[2015] UKFTT 0556 (TC)

TC04708

Appeal number: TC/2015/01757

EXCISE – seizure of antique narwhal tusk - whether refusal to restore unreasonable – yes – further review directed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CHARLES MILLER LTD **Appellant**

- and -

HOME OFFICE **Respondent**

TRIBUNAL: JUDGE JONATHAN RICHARDS
CAROL DEBELL

Sitting in public at Fox Court, Brooke Street, London on 8 October 2015

Andrew Banks, Solicitor, for the Appellant

Paul Sharkey, Counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondent

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DECISION

1. The appellant is appealing against the decision of Officer Deborah Hodge of the UK Border Force, in a review she performed on 14 January 2015, to refuse to restore an antique narwhal tusk that was seized at East Midlands Airport on 21 October 2014.

Evidence and procedural matters

2. Charles Miller, a director of the appellant, gave a witness statement. No challenge was made to his evidence and he was not, therefore, cross-examined.

3. The appellant also produced witness statements from Mr Svein Wold (the owner of the tusk) and from a Mr Per Terje Norheim, a previous owner of the tusk. Neither Mr Wold nor Mr Norheim attended the hearing to give evidence and their witness statements were therefore hearsay evidence. However, since Mr Sharkey was content for their statements to be admitted and did not challenge them, we decided to admit them as evidence.

4. For the Respondent (referred to in the rest of this decision as the "Border Force"), we had evidence from Officer Hodge and she was cross-examined. We found her to be an honest and reliable witness and have accepted her evidence.

5. Mr Banks had not previously been appointed as the appellant's representative under Rule 11 of the Tribunal Rules. However, the appellant did attend the hearing (through its director, Mr Miller). We therefore exercised our power under Rule 11(5) of the Tribunal Rules to permit Mr Banks to conduct the proceedings on the appellant's behalf.

Background and findings of fact

6. The facts set out at [7] to [24] below were either not in dispute or were determined by the Tribunal.

The import of the tusk and its seizure

7. The appellant carries on business as auctioneer. During the summer of 2014, Mr Miller received an email from Mr Svein Wold, asking if the appellant would be interested in handling the sale of an antique narwhal tusk. Although Mr Miller was not aware of this when he received the original email, Mr Wold was a resident of Norway, which is not a member of the European Union.

8. Mr Miller indicated that, provided the "papers were in order", he would be interested in handling the sale and gave an estimate of the price that the tusk might reach at auction. Some brief correspondence ensued in which Mr Wold gave more information on the tusk and, somewhat unexpectedly, on 5 September 2014, Mr Wold contacted Mr Miller to say that he was sending the tusk to him.

9. Shortly afterwards, Mr Miller received a telephone call from forwarding agents at East Midlands Airport saying that they were holding a narwhal tusk that had been sent to him and that it would be released once import formalities were completed. However, it soon became clear that there was a problem with the import formalities and the tusk was seized by Border Force officers under s139 of the Customs & Excise Management Act 1979 on 21 October 2014.

The provenance and nature of the tusk

10. Mr Wold stated in his witness statement that he purchased the tusk through a Norwegian auction house in 2014 and that the auction house told him that the tusk dated from the 17th or 18th century. That statement was not challenged. Mr Miller described the tusk in his witness statement as an "antique" and that statement was similarly not challenged. We find, therefore, that the tusk is around 300 years old.

11. The parties were agreed that no work has been performed on the tusk and it is a specimen of a narwhal tusk that has not been adorned or modified.

12. Mr Wold said in his witness statement that, having made enquiries of previous owners of the tusk, he had established that one of those owners had purchased it from an auction house in Denmark "in the 1970s". He also provided a witness statement from Mr Per Terje Norheim, a Norwegian resident and previous owner of the tusk, who stated that he had purchased the tusk "in the 1970s" from an auction house in Copenhagen. Those statements were not challenged. However, we note that Denmark only joined what was then the EEC on 1 January 1973. Therefore, given that we had no evidence as to whether the Mr Norheim purchased the tusk before or after that date, we are not satisfied, on a balance of probabilities, that the tusk has ever been in the European Union before its import into the UK in 2014.

The problem with the paperwork

13. Narwhals are protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). CITES is enforced within the EU by a number of regulations, each of which is directly applicable in Member States. The relevant regulations include Council Regulation (EC) 338/97 ("Regulation 338/97") and Commission Regulation 865/2006 ("Regulation 865/2006") which provides a detailed interpretation of Regulation 338/97.

