



TC04943

Appeal number: TC/2015/00462

EXCISE– seizure of whale bone sculpture - whether refusal to restore unreasonable – yes –appeal allowed and directions given for further review

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JULIET FORSTER-COPPERI

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE TIMOTHY HERRINGTON
JOHN ROBINSON**

**Sitting in public at 83-85 London Road, Southampton, SO15 2SH on 14
December 2015**

The Appellant in person

**Jonathan Underhill, Counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondent**

DECISION

Introduction

1. The appellant is appealing against the decision of Officer Karen Norfolk of the UK Border Force, in a review she performed on 29 December 2014, to refuse to restore a whalebone sculpture and an associated three pronged-skeletal bone (“the Sculpture”) that was seized at Felixstowe Docks on 3 September 2014.

Evidence

2. The appellant gave oral evidence and was cross examined. We found her to be a candid and honest witness and have no hesitation in accepting her evidence.

3. For the Respondent (“the Border Force”) the review officer, Karen Norfolk, gave evidence and she answered questions from the Tribunal. We also found her to be an honest and reliable witness and have accepted her evidence.

4. We also had a bundle of documentation, including correspondence between the parties and their representatives following the seizure and a picture of the seized items.

Findings of fact

5. There was no material dispute on the facts. They can be summarised as follows.

6. The appellant is a British-born artist and sculptress. She is now over 80 years old and after many years living in Southern Africa she decided to return to the United Kingdom in 2014. In that context she arranged with a South African shipping agent for her personal effects to be shipped to the United Kingdom.

7. The Sculpture was amongst those personal effects. It can be described as follows. There is part of a bone from the fin of a whale, shaped like a fan, on which there has been inscribed on one side a Latin inscription, which can be translated as “not for ourselves alone but for all” and on the reverse with depictions of whales. It has been mounted on a piece of preserved wood and two other separate bones are placed contiguously to the fin bone to complete the Sculpture. The bones have been treated to prevent their deterioration; the appellant says that these bones are prone to crumble after some years.

8. The appellant says, and we have no reason to doubt this, that the Sculpture is part of a series she has been working on which “make a strong statement on man’s destruction of the environment flora, fauna, birds and creatures of the sea” and the Sculpture was the most important of the series. It is clearly a serious work of art.

9. On 3 September 2014 officers of the Border Force examined the shipment of the appellant’s personal effects and discovered the Sculpture. It been described on the inventory of the shipment as a bone sculpture.

10. Enquiries of the shipping agent confirmed that it was a whalebone sculpture “of particular sentimental value” to the appellant.

11. Neither the agent nor the appellant obtained an export or import permit as required by the Convention on the International Trade in Endangered Species (CITES) 1973. Whales and their derivatives are protected by CITES. The Sculpture was therefore seized as liable to forfeiture on 3 September 2014 and a Notice of Seizure sent to the appellant informing her that the goods were seized under s 139 of the Customs and Excise Management Act (CEMA) as they were liable to forfeiture under s 49 (1) (b) CEMA because the goods were imported in breach of a prohibition and/or restriction of CITES. A Notice 12A was sent to the appellant explaining her options now that the goods were seized. This stated that she would have one month from the date of seizure to challenge the legality in the magistrates’ court. She did not do this and it was common ground therefore that the goods were duly condemned as forfeit to the Crown by the passage of time by virtue of the provisions of paragraph 5 of Schedule 3 CEMA. The appellant told us she did not challenge the seizure in the magistrates’ court as she was told that it would take at least a year before the case could be heard. She therefore decided to seek restoration from the Border Force.

12. It had never occurred to the appellant that a permit would be required for such an item. She is sympathetic to the purposes of CITES but does not see how its purposes are served by prohibiting the import of an item such as the Sculpture, which as we shall see, was made from an old bone found near the sea.

13. Indeed the appellant had made enquiries of her South African shipping agent before the Sculpture was dispatched and was told that in South Africa there was no need to obtain a permit for the export of bones which are antiques or artwork such as the Sculpture. She was told by her agent that he had been involved in similar situations before and they had never been an issue. It did not occur to the appellant to enquire of the UK authorities as to whether an import permit would be required. It is impossible now to obtain a retrospective export permit in South Africa; indeed this would not be possible in any event without the South African authorities inspecting the Sculpture. As the Border Force seized the item and will not, it seems, send it back to South Africa such an inspection will be impossible.

