TC004350

Appeal number: TC/2014/02680

EXCISE – seizure of crocodile skin handbag – failure to obtain CITES import permit – Appellant advised by AHVLA that goods fell within Appendix 1 of CITES – retrospective permit applied for but refused – forfeiture of handbag – Border Force refusal to restore upheld on review – handbag in fact within Appendix II of CITES – further application for retrospective permit – further refusal by AHVLA – Border Force review decision confirmed – whether discretion fettered – held, yes – whether refusal to restore* Wednesbury *unreasonable – held, yes because of failure to take into account all relevant factors – whether decision proportionate under EU law and the Convention – held, no – appeal allowed and Directions given

FIRST-TIER TRIBUNAL
TAX CHAMBER

SABINE SMOUHA **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE ANNE REDSTON
MR TOBY SIMON

Sitting in public at the Royal Courts of Justice, Strand, London on 8 January 2015, together with further submissions on paper

The Appellant in person

Mr Sharkey of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was Mrs Smouha's appeal against the refusal of the Border Force to restore a handbag made of crocodile skin ("the Bag"). Nile crocodiles (*Crocodilus niloticus*) are protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").

2. When a crocodile skin product is imported into the UK, it must be accompanied by an import permit (sometimes called an import licence) issued by the Animal Health and Veterinary Agency ("AHVLA"). That body has now been renamed the Animal and Plant Health Agency ("APHA"), but for the purposes of this decision we have continued to call it the AHVLA.

3. No import permit was obtained before the Bag was imported. Mrs Smouha's applications for a retrospective permit were refused.

4. The Border Force refused to restore the Bag and Mrs Smouha asked for a review. The Officer of the Border Force who carried out the review upheld the refusal to restore. Mrs Smouha appealed.

5. The Tribunal has a supervisory jurisdiction in relation to Mrs Smouha's appeal. That means we can only allow her appeal if the Officer's decision not to restore the Bag was unreasonable.

6. We decided that the decision was unreasonable because (a) the Officer had not taken into account all relevant factors and (b) it was not proportionate.

7. In restoration appeals such as this, the Tribunal's jurisdiction is limited. We are not able to order the Border Force to restore the Bag to Mrs Smouha. We can only require that it make another decision which must take into account the conclusions reached in this Decision. Our Directions are at §162. The new review should be conducted within 45 days of the release of this Decision.

The legislation and regulations

8. This part of our decision sets out the legislation and regulations, so far as relevant to this Decision.

CITES and Regulation 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. CITES has three Appendices, of which two are relevant:

(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 utilization incompatible with their survival.

10. CITES is enforced 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…"

11. 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.

12. Under Article 2 of Reg 338/97, "specimen" is defined to include "any animal or plant, whether alive or dead, of the species listed in Annexes A to D [and] any part or derivative thereof, whether or not contained in other goods."

13. Nile crocodiles are classified in Appendix I of CITES and Annex A of Reg 338/97. However, the following are included in Appendix II and Annex B:

> "The populations of Botswana, Egypt (subject to a zero quota for wild specimens traded for commercial purposes), Ethiopia, Kenya, Madagascar, Malawi, Mozambique, Namibia, South Africa, Uganda, the United Republic of Tanzania (subject to an annual export quota of no more than 1,600 wild specimens including hunting trophies, in addition to ranched specimens), Zambia and Zimbabwe."

14. Article 4 of Reg 338/97 is headed "Introduction into the Community." Paragraph 1 of that Article covers Annex A specimens and paragraph 2 covers Annex B specimens. The latter 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."

15. The Article sets out other conditions for the importation of Annex B specimens. The only one relevant to this case is the requirement that:

> "the applicant provides…in the case of import from a third country…an export permit issued in accordance with the Convention by a competent authority of the country of export or re-export."

16. Article 7(3) provides a derogation for personal and household effects, but this derogation is of very limited scope and neither party suggested that it was relevant on the facts of this case.

17. Article 8 provides 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.
>
> 2. …
>
> 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."

18. That Article therefore provides that a retrospective import permit may be granted for Annex B specimens if the conditions set out at (3)(a) and (b) are met, but that a retrospective permit can only be granted for Annex A specimens if they fall within Article 4(5). 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.

19. 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…."

20. 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, 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 authorization by the issuing authority…
>
> (b)-(m) …
>
> 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

21. 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."

22. Article 13 repeats Article 8(1) of Reg 338/97, requiring that documents be applied for in sufficient time before importation and Article 14 deals with the validity of documents from third countries.

23. 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 or (re-)exporter informs the competent management authority on arrival or before departure 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 or the (re-)exporter, and that the import or (re-)export of the specimens concerned is otherwise in compliance with Regulation (EC) No 338/97, the Convention and the relevant legislation of the third country…"

UK law: CEMA and appeal rights

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

"(1) Where–

(a) ….

(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."

25. 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 -

(a) ….

(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or ceased under these Acts…"

26. The right to require a review of a restoration decision is contained in Finance Act 1994 ("FA94") 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, not being decisions under this section or section 15 below, that is to say –

(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–

> (a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,
>
> (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."

27. An appeal against a restoration decision is classified as an "ancillary matter" by FA94. The right to appeal a decision as to an ancillary matter is at FA94, 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."

28. Although CEMA and FA94 refer to "the Commissioners" and 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.

29. Similarly, much of the case law to which reference is made in this Decision refers to the Commissioners of Customs & Excise, but as responsibility for most excise matters, including the enforcement of CITES legislation on importation of specimens, has now passed to the Border Force, the case law should be read as applying equally to that body.

The European Convention on Human Rights ("the Convention")

30. Article 1 Protocol 1 of the Convention reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The hearing

31. The hearing of Mrs Smouha's appeal opened on 8 January 2014. It was adjourned for the reasons explained at §70ff. The parties provided the Tribunal with their subsequent correspondence and said they were content for the Tribunal to decide the appeal on the basis of the hearing and that subsequent correspondence.

