[2022] UKFTT 00073 (TC)

TC 08404/V

EXCISE DUTY – decision not to restore a vehicle - ss 88, 139 and 152 of the Customs and Excise Management Act 1979 and reg. 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 - vehicle adapted to conceal goods and seized as liable to forfeiture - no condemnation proceedings and no challenge to legality of seizure therefore vehicle (and goods) deemed as forfeit - Jones and Race considered - whether review reasonable – yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00743

BETWEEN

GARRY SEMPLE **Appellant**

-and-

DIRECTOR OF BORDER FORCE **Respondent**

TRIBUNAL: JUDGE NATSAI MANYARARA
DEREK ROBERTSON JP

The hearing took place on 6 December 2021. With the consent of the parties, the hearing was held remotely, by video, using the Tribunal's own video hearing system. A face-to-face hearing was not held because it was not in the public interest during the pandemic to hold a face-to-face hearing and we decided that it was in the public interest for the hearing to go ahead remotely.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely, in order to observe the proceedings. As such, the hearing was held in public.

The Appellant, Litigant in Person

Mr William Dean of Counsel, for the Respondents

DECISION

INTRODUCTION

1. The Appellant appeals against the Respondent's decision, dated 23 November 2019, to refuse to restore his Fiat Motor Caravan, registration G2 SEM ('the Vehicle'). The Respondent concluded that the Vehicle had been adapted to conceal goods, namely 30,000 cigarettes, two and a half kilograms of Hand Rolling Tobacco ('HRT') and 229.5 litres of wine ('the Goods'), upon which excise duty had not been paid.

2. The Vehicle was therefore seized under s 139 of the Customs and Excise Management Act 1979 (hereinafter referred to as 'CEMA') as liable to forfeiture under s 141(1)(a) CEMA, as it was used for the carriage of Goods liable to forfeiture; and under s 88 CEMA as it had been constructed, adapted, altered or fitted for the purpose of concealing goods.

BACKGROUND FACTS

3. On 4 October 2019, the Appellant was intercepted by Border Force Officers at the UK Control Zone in Coquelles, whilst driving the Vehicle. During a search of the Vehicle, the Goods were discovered concealed behind panelling in the front of the Vehicle. The Appellant was interviewed and he was issued with Form BOR156 (Seizure Information Notice) and Notice 12A (challenging the legality of seizure in a Magistrates' Court).

4. On 11 November 2019, the Respondent received two letters, dated 30 October 2019, from Oracle Law Limited. The letters challenged the legality of the seizure and requested restoration of the Vehicle.

5. On 23 November 2019, the Respondent received a further letter, dated 2 December 2019, from Oracle Law Limited. The letter confirmed that the Appellant wished to withdraw the claim relating to the seized Goods, but advised that the Appellant wished to continue with the request for restoration of the Vehicle.

6. By a decision dated 23 November 2019, the Respondent decided not to restore the Vehicle

7. On 11 December 2019, the Appellant requested a review of the decision dated 23 November 2019. On 12 December 2019, the Appellant was invited to provide any further information in support of the request for review. Further correspondence was received from the Appellant on 21 December 2019, offering an explanation for the series of events that resulted in the seizure of the Goods and the Vehicle.

8. Following further exchanges of correspondence, the decision not to restore the Vehicle was upheld.

Respondent's Case

9. The Respondent's case can be summarised as follows:

(1) The Vehicle was seized as it was both adapted to conceal goods and was being used to carry non-duty paid excise goods.

(2) The Appellant misled Border Force by failing to disclose the full quantity of the excise goods that he was transporting. In misleading the officers as to the quantity of the Goods concealed within a sophisticated, purpose-built concealment, it was reasonable to conclude that the Goods were imported for a commercial purpose; and that the Appellant was attempting to evade the excise duty owed.

(3) The Appellant initially challenged the legality of the seizure, but withdrew his appeal. It is therefore a deemed fact that the Vehicle was used to transport cigarettes, wine and HRT that were imported for a commercial purpose, were not declared and where excise duty had not been paid.

(4) The Goods and the Vehicle were therefore duly condemned as forfeit, under para. 5 of Schedule 3 CEMA. Any excise goods are deemed as held in the United Kingdom for a commercial purpose and not for personal use.

(5) The Tribunal cannot re-open matters that have been deemed by the operation of para. 5, Schedule 3 CEMA.

