[2018] UKFTT 492 (TC)

TC06670

Appeal number: TC/2017/02955

CUSTOMS DUTY – refusal of restoration of goods lawfully seized - seizure of Class C drugs – mis-description of goods – drugs in question were known as "DHEA" or "Prasterone" – appellant suffering from Addison's disease – DHEA recommended by appellant's medical advisers as a replacement hormone to control his disease – whether refusal to restore the drugs was unreasonable – appeal allowed – further review directed

FIRST-TIER TRIBUNAL
TAX CHAMBER

A TAXPAYER **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE GUY BRANNAN
CHARLES BAKER

Sitting in public at Taylor House, London on 13 June 2018

The Appellant appeared in person with the assistance of his wife

Michael Newbold, counsel, instructed by the Director of Border Revenue, for the Respondents

DECISION

Introduction

1. The appellant appeals against the decision of the respondents dated 8 March 2017 ("the Decision") in which the respondents refused to restore 360 tablets of Dehydroepiandosterone ("DHEA"), also known as "Prasterone", which was seized by Border Force on 12 November 2016. As we shall see, the different names of the drug in question have caused some confusion. For the purposes of clarity we shall generally refer to the drug as "DHEA" in this decision, unless the context otherwise requires.

2. The appellant suffers from Addison's disease – a long-term disorder in which the sufferer's body does not produce sufficient adrenal hormones – and, on medical advice, took DHEA in tablet form on a daily basis. He imported DHEA tablets from United States because this particular drug is not available in the UK. DHEA is a Class C drug for the purposes of the Misuse of Drugs Act 1971. Its importation into the UK is prohibited unless it is imported pursuant to a licence issued by the Home Office or, in summary, it is personally imported by the person to whom the drug will be administered.

3. In short, the appellant argues that the respondents' refusal to restore his DHEA tablets was unreasonable in the sense that it was a decision that could not reasonably have been arrived at.

The evidence

4. The appellant gave evidence. In addition, Ms Hilary Smith, Senior Parliamentary Assistant & Adviser to Mr Matthew Offord MP (the appellant's Member of Parliament) gave evidence and was cross-examined. Ms Helen Perkins, the respondents' decision-maker, also gave evidence and was cross-examined.

The statutory provisions and relevant law

5. The importation of controlled drugs is prohibited under s 3 Misuse of Drugs Act 1971 ("MDA") which provides:

> **"3 Restriction of importation and exportation of controlled drugs**
>
> (1) Subject to subsection (2) below—
>
> (a) the importation of a controlled drug; and
>
> (b) the exportation of a controlled drug,
>
> are hereby prohibited.
>
> (2) Subsection (1) above does not apply—
>
> (a) to the importation or exportation of a controlled drug which is for the time being excepted from paragraph (a) or, as the case may be,

paragraph (b) of subsection (1) above by regulations under section 7 of this Act [or by provision made in a temporary class drug order by virtue of section 7A]; or

(b) to the importation or exportation of a controlled drug under and in accordance with the terms of a licence issued by the Secretary of State and in compliance with any conditions attached thereto."

6. Prasterone (i.e. DHEA) is specified as a Class C drug within Schedule 2 Part III MDA. Prasterone was added to the Schedule by the Misuse of Drugs Act 1971 (Modification) Order 1996. It should be noted that Schedule 2 does not refer to the drug by its name Dehydroepiandosterone or DHEA.

7. The Misuse of Drugs Regulations 2001 ("the Regulations") provide for the importation of controlled drugs in certain circumstances. Regulation 4 (2) provides:

"(2) The application of section 3(1) of the Act, in so far as it creates an offence, and the application of sections 50(1) to (4), 68(2) and (3) or 170 of the Customs and Excise Management Act 1979, in so far as they apply in relation to a prohibition or restriction on importation or exportation having effect by virtue of section 3 of the Act, are hereby excluded in the case of importation or exportation [which is carried out in person for administration to that person of any drug specified in Part II of Schedule 4]."[1]

8. Schedule 4 Part II to the Regulations lists Prasterone. Again, there is no reference to the drug by its name Dehydroepiandosterone or DHEA.

9. Therefore, Prasterone/DHEA can be imported provided it is personally imported for administration to the person importing it.

10. The power to restore goods which have been unlawfully imported is found in s 152 CEMA in the following terms:

"The Commissioners may, as they see fit –

…

(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under those Acts."

11. A decision not to restore goods is subject to a requirement to review that decision on written notice from an interested person (s 14(2) Finance Act 1994). A

[1] The wording in square brackets in Regulation 4(2), quoted above, was added by the Misuse of Drugs (Amendment No. 2) (England, Wales and Scotland) Regulations 2012, which applied with effect from 23 April 2012. According to the Explanatory Memorandum, the amendment allows importation of specified drugs "when carried out in person by the same person who then administers such drugs to himself." The instrument also removed the term "medicinal product" from the Regulations. The words in square brackets quoted above were substituted for the original words "by any person for administration to himself of any drug specified in Part II of Schedule 4 which is contained in a medicinal product".

right of appeal against a decision (including review decision) is conferred by s 16 Finance Act 1994. On appeal, this Tribunal has limited powers as set out in s 16(4), a provision which also deals with the burden of proof:

> (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) …
>
> (6) On an appeal under this section the burden of proof as to—
>
> (a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,
>
> (b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and
>
> (c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1)[, (1AA), (1AB)] [or (1AC)] or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid),
>
> shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established."

12. Although CEMA and the Finance Act 1994 refer to "the Commissioners" and to "HMRC," the legislation is to be read as applying currently to the Border Force, see Part 1 of the Borders, Citizenship and Immigration Act 2009.

13. It was common ground that this appeal involved an "ancilliary matter" (s 16(8) and Schedule 5 paragraph 2(1)(r) Finance Act 1994) and that the burden of proof lay upon the appellant.

14. In *Revenue and Customs v Riaz Ahmed T/A Beehive Stores* [2017] UKUT 359 (TCC) 23 ("*Riaz Ahmed T/A Beehive Stores*") the Upper Tribunal (Judges Herrington

and Walters) considered the scope of the FTT's jurisdiction under s16(4) Finance Act 1994 at [23]:

> "As the FTT correctly identified at [35] of the Decision, in *Balbir Singh Gora v C&E Comrs* [2003] EWCA Civ 525, Pill LJ accepted that the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal."

