



TC05963

Appeal number: TC/2014/05088

CUSTOMS DUTY – restoration – seizure of jewellery – whether decision not to restore as amended by subsequent decision to restore subject to conditions was reasonable – no – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RIDA ZAHRA

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE ASHLEY GREENBANK
PAUL ADAMS**

Sitting in public at Birmingham on 23 March 2017

Mr Zaman Khan, father of the Appellant, for the Appellant

Henry Skudra, counsel, for the Respondent

DECISION

- 5 1. The Appellant, Ms Rida Zahra, appeals against a formal internal review decision of the Respondent, the Director of Border Revenue, initially issued on 21 August 2014 and subsequently amended on 28 August 2015.

Background and facts relating to the dispute

- 10 2. The proceedings (and the earlier proceedings under reference TC/2013/07145) are part of a long running saga which began on 30 May 2013, when the Appellant, who was travelling with her mother, was stopped at Birmingham International Airport on her return from Pakistan. Six items of gold jewellery, comprising four gold bangles and two chains (one of which bore the name “Rida”), were seized from her as liable to forfeiture.

- 15 3. The Appellant did not contest the legality of the seizure within the one month period allowed for appeals, but she did request restoration of the seized goods in a letter dated 7 June 2013. In a letter dated 17 July 2013, the Respondent refused restoration of the seized goods on the grounds that it was not the Border Force’s policy to restore seized goods other than in “exceptional circumstances” and there were no exceptional circumstances in this case.

- 20 4. The Appellant requested a review of the decision in a letter dated 8 August 2013. That letter made a number of representations including:

- 25 (1) that the jewellery had been in the family’s possession for over 20 years;
(2) that the Appellant and her mother had therefore assumed that they did not need to declare the jewellery when they entered the UK;
(3) that the seizure officer had refused to listen to the Appellant’s mother’s explanation of the provenance of the jewellery and had on two occasions threatened to arrest her; and
(4) that the jewellery had been taken to Pakistan on previous trips.

30 The letter included photographs showing the items of jewellery being worn by the Appellant and members of her family before the trip to Pakistan.

- 35 5. In a statutory review letter issued on 18 September 2013, the Respondent confirmed the decision not to restore the seized jewellery. In that review letter, the review officer, Mr Brian Rayden, gave the following reasons for refusing to restore the jewellery:

- (1) The Appellant had entered into the Green “Nothing to Declare” channel without having declared the goods.
(2) The Appellant was questioned by a uniformed Border Force officer and was evasive about where the jewellery had been obtained.

(3) The Appellant was wearing the jewellery when passing through customs controls and that was a common ploy used by smugglers.

(4) There were no reasons for disapplying the Border Force policy not to return seized goods and no exceptional circumstances justifying a deviation from that policy.

(5) Although the Appellant had claimed that she and members of her family had owned the jewellery for 20 years and provided photographs to demonstrate this, that claim was at odds with the statements made to the Border Force officer that the jewellery had been obtained in Pakistan and had already been smuggled into the UK on a previous occasion or occasions.

6. The Appellant appealed against the outcome of the review. The Respondent applied for the appeal to be struck out. The application was heard by the Tribunal on 2 May 2014. By a decision issued on 27 May 2014, the Tribunal refused the application to strike out the proceedings.

7. Following that decision, the Respondent undertook a further review of the original decision. On 21 August 2014, the Respondent issued a further review decision which again refused to restore the jewellery. In that letter, the review officer, Mrs Helen Perkins, reviewed the evidence that had been provided by the Appellant but again concluded that there were no exceptional circumstances that would justify restoration of the jewellery. In addition to the points made in Mr Rayden's letter of 18 September 2013, she made the following points:

(1) she did not take into account the Appellant's complaints about the legality and correctness of the seizure itself as the jewellery was deemed to subject to forfeiture;

(2) if the jewellery had been brought into the UK as personal effects at the time at which the Appellant and her mother became resident in the UK, and even if a relevant relief would have applied, it should have been declared to Customs at the time and there was no evidence that this had been done;

(3) having taken into account the representations made in relation to the provenance of the jewellery and its cultural significance, she noted that it did not absolve individuals from their obligations to declare goods that were liable to duty; questioned why the Appellant and her mother had not sought advice in advance of their trip; and concluded, in the light of the answers given to the seizure officer that their actions were "a deliberate attempt to deceive the Officer".

