Neutral Citation: [2022] UKFTT 00272 (TC)

Case Number: TC08564

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/10564

CUSTOMS AND EXCISE** – **seizure of vehicle - appeal against decision not to restore the vehicle – s 152(b) Customs and Excise Management Act 1979 – s 16 Finance Act 1994 – whether the refusal decision could not reasonably have been arrived at – appeal allowed - further review directed

Heard on: 8 August 2022
Judgment date: 12 August 2022

Before

TRIBUNAL JUDGE ROBIN VOS
JANE SHILLAKER

Between
CORACH INTERNATIONAL TRANSPORT LTD

Appellant

and

DIRECTOR OF BORDER REVENUE

Respondent

Representation:

For the Appellant: **CHARLES HANNAFORD** of counsel, instructed by Graham & Co Solicitors Limited

For the Respondent: **DAISY KELL-JONES** of counsel, instructed by the Home Office Cash Forfeiture and Condemnation Legal Team

DECISION

INTRODUCTION

1. On 19 January 2021, the Border Force intercepted a lorry at the Channel Tunnel terminal in Coquelles which was found to be carrying 42 kilograms of cocaine. The driver, Ian Macdonald was arrested and the lorry was seized.

2. The appellant, Corach International Transport Limited ("Corach") is a haulage company based in Ireland. The sole director of Corach is Mr Niall Murray. Corach is the owner of the truck and the lessee of the refrigerated trailer which, together, comprise the vehicle which was seized.

3. Corach applied to the Border Force for restoration of the vehicle in accordance with s 152(b) Customs and Excise Management Act 1979. This request was initially refused on the basis that Corach had not provided sufficient evidence of ownership of the vehicle. The decision not to restore the vehicle was upheld on review but on the basis that the review officer, Mr Ray Brenton, considered Corach to have been complicit in the smuggling attempt.

4. Corach now appeals to the Tribunal against the decision of the Border Force to refuse restoration of the vehicle.

APPEAL AGAINST REFUSAL DECISION – LEGAL PRINCIPLES

5. Under the terms of s 152(b) Customs and Excise Management Act 1979, the Border Force has a discretion to restore anything which has been seized.

6. The powers of the Tribunal on an appeal against such a decision are set out in s 16(4) Finance Act 1994. In effect, the Tribunal only has a power to review the decision taken by the Border Force and does not have a power to substitute its own decision.

7. The threshold condition for interfering with a decision is that the Tribunal is satisfied that the "*person making that decision could not reasonably have arrived at it*". If the threshold condition is met, the Tribunal may direct that the decision should cease to have effect and may require (in this case) the Border Force to carry out a further review of the original decision.

8. There was no difference between the parties as to the principles which the Tribunal should apply in exercising its powers and which can be summarised as follows:

(1) The burden of showing that the decision is one which the reviewing officer could not reasonably have arrived at lies with the appellant (s 16(6) Finance Act 1994; *McGeown International Limited v HMRC* [2011] UKFTT 407(TC) at [46]).

(2) A decision will be unreasonable in the relevant sense if there was an error of law (*John Dee Limited v Customs and Excise Commissioners* [1995] STC 941 at [952g-h]), if the decision maker took into account irrelevant factors or failed to take into account relevant factors or, even if the right factors were taken into account, the decision was one which no reasonable decision maker could have reached in the circumstances (*Customs and Excise Commissioners v J. H. Corbitt (Numismatists) Limited* [1981] AC 22 at [60]).

(3) Even if the decision is unreasonable in the relevant sense, the appeal may be dismissed if the Tribunal is satisfied that, notwithstanding the flaw in the decision-making process, the decision would inevitably have been the same (*John Dee* at [953a]).

(4) The Tribunal should carry out its own fact finding exercise and assess the decision in the light of the facts as found (*Gora v Customs and Excise Commissioners* [2003] EWCA Civ 525 at [38e-39]). A decision which may be reasonable based on the facts taken into account by the decision maker may therefore be unreasonable in the light of the facts as found by the Tribunal.

9. The approach the Tribunal should therefore take is as follows:

(1) Determine the relevant facts.

(2) Consider whether the decision maker has taken into account the right factors.

(3) If they have not, consider whether their decision would inevitably have been the same had they taken into account the correct factors.

(4) Even if the decision maker had taken into account the right factors, consider whether the decision was one which no reasonable person could have reached in the circumstances.

BORDER FORCE POLICY ON RESTORATION

10. The policy of the Border Force in relation to the restoration of a vehicle involved in smuggling drugs is somewhat opaque and on the face of it has inconsistencies.

