[2013] UKFTT 134 (TC)

TC02563

Appeal number: TC/2011/5973

EXCISE DUTY – restoration – whether decision not to restore reasonable having regard in particular to evidence of travel patterns of which was not before the officer making the decision.

FIRST-TIER TRIBUNAL
TAX CHAMBER

TANIA HARRIS **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE CHARLES HELLIER
JOHN COLES

Sitting in public in Exeter on 12 September 2012 with additional written submissions from the Appellant on 24 September.

Mrs Harris in person

T Talbot-Ponsonby, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mrs Harris appeals against the decision of UKBA made in a review letter of 22 June 2012 not to restore her car.

2. The car had been seized on 29 March 2011 when it was being driven into the UK by her husband, Mr. Harris. Mrs Harris was not in the car when it was stopped but Peter Sutton, Barry Sutton and Janet Sutton, respectively Mr Harris's brothers-in-law, and mother-in-law were in the car. Each of the occupants of the car was bringing 3 kg of tobacco into the UK.

3. A UKBA officer formed the opinion that this tobacco was not for their own use and accordingly that duty was payable. Since duty had not been paid the UKBA treated the tobacco as forfeit and seized the car in which it was transported.

4. We must explain that the outset that the role of this tribunal in an appeal of this nature is unusual and is limited. There are two aspects to this.

5. First, in relation to the question of whether or not a car should be returned, we are not given authority by Parliament to make a decision that it should or should not be restored. The decision as to whether or not to restore the car is left in the hands of UKBA: only they have the power or duty to restore it. Instead we are required to consider whether any decision they have made is reasonable. If it is not a reasonable we can set the decision aside and require them to remake it; we can give some instructions in relation to the remaking of the decision, but we cannot take the decision ourselves. If we set aside a decision and UKBA make a new decision, then the taxpayer may appeal against that decision and the same process follows.

6. 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 us to declare that a conclusion reached by UKBA should be set aside.

7. The second limitation in our role follows from the fact that Parliament has decreed that it is for the magistrates court or the High Court to decide upon whether or not goods are legally forfeit. The Customs and Excise Management Act 1979 ("CEMA") sets out the required procedure: if the subject disputes the legality of the seizure he can require UKBA to bring proceedings (unhappily they are called condemnation proceedings) in the magistrates court to determine the legality of the seizure. If the magistrates court decides that the goods are properly forfeit then the tribunal cannot

overturn that decision or take a different view. Further we must proceed on the basis that any finding of fact which was necessary for the magistrates court to have come to this decision is to be taken as having been determined by the magistrates and, before us, is therefore to be treated as proved.

8. If the subject does not require condemnation proceedings to be taken in the magistrates court, he can effectively concedes the legality of the seizure. That is because Schedule 3 CEMA provides:

> "5. If on the expiration of the [one month period for giving notice that something is asserted not to be liable to forfeiture] 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 forfeit."

9. The effect of this deeming is that any facts which would have been necessary to the conclusion that the goods are forfeit must also be assumed to have been proved. It would be an abuse of process to permit such conclusions to be reopened in this (see para [71(7)] *HMRC v Jones* [2011] EWCA Civ 824: "Deeming something to be the case carries with it any fact that forms part of that conclusion").

10. In her additional submissions to us Mrs Harris addressed the question of the reopening of the forfeiture issue and the comments made by Buxton LJ at paras 52 to 56 in *Gascoyne v CCE* [2004]EWCA Civ 1162. These comments were discussed later by the Court of Appeal in *Jones.* The court in *Jones* held that the passages cited were not binding upon and held that the tribunal did not have the right to reopen the forfeiture issue on the grounds suggested by Buxton LJ. That conclusion is binding upon us.

11. There is one other oddity about this procedure. We are required to determine whether or not the UKBA's decision was "unreasonable"; normally such an exercise is performed by looking at the evidence before the decision maker and considering whether he took into account all relevant matters, included none that were irrelevant, made no mistake of law, and came to a decision to which a reasonable tribunal could have come. But we are a fact finding tribunal, and in *Gora and Others v Customs and Excise Commissioners* [2003] EWCA Civ 525 Pill LJ approved an approach under which the tribunal should decide the primary facts and then decide whether, in the light of the tribunal's findings, the decision on restoration was in that sense reasonable. Thus we may find that a decision is "unreasonable" even if the officer had been, by reference to what was before him, perfectly reasonable in all senses.

The statutory provisions

12. Regulation 13 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides that:

"(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; and

(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 (the "P"), except in the case where the excise goods are held for P's own use and were acquired in, and transported to the United Kingdom from, another member State by P.

(4) For the purpose 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 --

... 3 kg of any other tobacco products

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

(j) any other circumstances that appear to be relevant.

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

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

13. If excise duty has not been paid or secured prior to the time that the goods are held for a commercial purpose, they are liable to forfeiture under section 49(1) of CEMA.

14. However, it is not only the relevant goods that are liable to forfeiture. Section 141 of CEMA permits the forfeiture of other items with which the goods have been mixed, and of vehicles in which the goods are conveyed. It provides:

> "141(1) Without prejudice to any provision of the Customs and Excise Acts 1979, where anything has become liable to forfeiture under the customs and excise Acts -
>
> (a) any ... . vehicle.. 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
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> (b) any other thing mixed, packed or found with the thing so liable,
>
> shall also be liable to forfeiture."

Section 152 (b) of CEMA provides that the Commissioners may, as they think fit, restore anything forfeited or seized. This appeal is concerned with the exercise of that power by UKBA.

Statute provides a mechanism for challenging a seizure of goods. Schedule 3 to CEMA provides for an appeal against seizure of goods:

> "3. Any person claiming that anything 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.
>
> "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.
>
> "6. Where notice of claim in respect of any thing is duly given in accordance with paragraphs 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court,

> and if the court finds that the thing was at the time of seizure liable to forfeiture, the court shall condemn it as forfeited."