8. The Appellant appealed to the Tribunal against this new decision and commenced the present proceedings. Her notice of appeal was received by the Tribunal on 18 September 2014.

9. There followed a series of correspondence between the parties and the Tribunal together with the issue of case management directions by the Tribunal in preparation for a hearing in relation to the 21 August 2014 decision.

10. On 28 August 2015, the Respondent wrote again to the Appellant. In that letter, the review officer, again Mrs Perkins, agreed to restore the jewellery subject to the payment of a fee. The letter stated:

5 “Further to a revision of policy guidance within the Border Force, I have revisited the original decision dated 21 August 2014, not to restore your seize to jewellery, and conclude exceptionally, that the original decision should be varied to one of restoration for a fee.

10 The jewellery should be restored to you for a fee of £990.00.

 The fee is based on UK duty and VAT due on the seized goods plus an additional amount to reflect a penalty. Therefore the calculations are as follows:

15 Value of goods = £3,000
 £3,000 x 2½% (Duty) = **£75.00**
 £3000 + £75.00 = £3,075
 20% (VAT) on £3075 = **£615 (VAT)**
 10% of the purchase price (abroad) = **£300 (penalty)**
20 Amount due to BF = £75.00 + £615.00 +£300.00 = **£990**

 I consider this decision to be both reasonable and proportionate in all the circumstances. If you wish to accept my decision, I invite you to withdraw your Tribunal appeal.”

25 11. The letter gave no further explanation for the change of policy and gave no basis for the calculation of the penalty. (The fee was subsequently reduced to £970.20 to reflect an agreed adjustment to the weight of the jewellery.)

30 12. This letter was followed by some communications between the Appellant’s father and the Tribunal. On 29 September 2015, the Tribunal received a letter dated 25 September 2015 from the Appellant’s father in which he stated: “My daughter, Rida Zahra, has reluctantly decided to withdraw her appeal”. The reason given was that the “stress is too much for her and her mother and is the only reason for the withdrawal. She still maintains her innocence.” He went on to make various complaints about the conduct of the matter by the Respondent, from which it was clear that the Appellant’s family continued to harbour a real grievance about the decision.

40 13. On the same date (25 September 2015), the Appellant’s father wrote the Respondent expressing great dissatisfaction with the stance taken and making various points as to why he still considered the revised decision to be unfair, but that the “never ending mental torture” had driven the Appellant and her mother reluctantly to pay the restoration fee and withdraw the appeal.

14. On 7 October 2015, the Tribunal wrote to the parties notifying them formally under rule 17 of the Tribunal Procedure (First-Tier Tribunal)(Tax Chamber) Rules 2009 of the Appellant’s withdrawal of her appeal and informing her that she had the right to apply for the appeal to be reinstated within 28 days.

15. On collecting the jewellery pursuant to that arrangement, however, the Appellant found one bangle to be badly damaged. The Appellant raised claims against the Respondent for the damage done to her jewellery. That is not a matter that falls within the jurisdiction of this Tribunal.

5 16. It would appear that, when she found that the jewellery was damaged, the Appellant changed her mind about continuing with the appeal.

17. By a letter dated 30 October 2015 (which was received at the Tribunal on 3 November 2015), the Appellant's father requested the reinstatement of her appeal. The Respondent contested that application.

10 18. The application for reinstatement was heard by the Tribunal on 22 April 2016. The Tribunal (Judge Poole) allowed the application and reinstated the appeal. Judge Poole issued directions on 26 April 2016 which included directions that:

15 "the reinstated appeal should stand as an appeal against the decision issued by the Respondent on 21 August 2014 as subsequently amended on 28 August 2015; and

20 the Respondent should inform the Tribunal and the Appellant in writing no later than 14 days of the release of the directions, whether the Respondent intended voluntarily to call the original officer who seized the jewellery to give evidence at the substantive hearing of the appeal."

