TC02065

Appeal number: TC/2011/08385

Customs Regulations – Endangered species; elephant's tusk seized at airport; Customs and Excise Management Act 1979 s 49(1)(b), 139(1), 152(b); Convention on the International Trade in Endangered Species 1973 (CITES); Council Regulation (EC) 338/97 Article 4(2) and Annex B; Council Regulation 709/2010; Commission Regulation (EC) 865/2006 Article 57; whether decision to refuse to restore one which no reasonable decision maker could have arrived at.

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRIAN TALBOT **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE J GORDON REID QC, FCIArb.

Sitting in public at George House, Edinburgh on 21 May 2012

The Appellant in person

Kevin Clancy, Solicitor, Shepherd & Wedderburn LLP, for the Respondents

DECISION

Introduction

1. This is an appeal against the refusal by the Respondent (the "DBR") to restore a family heirloom, namely a small elephant's tusk, seized from the Appellant ("Mr Talbot") at Edinburgh Airport on his return from South Africa. The Appellant accepts that he did not possess the necessary paperwork and has not challenged the legality of the seizure.

2. A Hearing took place at Edinburgh on 21 May 2012. The Appellant represented himself. The DBR was represented by Kevin Clancy, solicitor, Shepherd & Wedderburn LLP. The Appellant gave evidence. The DBR led the evidence of R Brenton, an experienced HMRC official. A bundle of productions was produced on behalf of the DBR. Mr Talbot also produced some documents including a chronology of events and two photographs.

Legal Framework

3. There is no dispute about the law or (for the most part) its application to the facts of this appeal. Elephants' tusks fall within the scope of the Convention on the International Trade in Endangered Species 1973 (known as CITES) implemented by the European Union by virtue of Annex B to Council Regulation (EC) No 338/97, as amended by Council Regulation (EU) 709/2010 on the protection of certain species of fauna and flora. On the first lawful introduction into the Community of personal or household effects falling within the list of specimens of species listed in Annex B of the 1997 Council Regulation as amended, the presentation of an export document is required (see Article 57.3 of Commission Regulation (EC) 865/2006).

4. Improperly imported goods are liable to forfeiture under CEMA s49(1)(b), and may be seized by virtue of CEMA s139(1). There is statutory power under s152 to restore seized or forfeited goods subject to conditions.

5. Finally, the Tribunal's jurisdiction in this appeal, against the refusal to restore, is essentially supervisory (rather than fully appellate) by reason of the provisions of s16(4) – (6) of the Finance Act 1994.

Factual Background

6. Mr Talbot grew up in Rhodesia (subsequently Zimbabwe) with his family. In the 1960s, his father acquired or was given a pair of elephant's tusks. They were mounted and adorned a wall in the family home for many years. Mr Talbot remembers it being part of the living room décor at the family home in Harare during his teenage years in the 1970s. His parents moved to South Africa in about 1979 and these tusks formed part of the family's possessions which found their way into the new home at Illovo Beach, South Africa.

7. Mr Talbot is 55 years old. He is a Baptist Church Minister and worked as such in Zimbabwe until about nine years ago when he removed to Scotland where he continues to practise his calling.

8. Mr Talbot's mother died in South Africa in 2008. His father died there in 2010. His mother had expressed the wish that he inherit the tusks.

9. In 2010 Mr Talbot searched his late father's papers and documents but could not find any document relating to the tusks.

10. In about early May 2011 he attended a memorial service for his parents in South Africa. This was a family gathering. Mr Talbot's children accompanied him. They travelled to a remote part of South African and placed his parents' ashes in an old family grave.

11. While in South Africa, Mr Talbot's sister indicated that she wished to retain the tusks. She had inherited most of the remainder of their parents' effects. This unfortunately caused a minor family squabble. Mr Talbot wanted the tusks essentially so that he could pass them on to his own children. They would thus have a memento of the family's time in Southern Africa. Probably, on impulse, shortly before he and his family were due to return to the United Kingdom, Mr Talbot decided to take one of the tusks with him. He searched his parents' effects for paperwork relating to the tusks but could find none. He was hoping to find an invoice to demonstrate proof of purchase.

