

EXCISE DUTIES - Cigarettes imported in car belonging to third party - Car seized - Restoration of seized car - Refusal to restore car - Reasonableness - Whether third party's innocence of drivers' activities taken into account - No - Decision quashed on that ground - Whether third party who loses valuable car is dealt with disproportionately by comparison to drivers who lose less valuable excise goods - Appeal deferred for further argument in light of Granger  
LONDON TRIBUNAL CENTRE

AVIS (MICHELLE) Appellant  
- and -  
THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: STEPHEN OLIVER QC (Chairman)  
RACHEL ADAMS FCA, ATII  
SUNIL DAS ACIS

Sitting in public in London on 13 May 2002

The Appellant in person

Christopher Mellor, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

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## DECISION

1. Mrs Michelle Avis appeals against the decision taken on review not to return to her a BMW car which was registered in her name and kept by her. The decision letter is dated 15 October 2001.

### The Circumstances of the Seizure

2. The BMW (L reg) was seized at 0145 on Sunday 5 August 2001 at Eastern Docks, Dover. At the time it was being driven by a Mr G I Aram. His passenger, Mr C O Avis, was interviewed after the car had been stopped. According to the note of interview, C O Avis said that they had come for a "recce" of Calais and had bought five cases of beer. He said they were carrying luggage in the boot. But when the boot was opened a large suitcase and black holdall were found containing cigarettes and in the spare wheel housing were a further 1000 Marlboro Lights (cigarettes). Mr C O Avis said that the Marlboro Lights had been "for a mate of ours" who was going to pay for them.

3. The excise goods being carried were as follows:

6,920 cigarettes (mixed brands)  
30.5 litres of beer  
0.7 litres of spirits  
7.5 litres of wine

4. The same day Mr C O Avis wrote to the Commissioners. He is a soldier and wrote from his barracks in Woolwich. He reported that the Marlboro Lights were to be paid for by his friend when he returned to barracks. The rest of the goods were for personal consumption. He stated that he had not been on a cross channel trip before. He admitted lying on being stopped because he had

panicked. He said that he was a 21 year old soldier residing in barracks. He asked for the car back explaining that his wife and ten months old child needed it for visits to him.

The refusal to restore

5. On 9 August 2001 Michelle Avis wrote to the Commissioners sending a copy of the car "log". This showed a Maidstone address and described her as M Morrisson. In her letter she described C O Avis as "my husband". She asked for restoration.

6. On 22 August 2001 a Customs officer wrote to Michelle Avis as follows:

"The car was seized under section 141 of the Customs and Excise Management Act 1979 due to a large quantity of excise goods being found in the vehicle and the occupants of the vehicle failed to satisfy the Officer at the time that the excise goods were for their own use.

It is proper to inform you that the policy of Customs and Excise is that seized vehicles will not be restored unless you can clearly demonstrate exceptional circumstances.

I have considered all the factors in this case and recommend that the vehicle, on this occasion, is not offered for restoration, for the following reasons:

1. You allowed your husband Mr Charles Avis to use your vehicle for the purpose of a trip to France.
2. The vehicle was used to import a quantity of excise goods concealed within the fabric of the vehicle.
3. Vehicles are normally only restored to owners of reported stolen (sic) to the police (this does not appear to be the case)."

7. Michelle Avis asked for a review in a letter of 29 August 2001. In that letter she stated that she had not given her husband permission to take the vehicle. In the letter she said that: "I was away when my husband and Mr Aram had their day trip to France".

8. The review was conducted by Mr R P Truscott, a Customs officer in a newly formed review team at Plymouth. Michelle Avis had not been interviewed at any time. The relevant part of the review letter of 15 October 2001 states as follows:

"It is for me to determine whether or not the decision you are contesting is one that a reasonable body of Commissioners could not have reached."

