



TC02079

Appeal number: TC/2011/01303

EXCISE DUTY – Vehicle seized and condemned as liable to forfeiture under CMA – restoration appeal – Tribunal confined to considering the reasonableness of UKBA’s decision to refuse restoration following HMRC v Jones and Jones – whether exceptional circumstances existed which rendered that decision unreasonable – held there were none – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BEVERLEY DENNETT

Appellant

- and -

**DIRECTOR OF BORDER REVENUE
UK BORDER AGENCY**

Respondents

**TRIBUNAL: JUDGE JOHN WALTERS QC
MRS ELIZABETH BRIDGE**

Sitting in public in Norwich on 27 February 2012

The Appellant appeared in person with Mr S Dennett

Rebecca Wastall, Counsel, for the Respondent

DECISION

Introduction

- 5 1. The appellant, Mrs Beverley Dennett, appeals against a decision communicated to her in a letter (“the Decision Letter”) dated 20 January 2011, being the decision of Officer D C Hodge, Review Officer of the UK Border Force, that her Renault Clio, registration number AP08 LOJ (“the Vehicle”), which was seized under section 139(1) Customs and Excise Management Act 1979 (“CEMA”) on 18 September
- 10 2010, should not be restored. The Decision Letter gives the date of the seizure as 6 December 2010 and this error was repeated in the Statement of Case filed for the respondent (“the Director”) on 20 April 2011.
2. The Decision Letter confirmed a decision of Officer H Govier of the UK Border Agency National Post Seizure Unit, communicated to Mrs Dennett in a letter dated 7
- 15 December 2010, that the Vehicle would not be restored.
3. The Vehicle had been used to import 38.5 kilograms of hand rolling tobacco (“the Excise Goods”), attracting £4,989.22 in excise duty. The Excise Goods were seized as well as the Vehicle.
4. When the Vehicle and the Excise Goods were seized, a ‘Seizure Information Notice’ and Customs Notice 12A (‘Goods and/or vehicles seized by Customs’) were issued to Mrs Dennett. Notice 12A explains that the legality of a seizure may be challenged in a Magistrates’ Court by sending the UK Border Agency (“UKBA”) a notice of appeal within 1 month of the date of the seizure, or of the date of a notice of seizure. Mrs Dennett did not challenge the legality of the seizure in this way (and indeed her intention not to contest the legality of the seizure was explicitly stated in
- 25 her solicitors’ letter dated 11 October 2010 – see below) and the Excise Goods and the Vehicle were, in consequence, condemned as liable to forfeiture under paragraph 5, Schedule 3, CEMA.
5. The jurisdiction of this Tribunal on an appeal against a decision not to restore a vehicle is conferred by section 16, Finance Act 1994 and is limited to considering whether the decision could not have been reasonably arrived at. In that consideration, this Tribunal has no power to re-open and re-determine the question of whether or not the Vehicle has been lawfully seized or forfeited and condemned (*Commissioners for HM Revenue and Customs v Jones and Jones* [2011] EWCA Civ 824, paragraph 73).
- 30 6. Implicit in the seizure, forfeiture and condemnation of the Vehicle is the decision that the attempted importation of the Excise Goods, using the Vehicle, was for a commercial purpose and that the Excise Goods were not intended for ‘own use’ by Mrs Dennett or family and friends on a non-commercial basis. Whether or not this was the case in fact is therefore not a matter which it is open to this Tribunal to re-
- 40 examine or decide in this appeal.

7. What we must decide is whether the decision not to restore the Vehicle was reasonable, given that the Vehicle must be taken to have been lawfully seized and condemned as liable to forfeiture.

5 8. We heard oral evidence from Mrs Dennett, her husband Mr Steven Dennett, Officer Matthew Castle-Turner and Officer Deborah Hodge, the review officer who was the author of the Decision Letter. We also had before us a bundle of documents including witness statements made by Officer Castle-Turner and Officer Hodge. From the evidence as a whole we find the following facts.

The facts and submissions

10 9. Mr and Mrs Dennett went to France and Belgium, using the Vehicle, on 18 September 2010, with the intention of buying wine and tobacco.

