



[2021] UKFTT 0463 (TC)

TC 08347/V

EXCISE DUTIES – seizure of speedboat carrying approx 80,000 smuggled cigarettes – restoration refused – was decision reasonable and proportionate? – Lindsay considered - held: yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/03013

BETWEEN

DAVID SIDOR

Appellant

-and-

THE DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE ZACHARY CITRON
MR NOEL BARRETT**

The hearing took place on 1 November 2021. The form of the hearing was V (video). A face to face hearing was not held because of the pandemic. The documents to which we were referred was an electronic bundle of 260 pdf pages.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Joe Hingston, counsel, instructed by Berkeley Square Solicitors, for the Appellant

Rupert Davies, counsel, instructed by the Cash Forfeiture & Condemnation Legal Team, Home Office, for the Respondent

DECISION

1. This was an appeal against a decision of the respondent (**BF**) not to restore a speedboat which had been used to smuggle 80,000 or so cigarettes into the UK.

DECISION NOT TO POSTPONE THE HEARING

2. The Tribunal heard and then, in an oral decision, refused, an application by the appellant to postpone the hearing on the ground that the appellant's counsel had become unavailable.

Background facts to the appellant's postponement application

3. The appellant appointed Goran Stojsavljevic of Berkeley Square Solicitors as his representative in his notice of appeal dated 10 August 2020. All subsequent Tribunal correspondence with the appellant was sent to Mr Stojsavljevic.

4. The Tribunal's directions dated 9 April 2021 required listing information including

- (1) dates to avoid between 19 July and 19 November 2021; and
- (2) the number of participants for each party, the name and role of each participant, and their email and telephone number

5. By email of 21 May 2021 Mr Stojsavljevic informed the Tribunal of available dates for appellant's counsel (Mr Furlong), including 1 November 2021.

6. The Tribunal sent the parties notice of a hearing on 1 November 2021, by email dated 6 July 2021.

7. The Tribunal wrote to Mr Stojsavljevic on 20 October 2021 asking for the full name and telephone number of the appellant's attendees at the hearing, by 25 October 2021. No response was received by that date and the matter was referred to the hearing judge. On his instructions, the Tribunal directed on 26 October 2021 that the information be provided by the appellant without further delay. No response was received.

8. On Wednesday 27 October 2021 at 13:34, Mr Furlong's clerk emailed the Tribunal asking for the hearing to be vacated due to Mr Furlong's unavailability (as he had to attend another hearing on 1 November). The Tribunal responded to the parties at 14:11, directing that the appellant provide a complete explanation for Mr Furlong's sudden unavailability.

9. On Friday 29 October 2021 at 14:15, Mr Furlong's clerk emailed the Tribunal forwarding this message from Mr Furlong:

"I apologise for not responding earlier to the Court's letter which I did not have sight of. The background to this application to adjourn is that there has been no pre-trial hearing in the case and Monday's hearing was recorded in my diary as a mention rather than as the substantive hearing. I only became aware that Monday 1 November was the substantive hearing earlier this week on notification that I had not complied with an earlier direction to serve a skeleton argument and identify myself to the court. I have now supplied a skeleton argument and I apologise that it is late. Although it is fair to say that the courts generally are particularly unpredictable at the moment, with cases being put in and pulled out at the last minute, the case I am presently involved in has not (contrary to expectations) settled and is going into next week. I am thus unavailable. I represented Mr Sidor in the Crown Court and have had conduct of his case since a very early stage, and it would be unfortunate if he had to instruct fresh counsel now. I apologise to the respondent and the tribunal for the inconvenience but would be grateful if you could consider adjourning this administratively to a suitable date. The speedboat in issue remains in the possession of the respondent."

10. Later that Friday afternoon the Tribunal (i) received the appellant’s skeleton argument from Mr Furlong, and (ii) directed that the postponement application would be heard at the start of the listing on Monday 1 November 2021 at 10 am. Emails were also received by the Tribunal after working hours on Friday requesting that Mr Hingston of counsel, Mr Stojsavljevic and Mr Sidor be sent details allowing them to join the video hearing on Monday – however, these had not been forwarded to the hearing judge prior to the hearing opening on Monday morning.

11. At the opening of that hearing, Mr Davies said he had been contacted earlier that morning by Mr Hingston, who wished to participate in the hearing as appellant’s counsel. The Tribunal paused the video hearing and made arrangements for Mr Hingston to join. Upon joining, Mr Hingston told the Tribunal that Mr Stojsavljevic and Mr Sidor also wished to participate in the hearing. The Tribunal again paused the hearing and made arrangements for them to join (they received email invitations just after 11 am). The hearing recommenced at 11.15 am with Mr Sidor in attendance. Mr Stojsavljevic never joined the hearing.

Submissions

12. Mr Hingston said that the hearing should be postponed so that Mr Furlong could make oral submissions for the appellant, as he had represented him in the crown court and had handled the case from an early stage. He said Mr Furlong would be available on certain dates in December and January. Mr Davies said that BF left the postponement decision to the Tribunal but would apply for costs if the hearing was postponed.

