Neutral Citation: [2023] UKFTT 612 (TC)

Case Number: TC08854

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/00302

Customs and Excise Management Act 1979 – seizure of vehicle used in smuggling of drugs – restoration – whether review decision refusing restoration was reasonable – appeal allowed and directions given for a further review

Heard on: 13 and 14 February 2023
Judgment date: 5 July 2023

Before

Tribunal Judge Jonathan Cannan
Jane Shillaker

Between

JP TRANS URK BV

Appellant

and

DIRECTOR OF BORDER REVENUE

Respondent

Representation:

For the Appellant: Simon Clarke of counsel instructed by Tinkler Solicitors

For the Respondent: Richard Davenport of counsel, instructed by the Director of Border Revenue

DECISION

INTRODUCTION

1. This is an appeal against a refusal by the respondent to restore a Mercedes tractor unit and refrigerated trailer which were seized by the UK Border Force at the Control Zone in Coquelles, France on 29 July 2020. The seizure followed a search of the trailer which was destined for the UK. The search revealed 43 trolleys of fresh cut flowers. The bases of many of the trolleys were found to contain packages of drugs. This was later revealed to comprise 250kg of cocaine and 169kg of amphetamine with a street value of more than £13m.

2. The driver was arrested and cautioned. The drugs, vehicle and trailer were seized. The driver was subsequently charged and stood trial for evading a prohibition on the importation of prohibited goods. He was acquitted by a jury at Canterbury Crown Court on 19 April 2021.

3. In the meantime, the appellant, a company which owns the vehicle and the trailer (which together we describe as "the Vehicle"), had requested restoration of the Vehicle by email dated 11 August 2020. Further information was subsequently provided by the appellant at the request of the respondent. By letter dated 6 September 2020 the respondent stated that it would not restore the Vehicle.

4. The appellant requested a review of that decision and in a review decision dated 19 November 2020 the decision not to restore the Vehicle was upheld ("the Review Decision").

5. The appellant lodged an appeal with the tribunal against the decision on 18 December 2020. The grounds of appeal are as follows:

   (1) The Respondent took into account irrelevant factors.

   (2) The Respondent failed to take into account relevant factors.

   (3) The Respondent failed to reasonably exercise its discretion.

6. The hearing of this appeal took place via video. We have a fact finding jurisdiction, and we set out below our findings of fact. We heard evidence from Mr Jelle Post on behalf of the appellant and from Mr Mark Summers on behalf of the respondent. Mr Post is a Dutch national and a director of the appellant. He was the driver of the Vehicle when it was seized. He gave his evidence through an interpreter. Mr Summers is a Higher Officer of UK Border Force and was the review officer who made the Review Decision upholding the original decision not to restore the Vehicle. Following the video hearing, the parties both provided written closing submissions.

STATUTORY FRAMEWORK

7. We can describe the statutory provisions relevant to this appeal quite briefly.

8. Section 3 of the Misuse of Drugs Act 1971 prohibits the importation of controlled drugs.

9. Section 49(1) Customs and Excise Management Act 1979 ("CEMA 1979") provides that where any goods are imported contrary to any prohibition by virtue of any enactment, those goods shall be liable to forfeiture.

10. Section 141(1) CEMA 1979 provides that where anything has become liable to forfeiture, any vehicle which has been used to carry that thing shall also be liable to forfeiture.

11. Section 139(1) CEMA 1979 provides that anything liable to forfeiture may be seized or detained by any officer of the UK Border Force.

12. Section 152 CEMA 1979 Act provides for restoration of anything seized as follows:

> 152 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]…

13. The review and appeals procedure in relation to decisions concerning restoration of things forfeited or seized under CEMA 1979 is contained in Finance Act 1994. Section 14 Finance Act 1994 makes provision for a person to require a review of a decision under section 152(b) CEMA in relation to restoration of anything seized from that person.

