TC05235

Appeal number: TC/2015/00048

Excise duty – seizure of tractor unit under section 88 CEMA – refusal of restoration – whether decision unreasonable – decision to require further review

FIRST-TIER TRIBUNAL
TAX CHAMBER

PARNIS TRANS LTD **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE THOMAS SCOTT
SUSAN LOUSADA

Sitting in public at Fox Court, London EC1 on 5 April 2016

Ms Stephanie Georgiadou of Y Georgiades & Associates LLC for the Appellant

Mr Matthew Shaw of Counsel for the Respondents

DECISION

1. This is an appeal under section 16 of the Finance Act 1994 ("FA 1994") against a review of a decision not to restore a tractor unit seized by the Border Force under section 88 of the Customs and Excise Management Act 1979 ("CEMA"). The vehicle was seized as liable to forfeiture on the basis that it had been adapted for the purpose of concealing goods. We have concluded that the review decision should cease to have effect and that a further review should be conducted which takes account of our findings of fact.

Legal and procedural background

2. Section 88 CEMA provides, so far as relevant:

> "Where – (c) a vehicle is or has been within the limits of any port or at any aerodrome… while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods, that… vehicle shall be liable to forfeiture".

3. Section 139(1) CEMA provides:

> "Anything liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard".

4. By virtue of paragraph 5 of Schedule 3 CEMA, unless a notice of claim is lodged within one month of the seizure that the item seized was not liable to forfeiture, the seizure is deemed to be valid. As a result, it is not possible subsequently to claim that the vehicle was not duly condemned as forfeited: see *HMRC v Jones and Another* [2011] STC 2206.

5. The power to restore the seized vehicle is set out in section 152 CEMA as follows:

> "The Commissioners may, as they see fit - … (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the customs and excise Acts]."

6. Following a request by the Appellant the Border Force decided on 16 September 2014 to refuse to restore the vehicle. On 18 October 2014 the Appellant sought a review of that decision. On 25 November 2014 the Border Force upheld the decision on review.

7. The Appellant appealed to the Tribunal against the review decision under section 16(1) FA 1994. By virtue of section 16(8), the decision not to restore the vehicle was a decision in relation to an "ancillary matter". Section 16(4) sets out the powers of the Tribunal in such a case as follows:

> "(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other

person making that decision could not reasonably have arrived at it, to do one of more of the following, that is to say –

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

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

(c) in the case of a decision 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."

8. The Tribunal's powers under section 16(4) are therefore confined to applying the principles of judicial review. We must determine whether the decision to uphold the refusal of restoration on review was so unreasonable as to be irrational or perverse, such that no reasonable authority could have reached it. In particular, was there a failure to take account of a relevant consideration, or was account taken of an irrelevant consideration?

9. We must also consider whether the refusal to restore was proportionate, given the relevance of the Appellant's right to peaceful enjoyment of possessions set out in Article 1 of Protocol 1 to the European Convention on Human Rights. This requires consideration of all material matters relating to the facts of the particular case, including the degree of fault: *Lindsay v Commissioners of Customs and Excise* [2002] STC 588, at [55] to [67].

The Hearing

10. Mr Yiannis Kousides, a director of the Appellant, was present as a witness for the Appellant. Since Mr Kousides spoke no English, we arranged before the hearing for an independent, professionally qualified translator to be present. That translator translated the proceedings into Cypriot for Mr Kousides, and translated Mr Kousides' evidence into English.

Evidence

11. We also heard witness evidence from Ms Deborah Hodge. Ms Hodge is a Review Officer with the Border Force, the review officer who upheld the decision in the appeal having retired from the Border Force and being unable to attend the hearing. Both Mr Kousides and Ms Hodge gave evidence under affirmation, and both were cross examined and answered questions from the Tribunal. We were also provided with documentary and photographic evidence.

Agreed Facts

12. On 17 March 2014 at Dover Port, Mr Viktor Karavasileiadis, an employee of the Appellant, was intercepted while driving a DAF tractor unit (the "Vehicle") which was pulling a trailer.

13. The Vehicle load was found to be a groupage load. During a search of the tractor unit it was discovered that the floor had been altered. The area of adaptation was checked with an ion scanner and read positive for traces of cocaine.