15 10. They called at Adinkerke in Belgium where they purchased the Excise Goods. This took them so long that they did not have time to visit Calais, where they had intended to buy wine. Instead they went straight back to the Eurotunnel terminal at Coquelles.

11. There they were stopped by UK officer and directed into a garage, where Officer Castle-Turner questioned them. They opened the boot of the Vehicle at Officer Castle-Turner's request, at which point Officer Castle-Turner identified a substantial amount of tobacco.

20 12. They were separately interviewed by UK officers. Officer Castle-Turner interviewed Mrs Dennett.

25 13. After the interviews Officer Castle-Turner advised Mrs Dennett that he was going to seize the Vehicle and handed Mrs Dennett the two forms referred to above, the 'Seizure Information Notice' and Customs Notice 12A ('Goods and/or vehicles seized by Customs').

14. Mr and Mrs Dennett were taken to another train, escorted to England and left at Folkestone. They made their way from there to their home in Norfolk by train.

30 15. Mrs Dennett took legal advice, and on 11 October 2010 Greenland Houchen Pomeroy, Solicitors of Attleborough, Norfolk wrote to the Post Seizure Unit of UKBA requesting the return of the Vehicle. The letter stated that the Vehicle was a driving instructor's vehicle fitted with dual controls. On 13 October 2010 Mrs Dennett herself telephoned and wrote to the Post Seizure Unit confirming that the Vehicle was a driving instruction vehicle and that she used it in her profession as a driving instructor. She apologised for bringing into the country an amount of tobacco
35 which exceeded the limit for personal use, stated that the incident was her 'first offence' and that she did not intend that this should happen ever again.

40 16. She explained in her letter that she used the Vehicle for her work and to obtain an income and that to lose the ability to do this 'would have a detrimental impact on [her] work and [her] home life and would result in a loss of salary and [her] ability to maintain payments on [her] mortgage'. She further explained that she lived in a rural

area where public transport amounted to one bus each morning, stating that in order to go to her nearest town she would have to use a taxi or get a lift from a friend. She asked for further consideration of the case having regard to the information provided in the letter.

5 17. In response, Officer Govier of the National Post Seizure Unit of UKBA wrote to Mrs Dennett on 7 December 2010 (as noted above) stating that the general policy was not normally to restore private vehicles seized because they were carrying excise goods liable to forfeiture. Restoration was considered if the excise goods were
10 destined for supply on a 'not for profit' basis or, if they were destined for supply at a profit the quantity of excise goods was small and it was 'a first occurrence', or if the vehicle was owned by an 'innocent' third party, not present at the time of the seizure, or a third party who had taken reasonable steps to prevent smuggling in the vehicle. Officer Govier also stated that 'in all cases any other relevant circumstances will be taken into account in deciding whether restoration is appropriate'.

15 18. Officer Govier concluded that there were no exceptional circumstances that would justify a departure from the policy and refused restoration. Officer Govier did not mention in her letter the fact that the Vehicle was a driving instructor's vehicle fitted with dual controls, or that it was used by Mrs Dennett in her work as a driving instructor.

20 19. Officer Govier in the letter informed Mrs Dennett that she could have the decision not to restore the Vehicle reviewed and in a letter dated 31 December 2010 Mrs Dennett wrote to UKBA requesting a review.

25 20. In that letter, Mrs Dennett stated that she had read the policy for the restoration of private vehicles and made various further comments (as well as re-iterating points made in earlier correspondence). In particular she emphasised that the Excise Goods were destined for supply on a 'not for profit' basis for use by herself and her husband and their 3 grown teenagers (to whom they were to be a 'gift'). She complained in the letter that all of this had been explained to Officer Castle-Turner who had made a written log, which she and her husband were not permitted to see, but were required
30 to sign.