The letter referred to the following as considerations that he had taken into account:

- Lies by C O Avis and G R Aram
- Concealment of the cigarettes in the luggage and in the wheel housing
- Lies about where they had travelled : they had said that they had only done a "recce" of Calais, whereas in fact the cigarettes came from Luxembourg.
- Payment was to be received for the goods.

Those factors, Mr Truscott wrote, justified the seizure. There is no issue about that.

9. The review officer then addressed the restoration of the car. We quote from the letter:

"I now move on to the matter of restoration of the vehicle.

Within your letter of 29 August 2001, your grounds for seeking restoration of the vehicle are:

- You had not granted permission for your husband to use the vehicle.
- You contest that the goods imported were for personal use.
- You do not view the quantity imported as a large quantity.

Whilst this vehicle is registered in your name, it is kept at your joint home with Mr Avis and was not reported stolen at the time it was taken. This leads me to conclude that it is available for general use by you and/or your husband. You will see from the earlier paragraph concerning restoration of vehicles that vehicles used to improperly import excise goods are not restored, even for a first offence. This vehicle was used for an improper importation of excise goods, and had goods concealed within the spare-wheel housing. Such actions were not an impromptu action by your husband and his travelling companion, rather a well-planned deception. It is the view of the Commissioners that the fact that you have allowed the vehicle to be used by others, you must accept a variety of risks by so doing. Those risks include the loss of the vehicle through misuse. It is the view of the Commissioners that your avenue for redress lies with the person or persons who caused your loss and not with the Customs and Excise."

10. At the hearing before us Michelle Avis presented her own case and gave evidence. She said that, at the time of the seizure, she and C O Avis had not been married. He had been living in barracks at Woolwich. She and the child lived with Michelle Avis' mother in Maidstone. C O Avis normally stayed at his mother's house in Maidstone. They were waiting for army housing where they could live together. They are now married.

11. C O Avis, she said, had a car (a Renault) but it was usually "in a garage". We inferred from that that the Renault was not always in working order. The seized BMW had been bought the previous autumn for £7,500. C O Avis had paid the deposit of £500 and Michelle Avis had taken out a bank loan of £7000. The car was kept at her mother's house. C O Avis was not a permitted driver under the insurance of the BMW. He could drive it on the strength of his insurance of his own Renault.

12. On Saturday 5 August 2001, she said, C O Avis had taken the car from outside her mother's house. That day she had been away from home. She had not, she said, given him permission to take it. She would not have driven his car without his permission.

13. The first thing she knew about the seizure of the BMW was a phone call at 3.00am on the Sunday morning.

14. We are satisfied that Michelle Avis had no intention to deceive the Customs officers when she described C O Avis as her "husband". They had a joint child and were intending to get married. She could fairly have been his "common law" wife.

It was clear from the registration document sent by her to Customs and Excise that her surname was Morrison.

15. We were provided with a witness statement of Gerry Dolan, a Customs officer. This sets out the policy of Customs and Excise concerning restoration of seized vehicles in force on 5 August 2001. This contains the following passage:

"Vehicles which belonged to owners who are not present at the time of detection will also not have their vehicles restored, unless they can demonstrate that they are totally innocent or it would be disproportionate or inhumane not to restore."

It follows, so far as it is relevant to the present appeal, that the Commissioners' policy of non-restoration will not apply to third party owners who can demonstrate either that they are "totally innocent" or that it will be disproportionate not to restore.

16. The decision not to restore must be reasonable. This means that Michelle Avis has to show that, in taking the decision, the deciding officer of the Commissioners had been acting in a manner which no reasonable panel of commissioners could have acted, that he took into account some irrelevant matter or disregarded something to which he should have given weight.

17. Mr Truscott, the review officer, frankly admitted that the passage quoted in paragraph 8 above was wrong. He accepted that it had been written at an early stage of the Plymouth review team's experience. It evidences a wholly wrong approach to a review officer's function. His function is to examine all the relevant facts and reach his own decision. It is not to review the original decision on reasonableness grounds.

