[2016] UKFTT 547 (TC)

TC05296

Appeal number: TC/2015/06449

Customs & Excise - Vehicle seized carrying cannabis – driver imprisoned - restoration request refused on grounds that haulier was complicit – later evidence that haulier was not complicit - whether decision to refuse restoration unreasonable – yes – appeal allowed – further review directed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BOTRANS AVTOPREVOZNISTO **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE ZACHARY CITRON
MRS SHEILA CHEESMAN

Sitting in public at Fox Court, London on 20 April 2016

Mr Michael Newbold, Counsel, instructed by Stilwell & Singleton, for the Appellant

Mr William Dean, Counsel, instructed by Cash Forfeiture & Condemnation Legal Team, Home Office, for the Respondent

DECISION

1. This case was about whether it was reasonable of the respondent to have refused to restore a vehicle owned by the appellant, a family-run Slovenian haulage company. The vehicle had been seized by the respondent at Dover on 16 April 2015 after it had been used in an attempt to smuggle 60 kg of cannabis into the UK. The driver of the vehicle at the time was the son of the director and shareholder of the appellant.

The appeal

2. On 1 October 2015, Mrs Helen Perkins, an officer of the respondent, wrote to the appellant's solicitors confirming, after review, the respondent's earlier decision not to restore a DAF tractor unit and curtain-side trailer (together, the "vehicle") owned by the appellant. We shall refer to this letter as the "review decision letter" and to the decision made in it as "the decision in question".

3. The appellant appealed by notice of appeal dated 22 October 2015.

Application for postponement

4. The respondent made an application on the morning of the hearing for the hearing to be postponed, principally on the grounds that it had not had sufficient time to review witness statements that had been provided by the appellant 15 days before hearing.

5. The application to postpone was refused, although the hearing was adjourned until 12.30 pm to give the respondent some further time to review the appellant's witness statements. The parties agreed that it was unnecessary to give full written findings of fact and reasons for the decision to refuse postponement.

Evidence

6. We heard oral evidence from Mr Branco Oberc ("BO") (the director and shareholder of the appellant) and from Mrs Perkins. We also had witness statements from these two witnesses. We found them both to be reliable witnesses.

7. We also had a witness statement from the driver of the vehicle at the time of the attempted smuggling, Mr Goran Oberc ("GO"), BO's son. Because GO was not in attendance at the hearing (he could not attend in person due to his having been deported from the UK following his imprisonment for the smuggling attempt) and so could not be cross examined, we place little weight on evidence in his witness statement which was not corroborated by other reliable evidence.

Correspondence concerning the appellant's request for restoration of the vehicle

8. On 16 May 2015, the appellant asked, by means of an email to the respondent, for the vehicle to be restored. Certain documents were attached to the email, though none were in (or translated into) English.

9. On 3 June 2015, the respondent wrote to the appellant, as follows:

> "When considering the restoration of commercial vehicles, Border Force will consider, amongst other factors, the involvement of the owner/haulier; this will include the steps taken by the haulier to prevent the vehicles from being used to carry smuggled goods. Therefore, can you please provide the following information:
>
> 1. A copy of your employment contract with the driver, which should include the terms and conditions of employment.
> 2. Copies of any employment references from the driver's previous employers.
> 3. Details of your interview with the driver before employing him.
> 4. Copies of any instructions or written procedures that you issue to drivers or other staff to prevent them smuggling.
> 5. Details of how you obtained the contract to carry the goods.
> 6. The checks you made of the consignor.
> 7. The arrangements to collect the goods from the consignor and load them onto your vehicle.
> 8. Details of any physical checks made of the load and the application of any seals.
> 9. The checks you made of the consignee.
> 10. The arrangements made to deliver the goods to the consignee.
> 11. Details of any other measure you take to prevent your vehicles being used for smuggling.
>
> It is for you to make a case for restoration. This is your opportunity to bring to our attention anything else that you would like us to consider in support of the restoration request.
>
> All information and documents supplied to the Border Force in support of a request for restoration must be in **English**."

10. On 5 June 2015, BO responded, enclosing various documents (except the last, none of which were translated into English) which he described thus:

> (1) A copy of employment contract with the driver
>
> (2) Proof of ownership for the trailer
>
> (3) Information about the trailer
>
> (4) Arrangement to collect goods with the consignor

(5) Internal instructions about the behaviour of the drivers and preventing them smuggling

11. On 11 July 2015, the respondent wrote to the appellant, refusing to restore the vehicle:

(1) Under the heading, "A Summary of the Drugs Restoration Policy for Commercial Vehicles", the letter stated: "When a vehicle is involved in the smuggling of drugs, the policy is not to restore the vehicle unless there are exceptional circumstances."

(2) Under the heading , "My Decision", the letter stated:

> "I conclude there are no exceptional circumstances that would justify a departure from the Commissioners' policy as the driver Mr Goran Oberc who was responsible for the smuggling attempt held a high position within the company I therefore consider the haulier to be complicit in this case and can confirm on this occasion **the unit and trailer will not be restored**."

12. On 19 August 2015, the appellant's solicitors wrote to the respondent as follows:

> "This letter is to seek a review of your decision not to restore the vehicle to our clients which seems to be on the basis that the driver was responsible for the smuggling and held a high position within the Company.
>
> This is an erroneous view. Mr Goran Oberc was employed only as a driver and the Company knew nothing of his criminal activities.
>
> We understand that Mr Goran Oberc is now in custody awaiting sentence having pleaded guilty to the illegal importation and our client Company is quite adamant that Mr Goran Oberc was on a frolic of his own and having made the decision to import the drugs the Company would have been completely oblivious to his activities.
>
> You will observe that the director of the Company is Mr Branko Oberc. He is the father of Goran Oberc and Goran has apparently admitted to his father that he collected the drugs in Germany on the way to the United Kingdom but again this was something completely out of the control of the Company."

