EXCISE DUTIES - importation of excise goods purchased in Belgium and France without payment of UK duty - whether goods were for personal use - seizure by Commissioners of car used for importation- car belonging to importer's son - son ignorant of importer's purpose - refusal to restore - whether reasonable nature of tribunal's jurisdiction - Commissioners' policy

MANCHESTER TRIBUNAL CENTRE

JOHN CLARKE appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

Tribunal: Mr C P Bishopp (Chairman)

Sitting in public in Newcastle on 21 November 2001 and in Manchester on 4 April 2002.

Richard Barlow of counsel instructed by Hawkins Ross, Solicitors, for the Appellant

James Puzey of counsel instructed by the Solicitor for the Customs and Excise for the Respondents

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DECISION

Background

1. On Thursday 4 January 2001 John William Clarke (to whom I shall generally refer as "JWC") was stopped by Customs officers at the control zone by the entrance to the Channel tunnel at Coquelles, near Calais. He was found to have with him 10 kg of hand-rolling tobacco, 10,000 cigarettes, 50 cigarillos and 1.4 litres of spirits. His travelling companion, Anthony Wardrup, had 5,000 cigarettes and 18 kg of hand-rolling tobacco. JWC and Mr Wardrup failed to satisfy the Customs officers that the goods, which they had purchased in France and Belgium and which they were seeking to import into the United Kingdom without payment of UK excise duty, were for their own use and the officers proceeded to seize the goods and the car in which they were travelling. JWC had told the officers that the car was his.
2. On the following day John Clarke (to whom I shall generally refer as "JC"), who is the appellant and is also JWC's son, wrote to Customs in the following terms:

"Could I please request the return of the above vehicle as per telephone conversation, which was taken in France on the 4/1/01 by Customs officers. The driver of the vehicle was John William Clarke my father and the vehicle was lent by myself with no knowledge of its destination."

3. Although he did not say so in terms when writing that letter, and did not then produce any evidence of it, JC was in fact claiming ownership of the car. He later produced such evidence and the Commissioners have conceded that he was the owner of the car which, indeed, I am satisfied that he was. JC's request that the car be restored to him was refused by letter dated 25 January 2001. JC wrote again in response to that letter and his further letter was treated as a request for review of the decision not to restore the car to him. The review was carried out by Mrs Susan Pemberton and it is against her decision, upholding the refusal to restore and conveyed by letter of 25 March 2001, that JC now appeals.
4. He was represented by Richard Barlow of counsel. Mr Barlow called the appellant and his father to give evidence and at the beginning of the second day he provided me with a skeleton argument. The respondents were represented by James Puzey of counsel who called the reviewing officer, Susan Pemberton, and also provided me with a skeleton argument.
5. In essence, the appellant's case was that the goods had been bought for personal use by JWC and Mr Wardrup so that the seizure was wrongful; but even if that were not so the vehicle ought to be have been restored to him, since he was entirely innocent of any wrongdoing. Mr Barlow argued that, should I come to that conclusion on the evidence I heard, I should substitute my own view for that taken by Mrs Pemberton and judge her decision against my own finding. In any event, he contended, the Commissioners' policy of seizing and not restoring the cars of owners not present at the time of illicit importation of excise goods was irrational.

Evidence

6. The appellant's evidence was that at the material time he lived at Bedale, North Yorkshire, in a flat above a restaurant owned by his father and in which he worked as the chef. His father had employment elsewhere, and was therefore able to work in the restaurant only occasionally but his mother worked there regularly, although part-time. The appellant worked six full days per week.
7. In April 2000 he had bought the car which was ultimately seized, an Audi A4, at auction. He had paid £8,920.50 for it, most of which he had borrowed by means of a personal loan. He was still paying off the loan.
8. The car was kept at a garage at his parents' home, about ten minutes' walk away from the restaurant. That was done because there was no garage accommodation or secure parking at the restaurant, and JC's keeping the car in his parents' garage resulted in a saving on his insurance premium.
9. JC's parents, who did not have a car of their own, were insured to drive his car and he allowed them to borrow it when they needed to do so. He said that his mother borrowed it quite frequently while his father - who had the use of a van provided by his employers - would do so rather less frequently. Since his parents knew when he was working, and therefore when he would not be able to use the car himself, they often did not ask before borrowing the car although they would usually do so if they were in any doubt.
10. In the latter part of 2000, his parents had encountered some matrimonial difficulties and from time to time his father would move into the flat above

the restaurant. He had in fact been living at the flat for most, if not all, of the time for a few weeks before the car was seized, on 4 January 2001. Despite that, however, JC said that their paths did not always cross, because of his own long hours of work, and he could not recall whether his father had asked if he might borrow the car on 4 January 2001. If he had asked, the request would have been made casually and JC was quite sure that his father had not said that he intended to take the car to the continent.