32. We considered the overriding objective and decided that it was in the interests of justice to proceed on that basis.

The evidence

33. The Tribunal was provided with the following:

(1) the correspondence between the parties and between the parties and the Tribunal, including the review decision of Mr Brenton, Higher Officer of the Border Force, dated 14 April 2014, and his confirmation of that decision on 17 February 2015;

(2) correspondence between Mrs Smouha and the AHVLA;

(3) the CITES re-export permit granted to Hikiji Co. Ltd ("Hikiji"), the Japanese supplier of the Bag to Mrs Smouha;

(4) an invoice for the Bag issued by Hikiji;

(5) an email from Hikiji to Mrs Smouha dated 5 June 2013;

(6) an extract from the Officer's Notebook which was provided to us on the basis that it was a record of the seizure of the goods. We consider this further at §50 below; and

(7) a leaflet issued by the AHVLA entitled "General Guidance for importers and exporters," generally referred to as GN1.

34. Both Mrs Smouha and Mr Brenton gave oral evidence, were cross-examined and answered questions from the Tribunal. We found both to be transparently honest and straightforward witnesses.

35. We deal with Mrs Smouha's evidence under "findings of fact" below.

36. Mr Brenton said he had made the review decision in accordance with Border Force policy, which is that goods are only restored in exceptional circumstances. His words were "CITES is to protect endangered species. If there is no retrospective licence, there are not exceptional circumstances." In answer to a question from Mr Starkey, he denied he was fettered by the Border Force policy.

37. Mr Brenton was also asked by Mr Starkey to give an example of exceptional circumstances when goods would be restored. He said he was aware of a trader who

had contacted the AHVLA for advice as to whether an import permit was required for a certain type of wood oil, and been told that there was no requirement. However, between the date of that advice and the date of the importation, the wood oil had been added to the CITES list. On importation the oil was seized by the Border Force and restoration was refused. The trader applied for a retrospective import permit and the AHVLA granted the permit. The Border Force then restored the wood oil.

38. Mr Brenton also said that he had made his review decision on the basis that Mrs Smouha was the importer and it was her responsibility to obtain the permit.

39. On the basis of the evidence given to us, and listed or otherwise set out in this section, we find the facts set out in the next part of our Decision.

Findings of fact

Mrs Smouha orders the Bag

40. Mrs Smouha's 50th birthday was approaching. Her husband wanted to buy her a special present. Mrs Smouha saw what she described as a "very pretty bag" on Hikiji's website. Hikiji arrange for bags, once ordered, to be handmade by craftsmen in Japan from imported crocodile skins. Mrs Smouha described Hikiji as "a very reputable firm in Japan who has its shop in a hotel." This was not challenged and we accept it.

41. Mrs Smouha emailed Hikiji, enquiring about the bags. Hikiji replied on 5 June 2013, explaining that the bags are custom-made, and that their designer, Mayumi Kondo, carefully selects the hides and works closely with skilled artisans who make the bags. The email gave the price ($3,400); the expected delivery date (September 2013) and ends by saying "we should be able to issue CITES."

42. Mrs Smouha ordered the Bag, although her husband paid for it. The Bag was made with crocodile skin imported into Japan from Zambia. The importation was CITES compliant.

43. Hikiji knew that a CITES re-export permit would be required when the Bag was sent to Mrs Smouha, and discussed this with Mrs Smouha: she asked Hikiji whether this would be an extra cost. Hikiji offered to pay for the permit and did so.

44. Mrs Smouha believed that "everything was being taken care of" by Hikiji in relation to compliance with CITES. It was, however, the first time that Hikiji had exported to the UK, although Mrs Smouha was not aware of this until after the Bag had been imported. Mrs Smouha said "both they and I thought everything was in order. I had no idea that two CITES certificates were required, nor did they." Mr Sharkey did not challenge these statements of belief and we accept them.

The Bag is sent to the UK and detained

45. The Japanese re-export permit stated that the Bag was classified under CITES Appendix II R. The suffix "R" added to the Appendix II classification is used for "specimens of animals reared in a controlled environment, taken as eggs or juveniles

from the wild, where they would otherwise have had a very low probability of surviving to adulthood."

46. The Bag was sent to the UK via EMS, the Express Mail Service in Japan. On 11 October 2013, a parcel containing the Bag arrived at "Coventry hub." The date of arrival is not in dispute and is supported by later correspondence.

47. Mrs Smouha's unchallenged evidence, which we accept, was that the CITES re-export permit had become detached from the parcel during transit; EMS accepted that this was their fault and a copy of the permit was subsequently obtained from Hikiji and sent through to the Border Force.

48. An invoice attached to the parcel describes the Bag as "genuine crocodile skin Tote bag, black matt, Nile Crocodile, bronze cowhide leather lining, matt gold metal." The price was again given as $3,400. At the bottom of the invoice, under "other comments or special instructions," are the words "Documentation: CITES."

49. On 25 October 2013, the Border Force wrote to Mrs Smouha, advising her of that the goods had been detained, and saying that the Bag appeared to be goods "which may be imported into this country only under authority of an Import licence…if you hold an appropriate licence, please send it to the address above. If you do not have an appropriate licence, an application for a licence should be sent to…" and giving her the address of the AHVLA.

The Officer's Notebook

50. Although the Bag arrived at the Coventry Hub on 11 October 2013, the copy of the Officer's Notebook included as Exhibit 2 to Mr Brenton's witness statement is headed "Notes started at Coventry International Hub on 21 January 2014 at 11.08 hours." The Note reads:

> "I broke seal [reference] to re-examine goods in parcel. Found to contain one crocodile skin tote bag, black in colour, bronze lining, labelled mayumkondo crocodile skin tote bag found in a felt material draw string bag inside a black cardboard box. Affixed to the parcel CITES export permit and proforma invoice was found. Parcel placed into inverted [?] seizure bags and resealed under [reference] and placed in storage."

51. The Note is signed and dated by Officer Lois Goodban on 21 January 2014 as well as by JT Carter, another Border Force Officer, acting as witness.

52. It is clear from the details given by Officer Goodban that she is describing the Bag. We first thought that the discrepancy between the date of the Bag's arrival and the date given the Notebook might be explained by Bag having originally been "detained"; it was not seized until later. However, the Notice of Seizure was issued on 2 December 2013, see §60, over six weeks before the date on Officer Goodban's Note.