11. In his review letter, Mr Brenton explains that where the amount of drugs involved exceeds a specified quantity (100 grams in the case of Class A drugs such as cocaine), restoration will normally be refused unless there are exceptional circumstances where it is considered appropriate to offer restoration (for example assistance leading to further arrests).

12. Mr Brenton however goes on to say that, whilst he is guided by the restoration policy, he is not fettered by it and that he should consider every case on its individual merits. He then goes on to suggest that the restoration policy depends primarily on who is responsible for the smuggling attempt. In his oral evidence, he explained that this means that if the person seeking restoration is complicit in the smuggling either by active involvement or by turning a blind eye, restoration would normally be refused.

13. Mr Brenton also explained in his oral evidence that, even if the person seeking restoration was innocent, restoration may also be refused if that person has not taken adequate steps to prevent smuggling from taking place. However, although the review letter contains appendices explaining what steps might be taken to help prevent smuggling, this is not an aspect which Mr Brenton referred to in his review letter, presumably on the basis that he did not need to given his conclusion that Corach was complicit in the smuggling.

14. The policy which emerges is that restoration will normally be refused unless there are exceptional circumstances but that all relevant factors will be considered and restoration may be made if the person seeking restoration is not complicit in the smuggling and has taken reasonable steps to prevent or mitigate the risk of smuggling. This is consistent with the conclusion reached by this Tribunal in *Botrans Avtoprevoznisto v Director of Border Revenue* [2016] UKFTT 0547 (TC) at [28 and 32] as to the policy applied by the Border Force in these situations.

15. As the Tribunal noted in *Botrans* at [30], there is an apparent inconsistency in that, if the person seeking restoration is not complicit in the smuggling and has taken reasonable steps to prevent smuggling from taking place, restoration will be considered even though these circumstances do not appear, on the face of it, to fall within the definition of "exceptional".

16. Whilst the effect of the policy seems reasonably clear, it might be helpful if it could be expressed differently so as to avoid the apparent inconsistency. It might for example be explained that, if the relevant limits are exceeded, the normal position is that restoration will be refused. However, each case will be considered on its individual merits and that, subject to any other relevant factors, it may be considered appropriate to offer restoration if there are exceptional circumstances or where the person seeking restoration is not complicit in the attempted smuggling and has taken reasonable steps to prevent smuggling.

THE EVIDENCE AND THE BACKGROUND FACTS

17. The Tribunal had available to it a bundle of documents and correspondence. In addition, on the day of the hearing, the Tribunal was provided with a set of photographs of the vehicle at Coquelles and the load which it contained (some of which were already in the bundle) as well as what purported to be a copy of Mr Macdonald's employment contract with Corach, only the first page of which had been included in the bundle.

18. The bundle contained witness statements from Mr Brenton, Mr Murray and Corach's solicitor, Mr Stewart. Mr Brenton and Mr Murray also gave oral evidence. Mr Stewart was not asked to give oral evidence as the purpose of his witness statement was simply to put various documents into evidence.

19. Mr Brenton is an experienced Border Force Officer. Although his answers to some of the questions put to him were somewhat longwinded, we have no doubt that he was doing his best to answer the questions put to him and have no hesitation in accepting his evidence save on one point where, for the reasons we explain, we prefer Mr Murray's evidence.

20. For the most part, Mr Murray was also a straightforward witness although the answers to some of the questions put to him were a little vague. Having said this, we accept the evidence he was able to give. The only exception to this relates to Mr Macdonald's employment contract where there was some inconsistency between the documents provided to the Tribunal and no satisfactory explanation. We deal with this further below.

21. The background facts are not in dispute and can be stated reasonably briefly.

22. Corach is a haulage business based in Ireland. At the time, it operated approximately 12 lorries. Mr Murray is the sole director and runs the company, for example making arrangements for the loads to be carried. The main business is transporting fresh foods such as fish from Ireland to Continental Europe, hence the need for refrigerated trailers. In order to maximise revenue, Mr Murray would arrange for the vehicles to return with other loads, ideally to Ireland but sometimes via the UK.

23. Mr Macdonald started working for Corach at some point in 2020. He had been involved in the fairground business but, as a result of Covid, this was no longer operational. He therefore took up work for a number of haulage businesses having had previous experience in this field.

24. On 18 January 2021, Corach accepted a job from a freight agent, Morrison Freight Limited (based in the UK) to transport 26 pallets of protein powder from Aminolabs in Belgium to Avon Group in Redditch. The instructions from Morrison Freight required Corach to collect the goods from Aminolabs the following day and also to collect an export declaration from a Customs Agent, Janssens NV located approximately 10-15 kilometres from Aminolabs.