12. He brought back to the United Kingdom some personal effects of his parents which they had indicated in the past he should have. These included some paintings and one of the tusks. He was unaware that there might be a difficulty about exporting the tusk to the United Kingdom. It was a family heirloom, had only sentimental value; it had been broken in places and glued together; it had no commercial value as far as he was aware and he had no commercial purpose or motive in mind in taking it with him on his return to the United Kingdom. He thought that Customs would hold the tusk until the paperwork was sorted out.

13. On or about 5 May 2011, Mr Talbot travelled from South Africa by aeroplane to Edinburgh Airport. He took with him one of a pair of carved elephant tusks. This tusk had adorned a wall in his family home in Rhodesia (subsequently Zimbabwe) where he spent much of his childhood. For convenience, the tusk was placed in one of his son's bags. That bag contained an assortment of items such as scuba diving equipment.

14. On arrival at Edinburgh, Mr Talbot discovered that the family luggage had been delayed (mislaid) at Amsterdam. Mr Talbot voluntarily explained to a Customs official that he had the tusk in his son's baggage, had no paperwork relating to it and wished to do whatever was necessary to obtain the appropriate paperwork so that it could be lawfully brought into the United Kingdom.

15. The tusk, which is purely of sentimental value to Mr Talbot, was seized at Edinburgh Airport on 5 May 2011. A Notice of Seizure was issued.

16. The legality of the seizure was not challenged. It was condemned as forfeit and ownership passed to the Crown.

17. Mr Talbot made various enquiries and established that he needed a CITES export permit from South Africa, which required an inspection of the tusk by the South African authorities. By letter dated 23 May 2011, Mr Talbot narrated the enquiries he had made and asked the Customs Post Seizure Unit to consider allowing him to send the tusk back to CITES in South Africa at his expense to enable him to obtain the required CITES export permit, with a view to re-importing the tusk.

18. By letter to Mr Talbot dated 21 June 2011, the Border Force Heathrow CITES Team informed him that it was their policy not to restore such items without a valid CITES permit. They gave him until 21 July 2011 to *provide us with a retrospective re-export permit for the seized tusk. It is now the responsibility of the South African CITES Management Authority to decide if they are prepared to issue to you a* ***retrospective*** *re–export CITES permit for the seized tusk.* He was also given 45 days (to 5 August) to appeal this decision.

19. On 27 June 2011, Mr Talbot sent an email to Mr Rod Potter, a wildlife investigation officer, Merrivale South Africa, about obtaining a retrospective permit. He responded positively by email on the same day. He indicated that he would be prepared to receive the tusk and thereafter proceed with its registration followed by the necessary CITES export permit. He noted that there might be a complication in sending it back to South Africa without a CITES permit but stated he would discuss this with the appropriate permits office.

20. On the following day, Mr Potter emailed Mr Talbot and stated that the Permits office was prepared to help. However the tusk had to be sent back to South Africa to be registered and then it could be re-exported. He stated that as the tusk has not been released to Mr Talbot it could be considered to be *in bond* and therefore sent back to South African authorities by the UK authorities. He gave the address to where the tusk should be sent (the CITES Management Authority at a wildlife park at Pietermaritzburg, South Africa). He also, in effect, required an affidavit to be prepared, scanned and emailed to him, dealing with the history of the tusk.

21. Mr Talbot passed on all this information to the DBR's officials and requested they liaise with Mr Potter. He also suggested that he could import the second tusk (of the matching pair) with a valid CITES export permit. This he suggested would corroborate his story that the tusks were not the product of some illegal activity but were a matching pair.

22. By letter to Mr Talbot dated 8 July 2011, Mrs Ainslie of Border Force Heathrow, CITES Team informed him that it was not the Department's policy to circumvent the CITES and EU wildlife controls by re-exporting the seized tusk to South African without the issuing of valid CITES permits. The request for restoration on condition that the second tusk is imported with a South African CITES permit was refused *on the ground that the unlicensed tusk had been unlawfully re-exported from South Africa.*

23. By letter to the UK Border Agency dated 8 July 2011, Mr Talbot referred to the *in bond* view expressed by the South African authorities. In that letter he acknowledged that he had acted foolishly in hurriedly packing the tusk in his luggage without doing his homework on what rules might apply. He received no reply and so wrote and emailed again on 21 July 2011.