53. Furthermore Officer Goodban records that the parcel had the CITES export permit attached, when in fact it had become detached from the parcel and had to be resent.

54. Although this Note was attached as an exhibit to Mr Brandon's witness statement, we were not taken to it during the hearing. However, as there is no dispute that the Bag arrived without an import permit, we decided that it was not in the interests of justice to ask the Border Force for further submissions to explain these discrepancies.

55. Nevertheless, we find as a fact that Officer Goodban's note relates to a re-examination of the Bag rather than the initial examination. It was not contemporaneous with either the detention or the seizure being over three months after the detention and over six weeks after the seizure.

The first refusal of a retrospective permit, and the seizure

56. Mrs Smouha completed an Import Form asking for a retrospective import permit. On 19 November 2013 she received an email from Mr Tom Adams of the AHVLA saying that the information she had entered on the Form was incomplete, and advising her to "put the Annex which is A and the Appendix which is 1."

57. On 21 November 2013 Mrs Smouha's application for a retrospective import permit was rejected. Ms Nicholls, the AHVLA's Licensing Team Manager, said that "the EU Regulations allow the issue of retrospective import permits only in very exceptional circumstances" and under those regulations the AHVLA had no discretion to issue a retrospective permit for specimens listed on Annex A of Reg 338/97 unless the following four criteria were met:

(1) Any irregularities are not attributable to the importer/(re)-exporter.

(2) The import is otherwise in accordance with CITES, Reg 338/97 and the relevant legislation of the third country concerned.

(3) In the case of pets or household items, there was no intent to deceive.

(4) The specimens have previously been legally imported into or acquired within the EU, or are worked specimens acquired more than 50 years previously.

58. Ms Nicholls' letter went on to say that criteria (1), (2) and (4) had not been met. We observe that (3) was not relevant because the Bag did not satisfy the derogation for pets or household items, see §16. Item (4) is only relevant to Annex A specimens, see §18.

59. Mrs Smouha forwarded AHVLA's letter to the Border Force.

60. On 2 December 2013, the Border Force issued a Notice of Seizure on the grounds that the Bag was "an endangered species imported into the United Kingdom contrary to the prohibition in force" and cross-referencing to Reg 338/97.

61. The Notice went on to explain the procedure for challenging the forfeiture, and that Mrs Smouha could request restoration by writing to the "National Post Seizure Unit." The letter continues (embolding in the original):

> "The Border Force will consider all such requests on their individual merits and all relevant facts will be taken into account. **However, normally it is the Border Force's policy not to return (restore) seized goods prohibited from importation (for example endangered species)**."

62. The Notice was sent to Mrs Smouha with a covering letter from the Border Force at "Detection Central, Post Detection Team, Coventry International Hub." The email address begins "postal.seizures…"

63. On 17 December 2013, a firm of solicitors called Singleton, Saunders, Flood ("SSF") representing Mrs Smouha, wrote to the Border Force at Detection Central, Post Detection Team, Coventry International Hub, asking for restoration. The letter says that Mrs Smouha had made "an honest mistake" which she had subsequently done everything she could to rectify. The Border Force did not dispute that she did make an honest mistake and we find this to be a fact.

64. On 22 January 2014, the Border Force informed SSF that its letter had been forwarded along with the case papers to the "National Post Seizure Unit in Plymouth" for their review.

65. The Bag was sent by EMS, which is express mail. It arrived at the Coventry Hub. The decision to seize the Bag was made by an Officer from the "National Post Seizure Unit." Mrs Smouha first corresponded with the Post Detection Team, which has an email address beginning "postal.seizures…" and her case was then redirected to the National Post Seizure Unit in Plymouth. We find, based on these facts, that the Bag arrived in the UK by post.

The decision to refuse restoration and the review decision

66. On 20 February 2014, the Border Force refused restoration. The letter said that (emphasis in original):

> "the Directors' [sic] 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."

67. The letter goes on to say that the officer has "looked at all the circumstances surrounding the seizure" but not the legality of the seizure itself. It continues (again, emphasis in original):

> "I conclude that there are no exceptional circumstances that would justify a departure from the Commissioners' [sic] policy as the Animal Health and Veterinary Laboratories Agency have stated that there are no very exceptional circumstances in this case to allow them to issue a retrospective permit to import the goods and they also state that they

> have no discretion to consider applications outside this criteria. In view of the fact that no import permit has been issued for these goods, I can confirm that on this occasion **the goods will not be restored**."

68. On 2 March 2014, Mrs Smouha asked for a review of the decision and her solicitors also wrote to the Border Force. Mr Brenton issued his review decision on 14 April 2014. The letter repeats the paragraph set out at §66 with the same emphasis. It then continues (again, emphasis in original):

> "It is for me to determine whether or not the contested decision should be upheld, 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 of the date of seizure and the related evidence, so as to decide if any mitigating or exceptional circumstances exist 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 time of the decision."

69. After stating that he is not considering the legality of the seizure, Mr Brandon says:

> "The thrust of your correspondence and that of your client is summarised in your letter of 17 December 2013:
>
> *'there has been no attempt by our client to evade or ignore any regulations and the irregularity in the absence of CITES for[m] has come about purely as an honest mistake on the part of our client…'*
>
> 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. Your client failed to obtain an import licence for the bag prior to its importation into the UK. Whether by design or as "an honest mistake" the legislation is clear. You and your client have not evidenced any exceptional reasons why the bag should be restored."

The appeal hearing and subsequent events

70. On 8 January 2015 Mrs Smouha's appeal hearing opened. The Tribunal asked why the Bag had been classified under Annex A, Appendix 1, when the skin had come from Zambia. Mrs Smouha explained that she had simply followed the instructions given by the AHVLA when filling in the Import Form. She provided the Tribunal and the Border Force with her email correspondence with Mr Adams of the AHVLA.

71. Mr Sharkey accepted, having consulted the legislation, that the Import Form had wrongly classified the Bag as within Annex A and Appendix 1, when it should have been classified as within Annex B and Appendix II.

