TC03898

Appeal number: TC/2013/03957

PROCEDURE – restoration of vehicle – HMRC strike-out application on grounds of jurisdiction and no reasonable prospect of success – whether the review decision was out of time – if so, whether the reasons which can be put forward by HMRC on the substantive appeal are limited to those in the original decision – statutory deeming rules – change in basis of review decision – appellant unrepresented and unable to read or write – whether grounds of appeal went beyond a challenge to the legality of the seizure – held, yes – arguable that reasons inadequate and/or that relevant matters not taken into consideration – strike-out application dismissed – European Convention on Human Rights considered – directions – matters raised by the Appellant but outside the jurisdiction of the Tribunal

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID BICKELL **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ANNE REDSTON
MRS CATHERINE FARQUHARSON

Sitting in public at the Tribunal Centre, 115 Queen's Road, Norwich on 15 July 2014

The Appellant in person

Miss Kate Balmer of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr Bickell is a farmer in Norfolk. In February 2013 a vehicle belonging to his teenage son was seized by HMRC. HMRC offered to restore the vehicle for a payment of £683. Mr Bickell refused to pay and asked for a review of the restoration decision. Officer Bines confirmed the restoration decision and Mr Bickell appealed to this Tribunal.

2. When Mr Bickell arrived at the hearing he told us that he had been provided with the appeal bundle but had been unable to read the documents because he is illiterate. It was clear to us that he had not understand the purpose of hearing. His aim in coming to the Tribunal was to explain what had happened and to obtain a just and fair outcome.

3. The Tribunal explained to Mr Bickell that HMRC asked for this hearing because they considered his appeal should not be heard at all. This is called a "strike out" application. For the reasons set out below, the Tribunal **REFUSED** the application.

4. **Mr Bickell, you should note in particular that:**

   (1) **There will be another hearing**.

   (2) We have explained at paragraph 94 **what will happen next**.

   (3) We have also set out at paragraph 96 what we cannot consider**.**

The law on striking out an appeal

5. Under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules[1], the Tribunal must strike out an appeal if it does not have jurisdiction in relation to the proceedings.

6. Under Rule 8(3)(c) the Tribunal may strike out an appeal if it "considers there is no reasonable prospect of the appellant's case, or part of it, succeeding." In *Swain v Hillman* [2001] 1 All ER 91, Lord Woolf MR said, in relation to the similar power at Rule 24.2 of the Civil Procedure Rules:

> "The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or…they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

7. In *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16 [2001] ("*Three Rivers*"), the House of Lords gave further guidance on how a court or tribunal should approach an application made on the basis that a claim has no real prospect of success. Lord Hope said:

[1] All references to Rule or Rules in this decision are to those Rules.

"94. ...I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?

95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

The Tribunal's jurisdiction

8. Finance Act 1994 ("FA 1994"), s 16(4) provides that the Tribunal's power, when dealing with an appeal against a restoration decision, is limited to considering whether that decision "could not reasonably have been arrived at" by the relevant officer.

9. In *HMRC v Jones & Jones* [2011] EWCA Civ 824 the Court of Appeal has further clarified the extent of the Tribunal's jurisdiction. Once a vehicle has been condemned as forfeit in the magistrate's court, the Tribunal has no power to overturn that decision, but has to deem the vehicle to have been legally seized. In *Jones & Jones* Mummery LJ, giving the judgment of the court, said at [71(7)] that "deeming something to be the case carries with it any fact that forms part of the conclusion." In the context of this appeal that means we have to treat as true, not only that the vehicle was legally seized, but also any fact which underpins that finding.

10. The Upper Tribunal has recently given guidance on this Tribunal's fact-finding powers. In *Race v HMRC* [2013] UKFTT 489, also a strike-out application, the judge said at [23] that he "must therefore take it that the appellant would have a reasonable prospect of establishing that these events [which the appellant asserted had happened]

did happen." When that decision reached the Upper Tribunal (as *HMRC v Race* [2014] UKUT 0331 (TCC)), Warren J said at [44(d)]:

> "the Judge was not obliged to do what he did and to take it that Mr Race would have had a reasonable prospect of establishing that the events referred to by the Judge did happen. It was open to him to make as assessment of the factual position and to test, within reasonable limits, what Mr Race was telling him."

11. At [50] Warren J said that, in assessing whether Mr Race had a reasonable prospect of success in his appeal, he was "entitled to take account of the prospects of [Mr Race] being able to establish the facts on which he would need to rely to have even an arguable case." In making our findings of fact, below, we rely on this guidance.

Evidence

12. HMRC provided the Tribunal with a bundle of documents which included:

(1) the correspondence between the parties;

(2) the notes of Mr Bickell's interview with HMRC;

(3) the form RFTU C156, headed "Seizure Information Notice";

(4) the UK Registration Certificate for the vehicle;

(5) Mr Bickell's letter of appeal to the Tribunal. This is written in the same handwriting as his letter requesting an HMRC review, and ends "this letter has been written on my behalf with my approval by Miss Rebecca Thomas [address]."

