



Neutral Citation Number: [2024] EWCA Civ 737

Case No: CA-2023-002603

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT NOTTINGHAM
His Honour Judge Jonathan Owen
Claim No. K11NG180

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2024

Before:

LORD JUSTICE NEWEY
LORD JUSTICE BAKER
and
LORD JUSTICE PHILLIPS

Between:

KLG TRUCKING SRL **Appellant**
- and -
SECRETARY OF STATE FOR THE HOME **Respondent**
DEPARTMENT

Simon Clarke and Millicent Dooher (instructed by **Smith Bowyer Clarke**) for the **Appellant**
Matthew Howarth (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 11 June 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 02 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Newey:

1. The question raised by this appeal is whether His Honour Judge Jonathan Owen (“the Judge”) was right to uphold a penalty which the Secretary of State had imposed on the appellant, KLG Trucking SRL (“KLG”), pursuant to section 32 of the Immigration and Asylum Act 1999 (“the 1999 Act”) after clandestine entrants had been discovered in a vehicle of which it was the owner.

Facts

2. On 21 February 2023, a heavy goods vehicle owned by KLG collected a consignment in Bologna, Italy. When the vehicle reached the United Kingdom Control Zone in Calais on 23 February, it was searched and eight clandestine entrants were found. Mr Billy Mills, a Border Force Officer, was called and spoke to the driver. He recorded in his notebook, “driver had no written instructions but security checklist”. He explained in a witness statement which he made in these proceedings:

“The driver confirmed with me that his last stopping place was on the 23/02/2023 14:00 local time at G8 service station Comines Waneton and departed on the same date at 14:45 local time, this was also confirmed via the receipts the driver had with him for his purchase of Diesel at 14:36 and AdBlue at 14:40. The driver did have a vehicle checklist with him, however he had not completed it that day. The driver was also unable to provide me with any written instructions.”

3. The Secretary of State further relied on a witness statement in which Ms Alice Thomason of the Clandestine Entry Civil Penalty Team said that Mr Mills had “noted that the Driver was in possession of a security checklist” and that “[a] copy of the first page of that checklist was supplied by the officers at port”. It can be seen from an exhibit to Ms Thomason’s witness statement that a page headed “Vehicle checklist” had been photographed. Towards the top of the page, there was space for, among other things, “Company name”, “Vehicle number” and “Driver name” to be supplied, but nothing had been entered. Further down the page, details were given of two events on 22 February in columns with the headings “Stop No: 6” and, before that, some writing ending in “5” against the pre-printed words, “After loading:”.
4. Mr Constantin-Catalin Nestianu, the administrator and general manager of KLG, said in a witness statement made before he had seen those of Mr Mills and Ms Thomason that the driver had “completed ... contemporaneously and provided to Border Force upon the stop” a checklist which he exhibited. This had four pages, two of which appeared to show that the driver had carried out a range of checks on each of the occasions identified in the remaining pages. One of the latter pages corresponded in part to the page exhibited by Ms Thomason but referred to additional stops subsequent to 22 February: “Stop No: 7”, “Stop No: 8” and “Final check”. The other page included details of “Company name”, “Vehicle number”, “Driver name” and the like; referred to loading in Bologna and Verona; and appeared to record checks on 21 and 22 February “After loading”, at “Stop No: 1”, at “Stop No: 2”, at “Stop No: 3” and on a further occasion on 22 February.

5. Having seen the Secretary of State's evidence, Mr Nestianu made a supplemental witness statement in which he explained that he had become aware that the checklist with which he had been supplied by the driver was inconsistent with that "submitted by the [Secretary of State] as presented by the Driver ... at the time of the stop". Mr Nestianu explained:

"It was my understanding that the checklist I supplied with my first statement and exhibits was the exact checklist provided by the driver. I was made aware only following the [Secretary of State's] evidence that the checklist provided to Border Force was incomplete. It is clear to me now that the Driver added further information following the stop, then presented this as his checklist to me."

