Neutral Citation Number: [2021] EWCA Civ 1830

Case Nos:
B2/2021/0093
B2/2021/0243
B2/2021/1527

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT NOTTINGHAM
G01NG369
G01NG006
H00NG316

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 December 2021

Before:

LADY JUSTICE KING DBE
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE WARBY

- -

Between:

B2/2021/0093 and B2/2021/0243

(1) LINK SPOLKA Z O.O.

(2) KRZYSTOF RYSZARD KOSCIECHA

Appellants

B2/2021/1527

(1) SKAT TRANSPORT SP. Z O.O.

(2) OSKAR KASINSKI

Appellants

- and –

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -
- -

Simon Clarke (instructed by **Smith Bowyer Clarke**) for the **Appellants**
Jonathan Lewis (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 2 November 2021

- -

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Thursday 2 December 2021 at 10:30am

Approved Judgment

Lord Justice Stuart-Smith:

Introduction

1. These three appeals from decisions of three different judges sitting at the Nottingham County Court raise questions about the operation of Part II of the Immigration and Asylum Act 1999 ["the Act"], which provides for carriers who are found with clandestine entrants on board their vehicles to be liable to civil penalties. The facts of each case differ slightly but are in many respects routine and typical. In each case the appellants appealed to the County Court against the Respondent SSHD's imposition of a penalty. The present appeals are from the decisions of the respective County Court judges.

2. The relevant facts appear in slightly greater detail at [55] ff below. They concern commercial road hauliers. I shall therefore refer to the legal framework as directly relevant to owners, hirers and drivers of commercial road haulage vehicles. There are other provisions that apply where clandestine entrants travel by ship, aircraft, buses and coaches, or private vehicles, to which I will not refer further.

The legal framework

The Act

3. Section 32(2) of the Act provides that the SSHD may require a person who is responsible for a clandestine entrant to pay a penalty. The maximum penalty is £2,000 per clandestine entrant. Responsible persons are defined for the purposes of road haulage vehicles to include the owner and hirer of the vehicle. Where it is a vehicle but not a detached trailer, it also includes the driver; if it is a detached trailer, it also includes the operator of the trailer: see s. 32(5)(b) and (c). Where a penalty is imposed on the driver of a vehicle who is an employee of the vehicle's owner or hirer, the employee and the employer are jointly and severally liable for the penalty imposed on the driver (irrespective of whether a separate penalty is also imposed on the employer): see s. 32(4).

4. Section 33 of the Act provides that the SSHD must issue a code of practice to be followed by any person operating a system for preventing the carriage of clandestine entrants. That code of practice is known as the Prevention Code. Before issuing it, the SSHD was obliged to consult such persons as the SSHD considered appropriate and to lay a draft before Parliament. The version of the Prevention Code that is relevant to the present appeals was issued in 2008. To similar effect s. 32A of the Act provides that the SSHD shall (after laying it before Parliament but without the need for consultation) issue a code of practice specifying matters to be considered in determining the amount of a penalty under s. 32 of the Act. That code of practice is known as the Penalty Code. It was issued in 2004. The SSHD may from time to time revise either of the Codes. Before revising either of the Codes the SSHD must lay a draft of the proposed revision before Parliament; and, if revising the Prevention Code, the SSHD must additionally consult such persons as the SSHD considers appropriate.

5. The Prevention Code is published in many languages. We have only considered the English version. Counsel for the Appellants suggested that the versions in other languages may be less easily understood by those for whom they are in their mother

tongue. There is no material before the court upon which we could form any view on that suggestion even if it were necessary for the purposes of these appeals, which it is not.

6. Section 34 provides as follows:

> "**34.— Defences to claim that penalty is due under section 32.**
>
> (1) A person ("the carrier") shall not be liable to the imposition of a penalty under section 32(2) if he has a defence under this section.
>
> (2) …
>
> (3) It is also a defence for the carrier to show that—
>
> (a) he did not know, and had no reasonable grounds for suspecting, that a clandestine entrant was, or might be, concealed in the transporter;
>
> (b) an effective system for preventing the carriage of clandestine entrants was in operation in relation to the transporter; and
>
> (c) on the occasion in question the person or persons responsible for operating that system did so properly.
>
> (3A) …
>
> (4) In determining, for the purposes of this section, whether a particular system is effective, regard is to be had to the code of practice issued by the Secretary of State under section 33.
>
> (5) [...]
>
> (6) Where a person has a defence under subsection (2) in respect of a clandestine entrant, every other responsible person in respect of the clandestine entrant is also entitled to the benefit of the defence.

7. Section 35 lays down relevant procedures. Section 35(3)-(6) provides for a person to whom a penalty notice is issued and who objects on the grounds that he is not liable to the imposition of a penalty or that the amount of the penalty is too high to give a notice of objection to the SSHD. On receipt of such a notice, the SSHD may cancel, reduce or increase the penalty or decide to take no such action. The SSHD is obliged to have regard to the Penalty Code when considering a Notice of Objection: see s. 32A(2)(b).

8. Section 35A provides for a person to appeal to the County Court against a penalty imposed on him under s. 32 on the ground that either (a) he is not liable to the imposition of a penalty, or (b) the amount of the penalty is too high: see s. 35A(1). An appeal under s. 35A is a rehearing of the SSHD's decision to impose a penalty and is to be determined having regard to the Prevention and Penalty Codes of Practice and any other

matters which the court thinks relevant: see s. 35A(3). An appeal under s. 35A may be brought whether or not the appellant has served notice of objection on the SSHD under s. 35; and, on such an appeal, the Court may either cancel or reduce the penalty or dismiss the appeal: see s. 35A(2) and (5).

The Prevention Code

9. Much of the hearing of the appeal was directed to the terms and meaning of the Prevention Code. I therefore set out the provisions in full rather than attempting to paraphrase them.

10. Part 1 of the Prevention Code deals with "Road Haulage and Other Commercial Vehicles". Part 1.1 sets out "measures to be taken to secure vehicles against unauthorised entry" as follows:

> "1.1.1 Before final loading takes place, all existing cuts or tears in the outer shell or fabric of the vehicle, which exceed 25 centimetres in length, must be repaired and sealed so as to prevent unauthorised entry.
>
> 1.1.2 If present at the time of final loading, the owner, hirer or driver of the vehicle must check it to ensure that no persons have gained entry and are concealed within. It must then be locked, sealed, or otherwise made secure to prevent unauthorised entry. If not present at the time of final loading the owner, hirer or driver must, where possible, ensure that such checks are conducted at that point by reputable persons and then obtain written confirmation from those persons that these checks were properly conducted and that the vehicle did not contain concealed persons at the time of final loading and securing.
>
> 1.1.3 When the final loading has been completed, the load space must be secured immediately by lock, seal or other security device, which prevents unauthorised entry.
>
> 1.1.4 Tilt cords and straps, where used, must be undamaged, pass through all fastening points, made taut and be secured by lock, seal or other security device.
>
> 1.1.5 There must be no means of entry to the load space, other than via access points which have been secured by lock, tilt cord / strap and seal, or other security device.
>
> 1.1.6 Locks, tilt cords, straps and other devices used to secure the load space must be of robust quality and effective.
>
> 1.1.7 Seals, other than Customs' seals, must be distinguished by a number from a series which is unique to the owner, hirer or driver. This must be recorded in documentation accompanying the vehicle.

> 1.1.8 Where a sealed container (except a container sealed by Customs) is loaded onto a vehicle, the owner, hirer or driver must, where possible, check to ensure that it does not contain unauthorised persons. It must then be resealed and made secure in accordance with the above requirements. These actions and the number of the new seal used must be recorded in documentation accompanying the vehicle.
>
> 1.1.9 The same checking, securing and recording procedure detailed in paragraph 1.1.8 above must be followed where the load space in the vehicle has been opened by the owner, hirer, driver, or any other person before the final checks detailed in section 1.2 below are carried out.
>
> 1.1.10 Where a new driver becomes responsible for the vehicle en route to the United Kingdom, he should ensure that it does not contain unauthorised persons and that the requirements detailed above have all been met.
>
> 1.1.11 Paragraphs 1.1.1 to 1.1.10 above will not apply in relation to any vehicle, which it is not possible to secure by means of lock, seal or other security device. However, in such circumstances it will be for the owner, hirer or driver concerned to establish alternative arrangements to prevent unauthorised entry; and to be able to demonstrate that such arrangements have been made and complied with."

11. Part 1.2 sets out "[m]easures to be taken immediately prior to the vehicle boarding the ship, aircraft or train to the United Kingdom, or before arrival at the UK immigration control at Coquelles":

> "1.2.1 Where used, check tilt cords and straps for evidence of tampering, damage or repair.
>
> 1.2.2 Where used, check that seals, locks or other security devices have not been removed, damaged or replaced. In order to ensure that there has been no substitution, numbers on seals must be checked to confirm that they correspond with those recorded on the documentation accompanying the vehicle.
>
> 1.2.3 Check the outer shell / fabric of the vehicle for signs of damage or unauthorised entry, paying particular attention to the roof, which may be checked from either inside or outside the vehicle.
>
> 1.2.4 Check any external storage compartments, tool boxes, wind deflectors and beneath the vehicle.
>
> 1.2.5 Check inside the vehicle. Effective detection devices may be used for this purpose at the discretion of the owner, hirer or driver, but this will not obviate the requirement that the other

> checks detailed above be carried out. Where it is not possible to secure a vehicle by means of lock, seal or other security device, a thorough manual check of the load and load space must be conducted."

12. Part 1.3 sets out "General Principles":

> "1.3.1 Vehicles should be checked regularly en route to the United Kingdom to ensure that they have not been entered, particularly after stops when left unattended.
>
> 1.3.2 A document detailing the system operated to prevent unauthorised entry must be carried with the vehicle, so that it may be produced immediately to an immigration officer on demand in the event of possible liability to a penalty.
>
> 1.3.3 A report detailing the checks that were carried out must be carried with the vehicle. If possible to arrange, the report should be endorsed by a third party, who has either witnessed or carried out the checks himself by arrangement with the owner, hirer or driver, as the report will then be of greater evidential value.
>
> 1.3.4 Whilst owners, hirers or drivers may contract with other persons to carry out the required checks on their behalf, they will nevertheless remain liable to any penalty incurred in the event of failure to have an effective system in place or to operate it properly on the occasion in question.
>
> 1.3.5 Where the checks conducted suggest that the security of the vehicle may have been breached, or the owner, hirer or driver otherwise has grounds to suspect that unauthorised persons have gained entry to the vehicle, it must not be taken onto the ship, aircraft or train embarking for the United Kingdom, or to the UK immigration control at Coquelles. Any such circumstances must be reported to the police in the country concerned at the earliest opportunity, or at the latest, to the passport control authorities at the port of embarkation. In the event of difficulties arising, owners, hirers or drivers should contact the United Kingdom Immigration Service at the proposed port of arrival for advice."