The Hearing

25 19. A joint bundle of documents was prepared for the Tribunal. Mr Khan also introduced various other documents as evidence. These documents comprised correspondence between HMRC and the Appellant. We accepted the further documents in evidence.

30 20. The bundle of documents included witness statements from Mrs Helen Perkins, a review officer of Border Force, the Appellant and Mrs Naveda Tabbasum, the Appellant's mother, all of whom gave oral evidence. We also heard oral evidence from Mr Ward Westwater, the UK Border Force Officer who had seized the jewellery.

The Witness Evidence

21. Most of the witness evidence related to the events at Birmingham International Airport on 30 May 2013 leading up to the seizure of the jewellery. We will deal with that evidence first.

35 *Officer Westwater's evidence*

22. Officer Westwater referred to his notes of the interview with the Appellant and her mother at the airport. Those notes are reproduced below with some of the

abbreviations expanded and personal details removed. (In this extract, the abbreviation, “WW” is reference to Officer Westwater and “RZ” to the Appellant.)

30 May 2013	17:00hrs Birmingham Airport Terminal 1, green channel. I stopped [the passenger] I now know as Rida Zahra on UK PPN [number removed] born [date removed] of [address removed] travelling inbound from Pakistan.
WW	Are these your bags?
RZ	Yes
WW	Did you pack them yourself
RZ	Yes
WW	Does everything in the bags belong to you?
RZ	Yes
WW	Are you carrying anything for anyone else today?
RZ	No
WW	Are you aware it is illegal to bring drugs, weapons, firearms or indecent or obscene material into the UK?
RZ	Yes
WW	Do you have any cigarettes or tobaccos
RZ	No
WW	Have you bought any gold or jewellery that you got in Pakistan into the UK today?
RZ	Yes these bangles.
	(At this point [the passenger's] mother interrupted saying you didn't get those in Pakistan. They were a gift)
WW	Madam I am speaking to your daughter you will get a chance to speak in a moment
	I then addressed the daughter
WW	Where did you get the bangles?
RZ	I didn't get them this time
WW	I didn't ask you when you got them I asked where you got them
RZ	Pakistan
WW	How much did they cost?
RZ	I don't know
WW	Where did you buy them
RZ	My aunt gave me this one my uncle gave me that one, I bought these two
	(The mother then interrupted again and spoke to the daughter in their native language)
RZ	My aunt bought me these two my uncle these two
WW	While you were in Pakistan
RZ	No last year
WW	Did you pay the import taxes and duty when you bought them in last year?
RZ	No I wore them
WW	That does not exempt them from taxes

RZ	I didn't know
WW	Where did you get those chains?
RZ	In Pakistan
WW	Did you pay tax or duty on those
RZ	No
WW	These four bangles and the necklace are seized as forfeit to the Crown
	(Goods were placed under customs seal PO1247108 and transferred to the HSL C156, C162, notice i.e. notice 12A issued and explained. Notebook closed.

23. Under cross-examination, Officer Westwater confirmed that this record was an accurate account and had been written a few minutes after the interview with the Appellant and her mother.

5 24. Although Officer Westwater would not give details of the reasons why the Appellant and her mother were stopped by the Border Force, he confirmed that it was not as part of a random check and that the Appellant her mother had been identified for interview by reference to certain indicative factors employed by the Border Force.

10 25. Mr Khan put it to Officer Westwater that certain aspects of the interview had not been handled correctly and, in particular, that the interview had not been conducted in accordance with the Travellers' Charter. Officer Westwater rejected this assertion. He denied that he had threatened to arrest the Appellant's mother at any stage during the interview. He also denied that, after he had seized the jewellery, he had suggested that the Appellant would be able to retrieve the jewellery by paying a small fee.
15 Indeed, Officer Westwater noted that, at the time, it was contrary to UK Border Force policy to restore items that had been seized other than in exceptional circumstances.