13. The respondent's review decision letter of 1 October 2015 (written by Mrs Perkins) contained the following (after a summary of the seizure and correspondence to date):

(1) Under the heading "Summary of Restoration Policy for Vehicles used for the importation of Drugs", it stated:

> "When a vehicle is involved in the smuggling of drugs, the policy is to not restore the vehicle unless there are exceptional circumstances.
>
> A vehicle <u>adapted for the purposes of smuggling</u> will not normally be restored."

(2) The letter then said that:

> "The policy should be applied firmly, but not rigidly, so as to allow an exercise of discretion on a case by case basis."

(3) After dealing with the legality of the seizure, the letter then said:

> "Your client's vehicle has been used to facilitate the movement of a significant quantity of Class B drugs destined for distribution with the UK. Had these illicit goods not been detected they posed a significant risk to the UK and had an estimated street value in excess of £200,000. This is an extremely serious office and one that has resulted in a criminal conviction."

(4) The letter then observed that the contract with the driver sent to the respondent had not been translated into English. It cited a decision of the Tribunal (*McGeown International Ltd* [2011] UK FTT 407 (TC)) to the effect that the burden of proof lay with the appellant; and observed that other documents sent by the appellant had not been translated and had therefore been given no weight. It then said:

> "I note that your client acknowledges that the driver, Goran Oberc, who is also his son, was responsible for the smuggling of the drugs into the UK. I have also considered that your client stated that his son was only employed by the company as a driver and that the company knew nothing of his criminal activities. Documentation available to me, concerning your client's company conflicts with this account, and details your client's son as the '*Legal Representative*' for the company. Without evidence to the contrary, it is not unreasonable that I conclude Mr Goran Oberc, actually held a position of higher authority within the company, than has been declared. Therefore I am not persuaded that the company, on the balance of probability, were as unaware of the smuggling activities by Mr Goran Oberc as they had indicated."

(5) The letter then considered whether there was exceptional hardship to the appellant (and concluded there was not), before stating under the heading "Conclusion":

> "I am of the opinion that the application of the policy in this case treats your client, no more harshly or leniently than anyone else in similar circumstances. There are no exceptional circumstances that warrant a departure from the policy of non restoration and I therefore conclude that;
>
> - **The tractor unit and trailer (vehicle) should not be restored to your client.**"

14. We had in the bundle a copy of the document referred to in this letter: it appears to be a print out from the internet under the heading "Oberc Branko SP – free basic company check". It appears to relate to the appellant and, under the sub-heading "Principals", states:

Goran Oberc	Legal Representative
Branko Oberc	Proprietor

15. On 4 March 2016, the appellant's solicitors sent the respondent an English translation of a company registration document in respect of the appellant. This indicated that GO was a legal representative of the appellant "only in the case of death" – and this appears to be referring to death of BO, referred to on the document as the "entrepreneur". The document was dated as of 23 February 2016

16. On 21 March 2016, Mrs Perkins on behalf of the appellant wrote to the appellant's solicitors as follows:

> "I am satisfied from the documentation you have provided, on behalf of your client, that Goran Oberc's position of legal representative within the company only comes into force on the death of his father, your client Mr Branko Oberc.
>
> However, on 03 June 2015, your client was requested by [the respondent] to supply information pertaining to both the driver and the vehicle as follows…"

17. The letter then repeated the list of 11 items requested in the respondent's letter of 3 June 2015, summarised the appellant's responses, and then stated as follows:

> "Only some of the information requested by [the respondent] from your client [in the letter of 3 June 2015] has actually been provided by your client and [items 1-4 in the appellant's response of 5 June 2015] **were not translated into English as requested** and therefore have not been considered within my review. The internal instructions [item 5 in the appellant's response of 5 June 2015] were the only document that was translated into English by your client and it dealt simply with behaviour/conduct of a driver. It did not refer specifically to the consequences of gross misconduct, such as criminal or smuggling activities. As I have previously explained, the onus of making his case rests firmly with your client.
>
> Therefore, the new information provided by your client, in isolation, does not affect my original review decision issued to your client on 01 October 2015, namely that the tractor and unit should not be restored."

Findings of fact concerning the drug smuggling incident and the appellant

18. We make the following findings based principally on:

(1) BO's evidence;

(2) the "internal instructions" document, enclosed with the appellant's email of 5 June 2016;

(3) an English translation of an employment contract between GO and the appellant, dated 25 October 2014 (found in the bundle behind a letter from the appellant's solicitors to the Tribunal dated 22 October 2015); and

(4) Mr Newbold's cross examination of Mrs Perkins, in which agreement was reached as to the relevance of items 2, 3 and 5-10 in the respondent's letter of 3 June 2015.

The drug smuggling incident and seizure

19. The vehicle was seized at Dover on 16 April 2015 after officers of Border Force found vacuum packages containing 60kg of herbal cannabis within the floor of the trailer. The vehicle was carrying a consignment of plastic components from Cologne to England. The driver, GO, was arrested and charged with an offence contrary to s170 of the Customs and Excise Management Act 1979; he pleaded guilty, was convicted and sentenced to 20 months' imprisonment; he was released after five months and deported from the UK. The value of the cannabis seized was about £200,000. GO was given forms explaining the right to challenge the seizure in a magistrates' court by sending a notice of claim to Border Force within one month. No such challenge was made.

