THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Port of Spain

Civil Appeal No. P261 of 2022

Claim No. CV2021-00559

BETWEEN

THE COMPTROLLER OF CUSTOMS AND EXCISE

Appellant

AND

WESTCO FOODS UNLIMITED

Respondent

PANEL:

Mohammed J.A.

Rajkumar J.A.

Aboud J.A.

APPEARANCES:

Mrs. Debra Peake SC and Mr. Ravi Heffes-Doon, instructed by Ms. Amrita Ramsook and Ms. Melissa Papoonsingh, Attorneys-at-Law for the Appellant

Mr. Fyard Hosein SC, Mr. Jagdeo Singh, Mr. Leon Kalicharan and Mr. Aadam Hosein, instructed by Ms. Karina Singh, Attorneys-at-Law for the Respondent.

DATE OF DELIVERY: 19 January 2026

I have read the judgment of Mohammed J.A. I agree with it and I have nothing to add.

/s/ Rajkumar J.A.

I have read the judgment of Mohammed J.A. I also agree with it and I have nothing to add.

/s/ Aboud J.A.

JUDGMENT

Delivered by Mark Mohammed, J.A.

Introduction

1. This is an appeal from the judgment of The Honourable Madam Justice Gobin ("the Judge") delivered on 26 September 2022. The Judge granted the following declarations:

   "1) The decision of the Tariff Classification Committee and/or the Comptroller of Customs and Excise contained in General Order No. 9 of 2020 dated 1st July 2020 (the said General Order) is illegal, irrational, procedurally improper, null, void and of no effect;

   2) The decision of the Defendant, contained in the Defendant's letter dated 12th October 2020, finding that duties were short levied on the entries in the Appendix 1 hereto are "due and payable" and calling on the Claimant to pay the same pursuant to Section 20(1) and (2) of the Customs Act is illegal, irrational, procedurally improper, null, void and of no effect;

   3) General Order 9 of 2020 is null and void and is hereby quashed;

4) The Comptroller of Customs and Excise and/or the Tariff Committee is directed to reconsider its decision in the said General Order;"

2. The Judge ordered the Appellant to pay the Respondent damages and the costs of the proceedings, to be assessed by the Registrar.

Background

3. The Respondent's judicial review application was supported by affidavits sworn by its Customs Clerk, Ms. Turkessa Warwick. In response, affidavits were filed on behalf of the Appellant by Ms. Nadine Hamid, Customs and Excise Supervisor and Ms. Savitari Ramjit, Acting Assistant Comptroller of Customs and Excise, each of whom was cross-examined.

4. The Appellant, the Comptroller of Customs and Excise, is the statutory authority charged with the assessment and collection of duties, charges and clearance fees on goods imported into Trinidad and Tobago. The Respondent, Westco Foods Unlimited, is an importer and distributor of food products. The proceedings arose from the Respondent's challenge to the decision of the Tariff Classification Committee ("the Committee"), issued in General Order No. 9 of 2020 pursuant to ***section 263(6) of the Customs Act, Chap. 78:01.*** ("the Act"). The Committee determined that the Respondent's imports of "Frozen French Fried Potatoes (Wedges)" ("imported item") for the period 2012 to 2018 were to be classified under Customs Procedure Code Extension ("CPE") 900 rather than CPE 100, which had previously been applied. The consequence of this reclassification was that the goods attracted duty at the rate of 20%, instead of the rate of 5% at which duty had previously been paid.

5. Ms. Ramjit explained that CARICOM Member States have the authority, upon approval by the Council for Trade and Economic Development (“COTED”), to suspend or vary Common External Tariff (“CET”) rates. Such suspensions or variations are then published by way of Legal Notices.

6. The classification of goods for Customs purposes is governed by the General Rules for the Interpretation of the Harmonized System ("HS Rules"). The classification of goods in any CET item is determined in accordance with those HS Rules.

7. The Customs and Excise Division operates an Automated System for Customs Data (“ASYCUDA”), designed to facilitate importers through a process of self-assessment. Declarants input the particulars of imported goods, generate an eC82 declaration form and upon payment of the calculated duties, receive approval for the release of the goods. The system relies on the accuracy of the information submitted by importers and is intended to expedite border-control procedures.

8. Between 2012 and 2018, the Respondent imported frozen fried potato wedges from suppliers in Belgium. Acting as the Respondent’s agent, Ms. Warwick classified the goods under CPE 2004.10.90 (100), using the ASYCUDA platform. The health certificates issued by the Belgian Federal Agency for the Safety of the Food Chain described the goods as “Frozen French Fries” and this designation informed the classification utilised by Ms. Warwick.

9. According to Ms. Hamid, the applicable duty rates for Frozen French Fries during the relevant period were either suspended or varied pursuant to Legal Notices[1] issued under the CET and ***sections 8 and 8A of the Act***. As a result, items classified under CPE 2004.10.90 (100) attracted duty at either 0% or 5%.[2]

10. Around 2017 and continuing, the Customs and Excise Division commenced audits of the self-assessed classifications used by a number of importers of frozen potato products, including the Respondent. A classification query emerged in respect of the Respondent's imported items. Pursuant to what the Appellant considered to be its authority under ***section 247 of the Act***, the Respondent was audited for the period 4 April 2012 to 3 April 2018. The Post-Clearance Audit Unit conducted a Post-Clearance Desk Review ("desk review audit") in respect of each year within that period. The review concluded that additional duties and taxes totalling TT$313,765.86 had been short levied.

11. According to Ms. Hamid, a desk review audit took place only after the goods had already been released. Its purpose was to carry out documentary checks after the cargo had been released in order to facilitate trade. The desk review audit was done in office, using computer access to the Respondent's trade data stored in the ASYCUDA system and focused on auditing specific transactions or shipments.

12. She explained that this process was different from a field audit, which was carried out at the importer's premises. A field audit looked at the importer's overall business systems and how those systems affected compliance, rather than reviewing individual entries. Importers were contacted in advance of a field audit to ensure that the relevant personnel

[1] Record of Appeal, pages 311-342
[2] Record of Appeal, page 301

were available, that the requested documents were ready and that suitable space had been arranged for the audit team.

13. According to Ms. Hamid, prior to 13 March 2018, the Appellant did not send any correspondence to the Respondent with respect to the imported items. She stated that the Appellant neither consulted with nor sought representations from the Respondent prior to performing the desk review audit on the imported items. The only situation in which correspondence was sent beforehand was where a field audit was required. She explained that a desk review audit was used in the Respondent's case because the risk assessment indicated that a field audit was unnecessary. Only one area of Customs compliance, namely tariff classification, had been identified as incorrect. The purpose of the audit was to determine which transactions had been incorrectly classified and to calculate the resulting revenue loss. Those objectives did not require a visit to the Respondent's premises.

14. Further, deploying a team of auditors for a field audit would not have been an efficient use of limited resources, particularly when the Respondent's wider systems were not under scrutiny. Ms. Hamid stated that, for these reasons, there was no need to consult the Respondent before the desk review was carried out.

