[2015] UKUT 0297 (TCC)
Appeal number: FTC//112/2014

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Putri Projosujadi **Appellant**

- and -

Director of Border Revenue **Respondent**

TRIBUNAL JUDGE: MR JUSTICE MANN

Sitting in public in London on 11th May 2015

Mr Eric Metcalfe (instructed by **Blavo & Co Solicitors**) for the **Appellant**

Mr Michael Newbold (instructed by **Home Office Cash Forfeiture & Condemnation Legal Team**) for the **Respondent**

Mr Justice Mann :

Introduction

1. This is an appeal from the decision of the First-Tier Tribunal ("FTT" - Judge Adrian Shipwright and Phillip Gillett FCA) given on 13th January 2014. It is brought with permission of the FTT. The Tribunal's decision was that it dismissed the appeal from a reviewing officer (Mr G Crouch) dated 9th April 2013 not to restore to the appellant, as a matter of discretion, a red or orange alligator-skin handbag bought by her in the United States, conveyed to her in this country by a friend and forfeited by the Border Force because on importation it did not have relevant CITES certificates.

Factual Background

2. The basic facts relevant to this case can be described shortly.

3. The appellant, then resident in the UK but now resident in Singapore, wished to give her mother in the Philippines a handbag to be acquired in Washington DC. She asked a friend of hers, a Ms Sunny Reksono, to purchase it for her and provided her with funds in order to enable that to be done. The handbag cost $38,200. Ms Reksono duly purchased the handbag. She gave it to another friend, Mr Munoz, who was flying back from the United States on business, so that he could bring the bag with him and give it to the appellant when he arrived. He travelled with the bag as part of his ordinary luggage. When he arrived at Heathrow he went through the red channel and declared the bag. He produced purchase documents and he produced a CITES certificate which had been given to him in New York, and which apparently covered the export or re-export of the bag from France to the United States. Unfortunately, the provisions protecting endangered species and embodied in the CITES convention ("Convention on International Trade in Endangered Species of Wildlife Fauna and Flora") and associated European legislation required that a proper United States export certificate and a proper United Kingdom import certificate be obtained in order to render the passage of the bag into the UK proper. Mr Munoz did not have either of those because the appellant had not given them to him, and she had not obtained any because she did not know that they were required.

4. In those circumstances, as they were entitled to do, the Border Force forfeited the bag. No challenge to the forfeiture was made within the one month prescribed by the relevant rules, and in those circumstances the seizure was deemed lawful. At that point the appellant lost her right to challenge the seizure itself, assuming that she had had grounds to do so. However, another avenue was open to her, namely an application that the bag be restored to her as a matter of discretion. She was refused such restoration and she asked for a review in accordance with the provisions of ss14 and 15 of the Finance Act 1994. Those sections allow a reviewing officer to uphold, vary or cancel the original decision. That review was conducted by Mr Crouch, and on 9th April 2013 he delivered his decision. It was, as I have said, to refuse restoration. There was then some further limited correspondence in which he upheld his decision. The appellant has the right to appeal that decision, and it was that appeal that came before the FTT and was rejected.

5. Some further facts, or apparent facts, should be noted at this stage:

a) Mr Crouch indicated that he would be prepared to consider restoration if retrospective certificates were obtained from the UK and US authorities. Unfortunately at this point the appellant found herself in something of a Catch-22 situation. The English authorities indicated that before they would grant a retrospective certificate they would require the US authorities to produce an export certificate first. When approached, the US authorities indicated that they would not provide a retrospective certificate because, amongst other reasons, they had heard from the UK authorities that the UK authorities would not grant a retrospective certificate. That impasse meant that neither certificate would be forthcoming, and that route to restoration was not open to the appellant.

b) Although the CITES legislation covers alligators of the species of which the bag was made, that particular species is not necessarily an endangered one. Species of alligators and crocodiles are protected in general, but it is recognised that some particular sub-species require more protection than others and the protection regime is more relaxed for those others. Mr Metcalfe, for Mrs Projosujadi, emphasised there is nothing unlawful about buying, selling or possessing handbags of the kind bought by the appellant, and if she had imported the article herself as part of her "personal effects" she would not have required any certificates or licences under the legislation.

