Neutral Citation: [2024] UKFTT 00566 (TC) Case Number: TC09222

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/11163

Customs & Excise – seizure of vehicle – restoration of vehicle – whether decision to restore vehicle for a fee was unreasonable – appeal dismissed

Heard on: 28 May 2024
Judgment date: 27 June 2024

Before

TRIBUNAL JUDGE JENNIFER LEE
CAROLINE SMALL

Between

ANNA WIERZBICKA

Appellant

and

THE DIRECTOR OF BORDER REVENUE

Respondents

Representation:

For the Appellant: Ms Anna Wierzbicka

For the Respondents: Mr Edward Gordon-Saker, counsel

DECISION

INTRODUCTION

1. The Appellant (Ms Wierzbicka) appeals the Respondent's review decision ("the Review Decision"), dated 27 April 2022, to restore an Iveco vehicle with registration number ZS 631JB ("the Vehicle") for a fee of £8,500.
2. The Vehicle was intercepted on 10 December 2021 at the Port of Dover in the UK by officers of the Respondent. The driver was a Mr Adrian Stachowiak. The Vehicle was accompanied by poor handwritten CMR documents, detailing goods sent by "Taxa" based in Poznan, Poland, with the goods having been loaded in Germany. There were instructions to deliver the goods to the M25 bypass, with a telephone number to call.
3. The Vehicle had been sub-leased to the Appellant, who was the operator (carrier of the goods). The Appellant had entered into a fixed term contract of services with Mr Stachowiak for him to the drive the Vehicle.
4. A search of the Vehicle revealed 121,200 cigarettes hidden within the load, attracting revenue of £50,592.76. Officers of the Respondent seized the goods and the Vehicle at approximately 0110 hours on 10 December 2021, the Vehicle having been used to carry goods liable to forfeiture.
5. The issue in this appeal is whether the Review Decision, made by Officer Summers, a Higher Officer of the Respondent and employed as a Review Officer, was reasonable.

EVIDENCE

6. This hearing was initially listed as an in-person hearing, but was converted to a video hearing as a result of the Appellant's application on 7 May 2024 to attend remotely from Poland, which was granted by another Judge of the Tribunal on 14 May 2024.
7. As such, the hearing has proceeded as a video hearing before us today. The Appellant, Ms Wierzbicka, attended by way of video link from Poland. Mr Gordon-Saker, counsel for the Respondent, and Officer Summers, attended by way of video link from the UK. Also present was Ms Anderson, a Polish interpreter, who attended initially by way of video link but later by telephone as a result of technical issues. Notwithstanding those technical issues, Ms Anderson was able to hear and properly interpret what was said for the benefit of the parties and the Tribunal without difficulty. We are grateful to Ms Anderson for her assistance.
8. We are also grateful to Ms Wierzbicka for the measured and civilised manner in which she has presented her case despite these proceedings having been stressful for her, and to Mr Gordon-Saker and Officer Summers for their assistance in relation to the issues we have had to consider.
9. The Tribunal was provided with a hearing bundle consisting of 120 pages and a skeleton argument from Mr Gordon-Saker, dated 19 February 2024. The bundle included the following key documents:

    (a) The notice of appeal with detailed grounds of appeal dated 26 May 2024;

    (b) A witness statement dated 21 October 2022 and the exhibits thereto from Officer Summers (who made the Review Decision);

    (c) The Respondent's statement of case dated 24 October 2022.

10. Officer Summers was called to give oral evidence. Ms Wierzbicka did not give oral evidence but made full submissions to us during the course of the hearing, with the assistance of the interpreter, Ms Anderson.

11. Given the narrow scope of this appeal, Mr Gordon-Saker confirmed that the Respondent did not require Ms Wierzbicka to give oral evidence. Ms Wierzbicka is resident in Poland and joining by video link from Poland. She would not have been able to give oral evidence by video from Poland without the permission of that state: see the updated guidance on taking oral evidence from abroad, issued by the Chamber President on 28 July 2022, which follows the decision in *Agbiaka (evidence from abroad: Nare guidance)* [2021] UKUT 286 (IAC).
12. However, permission is not required for written evidence, e.g. a witness statement by an individual who is overseas or a document obtained from overseas. Nor is permission required for a person to make submissions, whether oral or written, from another country, although the Tribunal must guard against the risk of a litigant making oral submissions straying into giving oral evidence.
13. The current position as at the date of this hearing, as we have ascertained, is that Poland has not given permission for oral evidence to be given by video from that state. Individual requests (on a case-by-case basis) to Poland is also not currently possible.
14. We have decided, with the agreement of the parties, to proceed without Ms Wierzbicka giving oral evidence. Ms Wierzbicka made detailed submissions to us and relied on her written evidence. She was able to cross-examine Officer Summers. We are satisfied that she was able to fully participate in this hearing with the able assistance of the interpreter. The fact that Ms Wierzbicka did not give oral evidence at this hearing has not prejudiced her position in the slightest. The appeal does not turn on any factual disputes, and we have given full weight to her oral and written submissions to us.