14. Section 16 Finance Act 1994 sets out the jurisdiction of the tribunal on an appeal against such a review. A decision on review to refuse restoration or to impose conditions on restoration is an ancillary matter. As such the jurisdiction of the tribunal is limited to considering whether the decision of the review officer was reasonable. The Tribunal also has limited powers where it is satisfied that a decision is unreasonable. Section 16(4) provides as follows:

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

15. In the present appeal we are concerned with whether the review decision confirming the refusal of restoration was reasonable. If we find that the decision was unreasonable, then we have jurisdiction to direct the respondent to conduct a further review, and the basis on which that further review should take place. There is no challenge on this appeal to the legality of the seizure.

16. It is well established that the concept of unreasonableness in this context includes whether the review considered irrelevant factors, failed to consider all relevant factors or is otherwise in all the circumstances unreasonable (see for example, *Sczcepaniak v Director of Border Revenue* [2019] UKUT 295 (TCC)).

GROUNDS OF APPEAL

17. We have set out above the broad grounds of appeal relied on by the appellant. They were described in more detail in the appellant's skeleton argument.

18. The first ground of appeal is that the review officer wrongly took into account and/or drew adverse inferences from certain irrelevant factors, including:

> (1) That Mr Post was complicit in and responsible for the smuggling attempt when he was not complicit or responsible.

(2) That Mr Post was carrying five CMRs which were fabricated. The term "CMR" is shorthand for a consignment note issued pursuant to the Convention on the Contract for the International Carriage of Goods by Road.

(3) That the delivery addresses on the CMRs were not the address where delivery was intended to be made.

19. The second ground of appeal is that the Review Decision failed to take into account certain relevant factors, including:

(1) That Mr Post was acquitted of all charges in connection with the smuggling attempt.

(2) That a variation to the loading location in the Netherlands, not identified in the CMRs, was not unusual.

(3) That Mr Post was not able to observe the loading process in the Netherlands because of covid-19 precautions.

20. The appellant also says that the Review Decision was unreasonable. In circumstances where the appellant and Mr Post were innocent victims and guilty only of an error of judgment, it was disproportionate to refuse restoration. It was also said that the Review Decision adopted the wrong evidential test of beyond reasonable doubt rather than the balance of probabilities.

21. The respondent's case is that the appellant and Mr Post failed to make reasonable checks in relation to the consignor, the consignees and the goods being carried.

22. In closing submissions, the appellant contended that we should overturn the Review Decision and order restoration of the Vehicle. We have no jurisdiction to do that. Our jurisdiction if we find that the Review Decision was unreasonable is set out in section 16(4) Finance Act 1994. The most we can do is to require the respondent to conduct a further review in accordance with directions of the tribunal.

FINDINGS OF FACT

23. It is common ground that we have a fact finding jurisdiction on this appeal. In considering the reasonableness of the Review Decision we are not limited to considering evidence which was before the decision-maker – see *Gora v Customs & Excise Commissioners* [2003] EWCA Civ 525.

24. Mr Post gave evidence as to the circumstances in which the appellant agreed to transport the flowers and the circumstances in which the trolleys, known as Danish carts, came to be loaded into his trailer. He had also given an account of this when he was interviewed under caution on 30 July 2020 following seizure of the Vehicle. We had the benefit of a transcript of that interview. Mr Post's evidence is that he was unaware that drugs were concealed within the trolleys. For reasons described below, the respondent did not challenge Mr Post's evidence that he was unaware of drugs being concealed in the trolleys, and we accept his evidence in that regard.

25. Mr Post was 32 years old at the time of the seizure and has been a truck driver since 2010. He is the sole director and owner of the appellant. The appellant was established in July 2018 and continued the transport business of a previous company. Mr Post's father, Geert Post also works in the business.

26. The appellant carried three loads for a business called Greenorganic Flowers BV ("Greenorganic") prior to the load which was seized. There is evidence and we find that the appellant first carried loads of flower trolleys from the Netherlands to the UK on 6, 8 and 20

July 2020. On each occasion the goods were collected in Heemskerk and transported to Benfleet, Essex. There was no evidence before us as to the circumstances in which the appellant first started to do business with Greenorganic.