21. Also on 31 December 2010 Mr Dennett wrote to UKBA, on behalf of himself and Mrs Dennett, raising an official complaint against Officer Castle-Turner in relation to his conduct on 18 September 2010. The detail of the complaint provided by Mr and Mrs Dennett by email contained examples of abusive language which they said that
35 Officer Castle-Turner had used in speaking to them. Unfortunately the words involved caused the 'firewall' at UKBA's system to prevent these emails reaching the intended recipient (Officer White). Officer White asked for the details to be re-sent. This was done, on 17 February 2011 using asterisks in place of the words in issue. The emails were then received by Officer White. Officer Jordan, a Complaints
40 Officer at the Border Force Complaints Team wrote to Mr and Mrs Dennett on 21 February 2011 acknowledging the letter of 31 December 2010 and the later email of 17 February 2011 but stated that due to the length of time which had elapsed between the 'alleged incident' and Mr and Mrs Dennett writing to UKBA (on 31 December

2010) they were unable to investigate the matter. Officer Jordan stated that UKBA's complaints procedure 'states that a complaint should normally be made in writing by the aggrieved person or their representative no more than three months from the day on which the incident first occurs or came to their notice'. Being aware that Mr and Mrs Dennett might not be happy with this response, Officer Jordan assured them that UKBA's members of staff strive to provide a polite and professional service and hoped that any future dealings Mr and Mrs Dennett had with UKBA would be satisfactory. Mr Dennett emailed Officer Jordan on 4 March 2011 expressing strong dissatisfaction with her response.

22. Following receipt of the Decision Letter (dated 20 January 2011), Mr Dennett sent a further email (on 4 March 2011) to 'immig@hmrc.gso.gov.uk' stating that study of the Decision Letter had made him and Mrs Dennett certain that information relied on to reach the decision not to restore the Vehicle was incorrect and further stating that they wished to make a (further) complaint against Officer Castle-Turner on the ground that he 'intentionally falsified the answers we made to his questions'.

23. The Decision Letter recounted UKBA's version of the initial exchange between Officer Castle-Turner and Mr and Mrs Dennett and of their separate interviews. It stated that Officer Castle-Turner had been satisfied that the Excise Goods had been held for a commercial purpose and had seized the Excise Goods and the Vehicle under CEMA. It also stated that Mrs Dennett had been issued with a 'Seizure Information Notice' and Notice 12A which explained that she could challenge the legality of the seizure in a Magistrate's Court by sending UKBA a notice of claim within 1 month of the date of seizure. It also stated that as Mrs Dennett had not challenged the legality of the seizure the Excise Goods and the Vehicle had been condemned as forfeit to the Crown by the passage of time under CEMA Schedule 3, paragraph 5.

24. The Decision Letter dealt with Mrs Dennett's request for restoration of the Vehicle. It referred to Mrs Dennett's explanation that the Vehicle was a dual control vehicle and that she was a driving instructor and therefore needed the Vehicle 'for your income'. It also referred to the fact that Mrs Dennett lived in a rural area where public transport is limited to one bus each morning and to her statement that this was the first time that both Mr and Mrs Dennett had bought tobacco abroad. Officer Hodge explained UKBA's policy for the restoration of private vehicles, in a slightly fuller way than Officer Govier had done.

25. Officer Hodge explained in the Decision Letter that she considered every case on its individual merits. She had considered the matter afresh, 'including the circumstances of the events on the date of seizure and the related evidence, so as to decide if any mitigating or exceptional circumstances exist, that should be taken into account'. She had examined all the representations and other material that was available to UKBA both before and after the time of the decision by Officer Govier.

26. Officer Hodge stated that she had not considered the legality or the correctness of the seizure, which was a matter which could have been raised by an appeal to the Magistrates' Court within one month of the seizure. Officer Hodge's starting point

had been that the seizure of the Excise Goods and the Vehicle had been legal and that the Excise Goods had been held by Mr and Mrs Dennett for a commercial purpose and not for 'own use' by themselves or family or friends on a non-commercial basis.

5 27. Officer Hodge explained that the policy on restoration required her to ascertain the circumstances of the case to determine *inter alia* whether there were exceptional circumstances which should result in restoration of the Vehicle and whether the result is fair, reasonable and proportionate in all the circumstances.

