[2019] UKUT 0295 (TCC)

Appeal number: UT/2018/0163

EXCISE DUTY – restoration of vehicle – whether First-tier Tribunal erred in its approach to its fact-finding role – yes – appeal allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

GRZEGORZ SCZCEPANIAK **Appellant**
T/A
PHU GREG-CAR

-and-

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: **JUDGE TIM HERRINGTON**
JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice, Strand, London on 17 September 2019

Michael Wiencek of Euro Lex Partners LLP for the Appellant

Michael Newbold, counsel for the Respondent

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DECISION

1. The Appellant operates a haulage business. On 28 April 2016, a tractor and trailer unit (the "vehicle") that he owned was stopped by officers of the Respondent. A search of the vehicle revealed that it contained 2,687,800 cigarettes concealed among a load of dried pasta. The Respondent seized the vehicle as liable to forfeiture in exercise of powers given by s141 of the Customs and Excise Management Act 1979 ("CEMA"). The Appellant did not contest the legality of the seizure in condemnation proceedings, but asked the Respondent to exercise its discretionary power under s152 of CEMA to restore the vehicle. The Respondent refused to restore the vehicle and maintained that decision following a review concluded on 21 September 2016.

2. The Appellant appealed to the First-tier Tribunal (Tax Chamber) (the "FTT") against that decision. Following a hearing on 9 May 2017, the FTT gave an oral judgment dismissing the appeal. It provided full written reasons on 20 March 2018 (the "Decision"). The Appellant now appeals with the permission of this Tribunal (Judge Scott) against the Decision.

Relevant statutory provisions

3. It is convenient to start with a summary of applicable statutory provisions since they underpin certain of the Appellant's grounds of appeal.

4. Where, as in this case, the Respondent refuses an initial request to exercise its power under s152 of CEMA to restore an item that has been seized, s14 of Finance Act 1994 ("FA 1994") permits a person affected by that decision to require the Respondent to review it. Any review that is required must be performed in accordance with the provisions of s15 of FA 1994. If the person is still dissatisfied with the Respondent's decision following the review, s16 of FA 1994 confers a right of appeal to the FTT in the following terms:

> **16 Appeals to a tribunal**
>
> (1) An appeal against a decision on a review under section 15 (not including a deemed confirmation under section 15(2)) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates….
>
> (4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—
>
> > (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.

5. It follows from s16(1) that the Appellant's appeal to the FTT was against the Respondent's "decision on a review under section 15". In addition, since a decision reviewing a refusal to restore a seized vehicle is a decision on an "ancillary matter" (see s16(8) and paragraph 2(1)(r) of Schedule 5 of FA 1994), the FTT's powers on the appeal were limited to those set out in s16(4) of FA 1994. Accordingly, the FTT could only interfere with the Respondent's decision if was satisfied that the Respondent could not reasonably have arrived at that decision. Even if that threshold requirement was satisfied, the FTT could only take the steps set out in s16(4)(a) to (c).

6. However, the limitation of the FTT's powers is subject to an important qualification. In deciding whether the Respondent's decision was unreasonable, the FTT is not bound by the factual determinations that the Respondent made. Nor is the FTT limited to a consideration of evidence that was before the Respondent's decision-maker. It was, therefore, open to the Appellant to produce evidence that was not before the Respondent when it made its review decision and invite the FTT to reach factual conclusions different from those that the Respondent reached in its review. Moreover, the Appellant was entitled to argue that, in the light of those different factual conclusions, the Respondent's decision was unreasonable. The Court of Appeal recently endorsed that proposition in *The Commissioners for Her Majesty's Revenue & Customs v Behzad Fuels (UK) Ltd* [2019] EWCA Civ 319 in the following terms:

> It is common ground that a decision made by HMRC under section 152(b) of CEMA 1979 is an "ancillary matter" for the purposes of section 16, from which it follows that the powers conferred on the FTT on an appeal from the relevant review decision are confined to those set out in subsection (4), and are also dependent upon the FTT being satisfied that the decision is one which HMRC "could not reasonably have arrived at". The apparent strictness of this approach has, however, been significantly alleviated by the decision of this court in *Gora v Customs and Excise Commissioners* [2003] EWCA Civ 525, [2004] QB 93, where Pill LJ accepted the submission of counsel for HMRC (Mr Kenneth Parker QC, as he then was) that the provisions of section 16 do not oust the power of the FTT to conduct a fact-finding exercise, with the consequence that it is open to the FTT on an appeal from a review decision to decide the primary facts and then determine whether, in the light of the facts it has found, the decision was one which could not reasonably have been reached: see the judgment of Pill LJ at [38] to [39]. The correctness of this approach has not been challenged before us, and in [*Revenue & Customs Commissioners v Jones and another* [2011] EWCA Civ 824] Mummery LJ said at [71](6) that he "completely agree[d] with the analysis of the domestic law jurisdiction position by Pill LJ in Gora's case".