The appellant

20. The appellant is a Slovenian haulage company owned and run by BO. It delivers goods across Europe and has a turnover of about €500,000. It owns six lorries, one of which was the vehicle. The appellant employs four drivers, as well as GO. GO has been employed by the appellant for 11 years.

The appellant's involvement in the drug smuggling incident

21. BO, as sole director and shareholder of the appellant, had no knowledge, prior to the event, of GO's intention to smuggle cannabis into the UK; it was GO who planned and carried out the smuggling attempt. The load of plastic parts was itself legitimate; it was not a sham "cover load". The appellant was therefore not complicit in the attempted smuggling of cannabis by GO.

GO's status within the appellant

22. GO was an employee of the appellant at the time of the smuggling incident. He was also "the boss' son", which conferred a degree of special treatment: he was hired without interview or references (we infer this from Mr Newbold's assertion, agreed to by Mrs Perkins under cross examination, that requests for evidence of interview or references were irrelevant); he was the named "legal representative" of the appellant in the event of his father's death; and, prior to the smuggling incident, because his father trusted him, he was also the only driver, apart from BO, who was allowed to take driving assignments for the appellant that involved the UK, due to the risks associated with smuggling into the UK .

Measures taken by the appellant to prevent drug smuggling – prior to the incident

23. The incident involving GO was the first time one of the appellant's drivers had been involved in smuggling. The appellant had few if any measures in place to prevent drug smuggling by its drivers. There were no terms in GO's contract geared to the prevention of smuggling; the "internal instructions" issued to drivers contained instructions for safe driving, but did not say anything related to smuggling. As part of their legally-required training, the appellant's drivers were told that they should not smuggle. Finally, as stated in the preceding paragraph, only BO and GO were permitted to take driving assignments in the UK, prior to the smuggling incident.

Actions taken by the appellant following the incident

24. Following his release from jail in the UK, GO continued to be employed by the appellant. His employment contract, which describes his work as including "driving in road international traffic" and his salary as €1,631.25 gross per month, were not changed as a result of the incident; but, in practice, his duties became restricted to non-driving tasks such as cleaning trucks and changing tyres (although he could be given urgent driving jobs within Slovenia). He was also now paid only around €700 net per month, reflecting his reduced duties.

25. Following the incident, BO held a meeting with the drivers employed by the appellant, reiterating that they must not engage in smuggling, and saying that if

anyone broke the rules, they would be fired. This message was posted in writing on a wall in BO's office.

Consequences of the drug smuggling incident for the appellant

26. The incident resulted in the appellant losing the contract with the client for which the load was being transported when the incident took place. Since the incident, the appellant has not undertaken any contracts to transport goods to the UK.

27. The current value of the vehicle is between €20,000 and €25,000.

Finding of fact concerning the respondent's policy on restoration in drug smuggling cases

28. Based on Mrs Perkins' evidence, as well as the correspondence between the parties, we find three strands to the respondent's policy on vehicle restoration in drug smuggling cases:

(1) The first strand was as was simply stated in the review decision letter: vehicles involved in drug smuggling would not be restored other than in exceptional circumstances (which would include exceptional hardship).

(2) The second strand was that each case be reviewed on its own particular facts.

(3) The third strand was to give considerable weight to whether measures were taken by the haulier to stop drug smuggling (either preventive measures or sanctions taken in reaction to the smuggling incident in question). This aspect was alluded to in the respondent's letter of 3 June 2015, in which it mentioned "the involvement of the owner/haulier" as a relevant factor, as well as "the steps taken by the haulier to prevent the vehicles from being used to carry smuggled goods".

29. The aim of the respondent's policy is to reduce the risk of drug smuggling occurring; regarding the third strand of their policy, in the respondent's view, even though drug smuggling attracts criminal sanctions, the risk of drug smuggling is nevertheless further reduced when employees of hauliers know they could lose their job and receive no references for future jobs, if they are involved in drug smuggling; and if they have been warned regularly not to engage in smuggling.

30. We find that the three strands of the respondent's policy are not entirely consistent with one another. The first strand implies that "exceptional circumstances" are strictly required for restoration of a vehicle involved in drug smuggling. But the second strand suggests a sensitivity to circumstances which may not be altogether "exceptional"; and the third strand affirms this, by introducing a criterion which seems to have nothing to do with how "exceptional" the circumstances are, and everything to do with measures taken (or not taken) by the haulier to stop drug smuggling.

31. This inconsistency between the strands of policy was evident in the review decision letter, which, on the one hand, stated the policy as expressed in the first

strand but, in coming to its conclusion, laid much emphasis on the degree of awareness of the drug smuggling on the part of the appellant (rather than strictly adhering to the criterion of whether the circumstances were, or were not, "exceptional").

32. We find that the general effect of the respondent's policy in drug smuggling cases is to treat a haulier which, whilst not complicit in the drug smuggling, had taken no measures against it, in the same way as a haulier which was actually complicit in the drug smuggling ie in both cases, restoration would (as a general rule, subject to particular circumstances of the case) be refused.

