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# Administrative Appeals Tribunal of Australia

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## Zapirain and Minister for the Environment, Heritage and the Arts [2008] AATA 1047 (21 November 2008)

Last Updated: 21 November 2008

### Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION [\[2008\] AATA 1047](#)

ADMINISTRATIVE APPEALS TRIBUNAL )

) No 2008/0869

GENERAL ADMINISTRATIVE )  
DIVISION

<b>Applicant</b>	<b>Re</b>	<b>ASHLEIGH ZAPIRAIN</b>
<b>Respondent</b>	<b>And</b>	<b>MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS</b>

## DECISION

**Tribunal** Mrs Josephine Kelly, Senior Member

**Date** 21 November 2008

**Place** Sydney

**Decision** The decision under review is affirmed.

.....Mrs Josephine Kelly Senior Member

### CATCHWORDS

*ENVIRONMENT – Export of wildlife – Galahs (Cacatua roseicapalla) - Rosellas (Platycercus eximius) – Regulated native specimen – CITES specimen – Application for export permit – Refusal – Not eligible non-commercial purpose exports – Exceptional circumstances permit - Whether exceptional circumstances exist that justify proposed export – Exceptional circumstances should relate primarily to wildlife – Held no evidence birds’ circumstances exceptional – Decision affirmed*

[Administrative Appeals Tribunal Act 1975, s 37](#)

[Environment Protection and Biodiversity Conservation Act 1999, ss 303BA, 303CA, 303CC, 303CG, 303DA, 303DB, 303DD, 303DG, 303GB, 303FA, 303FG, 528](#)

[Environment Protection and Biodiversity Conservation Regulations 2000, reg 9A.13](#)

*Declaration to establish the List of Native Household Pet Animals (29 November 2001)*

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

*Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409

*Hand and Minister for the Environment, Heritage and the Arts* [\[2008\] AATA 893](#)

*Jones v Dunkel* [\[1959\] HCA 8](#); [\(1959\) 101 CLR 298](#)

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

*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](#)

Higgins PJ (Ed.), *Handbook of Australian, New Zealand & Antarctic Birds. Volume 4: Parrots to Dollarbird* (1999)

## **REASONS FOR DECISION**

21 November 2008

Mrs Josephine Kelly, Senior Member

## **INTRODUCTION**

1. Ms Ashleigh Zapirain has owned fourteen Galahs (*Cacatua roseicapalla*) and six Rosellas (*Platycercus eximius*) (the birds) since about 2001. The birds are family pets. In April or May 2008, Ms Zapirain and her family moved back to the United Kingdom from Australia because of Ms Zapirain's ill health. On 30 August 2007 Ms Zapirain had 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 the birds to the United Kingdom. On 14 November 2007 the Minister's delegate refused to grant a permit, and Ms Zapirain has

applied for the review of that decision.

## **ISSUE**

1. The issue is whether exceptional circumstances exist such that I should exercise the discretion to issue an export permit to Ms Zapirain pursuant to s 303GB of the Act.
2. For the reasons set out below, I am not satisfied that exceptional circumstances exist that justify the proposed export of the birds and, accordingly, I have decided to affirm the decision to refuse to grant Ms Zapirain an export permit.

## **MS ZAPIRAIN'S CASE**

1. Ms Zapirain did not appear or give evidence at the hearing. She was represented by her father, Mr Lee, who appeared by telephone from the United Kingdom.
2. Mr Lee submitted that exceptional circumstances did exist and that an exceptional circumstances permit should be issued. He told me that the birds were part of Ms Zapirain's family and they should not be separated as a matter of fairness and common sense. The husband of a friend of Ms Zapirain is looking after the birds and she sends him money for their upkeep. Mr Lee understands that the birds are fine.
3. Mr Lee said that Ms Zapirain has an attachment to the birds, having owned them for a long period of time. The Tribunal cannot be sure that Ms Zapirain has not hand-reared them or that the birds have not imprinted on Ms Zapirain or her family. He said the Tribunal does not know what "stress factor" the birds have undergone.
4. Mr Lee argued that Galahs and Cockatoos were not necessarily native to Australia as they were found in other countries and said that he was aware that 17,000 were culled in Victoria last year.
5. Mr Lee complained about the delay by the Department of the Environment, Water, Heritage and the Arts (the Department) in processing Ms Zapirain's permit application which he said had caused Ms Zapirain and her family unnecessary stress. He said that documents were apparently lost by the Department.
6. Mr Lee also said that the Department had raised Ms Zapirain's hopes because she was told that it would be fine to export the birds. She was concerned about having to break the news to the children that

they would not be reunited with their family pets.

7. He also referred us to a decision of the European Court of Human Rights where he said the Court intervened in a similar case in Belgium. He could not provide the name or reference for the decision.

