Neutral citation number: [2024] UKFTT 280 (GRC)

Case Reference: WA/2022/0012

First-tier Tribunal
General Regulatory Chamber
Welfare of Animals

Heard at: Field House, London
Heard on: 18 September 2023
Decision given on: 2 April 2024

Before

TRIBUNAL JUDGE NEVILLE

Between

SIMON RAY LIMITED

Appellant

and

SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Respondent

Representation:
For the Appellant: Mr Simon Ray and Dr Leng Tan, of the appellant company
For the Respondent: Mr I Steele, counsel instructed by the Government Legal Department

Decision:

The appeal is dismissed.

REASONS

1. This is the first appeal under the Ivory Act 2018. It concerns whether an antique ivory flywhisk should be exempted from the Act's ban on commercial dealing in items containing ivory.

The Ivory Act 2018

2. The trade in ivory, and items containing it, has long been recognised as a principal driver of elephant poaching. This not only endangers species of elephants, but leads to wider ecological damage. Elephants are a 'keystone species', meaning a species whose removal will set off a chain of events that turns the structure and biodiversity of its habitat into something very different. As stated by the National Resource Defense Council[i]:

> *By uprooting and eating vast quantities of small trees and shrubs that would otherwise convert to forest or scrubland, they are ecosystem engineers that preserve sunny, open spaces where grasses can thrive. This vegetation supports other herbivores like antelopes, wildebeests, and zebras; it also provides warm, dry soil for smaller animals like mice and shrews to burrow into. In turn, these prey species feed carnivores such as lions, hyenas, and cheetahs. …*

3. Since 1975, international trade in ivory has accordingly been regulated by the 1975 Convention on International Trade in Endangered Species ("CITES"). CITES was implemented in the European Union by the even more restrictive EU Wildlife Trade Regulations, which the United Kingdom has chosen to retain following its exit.

4. In passing the Ivory Act 2018, Parliament has created a scheme that is self-avowedly stricter still[ii]. It prohibits all commercial dealing in items containing ivory entirely, including within the UK, subject only to some narrowly defined exemptions.

5. One of those exemptions can be found at section 2(2), which permits the Secretary of State to issue an exemption certificate for an item he considers to meet two conditions: (a) it was made before the year 1918; and (b) it is of outstandingly high artistic, cultural or historical value. In reaching that decision, section 2(3) requires the Secretary of State to take into account the item's rarity and the extent to which it is an important example of its type.

6. When an application for an exemption certificate is made that meets the procedural requirements in the Act, it can be immediately refused if the item "clearly fails to satisfy" the two conditions at section 2(2). Otherwise, the Secretary of State must refer the application to a 'prescribed institution'. These institutions are prescribed at Schedule 1 of the Ivory Prohibitions (Exemptions) (Process and Procedure) Regulations 2022, which lists a number of well-known museums. The prescribed institution then nominates an assessor, who inspects and assesses the item and gives an opinion to the Secretary of State on whether it meets the two conditions. The final decision to grant or refuse the exemption certificate is then taken by the Secretary of State. In practical terms, the scheme and decision-making process is undertaken on his behalf by the Animal Plant & Health Agency ("APHA").

The present application

7. Simon Ray is a dealer in art and antiquities, trading through a limited company Simon Ray Limited ("SRL"). On 28 April 2022 SRL applied for an exemption certificate in relation to a nineteenth century flywhisk with an ivory handle. Here is a photograph:

8. In accordance with the procedure required by the Act, the application was referred to National Museums Scotland, which in turn appointed an assessor. In the assessor's opinion the flywhisk was made before 1918, but is not of outstandingly high artistic, cultural or historical value. The opinion can be set out in full:

