



[2021] UKFTT 0206 (TC)

TC08156

*Appeal against decision under section 152(b) of the Customs and Excise Management Act 1979 refusing to restore vehicle seized under section 139(1) of that act as being liable to forfeiture under section 141(1)(a) of the act. Failure to supply underlying written policy for exercise of the section 152(b) power. Tribunal's jurisdiction under section 16(4) of the Finance Act 1994. Section 16(6)(a) of the Finance Act 1994. Legal burden versus evidential burden. Consideration of *Gora v The Commissioners of Customs and Excise* [2003] EWCA Civ 525 and of *Golobiewska v The Commissioners of Customs and Excise* [2005] EWCA Civ 607. Next decision will not inevitably be the same on remittal—*John Dee Limited v The Commissioners of Customs and Excise* [1995] EWCA Civ 62. Allowed and remitted.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/03718(V)

BETWEEN

MRS POOLOKASUNTHARAM RAJESWARY

Appellant

-and-

THE DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE RACHEL PEREZ
CHARLES BAKER BSc FCA CTA**

The hearing took place on 14 and 15 October 2020. The hearing was held by video, on the Tribunal Video Platform (this is why “V” appears after the appeal number above). All participants attended remotely, including the interpreter, Ms Eesa Green. A face-to-face hearing was not held because of the Covid-19 coronavirus pandemic and because the parties were content with a video hearing.

**For the appellant: the appellant's son, Mr Thajhan Yogendran, and the appellant herself
For the respondent: Mr Rupert Davies of counsel**

DECISION

A. OVERVIEW

1. This case concerns the respondent's decision not to restore to the appellant the appellant's vehicle which the respondent's officer seized in Coquelles near Calais when the vehicle was

on its way to the United Kingdom carrying alcohol and being driven by someone other than the appellant. The appellant was not in the vehicle or on that trip. In a summary decision dated 23 October 2020, we decided under section 16(4) of the Finance Act 1994 (1) that the person making the decision contained in a letter dated 18 January 2019 (“the decision letter”) not to restore the appellant’s vehicle to her could not reasonably have arrived at that decision, (2) that that decision was to cease to have effect from the date on which our summary decision was issued, and (3) that the respondent must conduct a review of the respondent’s decision.

2. We now give our full decision at the respondent’s request.

B. INTRODUCTION

3. The appellant appeals against the respondent’s decision dated 18 January 2019 not to restore to the appellant her Toyota Estima seven-seater vehicle, registration number LU52 AVB (“the vehicle”).

4. The appellant gave oral evidence through an interpreter, Ms Green. The appellant was represented by her son, Mr Yogendran. He himself also gave evidence. He was not a legal representative, and no point was taken about him performing this dual role. He spoke to us in English. He had not requested an interpreter for himself, and did not appear to need one.

5. Certain new points were raised at the hearing or only emerged fully at the hearing. At the start of the hearing, the appellant did not know (1) the reasons why the decision-making officer had reached the conclusions that the appellant was not innocent and that she had not taken reasonable steps to prevent smuggling in her vehicle, (2) that the respondent’s position was that the burden of proof was on the appellant for all matters including proving negatives, proving matters on which she could not have evidence, and disproving the respondent’s assertions, (3) that, as it transpired, the respondent relied on the respondent’s assertion – which the respondent said the appellant had to disprove – that smuggling had previously been done in the vehicle, and possibly also new was (4) that the respondent relied on a third reason: that restoration would be tantamount to restoring to the smuggler (mentioned in the decision-making officer’s witness statement but nowhere else). Once we had worked out at the hearing that those matters were new, we asked the appellant whether she wanted an adjournment to be given written notice of them and time to consider them. Her son’s initial response for her was yes. But after consulting his mother privately, he told us that she declined, because her answer would be the same regardless – that is to say, that she had known nothing about it.

C. BACKGROUND

1. Circumstances of the stopping of the vehicle in France

6. The respondent’s evidence as to the circumstances of the stopping of the vehicle was as follows—

(1) The vehicle was stopped on its way to the UK by Border Force officers on 23 August 2018 at Coquelles Tourist Inbound Control in France. The vehicle was being driven by a Mr Yogeswaran Balasingam. There was one passenger, a Mr Muturaja Sangkeeth. According to the notebook of the officer who questioned Mr Balasingam and the passenger during the stop, Mr Balasingam told the officer that Mr Balasingam had purchased “some wine”¹, “some Boxes, maybe 100 liters [sic]”² for “A family party”³.

¹ Page 7, line 39.

² Page 8, line 3.

³ Page 8, line 7.

The officer requested receipts. Documents given to him included one dated 17 August 2018 produced by the passenger, Mr Sangkeeth, from emptying his pockets⁴ (which the respondent's statement of case said "evidenc[ed] further trips undertaken to purchase alcohol").

(2) According to the officer's notebook, Mr Balasingam also told the officer that Mr Balasingam ran a shop that sold – among other things – alcohol⁵, and that the vehicle belonged to "My aunty"⁶, by which both parties accept he meant the appellant. According to the notebook, Mr Balasingam told the officer that the appellant owned a shop in Garlinge, in the UK⁷. No point was taken about the use of "aunty" to describe the appellant. She is not in fact Mr Balasingam's aunt. But the respondent accepted that "aunty" was just the way that Mr Balasingam referred to her and that it was not used with an intention to mislead.

(3) On a check of the vehicle during the stop at Coquelles, the vehicle was found to contain 322.5 litres of alcohol, in the form of mixed wine. The alcohol had not been declared for duty purposes.

7. That was the respondent's evidence as to the circumstances of the stopping of the vehicle.

2. Smuggling or attempted smuggling?

8. The respondent's position was that the place in Coquelles where the vehicle was stopped was "UK enforcement territory". It was not clear whether that place was also UK soil for the purposes of whether the incident had been a smuggling attempt as opposed to a successful smuggling act. The respondent's counsel, Mr Davies, said it had been only an attempt. We did not resolve the point because the respondent's position was that it made no difference whether this had been an occasion of actual smuggling or an occasion of attempted smuggling (and that references to previous occasions in the decision letter and statement of case were to both smuggling attempts and actual smuggling).

3. Seizure of alcohol and of vehicle

9. The officer who questioned the driver and passenger after stopping the vehicle in Coquelles concluded that the alcohol found in the vehicle was held for commercial purposes. The officer seized the alcohol under section 139(1) of the Customs and Excise Management Act 1979 ("the Customs and Excise Management Act") as being liable to forfeiture under regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010⁸ and section 49(1)(a) of the Customs and Excise Management Act. In addition to seizing the alcohol, the officer also seized the vehicle itself, under section 139(1) of the Customs and Excise Management Act. He seized it as being liable to forfeiture under section 141(1)(a) of that act, because of the vehicle's use for the carriage of goods (the alcohol) liable to forfeiture.

4. Restoration request, refusal and appeal

10. By an email dated 29 August 2018, the appellant asked the respondent to restore the vehicle to her (page 26). The respondent sent her a questionnaire which she completed and returned, dated 16 January 2019 (page 32). On 18 January 2019, the respondent wrote to the appellant refusing to restore the vehicle (page 3). By a letter received by the respondent on 14 February 2019, the appellant requested a review. (We did not appear to have this last letter

⁴ Page 10, lines 2 to 5.

⁵ Page 8, lines 13 and 20.

⁶ Page 9, line 33.

⁷ Page 9, lines 35 and 36.

⁸ Statutory instrument number 2010/593, as amended.

before us. But it was mentioned in paragraph 15 of the respondent’s statement of case on page 36, and we had no reason to doubt that it had been written and received.)

11. The respondent failed to do a review of the decision within 45 days beginning with the day on which the review request was received⁹ (and did not in fact do a review at all). It was submitted for the respondent that the 18 January 2019 refusal to restore was therefore deemed upheld. The respondent cited both section 15 and section 15F of the Finance Act 1994 for this deeming. Counsel’s skeleton argument cited section 15F(6) and (8). But section 15 and not section 15F was the provision included in the respondent’s authorities bundle and relied on in the respondent’s statement of case and in the respondent’s counsel’s oral submissions. Both sections appear to have been in force at the time the decision was made. Section 15F(1) provided that “This section applies if HMRC are required to undertake a review under section 15C or 15E”. But whether it is by virtue of section 15F(8) or of section 15(2), the 18 January 2019 decision not to restore is deemed “upheld” or “confirmed” (respectively) if no review is done within the 45 days mentioned in each of those sections. Whether section 15F applied could make a difference had the respondent not notified the appellant of the deemed upholding (section 15F(9) requires that, but section 15 does not). But the respondent’s statement of case said (paragraph 16, page 36) that the respondent had issued a letter dated 9 April 2019 to the appellant “explaining the deeming process” and – although we could not find that 9 April letter – the appellant’s 9 May 2019 letter at page 51 appears to confirm that the appellant received such a letter. So, so far as notification was required of the deeming, the notification seems probably to have been done and we accept that it was done.

12. The appellant’s 9 May 2019 letter mentioned at paragraph 11 above was stamped as received on 20 May 2019 by the “Birmingham Tax Tribunal” (page 51). That letter repeated the restoration request. The letter said that the appellant had not been aware of Mr Balasingam’s purpose for the trip in question, and that the stock purchased was entirely for his store and had no involvement with the appellant’s own business. With that letter, the appellant enclosed a letter dated 8 May 2019 signed by Mr Balasingam (page 52), which the appellant said in her 9 May letter “confirms my innocence”. She also enclosed an invoice (page 53) which she said confirmed Mr Balasingam’s ownership of his own store.

5. Seizure versus refusal to restore

13. Mr Davies told us that the decision being appealed to the First-tier Tribunal is only the decision not to restore the vehicle to the appellant, and not the seizure itself. His skeleton argument said “A Seizure Information Notice BOR156 and Customs Notice 12 A were issued. The notice explained that the seizure could be challenged in the magistrates’ court by sending a notice of claim within one month of the seizure”, and “Neither the Appellant nor the passengers [sic] challenged the legality of seizure in the Magistrates’ Court” (paragraphs 9 and 10). Those notices were said by the respondent to have been issued to Mr Balasingam.

14. Mr Davies submitted that the appellant did not challenge the legality of the seizure and that neither did Mr Balasingam or the passenger, Mr Sangkeeth. Mr Davies submitted that the vehicle (as well as the seized alcohol) was therefore deemed, under paragraph 5 of Schedule 3 to the Customs and Excise Management Act, to have been legally seized as liable to forfeiture. He submitted that the legality of the seizure cannot be reopened by the First-tier Tribunal. This he submitted was confirmed by the Court of Appeal in *HMRC v Jones and Jones* [2011] EWCA Civ 824 (the respondent’s statement of case referred in particular to Mummery LJ’s judgment at paragraph 71). Mr Davies further submitted that “In any event the misdemeanour has been admitted in a letter from Mr Balasingam [sic] dated 8/5/2019” (skeleton, paragraph 21). The

⁹ We phrase it this way to cover the 45-day language of both section 15(2) of the Finance Act 1994 and section 15F(6)(a) and (7) of that act.

letter to which that submission referred was the one on page 52 that the appellant had sent with her own letter dated 9 May 2019.