(6) The review decision was arrived at reasonably.

Appellant's Grounds of Appeal

10. The Appellant's grounds of appeal can be summarised as follows:

(1) His motor home ('the Vehicle') was not adapted, altered or fitted in any manner, for the purpose of concealing goods.

(2) The officer in charge mistakenly mixed things up in his recorded notes, which resulted in the officer making ridiculous assumptions.

(3) The statement from the Border Force Seizure Unit was misleading and untruthful regarding the storage space above the passenger door of the Vehicle.

(4) A void space in the side roof was exposed above the passenger seat at the front as a result of twin rear cameras and a front monitor being fitted in by the previous owner.

(5) He did not hide the reason for his journey and he did not hide the Goods that he purchased. The only thing that he was guilty of was lying about the quantity of cigarettes that he had purchased. He is sincerely sorry about this.

(6) He has suffered financially and emotionally. He would like his family motor home to be returned.

THE APPEAL HEARING

Preliminary Matters

11. At the commencement of the appeal hearing, the Appellant confirmed that he was not expecting a legal representative to attend. He was supported at the hearing by Mr George Kidd. He further clarified that he was not raising any health problems as affecting his ability to take part in an appeal hearing and that reference to a deterioration in his mental health was as a result of the stress caused by these proceedings. The Appellant confirmed that he had received all of the documentation, and that he was ready to proceed with the appeal hearing.

12. We explained the Tribunal's jurisdiction to the Appellant, in light of the lack of any challenge to the seizure. The Appellant responded by saying that he had only become aware of this after the review decision and concluded that he had *"played into"* the Respondent's hands.

Evidence and Submissions

13. We then asked Mr Dean to proceed by opening the Respondent's case, as the Appellant was unrepresented before us.

14. Mr Dean opened the Respondent's case (as set out in the Statement of Case) and cross-referred us to the Legislation and Authorities bundle. We then heard oral evidence from Officer John Sanders, who was examined-in-chief by Mr Dean and cross-examined by the Appellant.

15. Officer John Sander is a Higher Officer of the Border Force, currently employed as a Review Officer. His duties include undertaking reviews of decisions regarding the restoration of items seized, following importation into the United Kingdom. He was the reviewing officer in this appeal and he prepared a witness statement, dated 27 March 2020, which he adopted in evidence. In his oral evidence, he confirmed that the further information and documents provided by the Appellant did not cause him to change his decision on review.

16. We also heard from the Appellant. The Appellant was cross-examined by Mr Dean and reiterated the matters raised in his grounds of appeal. In his oral evidence, the Appellant accepted that he had not been truthful about the quantity of the excise goods that he had in his possession. During his oral evidence, the Appellant sought to re-open the circumstances leading up to his interception by Border Force, despite also accepting that he had not challenged the legality of the seizure.

17. In closing, Mr Dean relied on the case as set out in the Statement of Case. In reply, the Appellant repeated the grounds of appeal and denied that the Vehicle had been adapted to conceal goods.

APPLICABLE LAW

18. The relevant law, so far as is material to the issues in this appeal, is as follows:

"**Excise Goods (holding, Movement and Duty Point) Regulations 2010** ('the 2010 Regulations')

Goods already released for consumption in another Member State-excise duty point and persons liable to pay

***13.**-(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.*

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person-

(a) making the delivery of the goods

(b) holding the goods intended for delivery; or

(c) to whom the goods are delivered.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held-

(a) by any person other than a private individual; or

(b) by a private individual ("P") except in a case where the excise goods are for P's own use and were acquired in, and transported to, the United Kingdom from, another Member State by P.

…

Forfeiture of excise goods on which the duty has not been paid

***88.** If in relation to any excise goods that are liable to duty that has not been paid there is-*

(a) a contravention of any provisions of these Regulations, or

(b) a contravention of any condition or restriction imposed by or under these Regulations, those goods shall be liable to forfeiture.

Customs and Excise Management Act 1979

88. Forfeiture of ship, aircraft or vehicle constructed, etc. for concealing goods

Where-

…

(c) [any other vehicle] is or has been within the limits of [any port, railway customs area or aerodrome] or, while in Northern Ireland, within the prescribed area,

while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods, that ship, aircraft [or other vehicle] shall be liable to forfeiture.

