Neutral Citation: [2024] UKFTT 00341 (TC)

Case Number: TC09145

FIRST-TIER TRIBUNAL
TAX CHAMBER

[Taylor House]

Appeal reference: TC/2022/02181

RESTORATION – trailer adapted to conceal goods and seized as liable to forfeiture - no condemnation proceedings and no challenge to legality of seizure therefore trailer (and goods) deemed as forfeit – the deeming provisions in Schedule 3 of the Customs and Excise Management Act 1979 - Jones and Race considered and applied - whether review reasonable – yes – whether hardship considered – yes - Appeal dismissed

Heard on: 27 April 2023 & 28 March 2024
Judgment date: 25 April 2024

Before

JUDGE NATSAI MANYARARA
GILL HUNTER

Between

LKV IVICA LTD

Appellant

and

DIRECTOR OF BORDER REVENUE

Respondents

Representation:

For the Appellant: Mr Chike Ezike, Universe Solicitors

For the Respondents: Ms Lucy Lodewyke of Counsel and Ms Kellina Gannon of Counsel

DECISION

INTRODUCTION

1. The Appellant appeals against the Respondent's decision, dated 26 October 2021, not to restore his trailer: Koegel SN 24 reg. CO2500EM ('the Trailer'). The Respondent concluded that the Trailer had been adapted to conceal goods, namely ten kilograms of Class A drugs (Cocaine), with a street value of £400,000 ('the Goods'). The Trailer and the Goods were being pulled by a Volvo tractor unit (reg. CA6823XT), which was owned by a third-party (who the Respondent concluded was innocent) and does not form part of the decision under appeal, or indeed the appeal. The tractor unit was collected by the third-party on 4 April 2022. The Trailer was seized under s 139 of the Customs and Excise Management Act 1979 ('CEMA') as being liable to forfeiture under s 141 CEMA. The legality of forfeiture was not challenged and the Trailer is deemed to have been condemned under para. 5 of Schedule 3 of CEMA.

2. The Appellant's case is that the decision to restore the Trailer is not reasonable because he was an innocent driver/haulier and is not responsible for the Goods.

3. The documents to which we were referred included the: (i) Document Bundle consisting of 178 pages (PDF 192 pages) – which included the witness statement of Officer Adam Clark, dated 12 April 2022, who gave evidence before us; (ii) Respondent's Skeleton Argument, dated 3 February 2023; and (iii) Witness Statement of Border Force Officer Gareth Michael White, dated 24 April 2023, who dealt with the seizure.

ISSUES

4. The issue before us is whether the decision not to restore the Trailer was reasonable.

BACKGROUND FACTS

5. On 8 May 2021, at the inward freight controls, Eastern Docks, Dover, the Trailer was intercepted. The Trailer was being pulled by a tractor unit driven by Mr Bogdanoski. Mr Bodganoski confirmed that LKV Ivika Ltd was his company and that he owned the Trailer. The Trailer had been loaded in Germany and had a load destined for one address in the UK. Mr Bogdanoski did not see the Trailer being loaded.

6. A scan of the Trailer revealed an anomaly and the Trailer was the searched. Whilst searching the load, a Border Force officer noticed a brown handled knife on the floor of the Trailer, next to a pallet. On this pallet, the officer discovered four wrapped packages between the boxes of the load. The officer cut into one of the packages and this revealed a white powder. More packages were found at the base of another pallet. The officer conducted a test on the contents of the packages, which returned a positive cocaine HCL result. The total amount of cocaine found was 10 kilograms.

7. Mr Bogdanoski was arrested and interviewed under caution by the National Crime Agency ('NCA'). He gave "no comment" responses in interview and was released pending further investigations. Following the detection of illicit drugs, the officer was satisfied that the tractor unit and the Trailer were liable to forfeiture under s 141(1)(a) CEMA and were seized under s 139(1) CEMA. This was because it was transporting prohibited, or restricted, goods that were liable to forfeiture. Mr Bogdanoski was issued with form BOR156 (Seizure Information Notice) and Notice 12A (What you can do if things are seized). Notice 12A explained that a person can challenge the legality of the seizure in the Magistrates. Court by sending a Notice of Claim to the Respondent within one month of the date of the seizure.

8. By an email dated 26 May 2021, Mr Bogdanoski made an inquiry about the tractor that was understood to be a restoration request for the tractor unit. On 20 June 2021, the National

Post-Seizure Unit ('NSPU') acknowledged the request and raised a number of questions about the ownership and use of the tractor.

9. On 12 July 2021, the NSPU stated that they were still awaiting answers to the questions previously posed.

10. Following further exchanges of correspondence between Mr Bogdanoski and the NSPU on 30 September 2021, 1 October 2021, 4 October 2021, 6 October 2021, and 8 October 2021 in which further requests for information and clarification were made, by a letter dated 26 October 2021, the Respondent refused restoration (in respect of the Trailer).

11. On 13 November 2021, Mr Bogdanoski requested a review of the decision to refuse to restore the Trailer and he was asked to provide the information requested once again.

12. On 15 December 2021, the review conclusion upheld the decision.

APPEAL HEARING

13. The hearing took place over two days: 27 April 2023 and 28 March 2024. Ms Lodewyke represented the Respondent on 27 April 2023 and Ms Gannon represented the Respondent on 28 March 2024.

14. Mr Bogdanoski attended the hearing in person on 27 April 2023, and his evidence was complete on that date. Mr Bogdanoski was assisted by a Macedonian interpreter during the hearing. The hearing was adjourned, part-heard. At the resumed hearing on 28 March 2024, Mr Bogdanoski had joined the hearing remotely. It was clear, however, that permission had not been sought and given by the Foreign, Commonwealth and Development Office ('FCDO') for him to join the hearing from abroad. He, therefore, merely observed proceedings at the resumed hearing.

Preliminary matters

15. At the commencement of the hearing on 27 April 2023, both parties confirmed that they had the same documentation that was before the Tribunal. Mr Ezike then submitted that he had provided the Respondent with documents that had not been included in the bundle. The first set of documents were pictures of a trailer unit. It was accepted that the pictures were not of the Trailer unit which is the subject of the decision under appeal. The second document was a Code of Conduct relating to a company known as "Verhaltenskodex". Once again, it was accepted that this code of conduct did not relate to the Appellant. The Respondent did not object to these documents being considered once it was agreed that they did not relate to the Trailer and the Appellant's code of conduct.