11. JC said that he would almost always use his car on his day off, but only infrequently on other days of the week, usually in the interval between the lunchtime and evening sessions. He recalled that on the occasion of his father's trip to France, when the car was seized, he had been working and had had no use of his car in contemplation. He was, he said, quite unconcerned that his parents borrowed his car and paid little or no heed to the frequency with which they used it or the amount of use they made of it. He thought his father probably used it about once a week but he was by no means sure and he had little knowledge of the journeys his father undertook in it. In particular, he said he was quite unaware that his father had ever travelled to the continent in it.
12. His father had, of course, to confess to JC that his car had been seized at Coquelles, and he also confessed that he had made two previous trips. In his letter seeking review of the refusal to restore his car JC denied any knowledge, before the car was seized, of his father's trips to the continent. He produced evidence that the car was his, protested his own innocence in the matter and said "I can only think that you have kept the car because you think it belongs to my father and not me". He went on to ask for the decision that the car was not to be restored to be reconsidered "because I'm finding it very difficult at this present time to get to work without my vehicle." That assertion, as he conceded at the hearing, was untrue but he explained that his mother had written the letter for him and had introduced the embellishment to his story designed (they thought) to improve his chances of recovering his car, and he had put his name to it.
13. He told me that he did not smoke at all and that his mother had given up about ten years ago, but that at the material time his father smoked, although he could not be specific about the amount he smoked. He did not consider him a heavy smoker. He would not have approved if his father had smoked in his car, and his father had always respected his wishes in that regard when he borrowed it.
14. The appellant's father, JWC, confirmed what his son had said about the garaging of the car, and the reason for it. The only discrepancy between his evidence and his son's on that issue was that he placed the walking time between their respective homes at 15 to 20 minutes. I consider that discrepancy to be inconsequential. Rather more hard to understand was JWC's inability to recall whether he attended the auction at which his son bought the car; JC had a clear recollection that he had done so. I find it difficult to believe that a father would not recall such an event and I regard his professed inability to do so as symptomatic of his general evasiveness, and of his reluctance to commit himself, as he gave his evidence.
15. JWC said that on the day when he was stopped he had left home at about 8 am, had picked up Mr Wardrup, an old friend, at Scotch Corner and had then driven to Dover. They had travelled by ferry to Calais and then by road to Belgium, to buy cigarettes and tobacco. He said that his purchases had been for his own consumption and that at the time he was smoking about sixty cigarettes a day, some manufactured and some produced from hand-rolling tobacco, and he expected his purchases to last him about a year. If he was right that he was smoking sixty a day, and also right (as

he said in evidence, after a good deal of hesitation which he blamed on his having taken up rolling his own cigarettes only shortly before the seizure) that he could produce only forty cigarettes from one packet of hand-rolling tobacco, his purchases would last him about ten months. However, his estimation that he could produce forty cigarettes out of one packet of hand-rolling tobacco was transparently a guess, and I was left with the clear impression not that JWC was genuinely unable to say because he had never considered the matter, but that he was not an habitual smoker of hand-rolling tobacco. He said in evidence that, about four months before the hearing, he had given up smoking altogether.

16. JWC agreed that he had made two previous trips within the last few months, one alone and one with his wife. On the first trip he had bought some wine and spirits but only a very modest quantity of cigarettes. His principal purpose in travelling was to find out at what prices goods could be bought, and from where, but he had not found any cheap tobacco outlets. It was for that reason he had bought very little. On the second trip, when he had been accompanied by his wife (he was rather vague and indecisive about the order in which these trips had taken place, but eventually settled on the sequence I have set out), they had merely visited Calais and he had not bought any tobacco, still not knowing where he could go to do so. The second trip had been undertaken three or four weeks before his third trip. He was able to buy tobacco on his third trip because Mr Wardrup knew the way to Adinkerke, where they had obtained it.
17. JWC said that he did not borrow his son's car very often, although he had used it for each of his three trips to the continent. Generally, he thought, he did ask his son for permission to use the car and he thought he probably had on this occasion since he would need the car all day, although he was sure that if he did ask for permission he did not tell his son where he was going, and he said too that he had not told his son of his two previous trips. He did not think his son would notice that his car had covered a considerable distance but he did think he would be unwilling to allow him to take the car out of the country.
18. JWC's explanation of his having claimed ownership of the car, when interviewed at Coquelles, was that it was "the easy way out" though it was not at all clear out of what it was the easy way. He also said that he thought his claiming ownership of the car would simplify matters somewhat, since there would be no cause for Customs to involve his son, and would also serve to conceal from his son the fact that he had taken the car to the continent. That assertion is rather more understandable.
19. He accepted that there was no indication within the car, when it was stopped by the Customs officers at Coquelles, that either he or Mr Wardrup had smoked in the car. That was because, he said, neither of them had done so. His son was a non-smoker and would certainly not have approved of their smoking in the car.
20. There was an obvious inconsistency between his claim to be a heavy smoker and his not smoking in what he had led Customs to believe was his own car. He did say that latterly he had had a bronchial problem and had given up smoking temporarily (which also explained his having no cigarettes or tobacco on his person) but this contention was difficult to reconcile with his having owned the car, as he claimed, for nine months (a period which, I observe, matches exactly the period for which his son had owned the car), while there were no signs that anyone had ever smoked in the car. I was not persuaded that he was a heavy smoker, and was not entirely convinced that he had been a smoker at all at the material time.
21. Some of JWC's evidence was also inconsistent with what he was recorded to have said in his interview at Coquelles. Those inconsistencies related

mainly to the income he claimed to have; at the tribunal he mentioned his income from the restaurant, but was silent on that topic in Coquelles.

22. He had, however, signed the interview notes, immediately below the words "I have read the above account and agree it is an accurate record." At the hearing, he at first denied that he had signed the notes; later, when shown his signature, he conceded it was his but said he had only skimmed through the notes. I regard JWC's evasiveness on this issue as indicative of his untruthfulness. I am also satisfied that he did read the notes, and quite carefully, since he took the trouble to mention that he owned some building society shares, and have the officer add a reference to that fact (though, strangely, he did not correct the omission of his income from the restaurant).
23. The Commissioners' policy in relation to the restoration of cars seized in circumstances of this kind is described in the statement of Gerry Dolan, which it was agreed I should read; Mr Dolan was not called as a witness. He describes the background to the policy, including the enormous sums of duty (£3.8 billion in lost tobacco duty alone in the year 2000, for example) which it is believed are evaded by the illicit importation of excise goods, and the increasingly severe measures the Commissioners have adopted in order to combat such importations. The policy in force at the relevant time, and applied by Mrs Pemberton in her review, is described in Mr Dolan's statement as follows:-

    "The current policy introduced on 13 July 2000 means that vehicles will be seized and not restored on the first attempt they are detected being used in smuggling. The message for fraudsters now using their vehicles to commit excise fraud is very simple, use it and you will lose it: there will be no second chances. The policy applies to all types of motor cars and light commercial vehicles, except those which are rented, such as vans, pick ups, transits and similar vehicles. Vehicles which belong to owners who are not present at the time of detection will also not have their vehicles restored, unless they can demonstrate that the decision not to offer the vehicle for restoration is unreasonable."