D. THE LAW

1. Law governing payment of duty

15. For the requirement to pay duty, the respondent cited regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010¹⁰. No issue was taken as to whether duty had been required to be paid.

2. Law governing seizure of the vehicle

16. As mentioned at paragraph 9 above, the vehicle was said to have been seized under section 139(1) of the Customs and Excise Management Act, as being liable to forfeiture under section 141(1)(a) of that act, because of the vehicle's use for the carriage of goods (the alcohol) liable to forfeiture.

3. Law governing the respondent's decision not to restore

17. For the decision by the Border Force officer as to whether to restore the vehicle to the appellant, section 152 of the Customs and Excise Management Act provided, at the time the decision under appeal was made (as it does now)—

“152. The Commissioners may, as they see fit—

- (a) [not relevant]; or
- (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts [the customs and excise Acts];”.

18. The 18 January 2019 decision refusing to restore the vehicle was made under section 152(b). Since no review was done of that decision (paragraph 11 above), that decision was deemed confirmed or upheld. It is that decision which we are considering on this appeal.

4. Law governing the First-tier Tribunal's jurisdiction

19. Section 16 of the Finance Act 1994 deals with appeals to the tribunal. Section 16(4) provides—

“(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—

- (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
- (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
- (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and

¹⁰ Statutory instrument number 2010/593, as amended.

to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.”.

20. Section 16(6) of the Finance Act 1994 provides—

“(6) On an appeal under this section the burden of proof as to—

- (a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,
- (b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and
- (c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1), (1AA), (1AB) or (1AC) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid),

shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.”.

E. THE POLICY: HOW THE SECTION 152(B) POWER TO RESTORE IS TO BE EXERCISED

21. Given that section 152 of the Customs and Excise Management Act says the commissioners (now taken as a reference to the respondent) “*may as they see fit...restore*”, we asked to be taken to the written policy by reference to which the decision not to restore had been made. Mr Davies submitted that we could decide the case without seeing the policy which had been applied. We disagreed. Without seeing the policy which the decision-making officer had purported to apply, how was the appellant – or the tribunal – to be able to assess whether the policy had been properly applied? Despite Mr Davies’s attempts overnight between day one and day two of the hearing, he was unable to produce to us the written policy, although it transpired – he said – that it did exist (we make further observations about it at paragraphs 116 to 118 below). Given our insistence that we needed a policy against which to measure the decision, Mr Davies relied solely in oral submissions on the following text in the decision letter (emphasis in original, pages 3 and 4)—

“A Summary of the Policy for the Restoration of Private Vehicles Seized For Carrying Excise Goods Liable To Forfeiture”

The Commissioners’ general policy is that private vehicles should not normally be restored. The policy is intended to be robust so as to protect legitimate UK trade and revenue and prevent illicit trade in excise goods. However vehicles may be restored at the discretion of the Commissioners subject to such conditions (if any) as they think proper (e.g. for a fee) in the following circumstances:-

- If the excise goods were destined for supply on a “not for profit” basis, for example, for re-imburement at [sic] the cost of purchase but not including any contribution to the cost of the journey.
- If the excise goods were destined for supply for profit, the quantity of excise goods is small, and it is a first occurrence.

- If the vehicle was owned by a third party who was not present at the time of the seizure and was either innocent or had taken reasonable steps to prevent smuggling in the vehicle.

In all cases any other relevant circumstances will be taken into account in deciding whether restoration is appropriate.”.

22. Mr Davies took instructions as to what “it” meant in “and it is a first occurrence” in the second bullet point in the decision letter. He said his instructions were that “it” meant both a successful smuggling act and an attempt at smuggling (he referred to the latter as a “thwarted policy”). That submission seemed to mean (1) that, had there been a previous attempt then (a) a further attempt would not be “a first occurrence” and (b) a successful smuggling act after the first attempt would also not be “a first occurrence”, and (2) that, had there been a previous successful smuggling act, then (a) a further successful smuggling act would not be “a first occurrence” and (b) an attempt after the first successful smuggling act would also not be “a first occurrence”.

F: THE RESPONDENT’S CASE

1. Respondent’s case: jurisdiction

23. Mr Davies submitted that the tribunal’s jurisdiction under section 16(4) of the Finance Act 1994 is a “judicial review plus” jurisdiction. He said this meant that the tribunal was not limited to assessing the decision against the evidence that was before the decision-making officer. The “plus” part of the jurisdiction was, he said, that the tribunal “may consider evidence that was not before the decision maker and may reach factual conclusions based on that evidence such that the decision under appeal may [be] found by the Tribunal to be reasonable or unreasonable, as the case may be, as a result”¹¹. For this, Mr Davies cited *Gora v The Commissioners of Customs and Excise* [2003] EWCA Civ 525. Mr Davies submitted that this was not, as we had enquired, because of a failure on the part of the decision maker to investigate, where proper investigation would have elicited that new fact. It was simply, said Mr Davies, that we “do a quick insertion of a new fact into the past decision”, in reliance on *Gora*. Mr Davies submitted also that it may be permissible for the respondent to put forward additional reasons for a decision that were not part of the original decision, citing *The Commissioners of Customs and Excise v Alzitrans SL* [2003] EWHC 75 (Ch).

2. Respondent’s case: burden of proof

24. Mr Davies submitted that the burden was on the appellant to prove all matters in the appeal, including proving that the vehicle had not been used previously for smuggling or for a smuggling attempt and including proving false all of the respondent’s assertions. Mr Davies initially argued that this burden arose simply because it is the appellant who brings the case. He later relied on section 16(6) of the Finance Act 1994.

25. Mr Davies did not accept that, even if the legal burden of proof lay on the appellant for all matters, the evidential burden would pass to the respondent where the legal burden on the appellant would require her to prove a negative or to prove matters as to which she could not have evidence. Mr Davies said it was “not a particularly difficult burden to meet in terms of evidence to be provided, for example, if Mr Balasingam were called as a witness and he said that [the appellant did not know], and the tribunal found him credible”.

¹¹ Skeleton, paragraph 13.

3. Respondent's case: why decision said to be justified

Decision letter and statement of case

26. The sole reasons given in the decision letter were these—

“Regarding your third party ownership, having examined the circumstances surrounding the seizure of your vehicle I am not satisfied that you are either an innocent third party or that you had taken reasonable steps to prevent smuggling in your vehicle

I conclude that there are no exceptional circumstances that would justify a departure from the Commissioners' policy and I can confirm that on this occasion the vehicle will not be restored” (page 4, fifth and sixth paragraphs).

27. The first of those two passages was a reference to the third of the three bullet point conditions that were said to be in the policy that the decision maker had applied (paragraph 21 above). The exceptional circumstances mentioned in the second passage were not expressly included in the text of the policy that was said to have been applied.

28. The respondent's statement of case added that—

“The Officer applied the Respondent's reasonable policy on the restoration of vehicles but was not fettered by it” (paragraph 21, page 43).

29. The decision-making officer, Mr Gardiner, had given a witness statement dated 31 July 2019 (page 1). He said in that statement that the “other documents” that he had relied on to make the decision consisted of (1) the letter notifying the non-restoration decision dated 18 January 2019 (although that document was the decision itself), (2) the copies of pages from the notebook of the officer who had stopped the vehicle at Coquelles, (3) copy seizure paperwork, (4) copy invoices, (5) the appellant's 29 August 2018 email, (6) Border Force's acknowledgement of the restoration request, and (7) the questionnaire completed by the appellant. Although he said that these were the “other” documents he had relied on, Mr Gardiner did not mention in that statement any other documents. So that seems to have been his exhaustive list of the documents on which he had relied to make the decision.

30. The pages from the officer's notebook, to which Mr Gardiner referred in his statement, included this exchange—

“EB I asked if they had any other receipts in their pockets and they emptied them out. From the pocket of the passenger MS I found another receipt for a purchase of various alcohol on the 17/08/2018.

EB Where is this from?

MS I don't know, I was in France the other week” (page 9, lines 37 to 39, page 10, lines 2 to 8).

31. The “copy invoices” to which Mr Gardiner referred in his witness statement were nine documents which the respondent said were found on the stopping of the vehicle in Coquelles—

(1) Four of the nine documents were dated 23 August 2018, the day of the seizure, and bore English and French text (pages 18, 19, 20 and 21).

(2) Three others were dated 23 October 2016, on pages 23, 24 and 25. They were addressed to a Mr Yogendran (the name of the appellant's son), were entirely in English, were issued by the seller Booker, and bore an address in Kent for Booker.

(3) The eighth of the nine documents was dated 24 March 2017, on page 22. It was entirely in English, was issued by the seller Prime Cash & Carry Ltd, and bore an address

in Kent for that seller. The document said “Bill To” “STATION SUPER STORE (M SANGKEETH)...STATION ROAD, WESTATE [sic] ON SEA, KENT” (the only one addressed to M Sangkeeth).

(4) The ninth of the nine “copy invoices” which Mr Gardiner mentioned in his witness statement was dated 17 August 2018, on page 20. It was labelled “ESTIMATE”, did not identify a client, and was entirely in English. Its last three lines said “Total amount £270.00”, “Cash £270 00 [sic]” and “STORE COPY”. It was stamped diagonally with “PAID”.

Decision-making officer’s oral explanation

32. In oral evidence, Mr Gardiner, the officer who had made the decision, explained that he believed the vehicle had been used for smuggling before. He said this was because of (a) the reference in the appellant’s completed questionnaire to the vehicle having been borrowed numerous times before, (b) the statement in the appellant’s 29 August 2018 email that “I...don’t often ask for a reason as to why he needs it”, and (c) the fact that the vehicle was said in the questionnaire to be insured for abroad. Mr Gardiner said it was because the vehicle had been used for smuggling before that he expected the appellant to show what steps she had taken to prevent its use for smuggling on this occasion. We queried where in the questionnaire there was a reference to being insured for abroad. It transpired that Mr Gardiner had a page of the questionnaire that was not in the bundle and which neither his counsel Mr Davies nor the tribunal had seen. Mr Davies submitted that we could rule that it had not been disclosed and was not admissible or we could have the page emailed to us. We had the page emailed to us during Mr Gardiner’s oral evidence. But Mr Davies did not, in the event, rely on the vehicle being insured for abroad.

33. In re-examination, Mr Davies took Mr Gardiner to the part of the decision letter which said that Mr Gardiner was not satisfied that the appellant was “an innocent third party” (page 4, fifth paragraph). Mr Gardiner had not mentioned “innocent third party” in oral evidence at all so far, despite the panel’s questions. Mr Davies recognised that asking it at this point might “trespass on evidence in chief”, but we permitted Mr Gardiner to answer. Mr Gardiner replied “I think they all very much feed into each other. Sticking her head in the sand and not asking what the vehicle was to be used for. I do think she was not a completely innocent third party”.