14. There was no dispute between the parties that narwhals are included within "Annex A" of Regulation 338/97 which includes the world's most endangered species. Accordingly, it was common ground that, before the tusk could be imported into the UK, since Norway is outside the EU, there needed to be both a valid export certificate from the Norwegian authorities and a valid import certificate issued by the UK authorities. Moreover, subject to the discussion of retrospective certificates at [18] below, both certificates needed to be in place before the tusk was imported into the UK.

15. Mr Wold had secured an export certificate from the Norwegian authorities, that quoted a CITES number applicable to the tusk. However, that certificate did not bear the required stamp from the Norwegian authorities and was, therefore, not complete. He had not secured an import certificate from the UK authorities before the goods arrived in the UK.

16. Mr Wold had not asked Mr Miller for advice on the procedure for importing the tusk into the UK. Rather, he instructed the well-known courier firm, DHL, to arrange the shipment for him. Mr Wold stated in his witness statement that DHL did not advise him of the need for an import licence for the import of the tusk and we have accepted that. We had no evidence as to the scope of DHL's obligations, contractual or otherwise, to advise Mr Wold on the need for import certificates, or to secure them on his behalf. However, we were shown an extract from DHL's website that stated that:

> "DHL Express is committed to facilitate your shipments by aligning them with ICS [the electronic Import Control System that took effect in the European Union from 1 January 2011]. By 1 January 2011 we will ensure that every country that receives your DHL shipments originated outside the European Union will be compliant with ICS."

17. We regarded the extract from DHL's website as simply stating that its systems would, from 1 January 2011, be compatible with ICS. We did not regard it as establishing that DHL assumed contractual responsibility for securing all necessary import and export permits for goods that they were transporting.

18. Regulation 15 of Regulation 865/2006 permits retrospective import certificates to be issued after goods have come into the UK in certain limited circumstances. Since the tusk was part of an "Annex A" species, the relevant requirements were:

(1) That the tusk had previously come into the EU legally or that it was a "worked specimen" that had been acquired more than 50 years previously;

(2) That any irregularities in the paperwork were not attributable to the importer or the exporter; and

(3) That the import and export is otherwise in accordance with the provisions of CITES and relevant EU regulations.

19. We will discuss the condition at [18(1)] in more detail below. However, it was common ground between the parties that the appellant was not entitled to a retrospective import certificate because the condition in [18(2)] was failed. The appellant did apply to the Animal and Plant Health Authority ("APHA") for a retrospective import permit but it was refused for this very reason.

The request for restoration and Officer Hodge's review

20. The appellant has not taken "condemnation proceedings" to contest the legality of the seizure of the tusk. Instead, on 7 November 2014, the appellant wrote to the Border Force to request restoration of the tusk under s152 of the Customs and Excise Management Act 1979. Having received a signed form from the appellant

demonstrating its authority to act on behalf of Mr Wold, on 24 November 2014 the UK Border Force wrote to the appellant refusing to restore the tusk.

21. On 5 December 2014, the appellant wrote to the Border Force requesting a review of that decision. On 12 December 2014, the Border Force acknowledged the request for a review and invited the appellant to submit any further evidence or information that it would like to provide.

22. On 29 December 2014, Mr Wold himself wrote to the Border Force enclosing a chain of correspondence between him and the appellant concerning the tusk.

23. Officer Hodge performed a review of the decision to refuse restoration under s15 of the Finance Act 1994 ("FA 1994"). In a letter dated 14 January 2015, she wrote to the appellant to advise that her decision was that the tusk should not be restored. Her letter contains the following relevant sections:

(1) In a section headed "Background", she noted that the exporter of the tusk obtained neither an import permit or a validated export permit as required by CITES and that, in the absence of any challenge to the legality of the seizure, the tusk is duly condemned as forfeit to the Crown.

(2) She summarised the Border Force's policy on restoring "seized prohibited and restricted things" in the following terms:

> "The general policy is that such things should not normally be restored. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally."

(3) In a section headed "Correspondence", she referred to correspondence between the appellant and the Border Force relating to the tusk. While she referred to Border Force's letter of 12 December 2014, inviting the appellant to submit further information, she did not refer to the chain of correspondence that Mr Wold had sent on 29 December 2014. We have inferred, therefore, that she either had not seen this, or did not take it into account when performing her review. However, we do not consider that anything turns on this since the correspondence that Mr Wold sent the Border Force on 29 December 2014 did not add anything material to points that the appellant had made.

