



Neutral Citation Number: [2020] EWCA Civ 649

Case No: C1/2019/2987

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Mr Justice Jay
CO/1273/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2020

Before :

SIR TERENCE EHERTON
(Master of the Rolls)
LORD JUSTICE SINGH
and
LORD JUSTICE GREEN

Between :

The Queen on the application of The Friends of Antique **Appellant**
Cultural Treasures Limited

- and -

The Secretary of State for the Department of Environment, **Respondent**
Food & Rural Affairs

Thomas de la Mare QC & Eesvan Krishnan (instructed by Constantine Cannon LLP) for
the Appellant

Sir James Eadie QC, Hanif Mussa & Daniel Cashman (instructed by Government Legal
Department) for the Respondent

Hearing dates: Monday 24th & Tuesday 25th February 2020

Approved Judgment

Sir Terence Etherton MR, Lord Justice Singh & Lord Justice Green :

A. Introduction/Issue

1. This is an appeal from the judgment (“*the Judgment*”) of Mr Justice Jay (“*the Judge*”) who dismissed a claim challenging the lawfulness of trading restrictions contained in the Ivory Act 2018 (“*the Act*”) which, when brought into force, will introduce wide ranging prohibitions on the domestic and international trade in ivory.
2. The thrust of the challenge before the Judge was that the prohibitions in the Act went too far and were disproportionate. It is common ground that in principle the trading bans infringe Articles 34 and 35 of the Treaty on the Functioning of the European Union (“*TFEU*”) which prohibit import and export restrictions on trade in goods between the EU Member States (including for this purpose the United Kingdom, which formally left the EU on 31 January 2020 - see paragraph [7] below). It is also common ground that the prohibitions in Articles 34 and 35 do not apply where the trading restrictions are justified on one or more of the grounds set out in Article 36 TFEU and that this includes restrictions justified upon the basis of safeguarding the welfare of animals. Where a Member State invokes the justifications in Article 36 the measure adopted must meet a test of proportionality. The question arising in this appeal is whether the Judge applied the proportionality test correctly.
3. The appellant mounts a series of challenges to the reasoning of the Judge. The central complaint is that there simply was not and is not sufficient evidence of a proper, scientific, nature to justify the trading bans and that the Judge erred in concluding otherwise. The complaint is directed at (i) the adequacy of the evidence supporting the justifications relied upon to justify the trading bans and (ii) the question whether less restrictive and intrusive but equally effective measures could have been adopted by Parliament than the stringent prohibitions actually imposed.
4. The appellant also directs a series of more specific criticisms at the approach adopted by the Judge to the proportionality test. There is a degree of overlap between these complaints and the overarching complaint that the evidence base was insufficient. The criticisms of the analysis of the Judge can be grouped under three headings: (i) wrongful use of the precautionary principle and the acceptance of inadequate evidence to support the bans; (ii) failure to take account of the failings in the Impact Assessment (“*IA*”) which preceded the Bill and the according of too much deference to Parliament; and (iii), violation of the principle of respect for property and the wrongful failure to require a right to compensation.
5. In the analysis below, we start by considering the actual evidence that was before the Judge and his evaluation of it (paragraphs [59] – [78] below). We then address the question whether Parliament should have adopted less restrictive measures (paragraphs [79] – [85] below). Finally, we address the complaints about the approach to the proportionality assessment adopted by the Judge (paragraphs [86] – [115] below). Before turning to the substance of the appeal we mention two preliminary matters.
6. First, in a proportionality challenge it is well established that the court will objectively assess the evidence for itself to determine whether the disputed measure is proportionate. This assessment is based upon the most up to date evidence. This was the position taken by the Judge. Following such an assessment the role of an appellate

court is determined by the national procedural rules applicable: Case C-333/14 *Scotch Whisky Association v Lord Advocate* [2016] 1 WLR 2283 paragraphs [63] - [65]. In this jurisdiction, following a proportionality assessment, an appellate court does not re-perform that assessment but considers whether the reasoning of the judge below was justified: *R (on the application of AR) v Chief Constable of Greater Manchester Police and another* [2018] UKSC 47 paragraph [64]. An exception can arise where there is relevant *new* evidence admitted before the appellate court, for instance because it is more current than that before the first instance judge: see e.g. *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51. This does not, however, arise on this appeal and the task of this court is therefore to decide only whether the Judge's analysis withstands scrutiny.