Respondent’s counsel’s submissions

34. Mr Davies submitted that the appellant had not demonstrated her case. He submitted that this was (1) because the vehicle had previously been used for smuggling (and that the burden was on the appellant to disprove that assertion and she had not done that), (2) because the evidence at least “raised a spectre that the appellant knew more than she was letting on” and that she was not completely innocent along the scale of knowledge, (3) that restoring to the appellant would be tantamount to restoring to the smuggler, and (4) that the 8 May 2019 letter of support from the driver, Mr Balasingam, did not help the appellant’s case. As to the first of these, previous smuggling, Mr Davies particularly relied on the document dated 17 August 2018 on page 20 which had been emptied out of the pocket of the passenger, Mr Sangkeeth, at the request of the officer who questioned the passenger and driver in Coquelles (paragraph 31(4) above). It was, said Mr Davies, because the vehicle had previously been used for smuggling that the appellant must have known about its use for smuggling on the occasion of its seizure, or at least that she must have had a degree of knowledge about its use for smuggling on that occasion.

35. Mr Davies submitted that the decision considered all relevant matters and no irrelevant matters, and that it was not disproportionate (citing Lord Phillips’ discussion of “Those who

deliberately use their cars to further fraudulent commercial ventures” at paragraph 63 of *Lindsay v The Commissioners of Customs and Excise* [2002] EWCA Civ 267, [2002] 1 WLR 1766¹²). Finally, Mr Davies submitted that no exceptional circumstances applied, hardship not being in his submission an exceptional circumstance.

36. Mr Davies’s skeleton argument had also said it was “a deemed fact that the Appellant’s share of the imported goods and the goods imported by the other passengers [sic] were imported for commercial purposes and were not for their own uses” (paragraph 19). He did not however pursue in oral submissions the assertion that the appellant had a share.

37. And Mr Davies had initially argued that it was an admitted fact that Mr Balasingam “had previously used the Vehicle to go to France to smuggle non-duty paid alcohol in the recent past” (paragraph 27e, skeleton argument). But Mr Davies resiled from that because it was not an admitted fact that Mr Balasingam had previously used the vehicle to smuggle.

4. Respondent’s case: disposal

38. Mr Davies submitted that the tribunal should dismiss the appeal (1) because the decision was reasonably arrived at, either (a) because of the material in front of the decision-making officer at the time the officer made the decision or (b) because the tribunal should – in light of the post-decision evidence including oral evidence – go back in time, submitted Mr Davies, and “insert new facts into the decision” (citing *Gora*), or (2) because the outcome would “inevitably” be the same if we remitted (citing *John Dee Limited v The Commissioners of Customs and Excise* [1995] EWCA Civ 62, STC [1995] 941¹³).

G. THE APPELLANT’S CASE

39. The appellant’s case was that she did not know that, on the occasion of the vehicle’s seizure, Mr Balasingam was using it for smuggling, or that he had planned to use it on that occasion for smuggling. She said therefore that she had had no reason to think she should take steps to prevent its use for smuggling. We are setting out the appellant’s evidence in some detail given the respondent’s case that we should not accept that she was “innocent” as mentioned in the third bullet point in the decision letter.

1. Appellant’s written evidence

40. The appellant’s first written communication to the respondent was the appellant’s email dated 29 August 2018, which was before the decision-making officer. In that email, the appellant said—

“Yogeswaran Balasingam borrowed my vehicle with my permission on 22/08/18. However, I was not aware that he would take part in these actions. He frequently uses the vehicle for personal reasons such as visiting family etc, therefore I grant him to use [sic] the car and don’t often ask for a reason as to why he needs it so as [sic] I presumed it would be the same purpose as he usually uses. All goods seized belong to Yogeswaran Balasingam and have no connection or relevance to me” (page 26).

41. The appellant’s second written communication to the respondent was the completed questionnaire dated 16 January 2019, which was before the decision-making officer. In the questionnaire, the appellant said (page 32)—

¹² [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2002/267.html&query=\(Lindsay\)+AND+\(v\)+AND+\(Customs\)+AND+\(Excise\)+AND+\(Commissioners\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2002/267.html&query=(Lindsay)+AND+(v)+AND+(Customs)+AND+(Excise)+AND+(Commissioners))

¹³ [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/1995/62.html&query=\(John\)+AND+\(Dee\)+AND+\(Ltd\)+AND+\(v\)+AND+\(Customs\)+AND+\(Excise\)+AND+\(Commissioners\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/1995/62.html&query=(John)+AND+(Dee)+AND+(Ltd)+AND+(v)+AND+(Customs)+AND+(Excise)+AND+(Commissioners))

“My friend Yoges asked to borrow the car to visit friends and family and said he would bring the vehicle back within 2 days” (answer to question 5)

“Yoges has borrowed the vehicle numerous times before, usually for family visits and such due [to] the vehicle having 7 seats” (answer to question 6).

In answer to other questions in the questionnaire, the appellant said she had never travelled abroad to purchase excise goods (question 17), that she had never been stopped by Border Force before (question 18) and that she had never had goods seized before.

42. The appellant’s third written communication to the respondent was the appellant’s letter dated 9 May 2019 (after the decision under appeal). In that letter, the appellant reiterated—

“I would like to further reinforce my innocence during this case. I can confirm that I was not involved in this incident whatsoever and was not informed of the situation. Mr Yogeswaran Balasingam is a friend of mine and has borrowed my vehicle on numerous occasions due to it being a large vehicle. However, this time, I was not aware of his purpose for the trip. I am pleading to you today as I need my vehicle back in order for me to run my day to day business” (page 51).

43. The appellant submitted with her 9 May 2019 letter a letter from Mr Balasingam dated 8 May 2019, which said—

“To whom this may concern,

I am writing this letter as evidence to support Miss P Rajeswary’s claim to return her vehicle that was seized on 23/08/18. I am able to confirm P Rajeswary was completely not aware of the circumstances regarding myself buying stock overseas and was not involved in any way in terms of sharing the stock. I used the vehicle solely for my own purpose and can confirm Miss P Rajeswary is innocent in this case and was simply lending the vehicle as a favour, as she has lent it to me numerous times beforehand.

Please could you review this case and help her get the vehicle back as she needs it to conduct her business. Miss P Rajeswary will also provide a cover letter within this appeal” (page 52).

44. Mr Yogendran, the appellant’s son, told us that he had drafted both the 9 May 2019 letter for the appellant to sign, and the 8 May 2019 letter for Mr Balasingam to sign. Mr Yogendran said he had translated for each of them the letter that he had drafted for them to sign. He said that Mr Balasingam spoke English, but that, with “his writing, if he’d written it, wouldn’t have made sense. So I put it all together”.

45. In her post-decision witness statement dated 19 February 2020, the appellant said the vehicle had been “borrowed by my friend Mr. Yogeswaran Balasingam for his personal use as he use [sic] to borrow my same vehicle for commuting”¹⁴.

2. Appellant’s oral evidence

Appellant’s oral evidence: circumstances of previous occasions on which she had lent the vehicle to Mr Balasingam

46. Through the interpreter, the appellant explained in oral evidence that Mr Sangkeeth, the passenger in the vehicle on the occasion of its seizure, also owned a shop, and that it was through him that the appellant had first come to know Mr Balasingam. Mr Balasingam had, said the appellant, worked at Mr Sangkeeth’s shop before Mr Balasingam got his own shop.

¹⁴ Paragraph 1, page 6, appellant’s bundle.

She said the reason she had felt she could trust Mr Balasingam enough to lend him her vehicle was that “Sangkeeth has borrowed my vehicle once or twice in the past, so when he [Mr Balasingam] asked, I have lent it”.

47. The appellant was asked about Mr Balasingam’s reasons for borrowing the vehicle on previous occasions. After she had been taken back step by step to previous occasions, the appellant’s evidence was that she specifically recalled five occasions, including the one in question, on which Mr Balasingam had borrowed the vehicle. She said that, on the first occasion, it was for him to collect family and that, on the second occasion, it was because his car had problems. She said she assumed that, on the third occasion, he was using the vehicle to move house. She said the occasion for which she assumed he was using the vehicle to move house was the one before the occasion on which the vehicle was seized.

48. Asked why she said Mr Balasingam borrowed the vehicle “usually for family visits” but also “once for family visit”, the appellant replied “First time I lent to him, that was the reason he gave me. So whenever he borrowed it, I assumed was for same reason”.

Appellant’s oral evidence: arranging the loan of the vehicle to Mr Balasingam on the occasion in question

49. As to the circumstances of her lending the vehicle to Mr Balasingam on the occasion of the seizure, the appellant’s evidence was that Mr Balasingam telephoned her at around 8pm or 8.30pm on the night before his trip. She told us he said in that call that “I have to borrow this car once again” and that he wanted it for the following day. She said “For this question I said ok, ’cause I was at airport, was looking for my luggage and I couldn’t hear the conversation properly. Once I said ok, I cut the line off”. Asked how in that case Mr Balasingam knew how he was going to get the keys, the appellant replied “Normally he comes home and gets the key from my children”. Asked how Mr Balasingam knew that the appellant’s children would be in when he called round, the appellant replied “I guess he would have called my children, because he has their number. Yes, all adults. I have two. Both live at home with me”. The appellant said she did not recall whether Mr Balasingam collected the vehicle that evening or the next morning. In recounting the telephone call that she received from Mr Balasingam while she was at the airport, the appellant said that Mr Balasingam did not say how long he wanted the vehicle for. But she said that, when he took the key from the children at home, he told the children that he was going to keep it for two days and the son from whom he took the key then told the appellant that Mr Balasingam had said he was going to keep the vehicle for two days.

50. The appellant was pressed in oral evidence about her use of “commuting” in her witness statement dated 19 February 2020. She had said in that statement that the vehicle was “borrowed by my friend Mr. Yogeswaran Balasingam for his personal use as he use [sic] to borrow my same vehicle for commuting” (paragraph 1, page 6, appellant’s bundle). Mr Davies told her that he Mr Davies understood “commuting” to mean “to and from work”, and asked the appellant what she understood by “commuting”. She replied that she thought it meant “I go and get back”, and then that it meant “he used to use the vehicle”. Mr Davies told her that the sentence in which “commuting” was used in her witness statement was “personal use and commuting”, and he asked again “What did you mean by ‘commuting’?”. The appellant replied “From that sentence, my understanding at that time, as he used to borrow the car for family visits, I took it as family visits”. Asked why she agreed to sign the witness statement with the word “commuting” in it, the appellant replied “I did not understand the exact word of commuting”. The appellant said the witness statement had been prepared by her solicitor for her to sign. In his own oral evidence, Mr Yogendran, the appellant’s son, said that he could not remember if it was he or the lawyer who had translated the witness statement to the appellant for her to sign, but that “Explaining commuting in translation lost”.

