



**TC05998**

**Appeal number: TC/2016/04867**

*RESTORATION OF SEIZED VEHICLE – whether a person who sold the seized vehicle has a reasonable prospect of succeeding in a challenge to UKBF’s decision to refuse to restore – no – appeal struck out*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GARY PAUL BRANDON**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY’S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE Barbara Mosedale**

**Sitting in public at Fox Court, London on 4 July 2017**

**There was no appearance by or on behalf of the Appellant**

**Mr B Zurawel, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. On 12 June 2016, Mr Gary Brandon applied to UKBF for vehicle Iveco Luton  
5 Van 3706DWD (registered in Spain) ('the van') to be restored to him. On 22 June  
2016 UKBF refused to restore the vehicle to him; that decision was upheld on review  
on 11 July 2016. Mr Brandon appealed that review decision by notice of appeal dated  
9 September 2016.

2. On 6 December 2016, HMRC applied to strike out the appeal. That application  
10 was set down for hearing and came before me on 4 July 2017.

### *Appellant not present at hearing*

3. As he had intimated in advance, the appellant did not attend the hearing. Under  
Rule 33 I was only able to proceed with the hearing if I was satisfied that (a) Mr  
Brandon had been notified of the hearing, or reasonable steps had been taken to notify  
15 him of the hearing, and (b) that it was in the interests of justice to do so.

4. I found Mr Brandon had been notified of the hearing: he was clearly aware of it  
as he had told the Tribunal that he would not attend it. I also considered that it was in  
the interests of justice to proceed with the hearing: Mr Brandon had not asked for the  
hearing to be postponed nor suggested he would attend the hearing if it was heard on a  
20 different date. His reason for not attending was that he lived in Spain, was short of  
funds and did not wish to travel. He had provided written representations on a  
number of occasions, the last being 27 June 2017 in anticipation of the hearing going  
ahead in his absence. No purpose would be served by deferring the hearing to another  
day or asking the parties for their consent to determine it on the papers: I had Mr  
25 Brandon's submissions and could deal with them at the hearing.

5. I determined that the hearing would proceed in Mr Brandon's absence.

### *Late appeal*

6. Mr Brandon's appeal was lodged with the Tribunal a few days late, because, he  
said, of difficulties with the postal system between the UK and Spain. HMRC did not  
30 object to the appeal being lodged late, and I admitted it out of time.

### *Findings of fact*

7. As this was a strike out application on the grounds that the appeal had no  
reasonable prospect of success, I was not called on to make findings of fact. I record  
35 the facts which were not in dispute. I can then determine whether on the law the  
appeal has a reasonable prospect of success assuming the appellant can prove the case  
he puts.

8. The undisputed facts were as follows:

9. At some point before 2014, Mr Brandon sold the van the subject of the appeal and which was located in Spain, to Fastcat SL, a company owned by a Mr Stephen Hardie (or Hardy), and was paid the purchase price. Fastcat failed to register the van in its name with the Spanish car registration authorities.

10. On 1 June 2014, the van was intercepted at Border Controls at Coquelles in France while it was being driven to the UK by Mr Robert Kendall Ward. It was discovered that the van contained various commercial loads, but also contained three cardboard boxes between containing 35Kg of cannabis and cannabis resin. The van was seized by UKBF.

11. There was no challenge to the seizure. Mr Brandon's case is that he knew nothing about it at the time.

12. On 16 June 2014, a Mr Stephen Hardie, on behalf of Fastcat SL, requested restoration of the van. Restoration was refused by UKBF on 30 September 2014 on the grounds that UKBF had not been satisfied that Fastcat SL owned the vehicle as they produced no evidence of ownership, such as a vehicle registration form. The reason for this failure was no doubt because Fastcat had not registered with the Spanish authorities as the van's owner (§9 above).

13. Mr Ward was prosecuted. He was acquitted on 2 June 2016.

14. As I have said, two weeks later Mr Brandon applied for restoration of the vehicle. He explained to the UKBF that he had just agreed to sell the van to Mr Ward. Mr Ward contacted UKBF the following day wanting to collect the vehicle. UKBF refused the restoration as I have said: the grounds were that they were not satisfied that Mr Brandon owned the vehicle.

15. When asking for the decision to be reviewed, Mr Brandon provided the Spanish Registration certificate and evidence he had paid in Spain road tax on, plus a fine for a road offence involving, the van, during the three years since he had sold it to Fastcat.