10 28. Officer Hodge noted that Mr Dennett had understated to Officer Castle-Turner the amount of Excise Goods being imported (25 kilos, when the true figure was 38.5 kilos). She also noted that Mrs Dennett had given inconsistent answers to questions about her own smoking habits which led Officer Hodge to conclude that she (Mrs Dennett) did not actually smoke tobacco. She noted the unusually large quantity of Excise Goods imported, that was (in her view) likely to damage legitimate UK trade, and a reasoned assumption that if it was imported for 'own use' a large amount of it
15 would have gone stale before it could be used at all. She rejected Mr and Mrs Dennett's explanation that the Excise Goods were bought by them to give (or sell at cost) to their 3 adult children. She concluded that non-restoration of the Vehicle was fair, reasonable and proportionate in the circumstances, citing familiar extracts from the judgments in the Court of Appeal in *Lindsay v Customs and Excise Commissioners* [2002] EWCA Civ 267, [2002] STC 588, viz: per Lord Phillips (at
20 [63]):

25 '... Those who deliberately use their cars to further fraudulent commercial venture in the knowledge that if they are caught their vehicles will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose their vehicles. Nor does it seem to me that, in such circumstances, the value of the car used needs to be taken into consideration. Those circumstances will normally take the case beyond the threshold where that factor can carry significant weight in the balance. Cases of exceptional hardship must always, of course, be given due consideration.'

and per Judge LJ (at [72]):

30 '... Given the extent of the damage caused to the public interest, it is, in my judgment, acceptable and proportionate that subject to exceptional individual considerations, whatever they are worth, the vehicles of those who smuggle for a profit, even for a small profit, should be seized as a matter of policy ...'

35 29. Officer Hodge then went on to consider the question of hardship caused to Mrs Dennett by the seizure and forfeiture of the Vehicle. She mentioned specifically Mrs Dennett's business as a driving instructor, but concluded that neither the inconvenience nor the expense of replacing the Vehicle amounted to exceptional circumstances which would disapply the policy of non-restoration of the Vehicle.

40 30. She concluded with her decision to uphold Officer Govier's decision and explained how Mrs Dennett could appeal her decision to this tribunal.

31. Mrs Dennett's oral evidence before the Tribunal recounted her view of the encounter with Officer Castle-Turner on 18 September 2010 and the ensuing

5 correspondence. She emphasised that Officer Castle-Turner had led her to believe that restoration of the Vehicle was likely and that she only found out that this was not the case when she contacted UKBA later. She also re-iterated that she had not purchased the Excise Goods for commercial gain, but for use by her family and that she was not seeking restoration of the Excise Goods, but only of the Vehicle.

32. Mrs Dennett was cross-examined on her smoking habits and how she had purchased Excise Goods at Adinkerke.

10 33. The Tribunal asked Mrs Dennett about her business as a driving instructor. She said she had been a freelance driving instructor for just over 5 years. She worked as a driving instructor for about 16 hours a week. She estimated that her profits from the business were 'a couple of hundred each year'. She described the business as 'more of a back-up – when I want to save for something'. She also has an office job as a sales office manager. She told the Tribunal that she was purchasing the Vehicle *via* a hire purchase arrangement and had continued paying the HP instalments even when
15 the car was not available to her because it had been seized. She said she had another car now, which did not have dual controls and which she does not use for driving instruction. Mr Dennett also has a car. Mr and Mrs Dennett always keep two cars.

20 34. Mr Dennett in evidence confirmed what Mrs Dennett had said and gave a similar account of the events of 18 September 2010. The main emphasis in his evidence was his account of the rudeness (in his view) of Officer Castle-Turner in questioning Mrs Dennett and himself and his determination to pursue a complaint against him. In particular he said that Officer Castle-Turner had been 'judgmental about what we should be able to buy our children'. He was cross-examined by Ms Wastall about his awareness of the guidance for personal importation of tobacco – which suggests that 3
25 kilos is appropriate for one person's own use. He confirmed he was aware of the guidance. He complained that he had not seen Officer Castle-Turner's notes or his witness statement before the day of the appeal hearing and challenged certain aspects of his answers as recorded in Officer Castle-Turner's notes.