Appellant’s oral evidence: events after the vehicle had been seized

51. Asked when it was that she had found out that the vehicle had been seized, the appellant replied “The following day night. I rang them ’cause the vehicle hasn’t come back to us.”. She explained that, by “them”, she meant “him”. She said that, in that telephone call, Mr Balasingam “told me he was quite busy at that time and would talk to me [later¹⁵]”, and that she did not then speak to him until the day after that, when he said “Only that vehicle seized”. Asked what was her response, the appellant replied “I got upset. I asked him ‘Why did you use my vehicle for that purpose?’. He said ‘Don’t worry, problem not for you, only me. They will return the vehicle to you’”. Asked about her current (post-seizure) relationship with Mr Balasingam (or possibly with both Mr Balasingam and Mr Sangkeeth), the appellant replied that she was “very upset, so I don’t mix with them much”.

Appellant’s oral evidence: her own use of the vehicle

52. The appellant explained that she did not regularly collect stock for her own shop in the vehicle because it was not big enough for that; it was a seven-seater and not a van, she explained. The appellant told us that, to make more room in the boot, one seat can be moved and another can be folded entirely. But she said, if you put down all the seats that can be put down, that still leaves five seats and that what had been the middle row and would be the back row in a five-seater cannot be put down (unlike in an estate car). So it is not a vehicle in which the seats can be put down so as to leave in place only the driver’s seat and the front passenger’s seat. She said she would occasionally use it for missed deliveries to pick up a few items pending the next delivery. She said she also used it to go to the bank and that she preferred it to the car her partner uses, the Rover, which is more expensive to run.

53. Mr Yogendran, the appellant’s son, told us the vehicle “is not designed to carry stock per se”.

Appellant’s oral evidence: previous trips to France

54. In cross-examining the appellant, Mr Davies asked “Were you aware that the vehicle had been used in the past to bring alcohol back from France?”. The appellant replied “No”. (We pause to note that this question was based on an unproven premise; there was no evidence, nor any admission from Mr Balasingam, Mr Sangkeeth (the passenger) or anyone else, that the vehicle had been used in the past to bring alcohol back from France.)

Insurance

55. As to the vehicle being insured for driving abroad, Mr Yogendran said in oral evidence that “we do it as a fleet policy on all our cars” and that it was not arranged for Mr Balasingam’s trip with which the appeal is concerned.

3. Appellant’s case: submissions

56. Mr Yogendran submitted for the appellant that “it boils down to Mum didn’t know he was going to use it for smuggling” and that, “in terms of previous steps taken, we’ve never had problems like this before, so how could we have taken steps to prevent it? She can’t just out of the blue tell him not to”, and that “we’ve lent him the vehicle numerous times, visiting family and stuff. It’s a seven-seater so it’s convenient for him”. Mr Yogendran submitted that it was “unfair to say that, because we both run shops, we would permit it to be used for smuggling.

¹⁵ The judge’s note of this answer does not make this word clear. But the gist was that he would not talk about it in that call.

It is a people carrier, not a commercial vehicle. It is not designed for carrying stock per se”. “Apart from that”, he said, “we can’t really elaborate, because we didn’t really know what was happening”.

H. MATTERS NOT IN DISPUTE

57. The appellant did not dispute the following—

- (1) that Mr Balasingam had been using her vehicle on the occasion of its seizure;
- (2) that he was using it on that occasion to attempt to smuggle alcohol (or using it actually to smuggle alcohol depending on the point in the process at which the vehicle was stopped; see paragraph 8 above);
- (3) that the amount of alcohol which was attemptedly or actually smuggled was 322.5 litres;
- (4) that the documents found when the vehicle was stopped included a document dated 17 August 2018 (page 20) and that it came from the pocket of the passenger, Mr Sangkeeth; and
- (5) that the appellant had not taken steps to prevent smuggling in the vehicle (the second half of the third bullet point in the policy cited in the decision letter).

58. Not having been privy to the stopping of the vehicle and the interview which followed of its occupants, the appellant was not in a position to challenge the asserted matters at paragraph 57(2) to (4) above. So we do not go so far as to say that she accepted them as true.

I. DISPUTED MATTERS

59. A reminder of the three bullet points in the decision letter—

“vehicles may be restored at the discretion of the Commissioners subject to such conditions (if any) as they think proper (e.g. for a fee) in the following circumstances:-

- If the excise goods were destined for supply on a “not for profit” basis, for example, for re-imburement at [sic] the cost of purchase but not including any contribution to the cost of the journey.
- If the excise goods were destined for supply for profit, the quantity of excise goods is small, and it is a first occurrence.
- If the vehicle was owned by a third party who was not present at the time of the seizure and was either innocent or had taken reasonable steps to prevent smuggling in the vehicle.”.

60. The respondent’s case was based on a tacit assumption that the circumstances of the present case did not fall within the first two bullet points. We return later to that assumption (paragraph 119 below).

61. The only disputed matter, so far as concerned the third bullet point of the policy, was whether the appellant was an innocent third party.

62. Mr Davies and his witness (the decision maker) said that whether the vehicle had been used for smuggling before was also relevant. This was not because it ruled out the second bullet point exception (which they appeared to assume did not apply). It was, said Mr Davies,

because, if in reality the vehicle was being used on a fairly regular basis to go abroad and bring goods back in, that made it less likely that, over that period, the appellant “would not have assumed some knowledge of what was going on”. In other words, he argued, it is easier to be ignorant of a single event than of a course of conduct. He accepted however that there was no actual evidence of a course of smuggling conduct.

J. DISCUSSION

1. Discussion: jurisdiction

(1) Section 16(4) of the Finance Act 1994

63. We accept that our jurisdiction to consider the appeal against the decision not to restore is in section 16(4) of the Finance Act 1994, because the decision not to restore is “a decision as to an ancillary matter” as mentioned in section 16(4), and as defined in section 16(8), of that act. We say that because we accept (i) that the decision is of a description specified in Schedule 5 to the act (being specified in paragraph 2(1)(r)¹⁶ of that schedule), (ii) that the decision is not comprised in a decision falling within section 13A(2)(a) to (h) of the act (those provisions do not include decisions refusing to restore), and (iii) that – as mentioned in section 16(9) – the decision is not of a description specified in any of paragraphs 3(4)¹⁷, 4(3)¹⁸, 9(e)¹⁹ or 9A²⁰ of Schedule 5 to the act.

(2) Section 16(4) and Gora

64. We would not necessarily accept that *Gora* has the effect for which Mr Davies contended – that is, that we could use new, post-decision evidence to make findings of fact then go back in time and insert those into the past decision in a way unfavourable to the appellant. First, that seems contrary to the express terms of section 16(4). Second, what Pill LJ said in paragraph 39 of *Gora* – where he accepted the submission cited at paragraph 38(e) of the judgment – appears to have been said in passing and to relate to a concession (according to the second sentence of Pill LJ’s paragraph 39). And it was a discussion in the context of whether the jurisdiction sufficed to satisfy article 6 of the European Convention on Human Rights (right to a fair trial). It is not clear that *Gora* would support doing the reverse of what Pill LJ mentioned, the reverse being to use new, post-decision evidence to find against an appellant that a decision is reasonable (or more accurately, to find against an appellant that it was not the case that the decision maker “could not reasonably have arrived at” the decision). We recognise that “could not reasonably have arrived at it” in section 16(4) is different from “did not reasonably arrive at it” which it could have said. “Could not...have” could perhaps be considered wide enough to mean “could not reasonably have arrived at it had he possessed all relevant information”. But, the reference to declaring “the decision to have been unreasonable” in section 16(4)(c) could, by contrast, suggest that the section 16(4) jurisdiction is not necessarily so harsh as to permit the effect against the appellant for which Mr Davies contends (and he declined to frame his submission in terms of a failure on the part of the decision maker to investigate where

¹⁶ Paragraph 2(1)(r) of Schedule 5 to the Finance Act 1994: “any decision under section 152(b) as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored”.

¹⁷ Paragraph 3(4) of Schedule 5: Any decision which is made under paragraph 1 of Schedule 3 to the Finance Act 2001 and relates to the Alcoholic Liquor Duties Act 1979.

¹⁸ Paragraph 4(3) of Schedule 5: Any decision which is made under paragraph 1 or 2 of Schedule 3 to the Finance Act 2001 and relates to the Hydrocarbon Oil Duties Act 1979.

¹⁹ Paragraph 9(e) of Schedule 5: Any decision with respect to the amount of any interest specified in an assessment under paragraph 11A of Schedule 6 to the Finance Act 1994.

²⁰ Paragraph 9A of Schedule 5: Any decision under or for the purposes of Part II of Schedule 3 to the Finance Act 2001 (interest).

proper investigation would have elicited new relevant facts: paragraph 23 above). Our decision would however be the same if we took account of post-decision evidence in the ways set out in paragraphs 92 to 111 below. So we need say no more about *Gora*.

65. After we had given our summary decision in this case, the Upper Tribunal heard and decided *Prospect Origin Limited* [2021] UKUT 51 (TCC)²¹ (released on 12 March 2021). We do not consider that we should have made a different decision in light of what the Upper Tribunal said in *Prospect*. *Prospect* was decided against the backdrop of a policy not to restore regardless of “blameworthiness” (see paragraph 31 of the *Prospect* decision). That was not the policy relied on in the present case. We should also mention, perhaps, that the Upper Tribunal in *Prospect* said at paragraph 35 that “Our conclusion is not altered by the judgment of the Court of Appeal in *HMRC v Smart Price Midlands*”. The Upper Tribunal cited the second sentence of Rose LJ’s paragraph 19 of the judgment in *HMRC v Smart Price Midlands Limited and Hare Wines Limited* [2019] EWCA Civ 841²². There, Rose LJ said—

“19. In the present appeals, although Mr Bedenham (appearing for the Traders) did not assert that the Traders' human rights had been infringed by the refusal of approval under the AWRS, HMRC accepted that the *Gora* principle applied. Thus, the role of the FTT in these appeals will be to decide for itself any disputed primary facts on which HMRC's decision was based and then consider whether the refusal to grant approval was one which a reasonable officer could make on the basis of the facts as found.”

66. Rose LJ’s reference to a “refusal...which a reasonable officer could make on the basis of the facts as found” – with “could make” in the present tense – could perhaps be interpreted as requiring a tribunal to be as generous to the respondent as Mr Davies contends. But since *Smart Price* was not cited to us for the respondent (or for the appellant), and since our decision would be the same applying a test more generous to the respondent, we have not invited submissions on *Smart Price* and do not deal with it further.

(3) Legality of the seizure

67. We accepted for the purposes of continuing with the appeal – but without deciding the point, which was not in issue – that the legality of the seizure was not before us. There was nothing on the face of the present case to suggest (in contrast to, for example, *John Mosson v HMRC* [2020] UKFTT 359 (TC)²³) that the legal requirements in relation to the seizure had not been met (and query whether we could consider that in any event in view of *The Director of Border Revenue v Dockett* [2020] UKUT 141 (TC)²⁴). There was a seizure information notice dated 23 August 2018 (the day of the seizure), apparently signed by Mr Balasingam (page 14). It said “This is not a Notice of Seizure”. A notice of seizure is required by paragraph 1(1) of Schedule 3 to the Customs and Excise Management Act to be served on the owner of the thing seized. But that requirement is subject to the exceptions in paragraph 1(2) of the schedule. Paragraph 1(2)(a) of the schedule lifted that requirement where the seizure was made in the presence of the person – in this case Mr Balasingam – whose offence or suspected offence occasioned the seizure.