6. In the FTT the facts covering the purchase, transportation and forfeiture of the bag were set out in witness statements provided by Ms Reksono, Mr Munoz and the appellant. None of them were in the jurisdiction at the time of the appeal, but they all professed to a willingness to be cross-examined by video link if necessary. In the event they were not cross-examined. There was therefore no material dispute before the FTT as to the basic facts. In particular, there was no challenge as to the innocence of the appellant in the sense that she did not know that technically the bag required import and export certificates. It should be noted that the bag was entirely properly declared by Mr Munoz when he arrived, and it may be that his own honest act in presenting CITES certificates to the customs authorities triggered a consideration of whether further certificates were required, and therefore the forfeiture. That is not known, but the presentation of the CITES certificate is a clear badge of the innocence of all those involved.

An outline of the basis of the appeal

7. Before setting out the basis of the decision, which involves considering further details of the review in order to understand it, it will be useful to have in mind the heart of the appeal. It is based on proportionality. Mr Metcalfe submits that Mr Crouch ought to have had proportionality in mind when he reached his decision, and did not do so. Had he done so, he ought to have acknowledged that to fail to restore an expensive bag, bought and imported in good faith, because of the absence of certificates which could well have been obtained but of whose requirement Mrs Projosujadi was innocent, and where the bag could quite lawfully have been bought in by Mrs Projosujadi without certificates if she had gone to get it herself, would be disproportionate. He submits that he raised the point (and Mr Crouch's failure to deal with it) in the FTT, on the appeal, but the FTT failed to take his point into account,

dealt with it wrongly and/or failed to give reasons for its decision on the point (if it reached one). His point in the appeal below can be summarised by saying that the FTT overlooked the need to consider proportionality in the decision-making process on the appeal.

The review process

8. As part of the review process the Appellant provided material to the reviewer (Mr Crouch). In essence she made the factual case coinciding with the basic facts which I have set out above, including informing the reviewing officer of the attitude of the US authorities. She provided proof of purchase. Mr Crouch's decision letter then contained the following elements:

> "Summary of the BF Restoration Policy of Restricted or Prohibited Items
>
> The general policy regarding the improper importation of prohibited or restricted items into the UK is that they will not be offered for restoration. However, each case is examined on its merits to consider whether or not restoration may be offered exceptionally."

He went on to observe that he was guided by the restoration policy but not fettered by it and he considered all cases on their individual merits, and he has taken all facts into account and considered the representations. He observes that the import of the handbag into the UK was prohibited without the certificates and observes:

> "It is incumbent on any person attempting to export and import an item that falls within the CITES legislation to ascertain what the requirements are before doing so. Ignorance of the law is no excuse. I would have expected questions to have been asked when the "Hermes" store selling the handbag provided a copy of the original export CITES certificate from France.
>
> For me to even consider restoring the prohibited item to you without the requisite certificate being in place would be ultra vires. The only circumstance in which I could consider restoring the item is if you are able to resolve this matter with the [UK licensing authority] and obtain a valid import certificate, which as I have previously stated is most unlikely because the American Authorities have refused to issue a retrospective export certificate. It is my understanding that the [UK licensing authority] will only issue permits retrospectively in exceptional circumstances and the facts of this case are not considered to be exceptional circumstances."

He then comes to the decision that he would uphold the original decision not to restore the item.

9. Mrs Projosujadi then engaged solicitors and they wrote a long letter setting out the factual background in more detail and the CITES and CITES-related legislation.

They then sought to make a case that the bag was exempt from the need for a certificate, but that was a point going to the legality of the seizure and, as such, was doomed to failure as a standalone point. They then turn to the "broader merits" of the restoration case and seek again to make the case that the article did not require licensing before making the case that there was no deliberate attempt to evade border controls, and then this:

> "(viii) The handbag is commercially available in both the US and Europe and it would be wholly disproportionate to impose forfeiture in circumstances where the Convention itself has already exempted goods of this kind from permit requirements."

This reference to proportionality is linked to a decision "to impose forfeiture", but in my view it clearly seeks to raise the point in terms of restoration as well, because that is the heading under which the point is made.

