

Respondent

DECISION

Tribunal Mrs Josephine Kelly, Senior Member
Dr T J Hawcroft, Member

Date of decision 25 August 2008

Date of written reasons 7 October 2008

Place Sydney

Decision The decision under review is set aside. In substitution therefor the Applicant is to be issued an exceptional circumstances permit under [s 303GB](#) of the [Environment Protection and Biodiversity Conservation Act 1999](#).

.....[sgd].....Presiding Member Mrs Josephine Kelly,
Senior Member

CATCHWORDS

ENVIRONMENT – Export of wildlife - Rainbow Lorikeet (Trichoglossus haematodus) - Regulated Native Title Specimen – CITES specimen - Application for export – Refusal – Not eligible non-commercial purpose export - Whether exceptional circumstances exist that justify proposed export – Exceptional circumstances should relate primarily to wildlife – Veterinary evidence considered – Held exceptional circumstances – Decision set aside – Decision substituted exceptional circumstances permit issued

[Administrative Appeals Tribunal Act 1975](#), [ss 37](#), [43\(2A\)](#)

[Environment Protection and Biodiversity Conservation Act 1999](#), [ss 303BA](#), [s 303CC](#), [303CG](#), [303DA](#), [303DB](#), [303DD](#), [303DG](#), [303GB](#), [303FA](#), [303FG](#)

Jones v Dunkel (1959) [101 CLR 298](#)

Re Beadle and Director-General of Social Security (1984) 6 ALD 1

Re Gale and Australian Fisheries Management Authority [2005] AATA 172

Re Perring and Australian Postal Corporation (1993) 31 ALD 693

Re Rodgers and Secretary, Department of Social Security (1991) 24 ALD 720

Kent v Wilson [\[2000\] VSC 98](#)

Convention on International Trade in Endangered Species of Wild Fauna and Flora

Handbook of Australia, New Zealand & Antarctic Birds, Volume 4, Parrots to Dollarbird (1999)

WRITTEN REASONS FOR ORAL DECISION

7 October 2008

Mrs Josephine Kelly, Senior Member
Dr T Hawcroft, Member

1. At the conclusion of the hearing of this matter in Sydney the terms of the decision, and short reasons for the decision made, were stated orally. The parties requested written reasons for the Tribunal's decision pursuant to s 43(2A) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act), which we furnish below.

INTRODUCTION

1. Dr Cynthia Hand is the owner of a Rainbow Lorikeet (*Trichoglossus haematodus*) named "Fred." She acquired Fred while she was living in Western Australia and studying veterinary science. When Dr Hand left Australia in March 2007 and returned to her home in the United States of America she wished to take Fred with her. On 26 March

2007 Dr Hand applied to the Minister for the Environment, Heritage and the Arts (the Minister) for a permit under the *Environment Protection and Biodiversity Conservation Act 1999* (the Act), to export Fred to the United States. The Minister's delegate refused to grant Dr Hand a permit on 11 May 2008. Dr Hand applied to this Tribunal for review of that decision.

ISSUE

1. The issue in this application is whether exceptional circumstances exist such that we should exercise the discretion to issue an export permit to Dr Hand pursuant to s 303GB of the Act.
2. For the reasons that follow, we are satisfied that there are exceptional circumstances in this case. We have therefore set aside the reviewable decision, and have substituted the decision that an export permit be issued to Ms Hand pursuant to s 303GB of the Act.

THE MINISTER'S CASE

1. Mr Seglenieks, who appeared for the Minister, contended that the rainbow lorikeet is both a "regulated native specimen", and also a "CITES specimen" under the Act. (CITES is the acronym for the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*). The consequence is that both categories of specimen require a permit to be exported and in this case, when the legislative paths are followed, the only provision which may apply in both cases, is s303GB, which is an "exceptional circumstances" provision.
2. It was submitted that the words "special" and "exceptional" are capable of being used interchangeably, and that the phrase "exceptional circumstances" possibly connotes a higher threshold than "special circumstances". We were referred to the discussion of "special circumstances" and "exceptional circumstances" in *Re Beadle and Director-General of Social Security*, *Re Gale and Australian Fisheries Management Authority* and *Kent v Wilson*.
3. Mr Seglenieks further submitted that the phrase "exceptional circumstances" must be viewed in the context of the provisions of the Act which are concerned with the protection of wildlife. He referred to the objects of Part 13A the Act set out s 303BA. It followed, in his submission, that the circumstances sought to be

characterised as 'exceptional' should relate primarily to the Rainbow Lorikeet itself, rather than to the Applicant, Dr Hand.