13. In addition, Mr Bickell and Mr William Bickell ("William") gave oral evidence to the Tribunal. William is Mr Bickell's teenage son and the owner of the vehicle. We found them both to be honest and credible witnesses.

14. The Tribunal notes that we were not provided with the original restoration decision, which (according to Officer Bines' letter of 7 May 2013) was provided to Mr Bickell on 12 March 2013. This document is likely to be important if we are correct in our analysis of the time limit provisions, and will be needed for the substantive hearing.

Constraints on making findings of fact

15. Although some of Mr Bickell's evidence was accepted by HMRC, there is a significant conflict in respect of the facts surrounding the seizure of the vehicle, which has now been condemned as forfeit by the Magistrates' Court. In accordance with the law as set out in *Jones & Jones*, we have to deem the vehicle to have been lawfully seized, and also to deem to be facts anything which underpins the legality of that seizure.

16. Mr Bickell gave oral evidence about the encounter with PC Willis which preceded the seizure; this evidence is repeated in his letters to HMRC. Although the

statutory deeming requirement does not preclude us from making findings of fact about this incident, we find that it is not in the interests of justice for us to do so, given that PC Willis was not present at this hearing and so had no opportunity to put his side of the story.

17. All paragraphs of the next section of our decision constitute findings of fact, with the exception of those sentences which have been italicised for either or both of the reasons set out in the previous two paragraphs.

Findings of fact

18. Mr Bickell owns or rents a number of different parcels of land, spread over an area about 11 miles from one end to the other. One of these parcels of land is a boggy, steep 80 acre site at Bircham Newton which he began to rent in about 2010. In February 2013 he was keeping sheep there. As part of his rental contract he had agreed to fence the land.

19. William works full time for his father. On 31 January 2013, William bought a second-hand Daihatsu Fourtrak for £1,000 from another farmer. A Fourtrak is a small utility vehicle. It was bought to make it easier to farm the Bircham Newton land and in particular to move the fencing material over the boggy ground there. The vehicle was licensed for "limited use" and the tank held red diesel when purchased and was not filled up between that date and its seizure. *Mr Bickell and William told us that the vehicle was kept at Bircham Newton to use on that land.*

20. On the evening of Friday 22 February 2013, Mr Bickell and William were on the land at Bircham Newton with a friend of William's who was on his moped. They had gone there to bring in the animals for the evening.

21. *They were approached by PC Willis, who asked them what they were doing on the land. Mr Bickell said that it was his land, but PC Willis did not believe him; Mr Bickell's words were that PC Willis "wouldn't accept that it had anything to do with me." PC Willis carried out what Mr Bickell described to the Tribunal as a "strip-search" but found nothing untoward*. It was a very cold night and they were in the open.

22. PC Willis asked Mr Bickell how much land he had and where it was. Mr Bickell told him that he had a number of holdings, about 11 miles apart. He had to visit them at least once a day to care for his stock; he had about 80 animals. Mr Bickell explained that he and William, together with William's friend, were at Bircham Newton to bring in the stock. They needed some foodstuff to attract the stock, and planned to buy this from a shop 68 yards from the gate of Mr Bickell's land (William has since measured the distance).

23. Mr Bickell then drove the vehicle through the gate to the shop and purchased the food. When he returned, PC Willis had closed the farm gate and was standing beside it. He asked Mr Bickell if the vehicle was using red diesel and Mr Bickell said it was, but this was allowed because it was a limited use vehicle. PC Willis said that he had never heard of a limited use vehicle and that the Fourtrak should not have been

driven on the public road. The vehicle was recovered to a nearby garage at King's Lynn. Mr Bickell had no further contact with the police and in particular never had a police interview.

24. On Tuesday 26 February 2013 Mr Bickell went the garage where he met two officers from HMRC's road fuel testing unit ("RFTU"). The RFTU officer's notebook says: "referral red daihatsu fourtrak L142 VNH seized by Norfolk Police under HMRC Powers. Vehicle challenged by police and fuel decanted red in colour on Sunday 24 February on public roads." That date is then crossed out and "Friday 22 February" written instead.

25. The entry continues:

> "VEL Licence seized by police on suspicion fraudulent obtained exemption licence for agricultural use. Driver admitted to running vehicle on red diesel."

26. The RFTU officers sampled the fuel in the vehicle's tank and confirmed it was red diesel. Mr Bickell told them he was allowed to use red diesel because it was a limited use vehicle and he had only used it to go to the shop which was just by the field gate, but the female HMRC officer present said HMRC were seizing the vehicle because it wasn't a limited use vehicle.

27. The officers' notebook says that in answer to the question "what do you use the vehicle for," Mr Bickell answered "checking the animals on three different holdings. The fields are 11 miles apart from furthest to nearest so 22 mile trip in total." In answer to the question "how long owned the vehicle" Mr Bickell replied "registered owner my son's name and purchased 8 Feb 2013." The date is crossed out and replaced with "31.01.2013."

28. The account of the interview is signed by Officers Featherstone and Stephens; it is not signed by Mr Bickell.

29. One of the officers gave Mr Bickell a "Seizure Information Notice." It says "what you can do if things are seized by HMRC: Type Notice 12A into the search box at the top of the home-page then select the relevant option." The Notice was signed by Mr Bickell.