30 35. Officer Castle-Turner's evidence was that he had worked at Coquelles for the last 12 years and was an anti-smuggling officer. His job was to detect attempted importations into the UK of excise goods and prohibited goods. He spoke to Mr and Mrs Dennett after they had been asked to pull over by other officers at passport control. He explained that he asks routine questions when he stops a vehicle and does not take notes at that point. He writes up his notes after the initial conversation. He
35 did this when he questioned Mr and Mrs Dennett. He said that he presented his notebook to Mr and Mrs Dennett (a fact which they disputed).

40 36. Officer Castle-Turner explained that there was CCTV in the garages where cars were examined and that other officers and his supervisors would be in the vicinity. However the CCTV film, which was not intended for the public's benefit was wiped clean in about three months after use. He refuted Mr and Mrs Dennett's allegations of verbal abuse, and of forcing them to sign unseen notes prepared by him. He said he had not used abusive words in their exchange. He denied Mrs Dennett's allegation that he had challenged her to show him that she could roll a cigarette. He said that at

the end of his interview with Mrs Dennett he had presented his notebook to her, she had looked at the notebook and signed it. He was challenged on all these points in cross-examination by Mr Dennett.

5 37. Officer Castle-Turner said in evidence that he had no part in the restoration of seized vehicles. He informed Mr and Mrs Dennett that vehicles were not kept at Coquelles but were taken to Dover and held there. He denied that he suggested to Mr and Mrs Dennett that their car would or could be restored to them in 2 weeks (as they alleged he had done). He said that he knew restoration would not happen in 2 weeks. He said that Mr and Mrs Dennett's misleading answers to questions had made him
10 suspicious that they were attempting to import the Excise Goods for commercial purposes.

15 38. Officer Hodge stated that she had considered Officer Castle-Turner's notes, the seizure information notice, the correspondence with Mr and Mrs Dennett and such documents, including receipts, as were provided to UKBA, in making her decision not to restore the Vehicle. She stated that where a seized vehicle was the subject of a hire purchase agreement, the driver had the option to claim restoration himself/herself or to surrender the vehicle to the finance company, leaving the finance company to claim restoration if it thought fit. In this case the driver (Mrs Dennett) had claimed restoration.

20 39. Officer Hodge said that she had formed the view that the Excise Goods were intended by Mr and Mrs Dennett to be sold on at a profit, and not as gifts for their children. She considered that the evidence showed that they had tried to mislead Officer Castle-Turner. She said that she had considered whether the seizure had caused Mrs Dennett exceptional hardship. She noted that Mrs Dennett had said in
25 correspondence that deprivation of the car (and loss of income as a driving instructor) threatened her ability to pay her mortgage, yet at the hearing she had said to the Tribunal that her income as a driving instructor was about £200 a year, which suggested to her that that income was not really relied on to pay the mortgage. A factor in her decision was that there was evidence that Mr and Mrs Dennett were
30 frequent travellers and may have imported significant quantities of Excise Goods on other occasions.

35 40. Ms Wastall submitted that Officer Hodge's decision, against which the appeal was brought, was one which could reasonably have been made on the basis of the information before her at the time. She had applied UKBA's policy which was generally not to restore private vehicles used in the importation of Excise Goods for commercial purposes. Ms Wastall contended that Officer Hodge's decision was justified by Mr and Mrs Dennett's conduct in misleading Officer Castle-Turner and that she had considered the hardship issue in line with the Court of Appeal's decision in *Lindsay*.

40 41. Mr and Mrs Dennett in reply submitted that the Excise Goods had been imported for their own use and as gifts and that they had been honest and open with the officers. Money had been available for the purchase from their earnings. Mrs

Dennett's new car had been bought with capital released from the sale of their house in July 2011.