15. The Court of Appeal in *Lindsay v Customs and Excise* [2002] EWCA Civ 267 considered the interaction of s16 Finance Act 1994 with the European Convention on Human Rights in the context of a decision to refuse restoration of a car used for smuggling Excise goods. At [40] Lord Phillips MR said:

> "However, the principal issue before the Tribunal, was whether the Commissioners' decision not to restore Mr Lindsay's car to him was one that they 'could not reasonably have arrived at' – within the meaning of those words in section 16(4) of the 1994 Act. Since the coming into force of the Human Rights Act 1998, there can be no doubt that if the Commissioners are to arrive reasonably at a decision, their decision must comply with the Convention. Quite apart from this, the Commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters – see *C & E Commissioners v JH Corbitt (Numismatists) Ltd* [1981] AC 22 at 60 per Lord Lane."

16. Lord Phillips MR continued at [52]:

> "The Commissioners' policy involves the deprivation of people's possessions. Under Article 1 of the First Protocol to the Convention such deprivation will only be justified if it is in the public interest. More specifically, the deprivation can be justified if it is 'to secure the payment of taxes or other contributions or penalties'. The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued (*Sporrong & Lonnroth v Sweden* (1982) 5 EHRR 35 at paragraph 61; *Air Canada* as cited above). I would accept Mr Baker's submission that one must consider the individual case to ensure that the penalty imposed is fair. However strong the public interest, it cannot justify subjecting an individual to an interference with his fundamental rights that is unconscionable."

17. Lord Phillips MR gave further consideration to the principle of proportionality at [64]:

> "The Commissioners' policy does not, however, draw a distinction between the commercial smuggler and the driver importing goods for social distribution to family or friends in circumstances where there is

> no attempt to make a profit. Of course even in such a case the scale of importation, or other circumstances, may be such as to justify forfeiture of the car. But where the importation is not for the purpose of making a profit, I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture. There is open to the Commissioners a wide range of lesser sanctions that will enable them to impose a sanction that is proportionate where forfeiture of the vehicle is not justified."

18. Even if we were to conclude that the reviewing officer reached a decision which was unreasonable in the judicial review sense, we would be entitled to dismiss the appellant's appeal if we were to conclude that the reviewing officer would "inevitably" reach the same conclusion if all the material facts were before her (*John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 at 953).

19. As regards the need for a public authority to give adequate reasons for its decision, the leading authority is *South Bucks District Council and another v Porter* [2004] 4 All ER 775 where Lord Scott said at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

20. In the course of his review of the authorities Lord Scott referred with approval to the 'felicitous' observation of Sir Thomas Bingham MR in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263 at 271–272, identifying the central issue in the case as:

> "… whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

The facts

General

21. The basic facts surrounding the seizure of the DHEA tablets were not in dispute and were as follows.

22. The seizure occurred on 12 November 2016 at Stansted Airport. "FEDEX" freight shed airway bill reference 7776 8637 9058 was intercepted by Border Force officers. The package was addressed to the appellant at his home address in London. The consignor was identified as "Origin ID-Sigra" 12818-Century Drive Suite 101, Stafford, TX 77477, United States. The sender was identified as "Amy Maude". The description on the label read: "vitamin C 500 mg 0 tabs and Folic Acid 400 IU 60 sg." On inspection, the officers discovered that the package contained 360 DHEA tablets. The accompanying invoice described the shipment as a gift and described the goods in the same way as the label.

23. It was common ground that DHEA is a Class C controlled drug under the MDA the importation of which is prohibited without a licence pursuant to s 3(1). The Border Force officers seized the DHEA under s 139 Customs and Excise Management Act 1979 ("CEMA") as being liable to forfeiture under s 49(1)(b) CEMA.

24. A note of the seizure was sent to the appellant by the Border Force on 13 November 2018.

25. Although the appellant initially contested the legality of the seizure, he no longer does so. Accordingly, this decision precedes on the basis (as it must do so, see *HMRC v Jones and Jones* [2012] Ch 414 per Mummery LJ at [71]) that the DHEA tablets were lawfully seized.

26. Correspondence between the appellant and the Border Force followed. In particular, the appellant wrote to the Border Force on 7 December 2016 requesting restoration of the seized DHEA tablets and enclosing supporting medical evidence.

27. In his letter, the appellant informed the Border Force that he was 67 years old and suffered from Addison's disease, a long-term disorder in which the adrenal glands do not produce enough steroid hormones. The appellant informed the Border Force that, because of his disease, his body did not make DHEA and that he had to take it in tablet form as a replacement. The appellant said that he did not understand why the shipment had been seized – he was not aware the DHEA was a Class C drug and had been unable to find it on any list when he had "Googled" Class C drugs on the Internet. The appellant stated that he had taken part in a trial that had demonstrated

that DHEA had both physical and psychological effects (he enclosed a paper set out in more detail in [34] below).

28. The appellant concluded his letter by stating that the quality of life for himself and his family have been greatly enhanced by the DHEA replacement therapy. He was anxious about the consequences if he was forced abruptly to stop taking DHEA. In addition, the stress he was feeling as a result of this situation may, he considered, become detrimental to the management of his Addison's disease.

29. We should add that the genuineness and nature of the appellant's disease was not in dispute. Neither was it in dispute that Addison's disease is a rare condition, with only approximately 8,400 sufferers in the UK.

30. At some stage either in late December 2016 or early in 2017 (the letter was undated) the Border Force wrote to the appellant rejecting his request that his DHEA tablets be restored. The letter explained the Commissioners' general policy regarding the improper importation of prohibited or restricted items into the UK viz that they will not be offered for restoration. The letter stated:

> "However, each case is looked at on its own merits to consider whether there are any exceptional circumstances that would warrant a departure from that policy."

31. The letter stated that the reviewing officer had "looked at all the circumstances surrounding the seizure", but had not looked at the legality or correctness of the seizure itself. The letter continued:

> "I conclude that there are no exceptional circumstances that would justify a departure from the Commissioners' policy and I confirmed that on this occasion **the goods will not be restored**."

32. The letter concluded by offering a statutory review.

33. As we have noted, the appellant enclosed with his letter of 7 December 2016 correspondence from Prof VKK Chatterjee, Professor of Endocrinology at the University of Cambridge (Addenbrooke's Hospital) dated 17 November 2016. Prof Chatterjee's letter confirmed that the appellant had taken part in a trial "some years ago" (in fact it was in 2001) in Cambridge which involved treatment with DHEA. Prof Chatterjee's letter enclosed the publication of the results of the trial (a paper published in February 2008, which was also enclosed with the appellant's letter of 7 December 2016) and stated that it was found that a substantial proportion of patients "experienced health benefit and improved well-being following DHEA treatment". The letter continued:

> "Consequently, as we recommended to trial participants, I understand that you have been purchasing DHEA from a reputable source overseas. Unfortunately, as yet, DHEA is not licensed for treatment use in the UK. However, in the United States, this hormone is freely available as a health supplement.