27. On 23 July 2020 the appellant received an email from Greenorganic. It was headed "Transport order" and was addressed to Geert Post. The email requested the appellant to transport 43 Danish carts of flowers in a refrigerated trailer. The return freight was to consist of approximately 43 empty Danish trolleys and empty packaging. The load was to be collected at 6pm on 29 July 2020 from an address in Rijnsburg and shipped to "London region" where it was to be unloaded at 7am. The email stated:

> Customers and exact route in consultation with the driver on the day of departure.

28. The address given for Greenorganic in Rijnsberg was a large flower export centre called Flora Holland, which contained offices of many flower wholesalers. The appellant had accepted work from businesses based there on previous occasions.

29. When Mr Post carried the first load for Greenorganic on 6 July 2020, he was told on the day of collection that he should collect the goods from an address in Heemskerk rather than Rijnsberg. He did not consider such diversions were unusual in the haulage industry. In his experience it was not unusual for a customer to have several branch addresses where loading would take place. The warehouse in Heemskerk had no signage and nothing to identify it as linked to Greenorganic.

30. Mr Post would normally observe the loading process to check that the load was evenly distributed and to make reasonable checks for contraband. However, he said that because of the pandemic restrictions in Holland, the warehousemen excluded him from observing the loading process. He considered that given the way the drugs were concealed in false bases of the trolleys, even if he had observed the loading process he would not have been aware of the drugs.

31. The trailer had a tail lift which the warehousemen used to load the trolleys. The warehousemen used a remote control which was kept in the trailer to control the lift. Mr Post did not consider that this was dangerous.

32. After the goods were loaded the trailer was completely full. Mr Post moved the vehicle forward and then looked inside before closing the doors. He could not see what was inside the trailer other than the trolleys closest to the doors and he could not get inside the trailer. It appears from the interview under caution that the load comprised 43 trolleys. The 8 trolleys nearest to the trailer doors had the same bases as the other trolleys but contained no drugs.

33. The respondent has described Mr Post's evidence in relation to the loading of the flower trolleys as "suspicious". In particular, we were directed to Mr Post's interview under caution where Mr Post is recorded as having confirmed to the officers that he had loaded the flowers himself in Rijnsberg. He later said that he did not load the flowers himself, but was present when they were loaded. The officers also asked Mr Post how many vehicles he had. He replied "one". In fact, the appellant operated nine vehicles which became clear later in the interview. Mr Post blamed these inconsistencies on the absence of an interpreter when he spoke to the officers. It is notable that at one stage during the interview in relation to other questions the officer records that Mr Post "looked like he did not understand". It was not put to Mr Post that he had lied during the interview. In any event, we consider that the most likely explanation for inconsistencies is the language difficulty experienced by Mr Post.

34. The seizing officer's notebook records that the bases of the trolleys appeared to be approximately 6cm deep which was described as "unusually thick". The bases were made of wood, held on with 6 screws which the officers removed to reveal the drugs. Mr Post did not

see anything unusual about the trolleys or their bases. He did not transport flowers every day and had no way of knowing the correct thickness of a trolley base. We accept that evidence.

35. Mr Post's evidence was that on the first trip for Greenorganic on 6 July 2020 he was given a piece of paper with the delivery address in Benfleet. He threw the paper away at some stage. When he loaded the flower trolleys on 29 July 2020, he was given another piece of paper with the Benfleet delivery address written on it. There is no reason to doubt that evidence and we accept it.

36. Mr Post did not check with any of the consignees identified on the CMRs to confirm whether they were expecting the flowers. He did not consider that he was required to do that. It does not seem to us that he would have had time to check details of the consignees because he only had their details from the CMRs which were given to him when he picked up the load. His instructions were to deliver to Benfleet, nothing more than that. He described the process of delivering several consignments for different customers at a single address, where the separate consignments are then delivered to separate addresses as "groupage". He would not expect to see separate CMRs for the journey to the single address and for the journey from the single address to the final destination. There was no other evidence as to the practice of groupage. We do not consider that we are in a position based on Mr Post's evidence alone to make any finding as to whether this is usual practice in the haulage industry.