72. Mr Brenton said he had been unaware of the correspondence between Mrs Smouha and the AHVLA about completing the Import Form. He had not realised that

the Bag had been wrongly classified on the Import Form, or that this had come about because of advice from the AHVLA. He said that as the Bag was under Annex B and not Annex A, had an import permit been requested before it arrived in the UK, it would have been issued. He had also not previously seen the email from Hikiji dated 5 June 2013, which was handed up at the hearing.

73. The parties asked for an adjournment with directions so that Mrs Smouha could reapply to the AHVLA for a retrospective permit. The Tribunal agreed; the appeal was adjourned and directions given. Mrs Smouha made a fresh application to the AHVLA for a retrospective import permit using a new Import Form.

74. On 20 January 2015, Ms Nicholls of the AHVLA responded, saying that while she accepted that the crocodile skin was from Zambia and that the Bag was therefore in Annex B and not Annex A, nevertheless under Regulation 865/2006 the AHVLA had no discretion to grant a retrospective import permit unless "any irregularities are not attributable to the importer or re-exporter" and this condition had not been satisfied. As a result, no retrospective import permit could be granted.

75. On 17 February 2015, having received that AHVLA letter, Mr Brenton wrote to Mrs Smouha, saying that:

> "as the AHVLA have refused to issue a retrospective license for the crocodile skin Tote bag on the new information supplied by you, I confirm that the decision in my letter dated 14 April 2014 stands."

One decision?

76. On 14 April 2014 Mr Brenton made the review decision. Mrs Smouha appealed that decision.

77. In the course of the hearing, Mr Brenton was provided with the email from Hikiji dated 5 June 2013. He also accepted that the Bag was in Annex B and not in Annex A. He was subsequently informed that the AHVLA had nevertheless refused to issue a retrospective import permit because the legislation did not give them any discretion to do so unless "any irregularities are not attributable to the importer or re-exporter." On 17 February 2015 he wrote confirming the decision of 14 April 2014.

78. We considered whether Mr Brenton's letter of 17 February 2015 was a new decision, or the same decision as that made on 14 April 2014. If it was a different decision, did Mrs Smouha have to make a fresh appeal?

79. In *C & E Comms v Alzitrans SL* [2003] EWHC 75 ("*Alzitrans*"), Blackburne J said that it was open to the Commissioners to bring forward, at the tribunal appeal hearing, reasons for their decision which were different from those included in the review letter. He continued:

> "Were it otherwise, and it was plain that the reasons originally given were manifestly bad but the decision could be justified on other grounds, the (almost) inevitable consequence is that an appeal to the Tribunal against the decision would result in the matter having to be

> referred back to the Commissioners for a further review in accordance with section 16(4)(b)."

80. Given that there is no new decision where there has been a change of reasons for that decision, the same must be true where new information is provided which does not change the officer's decision.

81. Here, Mr Brenton has been provided with new information: the Annex B categorisation of the Bag, the email from Hikiji, and the second refusal of the AHVLA to issue a retrospective permit, for narrower reasons. However, none of this changed his decision.

82. In conformity with Blackburne J's decision in *Alzitrans*, we find that Mr Brenton made one decision, against which Mrs Smouha had appealed, and therefore we retained jurisdiction to decide her appeal.

Submissions by and on behalf of the parties

83. Mrs Smouha said that she had never tried importing something like this before. She had seen the note at the bottom of the 5 June 2013 email from Hikiji about dealing with CITES and had subsequently been told Hikiji was getting the re-export permit. She had trusted Hikiji to deal with CITES.

84. Furthermore, the crocodile skin had been legally imported into Japan, and legally re-exported: she had no idea she also needed an import permit. She was very sad to lose her birthday present and had done everything she could to remedy the position. She would, for instance, be willing to pay a reasonable fine.

85. Mr Sharkey submitted that Mrs Smouha's appeal could only be allowed if Mr Brenton's decision was outside the band of possible reasonable decisions. Mrs Smouha was the importer, and it was therefore her responsibility to obtain the import permit. Her failure to do so cannot be an exceptional reason to depart from the Border Force's policy of not restoring the goods. The underlying basis for the policy, and Mr Brenton's decision, is that CITES legislation is to control the trade in endangered species. Mr Sharkey submitted that the decision was "fair, reasonable and proportionate in the circumstances."

Structure of our decision

86. The Tribunal's jurisdiction is limited. As set out at §4, we can only allow Mrs Smouha's appeal if Mr Brenton's review decision not to restore was unreasonable. We have considered that under two headings, *Wednesbury* unreasonableness, and proportionality.

87. In relation to *Wednesbury* unreasonableness our decision is structured as follows :

(1) the meaning of *Wednesbury* unreasonableness;

(2) how *Wednesbury* unreasonableness applies to AHVLA decisions on granting retrospective import permits;

(3) how *Wednesbury* unreasonableness applies to the Border Force in relation to decisions about the restoration of CITES specimens;

(4) the policy of the Border Force in relation to the restoration of CITES specimens;

(5) Mr Brenton's decision in Mrs Smouha's case;

(6) whether Mr Brenton fettered his discretion;

(7) relevant factors not taken into account by Mr Brenton;

(8) a factor wrongly taken into account by Mr Brenton;

(9) the Tribunal's decision on unreasonableness.

88. In relation to proportionality, we considered:

(1) the meaning of proportionality in the context of EU law in general and Reg 338/97 in particular, and in the context of the Convention; and

(2) whether Mr Brenton's decision in Mrs Smouha's case was proportionate.

89. Having considered both *Wednesbury* unreasonableness and proportionality, we set out our overall decision and the consequent directions.

WEDNESBURY UNREASONABLENESS

What is *Wednesbury* unreasonableness?

90. The term *Wednesbury* unreasonableness comes from the case called *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223, where Lord Greene said at pages 223-24 that a decision would be unreasonable if the decision makers have:

> "taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account."