24. The rationale behind the policy is also described in Mr Dolan's statement. He says that "The whole issue of vehicle involvement in excise fraud was revisited and reviewed to ensure that the policy in force was tough enough to act as an adequate deterrent to current smuggling trends" and "It is not our intention to penalise the genuinely honest traveller or to discourage travellers from shopping in other EU countries when making purchases for their own use, but to deter those who are intent on regularly smuggling tobacco and alcohol into the UK."
25. Mrs Pemberton's evidence was that she had reviewed the decision not to restore the car by applying the Commissioners' policy that where vehicles were seized in circumstances of this kind they were to be restored only in very exceptional cases. The examples she gave were of a vehicle which had been reported stolen before it had been used for the illicit importation of excise goods, and of a vehicle especially adapted for a handicapped person. She also mentioned a case in which she had herself decided to restore a vehicle, where it was needed to convey an ill child to and from hospital. She had carried out just over a hundred reviews, and had restored three vehicles: the one she had already mentioned, another which was adapted for a handicapped person and a third where she concluded that the goods had been imported for personal consumption and that the car should not have been seized.
26. In reaching her decision her practice (which she had adopted in this case) was to review the notebook of the officer or officers who had been

involved in the seizure, any information provided by the person seeking restoration or which had otherwise come to the Commissioners' notice, and the correspondence relating to the decision refusing to restore the vehicle. She would first determine whether the original seizure was a proper one. If she was satisfied that it was, she then considered whether there were any exceptional circumstances, within the confines of the policy, which justified restoration and, if there were not, she would uphold the decision to refuse restoration.

27. Her conclusions in this case were set out in her letter to JC of 25 March 2001, the letter against which this appeal has been brought. Mrs Pemberton indicated that she was satisfied that the goods had not been brought in for JWC's own use because of the large quantities, the inconsistencies in his claimed rates of consumption (she did not accept that only 40 cigarettes could be produced from one pouch of tobacco and estimated that he would need to chain smoke for twenty hours every day in order to consume as much tobacco as he claimed) and because of the absence of any indication that he did in fact smoke when he was stopped at Coquelles. She then referred to the Commissioners' policy and said "it is in any case the stance of the Commissioners that in allowing another person to use one's vehicle, the lender takes a risk. That risk includes its being lost through misuse. In such cases, it is the view of Customs that the lender's redress lies against the borrower."
28. Although these factors were not mentioned in her letter, Mrs Pemberton said in her evidence that she had also taken into account her belief that JC probably knew what his father was doing, because of the length of his absence, because they were at the time living at the same address and because, she thought, he would be likely to have seen what his father had brought back in the car on the previous occasions on which he had travelled to the continent. JWC said in his evidence that he would have kept the tobacco he purchased on this occasion at his wife's home and, of course, he denied having bought any on his earlier trips.
29. Although Mrs Pemberton accepted that she applied the Commissioners' policy which, in the circumstances of this case, effectively precluded her from agreeing to restoration, she nevertheless maintained that the review process was properly conducted and that she did look for factors which might have allowed her to restore the vehicle. She said that, in addition to the instances she had described when she had overturned decisions not to restore, she would also do so if she considered that the officers concerned had been over-zealous, such as in the case of a first offender with quantities only a little above the guidelines.
30. The section of her letter setting out her conclusions and the reasons for them begins with the sentence "It is for me to determine whether or not the contested decision is one which a reasonable body of Commissioners could not have reached." At the conclusion of that section appears the sentence "I do not consider that the refusal to restore is a decision which a reasonable body of Commissioners could not have reached." Mrs Pemberton could not account for the appearance of those two sentences in her letter since she was aware (she said) that she was not so limited in carrying out her review, and was entitled to reach her own conclusion and overturn the original decision if she disagreed with it, and not merely if she found it unreasonable. She insisted that she had in fact carried out her review in the proper fashion.

Findings of Fact

31. I am conscious of the possibility that the appellant and his father have concocted a story with a view to recovering the former's car, and I have

considered all the evidence I heard from them with that possibility very much in mind. In addition, and for reasons which will appear, I have borne in mind the ease of protesting one's innocence and the comparative difficulty for the Commissioners of judging the truth of any such protestation.

32. I found JWC to be an unsatisfactory witness and I regard his evidence as unreliable. I have commented previously about his evasiveness. I was left in no doubt that he was not importing the tobacco for his own use, or at least entirely for his own use, and that his statements both to the officers at Coquelles and to me that he was doing so were untruthful. He plainly had no real idea of the number of cigarettes which could be made from a pouch of hand-rolling tobacco - not to a precise number, but in the most general terms - nor how long 10 kg of such tobacco would last even a heavy smoker. Even if he could be excused not knowing how many cigarettes could be made from one pouch, he would know how many pouches per week he smoked. His evidence that he had only recently taken up rolling his own cigarettes was singularly unconvincing. It seems to me quite implausible that a middle-aged man, a confirmed and heavy smoker (as he maintained he was) of manufactured cigarettes, would take to rolling his own when he had the opportunity of buying manufactured cigarettes at about half the price he was accustomed to paying. I share Mrs Pemberton's doubts about his true tobacco consumption.
33. I also have little doubt that he had bought excise goods, including tobacco, on the two previous trips to which he admitted; I find it incredible that a heavy smoker, whether of manufactured cigarettes or of hand-rolling tobacco, would not take advantage of the lower prices at which such goods can be bought in France, on the ferry or at the tunnel shops. It is common knowledge that, although those prices are not as low as they are in Belgium, they are conspicuously lower than those prevailing in the UK, and that finding shops which sell such goods is easy.
34. Since I reject his contention that he had bought all the goods for his own use, and he did not suggest, either at Coquelles or in his evidence, that he intended to distribute the tobacco and cigarettes among his friends and family at cost, the only remaining inference is that he intended to re-sell them for profit. I heard no evidence about Mr Wardrup's purchases but it does not seem unreasonable to infer that he had obtained them for the same purpose. It appears that his position was not relevant to Mrs Pemberton's conclusions, since she barely mentioned him in her letter.
35. Despite what I have said about his evidence generally, I am nevertheless satisfied that JWC concealed all three of his trips from his son and that his son was entirely ignorant of the fact that his vehicle had been used for the illicit importation of excise goods. The evidence I heard from JWC that his son would not have approved of the trips and, had he been asked in advance, would have refused permission for his car to be used for the purpose, had the ring of truth as did JC's evidence that his father had not mentioned the purpose of his borrowing the car, if indeed he had asked to borrow it at all. I consider JWC to be devious, and not beyond deceiving his son. I had the impression that, even before the seizure, father and son did not have a close relationship.
36. I regarded JC, in contrast to his father, as a truthful witness. His claim, in his letter, that he needed his car to travel to work counts against him but I am satisfied that this was a foolish overstatement made by a man understandably distressed about the loss of his car when, as he perceived the matter, he had done nothing to warrant it; the remainder of his correspondence suggests that he was quite bewildered about the loss. His lie is regrettable but I have concluded it is not sufficient to cast serious doubt upon my overall impression that JC told me the truth. I am willing