The Appellant's evidence

20 26. The Appellant's account of the interview differs from that of Officer Westwater in some material respects. Her account, as extracted from her witness statement, is as shown below. The dialogue is as set out in the witness statement. We have adapted the explanation of the events (shown in brackets) for ease of reading. However, we should stress that the account of the interview in this paragraph is the Appellant's account and does not represent our findings of fact.

25 (In this extract, "WW" is reference to Officer Westwater, "RZ" to the Appellant and "NT" to the Appellant's mother.)

WW: Are these your bags?

RZ: Yes

WW: Did you pack them yourself?

RZ: Yes

30 WW: Does everything in the bag belong to you?

RZ: Yes

WW: Are you carrying anything for anyone else today?

RZ: No

WW: Do you have any cigarettes or tobacco?

RZ: No

5 (At this point, the Appellant says that Officer Westwater asked her and her mother to open their handbags and asked for their passports. Officer Westwater found a toy remote control car in her mother's handbag and checked that. He then asked about the bangles that the Appellant was wearing.)

WW: Where did you get the bangles?

RZ: Pakistan

10 WW: How much did they cost:

RZ: I don't know

WW: Where did you buy them?

RZ: I bought them from Pakistan last time.

15 (The Appellant says that her mother then interrupted to say that the Appellant did not buy the bangles and that they were gift from her aunt and uncle. Officer Westwater then asked her mother to stop speaking, as he was speaking to the Appellant, but her mother continued to explain about the origin of the bangles. The Appellant says that Officer Westwater threatened on two occasions to arrest her mother if she did not stop speaking.)

20

WW: Where did you buy them?

RZ: My aunty gave me these two small bangles and my uncle gave me these two big bangles.

25

(The Appellant says that Officer Westwater asked this question five times and she gave the same answer on each occasion.)

WW: Have you paid tax for these bangles in Pakistan?

30

NT: We don't pay tax in Pakistan.

WW: Can you take out your bangles?

(The Appellant says that she and her mother then gave their bangles to Officer Westwater.)

35

WW: How much did you pay for these bangles?

RZ: My marriage bangles from my husband.

WW: Do you have any more jewellery with you today?

RZ: Yes, in my handbag.

40

(The Appellant took out her jewellery box out and put it in front of Officer Westwater.)

WW: Can you take out which jewellery belongs to you?

45

(The Appellant took out two chains. Officer Westwater returned her mother's bangles, but took the Appellant's four bangles and two chains. He then went to check

the weight of the jewellery. When Officer Westwater returned, the Appellant's father, who was waiting to collect them from the airport, called her mother on her mobile phone. Officer Westwater told the Appellant's mother that she was not allowed to answer the phone. The Appellant says that she told her mother in Urdu not to answer the call, but that as the only occasion during the interview on which she spoke in Urdu and her mother did not speak in Urdu throughout.)

WW: These four bangles and two chains are now seized.

(Officer Westwater put the jewellery in a bag and asked for the Appellant's details. He told the Appellant that he was seizing the jewellery because she had entered through the green lane, had not declared the jewellery and had not paid duty on it. The Appellant's mother asked if they could pay the duty, but Officer Westwater said that they could not do so at this stage. The Appellant says that when Officer Westwater had finished dealing with the paperwork he told the Appellant that, as it was the first occasion on which she had been stopped, she would be able to recover her jewellery by writing a short letter and paying the duty. The Appellant also alleges that Officer Westwater told her that if her mother had not made up a story he would not have seized the bangles.)

27. The Appellant was challenged by counsel for the Respondents as to the time at which the account had been written down in her statement and whether there was a possibility that her account was not as accurate. She said that it had been written in 2016, but that it was accurate. In her words: "We know what happened to us".

The Appellant's mother's evidence

28. The Appellant's mother, Mrs Naveeda Tabbasum, supports her daughter's account of the interview with Officer Westwater.

29. The following additional points arose from the evidence given the Appellant's mother:

(1) The bangles were given to the Appellant by her aunt and uncle in Pakistan on a previous trip as a gift for her wedding in 2010.

(2) The bangles had not been purchased in Pakistan. They were refashioned from the Appellant's mother's wedding bangles from her wedding to her first husband. The Appellant had not known this at the time. Mrs Tabbasum had asked the Appellant's aunt and uncle to give the bangles to her daughter so that her daughter would not know that her mother had provided the gold for her bangles.

