[2017] UKFTT 0845 (TC)

TC05570

Appeal number: TC/2016/03125

EXCISE DUTIES – traveller arriving Dover with excise goods – BlaBlaCar passenger also with excise goods – vehicle seized – appeal against decision not to restore – appeal allowed – direction for a further review

FIRST-TIER TRIBUNAL
TAX CHAMBER

BARTOSZ STANISZEWSKI **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC
DEREK SPELLER FCA

Sitting in public at Ashford on 15th December 2016

The Appellant appeared in person

Paul Tapsell (barrister) instructed by the Cash Forfeiture and Condemnation Legal Team, for the Respondent

DECISION

1. Mr Staniszewski ("the Appellant") appeals against the decision on review dated 25 May 2016 in which it was concluded not to restore the Appellant's car, which had been seized at Dover on 11 March 2016. The circumstances of the seizure are described below.

2. The Appellant appeared in person. He gave his evidence and made his case for restoration entirely in Polish, translated into English by an interpreter provided by the Tribunal. We record the Appellant's evidence under "The Facts" and comment on certain aspects of it in later paragraphs. We should say at the outset that we formed the view that the Appellant was an honest witness notwithstanding that he under-declared the number of cartons of cigarettes he was carrying (see paragraph 13 below). We accept his account of events, including his explanation of his under-declaration.

3. Mr Tapsell appeared for the Director of Border Revenue ("the Respondent"). We had the benefit of a bundle of documents prepared by the Respondent. These included certain documents supplied by the Appellant in Polish but accompanied by a translation or explanation of their function, which the Respondent accepted. The reviewing officer, Karen Norfolk, also gave evidence. Again her evidence was honestly given and we accept it.

4. By way of summary, for the benefit of the Appellant who will otherwise have to have this decision translated into Polish, we accept the Appellant's account of events and we allow his appeal. We direct that the Respondent conduct another review of his decision not to restore the Appellant's car. In doing so the Respondent should take into account our findings in this decision.

The Facts

5. On 10 March 2016 the Appellant was planning to drive from Warsaw to London to visit his girlfriend. He was driving his own car, an Audi A5, which he had only acquired (second hand) on or around 24 February 2016. The car had cost him 61,000 Polish Zloty (around £11,000) plus taxes (which added some £5000 to the cost). He had been saving for some four years to be able to afford to buy the car.

6. To share the cost of the journey and the driving, which could take around 20 hours, the Appellant contacted BlaBlaCar. This is a car pooling system that operates in a number of countries, including the United Kingdom. The Appellant said that BlaBlaCar is very popular in Poland. He provided details of his BlaBlaCar booking.

7. As can be expected in this day and (internet) age, there is a degree of uniformity in the way in which BlaBlaCar appears to operate in different countries and in the way in which its services are advertised on the internet. The Polish website, for example, promotes its services with the following questions and answers (as translated by Google):

"You're the driver? Cut the cost of your trip. Do not travel alone! Get together passengers who are willing to pay for the fuel."

"You're the passenger? Travel cheaper. Quickly and easily book your place to enjoy cheap travelling."

"Common rides: trust and security. Verified profiles and ratings system to help create a trusted community of people who want to travel together with him."

8. The website then elaborates on how shared rides are identified and booked. It also offers personal profiles so that a person can know something about users of the service and one assumes potential travelling companions. The website indicates that "All profiles, photos and evaluation are checked. We do this in order to guarantee the credibility and trust in our community". There is scope for users of the service to submit their evaluation of other users following booked rides with the aim presumably that over time a picture can be built of the reliability and trustworthiness of an individual user. The information and material provided on the Polish website corresponds closely to that provided on the BlaBlaCar United Kingdom website.

9. BlaBlaCar secured two passengers to share the Appellant's journey. The first was only going as far as Lodz. The other was Lukasz Langowski, who was evidently travelling to Luton. The BlaBlaCar booking details indicate that he has a 4.2 score out of 5 based on 12 ratings. The Appellant had not previously met Mr Langowski and knew nothing about him (beyond what could be known through the BlaBlaCar booking and profile system).