13. A number of points arise.

14. First, parts 1.1, 1.2 and 1.3 include different types of provisions in close proximity to one another. The provisions of parts 1.1 and 1.2 identify steps to be taken by the responsible person to ensure that unauthorised access is not and has not been gained to their vehicle. The same description could be applied to [1.3.1] and [1.3.5], with [1.3.5] also identifying what the responsible person should and should not do in the event that they have grounds to suspect that unauthorised persons have gained entry.

15. [1.3.2] and [1.3.3] are of a different hue. Their primary purpose, at first blush, appears to be evidential: the document referred to in [1.3.2] evidences the existence of the

system being operated to prevent unauthorised entry while the report referred to in [1.3.3] evidences the checks that have been carried out in order to implement that system. Both paragraphs require that the specified documents "must be carried with the vehicle"; but only the system document specified by [1.3.2] must be carried with the vehicle "so that it may be produced immediately to an immigration officer on demand in the event of possible liability to a penalty." The reason for this divergence is not explained in the Code itself and it is unlikely to be useful or reliable to speculate why it exists.

16. Second, submissions were made on both sides about the significance of reports detailing the checks that have been carried out. We were shown an example of such a report form that is issued by Border Force, described as a "Vehicle security checklist" and were told that some hauliers devise their own forms: for present purposes the precise form does not matter. Ultimately it was common ground between the parties that the proper contemporaneous filling out of forms recording that necessary steps have been taken has a significance that goes beyond the merely evidential. I agree. The slightly disparaging references to them as "tick box" or "checklists" that appear in one of the judgments under appeal do not do justice to the importance they have in the overall scheme. To my mind it is plain that they are intended to serve a function similar to that of risk assessments or lists of steps to be taken in other fields concerned with the reduction of risk. In addition to the evidential value that they have (provided that they are filled out accurately) in demonstrating that appropriate checks have been carried out, they have an equal or greater value, if used appropriately, in focusing the driver's mind and forcing them to concentrate upon the security of the vehicle at particular points in the journey. They are therefore an integral part of any system and contribute to its effectiveness by reducing the risk that necessary and appropriate steps are omitted. Quite apart from the reference in [1.3.3], I would hold that the absence of such reports or the failure to fill them in contemporaneously and accurately would at least raise a question about the effectiveness of any system designed to prevent the carriage of clandestine entrants. I would also tentatively express the view that such reports need not now be paper-based, provided that their function is achieved by some other medium or process. There may, of course, be other elements of any system that are designed to ensure compliance with necessary steps, of which driver training is an obvious and important example. As will be seen when considering the statutory defence under s. 34(3) of the Act in more detail below, the question to be answered about the haulier's system in each case is whether it is "effective" when viewed overall.

17. Third, I have referred to the divergence in the language of [1.3.2] and [1.3.3]. What is its significance, if any? One view of [1.3.2] is that its language imposes two mandatory requirements, namely (a) that the document detailing the system operated to prevent unauthorised entry must be carried with the vehicle, and (b) that the document must be produced immediately to an immigration officer on demand in the event of possible liability to a penalty. But that is not what it says and the language differs markedly. In relation to carrying the document with the vehicle, the word "must" is used; in relation to production of the document, all that is said is that it must be carried "so that it may be" produced immediately on demand. I do not accept that [1.3.2] imposes a mandatory obligation upon a haulier to produce the document immediately on demand. Had that been the intention, it would have been simple and consistent to make the obligation clear, for example by saying that the document must be produced immediately on demand. That said, the importance of producing such a document immediately and the

potential significance of not producing it when demanded can scarcely be overestimated. It arises in the context of a demand by an immigration officer "in the event of possible liability to a penalty." The purpose of producing a document detailing the system is to head off the prospect of a penalty; and the scope for an adverse inference to be drawn by the SSHD or on appeal to the County Court if the driver fails to produce it is obvious.

18. Similarly, although there is no suggestion of a mandatory requirement under [1.3.3] to produce the report detailing the checks that have been carried out, the scope for an adverse inference being drawn if a driver does not produce the report when asked to do so by an immigration officer is clear. As a matter of evidence, either a delayed or a complete failure to produce the report may (depending on all the circumstances of the case) reasonably lead to an inference by the SSHD or the County Court that the report has not been completed contemporaneously or at all. Such an inference may (again depending on all the circumstances of the case) support a conclusion either that there was no effective system or that the system was not being operated correctly. That said, if a completed report is produced later, consideration of all the circumstances of the case may lead to the conclusion that, though produced late, the report was completed contemporaneously. If such as finding were to be made (as happened in one of the appeals now before the Court), the mere fact of late production would not obviously support a conclusion either that an effective system was not in place or that the driver had failed to operate it, at least in relation to the carrying out of checks and recording what had been done.

19. Fourth, the submissions of the parties revealed a fundamental difference as to the interpretation of [1.2.5] and, more generally, about when the Prevention Code requires hauliers to check inside loads that have been made secure and sealed, to which I will refer as "secured loads".

20. Parts 1.1 and 1.2 draw a distinction between secured loads and those which are not secured loads. Where loads are not secured loads, [1.1.11] provides that it will be for the owner, hirer or driver concerned to establish alternative arrangements to prevent unauthorised entry; and to be able to demonstrate that such arrangements have been made and complied with.

21. The current appeals are all concerned with secured loads. The paragraphs of primary relevance to checking inside secured loads are [1.1.2], [1.1.3], [1.1.9], [1.1.10] and [1.2.5]. [1.1.2] and [1.1.3] identify the measures to be taken at the time of final loading. Checks must be made to ensure that no persons have gained entry and are concealed within. The load space must then be secured immediately by lock, seal or other security device, which prevents unauthorised entry. Details of the seals that have been attached (other than those attached by Customs) must be recorded in documentation accompanying the vehicle. The effect of [1.1.9] is that, whenever a secured load is opened by the owner, hirer, driver, or any other person before the final checks detailed in section 1.2 are carried out, the same checking, securing and recording procedure should be repeated. It was common ground that opening a secured load is a moment of opportunity for those trying to be clandestine entrants: hence the need to repeat the checks if the secured load is opened.

22. There is no suggestion in the Prevention Code that the haulier should open or go inside a secured load space at every stop if it has not been opened. What the Prevention Code

says at [1.3.1] is that vehicles should be checked "regularly en route to the United Kingdom" to ensure that they have not been entered "particularly after stops when left unattended." It does not say or imply that the haulier should open or go inside the secured load space when carrying out such checks. [1.1.10] identifies steps to be taken when a new driver becomes responsible for the vehicle en route to the United Kingdom. It does not expressly require the new driver to open a secured load space. It does, however, require him to ensure that the vehicle does not contain unauthorised persons and that the requirements for securing and sealing the load have been met (which would include checking the securing, locking and sealing of the load).

23. On any view, [1.2.5] is badly and confusingly drafted, to the extent that its meaning is not clear. To put it in context, it is plain that all the steps identified in Part 1.2 are to be carried out "immediately prior to the vehicle boarding the ship, aircraft or train to the United Kingdom, or before arrival at the UK immigration control at Coquelles." In *ICS Car SrL and ors v SSHD* [2016] EWCA Civ 394 the Court of Appeal rejected a submission that this requirement was satisfied where the last tests were carried out over 100kms from Calais: see [44]-[45] per Simon LJ (with whom King and Gloster LJJ agreed). The Court did not otherwise give guidance about precisely where the last checks should be carried out. According to its terms, what is envisaged by the code is that the part 1.2 steps should be taken in very close proximity to the effective border in France where, as is common knowledge, determined and often desperate potential migrants will inevitably congregate. Even in the absence of evidence, it is obvious that their determination will only be increased if it is known that every secured load must and will be opened within sight of the effective border. As a matter of fact, it appeared to be common ground between the parties that, whatever the true meaning of [1.2.5], that is not what happens: to the contrary, it is avoided where possible precisely because of the danger of making vehicles yet more tempting targets by opening secured loads even if there is no indication that they have been breached. It was the SSHD's submission that the words "*immediately prior to*" the vehicle boarding the ship, aircraft or train to the United Kingdom, or before arrival at the UK immigration control at Coquelles, are not correct and that Part 1.2 is concerned with what should happen at the last stop before embarkation. That is not what the code says. By the terms of the Act, the code is "to be followed" by any person attempting to operate an effective system: see s. 33(1). The discrepancy between the terms of the code and the SSHD's submission in these proceedings leaves such persons in a position of complete uncertainty.

24. [1.2.5] must also be read in the context of [1.2.1]-[1.2.4]. They require thorough checks to ensure that the secured load space has not been breached and that unauthorised access has not been gained to external storage compartments, tool boxes, wind deflectors and beneath the vehicle. The value of such checks is limited if the secure load space is immediately to be opened even if the seals locks and other security devices are all intact, the thorough checking of tilt cords and straps show no evidence of tampering, damage or repair, and the outer shell of the vehicle shows no signs of damage or unauthorised entry. If every secured load is to be opened, the only purpose of the measures required by [1.2.1]-[1.2.4] would appear to be that they might reveal signs that the security of the load space had been breached and therefore alert the driver to the likelihood that, when he opens his load, he is likely to find clandestine entrants inside.

25. Taking the words of [1.2.5] on their own terms and within the context that I have outlined, I reject the submission that they require the opening of every secured load immediately before the effective border. The paragraph is divided into three sentences. The first is an entirely general "check inside the vehicle". It does not specify that the driver is to open and check inside a secured load space. The use of detection devices, referred to in the second sentence, is optional and does not identify where such detection devices should be placed. The third sentence is specific to vehicles whose loads cannot be secured loads and expressly requires a manual check of the load and load space. The contrast with the lack of specificity relating to secured loads is marked and suggests that drivers with secured loads are not required to conduct a manual check of their load space. The lack of specificity relating to secured loads is also significant in the context of a code of practice to which the SSHD is required to have regard when determining whether the haulier's system is "effective" so as to provide a defence to the possible imposition of a penalty. If the intention of the Code was to require that the driver should open and inspect inside every secure load, irrespective of the result of the checks identified in [1.2.1]-[1.2.4], it could and should have said so clearly. It does not.

26. Mr Lewis, while submitting that [1.2.5] required the driver of a secured load to check inside the sealed load space at the final stop, also submitted that, because compliance with the code is not prescriptive, questions of the feasibility and desirability of breaching the security of the load might be raised in particular cases. Yet there is no hint in the code of such flexibility. On the contrary, whatever the correct interpretation of [1.2.5], part 1.2 on its terms requires the implementation of a system that includes taking all the steps specified in [1.2.1] to [1.2.5] In summary, the SSHD's submission is that (a) part 1.2 does not mean what is says when requiring measures to be taken "immediately prior to" the effective border; and (b) [1.2.5] is to be interpreted subject to the major qualification that the step (however interpreted) is not required to be carried out if it is not feasible or desirable. This seems to me to be contrary to both the letter and the spirit of the Prevention Code and the other materials to which I refer elsewhere in this judgment.

