[2018] UKFTT 124 (TC)

TC06380

Appeal numbers: TC/2016/06147
TC/2017/01092

EXCISE DUTY – seizure of vehicles – whether decisions not to restore were unreasonable – jurisdiction of Tribunal where points not raised by appellant – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ZIAN CONTINENTAL SRL **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at Taylor House, 88 Rosebery Avenue, London on 5 December 2017

Ms Mirabela Popescu, director of the Appellant, for the Appellant

Mr Michael Newbold of Counsel, instructed by the General Counsel and Solicitor to the Home Office, for the Respondents

DECISION

1. Zian Continental SRL ("the Company") appealed against the Border Force's refusal to restore two lorries, with registration numbers CJO5 ZAN ("the First Lorry") and CJO3 ZAN ("the Second Lorry"), together "the Lorries". The two decisions were made and appealed separately but have been heard together.

2. The Tribunal's jurisdiction is limited in restoration appeals such as this. It cannot order restoration, but if it decides that the Border Force's decision(s) were unreasonable, it can direct that the Border Force make new decision(s), taking into account new, further or different points.

3. Having considered the facts, the law, and the submissions on behalf of both parties, the Tribunal found no basis on which the Border Force should be directed to make new decisions. The Company's appeals are therefore DISMISSED.

4. The Tribunal issued a summary decision shortly after the hearing. However, the Company exercised its right to ask for a full decision, and this is that full decision.

Preliminary issues

5. I opened the hearing by asking Ms Popescu about her level of English. She confirmed that she considered her English language skills to be of a sufficiently high standard to allow her to understand and participate in the proceedings. I directed that if she did not understand anything, or was in any difficulty relating to the use of language, she was to inform the Tribunal immediately. Ms Popescu gave no such indication. She appeared to have no problem understanding the proceedings, or in communicating with the Tribunal or with the other party.

6. The Company's appeal against the refusal to restore the Second Lorry was made slightly late. The Border Force did not object to the late appeal. Having considered the facts and the relevant law, I gave permission for that appeal to be made late.

7. The Border Force asked for permission to admit into evidence the witness statement of Officer Hodson, who had stopped and searched the First Lorry. His statement and the attached pictures had been emailed to Ms Popescu on 22 November 2017. Ms Popescu did not object to the evidence being admitted. Mr Hodson was present to give oral evidence and so was available for cross-examination. Taking all relevant matters into account, I found that it was in the interests of justice for Officer Hodson's evidence to be considered.

The law

The legislation relating to seizure

8. The Customs & Excise Management Act 1979 ("CEMA") s 88(c) provides that where a vehicle:

> "is or has been within the limits of any port…within the prescribed area while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods, that…vehicle shall be liable to forfeiture."

9. CEMA s 141(1) provides that a vehicle is also liable to forfeiture if it "has been used for the carriage…or concealment" of smuggled goods.

10. The First Lorry was seized in reliance on both provisions; the Second Lorry was seized in reliance on CEMA s 88(c) only.

The legislation on challenging a seizure

11. CEMA s 139 is headed "Provisions as to detention, seizure and condemnation of goods, etc." Subsection 6 provides:

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

12. Schedule 3 is headed "provisions relating to forfeiture". Paragraph 1 begins:

> "(1) The Commissioners shall, except as provided in sub-paragraph (2) below, give notice of the seizure of any thing as liable to forfeiture and of the grounds therefor to any person who to their knowledge was at the time of the seizure the owner or one of the owners thereof.
>
> (2) Notice need not be given under this paragraph if the seizure was made in the presence of–
>
> (a) the person whose offence or suspected offence occasioned the seizure; or
>
> (b) the owner or any of the owners of the thing seized or any servant or agent of his…"

13. Schedule 3, paragraph 3 provides that a person seeking to challenge the seizure of goods must give notice to the Commissioners within one month of the seizure. Paragraph 5 then says:

> "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."

