Neutral Citation: [2022] UKFTT 00444 (TC)

Case Number: TC08654

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2021/11298

EXCISE DUTY-Restoration-Seizure of vehicle on entry to UK-Appeal against decision to restore vehicle for a fee-Whether decision reasonable and proportionate on the facts-Yes-Appeal dismissed

Heard on: 22 November 2022
Judgment date: 30 November 2022

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER: LESLIE HOWARD

Between

MATEUSZ ZIOMEK

Appellant

and

THE DIRECTOR OF BORDER REVENUE

Respondent

Representation:

For the Appellant: Michael Wiencek, Euro Lex Partners LLP

For the Respondents: Rupert Davies of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The appellant seeks to appeal a review decision contained in the letter dated 11 September 2021. That letter notified the appellant that, after conducting a review, the respondent would restore, for a fee of £8,841.44, a Mercedes Sprinter ("the Vehicle") which had been seized on 29 July 2021.

2. The Vehicle had been seized because it was used to transport 114,800 cigarettes on which there was revenue due of £44,207.18.

3. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. A face-to-face hearing was not held because of the difficulty of ensuring the safety of all participants. We had a final consolidated Bundle extending to 201 pages, a further Bundle extending to 12 pages and an Authorities Bundle extending to 339 pages.

4. We had Skeleton Arguments for both parties.

5. We heard evidence from Officer Boote for the respondent and from the appellant himself.

The facts

6. On 29 July 2021, at the Port of Dover, the driver of the Vehicle was intercepted. A search of the load revealed used furniture and one clear shrink wrapped pallet of kitchen worktops which appeared to the officers to be improperly sealed around the edges. This concerned them. An X-ray scan of the worktops raised further doubts. The worktops were broken open and all contained commercial quantities of cigarettes.

7. The Consignment Note ("CMR") showed the consignee as being simply an address in London with no name and the consignor as Livarto UG. Other documentation suggested that the consignee was one Wayne E Lamb in Southend-on-Sea. Due to a lack of translation the officers were unable to ascertain which was more likely to be correct. In the course of the hearing it appeared to be the London address.

8. The carrier was 4-WHEELS which was the trading name of the appellant. The description of the goods was simply 1 pallet weighing 500kgs.

9. The tobacco and the Vehicle were seized under section 139 Customs and Excise Management Act 1979 ("CEMA") as being liable to forfeiture under section 141 CEMA. On the day of the seizure the Border Force officer offered restoration of the Vehicle for £44,207.18 being the equivalent of the revenue evaded on the cigarettes.

10. The driver was issued with a Form BOR156 "Seizure Information Notice", a BOR162 Seizure Vehicle Notice and Notice 12A notifying the appellant of the right to challenge the seizure in the Magistrates Court. The seizure was not challenged in the Magistrates Court.

11. By email dated 29 July 2021, the appellant requested a review of the decision to restore the Vehicle for £44,207.18. The email stated that:-

> "Both My (sic) office and the border control have thoroughly interviewed the PL Driver … of vehicle … and despite being very upset he has confirmed and assured me/the office that he had absolutely no reason to suspect anything relating to this shipment was out of the ordinary and that a false declaration had been issued to customs by the senders."

It attached a zip file of supporting evidence including a photograph of the pallet, a map showing the place of loading in Hannover, a copy of the CMR and an export document dated 27 July 2021, copies of an invoice and a delivery note and screenshots of emails.

12. By letter dated 30 July 2021, the respondent replied asking for further information including details of checks made of the consignor and consignee, details of physical checks made of the load and application of any seals, copies of any instructions or written procedures to drivers including any steps to be taken to prevent smuggling and details of other measures taken to prevent vehicles being used for smuggling.

13. On 5 August 2021, the appellant replied with the following information:-

(1) The contract with the driver which was described as a "Mandate" and an English translation was provided. The only relevant condition was section 3 which read:

"In the event of failure to perform the order on time, defective or improper execution of the order, the Principal has the right to reduce the remuneration or cancel the order without compensation".

(2) Copies of employment references from previous employers.

(3) In the interview with the driver before he was employed, he was informed about the obligations and prohibitions that applied to him.

(4) A document which was described as "Statute" was provided and the relevant provisions included

"Section 2

The driver may be charged with the costs in the case of:

….

