[2019] UKFTT 316 (TC)

TC07144

Appeal number: TC/2018/03092

IMPORT RESTRICTIONS (CUSTOMS) – handbags made of python and crocodile skin seized – application for restoration – whether decision by review officer reasonable – decision not reasonable or proportionate eg as no distinction made between CITES Appendix I species (crocodile) and Appendix II species (python) – further review directed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHELANGELO LTD (substituted as appellant for MICHELANGELO FASHIONS LTD)	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at the Magistrates Court Sheffield on 5 February 2019 with further submissions made by the appellant on 22 February 2019.

Paul Robertson, director, for the Appellant

Joe Culley, instructed by the Cash Forfeiture & Condemnation Legal Team, Home Office, for the Respondents

DECISION

1. This was the hearing of an appeal made by Michelangelo Fashions Ltd against the refusal by the UK Border Force to restore 28 handbags made from the skins of crocodiles and 26 from the skins of pythons and which had been seized by them.

The substitution of the appellant

2. The Statement of Case by the Home Office's Cash Forfeiture & Condemnation Legal Team showed the name of the appellant as Michelangelo Fashions Ltd. My reading of the papers before the hearing showed that that this was but one of 10 variants in the name of the importer, some differing only by the omission of "Ltd". The correct name appeared to be that in the Statement of Case and corresponds with the Companies House record for a company whose directors have been active in this case.

3. However that same Companies House record showed that the company Michelangelo Fashions Ltd was dissolved on 8 May 2018. Accordingly at the start of the hearing I asked Mr Paul Robertson, who purported to appear for Michelangelo Fashions Ltd, what the position was, given that the assets of a company which has been dissolved pass generally to the Crown[1] as bona vacantia and there was no indication that the Treasury Solicitor, who manages bona vacantia, was aware of the hearing. It turned out that Mr Culley, counsel for the Director of Border Revenue, was intending to raise the same point. Mr Robertson told me that before its dissolution Michelangelo Fashions Ltd had transferred its assets and business to a new company Michelangelo Ltd but he had no evidence with him that that was the case.

4. I directed that the hearing would go ahead, but that I would only substitute Michelangelo Ltd as the appellant if that company provided evidence that the right to claim restoration of the goods had been lawfully transferred to it. Unless such evidence was provided I would strike the appeal out and I referred the parties to my decision in *Sharafat Ali v HMRC* [2015] UKFTT 464 where a similar point involving an undischarged bankrupt arose.

5. In the event I was provided with a copy of an agreement dated 25 November 2017 transferring all assets and liabilities of Michelangelo Fashions Ltd to Michelangelo Ltd for £40,000 and a letter of 20 February 2019 from the directors of Michelangelo Ltd (including Mr Robertson) confirming this transfer and stating that the assets transferred included the stock seized by Border Force on 25 October 2017.

6. In the light of this evidence I direct that Michelangelo Ltd be substituted as the appellant in place of Michelangelo Fashions Ltd under Rule 9(1)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. It is sub-paragraph (a) of Rule 9(1) which applies because at the start of proceedings (the notification of an appeal to the Tribunal) the right of appeal and any ownership interest in the handbags had

[1] Or sometimes to the Duchy of Lancaster, something that seems very unlikely in the case of a Yorkshire based company such as this.

already passed to Michelangelo Ltd. Thus sub-paragraph (b) is not engaged as there was no relevant change of circumstances after the start of proceedings.

7. In the rest of this decision references to the "appellant" refer to either Michelangelo Fashions Ltd or Michelangelo Ltd as appropriate given the time of the event referred to.

The law

8. This part of my decision sets out the legislation, so far as relevant to the facts of this case. Much of it taken from the decision of Judge Anne Redston sitting with Mr Toby Simon in *Sabine Smouha v HMRC* [2015] UKFTT 147 (TC) ("*Smouha*") which I have found immensely helpful.

CITES and European Council Regulation (EC) 338/97

9. The purpose of CITES is to protect endangered species of fauna and flora through controlling the international trade in specimens of those species. This is reflected in the Preamble which in the English language version says:

> "The Contracting States,
>
> *Recognizing* that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come;
>
> *Conscious* of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view;
>
> *Recognizing* that peoples and States are and should be the best protectors of their own wild fauna and flora;
>
> *Recognizing*, in addition, that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade;
>
> *Convinced* of the urgency of taking appropriate measures to this end;
>
> *Have agreed* as follows:"

10. CITES has three Appendices, of which two are relevant to this case:

(1) Appendix I, which broadly speaking lists species which are either threatened with extinction or so rare that any level of trade would imperil its survival as a species;

(2) Appendix II, which (again, broadly speaking) lists species that are not necessarily now threatened with extinction, but may become so unless trade in specimens of such species is subject to strict regulation in order to avoid use of the specimens which is incompatible with their survival.