16. We decided to admit the documents as there was no objection from the Respondent, and on the basis that the documents may be a useful aid to Mr Bogdanoski's evidence.

17. At the commencement of the hearing on 28 March 2024, Mr Ezike submitted that he wanted to provide an update on the criminal proceedings following the seizure after Mr Bogdanoski had been arrested and investigated. We decided that the criminal proceedings had no bearing on the issue before us as the legal tests and standard of proof applied were different, and the issue before us was solely in relation to the reasonableness of the decision not to restore the Trailer.

Evidence and Submissions

18. At the commencement of the hearing on 27 April 2023, Ms Lodewyke opened the Respondent's case, as set out in the Statement of Case. We then heard oral evidence from Mr Bogdanoski, who adopted the contents of his witness statement, dated 25 August 2022, as being true and accurate. In response to further questions in examination-in-chief from Mr

Ezike, he said that there was no particular reason why he had provided the pictures and the code of conduct, but that he wanted to rely on them as the Appellant's practices had not been taken into consideration by the Respondent, in reaching the decision not to restore.

19. Under cross-examination, Mr Bogdanoski confirmed that he understood the decision under appeal, and that it was for him to prove that the decision not to restore the Trailer was unreasonable. He accepted that the Respondent had asked him a number of questions since May 2021. He further accepted that he had provided a 'no comment' interview when interviewed. Mr Bogdanoski explained that he did not understand English, and that all of his correspondence with the Respondent had been through Google (translate). He added that he had responded to the questions that he could understand and had responded to some questions that the police had asked. He nevertheless accepted that his witness statement had been drafted in English.

20. When asked why he had never requested any assistance in understanding the correspondence, he stated that this was the first time that something like this (the seizure) had happened to him and he did not know where to ask for help. He added that being arrested had been catastrophic, and that he subsequently managed to find Mr Ezike to assist him.

21. In respect of the failure to provide the PIN to his laptop and phone when he was intercepted, Mr Bogdanoski stated that this was because those details were private. He accepted that he had earlier told the Border Force officers that he did not remember the PINs, and said that that was because he could not remember the PINs at the time. Mr Bogdanoski further accepted that the Trailer had cocaine concealed in it when he was intercepted by Border Force. He accepted that if he had provided the PIN, checks could have been made by the officers when he was intercepted.

22. In respect of the lack of any further information from him, such as the Appellant's policy to ensure that illegal goods are not carried, Mr Bogadnoski's evidence was that he may have forgotten to provide the company policy. He alternatively stated that agreements are usually oral and not written. He explained that the code of conduct that he had provided at the start of the hearing related to the company (a freight forwarder) that the Appellant had been transporting the Goods for. He further explained that he believed that the photographs would show how the Trailer is usually packed when it has a full load.

23. In respect of the Appellant's policy when transporting goods, Mr Bogdanoski stated that loads are inspected, but that a driver is unable to physically attend to any loading if this is not permitted by the company that owns the goods. Mr Bogdanoski accepted that he did not watch the consignment being loaded and that the documents may not have corresponded with the load he was carrying when he was intercepted. He repeated that he did not understand English and that he had simply been given a loading form that did not include any detail about what was loaded. He further accepted that his evidence that he was not permitted to observe the consignment being loaded was different to his earlier claim that he could not enter the Trailer to inspect the load (due to the Trailer being full). He stated that he superficially checked the Trailer once it was loaded, but accepted that he did not have a record of the inspection that he carried out. He further stated that he could not check every box separately, but could only check the number of pallets.

24. When asked how he satisfied himself that the companies he was collecting from and delivering to were legitimate, he stated that he was just the transporter, and that Vertex did the checks. He further stated that he did not know what other checks he could make. When asked about the destination of the Goods, and why the delivery address (Leicester) was different from where the actual recipient was located (Barnsley District), his evidence was that he is guided by the CMR.

25. In respect of other protective measures once a consignment was loaded, Mr Bogdanoski stated that the Trailer did not have a seal, but had wires to the side. When it was put to him that a seal would have been another protective measure that the Appellant could have taken, his evidence was that he did not know whether such a measure would have assisted on this occasion. His evidence was that when he noticed a rip on the side of the Trailer, he called the freight forwarding company. He added that he did not mention this to the officers when he was intercepted because he had not been given the opportunity to mention it. He, alternatively, stated that when he had previously reported migrants to the authorities, he had been fined.

26. In respect of the issue of hardship, his evidence was that he was unclear as to the sort of evidence that he could provide to substantiate the claim that there would be hardship. He added that he cannot sleep and his life has changed. He further added that the Appellant is a small company and that he needs to work to survive.

27. There was no re-examination and no further witnesses were called on behalf of the Appellant.

28. At the resumed hearing on 28 March 2024, we heard from Officer Clark. Officer Clark is a Higher Officer of UK Border Force and is currently employed as a review officer. He completed the review of the decision not to restore the trailer.

29. Officer Clark adopted the contents of his witness statement, dated 12 April 2022, as being true and accurate. In response to further questions in examination-in-chief from Ms Gannon, he said that it was the Respondent's usual practice to write to individuals who had vehicles or goods seized on one occasion before a decision as to restoration is made, in order to give them an opportunity to provide an explanation. He explained that on this occasion, the Respondent had written to the Appellant on a number of occasions. He referred to the emails that had been sent to Mr Bogdanoski in this respect. He added that the Respondent accepts that there is always some hardship when an individual loses their vehicle. He explained that in those circumstances the Respondent would expect to see some evidence to substantiate a claim to hardship, such as an inability to pay one's mortgage or feed their family.

30. He concluded his evidence by saying that he had not seen the late evidence produced by Mr Bogdanoski prior to the date of the hearing (i.e., the photographs and code of conduct).