> *The flywhisk consists of a simple turned ivory handle with brush or possibly baleen whisks. A metal (possibly silver) collar with floriate decoration covers the junction between handle and whisks, and contains a small shield inscribed: "L / 1st. B n. / 22 n. R ?t.". The shield is recorded as pewter and may have been a later addition to the collar. In form and decoration, the object is heavily influenced by European design and, as such, is likely to have been produced for the British colonial market. The craftmanship employed in the turning of the ivory handle appears competent but very simple. The object is not of outstandingly high artistic value, and therefore must be assessed on its historic and cultural importance.*
>
> *The object clearly has an association with the 1st Battalion of the 22nd (Cheshire) Regiment, as detailed on the object's inscription. Furthermore, the applicant has tentatively associated the object with a junior officer of the Regiment, William Martin-Leake, presumably on the basis of the inscribed "L". This association cannot be confirmed through provenance information. Moreover, whilst Martin-Leake gained the brevets of major and lieutenant colonel he cannot be considered a particularly significant individual in the history of the regiment or wider British military history. It*

should be recorded, therefore, that the object is not of outstanding historic or cultural value.

9. That opinion was accepted by the Secretary of State who, in a decision dated 9 June 2022 refused the application. The reasoning given in the decision paraphrases the above opinion to conclude that the craftmanship did not disclose high artistic value, and that Lt. Col. Martin-Leak "cannot be considered a particularly significant individual in the history of the regiment or wider British military history".

The appeal

10. If an application is refused, then section 5 gives a right of appeal to the Tribunal. This may be on the grounds that the decision was based on an error of fact, was wrong in law, or was unreasonable. The Tribunal may then confirm the decision to refuse the exemption certificate, require one to be issued, or remit the decision for reconsideration.

How should the Tribunal approach the appeal?

11. Mr Steele, on behalf of the Secretary of State, argued at the hearing that the Tribunal's approach to the appeal should be founded on the same principles as a judicial review, and that the word "unreasonable" in section 5 should be interpreted in the "Wednesbury unreasonable"[iii] public law sense, requiring the decision to be so unreasonable that no reasonable decision-maker could have taken it. He further argued that the focus is upon the reasonableness of the decision itself, at the time it was made, meaning that the Tribunal should not take into account any post-decision evidence. I explained these concepts to Mr Ray, including the difference between a 'review' type of approach put forward by Mr Steele and a 'full merits' appeal where the Tribunal finds the relevant facts and decides for itself, from scratch, whether a certificate should be issued. He had no legal submissions on the point. I reserved my decision on that point, and with the consent of both parties heard full evidence.

12. In R. (Begum) v Special Immigration Appeals Commission & Anor [2021] UKSC 7, the Supreme Court considered appeals against the power at section 40(2) the British Nationality Act 1981 to deprive a person of British citizenship:

> *"(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good."*

13. The corresponding appeal provisions, at section 40A of the 1981 Act and section 2B of the Special Immigration Appeals Commission Act 1997, simply say that "a person may appeal", without setting out the grounds on which an appeal can be brought, the matters to be considered, or how the appeal is to be determined. The Supreme Court held that the condition for a deprivation order was whether the Secretary of State was satisfied that deprivation is conducive to the public good, not whether SIAC is so satisfied on appeal.

14. In the subsequent case of U3 v Secretary of State for the Home Department & Anor [2023] EWCA Civ 811, the Court of Appeal warned against allowing Begum to cause confusion between judicial review and a statutory appeal. The open-ended way in which the appeal right was phrased in the legislation permitted SIAC to hear evidence and make findings of fact on issues that were justiciable and where this was felt to be appropriate, and this might

be necessary in order to address whether the Secretary of State's assessment of (for example) national security was mistaken. Laing LJ summarised the correct approach as follows:

> *176. … The point is that the language conferring a statutory right of appeal is not the sole guide to the functions of the appellate body, which will depend on other factors. Those include which body Parliament has entrusted with the power to make the decision which is challenged, whether that body is a court, the nature and subject matter of that decision, the relative expertise of the decision maker and of the appellate body, and the particular issue or issues which the appellate body has to, or may, decide on an appeal. …*

15. Accordingly, in this case the Tribunal must therefore consider the words of the Act and the issues listed above to determine its function on this appeal. In doing so, it must recognise that it is for the Secretary of State to be satisfied that the section 2(2) conditions are met, not the Tribunal.