to accept, despite my misgivings about JWC's claimed consumption, that JWC was a smoker and that his son did not attempt to mislead me on that score. Mr Barlow described JC as simple, meaning lacking guile rather than unintelligent. That seems to me to be a fair description. I accept in particular JC's assertion that he had no idea that his father was using his car to travel across the Channel.

37. I was, however, for some time concerned about the trip which (so JWC said) he had made with his wife. Though I heard no evidence from her, I thought it unlikely that Mrs Clarke would have concealed such a trip from her son if it was as JWC described it, an innocent day out. She might have been persuaded by JWC to conceal the trip if it was indeed a shopping expedition for the purpose of importing excise goods but I think the more likely explanation is that she did not in fact go with JWC as he said. I cannot imagine that a man wishing to patch up an ailing marriage would think it a good idea to take his wife from North Yorkshire to France, in winter, on a day trip to look around Calais (as JWC maintained they did). I was left with the distinct impression that JWC was understating the extent of his matrimonial difficulties and the conclusion to which I have come is that Mrs Clarke's accompanying JWC was an invention, designed to lend a veneer of innocence to his journey. I think it probable that Mrs Clarke too was entirely ignorant of the trips and the purchases.
38. In summary, I am satisfied that the goods in the appellant's car when it was stopped at Coquelles were about to be imported for commercial purposes and, since they had not been declared, were properly seized: I will deal with the relevant law shortly. I am satisfied too that JWC had bought excise goods on his two previous trips, but that those purchases and the trips themselves had been concealed from his son. I have concluded also that JC had no knowledge, actual or constructive - that is, he had no reason for suspicion - of his father's previous trips or of his intentions on 4 January 2001.
39. Despite the criticisms I have made of the wording of Mrs Pemberton's letter, I am satisfied from her evidence that she did in fact carry out her review properly, in accordance with and subject to the constraints of the Commissioners' policy, and that (subject to a point with which I will deal at para 62 of this decision) she correctly applied that policy, as she understood it, to the facts as she saw them.

Argument

40. Since I dismiss Mr Barlow's first argument, that the goods were to be imported for personal consumption, I turn to consider his two remaining arguments, the one relating to the nature of the tribunal's jurisdiction, and the other to the sustainability of the Commissioners' policy. For the respondents, Mr Puzey maintained that the policy represented a reasonable and proportionate response to a serious problem. Mr Barlow did not seek to challenge the scale of the duty evasion described by Mr Dolan (see para 23 above), nor did he suggest that the problem was not serious. Mr Puzey also argued that it was not open to the tribunal to substitute its own findings of fact unless those reached by the review officer could be shown to be unreasonable, and he emphasised that the burden of proof lay on the appellant (see Finance Act 1994, s 16(6)). Before dealing with the arguments I need to set out the legislative background. Each of the following extracts has been edited so as to excise irrelevant material.
41. The general rule is that excise duty is payable in the Community country in which dutiable goods are "released for consumption" - that is, where they are last commercially exploited, even if duty has already been paid in

another Community country (see Council Directive (EEC) no 92/12 of 25 February 1992, art 7). Article 8 of the same Directive makes it clear that excise goods bought in one Community country may be transported by a traveller to another country, without payment of further duty, provided the goods are for his own use, and this provision is translated into United Kingdom law by the Excise Duties (Personal Reliefs) Order 1992 (SI 1992/3155) as amended by the Channel Tunnel (Alcoholic Liquor and Tobacco Products) Order 2000 (SI 2000/426). Article 3 of the Order, as so amended, reads:

"Subject to the provisions of this Order a Community traveller entering a control zone or the United Kingdom shall be relieved from payment of any duty of excise on excise goods which he has obtained for his own use in the course of cross-border shopping and which he has transported."

42. But art 5(1) of the Order provides that:

"The reliefs afforded under this Order are subject to the condition that the excise goods in question are not held or used for a commercial purpose whether by the Community traveller who imported them or by some other person who has possession or control of them; and if that condition is not complied with in relation to any excise goods, those goods shall . be liable to forfeiture."

43. Accordingly, the goods imported by JWC which, as I have concluded, were imported for the commercial purpose of re-sale for profit, were liable to be forfeited and the officers decided, quite properly, to forfeit them. There has been no challenge to that forfeiture, by means of condemnation proceedings, nor has JWC made an application for restoration of his goods.
44. The Commissioners' power to seize the appellant's car is to be found in s 141(1) of the Customs and Excise Management Act 1979 ('CEMA'), which reads:

" . where any thing has become liable to forfeiture under the customs and excise Acts-

a. any ship, aircraft, vehicle, animal, container (including any article of passengers' 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 . shall also be liable to forfeiture."