Reasons for the Tribunal’s decision

13. The Tribunal weighed up the following factors:

(1) The appellant had nearly four months’ notice of the hearing, which had been listed on a date when the appellant’s representative said counsel was available. The application to postpone had been made less than 2½ working days before the start of the hearing. It was unclear why Mr Furlong had been unable to keep the hearing date free i.e. why his other hearing ‘overrunning’ had been allowed to supersede the commitment to the Tribunal hearing on 1 November 2021. It seemed that there had been miscommunication between the appellant’s representative and counsel: note for example that Mr Furlong appeared not to have 1 November 2021 in his diary as a substantive hearing; that Mr Furlong seemed to be under the impression there would be a “pre trial hearing” (when none had been directed, and such a hearing would be very unusual in a Tribunal case like this one); and that Mr Furlong appeared not to have received the Tribunal’s directions to the parties of 27 October 2021 (sent at 14:11) until 29 October 2021, despite their urgency. The Tribunal noted that its communications with the appellant’s representative in recent weeks (on 13 October (see [16(3)] below), 20 October and 26 October) had been apparently ignored. In all, there appeared to be no good reason for the sudden unavailability of the appellant’s counsel.

(2) Whilst it would have been ideal for Mr Furlong to make oral submissions to the Tribunal, the “prejudice” to the appellant of not having Mr Furlong present at the hearing was materially mitigated by the facts that

- (a) the Tribunal had Mr Furlong’s skeleton argument;
- (b) Mr Hingston was available to step into Mr Furlong’s shoes;
- (c) the issues in the appeal were not complex; and
- (d) the appellant was not presenting oral evidence at the hearing.

(3) Postponement would mean relisting afresh and so delay of approximately 4-6 months (the earlier dates proposed by Mr Hingston and available to Mr Davies, were not available to the Tribunal panel).

14. On balance – and conscious that the terms of the Tribunal’s overriding objective incorporate proportionality, cost and timeliness – we decided it was more fair and just to proceed with the hearing as listed, than to postpone.

EVIDENCE

15. The bundle included a witness statement of John Sanders, the officer of BF who made the decision in question, dated 17 December 2020. The attachments to this included correspondence, a copy of the notebook of the BF officer involved in the seizure of the speedboat, and extracts from BF officers’ notes of that seizure and a previous seizure of Mr Sidor’s car in 2013. The Tribunal also had a witness statement of Raymond Brenton, another officer of BF, dated 21 September 2021, explaining that Mr Sanders was on long-term sick-leave and that Mr Brenton was adopting the case. At the hearing, Mr Hingston did not have cross examination questions for Mr Brenton.

16. The bundle also included correspondence and documents served by the appellant. However, the appellant presented no witness evidence. The background to this was that:

(1) under the Tribunal’s directions dated 9 April 2021, all witness statements on which a party wished to rely in the hearing were to be sent to the other party by 4 May 2021 (and the Tribunal was to be notified);

(2) a witness statement of Mr Stojsavljevic dated 10 August 2020 (relating to the value of the speedboat) was excluded from evidence by the Tribunal in directions dated 13 October 2021;

(3) the 13 October 2021 directions also required the appellant, within seven days, to confirm to the Tribunal the name of any witness on whom he intended to rely at the hearing and, if not already provided, immediately send or deliver written statements of those witnesses together with an application for the witness statement to be admitted out of time. No response was received by the Tribunal to this direction.

FINDINGS OF FACT

17. In this section we make findings of fact based on the evidence before the Tribunal and the balance of probabilities.

The day of the seizure

18. On the afternoon of 15 June 2018, Mr Sidor was stopped by BF officers after arriving at a marina in Ramsgate in his speedboat. Mr Sidor told the officers that he had launched the boat at Twickenham and made a nil declaration as to cigarettes. The speedboat was then searched; the back panels of several lockers were unscrewed and removed, and 80,780 cigarettes were found.

19. The cigarettes were seized under s139 Customs and Excise Management Act (**CEMA**) (relevant sections of which are set out in the appendix to this decision) as being liable to forfeiture under s49(1)(a)(i) CEMA. The speedboat was seized under s139 CEMA as being liable to forfeiture under s141(1)(a) as it was used for the carriage of goods liable to forfeiture.

20. The excise duty due on the seized cigarettes was £23,379.55; the VAT due was £10,661.71.

21. Mr Sidor was arrested and charged with the offence (the “**offence**”) of being knowingly concerned in a fraudulent evasion of chargeable duty, contrary to s170 CEMA.

22. Earlier that morning Mr Sidor, with Jacek Byra, had travelled by ferry from Dover to Calais with Mr Sidor's Ford pick-up truck, towing a trailer containing the speedboat. Mr Byra was stopped by BF at around 5 pm on the same day in Dover, driving the truck towing the (empty) trailer. The truck and the trailer were seized.

After the day of the seizure

23. The seizure of the speedboat, truck and trailer as liable to forfeiture was not challenged within the time limit set out in paragraph 3 Schedule 3 CEMA.

