



TC03996

Appeal number: TC/2012/07458

FORFEITURE – Border Force offering to restore car for 30% of value – vehicle used to smuggle Class A drugs – whether decision unreasonable – unreasonably favourable to appellant – appeal dismissed – Border Force directed to review its policies

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MOAZZAM AHMED

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE BARBARA MOSEDALE
MRS SONIA GABLE**

Sitting in public at Bedford Square, London on 25 June 2014

The Appellant in person

Mr W Hayes, Counsel, for the Respondents

DECISION

5 1. On 19 January 2009 the appellant's car was seized at Dover as it was being used to carry 1.982 kilograms of diamorphine, a Class A prohibited drug better known as heroin.

2. Mr Ahmed did not challenge the seizure and the car was forfeited as being used for the carriage of goods (the heroin) which were liable to forfeiture.

10 3. After he was acquitted at the ensuing criminal trial, Mr Ahmed asked for his car to be restored to him. The Border Force refused. Mr Ahmed asked for this decision to be reviewed. On review, this decision was initially upheld, but on Mr Ahmed's request the Border Force undertook another review following which they offered to restore the car on payment of £885 (30% of its value in Glass's guide). Mr Ahmed appeals against this decision which was contained in a letter dated 28 June 2011.

15 *Procedural matters*

20 4. Challenge to validity of hearing: An earlier hearing of the appeal was postponed as, at the start of it, it appeared the Border Force and Mr Ahmed would be able to settle the matter. They were subsequently unable to settle the matter and Mr Ahmed was notified that his case would now be heard on 25 June. At the start of this hearing, he informed the panel that he thought the hearing was just to 'discuss' the compensation to which he was entitled and not, as he put it, start the case again. He also informed the panel that he was registered blind and had failed to bring with him his marked up copy of the hearing bundle. We asked him if he wished to apply for an adjournment. Mr Ahmed said that he wanted the hearing to go ahead and did not
25 want to apply for an adjournment.

30 5. We note that the hearing was to some extent to determine (not 'discuss') the compensation to which Mr Ahmed was entitled to. His car had been seized and HMRC had offered to restore it on payment of a fee. Mr Ahmed considered the car should be restored without payment of a fee. As the car had been disposed of in the meantime, HMRC have accepted that they should compensate Mr Ahmed for the car and the only question between the parties is the amount of that compensation. The Tribunal has no jurisdiction over how the car is valued, which is a matter on which the Home Office and Mr Ahmed disagree, but it does have jurisdiction to determine if the Home Office's decision to require Mr Ahmed to pay the 30% fee was reasonable,
35 and the fee does affect the amount of compensation Mr Ahmed will receive.

6. A further copy of the bundle was provided to Mr Ahmed as he had failed to bring his own. We also took proceedings slowly and, in view of his statement he was registered blind, everything in the bundle which was referred to was read out. We observed that Mr Ahmed took notes of the hearing as it progressed.

40 7. Immediately after the hearing, Mr Ahmed in effect asked us to declare a mistrial, although those were not the words he used. He said he was disadvantaged

because he had not been prepared for the hearing. He also indicated he thought the hearing unfair because of the questions Mr Hayes asked him in cross examination. Mr Ahmed was reminded that he had declined to ask for an adjournment. We did not consider the cross examination unfair. We did not accept he was not prepared for the hearing (see [9] below). We did not declare a mis-trial.

8. Application to exclude document from hearing: during the hearing Mr Hayes referred to the notes of the interview with Mr Ahmed at the time of the seizure. Mr Ahmed's case was that these notes had been excluded by the Judge at his criminal trial and should not be used in the Tax Tribunal case. Our decision was that the exclusion of notes from the criminal trial was in no way binding on this Tribunal; as the review officer had relied on the notes in her review decision under appeal, the Tribunal necessarily had to consider the interview notes to consider the question of whether her decision was reasonable. We ruled that the notes were not excluded from evidence but Mr Khan was of course free to make submissions on why he thought the review officer should not have considered them.