(4) Her reasons for refusing to restore the tusk were set out in a section headed "Consideration". That section contained the following extracts:

> "It is for me to determine whether or not the contested decision should be confirmed, varied or withdrawn. The policy should be applied firmly, but not rigidly, so as to allow an exercise of discretion on a case by case basis.
>
> …
>
> In my opinion, the tusk was liable to forfeiture and should have been seized.
>
> However, I have to consider whether there are exceptional circumstances in this case for restoration.

> You have explained that your client is an elderly Norwegian gentleman who relied on DHL to ship his item. Although he could not be expected to understand an English website, the CITES regulations are an international agreement about which he could have taken professional advice in Norway. Perhaps *you* could have advised him accordingly? However, ignorance of the law and reliance on a 3rd party are not considered as exceptional circumstances and although a CITES re-export certificate was produced; it was not stamped by the Norwegian Border authorities on exit, which is a further breach of the regulations.
>
> …
>
> Taking all the above into account, I conclude that the original decision should be upheld and the seized items will not be restored."

24. Officer Hodge also gave some oral evidence and was cross-examined on matters relevant to her review and we have found the following additional relevant facts:

(1) In order to perform her review, she contacted colleagues with an expertise on CITES matters to ascertain, inter alia, whether if Mr Wold had applied for a UK import permit he would have obtained one and why the application for a retrospective import certificate had been refused. One of her colleagues (Jan Sowa) expressed the view that "if [Mr Wold] had a Norwegian export permit, I would assume that he would probably have got [a UK import permit]". She also spoke to Mark Britton (who had refused the application for a retrospective import permit referred to at [19]) and he confirmed that, because the requirements listed at [18] were not satisfied, there was simply no power to grant a retrospective permit.

(2) In making her decision, she did not take into account an assessment of the seriousness of the defects with the paperwork, whether those defects were Mr Wold's fault or whether Jan Sowa's views as to the likelihood of Mr Wold obtaining an import licence if he had applied for one were mitigating factors.

(3) She was aware that the tusk was an antique. However, she did not agree when Mr Banks put it to her that this made its import into the UK as being of less concern than the import of a tusk that had been taken from a narwhal that had "recently been fished out of the sea". We have therefore concluded that, when she performed her review, Officer Hodge did not consider whether the tusk was any more deserving of restoration than, for example, a tusk taken recently from an illegally poached narwhal.

(4) She was unaware at the time she performed her review of the suggestion that the tusk had previously been lawfully imported into the EU. If she had been aware of that fact, she would have considered it relevant to her review but only insofar as it affected APHA's decision on whether to grant a retrospective import licence (since, as noted at [18] above, since the tusk was not a "worked specimen", the question of whether it had previously been lawfully imported into the EU was relevant to whether APHA had discretion to grant a retrospective import permit).

(5) If a retrospective import licence had been granted, Officer Hodge would have restored the tusk. However, while she deferred to APHA on the question of whether a retrospective import licence should be granted, she did not regard the absence of such a licence as meaning that the tusk should inevitably not be restored. She had previously on two occasions agreed to restore goods (for a fee) even in the absence of a valid import licence, or retrospective import licence, in situations where private individuals (as opposed to businesses) had sought to import pianos not knowing that they had ivory keys.

(6) She attached significance to the fact that Mr Wold was seeking to import the tusk for sale at auction as she considered that this made the import akin to a commercial venture which was less deserving of restoration than the situation of a private import outlined at (5) above.

The law

Statutory provisions relevant to this appeal

25. Section 152 of the Customs and Excise Management Act 1979 ("CEMA 1979") provides …

> "The Commissioners may as they see fit –
>
> (a) …
>
> (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the Customs and Excise Acts] …"

26. It was not suggested to us in the hearing that s152 of CEMA 1979 does not apply in CITES cases, even where an Annex A species is involved. Officer Hodge's review proceeded on the basis that Border Force did have a discretion to restore the tusk (even though the provisions of CITES, Regulation 338/97 and Regulation 865/2006 had not been complied with). We have, therefore, proceeded on the basis that Border Force do have a discretion to restore the tusk. However, we consider that this discretion needs to be understood in the context of Article 16 of Regulation 338/97 which, so far as material, provides as follows:

> *Article 16*
>
> *Sanctions*
>
> 1. Member States shall take appropriate measures to ensure the imposition of sanctions for at least the following infringements of this Regulation:
>
> (a) introduction into, or export or re-export from, the Community of specimens without the appropriate permit or certificate or with a false, falsified or invalid permit or certificate or one altered without authorization by the issuing authority;
>
> …
>
> 2. The measures referred to in paragraph 1 shall be appropriate to the nature and gravity of the infringement and shall include provisions

> relating to the seizure and, where appropriate, confiscation of specimens.