6. Penalty notices (using form IS11) were subsequently issued to both the driver and KLG pursuant to section 32 of the 1999 Act. The driver's liability, which KLG shared, was initially put at £48,000, but his penalty per clandestine entrant was later reduced to £36 giving a total liability of £288. The driver was said to have failed to comply with regulations 2B(4)(b), 2B(8), 2C(2), 2C(5), 2E(3) and 2E(8) of the Carriers' Liability Regulations 2002 ("the 2002 Regulations"), but account was taken of his financial circumstances. A further penalty was imposed on KLG itself as the owner of the relevant vehicle. The Secretary of State initially decided that KLG should pay £80,000 but the figure was eventually revised to £36,000 (i.e. £4,500 per clandestine entrant) on the basis that the company was a "medium business" and had no record of liability in the previous five years. The penalty notice recorded that regulations 2B(3), 2B(5), 2B(6), 2E(6) and 2E(7) did not apply and that KLG had complied with regulations 2B(2), 2B(7), 2C(3), 2D(2), 2D(4), 2D(5), 2E(4) and 2E(5). However, it was said that KLG had not complied with regulation 2E(2). That was stated to be the case on the footing that "[t]he Checklist provided on the day of the incident shows no checks within 24 hours of the incident".
7. The penalties imposed on the driver and KLG were both appealed, but the appeal against the driver's penalty was abandoned after KLG had learned that the checklist with which it had been supplied by the driver differed from that which the driver had presented to Border Force. KLG pursued the remaining appeal, in respect of its own liability, at a hearing before the Judge, sitting in the County Court at Nottingham, on 8 December 2023. In an unreserved judgment ("the Judgment") given that same day, however, the Judge concluded that the appropriate penalty was £4,500 per clandestine entrant and so upheld the £36,000 penalty.
8. KLG now challenges the Judge's decision in this Court.

The legal context

The Immigration and Asylum Act 1999

9. As Sales J noted in *Bogdanic v Home Secretary* [2014] EWHC 2872 (QB), at paragraph 1, the 1999 Act, pursuant to which the penalty at issue in this appeal was imposed, aims "to encourage carriers, such as lorry drivers, not to transport clandestine entrants into the United Kingdom and to exercise care to ensure that there

are no clandestine entrant stowaways hidden in their vehicles when they come to the United Kingdom from abroad”.

10. Section 32 of the 1999 Act provides for the imposition of penalties on persons “responsible” for “clandestine entrants”. By section 32(1), a person is a “clandestine entrant” if, among other things, “he arrives in the United Kingdom concealed in a vehicle” and “claims, or indicates that he intends to seek, asylum in the United Kingdom or evades, or attempts to evade, immigration control”. In such a case, pursuant to section 32(5), the “owner, hirer and driver of the vehicle” are all “responsible persons”.

11. The power to impose a penalty is conferred by section 32(2), which provides:

“The Secretary of State may require a person who is responsible for a clandestine entrant to pay—

- (a) a penalty in respect of the clandestine entrant;
- (b) a penalty in respect of any person who was concealed with the clandestine entrant in the same transporter.”

12. Section 32 continues:

“(2A) In imposing a penalty under subsection (2) the Secretary of State—

- (a) must specify an amount which does not exceed the maximum prescribed for the purpose of this paragraph,
- (b) may, in respect of a clandestine entrant or a concealed person, impose separate penalties on more than one of the persons responsible for the clandestine entrant, and
- (c) may not impose penalties in respect of a clandestine entrant or a concealed person which amount in aggregate to more than the maximum prescribed for the purpose of this paragraph.

(2B) The Secretary of State may reduce the amount of a penalty under this section if the responsible person can show that they took the actions specified in regulations under subsection (2C) in relation to the securing of the transporter against unauthorised access.

(2C) The Secretary of State must specify in regulations the actions that a responsible person must have taken in order to be eligible for a reduction in the amount of a penalty.

(2D) The actions that may be specified in regulations under subsection (2C) include, in particular—

- (a) actions in relation to checking a person has not gained unauthorised access to the transporter,
- (b) actions in relation to the reporting of any unauthorised access to the transporter, and
- (c) actions in relation to the keeping of records to establish that other actions specified in the regulations have been taken.

...

(4) Where a penalty is imposed under subsection (2) on a person who is the driver of a vehicle pursuant to a contract (whether or not a contract of employment) with a person ('P') who is the vehicle's owner or hirer—

- (a) the driver and P are jointly and severally liable for the penalty imposed on the driver (whether or not a penalty is also imposed on P), and
- (b) a provision of this Part about notification, objection or appeal has effect as if the penalty imposed on the driver were also imposed on P (whether or not a penalty is also imposed on P in P's capacity as the owner or hirer of the vehicle)."

13. Section 32A requires the Secretary of State to issue a code of practice specifying matters to be considered in determining the amount of a penalty under section 32. By section 32A(2), the Secretary of State must "have regard to the code (in addition to any other matters he thinks relevant)" when imposing a penalty under section 32 and when considering an objection to a penalty.