THE LAW

15. CEMA sets out the powers of the Respondent in relation to seizure and forfeiture. S.139(1) CEMA provides that anything 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. S.141 provides that any vehicle carrying goods liable to forfeiture may also be seized.
16. The Vehicle was seized in reliance on these provisions. That seizure can be challenged by making a claim in the Magistrate's Court within one month of the date of the seizure (s.139(5) and (6) CEMA, together with Sch.3 para 3). If there is no challenge, the thing in question shall be deemed to have been duly condemned as forfeited (Sch.3, para 5).
17. Ms Wierzbicka did not challenge the seizure of the Vehicle in the Magistrates' Court. As we explained at the outset of the hearing, the Tribunal does not have jurisdiction to consider the legality or correctness of the seizure itself (see the Court of Appeal decision in *HMRC v Jones & Jones* [2011] EWCA Civ 824). We are required to proceed on the basis that the cigarettes were being illegally imported for commercial use.
18. Under s.152(b) CEMA, Border Force may restore, subject to such conditions, if any, as they think proper, anything forfeited or seized under CEMA.
19. Ss.14 and 15 of the Finance Act 1994 ("FA 1994") allows a person to seek restoration of a vehicle seized, and if Border Force refuse to restore the vehicle, the person may request a review of that decision. If that person is dissatisfied with the outcome of the review, they can appeal to the Tribunal under s.16.
20. A decision to refuse restoration is a decision as to an "ancillary matter" (s.16(8) FA 1994 read in conjunction with Sch. 5). The Tribunal's powers on such an appeal are limited by s.16(4) FA 1994. That provision reads as follows (emphasis added):

> "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."

21. In short, the question for us is whether the Review Decision was reasonable. Pursuant to *Customs and Excise v JH Corbitt (Numismatists) Ltd* [1980] STC 2312, a decision is not reasonable if (a) the decision maker acted in a way which no reasonable decision maker could have acted; (b) if they had taken into account some irrelevant matter; or (c) had disregarded something to which he or she should have given weight.

22. Further, as confirmed in *Commissioners of Customs and Excise in Gora v CCE* [2003] EWCA Civ 525, and in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC), the reasonableness of the decision-maker's decision is to be judged against the information available to us at the date of the hearing, even though in some cases this may include information which was not available to the decision-maker when the decision was taken. Further, in *Gora*, Pill LJ held that the Tribunal could make findings, and then go on to decide whether, in the light of those findings, the restoration decision made by the officer was reasonable.

23. The burden is on Ms Wierzbicka, the Appellant, to show that the Review Decision was unreasonable. This means that she must prove that the Respondents could not reasonably have arrived at the Review Decision: s.16(4) FA 1994. The standard of proof is the balance of probabilities.

SUBMISSIONS

24. In summary, Ms Wierzbicka's notice of appeal raises the following grounds:

(a) That the Review Decision is unreasonable;
(b) That the Review Decision is contrary to Article 1 of the First Protocol to the European Convention on Human Rights ("the ECHR");
(c) That non-publication of the Border Force policy on the restoration of seized commercial vehicles ("the Border Force policy") is unlawful.

25. The Respondent opposes the appeal. It maintains that the Review Decision to restore the Vehicle for a fee of £8,500 (50% of the trade value of the Vehicle) is reasonable. The Respondent contends that:

(a) The Review Decision took into account the relevant Border Force policy.
(b) Officer Summers was guided by the Border Force policy, but was not fettered by it when he made his decision.
(c) Officer Summers did not fail to take into account matters which he ought to have considered, and did not take into account matters which he ought not to have considered, in reaching his decision.

(d) Officer Summers' decision was not one which was so unreasonable that no reasonable decision-maker could have arrived at it.