25. Mr Macdonald arrived at Aminolabs at about 08:20 am the following day to collect the load. He left Aminolabs at 09:23, arriving at the location of Janssens NV's office at 10:20 am. He set off again at 10:48, stopping for approximately 15 minutes at 3:20 pm to purchase nine cases of wine for his personal use before arriving at Coquelles at about 3:45 pm.

26. On arrival at the UK Control Zone in Coquelles he was asked various questions by a Border Force Officer during which he mentioned the stop to buy the wine but did not mention the stop at Janssens.

27. The load was passed through a scanner by the Border Force Officers as a result of which the goods were unloaded and searched. 42kg of cocaine was found in pallets 15 and 16 which were in the eighth row of pallets contained in the trailer (presumably out of a total of 13 rows with two pallets to each row making a total of 26 pallets).

28. The protein powder was contained in tubs and each pallet contained a number of layers of tubs, each contained in a cardboard tray with a layer of cardboard over the top and wrapped in plastic. The cocaine was in vacuum packed blocks pushed between the tubs of protein powder on the first and second layer of tubs on each of the two pallets in question.

29. As we have already recorded, following the drugs being found, Mr Macdonald was arrested and the vehicle was seized in accordance with s 139(1) Customs and Excise Management Act 1979. No challenge was made to the legality of the seizure.

30. The matter was investigated by the National Crime Agency. There was no evidence before the Tribunal as to whether any charges have been brought against Mr Macdonald and if so, whether Mr Macdonald was found guilty of any offences.

31. The Border Force Officers searched the cab of the vehicle. Amongst other things, they found a roll of shrink wrap in the cab. They also took information from the tachograph contained in the vehicle.

32. Corach requested restoration of the vehicle on 22 January 2021 and, at the request of the Border Force provided certain additional information in March 2021, although not all of the information which had been requested.

33. On 6 July 2021, the Border Force wrote to Corach refusing the request for restoration on the basis that it had not provided sufficient evidence of ownership of the vehicle. Corach requested a review of this decision. The review was carried out by Mr Brenton who confirmed the decision not to restore the vehicle in a letter dated 15 September 2021. As we have mentioned, Mr Brenton's main reason for refusing restoration was his conclusion that Corach was complicit in the smuggling.

34. It appears that the Border Force sold the vehicle at auction in January 2022. We mention this only for completeness as it is not relevant to the matters which we have to determine. The Border Force's stated position is that if it decides to restore an item which has been disposed of it will normally offer an appropriate payment instead.

THE REVIEW DECISION

35. After setting out the background, Mr Brenton explains his reasons for concluding that Corach must have been complicit in the smuggling as follows:

> "This case involves the attempted importation of a commercial quantity of Cocaine Hydrochloride, a Class A drug, which I believe, on the evidence before me, could not have been perpetrated without the knowledge of your client. This was no casual concealment or one that could easily be made without the knowledge of both the operator and the driver. Not only were the smuggled illicit drugs concealed, but they were placed within the load; that it is most likely that they were put there after the vehicle was loaded with the legitimate consignment in Belgium. It is probable that they would have been hidden later, during the journey from Belgium to the UK. It is also probable that to conceal the illicit goods would require some of the legitimate consignment to be unloaded and re-loaded so as to hide the drugs. It is unlikely that that could be done without the knowledge of the driver. The re-loading and the route taken would probably have taken a considerable time and the delay should have come to the attention of a reasonably careful operator monitoring the movements of the vehicle (as required by many transport agreements). Furthermore, the drugs were concealed within the consignment destined for a bona fide company and therefore would

> require delivery to a clandestine delivery point prior to the genuine delivery. I believe that, on the balance of probabilities, this could not have been achieved without the involvement of your client; as it is your client who would have had to inform the driver of the location of the 'slaughter point' to unload the illicit part of the load."

36. Mr Hannaford, appearing on behalf of Corach criticises Mr Brenton's conclusion that Corach was complicit in the smuggling attempt on the basis that this conclusion was based on insufficient evidence and instead largely represented Mr Brenton's unsupported opinion.

37. Whilst Mr Hannaford to a large extent formulated his submissions in the form of relevant factors which he says Mr Brenton failed to take into account and irrelevant factors which he says that Mr Brenton took into account in concluding that Corach was complicit in the smuggling attempt, we consider this to be the wrong approach. The question as to whether Corach was in fact complicit in the smuggling attempt was clearly a relevant factor for Mr Brenton to take into account in deciding whether to uphold the decision not to restore the vehicle to Corach.