11. CITES is given effect to in the EU by Council Regulation (EC) 338/97 ("Reg 338/97"), which has direct effect in the UK. The Preamble includes the following:

> "(2) Whereas, in order to improve the protection of species of wild fauna and flora which are threatened by trade or likely to be so

> threatened, Regulation (EEC) No. 336/82 must be replaced by a Regulation taking account of the scientific knowledge acquired since its adoption and the current structure of trade; whereas, moreover, the abolition of controls at internal borders resulting from the Single Market necessitates the adoption of stricter trade control measures at the Community's external borders, with documents and goods being checked at the customs office at the border where they are introduced;
>
> …
>
> (10) Whereas there is a need, in order to ensure the broadest possible protection for species covered by this Regulation, to lay down provisions for controlling trade and movement of specimens within the Community and the conditions for housing specimens; whereas the certificates issued under this Regulation, which contributes to controlling these activities, must be governed by common rules on their issue, validity and use.
>
> …
>
> (17) Whereas, in order to guarantee compliance with this Regulation, it is important that member states impose sanctions for infringement in a manner which is both sufficient and appropriate to the nature and gravity of the infringement…"

12. Reg 338/97 has four Annexes. Annex A broadly replicates Appendix 1 of CITES, but includes some non-CITES species, and Annex B broadly replicates Appendix II, but again includes some non-CITES species.

Pythons and crocodiles in CITES & Reg 338/97

13. The python family, *Pythonidae*, is included in Appendix II of CITES except for the subspecies *Python molurus molurus*.

14. In Reg 338/97 Annex B includes all *Pythonidae* species except *P m molurus* (described as Indian Python) which subspecies is in Annex A.

15. Note 15 of the Interpretive Annex of Reg 338/97 says:

> "The symbol '=' followed by a number placed against the name of a species or higher taxon denotes that the name of that species or taxon shall be interpreted as follows:"

The reference to *P m molurus* in Annex A has the symbol "=447" against it and Note 15 shows that that *P m molurus* includes the synonymous subspecies *P m pimbura*.

16. All species in the order *Crocodylia* (Alligators, caimans and crocodiles) are included in Annex II of CITES, except for those listed in Annex I. The species so listed in the *Crocodylidae* family include *Crocodylus siamensis* without any symbols or qualifications.

17. In Reg 338/97 Annex A includes *C siamensis* (Siamese crocodile).

Importing CITES specimens

18. Article 4 of Reg 338/97 is headed "Introduction into the Community." Paragraph 1 of that Article covers Annex A specimens and says:

> "1. The introduction into the Community of specimens of the species listed in Annex A shall be subject to completion of the necessary checks and the prior presentation, at the border customs office at the point of introduction, of an import permit issued by a management authority of the Member State of destination.
>
> The import permit may be issued only in accordance with the restrictions established pursuant to paragraph 6 and when the following conditions have been met:
>
> …
>
> (d) the management authority is satisfied that the specimen is not to be used for primarily commercial purposes;
>
> …"

19. Paragraph 2 of Reg 338/97 covers Annex B specimens. It begins:

> "The introduction into the Community of specimens of the species listed in Annex B shall be subject to completion of the necessary checks and the prior presentation, at the border customs office at the point of introduction, of an import permit issued by a management authority of the Member State of destination."

20. It should be pointed out here that Art III of CITES on Appendix I specimens requires an import permit to be granted, but Art IV on Appendix II specimens does not: it merely requires an export permit to be presented before import. Art XIV however provides that:

> "The provisions of the present Convention shall in no way affect the right of Parties to adopt:
>
> (a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof;"

21. Article 8 is headed "Provisions relating to the control of commercial activities" and provides as follows:

> "1. The purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale of specimens of the species listed in Annex A shall be prohibited.
>
> …
>
> 5. The prohibitions referred to in paragraph 1 shall also apply to specimens of the species listed in Annex B except where it can be proved to the satisfaction of the competent authority of the Member State concerned that such specimens were acquired and, if they

originated outside the Community, were introduced into it, in accordance with the legislation in force for the conservation of wild fauna and flora."

22. These paragraphs reflect Art II(4) CITES:

> "The Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention."

23. Article 11 is headed "Validity of and special conditions for permits and certificates" and paragraph 3 begins:

> "Any permit or certificate issued in accordance with this Regulation may stipulate conditions and requirements imposed by the issuing authority to ensure compliance with the provisions thereof…."

24. Article 16 is headed "Sanctions" and includes the following :

> "1. Member States shall take appropriate measures to ensure the imposition of sanctions for at least the following infringements of this Regulation:
>
> (a) introduction into … the Community of specimens without the appropriate permit …;
>
> …
>
> (j) purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale of specimens in contravention of Article 8;
>
> 2. The measures referred to in paragraph 1 shall be appropriate to the nature and gravity of the infringement and shall include provisions relating to the seizure and, where appropriate, confiscation of specimens."