31. Under cross-examination, Officer Clark stated that the reason for the refusal to restore the Trailer was not only because of Mr Bogdanoski's failure to respond to enquiries, but also because the Respondent's policy was not to restore when drugs discovered during an interception exceed 100g. He added that Mr Bogdanoski had been given an opportunity to present his case and state why the Trailer should be restored. When it was put to him that Mr Bogdanoski's limited English would have been apparent during the Respondent's enquiries, Officer Clark's evidence was that some of the correspondence received from Mr Bogdanoski showed a good grasp of English, and that Mr Bogdanoski simply chose not to answer the questions that he was being asked to the extent that he referred to the difficulties that drivers face from migrants. He added that Mr Bogdanoski could have relied on the services of a translator. He disagreed that the correspondence received from the Appellant provided the answers that the Respondent was seeking.

32. Officer Clark referred to the discrepancy between the delivery note and the delivery address on the CMR, and the fact that Mr Bogdanoski had failed to provide the PIN codes to his devices, which he considered not to be the actions of an innocent haulier. His conclusion was that Mr Bogdanoski would have provided further information if he had nothing to hide. In respect of the rip to the side of the Trailer, Officer Clark's position was that Mr Bogdanoski failed to inform the Respondent of this at the time of the interception.

33. In respect of the issue of hardship, Officer Clark's evidence was that the claim to hardship was not substantiated by any evidence.

34. In re-examination, Officer Clark said it was not the Respondent's practice to provide translated documents.

35. Following completion of the oral evidence, we heard submissions from both representatives.

36. Ms Gannon submitted (in reliance on the Skeleton Argument) that:

(1) The decision not to restore the Trailer was one that was reasonably arrived at and the Appellant has not advanced a positive case that the decision was not one that could be reasonably arrived at.

(2) The Review Officer applied the Respondent's policy on the restoration of commercial vehicles used for smuggling drugs, and there was no fetter to the discretion exercised. The policy is intended to be robust, in order to tackle cross-border smuggling and to disrupt the supply of excise goods to the illicit market. The policy is used to ensure that there is a consistent, verifiable and uniform method to decision-making.

(3) The amount of Class A drugs seized in the Trailer was over 100g and, therefore, under the policy, restoration would only be considered in exceptional circumstances.

(4) The Review officer considered whether the Appellant had taken reasonable steps to prevent smuggling attempts. In so doing, the Respondent asked various questions in order to give the Appellant an opportunity to demonstrate that reasonable steps had been taken.

(5) The Appellant has not put forward any grounds which lead the Respondent to conclude that the decision as unreasonable and Mr Bogdanoski was asked a number of questions by email. Whilst some emails were responded to, he did not answer all of the questions posed. It is the Respondent's policy to only send one email to give an opportunity to provide further information. A number of emails were sent in this appeal and the only explanation is that Mr Bogdanoski did not have any answers to the questions that were being asked, or had failed to carry out the checks required to avoid illegal consignments.

(6) Even if the Appellant was not complicit in the smuggling, the Appellant was at least reckless.

(7) Hardship is a consequence of seizure and exceptional circumstances would need to be shown in relation to the issue of hardship.

37. In reply, Mr Ezike submitted (in reliance on the Grounds of Appeal) that:

(1) The decision not to restore the Trailer was not reasonable. The Respondent asserts that the Appellant failed to respond to numerous enquiries. The reasons for a failure to respond to some enquiries was because Mr Bogdanoski does not speak, or understand, English. All enquiries made by the Respondent were in English. This was not, therefore, a case where Mr Bogdanoski was refusing to answer. The Respondent had the answers to the questions that were being asked and he genuinely believed that he had provided all of the information.

(2) The no-comment interview and decision not to provide the PINs would have been taken after legal advice. Mr Bodganoski had forgotten the PINs by the time the request was made again.

(3) The Appellant's policy is that the driver should observe the loading of the Vehicle. Mr Bogdanoski was unable to carry out a thorough inspection due to the way in which the Trailer had been packed. His evidence was that there was nothing that appeared unusual and he had no reason to lie or mislead. Mr Bogdanoski openly stated that he did not see the consignment being loaded as there were restraints due to the COVID pandemic. There was no finding of recklessness in the original decision.

(4) All stops and breaks were taken at authorized check points. At one rest point, it was noted that the trailer was ripped, but Mr Bogdanoski could not access the trailer to check if there was anything of concern.

(5) There are no concerns regarding the consignor or consignee.

(6) The Appellant has suffered exceptional hardship and the absence of any evidence is not determinative of the issue of hardship.

(7) The Tribunal is entitled to consider further evidence that was not before the decision-maker.

38. At the conclusion of the hearing, we reserved our decision, which we now give with reasons.

RELEVANT LAW

39. The relevant law, so far as is material to the issues in this appeal, is as follows:

40. Section 2(1)(a) of the Misuse of Drugs Act 1971 ('the 1971 Act') defines "controlled drugs". These are listed in Parts I, II or III of Schedule 2 to the Act. Cocaine is listed under Part I as a "Class A drug". Section 3 of the 1971 Act provides that:

> "**3 Restriction of importation and exportation of controlled drugs.**
>
> (1) Subject to subsection (2) below—
>
> (a) the importation of a controlled drug; and
>
> (b) the exportation of a controlled drug, are hereby prohibited.
>
> (2) Subsection (1) above does not apply—
>
> (a) to the importation or exportation of a controlled drug which is for the time being excepted from paragraph (a) or, as the case may be, paragraph (b) of subsection (1) above by regulations under section 7 of this Act or by provision made in a temporary class drug order by virtue of section 7A; or
>
> (b) to the importation or exportation of a controlled drug under and in accordance with the terms of a licence issued by the Secretary of State and in compliance with any conditions attached thereto."

41. Section 49(1)(b) CEMA provides that:

> "**49 Forfeiture of goods improperly imported**
>
> (1) Where-
>
> …
>
> b. any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment...those goods shall, subject to subsection (2) below, be liable to forfeiture"

42. Section 139(1) CEMA provides that:

> "**39 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 or constable or any member of Her Majesty's armed forces or coastguard."

43. Section 141(1) CEMA provides that:

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

(1) Without prejudice to any other provision of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the customs and excise Acts—

(a) any ... 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 thing so liable, shall also be liable to forfeiture.

(2) Where any ... vehicle or animal has become liable to forfeiture under the customs and excise Acts, whether by virtue of subsection (1) above or otherwise, all tackle, apparel or furniture thereof shall also be liable to forfeiture."