1. If, therefore, the goods were properly seized, so also was the car in which they had been transported. And, so far as these legislative provisions are concerned, the fact that a car used to transport illicitly imported goods is owned by an innocent third party is irrelevant; the wording of s 141(1) is inimical to the restriction of the power of seizure to vehicles owned by the importer. However, by s 152 of CEMA:

"The Commissioners may, as they see fit- .

a. restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under [the customs and excise] Acts . "

1. The use of the word "may", of course, confers on the Commissioners a discretion to restore and, in the ordinary way, that discretion must be exercised fairly and reasonably. Mr Barlow did not argue that the discretion had been exercised unfairly - in the sense that, for example, the appellant had been treated more harshly than others in a similar position - but he contended, first, that the decision not to restore could not stand if the facts were as I have found them to be; and, second, that the policy described by Mr Dolan, and which severely limited Mrs Pemberton's freedom of action, was irrational in its application to innocent owners of vehicles used by others for illicit importation since it could not achieve its objective of deterrence; and thus it must be unreasonable not to restore the appellant's car.

The tribunal's jurisdiction

2. Mr Barlow's first argument turned on the interpretation of s 16 of the Finance Act 1994, which governs appeals to this tribunal against decisions such as that made by Mrs Pemberton in this case. This question was considered by the tribunal in *Bowd v Commissioners of Customs and Excise* [1995] V & DR 212 but Mr Barlow embarked on a rather different line of argument and I will therefore deal with the matter afresh, though with the tribunal's views in *Bowd* in mind.
3. Section 16 is entitled "appeals to a tribunal", and it refers to an "appeal" against, and not a "review" of, the respondents' decision. There was, he said, no reason to cut down the tribunal's power to examine the quality of the decision appealed against merely because the tribunal's powers, if an appeal should be allowed, were limited: sub-s 16(4) provides that:

   "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 ."

   I shall return later to those powers.

4. Mr Barlow's proposition was that the quality of the decision on review had to be judged, not against the facts as they were known to the review officer (even if the tribunal should find that the officer's conclusions about the facts were themselves reasonable) but against the tribunal's own findings of fact. In other words, the tribunal must make its own findings of fact, substitute those findings for the review officer's findings if there were any difference between them, and then examine the conclusion against its own findings of fact.
5. He endeavoured to persuade me to that view by an analysis of the only Court of Appeal decision on a case of this general type, *Lindsay v Customs and Excise Commissioners* [2002] STC 588, though I have to say I have found scant support for the argument, as he put it, anywhere in that decision. It is certainly true that the Court of Appeal saw, or at least expressed, no reason why the tribunal should not make its own findings of fact - that it would do so is, for example, implicit in para 48 of the judgment of the Master of the Rolls, at p 602, the material part of which reads:

   "I have expressed some reservation about Mr Lindsay's evidence that the goods in his car were destined only for himself and his close family. That evidence has, however, been accepted and it is not for this court to review

the tribunal's findings of fact. The major issue before this court is one of principle."

Nevertheless, that passage is some way removed from Mr Barlow's submission.

6. In *Lindsay*, the tribunal's finding of fact, as the passage above indicates, was that Mr Lindsay had imported the goods for the benefit of himself and his family, and that most of the recipients would reimburse him the cost of the goods. Duty was payable on the goods since they were not for the traveller's own use (see art 3 of the 1992 Order, set out at para 41 above) and, since it had not been offered, the goods were liable to be forfeited; so much was undisputed. The issue was whether it was a proportionate response not to restore Mr Lindsay's car, which had also been seized in accordance with s 141(1) of CEMA, and whether the Commissioners' refusal to do so was a decision at which they "could not reasonably have arrived". At para 40 of the judgment (p 601) the Master of the Rolls said:

   "Since the coming into force of the Human Rights Act 1998, there can be no doubt that if the commissioners are to arrive reasonably at a decision, their decision must comply with the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998 (the convention). Quite apart from this, the commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters - see *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231 at 239, per Lord Lane. It was argued before the tribunal that the Commissioners' decision fell at both hurdles. It violated the convention in that it involved depriving Mr Lindsay of his rights under art 1 of the First Protocol to the convention to the peaceful enjoyment of his possessions in circumstances which were disproportionately harsh. By the same token, because of the policy which was applied, the decision ignored the relationship that the value of the car bore to the duty that should have been paid, although this was a highly relevant matter."

7. I propose to deal with Mr Barlow's arguments in the order in which he presented them, that is by examining first whether Mrs Pemberton's decision passes the *Corbitt* test before turning to the Human Rights Convention and considering, as a separate issue, whether the policy, and the decision Mrs Pemberton reached in the light of it, are disproportionate in the context of this case.
8. Since the appeal is brought against a decision, it seems to me that the decision itself must be the primary point of the tribunal's focus. However, the phrase "arrived at" used in sub-s 16(4), and the journey at which it hints, suggests that it is also open to the tribunal to consider the route by which the officer concerned has reached that decision. So much is apparent from the manner in which the Court of Appeal approached the circumstances of Mr Lindsay's case. The officer's findings of fact represent, obviously enough, an important staging post on that journey and I accept Mr Barlow's argument to the extent that I agree with him that the tribunal can - indeed should - examine those findings of fact. Plainly any decision of the kind with which this appeal is concerned must be based on findings of fact and if those findings are unreasonable, it is likely that any decision based on them will also be unreasonable. The tribunal's findings of fact are, therefore, an appropriate yardstick against which the officer's findings can be measured.

