has been subsequently, produced by Mr Fairclough to show that UK Excise Duty had been paid in relation to the goods."

Later in the same letter, under the heading "My Decision", the writer of the letter said:

> "No evidence was, or has been subsequently, produced to show that UK Excise Duty had been paid in relation to the goods. They were being held for a commercial purpose and large quantities of goods, which duty has not been paid on, are likely to damage legitimate trade.
>
> I conclude that there are no exceptional circumstances that would justify a departure from the Commissioners policy. The excise duty on these goods has not been paid and your due diligence checks were insufficient.
>
> Regrettably, on this occasion the alcohol products will not be restored."

14. By letter dated 28 September 2012, Rainer Hughes requested an independent review of this decision. They did not provide any further evidence or information for the purposes of that review.

15. HMRC issued a formal independent review by letter dated 8 November 2012. In that letter, specific reference was made to the Rainer Hughes letter dated 12 April 2012. It was pointed out that the letter referred to three invoices but only gave two invoice numbers. The values given for the invoices in the letter were different from the values on the copy invoices themselves. Overall, the letter was said to be "confusing and inaccurate". It was pointed out that despite the general claim of ownership made in the letter, no evidence of ownership had been supplied and no attempt was made to reconcile the differing lists of products on the copy invoices and on HMRC's schedule of goods seized.

16. The letter went on to say:

> "I have attempted to ascertain the details of the goods that you and your representatives consider should be restored from the letters detailed above and from the information supplied to me by my HMRC colleagues.
>
> After examination of all the evidence and information available to me, I was unable to identify the goods that are considered by you as liable to restoration.
>
> ….
>
> **Review conclusion**
>
> You have not provided evidence to demonstrate that you are the owner of the goods in question.
>
> The seized goods can only be restored to their legal owner and as a result I consider that the decision not to restore the goods should be maintained.
>
> If you do obtain evidence to demonstrate that you are the owner of the seized goods you may wish to consider a requesting a second and final Review before progressing the matter to Tribunal…"

17. The Appellant's notice of appeal to the Tribunal was dated 8 December 2012. To the extent it may have been received slightly (at most a day or two) outside the statutory time limit, HMRC made no objection to the delay and I consider it appropriate to give permission for the appeal to proceed notwithstanding any such delay.

The Grounds of Appeal

18. The grounds of appeal attached to the notice of appeal were long and detailed. At the outset, however, it was stated that they boiled down to two bases, "the Article 6 point" and "the unreasonableness point".

19. Part of the grounds of appeal under the "Article 6 point" asserted that the Tribunal should make a reference to the European Court of Human Rights. This argument has been accepted by the Appellant to be unsustainable (no mechanism for such a referral existing) and has been withdrawn.

The Article 6 point

20. The grounds of appeal essentially complain that the nature of the appeal rights under section 16 Finance Act 1994 ("FA 94"), as commonly interpreted, does not comply with the requirements of Article 6 of the ECHR, which requires "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

21. The Appellant accordingly invites the Tribunal to "read down" the appeal rights in section 16(4) FA 94 pursuant to section 3(1) of the Human Rights Act 1998 ("HRA"), which provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with the Convention rights."

22. Its proposed approach to doing so is by "reading section 16(4)(a) to mean that the Tax Tribunal can direct that HMRC's decision shall cease to have effect because it, the Tribunal, substitute *[sic]* its own judgment and decision in respect of the matter under appeal."

The unreasonableness point

23. The grounds given in the grounds of appeal under this heading related to the express wording of the relevant appeal provision (s 16(4) FA 94), whereby the powers of the Tribunal on an appeal of the type involved in this case are sated to 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 certain limited things, those things not including the power for the Tribunal to substitute its own decision for that being appealed against.

24. It was argued in the grounds of appeal that the review officer of HMRC could not reasonably have arrived at the decision to uphold the refusal to restore the goods for a number of stated reasons. HMRC do not object to a number of those stated reasons (by which I do not mean they agree with them, but they accept that they raise matters which may properly be considered by the Tribunal in the context of this appeal). They do however maintain that the Tribunal either has no jurisdiction to consider certain stated grounds or, even if it does, the Appellant has no reasonable prospect of success on those grounds (which should accordingly be struck out).