24. On 26 June 2018 John Read of HMRC sent an email to Mr Stojsavljevic stating that the return of the vehicles was entirely a BF matter and that HMRC could not assist him further regarding return of the vehicles. Mr Read said that HMRC's matter concerned the criminal investigation into Mr Sidor and the civil investigation into the cash in this case.

25. On 28 June 2018 Mr Sidor sent an email to BF stating that he was informed by DC Semir Pervan of HMRC that from 29 June he would be able to collect his car, trailer and speedboat.

26. On 23 January 2020 at Margate Magistrates Court, Mr Sidor pleaded guilty to the offence. On 13 March 2020 at Maidstone Crown Court, Mr Sidor was sentenced to 8 months imprisonment suspended for two years together with 120 hours of unpaid work and costs of £340. He was sentenced on the basis that this was a first offence: Mr Sidor had no previous convictions.

27. On 18 March 2020 Mr Stojsavljevic wrote to BF asking for restoration of the seized truck, speedboat and trailer pursuant to s152 CEMA.

28. On 17 April 2020 BF decided not to make such restoration. On 29 May 2020 Mr Stojsavljevic's firm asked for a review of that decision, pursuant to ss14-15 Finance Act 1994. On 13 July 2020 BF issued a review conclusion letter (the "**decision**") varying the earlier decision by restoring the truck and trailer (but not changing the earlier decision not to restore the speedboat).

29. After setting out the background, the review decision letter of 13 July 2020 said:

(1) the general policy was that private vehicles used for the improper importation or transportation of excise goods should not normally be restored. The policy was intended to be robust so as to protect legitimate UK trade and revenue and prevent illicit trade in excise goods. However, vehicles may be restored at the discretion of BF, subject to such conditions as the Commissioners see fit e.g. for a fee. A vehicle adapted for the purposes of concealing goods would not normally be restored.

(2) (in amongst quotations from various cases) the comments of the Tribunal judge in *Hemms v HMRC* [2009] UKFTT 355 (TC) may also be apposite in this case:

"Where people attempt to evade excise duty and try to deceive HMRC officers, with conflicting explanations as to why items were purchased and proceed to give half-truths and feeble explanations for the reason for the importation of goods, in such circumstances, those people would not have a right to complain when the vehicle being used for smuggling is confiscated."

(3) all the representations and other material that was available to BF both before and after the time of the 17 April 2020 decision had been examined.

(4) due to the nature of the smuggling event, it was considered to be an aggravated offence; it was concluded that the vehicles should not normally be restored.

(5) whilst the Maidstone court may have accepted that this smuggling attempt was a one-off rather than regular attempts, information available to BF showed that Mr Sidor

was caught smuggling a commercial quantity of concealed cigarettes on a previous occasion, albeit several years ago.

(6) as regards hardship:

(a) one must expect a considerable inconvenience as a result of having a vehicle seized by the BF, and perhaps a considerable expense in making other transport arrangements or even in replacing the car.

(b) hardship is a natural consequence of having a vehicle seized; only exceptional hardship would be considered as a reason not to apply the policy not to restore the vehicle.

(c) the appellant's solicitors said Mr Sidor used the pick-up truck in his construction business; the inconvenience or expense in this case was considered borderline in regard to whether they constitute exceptional hardship over and above what one should expect.

(7) in conclusion:

(a) not to restore Mr Sidor's vehicle and trailer for use in his construction pursuits could be perceived as depriving him of his 'tools of the trade', which could in these times escalate into exceptional hardship.

(b) with regard to the speedboat, this was a deliberate and planned smuggling attempt of a commercial quantity of cigarettes by Mr Sidor, and his chosen modus operandi would have been impossible without it. The possibility that Mr Sidor may have intended to hire his boat out was not considered to constitute an exceptional hardship, or an exceptional or compelling reason to depart from the policy of non-restoration.

(c) the original decision was varied such that the truck and trailer were to be restored free of charge, but the speedboat used to transport the cigarettes would not be restored.

Before the day of the seizure

30. In August 2013 Mr Sidor's car (which he was driving, accompanied by another person) was stopped at Dover and 32,100 cigarettes found: 22,200 in luggage and 10,000 in a spare LPG tank. The car was seized on grounds that it was carrying smuggled goods. Restoration of the car was refused by decision of BF in August 2014.

31. Mr Sidor purchased the speedboat in December 2016 for £33,000.

Matters on which no, or limited, factual findings are made due to lack of evidence

32. The burden of proof in this case falls on the appellant: see s16(6) Finance Act 1994 (set out in the appendix). On the following matters, we have made no, or limited, factual findings, due to lack of evidence before the Tribunal.

Conversation between Mr Stojsavljevic and HMRC in June 2018

33. It was stated in the letter from Mr Stojsavljevic's firm to BF dated 29 May 2020 that the HMRC officer in charge of the criminal proceedings, Mr Pervan, in a conversation with Mr Stojsavljevic in June 2018, informed him that HMRC intended to return the truck, trailer and speedboat; and only later told him that HMRC had transferred these items to BF.