30. HMRC offered to restore the vehicle on payment of a sum of money, but Mr Bickell refused the offer. On 12 March 2013, Officer Featherstone wrote to Mr Bickell, formalising the offer of restoration, for a fee of £683.

31. On 18 March 2013, Miss Thomas wrote a letter on Mr Bickell's behalf. It says:

> "the police officer PC Willis who initially searched the vehicle did not carry out the correct police procedure for searching myself and two young school boys (one of which is my son and owner of the vehicle). The search was carried out with no explanation of why or our rights on private agricultural land which I rent…

> On seizure by HM Revenue and Customs your officer James Featherstone refused to accept that the vehicle was limited use as shown on the V5. Perplexed I questioned Mr Featherstone as to how I could offer any further evidence to support that the vehicle was limited use? On which I was given a vague response to 'find out myself.'"

32. The letter goes on to say that Mr Bickell called the DVLA and citizens advice and a solicitor but they could not understand why the vehicle was seized "when the V5 clearly shows it is limited use." Mr Bickell adds that *it was used "to cover the 80 acres of land I rent at Burcham Newton* to tend to livestock over difficult terrain. The seizure of the vehicle has caused a great amount of distress and difficulty in respect of the care and tending to of the livestock."

33. Attached to the letter was a copy of the UK Registration Certificate for the vehicle. Next to the heading "Taxation class" is stated "limited use" in capitals.

34. The letter was received by HMRC on 22 March and the HMRC review was carried out by Officer Bines. Her decision is dated 7 May 2013. She first sets out the background:

> (1) On Friday 22 February 2013, King's Lynn police challenged vehicle L142 VNH, a red Daihatsu Fourtrak, on public roads. The vehicle running tank was dipped and the fuel decanted was red in colour. The vehicle was recovered to Tear's Garage, King's Lynn, on behalf of HMRC. Officers from the Felixtowe RFTU attended Tears Garage on 26 February 2013 and carried out a preliminary sample. Formal samples were also taken.
>
> (2) In a voluntary interview, Mr Bickell stated inter alia the following:
>
> (a) He was unaware he was breaking the law by running the vehicle on red diesel.
>
> (b) He knew the vehicle had red diesel in it when purchased for £1000 on 31 January 2012 and had not fuelled it since then.
>
> (c) His interpretation of the HMRC website was that he was permitted to use red diesel because he held a limited use licence.
>
> (d) He used the vehicle for agricultural purposes to do daily checks on his animals on farms, three separate holdings; the distance between the holdings being around 11 miles, meaning a 22 mile round trip.
>
> (e) He admitted a previous offence in 2005.
>
> (3) The vehicle was then formally seized and a restoration offer made which was refused. Mr Bickell was issued with a Seizure Information Notice.
>
> (4) On 12 March 2013 HMRC's seizure team formalised the restoration offer which was sent to Mr Bickell. The fee was £683, made up of a penalty of £250 under 13(1)(a) of the Hydrocarbon Oil Duties Act 1979 ("HODA") for using red diesel, £250 under HODA 13(1)(b) for fuelling the vehicle with red diesel; duty arrears of £33 and costs of £150 for removing the vehicle.

(5) On 22 March 2013 HMRC had received a letter from Mr Bickell requesting a review of the seizure decision, in which he said:

(a) the seizure decision was illegal; he refused to pay the restoration fee because he had been using the vehicle legally on private land;

(b) he had contacted the DVLA for further confirmation that a limited use licence allowed red diesel to be used, but was advised that the licence was sufficient;

(c) the vehicle is used to tend livestock on the land at Birchham Newton over difficult terrain;

(d) the seizure has caused great amount of distress and difficulty with the tending of the livestock.

35. Under the heading "Consideration," Officer Bines said that she "considers every case on its individual merits" and had looked at:

> "the circumstances of the events surrounding the seizure and the related evidence, so as to consider if any mitigation of exceptional circumstances exist that should be taken into account. I have examined all the representations and other material that was available to the Commissioners both before and after the time of the decision."

36. Under the heading "Conclusion" she began by saying "in your interview with HMRC officers…you stated…" This is followed by items (a) to (d) set out in paragraph 34(5) above. She then says:

> "although the vehicle V5c does show the Taxation class at that of limited use, the vehicle is still bound by the regulations covering the use of fuel in road-use vehicles…there is a limit on the distance that an excepted vehicle may be used on public roads between areas of agricultural land of 1.5km. You have stated that you covered approximately 22 miles on public roads in the round trip between the three holdings, which exceeds this allowance."

37. Officer Bines explains the law on using red diesel before saying:

> "for the reasons set out above, I have concluded that there are no grounds to consider varying the original decision whereby your vehicle was offered for restoration for the fee of £683.00. I am of the opinion that the application of the Commissioners' policy in this case treats you no more harshly or leniently that anyone else in similar circumstances."

38. It is clear from Officer Bines' letter that HMRC had changed the basis for the seizure, with the original decision being based on the RFTU officers' belief that the vehicle was not a limited use vehicle, and Officer Bines' review decision being based on it being regularly used to cover 22 miles a day.

