[2015] UKFTT 0664 (TC)

TC04783

Appeal number: TC/2014/04682

EXCISE – seizure of two ivory figurines – imported without the required permits – CITES – restoration refused – whether or not the refusal was reasonable – failure to take into account delayed receipt of the notice of seizure – failure to consider proportionality – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DR ATEF SIDHOM **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE RICHARD CHAPMAN
MR MOHAMMED FAROOQ

Sitting in public in Birmingham on 18 May 2015.

The Appellant appeared in person.

Mr David Griffiths of Counsel, instructed by the Director of Border Revenue, for the Respondents

DECISION

Introduction

1. This appeal is against a review decision dated 31 July 2014 ("the Decision") upholding a decision dated 9 July 2014 refusing to restore to Dr Sidhom two ivory figurines ("the Figurines") seized by the Border Force on 15 March 2014. On HMRC's case, the ivory was of a type protected by Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").

2. The hearing took place on 18 May 2015. Various points arose which required written submissions. We received brief further submissions from HMRC but not from Dr Sidhom. Correspondence then passed between the parties and the Tribunal in respect of a proposed application to strike out the appeal made by HMRC. In the event, we were ultimately informed on 23 September 2015 that, instead of such an application being made, the parties were in a position for us to proceed to give a full decision.

The Factual Background

3. The following factual background was not in dispute.

4. Dr Sidhom purchased the Figurines on E-bay. They were posted to him in a package from Buenos Aires, Argentina ("the Package").

5. The Package was intercepted by the Border Force at Heathrow Worldwide Distribution Centre on 14 March 2014. Upon examination the following day, the Figurines were found and then inspected by an officer from the Animal Health and Veterinary Laboratories Agency. They were found to be ivory and so required a valid import licence pursuant to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). No such licence had been obtained.

6. The Figurines were seized on 15 March 2014. A notice of seizure bearing the date 15 March 2014 ("the Notice") was sent to Dr Sidhom.

7. Dr Sidhom maintains that he did not receive the Notice until between 17 and 22 April 2014.

8. Dr Sidhom sent what he refers to as a "letter of appeal" to the Border Force on 5 May 2014. He then sent a letter dated 21 May 2014 to the Border Force which included the following:

> "I am writing to formally request that the items be the subject of the Restoration process and that you consider the return of the goods to my home address. I have previously challenged the seizure of the items as detailed in my enclosed letter.

> I can confirm that I am within the time-frame for application since your original letter dated 15th March, 2014 was not received by myself until 22nd April, 2014. My original letter of appeal was forwarded to your address in Berkshire on 5h May, 2014."

9. The Border Force responded with a standard letter on 27 May 2014. The Border Force wrote to Dr Sidhom again on 4 June 2014 stating that he was out of time to challenge the legality of the seizure as any appeal request should have been submitted by 15 April 2014.

10. By a letter dated 9 July 2014, the Border Force refused Dr Sidhom's request for restoration of the Figurines. In particular, the unnamed officer issuing the decision stated as follows (retaining the emphasis included in the letter):

> "**A summary of the Policy for the Restoration of Restricted or Prohibited Items**
>
> The 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 departure from that policy.
>
> **My decision**
>
> I have considered your request under section 152(b) of the Customs & Excise Management Act 1979 ("the Act"), and our policy.
>
> In considering restoration I have looked at all of the circumstances surrounding the seizure but **I do not consider the legality or the correctness of the seizure** itself.
>
> I conclude that there are no exceptional circumstances that would justify a departure from the Commissioners' policy as the items were not accompanied by valid CITES import and export permits and I can confirm on this occasion **the goods will not be restored**."

11. By a letter dated 12 July 2014, Dr Sidhom responded as follows:

> "I am writing to appeal against the decision taken by National Post Seizure Unit of Border Force which states that "the goods will not be restored."
>
> The grounds for my appeal are:
>
> 1. The seller, who is from Argentina, was unaware that the goods should be accompanied by a valid CITES import and export permit.
>
> 2. I was not aware of the aforementioned requirement which would have prompted me to advise the seller accordingly.

3. I am unable to further communicate with the seller as the goods were purchased from Ebay.

4. The items are of pre-1927 origin which the appearance of their patina will confirm. This is the year before which all endangered species were not subject to section 139 of the Customs & Excise Management Act of 1979.

It should be noted that I have invested a great deal of money in the purchase of these items. However, I am willing to forward a reasonable fee in order to ensure their recovery."