25. The grounds of appeal to which this application relates are all contained as part of paragraphs 25 and 26 of the grounds of appeal and are as follows:

> "25 …
>
> h. The reviewing officer failed to take into account that the seizure of the goods was unlawful. It was Unlawful in that:
>
> i. No Notice of Seizure was given to the appellant by the Respondent.
>
> j. The respondent has unfairly and unreasonable refused to give the appellant the notice of seizure.
>
> k. Furthermore, the appellant reserves the right to challenge the lawfulness of reasons provided by the respondent for the seizure once respondent provides the notice of seizure to the appellant." *[sic]*

26. By way of explanation of its position, the Appellant went on to say in paragraph 26 of the grounds of appeal:

> "It assists HMRC nothing to refer to *HMRC v Lawrence Jones & Joan Jones [2011] EWCA Civ 824* because the appellant is not seeking a Declaration that the original seizure was unlawful. The appellant is putting its case on the basis that because the original seizure was unlawful (a matter which this Tribunal would have to decide upon, if it is in dispute), it was obviously unreasonable for the Review Officer to leave that unlawfulness out of account in arriving at his conclusion upon the Review."

HMRC's application

27. HMRC delivered their statement of case in a document dated 6 June 2013 and headed "Statement of Case and Notice of Application".

28. In this document, HMRC focused largely on the legal argument underpinning its application for the various grounds of appeal to be struck out.

29. There was also confusion about ownership of the goods in question (MDL having also claimed restoration of them), and largely in relation to that issue HMRC provided the following summary of the facts relating to the seizure in their Statement of Case and Notice of Application (none of which were disputed by the Appellant and therefore we take them, for the purpose of this Application, as being accurate background information):

> "…
>
> 36. On 4th April 2012, Officers of HMRC seized a quantity of wine from BOTL Limited in Northern Ireland on the grounds that it was liable to duty and no duty appeared to have been paid. That wine does not feature in this appeal but may have significance for what followed because it was seized from a customer of the Appellant's customer. BOTL Limited had bought the wine from Musgrave Distribution Limited ("MDL"), which is part of a large group based in Ireland which in 2011 made sales of €4.5 billion. MDL had, in turn, purchased the wine from the Appellant. Neither BOTL Limited nor the Appellant have ever produced evidence that duty was paid on the wine seized on 4th April 2012. This seizure raised obvious concerns about this supply chain.
>
> 37. On 12th April 2012, the Appellant's current solicitors (Rainer Hughes) wrote a letter to MDL on behalf of the Appellant stating that the Appellant had supplied "certain goods" (which, according to invoices provided, were different varieties of wine) to MDL on 23rd and 27th March 2012, that is, less than 21 days before the date of the letter. Although it does not say so in terms it is effectively a letter of claim. The letter made the following essential points: first, that MDL had not yet paid for the goods referred to, secondly, that it was a term of the contract between them that the goods referred to remained the property

of the Appellant until payment was made and, thirdly, that the Appellant would sue MDL "unless full pament, in the sum of £197,598.05 is received within 24 hours".

38. As far as HMRC are aware no proceedings have been brought by the Appellant to recover £197,598.05 (plus interest) from MDL. HMRC were not aware of the 12th April 2012 letter until after the Appellant's request for restoration on 28th May 2012, indeed, from the time of seizure until the time of writing, MDL are claiming ownership of the Goods.

39. The day after the letter was written, on 13th April 2012, Officers of HMRC attended MDL and seized the Goods, 59,477.25 litres of mixed wine, on the grounds that they were liable to duty and duty had not been paid on them. To date there has been no proof of duty payment, no reason advanced as to why the Goods may not be liable to duty and no duty paid. The excise duty due on the Goods is estimated to be £150,709.40.

40. MDL did not seek condemnation proceedings within the one month required by paragraph 3 of Schedule 3 of CEMA and consequently paragraph 5 of that Schedule operated to deem the Goods "duly condemned forfeited", on 13th May 2012.

41. On 24th May 2012, (that is, after the Goods had been condemned), MDL (through its representatives, PricewaterhouseCoopers Legal LLP) wrote to HMRC asking that condemnation proceedings be commenced. HMRC responded that as the Goods had already been condemned it was not possible to commence condemnation proceedings.

42. On 28th May 2012, Rainer Hughes acting for the Appellant wrote to HMRC on *[sic]* requesting restoration of the Goods.

43. On 31st May 2012, PricewaterhouseCoopers Legal LLP wrote to HMRC behalf of MDL seeking restoration of the Goods. For the avoidance of doubt, each restoration request sought restoration of the same Goods, 59,477.25 litres of mixed wine.

