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July 2013

## Case Ayuba Suleiman Diallo – Qatar Museums Authority and United Kingdom

*United Kingdom/Royaume-Uni – Qatar Museums Authority – National Portrait Gallery – Artwork/œuvre d'art – Post 1970 restitution claims/demandes de restitution post 1970 – Negotiation/négociation – Settlement agreement/accord transactionnel – Illicit exportation/exportation illicite – Cultural Cooperation/coopération culturelle – Loan/prêt*

*The Qatar Museum's Authority (QMA) purchased at Christie's the painting "Ayuba Suleiman Diallo" by Hoare of Bath that was subsequently hit with a temporary export bar in the United Kingdom. The export suspension gave any interested British museum the opportunity to buy the painting within a lapse of time. The National Portrait Gallery (NPG) in London made a firm purchase offer that was refused by the QMA. Negotiations were initiated between the QMA and the British Department of Culture, Media and Sport who ultimately came to an understanding in early 2011, providing for the loan of the painting and extensive cultural cooperation between the QMA and the NPG.*

*I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.*

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## I. Chronology

### Post 1970 restitution claims

- **8 December 2009:** The portrait of Job Ben Solomon, “**Ayuba Suleiman Diallo**” by Hoare of Bath (1733), was sold by a private collector at Christie’s<sup>1</sup> to the **Qatar Museums Authority (QMA)**.
- **March 2010:** The British Government temporarily barred the export of the painting for the purpose of giving the opportunity to a British museum to buy it. **The Reviewing Committee on the Export of Works of Art (RCEWA)**<sup>2</sup> judged the painting to be “of outstanding significance for the study of the history of the development of non-European portraiture in Britain, and of evolving responses within Britain to other cultures”<sup>3</sup>. In fact, it is regarded as “the earliest known British oil portrait of a freed slave and the first portrait to honour an African subject as an individual and an equal”<sup>4</sup>. Consequently, the RCEWA decided to defer its decision on the export licence application for two months. During this time, the **National Portrait Gallery (NPG)** London expressed a strong interest in the painting.
- **May/June 2010:** Subsequent to the NPG’s serious intentions to purchase the paintings, the RCEWA extended the deferral period for an additional 3 months.
- **July/August 2010:** The NPG launched an acquisition campaign aiming to raise £ 100,000 to purchase the painting. It initiated an appeal with the support of the Heritage Lottery Fund (HLF) and the Art Fund. Both Funds donated £ 300,000, £100,000 respectively to finance the purchase. At the expiration of the second deferral period, the **NPG submitted a firm purchase offer**. The **QMA refused this offer** but withdrew its application for an export permit<sup>5</sup>.
- **19 January 2011:** **The Department of Culture, Media and Sport** and Roger Mandle, executive director of the QMA, **negotiated** a cooperative agreement. The agreement

<sup>1</sup> Christie’s Old Master & 19<sup>th</sup> Century Paintings, Drawings & Watercolours Evening Sale, Sale 7782, Lot 20, sold for £ 541,250 (\$ 889,815).

<sup>2</sup> For more information on the Reviewing Committee on the Export of Works of Art (RCEWA), refer to [http://www.culture.gov.uk/what\\_we\\_do/cultural\\_property/3290.aspx](http://www.culture.gov.uk/what_we_do/cultural_property/3290.aspx) and [http://www.mla.gov.uk/what/cultural/export/reviewing\\_cttee](http://www.mla.gov.uk/what/cultural/export/reviewing_cttee), accessed May 12, 2011.

<sup>3</sup> Department for Culture, Media and Sport (DCMS), Museums Libraries & Archives (MLA), 56<sup>th</sup> Report of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest, 1 May 2009 – 30 April 2010 (December 2010): 31, accessed June 8, 2011, <http://www.mla.gov.uk/what/cultural/export/~media/Files/pdf/2010/AELU/RCEWA/MLA%20Export%20of%20Objects%20of%20Cultural%20Interest%20200910%20tagged>; see also National Portrait Gallery News Release, “First British Portrait of a Black African Muslim and Freed Slave Goes on Display,” January 19, 2011, accessed May 12, 2011, <http://www.npg.org.uk/about/press/ayuba-suleiman-diallo-display.php>.

<sup>4</sup> As reported in National Portrait Gallery, “Ayuba Suleiman Diallo,” description of the painting, accessed May 13, 2011, <http://www.npg.org.uk/whatson/display/2011/ayuba-suleiman-diallo.php>; see also Maev Kennedy, “Temporary export bar for portrait of freed slave after £530,000 sale,” *The Guardian*, January 19, 2011, accessed June 8, 2011, <http://www.guardian.co.uk/artanddesign/2011/jan/19/portrait-freed-slave-stays-britain>.

<sup>5</sup> See Department for Culture, Media and Sport (DCMS), Museums Libraries & Archives (MLA), 56<sup>th</sup> Report of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest, 31.

covered the loan, conservation, research into the history of the painting and its exhibition in Qatar.