44. In relation to restoration, s 152 CEMA provides that:

"**152 Powers of Commissioners to mitigate penalties, etc.**

The Commissioners may, as they see fit-

…

(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts…"

45. Section 15(2) of the Finance Act 1994 ('FA 1994') refers to the decision-making process:

"**15 Review procedure.**

(1) Where the Commissioners are required in accordance with section 14 or 14A 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 section 14 or 14A to have confirmed the decision."

46. Section 16 FA 1994 refers to the jurisdiction of the First-tier Tribunal ('FtT') in a number of areas which are specified in Schedule 5 FA 1994, as follows:

"**16 Appeals to a tribunal.**

…

(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making

that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—

> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

47. I will return to consider the jurisdiction of the FtT in this appeal shortly.

FINDINGS OF FACT

48. We have derived considerable benefit from hearing the oral evidence given in this appeal. We find that there were some internal inconsistencies in Mr Bogdanoski's in relation to the Appellant's policy, the steps that he took to inspect the load and the information that he gave to the Respondent when enquiries were being made. We find Officer Clark to be a credible and reliable witness whose evidence we accept as representing a truthful and accurate description leading up to the decision not to restore the Trailer, and the subsequent review of that decision. Having heard the evidence, we make the following findings of fact and give our reasons for the decision:

(1) At the time of the interception on 8 May 2021, a scan of Mr Bogdanoski's Trailer revealed an anomaly and the Goods were discovered. The Goods were drugs (cocaine) and the Goods exceeded the weight of 100g.

(2) Between June and November 2021, the NSPU and the Respondent sought further information from Mr Bogdanoski. Mr Bogdanoski failed to respond to the specific questions asked by the Respondent, despite providing some information in his email correspondence. He did not seek independent advice prior to the decision being made and did not use the services of a translator when dealing with correspondence from the Respondent.

(3) Mr Bogdanoski was interviewed under caution by the NCA and he provided 'no comment' responses. A request was made for him to provide the PINs/passcodes to his devices and he initially stated that he did not remember the PINs/passcodes. He later stated that he had forgotten the PINs/passcodes. Mr Bogdanoski did not alert the Border Force officers to the tear that appeared at the side of the Trailer.

(4) The Appellant does not have any written codes of conduct or policies in respect of the transportation of goods.

(5) Mr Bogdanoski did not inspect the load as it was being placed in the Trailer and he did not carry out any independent checks in respect of whether the Goods corresponded to the documentation, or in respect of where the recipient of the Goods was located.

DISCUSSION

49. The Appellant appeals against the decision not to restore a Trailer that was intercepted at the inward freight controls at Easter Docks, Dover, on 8 May 2021. The Trailer was being pulled by a Volvo tractor and the Trailer was found to contain cocaine. Mr Ezike submits that the Respondent's decision failed to consider Mr Bogdanoski's language difficulties, the fact that some information had already been provided to the Respondent (albeit not directly in

response to the questions asked). He further submits that the Tribunal can consider further information that has come to light since the decision was taken, and that the issue of hardship is not contingent upon documentary evidence being provided.

50. Ms Gannon submits that the Respondent's decision was reasonable, in accordance with the Respondent's policy and took into consideration all of the evidence provided at the time the decision was made.

51. The powers of the FtT on an appeal are set out in s 16 FA 1994. The FtT has power to review decisions of HMRC in a number of administrative areas which are specified in Schedule 5, FA 1994. These decisions are referred to, collectively, as "ancillary matters". Section 16(4) FA 1994 confers a limited jurisdiction on the FtT to examine the reasonableness of ancillary decisions, but with very limited powers to give effect to such findings. It would not allow the FtT, or the Upper Tribunal ('UT'), to quash the decision appealed against: *CC&C Ltd. v R & C Comrs* [2015] 1 WLR 4043 ('*CC&C Ltd*'), at [16] (per Underhill LJ). The appeal against the decision not to restore the Trailer is an ancillary matter, under Schedule 5, and falls for review by virtue of s 14(1) FA 1994.

The deeming provisions

52. The Appellant did not challenge the seizure of the Trailer, albeit that Mr Ezike sought to raise the outcome of the criminal proceedings in relation to the Goods at the resumed hearing before us. Pursuant to para. 5 of Schedule 3, in the absence of a notice of claim under para. 3 complying with the requirements of para. 4, seized goods shall be deemed to have been duly condemned as forfeit. This is the legislative scheme in Schedule 3 CEMA. The effect of para. 5, Schedule 3 CEMA was considered by the Court of Appeal in *HMRC v Jones & Jones* [2011] EWCA Civ 824 ('*Jones*'). There, the Court of Appeal concluded that the lack of a challenge to the seizure means that it is not open to the FtT to entertain any argument which would be inconsistent with the legality of the seizure.

53. In *Jones*, the appellants had maintained, in an appeal against the non-restoration of goods and their vehicle, that the goods had been for their personal use and gifts for members of their family. The Court of Appeal held that the tribunal had no power to re-open and redetermine the question of whether or not the seized goods had been legally imported for personal use. Mummery LJ, with whom Moore-Bick and Jackson LJJ agreed, held, at [73], that the question was "already the subject of a valid and binding deemed determination under [CEMA]" and the FtT only had jurisdiction to hear an appeal against a review decision on the deemed basis of the unchallenged process of forfeiture and condemnation. Mummery LJ provided guidance on the provisions of CEMA, the relevant authorities and the articles of the Convention. He said this, at [71]:

> "71. I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.
>
> (1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UT are statutory appellate bodies that have not been given any such original jurisdiction.
>
> (2) The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.
>
> (3) The respondents in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.

(4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned *and* to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

(5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.

(6) The deeming provisions in paragraph 5 and the restoration procedure are compatible with Article 1 of the First Protocol to the Convention and with Article 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods. The notice of claim procedure was initiated but not pursued by the respondents. That was the choice they had made. Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.

(7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora* and as approved by the Court of Appeal in *Gascoyne*. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion.

(8) The tentative obiter dicta of Buxton LJ in *Gascoyne* on the possible impact of the Convention on the interpretation and application of the 1979 Act procedures and the potential application of the abuse of process doctrine do not prevent this court from reaching the above conclusions. That case is not binding authority for the proposition that paragraph 5 of Schedule 3 is ineffective as infringing Article 1 of the First Protocol or Article 6 where it is not an abuse to reopen the condemnation issue; nor is it binding authority for the propositions that paragraph 5 should be construed other than according to its clear terms, or that it should be disapplied judicially, or that the respondents are entitled to argue in the tribunal that the goods ought not to be condemned as forfeited.