7. In his oral submissions, Mr Newbold observed that, in *Gora* itself the above principle had been conceded by leading counsel for the Commissioners. However, given the statements of the Court of Appeal in both *Jones* and *Behzad Fuels*, he rightly accepted that the concession was correctly made.

The FTT decision

8. Much of the argument before us focused on what principles of law the FTT had in mind when making the Decision and whether the FTT had found certain matters as facts. We will, therefore, start with a close analysis of the Decision to determine those issues which will inevitably foreshadow some of our overall conclusions. Numerical references in square brackets are to paragraphs of the Decision unless the context requires otherwise.

9. The FTT recited uncontroversial facts and procedural background at [2] to [8]. Having done so, the FTT set out a summary of the competing evidence and submissions of both parties. It is clear from those sections that some facts were not in dispute. In particular:

> (1) When it was seized, the vehicle was being driven by Andrzej Imanski who was making a delivery under an arrangement between the Appellant and Jan Winnicki, who purported to act as agent for a freight forwarder identified as "PIKO". In fact, PIKO did not exist. The CMR identified the load as pasta, the consignor as AB Foods Polska sp zoo ("AB Foods") and the consignee as Tenens Organix of Ashby de la Zouch. However, the documents were false. They were not issued by AB Foods (which did not even produce pasta) and Tenens Organix was not expecting any delivery of pasta.
>
> (2) Tachograph evidence demonstrated that the vehicle had not been loaded at the business premises of AB Foods (who were based in Nowa Sol) but in Poznan, some distance away.
>
> (3) The load did contain pasta. However, it also contained 2,687,800 cigarettes concealed in a separate coffin-shaped container packed deep within the load of pasta on the vehicle.
>
> (4) The Appellant had had some previous dealings with Mr Winnicki. On 5 April 2016 (just three weeks prior to the transport relevant to this appeal), Mr Winnicki, again ostensibly on behalf of "PIKO", asked the Appellant to deliver a load the consignor of which was AB Foods. Mr Imanski was the driver of that load as well. The load was returned undelivered because, the Appellant said, AB Foods called Mr Imanski to say the load was incorrect. Mr Imanski agreed that the Appellant would pay the Appellant EUR 900 for the return load to compensate the Appellant for the fact that it was missing an opportunity to book another load onto its vehicle for the return journey.
>
> (5) Mr Imanski was convicted of an offence connected with the smuggling of the cigarettes found in the vehicle.

10. At [56] to [65], the FTT summarised relevant aspects of the Respondent's policy on the restoration of vehicles. Since the parties were not entirely agreed on what that policy means, it is convenient to quote the extract of that policy that appears in the Respondent's review decision:

> A vehicle adapted for the purpose of concealing goods will not normally be restored.
>
> Otherwise the policy depends on who is responsible for the smuggling attempt:
>
> A: Neither the driver nor the operator are responsible; or
>
> B: The driver but not the operator is responsible; or
>
> C: The operator is responsible.
>
> A. If the operator provides evidence satisfying Border Force that neither the operator nor the driver were responsible for, or complicit in the smuggling attempt then:
>
> 1) If the operator also provides evidence satisfying Border Force that both the operator and the driver carried out basic reasonable checks (including conforming with the CMR Convention) to confirm the legitimacy of the load and to detect any illicit load, the vehicle will normally be restored free of charge.
>
> 2) Otherwise,
>
> a) On the first occasion the vehicle will normally be restored for 20% of the revenue involved in the smuggling attempt (or for 100% of the trade value of the vehicle if lower).
>
> b) On a second or subsequent occasion (within 12 months) the vehicle will not normally be restored.
>
> B. If the operator provides evidence satisfying Border Force the driver but not the operator is responsible for or complicit in the smuggling attempt then:
>
> 1) If the operator provides evidence satisfying Border Force that the operator took reasonable steps to prevent drivers smuggling then the vehicle will normally be restored free of charge unless
>
> a) The same driver is involved (working for the same operator) on a second or subsequent occasion in which case the vehicle will normally be restored for 100% of the revenue involved in the smuggling attempt (or for the trade value of the vehicle if lower) except that
>
> b) If the second or subsequent occasion occurs within 12 months of the first, the vehicle will not normally be restored.
>
> 2) Otherwise