- **20 January – 30 July 2011:** The painting was displayed at the NPG in London alongside a label reading “Property of Qatar Museums Authority”.

## II. Dispute Resolution Process

### Negotiation – Settlement agreement

- Negotiations were conducted between the British authority responsible for export controls on objects of cultural interest – the Department of Culture, Media and Sport – and Roger Mandle, executive director of the QMA.
- These negotiations ultimately led to the conclusion of an extensive cooperation agreement, which also affected the NPG. The NPG is a “non-departmental public body” (not integrally part of a government department but performs governmental functions and is financially supported by the government) sponsored by the Department of Culture, Media and Sport.

## III. Legal Issues

### Illicit exportation

- The main issue raised by the present case was the prohibition of the export of a specific cultural object due to the great interest in its protection and the wish to secure its stay within the UK. The **Treaty on the Functioning of the European Union (TFEU)**<sup>6</sup> allowed for such protection. Under Article 36 TFEU, exports of cultural goods could be restricted on grounds of “protection of national treasures possessing artistic, historic or archaeological value”. The UK Export of Cultural Interest (Control) Order of 2003 required a licence for the export of “[a]ny objects of cultural interest manufactured or produced more than 50 years before the date of exportation”<sup>7</sup>.
- The “Statutory guidance on the criteria to be taken into consideration when making a decision about whether or not to grant an export license” issued by the Department of Culture, Media and Sport (hereafter RCEWA Guidelines)<sup>8</sup> provided practical guidance regarding the issue.

<sup>6</sup> European Economic Union (EEC) Treaty, Council Regulation (EEC) 2603/69, December 20, 1969, OJ 1969 L 324/25. See consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal C 83 of 30.3.2010*. The EEC Treaty was renamed by the Treaty of Lisbon signed by all Member States on 13 December 2007 (formerly “Treaty establishing the European Community, TEC”).

<sup>7</sup> Art. 1 and 2 Export of Cultural Interest (Control) Order of 2003. The order was amended in 2009 following the implementation of the TFEU.

<sup>8</sup> See Department of Culture, Media and Sport, “Export Controls on Objects of Cultural Interest – Statutory guidance on the criteria to be taken into consideration when making a decision about whether or not to grant an export license,” November 2005, accessed Mai 21, 2011,

For the determination of whether cultural objects intended for export may qualify as national treasures, the Ministry of Culture had established a Reviewing Committee (RCEWA)<sup>9</sup> that advised the Ministry.

- According to the RCEWA Guidelines (no. 11), **three Waverley criteria** are considered: (1) connection of the object to the history and national life of the UK in such a way, that “its departure would be a misfortune for our history and national life”; (2) an object of “outstanding aesthetic importance”; or (3) outstanding significance of the object for research purposes. The last criteria would cover, as said by the Reviewing Committee, “a wide number of disciplines e.g. art history, archaeology, ethnography, anthropology, palaeontology (subject to definition of ‘fossils’) science, engineering, architecture or literature, etc”<sup>10</sup> (RCEWA Guidelines no. 12).
- Interestingly, the RCEWA Guidelines (no. 12) referred to the cases that fell under one of these criteria as examples:
  - o Waverley criterion no. 1 items include: “the deposit from the ‘royal’ ship burial from Sutton Hoo, the Middleham jewel, the Lutterell psalter, The Dog of Alcibiades, a portrait miniature of Henry Stuart, Lord Darnley, the archive of manuscripts relating to the editing of Newton’s *Principia Mathematica*, decorations awarded to Sir William Carnegie in connection with the battle of Trafalgar, Lewis Carroll’s photographs of Alice Liddell (the Alice of *Alice in Wonderland*)”.
  - o Waverley criterion no. 2 items include: The Elgin Marbles held in the British Museum, or “Venus and Adonis” by Titian and “The Holy Family with the Infant St. John” by Fra Bartolomeo.
  - o Waverley criterion no. 3 items include: “a lady’s secretaire by Thomas Chippendale, mathematical instruments associated with Charles, Earl Stanhope, ledgers and account books of Messrs Fribourg and Treyer”.
- When deciding whether to make an objection, only the three Waverley criteria are considered. The decision process should not be affected by other interests or factors such as an expert advisor’s own interest in acquiring the object for his/her own institution (RCEWA Guidelines no. 14). **In the present case, the RCEWA found that the painting met the second and third Waverley criteria**<sup>11</sup>.
- Under the RCEWA Guidelines, if the Reviewing Committee concludes that **one or more criteria is satisfied**, it advises that a decision on the **licence application should be deferred for a specified period** (normally two to six months, although any length of deferral can be recommended) to provide interested buyers an opportunity to make an offer to the owner. According to the RCEWA Guidelines (no. 18), the Committee recommends “the fair market price at which an offer should be made”.

