Neutral Citation Number: [2019] EWHC 2951 (Admin)

Case No: CO/1273/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/11/2019

Before:

MR JUSTICE JAY

- -

Between:

THE QUEEN
On the application of
FRIENDS OF ANTIQUE CULTURAL TREASURES LTD — **Claimant**

- and –

SECRETARY OF STATE FOR THE ENVIRONMENT FOOD AND RURAL AFFAIRS — **Defendant**

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Tom de la Mare QC and Eesvan Krishnan (instructed by **Constantine Cannon LLP**) for the **Claimant**
Sir James Eadie QC, Hanif Mussa and Daniel Cashman (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 16th and 17th October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE JAY

MR JUSTICE JAY:

Introduction

1. On 20th December 2018 the Ivory Act 2018 ("the Act") received Royal Assent. According to the Government website, it is "world-leading" and contains "one of the world's toughest bans on ivory sales". It will become law as and when secondary legislation is made under s.43(1) but no date for that has been fixed.

2. The clear purpose of the Act is to enhance the protection of African and Asian elephants in the face of ongoing threats to their survival. It does so by prohibiting the sale, as opposed to the retention, of all ivory (i.e. anything made out of or containing ivory) subject to a limited number of tightly defined exemptions. These prohibitions are backed by criminal and civil sanctions. As a general rule, the Act interdicts the sale of antique worked ivory, that is to say pre-1947 artefacts, unless one of these exemptions is applicable.

3. The Act received cross-party support and rapidly cleared the Parliamentary process. During that process, and the public consultation which preceded it, Defra received evidence, representations and submissions across the spectrum of reasonable opinion: from those who favoured a complete ban without exception, to those who sought to broaden the available exemptions to include antique items – the latter on the basis that the Act's fundamental objectives would not be advanced by preventing their sale.

4. The Claimant is a company limited by guarantee incorporated for the purpose of bringing this claim for judicial review. Its three members and directors are dealers in and/or collectors of antique objects that include worked ivory. Such artefacts include but are not limited to Chinese fans, walking canes with sculpted ivory tops, various items with ivory inlay such as furniture, cutlery handles and books, and netsuke. Mr Tom de la Mare QC focused on netsuke as being an encapsulation in microcosm of the beauty, allure and value of high-quality antique ivory and, as he put it orally with some modest adaptation by me, as an exemplar of the merits of his client's case. Netsuke are small carved ornaments worn as part of Japanese traditional dress. They were crafted in Imperial Japan between the 17th and the early 20th Century from a variety of materials including bone, coral, whale tooth, wood and ivory. I was told that the ivory was sourced from Africa and traded along traditional routes, both land and sea, to Japan. When carved out of ivory, netsuke are solid in the sense that they comprise no other material, but they are often hollow: although small, their volume (and their value) is disproportionate to their weight. Subject to the impact of the Act, netsuke items command prices of anything between a few hundred pounds to six figures.

5. The Act is more stringent than both international treaty and EU law. I will explain this in due course, but in essence the effect of EU Regulations and European Commission Guidance is that, although there is a general prohibition on the commercial trade in ivory, and the trade in raw ivory is now completely banned, there are complex exemptions for worked ivory made before certain dates, and a further set of rules

governing the import and export (including the re-export of items not originating here) of such items from the EU. Moves are afoot in the EU for going further.

6. The Claimant advances two grounds of challenge. Ground 1 alleges, in respect of the intra-EU trade in antique ivory, that the UK lacks competence to legislate on a basis which is more stringent than EU law in a situation where the Union has exercised its competence to allow such trade without the need for permits. In a nutshell, this is because the EU regime is one of total rather than minimum harmonisation. It also follows that the ban on domestic trade subject to the specified exemptions is impermissible because it would inevitably inhibit the trade in antique ivory between this country and Member States. Ground 2 alleges in the alternative that if the UK were free under EU law to legislate more stringently, the ban on the intra-EU trade in antique ivory, and the connected ban on this trade between the UK and third countries, is disproportionate under EU law and/or the EU Charter of Fundamental Rights and/or A1P1 of the ECHR.

7. It is immediately apparent that these grounds raise important and wide-ranging issues. Sir James Eadie QC submitted that those behind the Claimant have already had one opportunity to persuade Government and Parliament of the rightness of their cause, but they have lost that argument. Furthermore, issues arise as to the basis of and extent to which this court finds itself travelling over ground which has been well-tilled by others, in particular those with greater expertise in these matters, and – at least as regards Parliament – a democratic mandate. Even so, I am duty-bound to address the proportionality of these measures within the framework of established principles, according such deference to the decision-makers as is appropriate, and mindful that this proportionality assessment is not congruent in analytical terms with policy and political judgments made elsewhere.

An Outline of the Legislative Framework

CITES

8. The UK is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") which it signed in 1975 and ratified here the following year. Asian elephants (*Elephas Maximus*) were included within Appendix 1 in 1975, thereby attaining the highest level of protection, with African elephants (*Loxodonta Africana*, the savanna elephant) joining them there in 1990 (between 1976 and 1990 they enjoyed lower levels of protection, and even today savanna elephants in a number of countries in southern Africa remain in Appendix II but in practice have Appendix I protection). Essentially, save in exceptional circumstances, CITES has prohibited trade in new ivory from all elephant species since 1990 at the latest.

9. Article 14(1)(a) of CITES recognises the "right of parties to adopt … stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof".

The EU Regime

10. The EU regime, contained in a series of secondary and tertiary legislation known collectively as the EU Wildlife Trade Regulations ("the Regulations"), draws heavily

from CITES and also distinguishes between intra-EU trade and re-export from the EU for commercial purposes. Raw ivory may be traded within the EU subject to the case-by-case authorisation in the form of a certificate of pre-Convention items, i.e. pre-1975 ivory as regards Asian elephants and pre-1990 ivory for African elephants. Raw ivory comprising pre-1975/76 specimens cannot be exported from the EU and, as explained more fully below, re-export has now been effectively suspended for older items pursuant to Commission Guidance. As regards worked ivory, pre-1947 items or antiques can be traded within the EU without a certificate but the trader has a duty to demonstrate legality if requested. A certificate is required for the export of antiques from the EU. The 1947 date was chosen simply because it is 50 years before the coming into force of the Regulation (EC) No 338/97 ("the Principal Regulation"). The position is more complicated as regards items of worked ivory acquired in the EU after 1947 and before 1990, but the application of the regime pivots on the date the species of elephant in question joined Appendix I of CITES. The intra-EU trade of such items may be authorised by certificate, but their export from the EU is prohibited in respect of items having entered the EU after the date the species acquired Appendix I protection but is authorised, subject to certification, in respect of pre-Convention items (i.e. those acquired in the EU between 1947 and 1975).

11. A more detailed examination of the relevant provisions of EU legislation will follow, but at this stage I should touch on recent developments both within the Union and beyond. At the 17th meeting of the Conference of the Parties to CITES held in October 2016 it was resolved by resolution 10.10 that States with a legal domestic market for ivory that was contributing to poaching or illegal trade should "take all necessary legislative, regulatory and enforcement measures to close their domestic markets for commercial trade in raw and worked ivory as a matter of urgency". Narrow exemptions may be warranted but these "should not contribute to poaching or illegal trade". I read this resolution as recording CITES's view that the existence of a legal domestic market contributes to the illegal trade, in the sense that it indirectly encourages and stimulates it, but that it may be possible to carve out exemptions which do not. I cannot accept Mr de la Mare's submission that CITES is of the opinion that whether or not legal domestic markets may contribute to illegal trade is case specific.

12. On 17th May 2017 the Commission issued guidance intended to assist Member States with the application of the Regulations to intra-EU trade and re-export of ivory. This recommended, pursuant to Article 5(2)(d) of the Principal Regulation, the suspension of the re-export of pre-Convention raw ivory from the EU (post-Convention raw ivory was already banned) so as:

> "… [to] ensure that tusks of legal origin are not mixed with illegal ivory and help destination countries implement their actions to reduce the demand for ivory, which constitute an important step in addressing illegal trade in ivory and the current elephant poaching surge.
>
> The Commission recommend that, in the current circumstances, in the light of the precautionary principle, and unless conclusive scientific evidence to the contrary comes to light, Member States should consider that there are serious factors relating to the conservation of elephant species that militate against the issuance of re-export certificates for raw ivory."

I should add that the UK has followed this recommendation and has a policy (to the extent to which the Regulations do not already preclude it) which effectively bans the commercial trade in all raw ivory of any age.

13. This Guidance, together with the parallel Guidance on Worked Specimens under the Regulations, recommended a stricter interpretation of the enforcement regime generally as well as steps that should be taken in connection with proof of the age of pre-1947 items particularly in the context of worked ivory. The following passages in the first set of Guidance are clearly relevant and speak for themselves:

> "Contrary to raw ivory, 'worked ivory' encompasses many different types of specimens. This includes items which have been in trade legally for decades (for example musical instruments or antiques) and it is not clear whether a complete suspension of re-export for such items would have a tangible impact against international illegal ivory trade. In view of the increase in re-exports of worked ivory from the EU in recent years, there is however a need to strengthen scrutiny on the implementation of the current rules.
>
> In all cases, it is imperative that EU Member States exercise a high level of scrutiny in relation to application for re-export of worked ivory, to make sure that they only deliver the relevant documents when the conditions set out under EU law are met which guarantee that the ivory is of legal origin. With a view to avoiding that ivory items which do not fulfil the required conditions are exported, it is recommended that the conditions for issuing such re-export certificates are strictly interpreted."

14. In January 2019, following a public consultation, the Commission issued a background document stating amongst other things:

> "Reports indicate that large quantities of pre-1947 items are sold and purchased within the EU market, through antique shops, auction houses or online sites. Controls are carried out by enforcement agencies to verify that the items conform to the derogation, however 100% compliance cannot be guaranteed. There has been some indication that the pre-1947 derogation is sometimes abused and that post-1947 items are offered for sale on the EU market and presented as pre-1947 items which need no certificates."

The Commission proposed that current rules be tightened so as to require the owner to demonstrate "reliably, using approved scientific evidence and methods, that the ivory was acquired before 1947".

15. On 4th October 2019 the Commission published a "non-paper", i.e. a discussion document, proposing as a general rule a complete prohibition of trade in ivory both within and without the EU. As regards intra-EU trade, pre-1975/1990 musical instruments and worked items of "high artistic, cultural or historic value" accompanied by robust age-verification certificates could be authorised; as regards export to third

countries, all that could be permitted are worked items of high value backed by an age-verification certificate proving legal acquisition before 1975.

The Act

16. The Regulations, adopted in the main pursuant to what is now Article 192 TFEU, have direct effect in the UK. Breaches sound in civil and criminal sanctions as more fully specified in The Control of Trade in Endangered Species Regulations 2018 [SI 2018 No. 703]. The Act will not therefore abrogate the EU regime, but to the extent that it is more stringent it will supersede it in practice.

17. I will address Defra's policy in more detail below, but in a nutshell the need for a stricter regime arises because, despite the present panoply of protections in international treaty and the Regulations, between 2007 and 2014 the estimated total number of savanna elephants in Africa declined by 30%, equal to 144,000 elephants, primarily due to poaching. If these rates of decline were to continue, elephants could become extinct within decades in some African countries. Elephants are a "keystone" species and aside from the tragedy that would directly flow, the knock-on environmental consequences would be wide-ranging.

18. The core objectives of the Act are outlined in the Explanatory Notes:

> "The aim of the Act is to help conserve elephant populations, specifically by reducing poaching, through significantly limiting the legal market for ivory items in the UK. This is intended to reduce demand for ivory both within the UK and overseas through the application of the sales ban to re-exports of ivory items from the UK ...
>
> The Act also aims to remove the opportunity to launder recently poached ivory as old ivory items through legal markets, and for it to be re-exported to "demand" markets, i.e. those markets where ivory continues to be a desirable commodity. Such markets are also the primary destinations for newly poached and illegally-sourced ivory. This is intended to prevent products from the UK contributing, including inadvertently, to markets which create a demand for ivory, driving poaching and the illegal trade in ivory. Finally, the ivory ban will demonstrate the UK does not consider commercial activities in any ivory that could fuel poaching to be acceptable and it sends a message that similar actions should be taken globally.
>
> …
>
> At the 17th Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Resolution 10.10 (Rev COP17) on Trade in Elephant Specimens was agreed. This non-binding resolution recommended that all Parties and non-Parties in whose jurisdiction there is a legal domestic market for ivory items that is contributing to poaching or illegal trade should take all

> necessary measures to close their domestic ivory markets as a matter of urgency. The resolution also recognised that narrow exemptions to this closure for some ivory items may be warranted, but that any exemptions should not contribute to poaching or illegal trade.
>
> The Government, through the Act, is addressing its domestic and international commitments by adopting a ban on commercial activities in ivory."

19. The key provisions of the Act are contained in the Annex to this judgment but I need to highlight the following matters.

20. Section 1 creates a general prohibition against the "dealing in" items made of or containing elephant ivory. This includes buying, selling or hiring ivory, offering or arranging such activities, keeping ivory for sale or hire, or exporting it from or into the UK for sale or hire. The mere retention and use of ivory, and its gifting by will or otherwise, is not interdicted. The general prohibition is subject to specified exemptions.

21. Section 2 exempts items which are pre-1918 and "of outstandingly high artistic, cultural or historical value" provided that the Secretary of State so certifies (the "Rarest and Most Important Exemption"). The detail of the certification regime remains to be explicated in secondary legislation but it will turn on the rarity and importance of the item. Some netsuke will benefit from this but the threshold – "outstandingly high" – is designed to be formidable.

22. Section 6 exempts portrait miniatures made before 1918 and possessing a surface area of no more than 320cm² (the "Portrait Miniatures Exemption"). In this case the paint will naturally obscure the ivory surface although anyone with basic knowledge of these items will appreciate this fact, and the rear surface of the portrait will on examination demonstrate a degree of translucency inherent in the nature of the substance and its thinness.

23. Section 7 exempts items made before 1947 containing less than 10% ivory by volume and where all the ivory is integral to it and cannot be removed without difficulty or damaging the item (the "*De Minimis* Exemption").

24. Section 8 exempts musical instruments including bows and like items which are pre-1975 and where the volume of the ivory in the instrument is less than 20% of the total material of which the instrument is composed (the "Musical Instruments Exemption"). I should add that ivory-veneer piano keys have in recent years constituted the majority of the export of all ivory items from the UK. These are counted on an individual basis although on my reading the exemption will only operate if the entire instrument is traded.

25. Section 9 exempts sales to, and between, qualifying or accredited museums both inside and outside the UK (the "Museums Exemption").

26. As I have said, pursuant to section 43(1) the Act comes into force in accordance with provision made by the Secretary of State in regulations. According to Mr Richard Pullen, the senior civil servant in charge of the division within Defra responsible for

domestic wildlife and ivory, the Secretary of State expects to lay regulations before Parliament in early 2020 once a system to give effect to the regulatory mechanisms of the Act is in place. In very broad outline, the Act provides for a system of exemption certificates for those seeking the benefit of the Rarest and Most Important Exemption, including appeals to the First-tier Tribunal in the event of dispute; and a system of registration in relation to the remaining exemptions.

27. The Act provides for a range of civil and criminal sanctions, the former more fully set out in Schedule 1 which I have not annexed. Mr de la Mare's submission about the imposition of civil sanctions was in my view largely neutralised by the fact that the imposition of civil sanctions may be contested on appeal to the First-tier Tribunal. That said, the limit for such sanctions is £250,000.

28. Given that the detail of the system of registration awaits the enactment of subordinate legislation which will prefigure the coming into force of the Act, the costs which an applicant will have to bear are unknown; but Defra has made it clear that this system will be self-financing.

The Defra's Policy and Consultation in introducing the Ivory Bill

29. On 6th October 2017, Defra began its consultation on a proposal to prohibit UK sales of ivory with limited exceptions by publishing a consultation document entitled "Banning UK sales of ivory" and its preliminary impact assessment dated 5th September 2017. This proposal reflected what had been a Conservative party manifesto commitment in 2017. The consultation concluded on 29th December 2017, after 12 weeks. In that consultation document, Defra proposed what it described as:

> "a total ban on ivory sales in the UK that could contribute either directly or indirectly to the continued poaching of elephants, and to prohibit the import and export of ivory for sale to and from the UK, including intra-EU trade to and from the UK." (footnotes omitted)

As for the rationale:

> "By banning the sale of ivory in the UK, as well as prohibiting the import and export of ivory for sale to and from the UK, including intra-EU trade to and from the UK, we will send a global signal that trading ivory is not acceptable. We will send a strong signal that the UK does not condone continued demand for ivory.
>
> While there have been global efforts to ban the trade of new ivory, for example the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has banned the trade in new ivory from Asian elephants since 1975 and from African elephants since 1990, global trade in older ivory continues to be widely permitted. Other countries have also taken steps to ban the sale of ivory and ivory products within their domestic markets. Ivory is still, however, seen by many as a desirable commodity, and connotations of luxury and quality

> help to maintain a high price for both legal and illegally-sourced ivory. The legal trade continues to incentivise poaching by creating a demand for new ivory products and can also provide a way to launder fresh ivory from illegally killed elephants. We believe that the legal market presents opportunities for criminals to launder recently poached ivory as old ivory products. We want to remove any possibility that this could happen by placing very strict restrictions on what may be legally traded within the UK. Part of this will be to prevent items being exported from the UK to "demand" markets: those which are also destinations for newly poached and illegally-sourced ivory. This will prevent products from the UK contributing to markets which create a demand for ivory, driving poaching and the illegal trade in ivory. Sales of ivory products, including larger items of solid ivory, present a risk in terms of opportunity to pass off illegally-sourced ivory as legitimate. Statistics from the Elephant Trade Information System signify that the illicit ivory trade and the weight of ivory involved are now three times greater than in 1998." (footnotes omitted)

30. The proposed prohibition was subject to a more limited number of exceptions than are found in the Act. Those exceptions were limited to:

> "- Allowing the continued sale of musical instruments which contain ivory.
>
> - Allowing the continued sale of items which contain a small percentage of ivory, and where the ivory is integral to the item - a "*de minimis*" exemption.
>
> - Allowing the continued sale of items which are of significant artistic, cultural and historic value.
>
> - Allowing the continued sale of ivory to museums, and between museums."