27. I am reinforced in my view by the provisions of [1.3.5] which lay down the steps to be taken "where the checks conducted suggest that the security of the vehicle may have been breached, or the … driver otherwise have grounds to suspect that unauthorised persons have gained entry to the vehicle." This provision sits comfortably with the checks of the external security of the vehicle required by [1.2.1]-[1.2.4] but less obviously with a requirement that the secured load should be opened and that the driver should check the interior of the load in all cases.

28. I therefore conclude that it is not a breach of the Prevention Code for a haulier to have a system that includes the checks required by [1.2.1]-[1.2.4] but does not require the driver in all cases to open a secured load immediately prior to the vehicle boarding the ship, aircraft or train to the United Kingdom, or before arrival at the UK immigration control at Coquelles. Although I have suggested that opening a secured load at that point would be liable to render the vehicle a target for potential clandestine entrants, this court has not been provided with information that would enable it to form an independent judgment on whether, viewed overall, the practice of opening a secured load at that point would increase the likelihood of clandestine entrants concealing themselves on or in vehicles or reduce it. So far as the SSHD is concerned, that is a judgment that is for her to take. On appeal to the County Court, it would be for the

court to determine, on the basis of evidence and submissions, whether a failure to open the secured load at the point immediately before the effective border prevents the haulier's system from being "effective" within the meaning of the statute.

29. At the conclusion of the hearing, the Court asked the SSHD to confirm (in the context of what I shall call the SKAT appeal) whether the SSHD expected the driver to check inside the vehicle at every stop or only at the final stop before boarding the ship. The SSHD has subsequently confirmed that she only expects an internal check to be conducted at the final stop before boarding. I take this to mean at the point that is covered by part 1.2 of the Prevention Code. I agree that the Codes of Practice do not indicate a requirement to check inside the load space of a secured load after every stop, though there is a reference in the materials before the court to carrying out checks after each stop: see [1.2.1] of the Prevention Code, which I have set out above, and [35] below. For the reasons set out above, I do not agree that the Prevention Code requires the driver to check inside the load space of a secured load immediately prior to the vehicle boarding the ship. If the SSHD is referring to a stop before the point covered by part 1.2 it is not clear where and when the SSHD considers that the "final stop" can or should take place: see the reference to *ICS SrL* at [23] above.

30. To add to the potential confusion, the Border Force pro-forma Vehicle Security Checklist is divided into columns and rows. The columns are entitled "After loading", "1st stop", "2nd stop", "Final check", and "Extra check if time between 3rd party-check and embarkation > 15 min". Beneath each column heading are rows describing the checks to be carried out and "yes/no" to indicate whether a given check has been carried out. At the bottom of each column is a space for the time the checks were carried out, the location of the checks and the driver's signature. The descriptive rows include, for example, "External compartments checked" and "Padlock in place and checked" with "Seal/padlock number". Of particular interest in the present context is the first row, which is designated "Vehicle/Trailer inside". The "yes/no" appears in each column of the first row, which indicates that the trailer either should or could be opened up and the inside inspected at the time of each column heading, whether or not it is a secured load.

31. In addition, a note to the column "Final check", which might reasonably be thought to equate to the point of time covered by Part 1.2 of the Prevention Code, says "If travelling through Calais, Coquelles or Dunkirk, the final check should be carried out before entering the UK Control Zone. If using another port the final check should take place immediately before boarding the ferry."

Notice of Liability to a Penalty

32. In each of the appeals before the court, the SSHD's Border Force issued a "Notice of Liability to a Penalty", to which I shall refer as "Liability Notices". Separate Liability Notices are addressed to each responsible person, which will typically be (a) the driver and (b) the hirer/owner of the vehicle. The Liability Notice provides "short reasons for deciding that the responsible person is liable to a penalty", which (in the cases that are subject to these appeals) says no more than the facts of the clandestine entrant(s) being found in the vehicle. The Liability Notice specifies the penalty per clandestine entrant and the total amount of the liability. An annex then sets out to explain how the penalty per clandestine entrant has been calculated. Boxes are available which are populated with short details relating to (a) "details of the system for preventing clandestine entry

(including extent of instruction, training and monitoring)", (b) "condition of vehicle (including security features and devices)", and (c) "other relevant factors (whether or not mentioned in the "Level of Penalty: Code of Practice")".

33. We were told, and I would readily accept, that the "reasons for deciding that the responsible person is liable to a penalty" are lean because the fact of finding the clandestine entrants is sufficient reason of itself, it being for the responsible person to raise and establish the statutory defence under s. 34(3) if they can. Conversely, it is necessary to provide an explanation for the SSHD's selection of an appropriate penalty. We were also told that the SSHD's approach to penalty is to start at £2,000 per clandestine entrant and to discount it for each element that would contribute to the SSHD's view of an effective system. We have not seen official confirmation that this is so, either by published policy or otherwise and say no more about it, these being appeals against the determination of penalty by the respective County Courts and not a public (or private) law challenge to the SSHD's method of determining what penalty to impose.

34. However, the inclusion of "monitoring" in the rubric for the first box in the annex raises the question of the role of monitoring as part of an effective system, to which I now turn.

Monitoring

35. Monitoring is not mentioned as a feature of an effective system in the Prevention Code. In addition to being mentioned in the annex to Liability Notices relating to penalty, it is also mentioned in the SSHD's decision letters in response to a Notice of Objection under s. 35 of the Act, to which I shall refer as "Objection Decisions" and, as I set out below, in the Penalty Code. In what appears to be a standard form Annex to Objection Decisions, Border Force states:

> "Requirements of the Immigration & Asylum Act 1999 (as amended) and the Home Office Code of Practice to Prevent Clandestine Entry:
>
> The legislation requires road hauliers and drivers to operate an 'effective system' to protect their vehicles against the carriage of clandestine entrants. An effective system will not guarantee that no clandestine entrants can enter the United Kingdom in a vehicle but will, if properly operated, more likely than not prevent their carriage. It is only by operating an effective system that penalties can be avoided in the event that clandestine entrants are carried.
>
> There are five areas of responsibility for the company in operating an effective system:
>
> 1. To provide the driver with adequate training in the system to prevent clandestine entry. In the event of an objection weight is given to evidence which demonstrates that the driver was systematically trained, assessed, and monitored. Training records and regular reports would support this part of the system

> 2. To provide adequate written instructions describing the system to be operated to prevent clandestine entry. These may form a part of a driver's manual, and must be carried on the vehicle for the driver to refer to whenever required. They must be available for inspection on the request of a Border Force officer in the event of an incident. The Instructions must be specific to the prevention of clandestine entry, other topics will not be taken into account.
>
> 3. To provide adequate and effective security devices to secure the vehicle. Locks, seals and padlocks must be robust and of good quality. Tilt cords where used must be locked and sealed. Seals must be unique numbered and where used should be recorded on the CMR
>
> 4. To provide a checklist for the driver to complete after every stop; to indicate that he has completed effective checks of the vehicle, load and load space. The checklist should reflect the fact that the security system operated was effectively and efficiently maintained and monitored. Please note The Code of Practice indicates, paragraph 1.3.4 that, "Whilst owners, hirers or drivers may contract with other persons to carry out the required checks on their behalf, they will nevertheless remain liable to any penalty incurred in the event of failure to have an effective system in place or to operate it property on the occasion in question".
>
> 5. To provide evidence that the system was operated effectively. Due weight will be given to evidence which establishes that the system to prevent clandestine entry was effectively maintained by both company and driver.
>
> There are three areas of responsibility for the driver:
>
> 1. To secure his vehicle effectively as required by the company's system.
>
> 2. To maintain and check the vehicle, security devices, load and load space to prevent entry.
>
> 3. To maintain a record of the checks completed, as required by the employer."

36. It will immediately be noticed that these statements of requirements go beyond the Prevention Code in at least two respects: (a) training, assessment and monitoring, and (b) carrying out checks after every stop. It therefore appears that the SSHD will or may in an appropriate case take instruction, assessment and monitoring of drivers and/or carrying out checks after every stop into account when assessing whether a haulier's system is effective within the meaning of the Act.

The accreditation scheme

37. Annex 2 to the Objection Decisions states as follows:

> "**Accreditation**
>
> For your information the UK Border Force runs a Civil Penalty Accreditation Scheme to give recognition to companies who make all reasonable efforts to prevent the carriage of clandestine entrants. To gain this accreditation, companies must show that they have in place an effective system which meets the requirements of the Prevention of Clandestine Entrants: Code of Practice and do everything they can to ensure proper operation of it. Companies will be asked to provide evidence of an effective system to prevent the carriage of clandestine entrants. If we consider the requirements are met, we will accredit them to the scheme. This will be reviewed at regular intervals. The scheme is free and open to road haulage companies of any size or nationality.
>
> You can find more information about the accreditation scheme, including details on the Code of Practice, examples of checklists and the requirements as per the Immigration and Asylum Act 1999, and on our website: …"

38. The Government's website provides guidance on how the accreditation scheme works. For present purposes, three points may be noted:

   i) The Introduction to the general guidance states that "[i]f you're a member of the scheme and clandestine entrants are discovered in your vehicles, your company won't be fined as owner or hirer of the vehicle as long as you're operating in accordance with the scheme." I return to this later;

   ii) Under the heading "eligibility" the guidance says that:

   > "A company must be able to show that it:
   >
   > - has an effective system for preventing clandestine entrants (this is described in the prevention of clandestine entrants code of practice)
   >
   > - takes reasonable measures to make sure that the system works, eg training and monitoring its drivers"

   This may reasonably be said to encourage the view that the Prevention Code is prescriptive and that compliance with the Code will satisfy the requirements for an "effective" system within the meaning of the Act;

   iii) Under the heading "If clandestine entrants are discovered in your vehicle" the guidance says:

   > "We may need to request evidence from your driver. The scheme doesn't prevent us from fining drivers if they haven't operated

> your system properly. *If you employ the driver, your company must pay the fine imposed upon the driver.*"
>
> The last sentence of this passage is misleading. The Act imposes joint and several liability upon the driver and their employer. The employer does not have to pay the fine if the driver does, though it may choose to pay its driver's fine for internal reasons.

39. The accreditation scheme came progressively into focus during the hearing. However, we have no evidence and heard limited submissions about its operation either in theory or in practice, though it is material in one of the appeals before the court. I therefore say no more about it than necessary for the disposition of the appeals, which I deal with below.

The statutory defence

40. The statutory defence under s. 34(3) requires the carrier to satisfy each and all of the three requirements set out at s.34(3)(a), (b) and (c). The present appeals do not concern the first, since it has been accepted that the carriers did not know, and had no reasonable grounds for suspecting, that a clandestine entrant was or might be concealed in their vehicles.

