Restoration of vehicle - Refusal to restore - Reasonableness - Proportionality - Commissioners required to conduct further review s.16 FA 1994
LONDON TRIBUNAL CENTRE E00200

PHILIP J LETT Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: MR PAUL HEIM CMG (Chairman)
MRS R J MACKWORTH
MR M M SILBERT FRICS

Sitting in public in London on 19 June 2001

Mr David McHugh of Counsel, instructed by Stephen Welfare, Royds Treadwell, for the Appellant

Ms Z Taylor of Counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

DECISION

1. Mr Philip Lett appeals against the decision of the Commissioners contained in a letter of 10 November 2000 upholding, after a review, a decision not to restore a blue Rolls Royce, registration number VKT 930T, to him following the seizure of that vehicle by the Commissioners.

2. At the hearing of this appeal the Appellant was represented by Mr D McHugh of counsel and the Commissioners by Ms Z Taylor also of counsel.

3. The underlying facts of this appeal are not in dispute. On 21 August 2000 the vehicle in question was returning from a visit abroad, driven by the Appellant's father Mr Anthony Lett, accompanied by Mr S A Madden and Mr G S Elliot. The Appellant was not present. The vehicle was stopped by officers of H.M. Customs & Excise at the UK Control Zone in Coquelles, France. In reply to questions from these officers the occupants told them that they were returning from Calais where they had had a day out and bought some beer. In the boot of the vehicle however there was 30 kilos of hand-rolling tobacco, 7800 cigarettes, 250 grams of pipe tobacco, 180 litres of beer, 12 litres of sparkling wine, 1 litre of spirit, and 25 litres of diesel fuel. The total revenue value of these goods was noted by the officers as being £4,133. They also noted that 44 Euro Tunnel vehicle travel passes were found.

4. Each of the occupants of the car was interviewed. It was indicated that Mr Anthony Lett was the owner. He was asked "how long have you owned it?" and the answer was given "About 15 years". Notes of the interviews with Mr Madden and Mr Elliot were produced. They are not disputed. It is unnecessary to repeat

them, save that Mr Madden said that he owned 12 or 13 sleeves of cigarettes, and that he estimated that he had spent £500 on tobacco and £100 on beer. He did not know what excise duty was as he is illiterate.

5. Mr Elliot said that he owned 2000 of the cigarettes and 1½ boxes of tobacco.

6. The officers were not satisfied that the tobacco was for the occupants own use, taking into account among other things the fact that it amounted to thirty times the guide levels contained in the Excise Goods (Personal Reliefs) Order 1992. They therefore seized the goods and the vehicle. Mr Lett objected stating that he was concerned that the car was his pride and joy. The documentation concerning the seizure was apparently issued to him, and the appeal procedure explained.

7. From the documents put before the Tribunal it appears that Mr Lett received a document headed "Seizure Information" which purported to explain the position about the seizure of the goods, and a notice entitled "Seizure of Vehicle" stating that the vehicle have been seized under Section 139 of the Customs and Excise Management Act 1979. The notice contains the following statements:

"The private vehicle will be restored to the owner on payment of £... /TBA
"The private vehicle will be released free of charge to the owner.
"The hire vehicle will be released to a hire company.
"The vehicle restoration subject to enquiry."

The first three of these statements appeared to have been crossed out.

8. The document also states "further information regarding restoration is detailed overleaf; and;

"CUSTOMS AND EXCISE WILL RETAIN THE VEHICLE FOR 30 DAYS FROM THE DATE OF THIS NOTICE. AT THE END OF THE 30 DAY PERIOD THE VEHICLE WILL BE DISPOSED OF OR DESTROYED UNLESS COMMUNICATION IS RECEIVED FROM THE OWNER".

9. Mr Lett acknowledged receipt of this Form.

10. He further received Customs and Excise notice headed "Warning" stating:

"The attached schedule of goods have been seized under Section 139 of the Customs and Excise Management Act 1979 together with the vehicle index number VKT 930T under section 141(1)(a) of the aforementioned Act. This is without prejudice to any further action the Commissioners of Customs and Excise may take against you in connection with this importation.

You should also be aware that any further attempt by you to smuggle excise goods into the UK may render you liable to prosecution under the provisions of section 170 of the Customs and Excise Management Act 1979. A person found guilty of an offence under this section is liable to an unlimited fine and/or up to seven years imprisonment".

Mr Lett acknowledged receipt of this form. He was also given a form specifying the condition of the vehicle.

11. Correspondence then ensued between the parties.

12. On 22 August 2000 Mr Anthony Lett wrote to the Commissioners. His letter contained the following statements:

"On Monday 21/8/00 I was returning from a day trip out, when my car my goods and my colleagues' goods were seized.

In the absence of any proper documentation concerning the seizure will you please tell me how I can appeal against your official's Act and how to have my vehicle my goods and my colleagues' goods released".

13. On 4 September he put in writing his request that the seized vehicle be restored.

14. On 11 September Mr Marwood, Senior officer of HM Customs and Excise, replied stating that he had considered all the factors in this case and recommended that the vehicle, on this occasion, be not offered for restoration for the following reasons:

"The vehicle was used to carry the large quantity of excise goods detailed above, with the total revenue involved exceeding £4,133. In line with the department's policy your vehicle was seized as it was used to transport these goods as explained below:

The department's efforts are directed towards deterring and detecting fraud, failure to pay excise duty that is due, irregularities and to encouraging compliance with procedures established to control movements of excise goods. The Customs and Excise Management Act 1979 - CEMA section 141(1) provides that:

(a) any ship, aircraft, vehicle, animal, container (including any article of passenger's baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and
(b) any other thing mixed, packed or found with the thing so liable, shall also be liable to forfeiture.

There are no exceptional circumstances in this case which would justify departure from this policy."

15. On 26 September 2000 Mr Anthony Lett's solicitors asked for an appeal of that decision to an independent review officer, stating :

"It would appear that Mr Lett may not have explained his position fully to Customs officers. The vehicle that you seized, although driven by him and registered in his name is not his. The seizure therefore may not be lawful and the vehicle should be returned to Mr Phillip Lett who is the true owner. His home address is 64, Parkfield Road, Rainham, Kent.

If you do not accept this please institute proceedings for confiscation and serve them on our client.

Our client has never been in any difficulties with HMCE before and has offered to pay a compounded penalty in respect of the duty in this case. His treatment is unduly harsh given all the circumstances of this case."