#### *The restoration decision*

16. The restoration decision in essence, if not particularly clearly delineated, gave three reasons why restoration was refused, and I deal with each in turn.

17. UKBF policy: the review officer stated that it was the policy of UKBF not to restore vehicles used to smuggle 2kg or more of cannabis and cannabis resin (amongst other things) unless there were exceptional circumstances. He proceeded on the assumption that the vehicle had been used to smuggle more than 2KG of cannabis and cannabis resin and stated that he was guided but not fettered by the policy. and that he did not think that Mr Brandon had made out a case that there were any exceptional circumstances which would justify a departure from the policy.

18. Restoration to person complicit: the review officer stated that he considered restoring the vehicle to Mr Brandon would be tantamount to restoring it to a person (Mr Ward) complicit in the drug smuggling.

5 19. He reached this conclusion because Mr Brandon's evidence was that he intended to sell the car to Mr Ward, and while the review officer acknowledged that Mr Ward had been acquitted, he said that he did not find Mr Ward's answers in his interview credible, and implied that, applying the lower, civil standard of burden of proof (balance of probability), he considered it more likely than not Mr Ward was complicit in the smuggling. (In reality, the review letter contained an error as it  
10 referred to the civil standard as being 'beyond reasonable doubt' when of course that is the criminal standard).

20. He also stated that he was not satisfied that Mr Brandon's role was beyond reproach: the review officer said he had unanswered questions as to why Mr Brandon sold the van to Fastcat SL, and why he paid 3 year's road tax and traffic fines after he  
15 sold it. He suspected there was more to the relationship between Mr Brandon, Mr Hardie/Hardy and Mr Ward than UKBF had been told.

21. Ownership of the vehicle: the review officer stated it was UKBF's policy to establish that the person requesting restoration owned the vehicle before restoring it to that person. He was not satisfied Mr Brandon owned it as Mr Brandon had stated he  
20 had sold it to Fastcat SL and been paid.

#### *The law*

22. HMRC's application is made under the First-tier Tribunal (Tribunal Procedure) (Tax Chamber) Rules 2009 rule 8(3)(c) which provides that the Tribunal may strike out an appeal:

25 'if...the Tribunal considers there is no reasonable prospect of the appellant's case...succeeding'

23. What is the appellant's case? It is well established that the Tribunal does not have jurisdiction to consider whether it was lawful for the Border Force to seize the van. This jurisdiction is given to the Magistrates. I also mention that the Court of  
30 Appeal in *Jones & Jones* [2011] EWCA Civ 824 has put beyond doubt that Schedule 3 paragraph 5 of the Customs and Excise Management Act 1979 ("CEMA") means that where a seizure is unchallenged in the Magistrates Court, this Tribunal must proceed on the basis that the things seized were liable to seizure. While it was Mr  
35 Brandon's position that he was not aware of the seizure at the time it took place and could not have challenged the seizure, it is clear that he accepts that the seizure was lawful, because he accepts that the vehicle was being used by Fastcat to smuggle drugs. Indeed, he said the vehicle was purchased from him by Fastcat with the intention of using it as a 'drugs mule' although I assume he did not intend to imply he knew that at the time. The Tribunal must therefore proceed on the basis the van was  
40 lawfully seized.

24. What is in issue is whether the Border Force should, despite the seizure, ‘restore’ the van to Mr Brandon. The Border Force have power to restore the goods, despite the lawful seizure, as this is what the Customs and Excise Management Act (‘CEMA’) provides:

5                                   “s 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.”

10 25. The law gives the Tribunal a jurisdiction over UKBF’s decisions on restoration but only to a limited degree. The jurisdiction is contained in Section 16 of the Finance Act 1994 which provides that:

15                                   “(4) .... 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 ....

....

20                                   (6) On an appeal under this section the burden of proof as to—  
.... shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.”

26. In summary, Mr Brandon can only succeed in his appeal if he can demonstrate (s 16(6)) that UKBF’s refusal to restore the van to him was unreasonable. It is well established by binding authority that a decision is unreasonable only if the decision-maker applied the wrong legal test, took into account irrelevant considerations, failed to consider relevant considerations, or acted in a way in which no reasonable decision-maker could have acted in the same circumstances. In other words, it is not enough for Mr Brandon to show that a different decision maker might have reached a different decision: he would have to show that the decision was actually  
30 unreasonable.