4. Mr Seglenieks argued that the evidence did not establish any exceptional circumstances. Although he conceded that a bond existed between Dr Hand and Fred, he argued the evidence did not disclose that Fred's separation from Dr Hand was a risk to Fred's welfare and health. To the contrary, the evidence established that Fred was coping quite well in Australia. Further, he argued that Dr Hand's evidence about Fred's condition and neurological symptoms was not verified by objective and independent veterinary evidence.

CONSIDERATION

The Law

1. As Dr Hand was not legally represented, we think it appropriate to set out the legislative paths which lead to the issue of exceptional circumstances as framed. The export of "regulated native specimens" without a permit is an offence under s 303DD of the Act. Similarly, the export of a "CITES specimen" without a permit is an offence under s 303CC of the Act.
2. By the end of the hearing, it was not in dispute, and we accept, that Rainbow Lorikeets are a "regulated native specimen" as defined in s 303DA of the Act, being a native bird not included in the list referred to in s 303DB of the Act. The evidence of Dr Boles, the Collection Manager and Scientific Officer, Ornithology Section, Division of Research and Collection, Australian Museum, and the Handbook of Australians, New Zealand and Antarctic Birds was persuasive on this point.
3. We understood Dr Hand's argument on this question to be that because *Trichoglossus haematodus* was listed in CITES as being present in other countries, as well as in Australia, they were not native to Australia. We do not accept that the legislation requires that a species must be only found in Australia to be a native specimen.
4. Rainbow Lorikeets are a type of parrot. All parrots are included in the list in Appendix II of CITES. As stated above a permit is required for their export for that reason also (s 303CC).
5. Relevantly, s 303DG(3) provides that the Minister must not issue a permit authorising the export of a live native bird unless the Minister

is satisfied that the proposed export would be an eligible non-commercial purpose export within the meaning of s 303FA.

6. Similarly, s 303CG(3)(e)(i) provides that the Minister must not issue a permit for the export of a Cites specimen unless satisfied that the proposed export would be an eligible non-commercial purpose export within the meaning of s 303FA.
7. Section 303FA of the Act provides that the export will be an eligible non-commercial purpose export if the export is of a household pet in accordance with s 303FG.
8. In the case of both a live native animal and a live CITES specimen, the animal must be listed in the instrument made by the Minister pursuant to s 303FG(4) to qualify as a household pet (s 303FG(1)(a) and s 303FG(2)(b) respectively).
9. Rainbow Lorikeets do not appear in the instrument. Therefore, the Minister cannot issue a permit to Dr Hand under s 303CG or s 303DG of the Act.
10. If a permit cannot be issued under s 303CG or 303DG of the Act, then the Minister, and in this case the Tribunal, has the discretion to issue a permit under s 303GB of the Act if the criteria set out in that section are satisfied. Section 303GB provides, relevantly:

303GB Exceptional circumstances permit

(1) If:

(a) the Minister is considering an application by a person for a permit to be issued under section 303CG, 303DG or 303EN in relation to a specimen; and

(b) under this Part, the Minister is precluded from issuing that permit unless the Minister is satisfied in relation to a matter; and

(c) even though the Minister is not satisfied in relation to that matter, the Minister is satisfied that:

(i) the export or import of the specimen, as the case may be, would not be contrary to the objects of this Part; and

(ii) exceptional circumstances exist that justify the proposed export or import of the specimen; and

(iii) the export or import of the specimen, as the case may be, would not adversely affect biodiversity;

the Minister may issue a permit to the person.

(1A) The Minister must not issue a permit under this section unless the grant of that permit would not be contrary to CITES.

(2) A permit under this section authorises the holder of the permit to take the action or actions specified in the permit, in the permitted period, without breaching section 303CC, 303CD, 303DD or 303EK.

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The Facts

1. We had in evidence before us the documents filed pursuant to s 37 of the AAT Act, and material tendered by Dr Hand and Mr Seglenieks.
2. Dr Hand tendered several written statements and letters, two veterinary reports, and photographs of Fred in various situations while he was under Dr Hand's care in Australia. Various references and letters from her parents and other veterinarians were before us. There were also written statements and submissions from Mr Brown, Dr Hand's representative.
3. The following is not contentious. In July 2001, Dr Hand relocated to Perth, Western Australia, from Denver, Colorado, in the United States of America, to study veterinary science at Murdoch University. The partner of Fred's former owner relinquished him to Murdoch Pet Emergency Hospital in December 2003. Dr Hand acquired Fred. In December 2005 she moved to New South Wales to work as a veterinary surgeon in Penrith. She obtained permanent residence in Australia in April 2006, and decided to return to the United States to work, and did so on 21 March 2007. She left Fred in the care of the Penrith veterinary clinic where she had worked. Fred is now 5 or 6 years old. Rainbow Lorikeets live for 20 to 30 years.
4. Dr Hand gave evidence by telephone from the United States. She told us that before she became his owner, Fred had experienced a trauma while he was in the veterinary hospital where she worked in Perth. He had tried to fly out of the facility. Someone closed a door to prevent his getting out but unfortunately his head was caught. He