## **THE LAW**

1. To understand how the issue of exceptional circumstances arises, it is necessary to follow the legislative paths set out in the Act.
2. Part 13A is entitled "International movement of wildlife specimens".
3. It is an offence to export a "regulated native specimen" without a permit (s 303DD of the Act). It is also an offence to export a "CITES specimen" without a permit (s 303CC of the Act). CITES is the acronym for the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*.
4. Three kinds of permit are presently relevant:
  1. Permits for the exports of regulated native specimens (s 303DG of the Act);
  2. Permits for the export of CITES specimens (s 303CG of the Act); and
  3. Exceptional circumstances permits (s 303GB of the Act).
1. Section 303DG(3) of the Act 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.
2. Similarly, s 303CG(3)(e)(i) of the Act 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.
3. Section 303FA(e) 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.
4. To qualify as a household pet, 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) of the Act (ss 303FG(1)(a) and 303FG(2)(b) respectively). The relevant instrument is the *Declaration to establish the List of Native*

*Household Pet Animals* signed by the Minister on 29 November 2001. Galahs (*Cacatua roseicapilla*) are included on that list.

However, Rosellas (*Platycercus eximius*) are *not* included in the list.

5. Regulation 9A.13 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (the Regulations) provides that not more than three of the species of animals mentioned in the list referred to above may be exported. There are two exceptions to that limit – budgerigars and cockatiels.
6. 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.

...

## CONSIDERATION

1. The evidence before me included the material filed pursuant to [s 37](#) of the [Administrative Appeals Tribunal Act 1975](#), the information provided at hearing by Mr Lee, and an extract from the *Handbook of Australian, New Zealand & Antarctic Birds. Volume 4: Parrots to Dollarbird* tendered on behalf of Minister.
2. The Minister's representative, Mr Seglenieks, contended that Galahs and Rosellas are a "regulated native specimen" as defined in s 303DA of the Act, both species being "native species" as defined in s 528 of the Act. He relied on an extract from the *Handbook of Australian, New Zealand & Antarctic Birds. Volume 4: Parrots to Dollarbird*, to support this contention. I accept this submission. Even if the birds were bred and lived in captivity, which was not clear on the evidence, they would still fall within this definition.
3. Ms Zapirain could be given permission to export three of her Galahs under the household pet provisions described above. However, she wishes to export fourteen Galahs, which exceeds the regulated limit. Rosellas are not found in the list of native household pets at all. Therefore neither is an eligible non-commercial purpose export within the meaning of s 303FA(e) of the Act.
4. Mr Seglenieks also contended that Galahs and Rosellas are both a "CITES specimen," as defined in s 303CA of the Act. However, assuming that is so, it is unnecessary to pursue that path through the legislation because it also leads to the household pet provisions already considered, which can apply only to three Galahs.
5. It follows that I accept Mr Seglenieks' contention that an exceptional circumstances permit under s 303GB of the Act is the only kind of permit that could be issued in this case.
6. Mr Seglenieks submitted that the words "special" and "exceptional" can be used interchangeably, and that the term "exceptional circumstances" in s 303GB(1)(c)(ii) of the Act may connote a higher threshold than "special circumstances." He referred to the

consideration of those terms in *Re Beadle and Director-General of Social Security*, *Re Gale and Australian Fisheries Management Authority* and *Kent v Wilson*.

7. It was further contended that the term “exceptional circumstances” should be viewed in the context that the provisions of Part 13A of the Act are concerned with the protection of wildlife. Mr Seglenieks referred to the objects of that part set out in s 303BA. It followed, he argued that the circumstances sought to be characterised as exceptional should relate primarily to the birds themselves, rather than to Ms Zapirain.
8. Mr Seglenieks concluded that there is nothing before the Tribunal to support a finding that exceptional circumstances exist in this case, and that the onus was on Ms Zapirain to establish exceptional circumstances, and she had not done so.
9. Ms Zapirain stated her reasons for applying for a permit in a letter to the Department dated 24 August 2007, which accompanied her application for a permit:

*On having to leave Australia for medical reasons, my family and I wish to bring over our pet birds upon emigrating. I understand that twenty birds exceeds the amount in which you're accustomed to permitting at any one time but over the years we've become attached to our little feathered friends, not only do I find these birds therapeutic but they most definitely are a part of our family and my children adore them. The unexpected move overseas is traumatic enough, hopefully being an animal lover yourself you will let us leave together as a family...*

1. In a supplementary form signed by Ms Zapirain on 18 July 2007, her response to the question ‘Please provide information to demonstrate that at the animal’s final destination you will be suitably equipped to manage, confine and care for the animal(s), including meeting the behavioural and biological needs of the animal(s)...’ was:

*These birds will be kept in galvanised steel cages suitable to all their needs. That are constructed from BIRD AVIARY Mesh & galvanised steel angle frames with adequate room for flight to exercise their wings and bodies for their best well being.*

1. Ms Zapirain also supplied with her application an undated medical certificate from Dr Kichkin, a General Practitioner based in Kogarah

NSW. The certificate stated:

*This is to certify that [Ms Zapirain] has been my patient since 2001 and she has had all that time birds as house hold pets. Ashleigh chose to return to Britain due to medical condition.*

1. Mr Lee told the Tribunal that Ms Zapirain has experienced health problems but he did not say what the problems were or give any details about how they affected her.
2. I note that Ms Zapirain, her husband and two children were granted import licences for the birds by the United Kingdom's Department for Environment, Food and Rural Affairs on 9 November 2007. The evidence of Mr Lee and the covering letter for the licences dated 12 December 2007 indicate that Ms Zapirain had had to renew these licences at some expense, presumably because her application to the Minister had not been determined.

