TC01412

Appeal number TC/2009/16761

Appeal against decision not to restore seized vehicle used for the transportation of cannabis to the United Kingdom – Whether the decision could reasonably have been reached – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

R S FLOWERS
(MR REINDERT SCHORTEMEIJER) **Appellant**

- and -

DIRECTOR OF BORDER REVENUE
(FORMERLY THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS) **Respondents**

TRIBUNAL: Dr Christopher Staker (Tribunal Judge)
Mrs Caroline de Albuquerque (Tribunal Member)

Sitting in public in London on 24 June 2011

Mr Ronald Meijer for the Appellant

Iain MacWhannell for the Respondents

DECISION

Introduction

1. The Appellant appeals to the Tribunal, pursuant to s.16 of the Finance Act 1994, against the 21 October 2009 decision of the Respondent not to restore to the Appellant a Renault heavy goods vehicle (the "vehicle"), which was seized on 27 October 2008. At the time of seizure, the vehicle was found to contain 192 kilograms of cannabis.

The relevant legislation

2. Section 3(1) of the Misuse of Drugs Act 1971 provides:

> (1) Subject to subsection (2) below—
>
> (a) the importation of a controlled drug; and
>
> (b) the exportation of a controlled drug,
>
> are hereby prohibited.
>
> [Subsection (2) is not material to the present appeal.]

3. Section 49(1) of the Customs and Excise Management Act 1979 ("CEMA") relevantly provides:

> (1) Where—
>
> ...
>
> (b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; ...
>
> those goods shall, subject to subsection (2) below, be liable to forfeiture.

4. Section 139(1) of CEMA provides that "Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard".

5. Section 141(1) of CEMA relevantly provides that:

> (1) Without prejudice to any other provision of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the customs and excise Acts—
>
> (a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the

commission of the offence for which it later became so liable; ...

shall also be liable to forfeiture.

6. Section 152 of CEMA relevantly provides that:

(1) The Commissioners may, as they see fit—

...

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts; ...

7. Section 14 of the Finance Act 1994 relevantly provides that:

(1) This section applies to the following decisions [by HMRC], ...—

(a) any decision under section 152(b) of the Management Act [CEMA] as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored

(b) any relevant decision which is linked by its subject matter to such a decision under section 152(b) of the Management Act.

[The remaining sub-sections deal with a procedure for review by HMRC of decisions taken under s.152(b) of CEMA.]

8. Section 16 of the Finance Act 1994 deals with appeals to the Tribunal, and relevantly provides that:

(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, [a review or further review as appropriate] of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by [a review or further review as appropriate], to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the

unreasonableness do not occur when comparable circumstances arise in future.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(6) On an appeal under this section the burden of proof as to—

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,

(b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and

(c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid),

shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.

9. For purposes of s.16 of the Finance Act 1994, an "ancillary matter" includes "any decision under section 152(b) as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored": Finance Act 1994, s.16(8) and Schedule 5, paragraph 2(1)(r).

Background

10. The following background facts were not in dispute between the parties.

11. The Appellant is a national of the Netherlands, and resides in that country. The vehicle is registered in the Netherlands.

12. On 27 October 2008, the vehicle was stopped by Customs at Harwich and selected for examination. It was being driven by the Appellant. Its load was manifested with flowers.

13. In the course of the examination, 192 kilograms of herbal cannabis was found.

14. The cannabis was seized under s.49(1)(b) of CEMA, and the vehicle was also seized under that provision read together with s.141(1)(a) of CEMA.

15. The Appellant was arrested and charged with the illegal importation of the cannabis. He was found guilty and sentenced to 4 years' imprisonment. After service of the custodial part of his sentence, he was deported from the UK.

16. As there was no challenge to the legality of the seizure, the cannabis and vehicle were condemned as forfeit to the Crown under paragraph 5 of Schedule 3 of CEMA.

17. On 10 June 2009, the Appellant requested that the vehicle be restored to him. By a decision dated 22 July 2009 under s.152(1)(b) of CEMA, the Respondent refused the request. The Appellant requested a review of that decision under s.14 of the Finance Act 1994. By a decision dated 21 October 2009 (the "review decision"), the reviewing officer confirmed that the vehicle would not be restored. The Appellant now appeals to the Tribunal under s.16 of the Finance Act 1994.