14. In *HMRC v Jones and Jones* [2011] EWCA Civ 824 ("*Jones*") Mr and Mrs Jones had entered the UK in a car with 6 kg of Golden Virginia hand rolling tobacco, 228 litres of wine and 187.5 litres of beer which they said were for their personal use. Customs officers seized the car along with the cigarettes, tobacco and wine, on the basis that Mr and Mrs Jones were importing the goods for commercial purposes. At the First-tier and Upper Tribunals the appellants successfully argued that both the car and the goods should be restored, because the goods had been imported for personal use. However, the Court of Appeal unanimously allowed HMRC's appeal. Mummery LJ gave the only judgment, with which Moore-Bick and Jackson LJJ both agreed. Paragraph [71(5)] reads:

> "The deeming process limited the scope of the issues that the owners 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….In brief, the deemed effect of the owners' failure to contest condemnation of the goods by the [magistrate's] court was that the goods were being illegally imported by the owners for commercial use."

15. At [71(7)], Mummery LJ said that "deeming something to be the case carries with it any fact that forms part of the conclusion."

Application of that law in the context of this appeal

16. The Company did not challenge the seizure of the Lorries in the magistrate's court. The Tribunal is therefore required to find that the seizures were legal, see the Court of Appeal decision in *Jones*. The Court of Appeal also decided that, when considering a restoration appeal, the Tribunal had to accept any fact which underpinned the conclusion that the seizure was lawful.

17. The Second Lorry was seized on the basis that it had been adapted to conceal goods. The Tribunal is therefore required to accept that as a fact. The First Lorry was seized on two bases: (i) that it was carrying cigarettes and (ii) it had been adapted to conceal goods. The seizure would have been lawful if only one of these two reasons subsisted. The Tribunal is therefore able to find the facts relating to the adaptation of the First Lorry, based on the evidence provided at this hearing. For HMRC, Mr Newbold accepted that this was the position.

The law on restoration

18. The Company asked the Border Force to restore the Lorries, and the Border Force refused. The Border Force's decision not to restore the Lorries is what is known as an "ancillary matter", see CEMA s 152(b). Finance Act 1994, s 16(4) sets out the Tribunal's powers in relation to ancillary matters:

> "In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say -
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
>
> (c) in the case of a decision that has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

19. In ordinary language, what that means is that the Tribunal does not have the jurisdiction to order the Border Force to restore the Lorries. The Tribunal can only decide whether the decisions not to restore were unreasonable. If the Tribunal decides that this is the position, it can require the Border Force to look at the matter again and make a new decision.

20. In deciding whether or not the Border Force's decisions not to restore the Lorries were unreasonable, I followed the classic approach summarised by Lord Greene MR in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 ("*Wednesbury*"):

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

21. Even if the decision was unreasonable, for instance because the Border Force did not consider all relevant factors, the Tribunal will not order a further review if the conclusion not to restore the Lorries would inevitably have been the same had those further factors been considered, following the principle established in *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 ("*John Dee*").

The evidence

22. The Border Force provided helpful bundles of documents for the hearing, which included:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) witness statements of Officer Harris and Officer Hodge, who reviewed the decisions not to restore the First and Second Lorries respectively;

(3) copies of the Officers' Notebooks in relation to both seizures; and

(4) a statement from Mr Patrascu, the driver of the First Lorry, dated 2 September 2016, and a translation of that statement into English;

(5) a copy of an employment contract for Mr Patrascu, and a translation of that contract into English.

23. Officer Harris and Officer Hodge also gave oral evidence, led by Mr Newbold; they were cross-examined by Ms Popescu. As already noted, the evidence included Officer Hodson's witness statement and his oral evidence; he too was cross-examined by Ms Popescu. I found all three witnesses to be entirely honest and credible.

24. Ms Popescu gave evidence in chief, was cross-examined by Mr Newbold and answered questions from the Tribunal. Her evidence about the key issue of the void spaces was evasive and inconsistent, see §37, and there were other inconsistences, see §35. I found her to be an unreliable witness.

25. On the basis of my assessment of the evidence, I make the following findings of fact. I make further findings of fact later in this decision.

Findings of fact

26. Ms Popescu set up the Company in 2015 and is its only shareholder. In the same year, the Company purchased a second-hand lorry, and began to transport goods between Romania and the UK, and *vice versa*. The Company had only employees at this point: Ms Popescu; a mechanic; and Mr Savu, a driver.

27. In May 2016 the Company sold that lorry and acquired the First and Second Lorries on hire-purchase. Both Lorries were Ford box vans. On 19 May 2016 Ms Popescu sent the Lorries to a firm called Kontex for it to make a number of changes to the Lorries, including the installation of two lateral boxes ("Lockers") under each chassis; the Lockers are described in the translated version of the Kontex invoice as "for driver's personal stuff".