12. Review Officer Brenton reviewed the decision, resulting in a review decision dated 31 July 2014. Mr Brenton upheld the original decision to refuse to restore the Figurines. His decision includes the following (again retaining the emphasis included in the letter):

"You were sent a Notice of Seizure dated 15th March 2014. The notice explained that one could challenge the legality of the seizure in a Magistrates Court by sending Customs a notice of claim within 1 month of the date of seizure.

You challenged the legality of the seizure but were "out of time" and therefore the "things" are duly condemned as forfeit to the Crown by the passage of time under paragraph 5 of schedule 3 of CEMA.

…

Summary of the Policy for the Restoration of Restricted or Prohibited Items

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.

Consideration

It is for me to determine whether or not the contested decision should be confirmed, varied or cancelled. I am *guided* by the restoration policy but not *fettered* by it in that I consider every case on its individual merits. I have considered the decision afresh, including the circumstances of the events on the date of seizure and the related evidence, so as to decide if any mitigating or exceptional circumstances exits that should be taken into account. I have examined all the representations and other material that was available to the BF both before and after the decision.

In considering restoration I have looked at all of the circumstances surrounding the seizure but **I have not considered the legality or the correctness of the seizure** itself. If you are contesting the legality or

correctness of the seizure then you should have appealed to a Magistrates' Court within 1 month of the Notice of Seizure as no one else has the jurisdiction to consider such a claim. This you failed to do within the statutory time period.

…

The thrust of your correspondence are [sic]:

The seller, who is from Argentina, was unaware that the goods should [be] accompanied by a valid CITES import & export permit.

I was not aware of the aforementioned requirement which would have prompted me to advise the seller accordingly.

Ignorance of the law is no excuse in the eye of the law. Furthermore, a basic internet search prior to purchase e.g. what is required for the importation of ivory figures into the UK? – would have alerted you to the regulations in force.

The items are of pre-1927 origin which the appearance of their patina will confirm. This is the year before which all endangered species were NOT subject to section 139 of the Customs and Excise Management Act of 1979.

No evidence has been adduced with regard to your claim and this is a challenge to the legality of the seizure and can only be decided by the magistrates court.

Despite your submissions the legislation with regard to CITES is in force to control the trade in endangered species. It is the responsibility of the importer for any goods encompassed with the legislation to comply with the regulations in force. You failed to obtain an import license for the figures prior to its [sic] importation into the UK and their [sic] was no export license for the exporting country accompanying the items. The legislation is clear. I am of the opinion that you have not evidenced any exceptional reasons why the ivory figures should be restored.

Conclusion

Therefore, I have decided to uphold the original decision in that:

the 2 ivory figures should not be restored.

I am of the opinion that the application of the policy I have applied 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 policy."

13. Dr Sidhom appealed against the review decision in a notice of appeal dated 20 August 2014 and received by the Tribunal on 26 August 2014. Dr Sidhom's grounds for appeal are as follows (with typographical errors corrected):

> "The seller, who is from Argentina, was unaware that the goods should be accompanied by a valid CITES import and export permit. These items are not for re-sale. They are for my own personal display. I was unaware of the aforementioned requirement which would have prompted me to advise the seller accordingly. I am unable to further communicate with the seller as the goods were purchased from Ebay. The items are of pre-1927 origin which the appearance of their patina will confirm. This is the year before which all endangered species were subject to section 139 of the Customs & Excise Management Act of 1979. In a letter dated 31st July, a statement reads, "Ignorance of the law is no excuse in the eye of the law." I am a humble buyer and not a lawyer with intricate knowledge of the law. Yet lawyers and judges, with such working knowledge, are known to review their decisions on a regular basis."

The Legal Framework

14. Council Regulation (EC) 338/97 (as amended by Commission Regulation 709/2010) enforces CITES within the European Union ("Regulation 338/97").