9. Intimidation at hearing? Mr Ahmed told us near the end of the hearing that he was scared and intimidated by the Border Force and was still scared of them at the hearing. We did not accept that this was reliable. So far from being scared, he was able to ably represent himself at the hearing, taking objection to things that were said and, for instance, as reported above, objecting to the use of the interview notes. He also took the opportunity to put across his grievances with the Border Force, in particular alleging that UKBA had lied about his car being disposed of and alleging UKBA had promised him retail rather than trade value for it. His demeanour was very far from that of a person who was in any way intimidated.

10. Mr Hayes asked Mr Ahmed to clarify what he meant by suggesting he was intimidated in the hearing. Mr Ahmed said he thought there were too many persons from the Border Force present. We find that there were present Mr Hayes (counsel) and three ladies: Ms Hodge the witness, the instructing solicitor and a young work-experience person observing. We did not find Mr Ahmed's suggestion he found these persons intimidating reliable: they sat quietly (two in the back row) and said nothing (bar a few instructions from the solicitor to counsel). Ms Hodge, of course, also gave evidence in the witness box. We find Mr Ahmed was not the sort of person to be easily intimidated in any event; we also note he admitted (see below) being friends with, and agreeing to go on a day trip with, someone he said was a known gangster and known to be violent. We do not accept that he found the Border Force representatives at the hearing in any way intimidating, nor do we consider that there were any grounds for such an allegation.

11. Further evidence to be admitted? At the end of the hearing Mr Ahmed indicated that he wanted the Tribunal to consider additional documentation before reaching its conclusions, and in particular the reasons why the interview notes were not admitted in the criminal trial. Without the Home Office or the panel having sight of the document Mr Ahmed wished us to consider (he said it was at home) the Home Office were unable to take a view on whether they would object to its admission or the Tribunal to decide whether to admit it. We indicated that if he wished it to be

considered, he should write to the Home Office and the Tribunal as soon as possible with a copy of it.

12. In the event nothing was received from Mr Ahmed although the writing up of this decision was delayed to give him time to make the application.

5 *The facts*

13. Mr Ahmed is diabetic and registered blind (blind in one eye and partially sighted in the other), and was so at the time of the events at question.

14. The car was intercepted at Dover, where Border Force officers found the heroin concealed under the carpet in the boot. The car was driven by a Mr Imran Khan; Mr Ahmed the appellant and a Ms Paulina Sloma were passengers.

15. All three were arrested and interviewed under caution on 20 January 2009. All three gave (in separate interviews) similar accounts about what had happened since early morning the previous day. Mr Ahmed did not accept that the accounts were similar but we find they were. The consistent story each one told in their separate interviews is in summary set out in the next paragraph.

16. Their accounts were that at around 6am they left West London in the car bound for Dover, relying on a SatNav for directions. Their destination was Calais as they intended to sight see and shop in France. But they got lost and drove around France and Belgium all day for about 15 hours, without shopping, sight seeing or having a meal: all they did was stop at a service station to buy snacks and use the toilet. All three stayed together and none of them knew about the drugs.

17. HMRC examined their mobile phones and SatNav and discovered that the car had actually been driven to Amsterdam and that Mr Khan had been in contact with a Mr Herries who was in Amsterdam at the same time. The three in the car and (later) Mr Herries were charged with knowingly being involved in the illegal importation of the heroin. The trial took place in 2011. Mr Khan and Mr Herries were convicted and imprisoned. Mr Ahmed and Ms Sloma were acquitted.

18. Mr Ahmed now accepts that the car was driven to Amsterdam after arrival on the Continent, where Mr Khan and Mr Herries met up. We find it is obvious that Amsterdam was always the destination as Mr Herries had flown out to Amsterdam and back for the (short) meeting with Mr Khan. The only purpose for one to drive and the other to fly out to Amsterdam for a short meeting was for the drugs to be put in the car while it was in Amsterdam.

