

BEFORE THE CUSTOMS APPEAL AUTHORITY

Decision: [2023] NZCAA 01

UNDER

The Customs and Excise
Act 2018

BETWEEN

XXXX and YYYY

Appellants

AND

**Chief Executive of the
New Zealand Customs
Service**

Respondent

Hearing: On the papers

Counsel: Mr C Mitchell, counsel for the Appellants.

Ms N Taylor and Ms O Norling, counsel for Customs

Decision: 20 July 2023

DECISION – INDICATIVE

Representatives: Colin Mitchell, Barrister, Auckland, for the Appellants
New Zealand Customs Service, Auckland, for Customs

Introduction

- [1] This appeal concerns cash seized at the border when the Appellants entered New Zealand in the course of travel on 17 April 2020. They were travelling together (with other family members). The amount of cash was approximately NZD\$27,913.00.
- [2] The required declarations of cash (when it exceeds NZD \$10,000) had not been completed.
- [3] The explanation advanced by the Appellants has been that there was misunderstanding and the male Appellant, XXXX, suffered from cognitive impairment.
- [4] Customs has exercised its powers of seizure, with the statutory processes of forfeiture and condemnation applying. The Authority is required to consider whether the cash should be forfeit.
- [5] It is necessary to:
 - [5.1] Consider the factual circumstances, and whether forfeiture was the legal consequence; and if so,
 - [5.2] Whether the Authority should exercise its discretion to provide relief.

Interim decision

- [6] When this matter first came before the Authority its hearings were disrupted by COVID-19 restrictions. The Authority indicated it would issue an interim decision, allowing the parties an opportunity to have an oral hearing to challenge any legal or factual matters.
- [7] Unfortunately, there have been delays due to some confusion over the status of the proceedings.

The law

Forfeiture

- [8] The cash was seized as forfeited to the Crown pursuant to section 176(1)(d)(ix) of the Customs and Excise Act 2018 (the Act). It provides that goods are forfeit to the Crown if an offence has been committed under sections 388 to 391 of the Act. Customs claim that the cash was imported in circumstances where there was an offence under s 388(1)(a) of the Act. It provides it is an offence to, without “lawful authority or reasonable excuse” to import any “prohibited import” into New Zealand.

The prohibition and the offence

- [9] Section 114(2) of the Anti-Money Laundering and Counterfeiting Financing of Terrorism Act 2009 (the AML Act) provides that movement of cash in breach of the AML Act is the importation of a prohibited good.¹
- [10] Section 68(1) of the AML Act provides that a person must not move cash into or out of New Zealand if the cash:
- [10.1] Exceeded NZD\$10,000 in value;²
- [10.2] There was no prescribed report in respect of the movement of cash, and
- [10.3] It is not an exempt importation.
- [11] Section 106 of the AML Act provides it is an offence to import cash without making a cash report, or a reasonable excuse.

The Authority's powers

- [12] Under section 176(1)(a) of the Act, goods that are unlawfully imported are forfeit to the Crown, and Customs Officers are authorised to seize forfeit goods.³ Section 184 and clause 1 of Schedule 5 to the Act allows a person with an interest in seized goods to apply for a review by the Chief Executive of Customs, or appeal on two grounds:
- [12.1] There was no legal basis for the seizure, or
- [12.2] In all the circumstances relief should be granted.
- [13] Clause 6 of Schedule 5 of the Act provides various factors to take into account regarding potential relief.
- [14] This Authority has jurisdiction to consider an appeal from a decision of the Chief Executive on an application for review.⁴ Accordingly, as this matter is an appeal against a review the Authority must decide whether the Chief

¹ The term "prohibited goods" and "prohibited imports" is equivalent for present purposes, see definition of "prohibited goods" s 5 of the Act.

² The "threshold amount" is prescribed in Anti-Money Laundering and Countering Financing of Terrorism (Cross-border Transportation of Cash) Regulations 2010.

³ Section 185 of the Act provides for seized goods to be condemned.

⁴ Sch 5 cl 9 of the Act.

Executive's decision was correct. However, the appeal is on a *de novo* basis,⁵ and the burden of proof is on the Appellants.

The issues

[15] Given the facts and the issues raised in this case it appears that there are two factors the Authority must determine:

[15.1] Did the cash avoid liability for forfeiture, seizure and condemnation as there was "a reasonable excuse" for the non-declaration?

Alternatively

[15.2] After considering all the circumstances, including the provisions in Clause 6 of Schedule 5 of the Act should relief be granted?

Customs' Position

[16] I first discuss Customs' position as the Appellants' position is necessarily responsive to the basis for Customs making its decision.

[17] Customs say that the non-compliance was not reasonable, having regard to the Appellants' past experience with importation of cash, the amounts of cash and the roles and circumstances of both Appellants.

[18] Customs also contends only part of the cash should be considered, as they claimed an interest in only part of the cash they were carrying, claiming other family members owned the cash other than NZD\$6,978.25 each.

[19] Customs also says the circumstances do not justify relief.

The Appellants' Position

[20] Through their counsel the Appellants say XXXX has been suffering from a neurological condition since 2017, vascular issues with cognitive effects, and potentially Alzheimer's disease. Further, his medication influences him. However, despite his impairment "elderly Chinese male persons take control of the family's earnings." On this basis counsel contends that relief should be granted of \$6,978.25 for each of the Appellants.

[21] I infer the Appellants' maintain that the remainder of the money (the amount exceeding \$6,978.25 each) belonged to other family members.

⁵ Sch 8 cl 13 of the Act

Discussion

[22] This appeal is primarily a factual case, and the Appellants carry the onus of proof. I could not find a *prima facie* case to avoid forfeiture or grant relief on the material in the written record.

[23] In short, the Appellants do need to prove the grounds for their appeals, as the uncontested facts do not establish, they had a “reasonable excuse” for non-declaration, or that relief is justified. Potentially, they can establish both grounds, but have not done so at this point.

[24] Factors the Appellants will need to address using sworn evidence, subject to cross-examination are:

[24.1] What weight, if any, I should give to the earlier incident involving cash at the border?

[24.2] Who owned the cash? It seems the Appellants had possession of the cash in issue at the border. The starting point, in the absence of further evidence, would be the Appellants' owned the cash they possessed at the border.

[24.3] If the cash they owned was less than \$10,000 each, potentially they did not need to declare it, however they would need evidence to substantiate that for a factual finding.

[24.4] To the extent I can determine on the evidence I have seen, XXXX was cognitively impaired. I cannot assume that for unproven cultural reasons his family did, or would, allow him to manage large amounts of cash, or that YYYY would not closely manage the cash in those circumstances. Security for large amounts of cash is not usually dictated by cultural or social constructs, it is generally a simple security issue.

[24.5] Until I can make finding on the circumstances of importation, I cannot make satisfactory determinations regarding potential relief.

Hearing

[25] The observations and questions I raise do no more than indicate my preliminary view of the legal framework and raise questions that I need to determine based on evidence.

[26] The Authority will hold either an in-person hearing as soon as practicable or a remote hearing if the Appellants apply to do so.

[27] The parties are to liaise with the Case Manager to arrange a date and place for the hearing. If the parties cannot agree on a timetable, length of hearing

and any other issues arising, the Authority will hold a telephone conference at short notice.

Dated at Wellington 20 July 2023

G D Pearson
Customs Appeal Authority