16. On 31 August 2000 Mr A Mahoney, on behalf of Miss Bennett wrote to Mr Anthony Lett thanking him for his letter of 24 August 2000, and stating that it was not clear whether he wished to lodge a formal appeal against seizure under Schedule 3 of the Customs and Excise Management Act 1979 he said:

"A claim against forfeiture must be received by us within one month of the date of seizure. If a valid claim is received, the Commissioners are then obliged to institute proceedings for the condemnation of the seized goods. This will involve Court proceedings.

However, if you simply request the restoration of the seized goods and vehicle, your request will be sent to the senior officer of the team which made the seizure and a decision will be made whether or not to restore the goods and vehicle to you. The senior officer will then confirm his decision to you in writing. Please could you clarify in writing which course of action you wish to adopt".

It appears that Mr Anthony Lett intended, by annotating this letter with the words "I wish to adopt", and underlining a part of the passage relating to the request for restoration of the seized goods and vehicle, to choose that option.

17. On 3 October 2000 Miss S Bennett an officer of HM Customs and Excise replied stating that the matter would be reviewed but that the time to lodge a claim against forfeiture lapsed on 21 September as "for a claim to be valid under Schedule 3 of the Customs and Excise Management Act 1979 it must be received in writing within one calendar month of the date of seizure."

18. On 10 October 2000 Mr Anthony Lett's solicitors wrote to the Commissioners that they did not accept that their client was out of time to lodge proceedings against forfeiture stating "He wrote to you within the time limit but you did not treat his letter as being a claim against forfeiture."

19. The Appellant wrote to Mr Marwood on 4 October 2000 confirming that he, Anthony Lett, was the legal owner of the car having owned it for approximately 13 years. It had only just come to his attention that his vehicle had been seized hence his delay in coming forward. The letter contained the following passages:

"I have allowed Mr A F Lett private use of the vehicle for sometime but I was not aware he was using it for trips abroad. Furthermore I was totally unaware that he was using it for illegal activities.

Given I am the owner I see absolutely no justification for you to retain it any longer. Indeed the car has been booked for a number of functions, the income from which has been lost. Further functions are planned and as a consequence it is imperative that the vehicle is returned without further ado".

20. On 10 November 2000 the review officer Mr P A Devlin replied in detail to the Appellant.

21. The letter summarised the statements made by Mr Madden and Mr Elliot when the vehicle was stopped and stated that the Officer did not accept the

goods were for own use and seized them and the car. He noted that Mr Anthony Lett had objected to this course of action and that he was concerned because the car was his pride and joy. He referred them to Mr Anthony Lett's letters of 27 August and 4 September asking for restoration of the car, the refusal of 11 September 2000 to restore it and the letter of 26 September from the Appellant's solicitors stating that the car belonged to the Appellant.

22. Mr Devlin then referred to the legislation which he considered to be applicable, namely the Channel Tunnel (Alcoholic Liquor and Tobacco Products) Order 2000, with particular reference to section 9 of that Order, the 1992 Excise Duties (Personal Reliefs) Order, with particular reference to section 5(1), the Customs and Excise Management Act 1979, sections 141(1) and 152 and he referred also to the system of reviews and appeals established by the Finance Act 1994. His letter went on:

"Restoration policies

The Commissioners' policy regarding private vehicles seized as a result of their use in the improper importation of excise goods is that they will not be restored. That policy applied at the time of the seizure of the car. A car may either be restored to a third party where it has been stolen and the matter was reported at the time.

Consideration

It is for me to determine whether or not the contested decision is one which a reasonable body of Commissioners could not have reached. Before considering the issue of restoration I have examined whether or not the car was appropriately seized.

The seizure was consequent to the seizure of the goods it was transporting. Those goods were stated to be for own use but the Officer was not satisfied that this was the case. I have looked at that decision and I note the following:

When the travellers were stopped it was claimed that they had been to Calais for a day out and to buy beer. This is not borne out. They had in reality essentially been to Adinkerke in Belgium to buy tobacco and cigarettes. That part of their goods was not initially mentioned to the Officer and it had been removed from its packaging and put in bags. It was said that this made it easier to get into the car but I doubt if this would be necessary for a vehicle the size of a Silver Shadow. There were indications in the car that it may have travelled up to 44 times. Answers given to the Officers indicate to me that it was in any case not the first time that excise goods had been imported by this party.

Mr Madden in particular appears to have been well aware of the own use requirements and to have been importing tobacco goods for others. I am reinforced in this view by the fact that others had previously imported for him.

I concur with the Officer's conclusion that at least some of the goods were not for own use and liable to be seized and by virtue of section 141(1)(b) of the 1979 Act quoted above any other excise goods found with them were liable to forfeiture. The vehicle was equally liable by virtue of section 141(1)(a) of the same Act.

It remains for me to consider whether or not it should be restored. You say it was yours. That contention is not confirmed by any documentation and Mr A F Lett is

the registered keeper. He is shown as having been such since 30 March 1985. That is consistent with his claim of the car having been his `pride and joy' and the claim of ownership for fifteen years. However, he has not required a review and you have.

I assume that you are related although you have not given me any details. I can only deduce from the case papers that either you gave an indefinite loan of a car that was your or that your claim of ownership is not correct. On the basis that the former is accurate, I consider that the Commissioners policy in such a case is clear.

It is that in allowing one's vehicle to be used by others, one takes a risk and that risk includes it being lost through improper use. Policy is that private vehicles seized due to their having been used to improperly import excise goods are not to be restored in circumstances such as those claimed to be the case by you. Your redress is against the persons who occasioned the loss and Customs view that as a private matter which does not affect the application of policy. Had the vehicle been stolen, that may have been a different matter but that is not so in this case. The decision given on 11 September 2000 is in-line with policy and I am satisfied that it treats the former owner (be it you or the other Mr Lett) equitably in that it is no more harsh or lenient than would be given to any other former owner in such circumstances.

Conclusion

For the reasons which I have set out above I exercise my option to confirm the refusal to offer restoration of the seized car".

23. On 17 January 2001 the Appellants solicitors wrote to Mr Devlin sending in a copy of the judgment of District Judge Moorhouse given in the High Court of Justice, Family Division, dated 28 October 1998 confirming that the motor car had been gifted to the Appellant and his brother by Mr Anthony Lett prior to September 1995. The letter continued:

"It is evident from your letter of 10 November 2000 refusing restoration that your decision was heavily influenced, if not entirely based upon the misunderstanding by you that our client's claim to ownership was bogus. … The retention of this seized vehicle, and thereafter its destruction by HM Customs and Excise is wholly disproportionate to the value of unpaid duty on the imported items. Our third party client faces wholly unfair and disproportionate punishment as a result of another's misdemeanour. In the circumstances, and in the light of the evidence, you are invited to consent to the appeal and to restore this vehicle to our client. Incidentally, we would respectfully remind HM Customs and Excise that whilst the vehicle is in its custody, and pending the outcome of an appeal to the VAT and Duties Tribunal, HM Customs and Excise are our client's bailees and accordingly responsible for the safe keeping of the vehicle."