> a) On the first occasion the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if lower)
>
> b) On a second or subsequent occasion the vehicle will not normally be restored.
>
> C. If the operator fails to provide evidence satisfying Border Force that the operator was neither responsible for nor complicit in the smuggling attempt then:
>
> 1) If the revenue involved is less than £50,000 and it is the first occasion, the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if less).
>
> 2) If the revenue involved is £50,000 or more or it is seized on a second or subsequent occasion, the vehicle will not normally be restored.

11. The Appellant could not, and did not, argue that paragraph A of the Respondent's policy applied since the driver was plainly at least "complicit in" the smuggling attempt. However, he argued that the Respondent should have concluded that paragraph B of the policy applied since he had provided evidence which he argued demonstrated that he was not complicit in the smuggling attempt even though the driver was. The Respondent's position was that the Appellant was either responsible for, or complicit in, the smuggling and so paragraph C of the policy applied.

12. At [66] to [74], the FTT summarised the outcome of the Respondent's review into the refusal to restore the vehicle, together with some answers that Officer Hodge, who performed the review, gave in cross-examination. Given the way that the Appellant has made his case in this appeal, it is convenient to give a full extract from Officer Hodge's decision letter:

> The duty to take reasonable steps to prevent smuggling applies not just for movements to and from the UK: all countries now expect operators to take reasonable steps to prevent smuggling…
>
> My letter dated 19 August 2016 requested specific information regarding trips made by PHU Greg-Car on 5 and 6 April [i.e. the Appellant's previous abortive delivery for "PIKO"]. No reply has been received which leads me to doubt the legitimacy of those trips and leads me to suspect that pasta had previously been used as a "cover load" on 5 April and returned on 6 April to be used again. Further evidence gathered has revealed that the supporting documents were false and not issued by AB Foods. The Consignee was not expecting the goods and do not deal in dried pasta. Your client Mr Szczepaniak (GregCar) bought the ferry tickets, which, for this trip and the 5 and 6 April, were in the account of Freight Link, whereas other trips were LKW Walter. Your client has failed to provide evidence that the previous trips transporting pasta were legitimate.
>
> This was no casual concealment or one that could easily be made without the knowledge of both the operator and driver. In each case, not only were the smuggled cigarettes concealed, but they were placed so deep inside the load that it is most likely that they had be put there when the

> vehicle was loaded with the pasta. It is difficult to see how either the operator or the driver could not have known about the concealment. It is possible that the cigarettes could have been hidden later, during the journey from Poland to the UK but that would require most, if not all of the pasta to be unloaded and re-loaded using a fork lift truck or other machinery so as to hide the cigarettes. It is unlikely that could be done without the knowledge or at least the deliberate ignorance of the driver. That would also take some time and the delay should have come to the attention of a reasonably careful operator monitoring the movements of the vehicle (as required by many transport agreements). I concluded from the evidence available to me that, on the balance of probabilities, the operator was involved, or at least complicit in the smuggling attempt.

13. The line of reasoning set out in these paragraphs is not entirely clear. The paragraphs elide the culpability and involvement of the Appellant and the driver saying variously that "either the operator or the driver" must have known of the presence of the smuggled cigarettes, then moving to an assertion that that there must have been "knowledge or deliberate ignorance of the driver", without mentioning the Appellant. However, the overall conclusion is clear: Officer Hodge determined that, on a balance of probabilities, the Appellant was "involved, or at least complicit in the smuggling attempt" with the result that paragraph C of the policy applied.

14. Having concluded that the case fell within paragraph C and that the duty involved was £600,000, considerably more than the £50,000 mentioned in paragraph C(2) of the Respondent's policy, Officer Hodge concluded that the policy indicated that the vehicle should not be restored. Before confirming this decision, Officer Hodge considered the question of proportionality and concluded that the large quantities of cigarettes involved, and the Appellant's complicity in the smuggling made a refusal to restore proportionate.