²¹ <https://www.bailii.org/uk/cases/UKUT/TCC/2021/51.pdf>

²² [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2019/841.html&query=\(smart\)+AND+\(price\)+AND+\(midlands\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2019/841.html&query=(smart)+AND+(price)+AND+(midlands))

²³ [https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKFTT/TC/2020/TC07838.html&query=\(9.\)+AND+\(John\)+AND+\(Mosson\)+AND+\(v\)+AND+\(HMRC\)+AND+\(2020.\)+AND+\(UKFTT\)+AND+\(359\)+AND+\(TC\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKFTT/TC/2020/TC07838.html&query=(9.)+AND+(John)+AND+(Mosson)+AND+(v)+AND+(HMRC)+AND+(2020.)+AND+(UKFTT)+AND+(359)+AND+(TC))

²⁴ <https://www.bailii.org/uk/cases/UKUT/TCC/2020/141.pdf>

2. Discussion: burden of proof

68. It is not clear that the legal burden of proof is on the appellant to prove negatives or to prove matters on which she could not have evidence to give us. We explain that further below, but need not resolve it. We say that because we do not accept that the evidential burden is on the appellant to prove negatives and to prove matters on which the appellant could not have evidence to give us. We take the legal burden and the evidential burden in turn:

(1) Legal burden

69. It was not clear that section 16(6) of the Finance Act 1994 had the effect of placing the legal burden of proof on the appellant to prove the negatives that Mr Davies said she had to prove or to prove matters on which she could not have evidence to give us. Of the provisions in section 16(6)(a) to (c), which place the burden of proof on the respondent in an appeal, the one in section 16(6)(a) seemed the only one that could potentially apply in this appeal. It provides that the burden of proof “as to the matters mentioned in subsection (1)(a) and (b) of section 8 above...shall lie upon the Commissioners” (now taken as a reference to the respondent). Mr Davies relied on paragraph 27 of *Golobiewska v The Commissioners of Customs and Excise* [2005] EWCA Civ 607 as authority for the proposition that, because the present case is not a penalty case, the present case does not fall within the reference in section 16(6)(a) to “the matters mentioned in subsection (1)(a) and (b) of section 8”. He submitted that the burden was not therefore on the respondent to prove anything.

70. But section 8 had been repealed for some purposes²⁵, and *Golobiewska* was decided on 6 May 2005, before the repeal of section 8 on 1 April 2009²⁶. Moreover, references to some penalties were repealed from section 8(1)(a) and (b)²⁷. In any event, in section 16(6)(a), “the matters mentioned in subsection (1)(a) and (b) of section 8” might not mean “where the appeal concerns a liability to a penalty under section 8”²⁸. We say that because section 16(6)(a) does not say “the matters mentioned in subsection (1) of section 8 above”, which arguably would include the full-out concluding part of section 8(1) referring to a penalty: “that person shall be liable to a penalty of an amount equal to the amount of duty evaded or, as the case may be, sought to be evaded”. Rather, section 16(6)(a) says “the matters mentioned in subsection (1)(a) and (b) of section 8 above” (our emphasis). If and to the extent that there are surviving matters – not related to penalties – mentioned in subsection (1)(a) and (b) of section 8 of the Finance Act 1994, the burden of proof is on the respondent to prove those matters.

71. In view of what we say below, we need not resolve those points. But they may need to be resolved if where the legal burden lies is in issue in any onward appeal. And, if a fresh adverse decision on remittal is appealed, the respondent should be prepared to demonstrate to the tribunal why the respondent says the burden is on the appellant for all matters including proving negatives and including proving matters on which the appellant could not have evidence, if that remains the respondent’s position²⁹. The respondent should in any event preferably take a view – perhaps on advice – as to how matters surviving the repeal of section 8 affect how the next decision in this case is made on remittal.

(2) Evidential burden

72. Even if section 16(6) of the Finance Act 1994 did place the legal burden of proof on the appellant to prove all matters including proving negatives and proving matters on which the

²⁵ Section 122(1) of, and paragraph 21(d)(i) of Schedule 40 to, the Finance Act 2008.

²⁶ Article 2 of S.I. 2009/571.

²⁷ Article 4(b)(i) of S.I. 2009/511 and article 6(1) and (2)(a)(i) of S.I. 2009/571.

²⁸ Ninth unnumbered subparagraph of paragraph 27 of *Golobiewska*.

²⁹ Counsel gave us a post-hearing note reproducing the repeal provisions we had asked him about, but with no submission as to their effect.

appellant could not have evidence, we do not accept that the evidential burden was on her for matters as to which evidence would be in the respondent's control (see *Wood v Holden*³⁰) or for matters as to which the appellant could not have any evidence.

3. Discussion: the policy

73. The third bullet point of the policy mentioned “a third party who was not present at the time of the seizure and was either innocent or had taken reasonable steps to prevent smuggling in the vehicle” (our emphasis). “Innocent” and “taken reasonable steps to prevent smuggling” are set out disjunctively, not conjunctively. In other words, the policy does not say that both have to be met. But an email dated 27 May 2020 (page 54) from the respondent's lawyer implied, and counsel's skeleton said (at paragraph 25), that both “innocent” and “taken reasonable steps to prevent smuggling” have to be met. In evidence however, Mr Gardiner for the respondent accepted that, if the appellant was an innocent third party she would not need to take steps to prevent smuggling because she would have no reason to tell the person borrowing the vehicle not to use it for smuggling. And Mr Davies accepted that, if the appellant was innocent, she did not need to take steps to prevent smuggling in the vehicle. (He also said that there was a scale of knowledge, constructive knowledge being – he said – part way along that scale. We address that at paragraph 109 below.)

4. Discussion: reasonableness

(1) Evidence that was before the decision maker

74. On the evidence that was before the decision-maker, we find that the decision maker could not reasonably have arrived at the decision. We say that for the following reasons.

75. In relation to whether the appellant was an innocent third party, the decision maker and Mr Davies both relied on the vehicle having been used in the past for smuggling. The respondent's position was that previous use of the vehicle for smuggling meant, in turn, that the appellant must have known that it was being used for smuggling on the occasion of its seizure and that she was not therefore “innocent” as mentioned in the third bullet point of the policy set out in the decision letter.

76. There was however no evidence whatsoever of the vehicle having previously been used for smuggling. Mr Davies did not dispute that.

77. The respondent's case had originally been prepared on the basis that it was an admitted fact that Mr Balasingam “had previously used the Vehicle to go to France to smuggle non-duty paid alcohol in the recent past”³¹. Mr Davies initially invited us to draw from that an inference that the appellant knew that the vehicle had previously been used for smuggling. But once Mr Davies had withdrawn his submission that it was an admitted fact that Mr Balasingam had previously used the vehicle to smuggle, Mr Davies instead invited us to draw an inference that the vehicle had previously been used for smuggling, and to draw from that inference the further inference that the appellant knew that the vehicle had previously been used for smuggling. Similarly, Mr Davies had originally prepared the case on the basis that the document dated 17 August 2018 on page 20 had been found on the driver, Mr Balasingam, and that it was Mr Balasingam who had said of it “I don't know, I was in France the other week” which was recorded in the officer's notebook. Mr Davies initially argued that it was a reasonable assumption from that that Mr Balasingam “was doing this [smuggling] regularly”. Mr Davies

³⁰ *Wood and another v Holden (Inspector of Taxes)* [2006] EWCA Civ 26.

³¹ Paragraph 27e, skeleton argument.

revised that position when the tribunal panel member pointed out that the officer's notebook showed that it was the passenger Mr Sangkeeth, shown in the notebook as "MS", who had said "I don't know, I was in France the other week" (page 10, lines 7 and 8).

78. Mr Davies's revised position was that it was a reasonable inference that Mr Balasingam or the passenger Mr Sangkeeth, or both, "had previously used the Vehicle to go to France to smuggle non-duty paid alcohol in the recent past". Mr Davies accepted however that "we don't know if the vehicle was necessarily used on previous occasions to buy stock, or if Mr Balasingam was using a different vehicle when he went abroad in the past to buy stock, or whether he had gone abroad at all to buy stock" in the past. We go even further: there was no evidence that the vehicle itself had been to France before either.

79. We were however invited to draw inferences, to which we now turn.

Inferences that we were invited to draw

80. Mr Davies accepted that no individual point led to the inference that the vehicle had been previously used for smuggling. He invited us to add together "lots of little things", namely: (i) the notebook of the officer who questioned Mr Balasingam and the passenger in Coquelles, (ii) the 17 August 2018 document on page 20, which Mr Davies called a receipt (with his revised submission as to that set out at paragraph 78 above), (iii) that both Mr Balasingam and the passenger (from whose pocket the 17 August 2018 document came) were in the vehicle when the vehicle was seized, (iv) the evidence of the wine being "stock" in Mr Balasingam's post-decision letter dated 8 May 2019 on page 52 and, said Mr Davies, stock is replenished regularly, (v) the appellant's oral evidence (which Mr Davies acknowledged was new) that Mr Sangkeeth had also borrowed the vehicle on previous occasions, and (vi) that the same reasons had been given in oral evidence for both Mr Balasingam and Mr Sangkeeth having borrowed it – for a family trip – when the appellant could, argued Mr Davies, have given different reasons for each of them having borrowed it.

81. Of those six points, only the first three relate to evidence that was before the decision maker. The completed questionnaire (page 32) and the appellant's email of 29 August 2018 (page 26) were also before the decision maker. We deal briefly with those later (paragraph 88 below), although Mr Davies did not include them in the points he invited us to add together. We also acknowledge that Mr Davies did not separate his closing submissions into evidence that was before the decision maker and evidence that was not, and so did not ask us to consider his first three points at paragraph 80 above without the post-decision evidence. But we have separated our discussion of the pre-decision evidence from our discussion of the combination of the pre-decision evidence and the post-decision evidence in case *Gora* does not have the effect against the appellant for which Mr Davies argued.

82. The focus of Mr Davies's submissions was the 17 August 2018 document together with the notebook record of the officer being told about it "I don't know, I was in France the other week". Even in his revised submission based on the document having been found on Mr Sangkeeth, Mr Davies still argued that it showed a previous trip to France to buy alcohol and that we should infer from that that the alcohol on that "previous trip" was smuggled and that the appellant's vehicle was used to do that.

83. We do not accept that the 17 August 2018 document on page 20 showed a previous trip to France (whether to buy alcohol or not), for the following reasons—

- (1) First, we find that the evidence at lines 7 and 8 of the notebook, on page 10, is only that the passenger Mr Sangkeeth speculated – on the spot during questioning – that the 17 August 2018 document was from a visit he had made to France.