24. Mr Devlin replied on 18 January 2001 stating that he had not made the assumption that the Appellant's claim of ownership of the vehicle was "bogus". He took note of the documentation which has been supplied but said that the decision which he had given in his letter of 10 November remained extant.

25. Asked on 23 January 2001 the grounds upon which he relied on for refusing the return of the vehicle Mr Devlin replied on 25 January that the Commissioners' policy set out on page 4 of his letter of 10 November 2000 and the last two paragraphs of page 5 of the same letter were quite clear.

26. The Appellant has submitted an undated letter from a Mr Richard Hollands stating that he had been in the Rolls Royce and Bentley business for 30 years, that he knew the car in question having sold it to its present owner and that to replace it he would estimate the value to be in the region of £14,000 to £16,000.

27. There is also a letter of 13 January 1996 addressed to the Legal Aid Board in the following terms:

"I have been asked to confirm that in September 1986 my father Mr A F Lett, gave to me, as a gift, a Rolls Royce Shadow II, registration VKT 930T. I also understand that you require the Registration Certificate as proof of ownership. However, my father retains the use of the vehicle and consequently I have agreed, for the time being, to leave the registration of the vehicle in his name. …

P A Lett

28. In a further letter of 12 June 2001 the Commissioners replied to the Appellant's solicitors reiterating that it was the policy of the Commissioners not to restore vehicles in the circumstances of the present case and that they would not be in a position to offer restoration on any condition.

29. The Tribunal allowed a witness statement of Mr Anthony Lett to be handed in. The statement confirms that he gave the vehicle to his son Philip Lett but states that as he himself had greater garage and parking space the vehicle was kept as a matter of convenience at his own house. He confirmed that he had the authority of Mr Philip Lett to use the vehicle as he wished, but this did not extend to any unlawful purpose. The statement refers to the circumstances of seizure, that it was usual for him to travel to France on four or five occasions over a period of six months in the motor car. The visit in question was made for the specific purpose of going to Calais to stock up on alcohol and tobacco products for personal use. The statement explains the 44 Euro Tunnel vehicle travel passes found in the vehicle by saying that these passes were collected by himself and his colleagues and from any persons they knew to facilitate quick and easy loading. Vehicles were loaded by reference to colour passes. He kept as many of these travel passes as he could acquire so as to have the appropriate colour available and also because they made good toys for grandchildren. The statement continues:

"At no time was it ever suggested to me either orally or in writing that I might be able to obtain the restoration of the vehicle upon conditions set by it in Customs and Excise, for example the payment of money. I was simply told that the vehicle was liable to seizure and I was quoted some legal provision and when I objected I was told that I could apply in writing for restoration. I have seen the decision of the review officer, this is the letter dated 10 November 2000 which I refer to above, and note that there is no reference to my son being extended the opportunity to recover his vehicle on meeting any conditions, or that this possibility was ever even considered by the review officer in deciding not to allow restoration …"

30. The Appellant admits, and it is common ground, that Mr Anthony Lett, the Appellant's father, represented himself as the owner of the vehicle in an attempt to have the vehicle restored by the Commissioners. He had apparently been the legal owner of the vehicle until he gave it to the Appellant in 1986. It is further admitted that the vehicle is usually kept at the United Kingdom home of Mr Anthony Lett, who has the Appellant's authority to use the car when he wishes.

31. The Appellant further accepts that the Respondents acted lawfully in that they did have discretion by virtue of section 141(1)(a) of the Customs and Excise Management Act to forfeit the vehicle which had been used for the carriage of goods liable to forfeiture under section 139 of that Act. The Appellant similarly accepts that the Commissioners have the discretion to forfeit the vehicle by section 14(1)(a) regardless of the fact that the Appellant was not himself present or had knowledge of the unlawful use to which his vehicle had been put.

32. The Appellant's main argument, forcefully put by Mr McHugh, is that the Commissioners not only had the discretion under section 141(1)(a) to forfeit the vehicle, but also a discretion under section 152(b) to "restore, subject to any such conditions (if any) as they think proper, anything forfeited or seized ...".

33. While Mr Anthony Lett admits that he was told that he could apply in writing for the restoration of the vehicle, he says that he was not informed that there might be conditions attached to such restoration or indeed that there was a policy not to restore such vehicles; he did in fact apply for restoration in writing on 22 August 2000 and 4 September 2000; the only grounds for the refusal to restore in Mr Marwood's letter were that the vehicle had been used to carry a large quantity of goods and that there were no exceptional circumstances which justified a departure from the Commissioners' policy.

34. The Appellant accepts that the Commissioners are entitled to have a policy for forfeiture but says that it is unlawful for them to fetter their discretion to restore the vehicle subject to conditions simply by reference to a policy that vehicles were not restored. The Commissioners might have been unaware at the date of Mr Marwood's refusal to restore of the exceptional circumstances which the Appellant alleges, namely that the true owner of the vehicle was neither involved or aware of the unlawful purpose to which his vehicle had been put. Although Mr Anthony Lett had authority to use the vehicle, which would have included crossing the Channel, he had no authority to use the vehicle for any unlawful purpose. The circumstances were thus analogous to the use of a stolen vehicle in that neither the Appellant nor the owner of the stolen vehicle would consent to the unlawful use of the vehicle. Mr Devlin in his decision on review of 10 November 2000 appeared to accept that the Appellant was indeed the legal owner of the vehicle.

35. The Appellant submits that the vehicle has a value of £15,000 and that the loss of it is a disproportionate penalty for the attempted evasion of duty amounting to some £4,133, given the fact that the goods themselves were also forfeited. Moreover, the refusal to restore was unreasonable because there was no evidence that the Appellant was or had ever been involved in attempting to evade the payment of duty.

36. The Appellant had, in view of the value he attached to the vehicle, asked what sum would be required to secure the release of it but the Commissioners had replied on 12 June 2001 stating that it was the policy of the Commissioners "not to restore vehicles in the circumstances in the present case and I regret to inform you that they would not be in a position to offer restoration on any condition". By these words the Commissioners showed that they had a policy that a vehicle forfeited would not be restored in any circumstances. This amounted to a refusal to exercise a discretion which the Commissioners had clearly been given by statute. Fettering their discretion by blindly applying a policy with regard to the individual circumstances of an application was unlawful if in spite of their inviting an application to restore in their letters of 21 August 2000 and 11 September 2000 they were in fact never going to consider the application to restore.