41. S. 34(3)(b) requires proof that an "effective" system for preventing the carriage of clandestine entrants was in operation in relation to the vehicle. There is no definition in the statute or elsewhere of the meaning of "effective" in this context. It cannot mean "infallible" since the finding of a single clandestine entrant would show that the system was not infallible and the statutory defence must inevitably fail, whether the clandestine entrant gained access because of a weakness in the system or by human error in its operation. An infallible system is also impossible to achieve in practice: "absolute prevention of the cross-Channel traffic in clandestines is impossible", as was recognised in *International Transport Roth GmbH v SSHD* [2002] EWCA Civ 158, [2002] 3 WLR 344 at [108] per Laws LJ. This appears to be recognised by the SSHD, whose view as set out in the Objection Decisions is that "an effective system will not guarantee that no clandestine entrants can enter the United Kingdom in a vehicle but will, if properly operated, more likely than not prevent their carriage": see [35] above. While I would not wish this description to become set in aspic, it reflects the ordinary sense that may be conveyed by the word "effective" in this context.

42. Section 33(1) of the Act says that the Prevention Code is "to be followed by any person operating a system for preventing the carriage of clandestine entrants." S. 34(4) requires that "regard shall be had" to the Prevention Code in determining whether a particular system is "effective". It was common ground between the parties that the Prevention Code is not "prescriptive", by which I understand the parties to mean that failure to comply with any aspect of the Code does not automatically and of itself render the haulier's system ineffective within the meaning of the Act. I agree. Neither section says or means that proof of compliance with the Prevention Code shall be treated as sufficient proof that a system is effective or that failure to comply is of itself determinative proof that a system is not effective within the meaning of the Act. However, in the light of s. 33(1), and since it is plain that the purpose of the Prevention Code is to provide guidance to hauliers about what they should do to establish an "effective" system, proof of compliance with the Code should usually be regarded as

substantial (though not necessarily conclusive) evidence that the system is "effective", and proof of material breach of the Code may be treated as evidence that it may not have been. That said, a County Court's decision about whether a system is effective within the meaning of s. 34(3)(b) should be taken on the basis of all relevant matters: see s.35A(3).

43. It is apparent that the SSHD considers that training, assessment and monitoring of drivers are material to the question whether the haulier's system is "effective", despite the fact that they are not mentioned in the Prevention Code. Monitoring, instruction and training are referred to in the Penalty Code, as set out below; and monitoring, assessment and training are mentioned in Annex 1 to the Objection Decisions, as set out above. We were informed that there is no generally published guidance beyond the Prevention Code about what level of instruction, monitoring and assessment would be regarded as sufficient by the SSHD. There may be good reason for this, particularly in relation to monitoring where the practicalities of remote monitoring are likely to develop with advances in technology. For example, there are references in these appeals to telematics, which enable a vehicle's progress to be monitored remotely and the functionality of which may include the ability to contact the driver directly to prompt him to take steps or to obtain confirmation that he has done so. The court has no evidence and does not know what may be regarded as either "bare minimum" or "top of the range" monitoring and is not in a position to form or express any defining view about what level of monitoring may reasonably be thought to satisfy the needs of an "effective" system.

44. While an absence of further guidance might be thought to be unfortunate, for the purposes of these appeals it is sufficient to say that, because compliance with the Prevention Code is not prescriptive (in the sense explained above), the SSHD is not limited to taking into account matters that are mentioned in it. It is plain that instruction, assessment and monitoring may be integral to the effectiveness of any system and, reminding myself that these appeals are not public law challenges to the SSHD's system or decision-making processes, I would merely say that it is open to the SSHD and the County Court on an appeal to take training, assessment and monitoring into account as appropriate on the facts of a given case.

45. What the County Court should not do is to devise or decide for itself in a particular case what (if any) levels of training, assessment or monitoring are appropriate in the absence of evidence and properly focussed submissions on the point. Where on an appeal to the County Court it is a material part of the SSHD's case that training, monitoring or assessment were inadequate so as to prevent reliance on the statutory defence, fairness dictates that the SSHD should make that clear and should provide sufficient detail in advance to enable the responsible person to understand and respond to the case they have to meet, whether by evidence or merely by submission as they may be advised.

46. Much the same may be said of the reference in Annex 1 of the Objection Decisions to carrying out checks after every stop. It is self-evident that carrying out checks at every stop increases the level of security and reduces the likelihood that potential clandestine entrants will escape detection. That said, if the SSHD were to adopt the position that a failure to carry out checks after every stop (whether or not the vehicle has been left unattended) would be treated as grounds for rejecting the statutory defence under limb (b), it is desirable that her position should be published generally and not merely in the Annex to Objection Decisions. If it is to be an issue on an appeal to the County Court,

that should be clearly identified; and the County Court should be astute to limit itself to the issues raised by the parties and to decide those issues by reference to the evidence that has been presented.

The Penalty Code

47. Part 1 of the Penalty Code deals with road haulage and other commercial vehicles and sets out the matters that will be considered by the SSHD in determining the amount of penalty she may require to be paid by a person who is responsible for a clandestine entrant, including the following:

> 1. **Owner/Hirer**
>
> (i) The extent to which steps have been taken to instruct and train drivers, sub-contractors and other persons with operational control over the vehicle, and monitor their compliance in the operation of a system designed to prevent the carriage of clandestine entrants that complies with the code of practice for vehicles issued under section 33 of the Act.
>
> (ii) The extent to which:
>
> (a) the standard and maintenance of the integral security features of the vehicle prevent unauthorised access;
>
> (b) the outer shell or fabric of the vehicle is maintained in good order;
>
> (c) additional security devices (e.g. locks, seals, tilt cords) that prevent unauthorised access to the vehicle are made available and are maintained in good order.
>
> (iii) Where the owner or hirer is not also the driver but is present during any or all parts of the vehicle's journey to the United Kingdom, the extent to which he has acted to ensure that any system in place that complies with the code of practice for vehicles issued under section 33 of the Act is properly operated.
>
> (iv) The owner or hirer's record of liability to penalties.
>
> (v) The level of the owner or hirer's operational control over the vehicle. …
>
> (vi) …
>
> (vii) …
>
> 2. **Driver (or the operator of a detached trailer)**
>
> (i) The extent to which the available security devices have been put to use in order to prevent unauthorised access.

(ii) The extent to which checks in accordance with the code of practice for vehicles issued under section 33 of the Act have been carried out.

(iii) …

(iv) Driver's (or operator's) record of liability to penalties.

(v) Where no effective system for preventing the carriage of clandestine entrants is in place and/or inadequate security devices are available for use,

(a) The extent to which efforts have been made to otherwise ensure that unauthorised persons are prevented from gaining access;

(b) The extent to which the driver (or operator) has sought to influence the vehicle owner/hirer to introduce an effective system or to provide adequate security devices.

(vi) …

(vii) …

(viii) …"

48. It is sufficient to say that most of the features listed are also capable of being relevant to whether the haulier's system is effective. Even the responsible person's record of liability to penalties may, in appropriate circumstances, be evidence that contributes to a conclusion that their system is ineffective.

49. The Penalty Code provides clear guidance about the matters that will be considered by the SSHD in determining the amount of any penalty. In addition to joint and several liability for any penalty imposed on the driver, both the Act and the code contemplate that a separate penalty may be imposed upon the owner/hirer, for which it alone will be liable. The relative levels of any penalties that are imposed on the driver and the owner/hirer should reflect their respective culpabilities. Assessment of respective culpabilities may range from a case where the owner/hirer's system is impeccable in all respects but they have been let down by the driver's failure to implement it to a case where the owner/hirer's system is defective and the driver is effectively the innocent victim of the system's deficiencies. The respective culpability of the owner/hirer and the driver in permitting the clandestine entrant(s) to gain unauthorised access on the occasion in question is not, however, the only factor that may influence the level of penalties, as the Penalty Code makes clear.

50. In the course of the hearing, the appellants submitted that, if the owner/hirer was found to be blameless and to be unable to rely upon the statutory defence only because of a failure of implementation for which the driver was entirely responsible, it would be a proper exercise of either the SSHD's or the County Court's discretion to impose no penalty on the owner/hirer. In making the submission, Mr Clarke referred to and relied upon the published guidance to the accreditation scheme that an owner/hirer would not be fined as long as they are operating in accordance with the scheme. This submission

has more than a hint of a public law challenge about it. I would accept Mr Lewis' submission that it was not raised as a ground of appeal and that the SSHD was not in a position to deal with it at the hearing of this appeal. I would therefore not express any view on it beyond saying in the most general terms that the SSHD and the Court have a discretion to impose no penalty even where a responsible person is unable to rely upon the statutory defence.

The approach to be adopted by the court on appeal from the County Court.

51. In *Bolle Transport BV v SSHD* [2016] EWCA Civ 783 at [36]ff, Gloster LJ (with whom King and Simon LJJ agreed) set out the approach to be adopted by this court when dealing with appeals from the County Court, as follows:

> "36. It seems to me that logically the first issue for this court to determine is whether the judge was correct to hold that the appellant's defence under section 34 of the 1999 Act failed. Although section 35A provides that an appeal to the judge is "a re-hearing of the Secretary of State's decision", thereby incorporating the full discretion enjoyed by the respondent under section 32(2), the fact is that, if a responsible person establishes its defence under section 34(3) or (3A) on the facts, then there can be no liability at all to the imposition of a penalty, and the respondent's discretion as to whether to impose a penalty simply does not come into play. Likewise the court has no discretion as to whether the defence is satisfied; the defence is either established or it is not. The court at the first stage, therefore, simply has to determine on the evidence whether the responsible person has established all the relevant elements set out in section 34(3)(a) to (c) or section 34(3A)(a) to (d). If the responsible person fails to establish the defence, then the court has to move on to the second stage; it has to decide whether to impose a penalty, exercising the respondent's discretion under section 32(2). It is clear that, even though the defence has not been established, nonetheless the court still has a discretion whether in all the circumstances to impose a penalty, and if so, in what amount."

52. If the County Court concludes that the statutory defence has been established, that is the end of the matter. But if the County Court decides that the statutory defence has not been established, the next step ("stage 2") is for the judge to address the separate question whether, even though the section 34 defence was not available, in the exercise of her or his discretion under s. 35A(2)(a), the appeal should nonetheless be allowed and the penalty cancelled in the light of the facts as found: see *Bolle* at [44]. Only if the Judge has considered this second question and concluded that the penalty should not be cancelled should he or she then consider (as "stage 3") whether the penalty should be reduced and, if so, by how much.

