VAT deposit – no reasons – unlawful decision.
VAT deposit – no opportunity to taxpayer to make representations – unlawful decision.
Desirability of a "minded to" letter.

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07250

Appeal number: TC/2018/01083

BETWEEN

PACHANGAS MEXICAN RESTAURANT LIMITED **Appellant**

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE GERAINT JONES QC.
MRS JANET WILKINS.

Sitting in public at Taylor House, London on 20 June 2019

Mr. L. Ahmed for the Appellant

Miss Laura Morgan, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by the appellant, Pachangas Mexican Restaurant Limited, against a decision of the respondents requiring the appellant to provide security in the sum of £29,450 against future VAT sums due. The requirement was made by a written notification served on 27 September 2017. That notification was a bare requirement to provide security. It gave not a single reason to explain why the respondents were making the requirement. It is a very serious requirement. The respondents informed the appellant by their letter dated 19 October 2017 that if the appellant made taxable supplies without the security being provided, the appellant would be committing a criminal offence contrary to section 72(11) Value Added Taxes Act 1994.

2. When the appellant received the notification it contacted the respondents to ask for the reason or reasons for the requirement to provide the required security. The respondents replied by letter dated 3 November 2017, giving its reason(s) as follows:

"*Security was required for [the appellant] as a result of concerns that the company would be non-compliant. These concerns arose due to the links between this company and other non-compliant businesses which failed owing VAT. The links are demonstrated by personal as well as nature of trade and premises.*" [sic]

3. The appellant appealed the requirement to this Tribunal on 7 February 2019, out of time. At the hearing before us the respondents, very properly in our view, did not object to the appeal proceeding out of time. Accordingly, as we were satisfied that although the period of delay was not brief, there were valid reasons for the delay, we granted permission to appeal out of time.

4. This is an appeal in which this Tribunal does not substitute its own view for that of the respondents. The appeal is by way of review only and it is only if the appellant satisfies us that the respondents could not reasonably have arrived at the decision arrived at, or that the decision is unlawful, that the appeal can succeed. If a decision is unlawful then, in our judgement, it is, *ipso facto,* unreasonable.

5. We should record that this appeal proceeded in a rather unusual manner. Although the appellant's Director gave evidence, the respondents' decision maker, Mrs Sue Ogburn, did not give evidence. That is a serious omission which will usually work to the respondents' prejudice. Although in this appeal Mrs Julie Wilde gave evidence for the respondents, she very fairly accepted that she was unable to speak to what factors Mrs Ogburn had into account, whether she had considered the issue of proportionality and/or how she had gone about exercising her discretion if indeed she had appreciated that the process involved a discretionary decision which required her to exercise a discretion based upon identified relevant facts.

6. As it is Mrs Ogburn who made this administrative decision it is her evidence and, importantly, her reasoning processes and state of mind that would be of importance. The opinions and/or views of any other HMRC officer would be irrelevant, as Mrs Wilde correctly acknowledged. That much must flow from what Ld. Dyson explained in *R (Lumba) v Sec of State for the Home Department [2012] 1 AC 245* at [65 & 66]:

"65. All this is elementary, but it needs to be articulated since it demonstrates that there is no place for a causation test here. All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the defendant to show that there was lawful justification for doing so. As Lord Bridge of Harwich said in *R v Deputy Governor of Parkhurst Prison, Ex p Hague [1992] 1 AC 58* , 162 C – D: "The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it".

"66. The causation test shifts the focus of the tort on to the question of how the defendant *would* have acted on the hypothesis of a lawful self-direction, rather than on the claimant's right not *in fact* to be unlawfully detained. There is no warrant for this. A purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. *Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147* established that both species of error render an executive act ultra vires, unlawful and a nullity. In the present context, there is in principle no difference between (i) a detention which is unlawful because there was no statutory power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law. For example, if the decision to detain is unreasonable in the Wednesbury sense, it is unlawful and a nullity. The importance of Anisminic is that it established that there was a single category of errors of law, all of which rendered a decision ultra vires: see *Boddington v British Transport Police [1999] 2 AC 143* , 158 D – E".

7. Thus it is the reasoning of the officer who took the decision on the basis of the facts and matters taken into account by her that is all important. No other officer of HMRC can speak thereto. Nonetheless, at the outset of the appeal hearing we were told that Mrs Ogburn would not be attending the hearing and so the appellant would be, and was, denied the opportunity to cross examine her.