15. Article 8(1) and (3) of Regulation 338/97 provide as follows:

> "1. Import permits, export permits and re-export certificates shall, taking into account of Article 5(3), be applied for in sufficient time to allow their issue prior to the introduction of specimens into or their export or re-export from the Community.
>
> Specimens shall not be authorised to be assigned to a customs procedure until after the presentation of the requisite documents.
>
> …
>
> 3. By way of derogation from paragraph 1, first subparagraph and paragraph 2 and provided the importer/(re-)exporter informs the competent Management Authority on arrival/before departure of a shipment of the reasons why the required documents are not available, documents for specimens or species listed in Annex B or C to regulation (EC) No. 338/97, as well as the specimens or species listed in Annex A to that Regulation and referred to in Article 4(5) thereof, may exceptionally be issued retrospectively where the competent management authority of the Member State, where appropriate in consultation with the competent authorities of a third country, is satisfied that:
>
> (a) any irregularities which have occurred are not attributable to the (re-)exporter and/or the importer, and

(b) that the (re-)export/import of the specimens concerned is otherwise in compliance with the provisions of:

(i) Regulation (EC) No. 338/97,

(ii) the Convention, and

(iii) the relevant legislation of a third country."

16. Commission Regulation 865/2006 lays down rules in respect of the implementation of Council Regulation (EC) 338/97 including prescribed forms and procedures.

17. Section 49(1)(b) of the Customs and Excise Management Act 1979 ("CEMA 1979") provides as follows:

"49 Forfeiture of goods improperly imported

(1) Where –

… …

(b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; or

… …

those goods shall, subject to subsection (2) below, be liable for forfeiture."

18. The relevant sub-sections of section 139 of CEMA 1979 provide as follows:

"139 Provisions as to detention, seizure and condemnation of goods etc.

(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

…

(6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the customs and excise Acts.

…"

19. Section 152 of CEMA 1979 provides as follows:

"The Commissioners may, as they see fit –

…

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts;

…"

20. The relevant paragraphs of Schedule 3 to CEMA 1979 provide as follows:

"Notice of seizure

1.(1) The Commissioners shall, except as provided in sub-paragraph (2) below, give notice of the seizure of any thing as liable to forfeiture and of the grounds therefor to any person who to their knowledge was at the time of the seizure the owner or one of the owners thereof.

(2) Notice need not be given under this paragraph if the seizure was made in the presence of –

(a) the person whose offence or suspected offence occasioned the seizure; or

(b) the owner or any of the owners of the thing seized or any servant or agent of his; or

(c) in the case of anything seized in any ship or aircraft, the master or commander.

2. Notice under paragraph 1 above shall be given in writing and shall be deemed to have been duly served on the person concerned –

(a) if delivered to him personally; or

(b) if addressed to him and left or forwarded by post to him at his usual or last known place of abode or business or, in the case of a body corporate, at their registered or principal office; or

(c) where he has no address within the United Kingdom or the Isle of Man, or his address is unknown, by publication of notice of the seizure in the London, Edinburgh or Belfast Gazette.

Notice of claim

3. Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise.

4.(1) Any notice under paragraph 3 above shall specify the name and address of the claimant …

Condemnation

> 5. If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited.
>
> 6. Where notice of claim in respect of any thing is duly given in accordance with paragraphs 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited.
>
> …"

21. The Tribunal's jurisdiction in a restoration appeal is pursuant to section 16(4) of the Finance Act 1994. As such, the Tribunal is to consider the reasonableness of decision and (if the decision is found to be unreasonable) is limited to directing that a decision ceases to have effect, requiring a review or giving directions as to steps to be taken to sure that repetitions of the unreasonableness do not occur. Section 16(4) provides as follows:

> "(4) In relation to any decision as to an ancillary matter, 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 further review of the original decision; and
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, 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."

22. Unreasonableness in this context is *Wednesbury* unreasonableness. It follows that a decision will be unreasonable if the decision maker takes into account irrelevant matters or fails to take into account all relevant matters (see *Lindsay v C & E Commrs* [2002] STC 588 *per* Lord Phillips MR at paragraph [40]).

23. Mr Griffiths referred us to *John Dee Ltd v Commissioner of Customs and Excise* [1995] STC 941. Neill LJ stated as follows at page 952:

> "In furtherance of his argument that, once the tribunal had decided that the decision of the commissioners was flawed, it could substitute its own discretion, counsel for the company was constrained to submit that it was for the tribunal to decide whether it appeared to it 'requisite for the protection of the revenue' to require a taxable person to give security. I am quite unable to accept this submission. It seems to me that the 'statutory condition' (as Mr Richards termed it) which the tribunal has to examine in an appeal under s40(1)(n) is whether it appeared to the commissioners requisite to require security. In examining whether that statutory condition is satisfied the tribunal will, to adopt the language of Lord Lane, consider whether the commissioners had acted in a way in which no reasonable panel of commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The tribunal may also have to consider whether the commissioners have erred on a point of law. I am quite satisfied, however, that the tribunal cannot exercise a fresh discretion on the lines indicated by Lord Diplock in *Hadmor*. The protection of the revenue is not a responsibility of the tribunal or the court."