7. Second, this appeal arises whilst the United Kingdom is in the transition period following exit day from the European Union. It suffices to record that (with limited exceptions which do not arise for consideration in this appeal) until the end of the "Implementation Period" or "IP", which is presently set at 11pm on 31st December 2020, the same rules apply as they did prior to exit day: see *The Queen (Simonis) v Arts Council and others* [2020] EWCA Civ 374 paragraphs [9] and [10].

B. The Proceedings before the High Court

8. The appellant is a company limited by guarantee incorporated for the purpose of bringing this challenge to the Act by its three members and directors all of whom deal in antique ivory. The respondent is the Department of the Environment, Food & Rural Affairs ("*Defra*"). It conducted the consultation which led to the drafting of the Ivory Bill which was ultimately enacted by Parliament. As such it appears as respondent to represent the position of Parliament as the relevant decision maker.
9. The Act received Royal Assent on 20th December 2018. Under section 43 it comes into force in accordance with provision to be made by the Secretary of State by regulation. As of the date of this judgment the Act is not yet in force.
10. Permission to claim judicial review was granted on 9th July 2019. There were two grounds of challenge: (i) that the UK lacked competence to impose more stringent requirements than applied under applicable EU law as the EU regime on trade in ivory was one of complete, not minimum, harmonisation; and (ii), that the trading ban was in breach of Articles 34-36 TFEU in particular when viewed in the light of fundamental rights protected by the European Convention on Human Rights ("*the Convention*") and the EU Charter of Fundamental Rights ("*the Charter*").
11. The Judge dismissed both grounds. In relation to the first he held that under Article 193 TFEU Member States were empowered to adopt measures more stringent than those adopted by the EU Council on matters concerning the preservation and protection of the environment. In respect of the second he held that whilst the ban imposed on trade fell within the scope of the prohibitions on restrictions on imports and exports under Articles 34 and 35 TFEU, it was nonetheless justified under Article 36, including when considered in the light of the fact that the prohibitions adversely impacted upon fundamental rights contained in the Charter and Article 1 of the First Protocol to the Convention ("*AIP1*").

12. Permission to appeal was not sought on Ground 1, following the Judge’s indication. By the order dated 13 November 2019, the Judge granted permission to appeal on Ground 2.

C. The Facts

- CITES

13. The UK is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“*CITES*”), which was signed in 1975 and ratified in 1976. This regulates international trade in specimens of listed species. Those listed in Appendix I are granted the highest levels of protection. Asian elephants have been listed in Appendix I since 1975. The African savanna elephant was first listed in Appendix I in 1990. The elephant populations of South Africa, Namibia, Botswana and Zimbabwe are currently listed in Appendix II but in practice they have Appendix I protection with respect to the trade in their ivory.

14. Article 14(1) of CITES provides:

“The provisions of the present Convention shall in no way affect 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.”

- EU Competence on Environmental Policy

15. The EU has adopted measures to address the trade in specimens of endangered species, including that in elephant ivory. Under Article 4(2) TFEU the environment and the internal market are areas of “*shared competence*”, defined by Article 2 TFEU as follows:

“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.”

16. Articles 191 to 193 TFEU establish the competence of the EU in relation to the environment. Article 191(1) stipulates that Union policy in this field shall contribute to pursuit of certain objectives, including “... *preserving, protecting and improving the quality of the environment*” and “*promoting measures at international level to deal with regional or worldwide environmental problems ...*”.

17. Article 193 provides:

“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.”