10. The Appellant was proposing to leave Warsaw in the night of 10 March so that he would arrive in good time for his ferry crossing to Dover which had been booked for 11 March. In the event Mr Langowski was nearly 2 hours late in arriving at the agreed meeting place. The Appellant had asked him how much luggage he would have, to which Mr Langowski had indicated that he had presents for his family, which turned out to include a small child's bicycle, and Easter gifts. His luggage included a large brown bin bag, which the Appellant thought was likely to contain a blanket and pillow that would be available for the long journey, much as the Appellant ordinarily took with him for such journeys.

11. Because he needed to keep the back seat clear for his passenger to Lodz, all the luggage was put in the boot of the car and was packed somewhat hurriedly given Mr Langowski's late arrival and the Appellant's concern that if they did not leave soon they might risk missing the booked ferry. The Appellant explained that they had made limited stops for petrol on the journey to La Manche and they had not had occasion to open the boot on the journey.

12. The Appellant was bringing with him a certain number of cigarettes. Given that Mr Langowski had indicated that he had a reasonable amount of luggage, the Appellant had stored his cigarettes in the various available compartments in the car to leave as much free space as possible in the boot for Mr Langowski's luggage.

13. The Appellant was stopped at Dover. The expression on Mr Langowski's face on this occurrence was a cause of immediate concern to the Appellant, which in turn caused the Appellant to panic at the thought that Mr Langowski might be carrying

drugs or other prohibited items. The record of what followed can be taken from the Border Force officer's note book:

Officer: Do you live in the UK or are you visiting?

Appellant: Visiting.

Officer: Where are you going?

Langowski: To Luton

Officer: How long will you stay here?

Appellant: 3 days.

Officer: Is the car yours?

Appellant: Yes.

Officer: Documents please [provided]. Do you both know you cannot import controlled drugs, firearms, explosives?

Appellant: Yes.

Langowski: Yes.

Officer: Cigarettes or tobacco?

Langowski: No.

Appellant: 8 cartons cigarettes.

Officer: Can you open the boot please.

14. When the boot was opened the officer could immediately see that there was a brown bin bag which obviously contained in excess of 8 cartons of cigarettes. The Officer then asked the Appellant again how many cigarettes he really had. At that stage the Appellant said that his English was not good and that the officer should ask Mr Langowski. Mr Langowski spoke to the Appellant in Polish and the Appellant replied in Polish. Mr Langowski then told the officer that the Appellant had replied that it was "A few more than 8".

15. A search of the Appellant's car revealed a total of 19,800 Marlborough with a German health warning and 4000 Marlborough with Polish tax stamps and health warning. The 19,800 were of poor quality packaging, the carton was not cellophane wrapped and had no tax stamps or serial numbers. The cartons were Marlborough red king sized and the inner packets were Marlborough Gold. The officer's notebook then records that he asked Mr Langowski why he had bought cigarettes in Germany if they were cheaper in Poland. Mr Langowski explained that people sell cigarettes from German duty free supplies, which means that they are a better price than in the shops. The officer also asked Mr Langowski who the cigarettes were for and why he

had said he had no cigarettes. As to the latter question Mr Langowski said that he was scared and that as this was his first time at Customs in Dover he did not know what he must say.

16. The Officer asked who owned the cigarettes, to which the Appellant indicated that his were Gold and Mr Langowski that his were Red. We understand (and so find) that 19,800 belonged to Mr Langowski and were found in the brown bin bag and 4000 belonged to the Appellant. The latter were found in the boot side storage compartments, in the sleeves of a jacket and in the glove box. We do not understand that the Appellant's cigarettes were concealed in any way in an attempt to evade discovery; they were merely packed, as the Appellant had indicated, to leave as much free space as possible in the boot for his passenger's luggage.

17. The officer then read the following formal statement:

> "*You have excise goods in your possession (or control) which appear not to have borne UK duty. Goods may be held without payment of duty provided they are held for your own use. I intend to ask you some questions to establish whether those goods are held for a commercial purpose. If no satisfactory explanation is forthcoming, or if you do not stay for questioning, it may lead me to conclude that the goods are held for a commercial purpose and your goods and vehicle may be seized as liable to forfeiture. You are not under arrest and are free to leave at any time. Do you understand?*"

18. The officer's notebook records that Mr Langowski replied that he did and the Appellant said "a little". Mr Langowski then translated and the Appellant said "I understand but my cigarettes are from Poland." The Appellant and Mr Langowski were then asked to sign the officer's notebook as a correct record. Mr Langowski is recorded as saying that he will sign "because it's true". The Appellant is recorded as saying "OK I think". Both then signed that "It's correct".