28. The Company then hired another driver, Mr Patrascu. The Border Force's records, which were unchallenged, show that Mr Patrascu drove the Second Lorry to or from the UK on 14 June 2016, 28 June 2016 and 30 June 2016. The Second Lorry also made six other return journeys to/from the UK before the events with which this appeal is concerned. Mr Savu was the driver on all but one of those other occasions.

29. Ms Popescu subsequently supplied the Border Force with an employment contract between the Company and Mr Patrascu. The Romanian original of that contract states that his first working day was 22 July 2016; the English translation states that his first working day was 21 July 2016[1]. It followed from these dates, and Ms Popescu accepted this was the position in cross-examination, that Mr Patrascu was driving the Lorries before he had signed his employment contract; she told the Tribunal he was on "a trial period".

The First Lorry

30. On 30 July 2016, the First Lorry arrived in Dover, driven by Mr Patrascu. It was stopped by Border Force Officers, who found 9,000 cigarettes placed in a void space at the top of both Lockers. The existence of the void space had been concealed using a board secured by screws which formed a false ceiling to the Lockers. Access to the void space was possible only if the board was removed.

31. During the hearing Ms Popescu said several times that the void space had been put in by Kontex. At the end of the hearing she added that Kontex had told her that the void spaces were installed "otherwise when it is raining all the water is leaking

[1] The summary decision contained a typographical error: this date was written as 21 July 2017 instead of 21 July 2016.

inside". However, taking all relevant evidence into account, I find as a fact that the void space was not part of the Lockers provided to the Company by Kontex. I rely in particular on the following evidence:

(1) the Kontex invoice makes no reference to the construction of void spaces;

(2) the diagram of the Lorries which Kontex provided does not show the void spaces;

(3) the materials used to construct the void space were different from those used for the Lockers, being plywood with foam placed around its edges; and

(4) on 1 December 2016, Officer Hodge wrote to Ms Popescu saying "if you have information to demonstrate that the 'alteration'…was made by Ford (or Kontex), please forward that evidence to me". Officer Hodge confirmed to the Tribunal that no such evidence was supplied.

32. After the cigarettes had been found in the First Lorry, both the cigarettes and the Lorry were seized. Mr Patrascu denied knowledge of the cigarettes or the void space. He was given a Seizure Information Notice and a Notice 12A. He called Ms Popescu and informed her of the seizures.

33. When Mr Patrascu returned to Romania, he remained an employee of the Company. Ms Popescu accepted that she knew he had been involved in smuggling, but said she had retained him because the Company might be charged a penalty by the Border Force, and she wanted to be able to deduct that penalty from Mr Patrascu's wages. When asked by Mr Newbold what work Mr Patrascu was doing during this time, she said that he was doing "nothing", because she would not let him drive.

34. On 2 September 2016 Mr Patrascu signed a statement saying that:

> "After I presented the documents, the police officer asked me if I had alcohol, cigarettes or drugs. I said I had 800 cigarettes in the cabin. During the control they found other 8,200 cigarettes, which I have hidden in the boxes for driver's personal stuff. When I was asked [by the Border Force] if I knew about their existence, I said I had no idea, as I was afraid I would be arrested. I confess that the cigarettes belong to me, and the place where they were hidden was found by me and nobody in the company knew about it. The vehicle I was driving was manufactured from the factory with lateral boxes."

35. During her witness evidence Ms Popescu initially said that Mr Patrascu left the Company after he had given this statement. She subsequently stated that she had fired him. Mr Newbold challenged her change of position, asking "You said he left. Did you fire him or did he leave." Ms Popescu said "He left by himself". I find as a fact that Mr Patrascu left the Company of his own accord after signing his statement.

The Second Lorry and the restoration applications

36. Ms Popescu told the Tribunal that, on receipt of the call from Mr Patrascu after the cigarettes and Lorry had been seized, she "really checked the second lorry for

cigarettes but didn't realise the boxes were a problem", and she asked the rhetorical question "how should I know where the concealment was if I never saw it?".