Under section 14(1)(d) of the Finance Act 1994 certain decisions of the Commissioners may be made the subject of a review by HMRC and appeals as provided in sections 14 to 16 of that Act. One of the matters subject to this regime is a decision as to whether or not to restore a forfeited article to its owner:

> "Any decision under section 152(b) as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored."

Section 16(2) and (8) of the 1994 Act give a right of appeal to the VAT Tribunal in respect of a review. A decision not to restore a vehicle is an "ancillary matter". In this case the powers of the tribunal on an appeal are limited by section 16(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 further review of the original decision;…"

15. The rule is thus that if condemnation proceedings are not instituted the subject is not permitted to question the legality of the seizure - and consequently the subject is not entitled to question the, normally necessary, finding for such a decision that the goods were not for the subject's own use. However there can be circumstances where the "own use" conclusion is not a necessary implication of finding of legality of seizure. That was the case in *HMRC v Mills* [2007] EWHC 2241, where the subject's goods were mixed with the goods of another which were forfeit. The Act provides that goods mixed with forfeit goods are by reason of such mixing forfeit. Thus in that case Mr. Mills goods could have been legally forfeit by virtue of their mixing with goods which were forfeit (namely Mr Kerry's goods) rather than because they were not for his own use. Mann J said:

> "[35] However, the present case is not a normal case in that sense. Mr Kerry's goods complicate the position. He did not seek to challenge the

forfeiture of his goods. The Tribunal held that in the magistrates' court a challenge to the forfeiture of the car would have failed because of the mixing of Mr Mills' goods with Mr Kerry's, whether or not Mr Mills was found to have imported the goods for his own use or for a commercial purpose. The Tribunal treated that as an inevitable outcome. That is not quite the right analysis. If Mr Mills had decided to challenge the forfeiture in the magistrates' court it would have been open to him to try to prove that Mr Kerry's goods were not in fact liable to forfeiture. He would not himself have been bound by Mr Kerry's failure to apply within time. That emerges from the decision of Lightman J in *Fox v HMCE* [2002] EWHC 1244 (Admin). However, a similar point to the Tribunal's point can be made. If Mr Mills had applied to the magistrates' court he might still have failed to prove that Mr Kerry's goods were for his (Mr Kerry's) own use; if he had so failed then Mr Kerry's goods would have been properly forfeited, and so would Mr Mills' (with which they were mixed) and the car which carried them. The result is the same as the Tribunal's decision - in those circumstances one cannot say that a deeming of a proper forfeiture arising out of a failure to apply for forfeiture proceedings inevitably carries with it an assumption or inference of own use on the part of Mr Mills.

"[36].Accordingly, while it would be an abuse to challenge the forfeiture, one cannot identify other underlying facts which must also be assumed against Mr Mills. The abuse point therefore does not run, or at least not in the same way. One can test the matter in this way. Had there been a debate in the correspondence about whether own use could be argued in the restoration proceedings at the outset, and had HMRC sought to say that if he wanted to take the point then Mr Mills should go through condemnation proceedings so that it could be determined there, the correct stance for Mr Mills to have taken would have been to have said that the point would not necessarily be decided there because of the mixing with Mr Kerry's goods. He would therefore have been entitled to require HMRC to consider it as part of the restoration exercise, and to do so would not have been an abuse. By the same token, inviting the Tribunal to consider it on appeal would not have been an abuse."

The Letter of review

16. In a letter of 22 June 2011 Mr Sked of UKBA sets out his decision on review on the earlier decision not to return Mrs Harris's car. In this letter:

(1) He sets out the circumstances of the seizure and accurately transcribes the manuscript notes of Mr Harris's interview which took place following the stopping of the car on 29 march 2010;

(2) He describes the correspondence between the parties; in our view fairly;

(3) He says that UKBA checks showed that the car had travelled to the continent on 13 occasions between 2 April 2010 and the date of seizure;

(4) He notes that although the seizure of 3kg of tobacco was initially challenged by Mr Harris, Mr Harris had withdrawn his appeal; as a result he says:

> (a) "the tobacco is deemed to have been legally seized, ie the tobacco was being held for a commercial purpose and **you can no longer contend otherwise**"[his emboldening]

(5) He notes that Mrs Harris had challenged the legality of the seizure of the vehicle and says:

> (a) "you are currently awaiting a hearing in the Magistrate's Court. I have made my decision on the assumption that the court will find that the seizure was lawful, that the vehicle had been used to transport the smuggled goods, and that the court will therefore condemn the vehicle as forfeit…"
>
> (b) "When considering restoration it is on the basis that the goods *and the vehicle* were lawfully seized ie the goods had been imported for a commercial purpose and the vehicle was being used to transport the smuggled tobacco (*as only the Magistrates Court can now determine otherwise)*"[our italics]
>
> (c) "In considering restoration I have looked at all the circumstances…but I do not consider the legality of the seizure (which ,as I stated above, is a matter for the Magistrates Court…). The legality of the seizure has been contested in this case."

We note that Mr Sked appears in these passages to make an assumption as to what the Magistrates will decide the basis for his review.

(6) He sets out his reasons for considering that this was a case of Mr Harris and his co travellers smuggling for profit:

> (a) No traveller claimed the goods were for reimbursement on a cost only basis;
>
> (b) He could not accept that Mr Harris intended his tobacco as a gift for his father. He sets out 7 reasons for this conclusion. These relate to the course of the interaction with the officer at the time of seizure, and the pattern of Mr Harris's trips to the continent.

These 7 reasons were the subject of detailed criticism by Mr Harris, and we return to discuss each of them below.

> (c) Mr Harris's three co travellers had not contested the legality of the seizure of their goods

(7) He sets out the Agency's policy on restoration and explains (properly) that he will not be fettered by it but will consider each case on its merits.