16. Mr Steele argued that the grounds of appeal at section 5(3) – that the decision was based on an error of fact, was wrong in law, or was unreasonable – point towards a review based appeal. If that is right, however, the first and third grounds are superfluous, as "wrong in law" already includes both a mistake of fact (in the sense described E & R v Secretary of State for the Home Department [2004] EWCA Civ 49 at [66]) and Wednesbury unreasonableness. A similar feature in the Safeguarding Vulnerable Groups Act 2006 was held in EB v Disclosure and Barring Service [2023] UKUT 105 (AAC) at [29] to be a factor pointing towards an unfettered fact-finding jurisdiction. There were other factors pointing towards that conclusion, so I do not treat EB as determinative.

17. On other features of the 2018 Act, Mr Steele is on stronger ground. The Act is somewhat unusual in prescribing the procedural requirements of the application for an exemption certificate. This includes, at section 3, providing a description and photograph of the item and its distinguishing features and a signed declaration that the item meets the two section 2(2) conditions. Such details are nowadays more commonly left to secondary legislation. On receipt of the thus-completed application, the Secretary of State "must refer" it so that an opinion from an assessor can be obtained. This contrasts with the majority of executive decision-making powers, which enable the Secretary of State to decide an application in any way he thinks fit. Here, he cannot even select the assessor, but must instead ask a prescribed institution to do so. After receiving that opinion, the Secretary of State proceeds to make a decision without further reference to the applicant.

18. Those features, I consider, show two aspects of Parliamentary intention. First, it is anticipated that the application will contain the necessary information for the assessor to form an opinion, which in turn will be sufficient for the Secretary of State to properly reach a decision. There is no provision for further submissions or evidence by the applicant. This discloses a legitimate intent to 'front load' the application process, all necessary information being provided at the beginning. Second, it builds in a procedural safeguard whereby issues of artistic, cultural or historical value must be informed by a suitably qualified expert opinion but does not enable the applicant to challenge the opinion in any way (or even to see it) before the decision is made.

19. That first aspect is reinforced by the requirement at regulation 8(6) that a Notice of Appeal "must, where the information is not otherwise required to be provided by rule 22 of the

Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009(1) or by a practice direction, be accompanied by all the information which accompanied the application for an exemption certificate which is the subject of the appeal". That imposition of a procedural requirement for an appeal reinforces the expectation in the Act that the focus of the decision will be upon the material supporting the application for a certificate, and the opinion of the assessor.

20. Finally on the legislation, regulation 2(3) requires the Secretary of State to reimburse the reasonable costs of an assessor (or of an accredited institution's representative) associated with being "required to provide information or to give evidence in connection with an appeal". This would be inconsistent with the Tribunal being strictly prohibited from considering any evidence that was not before the Secretary of State.

21. While not raised by the parties, I nonetheless consider that the Tribunal's function must be such as to enable the decision-making process as a whole to comply with Article 6 of the European Convention on Human Rights. Relevant to that, a prohibition on commercial dealing – and therefore the present decision – is also likely to require justification under Article 1 of the First Protocol to the Convention.

22. Based on all the above, and balancing the relevant factors, I reach the following conclusions on the correct approach to an appeal under section 5 of the Act:

    a. It is the Secretary of State who must be satisfied that the item meets the section 2(2) conditions; the Tribunal does not simply decide that issue for itself.

    b. The issue of a certificate is mandatory if the conditions are satisfied. The Tribunal must decide whether the Secretary of State's decision that an item did not meet either or both conditions:

        i. Was based on an error of fact,

        ii. Was wrong in law, or

        iii. Was unreasonable.

    c. Error of fact

        i. This may relate to either condition.

        ii. The word 'error' is the same as 'mistake' in this context, as mere factual disagreement by the Tribunal would be inconsistent with the Act.

        iii. The issue should therefore be approached in accordance with E & R at [66], which sets out four requirements:

            1. There must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter.

            2. The fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable.

3. The appellant (or the appellant's advisers) must not been have been responsible for the mistake.

4. The mistake must have played a material (but not necessarily decisive) part in the decision-maker's reasoning.

iv. The second of those requirements must be approached with sufficient flexibility to recognise the subjective nature of the second section 2(2) condition, that the assessor's opinion is reached without consultation or prior notice to the applicant, and that nor is the opinion seen by the applicant until the decision has been made. Until the applicant sees the opinion and the decision, it will not be known what factual considerations were (or might be) taken into account. There must be a fair opportunity to rebut them with evidence, so long as the need to show a mistake of fact is respected (as opposed to disagreement).

