Neutral Citation: [2024] UKFTT 00377 (TC) Case Number: TC09162

FIRST-TIER TRIBUNAL
TAX CHAMBER

Sitting at Taylor House, London

Customs & Excise – seizure of vehicle – restoration of vehicle – whether decision refusing restoration was unreasonable – appeal dismissed

Appeal reference: TC/2023/00961

Heard on: 22 March 2024
Judgment date: 9 May 2024

Before

TRIBUNAL JUDGE HOWARD WATKINSON
JULIAN SIMS

Between

ADRIART ALIAJ

Appellant

and

THE DIRECTOR OF BORDER REVENUE

Respondents

Representation:

For the Appellant: Mr. Jibreel Tramboo, Counsel

For the Respondents: Mr.William Dean, Counsel

DECISION

INTRODUCTION

1. On 30.7.22 a Mercedes Benz car with the registration AL14 AJJ ("the Vehicle") was stopped at the Cheriton UK outbound controls. The Appellant was driving the car, which belonged to him. Border Force Officers seized the Vehicle because it had been adapted for smuggling. The Border Force refused to restore the Vehicle to the Appellant, a decision which was upheld on review, and the Appellant has appealed to the Tribunal.

2. The parties agree that the key issue in this case is whether Mr. Aliaj has proved that he did not know of the adaptation. If we were to make that finding it would follow that Border Force took into account an irrelevant factor in making the review decision, which was made on the basis that he did know of the adaptation. We could them remit the decision for reconsideration. The parties also agree that if we were to find that Mr. Aliaj has not proved that he did not know of the adaptation, and it followed that we found that he knew of it, then any further decision by Border Force would inevitably be the same. There was no dispute that the vehicle had been adapted for smuggling.

EVIDENCE

3. The Tribunal was provided with the following evidence:

   (1) A Witness Statement and exhibits thereto from Officer Clark who reviewed the decision not to restore the vehicle. Officer Clark also gave oral evidence.

   (2) A Witness Statement and exhibits thereto from Officer Curtin who searched the Vehicle, which included photographs and a video of the adaptation in operation.

   (3) A witness statement and exhibits thereto from Mr. Aliaj, which included a photograph of the Vehicle taken in Albania. Mr. Aliaj also gave oral evidence.

   (4) Notebooks from the seizing officers.

4. We found that Mr. Aliaj's evidence, the thrust of which was that he did not know of the adaptation, was not credible.

5. Mr. Aliaj's evidence was that he bought the vehicle whilst on holiday in Albania where it was advertised for sale at the side of the road. He was not sure how many times he had been abroad with it. He accepted that he had not provided evidence of the name of any previous owners, or the details of the person he bought the Vehicle from. Mr. Aliaj said that he purchased the Vehicle for €9,000 and thereafter had some repairs to the engine undertaken that cost €950 euros before he could drive it to the UK. Mr. Aliaj said that he would have sat in the driver's seat and adjusted it when he purchased the Vehicle, but not since, and the console did not pop up and he had never seen the adaptation work. Mr. Aliaj said that he looked in the Vehicle prior to purchase and saw no signs of the adaptation. Mr. Aliaj said that when the Vehicle was seized he did not go back to the person who had sold it and ask for a refund or explanation as he didn't have the contact details for the seller, and had not seen them since. Mr. Aliaj said that he had not reported the issue to the police.

6. In his evidence, Office Clark maintained that the refusal to restore on review was a reasonable one.

FINDINGS OF FACT

7. Based on the evidence before us the Tribunal made the following findings of fact:

8. The vehicle was previously registered as KS16 WRG. On 5.9.22 the Vehicle's V5 was provided to Border Force. The V5 recorded Mr. Aliaj as acquiring the vehicle on 13.1.21 and

that it had five former keepers. Whilst under registration KS16 WRG, and under the Appellant's ownership, the vehicle travelled from Dover to Calais and back on 9 – 11.7.22.