The application of that policy is affected by whether the quantity was "small" (ie if it was more than 5kg of tobacco) and whether or not it is a "first time offence"

(8) In relation to that policy he concludes that although this was a first offence, it related to 12 kg of tobacco, and indicates that "restoration would therefore not be appropriate". This appears to be a conclusion on whether it would be appropriate under UKBA's policy and not Mr Sked's final word on the issue because he then goes on to consider other matters.

(9) He notes that the duty on the 12kg of tobacco was £1,822.80 and the value of the car some £8,125.

(10) He sets out his belief that "this was not the first occasion for [Mr Harris] to have been involved in smuggling goods and that if he had not been intercepted on this occasion the smuggling activity would have continued".

Mr Sked does not set out his reasons for this conclusion but it seems fairly clear to us that it is for the reasons he lists in (6)(b) above. Indeed in the section of his letter setting out those reasons he draws precisely that conclusion. That makes those reasons of importance.

(11) He says that he considers that because Mrs Harris "and the driver are husband and wife…I must conclude that your husband also had equal joint ownership of this vehicle." Therefore he says that restoring the car would be tantamount to restoring it to Mr Harris who was not a genuine innocent third party owner.

(12) He indicates that no representation has been made that the car should be restored on humanitarian grounds.

(13) He concludes that there is no reason – no "sufficient or compelling reason" - to depart from UKBA's policy

17. Mr Talbot-Ponsonby says that Mr Sked had properly considered all the relevant circumstances, considered the application of the UKBA's policy (without being fettered by it) and come to a conclusion which was not unreasonable.

18. Mrs Harris concentrated her fire mainly on the 7 reasons for Mr Sked's conclusion at (6)(b) above. In summary she said that: Mr Sked took no account of their particular way of life; in his consideration of the statements made at the interview had failed to take account of Mr Harris' confusion; and he had failed to take into account the fact that there had been no concealment of the goods or in answering questions about them. The car was hers. Further proper consideration should be given to the needs of her daughter who had back problems.

The Evidence and Our Findings of Fact

19. We had the following evidence. Brian Raydon, an officer of UKBA produced: (i) copies of the manuscript notes made by the officer at the time of seizure and at the later interviews, (ii) a UKBA print out showing its records of the travels of the car and of that of Mr Sutton, Mr Harris's brother in law between March 2010 and January 2011; (iii) a copy of Mr Sked's list of Chelsea home fixtures relevant to the (6)(b) issues. We heard oral evidence form Mr and Mrs Harris and Mrs Harris produced copies of documents including bank statements, hotel and ferry bookings. From that we find as follows.

20. Mr. and Mrs Harris live in Barnstable in North Devon. They have three children.

21. Mr. Harris's father smokes and has chronic obstructive pulmonary disease: probably as a result. Mrs Harris objects to Mr. Harris providing his father with tobacco.

The seizure of the vehicle.

22. On 29 March 2011 Mr. Harris, travelling with the companions listed above arrived at Coquelles. They were travelling in a vehicle and being driven by Mr. Harris.

23. They were stopped and asked a number of questions by officers from UKBA Under the legend "I have read and agree the above" they signed the officer's notebook in which the questions and responses were noted. But Mr. Harris added a caveat in relation to one question.

24. The occupants of the car told the officer that each of them had purchased 3 kg of hand rolling tobacco, not for themselves, but as presents for family members. Mr. Harris said he had bought his 3kg for his father.

25. Mr. Harris's answers to some of the questions was the subject of comment by Mr Sked, the officer of UKBA who wrote the letter of review against which this appeal is brought.:

(1) Question: how many trips abroad have you made in the last year?

Answer: about five or six; my partner and I are frequent travellers as we have a Disneyland pass.

(2) Question: when did you last travel to Belgium?

Answer: October 2010

(3) Question: who does the vehicle belonged to?

Answer: me

Mr. Harris told us that this last question was asked when he was in the presence of the three other passengers. He said that by his response he was identifying that it was he rather than the others were those who was

responsible for the car. He indicated that he did not intend to give the impression that he was the legal owner of the car.

In a letter of 31 March 2010, two days after the seizure, in which he appealed against the seizure, Mr. and Mrs Harris make clear that the car belonged to Mrs Harris and that it had personalised number plates, SA51 TAN (“Sassy Tan”) - personal to Mrs Harris.

Although in a letter of 7 May 2010, Mr. Harris requests an appeal against the " decision not to restore my car to me", he makes clear later in that letter that the car belonged to Mrs Harris who had bought it with her own money.

(4) Question: Are you the only person who drives the vehicle?

Answer: yes

This last answer was qualified by words written by Mr Harris in the notebook "I am the only one who drives the vehicle abroad" at the time he signed the officer’s notebook.

26. We find that Mrs Harris was the registered keeper of the car. We accept Mr. Harris's statement that his answer in the early stages of questioning was not intended to be a statement of full ownership.

27. After the initial questioning of all the occupants of the car Mr. Harris was interviewed separately. In that interview he was asked number of questions which gave rise to discussion before us including the following:

Question: do you have any medical condition which may affect the interview

Answer: no.

28. Mr. Harris explained to us that he had been off work for some number of months in 2010/11 with stress related complaints. He had become depressed, and had been treated with fluoxetine. We were shown package information which indicated that confusion could be a side effect of fluoxetine.

29. We accept Mr. Harris was taking fluoxetine at the time he was stopped and that it might have had a side-effect of inducing some mental confusion.

30. Mr. Harris also said at the interview: that he had been to the continent 7 or 8 times in the previous year; that he had been to Disneyland with his wife and daughter(s) in the summer and autumn of 2010; that he had on one occasion travelled to the continent and back twice on the same day - but on prompting from the officer revised this and said that that had happened on two occasions; and that he had also travelled in Peter Sutton's van to the continent twice in the year.

The magistrates court.