14. Section 34 provides a defence of duress. In the past, by section 34(3), it was also a defence for a carrier to show that:

- “(a) he did not know, and had no reasonable grounds for suspecting, that a clandestine entrant was, or might be, concealed in the transporter;
- (b) an effective system for preventing the carriage of clandestine entrants was in operation in relation to the transporter; and
- (c) on the occasion in question the person or persons responsible for operating that system did so properly.”

That defence was, however, removed by the Nationality and Borders Act 2022 (“the 2022 Act”). Paragraph 859 of the explanatory notes for the 2022 Act explain that “[w]hile the steps taken to secure the transporter are no longer relevant to liability, the Secretary of State may exercise discretion to reduce the level of penalty where carriers can demonstrate compliance with section 32(2B)”.

15. Section 35(1) obliges the Secretary of State to notify a person whom he decides is liable to a penalty. By section 35(2), a notice under section 35(1) must, among other things, “state the Secretary of State’s reasons for deciding that P [i.e. the relevant person] is liable to the penalty (or penalties)”.
16. As originally enacted, the 1999 Act did not contain an appeal process. Following, however, the decision of this court in *International Transport Roth GmbH v Home Secretary* [2002] EWCA Civ 158, [2003] QB 728, a right of appeal was introduced by the Nationality, Immigration and Asylum Act 2002. This is to be found in section 35A of the 1999 Act, which states:
 - “(1) A person may appeal to the court against a penalty imposed on him under section 31A or 32 on the ground that—
 - (a) he is not liable to the imposition of a penalty, or
 - (b) the amount of the penalty is too high.
 - (2) On an appeal under this section the court may—
 - (a) allow the appeal and cancel the penalty,
 - (b) allow the appeal and reduce the penalty, or
 - (c) dismiss the appeal.
 - (3) An appeal under this section shall be a re-hearing of the Secretary of State’s decision to impose a penalty and shall be determined having regard to—
 - (a) any code of practice under section 32A which has effect at the time of the appeal, ...
 - (c) any other matters which the court thinks relevant (which may include matters of which the Secretary of State was unaware).
 - (4) Subsection (3) has effect despite any provision of Civil Procedure Rules”
17. An appeal is thus a re-hearing. The judge’s task on such an appeal is, *first*, to decide “whether in the exercise of his or her discretion under s. 35A(2)(a), the appeal should be allowed ... and the penalty cancelled in the light of the facts as found” and, *if not*, to consider whether the penalty “should be reduced and, if so, by how much” (to adapt slightly words of Stuart-Smith LJ in *Link Spolka Z O.O. v Home Secretary* [2021] EWCA Civ 1830 (“*Link Spolka*”), at paragraph 52). Appeals are allocated to the County Court: see section 43(2).
18. It is also relevant to refer to section 31A, which was inserted into the 1999 Act by the 2022 Act. Section 31A, headed “Penalty for failure to secure goods vehicle etc”, provides:

“(1) The Secretary of State may impose a penalty on a person responsible for a goods vehicle which has arrived at a place mentioned in subsection (2) if—

- (a) on its arrival at that place, the vehicle is not adequately secured against unauthorised access (see subsection (4)(a)), and
- (b) the person has not taken the actions specified in regulations under subsection (4)(b) as actions to be taken by that person in relation to the securing of the vehicle against unauthorised access before or during its journey to that place.

(2) Those places are—

- (a) a place where immigration control is operated, and
- (b) in a case where the vehicle previously arrived at a place outside the United Kingdom where immigration control is operated and then journeyed to a place in the United Kingdom, that place in the United Kingdom.

(3) A penalty may be imposed under subsection (1) regardless of whether any person has obtained unauthorised access to the vehicle during its journey to the place mentioned in subsection (2).

(4) The Secretary of State must specify in regulations for the purposes of subsection (1)—

- (a) what is meant by a goods vehicle being adequately secured against unauthorised access, and
- (b) the actions to be taken by each person responsible for a goods vehicle in relation to the securing of the vehicle against unauthorised access.

(5) The actions that may be specified in regulations under subsection (4)(b) include, in particular—

- (a) actions in relation to checking a person has not gained unauthorised access to the vehicle,
- (b) actions in relation to the reporting of any unauthorised access to the vehicle, and
- (c) actions in relation to the keeping of records to establish that other actions specified in the regulations have been taken”

19. The explanatory notes for the 2022 Act explain at paragraph 430 that the legislation “extends the scope of the civil penalties regime for clandestine entrants to create a new civil penalty that may be issued on persons responsible for goods vehicles that have not been adequately secured, whether or not there is a clandestine present in the vehicle”. Paragraph 434 states:

“The intent is to require drivers and hauliers to check the security of their goods vehicles during or prior to arrival in the UK or presentation at UK immigration control and to alert the relevant authorities (i.e. police in the country concerned) as soon as clandestine entrants are suspected to have entered a vehicle, and not when that driver reaches immigration controls. Drivers will be required to keep and produce documentation when presenting at UK immigration controls, or upon arrival in the UK, to establish that actions have been taken in relation to securing the vehicle against unauthorised access. This will include keeping evidence that ongoing checks have been carried out to identify signs of clandestine entry and to prevent unauthorised entry.”