#### *Question for Tribunal*

27. As this is a strike out application made by HMRC, the question for this Tribunal is whether HMRC have shown that Mr Brandon does not have a reasonable prospect of success of demonstrating that the decision to refuse to restore the van to him was  
35 unreasonable.

28. I comment in passing that UKBF’s policy of seeking to strike out what they perceive to be weak cases on restoration is perhaps misconceived, at least in the more straightforward cases where the same amount of paperwork and preparation for the strike out hearing is undertaken as for a substantive hearing. While I appreciate that  
40 such applications if successful have the potential of saving the review officer’s time as he will not be called to give evidence in strike out hearings, the policy risks unnecessary hearings before the Tribunal as a second hearing will be required if the

5 strike out application fails, while, at the same time, failing to save the parties or Tribunal much time (as a hearing of the same length has to take place in any event) and requiring the Tribunal to apply what must be to persons unfamiliar with legal processes the unwieldy test described in the previous paragraph. Nevertheless, it is UKBF's right to seek to strike out what they perceive to be a weak case, and I proceed to consider the matter.

10 29. So I will consider whether Mr Brandon has a reasonable prospect of showing of the reasons given by UKBF for refusing to restore the van to him was unreasonable. As any one of the three reasons given by the review officer for refusing restoration would, if reasonable, justify non-restoration, UKBF could succeed in their strike out application even if they were unable to demonstrate that Mr Brandon did not have a reasonable prospect of challenging one or two of the reasons, as long as UKBF could demonstrate that the at least one of the reasons was unimpeachable.

15 30. I consider each of the three reasons given, in the order in which I find most logical:

#### *Ownership*

31. Mr Brandon's position appears to be that he owned the van, or at least had an interest in it, because Fastcat SL had not re-registered the vehicle in its name, leaving him with responsibility under Spanish law for the road tax and fines for road offences.

20 32. I accept Mr Zurawel's point that the law permits 'restoration' (see s 152 CEMA at §24 above) of a vehicle seized so it implies that UKBF should only restore the vehicle to someone who actually owns it or has a comparable interest in it. It does not seem arguable that Mr Brandon is in any real sense the owner of the vehicle: he sold it and he was paid for it.

25 33. Mr Brandon's case seems to be that Spanish law recognises him as the owner of the vehicle because it is registered in his name and that this ought to be taken into account as he is out of pocket the road tax and fine.

30 34. I am far from certain that Mr Brandon could prove his proposition that Spanish law recognises him as the owner of the vehicle, rather than simply the person who is liable to pay the road tax on it, but even if he could, it remains the case that even on his version of events he sold and was paid for the vehicle: restoring it to him would be to give him its value twice. In such circumstances, I do not see that he has a reasonable prospect of success of showing that UKBF's refusal to restore on the grounds he was not really the owner was unreasonable.

35 35. It is also Mr Brandon's case that he ought to be compensated for his loss of road tax and the two fines. However, his liability to those does not stem from any action of UKBF but his own decision in selling the van to Fastcat SL in circumstances where Fastcat SL did not register itself as owner and thus, accepting Spanish law is what Mr Brandon says that it is, rendering himself liable on an on-going basis to the road tax and fines despite the sale. There is no reasonable prospect of a case that UKBF was

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unreasonable to restore the van in these circumstances as it is not for UKBF to provide compensation to Mr Brandon for a situation of his own making and where he had already been paid the value of the van.

5 36. I note that it is his case that his liability to road tax and fines continues even to this day, even after UKBF has actually sold the vehicle at auction. But that does not matter: on his own case, his liability to the road tax and fines under Spanish law stems from the fact that he sold the vehicle on terms such that the new owner was able to avoid re-registering the vehicle in company's name. It was not due to UKBF's actions that he remains liable to fines and road tax but his own.

10 37. I do not see that he has a reasonable prospect of success of showing that UKBF's refusal to restore on the grounds he was not really the owner was unreasonable.

*Restoration to person complicit*

15 38. If I am wrong to think that Mr Brandon's case surrounding 'ownership' has no reasonable prospect of success, it is worth considering the next ground of UKBF's refusal because, as I have said, even if he succeeded on the 'ownership' point, his appeal could not succeed unless he also succeeded on the 'person complicit' and 'policy' reasons for refusal to restore, as each reason would independently amount to a reason to refuse to restore.