37. An applicant had a legitimate expectation that his application would be properly considered. An inflexible policy made this impossible.

38. The Appellant relied also on article 1 of the 1st Protocol of the European Convention on Human Rights, in view of the fact that the decision under appeal was made after the date that the Human Rights Act 1998 had come into force. The Appellant considered that the Commissioners had a right to deprive an individual of his vehicle, but that power could only be exercised on a basis of proportionality and a fair balance between the demands of the general interest of the community and the protection of the Appellant's fundamental rights.

39. It was unreasonable to confirm the refusal to restore the motor car when it was known that the legal owner was not present or involved in the attempt to evade payment of duty, and unreasonable to consider restoration despite the fact that payment was offered.

40. The Appellant relied on four authorities.

41. The first is Merritt v Secretary of State for the Environment (2000) 3 PLR 125, where it was held that an inspector who simply applied a policy as a mandatory requirement without scope for discretion on his past had erred in law.

42. The second was Customs and Excise Commissioners v Air Canada [1991] 2 WLR 345 and in particular to the passage at page 362f where, in relation to the draconian nature of the powers granted by sections 139 and 141 of the Customs and Excise Management Act, and the limits thereon, Purchas LJ said:

"... the mitigating provisions included in section 152 and paragraph 16 of Schedule 3, indicate clearly that Parliament intended to trust to the Commissioners the exercise of these matters of discretion".

43. Simply to apply a policy without due consideration of the particular facts of the individual case deprived the citizen of the very safeguard that Parliament intended. The doctrine of proportionality was similarly considered to be applicable. In the case of R v Customs and Excise Commissioners ex parte Mortimer [1999] 1 WLR 17 was a case where on facts not dissimilar a vehicle was released on condition of payment.

44. The Appellant considers that the Commissioners have failed to use the "Wednesbury" criteria and that thus the decision reached is not a reasonable one.

45. The Appellant refers to the provisions of article 1 of the 1st Protocol of the Human Rights Convention, now part of domestic law, which states:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The proceeding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions on penalties."

46. The Appellant relies on the case of Matos e Silva, Lda v Portugal [1997] 24 EHRR 573 that the exceptions to the rule expressing the entitlement to the peaceful of possessions were to be construed in the light of that principle. It was therefore to be asked whether the interference with the Appellant's property corresponded with the objective sought or whether it was disproportionate, and did not amount to an intolerable interference with the rights of the legal owner.

47. The Appellant submits that if the Commissioners only method of contesting the refusal to restore was an internal appeal procedure which was doomed to failure because of the inflexible application of a previously undisclosed policy, there was never a fair means of having this case considered.

48. It is unnecessary for the Commissioners' objects for them to apply their general policy in such a way as to deprive an innocent third party of the possibility of recovering his vehicle, if necessary subject to conditions.

49. In the case of Air Canada the European Court of Human Rights made reference to the fact that domestic courts were able to hold, on judicial review, that the Commissioners' exercise of their discretion was unlawful on the grounds of illegality, irrationality, or procedural impropriety. In the present case, there was a failure to observe the basic rules of natural justice and the failure to act with fairness towards the Appellant, as well as the failure to observe procedural rules expressly laid down.

50. The Appellant says that the deprivation of a vehicle valued at about £15,000 plus the cost of the goods upon which duty of £4,133 was payable, was disproportionate, particularly when the main loser was an individual not involved. Any remedy which he took against Mr Anthony Lett in accordance with the suggestion made by the Commissioners would not lead to the return of the vehicle. Insofar as the forfeiture of vehicles was intended to be a punishment, it was unrelated to the Appellant, there being no evidence that he had ever tried or would ever tried to evade customs duties.

51. The Commissioners on the other hand rely on the terms of section 16(4) of the Finance Act 1994 which, for decisions which are deemed to be decisions as to an "ancillary matter" confines the Tribunal's jurisdiction to the question of whether it is satisfied that the Commissioners could not reasonably have arrived at the decision in question. They agree with the Appellant that "reasonableness" is defined in the "Wednesbury" criteria as considered in the appeal of Bowd v Customs and Excise Commissioners (1995) V&DR 212. The Commissioners say that their decision can only be found to be unreasonable where the Appellant can show that it is irrational, illegal or procedurally unfair. Moreover, the Commissioners say that their decision can only be judged in the light of the information available to them at the time the decision was made, and that any documents submitted after that decision, in particular those relating to the fact that the Appellant is the owner of the vehicle although the vehicle is not registered in his name, which were not before the Commissioners at the time of the decision, cannot be considered in assessing whether that decision was reasonable.

52. The Commissioners say that their decision to seize the goods and the vehicle was both correct and reasonable, and that their decision not to restore the vehicle was also reasonable. The Commissioners' decision to adopt the policy for the exercise of their discretionary powers to restore anything forfeited or seized was proper, and ensured both equality and certainty. Their policy was that private vehicles seized because they had been used improperly to import excise goods

were not to be restored. Their decision not to restore the vehicle had taken fully into account the representations put forward by the Appellant, as was shown by the evidence of the reviewing officer and his letter of refusal. The Commissioners had balanced representations made by the Appellant against the overall objectives of the legislation to prevent the improper importation of excise goods.

53. On the question of ownership the Commissioners say that they made their decision on the basis that the vehicle was owned by the Appellant at the material time but was subject to an indefinite loan to Mr Anthony Lett. By making an indefinite loan the owner ran the risk that the vehicle might be lost to improper use. The issue of ownership was not a sufficiently exceptional reason for departing from the Commissioners' policy.

54. The Commissioners submit that proportionality is not a concept expressly applied in English law, although in determining whether a decision was within the "Wednesbury" criteria of reasonableness, proportionality could be considered. Proportionality was not simply a monetary matter. The Commissioners had given due weight to all the matters advanced and their conclusion that there were no exceptional circumstances to justify departure from their policy was reasonable.

55. What is in issue is the Commissioners refusal to restore the vehicle, confirmed by the reviewing officer.

56. Evidence was given to the Tribunal by the reviewing officer, Mr Paul Devlin. He said that his role was to review the refusal to restore the vehicle. The review of the decision not to restore was requested by the Appellant. He considered whether it was proper to restore it to anybody. It was not his role to review the seizure of the vehicle and the goods but he looked to see if anything was wrong and to see that the starting point was all right. He found no reason to consider otherwise. He gave his understanding of the policy in his letter of 10 November 2000, which expressed what he thought about what had happened. He related what had happened to the policy and then took his decision. He considered that there was a proper seizure. There was confusion as to ownership so he was careful to consider that. The policy covered the case where the vehicle was accompanied by the owner and where it was not accompanied by the owner.