- The EU Regulations on trade in ivory

18. CITES has been implemented in the EU through directly applicable EU regulations since 3rd December 1982 with the introduction of Council Regulation (EEC) No 3626/82 (adopted upon the basis of the predecessor provision to Article 192(1) TFEU). This was replaced by Council Regulation (EC) 338/1997 (the “*Principal Regulation*”), which has applied since 1st June 1997. This is supplemented by Commission Regulation (EC) 865/2006 (the “*Subsidiary Regulation*”), dated 4th May 2006. We refer to these collectively as “*the EU Regulations*”.

19. The Principal Regulation imposes a general prohibition on commercial trade of “*specimens*” of the species listed in Annex A, which includes Asian and African elephants. The prohibition extends to “*worked specimens*”. Elephant ivory amounts to a “*worked specimen*”. That term is defined in Article 2(w) of the Principal Regulation as follows:

“...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.”

20. The prohibition on trade in specimens is set out in Article 8(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.”

21. Article 8(3) empowers Member States to grant “*case-by-case*” exemptions to the prohibition in Article 8(1) for worked specimens acquired more than 50 years previously (“*antiques*”):

“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 ...:

(b) are worked specimens that were acquired more than 50 years previously.”

22. Articles 8(3)(a), (c) and (h) permit Member States to authorise trade in “*specimens*” which are not antiques for other reasons including that: they were acquired in, or were introduced into, the Community before 1975; they were introduced into the EU in compliance with the provisions of the Regulation and were used for purposes which are not detrimental to the survival of the species concerned; and they originated in a Member State and were taken from the wild in accordance with the legislation in force in that Member State. Article 8(4) empowers the Commission to make general derogations from the prohibitions referred to in Article 8(1).
23. Article 11(1) states:
- “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.”
24. The Subsidiary Regulation made further provision in respect of the scheme established by the Principal Regulation. The Commission exercised the power granted by Article 8(4) of the Principal Regulation to define general exemptions from Article 8(1) and Article 8(3) of the Principal Regulation. Under Articles 61(2) and 62(3) of the Subsidiary Regulation the Commission expressly exempted antiques from the Article 8(1) prohibition on commercial dealing.
25. The net effect of this regime can be briefly summarised as follows: (i) raw ivory may be traded within the EU subject to case-by-case authorisation in the form of a certificate for pre-Convention items (i.e. pre-1975 ivory as regards Asian elephants and pre-1990 ivory for African elephants); (ii) raw ivory comprising pre-1975/76 specimens cannot be exported from the EU; (iii) antique ivory may be commercially traded within the EU without the grant of a certificate by a Member State, but the trader has a duty to demonstrate legality if requested by the authorities; and (iv), a certificate is required to export antique ivory from the EU.
26. The Regulations are directly applicable in the UK. The Control of Trade in Endangered Species Regulations 2018 (SI 2018 No. 703) provide for civil and criminal sanctions for breaches.

- Recent Guidance

27. In October 2016, at the 17th meeting of the Conference of the Parties to CITES, Resolution 10.10 was adopted:

“3. RECOMMENDS that all Parties and non-Parties in whose jurisdiction there is a legal domestic market for ivory that is contributing to poaching or illegal trade, 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;”

4. RECOGNIZES that narrow exemptions to this closure for some items may be warranted; any exemptions should not contribute to poaching or illegal trade.”

28. On 17th May 2017, the European Commission issued guidance (“*the Guidance*”) to assist Member States in the application of the Regulations to intra-EU trade in ivory. This highlighted that CITES had not succeeded in curbing high levels of elephant poaching. Between 20,000 and 30,000 African elephants had been killed *every* year since 2011 driven by growth in demand for ivory in Asian markets. The Guidance recommended expanding upon measures agreed at the 17th Conference that pursuant to Article 5(2)(d) of the Principal Regulation there should be a suspension of the re-export of raw ivory from the EU:

“Suspending the re-export of raw ivory from the EU will 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.”