- Lack of relevant information in CMR documents (quantity, weight, possible damage)

Section 4

1. Unauthorised transportation of people and loads is forbidden …

4. It is forbidden to transport alcohol …

6. It is forbidden to transport cigarettes in excess of 3 packets (60 items)…

7. It is forbidden to open the transported pallets, to look inside the transported goods."

Items 1, 4 and 6 were relied upon by the appellant and Officer Boote had identified them as being relevant. We noted the provision in Section 2 and item 7 in Section 4.

(5) The following explanation of how the contract was obtained was given:

"On July 27, an employee of the German company Livarto … contacted me by phone, Mr …, phone number …, I received an offer from him to load 1 pallet weighing 500kg in his company. He said the merchandise is a furniture composite. I received instructions from him by e-mail with the address of loading, delivery and all documents involved in the transport. The goods were already cleared through Customs. At the loading site, the driver received a CMR, Lieferschein [delivery note], an invoice and an EX document. The pallet was loaded, the driver did not report any damage, everything seemed fine".

In cross-examination the appellant confirmed that he had not checked whether the "employee" worked for Livarto. The said "employee" had not been present when the driver arrived but others present had pointed to the pallet so he assumed they had known the man.

(6) Replying to the question about the checks made of the consignor, it was stated that:

"the pallet was wrapped in foil by the sender and had been cleared beforehand, in the presence of the sender, the driver checked that the foil was not torn and that the pallet was not damaged. Then he reported to me that everything was fine."

In cross-examination the appellant stated that he had googled Livarto to check that it existed and he had not told Border Force because it was obvious that he would have done so in order to ensure that he was paid. He said that he could not remember whether the address was commercial premises or not and he had not considered whether the address was suitable for a delivery of commercial goods.

(7) In response to the question about the arrangements made to collect the goods, it was stated that during that telephone conversation the appellant had been assured that a transport order would be sent to the appellant's email address but that was never received. He had agreed a transport cost of €500. In cross-examination he confirmed that he had not followed up the transport order.

(8) It was confirmed that the driver did not make any checks of the load on the way and the seal was not applied.

(9) In response to the question about checks made of the consignee it was simply stated that the recipient did not receive the goods.

(10) The arrangement for delivering the goods to the consignee was simply to the delivery address which was sent by email.

(11) In regard to measures taken to avoid vehicles being used for smuggling, the appellant confirmed that he had been the owner of the transport company since 2002 and the drivers are advised to be careful and they know about the threats posed by illegal immigrants and smuggling. The drivers know that they can have no more than three packs of cigarettes and no alcohol.

(12) Lastly it was stated that the company was honest but had been "framed".

14. On 11 September 2021, Officer Boote, having completed her review, wrote to the appellant setting out her conclusion that the restoration fee should be reduced to £8,841.44. The letter, after setting out the background including the correspondence to which we have referred in the preceding paragraphs, summarised the restoration policy of Border Force as follows:

"The policy for the restoration of commercial vehicles that have been used for smuggling excise goods is intended to tackle cross-border smuggling and to disrupt the supply of excise goods to the illicit market. 'Commercial vehicles' include not only 'Heavy Goods Vehicles' but any vehicle considered to be moving primarily for a commercial and business purpose. Each case is considered carefully on its individual merits so as to decide whether exceptions should be made, and any evidence of hardship is always considered.

A vehicle adapted for the purposes of concealing goods 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.

A. If the operator provides evidence satisfying border force that neither the operator nor the driver was responsible for or complicit in 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 conforming 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 for 100% of the trade value of the vehicle if lower…".

15. After stating that she (Officer Boote) had been "*guided* by the restoration policy but not *constrained* or *fettered* by it" in that she considered "every case on its individual merits". She had considered the decision not to restore the Vehicle afresh and the letter pointed out that she had read the appellant's letters carefully to see whether a case for departing from the Border Force policy had been presented.

16. She made reference to two cases as authorities for the propositions that:

(a) the onus of proof lay squarely with the Appellant (*McGeown International Limited v HMRC* [2011] UKFTT 407 (TC)), and

(b) HMRC are not required to publish full details of their restoration policy, (*Phu Greg-Car v The Director of Border Revenue* [2018] UKFTT 148 (TC) ("Phu")).