37. Mr Post had been given five CMRs when he collected the flowers, in total covering 43 trolleys. The CMRs indicated the consignor to be Greenorganic with an address in Rijnsburg. The Review Decision states that "further enquiries have revealed that the consignor does not exist at the address given in the CMR". There was no evidence as to what these further enquiries entailed. We were not told whether the company existed but with a different address, and if so what that address was, or whether it did not exist at all.

38. The CMRs indicated that the flowers were being delivered to five different addresses in the UK. They were all garden centres or wholesale florists in South East England. The CMRs identified the place at which the goods were loaded as Rijnsberg, whereas in fact the goods were collected from Heemskerk. HMRC later established that none of the businesses at the delivery addresses were expecting the deliveries and none had ordered the flowers.

39. Mr Post was referred to various CMRs during his evidence. It became apparent during the hearing that these were not CMRs for the load being carried at the time of seizure, but for a previous load carried by the appellant for Greenorganic on 6 July 2020. Following the hearing, the respondent provided copies of the CMRs from the day of the seizure.

40. The CMRs for 6 July 2020 and 29 July 2020 all contained different order numbers in Box 5.The CMRs for loads on 6 July 2020 were signed in Box 24 to indicate that the goods had been delivered, although the places of delivery were stated to be the locations of the customers and not Benfleet. As one would expect, the CMRs for the seized goods had no signature to show that the goods had been delivered. Those CMRs also indicated the number of trolleys delivered and the number of trolleys being returned by the appellant on the journey back from Benfleet. We had no evidence as to the circumstances in which the trolleys were returned to the consignor in relation to the previous loads.

41. Mr Clarke on behalf of the appellant submitted that the trolleys had been carefully modified with well-disguised false bases which only an experienced customs officer was able to notice. We do not consider that the evidence establishes these facts. We cannot say whether anyone would have identified the false bases if they took reasonable care to inspect the trolleys.

42. It is not necessary for the purposes of this decision to describe the circumstances in which the appellant applied for restoration of the goods, the refusal of restoration or the request for a review of that decision. We consider relevant matters in the context of the Review Decision.

43. The bundle of documents included Mr Post's Defence Statement served in the Crown Court proceedings. This set out Mr Post's intended evidence as to the circumstances in which he came to deal with Greenorganic and the circumstances in which the various deliveries were made. We were not referred to this statement and it was not adduced in evidence by any witness. In the circumstances we have not taken it into account.

DISCUSSION

44. It is helpful to start with a consideration of the respondents' policy for the restoration of commercial vehicles used in attempts to smuggle drugs. It is stated in the Review Decision as follows:

> Restoration of vehicles may be considered where the total quantity of drugs involved does not exceed the following limits:
>
> a) 100g of Class A drugs (including cocaine and diamorphine and MDMA/MDA);
> b) 2 kilos of herbal cannabis, cannabis resin, amphetamine and any other Class B or C drugs; or
> c) 300 doses of LSD
>
> In these circumstances restoration may be considered where requested, on payment of a sum equal to 20% of the current retail value of the vehicle, with a minimum payment of £100. If the vehicle has been adapted to conceal prohibited or restricted goods (S.88 CEMA), the restoration payment should be increased by the cost taken to remove the adaptation. Where the total restoration sum exceeds £2500 the [Border Force] may allow a reduction where it is clear that the calculated sum is disproportionate to the offence (e.g. where a very expensive vehicle is used to smuggle a very small amount of drugs).
>
> For drug quantities in excess of those stated restoration should normally be refused.
>
> However, there may be exceptional circumstances where it is considered appropriate to offer restoration (e.g. where considerable assistance has been rendered in enabling further arrests etc.)