91. In *C& E Commrs v J H Corbitt (Numismatists) Ltd* [1980] STC 231 Lord Lane said that the where the Tribunal has a supervisory jurisdiction (as it does in Mrs Smouha's case), it can review the exercise of a discretion exercised by Commissioners of Customs & Excise to see if they:

> "had acted in a way in which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight."

92. In *Lindsay v C&E Commrs* [2002] STC 588 ("*Lindsay*"), a case about the restoration of a vehicle, Lord Phillips MR at [40] affirmed that a decision of the Commissioners of Customs & Excise will be unreasonable if "they take into account irrelevant matters, or fail to take into account all relevant matters."

How does *Wednesbury* unreasonableness apply to AHVLA decisions?

93. In order to see whether a public body has acted unreasonably in the *Wednesbury* sense, it is necessary to consider the scope of their discretion.

94. The discretion of the AHVLA is tightly circumscribed by EU law. Under Article 8(3) of Reg 338/97 the AHVLA can only issue a retrospective import permit:

> (1) in relation to Annex A specimens if they are (a) specimens previously legally imported into the EU or (b) worked specimens that were acquired more than 50 years previously; and
>
> (2) in relation to the Annex A specimens within (1), and all Annex B or C specimens, if :
>
> > (a) the irregularities are not attributable to the (re)exporter; and/or the importer; and
> >
> > (b) the import is otherwise in compliance with Reg 338/97, CITES, and the legislation of the third country from which the specimens were (re)exported.

95. We observe that Reg 338/97 does not mention "exceptional" circumstances.

96. Article 15 of Reg 865/2006 was set out earlier in this decision and repeated here for ease of reference. It is headed "Retrospective issue of certain documents" and reads (emphasis added):

> "1. By way of derogation from Article 13(1) and Article 14 of this Regulation, and provided that the importer or (re-)exporter informs the competent management authority on arrival or before departure 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 or the (re-)exporter, and that the import or (re-)export of the specimens concerned is otherwise in compliance with Regulation (EC) No 338/97, the Convention and the relevant legislation of the third country…"

97. The second paragraph of this Article replicates the requirements in Article 8(3) of Reg 338/97. It is clear from the italicised phrase that it is the satisfying of those requirements which allow permits "exceptionally [to] be issued retrospectively." In other words, the Regulation does not provide a further discretion, allowing retrospective permits to be issued in other "exceptional" situations; rather, it is describing as "exceptional" the situations where the Article 8(3) conditions are met

98. A decision of the AHVLA to refuse a retrospective import permit would therefore be unreasonable in the *Wednesbury* sense if the AHVLA had failed to take into account matters which were relevant to the exercise of that very limited discretion – for instance, if it had failed to consider a fact which showed that the importation was the fault of neither the importer nor the exporter.

99. In his oral evidence, Mr Brenton gave the example of a trader who had imported wood oil in reliance on advice given by the AHVLA. The failure to obtain a permit was therefore not the fault of either the importer or the (re) exporter, but an accident of timing. Had the AHVLA nevertheless refused to give the retrospective permit, that refusal could have been challenged as *Wednesbury* unreasonable. However, quite properly, the AHVLA issued the retrospective permit.

How does *Wednesbury* unreasonableness apply to Border Force decisions?

100. The discretion of the Border Force in relation to restoration decisions is given by CEMA s 152(b), which provides that the 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 Regulation 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 the seizure and, where appropriate, confiscation of specimens."

102. The broad discretion in CEMA s 152(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). However, it remains much wider than that of the AHVLA.

The policy of the Border Force

103. The stated policy of the Border Force is only to restore goods where the circumstances are "exceptional." This is clear from Mr Brenton's evidence, from the paragraph stating this in the letter refusing restoration dated 20 February 2014, and the repetition of the same paragraph in Mr Brenton's review letter of 14 April 2014. Both letters state that this a general policy, and our understanding is that it is not limited to CITES specimens.

104. However, the Border Force's letter refusing restoration reads as follows, with emphasis added:

> "I conclude that there are no exceptional circumstances that would justify a departure from the Commissioners' policy *as the Animal Health and Veterinary Laboratories Agency have stated that there are no very exceptional circumstances in this case* to allow them to issue a retrospective permit to import the goods and they also state that they have no discretion to consider applications outside this criteria."

105. It appears from this that the Border Force's policy on restoration of CITES specimens may equate:

(1) the meaning of "exceptional" under its own general policy guidelines; with

(2) the meaning given to "exceptionally" by Reg 865/2006, Article 15, under which the AHVLA can issue retrospective import permits only when the conditions in Article 15(2) are satisfied.

106. Conflating these two different concepts would restrict the exercise of the Border Force's discretion, making it as narrow as the discretion given to the AHVLA. That would be a clear fetter on the exercise of their own much wider statutory discretion.

107. If the restoration policy of the Border Force does fetter its discretion, is that relevant to the jurisdiction of the Tribunal? Under FA94, s 16(4), our power is "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." That clearly gives us jurisdiction to consider *Wednesbury* unreasonableness, but does it extend to allowing an appeal on the basis that the Border Force's discretion has been fettered? We observe that the approach taken by the High Court to the exercise of their judicial review function is that unreasonableness and fettering of discretion are not the same, but are instead different ways in which a decision might be flawed for illegality.

108. The answer is given in *Lindsay*, where Lord Philips found that the restoration policy then being operated by the Commissioners had fettered the discretion of its officers. He went on to say at [66] that the decision of the Officer in question "could not stand because she had failed, when reaching it, to have regard to all material considerations." In other words, if a policy fetters an officer's discretion, that officer may not be able to consider all relevant matters, as he is required to do. As a result, the fettering of discretion may cause that officer's decision to be *Wednesbury* unreasonable.

109. When deciding whether Mr Brenton's decision not to restore the Bag to Mrs Smouha was unreasonable, we therefore consider as part of the background whether or not his discretion was fettered.

Mr Brenton's decision

110. Mr Brenton's review letter includes a paragraph stating that he has not fettered his discretion, that he looks at "every case on its individual merits" and has considered the possibility of "mitigating" as well as "exceptional" circumstances."