19. Nevertheless, Mr Ahmed did not accept in the hearing before us that Amsterdam was the intended destination. He maintained that they were lost on arrival in Calais as the SatNav would not work abroad and drove around aimlessly. Mr Khan's case is that he couldn't read the road signs (although as he took notes in tribunal it was clear he has some ability to read) and didn't ask where they were going as he wasn't a nosy person (elsewhere he said he had asked where they were going),

he fell asleep a lot and Mr Khan would shout at him if he asked questions (although elsewhere he said Mr Khan was never aggressive towards him). He accepted he told the jury in his criminal trial that he got a text message on his phone 'welcome to Brussels' but maintained he hadn't known they were no longer in France and didn't
5 remember receiving any text message. He also says he was incurious as to why someone (Mr Herries) got into the car and directed them to a flat where Mr Ahmed and Ms Sloma sat while Mr Khan and Mr Herries had their meeting. It was, according to Mr Ahmed, 'none of my business'.

20. Mr Ahmed accepted he had told the jury that the purpose of the trip was both
10 shopping and for Mr Khan to meet someone. At the tribunal hearing he now said that at the time he understood the only purpose of the trip was shopping, although he accepted that he had bought nothing (bar snacks in a service station).

21. Mr Ahmed's case is that Mr Khan is a long-term friend of his. He knew Mr
15 Khan had a reputation as a gangster where they both lived (Hounslow) and that he knew him as someone known to be aggressive, but he backtracked on this when it was put to him it was odd to accept an offer for a day trip with such a person. He also backtracked on his description of Mr Khan as a known gangster, saying he had not meant that Mr Khan was known as a criminal, and it was (he then said) just that Mr Khan described himself as a gangster and claimed to get into fights.

20 22. Bearing in mind the inconsistencies between what he said in the interview and what he said now; between what he said at the trial and what he said now, and the inconsistencies even in the story in tribunal, we cannot accept what Mr Ahmed said in the hearing before us was reliable and in particular we can't accept that Mr Ahmed thought at the time that they were lost.

25 23. Mr Ahmed clearly lied in the interview with the Border Force as he denied any meeting had taken place during the journey. He now accepts that he did witness the meeting between Mr Khan and Mr Herries in Amsterdam and that it lasted about 20 minutes while he and Ms Sloma sat in a flat. His explanation for the inaccuracy in
30 what he said at his interview is that he was hyperglycaemic at the time and therefore incoherent. We do not accept this explanation. We have read the interview and it is coherent. Moreover, what he said (untruthfully) in his interview was consistent with what Mr Khan and Ms Sloma said untruthfully in their separate interviews, indicating that the three of them had agreed on telling a consistent lie. Someone incoherent is highly unlikely to be able to stick to a previously agreed lie.

35 24. Nevertheless, the Home Office accepts that Mr Ahmed's interview notes were not admitted at his trial on grounds of his ill-health. But even if we exclude from our mind what Mr Ahmed said in his interview, the story he told the Tribunal was, as outlined above both, incredible and riddled with inconsistencies.

40 25. For instance, when asked if he thought the encounter with Mr Herries was by chance he said he did not remember what he thought at the time and he was not suspicious. This was truly incredible evidence. To have a chance meeting with someone from home in foreign country after driving around lost for 7 hours would be

truly amazing: if Mr Ahmed had genuinely thought they were lost this ought to have made him think twice. But we do not accept he ever genuinely thought they were lost nor that he thought the meeting took place by chance. He ought to have been suspicious of the purpose of the meeting: why drive to Amsterdam for a 20 minute meeting with someone who lives in the UK?

26. Mr Ahmed also indicated that he thought he was invited along to act as a kind of alibi/chaperone for Mr Khan so that Mr Khan could prove to his wife he had spent the day with Mr Ahmed and not his girlfriend, Ms Sloma. Again we find this an unlikely story and we do not accept it as reliable: other evidence shows that Mr Ahmed was well aware that Mr Khan and Ms Sloma had spent significant time alone together so he can't reasonably have thought that Mr Khan was concerned about having an alibi. In any event, it is no answer to why the destination was Amsterdam.