9. However, I do not agree that the tribunal can go any further than that, and in particular I do not agree that the officer's findings of fact can be simply discarded if the tribunal happens to disagree with them. If the review officer's findings of fact are ones he could reasonably have made, and the decision he has based upon them is also reasonable, it seems to me (though subject to the points to which I shall shortly turn) that the decision is unassailable. By "reasonable" I mean that both the findings of fact and the decision pass Lord Lane's test in *Corbitt*. I see nothing in sub-s 16(4), nor in *Lindsay*, which confers upon the tribunal any more than a supervisory jurisdiction. On the contrary, to my mind sub-s 16(4) is incompatible with anything else and it is trite law that a supervisory jurisdiction does not confer upon the appellate body the right to substitute its own findings of fact.
10. Of course, if the Commissioners, through their reviewing officers, adopt a practice of limiting the material which they introduce into their deliberations, by their failure to explain to people in the position of this appellant what material should be provided, they run the risk of arriving at unreasonable conclusions about the facts of the case because they have failed to take relevant matters into account. Such a person does not have the opportunity of putting his case forward before the car is seized, and he can only ever have second-hand knowledge, if even that, of the importer's intentions. He is at an obvious disadvantage which, it seems to me, the Commissioners barely recognise. Here, neither the officer who first refused to restore JC's car, nor Mrs Pemberton, offered any such guidance to him, and they did not enter into any dialogue with him, or (as has been the Commissioners' practice) did they invite him to interview; they merely considered what he said in his letters. Those letters, as the extracts I have set out show, reveal some bewilderment on his part. Certainly he did not understand the true basis on which the car had been seized and on which its restoration had been refused.
11. In this particular case, however, these failings made little difference to the outcome since, if it is accepted that the Commissioners are justified in their refusal to distinguish between an importer using his own car for bootlegging and an owner such as the appellant in this case who has lent his car to the importer, regardless of the circumstances in which he did so, it seems to me that Mrs Pemberton's conclusion cannot be faulted. She took into account all the relevant information available to her about the importation, and left out of account the irrelevant. Her conclusion that JWC's importation was commercial was manifestly reasonable. JC did not advance any exceptional circumstances, as they are defined in the policy, for the restoration of his car and, if the policy is reasonable, so too was the decision. Any further examination of JC's position beyond the limited information available to Mrs Pemberton was rendered irrelevant by the terms of the policy.
12. On the other hand, if the Commissioners' policy of refusing to restore the cars of owners absent at the time of importation, almost regardless of the circumstances, is not justified Mrs Pemberton's decision does not stand up to scrutiny. That conclusion is not to be taken as a criticism of Mrs Pemberton, who was constrained by the policy; but she did not enquire into the circumstances in which the car had been lent and did not direct her mind to the question whether JC was as blameworthy as his father (in the sense that he had knowingly lent his car for bootlegging), entirely innocent, or somewhere between those two extremes. Once it was clear that the car had not been stolen, she enquired no further. It was enough that JWC was in possession of the car with his son's consent; the circumstances in which he came to borrow it were of no concern.

13. If JC's culpability is a relevant factor, Mrs Pemberton's approach to the decision she was required to take plainly fails the *Corbitt* test. She told me in her evidence that she had formed the view that JC probably did know what his father was doing, but that view was based only on the limited information available to her when she reviewed the case. Mrs Pemberton was not present on the first day of the hearing, when JC and his father gave their evidence. She might have formed the same view if she had heard their evidence (and had considered it with the question of JC's culpability in mind) but that seems to me to be immaterial. Even if Mrs Pemberton is right her conclusion is, in my judgment, unreasonable since it is based on little more than assumption, rather than a proper examination of the available evidence. If the owner's culpability is a relevant factor, she did not take account of all the relevant material.
14. It follows, therefore, that the sustainability or otherwise of the Commissioners' policy is the critical issue in this case, since Mrs Pemberton's decision stands or falls with that policy. I turn therefore to examine Mr Barlow's second argument, that the policy is fundamentally flawed.

The Commissioners' policy

15. There is no doubt that the Commissioners are entitled to have a policy setting out guidelines for the exercise of their discretion: see, for example, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 and *Bowd*, to which I have already referred. A policy will be not only acceptable but almost essential if several individuals, acting alone, make decisions on behalf of their employer since otherwise consistency is difficult to maintain. However, it is also clear from *Wednesbury* that the policy must be a reasonable one, in that it must reflect the terms of the statute or other instrument by which it is conferred, and it must not so restrict the discretion of those applying it that they cease to have any real discretion at all. A policy which requires the officer to make a particular decision, regardless of circumstances, is likely to be unreasonable.
16. I have set out at para 23 above the description of the policy contained in Mr Dolan's statement. It reflects the contents of a circular letter ("DCL"), some of which was set out in the judgment of the Master of the Rolls in *Lindsay* ([2002] STC 588 at 596). He did not, however, include the paragraph dealing with situations of this kind. It reads as follows:

"<u>Vehicles not owned by the smuggler</u>

9. In all cases the vehicle is to be seized. If an owner of a vehicle can subsequently demonstrate to the Senior Officer or Review Officer that he was **genuinely innocent** of any involvement e.g. his vehicle was stolen and reported to the police prior to seizure, the vehicle should be restored to him at **no charge**. Restoration will only take place where an owner can demonstrate they are completely innocent/unaware of the car's use. Any person who has consented to the use of their vehicle by others accepts a variety of risks by doing so and in future they should expect to lose their vehicle permanently." [original emphasis]

17. That the policy limits the reviewing officer's discretion very considerably was illustrated by Mrs Pemberton's answer to a question I asked her as she gave her evidence - if a couple owned two cars and went on holiday in one, leaving the other at home, and found when they returned that it had been stolen, used for bootlegging and seized, would it be restored to

them? I have little doubt that Mrs Pemberton knew perfectly well what the answer ought to be, but since (as she understood it) the policy allowed for the restoration of stolen cars only if the theft had been reported to the police before seizure she had obvious difficulty in answering. In fact I think she (though evidently in common with her fellow officers) has misinterpreted the policy by taking the example set out at para 9 of the DCL as an exhaustive description of the circumstances in which a stolen vehicle could be restored, whereas I do not think it is, or is intended to be, exhaustive.