39. On 7 June 2013 Mr Bickell appealed Officer Bines' decision to the Tribunal.

40. He also applied to the magistrate's court to contest the seizure. The paperwork about the hearing was in his name. The hearing was listed for 24 October 2014. Mr Bickell arrived on time but was told that as William was the registered owner, it was a legal requirement that William attended the court and swear that he owned the vehicle.

41. In William's absence, the magistrates upheld HMRC's decision and awarded costs against William of £447. Mr Bickell asked what he could do and was told he could ask for the case to be reheard and that a solicitor would help. He made enquiries about a solicitor but couldn't afford the £190 an hour which he was told would have been charged. He asked a friend to help, but the completed appeal papers arrived at the Magistrates Court slightly after the time limit and William was told it was now too late to contest the seizure.

42. Since the Magistrate's Court hearing was after the review decision, we have taken it that the legal basis for the seizure was Officer Bines' finding that the vehicle travelled 22 miles per day on public roads (more than the permitted maximum of 1.5 miles) and it is that fact which we must deem to be true and we do so. The earlier decision, based on the classification of the vehicle as limited use, was superseded and no deeming is therefore required in that regard.

43. Since the seizure William has had to do all the work at Bircham Newton using a wheelbarrow, which has been very difficult.

44. On 20 January 2014 HMRC applied to strike out the appeal on the basis that the Tribunal had no jurisdiction or, in the alternative, that Mr Bickell had no reasonable prospect of succeeding in his appeal.

Whether the review decision was out of time

45. Before we set out the parties' submissions on the strike-out application, we first consider whether Officer Bines' review decision was in time, and if not, the consequences which would follow.

The legislation relevant to the review decision time limit

46. The Customs and Excise Management Act ("CEMA") s 152 reads as follows

> **152 Power of Commissioners to mitigate penalties, etc**
>
> The Commissioners may, as they see fit—
>
> (a) stay, sist or compound an offence (whether or not proceedings have been instituted in respect of it) and compound proceedings or for the condemnation of any thing as being forfeited under the customs and excise Acts; or
>
> (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts
>
> but paragraph (a) above shall not apply to proceedings on indictment in Scotland."

47. So far as relevant to this decision, FA 1994, s 14 reads as follows:

> **14 Requirement for review of decision under section 152(b) of the Management Act etc**
>
> (1) This section applies to the following decisions by HMRC, not being decisions under this section or section 15 below, that is to say--
>
> (a) any decision under section 152(b) of the Management Act 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…
>
> (2) Any person who is–
>
> (a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies…
>
> may by notice in writing to the Commissioners require them to review that decision.

48. So far as relevant to this decision, FA 1994, s 15 provides as follows:

> **15. Review procedure**
>
> (1) Where the Commissioners are required in accordance with section 14 or 14A above to review any decision, it shall be their duty to do so and they may, on that review, either-
>
> (a) confirm the decision; or
>
> (b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.
>
> (2) Where-
>
> (a) it is the duty of the Commissioners in pursuance of a requirement by any person under section 14 or 14A above to review any decision; and
>
> (b) they do not, within the period of forty-five days beginning with the day on which the review was required, give notice to that person of their determination on the review,
>
> they shall be assumed for the purposes of s 14 or 14A to have confirmed the decision.

49. FA 1994, s 15A-F set out the review provisions which apply to "relevant decisions." These are defined at s 13, and do not include restoration decisions under CEMA s 152(b). Section 15A allows a person to ask for the review of a relevant decision, s 15D allows HMRC to extend the time limit within which a person may ask for that review, and s 15E allows them to accept a reasonable excuse for a late review request. The relevant parts of s 15F(6) to (8) read:

> (6) HMRC must give P, or the other person, notice of the conclusions of the review and their reasoning within–
>
> (a) the period of 45 days beginning with the relevant date, or

(b) such other period as HMRC and P, or the other person, may agree.

(7) In subsection (6) "relevant date" means--

(a) the date HMRC received P's notification accepting the offer of a review (in a case falling within section 15A)…or

(c) the date on which HMRC decided to undertake the review (in a case falling within section 15E).

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that the decision is upheld.

50. From the above provisions, it will be seen that FA 1994, s 14 gives a fixed deadline of 45 days to both the appellant and HMRC, whereas FA 1994, ss 15A-F allow HMRC to relax the time limit applying to the appellant and for the parties to agree to relax the time limit applying to HMRC.

51. Mr Bicknell's appeal concerns a decision not to restore a vehicle, and must therefore have been made under CEMA s 152(b). It seems to us clear, although (as discussed below) we had no submissions on this point, that the relevant provisions are therefore FA 1994, ss 14 and 15. It is only in the case of a "relevant decision" that the extended time limits and greater flexibility provided by ss 15A-15F require consideration.