37. However, under cross-examination her responses (set out below in italics) to Mr Newbold's questions were as follows:

> "Did you see the void in the second vehicle? *I don't remember seeing it and even if I saw it I thought it was supposed to be there…*
>
> Did you check the void area? *I am not checking spaces. I am checking illegal goods*.
>
> Did you check the void space? *I am checking illegal goods*.
>
> Did you check the void space for cigarettes? *I don't remember*.
>
> Did you know it was there? *I didn't know it could affect my company*.
>
> Did you know it was there? *No*.
>
> That's not true, is it? *I don't remember if I checked it…As long as has no cigarettes I had no fear…*
>
> You were taking a risk that the driver might use it for smuggling? *Yes.*"

38. From this exchange it is clear that Ms Popescu initially refused to give a straightforward answer to Mr Newbold's questions, but was instead evasive as to whether or not she knew about the void area. My assessment of the evidence is that Ms Popescu knew that void areas had been constructed above all the Lockers, but did not realise that sending a Lorry with empty void areas could result in it being seized, and I find these to be facts.

39. The Second Lorry departed, and arrived at Dover on 2 August 2016, driven by Mr Savu. Officer Hodson stopped and searched the Second Lorry; he found empty void areas above the Lockers. The Second Lorry was seized on the basis that it had been adapted for the purpose of concealing goods.

The restoration applications and Company A

40. The Company applied for both Lorries to be restored. On 22 August 2016 the Border Force sent the Company an email stating "please find attached a decision letter regarding your restoration request for CJ05 ZAN". Attached to the email was a decision about the seizure of a different vehicle, belong to an unrelated company, who I have called "Company A". The decision stated that 67,480 cigarettes had been found and that the Border Force had decided to restore the vehicle on payment of £15,420.02.

41. The Border Force later apologised for sending the wrong decision to the Company, but refused to restore both Lorries. Under cross-examination, Officer Hodge said that Company A had asked for a statutory review of the decision to restore

on the basis that the fine was too high. However, when that statutory review was carried out, the Border Force decided the vehicle should not be restored.

The review decision relating to the First Lorry

42. On 13 October 2016, Officer Harris carried out the review of the decision in relation to the First Lorry. He set out a summary of the facts about the seizure and the correspondence received from the Company, all of which he had considered for the purposes of his review; he also set out the key part of the relevant Border Force policy, which was as follows (emphases in original):

> "a vehicle adapted for the purposes of concealing goods will not normally be restored, but in *exceptional* circumstances the vehicle may be restored for a fee to include the cost of removing the adaptation."

43. Officer Harris said that he was applying that policy "firmly but not rigidly, so as to allow an exercise of discretion on a case by case basis, and to ensure that my discretion is not constrained by it". He assessed the Lorry as having "a sophisticated adaptation, capable of carrying illicit goods; policy dictates that it should not be restored".

44. He went on to consider whether there were any exceptional circumstances, but decided there were not. In doing so, he took into account Mr Patrascu's statement, when the smuggled goods were discovered, that he knew nothing about the concealment, saying:

> "You claim that the adaptation is not for the purposes of concealment but for drivers to place their personal items in. This explanation does not however sit well with the driver's reaction when the concealment was discovered. The driver said he knew nothing about the adaptation. In addition I have not found anything in the documentation you have provided that makes any mention of this adaptation to the drivers. Therefore I am left with a concealment which clearly contained illicit goods which the driver claimed to know nothing about."

45. Officer Harris also took into account the seizure of the Second Lorry, saying:

> "I am mindful that another one of your vehicles, CJ03ZAN was seized on 1 August 2016 in which a similar concealment was found and that vehicle was also seized. There were no goods in that adaptation driver-related or otherwise."

46. Finally, Officer Harris considered the degree of hardship caused by the loss of the Lorry. He said that:

> "one must expect considerable inconvenience as a result of having a vehicle seized by the Border Force, and perhaps a large expense in making other transport arrangements or even in replacing the vehicle. Hardship is a natural consequence of having a vehicle seized and it would have to be exceptional hardship for me to restore the vehicle."

47. Office Harris concluded that the Company had not proved there was any "exceptional hardship" in this case.

The review decision relating to the Second Lorry

48. On 1 December 2016, Officer Hodge reviewed the decision relating to the Second Lorry. Like Officer Harris, she set out a summary of the facts about the seizure; the correspondence received from the Company about the restoration decision, all of which she had considered for the purposes of her review; the Border Force policy on restoration; and her approach, which was to apply that policy "firmly but not rigidly, so as to allow an exercise of discretion on a case by case basis, and to ensure that my discretion is not constrained by it".