(3) Mrs Tabbasum had arrived in the UK for the first time in 2004. It was likely that she was either carrying or wearing the original bangles at that time as they were part of her personal effects. She had not paid duty on them. She was not aware of laws or regulations that might impose restrictions on her bringing personal possessions into the UK.

(4) When her daughter had been questioned by Officer Westwater, it was clear that she was anxious and confused. She did not know the true origin of the bangles at the time. Mrs Tabbasum had attempted to interject to give a fuller explanation.

5 *Mrs Perkins's evidence*

30. Mrs Perkins's witness statement was simply a list of documents put before the Tribunal. However, Mrs Perkins also gave evidence from which the main points were as follows.

10 (1) Mrs Perkins was questioned about the Border Force change in policy pursuant to which, after the initial refusal to restore the jewellery, the Border Force agreed to restore the bangles and chains subject to the payment of duty, VAT and a penalty charged at 10% of the value of the Jewellery. She said that prior to August 2015, the policy of the Border Force had been to refuse to restore goods except in "exceptional circumstances". This policy then changed
15 in relation to items of jewellery to permit restoration for a fee in the case of a first offence. She could not point to a particular reason for the change in policy.

(2) The initial fee of £990 had been reduced because it had been accepted that there was a slight error in the weight of the jewellery on which the original duty had been calculated. The fee was reduced to £970.20.

20 (3) Mrs Perkins was questioned about the calculation of the penalty that was included in the fee. She produced to the Tribunal a schedule which set out the Border Force restoration policy in relation to jewellery. We accepted this document in evidence. The schedule contained a table which is set out in the Appendix to this Decision. In summary, the table provided for a range of
25 penalties based on the amount of the purchase price of the goods. The level of the penalty ranged between 5% and 20% of the purchase price and the level of penalty depended upon the behaviour or conduct of the individual concerned ranging from a 5% penalty where goods were volunteered immediately on entry to 20% where goods were concealed or the individual was a commercial trader.
30 In the Appellant's case, she had been charged a 10% penalty on the grounds that the disclosure had been prompted.

(4) The policy remained not to restore goods in the case of a second offence.

(5) The level of the penalty was the only discretionary element in the restoration fee. The other elements comprised the duty and the VAT.

35 (6) Mrs Perkins confirmed that she had taken into account all information that had been available to her at the time. This included the original report written by Mr Rayden, the directions from the Tribunal Judge, the notes from the officer who had seized the goods as well as the information provided by the Appellant and the Appellant's father.

40 (7) Mrs Perkins also answered questions on how she had determined that the penalty should be set at the level of 10%. She said that she had applied the UK Border Force's policy. Given that the Appellant had not disclosed the goods

immediately, that there were conflicting stories as to the origin of the goods and various other matters raised in the review, she had come to the view that the circumstances did not justify a 5% penalty. It was equally clear that the Appellant was not a commercial trader and had not deliberately concealed the goods. So a 20% penalty was not appropriate. As a result she had raised the penalty at 10%.

Matters arising from the witness evidence

31. Office Westwater's account was limited to the standard questions that he would ask to most travellers and to the responses to them. That is understandable. Officer Westwater has to deal with numerous such interviews and retain notes of them all. His notes are inevitably brief. His notes do, however, have the benefit of being written contemporaneously.

32. The accounts of the Appellant and her mother are more vivid. It is clear that the experience had a marked effect on them. Although the account was finally written down in its complete form in 2016, we do note that some of the important details, in particular, the allegation that Officer Westwater threatened to arrest the Appellant's mother, were referred to in the original request for restoration in July 2013 and have not changed since that time.

33. The two main factual differences in the two accounts are: (i) the assertion made by the Appellant and her mother that Officer Westwater threatened to arrest the Appellant's mother on two separate occasions in the course of the interview and (ii) the assertion that Officer Westwater suggested that the Appellant would be able to obtain restoration of her jewellery for the payment of a small fee.