24. By letter to Mr Talbot dated 1 August 2011, a Mrs Ainslie, informed him that *it is the policy of the UK Border Agency not to restore or re-export any goods that are subject to the controls under CITES ….. without the submission of valid CITES permit(s).* She pointed out that the tusk could only be restored when he had been issued with a retrospective CITES re-export permit issued by the South African CITES Management Authority. The letter continues as follows

> *Our department has discussed this case with the UK CITES Management Authority and they have declined to issue valid CITES permits to return the restricted tusk to South Africa as the specimen was unlawfully imported into the EU.*

25. The United Kingdom CITES Management Authority appears to have declined to issue a valid CITES permit to enable the tusk to be returned to South Africa. There is no written record of that decision, the reasons for it or the information on which it was based. Nor is there any indication as to whether there is any administrative right of appeal against such a decision.

26. On 16 August 2011, Mr Talbot requested a review. The request was out of time but the reviewing officer, Mr Brenton, exercised his discretion and decided to consider it. He affirmed the decision by letter dated 28 September 2011.

27. After reviewing the facts and correspondence and summarising the law in an appendix to his letter Mr Brenton set out a summary of the *Policy on Restoration* as follows:-

> The Directors' general policy regarding the improper importation of prohibited or restricted items into the UK is that they will not be offered for restoration. However, each case is looked at on its merits to consider whether there are any *exceptional* circumstances that would warrant a departure from that policy.

28. In a section headed *Consideration* he makes further reference to the law and quotes from various letters sent by Mr Talbot. He then states

> It is clear to me that you were aware that there were legal implications in the importation and the moment you discovered that your baggage had been mishandled you declared the tusk to the nearest UKBA officer, who informed you that your actions rendered the tusk to be liable to forfeiture and would be seized.
>
> I am of the opinion that you knew that there as an obligation on your part to satisfy the regulations in force by having the relevant CITES permits but chose to act on your ***"ill-advised impression"*** and import the carved tusk without any permits or any form of evidence to show that this particular tusk fell outside the requirements for CITES export and import permits.

29. Mr Brenton's conclusion was as follows

> I am therefore of the opinion that the application of the policy in this case treats you no more harshly or leniently than anyone else in similar circumstances and have not found sufficient and compelling reasons to deviate from the policy.

30. On 8 December 2011, Mr Talbot signed an affidavit in relation to the other tusk, which at that time was still in South Africa. He described the origin and history of the tusk as mentioned above. That tusk is in the custody of Mr Talbot's brother Mark, who lives in the Durban area.

31. On 20 December 2011, Mr Potter examined that tusk and recorded his findings and recommendations in a *To whom it May Concern Letter* signed and dated 9 January 2012. In that letter, he noted that the tusk weighed 1.22kg, was 70.5cm long and its circumference was 22.5cm. He noted that it had been mounted on a board and that another similar tusk had also been so mounted (this is the seized tusk held by the DBR). He was satisfied regarding the explanation of the possession of the tusk and advised Mr Mark Talbot to proceed with its registration and apply for a CITES export permit to enable it to be exported to the Appellant. Mr Potter also stated in the letter that, had the other tusk (the seized tusk) been present at the time of his inspection and all else being equal. he would have made a similar recommendation for both tusks. There is nothing in the evidence before the Tribunal to show that all else is other than *equal*. Accordingly, the Tribunal finds that had the seized tusk been presented for export, its export would have been authorised without difficulty.

32. The tusk examined by Mr Potter is the subject of an import CITES certificate dated 22 February 2012 in favour of Brian Talbot (the Appellant), issued by the Department of Environmental Affairs, Pretoria, South Africa.

33. The DBR did not identify any published policy on the exercise of his statutory discretion under s152 CEMA in relation to effects and specimens to which CITES, the 1997, the 2006 and 2010 Regulations applied.

Grounds of appeal

34. Mr Talbot appeals to the spirit of the law against the decision not to restore the tusk or "at least make a way to CITES South Africa to issue a retrospective permit."

35. He expected that Customs would advise him about buying a permit or paying a customs tax, as he described it. The law should not penalise his naivety and withhold and destroy a family heirloom.

36. In effect, his appeal is that the DBR should have exercised their discretion in a way which would allow the tusk, a family heirloom of only sentimental value, to be restored to him.