d. Wrong in law

i. The possible errors of law include those listed by Brooke LJ in R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 at [9]:

1. Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");

2. Failing to give reasons or any adequate reasons for findings on material matters;

3. Failing to take into account and/or resolve conflicts of fact or opinion on material matters;

4. Giving weight to immaterial matters;

5. Making a material misdirection of law on any material matter;

6. Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings; and

7. [a mistake of fact as set out at (c) above].

e. Unreasonable

i. This does, I consider, refer to Wednesbury unreasonableness. The decision must be so unreasonable that no reasonable decision-maker could have reached it.

ii. While recognising that the inclusion of this ground is, strictly speaking, superfluous, the other features of the legislative scheme weigh against 'unreasonable' bearing a wider meaning.

f. Powers on appeal

i. The power at section 5(4) to require the Secretary of State to issue a certificate does not bestow a free-standing decision-making power on the Tribunal.

ii. Rather, like a mandatory order in judicial review, it exists to avoid an unnecessary decision-making process by the Secretary of State where the outcome is inevitable. Once the conditions are met, the Secretary of State has no discretion. For example, an application might be refused on the basis that an item of accepted outstandingly high cultural significance was made after 1918. If incontrovertible evidence were presented on appeal showing that it was actually made in 1910, then an order requiring the grant of a certificate would likely be appropriate.

g. Evidence

i. The Tribunal is permitted to hear evidence to decide the above grounds, and in some cases may be obliged to do so.

ii. Where the Secretary of State's decision follows the assessor's opinion, the appellant may wish to give evidence rebutting assumptions or conclusions by the assessor. An obvious example is given at (f)(ii) above. In some cases this may require evidence to be given by the assessor, or by a representative of the prescribed institution.

Redaction and anonymity of the assessor

23. A further legal issue arose at the hearing. In the papers provided to SRL and to the Tribunal, the identity of the prescribed institution is identified as "National Museums Scotland" but the name of the assessor is redacted. This was justified by the Secretary of State on the basis that (a) regulation 8 requires disclosure of the identity of the prescribed institution but not the assessor and (b) assurances of confidentiality had been made to the assessor. As I indicated at the hearing, this was misconceived. The identity of the assessor may well, in some cases, be material to the grounds of appeal and disclosure required for a fair hearing. Since the hearing, in Secretary of State for the Home Department & Anor v R. (IAB) [2024] EWCA Civ 66 the Court of Appeal has held that routine redaction of the names of civil servants in documents disclosed in judicial review proceedings is contrary to the duty of candour. I see no reason why the Secretary of State should face any lesser duty in these proceedings. Moreover, the identity of the assessor is a matter before the Secretary of State when he makes the decision and could well have been material to it. As held by the Court of Appeal, the duty of candour is a duty of explanation. Assurances of confidentiality should not have been made in these circumstances, nor will they necessarily be respected by the Tribunal in future proceedings. None of this is mitigated by the completion of a Conflict of Interest form.

24. Likewise, the Secretary of State relies on APHA having convened a panel to make a recommendation to the Secretary of State following receipt of the opinion. It is unclear how this is meant to carry any weight when all the participants' names are redacted. The redaction of the names of those who draft recommendations to ministers was specifically criticised in IAB.

25. Mr Ray disavowed any argument in the present appeal that he needed to be informed of the assessor or panel members' identity to fairly present his appeal. Indeed, he rather thought that he had guessed the assessor's identity in any event, and would have nothing to say about it. This does support, however, the need for disclosure in general. In a field that might well pit one expert against another it risks unfairness for only one of them to know the identity of the other. Mr Ray not wishing to pursue the matter however, and the identity of the expert not being material to my own consideration, no order is necessary in this appeal.

