[2019] UKUT 343 (TCC)

Appeal number: UT/2018/0164

EXCISE DUTY – restoration of vehicle – whether error of law in FTT's decision that Border Force's refusal to restore not unreasonable – no - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

JACEK SZYMANSKI T/A EVERPOL

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE SWAMI RAGHAVAN
JUDGE ANDREW SCOTT

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 24 September 2019

Michael Wiencek, Euro Lex Partners LLP, for the Appellant

Ben Zurawel, counsel, for the Respondent

DECISION

Introduction

1. This is an appeal by Mr Jacek Szymanski against a decision of the First-tier Tribunal ("FTT") issued on 21 July 2017 ("the FTT Decision"). The FTT Decision concerned Mr Szymanski's appeal against a Border Force review decision which had refused to restore a trailer unit to him which Border Force had seized when he was driving through the port of Dover.

2. Mr Szymanksi is a sole trader (carrying on business as a haulier under the name "Everpol") based in Poland. On 15 May 2016, at the port of Dover, the Director of Border Revenue's officers found the load he was carrying to contain a large quantity (approximately 2000kg) of unprocessed tobacco and seized his trailer unit. They refused Mr Szymanski's request to restore the trailer unit and upheld that refusal decision in an internal review carried out by its officer, Mr Raymond Brenton, on 26 July 2016. Mr Szymanski appealed to the FTT against Mr Brenton's review decision ("the review decision"). The FTT, having made various findings of fact on the evidence it had heard, was not persuaded that Mr Brenton's review decision had been arrived at unreasonably and dismissed Mr Szymanski's appeal. Mr Szymanski now appeals to this Tribunal against the FTT Decision on a number of grounds.

The law

3. It is helpful to first set out the background law to the provisions relating to seizure and restoration relevant to this appeal.

4. The tobacco was seized and liable for forfeiture under section 170B of the Customs and Excise Management Act 1979 ("CEMA"), which makes it an offence for a person to be "knowingly concerned in the taking of any steps with a view to the fraudulent evasion, whether by himself or another, of any duty of excise on any goods".

5. Section 141(1) of CEMA provides that any vehicle used for the carriage of the thing liable for forfeiture shall also be liable for forfeiture.

6. A failure to challenge the legality of the seizure in the magistrates' court means that, under paragraph 5 of Schedule 3 to CEMA, the seized goods are deemed to have been duly condemned as forfeited.

7. Section 152 of CEMA gives the Respondents a power to restore things lawfully seized "subject to such conditions (if any) as they think proper".

8. A decision under section of 152(b) of CEMA is an "ancillary matter" for the purposes of section of 16(4) of the Finance Act 1994 ("FA 1994"). That subsection confines the powers of the FTT on appeal to a consideration of whether "the tribunal

are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it".

9. In *Gora v Customs and Excise Commissioners* [2003] EWCA Civ 525, [2004] QB 93, Pill LJ held that the provisions of section 16 of FA 1994 do not prevent the FTT from conducting a fact-finding exercise. Consequently, it is open to the FTT to decide the primary facts and then determine whether, in the light of those facts, the decision was one which could not reasonably have been reached: (Pill LJ at [38] to [39]).

The facts and background

10. The appellant started his business in June 2010. He does not employ any drivers and has approximately 10 years' experience of driving to the UK.

11. On 15 May 2016, Border Force intercepted his vehicle (a tractor unit towing a trailer unit). The documentation indicated the load as five pallets of natural mattress filling contained in ten boxes. The boxes, when examined, contained unprocessed tobacco with an approximate weight of 2,000kg.

12. The consignment note ("CMR"), which Mr Szymanski produced to Border Force officers, showed the consignee as Mario Deka with an address in Westcliff-on-Sea and the consignor as UAB Kilita. The place of delivery was Welton Way, Rochford, England. Mr Szymanski had been handed the CMR when he arrived at the warehouse in Germany to collect the goods.

13. Border Force seized the tractor unit, trailer and raw tobacco. The legality of the seizure was not challenged in the magistrates' court. The tractor unit was returned to Mr Szymanksi.

14. On 24 May 2016, Mr Szymanski wrote to ask for the trailer to be restored. Border Force refused restoration on 10 June 2016 following which Mr Szymanski requested a review. Mr Brenton's review decision of 5 July 2016 refused restoration. This is the decision which was the subject of the appeal before the FTT and which in turn gave rise to the FTT Decision which is now under appeal before this Tribunal.

15. The FTT hearing took place on 24 May 2017. Both Mr Brenton and Mr Szymanski provided witness statements in advance of the hearing and gave evidence at the hearing.

The FTT Decision

16. Although the FTT decision made findings of fact and addressed issues of contention in various different sections of its decision it is convenient to structure our summary as follows to reflect the topics raised in the appellant's grounds.