The Carriers’ Liability Regulations 2002

20. The 2002 Regulations were issued by the Secretary of State pursuant to powers given by the 1999 Act. They were amended radically by the Carriers’ Liability (Amendment) Regulations 2023 (“the 2023 Regulations”). We were told that no version of the 2002 Regulations incorporating the changes is publicly available, which is unsatisfactory; I found myself that the legislation.gov.uk website shows the 2002 Regulations only in their original form. However, we were helpfully supplied by Mr Simon Clarke, who appeared for KLG with Ms Millicent Dooher, with a composite that he has prepared.

21. Regulations 2A to 2E of the 2002 Regulations (as amended by the 2023 Regulations) state that they are prescribing actions to be taken for the purposes of section 31A of the 1999 Act. They are relevant in the context of section 32 as well, however, since regulation 3A provides:

“For the purposes of section 32(2C) of the Act, in order to be eligible for a reduction in the amount of a penalty under section 32(2), a person responsible for a clandestine entrant concealed in a goods vehicle must have taken such of the actions in regulations 2B, 2C, 2D and 2E as are actions to be taken by that person.”

22. The regulation of most direct relevance to the present appeal is regulation 2E, which concerns record-keeping. It is this regulation which the Secretary of State alleges, and the Judge found, that KLG breached. It provides:

“(1) For the purposes of section 31A(1) of the Act, the actions to be taken by a person responsible for a goods vehicle before or during a journey to a place mentioned in section 31A(2) in

relation to the keeping of records to establish that other actions specified in these Regulations have been taken are as follows.

(2) As soon as practicable afterwards, the owner, or, as the case may be, hirer, must record in writing—

- (a) that they have ensured that actions set out in regulation 2B(2), (3), (5), (6) and (7) and 2C(3) (as applicable) have been taken; and
- (b) any signs noted by the person taking those actions that a person has gained, or attempted to gain, unauthorised access to the goods vehicle.

(3) As soon as practicable afterwards, the driver must record in writing—

- (a) that they have ensured that the actions set out in regulation 2B(4), (7) and (8) and 2C(2), (3), (4) and (5) (as applicable) have been taken; and
- (b) any signs noted by the driver that a person has gained, or attempted to gain, unauthorised access to the goods vehicle.

...

(8) The driver must ensure that a copy of the written records referred to in paragraphs (2), (3), (4) and (5) (as well as any related evidence) are kept with the goods vehicle.”

23. Four points are worth noting at this stage.

24. *First*, the parties agreed (correctly, in my view) that the word “afterwards” in regulations 2E(2) and 2E(3) refers to the relevant action rather than to the journey. In other words, the owner/hirer must make a written record as soon as practicable after ensuring that an action has been taken or a sign has been noted.

25. *Secondly*, the Secretary of State accepts that the owner/hirer’s obligations and those of the driver can be satisfied with a single document. There is no need to have one record for the owner/hirer and a separate one for the driver.

26. *Thirdly*, as Stuart-Smith LJ said in *Link Spolka*, at paragraph 16, “the proper contemporaneous filling out of forms recording that necessary steps have been taken has a significance that goes beyond the merely evidential”. Stuart-Smith LJ went on:

“To my mind it is plain that they are intended to serve a function similar to that of risk assessments or lists of steps to be taken in other fields concerned with the reduction of risk. In addition to the evidential value that they have (provided that they are filled out accurately) in demonstrating that appropriate checks have been carried out, they have an equal or greater

value, if used appropriately, in focusing the driver's mind and forcing them to concentrate upon the security of the vehicle at particular points in the journey. They are therefore an integral part of any system and contribute to its effectiveness by reducing the risk that necessary and appropriate steps are omitted. ... I would hold that the absence of such reports or the failure to fill them in contemporaneously and accurately would at least raise a question about the effectiveness of any system designed to prevent the carriage of clandestine entrants."