17. She went on to say

"The duty to take reasonable steps to prevent smuggling applies not just for movements to and from the UK: all countries now expect operators to take reasonable steps to prevent smuggling…".

and concluded that from the evidence that had been provided she believed that:

"… paragraph A of the policy applies, which states that neither the operator nor the driver are responsible. I must now look at whether the steps taken by you to prevent your vehicle being used to carry smuggled goods were *adequate.* I must determine whether you have provided *evidence* satisfying Border Force that you and the driver carried out basic reasonable checks (including conforming with the CMR Convention) to confirm the legitimacy of the load and to detect any illicit load."

18. Officer Boote went on to say:

"Taking into account your request for a review, I am satisfied that you do have **some** practices in place to prevent smuggling from your drivers, but that the details contained within your evidence show that these steps are limited and are not adequate. There is nothing in the documents that you have provided that appears detailed enough to deter your drivers, for example, I can find no mention of sanctions or penalties, such as dismissal should they become involved in the smuggling of illicit goods. Further to this, you stated that the driver did not make any checks on the way and the seal was not applied. You also stated that an employee of Livarto, Mr …, assured you that a transport order would be sent to your email address, which was not received. You have not provided any further information regarding this for example, whether you chased this.

These are steps that would be expected at the very least, especially from a reputable company which has been in operation since 2002 with the main work including travelling to the UK".

19. She then looked at the CMR Convention and referred the appellant to Judge Raghaven in *Szymanski v The Director of Border Revenue* [2019] UKUT 343 (TCC) ("Szymanski") at paragraphs 52-54 which she described as being wholly applicable in the appellant's case.

20. She concluded that neither the appellant nor the driver had complied

"*adequately* with Border Force's expectations of reasonable steps

…

Considering all the evidence available to me including the fact that you do have some steps in place and the commercial quantity of cigarettes involved I am able to vary the original decision of restoration for a fee of £44,207.18 to £8,841.44….I believe restoration for a lower fee is therefore fair, reasonable, and proportionate."

21. The letter explained that the appellant could either provide fresh information or appeal to the Tribunal. He appealed to the Tribunal on 9 October 2021.

22. The grounds of appeal extend to 36 paragraphs so we do not narrate them all here. In summary, the appellant argues that:

(a) The review decision was unreasonable because the Officer "took into account irrelevant, and indeed incorrect considerations (eg that the appellant did not provide for sanctions for breach of contract) and/or failed to take into account a relevant consideration (eg that the appellant was not responsible or complicit and took reasonable steps to prevent smuggling)".

(b) The Border Force policy was not known to the appellant and in any event it was unreasonable because it did not take sufficient account of the "haulier's blameworthiness". The policy should be published.

(c) The proposed restoration fee is "illegitimate, unreasonable and disproportionate" and in breach of Article 1 of Protocol 1 ("A1P1") of the European Convention on Human Rights Guide.

The Convention on the Contract for the International Carriage of Goods by Road as amended ("the CMR Convention)

23. Insofar as relevant, Article 6 of the CMR Convention reads:

"1. The consignment note shall contain the following particulars:

(a) The date of the consignment note and the place at which it is made out;

(b) The name and address of the sender;

(c) The name and address of the carrier;

(d) The place and date of taking over of the goods and the place designated for delivery;

(e) The name and address of the consignee;

(f) The description in common use of the nature of the goods and the method of packing…;

(g) The number of packages and their special marks and numbers;

(h) The gross weight of the goods or other quantity otherwise expressed…".

24. We find as fact that the CMR in this case was not compliant with the CMR Convention because the name of the consignee is missing and there is no description in common use of the nature of the goods.

25. Insofar as relevant, Article 8 of the CMR Convention reads:

> "1. On taking over the goods, the carrier shall check:
>
> …
>
> (b) The apparent condition of the goods and their packaging.
>
> 2. Where the carrier has no reasonable means of checking the accuracy of the statements referred to in paragraph 1 a of this article, he shall enter his reservations in the consignment note together with the grounds on which they are based. He shall likewise specify the grounds for any reservations which he makes with regard to the apparent condition of the goods and their packaging…"

26. The appellant correctly states that it was impossible to check the condition of the goods in the sense that he could not open the pallet but we find as fact that that was not noted on the CMR. Furthermore, we accept, and find as fact, the Border Force officer's contemporaneous record in his/her notebook that the load was "a clear shrink wrapped pallet of what appeared to be kitchen worktops. Kitchen worktops appeared to be inconsistent with workmanship and improperly sealed….".