15. On 13 March 2018, the Respondent received from the Preventive Branch of the Customs and Excise Division the first of several letters indicating that the classification used, CPE 2004.10.90 (100), was considered incorrect and that CPE 2004.10.90 (900) applied to potato products, not regarded as French fries. Additional correspondence was sent by the Appellant to the Respondent requesting supporting literature to justify the classification

used. Ms. Warwick subsequently requested a meeting with the Post-Clearance Audit Unit, which occurred during the week of 23 to 27 April 2018.

16. According to Ms. Ramjit, the Committee is mandated to handle all dispute resolution matters. The Committee deliberates on disputes arising at the post-clearance stage where the importer is not in agreement with the decision taken by the Post-Clearance Audit Unit and has requested a review of that decision.

17. The procedure adopted in determining any dispute resolution is set out in Circular No. 9 of 2008, as follows:[3]

    i. An Application for Classification Re: Dispute Resolution ("dispute") is lodged.
    ii. The dispute is assigned to a Customs and Excise Officer II, Research, Planning and Classification.
    iii. The Customs and Excise Officer II conducts comprehensive research on the item in dispute. The research includes, but is not limited to:
        a. the manufacturer's information on the item;
        b. the item's composition;
        c. the intended use of the item; and
        d. the item's specifications or dimensions, where relevant.
    iv. The Customs and Excise Officer II analyses the information and compiles a research document, which is then disseminated to the members of the Committee.

[3] Record of Appeal, page 352, para 18

18. On 2 May 2018, the Respondent submitted a dispute, accompanied by supporting documents. The dispute was assigned to Ms. Lee Hue, a Customs and Excise Officer, who prepared a research document ("the report") [4] for the consideration of the Committee. The report contained:

    i. A description of the imported items, including their ingredients;
    ii. The dictionary meanings of the terms "potato wedges" and "French fries";
    iii. The relevant rules considered under the General Rules of Interpretation, Section IV, Chapter 20 and the corresponding Explanatory Notes;
    iv. General Order No. 16A of 2018, (which concerned a prior classification dispute involving seasoned wedge fries imported by Vemco Ltd.);
    v. Legal Notice No. 149 of 2017, (which varied the rate of duty applicable to frozen French fries to the rate of 5% for the period 1 January 2018 to 31 December 2018);
    vi. Information obtained from the manufacturing company of the imported item, Clarebout Potatoes N.V. (indicating that French fries, steak fries and crinkle fries were classified under a separate category entitled "French Fries", distinct from another category entitled "Specialties", which included "Potato Wedges Nature, with and without skin" and "Potato Wedges Paprika coating"); and
    vii. That Customs duty of 20% was due, as the Potato Wedges under review did not qualify as Frozen French Fries and that therefore the 5% concession was not applicable.

19. Ms. Ramjit[5] stated in her affidavit that, in arriving at its decision, the Committee classified the imported item in accordance with the HS Rules and applied Rule 1. The Committee was also mindful that the classification of the imported item was determined under the CARICOM eight-digit Commodity Code, as reflected in the Legal Notices providing for the variation or suspension of Customs Duties and amendments to the ***Value Added Tax Act,***

[4] Record of Appeal, page 374
[5] Record of Appeal, page 355 paras 25-27

Chap. 75:06. Additionally, the disaggregation of the eight-digit Commodity Code was undertaken by the ASYCUDA Section of the Customs and Excise Division, utilising the CPE.

20. As an example of the disaggregation of the eight-digit Commodity Code 2004.10.90 and CPE codes 100 and 900 and their applicability in the ASYCUDA self-assessment process, Ms. Ramjit exhibited two examples. Exhibited as S.R.3[6] was an example of CPE 100 which was specific to Frozen French Fries at the rate of duty of 5%. S.R.4, this was an example of CPE 900 relative to Other Potatoes at the rate of duty of 20%[7], which the Committee determined was the correct classification for the Respondent's products. Both documents recorded a query date of "01/10/2021", a validity date of "01/02/2016" and VAT at a rate of 12.5%.

21. On 5 June 2020, the Committee delivered a unanimous decision, finding that:[8]

> "a) the appropriate Section was Section IV, namely "Prepared Foodstuffs: Beverages, Spirits and Vinegar: Tobacco and Manufacturing Tobacco Substitutes";
> b) the appropriate Chapter was Chapter 20, namely "Preparations of vegetables, fruits, nuts or other parts of plants";
> c) the appropriate Heading was "20.04 – Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, frozen, other than products of heading 20.06"; and
> d) the appropriate Sub-Heading for which Marquis Wedges and Marquis Spicy Wedges ought to have been classified was "2004.10.90 – 900" and was therefore incorrectly classified by the Claimant as "2004.10.90 – 100".

[6] Record of Appeal, page 370
[7] Record of Appeal, page 372
[8] Record of Appeal, page 358, para 29

22. The Committee's reasoning in reaching its decision, as described by Ms. Ramjit in her affidavit, was based on[9]:

    i. The report prepared by Ms. Lee Hue;

    ii. The interpretation and application of the relevant Section and Chapter Notes of the CET;

    iii. The Legal Notices pursuant to the suspension or variation of Customs Duties on frozen French fries for the period under the desk review. These Legal Notices clearly stated that where "Ex" is used in relation to an item number under a heading listed in the First Column of the First Schedule to the Customs Act, that item number shall refer only to the corresponding goods described in the Second Column. In the instant matter, "Ex" specifically referred to "Frozen French Fries" and not "Wedges"; and

    iv. Further clarification from the Ministry of Trade and Industry –

        a. A letter dated 25 January 2019 from the Appellant to the Permanent Secretary of the Ministry of Trade and Industry requesting information on the suspension or variation of duty on frozen French fries. [10]

        b. A letter dated 19 February 2019 from the Permanent Secretary of the Ministry of Trade and Industry to the Appellant explaining the policy governing the suspension or variation of duty in relation to frozen French fries. [11]

23. According to Ms. Warwick,[12] there was no dispute with the classification of the imported item as "2004.10.90". The issue was whether CPE 900 or CPE 100 constituted the appropriate declaration for the imported item.

[9] Record of Appeal, page 358, para 30
[10] Record of Appeal, page 385
[11] Record of Appeal, page 387
[12] Record of Appeal, page 432, para 9

24. On 14 July 2020, the Appellant issued a Notice of Classification dated 1 July 2020 together with General Order No. 9 of 2020, confirming that "Frozen French Fried Potatoes (Wedges)" fell under CPE 2004.10.90. (900) and attracted duty at the rate of 20%.

25. On 12 October 2020[13], the Appellant demanded payment of the alleged short levied duties. The letter warned that failure to comply would result in proceedings for recovery pursuant to ***section 246 of the Act*** and expressly referenced ***section 247 of the Act***, which states that proceedings under the Customs laws may be commenced within seven years of the date of the offence. Both the classification decision and the subsequent demand were contested on the grounds of illegality, irrationality, unreasonableness and procedural impropriety.

The Judge's findings

26. The Judge concluded that the Appellant's decision to undertake post-clearance audits in March of 2018 was ultra vires the Act. In the Judge's view, ***section 247 of the Act*** applied only to criminal offences and ***section 20(1) and (2) of the Act*** created no offence. They imposed obligations to pay the taxes due. Although accepting that ***section 20(2) of the Act*** permitted post-clearance audits in appropriate circumstances, the Judge considered that by virtue of ***section 23 of the Interpretation Act, Chapter 3:01***, such audits had to be conducted within a reasonable time and ought not to extend beyond six months from the date of delivery of the goods.