Conclusions on the facts

27. As explained above, we did not find Mr Ahmed to be a reliable witness.

28. Mr Ahmed considered that his acquittal in the criminal trial meant that the question of his innocence could not be re-opened. He is mistaken, at least so far as civil proceedings are concerned. The jury acquitted him of being knowingly involved in the illegal importation of prohibited goods. This must mean that they were not satisfied beyond reasonable doubt that he was guilty. This Tribunal would only have to consider the matter on the balance of probabilities and would not therefore be bound by the jury's conclusion.

29. That being said, HMRC advanced no positive case that Mr Ahmed was guilty of the criminal offence. Ms Hodge's review letter merely concluded that Mr Ahmed 'was at the very least reckless' to the offence being committed. Mr Hayes did not put it to Mr Ahmed that he was guilty of the offence. Therefore, we make no finding of fact as to his guilt.

30. What we are able to consider is whether he was reckless to the offence being committed by Mr Khan. We find he was. We find Mr Ahmed knew (as he admitted this) that Mr Khan had a reputation as a gangster, which we find necessarily implies, as we find Mr Ahmed knew, that that meant he had a reputation as a criminal. We do not accept that Mr Ahmed thought it was a shopping trip, or that he thought he was there as a chaperone; we do not accept that they got lost; we do not accept he did not know Mr Khan intended to meet 'a friend' from the UK in Amsterdam. We therefore find he was at the very reckless as to whether Mr Khan was smuggling prohibited goods into the country.

31. We accepted Ms Hodge's evidence. Mr Ahmed did put to her that the Border Force lied over whether it still possessed the car but Ms Hodge's explanation was that, while the writer of the letter had been mistaken, no one had lied. The car was held by the police for the criminal prosecution so the Border Force, relying on their computer records, had initially told Mr Ahmed they had disposed of it; by the time they realised it was still in the government's possession, it had in fact been disposed

of. Mr Ahmed also claimed that at the adjourned hearing he had been lied to over whether the Border Force would compensate at retail or trade value of the car: while Mr Hayes denied that Mr Ahmed had been misled, even Mr Ahmed accepted that Ms Hodge had not been at that hearing and could not therefore be accused of lying at it.
5 We accepted her evidence which was consistent with the review letter she had written.

The reasonableness of the officer's decision

32. HMRC say (and Mr Ahmed does not dispute) that their policy, so far as relevant to this case, is as follows. Where vehicles are used in smuggling prohibited drugs, the Border Force will not usually restore the vehicle. However, they may allow
10 restoration to an innocent owner for a fee of between 10-30% of the value of the vehicle depending on the degree of recklessness of the innocent owner.

33. The officer decided to offer restoration on payment of 30% of the value of the vehicle. It therefore follows that Ms Hodge considered that Mr Ahmed was an innocent, but reckless, owner. Indeed, Ms Hodge stated in cross examination that she
15 treated Mr Ahmed as innocent because the jury acquitted him.

34. Her review letter stated:

- She assessed innocence on balance of probabilities whereas the criminal trial looked at 'beyond reasonable doubt'
- She considered Mr Ahmed's lie in his interview in which he did not mention the
20 meeting with Mr Herries to be inconsistent with innocence;
- She considered that Mr Ahmed should have been suspicious about the trip because (on Mr Ahmed's own case) Mr Khan was aggressive and 'known as a gangster in Hounslow' and he knew Mr Khan intended to meet someone;
- Mr Ahmed said he thought he was there as 'chaperone' for Ms Sloma even though
25 he knew Mr Khan and Ms Sloma had made the trip together alone before;
- Mr Ahmed said the purpose of the trip was shopping yet he didn't do any shopping;

35. She also considered other factors and in particular whether the loss of the car caused Mr Ahmed any exceptional hardship. She noted Mr Ahmed was a car dealer
30 and should have access to other cars; she also noted he had a 'reasonable' income, and that he had managed without the car for some years without obvious hardship.

36. Her conclusion was that Mr Ahmed was at least very reckless and that the car should not be restored for less than 30% of the fee (which was £885 as Glass' trade value as at January 2009 was £2,950).

Conclusions on reasonableness of HMRC's decision

37. The Border Force's decision to refuse to restore the car to Mr Ahmed is termed a decision on an 'ancillary matter' under the applicable legislation, which is the Finance Act 1994.