was comatose for 48 hours and in hospital for a week. It seems that Dr Hand took him at this time. She nursed him in a cage, including taking him to university with her, for about four weeks. She gave him physical therapy. He can walk and climb, but cannot fly or perch normally. Fred cannot sleep like a normal bird, which tucks its head under its wing, but has to sleep in a crouched position with his head against something and with both feet down. She performed veterinary tests on him. When she acquired him he could not fly and his right foot did not flex properly.

5. Dr Hand told us that Fred has imprinted on her. He has behavioural problems and experiences separation anxiety when she is absent. He had picked his feathers out and screams constantly. His present carer is getting a little bit frustrated with carrying for him. Dr Hand is concerned that he will have to be euthanased if the permit is not issued. She described Fred as her “child.” He had been with her all the time and was like a member of her family. We accept her evidence that she is strongly bonded to Fred, and being separated from him is adversely affecting her family and personal life. We also accept her evidence that she does not want to sell Fred. We did not understand Mr Segelenieks to dispute that. In short, Dr Hand's evidence was that Fred needs her and she needs him.
6. Dr Hand provided the Tribunal with letters from two veterinarians, Dr Kris Ahlgrim from the United States, and Dr Ian Hackworthy, from Penrith.
7. Dr Hackworthy has known Dr Hand and Fred for two and a half years. In a letter of 15 May 2008, Dr Hackworthy expressed the opinion that Fred has neurological deficits which were probably caused by a trauma when he was young. The deficits resulted in Fred not being able to fly and have made him have a weakness in one foot making it difficult to grasp if not properly supervised. Fred was not a candidate for rehoming. He was showing signs of separation anxiety since being removed from his environment. Dr Hackworthy placed a collar around Fred’s neck to prevent him picking at his feathers and self-mutilating himself until he could be returned to his owner. He noted that stressed birds tend to pick their feathers out.
8. Dr Ahlgrim described the process of imprinting and bonding which birds can undergo. He wrote in a letter dated 16 May 2008 that, when birds are acquired and raised by humans, they become imprinted or

bonded to those who raised them. The bird fails to recognise it is a bird altogether. Dr Alghrim wrote that birds can suffer from separation anxiety. If a bird has been raised by a particular individual the bird will recognise the individual as his flock mate. These birds are extremely poor candidates for rehoming. Dr Aghlgrim's evidence was general, rather than about Fred in particular.

9. Mr Brown also took part in the proceedings by telephone. We took his evidence into account, however, it did not assist our consideration very much. For example, he referred to other licences which had been issued. We are concerned with the particular facts of this case, not the facts in other cases.
10. An affidavit from Ms O'Sullivan, Director of International Wildlife at the Department of Environment, Heritage, Water and the Arts, was tendered by the Minister. We accept her evidence that when she received a call from an officer of the New South Wales Royal Society for the Prevention of Cruelty to Animals (RSPCA) to whom Ms Hand had spoken and who was concerned about Fred's health, Ms O'Sullivan had requested that an RSPCA officer check on Fred. Ms O'Sullivan recounted what that officer, Ms Stockton, had told her about Fred's condition after having seen him.
11. The Minister also tendered an affidavit of Ms Stockton. She is an RSPCA Inspector. She attended the veterinary clinic at Penrith to see Fred on 23 May 2008. Fred was no longer staying at the clinic, but was taken there on the day to see Ms Stockton. At that time, he was being cared for by the mother of a nurse from the clinic, at her home. Ms Stockton observed that the bird appeared comfortable in its cage and was sitting on a perch. When Ms Stockton approached, Fred did not move away but appeared to be interested in her, dilating his pupils and making the usual Rainbow Lorikeet sounds. She noted:

It was obvious to me that this bird had undergone some previous injury as it didn't have complete control over its movements which is indicative of head trauma. The birds feathers were shiny and healthy. New feather growth was apparent on the bird suggesting that at some point feathers were missing but had regrown.