44. On 29th June 2012, HMRC refused MDL's request for restoration.

45. On 20th August 2012, HMRC refused the Appellant's request for restoration and on the same day MDL asked for a review of the decision on restoration.

46. On 21st September 2012, HMRC reviewed the MDL refusal decision and upheld it.

47. On 28th September 2012, the Appellant sought a review of the decision refusing restoration.

48. On 19th October 2012, MDL completed and lodged a Notice of Appeal in the FTT which, in due course, was allocated to the

Manchester Tribunal Centre with reference **Musgrave Distribution Limited TC/2012/09693** and is currently stayed until 25th June 2013.

49. On 8th November 2012, HMRC reviewed the refusal decision in respect of the Appellant and upheld it (largely on the basis that no or no sufficient evidence had been provided that the Appellant owned the goods at the time of seizure).

50. On 8th December 2012, the Appellant completed the Notice of Appeal in these proceedings."

30. MDL, in November 2012, withdrew its appeal against HMRC's refusal to restore the seized goods to it. I was not informed of the basis upon which it had done so, and in particular I am not aware of any statement made by it as to the ownership of the goods in question. I assume therefore that there is no evidence from that source as to the true ownership of the seized goods.

31. HMRC's application to strike out the relevant parts of the grounds of appeal was also contained in this document. The basis of the application was essentially that, either (a) the Tribunal had no jurisdiction to consider the relevant arguments (so that the appeal, insofar as it related to those arguments, should be struck out under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Procedure Rules")) or that (b) there was no reasonable prospect of the appeal, so far as it relied on the relevant arguments, succeeding and therefore it should be struck out under rule 8(3)(c) of the Procedure Rules.

32. Against this background, the hearing of the application therefore was concerned with a consideration of the legal merits of the "Article 6 point" and the "Unreasonableness point", and of whether (a) the Tribunal had jurisdiction to consider them, and (b) if it did, whether there was any reasonable prospect of them succeeding.

33. Both parties put forward their case on the basis that if I found as a matter of law that the Tribunal has no jurisdiction to consider the relevant arguments, or that those arguments had no reasonable prospect of succeeding, then the application must be granted.

34. As this is an application to strike out, the burden lies on HMRC to satisfy me that it should be granted, i.e. that based on the undisputed facts, their legal arguments deliver a "knockout blow" to the relevant parts of the Appellant's claim.

The law

35. Extracts from the relevant legislation are set out in the Schedule annexed to this decision. Various cases were referred to by the parties (mainly the Appellant), the most relevant of which are referred to below.

Arguments of the parties

36. Because the Appellant had set out much of its legal argument on the contested points in its grounds of appeal, and HMRC had set out much of their legal argument

on them in their Statement of Case and Notice of Application (to which the Appellant had delivered a written "Response and Skeleton Argument" dated 17 June 2013, as well as a further, different, skeleton argument dated 11 December 2013 which was left on my desk before the hearing but not referred to at it), the legal issues had already been largely identified before the hearing. Rather than summarise the respective arguments of the parties at the hearing, therefore, it is more appropriate to summarise the overall case put on each side, by reference to the two issues involved.

The Article 6 point

37. The parties agreed that the Appellant's rights in relation to restoration of goods which arguably belonged to it amounted to "civil rights" within the meaning of Article 6 of the ECHR ("Article 6"). There was some suggestion that the nature of the seizure provisions amounted to a criminal penalty (under the principle set out in *Jussila v Finland* [2007] 45 E.H.R.R. 39) so as to bring them within the "criminal" head of Article 6, but Mr Jones did not assert that any particular consequences flowed from that point for the purposes of this application; his criticism of the UK appeal provisions was that they failed to provide a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (a requirement of Article 6 in relation to both civil and criminal matters).

38. The essence of Mr Jones' argument was that the appeal provisions in relation to restoration of goods following seizure, "if limited as usually construed by the Tribunal", did not comply with Article 6.

39. He pointed out that restoration was the only remedy available under the appeal provisions as a whole if the right of forfeiture (a remedy *in rem*) had been validly exercised by HMRC. In a situation where the owner of goods might therefore be seeking restoration of his goods in the face of a valid forfeiture of those goods by reason of the acts or defaults of a third party, Article 6 required that there should be a "full" right of appeal and the right of appeal contained in s 16 FA 94 (as commonly interpreted) did not comply with that requirement.