14. The appellant described how she came to obtain the bones and turn them into a Sculpture as follows. The appellant had been living at St Francis Bay, near Port Elisabeth in South Africa which had previously been the location of a number of whaling stations. It was an area where whale bones were commonly to be found left over from the previous whaling activities. These particular bones have been left on a building plot owned by an acquaintance of the appellant and around 2007 or 2008 she was given them. Although was difficult to judge the age of the bones, they had been weathered by the elements and they could be 30 to 40 years old, evidenced by the fact that they had started to crumble.

15. The appellant was inspired by the beautiful shape of the fin bone to produce the Sculpture in the form described at [7] above.

16. The appellant has at no time had any intention of selling the Sculpture. She does exhibit her works at exhibitions, usual arrangements being that she will pay the exhibitor for the use of the exhibition space by paying a commission of a percentage of the sales of her works achieved through the exhibition.

5 17. The appellant candidly admitted that she would “show off” the Sculpture at these exhibitions as a fine example of her work and although the piece itself was not for sale, it might assist in attracting purchasers of other works in the exhibition.

10 18. Nevertheless, it is clear that the appellant has a personal attachment to the work and she does not wish it to be exploited commercially directly. In her will she has made it clear that she regards the Sculpture as an important piece of work to be donated to and retained by a gallery rather than sold. The appellant has no children but she regards her most important work such as the Sculpture as her child.

19. On 25 September 2014 the appellant wrote to the Border Force requesting restoration of the Sculpture.

15 20. On 4 November 2014 the Border Force wrote to the appellant refusing restoration of the Sculpture. On 26 November 2014 the appellant wrote asking for a review of that decision.

20 21. Officer Norfolk performed a review of the decision to refuse restoration under s 15 Finance Act 1994 (“FA 1994”). In a letter dated 29 December 2014 the Border Force informed the appellant that the Sculpture would not be restored. It is this decision which is the subject of this appeal.

22. The letter contained the following relevant statements:

25 (1) That the general policy regarding the “improper importation” of prohibited or restricted items into the United Kingdom is that they will not be offered for restoration. However, each case is examined on its merits to determine whether or not restoration may be offered “exceptionally”;

(2) That Officer Norfolk had considered the decision afresh on its own merits so as to decide if “any mitigating or exceptional circumstances” exist that should be taken into account;

30 (3) That all of the circumstances surrounding the seizure have been considered but that Officer Norfolk had not considered the legality or the correctness of the seizure itself as that was a matter for the magistrates’ court;

35 (4) That the items were seized as they were considered to be from a species which are listed in the appendices of CITES and that as such the species are considered to be vulnerable or endangered and particularly at risk. Consequently, when they or their derivatives are moved across international borders, both an export and import licence is required.

(5) The letter then set out Officer Norfolk’s reasoning for her decision not to restore as follows:

5 “However, I have to consider whether there are exceptional circumstances in your case
for restoration. It is your responsibility as the importer of such things to ensure the
relevant permits are obtained both at export and import to the UK. It is widely accepted
that ignorance of the regulations is not a “reasonable excuse”. Furthermore you have
10 stated your intention to exhibit the sculpture and therefore with the evidence before me,
I believe this import to be for a commercial purpose and not solely a movement of
personal belongings. Even if you were to have shipped the sculpture as personal
belongings only, as the items are classified as “Annex A” species, you would have been
required to obtain an export permit from South Africa and an import permit to the UK.
15 As it stands, for me to restore the items to you without the relevant permits in place
would be *ultra vires*, however if you were to obtain the required permits, I would be
prepared to review my decision.”

23. The letter then contained the following conclusion:

15 “Taking all the above into account, and in trying to apply a sense of **proportionality**
and **reasonableness** to the circumstances and seriousness of the offence: I conclude
that the original decision should be upheld and the seized items will not be restored to
you.”