52. This Tribunal (Judge Hellier and Mrs Farquharson) recently considered FA 1994, ss 14 and 15 in *Nas & Co v HMRC* [2014] UKFTT 50 (TC) at [25]-[27].[2] They decided that the 45 day period there stated began with the date on which the letter requiring a review is received by HMRC and that the 45 days included the date of receipt. Their helpful analysis, with which we agree, is summarised here for ease of reference:

(1) The date on which HMRC are required to review a decision within the meaning of ss 14(2) and 15(2) and the date on which notice is "given" to the Commissioners requiring them to review a decision (within the meaning of section 14(3)) should be read as the same date.

(2) The natural reading of the phrases "require...to review" and "notice requiring the review is given," especially when read as co-extensive, is that these events will occur on the date HMRC receive the notice requiring them to review the decision: ie the date the notice arrived at its destination, as opposed to the date it was dispatched or posted or the date it was opened.

(3) A differently constituted Tribunal came to the same conclusion in *BT Trasporti SRL v Director of Border Revenue* [2010] UKFTT 287 (TC) at [32] where they said, also in relation to FA 1994, s 14(3) that "the more normal meaning of giving notice" is that "notice is given when received, and not merely when posted."

[2] The legislation there cited is an earlier version, but nothing turns on that.

(4) This approach is reflected, albeit implicitly, in *C&E Commrs v Telford Tower & Scaffolding Ltd* [2002] EWHC 2994 (Ch). At paragraph 9(v) and (vi) Park J states that the appellant required a review "by a letter from its solicitors dated 10th August 2001" and that on "27th September 2001 the 45-day time limit for a review to be carried out expired" with the consequence that there was a deemed decision under FA 1994 s 15(2). The date Park J gives for expiry of the time limit only makes sense if the 45 day time limit runs from the date of receipt of the notice requiring a review rather than the date of that notice or the date it is posted.

Application to this case

53. Mr Bickell's letter requiring a review is dated 18 March 2012; Officer Bines' decision letter opens by saying that Mr Bickell's letter was received on 22 March. By our calculations, 45 days from 22 March (including that date) is 4 May. Officer Bines' review letter is dated 7 May.

54. Our provisional view is that Officer Bine's decision is out of time and that, in consequence, HMRC are to be treated as having confirmed the original decision (FA 1994, s 15(2)(b)).

55. We say "our provisional view" because the question of whether or not Officer Bines' letter was out of time did not occur to us until after the conclusion of the hearing. We note that the same thing happened in *Nas*, and that Tribunal asked for written submissions. However, *Nas* was a substantive hearing; this is a strike-out application. More importantly, it seems to us that although Officer Bines' decision may not be that appealed by Mr Bickell, that outcome may make little difference in practice. This is because the effect of FA 1994, s 15(2)(b) is only to confirm *the decision*, which is not the same as confirming *the reasons for the decision.*

56. This is clear from *C & E Comms v Alzitrans SL* [2003] EWHC 75 ("*Alzitrans*"). In *Alzitrans*, HMRC had seized a lorry and had given very limited reasons for the seizure. The appellant requested a review, but this was not provided within the time limit. At the tribunal hearing HMRC had put forward additional and different reasons from those given in the original decision. On appeal to the High Court, Mr Maugham, for the appellant, submitted that this was impermissible. Blackburne J rejected that submission, saying (emphasis added):

> "I do not accept Mr Maugham's further submission that because they were different (assuming they were) from the reasons which underlay Mr McWilliams original refusal...it was not open to the Commissioners to advance as reasons the matters set out in their statement of case before the Tribunal. Section 15(1) of the 1994 Act empowers the Commissioners to confirm or withdraw or vary a decision when required to carry out a review of that decision under chapter II of the Act. Implicit in this is a freedom, even when confirming its decision, to give reasons for the decision which are different from those which originally led to its making. Where, as here, the Commissioners fail within the stipulated period to give to the person acquiring the review notice of the determination of that review, it is assumed that they have

> confirmed the decision. I do not consider that that means that the Commissioners are bound by the reasons originally given for the decision thereby confirmed. Were it otherwise, and it was plain that the reasons originally given were manifestly bad but the decision could be justified on other grounds, the (almost) inevitable consequence is that an appeal to the Tribunal against the decision would result in the matter having to be referred back to the Commissioners for a further review in accordance with section 16(4)(b) (assuming the circumstances were not within section 16(4)(c)). In my judgment therefore, the Commissioners were entitled to advance, as in their statement of case before the tribunal they did, reasons for the decision not to return the vehicle which were different...from the reason from the reasons which had led [to the original] decision ..."

57. The distinction between confirming *the decision* and confirming *the reasons for the decision* is important, particularly in a case such as this, where the reasons changed between the original decision and the review decision. On the basis of *Alzitrans* it thus seems to us that HMRC would be able to put forward Officer Bines' conclusions as part of their submissions at the Tribunal hearing, even though Mr Bickell's appeal would be against the original decision.

58. It is of course possible, too, that HMRC could put forward other reasons. Again, we could have adjourned this decision and recalled the parties for submissions on the question of the reasons which might be put forward, but Mr Bickell and William have already waited a considerable time for this issue to be resolved and we find that further delay is not in the interests of justice. Moreover, this is HMRC's application; they were ably represented by Counsel, and no further reasons were put forward in either the Statement of Case or during this hearing. We have therefore limited ourselves to assuming that HMRC would put forward the reasons given by Officer Bines.