10. A further letter from Mr Crouch dated 8th May 2013 indicates that he stood by his decision, despite further intervening submissions. In that letter he says:

> "I draw attention to the words of Judge Kahn in the decision *Vernon Yip v Director of Board of Finance* [TC01860]; Judge Kahn states at paragraph 42:
>
> '…The other consideration which the Tribunal must take into account is whether the decision was proportionate. This means that the decision must be appropriate and sufficient given the gravity of the infringement. This must be balanced against the Appellant's property rights. The Tribunal feels that the decision to have a conditional restoration was proportionate in the circumstances…'"

The decision appealed from

11. There was a dispute between the parties as to what the FTT should be taken to have decided and in particular whether it considered proportionality at all. That in turn, in part, turns on the structure of the decision. It is therefore necessary to deal with that.

12. After a short introduction the decision deals with "The Issue". It identifies the central issue as being:

> "whether the decision not to restore the Goods is one that could not reasonably have been arrived at by a properly instructed decision-maker. In other words is the decision outside the range of possible reasonable decisions that such a person could reasonably make. It does not matter whether or not we would have reached the same decision, rather the question is whether broadly the decision not to restore the goods is within 'Wednesbury' reasonableness." (paragraph 4).

Having emphasised that the Tribunal was to treat the goods as properly forfeited, it then set out the questions that it considered to arise for consideration which were said to "include the following:

i) Can the Tribunal consider the legality of the Seizure?

ii) Is the Seizure to be treated as lawful?

iii) If as a result of the legislation the legality of the Seizure is not a matter for the Tribunal but for condemnation proceedings, are the Goods to be treated as illegally imported into the UK in the Tribunal's and Review Officer's deliberations?

iv) If Yes are there any exceptional circumstances here?

v) If the Goods are to be treated as duly condemned is the decision not to restore the Goods within the range of possible reasonable decisions that a decision-maker could reach?

vi) Was the decision not to restore done in a way that raises issues that are within the Tribunal's jurisdiction?"

13. Issues i) to iii) raise questions which do not arise on this appeal. At the hearing below they arose because the appellant was submitting that the handbag was one of her "personal effects" and therefore exempt from any certification requirement. If that were right then it would have made the seizure unlawful, but, as the Tribunal held, no challenge could be mounted on that basis because a failure to challenge the seizure within one month meant that it was deemed lawful. There is no appeal from that part of the decision, and, for the appellant, Mr Metcalfe accepted that the Tribunal was right about that. It is issues iv) and v) that give rise to the matters which arise on this appeal.

14. In paragraphs 9, 10 and 11 the FTT deals with "Jurisdiction" and it notes that in paragraph 11 the legality of the seizure was not a matter for them to consider since the case law required them to treat the Goods as having been lawfully seized and illegally imported.

15. There is then a section dealing with the law relating to the seizure, as to which nothing arises, and there are further sections dealing with evidence and findings of fact, which I have summarised above.

16. At paragraph 61 there are some paragraphs which I need to deal with in more detail. The FTT starts by considering the submissions of the appellant taxpayer and in paragraph 62 records a submission that since the goods were "personal effects" within the relevant legislation then the Goods ought to be restored because the legislation did not require certificates for "personal effects". This turned out to be an argument going to the validity of the seizure in the first place and in due course the FTT rejected it and it is not resurrected on this appeal. This appeal is concerned more with the content and meaning of paragraphs 64 and 65, said to record further submissions of the taxpayer:

> "64. In the alternative it was unreasonable not to restore the Goods particularly when they should not have been seized in the first place.
>
> 65. It was also originally argued that forfeiture was in any event disproportionate. However, this was not pursued. This was confirmed to us at the hearing."

17. Paragraph 65 is problematical in its terms. It was not originally argued that the forfeiture was disproportionate. What was argued, and is apparent from the full skeleton argument provided to the FTT, was that the refusal to restore was disproportionate. Furthermore, not only was disproportionality never argued in relation to the forfeiture, it was not confirmed at the hearing that the point was abandoned. The point never arose so there was never anything to abandon.

18. Then the Decision goes on to consider the Director's submissions. It records a submission that the legality of seizure was not within the Tribunal's jurisdiction – the issue on the appeal was whether the decision not to restore the Goods fell within the range of possible decisions that could be considered reasonable. The Director submitted that it plainly was within that range. Among his reasons for submitting that the Decision was within the bounds of the reasonable were that:

> "68(4). Having considered the facts of the particular case [the Director] decided to apply [his] policy to refuse restoration as there were no exceptional reasons to disapply it having regard to all the circumstances."