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 or constable or any member of Her Majesty's armed forces or coastguard.

141. Forfeiture of ships, etc. used in connection with goods liable to forfeiture

(1) Without prejudice to any other provisions of the Customs and Excise Acts 1979. 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 so be liable to forfeiture.

152. Powers of Commissioners to mitigate penalties, etc

The Commissioner may, as they see fit-

…

(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts

Schedule 3

5. If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of anything no such notice has been given to the Commissioner, 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 forfeit.

Finance Act 1994

> ***16. Appeals to a tribunal***
>
> *...*
>
> *(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 the future.*
>>
>> *...*

19. Following completion of the oral hearing, we reserved our decision, and issued a Summary Decision. We now give our full findings of fact, with reasons.

DISCUSSION

20. This is the Appellant's appeal against the Respondent's decision to refuse to restore the Vehicle, which was seized by the Respondent exercising its powers under s 139 CEMA, as being liable to forfeiture under s 88 CEMA. The Vehicle was considered to have been adapted to conceal smuggled goods. The legality of the seizure is not in issue between the parties as a result of the chronology in this appeal. The Appellant accepts that he did not challenge the legality of the seizure.

21. We have derived considerable benefit from hearing the oral evidence given in this appeal and from considering all of the documentary evidence. Having considered all of the documentary evidence, cumulatively, we make the following findings of fact:

22. On 4 October 2019, the Appellant was intercepted by Border Force officers at the UK Control Zone in Coquelles, whilst driving the Vehicle. The Appellant confirmed that he was with a passenger, known as Mr James McKenzie. He added that he had been to Luxembourg

and Belgium to *"stock up before Brexit"*. The Appellant was the interviewed. We have had the benefit of seeing the notebook prepared by Officer Abbott, who interviewed the Appellant.

23. The notebook records the Appellant's responses as follows:

> *"O. What have you bought?*
>
> *A. We've got some wine and cigarettes*
>
> *Q. Have you both bought wine and cigarettes?*
>
> *A. Yes*
>
> *Q. So how many cigarettes have you bought?*
>
> *A. I think there's 75.*
>
> *Q. Is that 75 packets?*
>
> *A. No, 75 sleeves.*
>
> *Q. How much wine is there?*
>
> *A. It's about 60 boxes.*
>
> *Q. Is that like 2 or 3 litre boxes?*
>
> *A. Yes, and another around 20 bottles.*
>
> *Q. Ok, so you've got 75 sleeves cigarettes, 60 boxes of wine and 20 bottles, is that right?*
>
> *A. Yes*
>
> *Q. Any other excise goods, any beer?*
>
> *A. Yes, we've got beer that we purchased in the UK because it's cheaper in England than it is in Scotland.*
>
> *Q. Ok, any Hand Rolling Tobacco?*
>
> *A. No."*

[Emphasis added both above and below]

24. The officer then requested that the Appellant and his passenger vacate the Vehicle whilst a search was conducted. The search revealed a quantity of cigarettes and HRT, which had been concealed behind panelling in the front of the Vehicle ('the Goods').

25. The Appellant was asked to read the officer's notebook and he then signed a copy of the notebook, agreeing that it was true and accurate. The following statement was read out to the Appellant:

> *"You have excise goods in your possession (or control) which appear not to have borne UK duty. Goods may be held without payment of duty provided they are held for your*

own use. I intend to ask you some questions to establish whether those goods are held for a commercial purpose. If no satisfactory explanation is forthcoming, or if you do not stay for questioning, it may lead me to conclude that the goods are held for a commercial purpose and your goods and vehicle may be seized as liable to forfeiture. You are not under arrest and are free to leave at any time. Do you understand?"

26. The Appellant confirmed that he understood.

27. The Appellant was also asked the following additional questions:

> *"Q. Who does the tobacco belong to?*
>
> *A. Half of its mine and half of its James's*
>
> *Q. Why did you place it behind the panelling in the motorhome?*
>
> *A. For space purposes. When we went to Turkey we utilised all the space we could so we could get more into the cupboards and boot so there is more space for clothes.*
>
> *Q. Why did you tell me you had only purchased 75 sleeves of cigarettes between you when there are in fact 150 sleeves of cigarettes in the vehicle?*
>
> *A. We were a bit embarrassed with the amount…"*

28. We have had the benefit of seeing copies of the notebooks prepared Officers Jarvis and Bailey, who were also present. We have had the benefit of seeing the photographs relating to the concealment in the Vehicle.