40. Mr Jones referred to a number of cases.

41. First, he referred to *R (Alconbury Developments Limited and others) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295. That case involved decisions of the Secretary of State to determine various planning and other applications. The House of Lords held that although the Secretary of State was not himself an independent and impartial tribunal, decisions taken by him were not incompatible with Article 6(1) provided they were subject to review by an independent and impartial tribunal which had full jurisdiction to deal with the case as the nature of the decision required; that when the decision at issue was one of administrative policy the reviewing body was not required to have full power to redetermine the merits of the decision and any review by a court of the merits of such a policy decision taken by a minister answerable to Parliament and ultimately to the electorate would be profoundly undemocratic; that the power of the High Court in judicial review proceedings to review the legality of the decision and the procedures

followed was sufficient to ensure compatibility with Article 6(1) and that, accordingly, the impugned powers of the Secretary of State were not incompatible with Article 6(1).

42. He then went on to refer to *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430, a case concerned with the appeal rights of individuals in dispute with the local housing authority about whether accommodation offered to them is suitable. Mr Jones referred to a particular passage in the judgment of Lord Hoffman, where he said (at [42]):

> "A finding of fact in this context seems to me very different from the findings of fact which have to be made by central or local government officials in the course of carrying out regulatory functions (such as licensing or granting planning permission) or administering schemes of social welfare such as Part VII [of the Housing Act 1996]. The rule of law rightly requires that certain decisions, of which the paradigm examples are findings of breaches of the criminal law and adjudications as to private rights, should be entrusted to the judicial branch of government. This basic principle does not yield to utilitarian arguments that it would be cheaper or more efficient to have these matters decided by administrators. Nor is the possibility of an appeal sufficient to compensate for lack of independence and impartiality on the part of the primary decision maker…"

43. Mr Jones' interpretation of the words "in this context" at the start of this passage was that they referred to social housing landlords. I cannot agree. The relevant passage was part of a consideration by his Lordship of *Bryan v United Kingdom* [1995] 21 EHRR 342, in which the crucial question was whether the appeal rights relating to findings of fact in a planning inspector's decision, which gave rise to potential criminal sanctions for non-compliance, were Article 6 compliant. What his Lordship was referring to as "this context" in the above passage was the *Bryan* situation, in which the relevant part of the appeal against the planning enforcement notice was "closely analogous to a criminal trial". Quite at variance with the submission made by Mr Jones, his Lordship was contrasting that situation (where criminal law liability was potentially at issue) with "findings of fact… by central or local government officials in the course of carrying out regulatory functions… or administering schemes of social welfare"; in the former situation, it was clear to him that such matters should be entrusted to "the judicial branch of government"; in the latter situation, he emphasised that he held a contrary view by going on to say (at [43]) that "utilitarian considerations have their place when it comes to setting up, for example, schemes of regulation or social welfare…"

44. Mr Jones also referred me to another decision of the European Court of Human Rights, *Tsfayo v United Kingdom* [2009] 48 EHRR 18 (decision issued 14 November 2006). In that case, the appellant did not realise that her housing benefit and council tax benefit had expired and she had made a late application for their reinstatement. Her claim (which was dealt with by the council's Housing Benefit and Council Tax Benefit Review Board, including 5 councillors of the council that would have to pay a proportion of the benefit if the appeal was allowed) was rejected on the

basis that no "good cause" had been made out for the appellant's delay in applying for benefit.

45. The ECHR held that the Board was "deciding a simple question of fact, namely whether there was "good cause" for the applicant's delay in making a claim… The HBRB found her explanation to be unconvincing and rejected her claim for back payment of benefit essentially on the basis of their assessment of her credibility." This involved no "specialist expertise"; furthermore, "the HBRB was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute, since it included five councillors from the local authority which would be required to pay the benefit if awarded." Given that judicial review was the only effective route of appeal from the decision of the HBRB, and given the limited scope afforded in judicial review proceedings to attack findings of fact (which were crucial in this case), "there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute. It follows that there has been a violation of art. 6(1)."

46. Mr Jones also referred to various authorities which were relevant to the question of whether or not the Appellant's rights in the present situation were such that they engaged Article 6 at all. As Ms Mitrophanous did not dispute that Article 6 applied I do not consider those authorities further.