31. We were told by Mrs. Harris that they did not pursue the challenge to the forfeiture in the magistrates court because (1) UKBA's letter indicated that Mr. and Mrs Harris could be liable for UKBA's costs of no less than £2,500, and (2) they were at that time not mentally fit to pursue the action. It was, said Mrs Harris, too much of a risk.

32. It appears to us that the condemnation proceedings however continued, for on 6 October 2011 the East Kent Magistrates Court condemned 12 kg of tobacco and the car as forfeit. In its order the magistrates court set out the "complaint" made by the officers of UKBA and state that they adjudged it to be true. Item 4 (a) of that complaint is that the goods were liable to forfeiture in that:

> "they had been released for consumption in another Member State of the European Union and at importation into the United Kingdom were held for a commercial purpose."

33. Item 6 of the complaint is phrased thus:

> "In so far as any item ... was not liable to forfeiture by virtue of the aforementioned provisions, then the goods were liable to forfeiture by virtue of section 141(1) (b) of the Customs and Excise Management Act 1979 as being mixed, packed or found with a thing liable to forfeiture."

34. We also noted that at item 5 the court recited that "the quantities imported exceeded the guideline quantities set out in regulation 13(4) (b) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010."

35. That regulation refers to 3 kg of tobacco products. It seems to us that, whilst the four travellers separate imports of 3 kg did not separately exceed the limit, the aggregation implicit in the magistrates finding is a surprising interpretation of that regulation.

Trips to the Continent in the preceding year

36. The history of Mr. Harris's journeys to the continent in the car between April 2010 and March 2011 was a central part of Mrs Harris’s argument. It was not disputed that Mr. Harris had driven the car to France on 13 occasions in that period. We deal with them in turn, and set out our conclusions at the end..

(1) 2 April 2010. Dover/Calais; and (2) 2 April 2010. Channel Tunnel. Return on the same day in each case.

37. This was Good Friday. Mr. Harris's bank account statement showed that he paid (1) for accommodation at the Premier Inn Ashford (£29); (2) for food

(which we were told was the Beefeater) Ashford (£48.95) and (3) £51.92 to Carrefdac Coquelles, all on 2 April; and showed a purchase at Ikea in Bristol (on the way back to Barnstaple) on 3 April.

38. We note an oddity in UKBA's records in relation to this trip. Those records detail a 4.40am Dover to Calais ferry trip followed by a return ferry journey at 11.40am. They record a return journey via the tunnel from Coquelles at 17.49, but do not record a corresponding outbound trip.

39. A copy of the Eurotunnel confirmation provided by Mr. and Mrs Harris shows a booking for journey leaving at 15.20 and returning from Calais at 19.20. The confirmation is dated 16 March 2010.

40. Mrs Harris did not say that she had been with Mr. Harris on both these trips. We concluded that she had been present on at least one of them because of the evidence of a stay at the Premier Inn and the making of a purchase at Ikea (Mrs Harris liked shopping).

(3) Saturday, 8 May 2010. Channel Tunnel. Return on the same day.

41. The copies of Mr. Harris's bank statements show that on 8 May he made a purchase at Carrefdac Coquelles for £48.20 and at Tesco in France for £30.79.

42. A Eurotunnel confirmation dated 6 May 2010 shows a booking for a train leaving at 11.40 and returning at 15.20.

43. Mrs Harris told us that she could not be sure that she had accompanied Mr. Harris on this occasion since there was no indication that there had been an overnight stay at a Premier Inn.

(4) Friday, 14 May 2010. Dover/Calais. Return on the same day.

44. Mr. Harris's bank statements indicate that on 14 May he paid for (1) a stay at Premier Inn, Heathrow (£104.90) and (2) a meal at KFC Ashford, and that on 13 May he made a payment which we accept as being at Rayners Lane Wembley described the statement as "Oyster Renew web".

45. A Premier Inn booking confirmation shows a booking for two adults and two children from the 14th to 16th of May 2010. The booking is dated 15 April 2010.

46. A ferry confirmation confirms a booking for two adults and two children and a car leaving at 14.20 and returning at 18.50. The confirmation is dated 12 May 2010.

(5) Friday 2 July 2010 Channel Tunnel; and (6) Friday 2 July 2000 10/6/Calais. Return on the same day in each case.

47. Mr. Harris's bank statement shows payments on 2 July for accommodation at Premier Inn Ashford (£69), to Carrefdac Coquelles in France of £44.69, and of £60.46 to Tesco's in France.

48. A Eurotunnel confirmation for those days shows a booking for departure at 3:27 am and return from Calais at 9:50 am. The confirmation is dated 30 June 2010.

49. Mrs Harris says that they had booked to travel via the Channel Tunnel on 2 July but Mr. Harris had been late and could not make it. They had paid for the Premier Inn booking and could not cancel it; so they decided to go by ferry - it was quite cheap and it came with a free case of wine.

50. The Channel Tunnel booking had been for departure at 3:27 am on Friday to July, and to return at 9:20 am on the same day. At this time Mr. and Mrs Harris's children were 6, 13 and 14. Mrs Harris told us that the youngest enjoyed travelling overnight. She said that at the time they would have arrived in Calais some shops would have been open in the early hours: Carrefour and the eateries. The plan had been a very early departure and return followed by a stay at the Premiere Inn on the Friday evening. They changed the plan. Children wanted to go by ferry. They stopped at Ashford.

(7) Monday, 26 July 2010. Dover/Calais. Return on the *same* day; and (8) 27 July 2010 Tuesday. Channel Tunnel. Return on the *next* day.

51. Mr. Harris's bank statements show that (1) on 27 July he paid £197.41 for (what we understand to be three nights') accommodation at the Heathrow Holiday Inn; made a payment in Windsor on 24 July; made a payment also in Windsor on 25 July; on 26 July paid £46.17 at Carrefdac Coquelles, on and on 27 July 8 paid £28.49 at Carrefdac Coquelles.