24. We also note that Neill LJ stated as follows at page 953:

> "It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic, the crucial words in the Decision were,
>
> 'I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr Ross' report, their concern for the protection of the revenue would probably have been forfeited.'
>
> I cannot equate a finding 'that it is most likely' with a finding of inevitability."

25. As set out below, Mr Griffiths submitted that the decision not to restore the Figurines was "reasonable and proportionate." We take this to be an acceptance that such a decision must be proportionate. We note the following comments of Mann J in *Projosujadi v Director of Border Revenue* [2015] UKUT 297 (TCC) at paragraphs [31] and [33] to [35] which make it clear that Mr Griffiths' inclusion of a requirement of proportionality is entirely correct:

> "[31] It is common ground that proportionality is a relevant matter in a restoration application such as that before Mr Crouch, and then in an appeal to the FTT. Without considering it the FTT would not have been able to determine whether the reviewer's decision was one at which no reasonable reviewer could have arrived. In the circumstances the FTT failed to take into account a very important part of the appellant's case and erred in law. Without seeking to decide the point, I can safely say that it was a point with significant merit. Mr Metcalfe drew to my

attention the case of *Smouha v Director of Border Revenue* [2015] UKFTT 147 (TC), another case in which a restoration application was made in respect of goods forfeited because of non-compliance with the need to provided CITES certificates. While not submitting that his case was on all fours with that case, he did submit that that case showed how proportionality, and the factors making it up, can fall to be dealt with in these cases, and he said that something similar should have happened in this case. I agree that that case is a useful demonstration of how the question can be dealt with, without saying that the result in the present case should be the same.

…

[33] It follows, therefore, that this appeal should be allowed. That raises the question of what order I should make. Although the FTT heard evidence which was capable of going to proportionality, and received submissions on proportionality, under section 16(4) of the Finance Act 1994, its powers were limited. It could not take a decision on proportionality itself. If it had come to the conclusion that Mr Crouch had erred, then the appropriate form of relief would have been to direct a further review under paragraph (d). I do not have power to do any more than that – Tribunals, Courts and Enforcement Act 2007 section 12(2). The only question I really have to address is whether I should remit the matter to the FTT for a reconsideration as to whether or not Mr Crouch erred, or whether I should take a view myself on Mr Crouch's decision and, if I thought it wanting, make the order myself.

[34] Having anxiously considered the matter, I do not think that it is right to force a further hearing in the FTT on these parties. I have considered Mr Crouch's main decision letter, and his letters which follow it, and I am satisfied that they do not carry a sufficient indication that he took proportionality into account to allow the review to stand. True it is that the submissions made to him did not focus on proportionality in the same way as submissions made to the FTT and to me did, but there was a reference to proportionality and, in any event, he ought to have considered it. Looking at his main decision letter, it seems that his focus was on "exceptional circumstances". As I have already pointed out, that is not the same thing as proportionality. He also seems to have considered that any decision to restore was "ultra vires" once the goods had been forfeited. That is another puzzling feature of this case. If it were right then Mr Crouch's job, and decision, would have been very easy. I wonder if he meant those words in the proper sense. But whatever he may have meant, their use does not encourage any confidence in the idea that he had proportionality in mind to an appropriate extent.

[35] In the circumstances I find that his decision-making process was flawed and it would be appropriate for me to order a further review. I am told by Mr Newbold that the general practice in these circumstances of a returned review is to have the review carried out by a different officer. I am sure that would be a very good idea in this case."

26. *Projosujadi v Director of Border Revenue, above*, was not cited to us by either party as it was released after the hearing. However, we take it into account because it is an Upper Tribunal authority and so is of course binding upon us.

27. It is now well settled that it is not open to the Tribunal to reopen the legality of the seizure in a restoration appeal. Mummery LJ stated as follows in *HMRC v Jones* [2011] EWCA Civ 824 at paragraph [71]:

> "[71] I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.
>
> (1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UT are statutory appellate bodies that have not been given any such original jurisdiction.
>
> (2) The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.
>
> (3) The respondents in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.
>
> (4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under para 3 of Sch 3 was that the goods were deemed by the express language of para 5 to have been condemned and to have been 'duly' condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act; it is impossible to read then in any other way than as requiring the goods to be taken as 'duly condemned' if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.
>
> (5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been 'duly' condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.