57. Mr Devlin was asked whether the policy which he applied was in the public domain and he replied that he was advised that the policy was posted on the Internet. The Commissioners spent a substantial amount on publicity. The policy was available on demand. Leaflets were issued to the Ferry and Tunnel operators. There had been discussion of the policy in Parliament and Press Releases had been issued. The policy had come into effect in July 2000. He had asked for the justification of the policy. It had previously been the policy to make provision for restoration on the first time of seizure in return for payment. This policy was not working. Bootlegging had not diminished. The Commissioners therefore escalated the policy to non-restoration. It was a large problem. One in four cigarettes in the United Kingdom had been smuggled. There were billions of pounds of lost revenue. He said that the exception to the policy of non-restoration was where the vehicle had been stolen. He had asked further about the exceptions and they were that third party could not have known what was to be done with the vehicle, but where the vehicle had been lent it was not to be restored. The reason that had been given was "that the lender must beware of the borrower". The original decision had been sent to Mr Anthony Lett because he had said that it was his car. In correspondence it had become clear that the Appellant was the owner. It appeared that Mr Anthony Lett had the use of it, on loan or otherwise, on a long term basis and the policy was that if he abused that trust the vehicle would not

be restored. He had seen no reason why the policy should not be applied. He had seen the Appellant's letter of 4 October 2000 stating that he was not aware that Mr Anthony Lett was using the vehicle for trips abroad and that he was using it for illegal activities but said that the Appellant had allowed Mr Anthony Lett private use of the vehicle for some time. He had taken the chances involved in doing so.

58. Mr Devlin said that in the year 2001 700 reviews on seizure and refusals to restore had been held. Third parties were involved in one in five of these cases. It was thus not an unusual position. He said that he discarded the fact stated in the letter of 4 October 2000 that "the car had been booked for a number of functions, the income from which has been lost". It was not material under the policy. It seemed to be contradictory as the Appellant was not sure where the vehicle was and had lent it for a considerable period of time. It appeared to be a private vehicle not a business vehicle. He was not enjoined to give weight to a person's perceived loss. He did take note of it but it was not a matter to which he could attribute particular weight. He did discover the value of the vehicle, not because it was a factor but to see if it required special storage and treatment. The vehicle appraisal unit had given a much lower trade in value for the vehicle, without knowing its condition. The policy did not give any weight to the ratio between the value of the vehicle and the goods. He had raised the issue with the policymakers but the stance was that if some ratio was used to decide restitution one would get one's car back if one were rich. The policy was for private vehicles. There was no distinction between expensive and less expensive vehicles. One drove what one could afford. He had not at the time of his review seen the report from Mr Hollands, on the value of the vehicle. He assumed the vehicle was valuable. It had no effect on his decision. He had refused to restore vehicles of greater value. He had seen no facts raised to lead him to decide to depart from normal policy and he maintained that view. When he took his decision on review he thought that the Appellant was probably the legal owner as he was the only one who had challenged the decision not to restore the vehicle. Mr Anthony Lett had not applied for restitution. The Appellant had. The vehicle in issue had been seized three weeks after the introduction of the new policy. He had no copy of the policy with him. He did not know where the posters giving information about the policy were. He had not seen one. He had seen a list of them. He did not have the Press release. The policy was that if it was decided to forfeit goods in a private vehicle that vehicle would be seized. He was not aware of exceptions to that policy. Seizure was automatic. If a vehicle was seized the driver would be told that he could apply for restitution. He would not be told that in no circumstances would the vehicle be restored and that it would be a waste of time to apply for them to be restored. He had himself decided to restore vehicles in the past, where they had been stolen, and where he thought that they had not properly been seized.

59. The witness repeated that the policy had two facets. The first was that any vehicle carrying contraband would automatically be seized. If an application for restitution was made, unless it was improperly seized, or reported as stolen before the event there would be no restitution. That policy applied whether the owner was present or not. If it had been on loan the owner would not get it back. The policy was of non-restitution, subject to the two exceptions stated. The exceptions did not include the value, ignorance of the use of the vehicle or presence when the vehicle was used. While the Appellant had said in his letter of 4 October 2000 that he was "totally unaware" of the use to which the vehicle would be put, he had nevertheless loaned to Mr Philip Lett. The distinction was whether the vehicle was taken totally without permission. He had asked if there were other exceptions and had been told that it was not the case. He was asked whether the policy meant that innocent third parties were to be punished and was told that the policy was that a loaned vehicle would not be restored. Lenders

should beware of borrowers. He was not aware of the Appellant's state of mind. Vehicles seized were stored under contract and then disposed of by auction. Seizure acted as a penalty, and as a deterrent. He had an option, which he exercised by refusing restoration. However, unless a vehicle was stolen it would not be restored to its owner. He was enjoined to look at the circumstances and to make an appropriate decision. He considered anything that was put to him.

60. It was pointed out to the witness that the "seizure of vehicle" form issued to Mr A F Lett on 21 August 2000 contained four options, being that the vehicle would be restored to the owner on payment of an unspecified sum, that a private vehicle would be released free of charge to the owner, that a hired vehicle would be released to the hire company and the vehicle would be restored subject to enquiry, the first three options having been crossed out. He said that it was an old form. It had been used previously. He did not know whether the new policy was working. In re-examination the witness said that if the policy allowed restoration of the vehicle he would have had it restored. The policy was that loaned vehicles should not be restored.

61. It is common ground that the Commissioners acted lawfully to exercise their discretion under section 141(1)(a) of the Customs and Excise Management Act 1979 to forfeit the vehicle in question, it having been used for the carriage of goods liable to forfeiture under section 139 of the same Act.

62. It is further common ground that the Commissioners have the discretion to forfeit the vehicle by the terms of section 141(1)(a) regardless of whether the owner was present or had knowledge of the unlawful use to which his vehicle had been put. However, the Commissioners not only had a discretion to forfeit the vehicle but also a discretion under section 152(b) which reads as follows:

"Section 152

The Commissioners may, as they see fit -

(a) stay, sist or compound any proceedings for an offence or for the condemnation of anything as being forfeited under the Customs and Excise Management Act,; or
(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under those Acts; or
(c) after judgment mitigate or remit any pecuniary penalty imposed under these Acts ..."