15. The Respondent's conclusion, therefore, in very broad summary was that:

(1) The Appellant had failed to satisfy it that it was neither responsible for, nor complicit in, the smuggling.

(2) Therefore, the case fell within paragraph C of its policy.

(3) The duty involved was well over £50,000 and it was proportionate not to restore the vehicle.

(4) Accordingly, the vehicle would not be restored.

16. That was the decision whose reasonableness the FTT had to consider. At [94] and [95], the FTT directed itself as to how it would approach its task as follows:

> 94. The relevant law makes it clear that the decision as to whether or not to restore a forfeited vehicle is a matter for HMRC [throughout the decision the FTT mistakenly referred to the Respondent as "HMRC"] to determine at their discretion and that this Tribunal can disturb that decision only if it is unreasonable in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 (*Wednesbury*). The Tribunal

> is not permitted to consider the relevant facts afresh and determine whether or not the Tribunal agrees with the conclusion that HMRC has reached.
>
> 95. Instead, the Tribunal needs to consider whether, in reaching that conclusion, HMRC have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account. We are entitled to consider whether HMRC have applied their general policy and whether that general policy is reasonable in the *Wednesbury* sense but, as long as both of those are the case, HMRC's decision cannot be impugned simply because this Tribunal or some other person might have reached a different conclusion on the same facts.

17. Mr Newbold invited us to read the final sentence of [94] as emphasising that the FTT did not have power to interfere with the Respondent's decision simply because it disagreed with it. Therefore, in Mr Newbold's submission, the FTT realised that it had the power to find facts afresh but that, having done so, it needed to consider whether the Respondent's decision was unreasonable in the light of those fresh facts, and not merely whether the FTT agreed with the decision.

18. Mr Newbold supported this submission by reference to [81] where the FTT recorded submissions of the Respondent as follows:

> 81. It was submitted that the appellant has not shown that the decision in the review letter was unreasonable. The driver's responsibility does not mean that the appellant cannot also be responsible. It was submitted that the standard of proof is the balance of probabilities taking into account all relevant facts...

That, Mr Newbold submitted, demonstrated that the FTT realised that it had a fact-finding power and duty and that it should find disputed facts on a balance of probabilities.

19. We do not, however, accept Mr Newbold's interpretation of [94]. The FTT stated that it was "not permitted to consider the relevant facts afresh". It did not refer to *Gora* to which both parties had referred in their skeleton arguments. If the FTT had realised that it had the power to "find facts afresh", it might be expected to have sought to exercise that power. However, as will be seen, the FTT did not make reasoned findings on disputed facts, although it did provide a lengthy summary of the parties' evidence and submissions on that evidence. Those factors indicate to us that the FTT did not appreciate the full scope of its fact-finding power, or indeed, its fact-finding duty. That conclusion is not altered by [81]. First, in that paragraph, the FTT was recording submissions that the Respondent had made, and was not setting its own conclusions on the law. More fundamentally, [81] deals only the standard of proof. It does not deal with the entire process that the FTT should follow in deciding whether the Respondent's decision was unreasonable or acknowledge that it was open to the FTT to decide that, having considered the facts afresh, the Respondent's decision was unreasonable in the light of those facts.

20. Having directed itself as to approach to follow, the FTT concluded that the Respondent's review decision was reasonable for reasons given at [98] to [104].

21. At [98], the FTT alluded to the issue of the Appellant's involvement or otherwise in the smuggling attempt in the following terms:

> 98. It is not sufficient for the appellant to state that it had no reason to believe that the load might have been a smuggling attempt: the burden of proof is on the appellant to show that it took reasonable steps to establish that this was the case.

At [99], the FTT concluded that it was reasonable for the Respondent to require operators to take "reasonable steps to prevent smuggling".