14. The Border officer was satisfied that the tractor had been adapted for the purposes of smuggling and seized it under section 139(1) CEMA as being liable to forfeiture under section 88 CEMA.

15. At the time of seizure the driver of the vehicle was given a Seizure Information Notice and Notice 12A (titled "What you can do if things are seized by HM Revenue & Customs"). Notice 12A sets out that the legality of a seizure can be challenged in a Magistrates' Court by sending a notice of claim to the Border Force within one month of the date of seizure.

16. On 20 March 2014 The Appellant faxed the Border Agency seeking the "immediate release" of the Vehicle.

17. On 21 March 2014, the Border Force responded by a letter which began as follows:

> "Thank you for your faxed letter dated 20 March 2014 and supporting documentation in which you have indicated that you wish to follow one of the processes listed below:
>
> - Appeal against the legality of the seizure of the items.
> - Request restoration of the seized items.
> - Appeal against the legality of the seizure and request restoration of the seized items.
>
> We will now begin processing your case, and will request further information from you if required."

18. On 16 April 2014 the Border Force wrote to the Appellant stating that they were considering the request for restoration of the Vehicle, and requiring various specified items of further information in order to make a decision.

19. On 28 April 2014 Waterfords Solicitors, instructed by Mr Kousides, wrote to the Border Force challenging the legality of the seizure.

20. On 14 May 2014 Border Force replied to Waterfords Solicitors informing them that such an appeal could not be accepted, as the notice of appeal had been received more than one month after the seizure, and therefore outside the statutory time limit.

21. On 9 September 2014 Georgiades & Associates, a firm of legal advisers in Cyprus instructed by the Appellant, wrote to the Border Force seeking restoration of the Vehicle.

22. On 16 September 2014 the Border Force wrote refusing restoration.

23. On 18 October 2014 Georgiades & Associates wrote seeking a review of that decision.

24. On 4 November 2014 the Border Force replied, describing the review process and inviting the submission of any further evidence or information in support of the review request.

25. On 25 November 2014 the Border Force wrote to Georgiades & Associates upholding the decision not to restore the Vehicle.

26. On 23 December 2014 the Appellant lodged a notice of appeal against the decision of 25 November 2014.

Findings of fact

27. It was not disputed that another vehicle owned by the Appellant had been seized in September 2013. On that occasion, a tractor unit owned by the Appellant was found to contain 55kg of cocaine. The Appellant sought restoration of the tractor unit, and the Border Force concluded that the Appellant had been reckless in failing to take reasonable precautions to ensure the unit was not used for illegal purposes. On the basis of that finding, the Border Force decided to restore the tractor unit to the Appellant on payment by it of a restoration fee equal to 10% of the value of the vehicle.

28. We were provided with a Witness Statement from Mr Kousides. He was also examined before us. The fact that Mr Kousides spoke no English inevitably meant that, even with the benefit of a professional translator, the process of establishing and weighing evidence was somewhat more laborious. However, we reached the following findings of fact on the basis of Mr Kousides' written and oral evidence:

    (a) Mr Kousides was at the time of seizure of the Vehicle one of three directors of the Appellant. He had been a director since 2001.

    (b) The Appellant was based in Bulgaria, and its directors were situated in Greece.

    (c) The Vehicle was manufactured in 2007.

    (d) The Vehicle had been purchased by the Appellant in Greece in January 2013. The seller was an agent for a creditor which had repossessed the Vehicle.

(e) As soon as it was purchased by the Appellant, the day-to-day control of the Vehicle was handed over to various drivers who were employees of the Appellant.

(f) Between its purchase and its seizure, the Vehicle had been used on numerous journeys, particularly in England, Bulgaria and Germany.

Issues to be determined

29. The Tribunal did not consider the legality of the seizure of the Vehicle. The Appellant did not seek to argue that it had lodged a notice of claim challenging such legality within the prescribed period of one month from the seizure. As a result, paragraph 5 of Schedule 3 CEMA had deemed the vehicle duly condemned as forfeited: see *HMRC v Jones and Another* [2011] STC 2206. It was therefore not open to the Appellant to dispute that the Vehicle was " .. adapted, altered or fitted in any manner for the purpose of concealing goods" within section 88 CEMA, and it did not seek to do so.