19. The officer then recorded his interview with Mr Langowski, which Mr Langowski signed as a correct record. In his interview Mr Langowski indicated that he did not know the Appellant or how many cigarettes he was carrying and that he had only met him the previous day for a lift to the UK arranged through the internet.

20. The officer considered that the Appellant's English was not good enough to enable him to conduct a formal interview.

21. The officer then seized Mr Langowski's 19,800 cigarettes and the Appellant's car. He detained the Appellant's 4,000 cigarettes. The Notice of Goods Detained indicated that the Appellant's English was "not good enough to answer questions". The Notice included the statements that, "These goods will be deemed seized after 30 days from the date of this Notice." The Notice also included a telephone number (see paragraph 30 below).

22. As regards these events the Appellant frankly acknowledged that he had lied when first asked about the number of cigarettes he was bringing into the UK. He had 20 cartons, not 8. Had the Appellant's English been better and had the officer pursued the matter further, the Appellant's subsequent answer, as conveyed by Mr

Langowski, of "A few more than 8" might ultimately have elicited the actual number of cartons he was carrying. At that stage the officer apparently only had sight of Mr Langowski's cartons, although he seems naturally to have assumed that they were the Appellant's. That does not, however, alter the Appellant's first answer before more cigarettes (albeit Mr Langowski's) had been revealed on opening the boot. The Appellant explained that he had frozen when he saw Mr Langowski's reaction to their being stopped at Customs. He was immediately concerned that Mr Langowski might be carrying drugs or other prohibited goods. He was scared because he knew he had more cigarettes than the normal guideline amount and he panicked when first asked by the officer how many he had with him. It may be that he thought that 8 cartons sounded a more acceptable number (albeit more than the guideline) than 20. At that stage (as we conclude below) he would have had no knowledge of the 99 cartons that would shortly be found in Mr Langowski's brown bin bag.

23. As the record shows, however, the Appellant's cigarettes had Polish tax stamps and the Appellant's evidence was that they were intended for personal consumption or gifts to his girlfriend and her family. We would accept his evidence to that effect, although that is not the principal matter with which we are concerned.

24. As regards what transpired at Dover on 11 March 2016, the Appellant agreed that he had initially answered the officer's questions in English but pointed out that the officer had accepted that his English was not good enough for him to be interviewed. The officer recorded the fact that the Appellant did not speak good English in his note book and on the Notice of Goods Detained. The Appellant said he was stressed and was unable to express himself or explain matters in English as he would have liked to. There was no officer on hand who could speak Polish and the Appellant had had to rely upon Mr Langowski, whom he regarded as the person principally at fault, to translate what the officer was saying and then convey the Appellant's replies to the officer.

25. The Appellant said that the officer had tried to explain the notes to him but he was unwilling to sign them because he was having to rely upon Mr Langowski to explain them. He had eventually signed them but he had felt pressurised, stressed and tired after a long journey. He explained that Mr Langowski had then been interviewed separately and the Appellant was told that he had admitted that the cigarettes were the Appellant's and that there was no need to interview the Appellant. He was given a telephone number and told to call within 30 days to collect the cigarettes.

26. Mr Tapsell for the Respondents cross-examined the Appellant on whether he had known that Mr Langowski was carrying a large number of cigarettes. In particular, he suggested that the Appellant could not have failed to notice that the brown bin bag contained cigarettes, which had been so obvious when the officer had opened the boot of the car. The Appellant denied that he knew anything about Mr Langowski's cigarettes: he repeated his original explanation of this (see paragraphs 10 and 11 above).

27. We accept the Appellant's evidence in this respect. It would not be unusual for an unsealed bin bag to shift in transit, revealing or spilling its contents, so that, in this case, Mr Langowski's cigarettes were immediately visible on opening the boot at

Dover. If the boot had not been opened in transit there would be no reason for the Appellant to know what the bin bag contained if it was not evident when the boot was hastily loaded before leaving Warsaw.