27. On the issue of procedural fairness, the Judge determined that the Appellant's practice of conducting post-clearance desk audit reviews without first affording the Respondent an

[13] Record of Appeal, page 231

opportunity to be heard was improper and unlawful. The Judge regarded the particular circumstances as requiring full notice of the intention to audit, the reasons for it and an opportunity for the Respondent to make meaningful representations. The Judge rejected the Appellant's distinction between field and desk audits. The Judge found that the later invitation to submit literature was issued after the demands for short levied duty had been made and did not discharge the duty to provide the opportunity to be heard. The Judge also found that Ms. Lee Hue's report recommending that wedges were not French fries, predated the dispute and this cast doubt on the fairness and credibility of the process.

28. On the issue of the rationality of the classification decision, the Judge found that the Appellant's explanation of its reasoning was deficient. The Judge considered the evidence presented by the Appellant, including the report relied on and the testimony supporting it, to be unclear, unreliable, inconsistent and lacking credibility.

29. The Judge found that, before 1 January 2016, "Frozen French Fries" had not been uniquely identified to exclude wedges. Until 2018, the Appellant treated wedges as falling within the broad description of frozen French fries, as shown by its approval of the Respondent's imports under the procedural code used by the Respondent, despite asserting that its internal systems reflected a different code.

30. The Judge found that exhibits S.R.3 and S.R.4 were of limited assistance to the Court because there was no explanation as to how they were generated. The exhibits showed 1 February 2016 as the validity date, which undermined the Appellant's case and suggested that a different code applied before 2016.

31. In relation to the Legal Notices, the Judge found that Ms. Ramjit's explanation that in Legal Notice No. 149 of 2017, an "Ex" marker referred only to Frozen French Fries and excluded wedges, was undermined, since "Ex" first appeared in Legal Notice No. 4 of 2015, which applied from 1 January 2016 to 31 December 2016.

32. The Judge determined that when applying the basic rules of harmonisation and in the absence of a recognised objective standard, the dictionary definitions could not be relied upon to conclusively define a product for tariff classification purposes, where certainty was key. The Judge found that the Appellant provided no evidence of the source of the definitions relied on by the Committee.

33. The Judge attached little weight to the letter from the Ministry of Trade and Industry as it asserted important policy matters without supporting documentation. Similarly, little weight was attributed to the manufacturer's distinction between French fries and wedges. The Judge was of the view that, if anything, more weight would be attached to the certification from health officials from the port of export as to how the product would be classified. In this case, wedges were included under the general heading "French Fries".

The Grounds of Appeal

34. The Appellant has challenged the decision of the Judge on these grounds:[14]

    a. The Learned Trial Judge erred in her reasoning for her decision when she ruled that ***General Order No. 9 of 2020*** issued by the Comptroller was illegal.

[14] Record of Appeal, pages 8-9

b. The Learned Trial Judge failed to consider that ***General Order No. 9 of 2020*** was not intended to remove wedges from the General Heading description of Frozen Fried Potatoes as contained in the ***Customs Tariff Schedule 1 of the Act***.

c. The Learned Trial Judged failed to consider that the purport of ***General Order No. 9 of 2020*** was to attach CPE 900 to wedges, which meant that they were ineligible for exemption from duties.

d. The Learned Trial Judge mistakenly found that the description of wedges as Frozen French-Fried Potatoes meant that the CPE 100 applied to the wedges.

e. The Learned Trial Judge was wrong as a matter of law in finding that the Appellant should be limited to making demands or revisiting clearances for a period of up to six (6) months from the date of delivery of goods and failed to have regard to ***section 228 of the Act***.

The Issues

i. Whether sections ***20***, ***246***, and ***247 of the Act*** contemplate a post-clearance audit and authorised the Appellant to demand payment of short levied duties.

ii. Whether the Appellant acted in conformity with the dictates of procedural fairness, as the circumstances attendant in this matter, required.

iii. Whether the Appellant's decision to classify frozen potato wedges as not being "Frozen French Fries" was unreasonable and irrational.

Issue 1

Whether *sections 20*, *246*, and *247 of the Act* contemplate a post-clearance audit and authorised the Appellant to demand payment of short levied duties.

35. The relevant portions of the Act under consideration are as follows:

> "Section 2.
>
> "offence against the Customs laws" includes any act of any person contrary to the Customs laws or any failure of any person to perform an act required by the Customs laws to be performed by him.
>
> Section 8. The President may from time to time by Order amend the Common External Tariff set out in the First Schedule, in accordance with any Agreement by Member States of the Common Market.
>
> Sections 8A. (1) The Minister may from time to time by Order subject to such conditions as he may prescribe suspend the Common External Tariff set out in the First Schedule for the period stated in the Order in relation to one or more types of goods, in accordance with any Agreement by Member States of the Common Market.
>
> Sections 20. (1) Where by entry, bond, removal of goods, or otherwise, any obligation has been incurred for the payment of duties of Customs, such obligations shall be deemed to be an obligation to pay all duties of Customs which may become legally payable, or which are made payable or recoverable under the Customs laws, and to pay the same as the same become payable.

Section 20. (2) When any duty has been short levied or erroneously refunded, the person who should have paid the amount short levied or to whom the refund has erroneously been made, shall pay the amount short levied, or repay the amount erroneously refunded, on demand being made by the Comptroller.

Section 210. Save as otherwise provided in section 211, a person who is convicted of an offence against the Customs laws for which no specific penalty is provided shall incur a penalty of four thousand dollars.

Section 246. Subject to the provisions of the Customs laws, any offences under the Customs laws may be prosecuted, and any penalty or forfeiture imposed by the Customs laws may be sued for, prosecuted and recovered either summarily or in the High Court, and all rents, charges, expenses and duties, and all other sums of money whatsoever payable under the Customs laws may be recovered and enforced in the manner prescribed by the Summary Courts Act or under the Supreme Court of Judicature Act as may be applicable, or as near thereto as the circumstances of the case will permit, on the complaint of an Officer.

Section 247. Proceedings under the Customs laws may be commenced at any time within seven years after the date of the offence."

The Submissions

The Appellant

36. The Appellant submitted that the Judge fell into error in the construction of the Act and in particular ***sections 20, 246*** *and* ***247 of the Act***. It contended that the Judge's

interpretation incorrectly treated the term "offence" as being confined to a criminal offence, when the statute clearly defined an "offence against the Customs laws". On a proper reading of ***section 2 of the Act***, an offence included any act contrary to the Customs laws or any failure to perform an act required by those laws.

37. The Appellant submitted that once the plain and ordinary meaning of the statutory text is applied, the Judge's interpretation must be rejected. The Appellant referred to ***Cross on Statutory Interpretation***, which distinguishes "interpretation" from "application," the latter being the process of giving effect to clear statutory language where no ambiguity exists.

38. With respect to ***section 20(2) of the Act***, the Appellant submitted that the provision explicitly contemplated and authorised the revisiting of duties that had been erroneously or short levied. It identified three essential features of ***section 20(2) of the Act***:

    a. That duties had been short levied and paid by the importer;
    b. That a subsequent determination revealed the levy to be erroneous; and
    c. That the Comptroller was empowered to demand and the importer obliged to pay the amount short levied.