34. No contemporaneous documentation of this conversation was produced to the Tribunal; the precise date of the conversation was not provided; nor did Mr Stojsavljevic produce a witness statement relating to it.

35. However, we have found (at [24]) above that HMRC emailed Mr Stojsavljevic on 26 June 2018 making it clear that the matter was in BF's hands.

36. We find, on the balance of probabilities, that whatever conversation may have taken place between Mr Stojsavljevic and Mr Pervan prior to 26 June 2018 was informal in nature and resulted in a misunderstanding on Mr Stojsavljevic's part about HMRC's role and intentions, that was promptly cleared up in writing by Mr Read's email of 26 June 2018.

£14,000 cash seizure

37. It was asserted in the appellant's grounds of appeal that "when police attended at Mr Sidor's home address, £14,410 was seized and forfeit"; and that Mr Sidor "had further forfeited the majority of his sale proceeds (the £14,100 seized at his home address)". It was asserted in Mr Furlong's skeleton argument that this cash was seized "in relation to the smuggling attempt and not in relation to any suggestion of other criminality."

38. No contemporaneous documentary evidence or witness evidence was adduced by the appellant to the Tribunal in respect of this cash seizure; and it is unclear what is meant by Mr Sidor's "sales proceeds".

39. The cash seizure was, however, alluded to in two near-contemporaneous documents produced by BF to the Tribunal: the 26 June 2018 email from Mr Read of HMRC (see [24] above) mentions "the civil investigation into the cash" as one of the matters handled by HMRC (and not BF); and an email from Mr Read to Mr Sidor dated 25 June 2018 refers to "the court forms from last week's cash detention hearing" (but the forms themselves were not produced in evidence).

40. Based on this evidence, we find, on the balance of probabilities, that Mr Sidor had approximately £14,000 cash seized around the time of the speedboat seizure; however, we find that no connection between the cash seizure and the speedboat seizure has been proved to the required standard, on the evidence, apart from the (obvious) fact that both were made against Mr Sidor; in other words, we find no other linkage between the cash seizure and Mr Sidor's smuggling of 80,00-odd cigarettes using his speedboat.

Origin of the smuggled cigarettes

41. It was stated in the letter from Mr Stojsavljevic's firm to BF dated 29 May 2020 that the smuggled cigarettes were bought at a petrol station in Poland. However, no contemporaneous documentary evidence, or witness evidence, was adduced to the Tribunal support this. On the face of it it seems odd that over 80,000 cigarettes could be purchased at a petrol station. We find that it is not proven to the required standard that the smuggled cigarettes were bought at a petrol station in Poland.

Value of the speedboat

42. The evidence before the Tribunal does not support our making any finding as to the value of speedboat.

Mr Sidor's use of the truck and speedboat for his livelihood

43. It was stated in the letter from Mr Stojsavljevic's firm to BF dated 29 May 2020 that the truck was used in Mr Sidor's construction work; that the speedboat was used for hire; and that Mr Sidor intended to develop a business of hiring the boat.

44. No contemporaneous documentary evidence, or witness evidence, was presented to the Tribunal in respect of these statements.

45. Our intuition is that the owner of a pick-up truck probably does use it for work; on the other hand, it seems to us improbable that the owner of a speedboat would, absent other

information, materially rely on it for his livelihood; and we note that the 29 May 2020 letter indicated that hiring out the speedboat as a business was something Mr Sidor was minded to develop, rather than a reality at the time of the seizure.

46. We therefore find, on the balance of probabilities, that Mr Sidor used the truck to make a living at the time of the seizure; and that he was considering developing the hire of his speedboat as a business, but that had not been actualised at the time of the seizure.

Mr Sidor’s involvement in the smuggling for which his car was used in August 2013

47. It was asserted in the grounds of appeal and Mr Furlong’s skeleton argument that, when smuggled cigarettes were found in Mr Sidor’s car in August 2013, it was the passenger in his car who was responsible for the smuggling; that Mr Sidor had nothing to do with it; and that this was accepted by the revenue authorities.

48. No witness evidence was adduced to the Tribunal to support these assertions. It was submitted that the fact that Mr Sidor was not prosecuted in respect of the incident, indicates that he had nothing to do with it.

49. In our view, the absence of a prosecution does not prove, on the balance of probabilities, that Mr Sidor had nothing to do with the smuggling, given that the smuggling took place in his car, when he was driving it, accompanied by another person. We find that it is not proven to the required standard that Mr Sidor had nothing to do with the smuggling for which his car was used in August 2013.

LAW

50. We set out in the appendix to this decision the relevant statutory provisions.

51. Because a decision under s152(b) CEMA is a “decision as to an ancillary matter”, the Tribunal’s powers are limited to considering whether the decision could not reasonably have been arrived at. If we find it could not reasonably have been arrived at, our powers are limited to making directions of the type referred to at s16(4)(a) to (c) Finance Act 1994.