9. Border Force's records show that the Vehicle had not travelled internationally prior to the Appellant becoming its registered keeper. Whilst, as set out below, the Vehicle was in Albania on 8.1.21 there was no explanation as to how it came to be there. We find that the Vehicle had not travelled internationally from the UK, save for it having gone to Albania where it was present on 8.1.21, prior to the Appellant becoming its registered keeper.

10. Records from Mr. Aliaj's British Airways Executive Club transactions show that he booked a one-way flight to Tirana, Albania, flying on 22.12.20.

11. A photograph taken on Mr. Aliaj's telephone shows the Vehicle under its previous registration in Durres, Albania on 8.1.21. The photograph shows the vehicle from the front parked on a street and does not show it as advertised for sale.

12. A Le Shuttle record shows that on 7.2.21 Mr. Aliaj booked to travel with the Vehicle on the 08:18 train from Calais to Folkestone and did travel.

13. On 30.7.22 at around 19:10 the Vehicle was stopped at Cheriton Channel Tunnel outward bound tourist controls. The driver was Mr. Aliaj. Mr. Agron Salja was a passenger. Mr. Aliaj said that they were en route to Albania and Kosovo to spend a few days in each for a holiday and that they would return together. Mr. Aliaj confirmed that the Vehicle was his, saying that he had had it for about a year and a half. Mr. Aliaj produced the V5 document. Mr. Aliaj said that he had £21,000 in sterling cash with him to buy a summer house in Albania which he had withdrawn from the bank the previous day and was in a sealed bag from the bank with the receipt. Mr. Aliaj also said that he had about €700 with him. Mr. Salja said that he had about £4,000 sterling and €500 with him which his brother had withdrawn for the holiday and spending money.

14. Officer O'Hare seized £21,400 and €500 from Mr. Aliaj, and £3,800 and €370 from Mr. Salja.

15. UKBF Officers Curtin, O'Hare and Flaherty searched the Vehicle. They found a sophisticated adaptation under the centre console. Beneath the cup holders was a metal plate held in by six screws that was on a hinge mechanism. Wires ran from the transmission tunnel to the bottom of the driver's seat which allowed the buttons on the driver's door that controlled the seat mechanism, to activate the metal plate and hinge, allow a large part of the centre console to pop up, and thus reveal a lead lined space.

16. This was an expensive and sophisticated adaptation to the Vehicle. It was the most sophisticated adaptation that Officer Clark had seen in 32 years with Border Force, 25 years of which he had spent as a front-line officer. The adaptation was designed to move concealed items internationally, hence the lead lining which would prevent an x-ray or scanner from revealing its contents. A sophisticated adaptation of this nature can, in the Tribunal's view, only really have been designed for use for the concealed movement of items that the law takes very seriously indeed, items such as: controlled narcotics, firearms and the proceeds of criminal conduct.

17. There was no dispute, nor could there be, that the Vehicle had been adapted or altered for the purposes of concealing goods. The Vehicle was seized under s.88(c) and s.139(1) of The Customs & Excise Management Act 1979 ("CEMA").

18. The seizure of the Vehicle was not challenged and the Vehicle was therefore condemned as forfeit. Mr. Aliaj then made his trip, as planned.

19. By letter of 31.8.22, RM Legal Solicitors ("RM") on behalf of the Appellant requested restoration of the Vehicle, saying that Mr. Aliaj was not aware of the adaptation, it was not constructed by him or on his instruction, the Vehicle had five previous owners, no illegal products were found during the search of the vehicle, Mr. Aliaj had no previous convictions and he had never had any issues with the Police, HMRC or Border Force prior to the seizure.

20. On 5.10.22 Mr. Aliaj confirmed that he was not challenging the legality of the seizure.

21. On 1.12.22 Border Force notified Mr. Aliaj of its decision that the vehicle would not be restored.

22. On 22.12.22 Mr. Aliaj requested a review of the decision to refuse restoration, saying that he was unaware of the adaptation of the vehicle, he could prove the source of the seized money, and he had enclosed bank statements for his personal and company accounts and proof of purchasing a flat in Albania.