45. Officer Summers stated in the Review Decision that the policy operates as guidance, and he is not fettered by the policy. He accepted that he must consider each case on its merits. He stated in the Review Decision that the restoration policy depends primarily on who is responsible for the smuggling attempt and that hauliers are expected to take reasonable steps to prevent smuggling. In fact, the policy as quoted in the Review Decision does not refer to these factors, but we can see that they would be relevant to the decision. The appellant did not suggest otherwise. The appellant makes no challenge to the reasonableness of the policy itself.

46. Given the quantity of drugs found in the Vehicle, it is clear that the respondent's policy requires exceptional circumstances if the Vehicle is to be restored. The appellant's case is that there are exceptional circumstances here because the appellant and Mr Post were not involved in the smuggling attempt and at worst they were guilty of an error of judgment.

47. We have set out the appellant's grounds of appeal in detail above. The respondents say that the appellant and Mr Post failed to make reasonable checks on the consignment which should have been made. In particular, there were no checks on the goods, the identity and credibility of the consignor, the authenticity of the orders and the identity and credibility of the consignees.

48. In *Szymanski v Director of Border Revenue* [2019] UKUT 343 (TCC), the Upper Tribunal considered what checks a carrier might be expected to make when transporting goods into the UK. The FTT in that case did not regard it as unreasonable for the review officer to require checks going beyond those required by the CMR Convention. In that case, the review officer considered that the carrier had not carried out any or any sufficient credibility checks to ensure that the consignor, which was a new client, was running a bona fide business. Further, the carrier failed to question the delivery arrangements, and gave an account of the delivery arrangements which was "confused and incomplete". The Upper Tribunal stated as follows:

> 53. While the FTT did not deal with the argument directly, the FTT considered at [72] that the issue of checks before and after accepting the order and on collecting the load was relevant to the decision as to whether the appellant was complicit in the smuggling. It is clear from its findings on the extent of the checks the appellant made relating to Mr Deka and UAB Kilita, and from the way in which it approached Mr Brenton's review of those checks, that the FTT did not regard Mr Brenton's decision as unreasonable just because the checks he expected to be carried out went beyond those required by the CMR Convention.
>
> 54. In our judgment, there was no error of law in the FTT's treatment of Mr Brenton's decision in this respect. The preamble to the CMR Convention recognises "the desirability of standardizing the conditions governing the contract for the international carriage of goods by road, particularly with respect to the documents used for such carriage". It is readily apparent that, in the different policy context of seeking to prevent smuggling, Border Force would not be unreasonable if they expected checks to be made beyond those set out in a Convention whose purpose was wholly different (the international standardisation of contractual conditions).

49. The Upper Tribunal also gave some general guidance at [59] and [61] as to the checks which a carrier might be expected to make:

> 59. The question of what will constitute adequate checks for the purpose of establishing whether an operator acted reasonably will depend on the particular facts relating to the operator and the circumstances surrounding the seized load. In this case (see [26] to [28] above), that might include verifying not just the personal ID but the nature of the consignor's business, or making checks in relation to the supplier, UAB Kilita. The checks which might reasonably have been carried out in the particular factual circumstances of this case were, in our view, ones a haulier might reasonably have been expected to carry out without specific advance notice.
>
> …
>
> 61. …The appellant's complaint that neither Border Force nor the FTT told him precisely what checks he ought to have carried out fails to appreciate that this was not the role of either and that the kinds of checks that might reasonably be expected will vary according to the circumstances.