47. Mr Jones' essential argument was that any decision about restoration, as it involved the exercise of discretion, would necessarily involve a full consideration of all the underlying facts. If any right of appeal from a restoration decision was to be Article 6 compliant, it therefore needed to include the possibility of forming an independent view on the primary findings of fact upon which the decision rested, including (if necessary) findings of fact which conflicted with the factual basis on which the original seizure rested.

48. In his submission, the Tribunal's power on an appeal against a review decision on a restoration application, as commonly construed by the Tribunal, was limited to a quasi-judicial review power and therefore any reconsideration of the underlying primary facts was precluded (unless it could be shown that no reasonable reviewing officer could have reached the factual conclusions that were reached in any particular case on the basis of the evidence before him in that case). This necessarily meant that the existing appeal rights, as commonly construed, were not Article 6 compliant.

49. Thus, he argued, the Tribunal was obliged by reason of s 3(1) HRA to "read down" the provisions of s 16(4) FA 94 in a way which made it compatible with Article 6. In his submission, this could be done by "reading s 16(4)(a) to mean that the Tax Tribunal can direct that HMRC's decision shall cease to have effect because it, the Tribunal, substitute its own judgement and decision in respect of the matter under appeal."

50. Ms Mitrophanous referred us to the Court of Appeal's well-known decision in *Jones & Jones v HMRC* [2011] EWCA Civ 824. She submitted that *Jones* effectively

knocked Mr Jones' argument on the head, because it clearly stated that the appeal rights in s 16(4) were compliant with Article 6 (at paragraph [71]):

> "71 (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 owners 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 owners. 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.
>
> …
>
> (9) … The Convention concerns expressed in *Gascoyne's* case 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."

51. Mr Jones however invited me to find that the true ratio of *Jones* could be stated thus:

> "Where, by reason of a statutory deeming provision, goods have been condemned as forfeit, the First Tier Tribunal has no jurisdiction, in proceedings between the same parties, to re-open that issue and to decide whether the goods were liable to forfeiture."

52. On that basis, he submitted, the decision in *Jones* could not be taken to support what he described as "the usual stance taken by the Respondents", to the effect that "the First Tier Tribunal must never decide whether a seizure, detention or other decision taken by the Respondents was taken lawfully." To develop this theme, he submitted that the error in HMRC's argument was that they failed to recognise that "the *Jones* decision addresses the jurisdiction of the Tribunal, but in no way circumscribes the issues it may have to consider if they arise for necessary determination ancillary to deciding any given appeal." He went on to explain his point as follows:

> "In other words, the First Tier Tribunal cannot make a declaration that the Respondents have acted unlawfully and thus quash its decision (as could the High Court upon hearing a judicial review application). However, what the First Tier Tribunal can and must do is determine the lawfulness of any given course of conduct if and to the extent that it is a relevant consideration to whether the Respondents acted unreasonably

> when the very jurisdiction of the Tribunal that is being invoked is to consider an appeal on the basis, put forward by an Appellant, that the Respondents acted unreasonably."

53. He gave some examples of the situations he had in mind. He referred to *Wandsworth London Borough Council v Winder* [1984] 3 All ER 976, where a county court had to decide whether a possession action had been pursued by the Council in breach of its public law obligations, when that issue arose in the Defendant's defence to a claim for possession. The impugned decision in that case, he said (the decision to increase the rent) could only have been quashed by the High Court. The House of Lords held however that it was not an abuse of the process of the court for the Defendant to challenge the validity of the rent increases in the context of the possession proceedings.

54. He referred also to *Oxfam v HMRC* [2009] EWHC 3078 (Ch), in which the High Court examined the scope of the First-tier Tribunal's jurisdiction in a matter where the public law doctrine of "legitimate expectation" was being prayed in aid. As a matter of construction, Sales J found that s 83(1)(c) Value Added Tax Act 1994 was sufficiently wide to confer jurisdiction on the First-tier Tribunal to consider the legitimate expectation argument. There was no general doctrine that reserved such arguments exclusively to the higher courts.

55. He referred to other examples, but I do not consider they added materially to his argument and I do not propose to set them out in this decision. His general theme was that whilst the Tribunal may not have the power to make a standalone declaration that HMRC's decision was unlawful, in the context of restoration proceedings there was nothing to prevent it from considering precisely that question (indeed, Article 6 required it to do so).