Submissions by Mr Bickell

59. Mr Bickell said that the whole problem had started when PC Willis had stopped and searched him, William and his friend on private land, and that PC Willis had acted illegally when he did that. They had been "wrongfully searched on private property" and Mr Bickell was clearly still outraged. He said "PC Willis wouldn't accept that it was my land and that I had a right to be there."

60. Then, he said, PC Willis impounded the vehicle, even though he had been told it was a limited use vehicle and he had seen that the journey had only been 68 yards; this was because he didn't know there was any such thing as a limited use vehicle.

61. Mr Bickell said he told PC Willis, in answer to his question, about his other pieces of land, but never said that he used the Fourtrak to get there.

62. When Mr Bickell went to King's Lynn the following week, the HMRC Officer said that it wasn't a limited use vehicle and it was taken away because of that. He then wrote to HMRC and sent the vehicle registration document that showed it was a limited use vehicle and they then changed the basis for the seizure, and that wasn't

right or fair. Mr Bickell repeated that he had never said that he had used the Fourtrak to go between his pieces of land and that HMRC's record that he had said this was wrong.

63. Mr Bickell said that he then turned up at the Magistrates' Court on time but was told that William had to be there and there had been a mix up with the paperwork. But they still condemned the vehicle. Then he went to a solicitor to get help but it was going to cost too much; then a friend offered to help but they just missed the deadline.

64. He and William said that they were now having to manage without the vehicle and that was really hard work for William in particular, who was using a wheelbarrow over a large area when he should have been using his own Fourtrak.

65. Mr Bickell summarised his position by saying that neither he nor William had done anything wrong. He shouldn't have to pay any penalty and William's vehicle should be restored to him.

Submissions by Miss Balmer on behalf of HMRC

66. Miss Balmer said that the appeal should be struck out, either because Mr Bickell was essentially questioning the legality of the seizure (which the Tribunal had no jurisdiction to consider) or because he had no reasonable prospect of succeeding in his appeal against the restoration decision.

67. In relation to the first, she said it was clear from Mr Bickell's submissions before the Tribunal that he did not accept that the seizure had been lawful, and that was the reason he was appealing. In relation to the second, she said that Officer Bines had acted entirely reasonably, and any attempt by Mr Bickell to show otherwise was bound to fail.

68. The Tribunal drew Miss Balmer's attention to the sentence in Officer Bines' decision, which began "for the reasons set out above" and asked her to identify those reasons. Miss Balmer said that they were under the heading "conclusions." The Tribunal noted that the distress and difficulty caused by the seizure had not been included under the heading "conclusions," although most of the other points from Mr Bickell's letter had been listed. Miss Balmer's response was that:

(1) the matters set out in Mr Bickell's letter had been recorded earlier in the review decision;

(2) Officer Bines had said she had considered "all the representations and other material"; and

(3) the fact that distress and difficulty were not referred to under her "conclusions" meant that Officer Bines had decided that no weight should be attached to that factor.

69. Miss Balmer also asked us to note that Officer Bines had not taken into account the statement that Mr Bickell "had admitted a previous offence in 2005" and observed that this might be taken into account if the decision had to be remade.

70. HMRC's Statement of Case at [29](a)] says that their "policy on a first detection of rebated fuel is to restore the vehicle for an amount equal to the value of the civil penalties and 100% of the revenue calculated on the fuel capacity of the vehicle's running tank and any removal and storage costs." In Miss Balmer's skeleton argument, which she repeated before the Tribunal, she said that "the policy is evidently reasonable and proportionate" and that the restoration fee was not significant in size and was "reasonable in all the circumstances in any case and not unduly high." The Tribunal asked Miss Balmer if the relationship between the value of the vehicle (being £1,000), and the restoration fee of £683 was relevant to proportionality; in her view it was not.

71. The Tribunal referred to the fact that the vehicle had been purchased with red diesel in the tank and asked whether this had been taken into account. Miss Balmer said it was not a relevant factor: the law expressly provided that a road vehicle using red diesel was liable to forfeiture even where the diesel was already in the vehicle, see HODA s 13(6)(b).

72. The Tribunal asked Miss Balmer whether there was an inherent conflict between Officer Bines' statements that (a) she had considered the case "on its individual merits" and (b) Mr Bickell had been treated "no more harshly or leniently than anyone else in similar circumstances." Miss Balmer said that there was no tension between these statements; in her submission Officer Bines had properly considered whether the standard £250 penalties for first use should apply to Mr Bickell and decided that they should.

Discussion and decision

73. We must strike out Mr Bickell's appeal if we have no jurisdiction. That will be the case if the only matter being appealed is the validity of the forfeiture. Because Mr Bickell's focus in his oral submissions was on the injustice of the forfeiture, Miss Balmer encouraged us to find that we should strike out the appeal on this ground.