29. The officers were satisfied that the Goods were held for a commercial purpose and the Goods were seized as being liable to forfeiture. The Vehicle was also seized as being liable to forfeiture. The officer then issued form BOR156 "Seizure Information Notice" and Notice 12A "challenging the legality of the seizure". We are satisfied that the Appellant was, therefore, made aware of the ability to challenge the legality of the seizure in a Magistrates Court within one month of the date of the seizure.

30. On 11 November 2019, the Respondent received two letters, dated 30 October 2019, from Oracle Law Limited, which both challenged the legality of the seizure and requested restoration. The Respondent replied to these letters on 10 November 2019. However, on 6 December 2019, a further letter dated 2 December 2019 was received from Oracle Law Limited. The letter confirmed that the Appellant wished to withdraw the claim relating to the seized Goods. The letter added that the Appellant would be continuing with the request to restore the Vehicle.

31. By a decision dated 23 November 2019, the Respondent decided not to restore the Vehicle.

32. On 11 December 2019, the Appellant requested a review of the decision not to restore the Vehicle. On 12 December 2019, the Respondent invited the Appellant to provide any further information in support of the request for a review. Further correspondence from the Appellant was received by the Respondent, on 21 December 2019. The correspondence offered a further explanation for the series of events that led up to the interception of the Vehicle and the seizure. The decision not to restore the Vehicle was upheld, following a review.

33. Section 152 CEMA confers a discretion on the Respondent to restore vehicles, or other items, which have been forfeited or seized. Section 14 of the Finance Act 1994 ('FA 1994') provides that where a person has requested restoration of a seized item, and restoration has been refused, that person may request a review of the decision. On review, the Respondent may either confirm the decision, or withdraw or vary the decision. If the seized item is not restored on review, s 16 FA 1994 gives the person who has requested the review the right of appeal to this Tribunal. An appeal against a restoration decision is an ancillary matter: s 16 FA 1994.

34. Section 16(4) FA 1994 sets out the extent of the powers and jurisdiction of the Tribunal. By virtue of s 16(6) FA 1994, the burden lies on the Appellant to show that the grounds on which his appeal is brought have been established.

The deeming provisions

35. The time at which the requirement to pay duty arises takes effect is addressed in the 2010 Regulations ('the excise duty point'). Despite the Appellant's submissions regarding the purpose of the Goods and the reasons for the adaptations to the Vehicle, an incontrovertible fact in this appeal is the fact that the Appellant did not challenge the legality of the decision to seize the Goods, or the Vehicle. This brings the deeming provisions into play.

36. It is trite law that goods that are not declared on importation are liable to seizure and forfeiture. If anything is seized as liable to forfeiture, any vehicle used for its carriage is also liable to forfeiture. In relation to anything seized as liable to forfeiture, s 139(6) CEMA provides that Schedule 3 CEMA shall have effect. Under para. 3 of Schedule 3, any person claiming that any thing seized as liable to forfeiture is not so liable has one month from the date of the notice of seizure in which to give notice of his claim in writing. The Appellant in the appeal before us did not give notice of claim, pursuant to para. 3 of Schedule 3. The Vehicle is, therefore, deemed to have been duly condemned as forfeited, under para. 5 of Schedule 3.

37. Under para. 5 of Schedule 3, in the absence of a notice of claim under para. 3, complying with the requirements of para. 4, the seized goods shall be deemed to have been duly condemned as forfeit. The effect of para. 5, Schedule 3 CEMA was considered by the Court of Appeal in *HMRC v Jones & Jones* [2011] EWCA Civ 824 ('*Jones*'). There, the Court of Appeal concluded that the lack of challenge to the seizure means that it is not open to this Tribunal to entertain any argument by the Appellant, which would be inconsistent with the legality of the seizure. This is the legislative scheme in Schedule 3 CEMA.

38. In *Jones*, the appellants had maintained, in an appeal against the non-restoration of goods and their vehicle, that the goods had been for their personal use and gifts for members of their family. The Court of Appeal held that the tribunal had no power to re-open and redetermine the question of whether or not the seized goods had been legally imported for personal use. Mummery LJ, with whom Moore-Bick and Jackson LJJ agreed held, at [73], that the question was "already the subject of a valid and binding deemed determination under [CEMA]" and "the FTT only had jurisdiction to hear an appeal against a review decision on the deemed basis of the unchallenged process of forfeiture and condemnation".