39. The Appellant contended that ***section 20(2) of the Act*** contemplated a "post-clearance audit" or an assessment to determine whether, after payment of duty and the release of goods, there had been a short levy. Without such a process, there would have been no manner in which it could have been discovered that, as stated in ***section 20(2) of the Act***, "duty has been short levied".

40. The Appellant noted that the Judge accepted, at paragraph 26 of her judgment, that ***section 20(2) of the Act*** permitted post-clearance audits and contained no express time limit for the Comptroller to determine whether duties had been short levied. However, the judge concluded that ***section 247 of the Act*** could not be invoked to justify a post-

clearance audit several years after the release of the goods. The Appellant submitted that this conclusion was flawed. It submitted that ***section 247 of the Act*** set the time limit for proceedings to recover duties arising from any breach or failure to comply with the Customs laws, including non-payment of the proper duties under ***section 20(1) and (2) of the Act***.

41. The Appellant further contended that the judge erred in her treatment of ***sections 246 and 247 of the Act***. It submitted that those provisions must be read together. ***Section 246 of the Act*** authorised proceedings in respect of any "offence against the Customs laws," and ***section 247 of the Act*** prescribed a seven-year limitation period for commencing such proceedings. The term "offence against the Customs laws," as defined in ***section 2 of the Act***, expressly included a failure to perform any act required by the Customs laws. Such acts included:
    a. The obligation under ***section 20(1) of the Act*** to pay all duties legally payable; and
    b. The obligation under ***section 20(2) of the Act*** to pay duties that were short levied, upon demand for payment.

42. The Appellant submitted that the Respondent failed to pay the proper duties between 2012 and 2018, thereby committing offences within the meaning of the Act. The subsequent demand under ***section 20(2) of the Act*** was properly made and the Appellant was entitled to recover the short levied duties within seven years of the Respondent's non-compliance. ***Section 247 of the Act*** was therefore directly applicable.

The Respondent

43. The Respondent submitted that the Act, being a taxing statute, was required to be strictly construed. In that regard, reliance was placed on ***Cape Brandy Syndicate v IRC [1921] 1***

KB 64 at 71 and ***Micklethwait Re: (1855) 11 Exch 452 at 910***, which underscored the principle that liability to tax cannot be extended beyond the clear language of the statute.

44. Against the background of the need for strict construction, the Respondent contended that any assertion of authority by the Appellant to conduct a post-clearance audit necessarily engaged the Respondent's property rights. As the Appellant was a creature of a taxing statute, its powers was confined to those strictly conferred by Parliament. The Respondent argued that a close reading of ***section 20 of the Act*** revealed no general power authorising the Appellant to undertake a post-clearance audit review or to reclassify goods retrospectively. The Respondent submitted that the Judge accepted that there were limited circumstances in which the Appellant had the authority to conduct a post-clearance audit review. It argued that ***section 20 (2) of the Act*** did not on its plain meaning authorise a post-clearance audit review, but rather made provision for payment in circumstances where there was a short levy. The authorisation for a short levy could not be teased out of a provision which authorised the payment of a short levy.

45. The Respondent further submitted that where Parliament intended to create a power permitting retrospective intrusion such as a post-clearance review procedure, it ordinarily prescribed specific parameters governing the scope and manner of its exercise. It argued that Parliament could not be taken to have conferred such a power indirectly, through the wording of ***section 20(2) of the Act***, the purpose of which was simply to impose liability on an importer to pay a short levy, where one had been identified.

46. In the alternative, the Respondent contended that even if ***section 20(2) of the Act*** did confer a power to demand short levied duties, such a power had to be exercised within a reasonable time, in the absence of an express statutory limit. It submitted that a six-

month period represented the outer boundary of what could be regarded as reasonable for conducting a post-clearance review.

47. The Respondent next submitted that ***sections 246 and 247 of the Act*** had no application to the present matter. It argued that ***section 246 of the Act*** addressed proceedings relating to "any offence under the Customs laws" and to the recovery of penalties or forfeitures, whether by prosecution or suit. It was submitted that the section was directed to circumstances in which penalties had been properly imposed under the Act and not to cases involving alleged short levied duties arising out of misclassification or computational error pursuant to ***section 23(2A) of the Act*****.**

48. With respect to ***section 247 of the Act***, the Respondent maintained that the seven-year limitation period applied only to an "offence." It argued that the definition of "offence against the Customs laws" in ***section 2 of the Act*** did not meet the requirements of ***section 247 of the Act***, for several reasons. First, ***section 247 of the Act*** specifically referred to "the offence," and not "an offence against the Customs laws". Second, the Respondent submitted that even if the Committee's decision was correct, it did not qualify as an offence caught by ***section 247 of the Act*** or even the definition in ***section 2 of the Act***. It was, the Respondent submitted, merely a unilateral decision by the Committee to purportedly exercise a power which was not statutorily underpinned relative to a reclassification which at best took place in 2016. Third, the Respondent argued that all Customs offences were statutorily enabled and the Appellant had identified no provision that the Respondent had contravened. It emphasised that it is trite law that a statutory offence must be framed in clear and unequivocal terms, with certainty as to both its elements and the conduct it prohibits.

49. The Respondent submitted that the doctrine of doubtful penalisation applied and any ambiguity in the scope or applicability of penal provisions must be resolved in favour of the subject. It noted that ***sections 212***, ***213***, and ***214 of the Act*** illustrated the manner in which Parliament created offences in express and specific language.

Discussion

50. Both parties accepted that the provisions under consideration had to be construed strictly and that the text of the statute remained the primary indicator of legislative intention. ***Section 20(1) of the Act*** imposes upon an importer a continuing statutory obligation to pay all duties that become legally payable or recoverable under the Customs laws. ***Section 20(2) of the Act*** further provides that where duty "has been short levied," the importer "shall pay the amount short levied" upon demand by the Comptroller.

51. ***Section 20(2) of the Act*** pertains to circumstances in which duty has been short levied or erroneously refunded. It is axiomatic that a short levy can only be ascertained subsequent to the initial declaration and the payment of duties. The identification of a short levied duty can only occur by virtue of a process which allows for the revisitation of the duties previously assessed, in order to determine whether an error has occurred and the relevant causative factors. A post-clearance assessment procedure does not need to be explicitly stipulated in the Act. It is a wholly logical and natural corollary to ***section 20(2) of the Act***, if it is to be effectual. While the Act is a taxing statute and must be strictly interpreted, this does not mean that there is a need for naturally incidental processes, integrally required in order to render the enforcement of provisions effective, to be statutorily articulated at every juncture.

52. ***Section 20(2) of the Act*** does not prescribe any temporal limit within which such reassessment has to occur. The audit undertaken in this case spanned seven years, from

2012 to 2018. In the absence of an express statutory limitation, the question which arises is whether the Act, read as a whole, permits the Comptroller to revisit the duties paid during that period and to demand the short levied amounts.