74. Mr Bickell is a farmer who has difficulty reading and writing; he is a litigant in person in these proceedings. HMRC are represented by Counsel. There is significant inequality of arms between the parties. In our judgment, for the reasons set out in the subsequent paragraphs, Mr Bickell's letters do disclose possible valid arguments in addition to his unhappiness with the basis for the forfeiture. It is unrealistic for an unrepresented taxpayer with Mr Bickell's background to be able to identify the points which could be put before a Tribunal such that he might succeed in showing that HMRC had acted unreasonably, as that term is understood by lawyers familiar with the judicial review process.

75. We are required by Rule 2 of the Tribunal Rules to deal with cases justly. That includes "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings." That must include helping an unrepresented litigant to identify,

from the material put before the court by both parties, the points which may be at issue in the proceedings.

76. That this is the correct approach has recently been confirmed by Warren J in *Race* at [50], where he said:

> "I appreciate, of course, the difficulties faced by Mr Race as a litigant in person and that it is appropriate for me to raise points in his favour which he has not thought of, giving HMRC a proper opportunity to respond to them."

77. In our judgment it would be a breach of the overriding objective if we struck out this case because Mr Bickell has focused on his sense of injustice on the forfeiture of his son's vehicle and had not separately identified, even from within his own submissions, the other points which could be made in support of his appeal.

78. We thus move on to consider whether his case has no reasonable prospect of success. On the one hand, as the leading case law demonstrates, this is a high hurdle for HMRC: we can only strike out the case under Rule 8(3)(c) if Mr Bickell's chance of success are "fanciful"; ie it is a case "not fit for trial at all." On the other, Mr Bickell has to show that Officer Bines' decision is one which she "could not reasonably have arrived at." Using the familiar terms of judicial review. this means he must have a reasonable prospect of showing that the decision was illegal, irrational, disproportionate, vitiated by procedural impropriety and/or constituted a breach of his Convention rights. That too is a high hurdle.

79. Without of course coming to any view as to the outcome of Mr Bickell's appeal, for the reasons set out in the next two paragraphs we find that he has a reasonable prospect of succeeding in showing that Officer Bines' decision was unreasonable either because her reasons were inadequate, and/or because one or more relevant matters were not taken into account.

80. *Inadequate reasons*: Under "conclusion" Officer Bines lists a selection of the points derived from her earlier summary of the evidence and then explains the legislation, before saying "for the reasons set out above." However, the preceding paragraphs say only that (a) using a limited use vehicle for a distance of more than 1.5 miles on public roads is prohibited, and (b) Mr Bickell has "stated that [he] covered more than 22 miles on public roads." This juxtaposition provides the reason why Officer Bines had decided that Mr Bickell had failed to comply with the rules relating to limited use vehicles, but it is questionable whether it also explains why she confirmed the decision that the vehicle should be restored for a fee of £683.

81. *Failure to consider relevant matters:*

(1) In his letters Mr Bickell expressly mentioned the "distress and difficulty" caused by the forfeiture of the vehicle; this is included in Officer Bines' summary of his submissions. However, there is no mention of distress or difficulty in the matters which she listed for apparent consideration as part of her "conclusions." Miss Balmer suggested that a Tribunal would infer that

Officer Bines had considered and rejected the issue of hardship, but it is also arguable that a Tribunal would decide that she did not consider it at all.

(2) Officer Bines' review decision makes no mention of William's position. He is the teenage owner of the vehicle – a fact known to Officer Bines from the vehicle registration document and the interview notes. The failure to consider the position of the vehicle's owner is an arguably relevant factor not taken into account.

(3) The red diesel was already in the vehicle when purchased. Although Miss Balmer is right that this receives no special treatment as a matter of law, it is arguably a mitigating circumstance when compared to the position of a person who deliberately fills up a vehicle with red diesel or requires it to be filled up to his order or request. Removing the red diesel already in the tank would presumably have required William or his father to siphon it off, a potentially hazardous task; alternatively they would have had to pay a garage to empty the tank, almost certainly incurring a charge.

(4) The vehicle cost £1,000; it is arguable that this is a relevant factor when considering whether a £683 restoration fee is proportionate.

(5) Officer Bines states that she had considered whether "any mitigating or exceptional circumstances should be taken into account." However, there is no indication of what she took into account or how she carried out this exercise. It could be argued that this is a standard phrase and does not of itself demonstrate that Officer Bines in fact properly exercised the discretion given to her.

82. Miss Balmer observed that Officer Bines had recorded that Mr Bickell had "admitted a previous offence in 2005" and that this might be taken into account if a Tribunal required HMRC to remake the decision. The sentence quoted was drawn from the account of the meeting with Mr Bickell set out RFTU officer's notebook. The relevant part of that account reads (emphasis added):

> "JF: Have you ever had any dealings with HMRC before?
>
> DB: Red diesel in a vehicle previous in approx 2005 and put in *by mistake* by ex-partner *deliberately*. Outcome was paid fine and vehicle restored."

83. We note that (a) the statement is inherently contradictory, (b) the person involved was not Mr Bickell himself, (c) the event was some eight years earlier (e) the notebook was not signed by Mr Bickell and (f) the account in that notebook had clearly been changed in at least two respects after it had been written. Our provisional view is that Officer Bines was correct not to take it into account in her decision.