52. A Eurotunnel confirmation shows a booking leaving at 5.28 on 27 July and returning at 20.50 on 28 July. The booking is dated 9 July 2010.

53. *Mrs* Harris's bank statement shows: a cash withdrawal at Lakeside Thurrock on Monday 26 July; purchases from four shops at Lakeside Hall on 27 July and cash withdrawal at Eurotunnel on 27 July of £20.

54. Mrs Harris told us that their eldest two children had gone on holiday with their grandparents leaving Mr. and Mrs Harris with their youngest child who was six. They decided to do something in the UK and France. They stayed at the Holiday Inn Heathrow on Friday 23 July and did Woburn Safari Park, then on Saturday 24 July, Legoland, and on Sunday 25 July, Chessington World of Adventure. They booked for 27 July, Monday, at Ibis Romford. They decided to go to France by ferry on that day to buy Mrs Harris's wine. Then they came back to the UK and early in the morning of Tuesday 27 July left Disneyland (a four hour trek from the end of the tunnel). They stayed there the night and returned to Calais the following afternoon for a 4 pm ferry. It was a late return and they stayed at the Ibis hotel on the way back.

55. There is no note of payment at Disneyland on the bank statements.

(9) Saturday, 7 August 2010. Channel Tunnel. Return on the same day.

56. Mr. Harris produced two tickets, one for an adult one for juvenile, for the Chelsea v Manchester United match on Saturday 8 August at Wembley. The kick-off was at 3 pm. Mr. Harris told us that he went to the match with one of his daughters. Mrs Harris said she went shopping with the other.

57. A copy of a Premier Inn booking confirms a booking for two adults and two children for the nights of 7 to 9 August. The confirmation is dated 15 June 2010.

58. A restaurant booking confirms a booking at La Tasca Windsor on 8 August 2010 for 7:30 pm; it is dated 4 August 2010.

59. Mr Harris's bank statement shows a payment to Premier Inn Heathrow of £86.25 95 on 9 August 2010. A copy of a booking e-mail confirms a booking at Premier Inn Heathrow from 7 to 9 August for 2 adults +2 children.

60. This would, according to Mrs Harris, had been an occasion on which, being in London, they would have popped across the Channel to pick up some wine.

(10) Friday, 3 September 2010. Channel Tunnel. Return on the same day.

61. Mr. Harris's bank statement shows that: (1) on 3 September he paid £57 to Premier Inn Cribbs Causeway Bristol, and £45 at Tesco Ashford, and (2) on Saturday 4 September he paid £20.99 at Pizza Hut in Hertfordshire.

62. Mrs Harris thought they had travelled to Bristol and spent the night of 2 September there before travelling to France and back on Friday the 4th.

(11) Friday 29 October 2010. Channel Tunnel. Return on the same day.

63. Mr Harris's bank statements show that on 29 October: (1) he paid Premier Inn Ashford £56.75 for (we believe the accommodation of two adults and 2 children), and £44.50 to Carrefdac Coquelles. On 30 October he was back in Barnstaple, for then he paid £19.23 to Pizza Hut Barnstable.

64. An e-mail ferry confirmation confirms a booking for departure from Folkestone at 8:20 am and return from Calais at 12.20 on Friday 29 October. The confirmation is dated 14 September 2010.

65. Mrs Harris said that they would have travelled from Barnstable to Calais on Friday 29 October and stayed at the Premier Inn on the night of Friday the 29th before travelling back for a Halloween party on Saturday 30th after which they would have gone to Pizza Hut.

66. She said this was the half term week. This was confirmed by the Devon school calendar.

(12) Wednesday, 1 December 2010. Channel Tunnel. Return on the same day.

67. Mrs Harris said that she did not travel on this occasion. Mr. Harris had taken the car. They had decided that he should go to get wine and everything for Christmas. She gave him a list of the wine she wanted. He travelled with her sister Emma and his brother-in-law.

68. A Eurotunnel booking showed departure at 7:20 AM and return from Calais at 11:50 AM. The booking was dated 19 November 2010.

(13) Sunday to January 2011. Channel Tunnel. Return on the same day.

69. A Eurotunnel booking confirmation confirms a booking for departure at 7:20 AM and return from Calais at 11.42am it is dated 19 November 2010.

70. Mr. Harris's bank statement showed that he paid (1) £65.75 to premiere in Cribbs Causeway on 31 December, (2) £47.83 to Carrefdac Coquelles on to January 2011.

71. A booking confirmation for a table at Brasserie Gerard in Kensington shows a confirmation for 6 pm on Sunday 2 January. The confirmation is dated 31 December 2010.

72. Mrs Harris said that they liked to go away for New Year. They had two nights at the Premier Inn in Bristol and then did the trip to Calais on the 2nd. They had to return quickly for the Chelsea v Aston Villa match that evening. Hence the early return journey.

The 13 Trips: Our conclusions

73. We accept Mrs Harris' account of the double journey on 2 July (Trips (5) and (6)). No explanation for the double journey on 2 April (Trips (1) and (2)) was offered.

74. We accept that Mrs Harris and one or more of their children travelled with Mr Harris in the car on all the journeys except for (3) and (12) and probably (1).

75. On the occasions Mrs Harris did not travel Mr. Harris said he had been accompanied by his brother in law. We accept that conclusion.

Other Journeys

76. On two other occasions in the year Mr. Harris had travelled to the continent with his brother-in-law Mr. Sutton.

77. [a further £29 is paid to Premiere Inn Heathrow on 25 November).

78. [Bank accounts also show £29 paid to Premiere Inn Heathrow on 7 September].

Costs of travel and joint income

79. From the booking confirmations we noted that the cost of the Eurotunnel transport was small. Generally it was paid for as to about 90% through the use of Tesco vouchers. The cost absent a voucher would have been between £30 and £100.