Other considerations

26. APHA has published guidance on the section 2(2) exemption. It materially provides as follows:

> *To help you decide if an item may be of outstanding high artistic, cultural or historical value, you should consider 2 factors:*
>
> - *whether the item is rare*
> - *the extent to which the item is an important example of its type*
>
> *You only need to demonstrate one of these factors to meet this condition, but if you have evidence to support both factors then you should submit this information as part of your application.*
>
> *Whether your item is rare will likely depend on:*
>
> - *the estimated number of similar items that exist, including how many are in the UK*
> - *how unique the item is, which may include distinctive or unusual features or historical adaptations*
>
> *Whether your item is an important example of its type may depend on:*
>
> - *artistic or aesthetic quality – it is of particularly high quality or by a named artist, school or studio*
> - *craftsmanship – it is particularly well-crafted or shows a specific, notable form of craftsmanship*
> - *condition of the item – it is in pristine or much better condition than similar items of its type*
> - *its significance – it is an integral part of a noteworthy collection, for example, an artistic collection put together by a well-known individual*
> - *noteworthy provenance – it is closely associated with a specific individual or event, for example, it was once owned by a well-known historical figure*
> - *significant historical context – it is closely associated with a specific historical, artistic, social, cultural, religious, scientific or technological development*
> - *significant geographic context – it is closely associated with a specific place or region*

- *previously recognised status – the status of the item has been recognised, for example, it has received a prestigious award, been recognised as a national treasure (by meeting the Waverley Criteria) or been part of a noteworthy exhibition*

27. This is not statutory guidance, and I am unsure that it provides any additional value to the statutory test. Section 2(3) requires the item's rarity and the extent to which it is an important item of its type to be taken into account. Furthermore, the legislation clearly anticipates that whether an object is of outstandingly high artistic, cultural or historical value should be referred to a suitable institution (all those currently prescribed are museums). It is difficult to see how APHA has any institutional experience or expertise on this subject.

28. The Secretary of State seeks to stress that section 2(2) provides a high threshold by reference to the explanatory notes to the Act at paragraph 16, which suggest that exemption is intended to be restricted to "the rarest and most important items of their type". I consider this to provide an unnecessary and potentially confusing alternative test that is inconsistent with section 2(3), and disregard it.

The parties' cases

Simon Ray Limited

29. Without prejudice to Mr Steele's arguments on how the Tribunal should approach the appeal, and with his agreement, the Tribunal heard evidence from Mr Ray and his colleague Dr Leng Tang on the artistic, cultural and historical value of the item. It was also brought to the hearing to be inspected.

30. I have taken careful account of everything said by Mr Ray, and on his behalf, in the initial application, the grounds of appeal, correspondence and evidence. The following is a summary of the principal arguments:

    a. The assessor wrongly conflated simplicity with a lack of artistic value. This is not a flywhisk "made for a maharajah", but for an officer of the 22nd Regiment serving in India: "the forthright simplicity is just right."

    b. Enlarging on that simplicity at the hearing, I was asked to note the item's weighting and proportions.

    c. The item's historical value was judged only in relation to its connection with Lt. Col. Martin-Leake himself, rather than (as had been put forward in the application) its connection to the historically significant First Battalion of the 22nd Regiment. This was attested by an engraved silver plaque.

    d. Like many historical objects, the significance of the flywhisk is contextual:

> *The fact that a flywhisk, an object of ancient symbolic significance in Indian courts, is given to an officer of 22nd regiment of the 1st Battalion (The Cheshire Regiment) is hugely significant. The officer might not be a man of great historical importance and the object itself may be humble in appearance, but the historic significance of such an object being in a British regiment speaks volumes of huge shifts of power from the Indian rulers to the British.*

In the miniatures of the Mughal period, the servants of noble personages carry chowries (flywhisks), but very few of them have been preserved today. The servant could use this type of whisk not only to shoo away flies, but also to create a gentle, cooling breeze for his master. The flywhisk had ancient associations of power and divinity in India, and had become one of the standard insignia of royal authority in Hindu and Muslim courts alike. Its significance is like that of the parasol, held above kings as a royal symbol or the morchal (peacock feather fan). These royal objects were only used by attendants waiting on royalty. The fact that it now belongs to a British officer in a British regiment shows the real loss of power of the Indian rulers and the shift of power to the British.