30. The issue for determination by us was the reasonableness, in a judicial review sense, of the review decision to uphold the refusal to return the Vehicle.

31. Were we to conclude that that decision was unreasonable in a judicial review sense, we would then need to consider whether, had the decision adequately taken into account the issues causing unreasonableness to arise, it would inevitably have been the same. That is clear from the decision of the Court of Appeal in *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 CA, at 953.

32. The burden of proof of establishing that the review decision was unreasonable lies with the Appellant by virtue of section 16(6) FA 1994. That burden must be assessed by reference to the civil standard of the balance of probabilities: see *Golobiewska v Commissioners of Customs & Excise* [2005] EWCA Civ 607.

The decision to refuse restoration

33. Under section 152 CEMA, HMRC "may, as they see fit" restore seized property such as the Vehicle. Any such restoration may be "subject to such conditions (if any) as they think proper …".

34. On its face, the discretion afforded by section 152 is not fettered. It is certainly very wide. It is, however, clear that a decision as to restoration cannot be one which "could not reasonably have been arrived at" by the Commissioners. That is implicit in the review powers granted to the Tribunal in respect of such a decision in section 16(4) FA 1994: see [7] above.

35. As we set out at [8] above, the jurisdiction of the Tribunal under section 16 is supervisory and limited to determining whether HMRC's decision was reasonable in a judicial review sense. In *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231, Lord Lane explained (at 240)

that a review of the exercise of discretion should consider whether "the commissioners had acted in a way which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight."

36. The statutory review letter from the Border Force was dated 25 November 2014. It stated that:

> "I have examined all the representations and other material that was available to the Border Force both before and after the time of the decision …. Your client was invited to provide any further information in support of your request for a review but as nothing has been received I have to make my decision based on the evidence that I already have."

37. The letter contains the following statement:

> "Summary of the Border Force Restoration Policy for Seized Commercial Vehicles
>
> The policy for the restoration of commercial vehicles that have been used for smuggling goods is intended to tackle cross border smuggling and to disrupt the supply of goods to the illicit market …. Each case is considered carefully on its individual merits so as to decide whether exceptions should be made and any evidence of hardship is always considered.
>
> A vehicle adapted for the purposes of smuggling will not normally be restored."

38. The reasons given in the review letter for upholding the decision not to restore the Vehicle were as follows:

> "You state in correspondence that [the appellant] took ownership of the tractor unit on 8th January 2013 and that "…. it was given to the employees of the company who were using it for transfers within Europe and mainly in Germany. After finishing with their job they were placing the vehicle in a specific parking in Greece …".
>
> I can only infer from such a statement that the directors of the company had no or very little control on what their employees were doing with the vehicle and that as no evidence has been provided to the contrary that, on the balance of probabilities, the operator was involved or at least complicit in the matter.
>
> Whilst the adaption was empty on this occasion, the fact that the area of the adaption tested positive for the traces of cocaine [makes it] highly likely that at some stage the unit had been used to smuggle cocaine.
>
> I note that this is not the first occasion when [the Appellant's] vehicles have been involved in the smuggling of drugs across international boundaries. On 19 September 2013 another of [the Appellant's] vehicles was seized when 55 kilograms of cocaine were found concealed about the tractor unit.
>
> I have read your letters carefully to see whether a case for disapplying the BF policy of non-restoration has been presented. In my opinion, I have not been provided with details of exceptional circumstances that would result in the tractor unit being restored. I have found no reason for disapplying the policy and no exceptional circumstances."

39. In considering whether the decision in the review letter was reasonable in a judicial review sense, we were particularly concerned by two related issues.

40. The first related to the Border Force policy on restoration of vehicles adapted for smuggling. We were concerned not with the reasonableness or otherwise of that policy but with what precisely the policy was, and how it had been communicated to and applied to the Appellant.

41. The second issue was whether, if that policy distinguished situations in which the vehicle owner had knowledge of or was complicit in the adaptation to the vehicle, all materially relevant factors, and no materially irrelevant factors, had been taken into account in assessing that question in the review decision.