80. The costs of staying at the Premier Inn for two adults and two children seemed to be about £30 a night.

81. Mr. and Mrs Harris have combined take-home pay of about £2600 per month with the addition of child benefit this gave them a monthly income of £2800. Mortgage and interest costs were £750 a month and utility bills and car maintenance some £250 per month.

82. Mr and Mrs Harris' daughter

83. One of Mr. and Mrs Harris's daughters, who was 14 at the time of the seizure, had back problems; her crutch was in the back of the seized car. She needed to be driven from to and from school. After the seizure of her car Mrs Harris borrowed money from her parents to buy a new car to transport her daughter. Mr. Harris's car was not suitable for this purpose.

Discussion

84. We accept that the Harris family travel within the UK and abroad frequently, and that their patterns and habits of travel do not fit a conventional model.

85. We believe that Mr. and Mrs Harris's salaries were sufficient to finance their travel to attractions around London, to Disneyland, and to purchase wine on the continent. Mr. and Mrs Harris have joint take-home pay of about £2600 per month which, with the addition of child benefit gave a monthly income of £2,800. Mortgage and interest costs were £750 a month and utility bills and car maintenance some £250 per month. That left £1,800 per month. Mrs Harris said that food bills were some £250 per month. We thought that this was an underestimate for a family of five, but even allowing for £800 per month that left £1000 a month. With the benefit of Tesco vouchers the cost of a trip to France to buy wine with a night at the Premier Inn there appears to be no more than £100, allowing for the cost of petrol. Their residual income was sufficient to finance their travel.

86. We believed Mrs Harris when she told us that Mr. Harris was not permitted to bring tobacco back in the car when she was with him.

87. Mrs Harris was the registered keeper of the car. Its number plate was SA51 TAN. We accept that this linked it to Tania Harris ("Sassy Tan"). We find that the car belonged to Mrs Harris and that Mr. Harris had no form of legal interest in it. He was however permitted to drive it.

88. This was a case where the tobacco and the car were adjudged legally forfeit by the magistrates court. There is no question of any deeming. That is a decision we cannot question. As we note above the Court held that the goods were "held for a commercial purpose.". Whilst the court also accepted that if the goods were not thus liable to forfeiture, they were liable they were so liable by virtue of being mixed with other goods, the court made a clear decision that they were held for a commercial purpose.

89. Whatever our own views as to the shortcomings or otherwise of the magistrates' Decision, it is a finding of the court given jurisdiction over the relevant matters, and a decision we must accept.

90. Thus we must proceed on the basis that the tobacco was duly forfeit and that it was held for commercial purposes.

91. Had there been a deemed to forfeiture of the tobacco, the possibility would have remained that Mr Harris's tobacco might have been for non-commercial use - as a gift - but that it was liable to forfeiture because it was packed in the car with the tobacco of the other travellers. That approach however is not open to us because of the terms of the magistrates court order.

Mr. Sked's decision

92. Mr. Sked's letter is dated 22 June 2011. It is a decision on review. The East Kent Magistrate's Court condemned the 12 kg of tobacco and the car three months later on 6 November 2011. Yet Mr. Sked proceeds on the basis: (1) that because Mr. Harris withdrew his challenge the paragraph 5 schedule 3 CEMA time limit meant that Mr. Harris could no longer contend for own use - despite the fact that it appears that the matter was being pursued before the magistrates; and (2) that the car was lawfully seized "as only the magistrates court can now determine otherwise".

93. It seems to us that the first of these assumptions may be forgivable since he may have believed that the matter was not proceeding before the magistrates (and we were not shown at the matter had eventually reached the magistrates court). But the second is not. While the issue was before the magistrates court the UKBA could not assume that the issue will be concluded in their favour. This was an unreasonable and incorrect approach. Mr. Sked should have considered whether, on the facts before him, the case should be the car should be treated as lawfully seized; the "own use" point was properly before him.

94. However given the presence in the car of goods of the other three passengers which were to be deemed to lawfully forfeit (because no

requirement to issue condemnation proceedings had been made), it seems to us that Mr. Sked could reasonably have concluded that the car was lawfully seized.

95. We have recorded (see section (6) of our summary of Mr Sked's letter above) that Mr. Sked considered that "Mr. Harris and his co-travellers were involved in smuggling for profit" and set out three reasons (see (6)(a) to (c)) why "this was a case of smuggling for profit".

96. His reasons were:

(a) That they did not claim that the goods were for reimbursement or not for profit basis.

That is true –to the contrary they claimed they were gifts, so this seems of very limited relevance.

(b) Mr. Harris, he concluded, was not importing the goods the tobacco as a gift for his father.

(c) The three co-travellers had not challenged the legality of the seizure of the goods.

97. We address (6)(b) below. But we doubt the weight of (c). Challenging seizure, as UKBA point out in their literature, is expensive. Failure to challenge may indicate a decision not to take a risk: a decision which, in the light of UKBA's published material, could well be wholly reasonable. The most that can sensibly said is that (c) leaves open the possibility of smuggling.

98. To the extent however that this is in relation to the co-travellers it is now academic because on 6 November their tobacco was condemned by the East Kent magistrates on terms we have already described.

The (6)(b) reasons.

99. So far as Mr. Harris position is concerned, Mr. Sked's conclusion is now a direct result of the magistrates court decision - although made after Mr. Sked wrote his letter. We cannot therefore doubt that the tobacco is to be treated as imported for a commercial purpose. However the findings on which Mr. Sked reaches his conclusion colour the issue of the seriousness of Mr. Harris's infraction, and gave rise to Mr Sked's conclusion that Mr Harris had been smuggling on previous occasions (which could be a factor relevant to a restoration decision). In that context they therefore merit careful examination. We consider them, and Mrs Harris's comments on them, in turn.

(a) *Mr. Harris had not challenged the legality of the seizure of his goods.*

100. In fact, as Mr. Talbot-Ponsonby accepted, Mr. Harris had challenged the seizure but had subsequently withdrawn from the challenge -although we note elsewhere that the matter was determined by the magistrates.