53. The Judge determined that the Appellant could not rely on ***section 247 of the Act*** to justify conducting a post-clearance audit several years after the goods had been released. The Judge's reasoning proceeded on the premise that ***section 247 of the Act*** applied exclusively to the prosecution of criminal offences under the Act. On this view, because there had been no allegation of a breach of the criminal law or no notice of any investigation or a charge for any offence, the seven-year limitation period in ***section 247 of the Act*** could have had no relevance to the recovery of short levied duties. The Judge concluded that the post-clearance audit undertaken in 2018 was not conducted within a reasonable period and was therefore ultra vires.

54. That interpretation and conclusion are not sustainable. The definition of "offence against the Customs laws" in ***section 2 of the Act*** is an extremely expansive one. It includes any act contrary to the Customs laws or any failure to perform an act required by the Customs laws. A deliberate legislative choice was made to define what constitutes an offence against the Customs laws in a very specific manner. Thus, the definition of "offence against the Customs laws" under ***section 2 of the Act***, upon proper analysis, first deals with the **acts** of any person contrary to the Customs laws. There are several examples of this in the Act. Examples include the fraudulent evasion of any import or export duties of Customs and the sale of any prohibited goods, contrary to ***section 213(e) and (f) of the Act***. The definition of what constitutes, broadly, an "offence against the Customs laws" under ***section 2 of the Act*** does not however stop after reference is made to **acts** contrary to the Customs laws. The definition **also** refers to any **failure** of any person to perform an act required by the Customs laws to be performed by him. Under this definition, a failure by a person to pay duties legally payable under ***section 20(1) of the Act***, is indubitably an offence against the Customs law. This is because a person has failed to perform an act

required by the Customs laws to be performed by him. There is no shadow of any ambiguity in such a requirement.

55. ***Sections 246*** and ***247 of the Act*** were required to be read in light of this interpretation. ***Section 246 of the Act*** authorised the prosecution of any offence under the Customs laws and ***section 247 of the Act*** prescribed the period within which such proceedings might be commenced, namely, seven years from the date of the offence. When the provisions are read together, the statutory scheme is clear.

56. The Judge's interpretation of what constituted an "offence" completely overlooked the statutory definition in ***section 2 of the Act*** and this resulted in an erroneous construction of ***section 247 of the Act***.

57. Once ***section 247 of the Act*** is properly understood, against the background of the definition of what constitutes, broadly, an "offence against the Customs laws" under ***section 2 of the Act***, its application to the present case is straightforward. The Respondent, by declaring and paying duties at the rate of 5% between 2012 and 2018, failed to pay the amount of duty that was legally payable pursuant to ***section 20(1) of the Act***. This constituted a continuing failure to perform a statutory obligation under the Customs laws. Upon discovery of the short levy, the Comptroller was empowered by ***section 20(2) of the Act*** to demand payment and by virtue of ***section 247 of the Act***, that recovery could lawfully be pursued within seven years of the date of non-compliance. There was, therefore, no statutory impediment to the review or the subsequent demand issued in 2020.

58. The Respondent argued that because the Act was a taxing statute, its provisions had to be construed with strictness and the principle against doubtful penalisation had to apply. That principle does not arise here. The definition of what constitutes an "offence against the Customs laws" is a remarkably pellucid one and the statutory language left no scope

for any ambiguity as to the applicability of ***sections 246*** and ***247 of the Act*** to a failure to comply with ***section 20(1) of the Act***.

59. Therefore, the Judge's interpretation of ***sections 246*** and ***247 of the Act*** was inconsistent with the legitimate scope of those provisions and with the broader statutory scheme governing the assessment and recovery of duties. When the Act is construed as a whole, ***sections 20***, ***246*** and ***247 of the Act*** operated to authorise post-clearance audits and to permit recovery of short levied duties within seven years of the importer's non-compliance. In the circumstances, the Judge was plainly wrong in coming to a contrary conclusion.

Issue 2

Whether the Appellant acted in conformity with the dictates of procedural fairness, as the circumstances attendant in this matter, required.

The Submissions

The Appellant

60. The Appellant submitted that the post-clearance audit was a mere preliminary investigation which produced only a query concerning the proper classification of the Respondent's potato products. It maintained that no decision was taken at the post-clearance audit stage on the classification of the Respondent's imported potato products. In support of its position, the Appellant relied on ***Rees v Crane (1994) 43 WIR 444*** and on the commentary in ***Supperstone and Goudie at paragraphs 11.127 and 11.128***.

61. The Appellant further submitted that it complied with the requirements of natural justice by informing the Respondent of the nature of the query and by inviting the Respondent to provide representations and supporting material on the classification it had used. The Appellant contended that the Respondent was afforded a full and extensive opportunity to be heard before the decision was taken that the products should not be classified as "Frozen French Fries". The Appellant relied on the following matters:

    a. The Respondent was asked to provide literature in support of its classification, including photographs of the products.
    b. The Respondent requested and was granted a meeting with the Appellant's representatives at which the Respondent made extensive oral submissions.
    c. The Respondent subsequently provided written representations which included a production process flow, photographs, ingredient information supplied by its supplier and a detailed classification report outlining the procedural history and the classification considerations that informed its position.

The Respondent

62. The Respondent submitted that the duty of procedural fairness required the decision maker to identify clearly the preliminary views and reasons for the proposed decision and to provide the affected party with an opportunity to respond. The Respondent relied on ***R v Secretary of State for the Home Department ex parte Doody [1993] 3 WLR 154 at 168*** and ***Peter Thomas Mahon and Air New Zealand Ltd and Others [1984] AC 808 at 821***.

63. The Respondent submitted that no request was made by the Post-Clearance Audit Unit to interview the Respondent or to solicit its views and that the only interaction with it was at the meeting of 21 July 2020.

64. The Respondent further submitted that the distinction between a desk review audit and a field audit did not remove the requirements of natural justice. According to the Respondent, even for a desk review audit, compliance with the constituent elements of natural justice was still required, including the need for disclosure of documents and an opportunity for the Respondent to respond. The Respondent contended that had it been afforded an opportunity to be heard, it would have raised the following concerns before the Committee made its decision. First, the validity of CPE 900 as reflected in S.R.3 and S.R.4. Second, that there was an inconsistency in the tariff heading applied in a prior classification dated 28 March 2018 concerning another importer, Vemco Limited.

65. The Respondent contended that, if upheld, the impugned decision would deprive it of property rights through the imposition of fines and it would cause reputational damage.

The Law

66. Relative to procedural fairness and preliminary investigations, Lord Slynn in ***Rees and others v Crane (1994) 43 WIR 444 at 457*** said:

> "It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that the making of the inquiry without observing the *audi alteram partem maxim* is justified by urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without

such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage.

But in their Lordships' opinion there is no absolute rule to this effect even if there is to be, under the procedure, an opportunity to answer the charges later. As Professor de Smith puts it in de Smith's Judicial Review of Administrative Action, 4th ed. (1980), p. 199:

> "Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests, the courts will *generally* decline to accede to that person's submission that he is entitled to be heard in opposition to this initial act, *particularly* if he is entitled to be heard at a later stage." (Emphasis added.)

In considering whether this general practice should be followed the courts should not be bound by rigid rules."