56. Ms Mitrophanous submitted that, as set out at [50] above, the Court of Appeal in *Jones* had quite clearly stated that the existing appeal structure (the combination of the ability to contest the lawfulness of the seizure in condemnation proceedings and the supervisory appeal jurisdiction in relation to the restoration decision) was Article 6 compliant. This, she said, distinguished the present case from any of the other authorities cited by Mr Jones, and that effectively disposed of the matter.

57. Turning to the second limb of the Article 6 point (the question of "reading down"), Ms Mitrophanous submitted that even if I disagreed with her on the first limb (whether the appeal rights were Convention-compliant), any attempt to "read down" the appeal rights in a case such as this so as to include a full appellate jurisdiction (i.e. the right to substitute the Tribunal's own decision for that of HMRC) was doomed to fail because the briefest of consideration showed that the clear and explicit intention of the primary legislation contained in section 16 FA 94 was to provide only a limited "quasi judicial review" right of appeal in relation to restoration decisions. This could not be more clearly illustrated than by pointing out that Parliament had, immediately following the statement of the limited right of appeal in relation to restoration decisions (in s 16(4)) gone on to set out (in s 16(5)) an express "full appellate" right of appeal in relation to other matters. If the Tribunal sought to "read down" s 16(4) as

Mr Jones asked, it would be flying in the face of a quite clearly expressed Parliamentary intention, which would be going far beyond "reading down"; it would be judicially overriding the clear terms of the statute.

The "unreasonableness" point

58. The essence of Mr Jones' argument under this heading was that it was unreasonable for the reviewing officer to have left out of account the fact that the seizure was unlawful when he made his decision. To maintain this argument, he obviously had to distinguish the present case from *Jones*, which he sought to do essentially on the basis set out at [51] above. He expanded on this as follows in one of his skeleton arguments:

> "What is the Difference between this situation and the **Jones** situation?
>
> 30. The answer is obvious and is spelt out in the judgment of Lord Justice Mummery where he points out that Jones had initially required condemnation proceedings to be commenced but had later withdrawn that requirement so that, pursuant to Schedule 3 CEMA'79 the goods were deemed forfeit. That is why, in the **Jones** case, abuse of process was argued by HMRC when it alleged that Jones was seeking to re-litigate an issue that was already the subject of a final determination in law (albeit a deemed final determination).
>
> 31. It was Jones' case that the Tribunal could decide for itself whether the goods had been liable to forfeiture, notwithstanding the deemed condemnation under the provisions of Schedule 3.
>
> 32. The difference here is that whether or not the goods were condemned in legal proceedings or deemed to be condemned, the nature of the application made to the Respondents (and the appeal therefrom) is quite different. Upon a restoration application the Respondents must take into account all relevant matters which necessarily includes whether the goods were lawfully seized (whether or not that point was taken in condemnation proceedings or whether or not the goods were simply deemed forfeit).
>
> 33. The force of the argument set out in paragraph 32 above is brought home when it is remembered that there may be many instances where goods are lawfully seized and forfeited because of some of *[sic]* defalcation on the part of the haulier, absent any fault on the part of the owner of the goods. In such circumstances the owner of the goods cannot contest that the goods are liable to be condemned but has his remedy by way of an application for a restoration. Upon such an application all relevant circumstances have to be taken into account and thus it would be improper to exclude from consideration the fact, if it is a fact, that goods were seized unlawfully and/or that the owner was not responsible for the defalcation that gave rise to the goods being seized/forfeited.

> 34. This is a case where, if the goods were liable to forfeiture and then condemned, the facts and matters giving rise thereto were outwith the control or culpability of the Appellant, but as condemnation acts *in rem*, that fact would be insufficient to allow the appellant successfully to contest condemnation proceedings, leaving it with the sole remedy of a request for restoration.
>
> 35. The owner of the goods is pursuing a different kind of application, with different appeal rights and in respect of which it is appropriate for all relevant circumstances to be taken into account."

59. Ms Mitrophanous, on the other hand, broadly relied on *Jones* in relation to this point as well, and submitted that Mr Jones' attempts to distinguish it were "mere sophistry".

60. Much of the remaining argument on both sides on this point was in substance simply a repeat of the arguments put forward as to why the existing appeal rights were (or were not) Article 6 compliant. I do not propose to repeat those arguments here.