42. Dealing first with the relevant Border Force policy, it is relevant to the reasonableness of the review decision to establish the terms of the policy, its communication to the Appellant, and the extent to which it was taken into account and properly applied in the review decision.

43. We have quoted above the description in the review letter of the relevant policy, namely that "a vehicle adapted for the purposes of smuggling will not normally be restored."

44. However, while this statement of the policy is accurate in itself, it is incomplete.

45. The following summary of the policy was contained in the letter from Border Force to the Appellant's representative of 16 September 2014:

> "**Policy**
>
> Our policy is normally to refuse to restore vehicles that have been seized under Section 88 [as adapted for smuggling] unless we are satisfied the owner had no knowledge of the adaption, in which case the vehicle may be restored on conditions, one of which would be the removal of the adaptation."

46. An earlier letter from Border Force to the Appellant, dated 16 April 2014, requested information relevant to the Appellant's request for restoration, and stated:

> "When considering restoration of commercial vehicles seized because there is an adaptation which could potentially be used for smuggling, Border Force will consider, amongst other factors, the involvement or otherwise of the owner/haulier and the steps that the haulier has taken to prevent their vehicles being used to carry smuggled goods."

47. A recent decision of this Tribunal helpfully describes the Border Force policy in this area. In *Urim Gjana v Director of Border Revenue* [2016] UKFTT 105 (TC) the Tribunal described the position as follows (at [32] to [35]):

> "*The restoration policy*
>
> 32. The review decision summarised the restoration policy as follows:
>
> > "The general policy is normally to refuse to restore vehicles that have been seized under section 88 unless we are satisfied the owner has no knowledge of the adaptation, in which case the vehicle may be restored on certain conditions, one of which would be the removal of the adaption.

> In all cases other relevant circumstances will be taken into account in deciding whether restoration is appropriate or not."
>
> 33. Mrs Perkins [the review officer] confirmed at the hearing that this was her understanding of the policy, but was unable to identify what "conditions" might be imposed in circumstances where the owner was unaware apart from removing the adaptation. In practice that was the one condition imposed, and the work would be carried out by a Border Force contractor once the person seeking restoration had agreed to bear the cost.
>
> 34. Mrs Perkins also indicated that, if the Border Force concluded that the appellant was aware of the adaptation, restoration would normally only occur in circumstances of exceptional hardship.
>
> 35. Our understanding of the general policy is therefore that a vehicle will be restored if the Border Force is satisfied that the owner was unaware of the adaptation, subject to covering the cost of removing it. Otherwise the general policy is only to restore in cases of exceptional hardship. We do not see any basis to question the reasonableness of this in principle, and the appellant's Counsel did not seek to do so."

48. It seems clear, therefore, that in adaptation cases such as this appeal, there are two key issues in relation to the Border Force policy which should be taken into account in any review decision. The first is whether the appellant was aware (or "had knowledge") of the adaptation. The second is whether there are circumstances of "exceptional hardship". If there is awareness, then apparently the policy is that restoration will be refused barring exceptional hardship.

49. In light of the relevant policy, we would therefore have expected a reasonable review decision to give particular weight to those issues, and not (in the *Wednesbury* formulation) take account of irrelevant factors.

50. In relation to exceptional hardship, it appears from the correspondence and the review letter that the relevant issues were considered, and that irrelevant issues were not. Border Force concluded that, while hardship arose from the seizure of one of the Appellant's three vehicles, that hardship was not exceptional. We see no reason to regard that conclusion as unreasonable.

51. However, in relation to the key question of the Appellant's awareness of the adaptation the decision to refuse restoration and the review of that decision do not evidence consideration of certain of the issues which we would have expected to be materially relevant.

52. The nature of the adaptation was not in dispute. It was described in the letter of 16 September 2014 from Border Force to the Appellant's representative:

> "The cab floor of the unit has a section built into it. This was accessed by removal of the fridge and carpet, revealing a plate in the floor, which could be removed by a special wire found under the carpet. This activated a toggle switch which enabled removal of the plate and access to void."

53. In order for the review decision to have reached a reasoned conclusion as to the Appellant's awareness or knowledge of this adaptation, we would have expected certain issues to have been presented to the Appellant and considered by the review officer. One such issue is the extent to which the adaptation in question would have been apparent. To state the obvious, all other factors being equal, awareness of an adaptation is more likely to the extent that it is visible or discernible without specialist expertise or intrusive examination.