Border Force's policy on non-restoration

17. The FTT Decision summarised Mr Brenton's decision and Border Force's restoration policy for seized commercial vehicles as set out in Mr Brenton's letter at [37] to [49]. Where the vehicle had not been adapted for smuggling, the application of the policy (which was divided into three sections, A to C) depended on who was responsible for the attempted smuggling. The policy provided for three outcomes: restoration, restoration for a fee or non-restoration. The applicable outcome depended on whether there had been a seizure in the previous 12 months, the amount of revenue involved, and, in the case of section A of the policy, whether "basic reasonable checks" were carried out to "confirm the legitimacy of the load and to detect any illicit load".

18. Section A of the policy applied if: (1) the operator provided evidence satisfying Border Force that neither the operator nor the driver was "responsible for or complicit in the smuggling attempt"; and (2) the operator provided evidence that both the operator and driver had carried out "basic reasonable checks" as described above. In that case, the vehicle would "normally" be restored free of charge. But, if Border Force were not so satisfied and the seizure was the second occasion of seizure within 12 months, then the vehicle would not normally be restored. Section C of the policy applied if: (1) the operator failed to provide evidence satisfying Border Force that the operator was neither responsible for nor complicit in the smuggling attempt, and (2) the revenue involved was at least £50,000 or it was the second or subsequent occasion of seizure in 12 months. In that case, the vehicle would not normally be restored. Section B of the policy was inapplicable to this case as it applied where the driver but not the operator was responsible: Mr Szymanski was both the driver and operator.

19. Regarding the meaning of "complicit", the FTT accepted (at [69]), referring to the Oxford English Dictionary definition ("involved with others in an activity that is unlawful or morally wrong"), Mr Brenton's suggestion that a person could be complicit even if he simply turned a blind eye and went on to say that it considered that a person could be involved in an activity "if he agrees to do something without question in circumstances where a reasonable person would make further enquiries to ascertain whether what he was told was credible."

20. At [73] the FTT agreed that while Section C did not refer, as A did, to "basic reasonable checks" the issue of what checks had been made before and after accepting the order and upon collecting the load was relevant to whether the appellant was complicit in the smuggling in the sense described above.

21. The FTT noted (at [40]) the explanation in the review letter that the policy was to be applied "firmly but not rigidly" and Mr Brenton's explanation that "each case is considered carefully on its merits so as to decide whether exceptions should be made and any evidence of hardship is also considered".

Mr Brenton's application of policy and decision

22. Mr Brenton's decision first set out the background which led up to the issue of the review decision, which included the correspondence and further enquires that had

been made of Mr Szymanski, for instance into the adequacy of checks that had been carried out. He dealt with a number of points, discussed in more detail below, and concluded that, on the balance of probability, the appellant "was complicit if not responsible" in the smuggling attempt. This brought section C of the policy into play. The policy pointed towards non-restoration taking into account the fact that: (1) Mr Szymanski's vehicle had been seized previously (the vehicle had been restored for a fee of £770 and Mr Szymanski had been put on notice in Border Force's letter of 15 February 2016 that, if the vehicle or any other owned or operated by him was found carrying smuggled goods in the future, Border Force might not restore it); and (2) the revenue involved once the tobacco was processed was "enormous" at over £490,000. Mr Brenton's letter accepted non-restoration of the trailer would cause hardship but did not consider the hardship to be exceptional.

23. Mr Brenton's conclusion that the appellant was "complicit if not responsible in the smuggling attempt" was prefaced with the following points:

(1) The credibility checks Mr Szymanski had carried out (obtaining a copy of the Polish ID card and UK National insurance number of the consignor, Mr Deka) "did not evidence credibility checks on the consignee/consignor with regard to whether Mr Deka was running a bona fide business".

(2) Mr Brenton queried Mr Szymanski's suggestion that Mr Deka had got in contact with Mr Szymanski as a result of Mr Szymanski's "marketing activities such as leaflets and business cards given that Mr Deka was a UK resident".

(3) Checks Mr Brenton had carried out showed UAB Kilita, the consignor stated on the CMR, was a Romanian-based company with one employee with the trading category "other activities". There was no mention of Mario Deka.

(4) No evidence had been produced to link UAB Kilita or Mr Deka to the collection point.

(5) It could not be accepted that Mr Szymanski would not be suspicious given the heavy weight and probable smell that would have been present during loading. Mr Szymanski's statement that he was not aware of the content of the load was "disingenuous" as during his interview with Border Force officers Mr Szymanski told the officer Mr Deka had told him the load was "snuff" (a tobacco based product - not mattress stuffing) and would not be a problem.