23. The proof of purchase of the flat in Albania was a guarantee document stating that Mr. Aliaj had guaranteed that he would appear by 5.8.22 to sign the final sales contract to buy an apartment in Durres for €23,000.

24. The bank statements produced by Mr. Aliaj showed that on 27.7.22 he had transferred £21,000 from the account of Adior Construction Ltd to his personal account, which was withdrawn on 29.7.22.

25. The bank statements also show Mr. Aliaj using his debit card abroad from 3.8.33, including in Serbia on 5.8.22.

26. On 30.1.23, at a hearing at Sevenoaks Magistrates' Court, the cash seized from Mr. Aliaj was detained for a period of a further 3 months. As at the date of Mr. Aliaj's witness statement (8.11.23) the seized cash had not been returned to him.

27. By letter of 2.2.23 the Border Force informed the Appellant that the conclusion of the review was that the Vehicle should not be restored. The Reviewing Officer, Officer Clark, noted in the letter that he had taken into account Border Force's policy on restoration of vehicles adapted to conceal goods under which such a vehicle would not normally be restored but in exceptional circumstances the vehicle may be restored for a fee to include the cost of removing the adaptation. Officer Clark said that he had looked at all the circumstances surrounding the seizure, but not the legality of the seizure itself. Officer Clark said that his starting point was that the seizure of the vehicle was legal, he did not think the seizure of the cash should be a contributing factor, the adaptation was very sophisticated, it was not credible for the Vehicle to have been sold after the installation of such a costly professional adaptation, the concealment could have been used for smuggling, the Appellant had recently changed the number plate, from records he had recently taken the vehicle abroad, and Officer Clark could find no records of the vehicle travelling abroad before the Appellant acquired it. Officer Clark therefore concluded that it was implausible that the Appellant was not aware of the adaptation. Officer Clark concluded that there was no reason to depart from the policy of non-restoration, the policy treated the Appellant no more harshly or leniently than anyone else and that there were no exceptional circumstances.

THE LAW

28. CEMA sets out the powers of the Border Force in relation to seizure and forfeiture.

29. Section 88(c) CEMA provides that a vehicle within the limits of a port whilst constructed, adapted, altered or fitted in any manner for the purpose of concealing goods" shall be liable to forfeiture.

30. Section 139(1) provides that "Any thing 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". The Vehicle at issue in this case was seized in reliance on this provision.

31. That seizure can be challenged by making a claim in the Magistrate's Court within one month of the date of the seizure (s.139(5) and (6) CEMA, together with Sch.3 para 3). If there is no challenge, "the thing in question shall be deemed to have been duly condemned as forfeited" (CEMA Sch.3, para 5). The Appellant did not challenge the seizure of the Vehicle in the Magistrates' Court.

32. Under s.152(b) CEMA, Border Force may restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under CEMA.

33. If the Border Force refuse to restore a vehicle, the owner has been deprived of his possession, and Article 1 to the First Protocol of the European Convention on Human Rights ("A1P1") is therefore engaged. In *Lindsay v C&E Commrs* [2002] EWCA Civ 267 ("*Lindsay*"), the Master of the Rolls, giving the leading judgment with which Judge, LJ. and Carnwarth, J. (as he then was) both agreed, said at [55]:

> "Broadly speaking, the aim of the commissioners' policy is the prevention of the evasion of excise duty that is imposed in accordance with European Community law. That is a legitimate aim under art 1 of the First Protocol to the convention. The issue is whether the policy is liable to result in the imposition of a penalty in the individual case that is disproportionate having regard to that legitimate aim."

34. He continued at [64]:

> "I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture."

35. If the Border Force refuse to restore a vehicle, s.14 Finance Act 1994 ("FA94") allows a person to request a review of that decision. If he is dissatisfied with the outcome of that review, he can appeal to the Tribunal under s.16 of the same.

34. Decisions, such as this one, which are made under s.152 CEMA, are decisions about an "ancillary matter", (s.16(8) FA94 read with Sch.5). The Tribunal's powers on ancillary matters are set out in s.16(4) FA94:

> "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 that 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."