31. In April 2018, following the close of the consultation, Defra published its "Summary of responses and government response". That document explained that 71,238 responses were received to the consultation, two of which were petition responses (and therefore replicative). The respondents included members of the public, antique dealers, auction houses, musicians and conservation NGOs. In particular, it included responses from the British Antique Dealers' Association and the Association of Arts and Antique Dealers respectively. Indeed, the Summary explained that among the organisations that responded to the consultation the fine art/antiques trade sector was the most represented.

32. In the same month the Regulatory Policy Committee ("the RPC"), the body that assesses the quality of evidence and analysis used to inform regulatory proposals, issued an opinion dated 9th April 2018 on Defra's "final stage impact assessment" in respect of the proposed prohibition on sales of ivory. Defra's preliminary impact assessment had been given a "green rating" by the RPC although the latter was clearly concerned

about aspects of it. In my view, it is clear that in its April 2018 report the RPC was addressing Defra's final Impact Assessment ("IA") which, although not promulgated until the following month, must have existed in advance draft. This is why the RPC was able to refer to what it calls Defra's "final stage" document.

33. The overall rating accorded by the RPC to the IA appears in green in my copy, and it states: "fit for purpose". However, close attention to this document is required, because in addressing the quality of the IA the RPC opined that it would "benefit significantly" from addressing certain points, including:

> "Impacts on individuals and households. The Department's assessment of the loss of wealth to individuals with items containing ivory (page 27) does not appear to be proportionate to the scale of this impact, with an estimated "over two million items made of ivory or with an ivory component… in British homes" (paragraph 124). **The Department's assessment of these impacts is, therefore, not fit for purpose, and should be strengthened significantly**. [emphasis supplied]
>
> Enforcement costs. The IA would also benefit from further assessment of the costs associated with ensuring compliance with the exemptions, and any wider enforcement costs. For example, it would appear proportionate for the Department to provide an estimate of the cost of setting up and administering the system referred to on page 26.
>
> Benefits. The Department describes anticipated benefits of the proposal at pages 16- 17. These include "…UK citizens whose welfare will be enhanced from the knowledge that the UK is playing its part to bring an end to the illegal trade in ivory…" and "A strong reputational benefit to the UK in showing international leadership…". **The IA's assessment of benefits would benefit significantly from discussing in more detail the likely effectiveness of the proposal in reducing trade in new ivory, in the light of previous experiences**. [emphasis supplied]
>
> Consultation responses. The Department states that the "…overwhelming majority of respondents supported the implementation of a ban." (page 4). The IA would benefit significantly from including a summary of responses from businesses negatively affected by the proposal, such as antique dealers and auction houses, and how the Department has considered these in its IA.
>
> Familiarisation costs. The Department states that "the time required for familiarisation will be 30 minutes per business" (page 20). As a one-off cost, even a significant increase in the assumed time spent on familiarisation would not affect the rounded EANDCB (the equivalent annual net direct cost to business). However, considering the potential complexity to be interpreted by businesses, particularly concerning the 'carefully

> targeted exemptions' within the legislation, the IA would benefit from providing evidence to support this assumption.
>
> Small and micro-business assessment (SaMBA). The Department explains that survey evidence suggest that all antique dealers are small or micro businesses and that two large auction houses account for 53 per cent of the auction market. The Department addresses why an exemption would not be justified. The SaMBA would benefit from discussing possible mitigation measures, e.g. production of guidance material.
>
> Exemptions. The Department states that it "… would not expect a large volume of (ivory) items to be sold by business to museums, so this exemption is unlikely to reduce the cost to business significantly." The IA would benefit from providing some indicative estimates of the scale of the impact of this and other exemptions, or at least a justification for this assumption.
>
> Post implementation review (PIR). The Department should set out its plans to review/evaluate the ban, particularly how any unintended consequences would be investigated."

34. The RPC Opinion concluded, somewhat mystifyingly, that a "classification" of its assessment is "[t]o be determined once the framework rules for the current parliament are set". It did however note that the "small and micro business assessment" is "sufficient".

35. On 23rd May 2018, Defra introduced the Ivory Bill to the House of Commons. The Explanatory Notes to the Bill were materially the same as the Explanatory Notes to the Act. The Bill reflected the consultation process to the extent that it included specific exemptions for portrait miniatures and for items of outstandingly high artistic, cultural or historical value. The latter decision reflected the antique sector's support for an exemption for items of artistic, cultural or historical value, while acknowledging concerns – particularly from conservation NGOs – about the potentially wide interpretation of such an exemption unless it was tightly defined.

36. On the same day, the Government published the IA, which "sets out Defra's final assessment of the case for banning the commercial activities of ivory in the UK that contributes directly or indirectly to elephant poaching, with the ultimate aim of addressing the decline in the number of wild elephants".

37. As regards the questions of (1) why government intervention is necessary, and (2) what the policy objectives and the intended effects are, the IA stated:

> "**What is the problem under consideration? Why is government intervention necessary?**
>
> Elephants are being poached and killed at unsustainable rates for their ivory. Although international conventions outlaw trade in recently poached ivory, the illegal trade and poaching has increased since 2007. UK Government intervention is necessary

> because international and domestic markets are not factoring in the total value of elephants to society or long-term conservation. The expectation is that the renewed UK leadership in this area and a commitment to close legal ivory markets would reduce the demand for ivory and thus the incentive to poach. It would also close loopholes in current legislation which present opportunities to launder poached ivory through legal markets, thereby indirectly encouraging continued poaching of elephants. Only Government can send a clear global signal that the trade in ivory is not acceptable and that the killing of elephants for their ivory will not be tolerated.
>
> **What are the policy objectives and the intended effects?**
>
> Ensure the UK plays a leading role in ending the illegal trade in ivory. A total ban on the commercial dealing of ivory in the UK that contributes directly or indirectly to elephant poaching would send the clearest possible signal that the UK does not tolerate the poaching of elephants for their ivory and demonstrates that we are world leaders in the fight against the ivory trade. Renewed UK leadership in this area will help encourage other countries to close their markets, reduce demand and stop poaching."

38. The IA explained that Defra considered two policy options:

> "Option 0: Represents the "do nothing" option of retaining the status quo. Currently, the international trade in ivory is controlled by rules set by the Convention on the International Trade in Endangered Species (CITES). These rules are implemented in the UK through EU Wildlife Trade Regulations.
>
> Option 1: Proposal for a total ban on ivory sales in the UK, and proposal to prohibit the import and export of ivory for sale to and from the UK, including intra-EU trade to and from the UK, with strictly limited and, carefully targeted exemptions."

39. The IA further explained that in addition Defra had previously considered other approaches such as "date-based restrictions", and "non legislative approaches" such as "stopping issuing permits for post-1947 ivory". In relation to the former proposal, the IA noted that date-based restrictions such as limiting the prohibition to all items of worked ivory produced after 1918, being 10 years before the Act, would "not support the policy objectives and would not achieve the intention of taking a global leadership role on this issue".

40. Mr Pullen explains that Defra considered whether there ought to be a full exemption for small businesses. The IA concluded that "[i]t is clear that a full exemption to small businesses from a ban on ivory sales, given their level of presence in the trade, is not compatible with achieving a large part of the intended benefits of the measure." Mr Pullen also states that Defra did consider "whether there should be a compensation scheme". It also concluded, however, that "the existence of a compensation scheme would have run contrary to the intention of the Act" and in particular "[a] compensation

scheme does not align with the policy objective of influencing global demand for ivory by removing the trade of ivory (and hence the monetary value associated with the ivory items subject to the ban)."

41. Finally, Mr Pullen explains that Defra did consider whether an exemption for portrait miniatures should lead to further exemptions for other types of antiques, and in that context particular attention was given to netsuke. However, the conclusion was reached that broadening the scope of the exemptions would undermine the objectives of the Act.

Impact of the Act

42. Having set out the "political and economic case for banning the sale of ivory in the UK", the IA is marked, as I have said, with a "green rating" following scrutiny from the RPC. That RPC scrutiny indicated, according to Mr Pullen, that there were "no significant concerns over the quality of the evidence and analysis, and that there is sufficient analysis to suggest that the equivalent annual net direct cost to business … is accurate to within £100,000." It will be clear from what I have already said that this is not altogether accurate. The EANDCB of the policy was said in the IA to be £7.4M and the present value of net cost to business over the ten-year appraisal period was £74.6M. Yet it does not appear that Defra specifically addressed any of the concerns articulated in the RPC Opinion or that the advance draft of the IA was modified to reflect it. I have set out the precise sequence of events. For example, §124 of the IA stated in anodyne terms that it would be "very hazardous" to estimate the cost to individuals, whereas the RPC stated that this analysis should be significantly strengthened.

43. In February 2019, the British Antiques Dealers Association commissioned Woodnewton Associates, an independent research agency that specialises in analysing issues of public policy and is often instructed by Government, to survey antique dealers and others affected, or likely to be affected, by the prohibition under the Act. At §5.22 its report concluded from survey evidence and extrapolations from it that the total loss (i.e. not reflecting the possibility of interim sales at an under-value) on all dealers' ivory holdings would be just under £32M. This was on the basis of "core impact" and the report also set out calculations based on high and low impact. As for collectors, §5.25 of the report gave a total loss figure of nearly £233M, again on the premise of core impact.

44. The Woodnewton report concluded as follows:

> "6.1 Section 5 considered the economic impact on the values of holdings of works of art or antiques that contain ivory that would be banned by the Ivory Act. This is the most significant area of economic impact and the one covered to least effect in the Government's Impact Assessment. To understand the overall economic impact, we need to combine this with other effects.
>
> 6.2 Some of these cannot be estimated on the evidence we have. We know that some businesses will close and others will relocate; that some staff will be made redundant; and that some businesses will suffer a reduction in turnover and profit; and that some professionals such as restorers or academics will experience a reduction in demand for their services or struggle

> to continue with their work. But we cannot quantify any of these effects.
>
> 6.3 We know that businesses will have compliance costs, notably to familiarise themselves with the provisions of the Act themselves, and to explain these to potential customers. There will also be a 'chilling effect' whereby potential customers of items that would be exempt might decide to play safe and not purchase them. Again, these are impossible to quantify on the data we have.
>
> 6.4 We know that some dealers and collectors have suffered a loss through selling items at a lower price than would have prevailed had the ban not been announced. The survey evidence, adjusted for potential overstatement, is that this is £1,957,986 for those taking part. We would also expect that, where owners have sold off their holding, they are less likely to take part in this survey compared to those who still have substantial holdings and therefore have more of a stake in the issue. This sum is therefore likely to be a considerable understatement of the true loss. Applying the multiplier derived from the survey's reach for dealers as a whole of 12%, this leads us to conclude that the overall loss would be £16,316,550.
>
> 6.5 The Government's Impact Assessment proposed totals for the loss of profits arising from reduced turnover as £72.4 million over ten years. This is based on a lower figure for the number of dealers than we have relied upon in our analysis (2,482 compared to 4,000) and we think it is an underestimate of the true costs. We have not undertaken a separate computation, and have instead used the Government's figure, adjusted proportionately to match our assessment of the total number of dealers of 4,000. This gives a total loss of profits from reduced turnover over ten years of £116.7 million.
>
> 6.6 This gives a total for the economic impact that we are able to quantify as follows:
>
> Loss already realised from sales £16M
>
> Loss on holdings of musical instruments £1M
>
> Loss on current holdings of other items containing ivory £256M [i.e. £32M + £233M]
>
> Profits forgone over ten years £117M
>
> **Total quantifiable economic loss £390M**"

45. In response to the Woodnewton Report, Mr Pullen states that there are "several analytical challenges in deriving a robust estimate of the Ivory Act 2018, due to limited

availability of reliable and specific data" and that, in any event, the "focus of an Impact Assessment process is on the impact on business" (emphasis added). Therefore, the IA did not quantify the impact on individuals "in monetary terms". Mr Pullen refers also to concerns of his "specialist colleagues" regarding the reliability of data used in the Woodnewton Report and the conclusions drawn from that data. In my view, it is obvious that self-completion surveys of this nature will tend to overstate the impact of a measure which is not welcomed. It is apparent that the authors have made some allowance for this, but whether it is sufficient is open to question.

46. In addition to the Woodnewton Report, the Claimant has filed witness statements from those with expert knowledge and understanding of this niche marketplace:

i) Ms Rosemary Bandini, who deals in Japanese antiques including worked ivory, reports that her sales have "drastically reduced" and antique ivory is being sold at prices "far below" their values prior to the Ivory Act. She reports that she expects to be forced into early retirement, as it is impractical for her to relocate her business overseas given the travel and costs involved. She explains in her evidence that collectors of netsuke face an invidious choice between (a) keeping their collections in the UK and rendering them worthless once the Act is commenced, a cost that only the wealthiest collectors will be able to absorb; (b) disposing of their collections now at a significant loss of value; or (c) taking their collections out of the country, at significant cost, and thereby limiting the enjoyment that can be derived from them.

ii) Mr Paul Moss, a collector and former dealer in Chinese and Japanese works of art, reports that his former business is considering relocating outside the UK and that his personal collection of netsuke built over a lifetime, which he "cannot bear" to sell or part with, will be rendered financially worthless to his heirs.

iii) Mr Alastair Gibson, who deals in 19th century Chinese and Japanese antiques, has incurred the cost of relocating the majority of his stock overseas and may set up a new business abroad to continue to trade.

iv) Mr Thomas Heneage, a specialist in rare books, some of which have ivory in the bindings, clasps or contain ivory decorative panels, reports a fall in the level and value of sales and fears having to write off a proportion of his stock.

v) Mr Peter Garrod, a private collector of antique Japanese ivory objects for "over 40 years", faces the "total loss of value" of a collection that was intended to supplement his pension.

vi) Mr Gregory Moss, a private collector of walking canes, faces the "loss of retirement savings".

47. I should add that according to Ms Bandini:

> "The factors that affect the price of netsuke and motivate my customers' purchases are the skill of the carving, the object itself as a work of art, the artist or school and the provenance. The ivory content, or material from which the netsuke is carved, rarely, if at all, affects the price. In the cases where it is the ivory

> that motivates the purchase, it is for aesthetic and historic purposes, for example to ensure that the material composition of a collection is balanced, not for potential reworking."

and Mr Moss:

> "Of course, many netsuke are exquisitely beautiful, and it is important to point out that netsuke enthusiasts do not look at or evaluate or desire or buy a netsuke because it is made or ivory. They appreciate it, or love it, because of the artistry and craftsmanship. In 46 years of trading, I have never come across a buyer who bought a netsuke because they thought of the ivory as a commodity. This is demonstrated by the lack of price differential in the netsuke market between ivory netsuke and comparable netsuke carved of other materials."

Neither of these mention the word "patina", which I suspect may have a role to play in relation to valuation; but I leave that matter there.

48. Mr Pullen's retort is on two levels. First of all, he states that it is not possible logically to separate out the value of the ivory in any specific item from that of the item as a whole. Secondly, he points out that any impact on individuals is mitigated by the delay in implementation, and that dealers and collectors have been on notice since 2017 of Defra's policy. There has therefore been "substantial opportunity for owners of affected items to consider how to deal with them, and for businesses with substantial ivory holdings to ensure they diversify in advance of the Act coming into force". Mr Pullen also refers to the exemptions, allowing "exempted items to continue to be traded with a certification or registration regime".

49. I have examined the Claimant's evidence with care as to the "chilling effect" of the Act on current values. Some of this is somewhat anecdotal, not least because few if any collectors or dealers attempted to liquidate their stock back in 2017. According to Ms Gettleson, her trade with European customers has "virtually disappeared" in the last couple of years. Other witnesses have stated that prices for individual items actually sold have fallen by 25-50%. Ms Bandini's evidence is that her sales have "drastically reduced" and that antique ivory is being sold at prices "far below" their pre-2017 values. According to the Woodnewton report, 70% of the respondents to their survey have received lower prices and two dealers have reported that sale prices are around 10% of pre-announcement levels. Overall, I consider that it is fair to proceed on the basis that there has been a significant fall in the values of antique ivory since 2017 but I must factor in an element of understandable hyperbole.