38. The key question for us to address, and in respect of which it is right for us to make a finding of fact, is whether, on the balance of probabilities, Corach was in fact complicit in the smuggling attempt. If our conclusion is that it was not, there can be no doubt that Mr Brenton's decision was flawed given that this was the only significant matter which Mr Brenton took into account in deciding to uphold the refusal to restore the vehicle. The only remaining question would be whether it is inevitable that Mr Brenton's decision would have been the same had he concluded that Corach was not involved in, or aware of, the smuggling attempt.

WAS CORACH COMPLICIT IN THE SMUGGLING?

Submissions

39. As can be seen from the extract from the review letter set out above, Mr Brenton's conclusion that Corach was complicit in the smuggling attempt is based heavily on his theory that the drugs were placed in the load at some point after the goods had been collected from Aminolabs. Mr Brenton did not however have available to him the GPS information relating to the movements of the vehicle which was before the Tribunal. Although the Border Force had access to information from the tachograph contained in the vehicle, Mr Brenton's evidence was that no analysis had been carried out by the Border Force of this information.

40. Mr Hannaford submits that it would not be possible for the drugs to be placed in the load after it had been collected as the GPS information shows that there were only two stops between the load being collected and arrival at Coquelles, the first being for 28 minutes at Janssens to collect the relevant export declaration and the second being for approximately 15 minutes when Mr Macdonald purchased some wine for himself. We do not need to consider the second stop any further as Ms Kell-Jones, representing the respondent, does not suggest that it would have been possible for the drugs to have been placed in the load during this stop.

41. As far as the first stop is concerned, Mr Hannaford points out that Mr Brenton himself in the review letter notes that it is likely that placing the drugs within the load would have required part of the consignment to be unloaded and reloaded in order for the drugs to be hidden and that this "would probably have taken a considerable time". He also draws attention to the fact that the original loading of the goods at Aminolabs took over an hour. On the basis that 16 out of 26 pallets would have to have been both unloaded and then reloaded, he argues that it is improbable that this could have been achieved within 28 minutes particularly given that time would also have to be allowed for unwrapping the packages which were to contain the drugs, placing the drugs within those packages and then re-wrapping the packages.

42. Based on this, Mr Hannaford submits that it is more likely that the drugs were concealed within the goods at Aminolabs and were therefore already contained in the load when it was collected by Mr Macdonald.

43. Mr Hannaford also makes the point that there is no evidence that Mr Macdonald was to take the load to another location in the UK so that the drugs could be unloaded (the so-called "slaughter point") before then transporting the legitimate goods to their ultimate destination. This he says again supports the proposition that it is more likely that the drugs had been placed in the load at the outset and would be unloaded at the ultimate destination in Redditch.

44. Mr Hannaford relies on two other matters in support of his submission that Corach was not involved in the smuggling attempt. The first is that Corach has been trading for 20 years and, on Mr Murray's evidence has not had any previous problems relating to the smuggling of drugs. This evidence was unchallenged. We have no doubt that, if the Border Force were aware of any previous seizures involving Mr Murray or Corach, this would have been highlighted by them. We therefore accept Mr Murray's evidence in relation to this.

45. The second point relied on by Mr Hannaford is that, in connection with their investigation, the National Crime Agency has not sought to interview or arrest Mr Murray. Again, the evidence in relation to this given by Mr Murray was not challenged and we accept it. Mr Hannaford suggests that the only inference which can be drawn from this is that the NCA does not consider Corach to have had any involvement in the attempted smuggling.

46. In terms of response, Ms Kell-Jones relied on the oral evidence given by Mr Brenton that it might have been possible for the drugs to have been placed in the load after the goods had been collected within the 28 minute stop at Janssens. She further relies on his evidence that, in over 20 years working for the Border Force, he has never come across a situation where documents relating to a load are collected from a different location. She suggests that this was simply a cover for the stop which was needed to place the drugs in the load and also points out that 28 minutes seems a long time simply to collect some documents.

47. In addition, Ms Kell-Jones suggests that, had the drugs been placed in the load at Aminolabs, it might have been expected that the concealment would have been more sophisticated. For example, the drugs could have been placed in the bottom layer on each pallet rather than the top two layers.

48. As far as the time taken to load the goods is concerned, Ms Kell-Jones points out that, although the vehicle was stationary for just over an hour, there is no evidence as to how long it actually took to load the goods into the vehicle. The time taken could have been significantly less than this.

49. Finally, in support of the submission that Corach was involved in the smuggling attempt, Ms Kell-Jones argues that the quantity of the drugs points to the involvement of an organised criminal group which would be unlikely to entrust the transport of the drugs to someone who they did not know. This, she argues, points to the involvement not just of the driver but also the haulage company in question.