28. Mr Tapsell also asked the Appellant what steps he had taken to check whether Mr Langowski was carrying prohibited goods or goods that should be declared on entry to the UK. The Appellant accepted that he had done nothing particular to check but questioned what in the circumstances he could be expected to do. His point was that Mr Langowski could have been carrying drugs or a gun concealed on his person or in his luggage and it would not have been realistic for the Appellant to question or search him to verify that. In this respect we note that Mr Langowski denied that he was carrying cigarettes when asked by the Border Force officer. There is no reason to think that he would have given a more honest answer to the Appellant, especially if that would have prejudiced his lift to the United Kingdom and his (no doubt hoped for) entry without being stopped.

29. Mr Tapsell suggested to the Appellant that it was highly risky to give a lift to a complete stranger. The Appellant did not accept that characterisation of the arrangement. It is obviously true that the Appellant had never met Mr Langowski before but it seems to us that Mr Tapsell's question does not take account of how the Appellant came to give Mr Langowski a lift through BlaBlaCar. We also think that the Appellant was entitled to assume that Mr Langowski was an honest passenger. Mr Langowski was not shown to be carrying prohibited goods and even if the Appellant had known that he was carrying a large quantity of cigarettes (which we have concluded he did not), he could not have known that Mr Langowski would lie about the cigarettes when asked or that he would be unable to satisfy the UK Border Force that they were for private rather than commercial consumption. The Appellant said, and we accept it as true, that he would never have taken Mr Langowski as a passenger had he discovered any hint of irregularity before leaving Poland. The Appellant also said (and we accept it as true) that he had no idea that he was putting his car at risk if Mr Langowski was found to be smuggling goods into the UK.

30. Following the seizure of his car the Appellant's plans to travel with his girlfriend had to be abandoned and he returned to Poland within a few days. He then tried to call the telephone number that he had been given in Dover on the Notice of Goods Detained. The Appellant produced telephone records showing 13 calls at varying times to the number he had been given made on 15 March 2016, 8 made on 16 March 2016 and 3 made on 17 March. On each occasion the call either went unanswered or resulted only in a recorded message. On 17 March 2016 the Appellant e-mailed the Border Force Complaints Team referring to the seizure of his car, explaining that he was unable to get in touch with any of the customs officers concerned by e-mail or telephone to establish what was going on with his case and asking for help with his case.

31. The Border Force Complaints Team passed the Appellant's e-mail to the National Post-Seizure Unit ("NPSU"). NPSU wrote on 18 March 2016 requesting proof of ownership of the car within 14 days. The Appellant responded by e-mail on 21 March 2016 submitting the purchase agreement and car book and noting that the registration documentation was with the car. The Appellant sent his reply and the documents again on 23 March 2016.

32. The seizing officer's note book reveals that on 19 March 2016 he telephoned the Appellant. The telephone number entered in the notebook is not in fact the Appellant's and the Appellant denied speaking to the officer. It was in fact a friend of the Appellant in the UK and as proof of this the Appellant produced the friend's UK telephone record. The officer's notes indicate that he believed he was talking to the Appellant. This was possibly an understandable confusion given that the friend was also Polish and had previously been enlisted by the Appellant to assist in making contact with Border Force given the Appellant's lack of English and the impossibility of making contact through the telephone number with which he had been provided.

33. The conversation, as recorded in the officer's notes, was as follows:

> "I asked [the Appellant] if he wished to attend an interview regarding his cigarettes. He asked me about the car and I explained that I could not deal with that and he would have to contact the NPSU to arrange either restoration or appeal. I explained each process to him. I asked if he wanted to answer questions regarding the cigarettes but he did not. He told me that he was asked to provide proof of ownership for the vehicle. I explained that his vehicle log book was amongst the paperwork that Border Force had and I stated that I would send them to the NPSD. I provided him with the NPSU phone number in case he had any more questions about his vehicle. He seemed satisfied with this."

34. It is not clear how the officer had got the telephone number to call. The officer must have known that he was calling a United Kingdom number and not a number in Poland even though his notes had recorded that the Appellant was only expecting to stay three days in the UK and by 19 March might therefore be expected to be in Poland (as indeed he was). More to the point, if the conversation was in English the officer must surely have realised that he was not speaking to the Appellant. In any event, the officer's record must be understood on the basis that he was in fact not speaking to the Appellant but to a friend who was assisting the Appellant. The friend presumably knew nothing about the cigarettes. Mr Tapsell asked the Appellant why his friend had chosen to impersonate him. The Appellant denied that he had and we can see no reason why he should have been. The officer appears to have thought he was calling the Appellant and the friend may quite reasonably have supposed that the officer was calling about the Appellant's case, with which the friend was assisting, without necessarily thinking that the officer thought he was the Appellant. The officer did not give evidence and the record we have of the call may be consistent with a misunderstanding on his part notwithstanding that it was a UK number and apparently an English conversation. Without any evidence it is unnecessary for us to conclude that he was being deliberately misled in some way.