50. As for the scope of the exemptions under the Act, the Claimant's solicitor, Mr Richard Pike, observes that "none of the implementing regulations have been passed or guidance produced so there is no clarity on how exemptions will be applied including, crucially, what criteria will be applied for the section 2 exemption". There were brief submissions about this at the hearing, and my reading of section 2(3) of the Act is that the majority of antique worked ivory will probably not benefit from this exemption because the concepts of rarity and importance are relative.

The Specific Objectives pursued by the Act

51. According to Mr Pullen, there are four main ways in which the schema introduced by the Act contributes to its objectives, viz.:

(i) By reducing further or eliminating any opportunity there may be for illegal ivory, including recently poached ivory, to be traded through markets for ivory items, including antique ivory items, in the UK;

(ii) By reducing further or eliminating the contribution made by ivory items from the UK, including antique ivory items, in supporting or sustaining demand for ivory items in other consumer markets, which may also support the illegal trade in ivory including the poaching of elephants;

(iii) By demonstrating that the UK is willing to close down the commercial trade in items which may be valued for their ivory content, including antique ivory items, thereby setting an example of leadership and contributing to achieving this change; and

(iv) By supporting those countries which have already taken action, in particular by closing their domestic markets for ivory items to the greatest extent so as to reduce demand for ivory items in those markets and associated markets and reduce incentives to obtain illegal ivory, including recently poached ivory.

52. The evidence before the Court on each of those four objectives is summarised below in turn.

By reducing further or eliminating any opportunity there may be for illegal ivory, including recently poached ivory, to be traded through markets for ivory items, including antique ivory items, in the UK

53. Overall, the evidence that there is an illegal ivory trade in the UK is quite limited. There is much stronger evidence that this country is being used as a form of transport hub for illegally sourced items *en route* to the Far East, which arises in Mr Pullen's second objective. Further, there is a clear overlap between this first objective and the second, and I have struggled to ascertain a clear line of demarcation between the two.

54. Mr Pullen opines that "[a] ban on ivory trade, subject to very narrow exemptions, will substantially reduce the size of the market" and will "reduce customer confusion about whether the trade in items containing ivory is permissible and will avoid inadvertent trade in items containing poached ivory." Such a prohibition, Mr Pullen posits, "will make it more difficult for criminals to use the lawful trade to mask a trade in items containing poached ivory and, by significantly reducing the scale of the lawful trade, will make enforcement easier."

55. Mr Pullen refers to the IA, which explained that:

> "20. Whilst most of the UK's ivory trade is legal, the UK has featured in several "cluster analyses" of ivory seizure data by CITES's "Elephant Trade Information System" (ETIS) since 2002, suggesting that "the UK has consistently played a role in

illegal ivory trade globally". Between 2010 and 2014, some 154 seizure records were reported by the UK to ETIS, a considerable increase on the previous five-year period, although less in volume terms than Germany and France. Seizures were made not only in the UK, but also in other countries that involved the UK either as a country of export, re-export, transit, or destination … [I set out the remainder of this paragraph below]

…

29. Despite existing legal restrictions, the UK ivory goods market is vulnerable to being unable to distinguish between legal and illegal trade, because only goods which have been worked before 1947 can be sold and exported without a permit. **Although the UK ivory market has not been directly linked to the trade in recently poached ivory, sales of more recent ivory products and particularly raw tusks potentially present a greater risk in terms of opportunity to pass off illegally-sourced ivory as legitimate.** The coexistence of legal and illegal ivory in the market creates confusion and some consumers might think they are buying something legal when that is not the case. This is the economic problem of asymmetric information between buyers and sellers potentially creating economically inefficient outcomes. [emphasis supplied]

…

31. The antique trade relies on the seller correctly and honestly assessing the ivory to be pre-1947 and worked. It is disproportionately costly for the trade to use scientific testing such as carbon dating as a means of establishing an item to be worked pre-1947. The cost of testing (£400 or more) is more than the value of many items on sale and re-quires extracting a sample from the item which can also irreparably damage small or fine items due to the size of the sample needed. Carbon dating is also far less accurate with regard to items created after 1945, due to the atmospheric impacts of the atomic bombs dropped at Hiroshima and Nagasaki.

32. Recent research highlights the fault lines in the domestic ivory trade. For example, in field research by Traffic, casual ivory market traders had limited awareness of legal requirements regarding ivory. Whilst all traders understood that there was a cut-off year for what was considered "antique" (ivory acquired and worked before 1947), some did not know which year this applied to (p.19). The University of Portsmouth interviewed dealers who "stated that they either know of dealers or auctioneers who would sell post-1947 ivory, or that they had witnessed illegal ivory being sold in the UK" (p.53). Similar issues were highlighted by Two Million Tusks, who found that many auction houses were unable to comply with the legal

> requirement to demonstrate proof of age for all ivory pieces dated pre-1947.
>
> …
>
> Increase illicit trade and poaching
>
> 56. Legal ivory trade can increase the illicit trade and poaching because:
>
> a) There is confusion whether antiques contain illegal ivory or not. Banning trade will increase the stigma of buying ivory reducing demand in both the legal and illegal markets. Also, those who buy ivory as an investment will cease to do so if they have concerns around whether they can find a market outlet for it.
>
> b) There is suggestive evidence that legal ivory is used by smugglers to mask the illicit ivory trade (see paragraph 30). Smugglers use legal permits to launder the product of elephant poaching by increasing the quantity over what was originally certified in permits to trade ivory or by using these permits several times. As the legal market shrinks and permits become more exceptional, laundering illegal ivory becomes more difficult and expensive.
>
> c) As the amount of legal ivory diminishes and becomes more easily identifiable monitoring and enforcing becomes easier."

56. The parties have drawn my attention to the United Nations Office on Drugs and Crime 2010 report which concluded that "the trade in illicit ivory is only lucrative because there is a parallel licit supply, and ivory can be sold and used openly. Ivory would lose much of its marketability if buying it were unequivocally an illegal act, or if ownership of these status goods had to be concealed." Further, "[i]n some cases, consumers are duped; in others, there is willing blindness. If the source of these products were clearly documented internationally, they would not be confronted with this dilemma". I have already observed that in relation to antique ivory products there is no certification requirement under the EU regime.

57. In addition, Defra references an Environmental Investigation Agency ("EIA") report entitled "Response to Inquiry into trade in elephants and rhinoceroses in Australia," in which it is stated:

> "Various studies, including investigations conducted by EIA in key ivory markets, show that a **legal domestic ivory market provides opportunities for laundering of illegal ivory**, further fuelling the elephant poaching crisis. It is very difficult to differentiate illegal ivory from legal ivory and traffickers use various techniques to launder illegal/new ivory by making it look legal/old/antique" [emphasis added].

58. While Mr Pullen acknowledges that "it is difficult to obtain robust data on the prevalence of poached ivory being laundered through the legal market" in the UK itself, he cites a range of sources that he says indicates that such laundering takes place.

59. §32 of the IA cites a 2017 report of the University of Portsmouth, "The Elephant in the Sale Room". In addition to the extract cited, the report notes (p. 55): "Whilst none of the interviewees admitted to selling post-1947 ivory many of them stated that they either know of dealers or auctioneers who would sell post-1947 ivory, or that they had witnessed illegal ivory being sold in the U.K. The ivory trade in the U.K. therefore depends on goodwill rather than the proper enforcement of the law." I take the Claimant's point that this report is only referred to; it is not strictly speaking in evidence before me. Even taking a lax approach to its admissibility, the evidence, such as it is, is highly anecdotal and certainly not quantitative.

60. In October 2017, Hugh Fearnley-Whittingstall and KEO Films issued a statement in the context of the Government's announcement of its proposed prohibition of sales of ivory. The statement followed the documentary series in which Mr Fearnley-Whittingstall appears, "Saving Africa's Elephants: Hugh and the Ivory War", first broadcast on BBC1 in October 2016. In that statement, Mr Fearnley-Whittingstall refers to "incontrovertible evidence that ivory pieces from the UK were being exported, both legally and illegally to Asia, to be sold in the very same markets that we know are dealing in recently poached African ivory". The parties have asked me to address this piece of evidence under the rubric of the UK rather than the overseas market. It more clearly falls under the second of Mr Pullen's rationales rather than the first, but I address it now. Mr Pullen has accepted that this programme has been "subject to criticism". However, the presenter did find evidence of post-1947 ivory carvings being offered for sale online, and he is clearly of the opinion, consonant with the views of others, that the existence of a trade in all ivory helps fuel the trade in the illegal product.

61. In October 2017, the group of researchers known collectively as Two Million Tusks produced a report, "Ivory: The Grey Areas: A study of UK auction house ivory sales – The missing evidence" setting out the results of an investigation in which a sample of lots sold by auction houses were queried and the information provided on the age of the item was tested. The report explained:

> "[The authors] contacted 72 auction houses about 180 ivory lots for sale and for the vast majority (90%) of the lots, the auction houses were unable to comply with the legal requirement to demonstrate proof of age for all ivory pieces dated pre-1947. Worryingly, an auction even included an illegal raw tusk and unworked ivory, ready to go under the hammer and then be exported, without any checks.
>
> Our second study proved how insignificant ivory sales are to many UK auction houses. Out of 232 auction houses surveyed in late 2016-early 2017, ivory lots formed only 0.70% of the total number of lots for sale. An update in Spring 2017 involving 301 auction houses found a similar figure of 0.76%."

62. In response to this the Claimant refers to the evidence of Mr Pike, who explains that the conclusions in the report were based on an unrepresentative sample of regional auction

houses selling low value lots, rather than London auction houses who have specialists in antique objects. Mr Pike continues that the report's conclusions were based on an "erroneous premise" as to the existence of a "legal requirement to demonstrate proof of age".

63. In riposte Defra cites the Commission May 2017 Guidance which provides (p. 10): "the owner of a specimen who wishes to sell it has first to demonstrate that the specimen was acquired … before 3rd March 1947 … it is recommended that Member States monitor their domestic markets of antique ivory, including carrying out regular checks to see if traders have evidence of the age and/or origin of antique ivory for sale." I would draw the conclusion that this Guidance has identified the existence of an enforcement issue without illuminating its extent. Whether an "active enforcement" regime (as per the Commission's May 2017 Guidance) would be sufficient is an issue which is better addressed subsequently.

64. Mr Pullen also refers to specific examples of prosecutions for the laundering of illegal ivory in the UK, namely two reports of the National Wildlife Crime Unit, the first entitled "Seven months imprisonment for Cumbrian ivory trader" (September 2016) and the second entitled "An ivory trader in Battersea fined just £1,375 for selling whale and dolphin bone" (January 2014). I understand that in this latter instance ivory billiard balls were being refashioned into carved items, and the trader did not have the necessary permit for ivory which was post-1947. Although this is evidence of the current regime working rather than failing, I agree with Defra that it is a reasonable inference that there must have been sales of a similar sort that have gone undetected, although the scale of the problem cannot be gauged. Although what was and is illegal now will continue to be so under the Act, there is force in Defra's overarching point that the existence of a regime which prohibits all ivory sales subject to narrow exemptions is likely to be more efficacious because there will be less uncertainty in the public mind as to what is permissible and what it not.

65. In its July 2018 study, "Europe's Deadly Ivory Trade: Radiocarbon testing illegal ivory in Europe's domestic antique trade" a non-profit organization, Avaaz, working in collaboration with Oxford University, reported on the results of radiocarbon dating of 109 ivory items purchased "from 10 countries across Europe". In the study, Avaaz reported that:

> "Within Europe, it is still legal to trade worked ivory originally acquired before 1947 without restriction. For the first time, this study shows that this legal trade is covering up an illegal trade. There is a widespread practice in countries across Europe of selling 'antique' ivory that actually dates from much later – and this illegal trade includes ivory from elephants poached and slaughtered in the last few years ….
>
> The study shows, without doubt, that recently poached ivory is being sold across Europe … The study found in Bulgaria, Spain, and Italy, all the pieces tested were illegal, and in France, the Netherlands, and Portugal, the large majority were illegal. Illegal items were found to be sold by antique shops as well as private sellers."

66. Mr Pullen has fairly accepted that this report has been "subject to criticism". Mr Pike explains that the sample sizes for all countries considered in the study were very small, with only five items from the UK. The Claimant also suggests that the methodology for selecting samples is not properly explained, and that of the five items identified in the UK, the single post-1947 item had a "calibrated age" of 1954-1956, being well before the introduction of CITES. To the extent that the report, with its methodological difficulties, did show that 74.3% of the items purchased in several countries were incontrovertibly post-1947, the problem would appear to be more prevalent in other EU markets.

67. The Claimant suggests that an August 2016 report conducted by the wildlife trade monitoring network, TRAFFIC, entitled "A rapid survey of UK ivory markets" demonstrates "clear and compelling assessment of (lack of) evidence of laundering" of ivory in the UK. In particular, the Claimant refers to the following passages:

> "Key findings … [l]inks with the current elephant poaching crisis appear tenuous at best, as researchers found no new or raw (unworked) ivory for sale, and only one item that was reportedly after the 1947 cut-off date for antique ivory. …
>
> Seizure data show that the UK is also an import, re-export and/or transit country for illegal ivory, with an increase in ivory seizure records reported by the UK in recent years (an average of 15 annual seizure records, totalling 134 kg raw ivory equivalent reported for 2010-2014). There have been a number of seizures of new and/or antique carved items – in 2015, the UKBF recorded over 150 seizures of ivory carvings in postal parcels en route to China, through targeted inspections and searches."

68. The Claimant explains further that TRAFFIC's August 2016 report reflects the UK's role as a "transport hub" as opposed to providing evidence of "laundering taking place in the UK market". By way of further example, the Claimant refers to the Government's June 2018 factsheet, which provides examples of seizure, all of which (the Claimant says) relate to transhipments (see further §80 below).

69. In response to that evidence, Defra cites another passage of TRAFFIC's August 2016 report, which states that:

> "Seizure data also show that the UK plays a role in illegal ivory trade, at **both import and re-export**, but in particular as a transit country, with ivory seizures reported by the UK having increased in recent years" [emphasis added].

The "in particular", so the argument runs, indicates that this phenomenon is not limited to the UK's role in being a transport hub. The Claimant observes that this contention is inconsistent with footnote 16 to the IA:

> "According to the [TRAFFIC] report, the role of the UK in the ivory trade is that of a transit country. This means that the UK is not the final destination for most of the ivory going through its

> ports and airports but an intermediate step in its voyage to Asia. However, the quantity of ivory taking this route is small."

70. Defra also relies on TRAFFIC's support for the Act. This is a fair point insofar as it goes, but TRAFFIC's concern would not appear to relate to the intra-UK and/or intra-EU market. The problem pertains to export to Asian markets, which leads me neatly to Mr Pullen's second rationale.

By reducing further or eliminating the contribution made by ivory items from the UK, including antique ivory items, in supporting or sustaining demand for ivory items in other consumer markets, which may also support the illegal trade in ivory including the poaching of elephants

The prevalence of exports of legal ivory from the UK to other countries

71. The IA reflects this second rationale at paragraph 33:

> "33. Furthermore, worked ivory products from the UK can currently be sent to key consumer markets with the relevant CITES permit. These same consumer markets are a frequent destination for freshly poached and illegally-sourced ivory, so any supply of UK worked ivory items, and particularly more recent items, to these markets may become mixed with illegally-sourced ivory, supporting demand which drives poaching and illegal trade."

72. Mr Pullen refers to a number of sources in order to demonstrate that the UK has a significant legal export market for ivory that did not originate in the UK.

73. In 2017, the EIA reviewed the CITES Trade Database, which aggregates records of trade in CITES-listed species, for certificates for legal ivory exports. According to the EIA's analysis, the data showed that, during the period from 2010 to 2015:

> "- the UK exported 370 per cent more ivory items globally than the next highest exporter, the USA;
>
> - the UK occupied the top spot in the list of largest ivory exporters for each year except 2015, when it was second only to Italy;
>
> - UK ivory exports to Hong Kong and China increased dramatically over the period, while exports to the USA plummeted as the US Government introduced greater restrictions on international and domestic ivory trade."

74. Mr Pullen also refers TRAFFIC's August 2016 report in the same vein:

> "According to CITES exporter data, the UK was a net (re-)exporter of ivory for commercial purposes over the last decade: 990 kg and ~54,000 specimens of ivory were re-exported for commercial purposes between 2005 and 2014. In total, the UK's re-exports of commercial ivory made up 31% of the total EU re-exports during this period. The majority of commercial trade

> reported by the UK for 2005–2014 was in worked ivory (carvings), with only 2% involving raw ivory."