52. Following the Court of Appeal’s judgement in *HMRC v Jones & Jones* [2011] EWCA Civ 824 (and given the finding at [23] above), when considering the question of reasonableness we must take as a “deemed fact” that the speedboat was “duly” and therefore lawfully condemned as forfeited under paragraph 5 Schedule 3 CEMA.

53. The Court of Appeal in *Customs & Excise Commissioners v JH Corbett (Numismatists) Ltd* [1980] STC 231 set out the correct approach for the Tribunal to follow where it has a supervisory (as opposed to a full merits) jurisdiction as it does in this case. In essence the Tribunal has the power to review the exercise of the discretion exercised by BF under s152(b) CEMA (and varied by BF under s15 Finance Act 1994) and in doing so should answer the following questions:

- (1) Did BF reach a decision which no reasonable director of BF could have reached?
- (2) Does the decision betray an error of law material to the decision?
- (3) Did BF take into account all relevant considerations?
- (4) Did BF leave out of account all irrelevant considerations?

54. However, *John Dee Ltd v Customs & Excise Commissioners* [1995] STC 941 is authority for the proposition that, if the decision in question failed to take into account relevant considerations, the Tribunal may nevertheless dismiss the appeal if we are satisfied that, even if it had taken into account those considerations, BF’s decision would “inevitably” have been the same. We note Warren J’s observation in *GB Housley Ltd v HMRC* [2015] STC 1403 (at

[22]) that this principle operates equally where there a decision-maker has failed to leave irrelevant considerations out of account:

“The second observation relates to the 'inevitably the same' exception. That exception reflects the way in which the law works in relation to decision-making authorities generally. Remedies in this field are discretionary. They are, putting the matter very broadly, designed to protect the citizen against decisions by a public authority which have not been taken properly because such a decision may unfairly impact on the citizen's rights. But there is no such unfairness where the authority's decision would inevitably have been the same even if it had taken account of the incorrectly disregarded material. For my part, I see no difference in principle between that sort of case where material is wrongly ignored and a case where material is wrongly taken into account, provided that the decision would inevitably have been the same had the material been ignored.”

55. In *Balbir Singh Gora v Customs & Excise Commissioners* [2003] EWCA Civ 525, Pill LJ accepted that the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. The overall position was more recently summarised by the Court of Appeal thus in *Behzad Fuels (UK) Ltd v HMRC* [2020] STC 760 at [7]:

“It is common ground that a decision made by HMRC under s152(b) of CEMA 1979 is an 'ancillary matter' for the purposes of s16, from which it follows that the powers conferred on the FTT on an appeal from the relevant review decision are confined to those set out in sub-s(4), and are also dependent upon the FTT being satisfied that the decision is one which HMRC 'could not reasonably have arrived at'. The apparent strictness of this approach has, however, been significantly alleviated by the decision of this court in *Gora v Customs and Excise Comrs, Dannatt v Customs and Excise Comrs* [2003] EWCA Civ 525, [2004] QB 93, [2003] 3 WLR 160, where Pill LJ accepted the submission of counsel for HMRC (Mr Kenneth Parker QC, as he then was) that the provisions of s16 do not oust the power of the FTT to conduct a fact-finding exercise, with the consequence that it is open to the FTT on an appeal from a review decision to decide the primary facts and then determine whether, in the light of the facts it has found, the decision was one which could not reasonably have been reached: see the judgment of Pill LJ at [38] to [39]. The correctness of this approach has not been challenged before us, and in *Jones Mummery* LJ said at [71](7) that he ‘completely agree[d] with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora's* case’.”

56. In ascertaining the reasonableness and lawfulness of the decision, it is necessary to consider whether it was proportionate. *Lindsay v Commissioners of Customs & Excise* [2002] STC 588 concerned a refusal to restore a vehicle by HM Customs & Excise under a policy to refuse restoration of any vehicle used to smuggle goods into the UK. The major issue for the Court of Appeal was whether that policy so fettered Customs' discretion in reviewing restoration decisions as to prevent them from considering proportionality “and thus to render their decisions unlawful” (see at [45]).

57. The court concluded that Customs' policy was flawed because it did not draw a distinction between those who used their cars for commercial smuggling (i.e. smuggling goods in order to sell them at a profit) and the driver importing goods for social distribution to family or friends in circumstances where there was no attempt to make a profit. In the latter situation (i.e. where the purpose of the smuggling was not to make a profit), the principle of proportionality required that each case should be considered on its particular facts, including the scale of importation, whether it was a first offence, whether there was an attempt at concealment or dissimulation, the value of the vehicle, and the degree of hardship that would

be caused by forfeiture. As regards the former situation (commercial smuggling), the court said this at [63] and [72] (Lord Phillips MR and Judge LJ respectively):

“63. ... I would not have been prepared to condemn the commissioners' policy had it been one that was applied to those who were using their cars for commercial smuggling, giving that phrase the meaning that it naturally bears of smuggling goods in order to sell them at a profit. 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. Those circumstances will normally take the case beyond the threshold where that factor can carry significant weight in the balance. Cases of exceptional hardship must always, of course, be given due consideration.”