Discussion

50. We note that the question as to whether the drugs were contained in the load at the time it was collected or whether they were placed in the load afterwards does not, of itself, answer the question as to whether Corach was complicit in the smuggling attempt. However, it is clear from Mr Brenton's conclusions in the review letter that the placement of the drugs into the load after it was collected provides the basis for his inferences that Corach must have been involved. As Mr Hannaford suggests, if the goods were already in the load when it was collected from

Aminolabs, there is no evidence at all of any involvement by Corach. We therefore start with the question as to when the drugs were placed within the load.

51. Based on the limited evidence available to us, our conclusion is that, on the balance of probabilities, it is more likely that the drugs were placed in the load before the goods were loaded into the lorry and not whilst the lorry was stopped outside Janssens' office. Our reasons for this are set out below.

52. The stop at Janssens was part of the instructions provided by Morrison Freight. a company which Mr Murray said in his evidence Corach had worked with over a number of years and with which it had had no problems in the past. Mr Brenton had made no checks in relation to Morrison Freight and confirmed in his evidence that he considered it to be a legitimate company.

53. There was a difference of opinion between Mr Brenton and Mr Murray as to the requirement to collect paperwork from a separate location. Mr Murray's evidence was that, although this was not the usual procedure, it was not uncommon. Mr Brenton's evidence was that he had never come across this before. However, the fact that Mr Brenton has not come across it (albeit in a lengthy career with the Border Force) does not mean that it cannot happen. Given that it was clearly provided for by the instructions given by Morrison Freight, we prefer Mr Murray's evidence in relation to this. We also note that the document which had to be collected was a customs declaration (Janssens being a customs agent) and not the CMR document which is required to accompany the relevant load.

54. We also accept Mr Hannaford's submission that, based on the time taken to load the goods at Aminolabs (approximately an hour), it is very unlikely that a stop of 28 minutes would be sufficient to offload 16 of the 26 pallets, unwrap two of the pallets, load the drugs, re-wrap the two pallets and then load the 16 pallets back onto the lorry. Even allowing for the fact, as observed by Mr Brenton, that smugglers would no doubt be working more quickly than those responsible for the original loading, achieving all of this in less than half the time it took to load the goods in the first place would no doubt be extremely challenging. This was of course recognised by Mr Brenton in his original review conclusion letter where he expressed the opinion that the re-loading would probably have taken a "considerable time".

55. In addition, as pointed out by Mr Hannaford, the operation would have taken place at around 10.30 in the morning in a car park of an industrial estate at least two of the occupants of which were customs agents. This would seem to be a surprising place to choose for such an undertaking.

56. We should say that we have considered the possibility that the drugs could have been placed within the load without the pallets being unloaded. This might of course enable the drugs to be placed in the load in a much shorter time and could safely be done in a more public place. However, neither party has suggested that this is what might have happened. Indeed, Mr Brenton's conclusion in his review letter is that it is probable that part of the consignment would have needed to have been unloaded and re-loaded in order to hide the drugs. Based on this, we do not consider it likely that the drugs were placed within the load whilst the pallets remained in the lorry.

57. In his evidence, Mr Brenton observed that, when asked by the Border Force officer whether he had stopped "from loading to [Coquelles]", Mr Macdonald only mentioned the stop at Pidou to purchase wine and did not mention the stop at Janssens. However, we do not consider that any inferences can be drawn from this. It is perfectly possible that Mr Macdonald considered the stop at Janssens to be part of the loading of the goods (based on the instructions from Morrison Freight) and not as a separate stop.

58. Although it was not a point relied on by Mr Brenton in his review letter nor a point mentioned by Ms Kell-Jones in her submissions, we note that the presence of a roll of shrink wrap in the cab of the vehicle could be said to support a suggestion that the goods had been tampered with after they had been loaded. However, as Mr Hannaford observed, there are other explanations for the presence of shrink wrap in the lorry such as simply to repair any damage to packaging of the load being carried.

59. In addition, given that the unloading of the goods, the placing of the drugs within the load and the reloading of the goods would have had to have been carried out by other individuals with their own equipment in order for there to be any possibility of this being achieved within the time the vehicle was stopped, it seems to us improbable that any packaging used to re-wrap the pallets would have been left in the vehicle and that it is therefore more likely that there is some other explanation for the presence of the shrink wrap in the cab. We do not therefore consider that any inference can be drawn from this that the drugs were in fact placed in the load after it had been collected.