35. On 27 April 2016 NPSU sent by e-mail to the Appellant a letter refusing to restore the vehicle.

36. On 11 May 2016 the Appellant responded with a detailed account of his case, which he confirmed in his evidence and which we have previously set out. This was treated as a request for a review of the decision not to restore the car.

37. On 25 May 2016 Officer Norfolk gave her decision on review concluding that the car should not be restored. She gave evidence, confirming the basis on which she had conducted her review. She said that she was satisfied that the decision not to offer restoration was correct and reasonable. She was also satisfied that she had considered every matter that was relevant and disregarded everything that was irrelevant. We consider below whether this is in fact correct.

38. Finally, we should note that the Appellant did not satisfy us that he would suffer exceptional hardship if his car was not restored. The Appellant is self-employed and apparently has the use of another vehicle for the purposes of his work. He explained that he had saved for four years to be able to acquire his car and we did not understand that he had owned a car previously. It seems therefore that he has lived and worked for some time without the need for his own car and his acquisition, which was very recent, was not associated with some change in his work or other circumstances. We accept that he will suffer a significant financial loss if the car is not restored, given the use of four year's savings to acquire it. This is, however, an inevitable consequence of the application of the Respondent's policy that is designed to deter the use of vehicles for smuggling.

The Law

39. Under the relevant Acts and Regulations excise duty is payable on certain types of goods, including tobacco, which are imported from other countries within the European Union for a commercial purpose. If the duty charged is not paid the goods are liable to forfeiture under section 49(1) of the Customs and Excise Management Act 1979 ("the Act"). This was the case for Mr Langowski's cigarettes. Under section 141 of the Act, "any … vehicle … which has been used for the carriage … [of the forfeited goods] … shall also be liable to forfeiture."

40. The Appellant's cigarettes were merely detained at the time of entry under section 139(1A) of the Act. Section 139(1A) provides that an officer "who reasonably suspects that any thing may be liable to forfeiture under the customs and excise Acts may detain that thing". Schedule 2A contains various supplementary provisions relating to detention including the provision for up to 30 days detention. Section 139(1B) states that references in section 139 and Schedule 2A to a thing detained as liable to forfeiture under the customs and excise Acts includes a thing detained under subsection 1A. However, section 141 refers to any thing which "has become" liable to forfeiture and does not appear to extend to some thing that has been detained but has not yet been seized as liable to forfeiture. The seizure paperwork suggests that the basis for the immediate seizure of the Appellant's car was the seizure of Mr Langowski's 99 cartons of cigarettes and not the detention of the Appellant's 20 cartons pending further explanation of their intended use.

41. Schedule 3 to the Act provides a mechanism for challenging the forfeiture and seizure of goods and vehicle, which involves the person in question giving notice of his claim that anything seized is not liable to forfeiture. That initiates a procedure before the Magistrates' Courts (and not this Tribunal) for the condemnation of the goods and vehicle as forfeit. If no notice of claim is made within the requisite period, paragraph 5 of Schedule 3 provides that the goods and vehicle shall be deemed to

have been duly condemned as forfeited. Mr Langowski made no such claim in respect of his cigarettes of which we were informed.

42. Section 152(b) of the Act gives the Respondent discretion to, "restore, subject to such conditions (if any) as [he] thinks proper, anything forfeited or seized under the Customs and Excise Acts." This is the discretionary power that the NPFU exercised on 27 April 2016 in deciding not to restore the Appellant's vehicle.

43. The Finance Act 1994 provides a separate statutory mechanism for challenging a refusal to restore goods or vehicle. The first stage of this statutory mechanism is an internal review by an independent officer of the decision not to restore. This was officer Norfolk's review of 25 May 2016. Section 16 of the 1994 Act provides a right of appeal to this Tribunal against the decision of the reviewing officer.

44. The powers of this Tribunal on such an appeal are limited (as we explained to the Appellant). We must be satisfied that the reviewing officer concerned could not reasonably have arrived at her decision. In that case the Tribunal may direct that the decision ceases to have effect and/or require a further review of the decision not to restore.