67. Further, the learned authors of ***Supperstone, Goudie and Walker on Judicial Review***[15] state:

> "[11.126]
>
> Where the courts are dealing with preliminary determinations, i.e., decisions which do not finally determine the rights or obligations of individuals, even though they may adversely affect individuals, being a stage in the process involving a determination of such rights or obligations, the principles of natural justice or fairness will often be truncated and indeed may be excluded altogether. The rationale behind this approach is that natural justice is not guaranteed at all stages of the decision-making process, and provided the individual has a full opportunity to make proper representations before a decision affecting his rights has ultimately

[15] 17th Ed (LexisNexis UK), paras 11.126-11.128

been made, its requirements of fairness will be met. At the same time, depending upon the nature of the process in issue, certain procedural safeguards may be required not merely having regard to the sequence of steps taken as a whole, but also in relation to particular individual steps in the process."

[11.127]

The classic example of an important preliminary decision which does not attract any procedural safeguards is the decision to prosecute. Obviously the prosecuting authority must determine that there is a prima facie case, but as Lord Reid pointed out in *Wiseman v Borneman* [1971] AC 297] the accused has no right to be heard or consulted before any such decision is made. He will, of course, have a right to make full representations at his trial, and it is this which secures the safeguards of natural justice. Likewise there is no need to accord a suspect in a criminal investigation a hearing as a condition precedent to a Crown Court making an order granting access to special procedure material [R v Crown Court at Leicester, ex p DPP]. In Wiseman itself [discussed in de Smith (1970) CLJ 19] the issue concerned the exercise of power by the tax authorities. They were empowered to take a taxpayer before a tribunal who had to determine whether the object of certain transactions was the illegal avoidance of tax. However, they first had to satisfy the tribunal that there was a prima facie case. The question in issue was whether the taxpayer was entitled to see the material put before the tribunal at this preliminary stage and to make representations upon it. The House of Lords held that he was not; the opportunity to state a case was given at a later stage if and when the tribunal decided to embark upon a full hearing. However, their Lordships were not willing to accept that natural justice was always excluded where preliminary determinations were in issue: on the contrary, as Lord Wilberforce pointed out, there are many kinds of preliminary determinations, and the requirements of fairness will vary from one to another.

[11.128]

Similarly, in *Norwest Hoist Ltd v Secretary of State for Trade*, the Court of Appeal held that the Secretary of State was under no obligation to give an opportunity to a company to state its case before appointing inspectors to investigate its officers pursuant to a specific power in the Companies Act. Ormrod LJ treated the situation as being precisely analogous to the decision to prosecute, and Geoffrey Lane LJ pointed out that the chance to make representations would occur during the inquiry itself."

Discussion

68. According to Ms. Hamid, following the completion of the desk review audit, the Preventive Branch of the Customs and Excise Division sent the Respondent seven letters covering the years 2012 to 2018.[16] The letters, addressed to Ms. Warwick and the Respondent's Manager, were materially identical except for the audit year. They informed the Respondent that a desk review audit had been conducted, that a classification query had arisen and that the Respondent was required to provide supporting literature, including photographs.

69. Ms. Warwick acknowledged receipt of the letters and requested time to compile the requested material. She further stated that, around 16 April 2018, she requested a meeting with representatives of the Post-Clearance Audit Unit. A meeting took place during the week of 23 to 27 April 2018 and included both Ms. Warwick and Ms. Hamid. From Ms. Warwick's affidavit it can be discerned that the meeting was an extensive one and that both parties made oral representations on the classification query. [17]

[16] Record of Appeal, page 185
[17] Record of Appeal, page 77-79

70. On 2 May 2018, the Respondent submitted the dispute to the Committee. The dispute was supported by documents, including a production process flow, photographs of the products, ingredient information from the supplier and a Classification Report setting out the procedural history and the classification considerations relied on by the Respondent.[18] The Committee issued its decision in General Order No. 9 of 2020 dated 1 July 2020, which was also reflected in a demand letter sent to the Respondent by the Appellant on 12 October 2020.

71. A desk review audit is a preliminary, documentary exercise directed at verifying whether the Respondent's prior declarations had been correctly classified. The desk review audit resulted in a classification query. As noted in ***Rees v Crane*** (supra), the absence of a right to be heard at a preliminary investigative stage will not necessarily amount to a denial of natural justice where "there will be a full chance adequately to deal with the complaints later". The passages from ***Supperstone, Goudie and Walker*** (supra) suggest that, depending on the context, procedural safeguards may be truncated, or even excluded, in relation to preliminary determinations, provided that before any decision is finally taken affecting rights or obligations, the person concerned is afforded a proper opportunity to make representations.

72. Although the duty of fairness may modify this general position and require additional obligations depending on the circumstances (see ***PSC v Ceron Richards [2022] UKPC 1***), no such circumstances exist in this case to displace the general position.

73. Before there was any letter of demand, the Respondent had been informed of the nature of the query, invited to produce supporting literature, afforded a meeting at which

[18] Record of Appeal, page 211-225

it made oral representations and was enabled to place comprehensive written material before the decision-maker.

74. In those circumstances, it could not be said that the Respondent was denied a fair opportunity to be heard. The process involved in the desk review audit did not lead to the final determination of the Respondent's rights. What ensued was the generation of a classification query. The process leading up to the desk review audit and the audit itself did not require the full application of the tenets of procedural fairness, at those stages. This was because the desk review audit was in the nature of a preliminary assessment. What fairness required was that, before any final classification decision adverse to the Respondent's interests was made, the Respondent should have had a meaningful opportunity to know the nature of the concerns and to respond. That requirement was satisfied by the correspondence, the meeting and the subsequent written request for classification with supporting documents.

75. Viewed as a whole, the sequence of events demonstrated an iterative process in which the Respondent was engaged at multiple points prior to the General Order or the demand for payment. The Respondent participated actively, both orally and in writing. On any reasonable assessment, the procedural safeguards appropriate to the stages and the nature of the process and its consequences were observed. The evidence demonstrated that the Appellant acted in conformity with the dictates of procedural fairness, as the circumstances attendant in this matter, required. In the circumstances, the Judge's conclusion to the contrary was plainly wrong.

Issue 3

Whether the Appellant's decision to classify frozen potato wedges as not being "Frozen French Fries" was unreasonable and irrational.

The Submissions

The Appellant

76. The Appellant submitted that frozen fried potato wedges had never been classified as frozen French fries. This, it argued, was evident from the Legal Notices, which demonstrated that the suspensions and variations of the CET applied specifically to frozen French fries pursuant to the decisions of the COTED and ***section 8 of the Act***. Accordingly, in the absence of any suspension or variation, frozen fried potato wedges attracted a duty rate of 20%.

77. The Appellant further contended that there was no dispute between the parties that the potato product in question, namely frozen fried potato wedges, was properly classified under the CET. The Appellant submitted that the issue before the Judge was a very narrow one, as reflected in the affidavit of Ms. Warwick, who stated that "there is no dispute with the classification of the imported goods as 2004.10.90; rather, the issue for determination is whether CPE 900, under which duty at 20% is levied, or CPE 100, under which duty at 5% is levied, was the appropriate declaration". [19]

78. The Appellant submitted that exhibit S.R.3 showed that the imported item, classified under the CET 2004.10.90 as "other potato", attracted CPE 100, consistent with the legal

[19] Record of Appeal, page 432, para 9

notices providing for the suspension or variation of duty on Frozen French Fries. By contrast, exhibit S.R.4 reflected the same CET classification but attracted CPE 900 and was described as other potatoes, a category that included frozen fried potato wedges.