50. The policy quoted by Officer Summers in the Review Decision in the present appeal did not include any reference to whether the carrier or driver were complicit in the smuggling attempt. The policy being applied in *Szymanski* expressly involved consideration of whether a haulier was "responsible for or complicit in the smuggling attempt". A vehicle would normally be restored if the operator and the driver were not responsible for or complicit in the smuggling attempt and had carried out basic reasonable checks. The Upper Tribunal considered the meaning of the word "complicit" in this context and said at [78]:

> 78. We do not agree that the FTT erred in its interpretation and explanation of "complicit" for the purposes of the policy. By referring to "turning a blind eye" (in the sense of acting where a reasonable person would make further enquiries to ascertain credibility), it is clear that the behaviour (in addition to actual knowledge of the smuggling) that the FTT considered could constitute complicity could be evidenced by the existence of circumstances which ought reasonably to have given rise to suspicion of smuggling. That situation is distinguishable from one where there was nothing overtly untoward about the circumstances but where the operator is

nevertheless held culpable as a result of not carrying out checks that might reasonably have been expected.

51. In other words, a person would be treated as complicit if they were aware of the smuggling attempt or where the circumstances gave rise to a suspicion of smuggling but they did not make further enquiries. The latter circumstances were treated as "turning a blind eye", which was to be distinguished from failing to carry out reasonable checks irrespective of whether there was any suspicion of smuggling. The Review Decision in the present appeal does not refer to any express finding that Mr Post was "complicit" in the smuggling attempt. However, it did refer extensively to the Upper Tribunal decision in *Szymanski* and said as follows in relation to its conclusion that Mr Post was "reckless and proportionately culpable" in the smuggling attempt:

> In this assessment I refer you to the Szymaski / Everpol case with regard to findings of complicity in that your client's actions, in my opinion, amounted to 'turning a blind eye'.

52. It was alleged in Mr Clarke's skeleton argument that Mr Summers applied the wrong standard of proof when he considered the circumstances of Mr Post's involvement in the smuggling attempt. This allegation is based on the following passage in the Review Decision:

> The investigations by the Officers of the National Crime Agency [NCA] with regard to your client's involvement in this case is a criminal investigation, which carries the criminal burden of proof – *'Beyond reasonable doubt'*. His trial is due to be heard at the Crown Court, before a judge and jury.
>
> However, I have to apply the burden of proof to the civil standard – *'beyond reasonable doubt'* – with regard to whether it would be reasonable and proportionate to restore the vehicle to you.

53. In the event, the appellant accepted that this was an error of expression and that officer Summers did apply the correct standard of proof.

54. The Review Decision states that the appellant was "legally responsible to comply with the CMR regulations". It referred to extracts from CMR regulations, including Article 6 which requires the CMR to show particulars including the place of taking over the goods and the place designated for delivery.

55. The following observations of officer Summers are extracted from the Review Decision:

> As the restoration policy depends primarily on who is responsible for the smuggling attempt I must first consider the evidence provided as to who is responsible.
>
> All countries now expect operators to take reasonable steps to prevent smuggling.
>
> The CMRs were a complete fabrication … the loading address was untrue … If [Mr Post] was not involved, this should have rang alarm bells immediately.
>
> … the delivery addresses on the CMRs were not true as he was given a piece of paper with an address in Benfleet that he was to drive to.
>
> It is clear that no checks were made of the consignees or the consignor but I believe that, on the balance of probabilities, [Mr Post] was complicit in this smuggling enterprise and knew any checks would be futile.
>
> … [Mr Post] has not evidenced any reasonable checks that his company has made to ensure that he was transporting a fully legitimate load … the importation … could not have been achieved without the direct or indirect involvement of your client's company.

> Having considered the evidence provided and concluded that not only had your client failed to make sufficient reasonable basic checks, but he was reckless and proportionately culpable in this smuggling attempt…
>
> … your clients action, in my opinion, amounted to 'turning a blind eye'.

56. Officer Summers also states in the Review Decision that he has paid particular attention to the degree of hardship caused to the appellant by loss of the Vehicle. He did not consider there to be any exceptional hardship. There was no challenge to this aspect of the Review Decision.

57. It appears from the Review Decision, which was made prior to Mr Post's acquittal in the criminal proceedings, that officer Summers considered Mr Post was complicit in the smuggling attempt in the sense that he was aware that he was being used to transport an illicit load. If someone knows that any checks would be futile, a failure to make checks goes beyond the turning of a blind eye described by the Upper Tribunal in *Szymanski*. It amounts to knowledge of the smuggling attempt.