33. Mrs Perkins accepted, on cross examination, that the respondent's policy in drug smuggling cases differed from its policy in excise goods smuggling cases, which, as Mr Newbold pointed out, was recently described thus by the Tribunal in *SC Inter Implex v Director of Border Force* [2016] UK FTT 172 (TC), at [25]:

> "A vehicle adapted for the purposes of smuggling will not normally be restored. Otherwise the policy depends on who is responsible for the smuggling attempt:
>
> A. Neither the operator nor the driver is responsible; or
>
> B. The driver, but not the operator is responsible; or
>
> C. The operator is responsible.
>
> "If the operator provides evidence satisfying Border Force that neither the operator nor the driver were responsible for or complicit for the smuggling attempt then:
>
> (1) If the operator also provides evidence satisfying Border Force that both the operator and the driver carried out basic reasonable checks (including confirming with the CMR Convention) to confirm the legitimacy of the load and to detect any illicit load, the vehicle will normally be restored free of charge
>
> (2) Otherwise,
>
> (a) On the first occasion the vehicle will normally be restored for 20% of the revenue involved in the smuggling attempt (or 100% of the trade value of the vehicle if lower).
>
> (b) On a second or subsequent occasion (within 6 months) the vehicle will not be restored."

34. We note that the passage above from *SC Inter Implex* does not describe the respondent's policy in excise goods smuggling cases where the driver, but not the operator, is responsible (analogous to the circumstances of this case). We heard no evidence of the respondent's policy in such cases.

35. We note that the respondent's policy in drug smuggling cases as we have described it above differs from that found by the Tribunal in *Ahmed* [2014] UKFTT 880 (TC) at [32] (namely, that in drug smuggling cases the respondent "may allow restoration to an innocent owner for a fee of between 10-30% of the value of the vehicle depending on the degree of recklessness of the innocent owner").

36. We also note that the Tribunal in *Ahmed* was critical of this policy: it said (at [46]):

> "Our most significant concern with this case however is … the policy that was applied. The policy set out at [32] above appears to be inconsistent with the policy applied by the Border Force in cases of evasion of excise duty. In those cases the policy is only to restore vehicles (if not adapted for smuggling) to third party owners who were not present at the seizure if it is shown (a) they are innocent and (b) have taken all reasonable steps to prevent smuggling and (c) restoration would not be tantamount to restoring the vehicle to the smuggler."

37. The Tribunal in *Ahmed* accordingly directed (at [49]) the respondent to carry out a review of its policies with a view to eliminating the apparent unjust inconsistency in treatment between those persons who fail to take reasonable steps to prevent the use of their vehicle for excise duty evasion (who would be refused restoration) and those who are reckless as to its use for the commission of the serious offence of importing class A drugs (who may, under the policy described in *Ahmed* have their vehicle restored for a fee).

38. We infer from this that the reason the respondent's policy in drug smuggling cases, as we have found it above, differs from that found in *Ahmed* at [32], is that the respondent has changed its policy following the review ordered by the Tribunal in that case.

The law

39. We set out in the Appendix to this decision the relevant statutory provisions.

40. The vehicle was seized under s139(1) Customs & Excise Management Act 1979 as being liable to forfeiture under s141(1) because it was used for the carriage of goods liable to forfeiture (the cannabis). No challenge was made to the seizure in the magistrates' court and therefore the vehicle and the cannabis were subject to deemed condemnation under paragraph 5 of Schedule 3 to that Act.

41. The Tribunal's powers are limited to considering whether the decision in question – the decision of the respondent to confirm, under s15(1) Finance Act 1994, its earlier decision not to restore the vehicle using its powers under s152 Customs & Excise Management Act 1979 - could not reasonably have been arrived at. If we find it could not reasonably have been arrived at, our powers are limited to making directions of the type referred to at s16(4)(a) to (c) Finance Act 1994.

42. Following the Court of Appeal's judgement in *HMRC v Jones & Jones* [2011] EWCA Civ 824, when considering the question of reasonableness we must take as a "deemed fact" that the vehicle was "duly" and therefore lawfully condemned as forfeit under the provisions of the Customs & Excise Management Act 1979 cited at paragraph [40] above.

43. The Court of Appeal in *Customs & Excise Commissioners v JH Corbett (Numismatists) Ltd* [1980] STC 231 set out the correct approach for the Tribunal to follow where it has a supervisory (as opposed to a full merits) jurisdiction as it does in this case. In essence the Tribunal has the power to review the exercise of the discretion exercised by the respondent under s152 Customs & Excise Management Act 1979 (and confirmed by it under s15 Finance Act 1994) and in doing so should answer the following questions:

(1) Did the respondent reach a decision which no reasonable director of border revenue could have reached?

(2) Does the decision betray an error of law material to the decision?

(3) Did the respondent take into account all relevant considerations?

(4) Did the respondent leave out of account all irrelevant considerations?

44. However, *John Dee Ltd v Customs & Excise Commissioners* [1995] STC 941 is authority for the proposition that, if the respondent's decision failed to take into account relevant considerations, the Tribunal may nevertheless dismiss the appeal if we are satisfied that, even if it had taken into account those considerations, its decision would "inevitably" have been the same. We note Warren J's observation in *GB Housley Ltd v Revenue and Customs Commissioners* [2015] STC 1403 (at [22]) that this principle operates equally where there a decision-maker has failed to leave irrelevant considerations out of account:

> "The second observation relates to the 'inevitably the same' exception. That exception reflects the way in which the law works in relation to decision-making authorities generally. Remedies in this field are discretionary. They are, putting the matter very broadly, designed to protect the citizen against decisions by a public authority which have not been taken properly because such a decision may unfairly impact on the citizen's rights. But there is no such unfairness where the authority's decision would inevitably have been the same even if it had taken account of the incorrectly disregarded material. For my part, I see no difference in principle between that sort of case where material is wrongly ignored and a case where material is wrongly taken into account, provided that the decision would inevitably have been the same had the material been ignored."

45. In *Balbir Singh Gora v Customs & Excise Commissioners* [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 any 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.