54. However, we are not persuaded that the review officer gave any real consideration to this question. We did not have the benefit of being able to question the review officer in the proceedings, as he had retired and was unable to be present. We did, however, have his Witness Statement. We were also able to question Ms Hodge, a senior review officer for Border Force who was a witness in the proceedings.

55. In response to a question from the Tribunal, Ms Hodge confirmed that, while Border Force were instructed not to disclose details of their restoration policy, the extract quoted at [45] above was an accurate description of the policy in adaptation cases.

56. We asked Ms Hodge what factors had been considered in this particular case in concluding that the Appellant was aware of the adaptation, as contrasted with having been negligent, or even reckless, in failing to take steps to prevent the adaptation, or discover it earlier.

57. Ms Hodge responded that, in her view, the "sophisticated" nature of the adjustment and the mechanism to open it made it unlikely that the driver would have made the adaptation without the knowledge of the haulier. Further, the absence of any evidence of preventative measures or thorough vehicle checking made knowledge likely. Ms Hodge stated that Border Force would normally look for evidence such as regular vehicle inspections and contractual duties imposed on drivers to prevent adaptations and to check for them.

58. We asked Ms Hodge how the Appellant might have satisfactorily demonstrated unawareness in this case. She responded that the haulier or driver might have shown that, for instance, they had inspected the inside of the cab behind the tractor, and lifted the fridge to examine the area beneath it.

59. We questioned whether, in assessing the likelihood of awareness, the review officer would have taken into account as a factor the period for which the Appellant had owned the Vehicle at the time of seizure, being approximately fourteen months of the seven years since the Vehicle was manufactured. Ms Hodge responded that the relevant fact in her view was that the Vehicle had been owned by the Appellant for more than twelve months at the time of seizure.

60. We referred Ms Hodge to the passage from the review letter set out at [38] above, which is the only section of the decision which appears to address, and

reach a decision on, awareness. That passage can reasonably be read as stating two, or possibly three, reasons for the conclusion that the Appellant was aware of the adaptation.

61. The first is that the review officer "can only infer" from the Appellant's explanation that the Vehicle was given to employees, who used it for transfers and then parked it in Greece, that "the directors had no or very little control on what their employees were doing with the vehicle". From this inference, the review officer reaches the conclusion that "as no evidence has been provided to the contrary … on the balance of probabilities, the operator was involved or at least complicit in the matter."

62. The second reason was that, while the adaptation was empty, the fact that the area of adaptation tested positive for traces of cocaine made it "highly likely that at some stage the unit had been used to smuggle cocaine."

63. The third factor referred to – though it is not clear whether this was a reason for the decision – was the smuggling offence in September 2013 ("I note that this is not the first occasion where your client's vehicles have been involved in the smuggling of drugs across international boundaries").

64. We asked Ms Hodge whether this was in fact a complete description of the review officer's reasons for concluding that the Appellant was aware of the adaptation. The cocaine traces were of limited relevance given that the ground of seizure, and the relevant Border Force policy, was adaptation and not smuggling. In relation to the 2013 smuggling offence, the Appellant had been granted restoration for a fee, on the basis that it had been "reckless", but not complicit. We questioned why the "inference" in the review letter that in the absence of contrary evidence the company's lack of control over their employees supported a finding of involvement or complicity on the part of the company had not led more naturally to a finding of recklessness rather than awareness.

65. Ms Hodge made two points in response.

66. First, she said that the previous smuggling offence made it "extremely unlikely" that restoration would be granted.

67. While such a policy might well be reasonable, it did not form part of the policy which Border Force purportedly applied in this case, as described above. Nor did we find any evidence that such a policy had been communicated to the Appellant or its advisers.

68. We note that there does appear to be a Border Force restoration policy in relation to smuggling (but not adaptation) where there have been multiple seizures within a twelve month period: see *Ibrahim Baser v Customs & Excise Commissioners* [2016] UKFTT 333 (TC) at [26] to [28].