49. Again, like Officer Harris, she referred to the existence of a "sophisticated adaptation" and stated that "policy therefore dictates that it should not be restored". She then went on to consider whether there were any exceptional circumstances. She considered Ms Popescu's claim that the void spaces were installed as part of the original specification, but said that:

> "I am not convinced that the concealment, boarded off from the main chassis and over the chassis rail, with access only from the inside of the locker by removing a plank which was screwed in and concealed with expanding foam, was part of the manufacturer's specification. If you have information to demonstrate that the 'alteration' described above was carried out by Ford (or Kontex) please forward the evidence to me and I will undertake a further review."

50. She also took into account the fact that the void space in the Second Lorry did not contain any smuggled goods. But she said that, given the number of previous trips made by the Lorry, there had been plenty of opportunity to use the void space. She also referred to the seizure of the First Lorry a few days earlier, when smuggled goods had been found in the similar void space. She came to the conclusion that there were no exceptional circumstances. Finally, she considered hardship, and the paragraph in her letter mirrors the similar paragraph in the earlier letter written by Officer Harris.

The Company's position after the seizures

51. In reliance on Ms Popescu's oral evidence, I find that the Company continued to operate after the loss of both Lorries. As at the date of the hearing, the Company was sending two to three lorries to the UK each week.

Submissions

52. Mr Newbold submitted that the review decisions were reasonable and there was no basis on which the Tribunal should direct a further review of either decision.

53. Ms Popescu submitted that the decisions not to restore the Lorries were flawed. Her reasons, and the Tribunal's view of those reasons, are set out below:

(1) *Although the void spaces existed, they were not adaptations made for the purposes of concealing goods.* I have already rejected Ms Popescu's oral evidence that the voids were installed in order to prevent rainwater entering the Lockers. No other purpose has been suggested. I find as a fact that the voids were adaptations made for the purpose of concealing goods.

(2) *Ms Popsecu was unaware of the adaptation to the Lorries*. I have found as a fact that Ms Popescu was aware that each Locker contained a void space.

(3) *Ms Popescu had done everything reasonable to prevent smuggling*. Given her knowledge of the adaptations, I reject that submission. It was also not consistent with the Company's subsequent retention of Mr Patrascu as an employee, despite his involvement in smuggling. I agree with Mr Newbold that the reasonable employer would not retain and pay an employee who had been found with smuggled goods, especially when there were no duties for that employee to perform. It is also not credible that Ms Popescu continued to pay Mr Patrascu in order to create a salary from which to deduct a possible future penalty.

(4) *The Company would become insolvent as the Lorries were leased, and the refusal to restore therefore caused exceptional hardship*. On Ms Popescu's own evidence, the Company not only continued to operate but is able to send two or three lorries to the UK each week.

(5) *The Border Force discriminated against the Company because it was Romanian*; *they had offered to restore another lorry to Company A, even though that lorry had been used to carry far more cigarettes than had been found on the Lorries*. There was no evidence before the Tribunal as to the facts relating to Company A – for instance, there is no information as to whether the cigarettes were concealed, or whether the vehicle was adapted for the purpose of smuggling. It is simply not possible to infer that the reason for the difference between that decision, and the decisions relating to the Lorries, was that the Border Force was discriminating against the Company because it was Romanian. For the avoidance of doubt, my conclusion on this point does not take into account the Border Force's review decision to refuse restoration of Company A's vehicle, although that change of position indicates that the original decision (to restore on payment of a fine) was too lenient.

(6) *Mr Patrascu wrote to the Border Force accepting responsibility for the smuggling, so the Border Force should punish him, not the Company*. As Mr Newbold said, the issue before the Tribunal is not whether Mr Patrascu should have been prosecuted, or whether he should be subject to a financial penalty. Instead, the issue is the decisions to refuse to restore the Lorries. The purpose of the Border Force's seizure policy is to prevent adapted vehicles from coming to the UK with smuggled goods, whether the driver or the owner makes use of the adaptation.

(7) *The Seizure Information Notice and Notice 12A were given to Mr Patrascu and Mr Savu but should instead have been provided to the Company*. As Mr Newbold correctly pointed out, if an agent or servant of the vehicle's owner is present when a vehicle is seized, there is no requirement to send the Notices to the owner, see CEMA Sch 3, para 1(2) cited earlier in this decision. Mr Patrascu and Mr Savu were both employees of the Company, and therefore its servants. It follows that the legal requirements were satisfied when the Notices were given to them.