Submissions

37. Mr Clancy fairly acknowledged that Mr Talbot was in an administrative impasse and, in effect, in an impossible situation. However, this, he said did not affect the reasonableness of the decision. He did not argue that there was no discretion, but that the exercise of the discretion was reasonable.

38. In the Statement of Case the DBR argues that his decision was based upon a careful analysis of the law as well as the relevant policy considerations including the established policy guidelines on restoration of items seized due to a breach of the CITES Regulations. It is noted that it is the policy of the DBR not to restore such specimens without the requisite paperwork.

39. Mr Clancy also relied on *Yip v DBR* 2012 UKFTT 165 (Tax), Article 57 of the 2006 Regulation and Article IV of the Convention. The key principle was that the first introduction of effects such as the tusk required an export document.

Discussion

40. At the outset of the hearing, I indicated to parties that they should consider whether there might be a way of resolving what appeared to be an administrative problem without hearing evidence. I invited the DBR's representative to consider whether a common sense approach might lead to the restoration of a family heirloom of no commercial value without compromising the underlying purpose of the various legislative provisions relating to endangered species. I did so having regard to the provisions of Rules 2 and 3 of the Tribunal's Rules. Parties adjourned for about half an hour. The Tribunal then re-convened and it was announced on behalf of the DBR that the decision was reasonable and proportionate and that the hearing had to proceed.

41. I therefore heard the evidence of Mr Talbot and Mr Brenton. Mr Talbot is a minister of the Church. He gave his evidence in a frank and modest manner and was somewhat regretful that the situation had developed as it had and culminated in a full blown hearing. I was satisfied that he was telling the truth and that his evidence was reliable. In particular, I am satisfied that he acted in good faith throughout, and that he genuinely believed that, having been unable to trace any documentation relating to the tusk, he would be able to sort out matters on arrival at Edinburgh Airport without difficulty. I am also satisfied that he always intended to declare the presence of the tusk and that the baggage delay was irrelevant to that decision. Nor is there anything sinister in the fact that the tusk was packed in his son's luggage rather than his own. This was a matter of pure convenience.

42. As for Mr Brenton, no question as to his credibility really arises as he was not giving evidence of fact but simply explaining his decision on review. The competency and worth of such evidence is questionable but it has been common practice for HMRC and their predecessors to lead the evidence of a review officer.

43. In spite of his extensive experience, Mr Brenton indicated that he had no experience of dealing with export licenses, only import permits and very few involving CITES.

44. The decision letter dated 21 June 2011 contained an offer to restore the seized tusk to Mr Talbot subject to a condition. The condition was that Mr Talbot, within one month, provide Border Force Heathrow, CITES Team with a

retrospective re-export permit for the seized tusk. That was a condition which was impossible to fulfil.

45. Insofar as relevant, I had the strong impression from Mr Brenton's evidence that simply because Mr Talbot could produce no export permit, the DBR, according to Mr Brenton, had to exercise his discretion against him and refuse to restore. He did not seem to appreciate that it was because Mr Talbot had no export permit that the question of the exercise of the statutory discretion arose. If he had exhibited an export permit, no question of seizure would have arisen and no question of the exercise of a statutory discretion would arise at all. On Mr Brenton's approach, the statutory discretion would never be exercised in favour of someone in Mr Talbot's position. That fetters the statutory discretion to extinction and cannot be the correct approach.

46. I prefer, however, to decide matters on the basis of the decision dated 21 June 2011 and Mr Brenton's review of it contained in his letter dated 28 September 2011. In that letter he recognised that in exceptional circumstances a personal effect such as the tusk, even though lawfully seized, may nevertheless be restored. On that basis it is unnecessary to consider the detail of the Regulations which rendered the seizure lawful.

47. Mr Brenton gives no consideration to the fact that the decision contained in the letter dated 21 June 2011 included a condition which was impossible of fulfilment. Imposing an impossible condition, in the exercise of a statutory discretion, cannot in my view, be rational, reasonable or proportionate under any circumstances. Put another way, it cannot be an act of good or sound administration to impose an impossible condition in the purported exercise of a statutory discretion, whether or not the decision maker knows the condition is impossible of fulfilment. If the decision maker knows the condition cannot be fulfilled, the imposition of the condition cannot be reasonable. If the decision maker does not know that the condition cannot be implemented, then the unreasonableness lies in failing to ascertain the true position before imposing it. No reasonable decision maker exercising his statutory discretion under s152 CEMA would authorise restoration subject to an impossible condition. No reasonable decision maker would act in a way which flies in the face of sound administration or creates a *Catch 22* situation.