Commission Regulation 865/2006

25. Commission Regulation 865/2006 ("Reg 865/2006") lays down detailed rules concerning the implementation of Reg 338/97. It prescribes standard forms and other procedures. Article 8 is headed "Issue and use of documents" and paragraph (1) reads

> "Documents shall be issued and used in accordance with the provisions and under the conditions laid down in this Regulation and in Regulation (EC) No 338/97, and in particular in Article 11(1) to (4) of the latter Regulation.
>
> In order to ensure compliance with those Regulations and with the provisions of national law adopted for their implementation, the issuing management authority may impose stipulations, conditions and requirements, which shall be set out in the documents concerned."

26. Article 13 is headed "Time of application for import and (re)-export documents and assignation to a customs procedure" and provides:

> "1. Import permits … shall, taking into account of Article 8(3), be applied for in sufficient time to allow their issue prior to the introduction of specimens into … from the Community.
>
> 2. The assignation of specimens to a customs procedure shall not be authorised until after presentation of the requisite documents.

27. Article 15 is headed "Retrospective issue of certain documents" and reads:

> "1. By way of derogation from Article 13(1) and Article 14 of this Regulation, and provided that the importer … informs the competent management authority on arrival … of the shipment of the reasons why the required documents are not available, documents for specimens of species listed in Annex B or C to Regulation (EC) No 338/97, as well as for specimens of species listed in Annex A to that Regulation and referred to in Article 4(5) thereof, may exceptionally be issued retrospectively.
>
> 2. The derogation provided for in paragraph 1 shall apply where the competent management authority of the Member State, in consultation with the competent authorities of a third country where appropriate, is satisfied that any irregularities which have occurred are not attributable to the importer …, and that the import … of the specimens concerned is otherwise in compliance with Regulation (EC) No 338/97, the Convention and the relevant legislation of the third country…"

28. That Article therefore provides that a retrospective import permit may be granted for Annex B specimens if the conditions set out in paragraph 1 are met, but that a retrospective permit can only be granted for Annex A specimens if they fall within Article 4(5) of Reg 338/97. That paragraph refers to (a) specimens previously legally imported into the EU and (b) "worked specimens that were acquired more than 50 years previously." A "worked specimen" is defined in Article 2 as one which has been significantly altered from its natural raw state for jewellery, adornment, art, utility, or musical instruments. While the handbags here are "worked specimens" there is no suggestion that they were either previously legally imported into the EU and clearly they were not acquired more than 50 years previously.

UK law: CEMA and appeal rights

29. The Customs and Excise Management Act 1979 ("CEMA") s 49 lays down provisions for forfeiture in connect with importation:

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

30. The relevant provision making them liable to forfeiture at the relevant time appears to be regulation 5 of the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (SI 1997/1372) ("COTES Regulations") which provides:

> "**Proof of lawful import or export**
>
> 5. Where any specimen is being imported or exported or has been imported or brought to any place for the purpose of being exported, a person commissioned by the Commissioners of Customs and Excise, or a person authorised by them, may require any person possessing or having control of that specimen to furnish proof that its importation or exportation is or was not unlawful by virtue of the Principal Regulation[2] or, as the case may be, the Subsidiary Regulation[3] and, until such proof is furnished, the specimen shall be liable to detention under the Customs and Excise Management Act 1979 and, if such proof is not furnished to the satisfaction of the Commissioners, the specimen shall be liable to forfeiture under that Act."

31. CEMA s 152 allows for the restoration of goods which have been forfeit, at the discretion of the Border Force. It reads:

> "The Commissioners may, as they see fit -
>
> ...
>
> (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or ceased under these Acts…"

32. The right to require a review of a restoration decision is contained in Finance Act 1994 ("FA 1994") s 14, which provides:

> "**14 Requirement for review of a decision under section 152(b) of the Management Act etc**
>
> (1) This section applies to the following decisions by HMRC… –
>
> (a) any decision under section 152(b) of the Management Act as to whether or not anything forfeited or seized under the Customs and Excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored;
>
> (b) …..
>
> (2) Any person who is–
>
> …
>
> (b) a person in relation to whom, or on whose application, such a decision has been made, or
>
> (c) …,
>
> may by notice in writing to the Commissioners require them to review that decision."

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[2] Defined as meaning Reg 338/97.

[3] Defined as meaning Reg 865/2006

33. An appeal against a restoration decision is classified as an "ancillary matter" by FA 1994. The right to appeal a decision as to an ancillary matter is in s 16, which is headed "Appeals to a tribunal". It provides:

> "(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."