19. The Tribunal then set about a "Discussion" in the course of which, in paragraph 73, it essentially re-identifies the questions already identified in paragraph 6. It then devotes a large number of paragraphs to dealing with the question of whether it can consider the legality of the seizure and concludes that it could not. It is common ground on this appeal that that conclusion is correct. That answered its questions (i) to (iii). It then found as follows (and it is necessary for me to set out these paragraphs in their entirety):

> "[In answer to question (iii)]
>
> 88. The Goods are therefore to be treated as illegally imported in our deliberations in respect of this appeal.
>
> *If Yes are there any exceptional circumstances here?*
>
> 89. There are no special circumstances here in our view.
>
> *If the Goods are to be treated as duly condemned is the decision not to restore the Goods within the range of possible reasonable decisions that a decision-maker could reach?*
>
> 90. As the goods are to be treated as illegally imported the decision could be said to be within the range of possible reasonable decisions not to restore the goods.

> 91. It is only "…where the Tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it…" that the Tribunal can intervene in the decision.
>
> 92. Whilst we might not necessarily have reached the same conclusion it has not been shown that the decision not to restore was outside the range of possible reasonably decisions.
>
> 93. The Goods are to be treated as illegally imported (see CEMA and *Jones* [i.e. in *HMRC v Lawrence Jones and Joan Jones* [2011] EWCA Civ 824]). It is not unreasonable of itself not to restore illegally imported items.
>
> 94. Whether the Goods were personal effects does not change the position for the Tribunal as personal use did not change the position in *Jones* in the Court of Appeal. Something more fundamental would be needed to allow intervention. This was likely to be something subject to Judicial Review which is outside our purview."

20. I do not need to set out or describe any other parts of the Decision.

The submissions on the appeal to the FTT

21. The written submissions made by the appellant to the FTT were clear. Paragraph 5 makes two points. The first is that import and export permits were not required because of a derogation in respect of "personal effects". This is the point, going to the validity of the seizure, that is no longer pursued on this appeal. The second is as follows:

> "(ii) The Respondent's continuing refusal to restore the handbag to the Appellant is unreasonable and disproportionate given the particular circumstances of the Appellant's case and the clear intention of both CITES and the Commission Regulation 865/2006 to exempt personal effects made from alligator skin."

The skeleton argument then goes on to challenge the legality of the seizure and makes submissions as to the jurisdiction of the FTT to consider that, before returning, in part III to make submissions to the effect that:

> "The Respondent's refusal to restore the handbag is unreasonable and disproportionate."

It then makes a considerable number of points going to proportionality, making in particular the point that the goods were themselves lawful goods which could be lawfully possessed by anyone and indeed were available in retail outlets in the UK. It was said that buying this handbag was not like buying ivory tusks or tiger skins (which are clearly imperilled endangered species); the appellant did not know that permits were required and her mistake was innocent; if she had brought in the bag

herself as part of her luggage no permit would have been required, and the position should be no different to that which would apply if she had accidentally left her handbag in the United States and a friend had returned it to her; and the handbag was very expensive.

The basis of this appeal

22. Before me Mr Metcalfe, for the appellant, submitted that the FTT did not fulfil its duties under the appellate jurisdiction which it was exercising. It is common ground that the appeal to the FTT was an appeal under section 16 of the Finance Act 1994, of which the relevant provisions are as follows:

> "16 – Appeals to a tribunal
>
> (1) An appeal against a decision on a review under section 15…may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.
>
> …(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 effect;
>
> (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
>
> (c) in the case of a decision which has already been acted on or taken 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 future."

23. It is accepted by both sides that under specific provisions of the legislation to which I do not need to refer the decision of the reviewing officer (Mr Crouch) was an "ancillary matter" within subsection (4). That subsection therefore applies. The effect of that is not only to specify the relief that may be granted on an appeal, it also prescribes the test (again, as both sides accepted), namely that the tribunal has to be satisfied that Mr Crouch could not reasonably have arrived at his decision.