(9) It is fortunate that Buxton LJ flagged up potential Convention concerns on Article 1 of the First Protocol and Article 6, which the court in *Gora* did not expressly address, and also considered the doctrine of abuse of process. The Convention concerns expressed in *Gascoyne* are allayed once it has been appreciated, with the benefit of the full argument on the 1979 Act, that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner.

> (10) As for the doctrine of abuse of process, it prevents the owner from litigating a particular issue about the goods otherwise than in the allocated court, but strictly speaking it is unnecessary to have recourse to that common law doctrine in this case, because, according to its own terms, the 1979 Act itself stipulates a deemed state of affairs which the FTT had no power to contradict and the respondents were not entitled to contest. The deeming does not offend against the Convention, because it will only arise if the owner has not taken the available option of challenging the legality of the seizure in the allocated forum."

54. *Jones* is, therefore, clear authority for the proposition that the FtT has no jurisdiction to go behind the deeming provisions in para. 5 of Schedule 3 CEMA and the circumstances in *Jones* fall squarely on the circumstances in this appeal. *Jones* was applied in *HMRC v Race* [2014] UKUT 03331 (TCC) ('*Race*'), in the context of an appeal against an assessment to excise duty. There, Warren J said:

> "26…If goods are condemned to be forfeited, whether in fact or as the result of the statutory deeming, it follows that, having been bought in a Member State and then imported by Mr and Mrs Jones, they were not held by the taxpayers for their own personal use in a way which exempted the goods from duty. The reasoning and analysis in *Jones* did not turn on the fact that the case concerned restoration of the goods and not assessment to duty."
>
> …
>
> 33…It is clearly not open to the tribunal to go behind the deeming effect of paragraph 5 Schedule 3 for the reasons explained in *Jones* and applied in *EBT* [i.e., *HMRC v European Brand Trading Ltd* [2014] UKUT 226 (TCC), a decision of Morgan J]. The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones."

55. In *HMRC v European Brand Trading Ltd* [2014] UKUT 0226 (TCC) ('*ETB*'), Morgan J said this, at [57] and [63], in relation to seized goods:

> "57. The effect of the order of the magistrates' court on 13 May 2010 is that in law, as between HMRC and EBT, duty was not paid on the goods seized on 20 August 2009. The effect of paragraph 5 of schedule 3 to the 1979 Act is that in law, as between HMRC and EBT, duty was not paid on the goods seized on 16 February 2010.
>
> …
>
> 63. For the above reasons, I am unable to accept the submission made by counsel for EBT on the appeal to the Upper Tribunal, which I have set out above, to the effect that the review officer is required to consider "that material relevant to the duty paid status of the seized goods which was available to and considered by the relevant officer at the relevant time". As at the time of the further review decision, the duty paid status of the seized goods is established to be that duty was not paid. It is irrelevant to inquire as to what might have been argued to have been the apparent position at an earlier time."

56. Morgan J's decision in *ETB* was subsequently upheld by the Court of Appeal: [2016] EWCA Civ 90, where Lewison LJ quoted, and endorsed, Warren J's decision in *Race*, at [38] and [39] of his judgment.

57. What can be gathered from these authorities is that the legislation does not provide for a right of appeal to the FtT against forfeiture and condemnation. The FtT has no express jurisdiction to determine such an issue on appeal. The nature and scope of the right of appeal to the FtT is against the discretionary review decision on the issue of restoration. If a challenge to the legality of the seizure is not pursued, the FtT must proceed on the basis that the Trailer was legally seized. In consequence, any facts relating to the legality of the seizure must be taken to have been proved and there can be no attempt to re-adjudicate these facts. It is clear that the issue relating to legality of seizure was for decision by the courts in

condemnation proceedings. Furthermore, Notice 12A is clear that unless seizure is challenged, it is not possible to argue that the Trailer was not liable to forfeiture. The FtT has no power to order restoration.

58. In *DV3 RS LP v HMRC* [2013] EWCA Civ 907, in the context of SDLT legislation, Lewison LJ said this, at [13], in respect of deeming provisions:

> "Sections 44 and 45 [Finance Act 2003] are what are sometimes called "deeming provisions". The Upper Tribunal referred to the discussion of such provisions by Peter Gibson J sitting in this court in *Marshall v Kerr* [1993] STC 360 after citation of well-known authorities, including the speech of Lord Asquith in *East End Dwellings Co Ltd v Finsbury BC* [1952] AC 109, 132, Peter Gibson J said:
>
> > "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.""

59. At [15] Lewison LJ made further comments on the interpretation of these provisions:

> "Although sections 44 and 45 are "deeming provisions" the fact that we are concerned with such provisions does not displace the ordinary principles of statutory interpretation: *HMRC v DCC Holdings (UK) Ltd* [2010] UKSC 58. In my recent judgment in *The Pollen Estate Trustee Company Ltd v HM Revenue and Customs* [2013] EWCA Civ 753 I set out what I believe to be those principles. Mr Gammie placed some reliance on the relevant passage, and Mr Thomas did not say that it was wrong. I repeat it here for convenience:
>
> > "The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. This approach applies as much to a taxing statute as any other: *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991; *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51. In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole: *WT Ramsay Ltd v Commissioners of Inland Revenue* [1982] AC 300; *Barclays Mercantile Business Finance Ltd v Mawson* at [29]... But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found: *Barclays Mercantile Business Finance Ltd v Mawson* at [32]."

60. The difference in fact and law in these authorities and the appeal before us do not negate the need to give effect to the deeming provisions. Having reviewed all of the authorities, and in light of the incontrovertible facts of this appeal, we find that the Appellant did not challenge the legality of the seizure by invoking and pursuing the appropriate procedure. We therefore find that the Trailer was, therefore, deemed to have been condemned as forfeit. This is the effect of the clear deeming provisions in CEMA. There is, therefore, in truth, only one live issue before this Tribunal; that is whether the decision to refuse to restore the Trailer was reasonable.