34. Although CEMA, FA 1994 and the COTES Regulations refer to "the Commissioners" and FA 1994 to "HMRC," the legislation is to be read as applying concurrently to the Border Force, see Part 1 of the Borders, Citizenship and Immigration Act 2009[4].

35. The COTES Regulations make any contravention of Art 8 Reg 338/97 a criminal offence

Facts

36. I had a witness statement from Mr Mark Summers, a Higher Officer in the UK Border Force, who was the officer who had carried out the review. He exhibited his review conclusions letter and the documents he had considered in coming to his conclusions. The Tribunal asked Mr Summers some questions. From those documents, others in the bundle and his answers I find as fact as follows.

37. On 4 October 2017 a container was landed at Felixstowe from Thailand. It contained handbags imported by the appellant.

38. On 18 October 2017 Officer Lance Cruse BEM of UK Border Force emailed Mr Robertson referring to previous discussions about the handbags. Mr Cruse referred to his having told Mr Robertson that to legally import the handbags Border Force needed to have UK CITES Import permits before the goods arrived in addition to the export

[4] Something explicitly recognised in regulation 7 the Control of Trade in Endangered Species Regulations 2018 (SI 2018/703) applying from 1 October 2018, the regulation which superseded regulation 5 of the COTES Regulations.

and re-export permits he did have, and because the appellant did not have the import permits Border Force had to put the consignment out for examination and would seize any goods without the proper documentation.

39. In the same email Mr Cruse sent Mr Robertson various notices including Notice 12A setting out appeal rights against seizure and the right to seek restoration of the goods. He was also told that before asking for restoration he should seek to obtain "what is known as a Retrospective Import permit (x2)" from the Animal and Plant Health Agency ("APHA"). He also gave Mr Robertson online addresses for CITES and the EU legislation.

40. On 25 October 2017 Officer Cruse opened the relevant boxes in the container and found 28 crocodile and 26 python handbags. Officer Cruse seized them as liable to forfeiture under s 49 CEMA.

41. On 29 October 2017 Officer Cruse wrote to Mr D Horsfield c/o Abbey Glen Ltd informing him of the seizure and telling him that if he claimed the goods were not liable to forfeiture he must give notice in writing within one month in accordance with paragraphs 3, 4 and 5 Schedule 3 CEMA, otherwise the goods would be duly condemned as forfeited. Mr Horsfield "c/o Abbey Glen" was shown as the consignee of the goods on the export permits issued by the Thai authorities, and "Michel Angelo International Co Ltd" of Thailand as the "permittee".

42. Those export permits showed the python handbags as made from Burmese Python *P m bivittatus* and as CITES Appendix II species[5]. They showed the crocodile handbags as made from Freshwater Crocodile *C siamensis* and as CITES Appendix I species. The crocodile bags (or the crocodiles) were re-exported from Thailand having been imported there from Cambodia.

43. On 7 November 2017 APHA replied to applications dated 27 October 2017 from Mr Horsfield and Mr Robertson on behalf of the appellant for retrospective permits. In their letter APHA said that because the EU legislation allowed for retrospective permits only in "very exceptional circumstances" which were not present the Agency was not satisfied that the relevant criteria had been met, and that APHA had no discretion to consider applications which fall outside the criteria. The letter then listed the conditions in Art 15 Reg 865/2006.

44. The appellant's explanation that they were unaware of the controls did not, said APHA, come within the terms of the criteria. Lack of knowledge of the legislation did not except them from the duty to comply with the legislation.

45. The letter from APHA also referred to the appellant's statement that they were misinformed and poorly advised by HMRC when they contacted them in January 2016 and said that it was not apparent that the appellant made further enquiries of the VAT, Excise and Customs Helpline as they were told to do. It was, they said, the appellant's

[5] This is correct as this subspecies, unlike *P m molurus*, is not in Appendix I.

responsibility to contact the relevant UK authority about importing CITES specimens into the UK.

46. On 15 November 2017 the appellant asked for the restoration of their goods in a long email explaining the background to the importation and the efforts they made to find out what they had to do.

47. On 10 January 2017, 56 days after the request for restoration, Border Force acknowledged it, with apologies.

48. On 29 January 2018 an unnamed Review Officer in Border Force's National Post Seizure[6] Unit wrote to the appellant. They described the things seized and attached as an appendix Border Force's policy for the disposal of seized things. The letter said that everyone involved in the transportation of goods into the UK must make themselves aware of Customs procedures, information about which was freely available at ports and airports, on the internet (www.gov.uk/duty-free-goods) or the HMRC National Advice Service on 0300 200 3700. "Everyone", the officer said, should also take care to ensure that their vehicles were not used to smuggle goods into the UK.

49. The anonymous officer then said that they had looked at all of the circumstances surrounding the seizure but they had not considered the legality or the correctness of the seizure. Their conclusion was that there were no exceptional circumstances that would justify a departure from the Commissioners' policy that in general prohibited or restricted items would not be restored.