5 38. This provides as follows:

10 "16(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the power 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, to do one or more of the following, that is to say –

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

15 (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review 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.

....

25 39. In other words, this Tribunal does not have the power to order the Border Force to restore the car to Mr Ahmed. All we can do is consider whether its decision to refuse to restore it was *unreasonable*. If we find the decision was unreasonable, we can order the Border Force to reconsider the matter.

30 40. Mr Ahmed's case is that Ms Hodge's decision to only restore his car to him on payment of 30% of its value was unreasonable. One element of the alleged unreasonableness of her decision was her reference to the interview notes.

35 41. Should Ms Hodge have considered the interview notes? As a matter of law, we do not consider that she was bound by the decision of the criminal court to exclude the notes from the criminal trial. She is not medically qualified but it follows from we have found at [23] we do not consider it unreasonable for her to conclude he deliberately lied in the interview and that that lie was relevant to the question she had to consider.

40 42. However, even if we are wrong about that and she should have excluded the notes from her mind, the other evidence, as we have explained at [24], we find, is more than sufficient for her to conclude that Mr Ahmed was at least very reckless as to whether Mr Khan was using his car to smuggle in drugs.

43. It was therefore reasonable for her to refuse restoration of the car to Mr Ahmed on more favourable terms than she offered. The appeal must therefore be dismissed.

44. That is not to say that we found the officer's decision to be beyond criticism. She was inconsistent over the question of his innocence. Although her evidence was that she treated him as innocent as he was acquitted, and it is clear that she did treat him as innocent as she applied a policy that was only applicable to innocent persons, nevertheless she appeared to be aware in her review decision (see [34]) that she was not bound by the decision of the jury and to consider his actions inconsistent with innocence. On the evidence we have found, and which was before her, she could reasonably have reached the conclusion (even assuming that the burden of proof was on HMRC) he should not be treated as innocent. But her ambivalence on the matter was unreasonable.

45. The Border Force does not seek to resile on its decision to offer the car for restoration on payment of 30% of its value. In these circumstances, while we have expressed the view that there was ambivalence in the decision as to whether Mr Ahmed was innocent or not, we do not consider it right to direct that the decision should not remain in force because, on our findings of fact, a new decision could not be more favourable to Mr Ahmed than the one against which he appeals. The appeal is dismissed.

HMRC's inconsistent policy

46. Our most significant concern with this case however is not the officer's somewhat muddled approach, but the policy that was applied. The policy set out at [32] above appears to be inconsistent with the policy applied by the Border Force in cases of evasion of excise duty. In those cases the policy is only to restore vehicles (if not adapted for smuggling) to third party owners who were not present at the seizure if it is shown (a) they are innocent and (b) have taken all reasonable steps to prevent smuggling and (c) restoration would not be tantamount to restoring the vehicle to the smuggler.

47. The policy applied by Ms Hodge permits restoration to someone who *was* present at the time of the seizure and who has *failed* to take all reasonable steps to prevent the smuggling. Indeed, in this case it has permitted restoration (albeit with a 30% fee) to someone who was very reckless as to the commission of a serious criminal offence and who most certainly failed to take any reasonable steps to prevent the smuggling. On the facts of this case justice would have been better served by restoration being refused at any price.

48. However, while a decision which applies an unreasonable or inconsistent policy is a decision which we could set aside under s 16(4)(a), we do not do so, as, on the findings of fact which we have made, any new decision could not be more favourable to Mr Ahmed than the one he challenges. It is not therefore appropriate to set it aside, particularly as UKBA have not sought to resile on it.

49. Nevertheless, under s 16(4)(c) we direct that the Border Force carry out a review of its policies with a view to eliminating the apparent unjust inconsistency in treatment between those persons who fail to take reasonable steps to prevent the use

of their vehicle for excise duty evasion and those who are reckless as to its use for the commission of the serious offence of importing class A drugs.

50. 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.

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**BARBARA MOSEDALE
TRIBUNAL JUDGE**

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RELEASE DATE: 10 September 2014