I questioned the clinic about this and was informed that the bird had lost some feathers when it was housed in the clinic but they had grown back since it had been placed in a foster care situation. In my professional

opinion the bird was in good health other than its neurological symptoms.

1. The extract from the *Handbook of Australia, New Zealand & Antarctic Birds, Volume 4, Parrots to Dollarbird* (1999) stated that Rainbow Lorikeets are monogamous and probably pair for life.
2. The Minister did not tender any veterinary evidence which addressed Fred's current condition.

CONCLUSION

1. We accept, for the purpose of this decision, Mr Seglenieks' submission that the circumstances sought to be characterised as 'exceptional' should relate primarily to Fred's welfare and circumstances rather than to Dr Hand's welfare and circumstances.
2. We are satisfied that Fred's circumstances are exceptional and a permit should be issued. In our opinion, Fred's long-term welfare requires that a permit be granted for his exportation to the United States to be with Dr Hand.
3. In arriving at this conclusion, we take into account that Rainbow Lorikeets are monogamous and usually pair for life. We accept Dr Hand's evidence, and the opinion of Dr Hackworthy and the evidence of Dr Ahlgrim, and find that Fred has bonded with, and imprinted on, Dr Hand. We find that Fred does have special problems and needs which Dr Hand can meet better than anyone else. He has suffered from a trauma which resulted in a neurological deficit. We accept that Fred has demonstrated and continues to demonstrate symptoms of separation anxiety since Dr Hand returned to the United States.
4. While we accept that Ms Stockton formed the view that Fred was in good health when she saw him in May 2008, we infer that her visit was brief. We prefer the evidence of Dr Hackworthy who had known Fred for two and a half years and was treating him. We know that Dr Hackworthy had put a collar on Fred to prevent his pulling out his feathers and infer that that had worked. How long it had been off when Ms Stockton saw Fred is not apparent from the evidence.
5. We appreciate Mr Seglenieks point that we have not heard evidence from Fred's present carer about his current condition. Although not put in terms, we infer that Mr Seglenieks was asking us to draw an inference in accordance with what is often described as the rule in

Jones v Dunkel. We accept that the rule has been held to apply in the Tribunal (*Re Perring and Australian Postal Corporation*). However, we consider that the rule should be applied with discretion in the case of an unrepresented party (see *Re Rodgers and Secretary, Department of Social Security*). In this case, Dr Hand is a practising veterinarian who has a close knowledge of Fred. She was not legally represented. Given her evidence and the evidence of Dr Hackworthy, we do not think it appropriate in this case to draw an adverse inference from the failure to provide evidence from Fred's current carer.

6. After consideration of all of the material, we are satisfied that exceptional circumstances exist that justify the export of Fred to the United States (s 303GB(1)(c)(ii) of the Act).
7. We are also satisfied that the export is not contrary to the objects of Part 13A of the Act (s 303GB (1)(c)(i) of the Act). The objects of Part 13A of the Act are set out in s 303BA of the Act:

(1) The objects of this Part are as follows:

(a) to ensure that Australia complies with its obligations under CITES and the Biodiversity Convention;

(b) to protect wildlife that may be adversely affected by trade;

(c) to promote the conservation of biodiversity in Australia and other countries;

(d) to ensure that any commercial utilisation of Australian native wildlife for the purposes of export is managed in an ecologically sustainable way;

(e) to promote the humane treatment of wildlife;

(f) to ensure ethical conduct during any research associated with the utilisation of wildlife;

(h) to ensure that the precautionary principle is taken into account in making decisions relating to the utilisation of wildlife.

1. We emphasise, for the reasons already stated, that we are satisfied that the export of Fred would promote the humane treatment of

wildlife.

2. We are satisfied that the export would not affect biodiversity (s 303GB(1)(c)(iii) of the Act) and is not contrary to CITES (s 303GB(1A) of the Act).

DECISION

1. For the reasons given, the decision under review is set aside. In substitution therefor the Applicant is to be issued a permit under s 303GB of the Act.

I certify that the 41 preceding paragraphs are a true copy of the reasons for the decision herein of Mrs Josephine Kelly, Senior Member and Dr T J Hawcroft, Member.

Signed:[sgd].....

Steven Mulipola, Associate

Date of hearing: 25 August 2008 Date of oral decision: 25 August 2008

Date of written reasons: 7 October 2008

Representative for the Applicant: Mr W Brown

Representative for the Respondent: Legal Section, Department of Environment, Water, Heritage and the Arts