24. In her oral evidence, Officer Norfolk stated that the reference in her letter to it
being *ultra vires* to restore the items without the necessary permits having been
20 obtained was “misleading” and she accepted that she could have taken a decision to
restore without permits having been obtained. Officer Norfolk gave as an example of
“exceptional circumstances” which would justify restoration as a situation where the
appellant was misled as to the need for permits having made all necessary enquiries.
When asked as to whether she had considered the question of proportionality her
25 answer was that in the absence of the necessary permits and the fact that the appellant
had failed to apply for them, that the bones were from an Annex A species she
concluded that there were no exceptional circumstances. In coming to her decision
she said she had put heavy weight on the lack of the permits and less weight on the
other factors.

30 25. When asked by the Tribunal what would happen to the Sculpture were it not to
be restored, Officer Norfolk said that although destruction was a possibility it was
more likely that the item would be sold at auction or donated to a gallery.

The Law

35 26. The purpose of CITES is to protect endangered species of fauna and flora
through controlling the international trade in specimens of those species.

27. CITES is enforced in the EU by Council Regulation (EC) 338/97 (“Reg
338/97”), which has direct effect in the United Kingdom.

28. Reg 338/97 has four Annexes. All Cetaceans and their derivatives are classified
as Annex A species which are considered the most vulnerable to overtrading.

40 29. Article 4 of Reg 338/97 covers specimens of the species listed in Annex A the
relevant provisions of which provide:

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

5 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:

....

10 (b) (i) The applicant provides documentary evidence that the specimens have been obtained in accordance with the legislation on the protection of the species concerned which, in the case of import from a third country of specimens of a species listed in the Appendices to the Convention, shall be an export permit or re-export certificate, or copy thereof, issued in accordance with the Convention by a competent authority of the country of export or re-export.

...

15 (d) The management authority is satisfied that the specimen is not to be used for primarily commercial purposes”

30. Article 8 provides as follows:

20 “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.

2. ...

25 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 of
30 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:

35 (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.”

5 31. Thus it can be seen that a retrospective permit can be granted for Annex A specimens if they fall within Article 4(5). That Article refers to (a) specimens previously legally imported into the EU and (b) “work to 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.

10 32. 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:

15 (a) introduction into, or export or re-export from, the Community of specimens without the appropriate permit or certificate or with a false, falsified or invalid permit or certificate or one altered without authorisation by the issuing authority...

...

20 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.”

33. Section 152 of CEMA provides so far as relevant:

“The Commissioners may as they see fit-

(a)...

25 (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the Customs and Excise Acts]...”

30 34. It was not suggested to us that this provision does not apply in CITES cases, and we therefore proceed on the basis that the Border Force does have a discretion to restore the Sculpture even though the relevant provisions of Regulation 338/97 have not been complied with.

35 35. Sections 14 and 15 of FA 1994 make provision for a person to require a review of the decision of the Border Force under s 152 (b) CEMA not to restore anything seized from that person. Officer Norfolk made her decision having carried out such a review.

36. Section 16 (1) of FA 1994 makes provision for an appeal to the Tribunal against a decision made on a review carried out under s 15. Section 16 (4) provides:

5 “(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 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;

10 (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

15 (c) in the case of a decision that has already been acted on or taking effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future.”

37. By virtue of s 16 (8) and Schedule 5 of FA 1994, a decision under s 152 (b) CEMA is a “decision as to an ancillary matter” as referred to in s 16 (4) and accordingly the Tribunal’s jurisdiction on an appeal under s 16 is thus limited. In essence, we have to consider whether Officer Norfolk’s decision not to restore could not reasonably have been arrived at. If we find that it could not have been reasonably arrived at, our powers are limited to making directions of the type referred to at s 16 (4) (a) to (c) above. We have no power to order the Border Force to return the Sculpture to the appellant.

38. We heard no submissions on the question of how the Tribunal must approach the reasonableness of a decision not to restore, but in our view the law is clear on the approach that must be followed which we can summarise as follows.

39. Following the Court of Appeal’s judgment in *Revenue and Customs Commissioners v Jones and another* [2011] EWCA 824, when we are considering the question of reasonableness we must take as a “deemed fact” that the Sculpture was “duly” and therefore lawfully condemned as forfeit because the legality of the seizure was not challenged in the magistrates’ court within one month of the seizure having taken place.