> Accordingly, I hope that this background information is of help in enabling you to continue to purchase and take DHEA from an overseas source. I have no doubt that it is of health benefit in a substantial proportion of patients with adrenal gland underactivity, including yourself."

34. The paper enclosed with Prof Chatterjee's letter of 17 November 2016 was entitled "Long-Term DHEA Replacement in Primary Adrenal Insufficiency: A Randomized, Controlled Trial", and Prof Chatterjee was one of the contributing authors. The paper was 9 ½ pages long including footnotes. Although couched in technical language, it seemed to us that there was little doubt that the paper indicated the health benefits of taking DHEA for patients suffering from Addison's disease. We start with the summary of the paper and its findings which appears at the beginning of the paper:

> "Context: Dehydroepiandosterone (DHEA) and DHEA sulfate (DHEAS) are the major circulating adrenal steroids and substrates for peripheral sex hormone biosynthesis. In Addison's disease, glucocorticoid and mineralocorticoid deficiencies require lifelong replacement, but the associated near-total failure of DHEA synthesis is not typically corrected.
>
> *Objective and Design:* In a double-blind trial, we randomised 106 subjects (44 males, 62 females) with Addison's disease to receive either 50 mg daily of micronized DHEA or placebo orally for 12 months to evaluate its longer-term effects on bone mineral density, body composition and cognitive function together with well-being and fatigue.
>
> *Results:* Circulating DHEAS and androstenedione rose significantly in both sexes, with testosterone increasing to low normal levels only in females. DHEA reversed ongoing loss of bone mineral density at the femoral neck ($P<0.05$) but not at other sites; DHEA enhanced total-body ($P = 0.02$) and truncal ($P = 0.017$) lean mass significantly with no change in fat mass. At baseline, subscales of psychological well-being in questionnaires (Short Form-36, General Health Questionnaire-30) were significantly worse in Addison's patients versus control populations ($P<0.001$), and one subscale of SF-36 improved significantly ($P = 0.004$) after DHEA treatment. There was no significant benefit of DHEA treatment and fatigue or cognitive or sexual function. Supraphysiological DHEAS levels were achieved in some older females who experienced mild androgenic side effects.
>
> *Conclusion:* Although further long-term studies of DHEA therapy, with dosage adjustment, are desirable, our results support some beneficial effects of prolonged DHEA treatment in Addison's disease."

35. We set out below a number of extracts from the body of the paper:

> …
>
> Deficiencies of glucocorticoid and mineralocorticoid in primary adrenal insufficiency (Addison's disease) are well recognised and require lifelong replacement. However, the associated deficiency of

> DHEA(S) has been investigated only recently, and its possible clinical significance remains controversial. Patients with Addison's disease on optimal glucocorticoid and mineralocorticoid replacement therapy still report a reduced quality of life when compared with normal individuals and score significantly worse than age-and sex-matched population controls on validated psychological tests that measure well-being.
>
> Several short-term studies of DHEA supplementation in adrenals insufficiency have now been reported: Young et al. [Footnote to article reference] validated the efficacy of oral DHEA treatment in restoring physiological circulating levels of DHEA (S) in 10 adults.

36. The paper then summarised the results of a number of earlier studies of DHEA supplementation in adrenal insufficiency:

> "[An earlier paper] validated the efficacy of oral DHEA treatment in restoring physiological circulating levels of DHEA (S) in 10 adults with panhypopitutarism and showed some biotransformation of DHEA in this to sex steroids.[Another paper] studied 24 women, 14 of whom had primary adrenal insufficiency… [T]he authors reported enhanced well-being and sexuality. Our previous placebo-controlled three-month crossover trial of 39 patients (including 15 males) with primary adrenal insufficiency showed similar biochemical changes and enhanced psychological well-being, independent of gender.
>
> …
>
> No changes in body composition, BMD or cognition were demonstrated in any of these short-term studies of DHEA replacement. A nine-month, parallel group trial of DHEA replacement in 39 patients showing no benefit in health status may have been underpowered.
>
> …
>
> We therefore undertook a 12-month trial of DHEA replacement therapy... To determine whether there are positive effects on bone mineral density (BMD), body composition, or effects on cognitive function, which might be related to the neuroprotective action of DHEA. We also wanted to confirm that the changes in biochemistry, well-being, and fatigue observed in our previous short-term trial could be replicated and maintained with a more protracted administration of DHEA, and these parameters were designated as secondary endpoints.
>
> …"

37. The paper then described the trial participants and the methods employed in the study and then continued to describe the results of the study:

> "*Hormonal and biochemical changes*
>
> In those receiving 50 mg oral micronised DHEA, serum DHEAS rose markedly within one month from grossly subnormal levels to levels within the physiological range for young adults in both male and female subjects. These levels were maintained throughout the 12-month period, signifying compliance with treatment. One month after

discontinuing treatment, DHEAS levels fell back to baseline low levels, confirming satisfactory washout of the active study treatment.

…

Body composition and BMD

Discussion

This 12-month study of DHEA replacement in patients with Addison's disease both supports improved well-being documented in our previous short-term study and adds new information on longer-term effects of DHEA. We report novel effects of DHEA on body composition (lean mass), femoral neck BMD, and particular psychological parameters (fatigue and self-esteem).

As expected, Addison's patients had grossly sub- normal DHEAS levels. All replacement with 50 mg micronized DHEA daily restored DHEAS blood levels to within the normal range for young adults.

…

The low baseline BMD in Addison's subjects progressed, with diminution in bone density at most sites in placebo-treated subjects during the subsequent 12 month period. In this context, reversal of this trend was an observed increase in femoral neck BMD after DHEA therapy is notable.

…

DHEA therapy increased both truncal and total-body lean mass measured by DEXA. The improvement in lean muscle mass mirrors that seen in previous studies with DHEA supplementation in ageing or postmenopausal women. The mechanism by which increased lean muscle mass occurs is not known, but it is noteworthy that there was no associated diminution in fat mass as has been reported by other groups after DHEA supplementation.