Discussion and decision

61. I consider there to be no material difference between this case and *Jones*. The Appellant in this case had the opportunity to challenge the lawfulness of the seizure under paragraph 3 of Schedule 3 Customs and Excise Management Act 1979 ("CEMA 79"). The fact that it chose not to do so at all (rather than doing so, and then withdrawing the challenge, as in *Jones*) makes no difference to the analysis. The Court of Appeal has clearly said in *Jones* (at [71(6)]) that:

> "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 owners were entitled to under the 1979 Act to challenge in court, in accordance with Convention-compliant legal procedures, the legality of the seizure of their goods… 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."

62. Mr Jones seeks to persuade me that *Jones* does not apply to the present facts, when properly understood. I fear that even if his interpretation of the ratio in *Jones* set out at [51] above were accepted, it would still not support his argument. The statutory scheme permits "any person claiming that any thing seized as liable is not so liable" to contest the seizure (paragraph 3 of Schedule 3 CEMA 79). By its failure to contest the lawfulness of the seizure, this Appellant must be taken to have accepted that it is not able to contest that issue in restoration proceedings before the Tribunal. Mr Jones' exposition of that argument at [58] above (whether considered in the context of the "Article 6 point" or in the context of the "Unreasonableness point") is in my view flawed. I say this because it does not recognise that an entirely innocent owner of the goods has no need to assert the unlawfulness of the seizure in restoration proceedings – under the statutory scheme, an innocent owner is at liberty to contest the validity of the seizure (in which case he should do so through condemnation

proceedings) but if he accepts that the seizure was lawful but can demonstrate that no fault attaches to him for the facts that made it so, then he will have a strong case in restoration proceedings, to which nothing would be added by seeking to challenge the lawfulness of the seizure in those proceedings.

63. I therefore find that the remedies available to the Appellant in this case, taken overall, were Article 6 compliant. There is therefore no necessity to "read down" the appeal provisions contained in s 16(4) FA 94 under s 3 HRA 1998.

64. I further find that even if a "reading down" exercise were warranted, the terms of s 16(4) are so clearly limited to what could be called a "quasi-judicial review" that they could not be interpreted in the way Mr Jones contends.

65. Under both the limbs of the "Article 6 point" as put to the Tribunal by the Appellant, therefore, I find it is doomed to fail. It follows that I consider HMRC have established that there is no reasonable prospect of that part of the appeal succeeding and therefore I have the power to strike it out. I can see no good reason why I should not do so. Whilst Mr Jones indicated it would take him "two or three days" to argue the matter fully and it might therefore be said that I should exercise my discretion so as to permit him to do so, that would not in my view be an appropriate exercise of my discretion. The Appellant was fully aware of the nature of the challenge facing it at this hearing and I am entitled to assume that it has put forward its best case in response to it. The case put forward falls a good deal short of what is necessary to persuade me that the Appellant should have the opportunity to develop its arguments under this head at any greater length than it has already done.

66. Turning to the "unreasonableness" point, this is based on an assertion that the seizure was unlawful (and various reasons are stated in support of that assertion).

67. For the reasons most clearly set out in the decision in *Jones* and rehearsed above, I find that the Tribunal has no jurisdiction to review, as part of its examination of the decision not to restore the goods, the lawfulness of the original seizure, however that review might be dressed up. The legislation sets out a clear process for contesting the legality of the seizure and the Appellant, in spite of having the right to avail itself of that procedure, has chosen not to do so. The result is that paragraph 5 of Schedule 3 CEMA 79 deems the goods to have been duly condemned as forfeit; and that deeming, in the words of Mummery LJ in *Jones*, "carries with it any fact that forms part of the conclusion".

68. So what facts "form part of the conclusion" in this case? Whilst the review letter dated 8 November 2012 focuses almost exclusively on the question of identification and ownership of the goods for which restoration was being claimed, it had already been made clear in HMRC's letter dated 20 August 2012 to the Appellant's solicitors that the goods had been seized under "Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 [HMDP] because they were held for a commercial purpose and UK excise duty had not been paid on them".

69. It is clear, therefore, that the facts forming part of the conclusion in the present case are that excise duty which was due on the goods had not been paid. The Tribunal, in considering the matter of restoration, cannot contradict those facts (which could have been contested, if the Appellant wished, in the context of condemnation proceedings). To put it another way (as was stated in *Jones* at [71(5)]):

> "The deeming process limited the scope of the issues that the owners 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 owners argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court… In brief, the deemed effect of the owners' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the owners for commercial use."

70. It follows that I consider the Tribunal has no jurisdiction to consider the appeal insofar as it is based on an assertion that the seizure was unlawful.