(6) The deeming provisions in para 5 of Sch 3 and the restoration procedure are compatible with art 1 of the First Protocol to the Convention and with art 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods. The notice of claim procedure was initiated but not pursued by the respondents. That was the choice they had made. Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.

(7) I completely agree with the analysis of the domestic law jurisdiction by Pill LJ in *Gora* and as approved by the Court of Appeal in *Gascoyne*. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to 'reality'; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion.

(8) The tentative obiter dicta of Buxton LJ in *Gascoyne* on the possible impact of the Convention on the interpretation and application of the 1979 Act procedures and the potential application of the abuse of process doctrine do not prevent this court from reaching the above conclusions. That case is not binding authority for the proposition that para 5 of Sch 3 is ineffective as infringing art 1 of the First Protocol or art 6 where it is not an abuse to re-open the condemnation issue; nor is it binding authority for the propositions that para 5 should be construed other than according to its clear terms, or that it should be disapplied judicially, or that the respondents are entitled to argue in the tribunal that the goods ought not to be condemned as forfeited.

(9) It is fortunate that Buxton LJ flagged up potential Convention concerns on art 1 of the First Protocol and art 6, which the court in *Gora* did not expressly address, and also concerned the doctrine of abuse of process. The Convention concerns expressed in *Gascoyne* are allayed once it has been appreciated, with the benefit of the full argument on the 1979 Act, that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner.

(10) As for the doctrine of abuse of process, it prevents the owner from litigating a particular issue about the goods otherwise than in the allocated court, but strictly speaking it is unnecessary to have recourse to that common law doctrine in this case, because, according to its own terms, the 1979 Act itself stipulates a deemed state of affairs which the FTT had no power to contradict and the respondents were not entitled to

> contest. The deeming does not offend against the Convention, because it will only arise if the owner has not taken the available option of challenging the legality of the seizure of the allocated forum."

The Evidence

28. Given that Dr Sidhom was acting in person, Mr Griffiths helpfully offered to present the Border Force's case first. As such, we first heard evidence from Mr Brenton.

29. Mr Brenton explained that he did not consider the legality of the seizure because Dr Sidhom had been out of time to challenge this within condemnation proceedings. He said that he could not see that there had been any attempt to apply for an export or import licence. When pressed upon the question as to who was responsible for obtaining a licence, he said that the overall responsibility was with the importer but only in the sense that it is for the importer to ensure that the exporter has got the appropriate licence. He considered the internal policy that restoration would only be given in exceptional circumstances and that there were no such exceptional circumstances here.

30. Mr Brenton was also asked about the date upon which the Notice was sent. He said that there was no record as to when it was sent other than the fact that it was dated 15 March 2014. However, he said that he would expect a notice to be sent within a day or two of the seizure.

31. Mr Brenton was asked about the value of the Figurines. He said that no value was declared and that, in any event, the value was not relevant.

32. We then heard evidence from Dr Sidhom. By way of background, he explained that he had retired as a general practitioner two years ago. He is a collector and buys whenever he can and whatever he can afford. He does not sell any items on.

33. Dr Sidhom had purchased the Figurines through e-bay and had expected them to arrive by December 2013 or January 2014. Nothing came. Between 17 and 22 April 2014, Dr Sidhom received the Notice from the Border Force. He had been on holiday during those dates and saw it on his return. He had not been away from home in late March or early April. Dr Sidhom expressed his firm view that this had been deliberately held back by the Border Force in order to ensure that he was out of time for challenging the legality of the seizure. He wrote on 5 May 2014 and received a reply which was erroneously dated 16 April 2014.

34. Dr Sidhom said that he did not know a licence was necessary. If he had known that and had been given the chance he would have applied for CITES or asked the seller to apply. He did not now have that chance.

35. Dr Sidhom was asked about his contention that the Figurines pre-dated 1927. He said that the seller had told him that and he had seen a photograph which showed patina on the Figurines which would indicate that sort of age.

Dr Sidhom's Case

36. In short, Dr Sidhom's case is that the seizure was unlawful because of the age of the Figurines. He seeks to circumvent the difficulty of the deemed forfeiture by arguing that he was denied the ability to challenge the legality of the seizure because the Notice had not been sent to him until the period to request condemnation proceedings had expired. He also argues that he did not know about the need for a licence and that he should have been given the chance to "put things right".