THE NEED FOR REASONS

8. In respect of almost all public law decisions, especially those where the exercise of discretion is involved, there are two requirements so far as reasons are concerned. The first is that valid reasons must exist and the second is that those valid reasons must be communicated to the appellant at the time when the requirement or decision is notified.

9. As the law has developed so far, there is not yet a universal rule that in respect of each and every public law decision reasons therefore must be given - see : *Wade & Forsyth : Administrative Law (10th ed.) pp 436 – 438 "Reasons for Decisions"*, but reasons must be given at least where :

(i) There is interference with a citizen's liberty and/or property rights (e.g. arrest, detention, seizure and/or compulsory purchase), or

(ii) A citizen would be unable to know what, if any, facts have been relied upon by the public authority in deciding to impose a specified requirement, given that such knowledge is a pre-condition to him being able to controvert any such factual allegation, or

(iii) Where a citizen cannot sensibly obtain legal advice (on an informed basis) absent knowing on what basis the public body has exercised any particular statutory power, or

(iv) A right of appeal would be valueless and/or prejudiced, without the public authority which exercised its power giving its reasons for exercising it. The law in this regard is summarised in *Wade & Forsyth : Administrative Law (10th ed.) pp 436 – 438 "Reasons for Decisions", R v Civil Service Appeal Board ex parte Cunningham [1991] 4 All E R 310, per McCowan LJ at 322H – 323C and Leggatt LJ at 325F – 326D and R v Home Secretary ex parte Doody [1994] 1 AC 531 at 560D – 561A, 562E -562H, 563E – H and 564E – F*, or

(v) The statute conferring the particular power specifically requires reasons or grounds to be given for the exercise of the power.

10. It is also a well-established principle that where a reason for a particular course of action or decision is given (whether because of statutory requirement or as required at common law), the public body making that decision cannot later rely on facts and/or reasons then in existence, but not relied upon at the time of the decision, to claim that the decision was/is lawful (same being unlawful on the basis of the reason(s) actually given) and/or that no liability to damages (or costs) can arise.

11. In this regard there are ample examples.

12. An arresting or detaining officer must :

a. subjectively believe that circumstances justifying such arrest/detention exist[1], and

b. that belief must be a reasonably held belief, when viewed objectively : *O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] AC 286 at 298 C-E.*

13. Where the police wish to enter private premises, they must give a lawful reason for doing so. In *R v Richards & Leeming* (1985) 81 Cr App R 125 the Court of Appeal considered the powers of a police officer to enter private premises. In that case the police had received a 999 call stating "*my dad is going to kill my mum*" and on arriving at the premises the police witnessed a man washing blood from his face. Unsurprisingly, the police demanded entry saying they were concerned for the safety of a possibly injured person and that they would enter by force if not admitted. However, as a matter of law there was no such power of entry for the police for the reason given. On entry being denied, they entered forcibly. The Court noted as follows:

> *"The police had ample power to enter 59 Colesmead Road on the information available to them, being a power conferred by section 2 of the 1967 Act [entry where there is suspicion of an arrestable offence – an assertion not made by the officer to the person refusing entry]. Had they purported to enter by virtue of such power, it is difficult to see how there would have been any valid defence to the charges or how this appeal could possibly have succeeded….The police had to act decisively and the misfortune is that in doing so* ***they failed to make known****…that they were acting by virtue of the power which they had. On the other hand, the Court must guard against any erosion of the principle that forced entry by police officers or anyone else on private premises will not be tolerated unless it is clearly justified by law."*

14. *R v Westminster City Council, ex p Ermakow* [1996] 2 All ER 302 concerned reasons that had to be given when a decision on a homelessness application was made. Although the case concerned a statutory obligation to give reasons, the Court concluded that the (improper) reasons given in a decision letter could not be corrected by later affidavits seeking to justify the legality of the decision. The core principle advanced by the Court of Appeal was that: "*It is well established that an obligation, whether statutory or otherwise, to give reasons for a decision is imposed so that the persons affected by the decision may know why they have won*

[1] Even though he may later be shown to have been wrong.

or lost and, in particular, may be able to judge whether the decision is valid and therefore unchallengeable or invalid and therefore open to challenge."