63. That is the provision in issue in this appeal. However it must be considered against the background of the liability to forfeiture and seizure set out in s.139 at seg. of the Act.

Section 139 provides:
"139 Provisions as to detention, seizure and condemnation of goods, etc

(1) 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.

.

(5) Subject to subsections (3) and (4) above and to Schedule 3 to this Act, any thing seized or detained under the Customs and Excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct.

(6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the Customs and Excise Acts.

Section 141 provides:

"... where any thing has become liable to forfeiture under the Customs and Excise Acts ... any ... vehicle ... which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture ... shall also be liable to forfeiture. "Section 139 of the 1979 Act provides that "any thing liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer ...".

The provisions relating to forfeiture are set out in Schedule 3 to the Act, given effect by section 139(6). By paragraph 1 of Schedule 3 the Commissioners are required to give notice of the seizure of any thing liable to forfeiture and the grounds therefore to any person who at the time of seizure was to their knowledge the owner or one of the owners thereof:

By Schedule 3, paragraph 6;

"Where notice of claim in respect of any thing is duly given in accordance with [paragraphs 3 and 4 above] the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited."

By Schedule 3, paragraph 7

Where any thing is in accordance with either of paragraphs 5 or 6 above condemned or deemed to have been condemned as forfeited, then, without prejudice to any delivery of or sale of the thing by the Commissioners under paragraph 16 ... , the forfeiture shall have effect as from the date when the liability to forfeiture arose".

By Schedule 3, paragraph 16

Where any thing has been seized as liable to forfeiture the Commissioners may at any time if they see fit and notwithstanding that the thing has not yet been condemned, or is not yet deemed to have been condemned as forfeited -

(a) deliver it up to any claimant upon his paying to the Commissioners such sum as they think proper, being a sum not exceeding that which in their opinion represents the value of the thing, including any duty or tax chargeable thereon which has not been paid ...

64. The appeal comes before the Tribunal under its jurisdiction with relation to "ancillary matters falling within paragraph 2(1)(r) of Schedule 5 to the Finance Act 1994.

65. Accordingly it is an appeal against a review held by the Commissioners and in accordance with section 16(4) of the Finance Act 1994 the Tribunal is confined to the question of whether it is satisfied that the Commissioners could not reasonably have arrived at the decision in question.

66. The first question for the Tribunal to decide is precisely what the decision under appeal encompasses. It is described as a decision on review, as the application of a policy, a policy which had within a matter of weeks before the events in issue changed to affect the Appellant's position, a policy which the Tribunal has not seen although it was described in evidence by the reviewing officer and a policy which is allegedly available on the Internet and in posters, none of which were presently available.

67. The Appellant is entitled to know the compass of the decision which affects him. He has, as the Tribunal has, only the decision of the reviewing officer and the documents which preceded it. The documents which were issued in relation to the seizure of the vehicle did not refer to this policy, and indeed the form used to give notice of seizure gives the impression that the restrictions which the Commissioners now enunciate did not exist; certainly they were not mentioned

68. The decision under appeal is given in Mr Devlin's letter of 10 November 2000. He went to some trouble to set out the background to the decision, the nature of the decision and the reasons for reaching that decision. It is relevant that before dealing with restoration policies he states clearly in his letter:

"Finally, the Finance Act 1994 establishes the statutory two-tier system of formal reviews and subsequent appeals. I am empowered on behalf of the Commissioners to confirm, vary or withdraw a contested decision".

The Tribunal accepts that statement, and although clearly Mr Devlin's evidence was that the policy was a restrictive one, and was to be applied with very few exceptions, he nevertheless had the power to confirm, vary or withdraw it.

69. The Tribunal thinks that it could not be otherwise. First, as far as an appellant is concerned, it is difficult to draw a distinction between a decision of policy and an individual decision. A decision may be made for a number of reasons, one of which may be a position of policy which the Commissioners have adopted. It is nevertheless an individual decision, no less subject to contest for being made under a policy. It is of course accepted that the Commissioners can have a policy and it may be wise for them to do so, but they can not by that policy or its application affect an Appellant's statutory right of appeal. The Commissioners have not sought in this appeal to do so, but it is nevertheless important to state that conclusion. Second, the Appellant has a right to have the issue tried both under the provisions for appeals, and indeed under the Human Rights Act, which in application of section 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms precisely provides for a right to a fair trial. Insofar as the Appellant relies on the right to property protected by Article 1 of Protocol 1 to that Convention is clearly asserting a right to which the provisions for fair trial apply.

70. Third, the Commissioners cannot by an unpublished policy affect the rights of the Appellant. They can certainly take decisions affecting him by applying a policy but an individual can hardly be expected to have his rights to seek restoration of his property affected by a policy which neither he nor anyone else have been able to contest.

71. It is perhaps not irrelevant to quote from the speech of the Earl of Chatham in the case of John Wilkes in 1770 the following passage:

"We all know what the constitution is. We all know that the first principle of it is that the subject shall not be governed by the arbitrium of any one man or body of men less than the whole legislature, but by certain laws to which he has virtually given his consent which are open to him to examine and are not beyond his ability to understand."

72. The Commissioners can certainly have their policy, and apply it subject to the usual safeguards, but by their incorporation of it in an individual decision, they render it open to challenge as part of that decision in accordance with the Appellant's right of appeal.

73. Fourth, the scope of the decision under review includes, as Mr Devlin very fairly put it, the matters preceding his decision, including the seizure. An improper seizure could not be cured by a review, and indeed it is not suggested that this would be so.

74. It is accepted that the Commissioners were within their rights to forfeit the vehicle, although on 10 October 2000 the Appellant's solicitors did write to the Commissioners saying that they did not accept that their client was out of time to lodge an appeal against forfeiture. However, Mr Anthony Lett's annotations on the Commissioners' letter of 31 August 2000 do indicate that he did not wish to make a claim against forfeiture.

75. The main issue in this appeal is whether the decision taken by Mr Devlin was reasonable within the terms of section 16(4) of the Finance Act 1994 which reads:

"(4) In relation to any decision as to an ancillary matter, or any decision under 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 further review of the original decision; and
(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, 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."

76. On the reasonableness of decisions by the Commissioners the Tribunal was referred to the appeal of Bowd v Commissioners of Customs and Excise (1995) V&DR 212. The Tribunal finds relevant, and applies the following passages from that decision:

"57. In our opinion the word "reasonably" is to be construed in the wider sense used by Lord Greene MR in Associated Provincial Picturehouses Ltd v Wednesbury Corporation [1948] 1 KB 223, where he said this at page 229:

"… a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v Poole Corporation [1926] CH. 66 gave the example of the red haired teacher, dismissed because she had red hair. That's unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another".