75. Mr Pullen refers to the same report as evidence for the proposition that the UK exports a large volume of ivory to certain Asian markets and that there has been a shift in the identity of countries importing ivory antiques from the UK:

> "In 2004, buyers of ivory antiques at London's physical markets were dominated by American and European tourists, but in 2016 traders reported that travellers/citizens from East Asian countries/ territories (including mainland China, Japan and Hong Kong) are increasingly purchasing ivory in the UK. According to ivory dealers, the craftsmanship, style of carving and the era and/or provenance of antiquity were considered the primary indicators of quality and value in the UK's antiques products, rather than the material the item was composed of. Correspondingly, there was little difference in price between products made with ivory or other materials.
>
> …
>
> The principal destinations for ivory re-exported from the UK over the last decade were the USA, mainland China, Australia, Switzerland and Canada. However, the number of actual specimens reportedly re-exported to the USA has nearly halved between 2005–2009 and 2010–2014 (from ~19,000 to ~11,000) and the number re-exported to mainland China increased from ~2,000 to ~11,000. Information collected from traders in the 2016 survey support this shift in principal destinations for antique ivory items."

76. Mr Pullen also refers to the, at the time, most recent Government data held by the Animal and Plant Health Agency ("APHA"), the authority responsible in the UK for issuing permits for export of ivory, on used export permits. Mr Pullen explained that data showed that 13,849 items were legally exported to the Far East for commercial purposes between 2013 and 2017, although as Mr Pike states in evidence, APHA has clarified in respect of that data that it has "generally recorded each ivory key on a piano separately".

77. In riposte, Mr Pike explains that, in any event, the scale of UK exports is overstated. He states that his colleagues have examined the CITES Trade Database. For the period from 2016 to 2018, Mr Pike states that piano keys represented "over 67%" of ivory-containing exports from the UK to the Far East in this period. Mr Pike cites an August 2014 "National Public Radio" article in which an interviewee claims that one elephant tusk can be used to make "45 keyboards". Mr Pike suggests that equates to "as many as … 2,340 keys" and that therefore the UK is "highly unlikely" to be the world's largest exporter of ivory, whether to the Far East or elsewhere, when the UK does not allow the export of tusks at all. Mr Pike also notes, by reference to the CITES Trade Database, that in the period from 2010 to 2015, China imported "over 600,000 items containing ivory including over 7,200 kg of tusks measured by weight plus over 2,000 tusks recorded by number."

78. The Claimant invites me to carry out some basic arithmetic, and I am content to do that. Between 2010 and 2015, China imported on average 100,000 items of ivory per annum. The percentage of piano keys amongst these items is unclear. According to Mr Pike, for the period 2016-18, 3,689 piano keys and 1,787 other items were exported from the UK to the Far East as a whole. However, the data provided by TRAFFIC indicates that approximately 11,000 items were re-exported to China over the four-year period between 2010 and 2014 (representing a significant increase over the previous four years), and of these the majority were I infer probably piano keys. My reading of the Act is that piano keys would only be exempt if the instrument were sold as a whole, but I did not receive submissions about this. My overall assessment is that the UK's contribution by way of exports of legal ivory to Far Eastern markets in particular cannot be ignored but it is not substantial.

The prevalence of exports of illegal ivory from the UK to other countries

79. In any event, Mr Pullen explains that the data referred to above accounts only for the *legal* trade of ivory to the Far East, and that it is unclear how many items have been illegally traded over the period. I have already mentioned the evidence contained in TRAFFIC's August 2016 report and the conclusion of the IA. However, there is further evidence on this topic.

80. Data from the UK Border Force recorded 602 seizures of illegal ivory items moving into or out of the UK in the four years between 2013 and 2017. The Government explained in its June 2018 factsheet on illegal ivory seizures that:

> "Data over this timeframe indicates a large increase in the number of times items seized between 2014 and 2015. This is likely the result of a targeted inspections and searches by the UK Border Force for ivory carvings in postal parcels en route to China where over 150 seizures were recorded in this operation as well as a single seizure of 110kg of ivory at Heathrow Airport. The weight of items containing ivory varies year on year, however a significantly higher seizure volume was reported in 2015. This is the result of a single large seizure of 110kg of ivory, including tusks, carved bangles and beads, at Heathrow in transit from Angola. This single seizure of ivory was larger in volume than that of the annual seizures in the previous 10 years.
>
> The UK market for ivory items, albeit for antique ivory, is in global terms surprisingly large. This is primarily a factor of the success and international renown of the UK arts and antiques sector. A survey conducted in 2004 found that the UK has the greatest number of outlets openly selling ivory products in the world, and ranked ninth in terms of the number of items available.
>
> It is extremely difficult to differentiate illegal ivory and legal ivory, with the UK Border Force having seized numerous ivory items which have been subject to artificial stains or aging techniques. Furthermore, studies have shown where outlets offering legal and illegal ivory side-by-side, revenue and

> projects become intermingled and difficult to separate. The legal market therefore presents an opportunity for criminals to launder recently poached ivory as old ivory products. The Bill will remove this opportunity." (footnotes omitted)

The interrelationship between demand for legal and illegal ivory

81. In addition to the issue of illegal trade of ivory, the Defendant seeks to demonstrate that the existence of the legal trade in ivory, including antique ivory, is likely to make enforcement against the illegal trade more difficult, including by increasing demand for illegal ivory.

82. Mr Pullen refers to a letter from Dr Thomas of TRAFFIC dated 4th July 2018. In that letter, Dr Thomas explains:

> "while a ban will not help the elephants that supplied the ivory used in the antiques, the UK ban is an important element to the international response to bring down poaching of elephants for their ivory. Though the major flows of newly poached ivory supply the current markets in Asia, the regulatory and enforcement efforts in those countries may be confused by on-going re-exports of older items from Europe and the US."

83. In discussing the demand for ivory in certain Asian markets, Mr Pullen refers to a number of factors including the aesthetic and cultural value attached to ivory, its association with prestige and status, and it being a perceived store of value. Mr Pullen, in support of those matters, refers to a December 2014 article by Gao and Clark, *Elephant ivory trade in China: Trends and drivers*:

> "4.1. Ivory values from the Chinese perspective
>
> Chinese society attaches diverse values to ivory: economic, social, cultural, aesthetic, religious, and medical. These different values give us insight into ivory consumers' motivations.
>
> First, the economic value of ivory products as an investment is widely advertised on the market. Almost every shop that Gao visited, ivory sellers talked of ivory as "bao jia" (inflation-proof) and "zeng zhi" (value appreciation). As well, investment is emphasized in articles by carvers and collectors (e.g., Gao and Zheng, 2012).
>
> Second, the social value of ivory, both as monetary wealth and a status symbol, as historically only a privileged few people owned ivory. Today, possessing an ivory carving, especially high-end ivory, gives owners a sense of prestige (or "face").
>
> Third, carvers and collectors cherish ivory for its cultural and aesthetic value as historic fine art. Some respondents complained that the market overemphasizes ivory's rarity, while neglecting its artistic quality (Gao and Zheng, 2012). These sources noted

> that machine-produced ivory products, such as chopsticks and bangles, contribute little to the preservation of the ivory craft. Yet, culture preservation is hardly a concern for most average consumers of low-end ivory products. These buyers purchase ivory trinkets often simply because of ivory's beauty and its relative affordability, compared to other more luxurious products.
>
> Fourth, religious and traditional beliefs is also an important motivation for consumers. Ivory is believed to be of "intelligence" ("Ling Xing," a complicated Buddhism concept). Ivory beads are used to make Buddhism prayer's bracelets. Ivory pendants with Buddha images and figurines of religious icons, such as "Guan Yin," are often seen in the offline and online markets. Additionally, it is believed by some that ivory exorcises evil spirits ("Bi Xie"). Some people also make the link between "xiang ya" (elephant ivory) and "ji xiang" (auspicious), and believe ivory can bring good fortune. Lastly and least importantly, some people buy ivory because of its medical value. Ivory powder is used in traditional Chinese medicine (Lin, 1998), and some people believe that ivory bangles can purge toxins from the body, thus keeping wearers healthy."

84. It is true that these cultural or behavioural factors would appear not to discriminate in principle between modern and antique ivory. Only to that extent, as Mr Pullen puts it, the new and the old are "at least partial" substitutes in Asian markets, in particular those in China or with significant Chinese populations. I should interpose that I was told at the hearing, and accept, that netsuke is not marketable in China for cultural reasons, and that this factor therefore applies to the other artefacts I have previously mentioned. On the other hand, the weight to be given to this consideration needs careful assessment. Items which are genuinely pre-1947 and were sold as such would presumably command relatively high prices in Far Eastern markets and would not readily be confused with the modern product. I can see greater scope for "substitution" in respect of post-1947 items which were sold without the relevant certificate. The extent to which the mere existence of a market for high-end antique items impacts on cheaper items, fabricated from recently-harvested ivory is a slightly different point which I will proceed to address.

85. Mr Pullen also refers to a May 2019 article by Hauenstein et al., "African elephant poaching rates correlate with local poverty, national corruption and global ivory price", in which the authors conclude that:

> "… annual poaching rates in 53 sites strongly correlate with proxies of ivory demand in the main Chinese markets, whereas between-country and between-site variation is strongly associated with indicators of corruption and poverty."

86. Defra contends that the re-exportation of ivory to the Chinese markets, and the maintenance of the demand for ivory in those markets, may therefore be relevant to the continued poaching of elephants.

87. Mr Pullen further describes a December 2016 TRAFFIC report, Kitade & Nishino, "Ivory Towers: An assessment of Japan's Ivory Trade and Domestic Market", which he claims is evidence that antique and modern ivory are found to be sold side by side in some markets, including those to which the UK re-exports ivory, in the Far East and that "this further demonstrates that the markets and demand for antique and modern ivory are to some extent interlinked". Defra points out there is evidence on page 13 of this report that the existence of antique ivory products such as netsuke in the Far East leads to ivory imitations being made of them.

88. Mr Pullen describes also that there is "some suggestion" that antique ivory may be being purchased in order to be re-carved:

(i) Two Million Tusks' consultation response relating to the Ivory Bill noted: "At the recent APPG Endangered Species meeting James Lewis – Auctioneer spoke about the demand for billiard balls in Asia. The balls are reworked as highly desirable and easily saleable puzzle balls."

(ii) WWF-UK's consultation response noted: "it is important that a restriction on the volume of ivory is included so as to limit the amount of solid pieces being traded, which could be desired or recarved by consumers of ivory who are stimulating illegal trade".

89. Mr Pullen surmises therefore that the continuation of the legal trade means that the social status attached to owning ivory is likely to be maintained and that therefore "the trade in ivory antiques is … likely to help sustain the demand for fresh ivory."

90. The Claimant responds by suggesting that Two Million Tusks' consultation response is "anecdotal", and that the WWF-UK consultation response is "merely an assertion of risk" with "no underlying data".

91. Mr Pullen acknowledges that he is not aware of any "ex post studies of the effects of restricting the antique ivory market on the market for fresh ivory". He does, however, seek to draw analogies from observed impacts of one-off legal sales of fresh ivory, which happened "most recently in 2008". Mr Pullen refers to a June 2016 article by Hsiang and Sekar, "Does legislation reduce black market activity? Evidence from a global ivory experiment and elephant poaching data", in which the authors observed that the temporary legalisation of ivory sales in 2008 "plausibly had the effect" (in the words of Mr Pullen) of increasing demand for poached ivory, in particular by reducing the stigma that might otherwise be associated with ivory:

> "International trade of ivory was banned in 1989, with global elephant poaching data collected by field researchers since 2003. A one-time legal sale of ivory stocks to China and Japan in 2008 was designed as an experiment, but its global impact has not been evaluated. We find that international announcement of the legal ivory sale corresponds with an abrupt ~66% increase in illegal ivory production across two continents, and a possible ten-fold increase in its trend. An estimated ~71% increase in ivory smuggling out of Africa corroborates this finding, while corresponding patterns are absent from natural elephant mortality, Chinese purchases of other precious materials,

> poaching of other species, and alternative explanatory variables. These data suggest the widely documented recent increase in elephant poaching likely originated with the legal sale. More generally, these results suggest that changes to producer costs and/or consumer demand induced by legal sales can have larger effects than displacement of illegal production in some global black markets, implying that partial legalization of banned goods does not necessarily reduce black market activity.
>
> …
>
> The notion of competitive displacement suggests black market demand should fall because some demand is satisfied in the legal market, however demand could also rise if new consumers are brought into the market when legalization occurs. This could occur if observable legal consumption alters social norms so that stigma associated with consuming illegal versions of the good falls. It also might occur if the risk of legal penalty for consuming the illegal good falls, due to masking on the supply side. Finally, it might also be the case that consumers misunderstand which versions of a good are legal vs. illegal, and they participate as consumers in the black market by mistake. All of these effects suggest … where the differential accounts only for these direct effects on demand and not for any displacement effects. In the context of the legal ivory sale, there is some indication that this demand effect plays a role. For example, a Chinese newspaper (Qilu Weekly, January 25, 2014) stated that the sale "stimulated new consumption instead of slowing down illegal ivory trades," and the executive director of the Environmental Investigation Agency argued that "allowing many tonnes of ivory to enter the marketplace with CITES' blessing has served only to boost the illegal trade, confusing consumers as to whether ivory is legal or illegal. Far from satisfying demand, the increased availability of ivory...has only spurred consumer appetite" (Rice, 2012)."

92. Mr Pullen takes these extracts as support for the converse proposition that eliminating or reducing the legal market could well have the effect, all other matters being equal, of reducing demand for ivory in general, including the illegal market.

93. The Claimant suggests any such analogy is weak, given Hsiang and Sekar's 2016 article concerns raw (as opposed to worked) ivory. Defra notes in response that Hsiang and Sekar's analysis found that reducing the stigma that might otherwise be associated with ivory plausibly had the effect of increasing demand for ivory. The increase of stigma surrounding ivory may, by parity of reasoning, have the effect of decreasing the demand for ivory.

94. I will be setting out my overall conclusions in connection with Mr Pullen's second rationale under the rubric of my treatment of the Claimant's second ground.

By demonstrating that the UK is willing to close down the commercial trade in items which may be valued for their ivory content, including antique ivory items, thereby setting an example of leadership and contributing to achieving this change

95. The IA stated as follows:

> "20. … the importance of taking action on the UK domestic ivory market goes beyond its current weight in ivory trade flows: it would send the clearest possible signal that the UK does not tolerate the sale of ivory and takes the strongest possible position against the ivory trade. This will enable the UK to influence other countries, especially those with larger ivory markets, to take action; and to remove any basis of the currently legal ivory trade providing a cover for illegal trade."

96. Defra maintains that the Act has already influenced plans, policies and actions of other countries. Mr Pullen refers, for example, to the fourth International Conference on the Illegal Wildlife Trade in October 2018, hosted by the Government. At that Conference, countries including Laos and New Zealand committed to reviewing their domestic legislation on ivory, or to taking steps to close their domestic markets.

97. At this Conference, the UK also launched the Ivory Alliance 2024 intended "to secure at least 30 new commitments to domestic ivory bans by the end of 2020 and for tougher enforcement against those caught breaking the law."

98. In July 2018, Australia ran a federal-level Parliamentary inquiry into the trade in elephant ivory and rhino horn. Following the inquiry, in September 2018 the Parliamentary Joint Committee on Law Enforcement published its report into the trade in elephant ivory and rhino horn. In that report, the Committee recommended that "Commonwealth, states and territories, through the Council of Australian Governments, develop and implement a national domestic trade ban on elephant ivory and rhinoceros horn. The domestic trade ban should be consistent with those implemented in other like-minded international jurisdictions". The report makes explicit reference to the UK's approach, "which was identified by a significant number of stakeholders as a model of best practice" and "the committee heard overwhelming support for the United Kingdom government's proposed framework."

99. Chapter 3 of the same report contains a detailed analysis of the UK framework under the Ivory Bill, including each of the UK exemptions. The Committee made recommendations for exemptions in line with the UK model, and recommended considering the UK approach to enforcement provisions:

> "*Exemptions*
>
> 6.19 The committee is supportive of the framework introduced by the UK government, which is currently being considered by the UK Parliament. This framework, the strongest of its kind, seeks to put an end to the domestic trade in elephant ivory within the UK by introducing a near complete ban with limited exemptions. As outlined in chapter 3, these exemptions include a *de minimis* exemption, and exemptions for musical

> instruments, portrait miniatures, items deemed the rarest and most important items of their type, and transactions between accredited museums.
>
> 6.20 Whilst the majority of advocates for a domestic trade ban fully supported the proposed exemptions, others called for more generous exemptions, or the application of a complete ban with no exemptions included.
>
> 6.21 The committee considers that a framework similar to that in the UK, including exemptions, is suitable for Australia, applicable to both elephant ivory and rhino horn."

100. In addition to the impact that the Defendant claims the Act has already had, Defra intends that it will continue to have "an impact in terms of influencing plans and actions in other jurisdictions". Mr Pullen describes that there remain a number of countries with significant legal ivory markets. In addition, as markets close, there is some evidence of that closure causing other markets in the region to grow as a result of demand displacement.