50. On 26 February 2018 the appellant confirmed they were asking for a review of the decision.

51. On 11 April 2018 Mr M Summers, a Review Officer of Border Force gave the conclusions of the review which were not to restore the goods seized.

52. On 24 April 2018 the appellant appealed to the Tribunal.

Submissions

53. The Director of Border Revenue, Home Office, says that the review decision was reasonably arrived at because:

(1) The Review Officer applied the Border Force's policy on the restoration of goods but was not fettered by it. That policy is that improperly imported goods will not normally be offered for restoration, but each case is examined on its merits to determine if there are exceptional circumstances that merit departure.

(2) CITES was intended to control the trade in endangered species and requires an import permit. Border Force cannot take into account the ethics of the import, only the law.

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[6] This unit does not, as might be thought, only deal with cases where the seizure was of goods sent by post (as in *Smouha*). A clarificatory hyphen should be read between "Post" and "Seizure".

(3) It is the importer's responsibility to obtain an import permit.

(4) The appellant was wrong to say that there was no guidance given by HMRC or any other body.

(5) The Review Officer found no exceptional reasons to restore the bags.

(6) The goods could not be sold (citing Art 8 Reg 338/97) so refusal to restore could not be causative of losses resulting from the appellant's inability to sell them. The officer noted that while the appeal notice stated that the goods were for personal use, the grounds of appeal make it clear that the importation was a commercial venture.

(7) The application of the Border Force's policy treated the appellant no more harshly or leniently than anyone else in similar circumstances.

(8) The result does not breach the appellant's rights under Art 1 Protocol 1 ECHR, and the decision was fair reasonable and proportionate in the circumstances.

54. The appellant says:

(1) They accept that they did not have the requisite paperwork and Border Force were within their rights to seize the goods, but the punishment, the deprivation of the company's stock leading to the inevitable closing of their business, was not commensurate with the offence. They offered to pay a fine.

(2) They asked HMRC about the importation of crocodile and python products in 2016 and were given information about import duty and VAT. They specifically asked if there were any other licensing considerations for import and no mention was made of a CITES import permit or any other criteria. As first time importers they were let down by HMRC.

(3) They had imported four bags in May 2017 as a "dry run" and had had no issues with import permits or seizure.

(4) Their exporter in Thailand did not inform them that an import permit would be required as well as an export/re-export permit. It had not been an issue with other buyers but it turned out that the appellant was their first EU buyer and the EU rules are different.

(5) Had they done as their import agents suggested and collected the goods on arrival no seizure would have happened. This showed that they had no intention of evading controls.

(6) Their research showed that the crocodiles were not pure bred Siamese crocodiles but were farmed hybrids. Burmese pythons are a pest in eg Florida and are arguably not vulnerable. Had they applied for the correct paperwork the permit would have been granted and so the issue is nothing to do with conservation but bureaucracy.

(7) The purpose of the import was not commercial They intended the bags as samples to take to fashion shows and give to influencers, and if restored they would be given to crowd funding investors for personal use.

Discussion

Further findings of fact

55. Before coming to my decision I need to make findings of fact about the 2016 advice requests and the 2017 "dry run".

56. In an email of 25 January 2016 Mr Robertson emailed an HMRC address "classification.enquiries" with the subject "Query". He referred to the fact that he was trying to ascertain the procedure for importing goods and the relevant tax treatment but had found the online guide very fragmented. He set out the information he needed which was:

(1) confirmation of the commodity code for customs purposes for "handbags hand-manufactured using leather, crocodile and snakeskin".

(2) whether Thailand, the country of origin, qualified for reduced rates of import VAT.

(3) whether import duty was 3% of the retail value or the amount paid.

57. He also asked what if any "licenses" were required, what declarations needed to be made to HMRC and "anything else we need to be aware of".

58. By email of 26 January 2016 Salma Malik of HMRC replied. She confirmed the commodity code but said that to get help on duty/VAT matters from HMRC he should phone the VAT, Excise and Customs helpline.

59. I find as fact that Mr Robertson was not given any information about CITES import permits even though that issue clearly came within the scope of his request. I also find that the email address of the section of HMRC in which Ms Malik worked should have led Mr Robertson to realise that, as she said, "classification enquiries" were just that, about the relevant commodity code for customs (import) duty, and that Ms Malik's directing him to the Helpline about his other specific requests should have made him realise that her part of HMRC was not equipped to give advice about "licensing" requirements.

60. For completeness I should mention that Mr Robertson also said he had contacted an international trade expert in Sheffield Chamber of Commerce but was not told about CITES. That shows that the appellant did make further enquires after the 2016 emails with Ms Malik, but not with HMRC or any other government department.