18. The final sentence of para 9 of the DCL was reflected in the conclusion of Mrs Pemberton's letter (see para 27 above). The Commissioners' view, as I understand it from what Mrs Pemberton said, is that if the owner's loss is not covered by insurance (as it would be in the case of the theft of the car, in the conventional sense of a theft) he should seek redress against the borrower, by suing in the county court if necessary. If (so the argument runs) the borrower has exceeded the terms of his licence to use the car, the Commissioners cannot be expected to enquire into the circumstances, still less to take them into account: the risk that his generosity will be abused must rest with the lender.
19. I can see some merit in that argument, at least so far as it relates to seizure. In many cases - of which this is an example - the Commissioners will not know, at the point of seizure, who the true owner of the car is (a search at the DVLC will reveal only the identity of the registered keeper). It would render their officers' task almost impossible if they were required, before seizure, to satisfy themselves even of the ownership of the car - and, as I have pointed out at para 45 above, there is no legislative requirement that they should do so (still less any requirement that they should enquire into the circumstances of any loan). In the more leisured environment of a request for restoration, however, these objections have rather less force; and if the correct view is that the almost invariable refusal of restoration is unsustainable they too are almost impossible to sustain.
20. I think there is a good deal of support for that proposition in the decision of the Court of Appeal in *Lindsay*. There, as I have said, the issue was the failure of the policy to distinguish between the true commercial smuggler and an importer intending to distribute at cost among family and friends. The Court of Appeal concluded that this failure had the result that decisions on review, where the nature of the importation was a relevant factor but it was ignored, were unreasonable. The Master of the Rolls put it this way ([2002] STC 588 at 606):

"63 . I would not have been prepared to condemn the commissioners' policy had it been one that was applied to those who were using their cars for commercial smuggling, giving that phrase the meaning that it naturally bears of smuggling goods in order to sell them at a profit. Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose those vehicles. Nor does it seem to me that, in such circumstances, the value of the car used need be taken into consideration. Those circumstances will normally take the case beyond the threshold where that factor can carry significant weight in the balance. Cases of exceptional hardship must always, of course, be given due consideration.

64 The commissioners' policy does not, however, draw a distinction between the commercial smuggler and the driver importing goods for social distribution to family or friends in circumstances where there is no

attempt to make a profit. Of course even in such a case the scale of importation, or other circumstances, may be such as to justify forfeiture of the car. But where the importation is not for the purpose of making a profit, 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. There is open to the commissioners a wide range of lesser sanctions that will enable them to impose a sanction that is proportionate where forfeiture of the vehicle is not justified.

65 I do not think that it would be impractical to distinguish between the truly commercial smuggler and others. The current regulations shift the burden to the driver of showing that he does not hold the goods 'for commercial purposes' when these exceed the quantity in the Schedule. In a case such as the present the driver importing for family or friends should be in a position to demonstrate that that is the case if called upon to do so (see the comments of Lord Woolf CJ in *Goldsmith v Customs and Excise Commissioners* [2001] 1 WLR 1673 at 1679-1680).

66 Unfortunately, in the present case and, I suspect, in others, the Customs officers have drawn no distinction between the true commercial smuggler and the driver importing goods for family and friends. Because of the confusion to which I referred at the outset, the cars of both have been treated as subject to almost automatic forfeiture. Review officer Florence appears to have understood that the commissioners' policy rendered it irrelevant whether or not Mr Lindsay's story was true and equally irrelevant the value of his car and the effect that its deprivation would have on him. I believe that she correctly interpreted the policy.

67 For these reasons, I consider that the tribunal was correct to decide that Mrs Florence's decision could not stand because she had failed, when reaching it, to have regard to all material considerations. To that extent the commissioners' appeal must be dismissed."

21. It will be observed that the Master of the Rolls dealt with the case in terms of proportionality. Mr Barlow did not put his case in that way: he did not argue that the Commissioners could have imposed a lesser sanction, such as restoration on terms, but said that the practice of depriving owners of their cars in cases where they did not know that they were to be used in an illicit importation was irrational because it could not achieve the Commissioners' avowed objective of deterring such importation. If an owner had no means of knowing that his car was to be used for that purpose he would not be deterred from lending it by the Commissioners' policy - still less would he be deterred if he believed on reasonable grounds that the car was to be used for a different purpose, and had consented to its use only for that purpose. Moreover, and perhaps more tellingly, depriving the owner of a car which had been borrowed by a smuggler would not deter the *smuggler*, since it was not he who suffered the penalty.
22. It seems to me that there is a good deal of merit in this argument. Even if it were to be accepted, for the purpose of discussion, that a car owner resident in Kent might foresee that if he lent his car to someone else, it was likely to be used for smuggling (and I express no view on that proposition) I am quite sure it is not foreseeable - in the sense that a

person lending his car would, without more, think of it as a reasonable possibility - in North Yorkshire. To deprive the owner of a car of that car because it has been used for smuggling, when the owner is wholly ignorant of that purpose, seems to me, in principle, to be unreasonable, because it acts as a deterrent not to smuggling but to lending; and to be disproportionate as well as unreasonable as it penalises the innocent and not the guilty.

23. Against that, I see the force in the argument which Mr Puzey advanced in support of the Commissioners' policy, that if it were otherwise smugglers would circumvent the sanctions by using only borrowed cars. That would certainly be so in the case of a borrowing "ring", and the Commissioners would in my view be entirely justified in seizing cars used in such a case; but the position is rather different where the owner is truly ignorant of the purpose to which his car is being put.
24. In addition, one cannot overlook art 1 of the First Protocol to the European Convention on Human Rights, incorporated into British law by the Human Rights Act 1998. I respectfully agree with the Master of the Rolls (para 40 of his judgment (p 601) in *Lindsay*) that if the Commissioners' policy, and decisions based on it, do not properly reflect its terms they are almost inevitably unreasonable. It reads:

"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 preceding provisions shall not, however, in any way impair the right of a 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 or penalties."

Conclusion

25. Plainly JC has suffered a deprivation such as is mentioned in the first paragraph of art 1. But (and I think this is really Mr Barlow's point) is there any reason to suppose that the deprivation is in the public interest, as the first paragraph requires, or that the refusal to restore his car fits within the second paragraph? The argument in favour of depriving smugglers of their own cars, if used for that purpose, seems unanswerable and I can only echo what was said by the Master of the Rolls on the topic, in para 63 of his judgment in *Lindsay*. The deterrent effect, where owners are themselves involved in smuggling, of depriving them of their cars is so obvious that it hardly needs stating, but it is by no means obvious what the deterrent effect of depriving absent owners of their cars might be.
26. The position of the owner of the car seized from its borrower was not considered in *Lindsay* since it did not arise, but there is an obvious analogy to be drawn with that case. There, as here, the Commissioners' policy failed to distinguish between those who were truly culpable and those who were not or, at least, (as in Lindsay) were guilty of a lesser offence. That distinction - to my mind fatally for the Commissioners - is not considered at all in Mr Dolan's statement or in the DCL on which it is based. Moreover, there seems to me to be a potential for conflict between the penultimate and final sentences of para 9 of the DCL - the former suggesting that restoration will be allowed where the owner is innocent, the latter that simply lending a car, whatever the circumstances, negates innocence - which conflict is resolved in practice by simply disregarding

the circumstances of a loan. So much was evident from Mrs Pemberton's evidence.