26. The Respondent has provided a summary of the relevant sections of the Border Force policy, which is as follows:

> "A vehicle adapted for smuggling will not normally be restored.
> Otherwise, the policy depends on who is responsible for the smuggling attempt with three possibilities:
> (a) Neither the driver nor the operator is responsible;
> (b) The driver but not the operator is responsible;
> (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 the 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, otherwise;
> 2. 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 12 months) the vehicle will not normally be restored.
> B: If the operator provides evidence satisfying the BF that the driver but not the operator is responsible for or complicit in the smuggling attempt then:
> 1. If the operator also provides evidence satisfying the BF that the operator took reasonable steps to prevent drivers smuggling then the vehicle will normally be restored free of charge unless, a) the same driver is involved (working for the same operator) on a second or subsequent occasion in which case the vehicle will normally be restored for 100% of the revenue involved in the smuggling attempt (or for the trade value of the vehicle if lower), except that b) if the second or subsequent occasion occurs within 12 months of the first the vehicle will not normally be restored.
> 2. Otherwise, a) on the first occasion the vehicle will normally be restored for 100% of the revenue involved in the smuggling attempt (or for the trade value of the vehicle if lower), b) on a second or subsequent occasion the vehicle will not normally be restored.
> C: Where the operator has failed to provide evidence to satisfy the BF that the operator was neither responsible or complicit in the smuggling attempt then:
> 1. If the revenue involved is less than £50,000 and it is the first occasion, the vehicle will be restored for 100% of the revenue involved (or the trade value of the vehicle if less).
> If the revenue involved is £50,000 or more or it is seized on a second of subsequent occasion within 12 months, the vehicle will not normally be restored."

27. The Respondent does not accept that the Review Decision is contrary to Article 1 of the First Protocol to the ECHR, or that non-publication of the Border Force policy is unlawful.

FINDINGS OF FACT

28. Ms Wierzbicka denies being complicit in the smuggling attempt involving the cigarettes and having any knowledge of the same. The Respondent now accepts that she was not complicit, and was not responsible for the smuggling attempt. This was implied in the Review Decision, and confirmed in the Respondent's statement of case and in Officer Summers' oral evidence. He stated that he had considered matters afresh and disagreed with the initial decision made by another officer that Ms Wierzbicka was complicit.
29. We find as a fact that Ms Wierzbicka was not complicit or responsible for the smuggling attempt.
30. Officer Summers maintained in his oral evidence that the Review Decision was reasonable and that Ms Wierzbicka did not take adequate steps to prevent driver smuggling. He stated that:

    (a) Ms Wierzbicka filling in the CMR note with instructions to deliver the goods to a layby on the M25 was not acceptable. The goods were to be delivered to a "Mr Krzysztof", with just a mobile number, which was also not acceptable. To be given a name of one person with a single mobile number was highly suspicious.
    (b) It would not have been possible for Ms Wierzbicka to confirm the legitimacy of the load, the authenticity of the consignor and consignee, and where the goods were coming from and where they were ultimately going. It would have been impossible for an operator to carry out checks in a layby.
    (c) The delivery address should have been a verifiable address and not a layby on the motorway.
    (d) Ms Wierzbicka did not take any adequate steps to prevent driver smuggling and had carried out little research into the risks involved before starting her commercial transport business.

31. As stated above, we find that Ms Wierzbicka was not complicit in the smuggling attempt. However, we find as a fact that Ms Wierzbicka did not take adequate steps to prevent smuggling, either by the driver or by third parties. We have taken the following factors into account:

    (a) It is not disputed that Ms Wierzbicka had just commenced her business as a commercial haulier/ operator seven months prior to the seizure of the Vehicle. In her letter requesting a review, dated 14 March 2022, her former representatives (Euro Lex Partners LLP) stated that "*our client was new on the market at the time the seizure took place. She did not fully appreciate all the risks associated with an international road transport…*".
    (b) Her naivety, being new to the business, caused her to be more trusting than she should have been in relation to this consignment of goods. Ms Wierzbicka herself accepts, in her notice of appeal, that she did not fully appreciate all the risks and "*certainly did not think that third parties dealing with her in respect of the transport order could take advantage of her inexperience and hide any contraband in the load*."
    (c) Ms Wierzbicka knew that the goods were to be delivered to a bypass on the M25, with a telephone number to call. These were the details set out in the CMR note which she had (CMR no. 6407764). She has further provided information that the goods were apparently to be delivered to an individual simply known as "Mr Krzysztof". These factors should have placed Ms Wierzbicka on high alert.

(d) The driver was on a fixed term contract with Ms Wierzbicka, dated 20 November 2021, entered into shortly before the incident that led to the seizure of the Vehicle. We are not satisfied that adequate checks had been carried out on the driver by Ms Wierzbicka, or that any adequate arrangements were put in place by her to prevent the driver from smuggling.