The hearing

18. This appeal was originally listed for hearing on 9 February 2011. On the morning of that day, both the Appellant and his representative Mr Meijer were denied entry on arrival from the Netherlands at London City Airport, due to deportation orders against them. The Tribunal held a hearing on that day, in which the Appellant and Mr Meijer participated by telephone from London City Airport, and at which HMRC were represented in person by Mr Jones. At that hearing, the Appellant applied for an adjournment so that he and Mr Meijer could make an application to the United Kingdom Border Agency with a view to obtaining permission to enter the United Kingdom in order to attend a future hearing in person. The Tribunal granted the adjournment, but indicated that the Appellant should proceed on the basis that if he or Mr Meijer were not able to obtain the necessary permission to come to the United Kingdom on the date of the adjourned hearing, the hearing would proceed without them being physically present.

19. Ultimately the Appellant and Mr Meijer were unable to obtain permission to enter the United Kingdom to attend the adjourned hearing on 24 June 2011. A request for a further adjournment made by the Appellant was not granted by the Tribunal. The Appellant and Mr Meijer participated in the 24 June 2011 hearing by telephone from the Netherlands. HMRC were represented in person by Mr MacWhannell.

20. The Appellant gave evidence by telephone, and was cross-examined by Mr MacWhannell, and the Tribunal asked him some questions. Mr David Harris, a review officer of UKBA gave evidence as a witness for the Respondent. The Tribunal heard submissions from both parties. Various documents have also been submitted in the case by both parties, including a "*verklaring*" (witness statement) of the Appellant's nephew.

The evidence and arguments of the parties

21. The witness statement of the Appellant's nephew states as follows. It was the Appellant's nephew who arranged for the cannabis to be transported in the vehicle to the United Kingdom. The Appellant believed that boxes that his nephew had

arranged for him to carry contained cigarettes, and the Appellant was completely unaware that they contained drugs. The Appellant's nephew was arrested in the Netherlands for exportation of drugs in February 2009 and was subsequently sentenced for the offence. He is sorry that he caused his uncle to lose his vehicle.

22. The Appellant's evidence included amongst other matters the following. The Appellant's nephew was arrested in the Netherlands on 24 February 2009, and was ultimately sentenced to 18 months' imprisonment. The seizure of the vehicle has caused the Appellant exceptional hardship. The vehicle was financed by the bank. After the vehicle was seized, the Appellant was still required to make repayments to the bank for the vehicle, of approximately EUR 1,500 to EUR 1,600 per month. In addition, he had to hire another vehicle to continue working. He was working 70 to 80 hours a week just to cover his costs. The Appellant was in a very bad situation financially. The Appellant is 55 years old. He seeks justice. When he was convicted, the judge did not make a confiscation order against him, indicating that the judge had doubts about whether he was guilty. He received the lowest possible sentence. He has also offered an amount of money to get the vehicle back. He initially offered £20,000. The vehicle will have deteriorated in value, especially as it has not been used. If sold to Ghana it would fetch about £3,000. The Appellant is now willing to offer £10,000 as a reasonable basis for negotiation.

23. In cross-examination, the Appellant confirmed that he was convicted at Ipswich Crown Court of importing a class B drug, cannabis. Reference was made to a letter dated 15 May 2009 to the Appellant from his legal representatives at that trial, stating that "the Judge said that he was giving you the shortest sentence of imprisonment that he could, and that he was taking into account the significant financial loss you and your family have suffered, your excellent character references and the fact that you had been honest about your previous conviction in Holland". The Appellant confirmed that the previous conviction in Holland was for an offence involving cannabis. The Appellant confirmed that on the advice of his counsel, he had accepted the sentence imposed by Ipswich Crown Court and had not sought to appeal against it.

24. It was put to the Appellant that even if he did think that he was transporting cigarettes rather than cannabis, he knew that it was not legal to do this. The Appellant acknowledged that he was "absolutely aware" that bringing cigarettes was not lawful, but that nine out of ten lorry drivers do this, and it is well known that if caught by Customs, a driver can simply pay a £750 fine. The Appellant acknowledged that in his admissions in the Crown Court proceedings, he had admitted that the cannabis he was transporting had a street value of about £465,000, and that if boxes of the relevant dimensions had contained cigarettes rather than cannabis, the estimated excise payable on those cigarettes would have been £34,688.64.