60. Ms Kell-Jones also suggested that, had the drugs been placed in the load at Aminolabs rather than at some later point, it is likely that they would have been hidden better than they were, for example that they would have been placed deeper in the load rather than in the top two layers. This is of course possible but, without any evidence as to who was responsible for placing the drugs in the load and how this was carried out, it is impossible to say that this would necessarily be the case.

61. Mr Brenton's view (albeit based only on a Google search) is that Aminolabs is a legitimate business and so, if there were one or more rogue employees who planted the drugs, it is perfectly possible that they would only have the opportunity to conceal them at the top of the load rather than at the bottom. Ultimately, all of this is speculation as we have no evidence as to how the drugs came to be concealed in the load. The key point however is that the mere fact that the drugs were concealed at the top of the load does not, in our view, give rise to an inference that they must have been concealed after the goods had been loaded onto the lorry as opposed to before the goods were loaded.

62. As we have said, based on all of this, our conclusion is that it is more likely that the drugs were concealed within the load before the goods were collected by Mr Macdonald. This does then give rise to the question as to whether Corach had any knowledge that the drugs would be transported with a legitimate load.

63. As Mr Hannaford has pointed out, there is no direct evidence that Corach had any knowledge of the drugs. Mr Brenton's conclusion in his review letter that Corach was complicit is based entirely on the proposition that the drugs were planted in the load after it had been collected and that Corach must have been aware of this as a result of the time taken to place the drugs within the load and any detour that would be required to enable this to happen and for the drugs to be offloaded after clearing customs in the UK.

64. The only other suggestion made by Ms Kell-Jones as to why Corach would have been aware that the drugs were being transported is that, given the quantity of drugs involved, the shipment must have been arranged by an organised criminal group and that they would only have entrusted the transport of the drugs to somebody they knew and trusted.

65. However, even if this is right, as Mr Hannaford points out, it could have been the driver, Mr Macdonald, who was trusted by the gang rather than Mr Murray/Corach. In any event, in our view, if it is right that the drugs were placed in the load before it was collected, there is not necessarily any reason why either Corach or Mr Macdonald would need to have any knowledge that the drugs were contained in the load as they could simply have been delivered to the destination shown on the instructions and offloaded by members of the gang working at that

location. We do not therefore think it would be right to draw any inference from the quantity of drugs and the possible involvement of an organised criminal group that Corach/Mr Murray must have had some involvement whether that is active involvement or simply turning a blind eye.

66. Taking into account the fact that there is no evidence of any involvement or knowledge on the part of Corach together with the fact that Corach has not previously been involved in any seizures and that the National Crime Agency has not seen fit to ask Mr Murray for an interview in relation to the events in question, we are satisfied that it is more likely than not that Corach had no involvement in, or knowledge of, the presence of the drugs within the load. Corach was not therefore complicit in the smuggling attempt and Mr Brenton was wrong to base his decision on the fact that it was.

67. The result of this is that Mr Brenton's decision was flawed as he took into account an irrelevant factor (that Corach was complicit in the smuggling attempt) and failed to take into account a relevant factor (that Corach was not complicit in the smuggling attempt). We must therefore now go on to consider whether Mr Brenton's decision would inevitably have been the same had he taken the right factors into account.

WOULD THE DECISION INEVITABLY HAVE BEEN THE SAME?

68. As the Tribunal noted in *Botrans* at [4] "inevitability is a high bar". It is not enough that the decision is likely to have been the same. The Tribunal must be satisfied that it inevitably would have been the same.

69. Ms Kell-Jones essentially relies on two factors in submitting that the decision would inevitably have been the same even if Corach was not complicit in the smuggling. The first is the quantity and value of the drugs in question. The second is what she suggests is Corach's failure to take reasonable steps to prevent the smuggling of drugs.

70. As we have found, the Border Force policy is to look at each case on its merits. In effect, this means taking into account all the relevant circumstances. In particular, even if the person seeking restoration is innocent, the steps taken to prevent or mitigate the risk of smuggling will be taken into account. In principle, we accept that the quantity and value of the drugs and the steps taken to prevent smuggling are both relevant factors which ought to be considered.

71. As far as the quantity and value of the drugs is concerned, we would accept that the greater the quantity and value, the more reasonable it might be to refuse restoration. However, we do not consider that this, on its own, would necessarily justify a refusal to restore a vehicle. As Border Force recognises, it will depend on all of the other circumstances. It is also not a specific factor mentioned as part of the policy other than the fact that there are certain limits (only 100 grams in the case of Class A drugs) above which restoration will normally be refused. However, given that there are circumstances where restoration will still be offered even if the limit has been exceeded, we do not think it can be said that the decision not to restore would inevitably have been the same based solely on the quantity of the drugs in question.