The Border Force's Case

37. Mr Griffiths argued on behalf of the Border Force in oral and written submissions that the Tribunal has no jurisdiction to consider the legality of the seizure because of the deemed forfeiture.

38. The question arose as to whether or not, if we were to find that Dr Sidhom did not receive the Notice until after the expiry of the time to request condemnation proceedings, that could be something to be taken into account when considering whether or not to restore the Figurines. Mr Griffiths' position in oral submissions was that the legality of the seizure could still not be considered but that the reason for Dr Sidhom's inability to have this considered could be taken into account as part of the decision whether or not to restore.

39. He also argues that Dr Sidhom was importing goods which required him to have the requisite export and import licences and that it was his responsibility to apply for and obtain those licences. Dr Sidhom's lack of knowledge of the need to do so is irrelevant because the forfeiture is not dependant upon any deliberate conduct and can be engaged innocently. Further, he submitted that there was no evidence of any attempt to obtain a licence or to declare the goods correctly.

40. In any event, Mr Griffiths said, the Border Force has an obligation to enforce the provisions of CITES and the importation of the Figurines cannot now be legitimised. He noted that Dr Sidhom had not provided any details on the actual age or provenance of the goods. In summary, Mr Griffiths said as follows in his skeleton argument:

> "18. It is submitted that the decision not to restore the goods was fair, reasonable and proportionate and in line with the Respondent's policy and no exceptional circumstances have been put forward which would justify a departure from that policy."

Discussion

Findings of fact

41. We found Mr Brenton to be an honest and credible witness who explained matters in a very helpful way.

42. We accept Mr Brenton's evidence that he applied the internal policy and that he considered that there were no exceptional circumstances in this case.

43. We note that the Decision is potentially ambiguous as to the responsibility for obtaining licences. The relevant part of the Decision is as follows:

> "… It is the responsibility of the importer for any goods encompassed with the legislation to comply with the regulations in force. You failed to obtain an import license for the figures prior to its [sic] importation into the UK and their [sic] was no export license for the exporting country accompanying the items. The legislation is clear. …"

44. On one reading, Mr Brenton is saying that the responsibility to obtain the relevant import licence was Dr Sidhom's. On another reading, Mr Brenton is saying no more that an importer must comply with his obligations (which does not take the matter any further without setting out exactly what those obligations are) and the obvious fact that (regardless of whose responsibility it was to do so) he did not obtain a licence and that there was no export licence. The oral evidence throws light on Mr Brenton's understanding. Taking the Decision with Mr Brenton's oral evidence in mind, we find as a fact that Mr Brenton was only treating Dr Sidhom as having "overall responsibility" in the sense of ensuring that the licences had been obtained rather than the more formal sense of referring to the legal obligation being upon Dr Sidhom to apply for an import licence himself as opposed to the exporter doing so.

45. We found Dr Sidhom to be both honest and credible and, where he was dealing with matters within his own knowledge rather than reaching conclusions as to the conduct of others, we entirely accept his evidence.

46. Dr Sidhom was obviously passionate about this matter and felt that he had been, to use his words, insulted and humiliated by the Border Force. We must say that we do not see from the correspondence that Dr Sidhom had been treated impolitely or improperly. Dr Sidhom said that his view stemmed from the impersonal form of the Notice, given that it was written on behalf of the Border Force without any individual's contact details. In any event, Dr Sidhom's depth of feeling led him to submit that the Border Force had actively held back the Notice so that he only received it after the time for challenging the legality of the seizure had expired. We do not have any evidence of this and so cannot accept that this was the case. Similarly, there is no evidence to suggest that the Notice was actually generated any later than 15 March 2014. The only evidence as to the date upon which it was generated is the date on its face.

47. We do, however, accept Dr Sidhom's evidence that he did not receive the Notice until between 17 and 22 April 2014. There was no reason to disbelieve his assertion that this was the case and we formed the view that his evidence was honest. Further, Dr Sidhom has been consistent in his position as to when he received the letter and refers to this in contemporaneous documents. He wrote to the Border Force on 5 May 2014 stating,

> "Further to your letter dated 15 March, 2014 which I received prior to the Easter break.
>
> …
>
> Therefore, I intend to exhaust every avenue available to me in order to recover them."