25. It was put to the Appellant that at his interview under caution on 27 October 2008, he had said that he was asked to transport the boxes of what he thought were cigarettes by a person he did not previously know, and who he had met at the flower auction in Aalsmeer (page 48 of the appeal bundle). It was put to the Appellant that he was now inconsistently stating that it was his nephew who had arranged this. The Appellant said that he only took things that were given to him by his nephew.

26. It was put to the Appellant that while he had produced evidence of the payments he had to make to the bank for the vehicle, this was evidence of a debt, but not necessarily evidence of financial hardship. The Appellant said that he did not agree and repeated his evidence that he had to work up to 80 hours a week to make the bank payments in respect of the vehicle as well as hire another vehicle, totalling some EUR 3,000 per month.

27. The Appellant further said in cross-examination that he owns two properties in the Netherlands. He said that one is rented out, and the rent is only just sufficient to cover the costs of the property. He said that the truck he uses is a custom built truck for transporting flowers, with refrigeration and heating, which is expensive to hire. The Appellant was referred to a statement he made (page 82 of the appeal bundle) in which he said that the vehicle was worth about EUR 145,000, and that he had another vehicle in the Netherlands worth about EUR 10,000 that he would have used the latter if he had wanted to try to import drugs. The Appellant said that the latter vehicle had no refrigeration, and could be used to pick up flowers in the Netherlands but could not be used for transport to the United Kingdom.

28. The Appellant said that the seized vehicle cost EUR 145,000 new, that it was bought in 2006, that it would have been worth about EUR 75,000 to EUR 80,000 when seized, and that it was hard to tell what its value would be now after being in Customs storage for three years. He said that he would have to continue making payments on the vehicle until September 2012.

29. The Tribunal then heard evidence from Mr Harris, officer of UKBA. Mr Harris adopted his statement of 18 January 2010, with the correction that the words "seized excise goods" should read "seized vehicle". He confirmed that he had seen all of the documents in the appeal bundle and further submissions of the Appellant, and was aware of the Appellant's offer to pay a sum of money for the restoration of the vehicle, but that he still considered non-restoration of the vehicle to be appropriate in view of the seriousness of the case. He referred to the policy described in the review letter, and said that he saw no reason to deviate from the policy in this case.

30. The submissions of the Respondent included amongst other matters the following. This case involves international drug smuggling. The case is about as serious as it gets, and it is difficult to envisage in what cases it would be appropriate not to restore if this was not such a case. Every decision is taken on its own facts, but the starting point is the policy referred to in the review letter. Under that policy, restoration may be considered if the total quantity of drugs involved does not exceed two kilograms of cannabis. For quantities in excess of that amount, restoration should normally not be restored. The reason is to prevent a vehicle that has been used for smuggling large quantities of drugs from being so used again. The review letter decided that the vehicle would not be restored. The test to be applied by the Tribunal is whether the Tribunal are satisfied that person making that decision "could not reasonably have arrived at it" (Finance Act 1994, s.16(4)). The burden is on the Appellant to establish that. The test is akin to *Wednesbury* unreasonableness. The conviction of the Crown Court can be relied upon to establish the conviction. The Tribunal is bound by the finding in the criminal proceedings that the Appellant was knowingly involved in the

importation of cannabis. It was the Appellant's decision to become involved in this activity, and if he finds that his activity has put him in a difficult position, he should have considered that beforehand. There is nothing exceptional in the Appellant's circumstances. The review officer considered the degree of hardship caused by the loss of the vehicle, but this is a natural consequence of having the vehicle seized. It was not necessarily required to use a replacement vehicle of equal specification if a more basic vehicle would perform adequately. The review officer did not consider the hardships to be above what one would expect, and was therefore not satisfied that the Appellant had suffered exceptional hardship. Even if the Appellant thought that he was smuggling cigarettes, he admitted that he knew that this was illegal. Reliance was placed on *Lindsay v Customs and Excise Commissioners* [2002] EWCA Civ 267, [2002] 1 WLR 1766, [2002] STC 588 at [63] where it was said that "Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose those vehicles. Nor does it seem to me that, in such circumstances, the value of the car used need be taken into consideration". The review officer did not need to consider the full file from the Crown Court, as the admissions made by the Appellant were sufficient. The review officer has considered all material submitted by the Appellant, and every letter to the Appellant ends with a statement inviting the Appellant to submit any further evidence that he wishes to be considered (referring to pages 147-152 of the appeal bundle). The fact that no confiscation order was made against the Appellant by the Crown Court goes against him because the financial hardship would have been greater if a confiscation order had been made.