111. It is not enough, however, to include a policy paragraph such as this in the review letter. We must consider, on the evidence before us, whether or not Mr Brenton has in fact fettered his discretion, whether he has looked at the individual merits, whether he has considered mitigation, and what he meant by "exceptional" circumstances.

112. As already set out at §69, after the "policy paragraph" Mr Brenton first said that he was not considering the legality of the seizure, and continued:

> "The thrust of your correspondence and that of your client is summarised in your letter of 17 December 2013:
>
> *'there has been no attempt by our client to evade or ignore any regulations and the irregularity in the absence of CITES for[m] has come about purely as an honest mistake on the part of our client…'*
>
> 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. Your client failed to obtain an import licence for the bag prior to its importation into the UK. Whether by design or as "an honest mistake" the legislation is clear. You and your client have not evidenced any exceptional reasons why the bag should be restored."

113. In his second letter, of 17 February 2015, Mr Brenton said:

> "as the AHVLA have refused to issue a retrospective license for the crocodile skin Tote bag on the new information supplied by you, I confirm that the decision in my letter dated 14 April 2014 stands."

114. These two letters provide evidence that Mr Brenton considered:

(1) the purpose of CITES;

(2) Mrs Smouha's "honest mistake";

(3) her failure to obtain the import licence;

(4) her failure to comply with the legislation; and

(5) AHVLA's refusal to issue a retrospective licence.

115. We next consider whether Mr Brenton's discretion was fettered, and whether he failed to take into account all relevant factors.

Fettering of discretion?

116. We have already said that if the Border Force is equating (a) the meaning of "exceptional" within its own policy guidelines with (b) the meaning of that term in the context of the AHVLA's limited discretion over the issuance of retrospective permit, that would be an impermissible fettering of the Border Force's discretion. Was that the approach taken by Mr Brenton?

117. In his oral evidence he was asked by Mr Sharkey to explain under what "exceptional circumstances" he could restore CITES goods. His words were "if there is no retrospective licence, there are not exceptional circumstances."

118. The example he gave of exceptional circumstances concerned a person who had been issued with a retrospective permit because the conditions of Regs 338/97 and 865/2006 had been satisfied. In other words, the Border Force restored the goods

only after the AHVLA had given the retrospective import licence because the facts came within the narrow discretion given to that body.

119. Mr Brenton told the Tribunal that if the AHVLA issued a retrospective import permit to Mrs Smouha, he would restore the Bag. When the AHVLA refused to issue the permit, as we have already noted, he wrote to her on 17 February 2015, saying (emphasis added):

> "*as the AHVLA have refused* to issue a retrospective license for the crocodile skin Tote bag on the new information supplied by you, *I confirm* that the decision in my letter dated 14 April 2014 still stands."

120. From his oral evidence, including the example, and the second letter, we find that Mr Brenton was applying the term "exceptional" as that was understood by the AHVLA and not the wider interpretation which is required under CEMA. This finding is also consistent with the position of the officer who made the original refusal decision, see §103.

121. In other words, Mr Brenton's understanding of the Border Force policy was that he could only restore the Bag if the AHVLA granted a retrospective import permit. As a result, we find that his discretion was fettered. This may be the reason why he failed to take into account all relevant matters, as we set out in the next section.

Relevant factors not taken into account

Reasonable reliance on Hikiji

122. The first relevant factor which Mr Brenton has not considered is the extent to which Mrs Smouha was relying on Hikiji. In particular:

(1) Mrs Smouha had no previous experience with CITES;

(2) she is not in business, but ordered the Bag as a private individual;

(3) Hikiji are a reputable Japanese company;

(4) Mrs Smouha had been told by Hikiji that it was dealing with the CITES obligations;

(5) she discussed the CITES re-export permit with Hikiji and agreed how it was to be paid for;

(6) Hikiji completed the re-export permit and attached it to the goods;

(7) Mrs Smouha did not know, until the Bag was detained and she made further contact with Hikiji, that it had never previously imported goods into the UK.

123. Given her lack of experience, and the representations made by Hikiji, we find that Mrs Smouha's reliance on Hikiji was reasonable.

Nature of specimen

124. The second relevant factor is the nature of the specimen. This was not an Annex A specimen, at risk of extinction. It was the skin of a Zambian crocodile, "reared in a

controlled environment." This indicates that it was the product of a crocodile farm, the purpose of which was presumably to sell the skins so they could be made into shoes and bags.

125. The classification of the specimen meant that an import permit would have been given had Mrs Smouha or Hikiji requested it before importation.

Previous compliance

126. The third relevant factor is that the skin was legally exported from Zambia, legally imported into Japan, and legally re-exported from Japan. The skin was not smuggled into the UK in defiance of CITES. The only reason for the absence of an import permit was that neither Hikiji nor Mrs Smouha realised that there was a further CITES requirement.

Matter wrongly taken into account

127. It appeared to us that there was a further error. Mr Brenton said:

> "It is the responsibility of the importer for any goods encompassed with the legislation to comply with the regulations in force. Your client failed to obtain an import licence for the bag prior to its importation into the UK."

128. No legal authority was cited to support Mr Brenton's statement that the obligation to obtain the import permit rested with Mrs Smouha as the importer.

129. There is no doubt that an import permit is required by Reg 338/97, as Article 4(2) requires:

> "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."

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 338/9. But the guidance issued with the Form does not include any information about identifying the importer or which person has to obtain the permit. However, that guidance states on its face that it has to be read in conjunction with GN1, which contains this paragraph (emphasis added):

> **"8. Importing and exporting CITES controlled items by post**
>
> All CITES import and (re)export permits must be endorsed (stamped) by the appropriate customs authorities upon entry into or exit from the

> EU. Where CITES controlled items are imported or exported via the postal system, it is the *sender's* responsibility to obtain the appropriate documents and submit them to the UK Border Force (UKBF) for endorsement."

132. We have already found as a fact that the Bag arrived by post, see §65. Under paragraph 8 of GN1, responsibility for obtaining the import permit therefore rested with Hikiji, and not, as Mr Brenton stated, with Mrs Smouha.

