Neutral Citation No. [2006] NICA 19 | *Ref:* **KERF5559**

Judgment: approved by the Court for handing down | *Delivered:* **09/05/2006**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

DEBRA MICHELLE McKITTRICK

Appellant;

-and-

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents.

BETWEEN:

GEORGE SIMON BARR, SARAH ANNE CAMPBELL

Appellants;

-and-

THE COMMISSIONERS OF CUSTOMS & EXCISE

Respondents.

Before: Kerr LCJ, Nicholson LJ and Sheil LJ

KERR LCJ

[1] These appeals involve identical issues and were heard together. Both involve a challenge to the decision of the Value Added Tax and Duties Tribunal that it did not have jurisdiction to entertain the appellants' appeals under rule 3 of the Value Added Tax Tribunal Rules 1986. (Rule 3 prescribes

the manner of appealing and is not otherwise relevant to the issues that arise on the present appeals.)

[2] Goods brought to the United Kingdom by Brian McKittrick (who is now deceased) were seized by the Commissioners of Customs and Excise at Larne on 5 March 1999. The first appellant is his personal representative. Goods that had been imported by the second and third appellants were seized at Dover on 16 January 2001. Mr McKittrick initially disputed the validity of the seizure of the goods that he had imported but he subsequently withdrew that claim. Neither of the other appellants challenged the authority of the respondents to make the seizures. They could have done so under paragraph 3 of Schedule 3 to the Customs and Excise Management Act 1979 which provides: -

> "Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise."

[3] The appellants intimated applications to the respondents that they should exercise their powers under section 152 (b) of the 1979 Act to restore the seized goods. In the case of Mr McKittrick the application was made on 19 March 2003. The other appellants applied on 12 March 2003. It is common case that there is no express statutory time limit on making an application for restoration. The applications were prompted by a decision of the Court of Appeal in England in the case of *R (on the application of Hoverspeed Ltd and others) v Customs and Excise Commissioners* [2002] EWCA Civ 1804 which was handed down on 10 December 2002.

[4] Section 152 (b) provides: -

> "**152 Power of Commissioners to mitigate penalties, etc**
>
> The Commissioners may, as they see fit—
>
> (a) …
>
> (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized…"

[5] The goods that had been seized had been disposed of long before the applications for restoration had been made but it is the contention of the appellants that section 152 (b) should be read as including a power vested in the Commissioners to pay compensation in lieu of the physical return of the seized goods. The respondents do not agree and assert that they may only exercise their powers under section 152 (b) if there are goods that can be restored in the sense of being handed back. The Commissioners therefore declined to consider the appellants' applications.

[6] By letter of 31 March 2003 Mr McKittrick's solicitors were informed that the goods had been destroyed and there was no basis for making restoration. On 2 April 2003 the solicitors asked for a review of that decision. The Commissioners replied on 9 April 2003 that there was no decision that could be reviewed. The solicitors then wrote to the respondents on 11 April 2003 stating that they regarded the letter of 9 April 2003 as an assumed decision not to restore for the purposes of section 15 of the Finance Act 1994. On 16 April 2003 a Notice of Appeal was served on behalf of Mr McKittrick purporting to appeal to the tribunal the "deemed" review decision that the respondents were said to have issued on 9 April 2003. On 26 August 2003 the Commissioners issued a notice asking the tribunal to strike out Mr McKittrick's appeal pursuant to rule 6 of the 1986 Rules. The tribunal held a preliminary hearing on 1 September 2004 and on 21 October 2004 issued its decision striking out the appeal.

[7] A broadly similar sequence of exchanges took place in respect of the other appellants with the Commissioners asserting that they had not taken a decision and the solicitors for the appellants contending that the avowed refusal to entertain the application for restoration amounted to a refusal to restore under section 152. The preliminary hearing in the second and third appellants' cases took place on 23 September and a decision in that appeal was also issued on 21 October with the same result.

[8] At the heart of the present appeals lies the question of the jurisdiction of the tribunal to hear appeals under section 152. The appellants submit that the tribunal has jurisdiction to hear the appeals because the respondents have made decisions under section 152. The Commissioners contend that the tribunal has no jurisdiction to entertain the proposed appeals because they have not made a decision under section 152 but have determined that that section 152 is not applicable in the present circumstances. The respondents say that a challenge to the legal correctness of that conclusion may only be made by way of judicial review.

[9] The answer to these competing cases is to be found in the provisions that establish the tribunal and define its jurisdiction. Before turning to those, however, we must say something about the system of review of decisions by Commissioners. Section 14 of the Finance Act 1994 outlines a range of

decisions that Commissioners will be required to review if certain conditions are met. Included in these at section 14 (1) (d) are "any decision by the Commissioners or any officer which is of a description specified in Schedule 5 to this Act." Schedule 5 paragraph 2 deals with decisions under the 1979 Act (referred to in the Finance Act as 'the Management Act'). Paragraph 2 (1) lists a number of different decisions "under or for the purposes of the Management Act", including, at sub-paragraph (r): -

> "any decision under section 152(b) as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored"

[10] Section 15 of the Finance Act provides for the procedure to be followed where a decision is to be reviewed by the Commissioners. By virtue of subsection (1) the Commissioners may, after reviewing the decision, confirm it, vary it or withdraw it. Section 16 (1) deals with appeals to the tribunal. For the purposes of the present appeal the relevant parts of this subsection are as follows: -

> "… an appeal shall lie to an appeal tribunal with respect to—
>
> (a) any decision by the Commissioners on a review under section 15 above"

[11] Section 16 (4) must also be considered. It sets out the powers of the tribunal in relation to any decision as to an ancillary matter or any decision on the review of such a decision. These include the power to direct that the decision should cease to have effect and to require the Commissioners to conduct a further review. The question arises whether a decision that section 152 (b) does not apply constitutes a decision as to an ancillary matter. We are satisfied that it does not. Section 16 (8) provides: -

> "(8) References in this section to a decision as to an ancillary matter are references to any decision of a description specified in Schedule 5 to this Act which is not comprised in a decision falling within section 14(1)(a) to (c) above."

[12] As we have observed above, decisions *under* section 152 (b) are dealt with in section 14 (1) (d) and Schedule 5 paragraph 2 (1) (r). Such decisions are therefore ancillary decisions for the purposes of section 16 since they do not fall within section 14 (1) (a) to (c). But what the Commissioners did was to determine that section 152 (b) could not be invoked by the appellants. They

made a legal determination as to the application of the subsection; they did not make a decision under the sub-section. The tribunal therefore did not have jurisdiction to entertain the proposed appeals. Both appeals to this court must therefore be dismissed.