58. The approach to be adopted by a tribunal in reviewing the exercise of a discretion conferred on the Commissioners (albeit a different discretion) was put in this way by Lord Lane in Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd [1980] 2 WLR 653 at page 663:

"It could only properly [review the discretion] if it were shown that the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight".

59. That approach was adopted by the Court of Appeal in John Dee Ltd v Customs and Excise Commissioners [1995] STC 941 where it was pointed out that the Tribunal may have to consider whether the Commissioners had erred on a point of law.

60. In relation to the decision now under appeal we ask ourselves these questions:

1. Did the Commissioners reach a decision which no reasonable Commissioners could have reached?

2. Did the Commissioners take into account all relevant considerations in this case?

3. Did the Commissioners leave out of account all irrelevant considerations?

61. In all of these questions it is necessary that the Commissioners should have acted on the correct understanding of the law. A decision which rests on an error of law is ex hypothesi not reasonable".

77. It is therefore necessary for the Tribunal to consider the three questions set out in paragraph 60 from the passage of the decision quoted here, though not necessarily in that order. In summary the Appellant says that the Commissioners have erred in law in applying to him blindly a policy of non-restoration which admits of exceptions only where a vehicle has been improperly seized or where it has been stolen from its owner, that the Commissioners have not properly considered the doctrine of proportionality, either in relation to the loss to an innocent owner or in relation to the proportionality required before there can be an interference with the right of property protected by Article 1 of Protocol 1 of the European Convention on Human Rights.

78. With regard to the policy itself, the Tribunal does not deduce from the evidence of Mr Devlin that the policy is absolute, so that it has the effect of

removing from the Appellant his right to a genuine review. If the Commissioners were seeking by the formulation and application of a policy to negate the right to review, they would without doubt have erred on a point of law, in relation to their own powers. However, Mr Devlin, examined at length on this point, maintained that he did have a discretion in spite of the Commissioners' rigorous policy.

79. The matter seems to the Tribunal to be simple enough in this sense, that if the Commissioners have a policy which requires the officer to close his mind to the arguments of an appellant, unless they relate to unlawful seizure or theft of the vehicle, they have obliged the officer to take an unreasonable decision because relevant considerations would not have been taken into account. The question is whether the Commissioners have taken all relevant considerations into account. If they have, their policy, though rigorous, allows of a reasonable application. If they have not they have failed on two of the questions which the Tribunal asks itself first that they have not taken into account all relevant considerations and secondly they have a policy which does not allow their officers to reach a reasonable decision because it is precisely so rigorous that a reasonable consideration is excluded.

80. The Tribunal is mindful of the fact that in the case of Customs and Excise Commissioners v Air Canada [1991] 2 WLR 345 Purchas LJ, considering the draconian nature of the powers granted to the Commissioners in respect of seizure and forfeiture said that a safeguard existed in the mitigating provisions included in section 152 and paragraph 16 of Schedule 3. It follows that the discretionary power to restore to an extent balances the other very considerable powers in the hands of the Commissioners, and their duty is to exercise that discretion.

81. One thing they did not take into consideration was the question of proportionality. The Commissioners submit that proportionality is not a concept expressly applied in English law. The Tribunal takes an opposite view. Proportionality is a concept clearly deriving from the terms of Article 1 of Protocol 1 to the Human Rights Convention, and is expressed as a principle to be applied by the judgment of the European Court of Human Rights in Air Canada v United Kingdom [1995] 20 EHRR 150.

82. Mr Devlin says that he did not consider the value of the car in relation to the value of the goods or to the revenue which they would have borne. In any event he considered the value of the car to be much less than the £15,000 later put on it in the certificate issued by Mr Hollands. He clearly gave no weight to the fact that it was, at least in the Appellant's eyes, and in the eyes of Mr Anthony Lett, a very special car, but he did say that he had refused to restore more expensive cars. He further said that he was specifically enjoined not to consider the value of the vehicle, and implied that there was a sufficient consideration of proportionality in the fact that all vehicles valuable or less valuable were equally subject to the non-restoration policy. That is an argument that goes to equal treatment, but not to porportionality.

83. If the Commissioners' actions proceed from a presumption that certain quantities of goods are commercial and not for own use, they must necessarily be considering the amounts of duty involved and would be acting disproportionately in inflicting a large loss on the owner of the vehicle where there was only a small loss to the revenue. The Commissioners rely on the deterrent effect of refusing to restore vehicles and must consider whether refusals to restore, if they appear to be unreasonable, have such an effect.

84. The Tribunal refers to the judgment of the European Court of Human Rights in the case of Air Canada v United Kingdom, and to paragraph (e) of the summary of the decision which reads:

"Taking into account the large quantity of cannabis found, its street value and the value of the aircraft seized, the requirement to pay £50,000 is not disproportionate to the aim pursued, namely the prevention of the importation of prohibited drugs into the United Kingdom."

85. It appears clear therefore, that the European Court of Human Rights saw a proportional connection between the extent of the transgression, and the loss inflicted in consequence.

86. At page 158 of the Report, the European Court considering the case of R v Secretary of State for Home Department, ex parte Brind (1991) 1 AC 696 noted that the House of Lords had held that lack of proportionality was not normally treated as a separate ground of review under English administrative law and referred to the speech of Lord Ackner which, "while considering that an administrative decision which suffered from a total lack of proportionality would be unreasonable in the Wednesbury sense, indicated that until Parliament incorporated the Convention into domestic law, there was no basis at present upon which the proportionality doctrine applied by the European Court of Human Rights could be followed by the courts of the United Kingdom." There now has been incorporation of the Convention into the United Kingdom law, so that the condition required by Lord Ackner has been satisfied.

87. The Tribunal is therefore obliged to consider the terms of Article 1 of Protocol 1, and in doing so to take into account what the European Court of Human Rights stated at paragraph 30 in page 172 of the Report that the three rules which make up Article 1 are not distinct in the sense of being unconnected: the second and third rules are concerned with enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule. The Court went onto say at paragraph 36 that "an interference [with the right to property] must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: "there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued". This does however seem to the Tribunal to reinforce the need to consider proportionality between the aim sought to be achieved and the interference with the right.

88. The Appellant says that the interference with his rights to ownership of the car is the more flagrant as he was in no way involved in the illicit importation sought, and that there is no evidence that he had engaged or would engage in such activities or that any deterrent to him was required. He was in the same position as if his car had been stolen from him as he was totally unaware of the use to which it was to be put.