Q. Was the decision not to restore reasonable?

61. There is a single test of reasonableness. In *Lindsay v C & E Comrs* [2002] STC 588; [2002] 1 WLR 1766 ('*Lindsay*'), the court held that in a restoration case, the Commissioners'

decision will be unreasonable if *"they take into account irrelevant matters, or fail to take into account all relevant matters."* (per Lord Phillips MR). The court so held in applying the principles adumbrated in *C & E Comrs v JH Corbitt (Numismatics) Ltd* [1980] STC 231, at [239] ('*JH Corbitt (Numismatics) Ltd*') (Lord Lane). A conclusion that the decision is unreasonable can also arise if the decision-maker reached a decision which no reasonable decision-maker could have reached on the basis of the information before him.

62. The reasonableness of the decision is to be judged against the background of the information which was available to the review officer. The FtT's fact-finding power in this regard was conceded by the Commissioners in *Gora & Ors v C & E Comrs* [2003] EWCA Civ 525 ('*Gora*'). In *Gora*, Pill LJ approved an approach under which the FtT should decide the primary facts and then decide whether in light of those findings, the decision on restoration was reasonable. Lord Justice Pill said this, at [38] and [39]:

> "38. In the course of argument, it emerged that the respondents took a broader view of the jurisdiction of the Tribunal than might have at first appeared. They were invited to set out in writing their views upon the jurisdiction of the Tribunal and Mr Parker provided the following written submission:
>
> "1. The Tribunal has found that:
>
> > 'the Commissioners have taken a policy decision not to restore properly seized goods. There are no exceptions to this. Even innocent failures to pay excise duty will not qualify as exceptions to the policy. The Commissioners regard themselves as exercising that power to deter illegal activities and to stamp our smuggling.' (*Gora*, para 33)
> >
> > …
>
> 3. The Commissioners accept:
>
> …
>
> e. Strictly speaking, it appears that under s 16(4) of the 1994 Act, the Tribunal would be limited to considering whether there was sufficient evidence to support the Commissioners' finding of blameworthiness. However, in practice, given the power of the Tribunal to carry out a fact-finding exercise, the Tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. The Commissioners would not challenge such an approach and would conduct a further review in accordance with the findings of the Tribunal."
>
> 39. I would accept that view of the jurisdiction of the Tribunal subject to doubting whether, its fact-finding jurisdiction having been accepted, it should be limited even on the "strictly speaking" basis mentioned at the beginning of paragraph 3(e). That difference is not, however, of practical importance because of the concession and statement of practice made by the respondents later in the sub-paragraph. As a "tribunal" to which recourse is possible to challenge a refusal to restore goods under section 152(b) of the 1979 Act, the Tribunal in my judgment meets the requirements of the Convention."

63. Whilst not binding on this Tribunal, in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC), at [8], Judge Helier said this:

> "It is important to remember that a conclusion that a decision is not unreasonable is not the same as a conclusion that it is correct. There can be circumstances where different people could reasonably reach different conclusions. The mere fact that we might have reached a different conclusion is not enough for us to declare that a conclusion reached by UKBA should be set aside."

64. We have derived considerable benefit from reading the review decision and from hearing Border Force Officer Clark and we found him to be a credible witness who clearly set

out the Respondent's policy and the matters taken into consideration in reaching the decision not to restore the Trailer.

Q. Was irrelevant material taken into account and was any relevant information ignored?

65. The Respondent's policy in relation to the decision under appeal can be summarised as follows:

> "a. Under the policy, *restoration of vehicles may be considered where the total quantity of drugs involved does not exceed the following limits:*
>
> *...*
>
> i. *100g of Class A drugs (including cocaine and diamorphine and MDMA/MDA).*
>
> b. *In these circumstances, restoration may be considered where requested, on payment of a sum equal to 20% of the current retail value of the vehicle, with a minimum payment of £100. If the vehicle has been adapted to conceal prohibited or restricted goods (s.88 CEMA), the restoration payment should be increased by the cost taken to remove the adaptation.*
>
> c. *For drug quantities in excess of those stated restoration should normally be refused. However, there may be* ***exceptional circumstances*** *where it is considered appropriate to offer restoration (e.g. where considerable assistance has been rendered in enabling further arrests etc.)"*

66. We are satisfied that this is the policy that Officer Clark applied in reaching his decision not to restore the Trailer. The policy clearly relates to restoration of commercial vehicles used for smuggling drugs and is intended to be robust in order to tackle cross-border smuggling, and to intercept the supply of excise goods to the illicit market.

67. We have considered the matters taken into consideration by the Respondent:

68. Firstly, the quantity of prohibited goods (drugs with an estimated street value of £400,000) found in the Trailer was in an amount that required exceptional circumstances to be established before restoration could be considered, and that Officer Clark applied this policy.

69. Secondly, the Respondent gave Mr Bogdanoski numerous opportunities to provide further information. Emails were sent to Mr Bogdanoski on 20 June 2021, 12 July 2021, 29 July 2021, 15 September 2021, 23 September 2021, 1 October 2021, 6 October 2021, 8 October 2021 and 4 November 2021 (in relation to the review process).

70. On 20 June 2021, the NPSU requested further information in support of the restoration appeal, as follows:

> *"1. Are you an owner/driver of this business?*
>
> *2. How many drivers do you employ?*
>
> *3. A copy of your employment contract with the co-driver, which should include the terms and conditions of employment.*
>
> *4. Copies of any employment references from the driver's previous employers.*
>
> *5. Details of your interview with the driver before employing them.*
>
> *6. Copies of any instructions or written procedures that you issue to drivers or other staff to prevent them from smuggling.*
>
> *7. Details of how you obtained the contract to carry the goods.*
>
> *8. The checks you made of the consignor.*
>
> *9. The arrangements made to collect the goods from the consignor and load them onto your vehicle.*

10. Details of any physical checks made of the load and the application of any seals.

11. The checks you made of the consignee.

12. The arrangements mad to deliver the goods to the consignee.

13. Details of any other measures you take to prevent your vehicles being used for smuggling."

71. Mr Bogdanoski failed to respond to the request for information and clarification, despite emailing the NPSU on 1 July 2021 to check up on the status of the case. The NPSU replied on 12 July 2021 stating that they were still waiting for the information requested. Mr Bogdanoski replied on 13 July 2021 and asked when his belongings would be returned to him. Within that email, he claimed not to have received the letter dated 20 June 2021, but this claim was not repeated at the hearing before us. A further email was sent by the NPSU on 29 July 2021, repeating the request for information. Mr Bogdanoski responded on 9 September 2021 and repeated the question about when he could collect the tractor unit, the Trailer and his personal belongings. On 23 September 2021, the NPSU informed Mr Bogdanoski that the case would be allocated for a decision to be made without the information requested in the letter dated 20 June 2021. The conclusion reached was that Mr Bogdanoski could not provide any answers to the questions.