53. Because the appeal to the County Court is a rehearing, an appeal to this court about the imposition and level of penalty requires this court to review the exercise of the County Court Judge's unfettered discretion. A finding by the County Court that the system was ineffective involves findings of primary fact and evaluative judgment, which this court

on appeal should approach accordingly. Not for the first time, I remind myself that we are not engaged in hearing a public law challenge; nor are we engaged in a further rehearing. The appellants raised arguments about the adequacy of the SSHD's reasons for imposing the penalties she did in these cases. But these appeals are against the decision of the County Court and not a "reasons" challenge to the SSHD's original determination. Accordingly, I accept the submission of Mr Lewis on behalf of the SSHD that this court does not have jurisdiction to enter upon a "reasons" challenge to the SSHD's original determination. In any event, such a challenge was not raised as a ground of appeal and leave has not been given to argue it. I would also accept Mr Lewis' submission that these appeals are not a forum for mounting what amounts to a public law challenge to the adequacy of the Prevention Code or, for that matter, the Penalty Code or the approach adopted as a matter of policy by the SSHD.

Summary

54. Although the submissions ranged far and wide, and I have spent some time setting out the relevant provisions and principles, the main principles may be shortly summarised:

i) Where the statutory defence is raised, the question under limb (b) is whether the responsible person's system is "effective". Effective does not mean infallible. I would accept as a reasonable working approach to the word that "an effective system will not guarantee that no clandestine entrants can enter the United Kingdom in a vehicle but will, if properly operated, more likely than not prevent their carriage."

ii) The Prevention Code is not prescriptive. In other words, proof of compliance with the code is neither necessary nor sufficient proof that a responsible person's system is effective.

iii) It follows that neither the SSHD nor the County Court is limited to considering matters that are included in the Prevention Code when determining whether a responsible person's system is effective, though they should have regard to it.

iv) It also follows that the County Court should not find that a responsible person's system is not effective merely because it is possible to identify one or more respects in which the system does not comply with the Prevention Code. The question is always whether the system is effective. In answering that, compliance with the Prevention Code is likely to be evidence in favour of a conclusion that the system is effective; and non-compliance is likely to be evidence in favour of a conclusion that the system is not effective. But the answer to the question whether the system is effective depends upon all relevant facts, circumstances and evidence. This does not mean or imply that it will be necessary to re-invent the wheel every time the issue arises: in many cases the need for evidence may be quite limited: but the need will depend upon the circumstances of the particular case.

v) Checklists may have an importance that goes well beyond the purely evidential because they are intended to focus the mind of the driver on the steps that they have to take and thereby reduce the risk that steps will be omitted.

vi) A failure to produce documents may call into question the effectiveness of the responsible person's system and lead to an adverse inference. Where a document that has been filled in correctly and contemporaneously is produced late, what matters most is likely to be that it was filled in and not that it was produced late.

vii) Training, assessment and monitoring may be relevant when determining whether a system is effective.

viii) The Prevention Code does not require secured loads to be opened at every stop en route. Nor does the Annex to Objection Decisions.

ix) It is not a breach of the Prevention Code for a haulier to have a system that includes the checks required by [1.2.1]-[1.2.4] but does not require the driver in all cases to open a secured load immediately prior to the vehicle boarding the ship, aircraft or train to the United Kingdom, or before arrival at the UK immigration control at Coquelles.

x) The words "immediately prior" in [1.2.5] are clear and are not the same as saying that the measures set out in part 1.2 are to be carried out at the final stop before embarkation. The SSHD's preference that the part 1.2 checks be undertaken at the final stop, while understandable, is not in accordance with the terms of the Prevention Code.

xi) On an appeal to the County Court, the Court should follow the three-stage procedure established by the Court of Appeal in *Bolle*.

The appeals: (1) Link Polka Zo.O v SSHD B2/2021/0243

Factual background

55. It is common ground that on 19 July 2017 Janusz Bujok, the driver of vehicle PNT52608/PO334YN entered the port of Calais at 2.50 in the afternoon. The vehicle, which was owned or hired by the Appellant ["Link"], was randomly selected for search by Border Force Officers. The search revealed 11 clandestine entrants concealed in the load. There was no dispute about the fact that the vehicle was properly sealed, properly secure and that checks had been carried out by the driver. It was the SSHD's view that the tilt cord had been cut and pinned at some stage.

56. The SSHD imposed penalties of £1,200 per clandestine entrant upon Link and £400 per clandestine entrant upon Mr Bujok. The total penalties for Link and Mr Bujok were therefore £13,200 and £4,400 respectively. The factual basis upon which these penalties were imposed (as set out in the SSHD's Objection Decision, which differs from the information in the Notice of Liability to a Penalty) included the SSHD's view that Mr Bujok had not produced any written instructions carried on the vehicle which described the system to be used to prevent the carriage of clandestine entrants into the United Kingdom; and that a checklist detailing the checks he had completed after stops had not been carried on the vehicle. A completed checklist had been provided subsequently, but the SSHD was not satisfied that the checks to which it referred had been recorded at the time of the incident. The Notice of Liability to a Penalty included an entry in the box setting out matters relating to details of the system for preventing

clandestine entry that "there is no documentary evidence that the company monitor the driver's compliance in the prevention of the carriage of clandestine entrants, in any way."

57. Link and Mr Bujok filed Notices of Objection. On the basis of her view of the case as summarised above, the SSHD maintained the penalty imposed on Link. On the basis of evidence about his financial means, the penalty imposed on Mr Bujok was reduced to £14 per clandestine entrant, a total of £154.

58. Link appealed to the County Court. The appeal was heard on 25 September 2020. Before the hearing, the SSHD had conceded that (a) there was adequate security equipment available to secure the vehicle; (b) written instructions on the system to be operated to prevent clandestine entrants had been provided; (c) training in the prevention of clandestine entrants and the securing and checking of vehicles had been provided; and (d) vehicle security checklists for drivers to record the checks that they carry out had been provided.

59. The question for the County Court in relation to Link's potential liability to pay a penalty was whether Link had provided adequate monitoring of its driver. The SSHD's case before the County Court was that the driver did not produce a vehicle security checklist to Border Force when he was stopped, from which it was inferred that the was no checklist in place or records of checks being made; and that there was no evidence demonstrating that Link monitored drivers' compliance in the prevention of clandestine events.

60. Link put in evidence that was essentially the same as in its other appeal now before the court: see [78] below. Specifically, equivalent evidence was given about keeping in touch with drivers via the telematics system and the obligation upon supervisors to remind drivers about vehicle security and the completion of vehicle checks and security checklists. Link exhibited their driver's completed checklist and messages passing between the driver and his supervisor which showed that:

    i) Mr Bujok had confirmed when loading was completed and had confirmed the application of a seal, giving the seal number that was also recorded on the Consignment Note;

    ii) At 12.39 pm, shortly before his vehicle was checked, Link sent a message to Mr Bujok asking him if he had completed his checklist, to which he replied that he had, giving his GPS coordinates.

Link also provided evidence showing their analysis of the completed checklist after completion of the journey.

The judgment

61. In her ex tempore judgment, the Judge recorded what was treated as a concession by the SSHD that the test under s. 34(3)(b) "is not whether or not clandestine entrants were, in fact, in the vehicle, but whether or not there was a breach of the requirements on the part of the appellant." Yet it remained the SSHD's case that, whilst Link had put systems in place, "the system of evidencing that system was not fully effective and

the system itself was not effective, as shown by reason of the fact that there were 11 clandestine entrants in the vehicle on inspection."

62. At [7] of her judgment the Judge found that "the monitoring of the driver's compliance by the system put in place by the appellant was in accordance with the requirements and I so find." She continued:

> "8. There were reminders and I have seen, in particular, at page 28, exhibit PM002, the way in which the system worked: texting the driver saying, for example, "Is the seal in place?" and the answer coming back "yes". That is clear evidence, as I find, of a system of monitoring which seems to me to be satisfactory in terms of the requirements. I remind myself that I am remaking this decision, not reviewing it.
>
> 9. It does seem to me that the failure of the driver to provide a checklist at that time, does amount to a failure to meet the requirements. It is that failure which the respondent now emphasises. The checklist should have been produced when asked for. That failure is, in my view, significantly mitigated by the fact that the evidence was provided, albeit at a later date. It is not clear to me what the reason was for the driver's failure to produce it at the time, given that it was produced at a later date. The Border Force officer asked about the systems. The checklist was not provided.
>
> 10. In those circumstances, it seems to me that it was open to the Secretary of State to impose a penalty for that failure, but not for the failure to monitor the driver's compliance. The first question, therefore, is whether or not, in all the circumstances of this case, the Secretary of State could reasonably have exercised her discretion not to impose any penalty at all, in light of the fact that the checklist was provided later, and in light of the fact that there was otherwise, as I find, compliance with the requirements.
>
> 11. It seems to me that the failure of the driver to produce the checklist is a feature which could entitle the Secretary of State to impose a penalty and, in the circumstances of this case, it seems to me that it would not be unreasonable in the exercise of her discretion to impose a penalty."

63. Turning to penalty, the Judge recorded that there had, at that stage, been historic breaches by Link but no recent ones: this appeal predated the appeal involving a Mr Kosciecha which comes next. The SSHD accepted, as did the Judge, that there were, for the most part, proper provisions in place and, which the Judge regarded as important, that there was a system in place for the checklist. She repeated her conclusion that the system was properly monitored. So the only infraction, in her view, was the failure of the driver to produce his checklist at the port. On that basis she said that "it would have been appropriate, in respect of each clandestine entrant, to impose a penalty in the figure of some £500."

64. I note in passing that the Judge's language both in relation to stage 2 and to stage 3 would be appropriate if the appeal had been by way of review of the SSHD's statement. She had previously reminded herself that the appeal was by way of rehearing, and, in the context of a short extempore judgment, her decision should be read in that light as being her assessment of the relevant stages to be decided by her on the rehearing.

65. The Judge allowed the appeal to the extent of reducing Link's penalty as indicated.

The appeal

66. Link challenges the Judge's conclusion that the failure of the driver to produce his checklist rendered its system ineffective. In my judgment, the challenge is well founded.

67. There were two fundamental differences between the findings made by the Judge and the position that had been adopted by the SSHD. First, she found as a fact that the checklist had been completed contemporaneously: the only "error" was that the driver did not produce it at the port. Second, she held that there had been adequate monitoring, a conclusion that the SSHD does not challenge in this appeal. To my mind, these two findings determine the outcome of the appeal.

68. Once it is accepted that the checklist was completed contemporaneously, it follows that the important function of the checklist, which I have discussed earlier in this judgment, had been achieved. Neither the Prevention Code nor any of the other materials to which I have referred seek to impose a mandatory requirement upon a driver to produce his checklist on demand. As I have accepted, a failure to do so may lead to an adverse inference that it has not been completed. That is the inference that the SSHD drew in the present case, and I would not criticise her for drawing it on the facts as the Border Force considered them to be. However, the significance of the inference is that it goes to the question whether Link's system was effective and properly implemented by the carrying out of the checks that should have been recorded on the "missing" checklist. Once it is held that the checklist was in fact completed contemporaneously, there is no further scope for the adverse inference to be drawn: see [18] above. I would therefore hold that there was no valid reason to hold that Link's system was not effective, within the meaning of s. 34(3)(b). In her skeleton argument for this appeal the SSHD submitted that "if a driver is in possession of a checklist and knows that it must be filled in throughout his journey, it can be said that in this respect, there is an effective system in place." I agree.