46. In ascertaining the reasonableness and lawfulness of the respondent's decision, it is necessary to consider whether the decision not to restore the vehicle was proportionate. In *Lindsay v Commissioners of Customs & Excise* [2002] STC 588, a case about a refusal to restore a vehicle used to smuggle excise goods (cigarettes and tobacco), the major issue was whether the policy of the Commissioners so fettered their discretion in reviewing restoration decisions as to prevent them from considering

proportionality "and thus to render their decisions unlawful" (see at [45]). The Court of Appeal in that case explained the principle of proportionality thus (at [52]):

> "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 …"

Appellant's arguments

47. Mr Newbold submitted that the respondent's decision in this case was unreasonable in a number of respects.

The respondent's policy

48. Mr Newbold acknowledged the facts here are quite different from those in *Lindsay* but submitted there are echoes of the same flaw in policy. In *Lindsay*, the policy of the Commissioners in respect of excise goods smuggling was that seized vehicles would not be restored unless there were exceptional circumstances; the Court of Appeal found (at [64]) that the policy failed to distinguish between the commercial smuggler and the driver importing goods for social distribution to family and friends with no attempt to make a profit. In the latter case, the principle of proportionality required 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.

49. Mr Newbold presented the respondent's policy thus: an 'innocent' haulier (ie one with no foreknowledge of drug smuggling by one of its employees) is treated in the same way as a haulier complicit in the drug smuggling. In both cases, the haulier has to demonstrate "exceptional circumstances" to have its vehicle restored. Mr Newbold contrasted this to the respondent's policy cases of smuggling excise goods, as it was found to be in *SC Inter Implex:* this, Mr Newbold said, was a more nuanced policy, taking into account culpability of the operator and the driver in the smuggling.

50. Mr Newbold submitted that it was wrong (a) for the restoration policy to have no relationship to the haulier's culpability, and (b) for the appellant to be put in a worse position (as regards restoration) on account of its vehicle being used in the smuggling of drugs, as opposed to excise goods. He also questioned why it should matter in this case that the drugs were concealed in the vehicle – he submitted that it should not affect the (non-complicit) haulier's position, whether its employee was a careful or a reckless smuggler.

51. As to the significance of whether the haulier had given its employees training as to the consequences of smuggling, Mr Newbold submitted that anyone would have been aware of the grave (criminal) consequences of smuggling 60 kg of cannabis - if those consequences were not enough to deter an employee from smuggling drugs, it was, in Mr Newbold's submission, unrealistic of the respondent to argue that it would

have made any difference had the appellant told its employees that they would lose their jobs if caught smuggling.

The respondent's review decision letter and 21 March 2016 letter

52. Apart from the above points on the respondent's policy, Mr Newbold submitted that Mrs Perkins had made the review decision on the mistaken basis that the appellant was complicit in the smuggling of drugs. He pointed out that the respondent later (in the 21 March 2016 letter) conceded that this was not the case. Mr Newbold therefore submitted that Mrs Perkins' review decision proceeded on a fundamentally flawed basis and so the decision not to restore the vehicle should be set aside. The review decision letter did not, as Mr Dean argued, have a number of reasons, of which one had fallen away; rather, it had a predominant reason (the appellant's complicity), and that is the one which subsequently fell away.

53. Mr Newbold submitted that the appellant was being required to prove its innocence – this was contrary to fundamental principles and on that basis alone, the Tribunal should direct that a new decision be taken.

54. Mr Newbold further submitted that the respondent's 21 March 2016 letter "held against" the appellant the fact that it had not delivered certain documents – which, in Mr Newbold's submission, were irrelevant:

(1) Mrs Perkins had accepted in cross examination that documents 2 and 3 in the list were not likely to be relevant (from which we have inferred, in our findings of fact at paragraph [22] above, that GO was not interviewed prior to his employment by the appellant, nor were references taken, as he was the boss' son)

(2) as regards documents 5-10 in that list, Mr Newbold submitted that Mrs Perkins accepted that, whereas at the beginning of the respondent's enquiries (in June 2015), they may have had some relevance, by March 2016, they were plainly not relevant: this was not a case of a false "cover load".

By insisting on the production of irrelevant documents showed, the respondent's letter of 21 March 2016 was, in Mr Newbold's submission, taking into account irrelevant matters.

55. The 21 March 2016 letter was also flawed, according to Mr Newbold, in that it stated that (amongst other documents) an English translation of GO's employment contract had not been provided to the respondent; whereas it appeared from the bundle that one had been included with the appellant's solicitors letter to the Tribunal of 22 October 2015 (albeit that this appears not to have reached Mrs Perkins herself by the time she sent the 21 March 2016 letter).

Respondent's arguments

56. Mr Dean summarised the respondent's case as follows:

(1) Its policy is reasonable. Mrs Perkins had applied the policy but not allowed herself to be blinkered by it. Concerning the respondent's stricter policy in cases of smuggling illegal drugs as opposed to excise goods, Mr Dean submitted that this was not unreasonable, given the more serious breach of the law with regard to illegal drugs, and the larger societal problem in bringing illegal drugs into the country. Looking at all the circumstances, this was a case where illegal drugs were deliberately concealed in the vehicle. A tough policy on illegal drugs is defensible and reasonable.

(2) The appellant failed to take sufficient care as regards the risk of its vehicles being used for drug smuggling. For example, there was nothing in GO's employment contract containing sanctions for smuggling (even though there was a clause dealing with, for example, competition).

(3) The appellant also failed to take appropriate sanctions against GO in the aftermath of the smuggling incident. GO's employment contract still permits "international" driving. It can be inferred from the fact that the appellant was unwilling to accept jobs in the UK, that the appellant accepts that it cannot take steps to prevent further smuggling in the UK occurring. There was a risk of future smuggling by the appellant, given GO's continuing employment.