79. In relation to the validity date 1 February 2016 appearing in both S.R.3 and S.R.4, the Appellant submitted that these dates related solely to the change in the applicable VAT rate from 15% to 12.5%. It was explained that when a query was generated in 2021, the system would have automatically reflected the VAT rate then in force, whereas a query made prior to February 2016 would have reflected VAT at the rate of 15%. Accordingly, the validity date did not signify when CPE 100 or 900 came into effect, but instead corresponded to the VAT amendment.

80. The Appellant further submitted that S.R.3 and S.R.4 were produced solely to illustrate the CPE applicable to "Frozen French Fries" which benefitted from a suspension or variation of the CET under CPE 100 and to "other potatoes" which did not benefit and fell under CPE 900. It was also submitted that these documents did not form part of the Committee's decision-making process.

81. Regarding the contention of retroactivity, the Appellant submitted that the Committee was determining whether the Respondent's imported items qualified as Frozen French Fries and were therefore entitled to the reduced CET rate of 5%. The creation of new categories of goods with retroactive effect did not arise.

82. The Appellant submitted that French fries were long thin strips of potato. A decision that wedges, which were not long thin strips of potato, were not French fries, was not one that could possibly be regarded as straying from logic, or was outside the limits of reason, or one that no sensible Customs authority could have regarded as permissible.

83. The Appellant maintained that there were logical reasons underpinning the decision that wedges were not French fries. It relied on several matters which, in its submission, directly supported the reasonableness and rationality of the decision:

    a. The dictionary definition of French fry placed before the Judge;
    b. The labelling used by the Respondent's own supplier; and
    c. The views expressed by the Ministry of Trade and Industry, which outlined the rationale for the suspension of the CET on frozen French fries. The Ministry's letter did not create a rationale for the suspension after the fact; rather, it simply explained why a suspension had originally been sought and agreed.

    The Appellant submitted that the Judge wrongly accorded little weight to the correspondence identified at "c." above.

84. The Appellant further submitted that the Judge was greatly influenced by the certification issued by the health authorities. The Appellant contended that the certificate was irrelevant to the issues in the claim as it addressed only the composition of the product and its fitness for human consumption. Moreover, the description of the product was the self-assessment of the exporter and not the Kingdom of Belgium and it was for health purposes rather than for trade classification.

85. The Appellant relied on the learned authors of ***Supperstone, Goudie and Walker on Judicial Review at paras 8.3 to 8.10***.

The Respondent

86. The Respondent submitted that the classification ruling identified the product as "Frozen French Fried Potatoes [wedges]," and that this amounted, in its view, to an acknowledgement by the Appellant that wedges were a species of frozen French fried potatoes. It further submitted that the term "French fry" had no single definitive meaning and was a generic, evolving expression whose scope varied across jurisdictions. The Respondent argued that numerous subcategories fell within the broader description of French fries, and that it was wrong in law for the Appellant to rely selectively on exporters' labelling or marketing terminology to isolate a precise subcategory of goods for the purpose of imposing a higher rate of duty.

87. In relation to the suspension and variation procedures, the Respondent contended that the Legal Notices were ambiguous. The Respondent submitted that the Legal Notices supported treating wedges as French fries. It explained that the suspension and variation Orders from 2011 to 2018 used the headings "20.04" or "2004.10.90." The heading 20.04 described goods as "other vegetables … frozen" and never mentioned potatoes or wedges, whereas 2004.10.90 specifically referred to potatoes and frozen French fries.

88. Since heading 2004.10.90 was specific to "potatoes and French fries", it should prevail over the more general "other vegetables" heading if there was any overlap, particularly in a tax statute where doubts must be resolved in favour of the taxpayer. The Respondent therefore submitted that the repeated use of the specific French fries heading across the Orders demonstrated that the plain and ordinary meaning must be given to the term "potatoes French fries", which includes potato wedges.

89. The Respondent challenged the Appellant's reliance on the letter from the Ministry of Trade and Industry. It argued that the Ministry's documentation was wrongly premised on the assumption that wedges were not French fries and that the letter was generated after the suspension and did not form part of the original reasoning for it. The Respondent further submitted that the relevant inquiry was not the Ministry's policy but the will of the Legislature, rendering the Ministry's views irrelevant to the interpretation of the suspension and variation Orders. It contended that no authority permitted a Court to interpret delegated legislation by reference to correspondence obtained from the Executive after the Order had been made. The rule was well established that where ambiguity arose, a Court might refer to Hansard reports of the promoter's speech in Parliament, but such references were extremely limited.

90. The Respondent contended that the Appellant relied on two system-generated exhibits, S.R.3 and S.R.4, which bore a validity date of 1 February 2016. The Respondent argued that any classification reflected in those documents could not lawfully be applied to periods prior to that date, nor could the documents themselves support either the classification or the suspension of the CET. The Respondent maintained that the Appellant, in using the ASYCUDA system to enforce a non-statutory code, could not lawfully change or increase the duties set by Parliament.

91. The Respondent asserted that only legislation and properly made Orders could determine which goods were taxed and at what rate and that the role of the Customs Authority was limited to applying those rules. It is submitted that the Customs Act contained no provision authorising the Appellant to create a new sub-classification with a different duty rate, where Parliament and existing Orders already prescribed the headings and rates.

92. The Respondent submitted that the Committee acted illegally in issuing the ruling. It contended that the Committee's decision of 1 July 2020 and the subsequent demand letter of 12 October 2020 contravened ***section 5(3)(e) of the Judicial Review Act, Chap. 7:08***. In any event, it argued that the decision was irrational, even under traditional Wednesbury principles. The Respondent relied on ***Kennedy v Secretary of State for Justice [2014] UKSC 20*** and ***In R (The Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin)***, submitting that the contemporary approach to irrationality no longer required adherence to the rigid threshold historically associated with Wednesbury. It also relied on paragraphs 44–50 of the Judge's reasoning. [20]

The Law

93. Relative to the test applicable to determining whether a decision was unreasonable or irrational, the learned authors of ***Supperstone, Goudie and Walker on Judicial Review at paras 8.4 to 8.8*** state:

> "**[8.4]**
>
> In 1947 the Court of Appeal discussed the review of executive discretion generally in Associated Provincial Picture Houses Ltd v Wednesbury Corpn. This case was concerned with a complaint by the owners of a cinema in Wednesbury that it was unreasonable of the local authority to licence performances on Sunday only subject to a condition that 'no children under the age of 15 years shall be admitted to any entertainment whether accompanied by an adult or not'. In an extempore judgment, Lord Green MR drew attention to the fact that the word 'unreasonable' had often been used in a sense which comprehended different grounds of review. He summarised the principles as follows:
>
> > ''The court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which

[20] Record of Appeal, page 27

they ought not to have taken into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the power which Parliament has confided in them.''