The regiment itself is of historical significance. In 1891 the 22nd went Belgaum in India and in 1894 they marched the 200 miles across India (it took them 3 weeks) to Madras. In 1895 they found themselves in Secunderabad where the Adjutant was one William Martin-Leake. After 4 years in Secunderabad, they moved to Quetta and then in October 1903 they moved to Bombay and left India finally in 1904.

For these reasons, the flywhisk is an important object in the constantly evolving history of India in the nineteenth century, and a symbol of the transfer of power from the Indian rulers to the British.

e. Developing this concept, it was argued that "history is not made up of the most glamourous objects", but rather everyday objects that tell us how we lived. A simple and ornamental regimental flywhisk powerfully demonstrates the way in which a previously important symbol of authority was in the hands of the British, its former bearers "now just puppets." Lt. Col. Martin-Leake "may not be Clive of India" but "history is made up of a multitude of small things and this is a very nice small thing". If only the very rarest items were retained then this collection of small things would be lost, and so would the history they carry with them. In any event, the item is rarer than the assessor considered. Mr Ray had procured an email from another dealer confirming his opinion that the flywhisk is rare.

f. On manufacture, the assessor had only looked at the turning of the handle and disregarded the plaque and the whisk itself.

31. In relation to all the above, Mr Ray emphasised his own expertise. He describes himself as one of the world's leading dealers in Indian and Islamic Works of Art, having worked in the field for 37 years. He lists numerous eminent institutions among his clientele, and has himself acted as an expert for the Arts Council Export Licensing Unit, which is responsible for issuing export licences for objects of cultural interest on behalf of the Secretary of State for Culture.

The Secretary of State's case

32. The Secretary of State adduced evidence from Emily Penry, the Head of International Trade in Endangered Species. She oversees the operational delivery of CITES, as well as the operation of the 2018 Act. Her evidence gave a useful overview of the background to the Act and the way in which this particular appeal was dealt with. Mr Steele argued that the new evidence relied upon by SRL at the hearing should be disregarded, or afforded little

weight, for the reasons already put forward as to way in which the Tribunal approaches the appeal.

33. Mr Steele also drew attention to the context in which Parliament had included rarity as a mandatory consideration and the high threshold of "outstandingly high".

Consideration

34. There are shortcomings in each party's case. The statutory scheme for deciding the application is simple. So was the application, and the assessor's opinion. To some extent, this simplicity may have been undermined by the process that was followed. The considerations posed to the assessor in a checklist, derived from the non-statutory guidance, *could* risk distracting an expert from properly applying their expertise to the actual statutory language. I doubt that a 'Curator of Modern and Military History' needs to be told by the Animal and Plant Health Agency what the word "rare" means, but he or she might well mistakenly believe that the checklist carries legal authority. If a future assessor can be seen to have treated the checklist as a straitjacket, or mistakes it for a list of legally mandated considerations, then this may undermine their opinion and any reliance upon it by the Secretary of State.

35. Similarly, the pro-forma for the assessor to complete is further headed "Rare and Most Important" and states that the "exemption is designed to be narrow and apply only to those items which have significance to wider society, beyond any personal, sentimental or financial value which may be attached to them" – again, both are unnecessary (and possibly contentious) statements of the law.

36. Having received the opinion, a panel was convened. Its purpose, contribution and even its membership is a mystery. It did nothing but read the assessor's already concise opinion and paraphrase two of its points. This was then presented as the reasoning behind the decision. The assessor's opinion is fundamental to the statutory process. Realistically, if the Secretary of State were to disagree with the opinion then he would have to give reasons why. Here, he does agree. It was enough for him to simply record the opinion, confirm his view that it addressed the relevant factors set out in the Act and put forward in the application, and decide that he agreed with its conclusions. The added unnecessary layers of 'guidance' and paraphrased reasoning, together with keeping secret the identity of everyone involved, could in some cases risk a finding that the decision was unlawful.

37. Notwithstanding the above, I accept that the assessor has given a cogent explanation that discloses no diversion from the statutory test, and that it was properly taken into account by the Secretary of State.