(4) As an employee of the appellant (and as the legal representative of the appellant in the event of his father's death), GO would potentially benefit from a restoration of the vehicle – and this would be contrary to the respondent's policy.

(5) The risks involved must be set against the non-exceptional hardship to the appellant. The value of the seized drugs was around £200,000. The value of the vehicle is around £16,000-20,000. Some degree of hardship is always to be expected in cases of vehicle seizure. Here, the appellant continues to trade, even though it lost a customer as a result of the smuggling incident.

57. Mr Dean submitted that when these points are set against the appellant's arguments for the unreasonableness of the decision – that the appellant was not in fact complicit, and that (arguably) irrelevant documents were being called for – it is inevitable that the decision, if re-made, would be the same.

58. Mr Dean submitted that Mrs Perkins was not saying, in her review decision letter and 21 March 2016 letter, that because the appellant did not produce certain documents, the vehicle would not be restored. Rather she was saying: it is for the appellant to show that its case is supported by evidence. She was inviting the submission of further evidence.

59. Mr Dean compared the position with regard to the review decision letter to one where a decision is made for, say, five reasons; even if one of those is no longer supportable, if the other four still apply, the Tribunal should dismiss the appeal.

Discussion

60. The issue in this appeal is whether the decision in question is one which the respondent could not reasonably have arrived at. One indicator of such a decision –

which, for shorthand, we shall refer to as an "unreasonable" decision – is a failure on the part of the decision-maker to leave out of account all irrelevant considerations. In making this determination, the Tribunal is bound to have regard to the facts as we find them; and so, where the factual information available to the decision-maker was different from, or less than, the facts as we have found them, it may be that we find a decision to be "unreasonable" where, on the information available to the decision-maker at the time, it was quite reasonable.

61. In our view, the decision in question falls into this trap of hindsight. It was based on information which, on the facts as we have found them, was not accurate: namely, that GO was the legal representative of the appellant at the time of the smuggling incident; that GO therefore held a position of "higher authority" in the appellant than had been declared (ie that he was more than just an employee of the appellant); and that the appellant was not as unaware of the smuggling as it had indicated (ie it had some foreknowledge of the smuggling incident). We have found that, in fact, GO was not the appellant's legal representative at the time of the smuggling incident; that he was simply an employee of the appellant; and that the appellant, in the form of its sole director and shareholder, BO, had no foreknowledge of the smuggling incident. These factual suppositions on Mrs Perkins' part, which were (with hindsight) not true, were sufficiently material, in our view, to the decision in question, to render it "unreasonable" on grounds that irrelevant considerations were taken into account.

62. We have therefore not accepted Mr Dean's argument that this was a case of a decision on a number of distinct, alternative grounds, such that the invalidity (with hindsight) of one ground should not render the decision as a whole unreasonable: we accept that a number of grounds were presented in the review decision letter, but we do not find these to be distinct and alternative, but rather to be cumulative in their effect of rationalising the decision.

63. We should therefore allow the appeal, and require the respondent to undertake a further review, unless we find that the respondent would, on the facts found at paragraphs [19]-[27] above, inevitably come to the same decision as before.

64. Inevitability is a high bar. In assessing it, we have considered the following evidence:

(1) the respondent's letter to the appellant of 21 March 2016, in which the respondent reconsidered its decision in the review decision letter in the light of facts subsequently made known to it; and

(2) the respondent's policy on restoration in drug smuggling cases, as we have found it based on the evidence before us.

65. We regard the respondent's letter of 21 March 2016 as evidence of what the respondent would do if presented with a given set of facts. Hence, if the facts known to Mrs Perkins at the time of this letter were substantially identical to the facts as we have found them, we would consider this to indicate that that the respondent would inevitably reach the same decision if required to do so afresh.

66. The 21 March 2016 letter, unlike the review decision letter, was written on the basis that GO was not the appellant's legal representative at the time of the drug smuggling incident – and this is consistent with the facts as we have found them (see paragraph [22] above). However, the facts we have found relating to measures taken by the appellant to stop its employees smuggling (see paragraphs [23] to [25] above) were not known to Mrs Perkins at the time of this letter. We consider those facts to be relevant to this case. The letter alone is therefore not sufficient evidence for us to conclude that, if required by us to make a fresh decision, it would inevitably make same one as it made in that letter (ie refuse restoration).

67. Turning to the respondent's policy in drug smuggling cases – this potentially enables us to make a finding on the inevitability of the respondent making the same decision if required to do so afresh, provided the policy is sufficiently clear and specific to predict the outcome if it is applied to a given set of facts. However, the policy as we have found it (paragraphs [28] to [38] above) does not display such features to a sufficient degree:

(1) Whether circumstances are "exceptional" (the first strand of the policy) is not given to precise, objective analysis. It could be argued here that it was "exceptional" for the appellant to have been "let down" by the boss' son, who had worked for the appellant for 11 years without engaging in smuggling. Equally, it could be argued that the circumstances were entirely unexceptional: the smuggling was carried out by a long-time employee carrying out the appellant's ordinary course business.

(2) The fact that attention is paid to the particular facts of cases (the second strand), does not assist in predicting what decision would be taken on a particular set of facts.

(3) The third strand of the policy (measures taken to stop smuggling) is the most specific. Here, the appellant took a few preventive measures – it gave its drivers the legally-required training, in which drivers were told they should not smuggle; it restricted driving to the UK to BO and the driver he most trusted, his son. These were, in our view, weak measures to prevent drug smuggling (even taking account of the fact that it was a small family-owned business). After the event, we have found that the appellant has restricted GO's duties, and reduced his pay; but it has not dismissed him, or introduced fundamentally new preventive measures. Again, we would classify the sanctions taken after the event as weak.