101. Mrs Harris explained that this was a financial decision. Letters sent by the UKBA said that the agency would seek to cover their fees are no less than £2500. A calculation showed that, along with their own costs the total cost could be £5000, and, as she had just lost her vehicle and needed to by an alternative one to transport her daughter, it would not have been feasible to bear those costs. It was not an admission of guilt. Indeed she says if the agency had explained that the decision not to take the matter to the magistrates court would, be used to discredit any further appeal she would have found a way to take it to court.

102. There is force in this latter point. Mrs Harris is not saying that she disputes the deeming affect; what she disputes is the inference drawn by Mr. Sked, and inference which is not required by the statute.

(b) *Mr. Harris attempted to deceive the Officers regarding his previous trips abroad. When initially questioned his stated that he had been abroad 5 to 6 times in the past year. When interviewed he then said it was 7 or 8 times. The UKBA records showed 14 trips. In interview Mr. Harris had said that he had also been across a couple of times with his brother-in-law Peter Sutton.*

103. Mr. Sked does not find it credible that Mr. Harris should have "confused 5 trips with at least 16 trips". He suggests that the movement between 5 to 6 times and 7 to 8 times is indicative of attempts to deceive from which he infers guilt.

104. Mrs Harris says that what Mr. Harris had been asked, or had perceived he had been asked, was how many times he had been to the continent "this year" and the records show that this 5 to 6 in fact an overestimation because he had been less than five times. It could therefore not be considered as an attempt at deceit. She points out that Mr Harris was under medication and was easily confused. She says that when you travel as much as they do is impossible to remember specific dates or numbers - even without medication.

105. We accept that the fluoxetine which Mr. Harris was taking at the time may have made him less clear in his recollection. The officer's notebook phrases the first question: "how many trips abroad have you made in the last year". Mr. Harris says that he understood the question is "how many trips have you made this year". In the later interview however the same question is recorded and Mr. Harris answers "about 7 maybe 8". We accept that the pressure of the interview may have induced some muddle and Mr. Harris's mind, but his pattern of travel shows that at least one trip was taken every month or so. He must therefore have realised that 10 would have been a fairer answer to the question particularly when asked the second time. We

conclude that he may well have been trying to paint a less suspicious picture. That may well be have been because he regarded his other trips is innocent, but it may also have been intended to give a better impression of his current trip. We cannot conclude that Mr. Sked's conclusion - that it pointed to involvement in unlawful activity is unreasonable.

(c) *Although Mr. Harris had said that he was a Chelsea season ticket holder and that his trips to Chelsea were accompanied by a trip across the Channel, it appeared that of the 23 home Chelsea games in the period only one coincided with a trip to the continent in the car. That Mr. Sked found pointed to dishonesty which in turn pointed to smuggling. He suggests that had Mr Harris been to Chelsea matches and abroad on each occasion there would have been a further 12 trips.*

106. Mrs Harris said that several of the crossing dates do coincide with Chelsea home matches or one of many visits to Wembley for FA Cup, Carling cup, and Community Shield games although the exact day of travel would have been on either side of the actual match day. She says that at no time did Mr. Harris claim to have gone to every Chelsea match but simply that when he did so he would also travel abroad to buy wine. She says that treating the additional 12 trips is a redundant assumption.

107. However: (i) on the evidence before us no more than four crossings could be linked to football matches; and (ii) in the evidence raised elsewhere in relation to the 13 journeys only two were on or adjacent to Chelsea home football matches.

108. Mr. Sked did not have the benefit of the evidence we received from Mr. and Mrs Harris related above. That evidence indicates to us a pattern of travel which could well be described as being for the most part in connection with "the theatre or a concert or Chelsea match" and travel to Disneyland. We did not find Mr. Harris's reference to Chelsea suspicious in view of that evidence.

109. Mr. Sked's conclusion that Mr. Harris was dishonest in this respect was, it seems to us, not unreasonable on the basis of what he knew at the time, but would not be reasonable in view of the evidence before us.

(d) *[Mr. Harris] stated that he was last abroad about Christmas time and that he only went to Cite Europe then. When initially questioned he stated that he was last in Belgium in October. Janet Sutton's statement however says that she travelled to Belgium in February and that Mr. Harris was fellow passenger on that trip. In the circumstances Mr. Sked concludes that Mr Harris was not being honest regarding his previous trips to Belgium and believed that he would only act in this manner if he were involved in an unlawful activity - importing tobacco goods for others for a commercial purpose.*

110. Mrs Harris says that the responses provided by Mr. Harris were actually extremely accurate. He travelled last to Belgium in October and indeed did travel with the Sutton family in February. On that occasion however (as he explained under cross examination) he had only travelled as far as Calais himself where he had alighted to gather various wines and other foods for Mrs Harris while the others had continued to Belgium. The last trip to Belgium was therefore in October exactly as stated.

111. We accept Mrs Harris's evidence of her instructions to Mr Harris, and conclude that Mr harris did not travel to Belgium on that occasion.

(e) *On two occasions in the past year Mr. Harris had travelled to the continent twice in one day. These were not the actions of a legitimate cross-border shopper and Mr. Sked and believed that he would only act in this manner if he were involved in an unlawful activity.*

112. Mrs Harris explains that they are not an average family and their travel patterns are certainly not normal. She says that they did indeed travel to the continent twice in one day on two occasions but this was done for the enjoyment of doing so and take advantage of the free case of wine with £19 crossing deal. It might be unusual but it was certainly not unlawful.

113. We have accepted that the family travelled to the continent twice on 2 July, but reached no conclusion in relation to the earlier trip on 2 April. Whilst unusual such a double journey could, particularly given the Harrises' travel patterns have been innocent. Mr Sked's conclusion should be revisited in the light of our findings of the family's travelling habits.