(6) Mr Szymanski's account of delivery arrangements was not credible. Mr Szymanski had said he was to meet at the address of 67 Salisbury Avenue, Westcliff-on-Sea and then to follow Mr Deka to a farm in Rochford (GPS would take him down unsuitable narrow roads and Mr Deka knew the best route). Mr Brenton enclosed print outs from Google maps and Street view which, he suggested, showed the location was not an identifiable business location and was clearly not a remote farm location that could not be found by GPS.

24. Having heard the evidence of Mr Szymanski and Mr Brenton, the FTT dealt with the above points and made further findings of fact (in accordance with its function as described in *Gora*).

25. In terms of Mr Szymanski's evidence, while (at [6]) it described Mr Szymanski as a straightforward witness who had very little recollection of what he had told the interviewing Border Force officers at the time of seizure, and although the FTT accepted certain elements of his evidence, there were also a number of matters where the FTT as, for the reasons it stated, not persuaded by his account. As will be seen the FTT also carefully evaluated Mr Brenton's evidence and his decision and came to the view that some of the factors he had considered in his review decision were irrelevant.

26. As regards points (1) and (2) above, the FTT found Mr Szymanksi had not worked for Mr Deka before May 2016. Mr Deka had made contact from an English phone number. The FTT noted that while Mr Szymanski's witness statement suggested the contact arose from marketing activities, and earlier correspondence had described leaflets and business cards, Mr Szymanksi's oral evidence, which the FTT concluded was the more likely explanation, was that the contact arose through another client. Earlier (at [12]) the FTT had noted that Mr Szymanski was reluctant to divulge client details due to an anxiety over upsetting customers, and that this might explain the differing accounts he gave during the enquiries and at the hearing. However, the FTT commented that this made the accuracy of his evidence more difficult to judge because the details he eventually disclosed did not seem to consist of sensitive information.

27. As for the nature of the checks carried out, the FTT rejected Mr Szymanski's explanation that the reason he had not carried out checks on Mr Deka's business activities was that Mr Deka had said he was starting a new business. The first time Mr Szymanksi had given the account of Mr Deka's conversation was at the hearing before the FTT: the FTT was not convinced the conversation took place. It was, the FTT considered, reasonable for Mr Brenton to expect Mr Szymanski to investigate the business of a new client, Mr Deka, or as an alternative to make checks on the activities of the supplier.

28. As regards points (3) and (4) above, the FTT noted (at [45]) Mr Brenton's point that UAB Kilita had no apparent links to Mr Deka, but also noted that Mr Brenton had not explained the significance of that point. At [17] the FTT found Mr Szymanski knew nothing about UAB Kilita beyond what was shown on the CMR and did not undertake any search of its activities. The FTT accepted there was some evidence (Mr Szymanski had mentioned signage) to allow him to conclude that UAB Kilita had a presence in a business park in Frankfurt where he had collected the load from.

29. On point (5) the FTT was satisfied that the weight of the load was not evidently unusual and that Mr Szymanski did not notice any unusual smell. The FTT also accepted Mr Szymanski's evidence that he did not tell Border Force officers that Mr Deka had told him the load was "snuff" and noted that Border Force withdrew the suggestion.

30. The FTT was accordingly satisfied that Mr Brenton took into account two matters he should not have: (1) the weight of the load and its smell, and (2) the statement by Mr Deka to Mr Szymanski that the load was "snuff" (at [77]). How the FTT then dealt with the review decision, in the light of its finding that these irrelevant factors were considered, is a key element of Mr Szymanski's grounds of appeal and we consider that issue in more detail later.

31. The FTT noted that Article 8 of the Convention on the Contract for the International Carriage of Goods by Road (as amended) ("the CMR Convention") requires the carrier to check the accuracy of the statements in the CMR as to the number of packages (and their marks and numbers), the apparent condition of the goods and their packaging, and entitles the carrier to enter reservations about these matters on the CMR. The FTT found (at [19]) that, when Mr Szymanski arrived to collect the goods in Frankfurt, the goods were already in boxes placed on pallets and stretch-wrapped. The FTT recorded Mr Szymanski's evidence that he checked the accuracy of the statements and the apparent condition of the goods and had no reservations. He did not examine the load believing he was not entitled to remove the stretch wrap or open the boxes.

32. Regarding the differing account of delivery arrangements (point (6)), the FTT found it difficult to establish the exact nature of these beyond the fact that Mr Deka had told Mr Szymanski the delivery address was difficult to find and had provided Mr Szymanski with a telephone number to use to make contact an hour before his arrival (a practice which the FTT accepted was not of itself unusual ([79]) although it was unclear from *where* the one hour pre-delivery phone call was to be determined as there were two different residential addresses given and the delivery address was stated simply as Welton Way, Rochford). The FTT noted that the delivery address on the CMR and order form were not complete ([21]). It noted Mr Szymanski could not recall what he had told officers when interviewed but also that he did not disagree that he might have said what was attributed to him. It concluded that Mr Szymanski probably did expect to deliver the goods to a farm and that at best "he lacked any sensible curiosity about the delivery instructions and was unable to give a clear account of them". The FTT was not persuaded that Mr Szymanski had fully described the delivery arrangements ([79]). It concluded that it was not satisfied that Mr Brenton had been unreasonable in forming the view that the various and unclear accounts of the delivery arrangements "did not stand scrutiny".