…

The effects of DHEA on psychological function were assessed both by comparing hormone and placebo-treated groups during 12 months of DHEA treatment and, in addition, determining whether any changes were reversed after washout in the DHEA-treated subjects. Because both the GHQ – 30 and SF – 36 tests have been validated and used on large population subnormal individuals, we were able to compare baseline scores in our Addison's disease patients before hormone/placebo treatment with normative data. We recognize that these control subjects were not contemporaneous, making such comparison tentative. There were striking reductions in baseline scores for some subscales of GHQ – 30 and dimensions of SF – 36, compared with normal subjects drawn from a reference population. Interestingly, similar abnormalities in the self-esteem subscale of GHQ – 30 occurred in both our studies [this one and an earlier short-term replacement study], and an identical pattern of abnormalities in baseline SF-36 scores were observed in another Addison's population

> from Norway, suggesting that there may be a disorder specific profile of psychological deficit in Addison's disease. During DHEA treatment, scores for the subscales of GHQ – 30 and SF – 36 improved and worse and more markedly (albeit nonsignificantly) after washout of DHEA. Furthermore we observed a similar trend with physical and mental fatigue dimensions of the MFI – 20 infantry (a prominent complaint in Addison's patients), with statistically non-significant improvement at six and 12 months during DHEA treatment, followed by deterioration of scores after washout. This pattern of initial early improvement in well-being and fatigue followed by a rebound in schools after DHEA washout may be noteworthy.
>
> …
>
> This trial describes the longest duration of DHEA replacement therapy in a comparatively large number of patients with Addison's disease and provides important additional information on its effects and tolerability. Our results show that daily oral administration of DHEA in physiological dosage for 12 months normalises serum DHEAS levels and does have positive psychological effects. Our study also suggests that patients with Addison's disease may have a disorder-specific psychological deficit.
>
> …
>
> Beneficial responses to DHEA treatment in lean body mass and femoral BMD were also observed, changes that if sustained in the long term, could reduce morbidity."

38. The appellant produced a letter from Prof Pierre Bouloux (Professor of Endocrinology at the Royal Free Hospital, London dated 4 September 2014) which stated:

> "[The appellant] has had no episodes of adrenal insufficiency, and had a very satisfactory day curve on 10, 10 and 5 of Hydrocortisone about nine months ago. He is also on Fludrocortisone 50 mcg twice daily and blood pressure is normal. He is using DHEA supplements and all things being well, we will keep an eye on him in two years' time."

39. The appellant also produced a letter, dated 12 June 2017, from Prof Bouloux which stated:

> "This is to certify that the above gentleman [the appellant] suffers from primary adrenal insufficiency (Addison's disease) for which he has been prescribed Hydrocortisone 10 mg twice daily and 5 mg at night, 9-alpha Fludrocortisone mcg twice-daily, and latterly DHEA at a dose of 50 mg per day. I, as his treating physician, would recommend that he continues on the DHEA long-term as this has shown to be beneficial to such patients. This letter will, therefore authorise the importation on medical grounds."

40. In addition, the appellant produced a letter dated 25 August 2017 from Dr Bernard Khoo, Senior Clinical Lecturer and Honorary Consultant in Endocrinology at the Royal Free Hospital, which stated:

> "This gentleman [the appellant] is symptomatically stable and has not apparently had any Addison's crises recently. He is still continuing to take DHEA and feels that this is beneficial for him. I understand Prof Bouloux has issued a letter which authorises its importation for medical purposes, and I hope this documentation will be sufficient for him to import the medication, which I concur is required for continued treatment of his Addison's disease."

41. The letter from Prof Chatterjee of 17 November 2016 (including the paper enclosed with Prof Chatterjee's letter) and that of Prof Bouloux dated 4 September 2014 were amongst the papers placed before Ms Perkins when, in a letter dated 19 February 2017, he requested a statutory review of the Border Force's decision not to restore his DHEA tablets.

42. In his letter of 19 February 2017 seeking a statutory review, the appellant wrote as follows:

> "Unfortunately the Border Force letter [unhelpfully this letter was undated] does not set out why the conclusion is reached that there are no exceptional circumstances to justify a departure from the policy, so I have not been able to specifically address their reasoning. So instead, I am setting out matters that I believe make my circumstances exceptional.
>
> **1. My specific personal and medical situation is exceptional** – I have a rare medical condition, which in itself makes my situation exceptional. It is estimated that only 40 to 60 people per million of the general global population habit. The NHS website says there are only 8400 sufferers in the UK.
>
> **2. DHEA is exceptional –** it is a naturally occurring hormone that everyone produces in their body, except Addison's Disease sufferers as their bodies stop making it. DHEA is legal and freely available in other countries, including the USA – see appendix 2 [the letter of 17 November 2016, Prof Chatterjee].
>
> **3. My personal use of DHEA is exceptional** because I am not taking it as a supplement, as other people who buy it may do, but as a REPLACEMENT; this is because my body does not make DHEA like other people.
>
> **4. The impact on me and my family of not having the DHEA restore to me is exceptional –** because I am taking DHEA as a replacement and not a supplement not taking DHEA has negative impacts on my health and well-being and my family life. Prior to receiving DHEA during the medical trial, my life and that of my family was blighted by the physical and psychological effects of not having DHEA in my body. Please see the highlighted sections of the medical paper at appendix 3 [the paper enclosed with Prof Chatterjee's letter of 17 November 2016] which provides an explanation of these.
>
> **5. I have been importing DHEA for 15 years for my personal use without incident –** on completion of the medical trial the researchers advised me which supplier I should use to obtain the tablets for my

future use. I ordered one year's supply (I take one tablet per day and ordered 360).

6. My MP, Matthew Offord, is supporting my case and has written to the Immigration Minister. Mr Offord agrees that if DHEA has been classified as a class C drug, which I have been unable to verify, it cannot have been intended to deprive those who are using it for personal medicinal purposes and whose health is significantly affected by being unable to access it.

…

The fact that there is an appeals process, which acknowledges that there may be exceptional circumstances where a decision can be made to depart from the policy, gives me hope that you can truly use your discretion to make a decision to restore the DHEA tablets to me. I honestly do not see how anyone's circumstances could be any more exceptional. Because the Government has allowed that there may be such exceptions I am putting my trust in you to use the power you have to help me."