(f) *Mr. Sked notes that on 6 August 2010 Mr. Harris travelled to the continent in the car. On 7 August he says that hiss co-traveller, Peter Sutton, travelled to the continent in his vehicle ... and on 8 August Mr. Harris again travelled to the continent (and back) in his vehicle. Mr. Sked concludes that those are not the actions of a legitimate cross-border shopper and point to unlawful activity.*

114. Mrs Harris points out that the UKBA records show that it was Mr. Sutton who travelled on the 6 and 8 August and that Mr. Harris (together with Mrs Harris said the children) travelled only on 7 August.

115. The UKBA records do indeed show that it was Mr. Sutton who travelled on 6 and 8 August. We accept that Mrs Harris travelled with Mr. Harris on 7 August. There is no evidence before us to determine whether Mr. Harris also travelled on the other two days. We do not believe that it can be assumed that he did.

(g) *Mr. Sked says that he does not believe that Mr. Harris's financial situation would allow him to drive from Barnstable in Devon to London for football/concert/theatre and then drive to Kent and stay in a hotel in Ashford overnight and then travel to the continent (sometimes twice in one day) to*

purchase beer and wine, or to travel to Disneyland, on at least 28 occasions in the past year.

116. Mrs Harris says that their income amply supports the lifestyle of visiting France 12 to 14 times a year.

117. For reasons set out elsewhere in this decision and we agree with Mrs Harris on this point.

Application of UKBA's policy.

118. Mr. Sked says "I also believe that this was not the first occasion for him to have been involved in smuggling goods and that if he had not been intercepted on this occasion the smuggling activity would have continued."

119. The evidence before us indicates that on all but two of the listed trips in the car Mr Harris travelled with Mrs Harris. And we have accepted that on these occasions he did not import tobacco.

120. However not only were there two occasions on which Mr. Harris travelled without Mrs Harris (but with Sutton relatives), but there were also two occasions on which he travelled in Mr. Sutton's van. (We also note above visits to Premier Inn on 7 September and 25 November which do not coincide with Chelsea home fixtures or trips which have already been identified.)

121. We conclude that it is possible that Mr. Harris imported tobacco on these occasions. Given Mr. Sked's conclusion in relation to the 29 March 2010 trip, it was not outside the bounds of reason for him to conclude that Mr. Harris was smuggling on those occasions.

122. Mr. Sked regards the importation on 29 March 2010 as being in the smuggling of 12 kg - rather than of "no more than 5 kg" for the purposes of the UKBA's restoration policy. We have no jurisdiction to construe that policy. Whether or not that is what it means, we cannot say that Mr. Sked's approach to the policy and to a decision as to whether to restore was unreasonable.

Ownership

123. We believe Mr. Sked's approach to ownership was wrong. There is a difference between ownership and use. Mr. Harris had in our view only a licence to use Mrs Harris's car.

124. On that footing Mr. Sked's approach must be unreasonable.

Humanitarian grounds

125. Mr. Sked was not aware of the nature of Mr. and Mrs Harris is daughter's ailments. His decision in that respect cannot be faulted, but on the facts before us we find that the seizure of the car did cause additional hardship because of the need to transport Mr. and Mrs Harris's daughter to school.

Conduct

126. Mrs Harris points out that the tobacco was not concealed and that the occupants of the car gave ready answers about its quantity and amount.

127. We agree. This is a factor specified by Reg 13(4)(g) in relation to the "own use" issue, but it also seems relevant to the question of restoration: indeed Mr Sked regarded an attempt to deceive as potentially relevant to whether the goods should be restored; lack of concealment is a factor which should therefore be considered in the balance.

Summary.

128. Mr. Sked's decision was in our view unreasonable in the light of the evidence available to us in the following respects:

(1) he assumed that the vehicle would be condemned by the magistrates court.

However it seems to us that he could properly have concluded on the evidence before him that the car contained goods which were legally forfeit, which meant that he could reasonably have concluded that the vehicle was properly forfeit;

(2) he took Mr Harris's reference inter alia to Chelsea matches, and his response to a question about visits to Belgium, as indications of dishonesty relevant to the question of restoration. On the evidence before us these were unreasonable conclusions;

(3) he appeared to take the failure to challenge the seizure as an admission of guilt. In the light of the evidence before us that was not a reasonable conclusion. It left open the possibility of guilt and of innocence;

(4) he concluded that Mr. Harris had a legal or equitable interest in the car. On the evidence before us that conclusion was unjustified;

(5) he took no account the lack of concealment; and

(6) he assumed that Mr Harris had travelled on both 6 and 8 August. We concluded that he had travelled on 6 August only

129. Because Mr. Sked took into consideration facts which we believe were wrong (and therefore irrelevant) his decision may be treated as unreasonable. As a result we should set it aside unless it is clear to us that the same conclusion would inevitably have been reached even if these matters

had been correctly considered. We are not wholly persuaded that that would be the case.

Disposition

130. We direct that the decision of 22 June 2001 cease to have effect from the release of this decision.

131. We require UKBA to conduct a further review and in that review to take account of the following:

(1) that the car belonged to Mrs Harris and that Mr. Harris had no legal or equitable interest in the car, although he was given use of it.

(2) that the goods were not concealed;

(3) that on 10 of the trips Mr. Harris had taken to the continent between 2 April 2010 and the date of the seizure, Mrs Harris had been with him and he had brought no tobacco into the UK;

(4) that Mr. and Mrs Harris' income was sufficient to fund their travel, given their use of Tesco vouchers and other offers;

(5) that the magistrates had condemned the car and the goods as forfeit having held that the goods were imported for commercial purposes;

(6) that Mr. and Mrs Harris needed the car to transport their daughter with back problems to and from school; and

(7) our findings as to the pattern of travel of the Harris family;

(8) our findings in relation to the answers given by Mr Harris to the questions asked of him on 29 March 2010.

132. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 19 February 2013