39. Mummery LJ provided guidance on the provisions of CEMA, the relevant authorities and the articles of the Convention. He said this, at [71]:

> "71. I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.
>
> > (1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UT are statutory appellate bodies that have not been given any such original jurisdiction.
> >
> > (2) The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.
> >
> > (3) The respondents in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.
> >
> > (4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned *and* to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.
> >
> > (5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to

the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.

(6) The deeming provisions in paragraph 5 and the restoration procedure are compatible with Article 1 of the First Protocol to the Convention and with Article 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods. The notice of claim procedure was initiated but not pursued by the respondents. That was the choice they had made. Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.

(7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora* and as approved by the Court of Appeal in *Gascoyne*. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion.

(8) The tentative obiter dicta of Buxton LJ in *Gascoyne* on the possible impact of the Convention on the interpretation and application of the 1979 Act procedures and the potential application of the abuse of process doctrine do not prevent this court from reaching the above conclusions. That case is not binding authority for the proposition that paragraph 5 of Schedule 3 is ineffective as infringing Article 1 of the First Protocol or Article 6 where it is not an abuse to reopen the condemnation issue; nor is it binding authority for the propositions that paragraph 5 should be construed other than according to its clear terms, or that it should be disapplied judicially, or that the respondents are entitled to argue in the tribunal that the goods ought not to be condemned as forfeited.

(9) It is fortunate that Buxton LJ flagged up potential Convention concerns on Article 1 of the First Protocol and Article 6, which the court in *Gora* did not expressly address, and also considered the doctrine of abuse of process. The Convention concerns expressed in *Gascoyne* are allayed once it has been appreciated, with the benefit of the full argument on the 1979 Act, that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner.

(10) As for the doctrine of abuse of process, it prevents the owner from litigating a particular issue about the goods otherwise than in the allocated court, but strictly speaking it is unnecessary to have recourse to that common law doctrine in this case, because, according to its own terms, the 1979 Act itself stipulates a deemed state of affairs which the FTT had no power to contradict and the respondents were not entitled to contest. The deeming does not offend against the Convention, because it will only

> arise if the owner has not taken the available option of challenging the legality of the seizure in the allocated forum.

40. *Jones* is, therefore, clear authority for the proposition that the First-tier Tribunal ('FtT') has no jurisdiction to go behind the deeming provisions in para. 5 of Schedule 3 CEMA, and the circumstances in *Jones* fall squarely on the circumstances in this appeal. By his own evidence, the Appellant in the appeal before us did not challenge the legality of the seizure.

41. *Jones* was applied in *HMRC v Race* [2014] UKUT 03331 (TCC) ('*Race*'), in the context of an appeal against an assessment to excise duty. There, Warren J said this:

> "26…If goods are condemned to be forfeited, whether in fact or as the result of the statutory deeming, it follows that, having been bought in a Member State and then imported by Mr and Mrs Jones, they were not held by the taxpayers for their own personal use in a way which exempted the goods from duty. The reasoning and analysis in *Jones* did not turn on the fact that the case concerned restoration of the goods and not assessment to duty."

> "33…It is clearly not open to the tribunal to go behind the deeming effect of paragraph 5 Schedule 3 for the reasons explained in *Jones* and applied in *EBT* [i.e., *HMRC v European Brand Trading Ltd* [2014] UKUT 226 (TCC), a decision of Morgan J]. The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones."

42. In *HMRC v European Brand Trading Ltd* [2014] UKUT 0226 (TCC) ('*ETB*'), Morgan J said this, at [57] and [63]:

> "57. The effect of the order of the magistrates' court on 13 May 2010 is that in law, as between HMRC and EBT, duty was not paid on the goods seized on 20 August 2009. The effect of paragraph 5 of schedule 3 to the 1979 Act is that in law, as between HMRC and EBT, duty was not paid on the goods seized on 16 February 2010.
>
> …
>
> 63. For the above reasons, I am unable to accept the submission made by counsel for EBT on the appeal to the Upper Tribunal, which I have set out above, to the effect that the review officer is required to consider "that material relevant to the duty paid status of the seized goods which was available to and considered by the relevant officer at the relevant time". As at the time of the further review decision, the duty paid status of the seized goods is established to be that duty was not paid. It is irrelevant to inquire as to what might have been argued to have been the apparent position at an earlier time."