35. The meaning and effect of that section was summarised by the Master of the Rolls in *Lindsay* at [68], when he said that if the Tribunal finds that the restoration decision to have been unreasonable, the Tribunal has:

> "the power to direct that the decision appealed against ceased to have effect and to require the [Border Force] to conduct a further review of the original decision in accordance with the directions of the tribunal."

36. In C*&E Commrs v Corbitt* [1980] 2 WLR 753 ("*Corbitt*"), Lord Lane said that a decision would not be "reasonable":

> "if it were shown [the decision maker] had acted in a way which no reasonable [decision maker] could have acted; if [he] had taken into account some irrelevant matter or had disregarded something to which [he] should have given weight."

39. In *John Dee* at [952(f)-(h)], the Court of Appeal outlined the principles in a similar fashion to *Corbitt,* but went on to acknowledge at [953]:

> "It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would *inevitably* have been the same, a tribunal can dismiss an appeal…I cannot equate a finding 'that it is most likely' with a finding of inevitability."

37. In *Gora v C&E Comms* [2003] EWCA Civ 525, Pill LJ accepted that the Tribunal could decide the facts and then go on to decide whether, in the light of those findings, the restoration decision made by the Officer was reasonable.

SUBMISSIONS

38. Mr. Aliaj's Grounds of Appeal were that:

(1) There were no illegal items found in the car;

(2) He had no previous issues or history with HMRC, Border Force or the Police;

(3) The Vehicle had 5 previous owners;

(4) He had no knowledge of any adaptation made to the Vehicle;

(5) He had not knowledge of the concealed compartment inside his car;

(6) The concealed compartment can only have been installed by one of the previous owners;

(7) He was willing to have the compartment removed or pay for the cost of removing the compartment; and

(8) Losing the Vehicle caused him financial hardship.

39. Mr. Tramboo made other points in his skeleton argument that were not pursued orally, but maintained the submission that the refusal to restore was disproportionate because Mr. Aliaj did not know of the adaptation. Mr. Tramboo provided other examples of Tribunal authorities on restoration, but these were provided to show different factual decisions, not principles of law, and we found them to be of little assistance.

40. The Respondents contended that:

(1) The Review Decision took account of the relevant Border Force policy which was that a vehicle adapted for the purposes of concealing goods would not normally be

restored, but in exceptional circumstances may be restored for a fee to include the cost of removing the adaptation;

(2) That policy was defensible;

(3) The adaptation was sophisticated and costly and the Vehicle was therefore unlikely to be sold;

(4) There was no record of the vehicle having travelled before coming into the Appellant's ownership;

(5) It was not necessary for the proper application of the general policy for the Appellant to have been aware of the adaptation but the Reviewing Officer had not been persuaded that the Appellant was ignorant of it;

(6) Whether or not the Appellant's account of the reason for his travel to Albania when the vehicle was seized is true does not change the fact of the adaptation;

(7) There was nothing exceptional in this case, since some hardship would always result from seizure and refusal to restore; and

(8) The Review Decision was reasonable.

41. Mr. Dean cross-examined Mr. Aliaj on the basis that he did know of the adaptation and that his evidence to the contrary was untrue.

DISCUSSION

42. The burden is on the Appellant to show that the Review Decision was unreasonable and to establish any facts that he relies on. The burden is therefore on the Appellant to show that he did not know of the adaptation. The Tribunal is entitled to make a finding of fact on this, issue taking into account Mr. Aliaj's evidence.

43. The Border Force policy that ordinarily a vehicle adapted for the purposes of concealing goods will not be restored, but that in exceptional circumstances such a vehicle may be restored for a fee, is entirely reasonable bearing in mind the threat posed by smuggling of illicit items in such vehicles. Forfeiture ensures that such vehicles cannot be used for that purpose in the future. The policy also rightly recognises that there will be exceptions. We can envisage one such exception being that the person from whom the vehicle was seized was entirely unaware of the adaptation. Whilst the absence of awareness of such an adaptation will not be determinative, in our view it could be a weighty factor for Border Force to consider on a restoration decision.