29. The Commission recommended: (i) a stricter interpretation of the conditions for the grant of re-export certificates; and (ii), higher levels of scrutiny for the re-export of worked ivory:

“In all cases, it is imperative that EU Member States exercise a high level of scrutiny in relation to applications 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.”

30. In relation to internal EU trade the Guidance proposed that Member States should adopt a narrow definition of worked specimens and should apply enhanced monitoring. It 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, and consider making it mandatory for traders to declare the age and origin of antique ivory items for sale, both on websites and in physical stalls/shops.”

- The DEFRA Consultation

31. On 6th October 2017 Defra published a consultation paper (“*the CP*”) on a proposal to implement a total ban on ivory sales in the UK, 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. On 5th September 2017 Defra published a preliminary impact assessment (“*the IA*”) which articulated the objective of the policy:

“Ensure that the UK plays a leading role in ending the illegal trade in ivory. A total ban of UK sales of ivory that contribute 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.”

32. The proposed prohibition was subject to a smaller number of exceptions than were ultimately adopted in the Act. As drafted the proposed 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.”

33. The consultation period closed on 29th December 2017. In April 2018 Defra published a “*Summary of responses and government response*” (“*the Consultation Response*”). Over 71,000 responses were received comprising: 10,623 individual responses, 60,613 campaign responses, and 2 petition responses. Those responding ranged from individual members of the public to organisations from sectors including the fine art and antiques trade, NGOs, the museums sector, the music industry, and auction houses. The proposed ban was strongly supported by 87.6% of consultees with 4.3% expressing opposition and 8.1% expressing no definitive opinion.

34. The policy options considered, according to the IA, were:

“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.”

35. Defra had also previously considered policy options including “*non legislative approaches*” such as “*stopping issuing permits for post-1947 ivory*” and “*date-based restrictions*”. In relation to the latter, the IA noted that date-based restrictions such as limiting the prohibition to “*sales of all items of worked ivory produced after 1947 and on all items of worked ivory produced after 1918 (100 years)*” but found that this approach “*would not support the policy objectives and would not achieve the intention of taking a global leadership role on this issue.*”
36. The IA found that the equivalent annual net direct cost to business was £7.4M and the net present value cost to business over the ten-year appraisal period was £74.6M. The ban was expected to result in direct business costs in four ways:

“a) Businesses selling worked ivory products will need to familiarise themselves with the new arrangements, and specifically the precise nature of the exemptions

b) For dealers that hold stock of items containing worked ivory. These businesses have incurred the cost of inventory in items that could no longer be sold and would no longer be of value. This would be a one-off cost, that the business cannot recover

c) For dealers that could no longer deal in items containing worked ivory, there would be lost profit from those sales (not covered above). This would be an annual on-going cost.

d) For auction houses that sell items containing worked ivory on others’ account, there would be lost profits that would have been earned from commission revenue and buyer’s premium. This would be an annual on-going impact.”

37. A draft final IA was submitted to the Regulatory Policy Committee (“*the RPC*”) for review. This is an arms-length, independent, body which evaluates the quality of evidence and analysis used to inform regulatory proposals. On 9th April 2018 the RPC expressed an opinion on the draft IA. It rated the IA “*fit for purpose*” but stated that it would benefit significantly from strengthening in eight different respects, including in particular that there appeared to be a substantial impact upon owners and collectors and that the assessment of the impact upon them of the proposed ban did not appear to be proportionate to the scale of the impact:

“*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.

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.

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.”