43. Morgan J's decision in *ETB* was subsequently upheld by the Court of Appeal: [2016] EWCA Civ 90. There, Lewison LJ quoted, and endorsed, Warren J's decision in *Race*, at [38] and [39] of his judgment.

44. Having reviewed all of the authorities, and in light of the incontrovertible facts of this appeal, we find that the Appellant did not challenge the legality of the seizure by invoking and pursuing the appropriate procedure. We therefore find that the Goods (and Vehicle) were therefore deemed to have been condemned as forfeited. This is the effect of the clear deeming provisions in CEMA.

45. We are satisfied that the Appellant cannot challenge the deemed due condemnation before this Tribunal. The legislation does not provide for a right of appeal to the Tribunal against forfeiture and condemnation. The Tribunal has no express jurisdiction to determine such an issue on appeal. The nature and scope of the right of appeal to the Tribunal is against the discretionary review decision on the issue of restoration. If a challenge to the legality of the seizure is not pursued, the Tribunal must proceed on the basis that the Vehicle was legally seized. In consequence, any facts relating to the legality of the seizure must be taken to have been proved and there can be no attempt to re-adjudicate these facts.

46. The role of the Tribunal does not extend to deciding that the Goods were being imported legally for personal use. The issue relating to legality of seizure was for decision by the courts in condemnation proceedings. If the Appellant had wanted to take that point, he should have continued with the proceedings in the Magistrates' Court. Furthermore, Notice 12A is clear that unless seizure is challenged, it is not possible to argue that the Goods were not liable to forfeiture because they were in fact held for personal use. The Tribunal has no power to order restoration.

47. There is therefore, in truth, only live issue before this Tribunal; that is whether the decision to refuse to restore the Vehicle was reasonable.

Q. Was the decision reasonable?

48. There is a single test of reasonableness. That is, whether the Review Officer acted in a way in which no reasonable Review Officer could have acted; and whether he or she took into account an irrelevant matter, or disregarded something to which he or she should have given weight: *Customs and Excise Comrs v JH Corbitt (Numismatics) Ltd* [1980] STC 231, at [239] (Lord Lane).

49. In *Lindsay v Customs and Excise Comrs* [2002] STC 588; [2002] 1 WLR 1766 ('*Lindsay*'), the court held that in a restoration case, the Commissioners' (in that appeal) decision will be unreasonable if *"they take into account irrelevant matters, or fail to take into account all relevant matters."* (per Lord Phillips MR). The court so held in applying the principles adumbrated in *JH Corbitt (Numismatics) Ltd*. A conclusion that the decision is

unreasonable can also arise if the decision-maker reached a decision which no reasonable decision-maker could have reached on the basis of the information before him.

50. Whilst not binding on this Tribunal, in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC), at [8], Judge Helier said this:

> "It is important to remember that a conclusion that a decision is not unreasonable is not the same as a conclusion that it is correct. There can be circumstances where different people could reasonably reach different conclusions. The mere fact that we might have reached a different conclusion is not enough for us to declare that a conclusion reached by UKBA should be set aside."

51. The reasonableness of the decision is to be judged against the background of the information which was available to the review officer. The Tribunal's fact-finding power in this regard was conceded by the Commissioners in *Gora & Ors v Customs and Excise Comrs* [2003] EWCA Civ 525. This can be found in the judgment of Pill LJ, at [38], as considered in *Harris*, at [11].

52. In *Gora*, Lord Justice Pill approved an approach under which the Tribunal should decide the primary facts and then decide whether in light of those findings, the decision on restoration was reasonable.

Q. Was irrelevant material taken into account and was any relevant information ignored?

53. We derived considerable benefit from reading the review decision and from hearing Border Force Officer John Sanders giving oral evidence before us. Officer Sanders gave his evidence in a clear and straightforward manner, without equivocation. We accept his evidence as representing a truthful and accurate description of his decision-making process in conducting the review on 24 January 2020. Officer Sanders was not involved in either the seizure, or the original decision dated 23 November 2019.