The Law

27. There was no dispute about the relevant legislative provisions. However, in relation to the Tribunal's powers in an appeal such as this it is helpful to set out the provisions of section 16(4) and (5) of the Finance Act 1994 ("FA 1994") which read as follows:

> "(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 40 directions of the tribunal, a further review 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 further review, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.
>
> (5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

26. In *Revenue and Customs v Riaz Ahmed T/A Beehive Store*s [2017] UKUT 359 (TCC) 23 the Upper Tribunal (Judges Herrington and Walters) considered the scope of the Tribunal's jurisdiction under s16(4) FA 1994 at paragraph 23:

> "As the FTT correctly identified at [35] of the Decision, in *Balbir Singh Gora v C&E Comrs* [2003] EWCA Civ 525, Pill LJ accepted that the Tribunal could decide for itself

primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal."

28. The Court of Appeal in *Lindsay v Customs and Excise* [2002] EWCA Civ 267 considered the interaction of section 16 FA 1994 with the European Convention on Human Rights ("EHCR") in the context of a decision to refuse restoration of a car used for smuggling excise goods. At paragraph 40 Lord Phillips MR said:

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

29. Lord Phillips MR continued at paragraph 52:

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

Burden and standard of proof

30. The burden of proof lies on the appellant to show that the review decision under appeal was one which no reasonable reviewing officer could have reached. The standard of proof is the normal civil standard, the balance of probabilities. The Tribunal may consider evidence which was not before the decision maker and may reach factual conclusions based on that evidence such that the decision under appeal may be found by the Tribunal to be reasonable or unreasonable as the case may be, as a result: *Gora v Customs and Excise Commissioners* [2003] EWCA Civ 525.

31. The only power which the Tribunal has in this appeal is to determine whether or not the review decision dated 11 September 2021 is reasonable and proportionate.

Discussion

32. We do not agree with Mr Wiencek's argument that the Border Force policy does not take account of the blameworthiness, or not, of the haulier. Officer Boote explained more than once that in providing what she described as paragraphs A to C and restoration for no fee, or a fee of 20% or 100% of the duty or no restoration at all, the policy distinguishes between operators who were complicit or responsible for the smuggling attempt and those who were not.

Furthermore she confirmed that she could work outside of the policy in exceptional circumstances and each case was decided on its own individual merits. We accept that.

33. The review decision letter states twice that she was considering the case on its individual merits. She also stated that she accepted that neither the driver nor the appellant were responsible for, or complicit in, the smuggling attempt. We agree with Officer Boote and find that the policy does take into account the blameworthiness, or not, of the haulier and is therefore proportionate in that regard.

34. We also agree with her argument that because the policy provides as it does at A(1) (see paragraph 14 above) that where basic reasonable checks are made the vehicle will be restored free of charge, the policy is proportionate.

35. Officer Boote explained that that ties in with blameworthiness in that where such checks are made it is less likely that the smuggling would occur. She argued that finding that a haulier was not responsible or complicit did not necessarily mean that the haulier was without blame. It depended on all of the circumstances. We agree.

36. In this case, she had formed the view that there was an element of blame not least because of the failures to comply with the CMR Convention. The very basic failure to comply with Article 6(f) in not identifying the nature of the goods was particularly blameworthy. We agree.

37. Mr Wiencek argued that the failure to publish the policy meant that the policy was unreasonable as was the lack of notice of the checks that were required.

38. Officer Boote relied on *Phu* for the proposition that HMRC are not required to publish full details of the policy. At paragraph 17 of the Grounds of Appeal Mr Wiencek correctly pointed out that *Phu* had been successfully appealed. However, what the Upper Tribunal found was that:

> "40. Whether or not the Respondent could, or should, publish its policy on restoration is of no relevance to this appeal
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> …
>
> 41. Neither this Tribunal, nor the FTT, has any power in the context of this appeal to require the Respondent to change its policy on restoration whether that policy is considered contrary to A1P1 or otherwise. Rather, the relevant question for determination is whether the Respondent's review decision in this specific case was unreasonable. That said, if the FTT determines that the entire policy on restoration is unreasonable, and contrary to A1P1, it may conclude that the particular decision made in pursuance of that policy is unreasonable. That will be a matter for the FTT, but we would observe that we see little force in the Appellant's argument that the policy takes no account of a haulier's blameworthiness."