33. There were two further matters which the FTT considered but which did not feature in Mr Brenton's review decision: (1) an invoice showing the sale of mattress stuffing between UAB Kilita and Mr Deka, and (2) a written statement from Mr Deka.

34. At [76] the FTT noted the invoice was dated the same date Mr Szymanski was in Frankfurt picking up the load and that it must have been unlikely that he had seen it beforehand. The FTT did not consider it relevant to the review decision, which focussed on what Mr Szymanski should have done prior to accepting the order and collecting the load in Frankfurt.

35. The statement from Mr Deka was enclosed with a letter (dated August 2016) from Mr Szymanski's Polish representative to Mr Brenton, which was sent after the initial review was completed. The statement set out that Mr Deka:

> "…was wrongly convinced of the legality of the transported goods and the information I gave my contractor. Therefore I declare that I improperly informed [the Appellant] on the legality of transported goods and mislead him by this action. Through my numerous assurances on the legality of the goods he was convinced that he could carry it across the border." [sic]

36. The FTT did not see a signed copy of the statement and noted (at [84]) that Mr Deka did not give evidence about what he said to the appellant and why Mr Szymanski had required repeated assurances about the legality of carrying mattress stuffing. In the FTT's view, far from assisting him, the statement possibly prejudiced Mr Szymanski's arguments. Mr Brenton was accordingly justified in dismissing the statement when he looked at his review decision again in September 2016.

37. The FTT then went on at [80] to consider whether, if the irrelevant facts (the weight and smell and the "snuff" statement) were ignored, the officer would inevitably have reached the same conclusion about complicity. It concluded, upon hearing Mr Brenton's evidence and reading his decision letter, that he had other reasons for concluding Mr Szymanski was "complicit": (1) the failure to make adequate background checks, and (2) the differing accounts of delivery arrangements. The FTT was "certain [Mr Brenton] would have concluded the same way by reason of these factors alone". At [81] the FTT concluded further that Mr Szymanski had failed to show that Mr Brenton had been unreasonable in deciding that Mr Szymanski's failure to enquire further into Mr Deka's business activities or to question the delivery arrangements meant he turned a blind eye and was complicit in the smuggling. The FTT also stated it took into account Mr Deka's statement (detailed in the preceding paragraph) when considering whether Mr Brenton's decision was reasonable.

38. At [83] the FTT dealt with Mr Szymanski's arguments that Border Force's policy was unfair because it ignored blameworthiness, particularly in relation to previous seizures. It considered Mr Brenton's explanation in evidence as to how he had reached his decision helpful. That explanation highlighted that Mr Brenton had considered, in response to questions on proportionality, the facts of the earlier seizure (which involved 2,400 cigarettes and 16.8 litres of vodka on which the duty was £770) as contrasted with the current seizure where, if the tobacco had been processed, the duty would have been £490,000. The FTT recounted Mr Szymanksi's explanation of the circumstances surrounding the first seizure (the goods were for private use, the vodka was for gifts) and accepted that his reasons for not challenging the earlier seizure (paying the fee to get the vehicle back so he could complete the delivery he had been paid to carry out) were pragmatic. Nevertheless, the FTT considered it was not unreasonable for Mr Brenton to apply the policy on the basis that the current seizure was the second seizure within a six-month period and noted that he also had in mind the amount and nature of the seized good on the earlier occasion.

39. At [85] the FTT considered the circumstances that had been put forward by Mr Szymanski as to why he would suffer exceptional hardship: he was the sole breadwinner of a family of seven (and one of his five children was disabled), he had significant outgoings and had no assets besides the tractor and trailer. The FTT noted that Mr Szymanski had confirmed he did currently have a trailer and tractor. The FTT did not find it unreasonable that Mr Brenton had concluded the circumstances did not amount to exceptional hardship.

40. The FTT concluded (at [86]) that Mr Szymanski had failed to show that the review decision was unreasonable and, accordingly, dismissed his appeal.

Grounds of appeal and issues to be determined

41. At the hearing Mr Wiencek, who appeared on behalf of Mr Szymanski, did not make any oral submissions but relied on the appellant's grounds of appeal to the FTT, his skeleton argument before this Tribunal and his annotations to the Respondents' skeleton argument before this Tribunal. The six formal grounds of appeal advanced were generic (the FTT variously did not apply or wrongly interpreted the law, did not have evidence or enough evidence to support its decision, did not take account of relevant considerations, gave inadequate reasons [etc.]). In his 17-page document the appellant set out a commentary containing a number of criticisms of the FTT Decision. This was interspersed at various points with cross-references back to a list of most of the generic grounds but regrettably did not unravel which point related to which specific ground.