133. We find that Mr Brenton not only failed to take into account Mrs Smouha's reasonable reliance on Hikiji (see §123), but wrongly considered that the responsibility for obtaining the import permit rested with Mrs Smouha, whereas paragraph 8 of GN1 states that it was the obligation of the sender, namely Hikiji.

Conclusion on unreasonableness

134. We therefore find that Mr Brenton's decision was unreasonable because it did not take into account Mrs Smouha's reasonable reliance on Hikiji; the nature of the specimen, or previous compliance with CITES. Instead, Mr Brenton fettered his discretion by believing that he could only allow restoration if the AHVLA had granted a retrospective import permit. Further, he placed the responsibility for obtaining the import permit on Mrs Smouha, when under the AHVLA guidance, it rested on Hikiji.

135. That is enough to decide the appeal in Mrs Smouha's favour. But we go on to consider the principle of proportionality and whether the decision not to restore was proportionate.

PROPORTIONALITY

The principle

136. The Preamble to Reg 338/97 says that its purpose is "to ensure the broadest possible protection for species covered by this Regulation." That is our starting point. The Border Force has the important responsibility of policing compliance with Reg 338/97.

137. However, the Preamble also says at [17] that (emphasis added):

> "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.*"

138. Article 16 of Reg 338/97 deals with sanctions. It opens by saying that "Member States shall take appropriate measures to ensure the imposition of sanctions" and paragraph 2 provides that the sanctions:

> "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."

139. These are explicit requirements that penalties for non-compliance with Reg 338/97 be proportionate as well as effective. Proportionality is also one of the general principles of EU law, see for example *R v Minister for Agriculture, Fisheries and Food Ex p Fedesa* (C-331/88) at [13].

140. In the House of Lords' decision in *C R Smith (Glaziers) (Dunfermline) Ltd* [2003] STC 419 Lord Hoffman explained what this entailed at [25]:

> "But in general European law would require them to satisfy the principle of proportionality in its broad sense, which, following German law, is divided into three sub-principles: first, a measure must be suitable for the purpose for which the power has been conferred; secondly, it must be necessary in the sense that the purpose could not have been achieved by some other means less burdensome to the persons affected, and thirdly, it must be proportionate in the narrower sense, that is, the burdens imposed by the exercise of the power must not be disproportionate to the object to be achieved."

141. Proportionality is also a requirement of the Convention. Refusal to restore the Bag is an interference with Mrs Smouha's rights under the first paragraph of A1P1, because it deprives her of a possession. The second paragraph of A1P1 is not in point here, as a refusal to restore is not the levying of "taxes or other contributions or penalties."

142. The Supreme Court recently considered A1P1 and proportionality in *R v Waya* [2012] UKSC 51, in the context of whether a confiscation order made following Mr Waya's false declaration for mortgage purposes was compatible with A1P1. The facts are obviously different to the present case but the principles considered by the Court are essentially the same. The judgment in *Waya* was given by Lord Walker and Hughes LJ. At [12] they said:

> "It is clear law, and was common ground between the parties, that [A1P1] imports, via the rule of fair balance, the requirement that there must be a reasonable relationship of proportionality between the means employed by the state in, *inter alia*, the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation. That rule has consistently been stated by the European Court of Human Rights."

143. They then cited *Jahn v Germany* (2006) 42 EHRR 1084 at [93], describing it as setting out a principle "gathered from established Strasbourg jurisprudence in terms often repeated and generally applied":

> "The court reiterates that an interference with the peaceful enjoyment of possessions must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights: see, among other authorities, *Sporrong and Lönnroth v Sweden* (1982) EHRR 35, para 69. The concern to achieve this balance is reflected in the structure of article 1 of Protocol No 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle

> enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions: see *Pressos Cia Naviera SA v Belgium* (1995) 21 EHRR 301, para 38.
>
> In determining whether this requirement is met, the court recognises that the state enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question: see *Chassagnou v France* (1999) 29 EHRR 615, para 75."

144. In *Lindsay*, Lord Phillips MR considered the application of A1P1 to the Commissioners' policy of not restoring vehicles used to import excisable goods into this country in excess of guideline levels. At [52] he observed:

> "The Commissioners' policy involves the deprivation of people's possessions. Under Article 1 of the First Protocol to the Convention such deprivation will only be justified if it is in the public interest. More specifically, the deprivation can be justified if it is 'to secure the payment of taxes or other contributions or penalties'. The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued . I would accept [the] submission that one must consider the individual case to ensure that the penalty imposed is fair. However strong the public interest, it cannot justify subjecting an individual to an interference with his fundamental rights that is unconscionable."

145. Drawing this together, the Border Force must exercise their discretion proportionately as that term is understood both under EU law and under the Convention, and that a failure to do so will make the decision unreasonable. In considering our jurisdiction under FA94 s 16(4) we are therefore required to consider not only the traditional *Wednesbury* test but whether Mr Brenton exercised the discretion given to the Border Force in a proportionate manner.

146. We respectfully agree with the summary given by Sir Stephen Oliver QC in *Yuan Shui v C&E Commrs* [2004] C00187, where he said at [35] that:

> "The power to restore in section 152(b) of the Customs and Excise Management Act 1979 is of an essentially discretionary nature. As such, the power must be exercised reasonably in the *Corbitt* sense and, following *Lindsay*, in a manner that produces a proportionate result. A decision satisfying those conditions will meet the requirements in Regulation 338/98 for an enforcement regime in the domestic laws of the Member state that operates in a manner that is sufficient and appropriate to the nature and gravity of the infringement. Moreover, if a way can be found of dealing with the request for restoration that is less invasive than a complete denial of the applicant's property rights, that should be adopted."

Mrs Smouha's case

147. The following facts of Mrs Smouha's case are particularly relevant to proportionality:

(1) Mrs Smouha did not ignore CITES. She communicated with Hikiji and understood that CITES had been complied with. She discussed the payment which would need to be made in Japan for the re-export permit.

(2) A bag made from Zambian crocodile skin is within Annex B.