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[http://www.culture.gov.uk/images/publications/Export Controls on Objects of Cultural Interest Statutory Guidance Nov05.pdf](http://www.culture.gov.uk/images/publications/Export%20Controls%20on%20Objects%20of%20Cultural%20Interest%20Statutory%20Guidance%20Nov05.pdf).

<sup>9</sup> Reviewing Committee on the Export of Works of Art & Objects of Cultural Interest (RCEWA).

<sup>10</sup> Complementary information as provided by no. 12 RCEWA Guidelines.

<sup>11</sup> See Department for Culture, Media and Sport (DCMS), Museums Libraries & Archives (MLA), 56<sup>th</sup> Report of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest, 31.

- If the owner declines an offer to purchase made from a public source (such as the NPG) during the deferral period, the Ministry of Culture, Media and Sport generally refuses to grant an export licence (RCEWA Guidelines no. 21). In addition, if the applicant withdraws his request after a purchase offer has been made from a public source, any subsequent applications by the owner are very likely to be refused (RCEWA Guideline no. 24) an application is withdrawn after an offer to purchase has been made from a public source, the application was generally considered as being refused (RCEWA Guidelines no. 24). Should a subsequent application be submitted “within 10 years or so of a licence being refused” without a change in circumstances since the previous request and still meet one or more Waverley criteria, it is highly likely that the Ministry of Culture, Media and Sport will **refuse without a deferral period to grant an export** pursuant to RCEWA Guideline no. 26.

#### IV. Adopted solution

##### Cultural Cooperation – Loan

- The settlement established that the QMA must loan the painting to the NPG for a period of five years<sup>12</sup>. Moreover, the parties agreed that the NPG would organize a programme on the research, conservation and interpretation of the painting, which would be funded by the QMA. The outcome of this research may be shared on an international basis<sup>13</sup>.
- As part of the programme, the NPG offered to allow an intern from Qatar to work at the Museum<sup>14</sup>.
- The painting will likely be displayed at several UK regional galleries (such as Leicester, Liverpool and the North-East) before being exhibited in 2013 in Doha, Qatar. Following the exhibition, the painting will return to Britain<sup>15</sup>.
- The director of the National Portrait Gallery, Sandy Nairne, welcomed the agreement with the words: “This is a good example of international cooperation between museums, which will extend the opportunities for people to understand the importance of Ayuba Suleiman Diallo. It is a portrait that sheds new light on cultural and intellectual exchanges in the first half of the eighteenth century. We are extremely grateful to all those people who were so enthusiastic about the appeal, and we will be following-up to return funds. I am very pleased that everyone will be able to see this fascinating painting on the walls of the Gallery and on tour”<sup>16</sup>.

<sup>12</sup> Qatar Museums Authority Press Communiqué, “QMA lends first British portrait of a black African Muslim and free slave to National Portrait Gallery,” January 20, 2011, accessed May 12, 2011, [http://www.qma.com.qa/eng/index.php/qma/news\\_item/167](http://www.qma.com.qa/eng/index.php/qma/news_item/167).

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> As reported in National Portrait Gallery News Release, “First British Portrait of a Black African Muslim and Freed Slave Goes on Display.”

## V. Comment

- According to the RCEWA Guidelines, in cases where one of the Waverley criterion is met, the Reviewing Committee advises the Ministry of Culture, Media and Sport to defer the decision on the licence application in order to allow a purchase offer to be made to the owner. Even though, in the present case, the NPG was able to raise the sufficient amount to purchase the painting and offered to do so, the parties agreed for a 5-year loan instead. Interestingly, this outcome is not one that was provided by the RCEWA Guidelines.
- As permitted by the RCEWA Guidelines, the QMA refused the NPG's purchase offer<sup>17</sup>. Nonetheless, without an export permit, the painting may not leave the country.
- The parties' outset position was rather unbalanced. In fact, as the NPG was willing to purchase the painting during the export licence deferral period, the QMA's chances of obtaining an export licence were scarce if not impossible. The QMA had no other plausible alternative than to agree to a settlement.
- As conclusive information on the parties' incentive to opt for negotiation and the record of their agreement was not available, the case left room for speculations. It was particularly questionable whether an export licence could have been issued at the expiry of the loan. It seemed that the NPG desired to keep the painting permanently in its collection<sup>18</sup>. Giving the options that the QMA had, it is no surprise that it agreed to settle. Further, without an export license, the painting will remain indefinitely in the United Kingdom. In addition, if the QMA had formally dropped its request to export the painting, even though a public museum (NPG) agreed to purchase it, the grant of an export licence within the next ten years is very unlikely<sup>19</sup>.

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<sup>17</sup> See Department for Culture, Media and Sport (DCMS), Museums Libraries & Archives (MLA), 56<sup>th</sup> Report of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest, 31.

<sup>18</sup> See Maev Kennedy, "Temporary export bar for portrait of freed slave after £530,000 sale."

<sup>19</sup> *Ibid.*

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