15. In *Checkaprice (UK) Ltd v HMRC [2010] EWHC 682 (Admin)* Sales J pointed out at para 43 :

> "*43. This [bailment] analysis does not apply in the present case. HMRC had no right to withhold the goods in question save to the extent that they validly exercised a statutory power to do so. They had a statutory power under section 139 of CEMA to detain the goods for a reasonable period, which period expired in mid-August 2007. Thereafter, HMRC could only lawfully retain the goods if they properly exercised their distinct power of seizure contained in section 139(1). Exercise of that power of seizure brings into operation statutory provisions constituting a protective regime for the benefit of the property owner. The notional availability of the power of seizure cannot be relied upon as a defence to a claim in conversion where it has not in fact been exercised and where, therefore, HMRC have not brought to the statutory protective regime into operation. There is no underlying right of retention for HMRC as there is in the bailment situation. HMRC's right of retention of the goods pursuant to the power of seizure is conditional on their actual exercise of that power. Therefore, in my judgement, HMRC were liable for conversion in respect of the relevant goods in category C in mid-August 2007."*

16. It is also relevant to note that as a matter of public law, if an arresting/seizing officer gives a bad/unlawful reason for an arrest/seizure, the fact that he could have arrested/seized on some other basis cannot render the arrest/detention lawful see *Roberts v Chief Constable of Cheshire [1999] 1 WLR 662 per Clarke L. J. at 667* and *R (Lumba) v SOS Home department [2012] AC 245 per Ld. Dyson at paras 65- 66 & 71-76.*

17. Although we have referred to decided cases which have nothing whatsoever to do with VAT or public law requirements made under the relevant VAT legislation, it is essential to remember that there is but one category of error of law in public law decision making, which, if made out, renders a decision *ultra vires* or unlawful. No distinction is to be drawn between a patent (or subjective) error of law and a latent (or procedural) error of law - per Ld. Irvine in *Boddington v British Transport Police [1999] 2 AC 143 at 158 D-E.*

18. A valid public law decision, if discretionary, also requires that the discretion is actually exercised. As the House of Lords has made plain if it is exercised in a Wednesbury unreasonable sense, the decision will be unlawful : per Ld. Dyson in ***R (Lumba) v SOS Home Department [2012] AC 245 per Ld. Dyson at para 66:***

> *"The causation test shifts the focus of the tort on to the question of how the defendant would have acted on the hypothesis of a lawful self-direction, rather than on the claimant's right not in fact to be unlawfully detained. There is no warrant for*

this. A purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 established that both species of error render an executive act ultra vires, unlawful and a nullity. In the present context, there is in principle no difference between (i) a detention which is unlawful because there was no statutory power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law. For example, if the decision to detain is unreasonable in the Wednesbury sense, it is unlawful and a nullity. The importance of Anisminic is that it established that there was a single category of errors of law, all of which rendered a decision ultra vires: see Boddington v British Transport Police [1999] 2 AC 143, 158D-E."

16. We note that in ***Lumba*** Ld. Dyson specifically referred to and approved the dictum in *R v Civil Service Appeal Board ex parte Cunningham [1991] 4 All E R 310*, per McCowan LJ at 322H – 323C and Leggatt LJ at 325F – 326D that reasons must be given for a discretionary decision if a right of appeal is of little or no practical value absent reasons being given.

19. We are satisfied that in circumstances where the appellant :

(1) Was not told what, if any, facts the respondents had taken into account in arriving at its decision, and/or

(2) Had been given not a single reason for the 27 September 2017 decision made by the respondents,

it was unlawful and thus unreasonable. That is because we are satisfied that this is a category of public law decision which requires the decision maker to set out the salient facts relied upon in arriving at the stated decision before going on to set out the reason(s) why those facts led to the particular discretionary decision or conclusion being reached.

20. In our judgement this is plainly a case where the appellant's right of appeal was of little or no practical value unless reasons for the decision were provided so that the appellant could understand the basis upon which the decision was reached. It is only then that the appellant would be in a position to take advice upon whether there would be merit in that decision being appealed. A right of appeal is of little value unless a person can take an informed decision as to whether the right of appeal should or should not be exercised. It is extremely important that a person should be aware of the facts and reasons relied upon by a public authority which imposes a requirement or decision, not only because common fairness so demands, but also because there will usually be significant cost implications if a person has to seek legal advice in circumstances where, had adequate reasons been set out initially, that person may not have incurred the expense of obtaining what might turn out to be unnecessary legal advice.