69. Turning to s. 34(3)(c), and for the reasons I have given, what matters about the implementation of the checklist is that it should be filled in contemporaneously and accurately. That is not affected by whether it is produced immediately or after a delay. The fact of delay merely raises the suspicion (now held to be wrong on the facts of the present appeal) that it had not been filled in contemporaneously. I therefore reject the submission that the driver's failure to hand in a checklist that has been properly completed is of itself a good reason for holding that the requirements of s. 34(3)(c) are not satisfied.

Conclusion

70. For these reasons I would allow Link's appeal against the Judge's conclusion that it was not entitled to rely upon the statutory defence.

The appeals: (2) Link Polka Zo.O & Kosciecha v SSHD B2/2021/0093

Factual background

71. It is common ground that, as recorded by the County Court Judge in her judgment, on 11 April 2018 the Second Appellant, who was the driver of vehicle WGM8XT5/WND229 ["Mr Kosciecha"], entered the port of Calais at about 5.35 in the morning. The vehicle, which was owned or hired by Link, was randomly selected for search by Border Force officers. The search revealed that five clandestine entrants were concealed in the vehicle. Although a tilt cord and seal had been applied to the vehicle, the tilt cord had not been applied properly and the vehicle was therefore not secure. It is not in dispute that Mr Kosciecha did not comply with the Prevention Code as he did not properly apply the tilt cord, with the result that access could be gained into the transporter, despite the padlock and seal being in position. A checklist detailing the checks he had completed was carried on the vehicle.

72. The SSHD determined that the Link did not have in place an effective method of ensuring compliance by their driver to ensure that the vehicle was secure and that the driver had not made the vehicle secure. The SSHD imposed penalties upon Link in the sum of £1,200 per clandestine entrant and upon Mr Kosciecha in the sum of £200 per clandestine entrant. The total penalties were therefore £6,000 for Link and £1,000 for Mr Kosciecha.

73. In the section providing reasons for penalty in the Notice of liability to a penalty addressed to Link, the SSHD recorded that Link had provided documentary evidence of the written instructions they issued to the drivers and had provided details and/or documentary evidence of driver training. It said that there was no documentary evidence that the company monitored the driver's compliance in the prevention of the carriage of clandestine entrants in any way; and it referred to Link having a large number of previous incidents of clandestine entrants in their vehicles.

74. Link and Mr Kosciecha submitted Notices of Objection. The SSHD maintained her decision to impose the penalties as before.

75. Link and Mr Kosciecha then appealed to the County Court. The appeal was heard on 18 December 2020. Before the hearing, the SSHD had conceded that (a) there was adequate security equipment available to secure the vehicle; (b) written instructions had been provided to the driver on the systems to be operated to prevent clandestine entrants; (c) training had been provided in the prevention of clandestine entrants and securing and checking of vehicles; and (d) vehicle security checklists had been provided to record the checks that the driver carried out.

76. The questions for the County Court in relation to Link's potential liability to pay a penalty were (a) whether Link had adequately monitored its driver's compliance in the implementation of the company's systems for preventing clandestine entrants, (b) whether the SSHD had exercised her "stage 2" discretion whether or not to impose a penalty, and (c) whether the penalties imposed were excessive. In pursuing this last point, Link complained about what it considered to be an inadequate statement of

reasons in the Liability Notice; and Mr Kosciecha provided evidence both about his conscientiousness in carrying out checks and also about his income in the form of a certificate from Link which he said averaged fractionally under £400 per month net.

77. The SSHD's case before the County Court under s. 34(3)(b) of the Act relied upon Link's failure to identify, when analysing Mr Kosciecha's Security Checklist after the journey was completed, either (a) that he had not secured the vehicle, or (b) that he had filled the checklist in incorrectly, or (c) the fact that clandestine entrants had gained access to the vehicle. Second, it relied upon the fact that there was no way of interrogating or checking the driver's assertion that the vehicle had been correctly secured and that Link did not identify that it was incorrect. These failings in the system were said to demonstrate "that monitoring was not effective and that consequentially the system was not effective for the purposes of Section 34(3)(b)".

78. Mr Kosciecha's security checklist was in the same form (in Polish/English) as the Border Force checklist to which I have referred above. It recorded that he had carried out final checks just after 2.31 am on 11 April 2018. Link submitted evidence that, whilst their drivers are on the road they are in permanent contact with their supervisors by means of a digital telematics system. This system tracks the vehicle and allows the supervisor to send "real time" text messages to a screen in the vehicle cab to which the driver can reply. Messages on the digital telematics system include notifications of loading, passage, and arrival; and supervisors are required to remind drivers about vehicle security and the completion of their vehicle checks and Security Checklists. All messages are archived and can be retrieved. In the present case, messages were retrieved which showed that:

i) Mr Kosciecha had confirmed when loading was completed and had confirmed the application of a seal to the vehicle, giving the seal and padlock numbers. This message had been read by Link within 10 minutes of being sent;

ii) On 11 April 2018, Link sent Ms Kosciecha a message asking him if he had filled in the checklist, to which he replied that he had.

The judgment

79. In her ex tempore judgment the Judge dealt first with the issue under s. 34(3)(b) of the Act. At [16] she rejected Link's submission that their system was effective, saying:

> "16. The system must be an effective system, and although it has been submitted on behalf of the appellants that this was an effective system, it clearly did not work. It has been submitted on behalf of the respondent that "effective" is to be given its ordinary meaning, which means it works and is effective, and I agree with that interpretation.
>
> 17. The appellant's system of checking on the driver was not an effective system. It relied on the driver completing a simple tick box form with no effective check that each step had been correctly completed by the driver. … It would have been effective and appropriate, for example, to require drivers to take photographs or a video on their mobile telephone, showing that

> the tilt cord had been properly applied and that the other required steps to secure the vehicle had also been correctly followed.
>
> 18. Page 45 shows that the tick box had been incorrectly filled in by the second appellant and the first appellant had no effective way of checking that the vehicle had been properly secured. The first appellant's paper checking of the checklist completed by the second appellant is at page 48 of the bundle and it records that the checklist had been filled out and that it had been completed correctly. The employee or agent of the first appellant checking the tick box form checklist therefore wrongly assessed the checklist as being correct, despite the vehicle not having been secured because of the wrongly applied tilt cord. The form's assessor was merely looking to see if boxes on a form had been ticked without any consideration or evidence as to whether the form had been completed accurately. This is not an effective monitoring system, because it failed to pick up that there was a problem, even when the first appellant would or should have known that clandestine entrants had been found on board.
>
> 19. I also note that the telematics used by the first appellant did not ask the driver whether he had correctly applied the tilt cord through all the fasteners, but merely asked about the padlock and seal which do not secure a vehicle when the tilt cord has been incorrectly fitted so that access can be gained into the vehicle. The padlock and seal did not secure the vehicle because the tilt cord to which they were attached did not secure all the fasteners.
>
> 20. It has been submitted on behalf of the appellants that, on this interpretation of the section 34 defence, there would be no potential defence available, but a defence would be available if, for example, a clandestine entrant tears a hole in the cover or does something to force entry. In the agreed factual matrix before this court the situation was very different: the appellant's driver failed to secure the vehicle and the first appellant had no effective system to ensure the checks had been properly conducted and the vehicle had been properly secured."

80. Turning to s. 34(3)(c), it was common ground that Mr Kosciecha had not applied the tilt cord correctly and that the vehicle was therefore insecure. The Judge rejected the submission that, in failing to secure the tilt cord, the driver was "on a frolic of his own".

81. The Judge next addressed the "stage 2" issue, namely whether the SSHD had exercised her discretion appropriately not to impose a penalty. After discussing the background and the purpose of the scheme, namely to prevent the transportation of clandestine entrants in such vehicles, the Judge said "I find it is proper to exercise the court's discretion to impose a penalty in these circumstances." She then turned to the level of penalty and said:

> "This was not the most serious of breaches on the part of the first appellant and the penalty of £1,200 takes this into account. The penalty is aggravated by the fact that the first appellant has had previous penalties imposed. The penalty of £1,200 is appropriate in the light of the fact that whilst this is not the most serious of breaches, the record of the first appellant's previous penalties is an aggravating matter that must be taken into account. The first appellant's system did not work and they have a lack of insight into why this is an issue. There is no suggestion that lessons have been learnt."

82. Turning to Mr Kosciecha, she held that the burden was upon him to show that he was unable to afford the penalty of £200 per clandestine entrant. She formed the view that the statement of income provided on his behalf was "improbable" and held that, in the absence of other evidence about his means, he had not provided sufficient evidence to show that he would suffer financial hardship if the penalty remained at £1,000.

83. For these reasons she dismissed both appeals.

The appeal

84. Link challenges the Judge's approach to s. 34(3)(b) on two main grounds. First, it is submitted that the Judge adopted too absolute an approach to the meaning of "effective" in [16] and [20] of her judgment. Second, it is submitted that her approach to the question of monitoring was unjustified. In my judgment, both heads of challenge are well founded.

85. First, "effective" does not mean "infallible": see [41] above. Second, the standard of monitoring adopted by the Judge is not supported by the Act, the Codes of Practice or the other iterations of the SSHD's views that I have set out above. While I accept that monitoring may be a relevant consideration, there is no material that justifies a view that a system that fails to ensure that the driver (a) has carried out their checks properly and (b) has secured their vehicle properly in the manner the Judge suggested should have been done is an ineffective system. The SSHD conceded before us that the Judge's suggestion at [17] of her judgment that Link should have required drivers to take photographs or a video showing that the tilt cord had been properly applied and that other required steps to secure the vehicle had been properly followed was not the result of any submission or evidence from the SSHD and that the SSHD did not seek to rely upon it in support of the Judge's decision.

86. Although not the subject of a further formal concession, I would also hold that the Judge's approach in [19] imposes an unrealistically high standard that is not justified by the Act, the Codes of Practice or the other materials to which I have referred. To my mind it is an important feature of the present case that Link provided their drivers with a security checklist in the same terms (with Polish and English included) as the Border Force checklist that I have described at [30] above. That checklist was itself an important element contributing to the effectiveness of the scheme, as I have explained above at [16] above. It was acknowledged from an early stage that Link provided suitable training for its drivers; and the papers before the County Court and for this appeal included clear written instructions about how to secure a vehicle. What is missing is any suggestion in the Codes of Practice or the other materials generated by

the SSHD that Link should go beyond requiring their drivers to carry out checks and fill in the checklist and should in addition externally verify that the checks have been correctly carried out. As a matter of fact, Link did monitor that the checklist had been carried out and that the relevant entries had been made. In that sense they monitored that the checklist had been completed correctly: what they did not do was to carry out additional checks in the manner of an independent audit of the accuracy of the answers that Mr Kosciecha had entered.