101. Mr Pullen affirms, therefore, that the Government has "been keen to promote further action being taken." The then-Foreign Secretary, the Rt Hon Boris Johnson, wrote in December 2017 that:

> "In the New Year [2018], the Government will act on our plans for a British ban on domestic ivory sales …
>
> My aim is to make 2018 the year of UK leadership in defeating the ivory trade: wherever I go as Foreign Secretary and whenever I meet the representatives of a relevant country, I will repeat our message.
>
> I did just that when I saw the Japanese foreign minister, Taro Kono, here in London earlier this month. Japan has a large domestic ivory market and its government could play a key role in stamping out elephant poaching.
>
> I've instructed our diplomats in embassies across the world to have frank conversations with our friends and allies."

102. Mr Pullen states that, in the absence of a "domestic ivory ban", the UK's international position would have been weaker. In a September 2016 article, ex-Foreign Secretary the Rt Hon Lord Hague stated:

> "The decisive battle against the ivory trade will be won in China and the rest of the Far East, through changing attitudes. The growing readiness of the Chinese authorities to give a lead and clamp down on ivory dealers is of huge importance. In the rest of the world, we have to do everything we can to help with that.

> … We British have been at the forefront of this fight. But now, in the absence of government action to close our ivory market, we are in danger of lagging behind. The UK is, embarrassingly, among the largest remaining ivory markets in the world. We still allow domestic trade in ivory with a certificate, as well as the trading and exporting of ivory said to originate before 1947, without any official certification."

103. The Defendant refers also to Dr Thomas's July 2018 letter in this context, in which Dr Thomas states:

> "the US (and indeed forthcoming UK) bans are vital elements to the international response: it may not be those markets where the demand is currently highest, but the act of making and implementing these bans is hugely symbolic."

104. The Claimant states that the general sentiment expressed by Defra through this third objective "still rests on the factual premise that the (unexempted) trade in antique ivory makes a direct/indirect contribution to the poaching of elephants today" and therefore, in the light of the evidence previously cited, is unsound.

By supporting those countries which have already taken action, in particular by closing their domestic markets for ivory items to the greatest extent so as to reduce demand for ivory items in those markets and associated markets and reduce incentives to obtain illegal ivory, including recently poached ivory.

105. The IA stated:

> "Response in Other Countries
>
> 16. In response to the current poaching crisis, several countries have imposed stricter measures on the ivory trade in an effort to preserve wild elephants. In February 2015 China – the world's largest market for ivory - imposed a one year ban on the import of African elephant ivory carvings (not including pre-Convention items) and from March 2016 the ban also included pre-Convention tusks, ivory products and hunting trophies. As of 2018, all trade in ivory and ivory products in China is illegal.
>
> 17. In June 2016, the USA introduced new restrictions on imports and exports of ivory items and banned trade between States for antiques less than a hundred years old. In June 2016, Hong Kong proposed to phase out domestic ivory trade in five years and banned international trade of pre-Convention ivory. In Europe, France and Germany no longer issue re-export certificates for pre-Convention raw ivory and in January 2014 the European Parliament called on Member States to "introduce moratoria on all commercial imports, ex-ports and domestic sales and purchases of tusks and raw and worked ivory products until wild elephant populations are no longer threatened by poaching".

> 18. In May 2017, the European Commission published guidelines recommending Member States suspend re-exports of raw ivory to non-EU countries from 1st July 2017, and ensure a strict interpretation of the provisions in EU law relating to intra-EU trade in ivory and the (re)export of worked ivory. The Commission has also recently consulted on the nature of the EU ivory trade, to inform development of possible additional measures at EU level." (footnotes omitted)

106. Mr Pullen explains that "the UK intends to be in a position to support, and not undermine, the steps taken by those countries".

107. Plainly, the most important potential market for ivory is in China, where in recent times there has been a total ban. In the same article that I referred to at §2 above, the Foreign Secretary, as was, commented in 2017:

> "... this far-sighted decision by China's leaders signifies something even more important, namely the emergence of a global consensus that buying or selling ivory is no longer acceptable anywhere. Saving elephants is not some Western obsession, but a cause that unites humanity."

108. Mr Pullen explains that the USA applied a domestic near-total prohibition on ivory sales at the federal level in 2016. TRAFFIC carried out market surveys to establish a new baseline for the ivory market in the USA and found that the prohibition had led to a marked decline in ivory items for sale. Mr Pullen also states that "six states in the USA have brought in stricter controls on intrastate ivory trade, and these have exemptions for antiques which are more restrictive than the federal level ban, and which are more closely aligned to the exemptions used in the Ivory Act 2018."

109. Mr Pullen explains, therefore, that the approach adopted by the UK supports the steps taken in the USA to close its domestic and international ivory trade. He also explains that, where countries act in isolation to close their own markets, they run the risk of simply displacing activity to other jurisdictions — and, hence, potentially losing their market share but without the policy aim being achieved. Closing the UK market in ivory avoids the UK becoming a haven for traders moving out of stricter jurisdictions (such as the USA).

110. It is unnecessary to burden this judgment with descriptions of other countries' responses to this crisis. The ground has been covered fully by Mr Pullen. I will summarise the position only in relation to two countries. In France, there is a domestic ban on all dealing in raw and worked ivory originating after 2nd March 1947. Trade in pre-1947 artefacts containing greater than 20% ivory by volume is permitted subject to these items being declared in a national database. There are various exemptions which I have noted. In Belgium, a new law which came into force on 1st October 2019 prohibits dealing in all raw ivory, all intra-EU dealing in ivory worked after 1975, and other trade in all ivory objects subject to museum exchanges and pre-1976 musical instruments.

The Exemptions to the Act

111. According to Mr Pullen:

> "It was considered appropriate to apply narrow and limited exemptions to this ban, in circumstances where the sale of those exempted items does not contribute directly or indirectly to the poaching of elephants or illegal trade and where the intrinsic value of the item is not due to its ivory content, i.e. where the extent of the exemption did not otherwise undermine the aims of the legislation."

112. I am mindful of the Claimant's overarching submission that Defra has adopted an illogical and inconsistent approach but at this stage I think that it is convenient to highlight the following points emerging from Mr Pullen's evidence:

(i) in relation to section 2 (pre-1918 items of outstandingly high artistic, cultural or historical value), the narrowness of the exemption, albeit one not so narrow that all netsuke will fail to benefit from it, means that it is more clearly demonstrable that the items within its compass are not being valued for the reason that they contain ivory.

(ii) in relation to section 6 (pre-1918 portrait miniatures), the ivory at issue is a wafer-thin "sliver" covered in a painting. Hence, the ivory is not visible, the item could not be valued primarily for its ivory content, it is not a "celebration" of the substance, and there is no scope for recarving.

(iii) in relation to section 7 (the *de minimis* exemption for pre-1947 objects), it is clear that the item does not contain modern ivory and is not being valued primarily for its ivory content.

(iv) in relation to section 8 (pre-1975 musical instruments), this creates a distinct and discrete category of items highly unlikely to be celebrated for their ivory content.

The Consideration Given by Defra to the Possibility of Equally Effective Measures

113. As Mr Pullen makes clear, during the consultation process Defra considered a number of options proposed by those representing the interests of antique dealers and collectors. The Claimant's proposals, which I will be addressing below, go somewhat further. In any case, in Mr Pullen's opinion:

> "These suggested measures, and the Claimant's suggested measures, appear to be aimed at addressing the risk of modern ivory being 'passed off' as antique. However, they do not address the other policy aims of the ban in the Act (if at all). A system of age verification would not, for example, reduce to the same extent as the Act the contribution made by ivory items from the UK in sustaining demand for ivory items (including antique items) in other consumer markets and it would not provide a basis for encouraging other countries to close down their domestic ivory markets.
>
> …

> As to a certification scheme for pre-1947 ivory: while it might (other things being equal) help to reduce the risk of laundering of modern ivory, it would be a similar exemption to that already in place under the EU Regulations. It would not, therefore, go much further to reduce the market and the ivory being sold and exported internationally. It would not achieve the wider aims of the Act.
>
> The Government considered and rejected a certification scheme for all exempt items. Certification requires a substantive advance assessment by government-appointed body of each exempt item. In contrast a registration system places the onus on the applicant to make an accurate declaration. For the Act, a registration system was chosen for the exemptions (apart from [the section 2] exemption which requires certification)."

Ground 1

The EU Regime Explained More Fully

114. I will adopt Sir James' schema of the hierarchy of legislative norms within the EU legal order: namely, the Treaties; the Regulations (made by the European Council under the Treaties); and Commission Regulations (made by the Commission pursuant to a specific power conferred under the Regulations).

115. The competences of the Union and of Member States respectively are described in general terms in Articles 3-5 of the Treaty on European Union. The limits of Union competences are governed by the principles of conferral, subsidiarity and proportionality. Article 3(6) provides:

> "The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties."

and Article 5(4) states:

> "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Union."

116. The following provisions of the Treaty on the Functioning of the European Union ("TFEU") are relevant:

> "**Article 1**
>
> 1. This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences.
>
> 2. This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties,

which have the same legal value, shall be referred to as "the Treaties".

Article 2

1. When the Treaties confer on the Union competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

…

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

…

Article 4

…

2. Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;

…

(e) environment;

…

Article 34

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 35

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 36

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

…

Article 191

1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,

…

- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of precaution taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

Article 192

1. The European Parliament and the Council … shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

…

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph.

Article 193

> The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission."

117. Council Regulation (EEC) No 3626/82 of 3rd December 1982 on the implementation in the Community of the Convention in international trade in endangered species of wild fauna and flora ("the 1982 Regulation") provided for an initial set of measures adopted within the EU to address the trade in specimens of endangered species. Given that the 1982 Regulation has been superseded it is unnecessary to dwell on the detail, save to note that the ninth recital and Article 15 in particular state that Member States may take stricter measures relating *inter alia* to the conservation of a species outside the Union provided that these comply with the Treaty.

118. The 1982 Regulation was replaced by Council Regulation (EC) No 338/97 of 9th December 1996 ("the Principal Regulation") which came into force on 3rd March 1997. Recital 3 preserves the ability of Member States to legislate more strictly. In addition, the following provisions of the Principal Regulation (citing from the current text on the eur-lex.europa.eu website) are relevant:

> "**Article 2**
>
> For the purposes of this Regulation:
>
> …
>
> (w) 'worked specimens that were acquired more than 50 years previously' shall mean specimens that were significantly altered from their natural raw state for jewellery, adornment, art, utility, or musical instruments, more than 50 years before the entry into force of this Regulation and that have been, to the satisfaction of the management authority of the Member State concerned, acquired in such conditions. Such specimens shall be considered as worked only if they are clearly in one of the aforementioned categories and require no further carving, crafting or manufacture to effect their purpose;
>
> …
>
> **Article 3**
>
> [the effect of this provision is that CITES Appendix 1, which includes elephants, is transposed into Annex A]
>
> …
>
> **Article 5**
>
> [the effect of this provision is that export or re-export from the Union of specimens of the species listed in Annex A may be authorised by the grant of an export permit subject to the

fulfilment of a list of conditions including, amongst others, (i) that a competent scientific authority has advised that the export of specimens of the species will not have a harmful effect on the conservation status of the species, and (ii) that it has been adequately proven that the age-limits have been satisfied. This first criterion does not apply to pre-1947 worked specimens (Article 5(6)(i)) but this second criterion does. Further, there is a criterion (Article 5(2)(d)) applying to all ivory specimens, raw and worked, to the effect that Member States must be satisfied following consultation with the competent scientific authority that there are no other factors relating to the conservation of the species which militate against issuance of the export permit.]

…

Article 8

Provisions relating to the control of commercial activities

1. The purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale of specimens of the species listed in Annex A shall be prohibited.

2. Member States may prohibit the holding of specimens, in particular live animals of the species listed in Annex A.

3. In accordance with the requirements of other Community legislation on the conservation of wild fauna and flora, exemption from the prohibitions referred to in paragraph 1 may be granted by issuance of a certificate to that effect by a management authority of the Member State in which the specimens are located, on a case-by-case basis where the specimens:

(a) were acquired in, or were introduced into, the Community before the provisions relating to species listed in Appendix I to the Convention or in Annex C1 to Regulation (EEC) No 3626/82 or in Annex A became applicable to the specimens; or

(b) are worked specimens that were acquired more than 50 years previously; or

(c) were introduced into the Community in compliance with the provisions of this Regulation and are to be used for purposes which are not detrimental to the survival of the species concerned; or

(d) are captive-born and bred specimens of an animal species or artificially propagated specimens of a plant species or are parts or derivatives of such specimens; or

(e) are required under exceptional circumstances for the advancement of science or for essential biomedical purposes pursuant to Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes where the species in question proves to be the only one suitable for those purposes and where there are no specimens of the species which have been born and bred in captivity; or

(f) are intended for breeding or propagation purposes from which conservation benefits will accrue to the species concerned; or

(g) are intended for research or education aimed at the preservation or conservation of the species; or

(h) originate in a Member State and were taken from the wild in accordance with the legislation in force in that Member State.

4. General derogations from the prohibitions referred to in paragraph 1 based on the conditions referred to in paragraph 3, as well as general derogations with regard to species listed in Annex A in accordance with point (ii) of Article 3(1)(b) may be defined by the Commission. Any such derogations must be in accordance with the requirements of other Community legislation on the conservation of wild fauna and flora. Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

5. The prohibitions referred to in paragraph 1 shall also apply to specimens of the species listed in Annex B except where it can be proved to the satisfaction of the competent authority of the Member State concerned that such specimens were acquired and, if they originated outside the Community, were introduced into it, in accordance with the legislation in force for the conservation of wild fauna and flora.

6. The competent authorities of the Member States shall have discretion to sell any specimen of the species listed in Annexes B to D they have confiscated under this Regulation, provided that it is not thus returned directly to the person or entity from whom it was confiscated or who was party to the offence. Such specimens may then be treated for all purposes as if they had been legally acquired.

…

Article 11

Validity of and special conditions for permits and certificates

1. Without prejudice to stricter measures which the Member States may adopt or maintain, permits and certificates issued by the competent authorities of the Member States in accordance with this Regulation shall be valid throughout the Community.

…

Article 19

…

2. The Commission shall adopt the measures referred to … Article 8(4), ... Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3)."

119. Commission Regulation (EC) No 865/2006 ("the Subsidiary Regulation") was made on 4th May 2006 pursuant to Articles 8(4), 18(3) and 19 of the Principal Regulation. Here, Article 62 is relevant:

"**General exemptions from Article 8(1) and (3) of Regulation (EC)No 338/97**

The provision laid down in Article 8(3) of Regulation (EC) No 338/97, to the effect that exemptions from the prohibitions in Article 8(1) are to be granted by the issue of a certificate on a case-by-case basis, shall not apply to, and no certificate shall be required for, the following:

(1) specimens of captive born and bred animals of the species listed in Annex X to this Regulation, and hybrids thereof, provided that specimens of annotated species are marked in accordance with Article 66(1) of this Regulation;

(2) artificially propagated specimens of plant species;

(3) worked specimens that were acquired more than 50 years previously as defined in Article 2(w) of Regulation (EC) No 338/97."

120. At §14-20 of his skeleton argument Mr de la Mare set out five reasons why the Principal and Subsidiary Regulations set out a regime of exhaustive harmonisation. He further submitted, in answer to what he characterised as the "Defendant's residual competence case", that the reach of Article 193 TFEU is constrained by other provisions of that Treaty, in particular Articles 2(2) and 4(2)(e). Given that the Union has exercised its

competence exhaustively to harmonise the relevant rules, Member States are not permitted to introduce more stringent measures.

121. In his oral argument which was commendably succinct on Ground 1, Mr de la Mare reduced the submission to the following pithy iteration (although I am not ignoring any aspect of the written submissions):

> "An examination of Article 8 of the Principal Regulation and Article 62 of the Subsidiary Regulation leads one to no other interpretation than that these provisions confer rights which are immediately cognisable on the basis that they are the complete/exhaustive set of rules. An individual is entirely free to trade (see Article 36 TFEU) subject only to fulfilling Article 2(w)."

122. On the second aspect (on his numbering) of this ground (sc. the so-called residual competence case) Mr de la Mare's headline submission was that it is because there is full harmonisation under the Regulations Member States have no competence.

123. Mr de la Mare also referred me to relevant authority in the CJEU which I will address below.

124. Although his submissions were highly persuasive and compelling elsewhere, I confess that my initial scepticism about Ground 1 was at no stage disturbed by anything he said. I think that the correct analysis is relatively straightforward and that Sir James' elegant rebuttal of the Claimant's case is well-founded.

125. The correct point of departure is not the Regulations but the Treaties, in particular the TFEU. It is wrong to refer to "the Defendant's residual competence case"; this is the starting point. The first sentence of Article 193 TFEU states in terms that Member States may adopt measures more stringent that those adopted by the Council pursuant to Article 192, which is the general provision dealing with environmental safeguards. These measures obviously include the Principal Regulation. The second sentence of Article 193 – "such measures must be compatible with the Treaties" – is a reference to provisions such as Articles 34-36 to which I have already referred. The structure of these core provisions is such that nothing done under Article 192 may displace Article 193.