54. In the review decision, Officer Sanders referred to his consideration of the Border Force Policy for the Restoration of Private Vehicles ('the Policy'). Officer Sanders clarified that any vehicle that has been adapted is subject to the law. In this respect, he was satisfied that the seizure was legal as the Appellant was not only importing a quantity of excise goods for a commercial purpose; but that the Vehicle had been adapted to conceal the goods. Officer Sanders clearly refers to having read the Appellant's letters leading up to the review decision carefully, in order to see how the evidence provided determines the application of the restoration and the Policy.

55. The review letter and the oral evidence show that Officer Sanders considered the circumstances surrounding the Appellant's interception by uniformed Border Force officers, and the need for the Appellant to have given truthful answers to the questions he was asked.

By his own evidence, the Appellant accepts that he initially lied about the quantity of the Goods that were in the Vehicle (letter dated 12 December 2019). The quantity of the Goods imported exceeded the levels specified in Regulations. We find that there is considerable force in Officer Sander's conclusion, in upholding the decision, that the Appellant would have had no incentive to lie if there was nothing to hide. This coloured the lens through which the Appellant's credibility was to be viewed.

56. Officer Sanders also considered that the Appellant's own written statement that he thought that Border Force were only interested in people smuggling did not sit well with the decision to be dishonest about the quantity of the Goods. He further considered that the Appellant's comments could be construed as having a prior knowledge of Border Force procedures. The knock-on-effect was that the Vehicle, which has been described as having a *"sophisticated adaptation, capable of concealing illicit goods"* pointed to the outcome that, in accordance with the Policy, the Vehicle should not be restored.

57. During his oral evidence, Officer Sanders referred to the notebooks that were prepared by the officers who were present during the interception and the search of the Vehicle. The notes gave a description of the nature and extent of the adaptation, which the Appellant confirmed he was aware of.

58. We are satisfied that Officer Sanders considered all of the information that was before him when he reached his review decision. We hold that the conclusion that the Vehicle had been adapted was a reasonable one on the facts of this appeal. We further find that the decision took account all of the relevant facts and circumstances.

59. Consequently, therefore, we hold that:

(1) The Respondent correctly applied the Policy on the restoration of vehicles, but was not fettered by it.

(2) The decision was considered afresh, including the circumstances of the events of the date of seizure, to decide if any mitigating or exceptional circumstances existed.

(3) All representations and materials made available were considered.

(4) The conclusion reached was one which was open to the reviewing officer to reach.

(5) It was reasonable for the Respondent to conclude that the Appellant was seeking to evade excise duty and that he was importing goods for a commercial purpose in being misleading about the quantity of Goods concealed.

Hardship and Proportionality

60. In *Lindsay*, Lord Justice Phillips said this:

> "Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable for forfeiture cannot reasonably be heard to complain if they lose their vehicles. Nor does it seem to me that in such circumstances, the value of the car used need to be taken into consideration…"

61. Lord Justice Judge added this:

> "Given the extent of the damage caused to the public interest, it is my judgment, acceptable and proportionate, that subject to exceptional individual considerations, whatever they are worth, the Vehicles of those who smuggle for profit, even for a small profit, should be seized as a matter of policy."

62. On the issue of hardship, in *UAB Barela & UAB Reisrida v HMRC* [2014] UKFTT 547 (TC), the tribunal considered the policy in relation to vehicles adapted for smuggling as follows:

> "54. It is clear from the decision of the Court of Appeal in the *Lindsay* case (see the judgment of Lord Phillips MR at [63]) that a policy of refusing restoration of a vehicle used in "commercial" smuggling (provided that policy allows for due consideration to be given to cases of exceptional hardship) is compatible with the requirements of law. The *Lindsay* case does not deal with vehicles which are adapted for the purposes of concealing goods which are intended to be smuggled into the United Kingdom, but that is clearly a situation which, even more strongly, justifies a policy of refusing restoration: adapting a vehicle indicates a carefully planned smuggling operation with a likely intent to use the vehicle for that purpose on a recurrent basis, and the legitimate aim of protecting the revenue is fairly achieved by ensuring that the vehicle is never restored to its owner.
>
> …
>
> 61. …That policy is to refuse, other than in exceptional cases, restoration of the adapted vehicle, whether or not the absent owner knew, or should have known, of the smuggling attempt. Therefore, even if it could be said that the review officer had reached an unreasonable conclusion as to the knowledge of the Appellants (and as we have said, we do not in any event consider that to be the case), that would not be a basis for impugning her decision to apply HMRC's policy and to refuse to restore the trailers.