40. The Court of Appeal in *Customs and Excise Commissioners v J H Corbett (Numismatists) Ltd* [1980] STC 231 set out the correct approach for the Tribunal to follow where it has a supervisory (as opposed to a full merits) jurisdiction as it does in this case. In essence the Tribunal has the power to review the exercise of the discretion exercised by Officer Norfolk and in so doing should answer the following questions:

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

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

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

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

41. In ascertaining the reasonableness and lawfulness of Officer Norfolk's decision it is necessary to consider whether the decision not to restore the Sculpture was proportionate. Since Article 16 of Reg 338/97 requires any sanctions imposed for an infringement of the Regulation to be "appropriate to the nature and gravity of the infringement" the EU Law principle of proportionality will be engaged so that the imposition of any sanction must produce a proportionate result.

Discussion

42. As appears from its Statement of Case and Mr Underhill's submissions the Border Force contained that the review decision was one that could reasonably have arrived at for the following reasons:

- (1) They reasonably applied their policy which is that the improper importation of prohibited or restricted items will not be offered for restoration. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally;
- (2) Article 4 of Reg 338/97 restricts the importation into the EU of items such as the Sculpture without both an import and an export licence neither of which were obtained;
- (3) It was reasonable for Officer Norfolk to have considered that there were no exceptional circumstances in this case. It is reasonable to consider that it was the appellant's responsibility to ensure that all relevant permits were obtained and ignorance of the law was not a reasonable excuse;
- (4) It was reasonable for Officer Norfolk to have considered that the import was primarily for commercial purposes because the Sculpture would be exhibited as a means of enhancing the possibility of sales of the appellant's other works of art exhibited, even though the Sculpture itself was not available for sale; and
- (5) It was reasonable for Officer Norfolk, having considered the restrictions placed on importation of endangered species, to find that in this case it is not proportionate or reasonable to restore the goods without valid permits, the officer remaining willing to offer a further review of the situation should retrospective permits be obtained.

It is apparent from this reasoning, and Officer Norfolk confirmed as such during her oral evidence, that in her decision making most weight was placed upon the fact that the necessary permits had not been obtained. Indeed she said in the review letter that it would be "ultra vires" to have restored the Sculpture without permits having been obtained. She also put strong weight on the fact that the appellant had not taken any steps to investigate the position as regards an import permit. In those circumstances, she had concluded, ignorance of the law not amounting to a reasonable excuse, that there were no exceptional circumstances and that therefore the decision not to restore was both reasonable and proportionate. As appears from the way the review letter is phrased, Officer Norfolk's reliance on her finding that the import was for commercial purposes was secondary to her primary concern regarding the lack of permits.

43. It appears to us that Officer Norfolk did not take the following facts into account:

5 (1) The appellant did not ignore the question of the need for permits entirely. She made enquiries of her shipping agent in South Africa who told her that there was no need for a permit for the export of bones which were antiques or artwork and that he had been involved in similar issues before and there have never been an issue;

10 (2) That the positive reply she received from her South African agent meant it did not occur to her to enquire of the position as regards an import permit with the UK authorities;

(3) That it is impossible to obtain a retrospective permit in South Africa without the goods being available for inspection there and that the Border Force would not allow the Sculpture to be repatriated;

15 (4) That the breach of the Regulations was not deliberate on the appellant's part and she acted honestly and in good faith;

(5) That the Sculpture was made from a whalebone which was many years old having been found on a beach as opposed to a bone from a recently poached whale;

(6) That the whalebone had been turned into a serious work of art; and

20 (7) Although the evidence showed that there would be a degree of use for a commercial purpose whether that purpose was the primary purpose for the import, bearing in mind the lack of intent to sell the Sculpture and the fact that the appellant intended that it be left to a gallery in her will.

25 44. Officer Norfolk approached her review by considering whether there were "exceptional circumstances" which justified restoration. However, there is nothing in the legislation or relevant case law which requires circumstances to be "exceptional" before goods are restored. The Border Force are given a broader discretion to restore and that discretion must be considered in the light of Article 16 of Reg 338/97 which
30 requires any sanction, including confiscation, to be appropriate to the nature and gravity of the infringement concerned.