The Respondent's submissions

45. Mr Tapsell put the Respondent's case briefly. He said that the Appellant had admitted that he had lied to the officer about the number of cartons of cigarettes that he was carrying. He had also admitted that he had carried out no checks to ascertain what his passenger was carrying. The number of cigarettes involved was substantial – 24,000 – and represented a commercial quantity. The amount of duty evaded – £5,811.66 – was significant. While it might appear unfortunate for the Appellant in losing his newly acquired car, it reflected the consistent application of a robust policy that was designed to discourage smuggling. The Appellant had been unable to demonstrate that he would suffer excessive hardship as a result of the seizure. Officer Norfolk had considered all the facts in the light of the Respondent's established policy. She had concluded that the decision not to restore the Appellant's car was a reasonable one. He submitted that her decision to that effect should be upheld and the Appellant's appeal dismissed.

Our Decision

46. Officer Norfolk's decision on review is set out in her letter of 25 May 2016. After a brief introduction, the letter sets out her understanding of the Appellant's case from the documents available to her. This included the information obtained from the officer's note book and the subsequent correspondence. Officer Norfolk noted the telephone call of 19 March 2016 in which the officer incorrectly believed that he was speaking to the Appellant and records that the Appellant had declined to attend an interview. Far from declining to attend an interview, one of the Appellant's main complaints is that he had never had the opportunity on 11 March 2016 to put his case and the telephone number that he was given to follow up the seizure proved useless. It is only at this stage, in the Tribunal, that he has had the opportunity to explain matters properly with the benefit of an independent interpreter.

47. Having outlined the facts as she believed them to be, Officer Norfolk then considered their application in the context of the policy guiding the exercise of the discretion to restore the vehicle concerned. In this she focussed initially on the circumstances surrounding the 4000 cigarettes that belonged to the Appellant, noting that the Appellant had lied regarding their amount. The seizure documentation, however, indicates that the seizure on 11 March related to Mr Langowski's 19,800 cigarettes. The Appellant's 4000 cigarettes had at that point only been detained pending further explanation and (in the absence of satisfactory explanation) would only be deemed to be seized 30 days later. The basis for treating the Appellant as unconcerned about his cigarettes and not wanting to attend an interview is the officer's telephone call of 19 March 2016, in which the officer mistakenly believed that he was speaking to the Appellant when in fact he had telephoned a friend of the Appellant. Officer Norfolk concludes this part of her consideration by referring to the 19 March telephone call and the Appellant's supposed refusal to attend an interview.

48. Officer Norfolk then turned in her review to consider the position of Mr Langowski's 19,800 cigarettes. She states that she did not find it credible that the officer was able immediately to identify a large quantity of cigarettes when he opened the boot but that the Appellant had not. We have previously dealt with the evidence on this at paragraph 27 above and have accepted the Appellant's explanation of this point.

49. Officer Norfolk then notes that even if it was the case that the Appellant did not know about Mr Langowski's cigarettes, he had shown a lack of concern for his safety and the security of his vehicle in agreeing to give a lift to Mr Langowski. In relation to this aspect, officer Norfolk does not appear to have taken any account of the manner in which the BlaBlaCar service operates. We have set out our understanding of its operation in paragraphs 6 to 8 above. The circumstances in which the Appellant met Mr Langowski and his reasons for taking no steps to test his honesty or verify the contents of his luggage are covered in paragraphs 10, 11, 28 and 29 above.

50. Officer Norfolk also noted in her review that in his e-mail of 11 May 2016 the Appellant had stated that after the seizure he had become aware that Mr Langowski had previously broken the law. This seems to us, however, to be an irrelevant consideration. We do not know how the Appellant came by that information and Mr Tapsell did not ask him about it. It is one thing, however, to make enquiries about a person in the knowledge of what they have done (in this case the knowledge of an attempt to smuggle a large quantity of cigarettes into the UK). It does not necessarily suggest, however, that equivalent enquiries should or necessarily can be made about a person whom you have just met through BlaBlaCar and who has given you no reason to doubt their honesty.