72. The steps taken to prevent or reduce the risk of smuggling is clearly a part of the Border Force policy in relation to restoration. Examples of steps which could be taken both by the operator and the driver are included as an annex to the review letter. However, given Mr Brenton's conclusion that Corach was complicit in the smuggling, it is not an area which he considered as part of his decision.

73. Given that this is an evaluative judgment which must be made by the relevant Border Force officer taking into account the fact that, in this case, Corach was not complicit in the smuggling attempt, we cannot conclude that it is inevitable that the decision not to restore the vehicle would have been the same had Mr Brenton taken into account the steps taken (or not

taken) by Corach to mitigate the risk of smuggling either in isolation or in conjunction with the amount of the drugs in question. In effect, we would be imposing our own decision in relation to this rather than allowing the Border Force to make its own decision. As is clear from the authorities (including *John Dee* and *Corbitt*), that is not the function of the Tribunal.

74. We do however consider it right to make some findings in relation to the steps taken by Corach in order to assist in the further review which we will require the Border Force to carry out.

75. The first area relates to checks made by Corach in relation to Mr Macdonald. Mr Murray's evidence is that he knew of Mr Macdonald but did not know him personally before he was employed by Corach at some point in 2020. He took a verbal reference from an oil transport company which Mr Macdonald had previously worked for but no written references. Mr Murray referred to the fact that Mr Macdonald also did work for other hauliers including possibly a cousin of Mr Macdonald. It does therefore appear that Mr Murray could have taken other references. He certainly could have asked for a reference in writing from the oil company.

76. As far as criminal convictions are concerned, Mr Murray's evidence is that he knew that Mr Macdonald worked in the fairground business and that in order to do this, he would have to be checked by the Garda in Ireland. However, he did not request and did not see any evidence relating to the lack of any previous criminal convictions on the part of Mr Macdonald. The only document he saw (and which he did not keep a copy of) was evidence of his membership of the Showmen's Guild.

77. Mr Murray himself emphasised the importance to his business of not taking on somebody who might get the business into trouble as a result of smuggling given the impact this would have financially. However, we consider that, even allowing for the small size of the business, the steps taken by Corach to check on Mr Macdonald's background were, in the words of Ms Kell-Jones, somewhat casual.

78. Turning to Mr Macdonald's employment contract, when originally asked for this by Border Force, Mr Murray supplied a single page which did not show the parties to the contract nor the rate of pay but on the face of it had a commencement date (in handwriting) of 1 September 2020.

79. At the hearing, Corach produced a four page employment contract which was clearly based on the same template as the page which had previously been provided but which showed a commencement date typed on the first page of 20 February 2021 and also, at the top of the first page, bore the date "2021 March". Notwithstanding this, it purports to have been signed on the final page by Mr Macdonald and by Mr Murray on behalf of Corach on 1 September 2020. The date of 1 September 2020 on both documents conflicts with Mr Murray's oral evidence that Mr Macdonald's employment with Corach began in May 2020.

80. The third page of the contract contains a clause providing that the carriage of illegal drugs is prohibited and will result in the employee's employment being terminated with immediate effect.

81. Given the discrepancies, we are not satisfied that Mr Macdonald was provided with an employment contract prior to the events in question in January 2021. The references to February 2021 and March 2021 on the first page of the contract which was subsequently provided strongly suggest that the contract was only signed after the event notwithstanding the date of the signatures which purports to be 1 September 2020. Based on this, we find as a fact that there was no written employment contract prior to the transport of the load in January 2021 and that the clause in the contract relating to the carriage of illegal drugs was not drawn to Mr Macdonald's attention prior to this date.

82. Mr Murray was also asked about the training given to Mr Macdonald when he was taken on. Mr Murray explained that he gave training to Mr Macdonald although, based on his evidence, the training focused on the need for Mr Macdonald not to purchase wine or spirits which were not for his own personal use and steps which he should take to avoid what he described as "clandestines" (such as refugees) concealing themselves on the lorry, for example by identifying safe places to park.

83. There is no suggestion that the training involved any specific measures to mitigate the risk of unwitting involvement in the smuggling of drugs. In addition, when asked about policies or procedures to prevent smuggling, Mr Murray could only refer to the employment contract in terms of documents as well as mentioning by way of practicalities the existence of the GPS tracker on the vehicles and the fact that the trailers were padlocked. It is apparent that Corach does not have any written policies or procedures in relation to this.