126. Mr de la Mare sought to escape this snare by placing particular emphasis on the second sentence of Article 2(2) TFEU – "[t]he Member States shall exercise their competence to the extent that the Union has not exercised its competence". His argument was that the Union had exercised full competence under secondary legislation thereby displacing what on this analysis would have to be envisaged as the *ex ante* principle of shared competence in the first sentence of Article 2(2). But I cannot read this provision in that way. In my judgment, competence remains shared, as is made clear by Article 2(6) and Article 4(2)(e). Article 2(6) directly engages Articles 192 and 193. My approach to these provisions seen as a coherent whole is that where a Member State imposes a more stringent protective measure it is doing so not because the Union has not exercised its competence but because the Member State is permitted to do so in the realm of a shared competence.

127. Furthermore, as a matter of general principle I would hold that nothing in a Council Regulation, being in the nature of secondary legislation made under a Treaty, could displace the express wording of the TFEU; and that there is nothing in the Principal Regulation which purports to do that. I agree with Sir James that a provision in a Council Regulation which did purport to do so would be *ultra vires* under EU law. But not merely does the Principal Regulation reflect what is now Article 193 TFEU – the ability to go further – the structure of Article 8 of the Principal Regulation is consonant with that proposition. There is a general prohibition under Article 8(1); there is power in Member States on a case-by-case basis to grant exemptions; there is power in the Commission pursuant to Article 8(4) to convert the case-by-case exemptions into general derogations from Article 8(1), it being made clear that this power relates only to Article 8(3) and the categories specified thereunder; there is power under Article 11 for Member States to impose stricter measures in relation to the territory covered by Article 8 generally.

128. It follows from the above that the regime in question is one of minimum rather than exhaustive harmonisation. What is discernible is a series of Union-wide floors, not ceilings. This after all is entirely consonant with Article XIV(1)(a) of CITES: the purpose of the Regulations was to implement this international treaty.

129. I also agree with Sir James that in any case the Regulations read as a self-contained unit do not seek to impose a fully or exhaustively harmonised regime. Here, the focus is on Article 8(4) where the Commission's legislative acts are in the nature of tertiary legislation. In the exercise of that power the Commission could not as a matter of principle create general derogations which impinge on the general powers of the scheme, including the general prohibition under Article 8(1): the *vires* for anything done under Article 8(4) is confined by Article 8(3). As I have said, the derogation is general only to the extent that it changes a power exercisable on a case-specific basis to a general power, being one which relates always to the categories of case specified in Article 8(3). This explains why Article 8(4) is a non-essential and supplemental provision; or, as I would put it, adjectival and subordinate.

130. My attention was drawn to two decisions of the CJEU which bear on the correct approach to Article 193 TFEU and its antecedents: Article 130(t) of the Treaty of Rome and Article 176 of the Maastricht Treaty.

131. In *Criminal Proceedings against Tridon,* Case C-510/99 [2003] 1 CMLR 2, a decree applicable to the *département* of Guyane arguably went further than both the 1982 Regulation and the Principal Regulation in prohibiting the sale of captive born and bred species of macaw throughout national territory. It was unclear whether these birds fell within Appendix I or II to CITES or the comparable provisions of the Principal Regulation, viz. Annex A or B (see §26), and so the CJEU addressed the issues on both premises. It was also unclear to the CJEU whether the French domestic measure in fact went further than the EU regime (see §46 but cf. §49) although this matters not because the court set out the principles on the hypothesis that it did. As for Appendix I/Annex A, the court noted that the general prohibition in Article 8(1) of the Principal Regulation was subject to Article XIV(1)(a) of CITES which, as we have seen, enables the parties to adopt stricter domestic measures (see §31). My reading of §34-36 of the judgment is that the court was recognising that Article 8(3) authorises but does not require exemptions from the general prohibition in Article 8(1), and, most pertinently (see §35) this prohibition was nonetheless subject to Article XIV(1)(a). This reasoning, brief

though it was, enabled the CJEU to reach the conclusions it did in §41, namely that in relation both to Appendix I and Annex A Member States were not precluded from enacting legislation which had a more onerous impact than the Regulations.

132. In my view this reasoning greatly assists Defra's case. It is true that the CJEU took a small detour at §37-40 of its judgment where it dealt separately with the effect of Article 32 of a different provision, namely Commission Regulation 939/97. The French government conceded that the two derogations in that regulation limited its ability to prohibit all trade in Annex A species after its coming into effect. It is unclear why this concession was made but it is clear that it is limited to the impact of Regulation 939/97. The CJEU was not bound by it and its core reasoning, which had nothing to do with Regulation 939/97, proceeded on the basis that a more stringent regime was possible.

133. This conclusion is further supported by the CJEU's more extended analysis on Appendix II to CITES and Annex B to the Principal Regulation. In my opinion, this analysis applies equally to Appendix I and Annex A, save that in this context Article 8(5) of the Principal Regulations is germane. This sets forth a separate power to derogate from Article 8(1) which in my view, and *pace* Mr de la Mare's argument, is not materially different for these present purposes to Article 8(4). At §45 of its judgment, the CJEU held:

> "It should be noted, second, that with respect to the species to which [the 1982 Regulation] and [the Principal Regulation] applies, those regulations do not preclude stricter measures which may be taken or maintained by Member States in compliance with the provisions of the Treaty. The introduction or maintenance of such measures is provided for, as regards [the 1982 Regulation], in Article 15 thereof, and as regards [the Principal Regulation], which was adopted on the basis of Article 130s(1) of the EC Treaty …, in Article 130t of the EC Treaty …, which provides that the protective measures adopted pursuant to Article 130s are not to prevent any Member State from maintaining or introducing more stringent protective measures which must be compatible with the Treaty."

134. Although I think that there may be some words missing in this report of the CJEU judgment (there is no express reference to Article 11 of the Principal Regulation), it is clear that this reasoning provides powerful support for Defra's case on Ground 1. I will be returning to *Tridon* on Ground 2.

135. Mr de la Mare also made brief submissions about *Azienda Agro-Zootecnica Francini Sarl and Eolica di Altamura Srl v Regione Puglia*, Case C-2/10 [2011] ECR I-06561 on the footing that the Habitats Directive under consideration was a minimum harmonisation measure. Sir James did not feel it necessary to counter this submission orally. This was no doubt because the CJEU made it quite clear that all measures imposed in the field of the environment under Article 192 TFEU were in the nature of being minimum harmonisation measures, yet Article 193 sanctioned the imposition of stricter domestic measures (see §48-50).

136. I have examined briefly the three further authorities cited at §38 of Sir James' skeleton argument and these it seems to me are to similar effect.

137. Ground 1 therefore fails.

Ground 2

138. The parties' various submissions on the law will be reflected in the discussion which follows. At this stage I seek to summarise Mr de la Mare's sustained and powerful submissions on the merits.

The Claimant's Case

139. Mr de la Mare submitted that the operation of the Act will achieve a state of affairs tantamount to the deprivation of rights; or, at the very least, a substantial interference with them. The rights in question arise under Articles 34-36 TFEU, Articles 16 and 17 of the EU Charter and A1P1 of the Convention. His principal case is that the measure strikes at the very essence of these rights, but if that goes too far the degree of the interference is relevant to the proportionality balance. The quantum of the restriction is not substantially ameliorated by the delay in implementation because the Act is already producing adverse effects (see §§46-49), many private collectors may not be aware that they possess ivory, there is a lack of clarity as regards the application of the exemptions, and the dealing in question may well be illegal even outside the UK once the Act is implemented.

140. It was further submitted that the impact of the Act will be significant – "the largest loss since the Reformation" – and that it has by no stretch of the imagination been properly assessed by Defra in the IA or elsewhere. This document only sought to model the impact on businesses, not on collectors, and even in that limited regard the analysis is jejune. The criticisms levied by the RPC have not been addressed.

141. Mr de la Mare stated that there is an extreme paucity of evidence demonstrating any causal link, and Defra has only suggested an indirect nexus, between the Act and any aspect of the illegal ivory trade. As regards the trade in this jurisdiction, the link is tenuous at best, and here the obvious solution would be to inculcate a better understanding of the rules as well as more stringent enforcement of them. The problem, such as it exists, relates to the illegal transhipment of ivory through UK airports and ports, but that is already unlawful. In relation to post-1947 artefacts, masquerading as pre-1947 artefacts or otherwise, the evidence base is very thin and the problem, such as it is, may be addressed by more stringent enforcement.

142. As for export and re-export from the UK to countries outside the EU, Mr de la Mare submitted that here again the evidence base is thin, and he relies on Mr Pike's point-by-point rebuttal of the material on which Defra relies. He submitted in the alternative, in my view for the very first time in his reply, that the obvious solution would be to impose a targeted export ban to specific countries pursuant to Article 5(2)(d) of the Principal Regulation.

143. As for Mr Pullen's third and fourth policy justifications (i.e. leadership and providing support), Mr de la Mare submitted that these could have no free-standing potency: they wholly depended on the correctness of the first and second justifications.

144. Mr de la Mare submitted that Defra could achieve its policy objectives by equally effective measures. In this respect the Commission has pointed the way forward: see

§§12-15 above. In essence, what is required is stricter interpretation and enforcement of the existing regime, a stricter set of age-verification requirements as part and parcel of a more onerous regime of licensing, certification and/or registration. The Act itself recognises that age limits will require verification in connection with a number of the exemptions.

145. Mr de la Mare submitted that there is no principled basis for the exemptions, that there are logical inconsistencies between them, and that their guiding philosophy applies equally to pre-1947 Act antique artefacts. Furthermore, the Claimant's evidence that the intrinsic value of the ivory *qua* ivory plays no or only a minuscule part in the value of the antique item has not been rebutted.

146. Overall, it was submitted in the context of the proportionality balancing exercise governed by *Lumsdon* that a proper weighing of the harm against any benefits in relation to these pre-1947 antique items leads inexorably to the conclusion that there should be a less restrictive measure (i.e. a broader exemption) supported as necessary by sharper teeth.

147. It is unnecessary to set out Sir James' submissions. These were equally forceful intellectually and on occasion may have sought to engage my sympathies. I do not agree with him across the board but, upon anxious and lengthy reflection, I have been driven to accept the essential gravamen of Defra's case.

148. In the light of all the submissions that I received, both orally and in writing, I take the following pathway through the issues in this case.

Discussion

149. Proportionality has been described as both "a legal construction" and "a methodological tool" composed of four elements: proper purposes; rational connection; necessary means; and a proper relation between the benefit gained by realising the proper purpose and the harm caused to the fundamental right at issue (see *Proportionality, Constitutional Rights and their Limitations*, page 131 by Professor Aharon Barak, former President of the Israeli Supreme Court). In an EU law context the general approach has been set out by the ECJ in *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano,* Case C-55/94 [1995] I-4165, at §37:

> "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."

It may be seen that the EU approach differs slightly from Professor Barak's inasmuch as "justified by imperative requirements" is conceptualised here as separate from the proportionality principle: see also *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, [2016] AC 697, §§33 and 53. In practice this matters not, because the justification question must be addressed at some stage of the inquiry, and in the circumstances of the present case it is not in issue, it being accepted by the Claimant that there is an

imperative requirement in the general interest to endeavour to protect dwindling elephant populations. §33 of *Lumsdon* also noted that there is "some debate" as to whether the proportionality principle encompasses what is Professor Barak's fourth item. It does, as I have pointed out, feature in Mr de la Mare's skeleton argument, and I am content to address it separately in line with the Supreme Court's recommendation in that paragraph.

150. The applicability of the principle of proportionality in *inter alia* environmental cases is impliedly vouched by Article 193 TFEU. The CJEU's decision in *Tridon* provides helpful further guidance:

> "53. Such legislation, adopted in a field in which secondary Community law does not preclude a Member State from taking measures stricter than those provided for by that law, and liable to have a restrictive effect on imports of the products, is compatible with the Treaty only to the extent that it is necessary for effectively achieving the objective of the protection of the life and health of animals. A national rule cannot therefore benefit from the derogation provided for in Article 36 of the Treaty if the health and life and animals can be protected just as effectively by measures which are less restrictive of intra-Community trade …"

151. A number of issues arise.

152. First, even if a Member State makes primary legislation which is more stringent than EU secondary legislation, the national court is duty-bound to assess its proportionality notwithstanding that such an obligation, or an ability, would not arise in a non-EU case. I am not ignoring ss.3 and 4 of the Human Rights Act 1998 where separate considerations arise.

153. Secondly, it is for the national court to make the proportionality judgment, deferring as appropriate to anterior assessments made by the Government; and the burden of proof is on the latter, not on a claimant (see *Lumsdon* at §63).

154. Thirdly, Sir James submitted in answer to my question that the Act would be proportionate even if there were no evidence that it would do any good. This, he submitted, was a moral and political judgment which could be supported by intuitive common sense alone. He reminded me of the fox-hunting case (*R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719) where Parliament legislated on the basis of an ethical objection to the practice. Although that undoubtedly played an important role, the objection was not purely abstract: there was evidence, no doubt disputed but in line with intuitive common sense, that fox-hunting caused unnecessary suffering. I would reject the proposition that moral and political judgments without more could suffice.

155. Fourthly, consideration must be given to the quality of the evidence required and the court's approach to it. The arguments raised by the French government in *Tridon* in support of its more stringent measure were largely of a scientific nature. The Commission Guidance (referred to at §§12-13 above) refers to scientific evidence in the field of wildlife conservation. Plainly, economic and statistical evidence should be

included in this category. I also note that in *Lumsdon* the Supreme Court at §56 made clear that an economic or social justification would need to be supported by evidence. However, in this specific context two important considerations need to be emphasised. The first is that moral and political judgments are not irrelevant; they may properly be invoked as soon as some evidence exists. This means that Mr Pullen's third and fourth justifications cannot work in isolation, but that they may be seen to have force once some evidence has been identified supporting the first and/or the second rationales. The second consideration is that the precautionary principle clearly applies in this area: see Article 191(2) TFEU. Sir James did not mention this in terms, and Mr de la Mare ignored it, but this was no doubt what the former had in mind when he emphasised in oral argument the importance of risk. In my judgment, we are in the realm of scientific and evidentiary uncertainty, and the need for a high level of protection. §3.1 of the Commission's 2017 Guidance makes that explicit. Although the evidence bearing on the issues of indirect causation and demand in Far Eastern markets may be uncertain, statistically questionable, impressionistic and often anecdotal, I consider that these factors do not preclude the taking of bold and robust action in the light of the precautionary principle.

156. Fifthly, the notion of suitability for securing the attainment of the objective (see *Gebbard*, *supra*) means "not inappropriate for that purpose" (§55 *Lumsdon*).

157. Sixthly, the notion of "must not go beyond what is necessary in order to attain it" has been explained in *Tridon* at §53 and in *Lumsdon* at §§55, 61, 65 and 66. In short a measure which is less restrictive of the right would need to be equally effective.

158. Having said that the decision is ultimately for this court and the exercise in question is not akin to a judicial review of the legality of the anterior assessment made, it has always been recognised that the Member State, here Defra acting for the Executive, and Parliament, possess a margin of appreciation: see *Lumsdon* at §64. The breadth of that margin involves a case-specific assessment rather than the application of an algorithm. There are three aspects to this.

159. First, the present case falls within the second category identified in *Lumsdon* at §35, namely a review of a national measure relying on derogations from general EU rights. Here, the national measure is a stricter measure expressly condoned by Article 193 TFEU which derogates from the right of free movement of goods enshrined in Articles 34-36. §50 of *Lumsdon* makes this clear, and the point has been recognised in §59 of Defra's skeleton argument.

160. This consideration brings in §37 of *Lumsdon* which provides in material part:

> "… Although private interests may be engaged, the court is there concerned first and foremost with a freedom guaranteed in the interests of promoting the interests of the single market, and the related social values, which lie at the heart of the EU project. … In that context, the court, seeing itself as the guardian of the Treaties and of the uniform application of EU law, generally applies the principle more strictly. Where, however, a national measure does not threaten the integration of the single market, for example because the subject matter lies within an area of

> national rather than EU competence, a less strict approach is generally adopted. …"

Sir James submitted that the instant case requires a less strict approach because we are no longer in the zone of shared competence. I cannot agree with that. A national measure which goes further than EU secondary legislation because it is expressly sanctioned by the Treaty does not displace the shared competence of Member States and the EU: rather, it is a manifestation of this competence. I believe that I have already said this in connection with Ground 1, accepting as I have Sir James' submissions on the issue. It follows that the starting point must be that a stricter approach to proportionality is applicable.