27. One is in no way enlightened by the DCL or by Mr Dolan's statement about the justification, within the terms of art 1 of the First Protocol, of depriving absent owners of their cars. It seems to me that if the Commissioners' policy of depriving the owner of his car, when he was truly ignorant of the purpose to which it was to be put, is to be regarded as reasonable, it is incumbent on the Commissioners to justify it. One would expect to see some evidence that it has had some effect on the level of bootlegging, and some support for the proposition that it is a proportionate response to the undoubtedly serious problem the Commissioners face. Without that, it seems to me that the refusal to restore the cars of absent owners, who are truly ignorant of the borrower's activities, is a pure penalty and is not justified by art 1 of the First Protocol.
28. I should make it plain that I consider that the word "ignorant" should be interpreted with some caution. The burden of proof is on the appellant - that is, the owner of the car: see CEMA s 154(2) and Finance Act 1994, s 16(6). It cannot be unreasonable for the Commissioners to require him to show, to their reasonable satisfaction, that he was ignorant of the borrower's intention. The natural presumption must be that the borrower of a car has possession of it with the informed consent of the owner and it is for the owner to displace that presumption; on this, the comments of Lord Woolf in *Goldsmith v Commissioners of Customs and Excise* [2001] WLR 1673, especially at pages 1679-1680, are very much in point.
29. There, he said (in the context of the imposition of the burden of proof regarding his intentions on the importer of excise goods):

    "The reverse onus of proof can be justified by the Commissioners on the simple basis that to place a burden upon a member of the public importing more than the specified amount of goods to establish that they are required for non-commercial purposes is proportionate, reasonable and justifiable. The individual concerned is in the best possible position to give an explanation . for the reasons why the quantity was imported."

    Here too, the owner of the car is in a position to explain how he came to lend it, and to displace, if he can, the presumption I have mentioned.

30. It would not be sufficient, in my view, to say that the vehicle had been lent for a cross-Channel trip but on the understanding that only modest quantities of excise goods, strictly for personal use, were to be bought. In such a case I think the Commissioners are right in saying that the owner takes the risk that his generosity will be abused, and if it is his recourse is against the borrower. It seems to me that, in order to succeed, the owner would have to show that he was unaware that the vehicle was to be used for a cross-Channel trip at all, and that there was no reason to suppose that it might be used for such a purpose. Thus it would not, I think, be sufficient to say that the car had been lent for one purpose but used for another; the owner would have to go somewhat further and show that it was not reasonably foreseeable that the car would be used for smuggling. Closing his eyes to the obvious would not assist the owner. Geographical proximity to the Channel ports might be a factor to be considered. Evidence of previous trips could well be a difficult hurdle to overcome.
31. Here I am persuaded that the appellant has overcome the hurdles; I am satisfied that he was ignorant, to the standard I have described, of his father's intentions on this occasion and of his previous trips. That being so, I am satisfied too that the decision not to restore his vehicle is one at

which the reviewing officer could not reasonably have arrived. I say that without intending any criticism of Mrs Pemberton, who was precluded by the policy from considering, at all, what I have found to be the determining factor in this case. I am persuaded that the policy is unreasonable (I am not sure I go as far as Mr Barlow in considering it irrational) in excluding the ignorance, or innocence, of the owner from consideration, and that it offends art 1 of the First Protocol to the Human Rights Convention in so doing. I have grave doubts whether it can be said that depriving owners, ignorant of the purpose to which they have been put, of their cars is a deterrent to smuggling. Rather, it appears merely to punish the innocent for the sins of others, and in that, and without the clear justification of the policy which is lacking in this case, it must be unreasonable and a disproportionate response even to a serious problem.

32. Accordingly, I allow the appeal. However, the powers I can exercise are very limited; I can direct that the decision, so far as it remains in force, is to cease to have effect; I may require the Commissioners to conduct a further review, in accordance with my directions; or I may declare the decision to be unreasonable and direct the Commissioners on how to avoid such unreasonableness in future. I cannot direct the restoration of the car.
33. I have concluded that I should exercise the first two of those powers. First, I direct that the decision shall cease to have effect. Although at first sight logic suggests that, if a decision not to restore ceases to have effect, restoration should follow, *Lindsay* indicates otherwise and I think the proper view is that this direction merely renews the Commissioners' discretion, within s 152 of CEMA, to restore if they think fit. Secondly, I direct that a further review be undertaken, in accordance with these directions:

    (a) the Commissioners shall proceed upon the footing that the complete ignorance, which has not been self-induced, of the owner of a car that it was to be used for a smuggling operation gives rise to a presumption that it would be unreasonable not to restore it to him;

    (b) the Commissioners shall take into account this tribunal's finding that the appellant was so ignorant.

34. I do not propose to exercise the third power, since I recognise that the Commissioners may have information, not provided to me, that their policy of not restoring cars seized in circumstances such as those with which I have dealt in this case has had a measurable deterrent effect, sufficient to demonstrate that it is indeed a proportionate response. However, it does seem to me appropriate, if this is the Commissioners' case, that they should produce evidence of it since, as I have indicated, it is in my view for the Commissioners to justify a draconian policy of this kind, if they can do so.
35. Lastly, Mr Barlow asked for a direction in respect of costs, which Mr Puzey did not resist. I direct that the Commissioners pay the appellant's costs, to be assessed by a tribunal chairman if they cannot be agreed.

COLIN BISHOPP

CHAIRMAN

RELEASE DATE:

MAN/01/8056