42. However, taking account of the content of that document and the matters focussed on in the appellant's skeleton argument and its annotations to the Respondents' skeleton argument, we consider the substance of the appellant's grounds of appeal relate to the following matters:

(1) The FTT's treatment of Border Force's policy;

(2) The FTT erred in law in its treatment of Border Force's expectation of what checks ought to have been made;

(3) The FTT erred in failing to take account of relevant facts: (a) it wrongly regarded the invoice as irrelevant when assessing reasonableness of checks; and (b) it erred in not taking account of Mr Deka's statement in the appellant's favour.

(4) The FTT erred in finding Border Force's decision would inevitably have been the same when the factors the FTT had found to be irrelevant were disregarded. The two remaining reasons (the inconsistent account of delivery arrangements and inadequate level of checks) could not reasonably support non-restoration.

(1) Treatment of Border Force's policy

43. It is clear from the Court of Appeal's consideration of the FTT's jurisdiction in *Gora and others v CCE* [2003] EWCA Civ 525 (at [38]) that, if a decision on

restoration is based on an unreasonable policy, the decision on restoration is itself unreasonable. The court held that the FTT should not substitute its own view as to the appropriate policy. Rather, the FTT "should ask itself, applying judicial review principles, whether the policy was one that could reasonably be adopted".

44. The appellant argued that, despite asking the FTT to determine the reasonableness of Border Force's policy, the FTT did not deal with the issue at all and did not apply the case law the appellant had cited.

45. We disagree. While there is no discrete section of the FTT Decision devoted to the reasonableness of the policy as whole, this reflected the way the challenge to the policy was put before the FTT. The appellant had set out various respects in which the policy was unreasonable: it took insufficient account of blameworthiness, in particular as regards prior seizures; the proportionality of the policy; the lack of notice as to the required checks; and non-disclosure of the policy. Each of these matters was addressed at various points in the FTT Decision in its consideration of the policy as it applied to the appellant's circumstances.

46. The FTT noted (at [40]) the review decision letter's explanation that the policy should be applied "firmly but not rigidly" so as to allow an exercise of discretion on a case-by-case basis, and Mr Brenton's explanation that each case is considered carefully on its merits.

47. As to blameworthiness, the FTT explained how the policy distinguished between operators who were complicit or responsible for the smuggling attempt and those who were not. As to consideration of blameworthiness in a prior seizure the FTT found (at [83]) that it was not unreasonable for the officer to apply the policy on the basis that the case was a second seizure within a six-month period despite Mr Szymanski's pragmatic reasons for not challenging the seizure. It was implicit that the FTT considered that, in so far as the policy did not require assessing the blameworthiness of the appellant for the previous seizure, this was not an unreasonable policy. As Mr Zurawel submitted on behalf of the Director of Border Revenue, once a vehicle had been seized as a result of its involvement in an illegal importation, it was reasonable to expect the operator or driver to be more careful in the future. In any case the policy does not *prevent* an officer from taking into account the nature of the prior seizure. This is clear form the way in which the policy is drafted: it leaves open the possibility of looking at the circumstances of the particular case. Mr Brenton's evidence did in fact set out his knowledge of the circumstances of the prior seizure.

48. Similarly, regarding the issue of proportionality, the FTT discussed (at [83]) the contrast Mr Brenton drew between the first seizure, where a refusal to restore would not be proportionate given the relevant amount of duty was £770, and this case where, if the tobacco had been processed, the duty would have been more than £490,000. The FTT was satisfied that Mr Brenton had in mind not only the prior seizure, but also the amount and nature of the goods seized on the previous occasion.

49. In evaluating Mr Brenton's application of the policy, it is clear that the FTT viewed the policy as one that could be reasonably adopted. We can see no error of law in that conclusion.

50. While the appellant's grounds criticised the FTT for not applying the case-law the appellant had referred to, this criticism is misconceived. The appellant referred to extracts of various cases but did not explain the legal proposition they stood for or address how and why any such propositions would apply on the facts of his appeal. The appellant's skeleton argument before the FTT, and his grounds of appeal before this Tribunal, referred to two VAT and Duty Tribunal cases (*Desmond Rogers (t/a LJR Transport) v Customs and Excise [2004] UK E00773 (29 July 2004)* and *D&SMB Ltd v CCE UK E00605 (14 January 2004))* in which the policy in those cases was held to be unreasonable or disproportionate. The appellant also drew attention to the reference in *Desmond Rogers* to Simon Brown LJ's judgment in *R (oao) International Transport Roth GmbH v Secretary of State for Home Department* [2002] EWCA Civ (at [53]). Simon Brown LJ had referred to the legitimacy of imposing vigilance on drivers but also to the fact that there came a point where the price (in terms of fairness) would be too high. That case concerned a £2,000 fixed penalty imposed if vehicle operators intentionally or negligently allowed persons to gain illicit entry to the UK. However, the appellant did not explain why such findings in those cases would apply to the relevant policy in this case. The appellant's criticism of the relevant policy does not acknowledge that the concern in *Lindsay* was the lack of distinction drawn between commercial smugglers and those who were not importing for profit.