35 45. In our view Officer Norfolk's concentration on the question as to whether there were "exceptional circumstances" and her view that in the absence of the necessary permits and the fact that the appellant made no enquiries of the position in the UK as regards an import permit let her to fail to consider whether, in all the circumstances, it was proportionate of the Border Force to refuse to restore the Sculpture.

40 46. Mr Underhill submitted that Officer Norfolk did consider the question of proportionality but in our view in so far as she did she did so purely on the basis that in the light of the failure to obtain permits and there being no other exceptional circumstances the decision was proportionate.

47. We reject that submission; the question of whether there are exceptional circumstances is not the same thing as to whether a decision not to restore is proportionate. In that context, all the matters we have referred to at [43] above go to the question of proportionality and whether confiscation is an appropriate sanction taking into account the “nature and gravity of the infringement” but Officer Norfolk did not take those into consideration.

48. In particular, the clear purpose of CITES is to deter the exploitation of endangered species for commercial purposes. Whilst we accept that there is a strong public interest in strict import controls for that reason, it needs to be considered whether the purposes are furthered by refusing to restore a serious work of art made innocently out of a bone from a whale which died many years ago.

49. In our view Officer Norfolk focused unduly on the permit issue to the exclusion of other relevant factors. This is further borne out by her reference in the review letter to it being “ultra vires” to restore the Sculpture in the absence of the necessary permits. Although Officer Norfolk retracted that view at the hearing it clearly influenced her decision at the time she wrote the letter and was therefore an irrelevant factor that was taken into account. It is a further indication that Officer Norfolk did not have proportionality in mind to an appropriate extent when she made her decision.

50. We should say a little more regarding Officer Norfolk’s finding that the import was primarily for commercial purposes. The appellant was perfectly open with both the Border Force and in the hearing before us in the fact that the Sculpture was used by her as a marketing tool. It does not appear to us that the appellant is continually marketing her works at exhibitions and as she gets older it is likely that this activity will diminish. Bearing in mind also that in the long-term the appellant is not seeking to exploit the Sculpture commercially and it is destined to be donated to an appropriate gallery in our view the evidence shows that the use for commercial purposes is incidental to the appellant’s desire to retain the Sculpture for herself and then bequeath it on her death. Our conclusion on the facts is therefore that although there is a commercial purpose, the Sculpture was not to be used by the appellant “primarily for commercial purposes” as referred to in Article 4 of Reg 338/97.

51. Turning now to the four questions set out at [40] above we conclude:

- (1) Officer Norfolk reached a decision which no reasonable officer could have reached because of the flaws in her decision making process detailed in our answers to questions (2) to (4) below;
- (2) Her decision betrays an error of law material to the decision because of her failure to give appropriate consideration to the question of proportionality;
- (3) She failed to take into account all relevant considerations, in that she failed to take into account the considerations detailed at [43] above; and
- (4) She took into account an irrelevant consideration, namely her view that a decision to restore the Sculpture in the absence of the necessary permits would be “ultra vires”.

52. We are not satisfied that Officer Norfolk would inevitably have reached the same decision had she taken into account those considerations. Consequently in our view the appropriate course for us to take is to direct that Officer Norfolk’s decision should cease to have effect and a further review of the decision not to restore the Sculpture be undertaken according to the directions that we set out below.

Conclusion

53. The appeal is allowed.

54. In accordance with s 16 (4) of FA 1994, we direct that Officer Norfolk’s decision is to cease to have effect from the date of release of this decision and that the Border Force must, within 6 weeks of the release of this decision perform a further review of the decision not to restore the Sculpture.

55. In performing that further review the Border Force is directed:

- (1) Not to fetter its discretion by relying unduly on the absence of the necessary permits;
- (2) To take fully into account the Tribunal’s findings of fact in this decision, in particular the findings at [43] and [50] above; and
- (3) To act proportionately, in accordance with the principles of EU law and Article 16 of Reg 338/97, so that any sanction imposed on the appellant is “appropriate to the nature and gravity of the infringement”.

56. We also direct that the review be carried out by a different officer. With regard to our direction at [55(3)] above, the Border Force is reminded of its power pursuant to s 152 of CEMA to restore an item subject to appropriate conditions.

57. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**TIMOTHY HERRINGTON
TRIBUNAL JUDGE**

RELEASE DATE: 4 MARCH 2016