In the same vein, Stuart-Smith LJ observed in paragraph 54(v) that "[c]hecklists may have an importance that goes well beyond the purely evidential because they are intended to focus the mind of the driver on the steps that they have to take and thereby reduce the risk that steps will be omitted".

27. *Fourthly*, there is little overlap between the regulations to which regulation 2E(2)(a) (relating to the owner/hirer) cross-refers and those to which regulation 2E(3)(a) (relating to the driver) cross-refers. Regulation 2E(2)(a) and regulation 2E(3)(a) both mention regulation 2B(7), but the regulations specified are otherwise different. That reflects the fact that regulations 2B and 2C impose distinct requirements on owner/hirers, on the one hand, and drivers, on the other.

28. The point can be illustrated by reference to regulation 2C, which, as regulation 2C(1) says, specifies "the actions to be taken by a person responsible for a goods vehicle before or during a journey to a place mentioned in section 31A(2) of the Act in relation to checking that a person has not gained unauthorised access". Regulation 2C(2) requires the *driver* to perform the "standard checks" set out in the schedule to the 2002 Regulations "during each occasion the vehicle is parked during a journey". No such obligation is, however, imposed on the owner/hirer. Only regulation 2C(3) is capable of applying to an owner/hirer. That provides:

"Where, at any point during a journey before the goods vehicle enters the United Kingdom, a person responsible for the goods vehicle knows or has reason to believe that a means of entry to the vehicle's load space has been opened, that person must ensure that the standard checks are performed."

29. Regulation 2C(3) apart, the regulations listed in regulation 2E(2)(a) all relate to actions that should be taken *before* a journey. Regulation 2B(2), for example, states:

"*Before a journey*, the owner, or, as the case may be, hirer, must ensure that each seal used on the goods vehicle is distinguished by a number that is unique amongst the seals used on the goods vehicle" (emphasis added).

Regulations 2B(3), (5), (6) and (7) likewise deal with what must be done before a journey begins.

30. Regulation 2(1) defines "relevant journey" to mean "the journey during which the clandestine entrant for which the person in question is responsible became concealed in the vehicle". At one stage during the hearing, it appeared to be the Secretary of

State's case that each leg of an overall journey was to be regarded as an individual "journey" for the purposes of the 2002 Regulations. A submission to that effect would have been hard to reconcile with matters such as regulation 2C(2)'s reference to a vehicle being parked "during a journey", but it became clear as the hearing before us proceeded that the Secretary of State does not maintain that every leg of a journey constitutes a "journey" within the meaning of the Regulations. The Secretary of State's position, which makes sense given the terms of the 2002 Regulations, is that an owner/hirer must ensure that steps are taken as specified in regulation 2B before a vehicle embarks on a journey, not whenever a new leg of the journey is to begin.

The Penalty Code

31. The Secretary of State has issued a code of practice ("the Penalty Code"), with the title "Immigration and Asylum Act 1999: Level of Penalty: Code of Practice", in accordance with section 32A of the 1999 Act. Part Two of the Penalty Code deals with penalties imposed under section 32 of the 1999 Act. It reads:

"Maximum level of penalty

The maximum level of penalty for carrying clandestine entrants under section 32 is £10,000 per responsible person per clandestine entrant. The maximum aggregate penalty for all responsible persons per clandestine entrant is £20,000.

Starting point for consideration of level of penalty

The maximum level of penalty will be used as the starting point in determining the responsible person's liability, subject to the following considerations relating to previous liability or involvement in incidents:

- If a responsible person has no record of liability in the five years prior to the incident under consideration, the maximum penalty to be used as a starting point in determining their level of penalty will be £6,000.
- If a responsible person has been issued with one penalty in the five years prior to the date of the incident under consideration, the starting point will be £10,000

Applying discounts to starting point level of penalty

The following matters will then be considered by the Secretary of State in determining any discount to be applied to the starting point level of penalty:

- 50% discount to the starting point level of penalty will be applied if the responsible person is a member of the Civil Penalty Accreditation Scheme.
- A further 50% discount will be applied to the starting point level of penalty if the responsible person is the driver, or

another responsible person who was present during the vehicle or detached trailer's journey to the United Kingdom, and they complied with the Regulations.

- A further 50% discount will be applied to the starting point level of penalty if the responsible person is not the driver and was not present during the vehicle or detached trailer's journey to the United Kingdom, but they acted to ensure compliance with the Regulations.

The Secretary of State may also consider any other matters the Secretary of State thinks relevant.

Joint liability

Where a penalty is imposed on a driver who is an employee of the vehicle's owner or hirer, the employee and the employer are jointly and severally liable for the penalty imposed on the driver (whether or not a penalty is also imposed on the employer).