87. What then is the required scope of monitoring? As I have said, it is not mentioned in the Prevention Code at all. That does not exclude it as a potentially material consideration when determining whether Link's system is effective; but it does give rise to the need to look elsewhere for guidance on what level of monitoring may reasonably be demanded of responsible persons. The Penalty Code refers to monitoring but gives no guidance about the level of monitoring that may reasonably be demanded. If reference is made to the Annex to Objection Decisions it is apparent that Link complied with the headline requirements under paragraphs 1-5: see [35] above. The reference to monitoring in relation to the provision of the checklist is that "*the checklist* (my emphasis) should reflect the fact that the security system operated was effectively and efficiently maintained and monitored." In the present case, the checklist did that by following the Border Force template.

88. The Judge's approach is summarised in [20] of her judgment where she relies upon Mr Kosciecha's failure to secure the vehicle and the absence of an effective system to ensure the checks had been properly conducted and the vehicle had been properly secured. Apart from the unsupportable suggestion that filmed or photographic evidence should have been obtained at the time of carrying out the checks, no other monitoring of the driver could or would have prevented his failure on this occasion. In my judgment, the Judge's reliance upon the results of Link's assessment after the journey had been completed is unjustified for two reasons. First, it goes beyond anything in the Act, the Codes of Practice or the other materials to which I have referred. Second, there is no reason to believe that it would have made a difference to the facts of this case.

89. I would therefore uphold Link's criticisms of the Judge's reasons under s. 34(3)(b). Although I accept that the burden was on Link to establish all limbs of the statutory defence, I am unable to see any valid reason for holding that they had not established limb (b).

90. The effect of the admitted failure by Mr Kosciecha to secure his vehicle was that the requirements of s. 34(3)(c) were not satisfied. Neither he nor Link could rely upon the statutory defence. The Judge was, in my view, correct to reject Link's submission that Mr Kosciecha was in any sense "on a frolic of his own." There is nothing to suggest that this was other than a simple mistake made by a properly trained driver while carrying out his duties as Link's employee.

91. Turning to stage 2, whether or not the SSHD properly exercised her stage 2 discretion is not the question for this court. Because the hearing in the County Court was a rehearing, the question for this court is whether the Judge below exercised her own stage 2 discretion. The answer is short: she did exercise her discretion and did so expressly, as set out above.

92. Turning to stage 3 for Link, the Judge's decision was based upon two factors, namely that (a) there had been "a breach" that was "not the most serious of breaches" by Link; and (b) Link had previously incurred penalties. If I am right in the analysis I have set out above, there was no "breach" by Link and the requirements of s. 34(3)(b) were satisfied. That factor, which evidently affected the Judge's view of the appropriate penalty, is therefore to be discarded. The second factor remains. To some extent, that too must be discounted: the previous penalties included the one imposed in the first Link appeal discussed above, which I have concluded was unjustified.

93. Link also submitted that relying upon a haulier's previous penalties was in some way unfair to larger organisations such as Link, which has some 800 lorries. I would accept that the number of lorries heading for the United Kingdom may affect the degree of risk to which an owner/hirer is exposed, for the simple reason that more lorries means there are more opportunities for its drivers to make mistakes, however well trained they may be, and for potential clandestine entrants to target their vehicles. However, I would not accept that previous penalties are irrelevant to the level of penalty. Properly understood, they may help to provide insight into the quality of an owner/hirer's operation. It would, of course, be possible and appropriate for an appellant to the County Court to put evidence before the Court that puts its previous penalties into proper context and perspective. If it chooses to submit such evidence, size may be relevant to help explain the owner/hirer's record.

94. It is plain that, if the Judge had concluded that Link was unable to rely upon the statutory defence purely because of Mr Kosciecha's error, she should have imposed a lesser penalty than she thought appropriate on her analysis. I am conscious that this court has no assistance in the form of guidelines and that the County Courts who deal with these appeals are likely to have a far better "feel" than this Court for what the proper level of penalty should be in differing factual circumstances. Bearing in mind the factual circumstances of this case and the important social goal to which the scheme is directed, my assessment is that an appropriate penalty for Link would have been in the order of £800 per clandestine entrant; but I would caution against taking that assessment as any kind of precedent or setting any form of tariff.

95. Turning to the penalty imposed by the Judge on Mr Kosciecha, the evidence supplied by Link about his earnings was clear, uncontradicted and capable of belief. In my view the reasons given by the Judge for rejecting it were insufficient. I would reduce the penalty imposed upon Mr Kosciecha to £100 per clandestine entrant.

Conclusion

96. I would reduce the penalty imposed upon Link to £800 per clandestine entrant, or £4,000 in total. I would reduce the penalty imposed on Mr Kosciecha to £100 per clandestine entrant or £500 in total. To that extent I would allow this appeal.

The appeals: (3) SKAT Transport SP.Zo.O v SSHD B2/2021/1527

97. This appeal arises out of two appeals to the County Court that were heard together. Once again the basic facts, as found by the Judge, are not in dispute. I shall refer to the two cases and subsequent appeals as "the Kasinski Case" and "the Owcarz case".

Factual background

98. The Judge outlined the facts as follows:

> "2. On 11 July 2020 one of SKAT's (the haulier) vehicles was being driven by Mr. Kasinski (one of their drivers) and was stopped seeking to enter the United Kingdom. Seven clandestine entrants were found in the vehicle. The seal and tilt cords were in place on the vehicle and the method of entry was unknown. The driver had a checklist, which should indicate what checks had been carried out, when and where but that was not filled in. Penalties in relation to that matter were imposed upon the driver (Mr Kasinski) in the sum of £400 per entrant x seven (£2,800) and on the haulier (SKAT) £600 per entrant x seven (£4,200).
>
> 3. Mr Kasinski no longer works for SKAT. They lost contact with him in or about October 2020. Attempts to trace him subsequently have come to nought. That is of some concern to SKAT, since under the legislation they are jointly and severally liable for any unpaid penalty imposed upon Mr Kasinski.
>
> 4. On 29 July 2020 a SKAT lorry being driven by Mr Owcarz was stopped as it tried to enter the United Kingdom. Thirteen clandestine entrants were found in the trailer of that vehicle. As I understand it, it was a soft-sided vehicle (tarpaulin covered). Again seal and tilt cords were in place but there was a hole cut in the roof. There was, it was said, insufficient evidence that the driver had checked the roof - he saying that he had checked it some 20 minutes prior to the discovery of the clandestine entrants - but given that there were 13 inside 20 minutes later, that was viewed with some scepticism. Penalty notices were imposed in relation to this stoppage of £200 upon the driver x 13 entrants (£2,600), again £600 upon SKAT x 13 (£7,800)."

99. In the Owcarz case, SKAT and their driver served notices of objection. The SSHD maintained her decision. At that stage the SSHD's position was that Mr Owcarz' checks as he got to the port of Calais may not have included the roof as he had not noticed the cut in the roof; and that he had not checked inside the load area during the journey as, if he had done so, he may have noticed the 13 clandestine entrants.

100. SKAT then appealed to the County Court in both cases. The appeal was heard on 17 August 2021. By the time of the hearing, the SSHD had accepted that (a) adequate security devices were provided; (b) security checklists were provided to drivers; (c) written instructions were provided to drivers. The SSHD did not accept that there was adequate evidence of training and did not accept that there had been adequate monitoring of drivers' compliance.

101. The questions for the County Court in each case were (a) whether SKAT had an effective system for preventing the carriage of clandestine entrants and whether on the occasion in question it was being operated properly; and (b) in the event that the statutory defence was not established, whether the penalties imposed were disproportionate and, in the Kaskinsi case, not lawful because of a failure to give reasons for the imposition of the penalty.

102. The SSHD's skeleton argument set out her position before the County Court.

i) In the Kasinski case the SSHD submitted that:

a) SKAT placed insufficient emphasis on the need for regular checking of potential entry *en route* to the United Kingdom;

b) SKAT had failed to provide adequate written instructions to the driver and he had was not carrying written instructions at the time of the incident; and

c) SKAT failed to monitor their driver's compliance with the system they had laid down;

ii) In the Owcarz case the SSHD submitted that:

a) Insufficient evidence had been submitted to show that checks had been made to the roof;

b) SKAT failed to monitor their driver's compliance with the system they had laid down.

103. The SSHD submitted witness statements in each appeal. The witness statement about the Kasinski case concentrated on his failure to complete the checklist and SKAT's failure to pick this up.

104. The witness statement in the Owcarz case was in similar form. In each statement the witness referred to what were indicated to be the relevant provisions of the Prevention Code. These included [1.1.3]-[1.1.7] and [1.3.1] to [1.3.3]. None of the provisions from Part 1.2 were included in the list or referred to expressly although there were references to the requirement to check inside the vehicle before entering the UK Control Zone. The witness statement in the Owcarz case recorded that, at the time of the incident, the Border Force considered that there was not satisfactory evidence that Mr Owcarz had made or recorded sufficient checks to the roof of his vehicle. It also set out the SSHD's position at the time of the Objection Decision, which I have summarised above. The SSHD's position on the appeal to the County Court was that the checks carried out throughout Mr Owcarz's journey had not included checking the interior of the load. Thus, before the County Court, it appears to have been the SSHD's position that SKAT's system should have included checking the interior of the secured load regularly en route and at the port.

105. In reviewing the factual evidence before him, the Judge made a series of findings that were favourable to SKAT. He described their systems as extensive, found that their drivers are trained extensively in separate training schemes for new drivers and for more experienced drivers, held that drivers were supplied with security devices and were trained in their use, held that they were given written instructions which they carried in the cab and that they were provided with checklists. He also held that there was monitoring via the telematic system, which monitored the movement and position of the vehicle and when it had been stopped so that SKAT could cross-refer to when the checks were carried out. The checklist was to be scanned back to base by the driver at three points. If it was not, then that was to be reported and the driver should be chased

by telephone to find out what was going on and to remind him to complete the checks on the checklist.

106. The Judge contrasted the conduct of the two drivers. There was no evidence from Mr Kasinski to explain why he had not filled in the checklist. Mr Owcarz gave evidence that he had done all the necessary checks and he had filled in the checklist. Two features of his evidence were particularly important. First, he said he had checked the roof some 20 minutes before the clandestine entrants were found and it was then intact. Second, he said he did not check inside the vehicle after final loading because it was sealed by the customer and he should not break the seal without very good reason. He had done all other checks. The Judge found him to be a perfectly credible and compelling witness. He found as a fact that Mr Owcarz had checked the roof 20 minutes before the clandestine entrants were discovered and that when he did so there was no slit in the roof.