24. Mr Metcalfe accepted (after a certain amount of skirmishing around the authorities) that the FTT, as the appellant body, should apply that test, and that it was one overall

statutory test. He originally seemed to be submitting that there were two tests, a sort of *Wednesbury* test and a further separate test of proportionality. However, as he refined his submission he accepted that *Wednesbury*-type principles, together with proportionality, were factors within the one overall statutory test. He relied on *Lindsay v Commisioners of Customs and Excise* [2002] EWCA Civ 267 in order to demonstrate the need to consider proportionality. He also submitted that it was necessary for Mr Crouch to take into account proportionality at the review stage. Because Mr Newbold for the Director did not challenge the relevance of proportionality at both stages, and accepted that the FTT had to consider the question, it is unnecessary for me to set out any details of the authorities in this respect.

25. On the appeal Mr Metcalfe's submissions ran thus. Mr Crouch does not seem to have taken proportionality into account, or considered it properly. That was the basis of part of the appeal to the FTT – see above. The FTT therefore ought to have considered that question of proportionality. However, not only did the FTT seem not to have considered it, it seems to have gone further and to have understood that reliance on proportionality was somehow disclaimed. That was a complete, and puzzling, misunderstanding of the position, because there had been no abandonment of the proportionality point (directed to the restoration application) advanced in Mr Metcalfe's skeleton argument. Not only was the point advanced in the skeleton argument, but it was apparent from Mr Metcalfe's conduct in relation to the evidence that the FTT heard that the point was being maintained. Mr Crouch himself gave evidence and was cross-examined by Mr Metcalfe. In the course of cross-examination he was asked whether he took into account certain factors, and those factors only made sense as factors if proportionality was still in issue. Mr Metcalfe invited me to study the FTT decision and to come to the conclusion that it simply did not deal with that important point. That was a breach of the principles of natural justice and a fundamental error in arriving at a correct decision.

26. If he was wrong about that, and if it could be seen that the FTT did somehow seek to deal with, or incorporate, a consideration of proportionality in its conclusion, then the Tribunal was in breach of the obligations of a judicial body to give reasons for its decision. Mr Metcalfe submitted that one could simply not see any reasons for its decision.

27. For the Director, Mr Newbold accepted that proportionality had to be considered by the FTT and he submitted that, when the FTT decision was properly read, one could see that it did have it in mind, and should be treated as having dealt with it in its conclusions. He accepted that the FTT could have made the point clearer, but submitted that it was clear enough. This is the point of difference between the parties as to what the FTT should be taken as having decided.

28. I have little hesitation in agreeing with Mr Metcalfe that the FTT seem to have overlooked the proportionality point. I accept that Mr Metcalfe did not run any point about proportionality in relation to the seizure, much less abandon it. Paragraph 65 of the FTT's Decision is therefore puzzling. I suppose one can imagine that there was some sort of passing remark about it, but if there was then it cannot have been a remark other than one directed to seizure. It is quite plain from Mr Metcalfe's skeleton argument that proportionality in relation to the restoration application was a key part of his submissions. I also accept that some of the questions posed to Mr Crouch will have been geared to proportionality. Paragraph 65 is certainly no basis

for thinking that the FTT thought that proportionality was in play in relation to something else. It seems to betoken the FTT thinking that it did not arise at all.

29. When one moves on to consider the Decision from that point on, and looking at it as a whole, it is impossible to detect that the Tribunal had proportionality in mind. The repetition of the questions which the Tribunal posed itself in paragraph 6 does not contain any reference to proportionality. It contains a consideration of whether there were "exceptional circumstances", but that is not the same thing as proportionality and is not an appropriate way of indicating questions of proportionality. The summary of the overall question contained in question (v) does not, of itself, suggest a focusing on proportionality either.

30. When one then turns to the answers to the particular questions, one still fails to find any reference at all to proportionality. The question about exceptional circumstances is simply answered in the negative and the question about the reasonableness of the decision amounts to no more than saying that it is not unreasonable to uphold the forfeiture of goods which were illegally imported in the first place. That conclusion does not reflect a proper consideration of the matters which need to be taken into account in a restoration application such as that with which Mr Crouch, and the FTT, were faced. One of the important questions that has to be decided is whether the goods should be restored <u>despite</u> the fact that they were illegally imported and validly forfeited in the first place. That is the whole purpose of the restoration inquiry. I have been unable to find any arguable benevolent construction of the FTT's decision which would enable me to consider that it had in mind proportionality when it reached its decision. Mr Newbold in effect submitted that it had received submissions on proportionality (and he set out various facts which would be relevant to that question), and it should be taken to have dealt with them. I agree with the first limb of that proposition, but I am afraid it does not follow that proportionality was actually considered by the FTT. It would appear to me that it lost sight of the point. Whether that was because of the matters it referred to in paragraph 65 or not I do not know, but it does not matter.