Where a penalty is imposed on a person who is the driver of a goods vehicle pursuant to a contract with the vehicle's owner or hirer (whether or not a contract of employment), the driver and the owner or hirer are jointly and severally liable for the penalty imposed on the driver (whether or not a penalty is also imposed on the owner or hirer)."

32. Part Three of the Penalty Code is concerned with the financial means of an individual or company subject to a penalty. It explains that, in determining the exact level of penalty in respect of an individual, "the Secretary of State will consider any representations made by the individual regarding their personal financial circumstances". As regards companies issued with penalties, "means testing will be available for small to medium sized enterprises (SMEs)". In the case of a business of "medium" size (such as KLG), the "[s]tarting point for reduction of any remaining level of penalty" is given as "25% reduction".
33. Part Four of the Penalty Code contains examples. One of those given in relation to section 32 is as follows:

"Scenario 1: Eight clandestine entrants were detected in a curtain-sided goods vehicle. The owner is a member of the Accredited Scheme.

A curtain-sided goods vehicle arrived at the Port of Portsmouth and was selected for checks by Border Force. These checks revealed eight clandestine entrants concealed in the load inside the trailer. There was a large cut to the roof of the trailer, and the record of checks completed by the driver did not state that the roof was checked before the journey began, nor that the driver checked the load space after the last two stops prior to

embarking to the United Kingdom. The driver had therefore not complied with the requirements laid out in the Regulations. The driver had no previous liability to a penalty.

The owner, as a responsible person, is also liable for a penalty. However, the owner had ensured that the vehicle was equipped with locks or other security devices and had also complied with all of the other applicable parts of the Regulations. The owner was also a member of the Accreditation Scheme.

The driver receives a £48,000 penalty (£6,000 per clandestine entrant).

The driver requested means testing, which may further reduce this level of penalty, depending on their circumstances and the nature of the evidence they produce in support of their request.

The vehicle owner receives a £0 penalty, as they are accredited and fully complied with the requirements laid out in the regulations. They nevertheless remain joint and severally liable for the driver's penalty

Had the vehicle owner not been accredited, they would have received a penalty of £24,000 (£3,000 per clandestine entrant), as well as being held joint and severally liable for the driver's penalty."

Nexways Cargo KFT v Home Secretary

34. In *Nexways Cargo KFT v Home Secretary* (unreported, 15 March 2024) ("*Nexways*"), the owner of a vehicle in which a clandestine entrant had been found appealed against a penalty imposed under section 32 of the 1999 Act. Her Honour Judge Coe KC, sitting in the County Court at Nottingham, allowed the appeal and cancelled the penalty. Having noted that the owner had complied fully with the 2002 Regulations, Judge Coe said in paragraph 65 of her judgment that she "accept[ed] that the test is met for the imposition of a penalty because of the fact of a clandestine entrant being present" but that, "[i]n light of the full compliance", she did "not consider it appropriate in the exercise of [her] discretion to impose any penalty". She continued in paragraph 66:

"I should say that if, this being an exercise of discretion and, therefore, a situation in which I have a wide ambit, I had decided to impose a penalty, I would, in this instance, have reduced the same to zero. As I say it is a matter for the [Secretary of State] to present the case as she chooses. ... [I]t is the [Secretary of State's] case that the first appellant was fully compliant with the regulations. If an owner is fully compliant with regulations, but by reason of the presence of a clandestine entrant is nonetheless liable for the imposition of a penalty, the approach by the [Secretary of State] in this appeal would seem to suggest that such an owner would always be liable to 50% of

the starting point penalty. I do not agree that that approach must be followed by the Court on appeal by way of rehearing.”