(2) Second, the following points suggest that Mr Sangkeeth’s speculation was wrong, and we find in light of these points that the 17 August 2018 document was not a receipt from purchasing goods in France—

(a) The 17 August 2018 document said “STORE COPY” rather than customer copy. If it was from a purchase made by Mr Sangkeeth (rather than from a sale by him), we would expect it to be the customer copy. Moreover, given that Mr Sangkeeth owns his own shop in the UK, that the document said “STORE COPY” could not necessarily be explained as a French trader having mistakenly issued the wrong copy. (This explanation arises from the post-decision oral evidence – which we accept – that Mr Sangkeeth has his own shop. So strictly this explanation does not belong here. But it does not detract from the points at (b) to (d) below. And it adds to those points when considered as part of all the evidence including the post-decision evidence.)

(b) The 17 August 2018 document was entirely in English. The stamp showing that it had been “PAID” was only in English. In the three places where the decimal point was clear, the decimal point was a stop and not a comma: “£18.50” and “£18.50” for the sixth item, “£12.00” for the seventh item, “£12.00” for the eighth item and “£18.50” for the ninth item. The document did not bear a French address for the shop (although it did not bear an English address either). By contrast: (i) the only other document stamped as paid (the one on page 18 from a Calais superstore) was stamped only with the French “PAYÉ”, (ii) all the receipts showing on their face as coming from Calais bore French text as well as English text (pages 19, 20 and 21: see **Annex 2** to this decision), (iii) all the receipts that did not bear an English address for the shop – other than the 17 August 2018 document on page 20 – bore a Calais address for the shop, and (iv) all those receipts used commas instead of stops for the decimal points (commas are the French way of writing a decimal point).

(c) The 17 August 2018 document included beer whereas all the Calais documents in the bundle were solely for wine (except possibly for the reference to 2 x 6 x 33cl of “Oasis Tropic” in the Calais document on page 19).

(d) Mr Sangkeeth’s statement that his previous visit to France was “the other week” suggests that that previous visit was made more than a week previously, whereas the 17 August 2018 document was dated only six days previously. We do not make much of this point however.

(e) If we had to say where the 17 August 2018 document did come from, we would find on the evidence so far – in view of the points at subparagraphs (a) to (d) above – that the document originated in Mr Sangkeeth’s own UK shop. It is however irrelevant where that document did come from, once we have found that it was not a receipt from purchasing goods in France (which we have found at the start of this subparagraph (2)).

84. But even if the 17 August 2018 document was from purchasing goods in France and so did show a previous trip to France, it did not in our judgment show a previous trip to France in the vehicle. We say that for two reasons—

(1) First, the 17 August 2018 document was not found in the vehicle. It was one of the items emptied from the passenger’s pockets, which is not the same (leaving aside fine arguments as to its being in the vehicle when the passenger Mr Sangkeeth was in the vehicle with it in his pocket). The document was not evidence that the vehicle had been to France the previous week or at all.

(2) Second, there was no evidence that the vehicle was what Mr Sangkeeth (or anyone else) had used to make a trip, or to transport goods to the UK, on 17 August 2018.

85. And, as Mr Davies accepted, there was no evidence that there had been a failure to pay, or an attempted failure to pay, the correct duty for any goods transported on 17 August 2018 (the 17 August 2018 document not being, itself, such evidence). We make a direction at paragraph 127 below about how the respondent must approach the 17 August 2018 document.

86. But Mr Davies argued alternatively that, even if the 17 August 2018 document was not evidence of a previous trip to France to buy alcohol, in saying “I don’t know, I was in France the other week”, Mr Sangkeeth was admitting that he had bought alcohol in France “the other week”. Mr Davies argued that we should infer from that (a) that Mr Sangkeeth had smuggled alcohol on that “other week” occasion, and (b) that he had smuggled it in the vehicle.

87. We have no hesitation in rejecting that argument. According to the notebook, Mr Sangkeeth went on expressly to tell the officer that Mr Sangkeeth had bought alcohol in France. So there is no need for an inference to that effect. But the two inferences mentioned at paragraph 86 above that Mr Davies invited us to draw from that purchase are unreasonable.

88. The other evidence before the decision maker was the 16 January 2019 completed questionnaire starting on page 32 and the appellant’s 29 August 2018 email on page 26. The email, and some of the answers in the questionnaire, are set out at paragraphs 40 and 41 above. The answers in the questionnaire said Mr Balasingam had borrowed the vehicle “numerous times before, usually for family visits and such due [sic] the vehicle having 7 seats”. The email said Mr Balasingam “frequently uses the vehicle for personal reasons such as visiting family etc, therefore I grant [sic] him to use the car and don’t often ask for a reason as to why he needs it so as [sic] I presumed it would be the same purpose as he usually uses”.

89. Mr Davies did not expressly rely on the pre-decision evidence in the questionnaire that Mr Balasingam had borrowed the vehicle “numerous times before” (paragraph 80 above). But we deal with it since the decision maker, Mr Gardiner, did rely on it. Even if that pre-decision evidence can lead to an inference that the vehicle had been used previously for smuggling, that is not the end of the matter. A previous use of the vehicle for smuggling was simply the basis for Mr Davies’s submission that the appellant must have known what it was being used for on the occasion of its seizure. It was the appellant’s knowledge that Mr Davies said was the crux of the respondent’s case. If the appellant believed that Mr Balasingam had used the vehicle previously for smuggling and if she wished to lie about that, why would she admit that he had borrowed it previously? That she did admit it suggests a frankness born of innocence.

90. Mr Davies argued in a yet further alternative that, “if even potentially the vehicle was used to smuggle previously, that amounted to a pattern of behaviour and the pattern of behaviour could be criminal”. We reject that argument. We cannot decide a case based on a “potential”. And, to the extent that it was an invitation to make a finding on the balance of probabilities, it too invited an unreasonable set of inferences.

91. That was our judgment as to “reasonableness” (to use Mr Davies’s shorthand) based on the evidence that was before the decision maker.

(2) Evidence including post-decision evidence

92. The post-decision evidence comprised the appellant’s letter dated 9 May 2019 (page 51), an invoice dated 20 April 2019 which the appellant said confirmed Mr Balasingam’s ownership of his store (page 53, although it seems to show him as the customer), a letter from the driver Mr Balasingam dated 8 May 2019 (page 52), the appellant’s witness statement dated 19 February 2020 (appellant’s bundle, page 6), and the appellant’s and her son’s oral evidence.

93. Adding the post-decision evidence to the pre-decision evidence did not change our above judgment. If anything, the post-decision evidence helped the appellant's case. We say that for the following reasons.

94. The appellant's insistence that the vehicle is a seven-seater and not a van was persuasive. A seven-seater is obviously designed to carry seven people. The Toyota Estima's additional three seats, as compared with a normal five-seater car, all face forward: there is just an extra row behind what would be the usual back-seat row found in five-seater cars. That extra row takes up much of what would otherwise be the boot. So on the appellant's evidence, although some seats can be folded, that still effectively leaves what in a five-seater car would be the back row. So it is not like even an estate car in terms of space, let alone a van. On the appellant's evidence, the vehicle is not designed to carry stock. Her evidence was also that she did not use it to bulk-buy stock for her shop, which she said she normally has delivered.

95. In cross-examining the appellant, Mr Davies contrasted "personal use" with "commuting", both of which the appellant had used in her witness statement in relation to Mr Balasingam's use of the vehicle. Mr Davies asked "The sentence is 'personal use and commuting'. What did you mean by 'commuting'?". The appellant's answers about that are set out at paragraph 50 above.

96. The use of "commuting" in the appellant's witness statement did not harm her case, for the following reasons—

(1) First, "commuting" clearly does not of itself imply smuggling. So it does not of itself imply knowledge of any smuggling.

(2) Second, to the extent that Mr Davies's point about "commuting" was that it was additional to "personal use" and so must have meant something different from "personal use", that point was not accurate. The sentence (or phrase) which Mr Davies told the appellant she had used in her statement was "personal use and commuting" (Mr Davies's emphasis). But that was not the phrase used in the appellant's witness statement. The phrase used in her statement was "borrowed by my friend Mr. Yogeswaran Balasingam for his personal use as he use [sic] to borrow my same vehicle for commuting" (our emphasis). That phrase less easily lends itself to a submission that the appellant had cited two uses. In what the appellant actually said, "Commuting" could be seen as a description of the "personal use" in question, rather than as an additional use. The same goes for the appellant's almost identical statement of case which used the same phrase as in the witness statement except for an "s" on the end of "use" in "as he uses".

(3) Third, we do not accept that the appellant's use of "commuting" in her witness statement meant that she knew that the vehicle had been used in the past for smuggling (as to which there was no evidence before us), or that she knew that the vehicle was to be used for smuggling on the occasion of its seizure. We say that for these reasons—

(a) The appellant needed an interpreter to give oral evidence. And Mr Yogendran, her son, said that a solicitor had drafted the appellant's witness statement for the appellant and that either the solicitor or Mr Yogendran had translated the statement for the appellant to sign. The appellant could not in our judgment be expected to understand fine points as to the meaning of "commuting", or as to its meaning when used in addition to "personal use" (an argument more usually seen perhaps in statutory construction).

(b) The solicitor who drafted the witness statement would not have intended "commuting" to mean "smuggling".

(c) Similarly, if the appellant thought (to the extent that she considered “commuting” at all), that “commuting” meant “smuggling”, she would not have signed the witness statement while it said “commuting”.

97. So, the respondent must, on remittal, not rely on the appellant’s use of “commuting” as evidence that the appellant knew that the vehicle was to be used for smuggling on the occasion of its seizure (or as evidence that the vehicle had in the past been used for smuggling, as to which there is no evidence in any event).

98. We accept that the appellant was in an airport when Mr Balasingam telephoned her asking to borrow the vehicle on the occasion in question. We accept that the conversation was short because the appellant “was looking for my luggage and I couldn’t hear the conversation properly [and] once I said ok, I cut the line off”, which was what she said in oral evidence. And we accept on the evidence so far that Mr Balasingam did not tell the appellant that he was going to take the vehicle to France to carry goods home in it or that he planned to smuggle goods in it. So, unless on remittal there is credible, new evidence that Mr Balasingam did tell the appellant that he was going to take the vehicle to France to carry goods home in it and/or that he planned to smuggle goods in it, the respondent must accept as a fact that Mr Balasingam did not tell the appellant either of those things. There was no evidence before us that anyone else had told the appellant either of those things, either. So, unless on remittal there is credible, new evidence that someone other than Mr Balasingam did tell the appellant either of those things, the respondent must accept as a fact that no-one told the appellant either of those things. We suggest that, as Mr Balasingam had borrowed the vehicle on previous occasions, the loan seems unlikely to have been a surprise to the adult son who handed to Mr Balasingam the keys and the vehicle at the family home and, on the face of it, the son would have had no reason to question Mr Balasingam once the son was satisfied that the appellant had agreed the loan.