(e) Whilst we accept that Ms Wierzbicka did make enquiries with Taxa (the sender as stated on the CMR note no. 6407764) and was told that the packages were personal items or gifts from individual clients, and that she called customs to check that parcels from private persons up to 45 pounds would not be subject to customs duty, we are not satisfied that she took adequate steps to actually address the risks that the driver would utilise the Vehicle for smuggling. We note from the notice of appeal that Ms Wierzbicka states that she subsequently found out that the driver had previously been arrested in the Netherlands in October 2021. If adequate background checks had been undertaken, it is possible that Ms Wierzbicka would have been alerted to the driver's history.

DISCUSSION AND DECISION

32. We have decided that the Review Decision was reasonable.
33. Given that Ms Wierzbicka was not complicit in the smuggling attempt, but did not take adequate steps to prevent driver smuggling, the matter fell within paragraph B2 of the Border Force policy.
34. Paragraph B2 of the policy states that a) on the first occasion, the vehicle will normally be restored for 100% of the revenue involved in the smuggling attempt (or for the trade value of the vehicle if lower); (b) on a second or subsequent occasion, the vehicle will not normally be restored.
35. This is the first occasion, and the policy therefore is that the Vehicle should be restored for 100% of the revenue involved in the smuggling attempt, or for the trade value of the vehicle if lower. The revenue involved is £50,592.75. The trade value of the vehicle is £17,000. The fee payable, if the policy were to be applied strictly, would therefore be a sum of £17,000.
36. However, on this occasion, Officer Summers made the decision to apply a 50% reduction, which reduced the fee to £8,500. He stated in his oral evidence that when arriving at the Review Decision, he took into account the Border Force policy and the following factors:

    (a) The fact that Ms Wierzbicka was not complicit but had not taken adequate steps to prevent driver smuggling.
    (b) Although the driver had informed officers when the Vehicle was intercepted that he was apparently delivering the cigarettes to Ms Wierzbicka's cousin, there was no proof as to whether what the driver said was true.
    (c) The Vehicle was used for commercial, international road transport.
    (d) The smuggled goods consisted of 121,200 cigarettes, which was not insubstantial and amounted to commercial scale smuggling.
    (e) Ms Wierzbicka was new to the business and relatively naïve.
    (f) Ms Wierzbicka was a single mother and appeared to be experiencing some financial hardship.

37. Officer Summers stated that he has decided, exceptionally, to reduce the fee by 50% due to the personal circumstances of Ms Wierzbicka.

38. A decision is not reasonable if the decision maker acted in a way which no reasonable decision maker could have acted, if they had taken into account some irrelevant matter or had disregarded something to which he or she should have given weight. We also remind ourselves of Judge Hellier's comments in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC) (§6):

> "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."

39. The Review Decision applied the Border Force policy. Officer Summers' discretion was not fettered by this policy. We are satisfied that he considered all of the circumstances, taking into account all relevant matters and no irrelevant matters. We are satisfied that the decision was not one which no reasonable decision maker could have reached.

40. We reject the contention that the Review Decision contravenes Article 1 of the First Protocol of the ECHR. In *Lindsay v C&E Commrs* [2002] EWCA Civ 267, the Master of the Rolls, giving the leading judgment, said:

> "[55] Broadly speaking, the aim of the commissioners' 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 art 1 of the First Protocol to the convention. The issue is whether the policy is liable to result in the imposition of a penalty in the individual case that is disproportionate having regard to that legitimate aim.
>
> …
>
> [64] I consider that the principle of proportionality requires 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."

43. The Border Force policy achieves a legitimate aim, e.g. the prevention of the evasion of excise duty. The Officer Summers had regard to the policy and was not fettered by it. The policy states that vehicles in cases falling within paragraph 2b would ordinarily be returned for a fee equivalent to 100% of the revenue or the trade value of the vehicle, if lower. In this case, Officer Summers applied a reduction of 50% to the fee. In this context, the Review Decision clearly cannot be said to have been disproportionate.

44. As for the non-publication of the Border Force policy, that issue does not assist Ms Wierzbicka. We have regard to *Sczepaniak (t/a PHU Greg-Car)* v *The Director of Border Revenue* [2019] UKUT (TCC), in which the Upper Tribunal stated (at §40):

> "Whether or not the Respondent could, or should, publish its policy on restoration is of no relevance to this appeal. That is because, in this appeal the Respondent makes the serious allegation that the Appellant was responsible for, or complicit in, an attempt to smuggle 2.6m cigarettes into the UK. If that allegation is true (which the differently constituted FTT will have to decide), the Appellant can scarcely complain that it could not have realised that there would be significant repercussions. If the allegation is untrue then, as we have observed, the Respondent's refusal to restore the vehicle is unlikely to be reasonable whether or not the policy was published."