71. Under Rule 8(2)(a) of the Tribunal's Procedure Rules, therefore, I am required to strike out the appeal to that extent, unless I exercise my power under rule 5(3)(k)(i) to transfer the relevant part of the appeal to another tribunal which has such jurisdiction. Neither party identified any such alternative tribunal or asserted that the power in rule 5(3)(k)(i) had in fact arisen. I do not consider there to be any such tribunal, indeed it would be in conflict with the express terms of the legislation; and additionally as the power in rule 5(3)(k)(i) only arises where there has been a relevant "change of circumstances since the proceedings were started" (and I find there to have been no such change in this case), I do not consider that rule to be in point at all.

72. I must therefore grant HMRC's application to strike out paragraphs 25(h) to (k) and 26 of the Grounds of Appeal as set out at [25] and [26] above.

73. It can readily be seen that the effect of the "deeming provision" in paragraph 5 of Schedule 3 to CEMA 79, as explained in *Jones*, will have different effects in different circumstances. In the present case, for example, it will have no effect on the Appellant's ability to prove its ownership of the goods as part of an argument for their restoration, as the lack of ownership of the goods was not the basis of their seizure and therefore there is no possibility that the goods will be "deemed" not to belong to the Appellant. In a "routine" smuggling case involving non-declaration of non-excise goods above the permitted limit (currently £390), failure to contest the seizure will result in the limit having been deemed to have been exceeded, but that will not prevent the appellant in restoration proceedings from arguing that, for example, the goods in question were only worth slightly above the limit and therefore non-restoration would be disproportionate (compared to alternatives, such as restoration on payment of the duty and a penalty).

Summary

74. I find that the appeal rights which were available to the Appellant were Article 6 compliant (see [63] above).

75. Even if they were not, I find that it would not be permissible for the Tribunal to "read down" the existing appeal rights as contended by the Appellant in a way which would confer a full appellate jurisdiction on the Tribunal in the context of this appeal (see [64] above).

76. I therefore consider the appeal to have no reasonable prospect of success insofar as it is based on the "Article 6 point"; and consider it appropriate to exercise the discretion conferred on me to strike out the grounds of appeal which relate to that point (see [65] above).

77. I find that the effect of the deeming provisions contained in paragraph 5 of Schedule 3 to CEMA 79, as explained by the Court of Appeal in *Jones*, is to preclude the Appellant from arguing before the Tribunal as part of its non-restoration appeal, that the original seizure of the goods by HMRC was unlawful (see [70] above).

78. I therefore consider the Tribunal has no jurisdiction to hear the appeal, insofar as it is based on an assertion that the seizure was unlawful. In the absence of any power to transfer that part of the appeal to another tribunal with jurisdiction, I must therefore strike out that part of the appeal (see [71] above).

79. HMRC's application is therefore granted. Paragraphs 2 to 24 (inclusive), 25(h) to (k) inclusive and 26 of the Grounds of Appeal, and the appeal itself (insofar as it arises from those paragraphs) are hereby STRUCK OUT.

80. I direct HMRC to deliver an amended statement of case, to address the grounds of appeal as so amended, to the Appellant and the Tribunal so as to be received by both of them within 42 days of the date of release of this decision. Upon receipt of the amended statement of case, further directions will be given for the disposal of the remainder of the appeal.

81. 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: 28 February 2014

Schedule

Key Legislation

Customs & Excise Management Act 1979

139. Provisions as to detention, seizure and condemnation of goods, etc

(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer…

…

(6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the customs and excise Acts.

…

152. Powers of Commissioners to mitigate penalties, etc

The Commissioners may, as they see fit –

(a) …

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under [the customs and excise Acts]…

Schedule 3

…

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.

…

5. If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, … the thing in question shall be deemed to have been duly condemned as forfeit.

Finance Act 1994

16. Appeals to a tribunal

…

(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 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) 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.

[Note: it is common ground that the decision the subject of this appeal is a decision as to an "ancillary matter" for the purposes of the above provisions]

Human Rights Act 1998

3. Interpretation of legislation

(1) Insofar as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights.

(2) This section –

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Schedule 1 – The Articles

Part I – The Convention

RIGHTS AND FREEDOMS

….

Right to a fair trial

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…..

…

Part II – the First Protocol

Protection of property

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

…

8. Striking out a party's case

(1) …

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal –

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Tribunal may strike out the whole or part of the proceedings if –

(a) …

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."