43. In addition, the appellant's letter of 19 February 2017 also enclosed leaflet from the Addison's Clinical Advisory Panel (prepared by Professor John Wass of Churchill Hospital, Oxford, Dr Trevor Howlett of the Leicester Royal Infirmary, Dr Wiebke Arlt of the University Hospital, Birmingham and Dr Simon Pearce of the Royal Victoria Infirmary, Newcastle) explaining that the use of DHEA was a method of treating Addison's disease. The leaflet referred to the fact that Addison's disease was treated by lifelong daily steroid medication and indicated that an Addison's disease sufferer would usually be prescribed Hydrocortisone, Fludrocortisone and, "possibly", DHEA. The leaflet continued:

> "Patients taking the precautions in section 5 usually manage their illness smoothly, without going into crisis … Adrenal crisis is a state of acute cortisol shortage … If you feel severely unwell, take extra medication then call a doctor. An emergency injection followed by urgent hospital treatment is needed for an adrenal crisis."

44. On 8 March 2017, Ms Perkins, the reviewing officer, wrote to the appellant notifying him of the outcome of the Border Force's review of its earlier decision not to restore the DHEA tablets. After setting out a summary of the correspondence, Ms Perkins' letter proceeded as follows:

> "**Summary of the Restoration Policy for seized goods [including Prohibited and Restricted goods]**
>
> The policy is that seized prohibited and restricted goods should not normally be restored. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally.
>
> **Consideration**
>
> It is for me to determine whether or not the contested decision should be confirmed, varied or withdrawn. I am *guided* by the restoration policy but not *constrained* by it in that I consider every case on its individual merits. I have considered the decision afresh, including the

circumstances of the seizure and the related evidence, so as to decide if any mitigating or exceptional circumstances exist that should be taken into account. I have examined all the representations and other material that was available to Border Force both before and after the time of the decision.

You were invited to provide any further information and support of your request for a review but as nothing has been received from you I have to make my decision based on the evidence that I already have.

…

While I sympathise with your medical issues the seized goods, Dehydroepiandosterone (DHEA), were obtained from the USA and were imported into the UK through the postal system. They are controlled under the Misuse of Drugs Act 1971 as Class C substances, classified under Schedule 4 (IV) of the Misuse of Drugs Regulations 2001. If you wished to import a controlled drug you are required to apply for a Home Office license [sic] to do so. While I note that you say you were not aware that these goods were considered to be a Class C, the responsibility rests with you is important to check prior to importing the goods, ignorance of the law is not accepted as reasonable excuse.

In addition I note that you say that you have been importing these goods into the UK for 15 years and have not previously had any problems. When BF intercepted these goods they were clearly mis-described, as they were referred to on both the label and the invoice as Folic Acid and Vitamin C, which clearly they were not. No explanation has been provided as to why these goods were not accurately described/declared and in the absence of a credible explanation it is not unreasonable that I conclude that this was a deliberate ploy to avoid the goods being detected. Secondly they were recorded as being a gift, which as you have provided proof of payment and they were clearly from a commercial source is clearly a false declaration. As the importer you are actually responsible for the declaration.

Furthermore information available to me indicates that BF have recently made a number of seizures of DHEA tablets through the post from the same individual, 'Amy Maude' which is noted on the label of your consignment, which have also been mis-described as Vitamin C. On the balance of probability, I am satisfied that these importations are a clear attempt to circumvent UK Customs controls to illegally import commercially Class C drugs into the UK.

Having taken account of the above including your medical condition I must conclude that the goods were not only improperly imported but also missed declared, and should not be restored. I believe that this decision is fair, reasonable and proportionate in all of the circumstances.

I have read your letters carefully to see whether a case is being presented for departing from the policy and whether there are any ***exceptional*** circumstances for doing so: I have found no reason departing from the policy and no exceptional circumstances.

> **Conclusion**
>
> I am of the opinion that the application of our policy in this case streets you know more harshly will leniently than anyone else in similar circumstances, and I can find no reason to vary the policy in this case. I have decided to uphold the original decision:
>
> - **The goods should not be restored to you**
>
> If you have *fresh* information that you would like me to consider and please write to me: however, please note that I will not enter into further correspondence about evidence that you have *already* provided."

45. The appellant has now appealed against Ms Perkins' decision to this Tribunal.

46. Finally, we should note that although Ms Perkins refers to the Border Force having seized other packages from "Amy Maude", there was no suggestion that these packages were addressed to the appellant. Moreover, although the appellant told us that he had been importing DHEA tablets without any question being raised for the last 15 years, there was no evidence to suggest that those tablets were mis-described – there was simply no evidence before us on this point and we make no finding of fact in relation thereto.

The appellant's evidence

47. The appellant told us that without his DHEA tablets he had ended up taking more time off work than before and he did not complete a trial period for a promotion a his workplace. He was made redundant in May of this year and whilst he could not prove that his redundancy was a direct result of his lack of access to his DHEA tablets he considered it to be "highly coincidental." He felt that there was no indication that the Border Force had considered his case on its individual merits. He said that the NHS had told him what to buy (i.e. DHEA tablets) and where to buy it. No one had told him that it was unlawful to procure the tablets in this way.

48. Originally, Professor Bouloux had been willing to provide a private prescription for DHEA. However, the appellant was unable to find a pharmacy that was able to provide the McPherson Labs Inc version used in the trial. The appellant therefore began to order directly from McPherson Labs Inc. The appellant ordered the particular package that was seized on 8 November 2016. He placed the order openly through their website and paid with a Visa card.

The evidence of Hilary Smith

49. Ms Smith gave evidence on behalf of the appellant. She is the senior adviser and assistant to the appellant's Member of Parliament, Mr Matthew Offord, who has supported his constituent's case. The appellant had approached Mr Offord in some distress after his DHEA tablets have been seized by the Border Force.

50. Ms Smith recorded her difficulty in establishing that the drug commonly known as DHEA was, in fact, a controlled Class C drug. The difficulty arose from the fact

that on the list of controlled Class C drugs on the UK Government's website, DHEA was referred to under an alternative name "Prasterone". She could not understand how the appellant could reasonably have been expected to know that DHEA – the name by which this drug was consistently referred to by the medical professionals who attended the appellant – was listed as a Class C drug. It was only by chance that she came across DHEA's alternative name of Prasterone.

The evidence of Ms Perkins

51. Ms Perkins said that in conducting her statutory review of the earlier decision not to restore the DHEA tablets to the appellant, she had taken account of all the information before her. She had, she said, taken account of all factors including how the goods were imported. She noted that a Home Office licence was required and that the importer had failed to check whether one was required. She noted that the labelling and declaration of the goods were incorrect.

52. In response to a question from Mr Newbold when examined in chief, she said that she had not assumed that the appellant had participated in the false declaration. She had looked at the way in which the statutory controls on importation of Class C drugs had been circumvented – it was possible to import DHEA with a Home Office License or to import them personally. Neither of these conditions was satisfied and therefore there was a breach.