68. On the basis of the above, whilst it is probable or even likely that the respondent would make the same decision if it considered the matter afresh, its policy is insufficiently clear and specific for us to conclude that this would inevitably be the result.

69. Our findings at paragraphs [61] and [68] above are, together, sufficient for us to conclude that the decision in question was "unreasonable" (by reason of taking into account irrelevant considerations) and so dispose of this appeal. However, we shall go on to consider the appellant's alternative arguments as to why the decision was

"unreasonable" as they may have a bearing on the further review which we shall direct the respondent to conduct upon allowing this appeal.

70. Mr Newbold's principal alternative argument was that the decision in question was disproportionate (and so "unreasonable") because it derived from a policy of refusing restoration in drug smuggling cases with no distinction drawn between the haulier who was complicit in the drug smuggling and the haulier who was not. Such a policy, it was argued, could lead to a disproportionate decision in respect of an "innocent" (ie non-complicit) haulier, who received the same sanction as a complicit haulier.

71. We have found that the respondent's policy distinguishes (in its third strand) between hauliers which take measures to stop smuggling and those which do not; but amongst those which fail to take such measures, the policy does not make a further distinction expressly based on complicity.

72. We agree with Mr Newbold that, when dealing with a haulier which has failed to take measures to prevent smuggling, the haulier's non-complicity with the smuggling in question is a relevant consideration which should be taken into account – and there may be cases where, if it is not taken into account, a disproportionate decision may ensue. However, we would also point out:

(1) The second strand of the respondent's policy – to review each case on its facts – is potentially broad enough to allow the respondent the take into account the fact that the haulier was not complicit in the smuggling. What matters is whether in any particular case the respondent has in fact taken this into account.

(2) Taking into account the fact that a haulier was not complicit in the smuggling incident does not necessarily, in our view, mean the vehicle restoration outcome will be different to that for a complicit haulier: the policy should take into consideration all the sanctions at the government's disposal and it may be that the complicit haulier is made subject to additional sanctions (for example, prosecution under s170 Customs & Excise Management Act 1979).

(3) It does not seem to us unreasonable to have a stricter policy for all hauliers, complicit or not, as regards the smuggling of, for example, controlled drugs under the Misuse of Drugs Act 1971, as compared to the policy in respect of smuggling of excise goods such as cigarettes and tobacco.

73. We find ourselves unable to apply these observations concerning *non-complicit* hauliers directly to the decision in question, because that decision was made on the basis that the appellant was *complicit* in the drug smuggling. However, because we have found in fact that the appellant was not complicit, and we will be directing a further review on the basis of the facts we have found, we shall direct that our observations at paragraph [72] above be taken into account in that further review.

74. Another argument advanced by Mr Newbold was that it was "unrealistic" of the respondent to put emphasis on measures by the haulier to stop smuggling (the third strand of its policy in drug smuggling cases). In Mr Newbold's submission, such measures would not be effective. Our response is that the power of the Tribunal is

limited to deciding if a decision by the respondent is "unreasonable" (say, by taking irrelevant considerations into account). We are not persuaded that measures of the kind in the third strand of the respondent's policy are irrelevant considerations – they are clearly intended to have an effect which is relevant, namely to deter smuggling. We do not therefore accept the submission that this aspect of the respondent's policy rendered the decision in question unreasonable.

75. Mr Newbold made an additional argument that the respondent's policy in drug smuggling cases was flawed because it effectively required the appellant to "prove its innocence": the vehicle would not be restored unless certain information was provided by the appellant. In our view, requiring information from a haulier whose vehicle has been seized is not unreasonable provided (a) the information is relevant and (b) it is made clear to the haulier what sort of information is required. If these conditions are satisfied, then it would not in our view be unreasonable to refuse restoration if the haulier fails to provide the information. We consider that the respondent's letter of 3 June 2015 adequately satisfied our two conditions. It was not therefore, in our view, unreasonable for the respondent to have made the decision in question solely on the basis on information that had been supplied by the appellant prior to the review decision letter.

76. Mr Newbold criticised the respondent's letter of 21 March 2016 as taking into account irrelevant matters by requesting certain documents. As the decision in question in this appeal is the review decision letter of 1 October 2015, it is not necessary for us to conclude as to whether the 21 March 2016 letter took irrelevant considerations into account.

77. In making findings of fact, based on the evidence before us, as to the respondent's policy in drug smuggling cases (paragraphs [28] to [38] above), we have found (at paragraph [30]) that the strands of that policy are not entirely consistent with one another. We shall therefore direct, as part of the further review we shall require upon allowing this appeal, that the respondent

(1) point out in what material respects (if any) the policy it applies on that further review differs from the policy as found by the Tribunal at paragraphs [28] to [38] above; and

(2) to the extent relevant to the policy it applies on that further review, ensure that the inconsistencies described by the Tribunal at paragraph [30] above are reconciled in that policy.

Conclusion and directions

78. For the reasons stated at paragraphs [61] and [68] above, we conclude that the decision in question was one which the respondent could not reasonably have arrived at.

79. We direct that the decision in question shall cease to have effect from the date of release of this decision.

80. We require the respondent to conduct a further review of its earlier decision to refuse restoration of the vehicle within 28 days of release of this decision. In doing so, we direct that the respondent:

(1) take account of the facts found by the Tribunal at paragraphs [19] to [27] above;

(2) state the policy of the respondent being applied and point out in what material respects (if any) that policy differs from the policy of the respondent as found by the Tribunal at paragraphs [28] to [38] above; and

(3) take account of the conclusions of the Tribunal set out at paragraphs [72], [74], [75] and [77] above.