34. As regards the specific assertion that Officer Westwater threatened to arrest the Appellant's mother, we do not find it necessary to reach a view. We are, however, more than satisfied that the Appellant and her mother felt very intimidated by the manner in which the interview was conducted and that this must have resulted in their answers appearing to be confused and inconsistent.

35. Given the Border Force's clear policy at the time not to restore items that were seized, we find it unlikely that Officer Westwater would have made the suggestion that the Appellant would be entitled to restoration on repayment of a small fee. However, given that the Appellant and her mother clearly did not understand the process for challenging the seizure of the jewellery in the Magistrates Courts, it is not unlikely that the explanation of those procedures was not fully understood by them at the time.

36. Having heard the Appellant's mother's explanation of the origin of the bangles, we are satisfied that her account is accurate. We accept her evidence and find as a fact that the gold for the bangles was derived from the Appellant's mother's bangles that were in her personal possessions when she came to the UK.

37. Also having heard the Appellant, and the Appellant's mother, we are satisfied, and find as a fact, that they did not set out deliberately to evade duty and they did not seek deliberately to deceive Officer Westwater about the origin of the goods.

The Law

5 38. The effect of section 49(1) Customs & Excise Management Act 1979 ("CEMA") is that where goods chargeable to duty are unshipped at a port without payment of the duty, they are liable to forfeiture. Section 139(1) CEMA provides:

10 "Anything liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard".

15 39. The effect of paragraph 5 of Schedule 3 to CEMA is that, unless a notice of claim that the item seized was not liable to forfeiture is lodged within one month, the seizure is treated as valid and it is not possible to claim subsequently that it was not duly condemned as forfeit to the Crown (see *HMRC v. Jones and another* [2011] STC 2206).

40. The Appellant did not challenge the forfeiture within the one month period for doing so and so the jewellery was condemned as forfeit to the Crown.

41. There is a power to grant restoration under section 152 CEMA:

20 "The Commissioners may, as they see fit... (b) restore subject to conditions (if any) as they think proper, anything forfeited or seized under the customs and excise Acts."

42. By virtue of section 16(8) and Schedule 5 Finance Act 1994, a decision under section 152(b) CEMA whether or not to restore any item is a "decision as to an ancillary matter". The Tribunal's jurisdiction in these cases is set out in section 16(4) Finance Act 1994. It states, so far as relevant:

25 (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 –

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

35 (c) in the case of a decision which has already been acted on will take an effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and give directions to the Commissioners as to the steps to be taken for securing the repetitions of the

unreasonableness do not occur when comparable circumstances arise in the future.”

43. The Tribunal’s powers are therefore limited. Its jurisdiction is a supervisory one and is confined to the application of the principles of judicial review (see the decision of the Court of Appeal in *HMRC v. Jones and another*). This includes questions of reasonableness – that is, whether the decision was so unreasonable as to be irrational or perverse, such that no reasonable authority could have reached that decision (*Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 KB223) – and also issues of proportionality (because Article 1 of Protocol 1 to the European Convention on Human Rights (peaceful enjoyment of possessions) potentially applies).

44. If we find that the decision could not have been reasonably arrived at, our powers are limited to making directions of the type referred to in paragraphs (a) to (c) of section 16(4).

15 **The parties’ submissions**

45. On behalf of the Appellant, Mr Khan makes the following submissions:

(1) The interview at Birmingham International Airport was not conducted properly or in accordance with the Travellers’ Charter.

20 (2) The review decision was unfair. It did not take into account all of the circumstances of the case.

(3) The Appellant and her mother were unaware of the rules and regulations regarding the import of goods.

46. On behalf of the Respondent, Mr Skudra made the following points:

25 (1) Officer Westwater’s note of the interview was made contemporaneously and should be regarded as the more accurate account.

(2) On review, Mrs Perkins had taken into account all of the available evidence.

30 (3) The Appellant had the opportunity to challenge the seizure of the jewellery in the Magistrates Courts. She had not done so. As a result, the jewellery was deemed to be subject to forfeiture. It was not open to the Appellant to re-open issues that went to the legality of the seizure of the jewellery. The amount of the duty and the VAT could not therefore be contested.