99. Mr Davies said, in his skeleton argument, that a “share of the imported goods” belonged to the appellant (paragraph 19). Mr Davies did not pursue the point in oral submissions. But we deal with it in case he did not mean to abandon it. There was no evidence before us that a share of the goods belonged to the appellant. And Mr Balasingam’s letter dated 8 May 2019 (page 52) said that the appellant “was not involved in any way in terms of sharing the stock”. Mr Davies challenged the credibility of that letter, although not particularly that aspect of it. He submitted that it was “suspiciously similar” to the appellant’s letter dated 9 May 2019 at page 51. But the appellant’s son made no secret of the fact that he had drafted both letters, for the appellant and Mr Balasingam to sign. That does not of itself render either letter untrue.

100. But even if no weight were given to Mr Balasingam’s 8 May 2019 letter, that does not alter the fact that there was no evidence that a “share of the imported goods” belonged to the appellant. Even if it could be said that she was required to prove not a negative but a positive – that all the imported alcohol belonged to Mr Balasingam or to him and the passenger – evidence about that was not within the appellant’s control. It was within the control of Mr Balasingam and/or of the passenger. Mr Balasingam had signed a letter that went as far as Mr Yogendran, who we accept drafted it, had thought necessary and which did say that the appellant “was not involved in any way in terms of sharing the stock”. Given that, until Mr Davies’s closing submissions, the respondent’s case had not been put on the basis that the passenger had any ownership of the alcohol that was seized, we consider that the appellant went as far as she reasonably could in obtaining evidence from Mr Balasingam and not also from Mr Sangkeeth, the passenger.

101. Mr Davies made the point that the appellant had not asked Mr Balasingam to give oral evidence for her. We do not criticise her for not having gone that far however. She may not even have known that she could ask him to do that. And in any event he had signed the letter saying she was innocent, which we accept she – or her son on her behalf – perceived to be enough.

102. The appellant’s oral evidence that she was “very upset, so I don’t mix with them much” also helped her case. If true, it supported her assertion that she had not authorised the use of the vehicle for smuggling or known that it was to be used for that. We leave to the decision maker on remittal the question of whether that oral evidence was true.

103. Mr Davies submitted that the appellant could have given different reasons in oral evidence for why Mr Balasingam and Mr Sangkeeth had each borrowed the vehicle in the past rather than giving the same reasons – a family trip – for each of them. That she gave the same reason for each of them does not necessarily harm the appellant’s case. A seven-seater is for carrying people. The appellant’s evidence that she believed that to be the reason for both Mr Balasingam’s and Mr Sangkeeth’s use of the vehicle is not prima facie implausible. But the decision maker can consider that on remittal, if the decision maker considers it relevant.

104. We mention another point arising from the appellant’s 29 August 2018 email on page 26, for the decision maker to take into account on remittal. The appellant said in that email “I presumed it would be the same purpose as he usually uses”. That seems unlikely to be something the appellant would say if she believed Mr Balasingam’s “usual” purpose to be smuggling. It seems unlikely that it would occur to her to mention the past at all if that was her belief.

(3) Insurance

105. Although Mr Davies did not in the event rely on the vehicle being insured to go abroad, we mention the following points for the decision maker to consider next time round, if the decision maker is considering whether to take account of insurance for going abroad.

106. There is no evidence so far to suggest that the vehicle was insured by or for the appellant specifically for Mr Balasingam to use it to go abroad specifically on the occasion in question. We say that for two reasons—

(1) First, question 10 on the missing page of the questionnaire (which was emailed to us during the hearing³²) was: “Was insurance arranged to account for the additional driver and driving the vehicle abroad?”. The answer given was “Yes”. Question 10 however conflates a number of unexpressed sub-questions, so that a single answer does not give an accurate picture. The question is also in the passive, which would allow for someone other than the owner of the vehicle to have arranged the insurance. The appellant might not know that that had been done, however, so would answer no when the answer could be yes. In the following sub-questions, we have changed the focus to whether it was done by or for the appellant. The unexpressed sub-questions in question 10 include at least these—

(a) Was insurance arranged by you or on your behalf in relation to loans previous to the occasion in question specifically for this additional driver (Mr Balasingam) to drive the vehicle abroad?

(b) Was insurance arranged by you or on your behalf specifically for this additional driver (Mr Balasingam) to drive the vehicle abroad on this particular occasion?

(c) Was insurance arranged by you or on your behalf for this particular vehicle to be driven abroad generally? (And, given our observations at paragraph 115 below, even this question might need to be more specific to exclude cover that automatically comes with the insurance.)

³² We numbered it page 32A.

(2) Second, as mentioned at paragraph 55 above, Mr Yogendran said in oral evidence that “we do it as a fleet policy on all our cars” and that it was not arranged for Mr Balasingam’s trip with which the appeal is concerned. That evidence was not challenged.

107. Those are our reasons for saying that the evidence so far does not suggest that the vehicle was insured by or for the appellant specifically for Mr Balasingam to use it to go abroad on the occasion in question (although even if that had been done, that does not necessarily mean that the appellant knew he planned to smuggle). That in turn means that the evidence so far about insurance does not suggest that the appellant knew that Mr Balasingam planned to use the vehicle to go abroad (or to smuggle) on the occasion of its seizure. We have made a direction about insurance at paragraph 127(2) below. Moreover, if the decision maker is considering insurance at all on remittal, it would be prudent to take account of our observations about insurance for driving abroad at paragraph 115 below.

(4) Leaving the way open for a fresh decision on remittal

108. Given that we are remitting, we need to leave the way open for findings by the next decision maker on the question of innocence (for the purposes of the third bullet point of the policy as set out in the decision letter). Except for the matters mentioned at paragraph 127(2) below, and except for the inferences that we have refused on the evidence so far to draw, it is open to the decision maker to make his or her own fresh findings.

(5) “Scale of knowledge”

109. We have not needed to address Mr Davies’s submission that there is “a scale of knowledge”, given our view that the evidence so far does not support a finding that the appellant was not innocent. But it was not in any event clear what the respondent’s position was as to how much constructive knowledge would be needed to render an appellant not innocent within the meaning of the third bullet point of the policy as set out in the decision letter.

5. Discussion: restoring to appellant “would be tantamount to restoring to smuggler”

110. Mr Davies also submitted however that restoring the vehicle to the appellant would be tantamount to restoring it to the smuggler. The appellant’s oral evidence of being very upset and not mixing much with Mr Balasingam and Mr Sangkeeth after the seizure of her vehicle suggests that – following restoration to the appellant – she would not permit Mr Balasingam (or Mr Sangkeeth) to use the vehicle to smuggle. We leave the assessment of that evidence to the decision maker who makes the fresh decision on remittal.

6. Discussion: taking reasonable steps to prevent smuggling in the vehicle

111. We turn now to the second part of the third bullet point of the policy as set out in the decision letter – the reference to taking reasonable steps to prevent smuggling in the vehicle. The appellant accepts that she did not take steps to prevent smuggling in her vehicle; she says she had no reason to take such steps. And both Mr Davies, and the decision-making officer who gave oral evidence, accepted that the appellant was not required to take steps to prevent smuggling if she satisfied the first part of the bullet point, in other words, if she was “innocent”. Since we are remitting because of our view of reasonableness in relation to the question of innocence, we need not deal with the “taken reasonable steps to prevent smuggling” part of the policy.

7. Discussion: the decision will not inevitably be the same on remittal: *John Dee*

112. In view of what we say above, the next decision will not inevitably be the same on remittal. So the respondent's reliance on *John Dee Limited v The Commissioners of Customs and Excise* [1995] EWCA Civ 62, STC [1995] 941 does not cause us to dismiss the appeal.

K. CONCLUSION

113. It is for all the above reasons that we are allowing the appeal and remitting.

L. OBSERVATIONS

114. We make the following observations.

1. Observations: insurance for driving abroad

115. The panel member's research after the hearing, and after we gave our summary decision, found the United Kingdom government website at <https://www.gov.uk/vehicle-insurance/driving-abroad>. It states that "All UK vehicle insurance provides the minimum third party cover to drive in: the EU (including Ireland)" as well as Andorra, Iceland, Liechtenstein, Norway, Serbia and Switzerland. As we understand third party cover, that would not cover a driver not already on the policy, but would allow the vehicle owner and anyone else already on the policy to drive in those places without arranging specific insurance for driving there, albeit that the policy would give only third party cover. We have not taken this into account because (i) we found it after our summary decision, (ii) we have not invited submissions on it and (iii) it would not make a difference to the outcome. We mention the website however because it suggests that the answer to whether insurance was arranged for driving abroad will on one view always be yes, if the person answering thinks it is just about whether the policy that he or she arranged covers driving abroad. Since we are already directing the next decision maker not to view the answer to question 10 – without more – as evidence of knowledge (paragraph 127(2)(a) below), this point does not add to that on this appeal. But the decision maker on remittal would be prudent to take account of the points in this paragraph.

2. Observations: the "General Policy"

116. The decision letter purported to apply a "general policy" in deciding whether to restore the vehicle. As mentioned at paragraph 21 above, we asked Mr Davies for sight of the policy. Mr Davies told us that HMRC, and not his client, own the policy and that HMRC do not release it because it contains detail that could help smugglers: "a smugglers' charter" as Mr Davies put it. Understanding that, we said the relevant parts of the policy could be supplied to us, along with – for context – a copy of the contents page and a copy of the front cover. But Mr Davies was not supplied even with extracts.

117. We did however hear from Mr Gardiner, the respondent's decision maker, that Mr Gardiner had chosen a template letter for this case. It was – he said – the only template appropriate to the circumstances of this case. He told us, and we accepted, that the text within it, between the heading "A Summary of the Policy for the Restoration of Private Vehicles Seized For Carrying Excise Goods Liable To Forfeiture" and the heading "My Decision", came with the template and that he had not altered the template at all. Although that text was labelled in the letter as a "summary" of the policy, it was all we had. Given the outcome of this appeal,

we concluded that there was no need for the tribunal to press – on this appeal – for sight of the written policy from which the text in the template was taken.

118. But if the respondent again decides not to restore, the appellant or her legal adviser may wish to see the actual policy, rather than a letter reciting it, in order to consider whether to challenge the decision on the ground, for example, that it did not accurately or properly apply the written policy. The written policy might contain additional material such as factual examples or how the decision maker is to approach the questions that the decision maker is to decide. We give three examples, at paragraphs 119 to 126 below, of the kind of thing we mean.

3. Observations: the second bullet point of the policy

119. The respondent proceeded on the assumption that the second bullet point in the policy, as set out in the decision letter, did not apply. That bullet point said—

“If the excise goods were destined for supply for profit, the quantity of excise goods is small, and it is a first occurrence”.

120. Although that bullet point refers to a first occurrence, the respondent’s argument that the vehicle had previously been used for smuggling was not aimed at excluding the second bullet point. Rather, it was to provide a basis for the submission – as to the third bullet point – that the appellant must have known that the vehicle was being used for smuggling on the occasion of its seizure.