51. In the end, however, officer Norfolk appears to attribute little weight to the fact of Mr Langowski's 19,800 cigarettes but rests her decision on the basis of the Appellant's untruthful declaration of 8 rather than 20 cartons. In respect of those, however, the Appellant never appears to have been given a proper opportunity to explain whether his cigarettes were for personal or commercial use. Given the time, cost and language difficulty involved in dealing with matters from Poland, understandably his principal concern has been to recover his car. However, his initial e-mail communication on 17 March 2016, well within the 30 days allowed for a

response regarding his cigarettes, referred to "my case" and sought assistance given that he had been unable to establish what was going on. This goes back to the Appellant's inability to make contact via the telephone number with which he had been supplied. At that stage he could have no idea that car and cigarettes were dealt with separately. His e-mail was then directed by the Respondent's Complaints Team to the NPSU, which was dealing with the seizure of his car and was not concerned with his cigarettes. We have referred in paragraph 25 above to what the Appellant understood about his cigarettes on the day they were detained. It was not his intention to abandon his cigarettes but, realistically, for him they went hand-in-hand with his car and he was unlikely to pursue recovery of the cigarettes without the car.

52. Officer Norfolk then notes in her review that the Appellant has not claimed that the cigarettes were to be passed to others on a 'not-for-profit' reimbursement basis, she must conclude that they were held for profit. We would conclude that they were not held for commercial purposes. Initially they were merely detained pending an interview that could not take place at the time. The Appellant's abortive telephone calls and his e-mail asking what was going on with "my case" were well before the expiry of 30 days when they would be deemed to be seized. No interview has ever taken place because the issue of his cigarettes was the subject of the confusion underlying the officer's 19 March 2016 telephone call. It might be difficult for a UK resident and native English-speaker to appreciate that the detention of their cigarettes and the seizure of their car must be dealt with separately notwithstanding that both derive from a single event. In the present case the Appellant was having at all stages to pursue his case from Poland through friends and intermediaries trying to discover what was going on. As we have noted, given the language difficulties, this appeal is the first opportunity that the Appellant has had to put his case properly.

53. We therefore consider that Officer Norfolk's review cannot stand. She has failed to take account of all the facts that have become apparent now that the Appellant has had a proper opportunity to explain the circumstances of the seizure.

54. Accordingly, we decide that Mr Staniszewski's appeal is allowed and the Respondent is directed to carry out a new review of their decision not to restore his vehicle. In carrying out that review we direct that the Respondent takes into account our findings of fact as set in this decision.

55. We note that the general policy on restoration is that vehicles may be restored subject to such conditions (if any) as the Respondent thinks proper (including for a fee), in the following circumstances:

- If the excise goods were destined for supply on a "not-for-profit" basis, for example for reimbursement. (As already noted, we would conclude that the Appellant's cigarettes were intended as gifts and for personal consumption.)
- If the excise goods were destined for supply for profit, the quantity of excise goods is small, and it is a first occurrence. (As already noted, we would conclude that they were not destined for supply for profit.)
- If the vehicle was owned by a third party who was not present at the time of the seizure, and can show that they were both innocent of and

blameless for the smuggling attempt. (While the Appellant cannot strictly bring himself within this leg of existing policy given that he was present at the time, the Respondent is now fully aware of the circumstances in which Mr Langowski was his passenger. We note also that the fact of Mr Langowski's attempt to smuggle a large quantity of cigarettes for commercial use was not regarded on initial review as being the principal reason for justifying the seizure of the Appellant's car or the decision not to restore it.)

56. Strictly the restoration of the Appellant's 4000 cigarettes is not before us and Mr Tapsell referred to the decision of the Court of Appeal in *Revenue and Customs Commissioners v Jones and another* [2012] Ch 414 as authority for the proposition that it is not open to us to find that the cigarettes were legal imports illegally seized by finding as a fact that they had been imported for personal use once they have been duly condemned as forfeit. That case did not, however, deal with the circumstances that have arisen here, where the cigarettes were only detained initially pending further interview and no further interview was undertaken following the confusion on the telephone. We see no reason therefore why our conclusion on the Appellant's cigarettes should not be taken into account in the new review that we have directed. We assume that by now the cigarettes will have been destroyed in accordance with the Respondent's normal policy. The Appellant may, however, regard their loss as a small price in the circumstances if his car is ultimately restored to him.

57. 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 this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MALCOLM GAMMIE CBE QC
TRIBUNAL JUDGE

RELEASE DATE: 21 DECEMBER 2016