48. He wrote again on 21 May 2014 stating as follows:

> "I am writing to formally request that the items be the subject of the Restoration process and that you consider the return of the goods to my home address. I have previously challenged the seizure of the items as detailed in my enclosed letter.
>
> I can confirm that I am within the time-frame for application since your original letter dated 15th March 2014 was not received by myself until 22nd April 2014."

49. Mr Griffiths did not take issue with the content of these letters in his cross-examination of Dr Sidhom. Although the Notice referred to the one month time limit, it is clear from Dr Sidhom's evidence that There is simply no explanation by either party as to why Dr Sidhom did not receive the Notice until then and we can make no findings as to that question.

50. A further unusual feature of this case is that the Border Force wrote to Dr Sidhom on 13 May 2014. This was in response to Dr Sidhom's letter dated 5 May 2014 and prompted his letter dated 21 May 2014. In essence, the Border Force informed Dr Sidhom that they were not clear whether he was asking for condemnation proceedings or requesting restoration. There was an explanation within the letter of how to request condemnation proceedings, which stated as follows:

> "If you claim that the items are not liable to forfeiture you must, within one month of the date shown above, give notice in writing of your claim to the above office of the Border Force, stating your full name and address …"

51. The only "date shown above" on this letter was 13 May 2014. We therefore find as a fact that the Border Force were by this letter telling Dr Sidhom that he was still in time to request condemnation proceedings.

52. We also find as a fact that the proper construction of the 5 May 2014 letter and the 21 May 2014 letter is that Dr Sidhom was challenging the seizure and so requesting condemnation proceedings. This is because of the extracts quoted above referring to exhausting every avenue and challenging seizure.

53. We accept that Dr Sidhom did not know that he needed to obtain a licence. Dr Sidhom's assertion as to this was credible and we did not take Mr Griffiths to argue that Dr Sidhom did in fact know of any such need. Indeed, as set out above, Mr

Griffiths' submissions included the point that it did not matter whether Dr Sidhom was aware or not.

Legality of the seizure

54. We accept Mr Griffiths' argument that we cannot consider the legality of the seizure, as is clear from the passages from *HMRC v Jones*, above, which we have already cited.

55. In our view, the deemed forfeiture is not affected by our finding that Dr Sidhom did not receive the Notice until between 17 and 22 April 2014. The wording of paragraph 3 of Schedule 3 to CEMA 1979 is that a notice of claim must be given, "within one month of the date of the notice of seizure or where no such notice has been served on him, within one month of the date of seizure." It is of note that the touchstone is the date of the notice rather than the date upon which the notice is served. We therefore take this to mean the date on the face of the Notice, which, in this case, is 15 March 2014. Even if this is incorrect, the backstop of "where no such notice has been served on him, within one month of the date of seizure" will still mean that Dr Sidhom was out of time to request condemnation proceedings. It might be argued that this backstop is simply dealing with the situation where no notice has been served at all because there is no need to pursuant to paragraph 1(2) of Schedule 3 to CEMA 1979. However, this would require us to construe paragraph 3 as applying "where there is no requirement for such notice," instead of "where no such notice has been served on him." Instead, the more natural construction is that it applies where no notice of seizure has been served on him as at the expiry of one month from the date of seizure.

56. Dr Sidhom argues that his position that the ivory pre-dates 1927 (for which, we note, there was no evidence) means that it should not have been seized. It is not clear what he says the legislative basis for this is. In any event, this would go to the legality of the seizure and so cannot be a question for us.

57. Finally, we make the point that Dr Sidhom's suggestion that he should have been allowed to "put things right" might be construed as him saying that he should have been granted a retrospective permit. Again, this might well be seen as questioning the legality of the seizure. However, we need not reach a view upon this as Dr Sidhom did not seek a retrospective permit prior to the deemed forfeiture, even now he has not formally done so and the Border Force have not made any decision in respect of any such request.

The matters taken into account

58. In making the Decision, Mr Brenton essentially took into account, or where relevant expressly refused to take into account, the following matters:

(1) There was no evidence as to the age of the Figurines and, in any event, this would go to the legality of the seizure.

(2) Ignorance of the law is no excuse.

(3) It was Dr Sidhom's responsibility to comply with the regulations.

(4) Dr Sidhom had not evidenced any exceptional reason why the Figurines should be restored.

59. As set out above, we agree that the age of the Figurines is not a relevant consideration to the extent that Dr Sidhom seeks to use this as a way to challenge the legality of the seizure.