22. At [100] the FTT concluded that Officer Hodge had taken into account relevant factors. It gave particular mention to two factors in the following terms:

> 100. We consider that the factors which the Review Officer took into account, set out in evidence, are relevant factors, and note particularly:
>
> > (1) the appellant's statement that it had no internal procedures in relation to smuggling because it did not believe that anyone would use them for smuggling purposes. Although this is an explanation, it is not a reasonable excuse or in any sense a matter which was relevant to the application of HMRC's policy. HMRC were entitled and (given their policy) obliged to have regard to the aspects in which there was a failure to carry out basic reasonable checks in the process of reaching their decisions – these were plainly relevant matters; and
> >
> > (2) it is clear that the driver was involved with the smuggling attempt and it is clear from the tachograph evidence that the driver made no attempt to collect the load at the address on the CMR documentation. The appellant gave no explanation as to how the driver knew that the load should be picked up from a different location and has confirmed in evidence today that the freight forwarder would not have known which driver was assigned to the delivery.

23. It is not straightforward to see how the FTT's observations on "reasonable checks" in [98], [99] and [100(1)] fitted with Officer Hodge's review decision. In deciding that paragraph C of the policy applied, Officer Hodge was not simply saying that the Appellant had failed to complete "reasonable checks". Rather, the conclusion was much tougher: namely that the Appellant was responsible for, or complicit in, the smuggling attempt. Mr Newbold invited us to read [100(1)] as a finding that the Appellant's failure to perform "basic reasonable checks" had led the FTT to conclude that the Appellant was complicit in the smuggling (because, an operator knowing that a load contains smuggled goods would have an obvious incentive to perform no checks). We do not, however, read [100(1)] in that way. A failure to perform reasonable checks does not, of itself, demonstrate complicity in a smuggling attempt: conceptually such a failure could be explained by incompetence, inexperience, ignorance, laziness, lack of time or many other factors. If the FTT had wanted to say that the Appellant's failure to perform

checks supported a conclusion that it was responsible for, or complicit in, the smuggling attempt, it would have needed to explain why it had reached that conclusion.

24. Mr Newbold invited us to read [100(2)] as containing a positive conclusion that, since (on the Appellant's evidence) the smugglers did not know who was the driver allocated to the load, the Appellant must have told the driver to go to Poznan, rather than the premises of AB Foods (the stated consignor), for loading. Clearly such a finding would have been of central significance. However, we do not read [100(2)] as containing the positive conclusion for which Mr Newbold argued. In [100], the FTT was not expressing its own conclusions on disputed matters of fact; it was referring to matters that Officer Hodge had taken into account in the review decision. Moreover, before making a factual finding adverse to the Appellant on such a contentious issue, the FTT would have needed to weigh up the evidence and explain why it was rejecting the Appellant's version of events. The fact that paragraph [100(2)] contains no such weighing of the evidence reinforces the conclusion that the FTT was intending to recite considerations that Officer Hodge took into account, rather than to make factual findings of its own.

25. At [102] to [103], the FTT concluded that the Respondent had not failed to take into account any relevant factors and at [104], the FTT rejected criticisms that the Appellant had made of the Respondent's failure to publish the full text of its policy on restoration. At [105] and [106] the FTT concluded that a refusal to restore the vehicle was proportionate in the circumstances saying:

> 106. In this case, we have found that it is reasonable for HMRC to have concluded that the appellant was implicated in the attempted smuggling attempt and so the refusal to restore is not disproportionate.

26. The FTT's overall conclusion at [107] was that the Respondent's decision was reasonable in all the circumstances and so the appeal was dismissed.

The Grounds of Appeal and overview of the parties' positions

27. The Appellant's grounds of appeal against the Decision are as follows:

> (1) The FTT erred in law by not applying the relevant law, or by applying it incorrectly, or by not having any adequate or sufficient evidence.
>
> (2) The FTT failed to give appropriate reasons for its decision and that decision was irrational.

28. Ground 1, in particular, is quite general. However, in the Appellant's written and oral submissions, it was made clear that the core of the Appellant's complaint was that the FTT had not engaged with the scope of its fact-finding power as set out in *Gora* and subsequent cases and, as a result, had made no factual finding on the central question of whether the Appellant (as distinct from the driver) was responsible for, or complicit in, the smuggling attempt. To the extent that the FTT had made a factual finding that the Appellant was responsible for, or complicit in, the smuggling, the Appellant argues that that conclusion was inadequately reasoned, irrational and not supported by the evidence.