18. On the question of whether Michelle Avis has shown that she was "totally innocent" we mention a concession made by the Commissioners at the hearing before us. This was that it was "not part of the Commissioners' case that Michelle Avis knew the purpose for which the car was to be used".

19. A number of circumstances were not, in our view, taken into account by the review officer. These were as follows:

- Michelle Avis and C O Avis were not living together. C O Avis lived in army barracks some way away. They did not have a "joint home". This should have been evident from C O Avis' letter of 5 August 2001 and is borne out by the fact that both he and Michelle Avis write from different addresses.
- Michelle Avis and not C O Avis was the keeper of the BMW. This was evident from the registration document.
- Michelle Avis said that she had not given C O Avis permission to use the car: see her statement (in her letter of 29 August 2001) that she had been away on the Saturday. In the absence of any evidence to the contrary (and the review officer had none), the inference that Michelle Avis had given permission to use the BMW for any purpose is not tenable.
- While the "bootlegging" exercise may have been "a well-planned deceit" on the parts of C O Avis and G I Aram, it was wrong for the review officer to have inferred from that that it was a risk that she should be taken to have accepted. It was not challenged that she had been "away" on the Saturday when the car had

been taken by C O Avis. At the most she might have taken the risk of the BMW being taken on a trip to the continent to bring alcohol and tobacco back. But it certainly does not follow that a person in Michelle Avis' shoes should have taken the risk that the car would be used for bootlegging.

- There is no evidence to counter C O Avis' statement in a letter that he had not previously made a cross channel trip by car before.

- The notes of interview disclose that G I Aram and not C O Avis was driving the car when it was stopped. (The Statement of Case says that C O Avis had been the driver.) Michelle Avis said that she had not given C O Avis permission to take the car. It cannot be inferred that she gave, or would have given, Mr Aram permission to drive it.

20. In the light of those factors, all of which were, or should have been, available to the deciding officer and to the reviewing officer, we think that the decision not to restore the BMW was flawed. In essence the officers fail to recognize the separation of the interests of Michelle Avis and C O Avis. They had separate homes and separate cars. The review officer should not have concluded that the BMW was "available for general use by you and/or your husband". It was not reasonable to have concluded, as the review officer did, that Michelle Avis allowed C O Avis and G I Aram to use the vehicle and in so doing accepted the risk of its being used for a well-planned deception. Bearing in mind the concession that it was no part of the Commissioners' case that Michelle Avis knew the purpose for which the car would be used, we think that any such conclusion is untenable.

21. For those reasons we think that the decision was unreasonable. The decision is to cease to have effect and the Commissioners are to conduct a further review of the original decision. In so doing they shall take into account the factors that we have identified as missing from the decision that we have quashed.

22. The Commissioners anticipated that this appeal might be affected by the outcome of the appeal to the High Court of a tribunal decision called "Granger". In that case the tribunal had concluded that the decision of the Commissioners not to restore a van to a third party owner was unreasonable as being disproportionate. The effect of the refusal had been that the driver lost excise goods valued at £2,184 which he had unlawfully imported, while the owner (a builder) lost not only his van (valued at £3,875) but also the building work he could not undertake without it. Here the seized excise goods were worth something in the region of £1,400. The BMW had cost £7,500 some ten months before the seizure. Its market value may have been about £6000 at the time of seizure.

23. The Granger case, we were told, is likely to come on for hearing in the High Court in June 2002. Its outcome may help Michelle Avis. On that basis it seems reasonable for us to make a Direction as follows:

"IT IS DIRECTED THAT the Commissioners shall within 30 days of the release of this Decision conduct a review of the original decision on the grounds that the Appellant was innocent of the activities of C O Avis and G R Aram AND in case it still remains necessary and appropriate to hear further argument on the "Granger issue", the appeal will be relisted for a ½ day hearing as soon as possible after the release of the decision of the High Court in Granger."

STEPHEN OLIVER QC  
CHAIRMAN

RELEASED:

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