161. Secondly, there is the issue of institutional competence. Given the level of challenge that this particular case poses, this court is well equipped to assess scientific and economic evidence, and to determine whether a piece of statistical evidence is robust or weak. Even so, I cannot convert myself into an expert in wildlife conservation and policy by dipping into the topic in this way, and Defra are the experts. The same observation applies, with respect, to Mr Pike, who is a solicitor and not a civil servant. I appreciate that civil servants tend to move across departments of state after a few years in post, but Mr Pullen occupies a very senior grade and I suspect has lived and breathed this subject for at least a couple of years. I must give weight to that. Members of Parliament will differ in their knowledge and expertise, and some may make political and ethical judgments based primarily on intuitive common sense. There is absolutely nothing wrong with that. What I would say is that Parliament was probably in no better position than me in weighing up the scientific and economic evidence, to the extent that it did so, and that my approach in any case must be directed by the guidance of *Lumsdon* applied in a precise manner which need cut no ice in the legislature. On the other hand, subject to binding authority to the contrary, the political and moral judgments entailed by Mr Pullen's third and fourth justifications are, it seems to me, better evaluated by Parliament on an individual and collective basis than by this court.

162. This brings me to the third point. At §45 of his judgment in *Countryside Alliance* Lord Bingham in the context of the ECHR expressly endorsed a principle that respect should be shown to what the House of Commons decided (see also §§47 and 50). However, the Supreme Court in *Lumsdon*, having reviewed authority which suggested that no respect need be shown, finessed the issue in this way:

> "81. There is some force in the point made by Lord Carloway; and it is difficult to discern in the court's case law any clear indication that the identity or status of the national authority whose action is under review is a factor which influences the intensity of scrutiny. On the other hand, we would not rule out the possibility that whether, for example, a measure has been taken at the apex of democratic decision-making within a member state might, at least in some contexts, be relevant to the assessment of its proportionality, particularly in relation to the level of protection considered to be appropriate and the choice of method for ensuring it. It is however unnecessary to resolve that question for the purposes of the present appeal."

163. I think that it is necessary for me to resolve this question. My approach is similar to Green J's in *R (BAT Ltd) v Secretary of State for Health* [2016] EWHC 1169 (Admin) at §§453 and 454. I repeat what I have said at §161 above.

164. It follows that the margin of appreciation to be shown in the instant case is somewhat nuanced. My point of departure is that the intensity of review is strict (as per §37 *Lumsdon*). The scientific and economic evidence will be reviewed both with care and with very little regard to anterior assessments, and it is for that reason that I have devoted an extended section of this judgment to it. On the other hand, I recognise Mr Pullen's greater knowledge and experience when it comes to matters of policy. I must also recognise that Defra must have spoken informally with large numbers of people over the years, all bringing valid opinions to the table, and that Defra's considered view (not limited of course to Mr Pullen) will reflect that. I have also held that I must heed, but by no means act as a cipher for, both Defra's and Parliament's ability better to assess the validity and strength of Mr Pullen's third and fourth justifications.

165. The next issue which arises is whether the Claimant's case is enhanced because it engages not merely Articles 34-36 TFEU but also Articles 16, 17 and 52 of the Charter and A1P1 of the ECHR. My reading of the cases (see *Pfleger*, Case C-390/12 and *Festersen*, C-370/05) is that the property rights vouchsafed by the Charter could in theory supplement fundamental freedoms under the Treaty, thereby requiring a higher level of justification by government, but I would hold that this issue does not arise on the present facts. This is because the Act does not achieve expropriation; what it does is to prevent dealing in these items. In reality, therefore, I cannot accept that the Charter adds anything of substance to the relevant fundamental freedoms in the TFEU.

166. The test for proportionality in an A1P1 case differs slightly from *Lumsdon* (see *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] 700), but Mr de la Mare did not suggest that this was material in these particular circumstances. Accordingly, I do not think that it is necessary for me to address the ECHR challenge separately, and I do not understand Mr de la Mare to submit that I should. I would obviously have done so had the EU legal landscape changed in the UK during the course of this litigation, including the preparation of this judgment.

167. The next topic is the related one of the nature of the interference with fundamental rights.

168. If this were a case of complete deprivation of a property right compensation would probably have to be paid in order to render the interference proportionate. Mr de la Mare submits that the interdiction of the alienation of ivory strikes at the heart of fundamental freedoms and of proprietary rights generally, and that the "very essence of the right" is violated. This last concept is frequently deployed by the ECtHR in cases brought under Articles 6 and 8, and A1P1, of the ECHR. Whether it is applicable at all to an EU case is less clear, but I do not have to decide that in the abstract. If an interference strikes at the very essence of a fundamental right, it cannot be justified at all and the inquiry would end there; but that is not in truth the Claimant's case. In my view the Claimant rightly does not seek to go that far because such a contention would mean that the measures taken by the Commission in relation to raw ivory would on that approach be impermissible, as would any stricter measure (per Article 193 TFEU) which prevents dealing in specified items in order to enhance environmental safeguards.

169. The interference with the Claimant's rights (here, I should stress, I do not take the point against it that the Claimant is a corporate vehicle for bringing this claim: I am prepared to accept that it represents the interests of those whose rights are directly in issue) entails the following aspects: the Act prevents dealing rather than use; the delay in implementation has enabled owners of antique ivory to sell items if they can, almost certainly at a significant undervalue; and sales outside the UK, as opposed to the dealing within the UK of items to be sold abroad, are probably still permitted (see *Air India v Wiggins* [1980] 1 WLR 815). These last three factors serve to temper, at least to some extent, the degree of interference. The present case is, I am afraid, far removed from the desecrations of the 1530s.

170. However, the Claimant is on much stronger ground on one facet of the broader issue of impact. I am not impressed with important aspects of Defra's IA. In my judgment, this considerably understates the impact of the Act (then the Bill) on businesses, and fails completely to deal with collectors, whether they be amateur or expert. The RPC said in terms that these facets of the IA were "not fit for purpose", but the unfitness and the lacunae identified by this expert body have largely been ignored. Furthermore, the Claimant's evidence that antique ivory is not valued primarily or at all for its ivory content has not been rebutted. I would agree that to differentiate somehow between the value of the ivory content of an item and the item itself is artificial and to some extent illogical, but these artefacts tend to be small, they cannot sensibly be reworked, and as a matter of intuitive common sense it seems obvious to me that the overwhelming preponderance of the value of a piece of netsuke worth several hundred pounds (i.e. bottom end) cannot be ascribed to its inherent ivory content. I also take on board the Claimant's contention that there is no distinction between the value of wood and ivory netsuke.

171. This does not mean that I am driven to endorse all the methodology and conclusions of the Woodnewton report. There are obvious holes in the exercise undertaken, and I suspect that the authors would accept that. However, this report from an entirely reputable organisation cannot be brushed aside, and even a very cautious approach to its conclusions demonstrates that the financial impact on businesses and collectors is substantial. £390M could, I suppose, be halved but the Claimant's case on this issue would not be commensurately harmed.

172. The poor quality of aspects of the IA means that the margin of appreciation dwindles to the nugatory in connection with my assessment of the evidential terrain it purports to cover.

173. I think that a separate issue arises in connection with Mr de la Mare's submission that, in the same way as the price of Maserati cars does not impinge on the price of cheap second-hand vehicles, the market in antique items leaves values and prices in bottom-end Far Eastern markets for trinkets fashioned out of fresh ivory unscathed. I will be returning to this matter.

174. I turn now to address the issue of indirect causation in the context of Mr Pullen's first and second justifications.

175. Any evidence supporting the proposition that the Act might have a salutary dampening effect on opportunities to trade ivory illegally in the UK is, I think, tenuous at best; and I have already covered the ground here. Illegal transhipments through UK airports and

ports by unscrupulous individuals is as unlawful at present as it will be when the Act comes to force. The problem here is that these individuals will remain unscrupulous and unrepentant, and they can operate with a degree of impunity within those countries which lie at the source of the problem. I consider that another factor bearing on the UK market is that in the main cultural attitudes in the UK are such that there is little or no appetite for ivory which is other than of some antiquity.

176. In my judgment, the evidence base is stronger in connection with Mr Pullen's second justification, but it is still not particularly compelling. I have already summarised it. Overall, I would characterise it as somewhat of a mélange of evidential shards varying in their weight; anecdote; and inference and/or opinion, the latter often very strongly held and emotionally expressed, and therefore not necessarily entirely dispassionate. However, Mr Pullen's proposition is as difficult to prove as it is to disprove, and the operation of the precautionary principle means that he does not have to prove it before me to the probabilistic standard or at all. There is *some* evidence; the challenge is to see where it leads.

177. I must recognise the strength of Mr de la Mare's submissions on this issue. The proposition that demand and prices in an illegal market increase because there is a legal market in antique items is not self-evident. The analogy with the car market is not complete, but I cannot accept that it is logical to hold that just because antique ivory is a sub-set of ivory it must follow that the market in the former impacts generally on the latter. Moreover, I strongly doubt that good quality pre-1947 items are being sold in significant numbers in the sort of Far Eastern markets which trade in the recently harvested product. Assuming both that the former are genuine and not of poor quality, market forces alone would indicate that Mr de la Mare's "tat" is segregated in physical terms from the items his client promotes.

178. However, I disfavour an overly granular, analytical and exactingly micro-economic approach. This is not a case before the Competition Appeal Tribunal. I consider that one needs to stand back and give weight to "softer" factors which may be described as cultural (applying this with some sensitivity), behavioural, perceptual and stigmatic.

179. Much of the problem in Far Eastern markets does not relate to genuine pre-1947 artefacts but more recently crafted items which are *ersatz* in some way. These consumers may have some notion of what a good quality piece looks like but it being out of their price range they will have to make do with second-best. I would also not describe everything of recent provenance as being "tat". This is a problem which the Avaaz report highlighted in relation to the wider EU market and one which cannot be lightly dismissed. If the problem resides more in the wider EU market than the UK, it is not a complete answer to say that it is for individual Member States elsewhere to take appropriate action. Measures taken here will, if they go further than those in other Member States and perhaps in any event, have the tendency to encourage a common anti-ivory front. Enforcement will always be difficult for a number of reasons: confusion in even the relatively honest market place as to where the boundaries lie (I am obviously exonerating the Claimant and its witnesses of any such failing); difficulties in dating items when and where experts are not always involved; and a consequent failure to recognise that something that may appear to be old is not.

180. The existence of a market in high-end antiques may not have a direct bearing on prices lower-down, and no one buying a utilitarian second-hand car would or could equate it

in any way with a Maserati, but there must be force in Mr Pullen's contention that anything that contributes to the allure, mystique and value of ivory in general could well be fuelling the demand for ivory items much lower down the economic ladder. Put the other way, if the endeavour is to modify behaviour and perceptions, any course of action which seeks to stigmatise ivory *tout court*, subject to narrow exemptions, is to be supported.

181. The application of the precautionary principle to Mr Pullen's second justification leads me to conclude that it may be supported because there is some evidence of the indirect causal connection which he propounds. Particularly when this second justification is conjoined with the third and the fourth, it is not difficult to conclude that the measures in the Act, subject to the narrow exemptions it sets forth, are "not inappropriate" for the purpose.

182. Turning now to the third and fourth justifications, I think that these may be taken together. I have agreed with Mr de la Mare that if the first and second justifications amount to zero, these further justifications cannot be additive; but in my view that is not the position. I endorse Mr Pullen's estimation that the third and fourth justifications are important, although I would place greater emphasis on the fourth. There is some evidence that the UK is being seen as taking the lead, but more importantly I think that it would be very difficult to take the high moral ground in relation to Far Eastern markets, including markets beyond our direct control which feed those markets, if the UK retains a significant market in antique ivory. This is where Lord Hague's point about the size of the domestic market being "embarrassing" has force. I would qualify this only to the extent that I do not think that size matters. Those in the markets I am referring to will not draw nice distinctions between the old and the new. I have already set out Mr Pullen's evidence on these topics, and it is persuasive.

183. I do not think that Mr Pullen's evidence is countered by the argument that the intrinsic value of the small amount of ivory in these items is minuscule or by the submission that the Act goes further than recent Commission Guidance on worked items. Mr Pullen's third and fourth justifications are all about perceptions and behaviours, and seeking to support those who are in the front-line of this potentially losing battle. What an expert has to say about how particular items of ivory are or may be valued is correct as far as it goes, as I have recognised, but it does not go very far. The fact remains that a beautiful ivory fan or carving has obviously been fashioned from that substance, and – to my eye at least – part of its aesthetic quality, both in terms of its visual appeal and its feel, relates to what it is made of. The same applies to wood, marble or whatever. To a Far Eastern consumer, these items typify ivory in all its qualities and emanations. The Act goes further than the Commission's May 2017 Guidance, and it also goes further than its October 2019 "non-paper" (at least as regards the cut-off date), but these documents are not intended to displace the ability of Member States to do precisely that. They do not purport to define the limits of what would be proportionate. Nor does it follow that adhering to Commission Guidance and going no further would be as equally effective as the Act.

184. Sir James submitted that the Act is just one step along the road, and that we are talking about a process rather than an event. I agree with that. The world needs to move towards a position where the dealing in ivory is anathematised, save where a compelling and evidence-based justification for a narrow exemption is made out.

185. This leads into the second aspect of proportionality, namely whether there are equally effective measures which would serve the stated objectives.

186. There is obvious force in the submission that a stricter enforcement and age-verification regime would advance the objectives of the Act but I am far from persuaded that they could be equally as effective. Such a regime would have little or no impact on Mr Pullen's third and fourth justifications, not least because the UK would not be seeking to go further than many other countries – although, the 1947 date for antique items proposed by the Claimant would it is true be more demanding that the Commission's 1975 date for items of high artistic, cultural or historic value as suggested in the recent "non paper". Furthermore, Mr de la Mare's submissions were crafted with a view to persuading me that pre-1947 antiques registered or certified by expert opinion as being such should be accorded a separate exemption. In my view, in both qualitative and quantitative terms this would significantly broaden the scope of the exemptions to the Act and serve to dilute its overall efficacy, as well as the perception of it overseas. Given that enforcement requires a human system, I accept the general force of Mr Pullen's argument that the smaller the quantity of ivory that needs to be regulated, the more effective the enforcement regime will be.

187. After the oral argument concluded, I asked the parties to deal briefly in writing with Mr de la Mare's submission, advanced for the first time in his reply, that an equally effective and therefore proportionate step would be the imposition of a trade ban to certain countries. There would be power to achieve this pursuant to Article 5(2)(d) of the Principal Regulation, as has been done for raw ivory. Defra objected to the raising of this new point on the ground of lateness, but it has nonetheless been addressed, albeit without evidence. In my judgment, Defra's reasoned riposte is compelling. It would be very difficult to create what in effect would be a "blacklist" of countries to which ivory could not be exported, these being the very countries which the UK seeks to support in their difficult endeavour to stamp out this trade. This situation is very different from the legislative scheme governing aspects of asylum and the application of the Refugee Convention where lists of this sort exist in order to facilitate the compliance by the UK with its international obligations. Furthermore, the charge of hypocrisy, whether it not it would be entirely justified, would obviously be made. I do not see the need to compound the diplomatic sensitivities in this area.

188. The Claimant's criticisms as to the scope of the exemptions in the Act now fall to be addressed. I do not agree that the decision of the CJEU in *Commission v Portugal*, Case C-265/06 assists. My reading of §§40-44 is that the CJEU was addressing the proportionality of a specific measure which derogated from the Treaty rather than any exception to it.

189. I consider that the difficulty with the Claimant's submissions on this issue is that Mr Pullen has clearly explained the logical, policy (see §§111-112 above) and evidentiary basis for each exemption judged individually and on its own merits, and that as a matter of principle it cannot be heard to say that the interests of consistency alone demand that Defra and Parliament should have gone further and have created the additional broad exemption which is sought. Of course, while it could be argued that the *de minimis* exemption should have been set at 20% rather than 10%, and that even an item with 10% ivory could well have more ivory by weight than a piece of netsuke, none of that weakens Mr Pullen's overarching contention that each exemption must be narrowly

drawn and compellingly justified. The fact remains that netsuke is 100% ivory whatever its size and weight.

190. In any case, it does not avail the Claimant's case to contend that the existing exemptions in the Act should either be removed or reformulated. What the Claimant is contending for is a separate additional exemption which requires a compelling justification on a free-standing basis. I disagree with Mr Pullen that what he calls the intrinsic value of pre-1947 antiques is due at least in part to its ivory content because that is in danger of overstating the matter. I would prefer to say that the intrinsic value of the ivory content of the item contributes in only a marginal way to its overall value. Although it could be said that it is difficult to see why pre-1947 antiques contribute indirectly to the illegal trade when dealing in musical instruments and pre-1918 outstanding etc. items do not, I have already expressed my view that this does not matter. In any case, the philosophy of the Act is to apply narrow and limited exemptions to the ban, which is not fulfilled by the Claimant's proposal.