107. Mr Owcarz' evidence, which the judge evidently accepted, was that he had been present and responsible for the loading of his vehicle and had checked for the presence of clandestine entrants before securing his load, which he had done with a tilt cord, padlock and a seal which the consignor ordered him to put on. He had stopped several times en route and, on each occasion, checked the condition and security of his tarpaulins. His last inspection was at the port when he did not find any damage or signs to indicate the presence of third parties in the trailer. He checked the vehicle, the customs line, the seal, padlock, tarpaulin and the roof, all of which were intact.

108. The instructions provided to drivers (of which a copy signed by Mr Owcarz was exhibited) included that they should regularly inspect the cargo space of the vehicle and, at every break in the journey, should check the security measures and complete the checklist. It provided that, if necessary, in order to check the interior of the trailer the driver could break the SKAT seals and replace them with a new one. The checklist devised by SKAT was based on but went further than the requirements of the Border Force template.

109. The kernel of the Judge's reasoning was as follows:

> "17. I am bound to say that in respect of various of these cases that I have dealt with before it is a more impressive system than most that I see. It is, nonetheless, criticised by the Secretary of State. It is criticised because it is said there is (quite literally) a hole in the system, and that hole relates to the checking of the inside of the vehicle. *If the customer seals the trailer, how does one check inside because inside is where the clandestine entrants will be? One can rely, to some extent, upon seals and tilt cords, but they are not wholly effective.*
>
> 18. There is a code of practice which is promoted by the Secretary of State and which is recognised in the statute and that gives indications as to what may or may not constitute an effective system. The code of practice makes reference to the checks to the inside of vehicles. Section 1.2 deals with: "Measures to be taken immediately prior to the vehicle boarding" its means of arrival in United Kingdom. A

requirement of "checking seals and cords and straps," requirement for "checking the shell and the fabric of the vehicle, checking the external compartments, toolboxes" et cetera and also "checking the inside the vehicle. Effective devices may be used for this purpose at the discretion of the owner, hirer or driver, but this will not obviate the requirement that other checks detailed above should be carried out."

19. This was a soft-topped and sided trailer. *I accept that the SKAT system was not sufficient to meet the standards of an accredited system. …*

20. It is said on behalf of the Secretary of State that the system operated by SKAT - commendable in many respects though it may well be - does not reach that standard. As I say, I accept that the system is not one which would meet the requirement for accreditation (at least not quite) *and the deficiency lies in particular in the ability to check inside a vehicle, particularly one which is bearing a customer seal.*

21. That then takes me to the statutory defence in relation to each of the two stops. So far as what I will call the 'Kasinski stop' is concerned, the statutory defence fails so far as the haulier SKAT is concerned because, as I have found, *limb (b) is not satisfied in that the system was not one that was effective to prevent access of clandestine entrance to the vehicle*. It fails also, I find, in relation to limb (c) in that on the occasion in question a person or persons responsible for operating that system did not do so properly.

22. It fails in those two respects. Firstly, Mr Kasinski did not operate the system. He did not complete the checklist. Indeed there is some doubt as to whether he did any check at all. Further than that, he was not properly monitored. Although monitoring is not part of the code of practice, it was part of the SKAT system. If he failed to send a scan of his checklist to the billing department, they should have been on to him pretty quickly but from the start of this trip he did not send any checklist, either on loading or at any point thereafter. He missed, therefore, three points where he should have sent a scan and following which he should have been contacted to find out what was going on. Thus (c) is not met either by Mr Kasinski or by those in the billing department who should have been operating the system that they themselves were saying was sufficient to prevent the problem with which I am dealing here.

…

25. So far as the 'Owcarz stop' is concerned there is the same problem for the company. Limb (b) is not satisfied because the system - commendable though it may be - *is not an effective*

> *system for preventing the carriage of clandestine entrants, as I have already found*. And for Mr Owcarz, he has the same problem. Despite adhering, I have no doubt, to his training and being conscientious in carrying out his instructions (as I so find), he cannot rely upon the statutory defence because (b) is not met - there was no effective system for preventing the carriage of clandestine entrants, so the statutory defence for all appellants fails." (Emphasis added)

110. Three points may conveniently be noted here. First, the Judge has based his conclusion that s. 34(3)(b) is not satisfied either wholly or substantially on his understanding that SKAT's system would not have satisfied those operating the accreditation system. His language makes clear that, in his judgment, the SKAT's system is "commendable" and that any failure to comply with what would be required in order for SKAT to be accepted onto the accreditation scheme is marginal: they have "not quite" met the requirements. Second, the "deficiency" lies in the ability to check inside a vehicle, particularly one bearing a customer seal. Third, when the Judge refers to his finding that SKAT's system was not effective, he appears to be limiting himself to the marginal failure to comply with what he understood would be required in order for SKAT's scheme to be accredited.

111. Turning to penalty, the Judge said:

> "26. That then takes me to the question of discretion. I accept that that should not be used as a way of circumventing the statutory defence and perhaps filling in small holes that may have developed around it."
>
> 27. So far as Mr Kasinski is concerned, the failures on his part are quite substantial and they do not persuade me to exercise discretion in his favour to avoid him having to pay a penalty - he is clearly culpable.
>
> 28. So far as SKAT is concerned, there was an inadequate system (as I have found) but, as I have also indicated, better than many. That, in my judgment, is relevant to the level of penalty but not as to whether there should be one. If the system the deficient, they are vulnerable to a penalty."

112. The Judge then held that, since Mr Owcarz followed his training and instructions and done nothing wrong, his was a suitable case in which to exercise his stage 2 discretion in Mr Owcarz's favour. He therefore decided that no penalty should be imposed. He then reduced Mr Kasinski's penalty to £1,000 in total because of his limited means. He declined to vary the penalties imposed on SKAT because (a) in the Owcarz case the breach which he had found was "in the lower echelons" and the system was being properly implemented, which justified the penalty of £400 per clandestine entrant, and (b) in the Kasinski case there was the additional failing on the part of SKAT in failing to chase Mr Kasinski to complete his checklist, justifying retaining the penalty at the higher level of £600 per clandestine entrant.

The appeal

113. SKAT challenges the finding that its system was not effective within the meaning of s. 34(3)(b). The only failing that can be identified in the Judge's reasons is the failure to break the seals and enter the load space as part of the final check; and it is submitted that the Judge only held that to render the system ineffective because he understood that such a system would not be accepted for accreditation. SKAT submits that [1.2.5] is unclear and should not be the basis for a finding of ineffectiveness on the facts of this case.

114. Second, SKAT submits that the failure of Mr Kasinski to comply with SKAT's procedure for reporting and filling in the checklist does not justify a finding that the requirements of s. 35(3)(c) were not met. SKAT submits that the absence of a checklist or the presence of an incomplete checklist cannot defeat the statutory defence; and it submits that, because monitoring is not mentioned in the Prevention Code, a failure of monitoring goes only to penalty.

115. Third, SKAT submits that, by using the words "the exercise of a discretion should not be used as a way of circumventing the statutory defence", the Judge has fettered what should be an unfettered discretion and failed to exercise his stage 2 discretion in relation to Mr Kasinski and SKAT.

116. I deal with each of these points in turn.

117. In my judgment SKAT's first ground of challenge is well founded. Assuming for the purposes of argument that the SSHD would not accept SKAT's system for accreditation, that cannot of itself be determinative of the question whether the system is effective within the meaning of s. 34(3)(b). It would not even be particularly material evidence when compared with non-compliance with the Prevention Code, which has the authority of s. 33 and the process of consultation and laying before Parliament to support it. If the proposition is that accreditation will be afforded to a system which demonstrates compliance with the Prevention Code, it adds nothing to the process of having regard to the Prevention Code. The Prevention Code itself is not prescriptive. Accordingly, the Judge's finding that the SKAT system did not quite meet the requirements that would be imposed for accreditation is not a sound basis for holding that the system is not effective for the purposes of s. 34(3)(b).

118. Turning to the actual deficiency identified by the Judge, he did so in fairly imprecise terms: it "lies … in the ability to check inside a vehicle, particularly one which is bearing a customer seal." Here the ground has shifted significantly since the hearing before the County Court. First, the SSHD's position at the time of the Objection Decision and before the County Court was that the driver should have checked inside the secured load at regular intervals en route: see [99] and [104] above. Now, however, it is the SSHD's wish that secured loads should not be entered except at the final check: see [29] above. And she accepts that the step required by [1.2.5] (however interpreted) is not required to be carried out if it is not feasible or desirable: see [26] above. I would accept that circumstances might arise when carrying out checks en route that provide a compelling reason for breaching a secured load; but the Codes of Practice and materials to which I have referred do not indicate a need to do so on a regular basis. While noting the SSHD's wish, expressed in the context of these appeals, that drivers should routinely open secured loads as part of the final check, that is not a requirement of the Prevention Code, for the reasons explained at [23] above.

119. The Judge considered SKAT's system to be "commendable" and "more impressive than most" that he sees. Having reviewed the evidence that was before him and is now before this court, I would respectfully agree with his assessment. Specifically, the system as documented provided for seals to be broken and secured loads to be entered if necessary; and Mr Owcarz gave evidence that he would not open a secured load sealed by the customer without good reason. The Judge appears to have been under the impression that the Prevention Code required all secured loads to be opened en route and/or at the final stop. For the reasons given earlier in this judgment, that impression was wrong. In the absence of a clear requirement that secured loads must be entered as a matter of routine whether or not there are any signs to alert the driver to the possibility that clandestine entrants have gained unauthorised entry, I see no good reason for holding that SKAT's system was not effective for the purposes of s. 34(3)(b): see [41] above.

120. There is no substance in SKAT's second point. For the reasons given earlier in this judgment the failure to complete a checklist may (in the absence of cogent explanation) amount to a failure of implementation that justifies a finding that the requirements of s. 34(3)(c) have not been satisfied. And monitoring may be a material consideration despite the fact that it is not mentioned in the Prevention Code.

121. I would also reject SKAT's third head of challenge. It is plain that the Judge had the existence of his stage 2 discretion well in mind, because he exercised it in Mr Owcarz's favour. The fact that he then adopted an abbreviated approach to the other appellants is entirely forgivable in an ex tempore judgment in which he concluded that substantial penalties were called for. It is inconceivable that he would have concluded that his stage 2 discretion should be exercised in favour of imposing no penalty on SKAT or Mr Kasinski.

Conclusion

122. For these reasons the Judge was wrong to find that SKAT had failed to show that s. 34(3)(b) was satisfied. Since he also found that Mr Owcarz did nothing wrong, the appeal in the Owcarz case should be allowed. But the Judge was correct to reject SKAT's case on s. 34(3)(c) in the Kasinski case and he exercised his stage 2 discretion as to penalty. As there is otherwise no challenge to the level of penalty, success on the first point has no impact on the order below in the Kasinski case. The appeal in the Kasinski case should therefore be dismissed.

Lord Justice Warby

123. I agree.

Lady Justice King

124. I also agree.