45. Although Ms Wierzbicka is not complicit in the smuggling attempt, the Vehicle in this case was used to smuggle 121,200 cigarettes (a not insignificant amount) and no adequate steps had been taken to prevent the driver smuggling. The fact that it was

seized as a result should not have come as a surprise. The policy is of no relevance to the appeal, which turns on whether the Review Decision is reasonable.

CONCLUSION

46. For the reasons set out above, the appeal against the Review Decision is dismissed.
47. In closing, we wish to add this. For most of the hearing, we had proceeded on the basis that the Vehicle remained in storage. Mr Gordon-Saker and Officer Summers were also of that understanding and believed that the Vehicle remained in storage.
48. It later transpired that the Vehicle had in fact been disposed of by the Respondent on or about 9 September 2022. This only came to light towards the end of the hearing as a result of Ms Wierzbicka having commented that she believed that the Vehicle had been disposed of and the Tribunal raising the question as to whether that was the case.
49. Officer Summers stated that he was unaware that the Vehicle had been disposed of and that he would be disappointed if it had been disposed of pending this appeal. He made enquiries and ascertained that the Vehicle had indeed been disposed of on or about 9 September 2022. The decision had been made by another officer. According to Officer Summers, a letter had been sent to Euro Lex Partners LLP dated 4 August 2022 indicating that the fee had not been paid, and as there was no appeal to the Tribunal, disposal had been authorised.
50. The fact that the Vehicle was disposed of on or about 9 September 2022 in circumstances when an appeal had been brought on 26 May 2022 in respect of the decision to restore in return for a fee, and the Respondent had been notified by the Tribunal by letter dated 16 August 2022 that the appeal had been assigned to the standard category, is unsatisfactory. The Respondent would have been made aware on/shortly after 16 August 2022 that there was an appeal pending.
51. Furthermore, nowhere in the Respondent's statement of case, dated 24 October 2022, or in counsel's skeleton argument, dated 19 February 2024, was the fact of the disposal of the Vehicle made known to Ms Wierzbicka and the Tribunal.
52. We have directed the Respondent to provide (a) an explanation as to the circumstances surrounding the disposal of the Vehicle in September 2022, prior to the determination of this appeal (to include provision of any letter(s) sent by the Respondent to the Appellant regarding such disposal); and (b) an explanation from the Respondent as to what payment/ compensation might be available to the Appellant concerning the disposed Vehicle, by 4 pm on 7 June 2024.
53. On 29 May 2024, the Respondent sent an email to the Tribunal copying in Euro Lex Partners LLP with (a) a letter addressed to Euro Lex Partners LLP dated 4 August 2022 indicating that the Respondent cannot store the Vehicle indefinitely, and requesting payment of the restoration fee and collection of the Vehicle within 14 days; and (b) a document explaining compensation entitled "Forfeiture of Excise Goods (Alcohol, Tobacco & Oils) – Mandatory Instructions".
54. The Tribunal has arranged to forward the Respondent's email and the attached documents to Ms Wierzbicka given that she is no longer represented by Euro Lex Partners LLP (and has not been represented by them for some time).
55. On 7 June 2024, the Tribunal received a further email from the Respondent with a document prepared by Mr Gordon-Saker entitled "Explanation of the disposal of the vehicle". Ms Wierzbicka was copied in.
56. We make clear that disposal of the Vehicle does not in any way affect our decision in relation to this appeal, which concerns only whether the Review Decision is reasonable. We have upheld the Review Decision. However, the disposal does have a bearing on

the next steps. Ms Wierzbicka is now not able to recover the Vehicle even if she were able to pay the £8,500 fee.

57. Whilst the information provided by the Respondent does not explain why disposal of the Vehicle had not been made known to the Tribunal or to the Respondent's representatives for the purposes of this appeal, and indeed Officer Summers expressed surprise that it might have been disposed of prior to the outcome of the appeal, the information which the Respondent has now provided does shine some light on the circumstances surrounding the disposal. It will be a matter for Ms Wierzbicka whether she wishes to take the matter up with the Respondent and pursue compensation (if indeed there is any). It is not a matter for the Tribunal. As for her personal effects in the Vehicle, the Respondent has not provided information as to their whereabouts, but we had understood from Officer Summers that he believed those would likely also have been disposed of. Ms Wierzbicka will have to make her own enquiries.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

58. 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.

JENNIFER LEE
TRIBUNAL JUDGE

Release date: 27 JUNE 2024