53. Mr Newbold asked whether it was part of her decision that the appellant had actively participated in the mis-description of the goods. Ms Perkins replied that the goods had clearly been mis-described and no credible explanation had been forthcoming for the mis-description. The appellant could have "come back to" her on this point. There was a deliberate ploy to circumvent the controls on the importation of Class C drugs. Mr Newbold pressed Ms Perkins on this point and asked who had carried out this "deliberate ploy" (the expression used in Ms Perkins' review letter). Ms Perkins accepted that this would have to have been the person who put the contents of the parcel into the post (i.e. Amy Maude). She said, however, that the appellant had a responsibility as regards the parcel and added that the importer was responsible for the declaration. When further examined by Mr Newbold, who asked whether she meant that the appellant was responsible for the consequences of the mis-declaration, Ms Perkins appeared to shift her ground saying, instead, that the appellant was ultimately responsible for the declaration in the sense the appellant would bear the consequences of a false declaration.

54. We were not convinced by Ms Perkins' oral explanation of the words in her review letter: "As the importer you are actually responsible for the declaration." We consider that her answer was in part prompted by Mr Newbold and a request for clarification from the Tribunal and we attach little weight to it. [2]In our view, Ms Perkins plainly proceeded on the erroneous basis that somehow the appellant was

[2] We also note that in HMRC's statement of case (paragraph 16 c), after recording the mis-description of the goods (i.e. that they were Vitamin C and Folic Acid and that they were gifts), it is asserted: "The Appellant is ultimately responsible for the importation."

indeed responsible for the mis-description. The words in her letter on this point seemed perfectly clear. [3]

55. Ms Perkins said that she had considered whether to restore the DHEA tablets in return for the application of a financial penalty. However, the low value of the goods, in her view, meant that a penalty would not adequately reflect the mischief which the seizure was intended to prevent. She explained that a financial penalty would usually be either 100 % of the customs duty evaded or 10 to 15% of the value of the goods.

56. Ms Perkins also said that the appellant could have sought advice from the Border Force on from HMRC about the importation of DHEA.

57. Ms Perkins also noted that she had researched DHEA on the Internet and had found the alternative name Prasterone, although she could not recall exactly how long that process took.

58. In cross-examination, Ms Perkins was asked for the reasons why she decided that the appellant was not treated more harshly than others in similar circumstances. She replied that in this case the controls on the importation of Class C drugs had been circumvented, there was no licence, the goods had been mis-described and the goods had a low value. She was questioned on the fact that she had not mentioned the medical issues but Ms Perkins then asserted that she had looked at all the issues.

59. Ms Perkins, however, conceded that she did not fully understand all the contents of the paper enclosed with Prof Chatterjee's letter of 17 November 2016 – she had no medical expertise. When asked what medical consequences she considered, Ms Perkins said that she considered fatigue – mental and physical, particularly mental well-being, although her answers seemed to us somewhat vague. The health consequences, she said, had to be balanced against the correct way, permitted by statute, of importing DHEA.

60. We asked Ms Perkins what she knew about the companies selling DHEA into the UK. She said that she was aware of three intercepted parcels within a short time. She had not conducted other research. Clearly, Ms Perkins knew very little about the trade.

Discussion

61. We should emphasise that the question which we have to decide is <u>not</u> whether we agree with Ms Perkins' decision or whether we would have taken a different decision.

62. The question before us is whether the decision contained in Ms Perkins' letter of 8 March 2017 was one which could not reasonably have been arrived at, within the

[3] This is supported by the fact that mid-way the same paragraph through Ms Perkins appears to hold against the appellant the fact that he had not explained the mis-description of the goods even though Ms Perkins accepted in her oral evidence of the mis-description would have been that of the sender of the goods i.e. "Amy Maude".

meaning of s16(4) Finance Act 1994. Essentially, this involves the application of the *Wednesbury* test (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1). Additionally, as explained by the Upper Tribunal in *Riaz Ahmed T/A Beehive Stores*, we are able to exercise a degree of hindsight in the light of the facts that we find.

63. The question before Ms Perkins was whether she should exercise the Border Force's discretion to restore the appellant's DHEA tablets. The question of the lawfulness of the seizure of the goods was, as Ms Perkins noted, not a question which was before her and she correctly proceeded on the assumption that the goods had been lawfully seized.

64. The Border Force's discretion to restore goods contained in s 152 CEMA only arises in cases where goods have been unlawfully imported and had been lawfully seized. In *Putri Projusujadi v Director of Border Revenue* [2015] All ER (D) 240 ("*Putri Projusujadi*"), a restoration case where the First-tier Tribunal ("FTT") had failed to address the appellant's arguments in relation to proportionality, Mann J explained this point clearly:

> "[30] The question about exceptional circumstances is simply answered [by the FTT] in the negative and the question about the reasonableness of the decision amounts to no more than saying that it is not unreasonable to uphold the forfeiture of goods which were illegally imported in the first place. That conclusion does not reflect a proper consideration of the matters which need to be taken into account in a restoration application such as that with which Mr Crouch, and the FTT, were faced. *One of the important questions that has to be decided is whether the goods should be restored <u>despite</u> the fact that they were illegally imported and validly forfeited in the first place. That is the whole purpose of the restoration inquiry*." (Emphasis added)

65. It seems to us that Ms Perkins' decision was flawed when considered in the light of *Wednesbury* principles for the following reasons.

66. First, we consider that Ms Perkins misdirected herself in the way in which she dismissed the appellant's difficulties in ascertaining whether DHEA was a Class C restricted drug. We have no hesitation in concluding that the appellant was genuinely unaware that DHEA was a Class C drug within Schedule 2 Part III. When this drug was added to Schedule 2 Part III in 1996 it was added under the name of "Prasterone". In all the correspondence that we have seen between the appellant and his medical advisers and in the lengthy scientific paper enclosed with Prof Chatterjee's letter of 17 November 2016, the drug is always referred to as "DHEA" or as "Dehydroepiandosterone" rather than "Prasterone". Even after the goods had been seized, the appellant was still unable, by searching on the Internet, to establish that DHEA was a Class C drug because it was referred to in Schedule 2 Part III as "Prasterone" rather than "DHEA" or "Dehydroepiandosterone".

67. We accept Ms Smith's evidence of the difficulties that she had in establishing that DHEA was a Class C drug and find that it was difficult to establish that DHEA was a Class C drug.