“72. Given the extent of the damage caused to the public interest, it is, in my judgment, acceptable and proportionate that, subject to exceptional individual considerations, whatever they are worth, the vehicles of those who smuggle for profit, even for a small profit, should be seized as a matter of policy. However, the equal application of the same stringent policy to those who are not importing for profit fails adequately to recognise the distinction between them and those who are trading in smuggled goods ...”

APPELLANT’S CASE

58. According to Mr Furlong’s skeleton argument,

- (1) the decision was flawed because
 - (a) it took account of the following irrelevant matters:
 - (i) that the vehicle was adapted for the purposes of concealing goods, whereas there were no such adaptations; the decision underlined that part of the policy - it is a reasonable inference that it was taken into account;
 - (ii) that Mr Sidor had given half-truths and feeble explanations for the reason for the importation (citing *Hemms*), whereas he admitted bringing the cigarettes to the UK, said (correctly) that it was the only time he had done it and he got caught, and that there was nothing more he could say;
 - (iii) that “on information available to [the BF officer]” Mr Sidor had been caught smuggling a commercial quantity of concealed cigarettes on a previous occasion, whereas the party responsible for the cigarettes in the August 2013 incident was his passenger in the car, the cigarettes were not in the possession or under the control of Mr Sidor, he was nothing to do with that smuggling attempt, and this was accepted by the revenue authorities at the time;
 - (b) it failed to take account of the following relevant matters:
 - (i) in respect of proportionality, that Mr Sidor had forfeited the smuggled cigarettes and thus the full value of what he paid for them;
 - (ii) Mr Sidor had further forfeited “the majority of his sale proceeds” (the £14,100 seized from his home address);
 - (iii) that the forfeiture of the speedboat, valued at considerably more than its purchase price, might well constitute exceptional hardship, notably in the context of Mr Sidor’s expressed intention to hire it out; if BF accepted that the trailer for the speedboat was a tool of his trade, then it is difficult to see

how the same principle should not mean that the speedboat itself fell within that category;

(iv) that the Crown accepted this was a first offence (in the criminal proceedings);

(v) that the purchase of cigarettes from a retail outlet supports the proposition that this was both unsophisticated and a first attempt;

(vi) that the principle of the Crown being an indivisible unity entitles a subject to rely on representations made by a duly authorised representative of the Crown, namely the assertions by the officer of HMRC (conversation Pervan/Stojsavljevic, June 2018) in the criminal proceedings that HMRC intended to return the speedboat, trailer and truck; the appellant relies on the conversation as going to the issues of (a) fairness, and (b) the reasonableness of the decision not to return the speedboat;

(vii) that the value of the duty evaded was considerably less than £50,000 and, in the light of the Border Force policy summarised at C of [10] in *Sczcepaniak (t/a PHU Greg-Car) v Director of Border Revenue* [2019] UKUT 295 (TCC), whether in the alternative a penalty of 100% of the duty evaded might not suffice. If, as BF's counsel said, that policy only applies to 'commercial vehicles', then the speedboat was capable of being used as a commercial vehicle, as the appellant indicated that it would be used for hire purposes.

(2) further, the decision was challenged on the basis that BF took account of information which was not only incorrect (the allegation of involvement in a previous importation) but to which Mr Sidor had not been given any chance to respond.

(3) the decision was also challenged on the basis that there is no, or no proper justification given for allowing the restoration of the truck and the trailer but not the speedboat and no consistency of the approach to the making of the decision in respect of each of these vehicles. It is noted that there was no finding in respect of exceptional hardship in relation to the trailer, but it was nonetheless restored. This inconsistency argument was emphasised by Mr Hingston at the hearing: he said it was best brought out in relation to the trailer: if the trailer was part of the tools of Mr Sidor's trade, then the speedboat must also be.

(4) the cash was seized and forfeit in relation to the smuggling attempt and not in relation to any suggestion of other criminality.

BF'S CASE

59. BF maintained that the decision was reasonable and, given the dicta from *Lindsay* quoted at [57] above, unsurprising. BF did not accept that the decision took into account irrelevant considerations, or left any relevant considerations out of account.

DISCUSSION

60. It seems to us that the general policy applied in making the decision – as to which, see [29(1)] above – was both reasonable and proportionate. The policy seems to us in keeping with the Court of Appeal's dicta in *Lindsay* to the effect that, in general, it is reasonable and proportionate that smuggling using one's private vehicle, with a view to profit, will, absent exceptional circumstances, result in non-restoration of the vehicle. This reasoning applies equally to the speedboat in this case; and the consequence of our taking as a deemed fact that the speedboat was "duly" and therefore lawfully condemned as forfeited (see [52] above), is

that we must equally take as a deemed fact that the 80,000-odd seized cigarettes were held by Mr Sidor for a commercial purpose i.e. not for his own use or as a personal gift – as that is what rendered them liable to forfeiture by reason of regulations 13 and 88 Excise Goods (Holding, Movement and Duty Point) Regulations 2010. Even if this had not been a deemed fact, we would have found, on the balance of probabilities, given the sheer number of cigarettes smuggled, that the smuggling was in order to sell the cigarettes at a profit.