## **CONCLUSION**

1. For the purpose of this decision, I accept, as the Tribunal did in *Hand and Minister for the Environment, Heritage and the Arts* at [30], Mr Seglenieks' submission that the circumstances sought to be characterised as exceptional should relate primarily to the birds' welfare and condition, and not to Ms Zapirain's circumstances.
2. There is little evidence of the present or past circumstances of the birds. There was no veterinary evidence, or evidence from the birds' current carer, tendered by Ms Zapirain or the Minister addressing the current condition of the birds. Mr Lee said as far as he knew they were fine. I do not draw any adverse inference in accordance with the rule in *Jones v Dunkel* from the failure of either party to adduce evidence of the birds' current condition (*Re Perring and Australian Postal Corporation; Re Rodgers and Secretary, Department of Social Security*).
3. I do not accept that there is a legal onus on Ms Zapirain to establish exceptional circumstances, however, in the end, in order to make the correct or preferable decision I have to be satisfied that the criteria for the grant of a permit are met – I must be satisfied on the material before me that exceptional circumstances exist (*Drake v Minister for Immigration and Ethnic Affairs* at 419).
4. I find that there is no evidence that the birds are suffering as a result

of separation from Ms Zapirain and her family. There is no material before the Tribunal that would persuade me that the birds' circumstances are exceptional, or "markedly different from the usual run of cases" (*Re Beadle and Director-General of Social Security* at 3).

5. While I understand that Ms Zapirain and her family are very attached to the birds and would like to be reunited with them, I do not consider that the circumstances in this case are any different from any pet owner wishing to take a longstanding household pet when relocating overseas. The legislature has specifically taken such a circumstance into account and has determined that restrictions apply as to the species and the number of a species which may be exported.
6. I also take into account the matters the Department's officers considered weighed against the issuing of the permit which I have not already considered. They were that the number of birds could be seen as a commercial consignment; the bond with twenty birds is unlikely to be as strong as would occur with one bird, and the birds have each other to bond with, which lessens the need for human companionship; the commercial value of these birds in the international market may be as high as A\$50,000, and the number involved is sufficient to establish a breeding colony for the sale of progeny, particularly with respect to the Galahs.
7. Even if I took into account Ms Zapirain's circumstances, there is no medical or other evidence that separation from the birds is adversely affecting her health or that having them would be beneficial to her health. The certificate from Dr Kichkin did not provide such evidence. The evidence is that like any pet owner, she would like to have her pets with her and she is upset that she does not.
8. Although not clearly relied on as constituting exceptional circumstances, I make the following comments about the alleged delay by the department and the provision of incorrect information.
9. It appears from the evidence that the decision which was made in November 2007 was sent to an address which Ms Zapirain had left, and was returned to the department. An officer of the department sent emails to Ms Zapirain on 30 November and 4 December 2007 advising her that the letter had been returned and that a letter had been sent to the UK address she had provided. The second email also attached a copy of the refusal letter. However, it was not until the

end of January 2008 that Ms Zapirain contacted the department to find out what was happening with her application. In those circumstances I am not persuaded that the department was at fault in any way. Unfortunately, there was a loss of contact for a period of time. I appreciate that Ms Zapirain found the delay distressing, as she set out in her letter to this Tribunal seeking the review of the decision.

10. If Ms Zapirain had understood from her inquiries of some officer or officers of the department that she would be able to export the birds then that is unfortunate. However, I do not consider that that would constitute exceptional circumstances under the Act.
11. Taking into account all the evidence before me, I am not satisfied that exceptional circumstances exist that justify the proposed export of the birds to the United Kingdom, under s 303GB(1)(c)(ii) of the Act. It is therefore unnecessary to consider the remaining criteria in s 303GB of the Act.
12. I have therefore decided to refuse to exercise the discretion to grant Ms Zapirain an exceptional circumstances permit under s 303GB of the Act.

## **DECISION**

1. For the foregoing reasons, I affirm the decision under review. I certify that the 46 preceding paragraphs are a true copy of the reasons for the decision herein of Mrs Josephine Kelly, Senior Member.

Signed: .....

Steven Mulipola, Associate

Date of hearing: 25 August 2008 Date of decision: 21 November 2008

Representative for the Applicant: Mr B Lee

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

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