39. We agree with paragraph 41 and the observation. As far as paragraph 40 is concerned, the Upper Tribunal gave the reasons why publication was irrelevant in that instance and those reasons are of no relevance to this appeal.

40. We agree with Mr Davies' argument that it is reasonable that the policy is not published in full because that would present potential smugglers with a method of tailoring their behaviour to that policy. That does not prejudice a haulier who should be aware that smuggling, being complicit in smuggling, or being negligent in preventing smuggling, is likely to carry a sanction without explicitly being told how such sanctions are considered in advance.

41. As far as the checks that Border Force require are concerned, the Upper Tribunal in *Szymanski* considered the matter at paragraphs 55 to 61. The key point is that the arguments

there advanced were very similar to those advanced in this appeal. The Upper Tribunal found that there was nothing in the appellant's arguments and crucially that the question of what will constitute adequate checks depends on the particular facts of the case and will vary according to the circumstances.

42. In this case we find that the failure to comply with the CMR Convention in identifying the nature of the goods is a significant failing. It is compounded by not including the consignee's name on the CMR. The appellant told the Tribunal that he was not interested in the consignee but only the consignor. He had only looked at Google Maps for the address for the driver. We find that the failure to do even the most basic of checks on the consignee is a further indication of inadequate checks.

43. Furthermore, as we have noted at paragraph 13(4) above, the importance of ensuring compliance with the CMR Convention has only very partially been included in the Statute. In the context of smuggling, whilst quantity and weight are relevant, the provisions of Article 6(1) (b), (c), (d), (e) and (f) are if anything far more significant or at worst of equal importance. The omission of those as required checks is a failing on the part of the appellant.

44. Mr Wiencek argued that the review decision was inadequate in a number of respects and in particular that Officer Boote had not addressed in detail the points made about the deficiencies in the CMR. Further there were other aspects that had not been addressed in sufficient detail.

45. We were not referred to it but in regard to the need for a public authority to give adequate reasons for its decision, the leading authority is *South Bucks District Council and another v Porter* [2004] 4 All ER 775 where Lord Scott said at paragraph 36:

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

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

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

47. Officer Boote made it clear in the letter that she had considered compliance with the CMR Convention. She also said that hardship is always considered and that she had read the appellant's letters and all of the evidence provided. Whilst she did not address every detail in the letter there was no need to do so. The message was clear. We find that the letter was adequately reasoned and whilst the appellant might disagree with Officer Boote's conclusions he did know, or should have known, what she had considered and what she decided. He was not prejudiced.

48. It is incumbent upon the appellant to comply with the CMR Convention. Paragraphs 52 to 54 of *Szymanski*, on which Officer Boote and Mr Davies rely under the heading "Sufficiency of CMR Convention checks" read:

> "52. The appellant argued that the FTT erred in law because its decision expected Mr Szymanski to carry out more checks than he was legally obliged to carry out under the CMR Convention. As well as Article 8 (see [32] above), the appellant had referred the FTT to Article 11, which stated that the carrier was under no duty to enquire into the accuracy or adequacy of the relevant documents.
>
> 53. While the FTT did not deal with the argument directly, the FTT considered at [72] that the issue of checks before and after accepting the order and on collecting the load was relevant to the decision as to whether the appellant was complicit in the smuggling. It is clear from its findings on the extent of the checks the appellant made relating to Mr Deka and UAB Kilita, and from the way in which it approached Mr Brenton's review of those checks, that the FTT did not regard Mr Brenton's decision as unreasonable just because the checks he expected to be carried out went beyond those required by the CMR Convention.
>
> 54. In our judgment, there was no error of law in the FTT's treatment of Mr Brenton's decision in this respect. The preamble to the CMR Convention recognises "the desirability of standardizing the conditions governing the contract for the international carriage of goods by road, particularly with respect to the documents used for such carriage". It is readily apparent that, in the different policy context of seeking to prevent smuggling, Border Force would not be unreasonable if they expected checks to be made beyond those set out in a Convention whose purpose was wholly different (the international standardisation of contractual conditions)." (emphasis added)

49. We agree with Officer Boote when she stated that these paragraphs were "wholly applicable" to the appellant.

50. In this case there was a failure to comply with even the CMR Convention let alone anything else; hence the emphasis that we have added to the quotation. We find that the checks expected by Border Force were reasonable and proportionate but the failures in terms of the CMR Convention alone gave Officer Boote reason to find that neither the appellant nor the driver had adequately complied.