58. At one stage, Mr Davenport appearing for the respondent sought to cross-examine Mr Post on the basis that he knew that there were drugs in the load. We did not permit that cross-examination because it had been no part of the respondent's case on this appeal. The respondents' case in its statement of case was put as follows at [18(f)]:

> All these anomalies are suspicious and the Appellant could and should have discovered them after routine checks. Given these anomalies, it was reasonable to conclude that the Appellant made no, or no reasonable, checks regarding the consignees or consignor and was therefore culpable at least to the extent that a blind eye had been turned.

59. Similarly, the respondent's skeleton argument puts the respondent's case as follows at [9]:

> If the appellant had conducted simple basic checks then he would have easily discovered that these were not genuine orders.

60. We are satisfied that the phrase "a blind eye had been turned" in the statement of case and the similar expression in the Review Decision were being used in the sense described by the Upper Tribunal in *Szymanski*. Namely, where there are suspicious circumstances, but a person fails to make reasonable enquiries. It was not used in the sense of failing to make checks because it was known that the checks would reveal an illicit load. We accept the Appellant's submission that this amounts to an assertion of direct involvement in the smuggling enterprise.

61. Mr Summers provided a short witness statement which exhibited the documentary material he relied on in producing his Review Decision, and states that the Review Decision sets out his reasons for refusing restoration. He also stated generally that he was satisfied that he considered every matter that was relevant and disregarded every matter that was irrelevant. Mr Clarke on behalf of the appellant did not seek to cross-examine Mr Summers. Both parties appeared to have anticipated that Mr Summers would not be required to give oral evidence, and Mr Davenport for the respondent did not suggest that the appellant had not properly put its case to Mr Summers. Both parties appeared to be content that the reasonableness of the Review Decision was a matter for the tribunal based on the underlying evidence, and Mr Summers' evidence would not be relevant to that assessment. We shall proceed on that basis.

62. It concerns us that the Review Decision alleges Mr Post knew that checks would be futile, but the respondent does not seek to uphold that finding on this appeal. We now know that Mr Post was acquitted of criminal involvement in the smuggling attempt. We accept Mr Clarke's submission that officer Summers' finding that Mr Post knew checks would be futile is a matter which should not have been taken into account in the Review Decision. In our view, this in

itself is sufficient to make the Review Decision unsafe and unreasonable. It will be necessary for us to direct a further review by an officer previously unconnected with the case.

63. We turn now to consider other aspects of the appellant's grounds of appeal.

Ground 1 – Failure to take into account all relevant factors

64. The appellant says that there are a number of factors which officer Summers failed to take into account in making the Review Decision which ought to have been taken into account.

65. Firstly, that officer Summers did not refer to the interview under caution on 30 July 2020 which is consistent with Mr Post's subsequent account of the arrangements for the load and his evidence before us.

66. The record of this interview was not one of the documents identified as having been relied on by officer Summers in making the Review Decision. Whilst we would have expected officer Summers to have had regard to the interview, overall in our view the contents of the interview do not take matters much further. We have already addressed the inconsistencies in this interview.

67. Secondly, that officer Summers failed to consider that Greenorganic gave the appearance of being a legitimate concern with offices at a well-known flower market. It is not clear to us on the evidence we have seen that Greenorganic did give the appearance of being a legitimate concern. We know very little about how Greenorganic held itself out beyond the email dated 23 July 2020. It appears that there may have been other email correspondence in relation to earlier loads in July 2020 but that material was not in evidence.

68. Thirdly, that the appellant had worked for Greenorganic on three previous occasions. This is not referred to in the Review Decision. We can see that it has some relevance, although if this was the only criticism of the Review Decision then we do not consider that on its own the failure to take this into account would make the decision unreasonable.