72. On 1 October 2021, the case officer emailed Mr Bogdanoski and asked him a series of questions as part of the investigation. The questions were as follows:

"1. I understand you are claiming restoration of the tractor unit (registration: CA6823XT), but can you confirm whether you are also claiming restoration for the trailer (registration" CO2500EM)?

2. The trailer (...) is registered to LKV Ivica – how are you connected to this company (for example, is it your company/are you an employee/have you leased the vehicle from this company)?

3. If you have leased the trailer, please provide a copy of the lease agreement.

4. The unit (...) registration card also lists LKV Ivitsa [sic] *as a legal person/entity who may use the vehicle – how are you connected to this company?*

6. If you leased the unit, please provide a copy of the lease agreement.

7. Did you witness the trailer being laded?

8. Did you carry out any checks of the load after it had been loaded?

9. How did you get the contract to transport the goods for 4PX Express GmbH (the sender of the goods)?

10. What checks did you make on 4PX Express GmbH?

11. What is your relationship t Milos Igrovic?"

73. We accept that numerous opportunities were given to Mr Bogdanoski over and above the usual single opportunity given to provide information before a decision is taken.

74. Mr Ezike submitted that the failure to respond to the request for information was due to a language barrier. We have found, however, that at no stage prior to the decision being made did Mr Bogdanoski approach a legal adviser or translator to assist him in dealing with the correspondence that he was receiving from the Respondent, after the Trailer had been seized. We find that it would have been clear to Mr Bogdanoski that the correspondence being received from UK Border Force related to the Trailer that he was hoping would be returned to him. It would, therefore, have been prudent for him to seek assistance. The failure to provide information persisted for some time. We are satisfied that it is not the responsibility, or the

function, of the Respondent to translate correspondence (in various different languages) that may be sent to any individual who has had their vehicle or goods seized in the United Kingdom. Mr Ezike further, and alternatively, submitted that Mr Bogdanoski had, in fact, provided answers to the questions being asked.

75. In his correspondence to the Respondent on 3 November 2021, Mr Bogdanoski was able to describe the difficulties faced by hauliers and drivers. He further referred to the issue of illegal migrants. We, therefore, find that there is considerable force in Officer Clark's position that Mr Bogdanoski could understand what was being required of him after the Trailer was seized. We further find that the only real information provided by Mr Bogdanoski was that the Trailer had been leased (providing a copy of the lease agreement) and that he owned the Appellant company.

76. Thirdly, prior to the request for further information, Mr Bogdanoski gave 'no comment' responses in interview regarding the transportation of the Goods. The interview was conducted under caution. Whilst Mr Ezike submitted that the 'no comment' responses in interview may have been as a result of legal advice given, we find that the failure to provide any information when requested facilitated the conclusion that the Appellant was culpable. Furthermore, it is unclear what happened to the legal representatives that are said to have advised Mr Bogdanoski to give a 'no comment' interview if his case is that he did not understand what was required of him by the Respondent. We find that it would have been prudent for Mr Bogdanoski to seek legal representation throughout his dealings with the Respondent if he was willing to provide useful assistance to the enquiries being made.

77. Fourthly, following the interception of the Trailer, Mr Bogdanoski did not give access to his phone and laptop. The reason he gave for not providing the PINs was that he had forgotten the PINs. This was, however, at odds with the alternative reason given, which was that the PINs were private. We do not accept that Mr Bogdanoski would not have been able to remember the PINs to his own devices relatively shortly after he had been intercepted. We further find that reference to the PINs being private would rightly have been viewed by the Respondent with suspicion.

78. Fifthly, despite referring to the various ways that the Appellant ensured the security of goods, such as witnessing the load, in his oral evidence, Mr Bogdanoski described having conducted superficial checks when the Goods were being loaded. Conflicting reasons were subsequently given for not carrying out a more detailed inspection. The first was that some companies did not permit inspection during loading. The second was that the COVID-pandemic meant that close inspection was not possible. The third was that the manner in which the Trailer had been loaded meant that there was insufficient room to carry out an inspection. Whilst we have been shown photographs of a similar trailer, we find these photographs are of marginal probative value to the Appellant's case. This is because the incontrovertible fact in this appeal is that the photographs are not from the day of the interception and do not relate to the actual Trailer in this appeal. We further find that conflicting reasons were given for the failure to carry out checks.

79. Sixthly, in respect of the Appellant's policy, it was accepted that the Appellant does not have a written code of conduct. Whilst this may not necessarily be fatal, we find that this was further aggravated by the fact that the documentation accompanying the load did not correspond with the actual load in circumstances where no proper checks had been carried out by Mr Bogdanoski. We further find that the code of conduct provided by Mr Bogdanoski at the start of the hearing was never provided to the Respondent and related to a completely separate entity (the freight forwarder). It is also noteworthy that the code of conduct was in English and German. It is unclear, therefore, how Mr Bogdanoski would have been able to

read the code of conduct in the absence of a translated version, in light of the potential language barrier.

80. Lastly, while the consignor and the consignee turned out to be legitimate, the recipient of the Goods was based in Barnsley District. This was despite the fact that the delivery address, as set out on the CMR, was in Leicester. No explanation was given for this discrepancy by Mr Bogdanoski, whose position was that he was only concerned with the number of pallets referred to in the documentation (in relation to any further checks carried out). We accept that Officer Clark considered all of the relevant information concluded that the attempted smuggling operation could not have been achieved without the Appellant's direct, or indirect, involvement. Furthermore, we accept that he properly concluded that the Appellant failed to exercise reasonable care to ensure the legitimacy of the load.