191. Applying the approach indicated in *Lumsdon*, my conclusion on proportionality may be encapsulated in this way. I have subjected aspects of Defra's IA to close scrutiny and have indicated where in my view it is deficient. I have recognised that the impact of the Act on private rights is much greater than Defra would have it. I have accorded little or no deference to Defra's assessment of Mr Pullen's first and second rationales. I have concluded that there is some evidence supporting the second rationale in particular, and that the precautionary principle is therefore engaged. As for the third and fourth rationales, I have accorded both Defra and Parliament considerably more deference. These rationales are therefore capable of aggregation, and on that basis I am driven to conclude that the measures imposed by the Act are not inappropriate. Finally, I have concluded that there are no equally effective measures particularly when condign weight is accorded to the third and fourth rationales. The conclusion must be, answering thus far the first two questions posed by §33 of *Lumsdon*, that the Act is proportionate.

192. Finally, I have given separation consideration to the Claimant's case that the Act is disproportionate *stricto sensu*, although Mr de la Mare did not place particular emphasis on this in oral argument. Ultimately, it is the aspect of the case which has caused me the greatest difficulty, not least because it entails a fluid assessment of the existence or otherwise of a proper relation between the benefits gained by realising the proper purpose and the harm caused to the fundamental right(s) at issue.

193. The Claimant would say that this a classic case of a sledgehammer to crack a nut. The real problem lies in parts of Africa and the Far East. Any benefits flowing from the Act are unquantifiable and conjectural, whereas the immediate harm to the financial and personal interests of those dealing in quantities of antique ivory are significant, immediate and obvious. The salvation of the elephant may be extremely important, but this does not justify the sacrifice of private rights and the solution is the taking of protective measures which are more stringent, more coherent and better-focused. Overall, the collateral damage from seeking to achieve this proper purpose is unacceptable.

194. There is no doubt that this line of argument has force. It probably represents the way the Claimant and its witnesses apprehend the broader merits of this case, all legal refinement being stripped away. Ultimately, however, I cannot accept it.

195. Whether Parliament would have envisaged the issue in terms of this sort is unclear, and frankly doubtful. Defra certainly appreciated that the Act would have an adverse impact, but as I have said made inadequate attempts to quantify it. The value-judgment that I am being required to make, and the compromises entailed, would ordinarily require a considerable degree of deference in this context (see, for example, *Administrative Law*, Wade & Forsyth, 11th edition, page 309); yet Government's failure to conduct a proper IA suggests that this measure of deference should be diluted.

196. On the other hand, I am not persuaded that the weaknesses in the IA should materially affect the outcome, nor do I consider that either Defra or Parliament would have concluded differently on the basis of the evidence now available. Many private individuals own ivory and some of it (probably unbeknownst to the majority) may be quite valuable. The number of dealers in antique ivory likely to suffer the significant losses attested to by the Claimant's witnesses will be relatively small. In any event, on the basis of the proper impact assessment that has been carried out, I would conclude that the Act contains a series of coherent and proportionate measures which do not amount to the metaphorical sledgehammer. I continue to give considerable weight, and accord appropriate deference, to Mr Pullen's third and fourth rationales, unquantifiable though their effects may be. The fact that an economic value of sorts may be allocated to one side of the scales and not to the other matters not. I continue to accord weight to Sir James' submission that this is significant progress along what may be a long road. In this respect, the UK is leading the world in its endeavour to protect these magnificent animals, and to the extent that they may not be doing so already, other countries may well follow. The UK cannot sensibly be accused of applying double standards.

197. With some regret, because I remain sympathetic to the Claimant's case and have much appreciated Mr de la Mare's submissions, these considerations, and the others I have addressed in this judgment, serve to outweigh the rights and interests of those represented by the Claimant.

Disposal

198. This claim for judicial review must be dismissed.

ANNEX

Ivory Act 2018

2018 CHAPTER 30

An Act to prohibit dealing in ivory, and for connected purposes.

[20th December 2018]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Prohibition

1 Prohibition on dealing in ivory

(1) Dealing in ivory is prohibited.

(2) "Dealing" in ivory means—

(a) buying, selling or hiring it;

(b) offering or arranging to buy, sell or hire it;

(c) keeping it for sale or hire;

(d) exporting it from the United Kingdom for sale or hire;

(e) importing it into the United Kingdom for sale or hire.

(3) For the purposes of this section—

(a) buying includes acquiring for valuable consideration;

(b) selling includes disposing of for valuable consideration;

(c) offering includes advertising and inviting to treat.

(4) In subsection —

(a) a reference in paragraph (b) to buying or hiring ivory does not include buying ivory, or hiring it as the borrower, outside the United Kingdom;

(b) a reference in paragraph (b) or (c) to selling or hiring ivory includes selling ivory, or hiring it as the lender, outside the United Kingdom.

(5) In this section "ivory" includes—

(a) an item made of ivory;

(b) an item that has ivory in it.

(See further section 37.)

(6) Sections 2 and 6 to 9 set out exceptions to the prohibition.

Exemption for outstandingly valuable and important pre-1918 items

2 Pre-1918 items of outstanding artistic etc value and importance

(1) An item that is made of ivory, or has ivory in it, is exempt from the prohibition if—

(a) the Secretary of State has issued a certificate under this section (an "exemption certificate"), and

(b) the certificate has not been revoked under section 4(3).

This is subject to section 4(7).

(2) The Secretary of State may issue an exemption certificate for an item only if satisfied that—

(a) the item is pre-1918, and

(b) the item is of outstandingly high artistic, cultural or historical value.

(3) The following matters are to be taken into account in considering whether the condition in paragraph (b) of subsection (2) is satisfied in the case of a particular item—

(a) the rarity of the item;

(b) the extent to which the item is an important example of its type;

(c) any other matters specified in regulations made by the appropriate national authority.

(4) An exemption certificate for an item may be issued only on the application of the owner of the item.

(5) The appropriate national authority may by regulations prescribe institutions that, in the authority's opinion, possess the necessary knowledge and expertise to provide the Secretary of State with advice on applications for exemption certificates.

In this Act "prescribed institution" means an institution prescribed under this subsection.

(6) An institution may be prescribed under subsection (5) only with the consent of the persons in charge of the institution.

3 Applications for exemption certificates

(1) A person applying for an exemption certificate for an item must—

(a) give the name and address of the owner of the item,

(b) provide a description of the item and of any distinguishing features that it has,

(c) provide a photograph of the item showing any such features,

(d) make a declaration that, in the applicant's opinion, the item satisfies the conditions in paragraphs (a) and (b) of section 2(2),

(e) provide an explanation as to why the applicant is of that opinion,

(f) provide information about any dealing in the item that is expected to take place,

(g) provide any other information specified in regulations made by the appropriate national authority, and

(h) pay to the Secretary of State any fee prescribed by regulations made by the Secretary of State.

(2) The Secretary of State must refer an application for an exemption certificate to a prescribed institution if satisfied that—

(a) the applicant has complied with subsection (1), and

(b) the item is not one that clearly fails to satisfy the conditions in paragraphs (a) and (b) of section 2(2).

Otherwise the Secretary of State must refuse the application and inform the applicant why it has been refused.

(3) Where an application is referred to a prescribed institution under subsection (2), an individual nominated by the institution ("the assessor") must—

(a) inspect and assess the item,

(b) notify the Secretary of State whether or not, in the assessor's opinion, the item satisfies the conditions in paragraphs (a) and (b) of section 2(2), and

(c) notify the Secretary of State of the assessor's reasons for forming that opinion.

(4) An institution may nominate an individual under subsection (3) only with the individual's consent.

(5) The Secretary of State must reimburse the reasonable costs of the prescribed institution or the assessor in dealing with an application referred under subsection (2).

(6) Having considered the assessor's opinion, the Secretary of State—

(a) must grant the application for an exemption certificate if the Secretary of State is of the opinion that the item satisfies the conditions in paragraphs (a) and (b) of section 2(2);

(b) otherwise, must refuse the application and inform the applicant why it has been refused.

(7) If the application is granted, the Secretary of State must provide the applicant with an exemption certificate.

4 Further provision about exemption certificates

(1) An exemption certificate must—

(a) contain a unique number (or combination of letters and figures);

(b) contain enough information to identify (so far as possible) the item to which it relates.

(2) Where an exemption certificate has been issued for an item and—

(a) the owner of the item becomes aware that any relevant information relating to the item is inaccurate or incomplete, or

(b) any such information becomes inaccurate or incomplete,

the owner must notify the Secretary of State accordingly and must provide the Secretary of State with the necessary information to make good the inaccuracy or incompleteness.

(3) The Secretary of State may revoke an exemption certificate if it appears to the Secretary of State that—

(a) the item concerned does not satisfy the conditions in paragraphs (a) and (b) of section 2(2), or

(b) the owner of the item has failed to comply with subsection (2) above.

(4) The Secretary of State may issue a revised exemption certificate if it appears to the Secretary of State that any relevant information relating to the item concerned is, or has become, inaccurate or incomplete.

(5) The Secretary of State may provide a person with a new exemption certificate (a "replacement certificate") if—

(a) an exemption certificate has been lost,

(b) a person acquires an item in respect of which an exemption certificate has been issued but is unable to obtain that certificate from the previous owner, or

(c) it seems to the Secretary of State to be appropriate for any other reason to provide a replacement certificate.

(6) Section 3 does not apply to an application for a replacement certificate.

(7) Where a person (P) deals in an item in respect of which an exemption certificate was issued to a different person, the exemption under section 2 applies only if—

(a) P has taken possession of the certificate or has been provided with a replacement certificate in respect of the item, and

(b) P has provided the Secretary of State with any specified information and has paid to the Secretary of State any fee prescribed by regulations made by the Secretary of State.

(8) In this section—

- "information" includes any declaration or photograph;
- "relevant information" means any information given to the Secretary of State under section 3 or this section;
- "specified information" means information specified in regulations made by the appropriate national authority.

5 Fresh applications and appeals

(1) Where an application for an exemption certificate is refused or an exemption certificate is revoked, the owner of the item concerned—

(a) may make a fresh application;

(b) may appeal to the First-tier Tribunal against the refusal or revocation.

(2) A fee prescribed under section 3(1)(h) must be the same for a fresh application under subsection (1)(a) as for a first application.

(3) An appeal under subsection (1)(b) may be on the ground—

(a) that the decision was based on an error of fact,

(b) that the decision was wrong in law, or

(c) that the decision was unreasonable,

or on any other grounds that are prescribed by regulations made by the appropriate national authority.

(4) On an appeal under subsection (1)(b), the First-tier Tribunal may—

(a) confirm the Secretary of State's decision to refuse or revoke the exemption certificate,

(b) require the Secretary of State to issue an exemption certificate, or to cancel the decision to revoke an existing exemption certificate, or

(c) remit the decision to refuse or revoke the exemption certificate to the Secretary of State for reconsideration.

(5) The appropriate national authority may by regulations make further provision about appeals under subsection (1)(b).

(6) The Secretary of State may by regulations make provision requiring an appellant to pay a fee of a prescribed amount.

Other exemptions

6 Pre-1918 portrait miniatures

(1) An item that has ivory in it is exempt from the prohibition if—

(a) the item is a pre-1918 portrait miniature with a surface area of no more than 320 cm^2, and

(b) it is registered under section 10.

(2) For the purposes of subsection (1)(a) the "surface area" of a portrait miniature does not include any part consisting of or covered by a frame.

7 Pre-1947 items with low ivory content

(1) An item that has ivory in it is exempt from the prohibition if—

(a) the item is pre-1947,

(b) all the ivory in the item is integral to it,

(c) the volume of ivory in the item is less than 10% of the total volume of the material of which the item is made, and

(d) the item is registered under section 10.

(2) For the purposes of subsection (1)(b) ivory is "integral" to an item if it could not be removed from the item without difficulty or without damaging the item.

8 Pre-1975 musical instruments

(1) An item that has ivory in it is exempt from the prohibition if—

(a) the item is a pre-1975 musical instrument,

(b) the volume of ivory in the instrument is less than 20% of the total volume of the material of which the instrument is made, and

(c) the instrument is registered under section 10.

(2) In this section "musical instrument"—

(a) does not include anything that, although capable of being played as a musical instrument, was not made primarily for that purpose;

(b) includes a bow, plectrum or other thing made for playing a musical instrument.

9 Acquisitions by qualifying museums

(1) Dealing in an ivory item to which this section applies is exempt from the prohibition if or to the extent that the dealing—

(a) is a sale to, or a purchase or hire by, a qualifying museum, or

(b) is done for the purpose of such a sale, purchase or hire.

(2) This section applies to an ivory item that—

(a) was owned by a qualifying museum immediately before the relevant time, or

(b) is registered under section 10.

(3) A museum is a "qualifying museum" if at the relevant time—

(a) in the case of a museum in England, the Channel Islands or the Isle of Man, it is shown as being accredited in a list published by or on behalf of Arts Council England;

(b) in the case of a museum in Wales, it is shown as being accredited in a list published by or on behalf of the Welsh Government;

(c) in the case of a museum in Scotland, it is shown as being accredited in a list published by or on behalf of the Scottish Ministers;

(d) in the case of a museum in Northern Ireland, it is shown as being accredited in a list published by or on behalf of the Northern Ireland Museums Council;

(e) in the case of a museum anywhere else, it is a member of the International Council of Museums.

(4) Regulations made by the appropriate national authority may make any amendment to paragraph (a), (b), (c), (d) or (e) of subsection (3) that is consequential on a change of name or transfer of functions involving a body specified in that paragraph.

(5) In this section—

- "ivory item" means—

(a) an item made of ivory, or
(b) an item that has ivory in it,
but does not include an item consisting only of unworked ivory;

- "purchase" includes an acquisition for valuable consideration;
- "the relevant time" means the time of any activity that constitutes dealing in the ivory;
- "sale" includes a disposal for valuable consideration (and "sell" is to be read accordingly).

10 Registration

(1) The Secretary of State must register an item under this section if the owner of the item—

(a) applies for it to be registered, giving the owner's name and address,

(b) provides a description of the item and of any distinguishing features that it has,

(c) provides a photograph of the item showing any such features,

(d) in the case of an exemption under section 6, 7, or 8—

(i) makes a declaration that the item satisfies the relevant exemption conditions, and

(ii) provides an explanation of how the item satisfies those conditions,

(e) provides information about any dealing in the item that is expected to take place,

(f) provides any other information specified in regulations made by the appropriate national authority, and

(g) pays to the Secretary of State any fee prescribed by regulations made by the Secretary of State.

(2) "The relevant exemption conditions" are—

(a) in the case of section 6, the condition in subsection (1)(a) of that section;

(b) in the case of section 7, the conditions in subsection (1)(a) to (c) of that section;

(c) in the case of section 8, the conditions in subsection (1)(a) and (b) of that section.

(3) Regulations under subsection (1)(g) may provide for exemptions.

(4) Where an item is registered in response to an application under this section, the Secretary of State must provide the applicant with written confirmation of the registration.

The confirmation must—

(a) identify the owner of the item;

(b) contain a unique number (or combination of letters and figures);

(c) contain enough information to identify (so far as possible) the item to which it relates.

(5) The Secretary of State must keep a record of information (including photographs) provided to the Secretary of State under this section or section 11.

11 Further provision about registration

(1) The registration of an item under section 10 ceases to be valid if the ownership of the item changes (but the new owner may make a fresh application for registration).

(2) Where an item is registered under section 10 and—

(a) the owner of the item becomes aware that any relevant information relating to the item is inaccurate or incomplete, or

(b) any such information becomes inaccurate or incomplete,

the owner must notify the Secretary of State accordingly and must provide the Secretary of State with the necessary information to make good the inaccuracy or incompleteness.

(3) The Secretary of State may cancel a registration under section 10 if it appears to the Secretary of State that—

(a) the item concerned does not satisfy the relevant exemption conditions,

(b) the registration has become invalid because of subsection (1), or

(c) the owner of the item has failed to comply with subsection (2).

(4) The Secretary of State may amend a registration under section 10, or anything recorded under section 10(5), if it appears to the Secretary of State that any relevant information relating to the registered item is, or has become, inaccurate or incomplete.

(5) In this section—

- "information" includes any declaration or photograph;
- "relevant information" means any information given to the Secretary of State under section 10 or this section;
- "the relevant exemption conditions" has the meaning given by section 10(2).

Criminal and civil sanctions

12 Offence of breaching the prohibition or causing or facilitating a breach

(1) It is an offence—

(a) to breach the prohibition,

(b) to cause the prohibition to be breached, or

(c) to facilitate a breach of the prohibition.

(2) A person commits an offence under this section in relation to an item only if the person knows or suspects, or ought to know or suspect, that the item is ivory, is made of ivory or (as the case may be) has ivory in it.

(3) It is a defence for a person charged with an offence under this section to prove that the person took all reasonable precautions and exercised all due diligence to avoid committing the offence.

(4) A person who commits an offence under this section is liable—

(a) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or a fine (or both);

(b) on summary conviction in Scotland, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both);

(c) on summary conviction in Northern Ireland, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum (or both);

(d) on conviction on indictment, to imprisonment for a term not exceeding five years or a fine (or both).

(5) In relation to an offence committed before section 154(1) of the Criminal Justice Act 2003 comes into force, the reference in subsection (4)(a) to 12 months is to be read as a reference to six months.

13 Civil sanctions

Schedule 1 (civil sanctions) has effect.