68. The relevant passage in Ms Perkins' review letter is as follows:

> "While I sympathise with your medical issues the seized goods, Dehydroepiandosterone (DHEA), were obtained from the USA and were imported into the UK through the postal system. They are controlled under the Misuse of Drugs Act 1971 as Class C substances, classified under Schedule 4 (IV) of the Misuse of Drugs Regulations 2001. If you wished to import a controlled drug you are required to apply for a Home Office license [sic] to do so. While I note that you say you were not aware that these goods were considered to be a Class C, the responsibility rests with you is important to check prior to importing the goods, ignorance of the law is not accepted as reasonable excuse."

69. It seems to us that Ms Perkins simply asked herself the wrong question. The second and third sentences of this amount, in essence, simply to a statement that the goods were illegally imported. In relation to the final sentence, whilst the existence of a reasonable excuse is a statutory defence in relation to a wide range of penalties prescribed in the tax code, it is not the applicable test in this case. The question was whether the appellant's lack of awareness that DHEA was a Class C drug and his difficulties in establishing that it was were questions which should have been taken into account by the Border Force in exercising its statutory discretion. These factors seem to us go to the issue of the degree of culpability of the appellant. It seems to us that the fact that the appellant had been advised by his doctors to take DHEA on medical grounds, had no reason to believe that it was unlawful to import DHEA and could not easily establish that DHEA was, in fact, the same drug as Prasterone listed in Schedule 2 Part III were relevant factors that Ms Perkins should have taken into account and her failure to do so, in the belief that the principle that ignorance of the law is not a reasonable excuse prevented her from giving consideration to these matters, flawed her decision.[4]

70. Secondly, the circumstances of the appellant's medical condition and the importance and benefits of DHEA in treating that condition were highly relevant. Ms Perkins admitted in her oral evidence that she did not understand all the aspects of the paper enclosed with Prof Chatterjee's letter of 17 November 2016. It seemed to us that, on her own evidence, she had failed properly to take into account relevant matters. If she did not understand the paper enclosed with Prof Chatterjee's letter, she should have taken appropriate specialist advice. Ms Perkins asserted in her oral evidence that she had taken into account matters of fatigue and physical and mental issues and that she understood that the DHEA tablets had a benefit in respect of mental well-being, but that this had to be balanced against the correct way of importing the tablets. But it seems to us that Ms Perkins's understanding of the medical issues was superficial. This is reflected in the fact that in the "Consideration"

[4] In any event, the Upper Tribunal has recently commented, *obiter*, that ignorance of a legal obligation to file a tax return could potentially be a "reasonable excuse" (see *Perrin v The Commissioners for HM Revenue and Customs* (Tax) [2018] UKUT 156).

section of her review letter, the appellant's medical issues are only briefly mentioned.[5] Accordingly, we consider that Ms Perkins failed to take into account all relevant matters.

71. Thirdly, as we have mentioned, we consider that Ms Perkins misdirected herself by considering that the appellant was "actually responsible for the [mis-] declaration." Ms Perkins later accepted in her oral evidence that it would have been better to have said that the appellant would suffer the consequences of a mis-description. Nonetheless, it seems to us plain that Ms Perkins in her review letter assumed that the appellant had some form of responsibility for Amy Maude's false description of the goods.

72. Fourthly, towards the end of the section of her review letter under the heading "Consideration", Ms Perkins wrote:

> "Having taken account of the above including your medical condition I must conclude that the goods were not only improperly imported but also mis-declared, and should not be restored. I believe this decision is fair, reasonable and proportionate in all the circumstances."

73. In our view, Ms Perkins' letter does not give adequate reasons for concluding that it was proportionate for the DHEA tablets to be restored to the appellant. That proportionality is an essential factor in any restoration decision is clear from the decision of Mann J in *Putri Projusujadi* (see at [31]). Ms Perkins simply asserts that decision is proportionate. That is a conclusory statement i.e. it is simply a statement of Ms Perkins' conclusion, but gives no indication as to what factors she took into account or what principles she applied in reaching that conclusion. In short, she did not give reasons for her conclusion that the decision was proportionate.

74. Fifthly, and in the same vein, in the final paragraph of Ms Perkins' review letter under the heading "Consideration" Ms Perkins wrote:

> "I have read your letters carefully to see whether a case is being presented for departing from the policy and whether there are any ***exceptional*** circumstances for doing so: I have found no reason for departing from the policy and no exceptional circumstances."

75. In this sentence, Ms Perkins identifies the question that she has addressed (i.e. whether there were exceptional circumstances) and then states a conclusion that there were none. She gives no reasons as to why she has reached this conclusion. Once again, her failure to give adequate reasons is a flaw in her decision.

76. We reject the argument advanced by Mr Newbold that the lack of reasons given by Ms Perkins in respect of proportionality and "exceptional" circumstances can somehow be cured by the production of the Border Force's statement of case and skeleton argument. Adequate reasons are required in order to allow a potential

[5] "While I sympathise with your medical issues…" and "Having taken account of the above including your medical condition….".

appellant to decide whether to appeal within the statutory 30 day period and must be contained in the decision in question.

77. Next, under the heading "Conclusion", Ms Perkins stated:

> "I am of the opinion that the application of our policy in this case treats you no more harshly or leniently than anyone else in similar circumstances, and I can find no reason to vary the policy in this case."

78. We have recorded at [56] above the answers which Ms Perkins gave in cross-examination as to why she considered that the appellant had been no more harshly treated than those in similar circumstances. In her initial answer she did not refer at all to the appellant's medical condition but only did so when pressed. We were not convinced by Ms Perkins' answer. Indeed, we asked Ms Perkins whom she had in mind when she referred to "anyone else in similar circumstances". She replied that she "looked at all financial aspects." Essentially, therefore, Ms Perkins considered the question of the harshness of her decision to be a purely or predominantly financial issue. It seems to us that in doing so she mis-directed herself. She should, instead, have considered all the facts and, in particular, the special circumstances of the appellant's medical condition in drawing a conclusion on comparative harshness or leniency.[6]

79. Finally, we have come to the conclusion that Ms Perkins' decision was disproportionate. As we have seen, proportionality is a relevant factor in determining whether a decision is *Wednesbury* unreasonable (see the decision of Mann J in *Putri Projusujadi* (see at [31]).[7] It seems to us that HMRC could have restored the goods

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[6] We should add that it occurs to us that it may be necessary, in this connection, to consider the impact of Article 14 of the European Convention on Human Rights in relation to discrimination. Article 14's protection is limited in that it only prohibits discrimination with respect to other rights under the Convention – the relevant provision would be Article 1 Protocol 1. If the comparison which Ms Perkins sought to draw with persons in "similar circumstances" was, for example, with all persons importing Class C drugs unlawfully, it is at least possible (we express no concluded view on the point) that such a test might be discriminatory. Discrimination can arise not only in treating persons in a similar situation differently but also where persons in different situations are treated in the same way. If the appellant's Addison's disease, for example, constituted a disability then comparing the harshness of his treatment with persons not similarly afflicted might (again without deciding the point) constitute discrimination. The Border Force must, of course, not act in a way which is incompatible with a Convention right (s6 The Human Rights Act 1998).