51. Mr Wiencek argued that Officer Boote had been wrong to say that there was nothing in the appellant's documents to deter drivers as there was no mention of a sanction or penalties if they became involved in smuggling. He relies on the Mandate and the Statute (see paragraphs 13(1) and 4 above). The point is that Officer Boote did recognise that the appellant did have in place "some steps" and she confirmed that those documents were what she had in mind but she explained in the letter that they were not detailed enough.

52. The Mandate, whilst potentially punitive, does not reference smuggling but only performance, or not, of the contract. We agree that there is insufficient detail. For example, there is nothing pointing to the need to do checks to prevent smuggling (such as complying

with the CMR Convention) and the penalties or sanctions if that is not done. As we have pointed out at paragraph 43 above, the Statute does refer to the CMR Convention but in a decidedly minimalist fashion. We cannot accept the argument that because the driver was not complicit in the smuggling the Mandate and the Statute had been "proved to be effective".

53. Lastly, we turn to A1P1. As we have indicated at paragraph 39 above, and we are bound by the findings of the Upper Tribunal, this Tribunal does not have the power to require the respondent to change its policy on restoration.

54. We have found that the appellant and the driver were blameworthy. The basic checks of the CMR required by the CMR Convention were not done. The appellant told the Tribunal that he still thinks that there was enough information on the CMR because it specified the weight and quantity of the load. That is consistent with the Statute but, as we have pointed out at paragraph 43 above, that does not suffice.

55. We find that that is indicative of the fact that the appellant has not given adequate attention to his responsibility as a haulier to prevent, insofar as possible, the use of the Vehicle for smuggling albeit without his involvement. We agree with Mr Davies that it is reasonable for Border Force to expect that all hauliers should put in place appropriate measures in that regard. The appellant did not. It is not an unfair burden that he should have done so.

56. As we have indicated at paragraphs 13(8) and 26 above, the appellant conceded that the driver did not make checks of the load on the way and the seal was not applied and the Border Force officer found that the load was improperly sealed.

57. We accept that Officer Boote did take into account hardship but hardship is an almost inevitable consequence of the legislative scheme and the seizure process. There was no evidence before us, or Officer Boote, suggesting any particular level of hardship let alone an exceptional level. We merely have an unsupported assertion at paragraph 21 of the appellant's Skeleton Argument that "the restoration fee offered was equal to a non-restoration". We are bound by the Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC) where at paragraph 51 the Tribunal approved the statement that the assertion of an advocate is not evidence.

58. Mr Wiencek cited numerous cases in his Skeleton Argument and we have considered them but do not propose to address all of the arguments advanced because as the Upper Tribunal found in *Szymanski* at paragraph 43 "the FTT 'should ask itself, applying judicial review principles, whether the policy was one that could reasonably be adopted".

59. We find that the policy should reasonably be adopted. We find that:

(a) The purpose of the policy is to minimise smuggling.

(b) In that context the expectation on the part of Border Force that hauliers have a responsibility to have in place appropriate basic measures to attempt to prevent smuggling is a legitimate aim in terms of A1P1. Knowing the name of the consignee is a "basic" check.

(c) We have found that the policy does take into account blameworthiness.

(d) There is, in this case, blameworthiness on the part of the appellant.

(e) Since the full policy is not published we cannot know whether it refers to proportionality, or not, as argued at paragraph 16 of the appellant's Skeleton Argument, but we accept that in applying the policy, Officer Boote did take into account the questions of both proportionality and hardship.

60. The application of the policy in this instance treats the appellant on the same basis as any other haulier in similar circumstances. The issue for this appellant is quite simply that basic reasonable checks were not carried out.

Conclusion

61. We conclude that Officer Boote did not take into account irrelevant matters or place insufficient weight on relevant matters. In light of all the facts available to us, we conclude that the decision not to restore the Vehicle was not disproportionate and was not a decision which no reasonable decision-maker could have reached.

62. For the reasons set out above, we dismiss this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

63. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 30th NOVEMBER 2022