51. The appellant also referred the FTT in his skeleton argument to a passage in the FTT decision in *Nas and Co Ltd v HMRC* [2014] UKFTT 50 (TC) (at [98]) where Judge Hellier had noted that it could not be right that a person seeking restoration could be required to prove the unreasonableness of a decision whose full basis he did not know and could not challenge. However, nothing on the face of the review decision, or Mr Brenton's account of it, indicates that the basis for his decision was not disclosed. This is in contrast to the facts in *Nas and Co Ltd* where HMRC were unwilling to disclose a report in full even though it was accepted by the review officer that it formed part of her thinking ([87] and [88]). The appellant did not explain in what respects the basis of Mr Brenton's decision was incomplete. The FTT Decision could not address a point which was made in the abstract. In the circumstances there was no error of law in the FTT not dealing with the point.

(2) Expectation of what checks ought to have been made

Sufficiency of CMR Convention checks

52. The appellant argued that the FTT erred in law because its decision expected Mr Szymanski to carry out more checks than he was legally obliged to carry out under the CMR Convention. As well as Article 8 (see [32] above), the appellant had referred the FTT to Article 11, which stated that the carrier was under no duty to enquire into the accuracy or adequacy of the relevant documents.

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).

Lack of detail of expected checks and publicity of expected checks

55. The appellant further argued that the FTT erred in not specifying exactly what checks the appellant was supposed to have carried out and the fact that inadequate notice was given of the checks expected and the risk of seizure. He referred to the tribunal's decision in *Desmond Rogers* and a reference in the judgment in *Lindsay* to the effect that, if Border Force want to rely on a policy which had potentially such damaging effects on individual hauliers, they ought to give the hauliers likely to be affected sufficient notice of the policy. The reference in *Lindsay* (at [62]) was, however, in the context of a discussion of why Lord Philipps MR would not have been prepared to condemn Custom and Excise's policy as it applied to cars used for *commercial* smuggling. He said it was "right to bear in mind that notice is given to travellers that they are only entitled to bring back excise goods duty free if they are for their own use and that smuggling can lead to forfeiture of their vessels".

56. The FTT said it saw the appellant's point on the lack of guidance but that it also recognised that it would be difficult to list checks that would cover such a wide range of cases (at [73]).

57. Mr Zurawel highlighted that the relevant burden regarding adequacy of checks could be satisfied in a myriad of ways. The matters Border Force had enquired about (and which Mr Szymanski had suggested could have been publicised in advance) were, Mr Zurawel submitted, perfectly common-sense matters related to prevention of smuggling and not onerous. They were not prescriptive or unusual expectations that required published guidance. To a large extent, they simply asked the appellant what checks he had actually made of the consignor, consignee and the load.

58. In our judgment there is nothing in the appellant's points regarding the lack of detail of the checks or the lack of publicity given to the expected checks.

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.

60. We also agree with Mr Zurawel that the initial matters enquired about by Border Force after the seizure were both relevant and expressed at such a general level that it cannot have been surprising that Border Force would want to know about them in considering blameworthiness in relation to the smuggling attempt.

61. In any event, there *was* a prior seizure which put Mr Szymanski on notice of the relevant risks of seizure. The FTT made findings of fact about Mr Szymanski's awareness: it accepted (at [68]) that, although Mr Szymanski might not have read the literature warning that commercial vehicles were vulnerable for use in smuggling, it was clear that he knew there were risks that some loads might be otherwise than described, particularly in circumstances where the customer was not a large company (the Polish Post Office was the example given at the hearing). At [10] the FTT had noted Mr Szymanski's evidence that he was conscious, as a result of his experience of the previous seizure, that a vehicle could be seized and that it might not be restored. 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.

(3) Failure to take account of the invoice and Mr Deka's statement

62. The FTT dealt at [76] of its decision with an invoice the appellant had supplied to Mr Brenton showing that Mr Deka had purchased mattress stuffing from UAB Kilita. The appellant submitted that the FTT was wrong to find the invoice was irrelevant because it post-dated the order especially as the FTT had said earlier at [72] that checks before or *after* accepting the order would be relevant to the issue of complicity. By obtaining the invoice the appellant clearly made an additional check after accepting the order.