- The trading restrictions in the Act

38. We turn now to the legislation imposing the trading bans. The Ivory Bill was introduced to the House of Commons on 23rd May 2018 and it received Royal Assent on 20th December 2018. The Act 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 key provisions are summarised below.
39. Section 1 introduced a prohibition on all trade in ivory and this included a ban on (a) internal UK trade, and (b) a prohibition on the import and export of ivory. It prohibits the “*dealing in*” items made of or containing elephant ivory, which includes: buying, selling or hiring; offering or arranging to buy, sell or hire; keeping for sale or hire; or, exporting or importing into the United Kingdom for sale or hire. Mere retention and use of ivory or the gifting of ivory is not prohibited.
40. There are five exceptions to the ban: (i) Section 2 allows the Secretary of State to issue exemption certificates for pre-1918 items of “outstandingly high artistic, cultural or historical value” (the “*Rarest and Most Important Exemption*”); (ii) Section 6 exempts portrait miniatures if they were made before 1918, possess a surface area of no more than 320cm², and are registered (the “*Portrait Miniatures Exemption*”); (iii) 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 “*Minimal Content Exemption*”); (iv) Section 8 exempts musical instruments 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*”); and (v) Section 9 exempts sales to, and between, qualifying or accredited museums both inside and outside the UK (the “*Museum Exemption*”).
41. Sections 12 and 13, along with Schedule 1, set out the criminal and civil sanctions for breaching or causing or facilitating a breach of the prohibition. Under section 1(3) of Schedule 1 a maximum fine of £250,000 is provided for. Section 43 provides that the Act will come into force in accordance with provision made by the Secretary of State by regulations.

- The justifications advanced by the Respondent for the trading bans

42. The respondent has identified four objectives or purposes which lie behind the trading prohibitions:
- (i) **Suppression of demand through a ban on domestic trade:** To reduce further or eliminate 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) **Suppression of demand through a ban on international trade:** To reduce further or eliminate 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) **Persuading third states to impose stringent bans through international leadership:** To demonstrate 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, and so setting an example of leadership and contributing to achieving this change.
- (iv) **Supporting third countries that have imposed stringent bans through the giving of advice and support:** To support 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.

- The Woodnewton Report

43. We have explained above (see paragraph [37]) that the RPC criticised the IA for failing to examine the adverse economic effect that the trading bans would have upon business and collectors. In February 2019 the British Antiques Dealers' Association commissioned an independent research agency, Woodnewton Associates, to conduct a survey of the economic impact on antique dealers and others affected by the Ivory Act ban. Their report (the "*Woodnewton Report*"), dated 18th March 2019, addressed: the number of people affected; the ways in which they were affected, and the direct financial impact of those effects. There were 315 valid responses. The 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"

44. In relation to the limitations identified by the RPC Mr Richard Pullen, the official within Defra with responsibility for domestic wildlife and ivory, explained in witness statement evidence that a lack of reliable and specific data had presented an analytical challenge to determining the impact of the trading bans and that any estimates of adverse impact were subject to a degree of uncertainty. He submitted that the difference between the limited Defra figures upon impact and those in the Woodnewton report was attributable to the fact that Defra measured only the impact upon business and not upon individuals:

"The focus of an Impact Assessment process is on the impact on business. Consistent with that principle, the Impact Assessment did not quantify the impact on individuals in monetary terms. [...] The Impact Assessment did not monetise the costs to individuals / private collectors, and such costs are not included in the EANDCB estimate."

Further,

“...a significant proportion of respondents to the survey were ‘private collectors’, and they would be more accurately classified as individuals rather than businesses; however, the Woodnewton Report appears to assume (without supporting evidence) that these individuals are actively trading ivory items for profit.”

45. Mr Pullen nonetheless sought to criticise the Woodnewton Report upon the basis that: (i) it was likely to contain bias though he acknowledged that the consultants had taken steps to mitigate for this; (ii) the value of stock recorded could be overstated by respondents; (iii) the survey questions failed to conform to best practice as two questions contained leading questions; and (iv), the sample size was small and unrepresentative and this risked a substantial overestimation of loss.