121. It could not be assumed however that the appellant’s case did not fall within the second bullet point in the decision letter. That bullet point had three parts: (i) destined for supply for profit, (ii) the quantity was small, and (iii) it was a first occurrence. It seemed undisputed that the first part was met (although the appellant was not in a position to dispute it). If it was indeed a first occurrence, which is the third part, then the only issue would be the second part: whether the quantity was “small”. While 322.5 litres may not sound small, “small” is used in the context of “supply for profit”. In that context, “small” might not exclude 322.5 litres. We say this with caution because 322.5 litres is 430 75cl bottles which would be 35.83 cases of 12 bottles each. Nonetheless, if the policy underlying the decision specified how decision makers should approach the question of “small” in the context of “supply for profit”, the appellant would arguably be entitled to see that part of the policy (suitably excised from the policy as a whole, if necessary, to address the respondent’s concern about publishing “a smugglers’ charter”).

122. We need not go into that given that we are allowing the appeal on other grounds. But whether the second bullet point is met may be relevant in any further appeal against a fresh adverse decision.

4. Observations: “exceptional circumstances”

123. The decision letter also said—

“I conclude that there are no exceptional circumstances that would justify a departure from the Commissioners’ policy” (page 4, sixth paragraph).

124. We were not taken to anything in the written policy underlying the decision which might have explained how decision makers should approach the question of exceptional circumstances. So the appellant has been unable to make a case as to whether the respondent’s decision did not properly apply the part of the policy relating to exceptional circumstances (if there was anything about that in the written policy). That has not made a difference on this appeal. But it may need to be considered if there is an appeal against a fresh adverse decision.

5. Observations: decision maker “not fettered by” the policy

125. The respondent’s statement of case said—

“The Officer applied the Respondent’s reasonable policy on the restoration of vehicles but was not fettered by it” (our emphasis, paragraph 21, page 43).

126. It was not clear how not being fettered by the policy affected the respondent’s case, since the case was framed in terms of the policy as set out in the decision letter (the only statement of policy before us). Again, that has not made a difference on this appeal. But it may need to be considered if there is an appeal against a fresh adverse decision.

DIRECTIONS

127. The tribunal therefore directs as follows—

(1) The decision dated 18 January 2019 was to cease to have effect from the date on which our summary decision was issued (we had already directed that in our summary decision).

(2) The respondent must review the 18 January 2019 decision and base a fresh decision on the following—

- (a) the respondent must not find that the appellant’s answer to question 10 (insurance) in the questionnaire (page 32A) – without more – shows—
 - (i) that she knew that Mr Balasingam planned to smuggle in the vehicle on the occasion of its seizure; or
 - (ii) that she knew that Mr Balasingam planned to go abroad in the vehicle on the occasion of its seizure;
- (b) the respondent must not find, on the evidence so far about insurance—
 - (i) that the vehicle was insured by or for the appellant specifically for Mr Balasingam to use it to go abroad on the occasion of its seizure; or
 - (ii) that the appellant knew that Mr Balasingam planned to use the vehicle to go abroad (or to smuggle) on the occasion of its seizure;
- (c) the respondent must not find—
 - (i) that the 17 August 2018 document on page 20 shows a previous trip to France in the vehicle (whether to buy alcohol or not); or
 - (ii) that the 17 August 2018 document is evidence of the vehicle having been used for smuggling;
- (d) the respondent must not rely on the appellant’s use of “commuting” in her witness statement and in her statement of case as evidence that the appellant knew that the vehicle was to be used for smuggling on the occasion of its seizure (or as evidence that the vehicle had in the past been used for smuggling);
- (e) the respondent must not find, on the evidence so far, that the vehicle had been used in the past for smuggling;
- (f) the respondent must accept (as we have)—

- (i) that the appellant was in an airport when Mr Balasingam telephoned her asking to borrow the vehicle on the occasion in question; and
- (ii) that the conversation was short because the appellant “was looking for my luggage and I couldn’t hear the conversation properly [and] once I said ok, I cut the line off”;
- (g) the respondent must not find, on the evidence so far, that Mr Balasingam told the appellant that he was going to take the vehicle to France to carry goods home in it or that he planned to smuggle goods in it; and
- (h) the respondent must not find, on the evidence so far, that someone other than Mr Balasingam told the appellant either of the things mentioned at subparagraph (g) above.

M. RIGHT TO APPLY FOR PERMISSION TO APPEAL

128. This document contains full findings of fact and 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 the First-tier Tribunal not later than 56 days after this decision is sent to the party making the application. 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.

**RACHEL PEREZ
TRIBUNAL JUDGE**

RELEASE DATE: 03 JUNE 2021

Section 16 of the Finance Act 1994

"Appeals to a tribunal

16.—(1) An appeal against a decision on a review under section 15 (not including a deemed confirmation under section 15(2)) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.

(1A) An appeal against a deemed confirmation under section 15(2) may be made to an appeal tribunal within the period of 75 days beginning with the date on which the review was required.

(1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision (other than any relevant decision falling within subsection (1) or (1A)) may be made to an appeal tribunal within the period of 30 days beginning with—

- (a) in a case where P is the appellant, the date of the document notifying P of the decision to which the appeal relates, or
- (b) in a case where a person other than P is the appellant, the date the other person becomes aware of the decision, or
- (c) if later, the end of the relevant period (within the meaning of section 15D).

(1C) In a case where HMRC are required to undertake a review under section 15C—

- (a) an appeal may not be made until the conclusion date, and
- (b) any appeal is to be made within the period of 30 days beginning with the conclusion date.

(1D) In a case where HMRC are requested to undertake a review in accordance with section 15E—

- (a) an appeal may not be made to an appeal tribunal—
 - (i) unless HMRC have notified P, or the other person, as to whether or not a review will be undertaken, and
 - (ii) if HMRC have notified P, or the other person, that a review will be undertaken, until the conclusion date;
- (b) any appeal where paragraph (a)(ii) applies is to be made within the period of 30 days beginning with the conclusion date;
- (c) if HMRC have notified P, or the other person, that a review will not be undertaken, an appeal may be made only if the appeal tribunal gives permission to do so.

(1E) In a case where section 15F(8) applies, a notice of appeal may be made at any time from the end of the period specified in section 15F(6) to the date 30 days after the conclusion date.

(1F) An appeal may be made after the end of the period specified in subsection (1), (1A), (1B), (1C)(b), (1D)(b) or (1E) if the appeal tribunal gives permission to do so.

(1G) In this section “conclusion date” means the date of the document notifying the conclusion of the review.

(2) An appeal under this section with respect to a decision falling within subsection (1) or (1A) shall not be entertained unless the appellant is the person who required the review in question.

(2A) An appeal under this section with respect to a relevant decision (other than any relevant decision falling within subsection (1) or (1A)) shall not be entertained unless the appellant is—

- (a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by the relevant decision,
- (b) a person in relation to whom, or on whose application, the relevant decision has been made, or
- (c) a person on whom the conditions, limitations, restrictions, prohibitions or other requirements to which the relevant decision relates are or are to be imposed or applied.

(3) An appeal which relates to a relevant decision falling within any of paragraphs (a) to (h) of section 13A(2), or which relates to a decision on a review of any such relevant decision, shall not be entertained if the amount of relevant duty which HMRC have determined to be payable in relation to that decision has not been paid or deposited with them unless—

- (a) the Commissioners have, on the application of the appellant, issued a certificate stating either—
 - (i) that such security as appears to them to be adequate has been given to them for the payment of that amount; or
 - (ii) that, on the grounds of the hardship that would otherwise be suffered by the appellant, they either do not require the giving of security for the payment of that amount or have accepted such lesser security as they consider appropriate;
- or
- (b) the tribunal to which the appeal is made decide that the Commissioners should not have refused to issue a certificate under paragraph (a) above and are satisfied that such security (if any) as it would have been reasonable for the Commissioners to accept in the circumstances has been given to the Commissioners.

(3A) Subsection (3) above shall not apply if the appeal arises out of an assessment under section 8, 10 or 11 of the Alcoholic Liquor Duties Act 1979.

(3B) Sections 85 and 85B of the Value Added Tax Act 1994 (settling of appeals by agreement and payment of tax where there is a further appeal) shall have effect as if—

- (a) the references to section 83 of that Act included references to this section, and
- (b) the references to value added tax included references to any relevant duty.

(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—

- (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

- (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
- (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(6) On an appeal under this section the burden of proof as to—

- (a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,
- (b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and
- (c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1), (1AA), (1AB) or (1AC) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid),

shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.

(7) An appeal tribunal shall not, by virtue of anything contained in this section, have any power, apart from their power in pursuance of section 8(4) above, to mitigate the amount of any penalty imposed under this Chapter.

(8) Subject to subsection (9) below references in this section to a decision as to an ancillary matter are references to any decision of a description specified in Schedule 5 to this Act which is not comprised in a decision falling within section 13A(2)(a) to (h) above.

(9) References in this section to a decision as to an ancillary matter do not include a reference to a decision of a description specified in the following paragraphs of Schedule 5—

- (a) paragraph 3(4);
- (b) paragraph 4(3);
- (c) paragraph 9(e);
- (d) paragraph 9A.

(10) Nothing in this section shall be taken to confer on an appeal tribunal any power to vary an amount of interest specified in an assessment under paragraph 11A of Schedule 6 to this Act except in so far as it is necessary to reduce it to the amount which is appropriate under paragraph 7 of that Schedule.”

[End of Annex 1]

ANNEX 2 TO FIRST-TIER TRIBUNAL DECISION

Invoices/receipts dated 23 August 2018, the day of the seizure

- Page 18: Document headed “INVOICE FACTURE” with a pre-order date of 21/08/2018 and an invoice date of 23/08/2018. This document was in English and French. For example, in addition to “FACTURE” in its heading, it stated “Caisse n^o/Till n^o”, “Caissier/Cashier”. It was stamped only “PAYÉ” and not also “PAID”. It stated the date only in French. The heading to the items column was only in French: “Désignation”. It used commas instead of stops for the decimal points (commas are the French way), and bore a Calais address for the shop.
- Page 19: Document headed “TICKET DE CAISSE / RECEIPT” dated 23/08/2018. This document was in English and French. In addition to “TICKET DE CAISSE” in its heading, it stated contact details in English, but stated only in French the date, time and cashier: “Le 23/08/2018 à 09:23 Caissière : [with the cashier’s name not fully legible]”. It used commas instead of stops for the decimal points, and bore a Calais address for the shop.
- Page 20: The first of the two documents on page 20 was a receipt dated 23/08/2018. This document was in English and French. It stated in English the contact details and goods details. But it identified in French which checkout was used, and the customer: “Checkout : CAISSE N^o 2” and “Customer : CLIENT CAISSE”. It used commas instead of stops for the decimal points, and bore a Calais address for the shop.
- Page 21: Document dated 23/08/2018. This document was in English and French. It stated in English the contact details and goods details. But it identified in French which checkout was used and the customer: “Checkout : CAISSE N^o 2” and “Customer : CLIENT CAISSE”. It used commas instead of stops for the decimal points, and bore a Calais address for the shop.

[End of Annex 2]