61. Turning now to whether the decision took into account any irrelevant considerations:

(1) In our view the decision did not proceed on the assumption that the speedboat was adapted for the purpose of concealing goods: the fact that those words were underlined in the description of the policy in the decision letter (see [29(1)] above) does not, in and of itself, indicate that this was assumed. We would note that, even if the decision had assumed that the speedboat had been so adapted, this would not in our view have rendered the decision unreasonable, as it could reasonably be said that the speedboat was so adapted, given that fixed panels had be unscrewed in order to find the concealed cigarettes: see [18] above.

(2) Similarly, in our view the decision did not proceed on the assumption that Mr Sidor had given half-truths and feeble explanations for the reason for the importation: the fact that the decision letter said that certain comments of the Tribunal judge in *Hemms* “may be apposite in this case” (see [29(2)] above) does not, in and of itself, indicate that every aspect of those dicta was considered to apply to Mr Sidor.

(3) In our view, when the decision letter said that Mr Sidor had been “caught smuggling” a commercial quantity of concealed cigarettes a number of years ago, it was in all likelihood referring to the facts as we have found them at [30] above. The decision letter could have been more felicitously worded along the lines of, “caught with a commercial quantity of smuggled cigarettes in his car” – but what concerns us here is not exactly how the letter was phrased but what, on the balance of probabilities, was taken into consideration in making the decision. Even if we had found that matters above and beyond the facts found at [30] were taken into consideration in making the decision – such as, an assumption that Mr Sidor had a level of culpability in the August 2013 smuggling incident that would have made him liable to prosecution under s170 CEMA – this would not in our view have rendered the decision unreasonable, as the same decision would inevitably have been made, under BF’s policy, even if there had been no prior incident of smuggling: BF’s policy of non-restoration, as described and considered at [60] above, did not depend on, or give special importance to, whether the owner of the seized vehicle was involved in a prior smuggling incident.

62. Turning now to whether there were relevant considerations left out of account in the decision:

(1) In our view the value of the smuggled cigarettes was not a relevant consideration in making the decision – the law provided for their forfeiture, and it would defeat the purpose of that law if that were to be taken into account in Mr Sidor’s favour in deciding the separate matter of whether to restore the speedboat.

(2) Nor was the fact that Mr Sidor bought the speedboat for £33,000 a relevant consideration in making the decision – as the dicta in *Lindsay* (see [57] above) make clear.

(3) Given our finding at [40] above, the £14,000 cash seizure was not a relevant consideration in making the decision – no relevant connection to the speedboat seizure has been made out.

(4) Given our finding at [41] above, it was not a relevant consideration in making the decision that the smuggled cigarettes were purchased at a petrol station in Poland (as this was not proved).

(5) The informal conversation between Mr Stojsavljevic and HMRC in June 2018, giving rise to a misunderstanding on Mr Stojsavljevic's part about HMRC's role and intentions, was not a relevant consideration in making the decision, not least because the correct position was promptly made clear to Mr Stojsavljevic by Mr Read's email of 26 June 2018 (see our findings at [36] and [24] above).

(6) The findings of fact set out at [10] in *Sczcepaniak* were not a relevant consideration in making the decision: in that paragraph, the Upper Tribunal was quoting the extract of BF's policy on the restoration of vehicles that appeared in BF's review decision letter in that case. In this case, the policy applied was that set out at [29(1)] above. The non-relevance of the factual findings at [10] of *Sczcepaniak* to this case is underlined by the reference there to a significant distinction between the 'driver' and 'operator' of the vehicle: here, the same person (Mr Sidor) was both the driver and operator of the speedboat.

(7) Given our findings at [46] above, it was reasonable for the decision to conclude that non-restoration of the speedboat would not result in exceptional hardship for Mr Sidor: at the time of the seizure, the development of a speedboat-hire business was a possibility for Mr Sidor, but not, by any means, a mainstay of his livelihood.

63. We considered whether the decision was one that could not reasonably have been arrived at, on the grounds that it accepted (see [29(7)(a)] above) that the trailer could be perceived as a tool of Mr Sidor's trade, and that continued deprivation of it could escalate into exceptional hardship – and so restored it to him – and yet refused restoration of the speedboat (which the trailer was used to transport).

64. In our view, the decision to restore the trailer but not the speedboat was one that could reasonably have been arrived at, as it was in our view reasonable to distinguish between the speedboat, which was the vehicle used in the smuggling, and the truck and trailer, which were not used in the smuggling, but had a secondary role – and to take a more stringent line with the former. This reasoning is set out in the decision itself (see [29(7)(b)] above) above and the dicta from *Lindsay* at [57] above support such an approach to the vehicle used for the smuggling.

CONCLUSION

65. Based on the discussion above we conclude that the decision

- (1) was not one which could not reasonably have been arrived at; and
- (2) was proportionate

66. The appeal must accordingly be dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

67. 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.