29. As well as his core complaint set out at [28], the Appellant made other points in his written and oral submissions:

> (1) He argued that the fact that the driver was convicted of an offence in connection with the smuggling necessarily obliged the Respondent to apply paragraph B of its policy, not paragraph C.
>
> (2) He criticised the Respondent's failure to publicise its policy on the restoration of vehicles that are seized. That policy sets out a level of checks that the Respondent expects hauliers to make to reduce the risk of smuggling. However, many hauliers are based overseas with little smuggling of excise goods in their domestic markets. Such hauliers are entitled to know what the Respondent expects.
>
> (3) He argued that the Respondent's policy as a whole was unreasonable, and contrary to Article 1 Protocol 1 of the European Convention on Human Rights ("A1P1") because it did not take adequate account of whether a haulier was to blame for a smuggling attempt.
>
> (4) He criticised the Respondent's review decision (made under s15 of FA 1994) for relying on factors not mentioned in the original refusal to restore the vehicle (made under s152 of CEMA).

30. Mr Newbold agreed that the crucial question in this appeal is whether the FTT properly appreciated, or exercised, its fact-finding power (and duty) explained in *Gora* and confirmed in both *Jones* and *Behzad Fuels*. If the FTT did not do so, he realistically accepted that the Decision would contain a material error of law. However, he argued that, once the Decision is read as a whole, it is clear that the FTT appreciated that it had power to find facts afresh and exercised that power to make findings that were available to it on the evidence.

Discussion

31. From our analysis of the Decision in the section above, and in particular paragraphs [17] to [24] above, it is clear to us that the FTT did not properly appreciate that it needed to try to establish whether the Respondent's central allegation, that the Appellant was responsible for or complicit in the smuggling attempt, was true or not. Findings on that crucial issue would almost certainly have determined the appeal. If the Respondent's central allegation was true then the Respondent would plainly have been acting in accordance with its policy in refusing to restore the vehicle. Moreover, if the Appellant had been responsible for, or complicit in, an attempt to smuggle over 2.6m cigarettes, it is highly unlikely that the FTT would have concluded that a refusal to restore the vehicle was disproportionate. If the FTT had concluded that the Respondent's central allegation was not true, then the Respondent's review decision would have been unreasonable since it would have taken into account an irrelevant, and indeed incorrect, consideration (that the Appellant was responsible for, or complicit in, the smuggling attempt) or conversely would have failed to take into account a relevant consideration (that the Appellant was not so responsible or complicit).

32. Since the FTT did not appreciate the scope of its fact-finding power and duty it did not find the necessary facts. The vast majority of the Decision (some 78 out of 108 paragraphs) is taken up with a recitation of evidence and submissions. We would remind First-tier Tribunals that while it is perfectly acceptable to summarise evidence and submissions, a finding of fact is made only when a conclusion, appropriately reasoned, is expressed on the evidence in the light of the submissions made. As we have explained, the Decision did not reach a clear conclusion on the accuracy or otherwise of the Respondent's central allegation.

33. In arguing against the conclusion at [32] above, Mr Newbold understandably emphasised that, at [106] of the Decision, the FTT said that "it is reasonable for [the Respondent] to have concluded that the Appellant was implicated in the smuggling attempt". However, as we have explained the FTT did not appreciate the scope of its fact-finding power or duty. Moreover, it did not explain what conclusions it had reached on hotly contested matters of primary fact. In those circumstances, we consider that the conclusion expressed at [106] is inadequately reasoned applying the following approach of Patten LJ in *Weymont v Place* [2015] EWCA Civ 289:

> 4.But the relative immunity of the trial judge's findings of fact to interference on appeal depends upon the trial process having been conducted in a way which confirms that the trial judge has properly considered and understood the evidence; has taken into account the criticisms of the evidence advanced by the parties' legal representatives; and has reached a balanced and objective conclusion about points on which differing or inconsistent evidence has been given in making the factual findings which form the basis of his decision.
>
> 5.An important aspect of this process is the production of a properly reasoned judgment which explains to the parties and to any wider readership why the judge has reached the decision he has made. This includes making a reference to the issues in the case; the legal principles or test which have to be applied; and to why, in cases of conflicting factual evidence, the judge came to accept the evidence of particular witnesses in preference to that of others.
>
> 6.The judge is not, of course, required to deal with every point raised in argument, however peripheral, or with every part of the evidence. The process of adjudication involves the identification and determination of relevant issues. But within those bounds the parties are entitled to have explained to them how the judge has determined their substantive rights and, for that purpose, the judge is required to produce a fully reasoned judgment which does so: see *English v Emery Reimbold & Strick Ltd*. [2002] EWCA Civ 605. The production of such a judgment not only satisfies the court's duty to the parties but also imposes upon the judge the discipline of considering the detail of the evidence and the legal argument.