Our decision

5 42. As will be apparent from the above account of the evidence and the facts, most of the debate at the hearing was about the reasonableness of Officer Castle-Turner's decision that Mr and Mrs Dennett had imported the Excise Goods for commercial purposes and the reasonableness of Officer Hodge on her review of reaching the same conclusion.

10 43. From paragraphs 5 to 7 above, it will be seen that this issue is outside the parameters of the Tribunal's function in this appeal, which is to consider the reasonableness of the decision not to restore the Vehicle, taking as a fact that the attempted importation of the Excise Goods was for commercial purposes. We therefore make no findings of fact in relation to the contentious issues which emerged in the evidence concerning what was said and done after Mr and Mrs Dennett were
15 detained at Coquelles on 18 September 2010.

44. However, we gave careful consideration to the relevant issue whether Officer Hodge had reasonably rejected the argument that Mrs Dennett, as a driving instructor, would suffer exceptional hardship from being deprived of the Vehicle. Mrs Dennett's evidence that her business as a driving instructor was a 'second job' and that her
20 estimate of her profits from the business were 'a couple of hundred each year', the business being 'more of a back-up – when I want to save for something' persuaded us that this factor did not present exceptional circumstances which would reasonably justify a departure from UKBA's general policy not to restore private vehicles used for smuggling attempts.

25 45. Mr and Mrs Dennett did not present any other arguments to the effect that Officer Hodge's decision was unreasonable. Nor did they suggest that the decision was disproportionate – a factor which is included in the concept of reasonableness.

30 46. Having regard to the dicta from *Lindsay* referred to above, we would not expect any argument to the effect that Officer Hodge's decision was disproportionate or otherwise unreasonable to succeed.

47. Certainly we are quite unable to conclude on the evidence before us that her decision was one which no reasonable body acting on the basis of the evidence available – or the evidence which we have considered – could have reached. On this basis Mrs Dennett's appeal must fail, and we dismiss it accordingly.

35 48. We add a word about Officer Castle-Turner. It appeared to us that the greater part of Mrs and Mrs Dennett's dissatisfaction in this matter related to their perception of Officer Castle-Turner's behaviour towards them on 18 September 2010. Since, as he said, and as is quite obvious, he played no part at all in UKBA's decision not to restore the Vehicle to Mrs Dennett, the matter of his behaviour on that day is wholly
40 outside the remit of our consideration in this appeal.

49. Accordingly we find no facts in relation to it. The appropriate fact-finding body would be the court, tribunal or administrative body which is properly seized of any complaint which Mr or Mrs Dennett have made or may make in the future in relation to Officer Castle-Turner.

5 50. However, in fairness to him as a person whose character was attacked in these proceedings, we conclude this decision by saying that from the evidence which was before us we gained the impression that he was a conscientious officer doing his best to fulfil his quite arduous duties of detecting attempted importations into the UK of excise goods and prohibited goods at Coquelles.

10 51. We also express the view that Mr and Mrs Dennett were understandably frustrated by UKBA's conduct in relation to the official complaint made against Officer Castle-Turner by Mr Dennett on 31 December 2010. It seems to us that UKBA were unnecessarily unhelpful (to put it no higher) to refuse to investigate the complaint because it was made (just) over three months after the incident complained about.
15 This is especially so because it is apparent from Officer Jordan's letter dated 21 February 2011 that UKBA's complaints procedure clearly permitted a complaint received more than three months after such an incident to be investigated in some circumstances. In particular it caused understandable frustration to Mr and Mrs Dennett that UKBA refused to investigate the complaint when they had requested Mr
20 and Mrs Dennett to re-send to them details of their allegations. The bland conclusion of Officer Jordan's letter – that officer's assurance that UKBA's members of staff strive to provide a polite and professional service and hope that any future dealings Mr and Mrs Dennett had with UKBA would be satisfactory – was bound, in our view, to add salt to the wound, and whoever drafted the letter should have avoided
25 deploying it. We hope that UKBA will take note of this for future reference.

52. 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
30 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 findings of this decision notice.

35

**JOHN WALTERS QC
TRIBUNAL JUDGE**

40

RELEASE DATE: 14 June 2012