[7] See also the recent decision of this Tribunal (Judge Redston and Mr Simon) in *Smouha v The Director of Border Revenue* [2015] UKFTT 147 (TC) at [142] – [144] with which we respectfully agree:

> "142. The Supreme Court recently considered A1P1 and proportionality in *R v Waya* [2012] UKSC 51, in the context of whether a confiscation order made following Mr Waya's false declaration for mortgage purposes was compatible with A1P1. The facts are obviously different to the present case but the principles considered by the Court are essentially the same. The judgment in *Waya* was given by Lord Walker and Hughes LJ. At [12] they said: "It is clear law, and was common ground between the parties, that [A1P1] imports, via the rule of fair balance, the requirement that there must be a reasonable relationship of proportionality between the means employed by the state in, inter alia, the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation. That rule has consistently been stated by the European Court of Human Rights."

subject to a penalty. We note the argument that the goods were of a relatively low value and that to impose a penalty equal to the value of the goods would have been tantamount to a refusal to restore. Each case must be judged on its own merits. In this case, the value to the goods to the appellant was not primarily financial but was an important factor in his health and well-being, as was borne out by the medical advice. We accept that the goods had a relatively low monetary value. Nonetheless, we consider that a less restrictive alternative which would promote the objects of the legislation and be consistent with HMRC's policy on restoration would be to impose a financial penalty up to (but not exceeding) the value of the seized DHEA tablets as a condition of their restoration.

80. Mr Newbold argued that we should be cautious in our approach. He submitted that Ms Perkins's decision letter was within the range of reasonable conclusions that could have been reached. That may be so, but the flaws Ms Perkins' in our view render the decision unreasonable for the reasons we have given.

81. Mr Newbold argued that we should focus on what was "exceptional" in the sub-category of importers of any Class C drugs by post. We reject that argument. It seems

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143. They then cited *Jahn v Germany* (2006) 42 EHRR 1084 at [93], describing it as setting out a principle "gathered from established Strasbourg jurisprudence in terms often repeated and generally applied": "The court reiterates that an interference with the peaceful enjoyment of possessions must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights: see, among other authorities, *Sporrong and Lönnroth v Sweden* (1982) EHRR 35, para 69. The concern to achieve this balance is reflected in the structure of article 1 of Protocol No 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions: see *Pressos Cia Naviera SA v Belgium* (1995) 21 EHRR 301, para 38. In determining whether this requirement is met, the court recognises that the state enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question: see *Chassagnou v France* (1999) 29 EHRR 615, para 75."

144. In *Lindsay* [[2002] EWCA Civ 267], Lord Phillips MR considered the application of A1P1 to the Commissioners' policy of not restoring vehicles used to import excisable goods into this country in excess of guideline levels. At [52] he observed: "The Commissioners' policy involves the deprivation of people's possessions. Under Article 1 of the First Protocol to the Convention such deprivation will only be justified if it is in the public interest. More specifically, the deprivation can be justified if it is 'to secure the payment of taxes or other contributions or penalties'. The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued . I would accept [the] submission that one must consider the individual case to ensure that the penalty imposed is fair. However strong the public interest, it cannot justify subjecting an individual to an interference with his fundamental rights that is unconscionable."'

to us quite clear that the test of what is "exceptional" should be applied to the circumstances of the appellant's individual case.

82. Mr Newbold further argued that in the present case, the legislation allowed for DHEA to be imported either pursuant to a license or personally imported for personal use. Mr Newbold submitted that we should not seek to expand the categories of lawful importation for which Parliament has expressly provided. It seems to us that this argument misses the point. Parliament has provided the Border Force with a discretion to restore goods notwithstanding the fact that they have been unlawfully imported. That discretion must be exercised reasonably. Our jurisdiction is limited. We cannot order that the DHEA tablets be restored to the appellant and there is therefore no question of us expanding the circumstances in which DHEA can be lawfully imported.

83. Mr Newbold also submitted that Ms Perkins came to the correct conclusion that the mis-description of the goods by "Amy Maude" was a "deliberate ploy". It was no part of his case that the appellant was a party to that deception but rather that the appellant may end up bearing the consequences of it. The mis-description of the goods was a relevant consideration which went to the question of proportionality. We accept that the mis-description of the goods was a relevant factor which Ms Perkins was entitled to take into account. Nonetheless, we consider that she mis-directed herself as to the responsibility which the appellant bore for that mis-description.

84. For the reasons given above we consider that Ms Perkins' review letter dated 8 March 2017 contained a decision that could not reasonably have been arrived at for the purposes of s16(4) Finance Act 1994.

85. Under s16(4) Finance Act 1994 we make the following directions:

IT IS DIRECTED THAT

(1) The Border Force shall carry out a further review of Ms Perkins' review decision of 8 March 2017 in accordance with the views contained in this decision, giving full reasons for its decision.

(2) In carrying out such further review the Border Force shall consider the applicability of Article 14 of the European Convention on Human Rights and shall bear in mind the appellant's Convention rights.

(3) The Border Force act proportionately, in accordance with the appellant's Convention Rights and in particular A1P1, bearing in mind the guidance given by the Supreme Court and the Court of Appeal set out in the *Smouha* decision referred to in footnote 7 above, and the views expressed by this Tribunal.

(4) The appellant shall be entitled for the purposes of this further review to produce any further information (including medical information) which he considers appropriate – such information to be produced within 30 days of the date of the release of this decision.

(5) The further review by the Border Force shall be completed and issued within 60 days of the date of the release of this decision.

(6) The parties shall be at liberty to apply to the Tribunal for an extension of the above time limits.

86. Finally, in accordance with Rule 14, The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, the Tribunal orders that the name or address of the appellant shall not be published in any manner that is likely to lead to members of the public identifying the appellant. It is necessary for this decision give details of the medical condition of the appellant that would ordinarily remain confidential. The appellant is a private individual and this order to withhold his name and address is made in order to respect his right to a private and family life.

87. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 21 AUGUST 2018