69. If it was in fact an aspect of Border Force policy that in cases of adaptation (and not only smuggling) multiple seizures within a twelve month period would generally lead to refusal of restoration, then in our view that should have been plainly stated in the review process. In any event, in determining whether the review decision was a reasonable one, we received no evidence to establish that such a policy was adopted in the review decision.

70. The second point raised by Ms Hodge was that the Border Force database of seizures indicated that, during the cab rummage following seizure of the Vehicle, "fresh paint" was found on the bottom of the cab floor, adjacent to the adaptation. In light of the fact that the Appellant had at that time owned the Vehicle for over twelve months, this was, Ms Hodge suggested, a strong indication that the adaptation had been made during that period, and with the Appellant's knowledge.

71. Ms Hodge told us that, in view of its sensitive nature, this information was not disclosed in the review process, or in the evidence lodged with the Tribunal. We find it curious that it is not referred to in the contemporaneous notes of the investigating officer which were compiled on the interception of the Vehicle.

72. Ms Hodge told us that the existence of the fresh paint did not form part of the evidence taken into account by the review officer. Again, we find that surprising given its clear potential relevance to the key issue of likely awareness.

73. However, we do not consider that the existence of such fresh paint, insofar as it is relevant, can have the effect of subsequently converting an unreasonable review decision into one which is reasonable.

74. In *F Lohmann Gmbh v The Director of Border Revenue* [2016] UKFTT 185 (TC) this Tribunal considered whether evidence which was before the Tribunal but not the reviewing officer could be taken into account in considering the reasonableness of a review decision. The Tribunal referred to the decision of the Court of Appeal in *Gora v Customs and Excise Commissioners* [2004] QB 93, and concluded (at[52]):

> "… the effect of *Gora* is that the Tribunal is entitled to take into account all the evidence before it in determining whether a decision was reasonable even if that evidence was not before the reviewing officer. Thus it is open to us to decide that [the reviewing officer's] decision was "unreasonable" if we are satisfied as to this on the evidence before us, even if her decision as based on the materials before her was reasonable on the basis of those available materials."

75. This passage is dealing with new evidence which could lead a tribunal to determine that a previously reasonable decision was unreasonable. It is not dealing, expressly or by implication, with the converse situation, namely where new evidence might have led a tribunal to determine that a previously unreasonable decision was reasonable. In the later situation, it would clearly frustrate the jurisdiction conferred on the Tribunal by section 16(4) if evidence

placed before the Tribunal, but not available to the review officer, could render an unreasonable decision by the review officer reasonable. In such a situation, any number of rabbits could be pulled from any number of hats to legitimise a review decision with retrospective effect.

76. We therefore conclude that the reference in the Border Force database to fresh paint, which Ms Hodge told us was information not available to the review officer, is not relevant in our consideration of the reasonableness of the review decision.

Reasonableness of the review decision

77. We find that the review decision was deficient in several important respects.

78. First, the significance of awareness in applying the relevant Border Force policy was not communicated to the Appellant concisely or clearly. It is clear that critical issues in adaptation cases are knowledge or awareness and exceptional hardship. Yet the review letter does not refer to knowledge or awareness in describing the policy. The letter of 16 September 2014 (see [45] above) is not incorporated or referred to in the statement of policy in the review letter. Nor does the review letter set out the policy as the review letter did in *Gjana*.

79. Indeed, much of the information sought from the Appellant during the process leading to the refusal of restoration concentrated not on knowledge but on issues more directly relevant to recklessness and due care. While awareness and recklessness might have certain indicators in common, it is clear, and Border Force policy reflects this, that a failure to take care, or even recklessness, falls short of knowledge.

80. Secondly, the weight attached to the prior smuggling conviction in the review process was not clear. It was referred to in the review letter (see [62] above), but without any indication that it carried the weight which Ms Hodge suggested to us that it carried. Neither the Appellant nor this Tribunal is therefore able to establish the relative weight given to that factor in the refusal of the review decision.

81. We also consider that, to the extent that the prior conviction was taken into account as evidence of likely awareness, consideration should have been given to the fact that the driver of the vehicle seized for smuggling in 2013 was different from the driver of the Vehicle.