27. We conclude that Article 16 of Regulation 338/97 makes it clear that there should be "sanctions" for the importation of species without appropriate import or export licences, but that the applicable sanction should not, in all cases, be the confiscation of the goods in question. Rather, the sanction imposed must be "appropriate to the nature and gravity of the infringement".

28. Sections 14 and 15 of FA 1994 make provision for a person to require a review of a decision of the Border Force under section 152(b) CEMA 1979 not to restore anything seized from that person. Officer Hodge made her decision in the course of such a review.

29. Section 16(1) of the Finance Act 1994 provides that a person can appeal to the Tribunal against a decision on a review under s15. Section 16(4) provides:

> (4) In relation to any decision as to an ancillary matter[1], or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say -
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
>
> (c) in the case of a decision that has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

30. The Tribunal's jurisdiction on an appeal under s16 is thus limited. We must consider the threshold question of whether we are satisfied that Officer Hodge could not reasonably have arrived at her decision on the review under s15. If we are not satisfied that she could, we can only make directions of the kind set out in s16(4)(a) to s16(4)(c). In particular, even if we were to conclude that Officer Hodge's decision was unreasonable, we have no power to order the Border Force to return the tusk to the appellant or to Mr Wold.

31. For completeness, we note that, although the provisions of CEMA 1979 and FA 1994 mentioned above refer to "the Commissioners" (being the Commissioners for

[1] By virtue of s16(8) and Schedule 5 of FA 1994, a decision under s152(b) of CEMA 1979 is a "decision as to an ancillary matter".

HM Revenue & Customs), in the context of this appeal, by virtue of s1 of the Borders, Citizenship and Immigration Act 2009, that expression includes the Border Force.

Approach to ascertaining the "reasonableness" of a decision

32. The parties were agreed, rightly in our view, that following the decision in *Revenue and Customs Commissioners v Jones and another* [2011] EWCA 824, when we are considering the reasonableness or otherwise of the Border Force's decisions, we must take as a "deemed fact" that the tusk was "duly" condemned as forfeit.

33. Following the approach set out in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] 2 WLR 753 at 663 we consider that we must address the following questions in order to assess the reasonableness or otherwise of the decisions that Officer Hodge made:

(1) Did she reach a decision which no reasonable officer could have reached?

(2) Does her decision betray an error of law material to the decision?

(3) Did she take into account all relevant considerations?

(4) Did she leave out of account all irrelevant considerations?

34. In *Balbir Singh Gora v C&E Comms* [2003] EWCA Civ 525, Pill LJ accepted that, the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal.

35. In addition, when ascertaining the reasonableness of Officer Hodge's decision, it is necessary to take into account the proportionality or otherwise of the decision not to restore the tusk as proportionality is a relevant consideration. Authority for that proposition can be found in *Lindsay v Commissioners of Customs and Excise* [2002] EWCA Civ 267.

36. Finally, the Tribunal's jurisdiction in this appeal is supervisory and, accordingly, we must simply determine whether Officer Hodge's decision was "reasonable" in the sense outlined above. However, *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 is authority for the proposition that, if Officer Hodge's decision failed to take into account relevant considerations, we may nevertheless dismiss the appeal if we are satisfied that, even if she had taken into account those considerations, her decision would "inevitably" have been the same.

The submissions of the parties

37. Mr Banks made the following broad submissions in support of his argument that Officer Hodge's decision was unreasonable:

(1) Officer Hodge had failed to take into account that the problem with the paperwork was a genuine mistake made by an elderly private individual in the course of a private arrangement rather than a business venture.

(2) Officer Hodge did not take into account the averred fact that the tusk had previously been lawfully imported into the EU as a mitigating factor.

(3) Officer Hodge had not taken into account the Border Force's own view that Mr Wold would probably have obtained an import licence if he had applied for one in advance and had ignored other mitigating factors, namely that Mr Wold had used DHL, a reputable shipper, to transport the tusk and had not attempted to conceal it.

38. Mr Sharkey defended Officer Hodge's decision on the following grounds:

(1) Mr Wold was importing the tusk into the UK for a commercial purpose, namely to sell it at auction. The public interest in having strict controls on the transport of endangered species is particularly strong in such circumstances.

(2) Mr Wold was aware that some import controls existed. His ignorance of the precise nature of those requirements and his reliance on third parties could not excuse the failings with the paperwork which resulted in there being neither an import licence nor a valid export licence for the tusk.

(3) It was appropriate for the Border Force to have a policy of restoring items such as these only in exceptional circumstances.