63. There is, in our judgment, no merit in this argument. The FTT explained why the invoice was irrelevant (see [35] above which set out the FTT's reasoning at [76]). The invoice was not irrelevant because it post-dated the order but because it was dated with the same date that the appellant was picking up the load in Frankfurt – the FTT found it was unlikely Mr Szymanksi had seen it beforehand.

64. Regarding Mr Deka's statement that he misled the appellant (see [36] above), the appellant submitted that the FTT did not take it into account even though it was relevant to Mr Szymanski's knowledge and the steps he had taken to ensure the

legitimacy of the order. The FTT did not explain why the statement was prejudicial. The appellant also argued that the FTT was wrong to say the statement was unsigned.

65. Mr Zurawel pointed out, on behalf of the Director of Border Revenue, that the FTT *did* take the statement into account (at [81]) and it was entirely clear why Mr Deka's statement, which referred to his having given numerous assurances to the appellant as to the legality of the transported goods, possibly prejudiced the appellant's argument he was an innocent carrier: an innocent carrier would not need to be continually reassured that mattress filling was not an illegal import.

66. In concluding that Mr Brenton was justified in dismissing the statement (having explained earlier at [81] that it was entitled to take the statement into account even though the officer had not when originally making his decision), the FTT was effectively saying the statement was irrelevant. Its reasoning was, in essence, based on an assessment of the weight to be attributed to the statement given it was not signed and Mr Deka had not been called to give evidence. In its decision refusing permission to appeal the FTT explained that, while the letter from the appellant's representative was signed, Mr Deka's statement itself was not. However, even putting aside the significance of whether the letter or statement was signed, we consider the FTT acted well within its discretion in giving little weight to the statement in circumstances where Mr Deka did not attend to give evidence. In declining to make the findings suggested by the statement, it might be said that the FTT was acting to the appellant's advantage. The statement raised more questions than it answered: in addition to the matters identified by the FTT, the evidence suggested that Mr Szymanski's account of his dealings with Mr Deka was incomplete.

67. We conclude there is no error of law in the FTT's approach to the invoice and statement from Mr Deka.

(4) Decision would inevitably have been the same

68. Mr Szymanski's core complaint with the FTT's decision is that, once the two factors it had found to be irrelevant were disregarded (the weight and smell of the load and the "snuff" statement), the FTT was wrong to hold that Border Force would have reached the same conclusion and to hold that a decision based on the remaining factors was a reasonable one.

69. The relevant law on the approach to be taken in such circumstances was set out by the FTT at [31] where it referred to the Court of Appeal's decision in *John Dee Ltd v CCE* [1995] STC 941. That case concerned an appeal in which the VAT Tribunal had concluded that the Commissioners had failed to have regard to additional material relating to the appellant's financial circumstances. Neil LJ (with whom the other Lords Justices agreed) held that the appellant had been right to concede that:

> "where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a tribunal can dismiss an appeal."

70. No distinction is made as a matter of principle, rightly, between that situation (taking account of relevant material that was not originally taken into account) and the facts of this case where irrelevant material ought not to have been taken into account.

71. Mr Zurawel argued that there was no error of law as the FTT directed itself as to the correct legal test of inevitability. The appellant did not, in fact, dissent from this.

72. In reaching a conclusion that the relevant decision would inevitably be the same, a tribunal may well consider the evidence from the decision-maker and whether it would have decided the matter in the same way. The tribunal will also need to consider whether, if the decision reached without the irrelevant material would have been the same, it would nevertheless still be a flawed decision. In the context of restoration decisions, consistent with the FTT's fact-finding role as explained in *Gora,* there is no reason why the tribunal should not, in considering inevitability, also take account of any facts it has found.

73. In this case Mr Szymanski did not argue that the FTT used the wrong legal test. His case was that: (1) if the two irrelevant factors were disregarded, the Respondent "would likely not find" Mr Szymanski responsible for or complicit in the smuggling attempt: the two irrelevant factors (and not the remaining factors) were decisive; (2) the FTT was wrong to be satisfied that Mr Brenton's conclusions on the two remaining factors (inadequacy of checks and differing accounts of delivery instructions) were reasonable; and (3) a finding that the appellant was complicit, that was based only on those two remaining factors, would be unreasonable.

74. As regards (1) the FTT concluded at [80] that, in the absence of the irrelevant factors, Mr Brenton would inevitably have reached the conclusion that the appellant "had at best turned a blind eye to what was going on" and would, therefore, have reached the same conclusion on complicity. The FTT explained, in the same paragraph, that, in the light of Mr Brenton's evidence and his decision letter, it was "certain [Mr Brenton] would have concluded the same way by reason of these factors [failure to make adequate checks and differing accounts of delivery arrangement] alone." The FTT made a clear finding after hearing and reviewing the relevant evidence. We did not hear Mr Brenton's evidence, but there is nothing in the FTT's decision to suggest that there was any challenge to any account he gave of what he would have decided if the irrelevant factors were ignored. There is also nothing in the review letter, when read a whole, which suggests the FTT was unreasonable in reaching the conclusion that it did.