35. I shall return to *Nexways* later in this judgment.

The Judgment

36. In paragraph 76 of the Judgment, the Judge said that he was satisfied that “there has been a breach by [KLG] of Regulation 2E(2) as specified in the IS11 penalty notice in this case in that the owner, [KLG], failed as soon as practicable afterwards a journey to record in writing that they have ensured that actions set out in Regulation 2B(2), (3), (5), (6) and (7) and 2C(3) as applicable have been taken”. “The driver’s checklist”, the Judge observed in paragraph 77, “was in the form seized by the Border Force when the vehicle was stopped: a partially completed record which did not contain a record of the various checks which were asserted to have been made during the journey’s transit”. Accordingly, the Judge said in paragraph 78, “the company failed to record in writing the pertinent matters through its driver’s failure properly and fully to complete a driver checklist at the time, which is the means by which the company delegated its record keeping and it failed in that respect”. Having commented in paragraph 81 that the driver’s failure to complete the checklist “suggests that he had not been properly trained or instructed as to his duties”, the Judge said in paragraph 82 that “there was a genuine and substantial breach of Regulation 2E(2) by the company” and that he was “satisfied in the exercise of my discretion that it would be right to impose a penalty for that genuine and substantial breach and that I should not exercise my discretion not to impose any penalty or at all”.
37. Moving on to the level of penalty, the Judge said in paragraph 84 that a starting point of £6,000 per clandestine entrant was appropriate “because the company should be treated as being of good character” and that “a 25 per cent reduction should be imposed upon any penalty to reflect the medium size of the enterprise”. The Judge did not consider that any further discount should be applied, however. In this connection, he said:

“87. The other potentially applicable discount is that the owner acted to ensure compliance with the Regulations. I am not satisfied that they did, satisfactorily or at all, in the circumstances of this case, although they did comply with various substantive obligations contained within the Regulations or such Regulations did not apply, as the IS11 itself bears out. In relation to the important obligations with respect to record keeping they did not act to ensure effective compliance with those Regulations for the reasons that I have already explained. They delegated the task to their driver, who did it wrong, and I am not satisfied that they provided any or any adequate training, instruction or written guidance to the driver as to the ways in which record keeping should be undertaken. I do not consider they are entitled to a discount under that.

88. I also do not consider that the circumstances of this case generally militate in favour of a discount being applied. There were important breaches in this case and unsatisfactory evidence about the system employed by the company.”

38. The Judge concluded in paragraph 89:

“So, in all of those circumstances I am satisfied in the exercise of my discretion that the appropriate penalty per clandestine entrant is £4,500. I will therefore uphold the penalty charge in the amount of £36,000.”

Discussion

Did KLG fail to comply with regulation 2E(2)?

39. It emerged during the hearing before us that the Secretary of State’s case was that KLG had failed to comply with regulation 2E(2) of the 2002 Regulations because it had failed to record that it had ensured that the actions required by regulations 2B(2), (3), (5), (6) and (7) had been taken before the journey from Italy began on 21 February 2023. In support of that contention, Mr Matthew Howarth, who appeared for the Secretary of State, submitted that all that the driver had by way of checklist when the vehicle was stopped on 23 February was the single page a photograph of which was exhibited by Ms Thomason. The only checks identified on that page took place on 22 February. It can therefore be seen, Mr Howarth argued, that no record was made of the pre-journey checks as soon as practicable after they were made, as regulation 2E(2) requires.

40. These contentions are open to objection on more than one ground. In the first place, they are inconsistent with the penalty notice which the Secretary of State issued to KLG. The Secretary of State was obliged by section 35(2) of the 1999 Act to state his reasons for imposing the penalty. The explanation given was that “[t]he Checklist provided on the day of the incident shows no checks within 24 hours of the incident”. The allegation was thus that no record had been made of checks carried out in the 24 hours before the lorry was stopped on 23 February. It has now, however, become the Secretary of State’s case that there was no adequate record of checks performed before the journey started on 21 February.

41. Secondly, the available evidence does not seem to me to establish that no record complying with regulation 2E(2) was made of the pre-journey checks. It is true that the page which Ms Thomason exhibited did not show such checks, but there is good reason to think that the page referring to checks on 21 and 22 February which Mr Nestianu exhibited was already in existence. It would be surprising if the driver had begun to maintain a checklist only at stops 5 and 6 and without giving details of the “Company name”, “Vehicle number” and “Driver name”. On the face of it, it is more plausible that the driver had previously entered such details and recorded checks “After loading” and at four subsequent stops as shown in Mr Nestianu’s exhibit. Nor is compelling evidence to the contrary to be found in Ms Thomason’s witness statement. Ms Thomason spoke of the page she was exhibiting as a copy of “the first page of that checklist [i.e. that in the possession of the driver]”. It is not clear in what

sense she meant that the page was the “first”. Perhaps it was “first” in the sense that it was at the front. At any rate, it is implicit in the reference to “first” that there was at least one additional page, and Ms Thomason’s exhibit does not include anything further. Moreover, given Mr Mills’ concern that the driver “had not completed [the checklist] that day”, it is not unlikely that he would have photographed just the page which confirmed that point and not one which related to earlier events.