31. In his submissions, the Appellant adopted the points he had made in his evidence.

The Tribunal's views

32. The Tribunal has considered all of the evidence before it as a whole. Omission of any detail in this decision does not mean that it has not been considered.

33. The issue in this case is whether or not the Tribunal should exercise its power under s.16 Finance Act 1994 to alter the review decision.

34. An exercise of that power requires the Tribunal to be satisfied "… that the ... person making that decision could not reasonably have arrived at…" that decision. In *Benahmed & Anor v Revenue & Customs* [2010] UKFTT 207 (TC) at [17] the case law on the exercise of this power was summarised as follows:

(1) The Tribunal's jurisdiction is limited to determining whether the decision to refuse restoration or to offer restoration on terms was reasonable.

(2) The Tribunal is not entitled to substitute its own view about whether the goods should be restored.

(3) The test for reasonableness is whether the decision maker had acted in a way in which no reasonable decision maker could have acted; if they had taken

into account some irrelevant matter or had disregarded something to which they should have given weight.

(4) In deciding the reasonableness of the decision the Tribunal has a comprehensive fact finding jurisdiction to establish whether the primary facts upon which the decision was based were correct.

(5) The Tribunal is not entitled to consider the lawfulness of the seizure, or determine the underlying facts relating to seizure when deciding the reasonableness of the decision to refuse restoration except when the Tribunal is satisfied that it would not be an abuse of process to take into account the facts surrounding the seizure of the goods.

(6) Where the goods have been condemned as forfeited by the magistrates, there is no further room for fact finding by the Tribunal on the circumstances surrounding the seizure.

(7) Where there has been a deemed forfeiture of the goods, the Tribunal should apply the principle of proportionality to the particular facts of the case having in mind considerations of abuse of process when deciding whether to reopen the issue about the lawfulness of the original seizure.

(8) The Appellant's failure to institute condemnation proceedings will, in most cases, preclude subsequent challenge to the lawfulness of the seizure in restoration proceedings. In such circumstances the Tribunal should consider the Appellant's response to two questions when deciding whether to re-open the facts of the original seizure. The first question is: could the Appellant have raised the question of lawfulness of forfeiture in other proceedings and if yes, why did he not do so?

35. Authority for the last of these propositions was *Customs & Excise v Smith* [2005] EWHC 3435 (Ch) in which Lewison J said at [23]. A recent consideration can be found in *HMRC v Jones and Jones* [2010] UKUT 116 (TCC).

36. In the present case, there was no challenge to the legality of the seizure, and the cannabis and vehicle were condemned as forfeit to the Crown under paragraph 5 of Schedule 3 of CEMA.

37. The Tribunal does not understand the Appellant to now be seeking to re-open the facts of the original seizure. The Appellant has not argued in the present appeal that the original seizure was unlawful. The liability of the vehicle to seizure did not depend on whether or not the Appellant had knowledge that the boxes contained cannabis rather than cigarettes: *R (Mudie) v HM Customs & Excise* [2003] EWCA Civ 237 at [34]. For the Appellant to now suggest that he had no knowledge that the boxes contained cannabis is therefore not inconsistent with the lawfulness of the original seizure.

38. However, the Tribunal does consider this suggestion to be inconsistent with his criminal conviction by the Crown Court. It is not in dispute between the parties that

the Appellant was convicted for the importation of the cannabis and sentenced to 4 years' imprisonment. The sentencing remarks of the judge are unfortunately not available. However, it is inherent in such a conviction that the Appellant knew that he was importing cannabis. The review letter states that "It is apparent to me that you have been found guilty of the offence of being knowingly concerned in the illegal importation of a large amount of ... cannabis". In a letter to the Tribunals Service dated 23 March 2010, the Appellant refers to the statement in the review letter that the Appellant was convicted of being "knowingly concerned in the illegal importation of Cannabis". That letter then goes on to state that "I accept that it is not possible for me to refute this fact although it will haunt me forever knowing that this was not true".

39. The Tribunal therefore considers that the Appellant's case is that he was in fact innocent of the crime of which he was convicted, on the basis that he had no knowledge that his truck was transporting cannabis.