60. We also agree that ignorance of the law is no excuse.

61. If we had reached the view that Mr Brenton had considered that it was Dr Sidhom's obligation to apply for the licences, we would have had some concerns. We have not been provided with any authority for this assertion and in the First-tier Tribunal case of *Smouha v The Director of Border Revenue* [2015] UKFTT 0147 (TC) Judge Redston provides a detailed analysis of the position when an item is sent in the post and reaches the conclusion at paragraph [132] that the responsibility for obtaining an import permit rests with the sender. However, this is of no consequence in the present case given our finding of fact that Mr Brenton was considering the question of responsibility in the wider sense of ensuring that permits were in place rather than identifying who should have obtained it.

62. At first sight, a greater difficulty is Mr Brenton's reliance upon the need for Dr Sidhom to have an exceptional reason in order for the Figurines to be restored. This appears to come from Border Force's own policy rather than having any statutory basis. However, no evidence was given to us as to what Mr Brenton actually meant by "exceptional". In the circumstances, there is no evidence before us that by looking for "exceptional" reasons Mr Brenton fettered his discretion in such a way as to make the Decision *Wednesbury* unreasonable.

Relevant matters not taken into account

63. If the matter ended there, then we would not find the Decision to have been *Wednesbury* unreasonable. However, the matter does go further as there is no evidence that Mr Brenton considered the fact that Dr Sidhom did not receive the Notice until after one month from either the date of the Notice or the date of seizure (which Mr Brenton would have known prior to making his Decision because of the content of Dr Sidhom's letters).

64. In our judgment, the late receipt of the Notice was a relevant consideration that should have been taken into account in reaching the Decision. This is clearly relevant because Dr Sidhom was effectively deprived of his ability to challenge the seizure. We do emphasise that this would still not allow Dr Sidhom to reopen the legality of the seizure; instead we agree with Mr Griffiths' position that the reason for Dr Sidhom's inability to have the legality considered can be taken into account as part of the decision whether or not to restore.

65. It might be that this would not have resulted in any different decision. However, with Neill LJ's comments in *John Dee Ltd v Commissioner of Customs and Excise* (see above) in mind, we cannot say that it is inevitable that the outcome would have

been the same as the Decision even if the late receipt of the Notice had been considered.

66. We did consider whether or not it was relevant that the Border Force's letter dated 13 May 2014 wrongly stated that condemnation proceedings could be requested within one month of the letter (and so within one month of 13 May 2014). However, we have reached the conclusion that the fact that Mr Brenton did not take this into account did not make the decision unreasonable in the *Wednesbury* sense. This is because the Border Force was not entitled to treat the time for requesting condemnation proceedings as commencing with the date of the letter, given that this is instead prescribed by paragraph 3 of Schedule 3 to CEMA 1979 as being one month from the date of the notice of seizure or, if there is not notice of seizure, one month from the date of the seizure. Further, Dr Sidhom did not suggest that there was any significance to this letter.

67. It follows that we find that the Decision was unreasonable because Mr Brenton failed to consider that Dr Sidhom did not receive the Notice until after one month from either the date of the Notice or the date of seizure.

68. We also find that the decision was unreasonable because Mr Brenton did not consider the question of proportionality.

69. As set out above, it is clear from *Projosujadi v Director of Border Revenue* that proportionality should be considered by the Border Force in making a decision about restoration.

70. The Decision does not make any mention of proportionality being considered and no evidence was put before us to suggest that it had been considered. Indeed, whilst Mr Griffiths submitted that the decision was "reasonable and proportionate", neither he nor Mr Brenton set out what the Border Force says makes the Decision proportionate.

71. It follows that the Decision was unreasonable because Mr Brenton did not take into account proportionality. Again, we do not know what the outcome would have been if he had taken this into account. However, again, we do not have sufficient evidence to find that it is inevitable that the Decision would have been the same.

Decision

72. For the reasons set out above, we allow the appeal.

73. We direct that the Border Force carry out a further review of the original decision. This must take place within six weeks of the release of this decision.

74. Finally, we make the point that we were assisted by both Dr Sidhom and Mr Griffiths during the hearing and particularly note the fairness of Mr Griffiths' approach in ensuring that all arguments were before us in light of the fact that Dr Sidhom was not represented.

75. 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.

RICHARD CHAPMAN

TRIBUNAL JUDGE
RELEASE DATE: 11 December 2015