20 39. UKBF does not alleged that Mr Brandon was complicit in the smuggling. However, Mr Brandon's own case is that if the vehicle is restored to him he intends to sell the van to Mr Ward for an amount equal to the amount he considers himself to be out of pocket in respect of road tax and fines. So restoring the vehicle to Mr Brandon will be tantamount to restoring it to Mr Ward. So the question is whether Mr Ward  
25 was complicit in the smuggling attempt.

40. Mr Brandon's case is that Mr Ward must be presumed innocent, as he was acquitted by a jury of a criminal offence in connection with the smuggling. But Mr Brandon is wrong in law to say that Mr Ward must be presumed innocent. As I have already said at §19, s 152 CEMA is a civil (as opposed to criminal) matter and only  
30 the civil standard of proof applies. It is quite reasonable for the review officer to consider the question of Mr Ward's complicity in smuggling on the 'balance of probabilities' test rather than the 'beyond reasonable doubt' test applied by the jury. On the balance of probabilities, it is unlikely that Mr Brandon could show that it was unreasonable for the review officer to conclude on the balance of probabilities that Mr  
35 Ward was complicit. Mr Ward's case was that he was employed by Fastcat, and even Mr Brandon accepts that Fastcat SL and Mr Hardie/Hardy were complicit in the smuggling. Nor does Mr Brandon suggest that the review officer was wrong to draw adverse inferences from Mr Ward's answers in interview when he was stopped.

40 41. I am satisfied that Mr Brandon does not have a reasonable prospect of demonstrating that UKBF's refusal to restore the van to him on the basis that a

restoration to him would be tantamount to restoring it to a person (Mr Ward) who was complicit in the smuggling attempt was an unreasonable decision.

*UKBF's policy on restoration*

42. If I am wrong to think that Mr Brandon's case surrounding 'person complicit'  
5 has no reasonable prospect of success, it is worth considering the next ground of UKBF's refusal because, even if he succeeded on the 'person complicit' point, his appeal could still not succeed unless he also succeeded on the 'policy' reason for the refusal to restore.

43. UKBF's stated policy is not to restore the vehicle used in cases of smuggling of  
10 more than 2KG of cannabis and cannabis resin unless there are exceptional circumstances. Mr Brandon does not put forward a case that this policy was unreasonable and I see no grounds in any event on what basis such a challenge could succeed.

44. So his case must be that the policy was misapplied. Mr Brandon accepts that  
15 the van was used for the smuggling of more than 2KG of cannabis and cannabis resin. Indeed, he suggests in his representations that the vehicle was bought from him for that purpose, although as I have said I do not suppose by that that he intended to imply that he knew that at the time.

45. So this ground of appeal must be taken to be a challenge to the UKBF's review  
20 officer's decision that there were no exceptional circumstances. However, Mr Brandon does not put forward any factors which could reasonably be thought to be exceptional circumstances. Losing the value of a vehicle is not by itself exceptional circumstances as that arises in every case that a vehicle is seized. And in any event, Mr Brandon has not even lost the value of the vehicle as he accepts he was paid for it:  
25 it appears he is less out of pocket than the normal applicant as he is just out of pocket the road tax and fines.

46. Moreover, so far from exceptional circumstances in his favour, the case he puts  
forward does not indicate that he was without fault. I note that while Mr Brandon has offered some answers to questions raised by the UKBF officer, there are indications  
30 that he was rather careless when he sold he vehicle: if he is right that under Spanish law he remained liable for road tax and fines until the van was re-registered in the new owner's name, it was at the very least careless of him to sell the vehicle without insisting that the re-registration took place before the vehicle was handed over. Nor does he explain how Mr Ward came to contact him 2 years after the vehicle was  
35 seized with a view to buying it when it had not even been restored to Mr Brandon, nor why on his own case that (if it was restored) he would be prepared to sell the van to Mr Ward for no more than the road tax and fines. He also admits his connection with Mr Hardie/Hardy was more than just buyer and seller of van; he appeared on his own evidence to have an on-going business relationship with him up until the point Mr  
40 Hardy disappeared after the van was stopped at Coquelles.



47. So far from exceptional circumstances in favour of Mr Brandon, there are unanswered questions about his relationship with the men involved in the smuggling. I am satisfied that Mr Brandon does not have a reasonable prospect of showing that UKBA's decision to refuse to restore the van in line with their policy was unreasonable.

*Conclusion*

48. I am satisfied that Mr Brandon's case does not have a reasonable prospect of success and strike it out under Rule 8(3)(c).

49. 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.

**BARBARA MOSEDALE**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 10 JULY 2017**