38. Nor has SRL helped itself. There is no restriction on the evidence and argument that may be submitted with an application for an exemption certificate. That is the material upon which the assessor will give an opinion, together with their own expertise and that of their nominating institution. Here the application was very brief indeed. If the evidence and argument put forward in this appeal had been presented with the application, it might be that the assessor would have reached a different opinion. It might not. SRL has a greater hill to then climb on appeal, because it must instead show that the opinion, or the Secretary of State's reliance upon it, suffered from one of the defects I have described at paragraph 22. Dealing with its individual points, adopting the same letters as at paragraph 30 above:

a. The assessor cannot be seen to conflate simplicity in a military context with a lack of artistic value. Quite apart from its artistic value not being explained in the application, the assessor's opinion that the item was not of outstandingly high artistic value was made after specifically observing that the handle was "competently" made, and that it related to the 22nd Regiment and was made for colonial use. Its artistic value was clearly approached in context and SRL's assertions to the contrary are not made out. Disagreement with the significance of the simple design cannot establish an error in the opinion or the Secretary of State's reliance upon it.

b. As with many historical objects, seeing an item in person communicates its characteristics far more than seeing a photograph. Having held the flywhisk I agree with what was said about its weighting and proportions. Yet my opinion is not what counts, the question rather being whether this was a matter wrongly neglected by the assessor. It is a matter of evaluation that falls squarely within their expertise, and the competence and simplicity of its manufacture was taken into account.

c. The historical significance of the Regiment was not put forward in the application, so SRL must show that it was wrong for an assessor not to have considered it for themselves. Their evidence was insufficient to do so, setting out their alternative perspective rather than persuading me that this was such an essential or obvious consideration that neglecting it vitiated the opinion. The historical significance attached to various matters will naturally vary between experts. I also consider it likely that the assessor did consider the significance of the Regiment, as shown by the word 'Furthermore'.

d. The same can be said of the historical context. SRL's submissions perhaps speak to the item's *significance* rather than its individual *value*, but in any event it can be assumed that a Curator of Modern and Military History nominated by National Museums Scotland would take the historical context of the 22nd Regiment and the cultural significance of a flywhisk into account if it were an essential consideration.

e. Mr Ray and Dr Leng Tang's submissions on this point were eloquently and powerfully put. History is indeed made up of small objects, but again this goes towards the item's significance rather than an assessment of historical value that must take into account its rarity. Moreover, if the number of small objects diminishes as a result of the Act, then their rarity will increase to the point where exemption may be appropriate. As to whether the rarity of this item was underappreciated by the assessor, SRL produced only assertion rather than evidence. No evidence was produced showing how many similar such items exist.

f. While the artistic execution of these parts of the item was not specifically commented upon, the opinion cannot be read as restricting its consideration to just the handle. The existence of the other components was noted.

39. There is a limit to the weight that can be placed on Mr Ray's evidence in this appeal. I do not doubt that he has the experience, expertise and distinguished career he claims, but of course he is not independent and he produced no documentary evidence in support of his conclusions. As observed by Ms Penry, his role as an expert for the Export Licensing Unit does not give him expertise in the different legal test posed by section 2 of the 2018 Act – but I accept that he only put his involvement forward as illustrating his expertise.

Conclusion

40. For the above reasons, nothing put forward by SRL establishes that the decision refusing an exemption certificate was based on any error of fact, whether by the assessor or the Secretary of State, was taken unlawfully, or was one that no reasonable decision-maker could have reached. The appeal must be dismissed.

Signed	Date:
Judge Neville	28 March 2024

Notice of decision and reasons corrected pursuant to rule 40 on 2 April 2024.

Signed Date:

Judge Neville 2 April 2024

[i] Taken from https://www.nrdc.org/stories/keystone-species-101; see also the academic articles summarised at https://www.sciencedirect.com/topics/earth-and-planetary-sciences/keystone-species. This evidence was placed before the Tribunal and is uncontroversial between the parties.
[ii] See paragraph 3 of the Explanatory Notes to the Act.
[iii] Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223