48. The result is that the DBR's position is that Mr Talbot cannot secure restoration of the tusk unless he obtains a retrospective CITES export permit from the South African authorities. He cannot do that unless and until the tusk is returned to South Africa. The DBR refuses to allow the tusk to be returned to South Africa because it was illegally imported into the EU. This creates a *Catch 22* situation.

49. In his letter dated 28 September 2011, Mr Brenton recognises that the policy of non-restoration may be departed from in *exceptional circumstances.* He states that he is guided by the policy but not fettered by it. It is thus accepted that restoration may, in exceptional circumstances, be granted where there is no export permit. In evidence Mr Brenton gave an example of an out of date

permit. But an out of date permit relating to a tusk is no better than no permit at all. In neither situation is there a valid permit.

50. Although his decision letter is quite lengthy, his reasoning is brief. He misinterprets the letter dated 21 June 2011, by stating that the officer refused to restore the tusk. In fact, the letter offers to restore subject to an impossible condition. He relies on the terms of Mr Talbot's letters dated 23 May and 16 August 2011 (although he does not expressly identify the August letter). This letter post-dates the original decision but he would be entitled to take it into account.

51. He seems to construe these letters as if Mr Talbot embarked on some deliberate or devious campaign to bring the tusk into the United Kingdom without an export permit which he knew was required. In my view, no official of the DBR acting reasonably would construe these letters in that way having regard to the circumstances of Mr Talbot's presence in South Africa, the nature of the artefact in question, Mr Talbot's voluntary disclosure of it on arrival at Edinburgh Airport, and his efforts to do what was required to make amends. Any official acting reasonably would not have based his decision to refuse to restore a small family heirloom of only sentimental value on such reasoning.

52. There would therefore seem to me to be two basic reasons why I must conclude that the decision to refuse to restore was one which no official of the DBR could reasonably have arrived at. In the first place, there was an offer to restore which was subject to a condition which was incapable of fulfilment. Such a decision cannot be reasonable as discussed above. Mr Brenton makes no comment on this in his review. In the second place, the basis of Mr Brenton's decision (having regard to the terms of his letter), is an unreasonable interpretation of Mr Talbot's letters and one which he was not entitled to make. He has reached a conclusion which he was not, on the material before him, entitled to make. In one sense, he has taken into account irrelevant considerations.

53. In relation to *Yip*, it plainly was decided on its own facts and circumstances and is of no real assistance here; the Appellant was a trader and the appeal concerned the proposed export of rhino horns from the United Kingdom. It is, however, interesting to note that one of the conditions on which, at one stage, the Animal Health and Veterinary Laboratories Agency (an executive agency of DEFRA which issues CITES permits), stated that applications to re-export rhino horns would be granted, was where the item has not been sold and was an heirloom, moving as part of a family relocation (paragraph 8).

Conclusion

54. I conclude that the Decision appealed against is one which the decision maker could not reasonably have arrived at. The appeal is therefore allowed. I accordingly direct that it shall forthwith cease to have effect. I require the DBR to conduct, within six weeks of the release of this Decision, a further review of the original decision in accordance with the Directions in the following paragraph. The review must be carried out by an official with no previous

involvement in or knowledge of the request for restoration of the tusk or the subsequent proceedings.

55. The Directions referred to are that the further review shall proceed upon the following basis, namely that:-

1. The Factual Background set forth in paragraphs 6-17, 19-21, and 30-32 above is true and shall be taken into account.

2. Throughout, Mr Talbot has acted in good faith.

3. The tusk has only sentimental value.

4. Granting restoration in the circumstances of this case would not undermine the DBR's policy of only granting restoration in exceptional circumstances.

56. There may be other relevant matters the DBR wishes to take into account. The foregoing Directions do not preclude that being done. It is for the DBR, through the appropriate official, to determine whether there are exceptional circumstances justifying restoration of the tusk and the conditions (which must be capable of fulfilment), if any, to which restoration may be subject.

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.

TRIBUNAL JUDGE

RELEASE DATE: 14 June 2012