84. The above reasons are sufficient for us to find that this is not a case where there is no reasonable prospect of success. We refuse HMRC's application to strike out this appeal.

The European Convention

85. In *Jones & Jones* the Court of Appeal decided (at [72(6)] that there had been no breach of the European Convention on Human Rights because the appellants had been entitled to challenge the legality of the seizure in court, in accordance with Convention compliant legal procedures. Mummery LJ said "The notice of claim procedure was initiated but not pursued by the respondents. That was the choice they had made."

86. In the First-tier Tribunal decision in *Race*, mentioned earlier, the reasons for the refusal to strike out the appeal were set out at [35]. At (b) the judge said:

> "If Mr Race were to satisfy the tribunal that he was frustrated in a genuine attempt to challenge the legality of the seizure, then the tribunal must arguably give him a remedy in order to vindicate his rights under Article 1 of the Convention which includes the right to a fair hearing."

87. In the Upper Tribunal, Warren J rejected this argument at [35], saying:

> "As to the second of the Judge's reasons, concerning procedural unfairness, it is clear that paragraphs 5 and 6 of Schedule 3 are Convention compliant. That is not to say that HMRC could escape the consequences of any unfairness on their part in relation to the application of those statutory provisions. The remedy for that sort of unfairness, however, is judicial review, which itself gives a Convention-compliant remedy to a taxpayer alleging the sort of unfairness about which the Judge was concerned. The First-tier Tribunal has no inherent power to review decisions of HMRC; although it does have certain statutory powers in relation to certain decisions, it has no power to review, or to provide any remedy, in relation to procedural unfairness of the sort which concerned the Judge. It is not, in any case, immediately obvious that there is anything in the point concerning procedural unfairness in the light of the fact that Mr Race was provided with Notice 12A which set out clearly what he needed to do."

88. Mr Bickell is illiterate. HMRC sent all relevant documents to him, not to his son, the owner of the vehicle. There is also nothing before the Tribunal to show that Mr Bickell or his son were provided with Notice 12A, which at paragraph 3.2 says:

> "Any person can challenge the legality of the seizure but the person who does that (or their solicitor) will be required to swear on oath at court that they owned the thing at the time of seizure. As the owner you may ask someone else to send a Notice of Claim for you but it must include your signed authority for them to act on your behalf."

89. It appears that Mr Bickell was simply told, via the Notice of Seizure, that he might find Notice 12A on the HMRC website, but the importance of William attending the Magistrates Court was not explained to him. As a result, Mr Bickell attended that court alone; as he was not the owner of the vehicle, he was unable to swear the requisite oath, and so could not challenge the seizure. It is arguable that this was a breach of Mr Bickell's and/or William's rights under the Convention

90. Section 8(1) of the Human Rights Act reads:

> "In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate."

91. FA 1994, s 16(4)(b) states that the Tribunal may "require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision."

92. However, if the Tribunal were to decide to remit this case back for a further decision, it has no jurisdiction to direct that HMRC take into account any breach of Mr Bickell's or William's rights under the Convention. Before such a direction could be given, the Tribunal would first have to decide that there had been a breach. As Warren J said in *Race*, the Tribunal has no jurisdiction to make such a finding. HMRC may of course decide to review this matter in the light of the Convention, but that would be a matter for them.

What happens next ("directions")

93. We have decided that Mr Bickell's appeal should not be struck out. This means **there will be another hearing** to decide whether HMRC acted unreasonably in making the decision to restore the vehicle only if Mr Bickell pays £683.

94. We therefore direct as follows:

(1) Mr Bickell and HMRC's representatives are to inform the Tribunals Service, within 21 days of the date of issue of this decision, of any dates when they cannot attend the Tribunals Centre in Norwich for the hearing during the period from 1 September 2014 to the end of this year.

(2) The Tribunals Service is then to arrange a further hearing, with a time estimate of one day, in Norwich **at the earliest possible date**. The period of forfeiture has already extended to 18 months.

(3) The hearing should be listed before either this Tribunal or a completely different Tribunal.

What the Tribunal cannot do

95. Mr Bickell hoped that this Tribunal would resolve a number of different issues, and we address the next paragraph to him.

96. The Tribunal only has the powers given to us by Parliament. In particular:

(1) We cannot inform the Magistrates' Court of the submissions you made to us, or ask them to allow you to make a further appeal. This is a matter on which you would need to take legal advice from a solicitor or an advice centre.

(2) We cannot respond to your complaint about PC Willis. Complaints about the police can be made to the relevant police authority (such as the Norfolk

Constabulary), either directly or via the independent Police Complaints Commission.

(3) We cannot consider whether HMRC behaved "fairly" in relation to you or William, and we cannot complain on your behalf to HMRC on the basis that they acted unfairly. HMRC have provided some guidance as to how to complain at www.hmrc.gov.uk/factsheets/complaints-factsheet.pdf, including the need to send the initial complaint to the department you are complaining about, clearly marking the letter "complaint." If you remain dissatisfied, you can escalate your complaint to the independent Adjudicator, see www.adjudicatorsoffice.gov.uk.

Appeal rights

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

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 12 August 2014