42. Mr Howarth appeared to suggest that, if it was KLG’s case that a record had been made of the pre-journey checks, it should have made that plain in its evidence. Instead, he said, Mr Nestianu had expressly admitted that the checklist which the driver had provided to Border Force had been “incomplete”. However, Mr Nestianu cannot be taken to have been accepting that the checklist was “incomplete” except in its failure to record checks at “Stop No: 7”, “Stop No: 8” and “Final check”. The simple fact is that KLG had no reason to address the recording of pre-journey checks. The penalty notice did not allege that such checks had not been duly recorded. Nor had the Secretary of State made clear in any other way that he was complaining of failure to record such checks. In fact, that was not how the Secretary of State’s case was first developed even at the hearing before us.
43. In the circumstances, the Judge was, I think, mistaken in concluding that KLG had breached regulation 2E(2) of the 2002 Regulations. It follows, as it seems to me, that the Judge approached the exercise of his discretion on an erroneous basis and that the discretion needs to be exercised afresh. Both parties took the view that, if we reached this point, we should re-exercise the discretion ourselves rather than remitting the matter.

Re-exercising the discretion

44. When considering an appeal against a penalty, the Court is required by section 35A(3) of the 1999 Act to have regard to both the Penalty Code and “any other matters which the court thinks relevant”.
45. The Penalty Code explains that, where the person has no record of liability in the previous five years (as with KLG), the figure of £6,000 per clandestine entrant is to be used as the starting point. The Penalty Code further provides for a reduction of 25% in the case of a “medium” company such as KLG. There is provision, too, for certain discounts. That of relevance in the present case states that a 50% discount will be applied to the starting point level of penalty “if the responsible person is not the driver and was not present during the vehicle or detached trailer’s journey to the United Kingdom, but they acted to ensure compliance with the Regulations”. Had KLG breached regulation 2E(2) of the 2002 Regulations, as the Judge thought, KLG would not have qualified for this discount. On the basis, however, that it did not do so, it does.
46. Looking no further than the Penalty Code, therefore, the appropriate penalty would be £18,000. That would equate to £6,000 per clandestine entrant less a 25% reduction and a 50% discount.
47. Mr Clarke, however, submitted that there should be no penalty at all. He pointed out that the word “may” in section 32(2) of the 1999 Act means that the Secretary of State has a discretion as to whether to impose any penalty and that the Court similarly has a

discretion when determining an appeal. In circumstances, he argued, where there has been full compliance with the 2002 Regulations, the Court should decide that no penalty is appropriate. He relied in support of his submissions on *Nexways*.

48. While, however, both the Secretary of State and, on an appeal, the Court have a discretion as to what, if any, penalty to impose where one or more clandestine entrants have been found:
- i) The 1999 Act is designed to incentivise owners, among others, to ensure that there are no clandestine entrants in their vehicles:
 - ii) Section 32(2B) speaks of the Secretary of State “reduc[ing]” the amount of a penalty where the person acted in accordance with the 2002 Regulations, not of there being no penalty in such a case;
 - iii) Similarly, section 32(2C) stipulates that regulations made by the Secretary of State (in the event, the 2002 Regulations) must specify the actions that must have been taken “in order to be eligible for a *reduction* in the amount of a penalty” (emphasis added);
 - iv) Part Two of the Penalty Code, to which the Secretary of State and the Court are directed to have regard, provides for a 50% discount where an owner “acted to ensure compliance with the Regulations”, not for the owner to be relieved of any penalty at all; and
 - v) In the example from Part Four of the Penalty Code which I have quoted in paragraph 33 above, the vehicle owner would have received a penalty of £3,000 per clandestine entrant had they not been accredited notwithstanding full compliance with the 2002 Regulations.
49. In the circumstances, I do not think that the mere fact that a vehicle owner has not been shown to have failed to comply with the 2002 Regulations provides a good reason either for declining to impose any penalty or for imposing one at a level lower than indicated by the Penalty Code. In so far as *Nexways* suggests otherwise, it should not be followed.
50. Returning to the present case, it seems to me that it is appropriate to impose a penalty but of £18,000 rather than £36,000. The fact that, contrary to the Judge’s understanding, KLG did not breach the 2002 Regulations means that the penalty should be reduced, but it does not warrant either the imposition of no penalty or a penalty of less than the £18,000 suggested by the Penalty Code. Nor, in my view, does any other matter render a penalty of £18,000 inapt. In short, it seems to me that, in the exercise of our discretion, we should impose a penalty of £18,000.

Conclusion

51. I would allow the appeal to the extent of reducing the penalty from £36,000 to £18,000.

Lord Justice Baker:

52. I agree.

Lord Justice Phillips:

53. I also agree.