82. Thirdly, assuming that the Border Force restoration policy in adaptation cases is as described to us by Ms Hodge, and as summarised in *Gjana*, we find that the review decision did not afford due consideration to determining the critical issue of knowledge or awareness.

83. In reaching a view as to the Applicant's likely knowledge of the adaptation, we would have expected the review process to consider carefully a number of factors. One would have been the relevance of the period of ownership of the

Vehicle relative to the period since it was constructed. There is no evidence that this was taken into account; indeed, the assertion, by Ms Hodge, that knowledge of adaptation is likely if a vehicle has been owned for over a year shows a certain unwillingness, in our opinion, to approach that question with an open mind.

84. More significantly, there appears to have been no evaluation of the extent to which the adaptation would have been apparent, or apparent only following an intensive forensic investigation. While that question alone is clearly not determinative of likely knowledge, in our opinion it is highly material. During the proceedings, Mr Kousides was asked by Mr Shaw what steps he had taken to check the Vehicle for possible adaptations. Mr Kousides replied that it was too costly to dismantle tractors or carry out a "detective investigation" in practice. We are not satisfied that such questions had been properly considered during the review process in assessing likely awareness.

85. The only reasons given in the review letter for Border Force's conclusion that the Appellant was aware of the adaptation (meaning that there would be no restoration barring exceptional hardship) were contained in the first two paragraphs set out at [38] above.

86. In our opinion, the reasonable inference to have drawn from such a statement would have been that the Appellant had failed to exercise due care, or had been reckless, in relation to the risk that the Vehicle might be used or adapted for smuggling. It is difficult to see why, of itself, the statement would reasonably lead, or the balance of probabilities, to the conclusion stated in the review letter.

87. Border Force placed considerable emphasis in the correspondence and during the hearing on the fact that the burden of proof is on the Appellant in making a case for restoration. In this context, Border Force argued, the Appellant, which bore the burden of proof, had failed to produce evidence that it was not complicit in or aware of the adaptation.

88. We were not presented with any such evidence, so this is not a situation where it is necessary for us to determine whether (and, if so, with what consequence) the Tribunal's findings of facts are inconsistent with those of the Border Force on the critical issue of awareness.

89. We do, however, conclude that, in reaching the review decision, relevant factors were not properly taken into account and irrelevant factors were taken into account, such that the decision could not properly have been arrived at. In particular:

    (a) We do not consider that the significance of awareness in applying the Border Force policy in adaptation cases was properly explained in the review decision.

    (b) In assessing the likelihood of awareness, we would have expected the relative period of ownership of the Vehicle (being approximately 15%

of its life) to have been considered as a factor. We saw no evidence of any such consideration.

(c) We are not persuaded that the review officer gave any real consideration to whether the adaptation would have been apparent, at least without intrusive investigation such as removal of the fridge and carpet, in assessing the likelihood of awareness. We regard this as a materially relevant consideration in the review process given the applicable Border Force policy.

(d) We do not consider that the inference drawn in the review letter was reasonable where, as in the review letter, it was stated to be based solely on the statement from the Appellant's adviser and on absence of contrary evidence. An inference in such circumstances of negligence or recklessness would have been within the range of reasonable decisions, but awareness (or "knowledge" or "complicity") is a state beyond negligence or recklessness.

90. This conclusion is, however, not sufficient for the Tribunal to exercise any of its powers under section 16(4). As explained (at [31] above) we must also consider whether, had the review decision adequately taken into account the issues we have identified, it would inevitably have been the same, as set out in *John Dee*.

91. We conclude that we cannot predict with sufficient confidence that the review decision would inevitably have been the same. One can speculate as to the possible effect on the decision of properly taking into account the concerns we have identified, and indeed it is possible that the decision might be unchanged; we are, however, not persuaded that this would inevitably be so.

92. We have decided that the review decision should cease to have effect from the date of release of this decision. We require the Border Force to conduct a further review of the decision to refuse restoration within 28 days of the release of this decision. In doing so, we direct that they take full account of the issues identified by the Tribunal.

93. The Appellant should be aware that, if it disagrees with a further review decision, it will have the ability to appeal to the Tribunal, which will have the same powers as this Tribunal has in relation to this appeal.

94. 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.

THOMAS SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 11 JULY 2016