35 (4) Section 152 CEMA permitted the Commissioners to impose conditions on the restoration of goods that were subject to forfeiture “as they think proper”. The level of the penalty was appropriate. It was important to impose a level of penalty that was adequate to penalize defaults and encourage compliance with the laws and regulations.

Discussion

47. This appeal relates to a decision made by the reviewing officer, Mrs Perkins, in her letter dated 21 August 2014 as subsequently amended in her letter dated 28 August 2015.

5 48. As we have noted above, the Tribunal’s jurisdiction and powers are limited in these cases. Its jurisdiction is a supervisory one. We can only consider whether or not the decision of Mrs Perkins, the reviewing officer, was reasonable and proportionate (in the sense that we have described at [43] above).

10 49. When we are exercising that jurisdiction, we must treat as a “deemed fact” that the jewellery was duly and therefore lawfully condemned as forfeit because the legality of the seizure was not challenged in the Magistrates’ Courts within one month of the seizure having taken place (*HMRC v Jones and another*). For similar reasons, we cannot revisit the imposition of the charge to VAT and customs duty.

15 50. The Court of Appeal in *Customs and Excise Commissioners v J H Corbett (Numismatists) Ltd* [1980] STC 231 set out the correct approach for the Tribunal to follow where it has a supervisory jurisdiction. In summary, in reviewing the decision made by Mrs Perkins, we should ask the following questions:

- (1) did she reach a decision which no reasonable officer could have reached?
- (2) does the decision betray an error of law material to the decision?
- 20 (3) did she take into account all relevant considerations?
- (4) did she leave out of account all irrelevant considerations?

25 51. In doing so, it is open to us to establish the primary facts and then to decide whether, in the light of those findings of fact, the decisions on restoration were reasonable (see the judgment of Pill LJ in *Balbir Singh Gora v Customs and Excise Commissioners* [2003] QB 93 [2003] EWCA Civ 525 at [39]). This means that we can consider the decision with a degree of hindsight. It is possible that we might find a decision, which in the light of the information available to Mrs Perkins at the time was reasonable, was unreasonable in the light of the facts that we find.

30 52. We also need to consider whether the decision of Mrs Perkins was proportionate given that the seizure of the jewellery involved an interference with the Appellant’s rights under Article 1 of the First Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998 (“A1P1”).

35 53. Having taken all of these issues into account, we have come to the conclusion that the decision to restore the jewellery on the conditions set out in the letter of in the letter of 28 August 2015 was neither reasonable nor proportionate.

54. Our reasons are set out in the following paragraphs.

55. We should first comment on the original decision not to restore the jewellery as contained in the letter of 21 August 2014 as it is relevant to the final decision to restore the jewellery subject to the conditions set out in the letter of 28 August 2015.

5 (1) Mrs Perkins came to the view that there were no exceptional
circumstances which would justify restoration of the jewellery. This was in part
based on her conclusion that the Appellant and her mother made “a deliberate
attempt to deceive the officer” and, we infer from her letter, her assumption that
the Appellant and her mother were deliberately attempting to evade duty. Those
10 conclusions may or may not have been justified on the evidence that she had at
the time. In the light of our findings of fact based on the evidence presented to
us - that the Appellant and her mother did not deliberately attempt to evade duty
and did not deliberately attempt to deceive the officer – those conclusions are no
longer tenable.

15 (2) Mrs Perkins had before her evidence (in the form of photographs provided
by the Appellant and the Appellant’s father) to support the claims of the
Appellant concerning the provenance of the jewellery. She appears to have
discounted that evidence. In the light of our findings of fact, in our view, it was
inappropriate to do so.

20 (3) The policy of the Border Force in relation to restoration of goods seized
appears to have changed after the decision in the letter of 21 August 2014.
However, at the time of the original decision, the UK Border Force was clearly
aware of the personal and cultural significance of the jewellery to the Appellant
and her mother. There was no evidence that the Appellant and her mother were
part of any organized operation to smuggle gold into the country. At worst, the
25 Appellant and her mother were naïve as to the requirements to disclose and
failed to obtain appropriate information before travelling. A decision not to
restore the Appellant’s property as a penalty for those failings was, in our view,
disproportionate in the terms of A1P1 (see the judgment of Lord Phillips MR in
Lindsay v HMRC [2002] EWCA Civ 267 at [52] to [54]).