(3) The crocodiles were "reared in a controlled environment" which (as we have already said) indicates that they were farmed, and it is reasonable to infer that the reason for this was to market their skins to make goods such as shoes and bags.

(4) The skin was exported from Zambia in accordance with CITES, and re-exported from Japan, also in accordance with CITES.

(5) Had Hikiji or Mrs Smouha applied for an import permit before the Bag arrived, it would have been granted.

(6) She is not in business and the Bag was a birthday present.

(7) This was her first experience with CITES.

(8) She did everything she could to rectify the position after she realised the mistake.

(9) The Bag cost $3,400.

(10) Mrs Smouha acted honestly and in good faith throughout.

148. There is no evidence that Mr Brenton considered any of these facts. His decision says only:

> "Your client failed to obtain an import licence for the bag prior to its importation into the UK. Whether by design or as 'an honest mistake' the legislation is clear."

149. It is clear from this that Mr Brenton would treat those who deliberately breached the CITES provision in the same way as he treated Mrs Smouha. Once a person has failed to obtain a retrospective permit, the goods are forfeit, irrespective of any other considerations.

150. There is as we have already found, no evidence in the review letter that Mrs Smouha's case was considered "on its individual merits" or that "circumstances of the events of the date of seizure" were assessed, or that the case was considered to see if "any mitigating…circumstances exist." Instead, Mr Brenton was making a binary decision: if the law is broken, the goods are forfeit, unless there are "exceptional" circumstances.

151. In some situations, a binary decision may be appropriate. For example, if a person imported non-native plant species, the Officer may well have to decide between restoring the plants or destroying them. But this is not such a case. The Bag

has a value. There are no wider risks to the UK environment were it to be restored to Mrs Smouha. The matter is one of non-compliance with regulations relating to documentation rather than one which places any endangered species at risk. The Border Force could impose a financial penalty as a proportionate punishment for any mistake Hikiji or Mrs Smouha may have made. In other words, there are a range of intermediate positions here, which should have been considered in the light of the facts.

152. Mr Brenton's approach is clearly at odds with Reg 338/97. Both the Preamble and Regulation 16(2) require that the penalty is "appropriate to the nature and gravity of the infringement." Confiscation is a sanction is to be applied "where appropriate."

153. Mrs Smouha showed good faith, believed she was complying with CITES, had no previous experience of the requirements, and made every possible effort to rectify the position. The Bag was in Annex B. This case is a paradigm example of one for which a less severe penalty would be proportionate. In other words, if the failure to obtain an import permit cannot be remedied by a fine, then it is difficult to imagine when, if at all, the discretion would be exercised in favour of restoration.

154. We also observe that the AHVLA made a mistake when they informed Mrs Smouha that the Bag was to be classified under Annex A, despite being the expert government agency charged with enforcing Reg 338/97 and having in its possession the re-export certificate which showed that the specimen came from Zambia, and was classified under Appendix IIR and Annex B. It appears that the Border Force also made a mistake in not making a contemporaneous record of the seizure. No person or body can guarantee never to make a mistake.

155. While all CITES cases are decided largely on their particular facts, and none were cited to us, we note that in *Taylor & Lodge v C&E Commrs* [2009] 01178 (TC) (Judge Demack and Mr Denny) the appellant failed to obtain an import permit and was refused a retrospective permit. The Tribunal allowed the appeal because the appellant had committed "a simple error and nothing more," see [31]. The same is true in this case.

156. Finally, although the facts of *Lindsay* were different, at [63] Lord Philips criticised the Commissioners' then restoration policy because it levied the same harsh punishment on commercial smugglers as it did on those who were not trying to make a profit. He says at [64]:

> "…where the importation is not for the purpose of making a profit, I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture. There is open to the commissioners a wide range of lesser sanctions that will enable them to impose a sanction that is proportionate where forfeiture of the vehicle is not justified."

157. Lord Judge, giving a concurring judgement, said at [73]:

> In my judgment, the question whether the power to seize the vehicle of a non-profit making smuggler should be exercised is fact dependent, requiring a realistic assessment of all the circumstances of the individual case, including the alternative sanctions available to the commissioners, rather than the virtually automatic imposition of a burdensome and, at times, oppressive prescribed penalty.

158. This is, in essence, the same conclusion as the one to which we have come.

159. For all those reasons, we find that the decision not to restore was disproportionate, both in terms of Reg 338/97 and the Convention.

Decision, Directions and appeal rights

160. We decide that the decision not to restore the Bag was unreasonable because (a) Mr Brenton failed to consider relevant factors, consequent upon the fettering of his discretion (b) wrongly treated Mrs Smouha as responsible for obtaining the import permit; and (c) the decision was disproportionate.

161. The Border Force must carry out, within six weeks of the release of this Decision, a further review of the original decision in accordance with the following Directions.

162. The Border Force is directed:

(1) not to fetter its own discretion by refusing to restore on the basis that AHLVA has not granted Mrs Smouha a retrospective import permit;

(2) to look at the facts of this case, including Mrs Smouha's reliance on Hikiji; her good faith; the nature of the specimen; compliance with CITES at earlier stages of the specimen's journey to the UK and Mrs Smouha's efforts to rectify the simple mistake which has occurred;

(3) to take into account paragraph 8 of GR1 when assessing the respective responsibilities of Hikiji and Mrs Smouha for the failure;

(4) to act proportionately, in accordance with the Preamble and Article 16 of Reg 338/97, so that the sanction imposed on Mrs Smouha is "appropriate to the nature and gravity of the infringement";

(5) to act proportionately, in accordance with Mrs Smouha's Convention Rights and in particular A1P1, bearing in mind the guidance given by the Supreme Court and the Court of Appeal set out at §142-144;

(6) in so doing, to take into account the factors set out at §147 and in particular that what happened here was "a simple mistake and nothing more," as Judge Demack put it in *Taylor & Lodge.*

163. Although we have decided this appeal against the Border Force, we thank Mr Sharkey and Mr Brenton for their co-operative approach and for the assistance given to Mrs Smouha, who was unrepresented.

164. 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.

Anne Redston

TRIBUNAL JUDGE
RELEASE DATE: 14 April 2015