75. In relation to (2) (whether the FTT was wrong to be satisfied that Mr Brenton's conclusions on the two remaining factors – adequacy of checks, and differing accounts of delivery arrangements - was reasonable), as indicated above at [27] and [28] of this decision, the FTT made findings of fact on what checks were, and were not, made. It also considered the invoice and Mr Deka's statement and explained why neither of these helped the appellant's case. We have already explained why the FTT's conclusions were not unreasonable. We have also explained why the appellant's arguments on the checks being restricted to those required by the CMR Convention are wrong. Taking account of the facts found, we can see no error of law

in the FTT's conclusion that, Mr Brenton's conclusion concerning the inadequacy of checks, was not unreasonable.

76. As for the differing accounts of the delivery arrangements, the FTT again made various findings of fact on the evidence it heard (see [33] above). There is nothing that emerges from those findings which suggests that the FTT erred in law in not disturbing Mr Brenton's conclusion that the arrangements did not stand up to scrutiny. Indeed, the lack of clarity surrounding the delivery arrangements noted by the FTT, and its finding that Mr Szymanski's account of delivery arrangements was incomplete, fortified that conclusion.

77. That then leaves (3) above; the question as to whether a conclusion that the appellant was complicit in the smuggling was a reasonable one by reference to the two remaining factors. It is convenient at this point to deal with the appellant's criticisms of the FTT's understanding of what was required to constitute complicity. The FTT accepted that a person could be complicit "even if he simply turns a blind eye to what is going on". It noted that the OED definition referred to involvement with other and went on to say a person can be involved in an activity if he agrees to do something without question in circumstances where a reasonable person would make further enquiries to ascertain whether what he was told was credible (see [19] above). The appellant submits that involvement requires some conscious act – here, the knowledge of smuggling.

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.

79. As regards the finding on complicity, Mr Zurawel emphasised that Border Force's policy did not require that Mr Brenton find that the appellant was responsible for or complicit in the smuggling - the policy contains a "reverse burden", which requires drivers and operators to prove a lack of complicity. Although in this respect Mr Brenton's finding that the appellant *was* complicit went further than it needed to, it necessarily meant, Mr Zurawel submitted, that *insufficient evidence* of lack of complicity had been provided. The relevant issue for this Tribunal was, accordingly, whether there was an error of law in the FTT's conclusion that the appellant had failed to provide evidence satisfying the Respondent that he was neither responsible for nor complicit in the smuggling and that was a decision reasonably open to Mr Brenton.

80. For our part, we note that, understandably given the terms in which Mr Brenton's decision was expressed, the FTT did not couch its assessment of reasonableness in

terms of the *lack of evidence* as to the appellant's complicity. The FTT found the appellant had failed to show that Mr Brenton was unreasonable in deciding that the appellant's failure to enquire further into Mr Deka's business activities or to question the delivery arrangements meant he turned a blind eye to what was actually going on and was complicit in the smuggling. In our view, given these appeals relate to the decisions that were actually made, both Mr Brenton's decision and the FTT's decision must be scrutinised on the basis of the reasoning that was actually expressed.

81. It fell to the FTT to consider, having regard to the relevant factors which remained, whether a decision not to restore would inevitably have been made. That consideration, as we have said above, would also need to take account of any additional facts that the FTT had found.

82. Given the inadequacy of the checks (taking into account, in particular, that this was a new customer who was not a well-known organisation) and the FTT's findings that the account given of the delivery arrangements was confused and incomplete, we can see no error of law in the FTT's conclusion that it was inevitable that Border Force would have decided that Mr Szymanski was "complicit" (in the sense described above). Nor do we consider that a decision, so reached, was unreasonable.

83. As regards the significance of the account given of the delivery arrangements we note that there are two strands which can be distinguished: (1) the inconsistency of the accounts, which affects the credibility of Mr Szymanski's account; and (2) the nature of the arrangements and the lack of clarity around them as found by the FTT, which ought in conjunction with the other circumstances to have triggered further enquiry. While the second strand is more relevant to "complicity", the consideration of the first does not in our view render the FTT's decision (that the new decision by Border Force would, if irrelevant factors were disregarded, not have been an unreasonable one) wrong in law. The second strand provides a sufficient basis for the FTT to have concluded as it did. The first strand does not detract from the relevance of the second.

84. We cannot see any error of law in either the test of inevitability the FTT used or in its application of that test to the circumstances of this case.

Decision

85. None of the grounds raised above show the FTT Decision contained errors of law. The appellant's appeal is therefore dismissed.

Swami Raghavan
Judge of the Upper Tribunal

Andrew Scott
Judge of the Upper Tribunal

Release date: 12 November 2019