[8.5]

This summary by Lord Greene has been applied in countless subsequent cases. The grounds of review that it describes are not confined to unreasonableness, but Lord Greene's criterion of 'a conclusion so unreasonable that no reasonable authority could ever have come to it' was so frequently cited that this head of review came to be known as 'Wednesbury unreasonableness'.

[8.6]

The narrowness of the limits within which the court can intervene was stressed by Lord Diplock, who gave this head of review a new name – 'irrationality' – when expounding his tripartite classification of the grounds of review in Council of Civil Service Unions v Minister for the Civil Service. Elaborating on this aspect of Lord Greene's exposition, Lord Diplock said of this head of review:

> ''By “irrationality” I mean what can now be succinctly referred to as “Wednesbury unreasonableness” (Associated Provincial Picture Houses v Wednesbury Corpn [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no

sensible person who had applied his mind to the question to be decided could have arrived at it'.'

[8.7]

Lord Diplock's statement of principle underlines the crucial feature that the court is not concerned with what it regards as the appropriate decision, but rather with the quite different test of whether sensible decision-makers, properly directed in law and properly applying their minds to the matter, could have regarded the conclusion under review as a permissible one. Adopting the words of Cooke P in the New Zealand case of Webster v Auckland Harbour Board, what is required before the court may intervene on this ground is that the decision is one outside the limits of reason.

[8.8]

Moreover, the test is stringent: the court is not concerned with peccadillos. Reasonable people may differ about moral standards, and about the rigour with which logic must be applied. An assertion that a decision is illogical or fails to meet moral imperatives must be weighed against the needs of good administration, recognising that administrators will sometimes find themselves confronted with a Gordian knot, and must not shirk from applying a common sense solution. Only if the solution strays so far from logic or accepted moral standards that no reasonable administrator could have thought it right will it be condemned as irrational. This involves a value judgment by the court: but it is a judgment of a very limited kind."

94. Further, in the decision ***In R the Law Society v The Lord Chancellor [2018] EWHC 2094 (Admin)***, Carr J aptly stated that the assessment of irrationality has two aspects:

> "98 The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of "irrationality" or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic Wednesbury formulation it is "so unreasonable that no reasonable authority could ever have come to it": see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223, 233–234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g Boddington v British Transport Police [1999] 2 AC 143, 175, per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it—for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. Factual error, although it has been recognised as a separate principle, can also be regarded as an example of flawed reasoning—the test being whether a mistake as to a fact which was uncontentious and objectively verifiable played a material part in the decision-maker's reasoning: see E v Secretary of State for the Home Department [2004] QB 1044."

Discussion

95. The decision under review was issued by the Committee in response to the Respondent's request for classification. The Committee, on 5 June 2020 delivered a unanimous decision. The affidavit of Ms. Ramjit[21] established that the Committee had before it a body of material, including the report prepared by Ms. Lee Hue, an interpretation and application

[21] Record of Appeal, pages 354-359

of the relevant section and chapter notes of the CET, Legal Notices pursuant to the suspension and variation of the Customs duties on Frozen French Fries and the clarification letter received from the Ministry of Trade and Industry. The Committee decided that the Respondent's imported items were incorrectly classified, in that, frozen French fried potato wedges were not frozen French fries and that the 5% duty rate was not applicable.

96. The legal framework governing the Court's review of that decision is well established. As explained in ***Supperstone, Goudie and Walker on Judicial Review*** (supra), the ground of irrationality is well established as a narrow one, engaged only where a decision strays so far from logic that no reasonable administrator could have regarded it as permissible. The assessment involves a value judgment by the Court, but one of a strictly limited kind. In ***Council of Civil Service Unions v Minister for the Civil Service***, Lord Diplock described irrationality as applying to decisions that were "so outrageous in its defiance of logic" that no sensible decision-maker could have arrived at them. More recently, in ***R (Law Society) v Lord Chancellor*** (supra), Carr J explained that irrationality has two aspects, whether the outcome falls outside the range of reasonable decisions open to the decision-maker and whether the decision-making process was vitiated by reliance on irrelevant considerations, lack of evidential support, serious logical error or a material and objectively verifiable factual mistake.

97. The dictionary definitions relied upon by the Appellant stated the natural and ordinary meaning of the terms "French fries" and "potato wedges" and provided a plausible starting point for the classification as evidenced. The dictionary definitions before the Committee distinguished the long, thin strips of fried potato that characterised French fries from the larger, unpeeled, wedge-shaped pieces typical of potato wedges. While dictionary definitions are not determinative, they reflect ordinary usage and may furnish a rational basis for distinguishing the products.

98. The Committee also considered the descriptions and categorisation issued by the manufacturer. Clarebout Potatoes N.V., the manufacturer, placed French fries, steak fries and crinkle-cut fries in a defined "French Fries" category separate from a "Specialties" category, within which potato wedges were grouped. Such categorisation, although a commercial one, was indicative of how the products were understood within the industry and supported the view that wedges were treated as a distinct product type rather than a variant of French fries. The Judge wrongly attached little weight to the fact that the manufacturer's own classification drew a clear distinction between the two products.

99. The Committee also considered the explanation in the Permanent Secretary's letter of 19 February 2019 regarding the rationale for the longstanding suspension of the CET on frozen French fries. The correspondence indicated that the reduced rate had been applied consistently since at least 1993 to support the food, beverage and tourism sectors, where frozen French fries were regarded as a key input. The pattern of suspension and variation orders was consistently applied only to frozen French fries and never to wedge-type products. The letter did not introduce a rationale for the variations or suspension after the fact, but explained the longstanding basis of the policy. As the letter stated, frozen French fries were considered a significant input in the food, beverage and tourism subsectors, warranting a reduced CET to support the development of those sectors. The consistency of that demarcation over many years could not reasonably be characterised as arbitrary.

100. The Judge considered that the system-generated documents, S.R.3 and S.R.4, undermined the Appellant's position on the basis that they bore a validity date of 1 February 2016. However, the Appellant's explanation that the validity date corresponded to a revision of the VAT rate and that the ASYCUDA system automatically reflected VAT changes was supported by the import declarations exhibited by Ms Warwick[22]. The

[22] Record of Appeal, page 83 and 108

evidence established that S.R.3 and S.R.4 were not relied upon by the Committee in reaching its decision. Ms. Ramjit referred to those documents only to illustrate the relationship between Commodity Codes and the corresponding CPE and they did not form part of the material considered by the Committee. The Respondent's assertion that the suspension took effect only from 2016 or that sub-classifications were created, was inconsistent with the actual suspension and variation Orders.

101. Relative to the health certificate, the Judge was of the view that, if anything, more weight would be attached to the certification from health officials from the port of export as to how the item would be classified. In this case, wedges were included under the general heading "Frozen French Fries". The Appellant's argument is accepted. The certificate addressed the item's composition and fitness for human consumption. As well, the description of the item was the declaration of the exporter for the purpose of health and not trade classification.

102. Considered in its entirety, the Committee's decision rested on a rational and reasonable basis, with the material capable of yielding support for the classification of potato wedges outwith the heading of "Frozen French Fries." The Judge was therefore plainly wrong in concluding that the decision was irrational.

Disposition

103. The appeal is therefore allowed.

104. We shall hear the parties on the issue of costs.