89. The Tribunal does not accept these submissions at their face value. The Appellant clearly allowed Mr Anthony Lett unlimited enjoyment of the use of the car, tantamount to ownership. Mr Anthony Lett used this possibility to the full. There is no evidence that the Appellant incorporated into his long term loan of the car any conditions. There was nothing to stop Mr Anthony Lett from travelling to France in the vehicle and importing as much in the way of tobacco products and

alcohol as he required for his own use. The Commissioners say that a lender of a car must beware of the borrower. This principle could be otherwise expressed by saying that a lender took a risk when he lent his vehicle. If that principle applies, the loan which the Appellant made to Mr Anthony Lett was as wide a transfer of use as could be made without the technical transfer of ownership. Of course the Appellant was not involved in the illicit transaction, but cannot have been unaware that Mr Anthony Lett used the vehicle on a number of occasions for going to France. The Tribunal does not therefore accept that the Appellant was in a position analogous to someone whose vehicle had been stolen. He can say that it was implicit in the long term loan that the vehicle would not be used for illicit transactions. But it must be within the minds of those lending their vehicles that the vehicles may be involved in something which they would have preferred to avoid, be it traffic violations, accidents or other equally undesirable difficulties which might have meant that an owner's right to the vehicle would be limited. It is open to the Appellant to say that had he known that the importation of commercial amounts of alcohol and tobacco products would have led to seizure of his vehicle and its likely non-restoration, that he would have imposed stricter conditions on the loan which he made. The tightening up of the Commissioners' policy on non-restoration may be better known in some circles than in others. However, the power to seize and to restore, implicit in which is the power not to restore, is created by statute so that the risk of seizure and non-restoration has existed since the passing of the Customs and Excise Management Act 1979, and no doubt in Excise law for many years before that. It seems reasonable that the Commissioners, in deterring bootlegging, should take into account the fact that seizure and non-restoration are weapons of deterrence which the statute places at their disposal, and that these would be reduced in effect if the simple fact of using a borrowed vehicle meant that it will be either not seized or at least restored to the owner.

90. The Tribunal was referred to the case of Regina v Customs and Excise Commissioners ex patre Mortimer [1999] 1 WLR 17 where a seized vehicle was apparently restored, but the Tribunal finds no considerable assistance from that case which was heard before the change in the Commissioners' policy.

91. The Tribunal considers that in exercising his discretion under the review procedure Mr Devlin rightly concluded that the goods and the vehicle were correctly seized. In considering whether the vehicle should be restored to the Appellant he considers first the Commissioners' policy, secondly whether there were grounds for not applying it, and thirdly the representations made to him. He considered the magnitude of the problem caused by bootlegging, and the objects of the policy to combat it. He took into account the views expressed to him by those responsible for the policy that it admitted only a very limited exceptions. He took the view that exceptional reasons were necessary to depart from the policy and that such reasons did not exist. He was not influenced by the fact that the Appellant was apparently the owner of the vehicle having made it available on long term loan to Mr Anthony Lett, and that the Appellant had been in no way involved in the operations which led to seizure. He considered that the principle that the lender should beware of the borrower should apply. He did not consider the value of the vehicle in relation to the value of the goods, and said he was in fact specifically enjoined not to consider the value of the vehicle. He made no mention in his decision of the fact that there was a right to property which, while it could be affected in the conditions set out in Article 1 of Protocol 1, but subject to the governing principle of a fair balance between the individual's right and the general interest of the community. He considered more the policy and the need to find exceptional circumstances on which to base his discretion to restore the vehicle, that is to say to depart from the policy, rather than the need to find a reasonable relationship of proportionality between the interference with property

and the aim pursued. The Tribunal considers that applying the policy as rigorously as it was explained to Mr Devlin by those responsible for it would amount to a very considerable reduction of the discretion of those responsible for reviewing these decisions. By such a reduction an individual's right, and it is a right, and a legitimate expectation as it is a right expressed by law, to have his arguments fairly considered, would be prejudiced. There would be in effect the closed mind to which Mr McHugh referred. The Tribunal was referred to the appeal of Krzysztof Dreczenik of 10 May 2001 where the reasonableness of the Commissioners' policy and their decision thereunder was examined, and both affirmed. The Tribunal nevertheless refers to the following passage at paragraph 15 of that decision:

"Looked at overall, we are satisfied that the Commissioners have not acted perversely or capriciously and they have taken all relevant factors into account. We are satisfied that the Commissioners have not allowed their established policy (summarised at paragraph 10 above) to prevent them from going through a proper decision making process. The Commissioners, in common with any other branch of the administration, are entitled to maintain policies. This course of action can only be impugned if the administration fetters the exercise of its own discretion by refusing to listen to an application for its discretion to be exercised in a manner that does not conform with these strict terms of the policy. See British Oxygen Co Ltd v Minister of Technology (1970) 3 All ER 165. Here we are satisfied that the officers responsible for the decision were prepared to listen to any relevant explanation. …"

92. The Tribunal finds this passage valuable although it would add to the second sentence quoted that what the Commissioners must do is not only go through a proper decision making process, but reach a decision which is not unreasonable. The Tribunal in the appeal of Dreczenik noted that the result achieved was in its view proportionate but observed that the Commissioners had not exercised the power which they might have had to seize the totality of the conveyances involved.

93. The Tribunal does not intend to substitute its own decision for that of the Commissioners. It makes no comments on the merits or otherwise of the actions of those involved in the use of the vehicle. The Tribunal is uninfluenced by the fact that the vehicle in question was said to be a rare model. It is influenced by the fact that the Commissioners did not, and this was affirmed in their statement of case, fully consider the issue of proportionality between their decision and the interference with the rights of property of the Appellant. The Tribunal makes no pronouncement on the Commissioners' policy on restoration, or rather non-restoration. It is not the policy which is under appeal. What is under appeal is the decision taken by the Commissioners in the person of the reviewing officer and whether that decision was unreasonable. Of course if the policy is so restrictive that it does not allow relevant factors to be taken into account, it is more likely to lead to an unreasonable decision, but what the Tribunal is considering is the decision itself. This did not sufficiently take into account the question of proportionality as set out in the passage quoted from the judgment of the European Court in the case of Air Canada.

94. Accordingly under the Tribunal's powers under section 16(4)(b) of the Finance Act 1994 the Tribunal requires the Commissioners to conduct a further review of the original decision so that the issue of proportionality can be properly considered in such a review.

PAUL HEIM CMG
CHAIRMAN

RELEASED:

LON/00/8052-LETT.HEIM