63. Officer Sanders concluded that neither the inconvenience, nor the expense, in this case was tantamount to exceptional hardship over and above that which one should expect. Hardship is, indeed, a natural consequence of a decision to seize a vehicle. The review decision shows that Officer Sanders considered the fact that the Appellant has been the keeper of a Nissan Juke, since 29 April 2016. Although a forfeiture accompanied by a refusal of restoration has an adverse effect, we do not consider non-restoration to be a penal measure. Having considered all of the evidence, cumulatively, we are satisfied that hardship was considered.

64. In relation to proportionality, in *OK Trans Ltd v UKBA* [2010] UKFTT 223 (TC), the Tribunal referred to the decision of the European Court of Human Rights in *AGOSI v United Kingdom (1986) 9 EHRR 1,* which held, at [54], that:

> “The striking of a fair balance depends on many factors and the behaviour of the owner of the property, including the degree of fault or care which he has displayed, is one element of the entirety of circumstances which should be taken into account”. It has to be correct that a policy on restoration should draw the type of distinctions addressed in the Commissioners’ policy. (…) Furthermore, it seems to us that part of its legitimate aims in the public interest, the State is able to impose by means of a restoration policy obligation of vigilance on drivers and hauliers, providing that the burdens imposed as a result are not excessive so as to enable the relationship of proportionality to remain between the means employed and the aim sought to be realised.”

65. The State is permitted to secure property in order to control the use of it in accordance with the general interest or securing the payment of taxes and other contributions or penalties, pursuant to Article 1 of Protocol 1 of the European Convention on Human Rights (‘the Convention’). This is compliant with Article 6 of the Convention: *Air Canada v United Kingdom* (1995) 20 EHRR 150, at [61] – [63].

66. On the question of Convention compliance, both the condemnation and restoration procedures are available to the owner of items when they are seized. If the owner wishes to challenge the condemnation of the items as forfeit, the notice of claim court hearing procedure is available. If he simply wishes to challenge the refusal to restore the items, the appeal tribunal hearing procedure is available. There is simply no question of an owner being deprived of his property without an opportunity to challenge, in a court, the legality of the decision to seize and to challenge, in a judicial tribunal, the legality of the decision refusing to restore them.

67. Schedule 3 is Convention compliant. The remedy for any arguments that there was any unfairness in relation to the application of those statutory provisions is judicial review and not an appeal before the Tribunal. The Tribunal has no inherent power to review decisions of the Respondent, or to provide a remedy in respect of any alleged procedural unfairness. In any event, we are satisfied that the Appellant was provided with Notice 12A, which set out what the Appellant needed to do. The issue of import for personal use has been determined by the statutory deeming.

68. All current formulations of the proportionality test involve four elements taken from Lord Sumption's speech in *Bank Mellat v Her Majesty's Treasury (No.2)* [2014] AC 700, at [20]:

> "... the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine: (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters

> and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

69. The third element is now usually qualified in the manner explained by Lord Neuberger in *R (Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055, at [85], for which Lord Reed's speech in *Bank Mellat* was cited:

> "...it has been authoritatively said that the question it involves may be better framed as was 'the limitation of the protected right ... one that it was reasonable for the legislature to impose' to achieve the legitimate aim, bearing in mind any alternative methods of achieving that aim..."

70. The aim of the policy is the prevention of the evasion of excise duty that is imposed in accordance with European Community law. That is a legitimate aim under article 1 of the First Protocol to the Convention. We hold that the decision-maker did not take irrelevant matters into account, or place insufficient weight on relevant matters. We further hold that the decision not to restore the seized Vehicle was not disproportionate and was not a decision which no reasonable decision-maker could have reached.

CONCLUSION

71. This Tribunal has no power to re-open and re-determine the question of the legality of the seizure. That question was already the subject of a valid and binding deeming determination under CEMA. The deeming was in consequence of the Appellant's own decision to withdraw the notice of claim contesting the condemnation and forfeiture. This Tribunal's jurisdiction only extended to hearing an appeal against the review decision made by the Respondent on the deemed basis of the unchallenged process of forfeiture and condemnation.

72. Consequently, therefore, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

73. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 16 FEBRUARY 2022