40. The Tribunal was not referred to any authority as to whether it can go behind a criminal conviction in exercising its power under s.16 Finance Act 1994. A criminal conviction is based on a criminal standard of proof, which is a high standard. It is likely that there was more evidence concerning the circumstances of the importation of the cannabis before the Crown Court that there was before the Tribunal in the present case. The trial before the Crown Court also took place much closer in time to the events in question. The Tribunal certainly considers that it cannot simply ignore the criminal conviction, and make its own determination afresh of whether or not the Appellant had knowledge that he was transporting cannabis.

41. Arguably the Tribunal should in a case such as this treat the criminal conviction as conclusive of the Appellant's knowing involvement in the importation of the cannabis. The Appellant could have sought to appeal against the conviction but did not. Arguably, having not done so, he cannot now seek to attack the conviction in proceedings before the Tribunal.

42. The Tribunal finds that it does not need to decide whether or not this argument is correct. At the very least, the Tribunal is satisfied that it must take the criminal conviction as a starting point. For the Appellant to succeed in an appeal before the Tribunal on the basis that the Crown Court was wrong in concluding that he knew that he was transporting cannabis, at the very least the Appellant would have to produce something cogent to establish that the Crown Court was wrong.

43. The evidence produced by the Appellant in this appeal in support of his contention that he had no knowledge that he was transporting cannabis consists of his own evidence and a witness statement of his nephew. In the Appellant's letter to the Tribunal dated 23 March 2010, referred to above, the Appellant, despite denying his knowledge, accepted that he could not refute the fact of his conviction, and went on to say "I will not mention this issue anymore in my views". The witness statement of his nephew was obtained only in 2011. The Tribunal is not satisfied that any persuasive reason has been given why the Appellant's nephew's evidence could not have been given earlier. In cross-examination, it was also put to the Appellant that his nephew's statement was inconsistent with what the Appellant had said in his

interview under caution on 27 October 2008 (appeal bundle pages 47-49). At that interview, the Appellant said that someone he had not seen before spoke to him at the flower auction at Aalsmeer and proposed to him that he transport boxes of cigarettes to the United Kingdom. The Appellant's nephew's statement says that it was he, the Appellant's nephew, who persuaded the Appellant to take the boxes, and makes no mention of anyone else being involved. The Tribunal does not consider that any satisfactory explanation has been given for this discrepancy.

44. The Tribunal finds that the Appellant had not produced sufficient evidence to persuade the Tribunal that it should go behind the criminal conviction, even assuming that the Tribunal has the power to do so. The Tribunal therefore finds that the Appellant was knowingly involved in the importation of cannabis.

45. The review decision sets out the Respondent's policy in relation to restoration, while stating expressly that "I am *guided* by the restoration policy but not *fettered* by it in that I consider every case on its individual merits" (emphasis in original).

46. The policy is that restoration will be considered if the total quantity of drugs does not exceed 2 kilos. The Tribunal notes that the amount of cannabis in the present case was 192 kilos, which is almost 100 times the threshold in the policy.

47. The main contention of the Appellant was that the review decision was unreasonable, given the effects of financial hardship on the Appellant.

48. The Tribunal is satisfied that the decision maker has given consideration to all of the material relied upon by the Appellant in relation to the issue of financial hardship. Mr Harris gave oral evidence to confirm this.

49. The Tribunal accepts the evidence of the Appellant that he has had to pay some EUR 3,000 a month by way of repayments on the seized vehicle and rental payments for another vehicle to continue working. The Tribunal notes however that even if the vehicle had not been seized, the Appellant would have had to pay the repayments on the vehicle of some EUR 1,600 a month in any event. The additional burden to the Appellant caused by the seizure of the vehicle is thus confined to the rental payments for the other vehicle he has now hired to continue working. The Appellant has confirmed that he owns two properties. Although one is said to have been rented out, and not to generate any income additional to what is needed to cover its costs, the fact remains that the Appellant's financial situation has not become so bad as to require him to sell that additional property.

50. Considering all of the material in the case as a whole, and having regard to the amount of cannabis involved, the Tribunal cannot conclude that there is anything unreasonable about the decision not to restore the vehicle.

Conclusion

51. For the reasons given above, the Tribunal dismisses the appeal.

52. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Christopher Staker

TRIBUNAL JUDGE
RELEASE DATE: 24 August 2011