44. We find as a fact that the Appellant has not proven that he was unaware of the adaptation. He either commissioned it himself, knew of it when he purchased it, or became aware of it after he purchased it but before the vehicle was seized. We set out our reasons for these conclusions below:

(1) This was an expensive and sophisticated adaptation to the Vehicle. The adaptation was designed to move concealed items internationally, hence the lead lining. Anyone who commissioned or constructed such an adaptation is inherently unlikely to sell such a vehicle cheaply bearing in mind their outlay, and the purpose of their ownership of the vehicle, that being the international transport of items that are to be concealed from the authorities. Yet the Appellant claims that the vehicle was being sold at an attractive price. Further, were such a person to wish to sell such a vehicle at all to someone who did not know the adaptation, it is inherently likely that they would seek to remove, or at least remove any obvious signs of, the adaptation. That is because such a sophisticated adaptation of this size can only really have been

designed for use for the concealed movement of items that the law takes very seriously indeed, items such as: controlled narcotics, firearms and proceeds of criminal conduct. By leaving such an adaptation in the vehicle any seller would take the risk that the adaptation would be discovered and traced back to them, with potentially serious consequences for them. Where, as in this case, the adaptation involves the electrical system of the vehicle that also runs the risk that the adaptation could be discovered during routine maintenance work. The risk of discovery by the purchase is therefore greater. The Tribunal therefore starts from the point that it is inherently unlikely that a person in possession of a vehicle adapted as this Vehicle was, would not know of such an adaptation.

(2) Border Force's records show that the Vehicle had not travelled internationally from or to the UK by a route where it was recorded prior to the Appellant becoming its registered keeper. The adaptation was designed for international use. The Appellant used the Vehicle to travel internationally prior to the vehicle being seized. These point towards the Appellant knowing of the adaptation.

(3) The Appellant was ostensibly holidaying in Albania in December 2020, he did not say in his evidence that he was seeking to purchase a vehicle and was vague as to whether he had a vehicle at home at the time. We regard it as improbable that a UK registered right hand drive vehicle was being offered for sale on the street in Durres, Albania, and that the Appellant simply happened upon it, it took his fancy he decided to pay for it to be repaired, he then decided to drive it back to the UK, yet it had a sophisticated adaptation in it that he was unaware of. Save for the V5 document the Appellant did not produce any other document relating to the purchase. There was no record of payment or withdrawal of money to pay for the Vehicle, and no invoice for the extensive repairs said to have been carried out. The circumstances of the Appellant's acquisition of the Vehicle, bearing in mind the lack of documentary evidence that we would expect to be available, are also improbable.

(4) The Appellant also did not identify from whom he had purchased the Vehicle yet on his account he spoke to the person from whom he purchased the Vehicle both on the telephone and in person. There is no good reason, in the Tribunal's view, for this reticence by the Appellant. It suggests to us that the Appellant does not wish to identify the previous keeper because of their own knowledge of the adaptation. Had the Vehicle simply been purchased at arm's length, and without knowledge of the adaptation, the Appellant would have no such concern.

(5) The way in which the adaptation works, by use of the buttons to adjust the driver's seat, makes it highly unlikely that if the Appellant did not commission the adaptation, or was not aware of it at the time of purchase, he was unaware of it prior to the seizure. The Appellant had driven the vehicle since early 2021. Even accidental manipulation of the seat button would have been likely to cause the hinge mechanism to release.

45. Having found that the Appellant has not proved that he did not know of the adaptation, we uphold the refusal to restore the Vehicle.

46. Some hardship is inevitable when a vehicle is seized and not restored. The Tribunal finds that there is nothing exceptional about the hardship to the Appellant.

47. The Tribunal also finds that there is nothing disproportionate in refusing to restore the Vehicle by reference to the Border Force policy, and the fact that we have found that the Appellant knew of the adaptation yet continued to use the vehicle for international travel.

48. The appeal is therefore dismissed and the refusal to restore the Vehicle is upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

49. 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.

HOWARD WATKINSON
TRIBUNAL JUDGE

Release date: 09th May 2024