84. Given the risk of becoming innocently involved in smuggling, the lack of any such policies or procedures including any recommendations as to precautions which drivers should take again shows what might be described as a casual approach on the part of Corach. For example, the appendix to the review letter setting out possible checks which could be undertaken include a simple examination of the load which might reveal illicit goods. Had Mr Macdonald been instructed to carry out such a check as part of his training or as part of Corach's procedures, it may well be that he would have identified the existence of the drugs given that the evidence of the Border Force Officer who inspected the load is that, in relation to the second pallet where the drugs were found, the packages of drugs were visible through the plastic wrapping.

85. Turning to events after the seizure, Mr Murray's evidence was that Corach and Mr Macdonald parted ways, effectively by mutual agreement. However, notwithstanding this, Mr Murray told the tribunal that, approximately a week after the seizure, the legitimate load of protein powder was released and Mr Macdonald was dispatched to the UK with another lorry to take the load on to its ultimate destination in Redditch.

86. It is therefore apparent that, notwithstanding the terms of the contract which Mr Murray said was in place between Corach and Mr Macdonald, which, on the face of it, required his employment to be terminated with immediate effect and notwithstanding that he had been arrested in connection with the seizure, Corach was willing to allow him to complete the delivery of the load. In terms of the message this would give to other drivers working for the company, we do not consider that such a response is consistent with the need to take steps to prevent or mitigate the risk of smuggling.

87. One other matter referred to by Ms Kell-Jones is the fact that Mr Murray did not take any steps to verify the legitimacy of Aminolabs or, the ultimate recipient, Avon Group. Mr Murray's response to this was that he was contracting with Morrison Freight and not with Aminolabs or Avon Group and that, having dealt with Morrison Freight successfully for a number of years, there was no reason for Corach to undertake checks in relation to the consignor or the consignee. We would accept that, in the absence of anything to raise suspicions, this is not an unreasonable approach.

88. Ms Kell-Jones suggested that the requirement for a separate stop to collect the customs declaration should have raised suspicions. However, given Corach's past dealings with Morrison Freight and Mr Murray's evidence that, whilst not the norm, this was not uncommon, we do not accept that this should have raised any suspicions. In any event, Mr Brenton's own checks, which he accepted were limited to Google searches, confirmed to him that both organisations were legitimate businesses and so, had Corach carried out any further checks, it seems unlikely that this would have made any difference in this particular case.

89. It will be apparent from what we have said that we consider the steps taken by Corach to prevent or mitigate the risk of smuggling to be relatively weak. However, as we have said, we cannot say that, even in the light of this and taking into account the quantity of drugs involved, it is inevitable that the decision not to restore the vehicle would have been the same in the light of the fact that Corach was not complicit in the smuggling attempt. This is something which will need to be considered as part of the further review which we will order to be carried out in the light of all other relevant circumstances.

FINANCIAL HARDSHIP

90. Mr Hannaford criticises Mr Brenton's approach to financial hardship in the review letter. In effect he concludes that as Corach chose to be involved in a smuggling attempt, they cannot complain about any financial consequences as a result of the seizure. However, he does go on to say that he would need to have evidence of exceptional hardship in order to restore the vehicle and that the inconvenience or expense of the loss of the vehicle does not in his view amount to exceptional hardship.

91. Given our finding that Corach was not complicit in the smuggling, we agree that this approach is not appropriate. However, we would accept in principle that, on its own, something more than the financial cost of the loss of the vehicle and any associated loss of business would be required in order to justify restoration. That might for example involve showing particular financial difficulties which would be experienced by the company if the vehicle were not restored such as potential insolvency or an inability to pay wages. In this case there is no evidence of any specific financial hardship.

92. Having said that, the financial consequences of a refusal to restore the vehicle is clearly a relevant factor to take into account as part of the overall circumstances of the case in deciding whether or not to offer restoration.

CONCLUSION

93. For the reasons which we have set out, the review decision upholding the decision not to restore the vehicle to Corach was not one which Mr Brenton could reasonably have arrived at in the light of the factual findings we have made and it is not inevitable that the decision would have been the same had the facts, as we have found them, been taken into account.

94. We therefore direct that the decision not to restore the vehicle is to cease to have effect from the date of this decision and that the Border Force must conduct a further review of the original decision based on the facts as we have found them as well as taking into account any other relevant factors. To the extent consistent with this decision, the review should be carried out in accordance with s 15F Finance Act 1994 as if the "relevant date" were the date of this decision.

95. For completeness, we would note that, should the Border Force uphold the decision not to restore the vehicle, Corach will of course be able to make a separate appeal to the Tribunal in relation to that decision should it consider it appropriate to do so.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

96. 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.

ROBIN VOS
TRIBUNAL JUDGE

Release date: 12 AUGUST 2022