81. Having considered all of the information, cumulatively, we are satisfied that the decision was reasonable.

Hardship and Proportionality

82. We are further satisfied that hardship was considered by the Respondent. In *Lindsay*, Lord Phillips MR said this:

> "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 for forfeiture cannot reasonably be heard to complain if they lose their vehicles. Nor does it seem to me that in such circumstances, the value of the car used need to be taken into consideration…"

83. Lord Justice Judge added this:

> "Given the extent of the damage caused to the public interest, it is 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."

84. On the issue of hardship, in *UAB Barela & UAB Reisrida v HMRC* [2014] UKFTT 547 (TC), the tribunal considered the policy in relation to vehicles adapted for smuggling as follows:

> "54. It is clear from the decision of the Court of Appeal in the *Lindsay* case (see the judgment of Lord Phillips MR at [63]) that a policy of refusing restoration of a vehicle used in "commercial" smuggling (provided that policy allows for due consideration to be given to cases of exceptional hardship) is compatible with the requirements of law. The *Lindsay* case does not deal with vehicles which are adapted for the purposes of concealing goods which are intended to be smuggled into the United Kingdom, but that is clearly a situation which, even more strongly, justifies a policy of refusing restoration: adapting a vehicle indicates a carefully planned smuggling operation with a likely intent to use the vehicle for that purpose on a recurrent basis, and the legitimate aim of protecting the revenue is fairly achieved by ensuring that the vehicle is never restored to its owner.
>
> …
>
> 61. …That policy is to refuse, other than in exceptional cases, restoration of the adapted vehicle, whether or not the absent owner knew, or should have known, of the smuggling attempt. Therefore, even if it could be said that the review officer had reached an unreasonable conclusion as to the knowledge of the Appellants (and as we have said, we do not in any event consider that to be the case), that would not be a basis for impugning her decision to apply HMRC's policy and to refuse to restore the trailers."

85. Officer Clark concluded that neither the inconvenience, nor the expense, in this case was tantamount to exceptional hardship over and above that which one should expect. Hardship is, indeed, a natural consequence of a decision to seize a vehicle. Furthermore, no

supporting evidence was provided by the Appellant on the issue of hardship. Although a forfeiture accompanied by a refusal of restoration has an adverse effect, we do not consider non-restoration to be a penal measure. Having considered all of the evidence, cumulatively, we are satisfied that hardship was considered.

86. In relation to proportionality, in *OK Trans Ltd v UKBA* [2010] UKFTT 223 (TC), the tribunal referred to the decision of the European Court of Human Rights in *AGOSI v United Kingdom (1986) 9 EHRR 1,* which held, at [54], that:

> "The striking of a fair balance depends on many factors and the behaviour of the owner of the property, including the degree of fault or care which he has displayed, is one element of the entirety of circumstances which should be taken into account". It has to be correct that a policy on restoration should draw the type of distinctions addressed in the Commissioners' policy. (…) Furthermore, it seems to us that part of its legitimate aims in the public interest, the State is able to impose by means of a restoration policy obligation of vigilance on drivers and hauliers, providing that the burdens imposed as a result are not excessive so as to enable the relationship of proportionality to remain between the means employed and the aim sought to be realised."_

87. All current formulations of the proportionality test involve four elements taken from Lord Sumption's speech in *Bank Mellat v Her Majesty's Treasury (No.2)* [2014] AC 700 (*'Bank Mellat'*), at [20]:

> "... the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine: (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

88. The third element is now usually qualified in the manner explained by Lord Neuberger in *R (Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055, at [85], for which Lord Reed's speech in *Bank Mellat* was cited:

> "...it has been authoritatively said that the question it involves may be better framed as was 'the limitation of the protected right ... one that it was reasonable for the legislature to impose' to achieve the legitimate aim, bearing in mind any alternative methods of achieving that aim..."

89. The State is permitted to secure property in order to control the use of it in accordance with the general interest or securing the payment of taxes and other contributions or penalties, pursuant to Article 1 of Protocol 1 of the European Convention on Human Rights ('the Convention'). This is compliant with art. 6 of the Convention: *Air Canada v United Kingdom* (1995) 20 EHRR 150, at [61] to [63].

90. Furthermore, on the question of Convention compliance, both the condemnation and restoration procedures are available to the owner of items when they are seized. If the owner wishes to challenge the condemnation of the items as forfeit, the Notice of Claim court hearing procedure is available. If he simply wishes to challenge the refusal to restore the items, the appeal tribunal hearing procedure is available. There is simply no question of an owner being deprived of his property without an opportunity to challenge, in a court, the legality of the decision to seize and to challenge, in a judicial tribunal, the legality of the decision refusing to restore them.

91. We are satisfied that Schedule 3 is Convention compliant. The remedy for any arguments that there was any unfairness in relation to the application of those statutory

provisions is judicial review, and not an appeal before the FtT. The FtT has no inherent power to review decisions of the Respondent in these circumstances, or to provide a remedy in respect of any alleged procedural unfairness. In any event, we are satisfied that the Appellant was provided with Notice 12A, which set out what the Appellant needed to do.

CONCLUSIONS

92. Having considered all of the evidence, cumulatively, and having regard to our findings of fact and the relevant law, we are satisfied that the appeal must fail. We hold that:

(1) The Respondent correctly applied the Policy on the restoration of vehicles, but was not fettered by it.

(2) The decision was considered afresh, including the circumstances of the events of the date of seizure, to decide if any mitigating or exceptional circumstances existed.

(3) All representations and materials made available were considered.

(4) The conclusion reached was one which was open to the reviewing officer to reach.

(5) The Respondent considered that the Appellant failed to take reasonable steps to prevent smuggling, or to conduct reasonable checks.

93. For completeness, the investigations and conclusions reached by the NCA in relation to Mr Bogdanoski's involvement in the Goods is/was a criminal investigation, which carried the criminal standard of proof; that of proof beyond reasonable doubt. The standard of proof applied by the Respondent was the civil standard, namely the balance of probabilities.

94. We hold that the decision-maker did not take irrelevant matters into account, or place insufficient weight on relevant matters. We further hold that the decision not to restore the Trailer was not disproportionate, and was not a decision which no reasonable decision-maker could have reached. The Respondent, rightly, did not consider the legality of the seizure.

95. Accordingly, therefore, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

96. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 25th APRIL 2024