30 (4) For these reasons we would have found that original decision contained in
the letter of 21 August 2014 was neither reasonable nor proportionate.

56. As regards the amended decision, Mrs Perkins’s decision was that the jewellery
should be restored subject to certain conditions, being the payment of the duty and the
35 VAT and a penalty equal to 10% of the value of the jewellery. This decision was
made in accordance with the Border Force policy on the basis that the Appellant had
only disclosed the goods after questioning.

57. We find that the decision was unreasonable and the level of the penalty
disproportionate.

40 (1) As an initial point, we note that, although the Border Force, changed its
approach in 2015 and offered to restore the jewellery to the Appellant, no
reasons were given for the change in policy and no reasons were given to justify

the level of the penalty. The policy for determining the level of the penalty was not disclosed to the Appellant until the hearing.

5 (2) When imposing a penalty all of the facts and circumstances of the case must be taken into account. The decision – and indeed the policy – did not properly take into account the level of blameworthiness of the Appellant. As we have found, the Appellant and her mother did not deliberately seek to evade duty and did not deliberately seek to mislead the seizure officer. The level of penalty imposed implies a greater degree of culpability on the part of the Appellant than is justified on the facts as we have found them.

10 (3) In the circumstances, a penalty of 10% of the value of goods seems to be excessive and disproportionate. A penalty at that level is more than 43% of aggregate of the duty and the VAT and again, in our view, is not justified on the facts of this case as we have found them. Whilst we accept that smuggling is a serious issue which the authorities need to address and so seizure of goods and significant penalties are justified in appropriate circumstances, this is not one of them.

15 (4) Finally, as we have mentioned above, in our view, the original decision as contained in the letter of 21 August 2014 was neither reasonable nor proportionate. Furthermore, the final decision to restore the jewellery and the level of the penalty should have reflected the fact that by the time that decision was made the Appellant had been deprived of her property for more than two years as a result of the seizure and the decision in August 2014. This was a relevant consideration and there is no evidence that it was taken into account in the decision.

25 **Decision**

58. We allow this appeal.

59. As we have noted at [40] above, the powers of the Tribunal in these cases are limited. We also need to take into account that the decisions has already been acted on and taken effect. That said, in our view, there is the prospect that the decision can, to an extent, be remedied by a further review.

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60. We direct that:

(1) the decision shall cease to have effect from the date of issue of this decision; and

35 (2) that the decision, and in particular, the level of the penalty should be reviewed in the light of the facts that we have found and in the light of the comments that we have made above.

61. Our principal concern in relation to the process is that no reasons were given for the level of the penalty and the basis on which the penalty was calculated was not made available to the Appellant at that time. In our view, the basis of calculation should have been made available at the time.

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Rights of appeal

62. 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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**ASHLEY GREENBANK
TRIBUNAL JUDGE**

RELEASE DATE: 21 JUNE 2017

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Appendix 1

Border Force Restoration Policy: Jewellery

Behaviour/Conduct of the Individual	Restoration fees are based on import duty** + VAT <u>plus</u> % of the purchase price abroad (Penalty)* * If purchase price abroad unknown then based on independent valuation by BF at individual's expense ** No import duty on watches
Volunteered Goods immediately on Entry (Unprompted) & Co-operated Fully no Aggravating Factors	2.5% (Duty) of the total value of the goods + VAT (20%) + Penalty: 5% of the purchase price abroad*
After Questioning disclosed the goods (Prompted) – Creeping Declaration	2.5% (Duty) of the total value of the goods + VAT (20%) + Penalty: 10% of the purchase price abroad*
Deliberate Evasion / Concealment or Commercial Trader	2.5% (Duty) of the total value of the goods + VAT (20%) + Penalty: 20% of the purchase price abroad*
Second Offence	Non-Restoration

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