31. It is common ground that proportionality is a relevant matter in a restoration application such as that before Mr Crouch, and then in an appeal to the FTT. Without considering it the FTT would not have been able to determine whether the reviewer's decision was one at which no reasonable reviewer could have arrived. In the circumstances the FTT failed to take into account a very important part of the appellant's case, and erred in law. Without seeking to decide the point, I can safely say that it was a point with significant merit. Mr Metcalfe drew to my attention the case of *Smouha v Director of Border Revenue* [2015] UK FTT 147 (TC), another case in which a restoration application was made in respect of goods forfeited because of non-compliance with the need to provide CITES certificates. While not submitting that his case was on all fours with that case, he did submit that that case showed how proportionality, and the factors making it up, can fall to be dealt with in these cases, and he said that something similar should have happened in this case. I agree that that case is a useful demonstration of how the question can be dealt with, without saying that the result in the present case should be the same.

32. Since I have concluded that the FTT's Decision does not deal with a relevant matter, it follows that it did not give proper consideration to the application of the statutory test and the appeal will succeed for that reason. I therefore do not need to consider

the second principal limb of Mr Metcalfe's appeal (failure to give reasons). I will content myself with merely observing that if in fact the FTT considered itself to be dealing with proportionality arguments, then its reasons simply do not appear and the appeal would have been likely to have succeeded on that alternative ground.

Result

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

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

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

36. At one stage in his submissions Mr Metcalfe invited me to make some very positive directions about proportionality, and almost a finding on proportionality in his client's favour. I shall not do so. It is not the function of this Tribunal to do that on this appeal, and in any event I am not satisfied that I have got all the material I would need. Nor did I receive all the submissions that would normally be expected to be made on such a point. I shall therefore do no more than indicate (which will already be apparent from my decision above) that proportionality has to be taken into account in considering restoration.

37. I have, however, wondered whether I should give some firmer guidance on the application of the "personal effects" derogation from the CITES requirements. The original CITES Convention exempted certain species from the certification requirement if they were exported and imported as "personal effects". That expression was elaborated in a subsequent Protocol. When the Convention was brought into European law by a Regulation (Council Regulation 338/97) that exemption was carried into European law, albeit without specifically enacting the definition in the Protocol. It seems to be common ground that the particular alligator whose skin was applied in the appellant's handbag was a species capable of falling within that derogation. Mr Metcalfe has submitted that that being the case, the circumstances of the import in this particular case meant that the handbag was imported as "personal effects". He can no longer argue that that means that his client did not need the certificates (that has been dealt with by the deemed validity of the forfeiture), but he says that the point remains an important part of his case on proportionality. Put briefly, one of his points on proportionality is that this is a handbag whose trade or ownership is not forbidden by CITES, and which it is specifically envisaged may cross borders without certificates in "personal effects" circumstances. Since that is what happened here, it will be relevant for the reviewing officer to give that fact some significant weight. He seeks to invoke the point as a matter of discretion, not as a matter of right.

38. For what it is worth, it seems to me that, as a point, it is a point that Mr Metcalfe (and his client) is entitled to make if the importation at the time was an importation of "personal effects". However, Mr Newbold and his client do not accept that it was such an import. He would say that carriage by Mr Munoz, as a friend, does not make the article his personal effects or the personal effects of the appellant. The legal position is therefore in issue.

39. It is that legal issue on which I wondered whether I could give some useful assistance to the reviewing officer by making a ruling on the point. However, in the end I decided I should not. Mr Newbold told me that he had not come to court prepared to argue the point because, as a point, it was not something which had to be decided on the proportionality points about which this appeal turned. It was originally relevant to the attack on the validity of the seizure, but that was no longer pursued. He was therefore unable to advance his full case on the point.

40. In those circumstances I do not think it would be right for me to embark on a consideration of the point. On any further review the reviewing officer will have to make of the point what he will. I shall not express any view on it.

DECISION

TRIBUNAL JUDGE: Mr Justice Mann
RELEASE DATE: 9th June 2015