61. As to the "dry run", Mr Robertson enclosed a number of documents related to this:

(1) Four Thai export permit for 1 python bag each dated 7 November 2016 showing David Horsfield c/o Abbey Glen.

(2) A DHL import VAT and duty statement dated 9 November 2016 addressed to David Horsfield relating to "1 pk handbag" showing Customs Duty of £79.76 and import VAT of £447.09.

(3) Invoices dated 4 November 2016 from Michel Angelo International Co, Ltd of Thailand referring to 5 "Cow leather" bags.

62. Mr Robertson says that they had no issues with this import and the goods were delivered without seizure even though there were no CITES import permits. I cannot draw any inferences from this event other than to say I accept it happened as Mr Robertson described, although Mr Robertson had said in his letter to the original and anonymous decision maker that the dry run was in May 2017. I note that all the bags, being python and not crocodile, fell within Annex II (Appendix B).

63. After considering all of these matters I find as fact that the appellant was unaware of the need for an import permit in addition to an export permit (which they did have).

64. I must also mention a document exhibited by Mr Summers, but not mentioned anywhere else. In his witness statement he lists as one of the documents he relied on in making his decision what he describes as:

> "Admission of mistake and copy of a CITES import permit for a previous importation dated 4th April 2018".

This exhibit consists of a letter and a EU CITES import certificate.

65. The letter is from Magna Leather Corp of El Paso, Texas, USA ("Magna") and is addressed to a Mr Mavros. It refers to a consignment of belts sent by Magna to Mavros which had been held by the UK CITES authority for over a year. The letter referred to a mistake by Magna's shipping department and said they hoped the CITES authority would consider it an honest mistake.

66. The certificate is dated 14 December 2016 and relates to 48 belts made from *Crocodylus novaeguineae* (New Guinea crocodile), a CITES Annex II and Reg 338/97 Appendix B species (only the subspecies *C n mindorensis* (Philippine crocodile) is in Annex I and Appendix A) sent by Magna to Patrick Mavros International in the UK.

67. I find as fact that this letter and certificate had no relevance whatsoever to the appellant and its importations.

The review decision

68. The Tribunal was referred to one decision on CITES imports, *Putri Projosujadi v Director of Border Revenue* [2014] UKFTT 80 (TC) (Judge Adrian Shipwright and Philip Gillett FCA – as he then was, now Judge Gillett of this Tribunal). However that decision was referred to merely to show that the legality of the seizure could not be challenged following *HMRC v Jones and another* [2011] EWCA Civ 824, a proposition with which I wholly agree.

69. I find it somewhat surprising that Border Force did not refer to any other decisions on CITES imports, particularly where, as here, they knew that the appellant was not legally represented, and from the terms of their submissions it is clear they knew at least of the case of *Smouha*. As I have said I find the case of *Smouha* very helpful (as have other Tribunals – see eg *Jacques Armand International Ltd v Director of Border Revenue* [2016] UKFTT 95 (TC) (Judge Amanda Brown and David Earle) ("*Armand*")

and *Sidhom v HMRC* [2015] UKFTT 664 (TC) (Judge Richard Chapman and Mohammed Farooq), a case which also refers to the approval of *Smouha* by the Upper Tribunal in *Putri Projosujadi v Director of Border Revenue* [2015] UKUT 297 (TCC) (Mann J), a decision which is binding on me and is about the question of proportionality.

70. In *Armand* the Tribunal says of *Smouha*:

> "50. Judge Redston undertakes at paragraphs 90 – 135 a detailed analysis of the approach to be taken by the Tribunal in appeals of this type. At paragraphs 136 – 158 she considers the application of the principle of proportionality.
>
> 51. Consistent with the approach taken by Judge Redston it is this Tribunal's role to consider the reasonableness of the decision refusing to restore and the proportionality of the outcome.
>
> 52. The approach to considering the reasonableness of the decision is commonly referred to as *Wednesbury* reasonableness stemming from a 1948 judgment of the High Court in *Provincial Picture Houses Limited v Wednesbury* Corporation [1948] 1 KB 223. A decision is considered to be unreasonable where the decision maker has:
>
> > 'taken into account matters which they ought not to have taken into account, or conversely, have refused to take into account or neglected to take account of matters which they ought to take into account'
>
> 53. At paragraphs 100 – 102 of *Sabine Smouha* the application of these principles to Border Force decisions on restoration are considered:
>
> > '100 The discretion of the Border Force in relation to restoration decisions is given by CEMA s152(b), which provides that Border Force can "restore, subject to such conditions (if any) as they think proper, anything forfeited or ceased under these Acts". That is a very broad discretion.
> >
> > 101 The Border Force are also the body charged with levying sanctions on those who do not comply with Reg 338/97. Article 16(1) of that Regulations provides that there must be "appropriate measures to ensure the imposition of sanctions" on those who, *inter alia*, introduce specimens without the necessary documents. Article 16(2) states that the sanctions must be "appropriate to the nature and gravity of the infringement and shall include provisions relating to seizure and, where appropriate, confiscation of specimens".
> >
> > 102 The broad discretion in CEMA s152(b) is therefore narrowed in the context of CITES importations by the requirements that (a) a sanction be levied for non-compliance and (b) that the sanction complies with Article 16(2) …'"

71. I intend to approach Mr Summers' decision in the same way, that is I will consider the reasonableness of the decision refusing to restore and the proportionality of the outcome.