The Review Decisions

54. For the reasons set out above, I rejected the submissions made by Ms Popescu. However, the Company was not legally represented, and Ms Popescu did not submit that the review decisions were unreasonable in a *Wednesbury* sense – in other words she did not seek to argue that the decisions made by Officers Harris and Hodge had "taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account", as Lord Greene put it in *Wednesbury.*

55. The role of the Tribunal in this situation is not entirely clear. In *HMRC v Jenkin* [2017] UKUT 239 (TCC) the Upper Tribunal endorsed the decision of Carnwarth J (as he then was) in *Elias Gale v HMRC* [1999] STC 66 at [30], that the "the rules that govern appeals envisage an adversarial procedure, with the running made by the two parties". That would indicate that the Tribunal should not raise points of its own motion. However, the issue in both *Jenkin* and *Gale* was whether the Tribunal had a power to increase a tax assessment of its own initiative. The issue here is different in type, namely whether the Tribunal was able to consider points of law of which the appellant, being a litigant in person, was unaware.

56. In relation to employment tribunals, which also have an adversarial jurisdiction, in *Small v Shrewsbury and Telford Hospital Trust* [2017] EWCA Civ 822 at [12], the Court of Appeal recently confirmed:

> "…the importance of an employment tribunal taking for itself points which arise…'as a matter of course', irrespective of whether they have been taken by the parties before them."

57. Although the jurisdictional position is not entirely clear, I decided I should consider for myself whether either or both of the review decisions were unreasonable in a *Wednesbury* sense, as that was something which arose "as a matter of course" in this type of appeal.

58. Officer Harris's decision explicitly took into account the driver's claim, when the smuggled goods were discovered, that he knew nothing about the concealment. But it does not refer to the statement made by Mr Patrascu on 2 September 2016 that "…the place where they [the cigarettes] were hidden was found by me and nobody in the company knew about it", although that statement was sent to Border Force on 9 September 2016 as an attachment to Ms Popescu's letter.

59. However, in his review decision Officer Harris specifies the material he had considered, and it included the attachments to Ms Popescu's letters. Moreover, he confirmed this was the position in his witness statement and under cross-examination. I thus find as a fact that he did consider that evidence when coming to his decision.

60. However, he did not explain how he resolved the contradiction between (a) the written evidence in Mr Patrascu's statement of 2 September, and (b) his oral evidence as given to the Border Force Officers when the Lorry was stopped. In *Save Britain's Heritage v No. 1 Poultry Ltd* [1991] 1 WLR 153 at p 24 Lord Bridge said a decision may be flawed if it "depended on a disputed issue of fact and the reasons do not show

how that issue was decided". I therefore considered whether the review decision was flawed because Officer Harris had not explained how he resolved this evidential contradiction.

61. However, Officer Harris explicitly took into account the fact that another vehicle owned by the Company with almost identical void spaces, but a different driver, was stopped on 1 August 2016. It is therefore unsurprising that he did not think it necessary to refer to Mr Patrascu's statement that he and he alone was responsible for constructing and using the concealment; that evidence is very difficult to reconcile with the existence of an almost identical void space in the Second Lorry. Thus, taking into account this further fact, which was fully considered by Officer Harris, it is possible to infer how he resolved the conflict between Mr Patrascu's two contradictory evidential positions.

62. Even were that not to be the position, if the Border Force were to make the decision again, they would take into account the facts established in this hearing, including Ms Popescu's knowledge of the adaptation and that the voids were adaptations made for the purpose of concealing goods. As a result, the Border Force would inevitably confirm the decision not to restore the First Lorry. There would be therefore be no point in remitting the case back for a further decision, see the principle established in *John Dee* cited earlier in this decision.

63. For completeness I record that I identified no *Wednesbury* points in relation to Officer Hodge's decision.

64. As a result of the foregoing, there is no basis on which the Tribunal can direct the Border Force to make further restoration decisions.

The decision and appeal rights

65. The Company's appeals are therefore refused.

66. This document contains full findings of fact and reasons for the decision. If the Company is dissatisfied with this decision, it 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.

67. The application must be received by this Tribunal not later than 56 days after this decision is sent to the Company. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 09 MARCH 2018