Discussion

39. Officer Hodge approached her review by considering "whether or not restoration may be offered exceptionally" and whether there are "exceptional circumstances in this case for restoration". However, the applicable law referred to at [25] to [27] does not require circumstances to be "exceptional" before goods are restored. Rather, the Border Force are given a broad discretion to restore, although, as discussed at [27] above, that discretion has to be considered in the light of Article 16 of Regulation 338/97.

40. By focusing on the presence or otherwise of "exceptional circumstances", we consider that Officer Hodge did not consider a crucial question which was whether, in all the circumstances, it was proportionate of the Border Force to refuse to restore the tusk. If she had considered questions of proportionality, she would not have concluded that a tusk taken from a recently poached narwhal is in no way distinguishable from a 300 year old antique. We also note that, although Officer Hodge's review decision quotes the appellant's description of the tusk as "a perfectly good antique narwhal tusk", it contains no explicit consideration of the proportionality of the seizure or whether the question of proportionality is affected by the age of the tusk.

41. We also consider that Officer Hodge paid most attention in her review to the absence of proper import or export paperwork, and to APHA's refusal to grant a retrospective import certificate. Those points were clearly relevant. There is a strong

public policy reason for imposing strict requirements on the import and export of endangered species. The defects in the paperwork also made the seizure lawful. However, the whole point of the discretion conferred by s152 of CEMA 1979 is that it is a discretion to restore goods that have been lawfully seized. We consider that Officer Hodge focused unduly on the undoubted fact that the paperwork was defective, and her perception that Mr Wold was engaging in a commercial operation by seeking to sell the tusk at auction, with the result that she did not take into account other considerations, that were also relevant to the proportionality or otherwise of a decision not to restore the tusk. Specifically, Officer Hodge did not take into account:

(1) That Mr Wold had been transparent in his dealings with the UK authorities and there was no question of Mr Wold seeking to smuggle the tusk into the country.

(2) That the defect with the Norwegian export permit was relatively minor, namely the absence of a stamp on the document and that the export permit did quote a CITES number for the tusk

(3) That, as noted at [24(1)], one of her colleagues, Jan Sowa, appeared to consider it likely that, if Mr Wold had a Norwegian export permit, he would likely have obtained a UK import permit if he had applied for one at the right time. Failure to obtain an import permit that would never have been granted is self-evidently more serious than failing to apply for a permit that would probably have been granted.

As well as being relevant to the general question of whether it was proportionate for the Border Force to refuse to restore the tusk, those matters were relevant to the "nature and gravity of the infringement" referred to in Recital (17) of Regulation 338/97.

42. We have, therefore, concluded that Officer Hodge failed to take into account the relevant considerations set out at [40] and [41] above and that, accordingly, her decision was "unreasonable" in the sense outlined at [33]. We are not satisfied that she would "inevitably" have reached the same decision had she taken into account those considerations and for that reason, we consider that the Border Force should perform a further review and we make the directions set out at [47] and [48] below.

43. Having reached that conclusion, we will say just a few words about other aspects of the decision that Mr Banks criticised.

44. We do not agree with Mr Banks that Officer Hodge's failure to take into account the fact that Mr Wold engaged the services of a reputable courier company made her decision unreasonable. It was clear from the extracts from her review letter quoted at [23] above that she was aware that Mr Wold used DHL to transport the tusk. However, given the absence of any evidence as to whether DHL were obliged to secure the import or export permits, we do not consider that DHL's involvement sheds any light on the question of who was to blame for the defects in the paperwork.

45. Since, for reasons set out at [12] above, we are not satisfied that the tusk has previously been lawfully imported into the EU, we have not accepted Mr Banks's

submission that Officer Hodge should have taken the tusk's previous import into the EU into consideration.

Conclusion

46. The appeal is allowed.

47. In accordance with s16(4) of FA 1994, we direct that Officer Hodge's decision is to cease to have effect from the date of release of this decision and that the Border Force must perform a further review of the decision not to restore the tusk.

48. In performing that further review, the Border Force must consider whether it is proportionate to refuse to restore the tusk in the light of the following:

(1) the findings of fact that we have made in this decision including, without limitation, the finding that the tusk is an antique that is around 300 years old;

(2) the matters referred to at [41(1)] to [41(3)] above; and

(3) the degree of blame that the Border Force conclude should attach to Mr Wold for the defects with the import and export permits.

49. Before performing the further review, the Border Force should give the appellant and Mr Wold at least 28 days in which to make representations, and to provide evidence, on matters relating to proportionality.

50. 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.

JONATHAN RICHARDS

TRIBUNAL JUDGE
RELEASE DATE: 10 NOVEMBER 2015