72. In his witness statement Mr Summers says that he took into account:

(1) A copy of the seizing officer's notebook and the seizure paperwork.

(2) The request for restoration of 10 January 2018 (and oddly the acknowledgement of it dated 10 January 2018).

(3) The decision letter by the anonymous decision maker of 29 January 2018.

(4) The review request letter from the appellant of 26 February 2018 (and oddly the acknowledgment letter of 27 February).

(5) CITES guidance from the internet site.

(6) The CITES export permits from Thailand.

(7) The letter of 10 April 2018 from the USA and the CITES import permits.

73. Mr Summers said that he had considered the decision afresh on its own merits so as to decide if there were mitigating or exceptional circumstances that should be taken into account. Later in the letter he went further and said that he had to consider whether there were mitigating or exceptional circumstances for restoration in the appellant's case and that the outcome of his review was proportionate.

74. He said that "despite your submissions, the legislation with regard to CITES is in force to control the trade in endangered species". I cannot see where the appellant had denied this, indeed the appellant was clearly fully in support of the objectives of CITES.

75. He said further that the appellant had the responsibility to comply with the regulations but they failed to obtain an import permit before importation. That requirement was, he said, made clear in the legislation so there were no exceptional reasons why the goods should be restored.

76. He added that without a valid CITES permit the goods cannot be sold and are therefore of no commercial value in the UK.

77. My main problems with this decision are its internal inconsistency and its lack of reasoning, in respect of both the Border Force policy on restoration and of proportionality.

Reasonableness of the decision – Border Force policy on restoration

78. As to internal inconsistency, Mr Summers refers twice to *mitigating* circumstances as being relevant, but his conclusion is only that there were no *exceptional* circumstances. He does not indicate why he did not regard any of the appellant's submissions as amounting to mitigating circumstances or whether he even considered many of the points made by the appellant which I have summarised at §54.

79. The lack of reasoning and explanation means that I do not know whether Mr Summers appreciated or failed to appreciate that the crocodile handbags were CITES Appendix I goods and the python bags CITES Appendix II goods. He said that he had studied the CITES website and exhibited screenshots of pages which clearly distinguish between the two, especially as regards the different objects of the two Appendices. But no differentiation is attempted despite the differences in treatment in CITES, in Reg 338/97 and in Reg 865/2006.

80. The lack of any reference in the decision to the individual circumstances of the case (including the difference in the legal nature of the two types of bag) or any reasoning about why those circumstances did or did not amount to mitigating circumstances, coupled with the only reasoning actually given, makes it difficult for me not to conclude that Mr Summers was, like Mr Brenton in *Smouha*, simply making a binary decision – "if the law is broken, the goods are forfeit, unless there are 'exceptional' circumstances" (*Smouha* at [150]). That is the message that the only reasoning conveys.

81. In particular the reference to the failure to obtain an import permit "prior to importation" suggests strongly that the only exceptional circumstance Mr Summers would recognise would be the obtaining of a retrospective permit from APHA. Mr Summers knew from the review request that the appellant had tried and failed to get this. He did not apparently include any correspondence from APHA (see §§42 to 45) in his consideration, so was it seems unaware of APHA's reasons for not allowing the application[7]. Thus despite the reference to mitigating circumstances being considered it seems to me that Mr Summers did fetter himself and took a far too narrow view of his role as a reviewing officer and what he could properly take into account. In other words his reference to mitigating circumstances was lip service only, and his reference to exceptional circumstances was, as it as in *Smouha*, only to APHA allowing a retrospective permit.

82. I mention here some of the other matters which Mr Summers did not take into account or did not explain why they did not affect his decision about whether there were exceptional or mitigating circumstances:

(1) The appellant's first "dry run" importation was not seized despite there being no import permit.

(2) The appellant relied on the exporter who was experienced in CITES matters but not in relation to exports to the EU.

(3) The appellant sought information from HMRC about permits in 2016 but was not given any information. The appellant also sought information from the Chamber of Commerce.

(4) They were not attempting to smuggle goods into the UK in contravention of CITES or Reg 338/97.

(5) They did not attempt to collect the goods as soon as they arrived at Felixstowe which, had they done so, would probably have led to them not being seized.

(6) The differences between Appendix I (Annex A) and Appendix II (Annex B) goods, despite his claiming to have looked up the CITES website.