21. There is a second and equally serious deficiency in the way in which this public law decision was reached. It is common ground in this appeal that the appellant was not afforded any opportunity whatsoever to make any representations, or to comment upon, any of the facts (which the respondents did not disclose to the appellant) upon which the respondents based the

decision. In our judgement this is a situation where a "minded to" letter is appropriate, which affords the company or person to whom it is addressed a reasonable opportunity to respond to, comment upon and/or make representations in respect of the facts and matters disclosed in the "minded to" letter. The appellant was afforded no such opportunity and, having heard the evidence of Miss Hageman-Rowe, which we need not set out, this is a case where we readily conclude that if she had had the opportunity to inform the respondents of the facts and matters which she disclosed to us in evidence, it might be the case that the respondents might have reached a different conclusion. It is not for us to decide whether the respondents would have, or ought to have, reached a different conclusion. It suffices for this appeal to succeed on this second basis that the facts and matters that would have been disclosed, being facts and matters in existence immediately prior to the respondents making their decision, would have been relevant and ought to have been considered and taken into account by the respondents because they might have resulted in a different decision being made by the respondents.

22. This is an appeal where we have not considered it necessary to set out the evidentially unsupported facts asserted in the respondents' Statement of Case. It would have been open to us to make relevant findings of fact in circumstances where, although Miss Hageman-Rowe, the appellant's Director, did not dispute many of the primary facts asserted in the respondents' Statement of Case, she nonetheless sought to place many of them into a particular context or to explain how or why certain factual situations had come about and/or to explain why the appellant should be regarded as detached or distanced from some of the events alleged in the Statement of Case.

23. We keep in mind that in Balbir Singh Gora v HMCR [2003] EWCA Civ 255 the Court of Appeal considered an appeal against a decision not to restore goods seized under the 1979 Act. The provisions of Finance Act 1994 applied to that appeal in the sense that it was an appeal by way of review only; as is the current appeal.

24. Two preliminary points were considered by the Court of Appeal. One of these was whether the jurisdiction of the tribunal was sufficient to satisfy the requirements of Article 6 of the European Convention on Human Rights . In the course of argument, it emerged that HMRC took a broader view of the jurisdiction of the tribunal than had originally appeared. HMRC said that, although "strictly speaking" it appeared that section 16 limited the tribunal to considering whether there was sufficient evidence to support the appealed decision; in practice the tribunal could make findings of fact and then in the light of its factual findings decide whether the decision was reasonable. Pill L.J., with whom the other members of the Court agreed, said at [39] that he would accept that view of the jurisdiction of the tribunal subject only to doubting whether the "strictly speaking" limitation was correct, once it had been accepted that the tribunal had a fact finding jurisdiction.

25. In *Charles Miller Ltd v Home Office [2015] UKFTT 556 (TC)* the Tribunal (Judge Jonathan Richards) put the position admirably succinctly at [34] " *In Balbir Singh Gora v C&E [2003] EWCA Civ 525* Pill L. J. accepted that the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision of restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which, in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal." We adopt that statement of principle but given the way in which this appeal proceeded, with the respondents relying solely upon documents and the evidence from Mrs Wilkie (which was of only marginal relevance) we consider it appropriate to allow this appeal on the two bases set out above.

26. However, in circumstances where we conclude that this appeal must succeed for the two public law reasons which we have already set out above, we do not consider it necessary to go on to make findings of fact notwithstanding that it is usually the primary function of the First Tier Tribunal to make relevant factual findings. If I we had embarked upon that function we would have started from the position that only one party has adduced witness evidence to support its pleaded case. That may not have suited the respondents particularly well and so it was unsurprising that after we had retired and returned to indicate the outcome of the appeal, with our reasons therefor being stated briefly, the parties were content for this appeal to be decided in accordance with the legal principles that we have set out above.

27. Although we allow this appeal we make it plain that we are expressing no view whatsoever as to whether the respondents could have or should have made the requirement for VAT security to be provided, if some or all of the facts asserted by it are established.

28. Thus our Decision is that the respondents' Decision, set out in its Notice dated 27 September 2017, is set aside and quashed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. This document contains full reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

GERAINT JONES QC.
TRIBUNAL JUDGE

Release date: 02 JULY 2019