81. The appellant should be aware that if it disagrees with a further review decision it will have the ability to appeal to the Tribunal, which will have the same powers as the Tribunal has in respect of this appeal.

82. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 03 AUGUST 2016

APPENDIX

Relevant legislation

Customs and Excise Management Act 1979

Section 49 (Forfeiture of goods improperly imported)

(1) Where

…

(b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; or

…

(f) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer

those goods shall … be liable to forfeiture.

Section 139 (Provisions as to detention, seizure and condemnation of goods etc)

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

…

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

Section 141 (Forfeiture of ships, etc used in connection with goods liable to forfeiture)

(1) …where any thing has become liable to forfeiture under the customs and excise Acts –

(a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and

(b) any other thing mixed, packed or found with the things so liable,

shall also be liable to forfeiture.

Section 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 under [the customs and excise] Acts …

Section 170 (Penalty for fraudulent evasion of duty, etc)

(1) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person—

(a) knowingly acquires possession of any of the following goods, that is to say—

(i) …;

(ii) …;

(iii) goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force under or by virtue of any enactment; or

(b) is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any such goods,

and does so with intent to defraud Her Majesty of any duty payable on the goods or to evade any such prohibition or restriction with respect to the goods he shall be guilty of an offence under this section and may be arrested.

(2) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion—

(a) of any duty chargeable on the goods;

(b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; or

(c) of any provision of the Customs and Excise Acts 1979 applicable to the goods,

he shall be guilty of an offence under this section and may be arrested.

(3) Subject to subsection (4) … below, a person guilty of an offence under this section shall be liable—

(a) on summary conviction, to a penalty of £20,000 or of three times the value of the goods, whichever is the greater, or to imprisonment for a term not exceeding 6 months, or to both; or

(b) on conviction on indictment, to a penalty of any amount, or to imprisonment for a term not exceeding 7 years, or to both.

(4) In the case of an offence under this section in connection with a prohibition or restriction on importation or exportation having effect by virtue of section 3 of the Misuse of Drugs Act 1971, subsection (3) above shall have effect subject to the modifications specified in Schedule 1 to this Act.

…..

(5) In any case where a person would, apart from this subsection, be guilty of—

(a) an offence under this section in connection with a prohibition or restriction; and

(b) a corresponding offence under the enactment or other instrument imposing the prohibition or restriction, being an offence for which a fine or other penalty is expressly provided by that enactment or other instrument,

he shall not be guilty of the offence mentioned in paragraph (a) of this subsection.

(6) Where any person is guilty of an offence under this section, the goods in respect of which the offence was committed shall be liable to forfeiture.

Schedule 1: Controlled Drugs: Variation of punishments for certain offences under this Act

1. Section … 170(3) of this Act shall have effect in a case where the goods in respect of which the offence referred to in that subsection was committed were a Class A drug, Class B drug or a temporary class drug as if for the words from "shall be liable" onwards there were substituted the following words, that is to say—
"shall be liable—

(a) on summary conviction, to a penalty of £20,000 or of three times the value of the goods, whichever is the greater, or to imprisonment for a term not exceeding 6 months, or to both;

(b) on conviction on indictment—

(i) …

(ii) where they were a Class B drug or a temporary class drug, to a penalty of any amount, or to imprisonment for a term not exceeding 14 years, or to both".

3. In this Schedule … "Class B drug" … ha[s] the same meaning[s] as in the Misuse of Drugs Act 1971.

Schedule 3: Provisions relating to forfeiture

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

4. (1) Any notice under paragraph 3 above shall specify the name and address of the claimant and, in the case of a claimant who is outside the United Kingdom and the Isle of Man, shall specify the name and address of a solicitor in the United Kingdom who is authorised to accept service of process and to act on behalf of the claimant.
(2) Service of process upon a solicitor so specified shall be deemed to be proper service upon the claimant.

5. If on the expiration of the relevant period under paragraph 3 above, for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited.

Misuse of Drugs Act 1971

Section 3 Restriction of importation and exportation of controlled drugs

(1) …

(a) the importation of a controlled drug; and

(b) the exportation of a controlled drug,

are hereby prohibited.

Cannabis is listed as a Class B controlled drug in Schedule 2.

Finance Act 1994

Section 14 (Requirement for review of a decision)

(1) This section applies to the following decisions …

(d) any decision by the Commissioners or any officer which is of a description specified in Schedule 5 to this Act.

(2) Any person who is –

(a) …

(b) a person in relation to whom, or on whose application, such a decision has been made, or

(c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied

may by notice in writing to the Commissioners require them to review that decision.

…

The decisions listed at Schedule 5 include (at paragraph 2(r)) "any decision under section 152(b) [of the Customs & Excise Management Act 1979] as to whether or not any thing forfeited or seized under the custom and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored".

Section 15 (Review procedure)

(1) Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either -

(a) confirm the decision; or

(b) withdraw or vary the decision and take further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

…

Section 16 (Appeals to a tribunal)

(1) Subject to the following provisions of this section, an appeal shall lie to an appeal tribunal with respect to any of the following decisions, that is to say -

(a) any decision by the Commissioners on a review under section 15 above ..

…

(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 that 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.

…

(6) On an appeal under this section … it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.

By virtue of s16(8) and Schedule 5, a decision under s152(b) Customs & Excise Management Act 1979 is a "decision as to an ancillary matter".