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[7] Not that it would have helped him much. The APHA letter does not anywhere say which of the criteria it refers to were not met, but I infer that it was that the irregularity concerned, failure to have import permits, was "attributable" to the appellant, and that for the crocodile bags (Annex A goods) they were not within art 4(5) of Reg 338/97.

83. In *Smouha* Judge Redston considered that Border Force were wrong to refer to it being the importer's responsibility to obtain the import permit. She pointed out that Guidance Note 1 issued by APHA showed that in cases of postal importation, as in that case, it was the sender's responsibility to obtain the permit. The Guidance Note is silent on imports by sea, as this was, but as Judge Redston noted in *Smouha* (at [130] and [131]):

> "130. However, neither Reg 865/2006 nor Reg 338/97 prescribe who should obtain the import permit. Article 11 of Reg 865/2006 says that permits may 'stipulate conditions and requirements imposed by the issuing authority to ensure compliance with the provisions [of that Regulation].' Article 8 of Reg 338/97 provides that "documents shall be issued" in accordance with that Regulation and that the issuing management authority 'may impose stipulations, conditions and requirements, which shall be set out in the documents.'
>
> 131. An Import Form has to be completed in order to request a permit, and this is presumably a 'document' within the meaning of Article 8 of Reg 338/97. But the guidance issued with the Form does not include any information about identifying the importer or which person has to obtain the permit. …"

84. A case of this sort was considered in *Sidhom*. There the Tribunal interpreted the review officer's statement thus:

> "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."

85. The Tribunal said that:

> "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."

86. For my part I think that the second sentence quoted in §84 is not at all ambiguous. "A failed to do X" is not the same as "A failed to ensure that X was done". The subordinate clause in the second statement just mentioned is in the passive voice and is agentless. The first statement clearly indicates that the responsibility for the doing of X is entirely that of A. Mr Brenton's gloss in evidence on his wording would not have

convinced me that what he said is what he meant in the letter, which is obviously stock wording as Mr Summers used it too.

87. But Mr Summers did not explain what he meant so I have to take what he said at face value. In my view Mr Summers wrongly took into account that it was the importer's responsibility to themselves obtain an import permit.

88. A matter Mr Summers says he did take into account which he should not have was the material about Magna Leather Corporation and the belts. I find it extraordinary that the letter which he exhibited is dated 10 April 2018, the day before the date of his review conclusions letter. He does not say in what way he took in it into account or how it affected his decision.

Reasonableness of the decision – proportionality

89. The same lack of explanation and reasoning infects Mr Summers' decision about proportionality. The appellant suggested that it was disproportionate to seize and not restore any of the goods under any circumstances. They suggested a fine would be more appropriate. The only statement that might bear on this was Mr Summers' view that the goods had no commercial value as they could not (legally) be sold. He does not explain why that is the case especially for Appendix II goods or why it would not have been possible to restore at least the Appendix II goods with restrictions or for a fee.

Decision, direction and appeal rights

90. I find that Mr Summers' decision not to restore all the bags was flawed and unreasonable because, in the absence of reasoning explaining what he did, I find that:

(1) he did not distinguish between the Annex A and Annex B goods.

(2) he did not consider relevant factors, as a result of his fettering his discretion to consider only whether a retrospective permit was obtained.

(3) he considered irrelevant factors, the Magna belts.

(4) he wrongly treated the appellant as responsible for obtaining the import permit.

91. There was also no reasoning to explain why he considered the outcome of his review was proportionate, as he rightly said he was required to do, and what matters, if any, that he took into account in coming to his decision on proportionality.

92. I therefore direct that, in accordance with s 16(4) FA 1994, Border Force must carry out, within 42 days of the release of this decision, a further review of the original decision, by an officer other than Mr Summers, in accordance with the following directions.

93. In carrying out that review, the Border Force is directed:

(1) to separately review the crocodile (Annex A) and the python (Annex B) goods and in doing so to have regard to the law applying to each category.

(2) not to fetter its own discretion by refusing to restore on the basis that APHA had not granted the appellant a retrospective import permit and that there could not as a result be any exceptional circumstances.

(3) not to limit itself by seeking only exceptional circumstances but also to consider mitigating circumstances as it promised to do.

(4) to look at all the facts of this case, including the contacts the appellant made with HMRC; their reliance on the exporter; the "dry run"; their good faith; their compliance with CITES at earlier stages of the goods journey to the UK; and the appellant's efforts to rectify the mistake it accepted it made and all other matters raised by the appellant.

(5) to act proportionately, in accordance with the Preamble and Article 16 of Reg 338/97, so that the sanction imposed on the appellant is "appropriate to the nature and gravity of the infringement" (which might require different sanctions (or lack of them) for Annex A and Annex B goods).

94. 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 THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 16 MAY 2019