69. Fourthly, that the supporting documentation in the form of the email dated 23 July 2020 and the CMRs was unremarkable. We accept that on one view it is unremarkable, but it will be necessary for the officer conducting the further review to form a view as to the significance of this documentation.

70. Officer Summers also stated in the Review Decision that the appellant had produced minimal documentation. It is not clear what other documentation officer Summers expected to be provided. In any event that will be a matter for the further review.

71. Finally, and significantly, officer Summers did not take into account the fact that Mr Post was acquitted of criminal involvement. Clearly, officer Summers cannot be criticised for this omission. However, we agree with the appellant that this is now a significant part of the factual context to be taken into account.

Ground 2 – Taking into account irrelevant factors

72. The appellant says that the Review Decision takes into account various irrelevant factors. Further, officer Summers failed to ask himself what was or could have been known to the appellant on 28 July 2020 in relation to those factors.

73. Firstly, that none of the consignees had ordered flowers from Greenorganic and the CMRs were a complete fabrication. We agree with the appellant that in the ordinary course it would not be reasonable to expect a haulier to contact a consignee directly to confirm that it was expecting an order of flowers to be delivered. Indeed, a haulier may not know the identity of the consignees until the goods are being loaded, which was the case here. It will be a matter for the further review what checks would be reasonable in the present circumstances.

74. Secondly, that Greenorganic did not exist at the address on the CMRs. It is said that this could not have been known to the appellant and it was only further enquiries by the respondents which established this fact. We have previously indicated that we do not know whether Greenorganic existed as a business, or simply was not based at the address given in the email and CMRs. Nor do we know what further enquiries the respondent made to establish that Greenorganic did not exist at the address given. On the further review the officer will have to address the question of what enquiries, if any, the appellant should reasonably have made, and possibly what the likely result of those enquiries would have been. We leave that as a matter for the further review.

75. Thirdly, the fact that multiple CMRs were used for a single delivery to Benfleet. The appellant says that ought to have been considered in the context of the groupage arrangements referred to by Mr Post. It is not clear whether the groupage arrangements were relied upon by the appellant prior to the Review Decision. In any event, this is a matter which must be considered in the further review.

76. Fourthly, the reliance placed on the decision in the case of *Szymanski*, without also recognising that it can be distinguished on its facts. As far as the further review is concerned, clearly the review officer must be alert to the fact that each case must be decided on its own facts.

77. Fifthly, the absence of checks by the appellant as to the legitimacy of Greenorganic, the premises at Benfleet, whether the consignees were expecting deliveries of flowers and the content of the load itself. The absence of such checks must be considered in the context of what checks the appellant could have made and what they would have shown. It is notable that the respondent has not specified what checks a reasonable haulier ought to have made in the circumstances of this load. The respondent did not put to Mr Post in cross-examination what checks he ought to have carried out. The further review will need to consider these matters.

Ground 3 – Reasonableness of the Review Decision

78. The appellant says that the Review Decision did not contain a proper and fair evaluation of all relevant matters.

79. For the reasons already given, we consider that the Review Decision took into account certain irrelevant factors and failed to take into account all relevant factors. It is not necessary or desirable for us to say whether, overall, the decision not to restore was unreasonable. To do so, would be to pre-judge the outcome of the further review.

CONCLUSION

80. For the reasons given above we allow the appeal and direct the respondent to carry out a further review of the decision to refuse restoration. For the purposes of that further review, we make the following directions:

(1) The further review shall be carried out by an officer who has not previously had any connection with the case.

(2) The review officer should carry out the review consistently with the findings of fact and reasoning in this decision. It must not take into account any facts which are inconsistent with our findings.

(3) Subject to that, the review officer may take into account additional facts considered to be relevant.

(4) The Appellant shall be entitled to make further written representations to the respondent for the purposes of the further review within 28 days of the date of release of this decision.

(5) The further review shall be completed within 56 days from the receipt of any further written submissions made by the Appellant, and in the absence of further written submissions within 56 days from the date of release of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

81. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

Release date: 05th JULY 2023