34. It follows, therefore, that in our judgment, the Decision contains the following errors of law:

(1) It does not appreciate the full scope of the FTT's power, and duty in appropriate cases, to find facts afresh and judge the reasonableness or otherwise of the Respondent's decision in the light of those facts.

(2) Because of the error at [(1)] it contains insufficient factual findings on matters that were central to the dispute between the parties.

(3) Insofar as the FTT did express a factual conclusion, at [106], that the Respondent's decision was reasonable, that conclusion was insufficiently reasoned and vitiated by the errors of law at [(1)] and [(2)] above.

35. In those circumstances, s12 of the Tribunals, Courts and Enforcement Act 2007 provides that:

(1) We may (but need not) set aside the Decision.

(2) If we do set aside the Decision we may either (i) remit the case back to the FTT with directions for its reconsideration or (ii) re-make the Decision.

36. Since the Decision contains errors of law on matters of central importance, we are in no doubt that it should be set aside.

37. We share Mr Wiencek's concerns about the delay and expense that would be involved in remitting the appeal back to the FTT. However, we see no realistic alternative. As we have noted, the FTT must seek to decide whether or not the Appellant was responsible for, or complicit in, the smuggling attempt. To do so, it would need to see all the evidence and hear the answers given by witnesses in cross-examination. The FTT's assessment of the reliability and credibility of Mr Szczepaniak as a witness will no doubt be of some importance to this matter. We have access to the parties' witness statements, but do not have any transcript of the FTT hearing and, even if we did, it is doubtful whether we could determine the relevant matters of fact. Accordingly, with some regret, we have concluded that a differently constituted FTT will need to re-hear this appeal.

38. Having reached that conclusion, we do not need to deal with the other submissions that we have summarised briefly at [29] above. However, to ensure that the FTT hearing the remitted appeal is in as good a position as possible to deal with that appeal, we will make some brief observations on those points.

39. The Appellant is wrong to argue that paragraph B of the Respondent's policy necessarily applies if a driver is involved in a smuggling attempt. If both the operator and the driver are responsible for the smuggling attempt, paragraph C can apply.

40. Whether or not the Respondent could, or should, publish its policy on restoration is of no relevance to this appeal. That is because, in this appeal the Respondent makes the serious allegation that the Appellant was responsible for, or complicit in, an attempt to smuggle 2.6m cigarettes into the UK. If that allegation is true (which the differently constituted FTT will have to decide), the Appellant can scarcely complain that it could not have realised that there would be significant repercussions. If the allegation is untrue then, as we have observed, the Respondent's refusal to restore the vehicle is unlikely to be reasonable whether or not the policy was published.

41. Neither this Tribunal, nor the FTT, has any power in the context of this appeal to require the Respondent to change its policy on restoration whether that policy is considered contrary to A1P1 or otherwise. Rather, the relevant question for determination is whether the Respondent's review decision in this specific case was unreasonable. That said, if the FTT determines that the entire policy on restoration is unreasonable, and contrary to A1P1, it may conclude that the particular decision made in pursuance of that policy is unreasonable. That will be a matter for the FTT, but we would observe that we see little force in the Appellant's argument that the policy takes no account of a haulier's blameworthiness.

42. Under s16 of FA 1994, the appeal is against the Respondent's decision on review. Therefore, the fact that the review decision may refer to matters that the Respondent did not mention in its original refusal under s152 of CEMA does not, of itself, make the review decision unreasonable. However, if the reference to fresh material is arbitrary, or the Appellant had no adequate opportunity to comment on that material, the FTT may well wish to take those factors into account when determining the reasonableness or otherwise of the review decision.

Disposition

43. The Appellant's appeal is allowed. The Decision is set aside. We remit the appeal back to the FTT with a direction that it be heard by a differently constituted tribunal.

JUDGE TIM HERRINGTON
JUDGE JONATHAN RICHARDS

RELEASE DATE: 1 October 2019