**ZACHARY CITRON
TRIBUNAL JUDGE**

Release date: 10 DECEMBER 2021

APPENDIX

Relevant legislation

Excise Goods (Holding, Movement and Duty Point) Regulations 2010

13 Goods already released for consumption in another Member State - excise duty point and persons liable to pay

(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person

- (a) making the delivery of the goods;
- (b) holding the goods intended for delivery; or
- (c) to whom the goods are delivered.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held—

- (a) by a person other than a private individual; or
- (b) by a private individual (“P”), except in a case where the excise goods are for P’s own use and were acquired in, and transported to the United Kingdom from, another Member State by P.

(4) For the purposes of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P’s own use regard must be taken of—

- (a) P’s reasons for having possession or control of those goods;
- (b) whether or not P is a revenue trader;
- (c) P’s conduct, including P’s intended use of those goods or any refusal to disclose the intended use of those goods;
- (d) the location of those goods;
- (e) the mode of transport used to convey those goods;
- (f) any document or other information relating to those goods;
- (g) the nature of those goods including the nature or condition of any package or container;
- (h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities—

- 10 litres of spirits,

- 20 litres of intermediate products (as defined in article 17(1) of Council Directive 92/83/EEC),
- 90 litres of wine (including a maximum of 60 litres of sparkling wine)
- 110 litres of beer,
- 800 cigarettes,
- 400 cigarillos (cigars weighing no more than 3 grammes each),
- 200 cigars,
- 1 kilogramme of any other tobacco products;

(i) whether P personally financed the purchase of those goods;

(j) any other circumstance that appears to be relevant.

(5) For the purposes of the exception in paragraph (3)(b)—

(a) “excise goods” does not include any goods chargeable with excise duty by virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or of any order made under section 10 of the Finance Act 1993;

(b) “own use” includes use as a personal gift but does not include the transfer of the goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them).

(6) Paragraphs (1) and (2) do not apply—

(a) where the excise duty point and the person liable to pay the duty are prescribed by the Excise Goods (Sales on Board Ships and Aircraft) Regulations 1999; or

(b) in the case of chewing tobacco; or

(c) in the case of tobacco for heating.

88 Forfeiture of excise goods on which the duty has not been paid

If in relation to any excise goods that are liable to duty that has not been paid there is—

(a) a contravention of any provision of these Regulations, or

(b) a contravention of any condition or restriction imposed by or under these Regulations,

those goods shall be liable to forfeiture.

Customs and Excise Management Act 1979

49 Forfeiture of goods improperly imported.

(1) Where—

(a) ... any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty—

(i) unshipped in any port,

...

those goods shall ... be liable to forfeiture.

139 Provisions as to detention, seizure and condemnation of goods etc

(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer...

...

(6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the customs and excise Acts.

141 Forfeiture of ships, etc used in connection with goods liable to forfeiture

(1) ...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; and

(b) any other thing mixed, packed or found with the things so liable,

shall also be liable to forfeiture.

152 Power of Commissioners to mitigate penalties, etc

The Commissioners may, as they see fit –

(a) ...

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under [the customs and excise] Acts ...

170 Penalty for fraudulent evasion of duty, etc.

(1) ...

(2) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion—

(a) of any duty chargeable on the goods;

...

he shall be guilty of an offence under this section and may be detained.

(3) ... a person guilty of an offence under this section shall be liable—

- (a) on summary conviction, to a penalty of £20,000 or of three times the value of the goods, whichever is the greater, or to imprisonment for a term not exceeding 6 months, or to both; or
- (b) on conviction on indictment, to a penalty of any amount, or to imprisonment for a term not exceeding 7 years, or to both.

...

Schedule 3: Provisions relating to forfeiture

3. Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise.

4. (1) Any notice under paragraph 3 above shall specify the name and address of the claimant and, in the case of a claimant who is outside the United Kingdom and the Isle of Man, shall specify the name and address of a solicitor in the United Kingdom who is authorised to accept service of process and to act on behalf of the claimant.

(2) Service of process upon a solicitor so specified shall be deemed to be proper service upon the claimant.

5. If on the expiration of the relevant period under paragraph 3 above, for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited.

Finance Act 1994

14 Requirement for review of decision under s152(b) [CEMA]

(1) This section applies to the following decisions of HMRC, not being decisions under this section or section 15 below, that is to say -

(a) any decision under s152(b) [CEMA] as to whether or not any thing forfeited or seized under the custom 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 s152(b) [CEMA] .

(2) Any person who is –

(a) ...

(b) a person in relation to whom, or on whose application, such a decision has been made, or

(c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied

may by notice in writing to the Commissioners require them to review that decision.

...

15 Review procedure

(1) Where the Commissioners are required in accordance in accordance with section 14 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 further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

...

16 Appeals to a tribunal

(1) An appeal against a decision on a review under section 15 ... may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.

(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 that has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

...

(6) On an appeal under this section ... it shall ... be for the appellant to show that the grounds on which any such appeal is brought have been established.