D. Relevant Treaty Provisions

46. We set out below the relevant provisions of law relied upon by the appellant.
47. Articles 34 and 35 TFEU impose prohibitions on quantitative restrictions on imports and exports. The basic rules are uncontroversial, and so it is unnecessary to address in detail the scope of these prohibitions. They include all laws and administrative measures which hinder directly or indirectly, actually or potentially, imports and exports between the Member States. The prohibitions in the Act are caught by these prohibitions unless justified by Article 36 which lays down exceptions to Articles 34 and 35. One of the justifications for which restrictions may lawfully be imposed is the “*protection of health and life of humans, animals or plants*”. Any restriction must meet a test of proportionality. The burden of proof lies with the state seeking to justify the restriction to show that it is warranted under Article 36 and is proportionate.
48. Article 5(4) of the Treaty on the European Union (“*TEU*”) lays down a broad principle of “*proportionality*” to be applied by the Union: “*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.*” Proportionality is also a general principle of EU law to be observed by Member States in areas covered by the EU, which include fields of shared competence such as the environment (which embraces animal welfare): see the often cited articulation of the principle in Case C-55/94 *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 at paragraph [37]; and in the environmental context Case C-510/99 *Tridon* [2001] ECR I-777 at paragraph [55].
49. The relevant provisions of the TFEU are as follows:

“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.”

50. The appellant also relies upon Article 17 of the Charter and A1P1 which set out the right to respect for property.

51. Article 17 of the Charter provides:

“Article 17 - Right to property

“Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.”

52. A1P1, brought into effect in this jurisdiction by the Human Rights Act 1998, lays down the fundamental right to respect for property. It is in very similar terms to Article 17 of the Charter. It provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

53. Next the Appellant relied upon Article 16 of the Charter which provides a highly qualified freedom to conduct business. It did not form the centrepiece of the appellant’s arguments.

“Article 16 - Freedom to conduct a business

“The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.”

54. Finally, the Appellant relies upon Article 52 of the Charter and its instruction that any incursion into a fundamental right must respect the “*essence*” of the right and be proportionate. Recourse to this provision was in order to persuade the Judge to apply a

particularly strict version of the proportionality test. It was contended that the trading prohibitions were *so* draconian that they *did* undermine the *essence* of the right of traders and collectors to their property rights in ivory items. The provision reads:

“Article 52 - Scope and interpretation of rights and principles

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.”

E. The approach adopted by the Judge

55. We turn now to the Judgment. The reasoning of the Judge is set out in paragraphs [138] – [197] of the Judgment. He adopted what he described as a “*nuanced*” approach. He closely scrutinised the evidence before the court upon an objective basis, irrespective of whether that evidence had been before Parliament when the Act was adopted. He applied different levels of deference to different strands of the evidence, depending upon its nature and his analysis of its adequacy. We do not need to cite at length from the Judgment. The overall approach of the Judge can be summarised as follows:

- i) The justifications for the Act were set out in the IA.
- ii) There were four justifications advanced for the restrictions (see paragraph [42] above). The first two concerned the conclusion that the prohibition upon both intra-UK trade and international trade would, because of a suppression of trade into, in from and through the UK, quantitatively contribute to the dampening of demand for ivory. The third and fourth concerned the conclusion that the enactment of these same trading prohibitions would exert a positive political and diplomatic effect upon other states which the Government wished to encourage also to adopt additional stringent measures to suppress demand.
- iii) Those justifications would be subject to “*close scrutiny*”.
- iv) Aspects of the reasoning were inadequate; the assessment of the adverse impact upon collectors and dealers of antique ivory in the IA was “*deficient*” and the adverse effects upon “*private rights*” was much greater than Defra contended. Little or no deference should therefore be paid to the evaluative assessment of Defra in relation to these particular justifications.
- v) There was no evidence to support the conclusion that the first causal justification (for an intra-UK ban) would exert any material impact upon dampening of demand.

- vi) There was “*some*”, relatively modest, evidence to support the conclusion that the second causal justification (for an international trade ban) would exert an impact upon international demand for ivory. This meant that the use by Parliament of the precautionary principle *was* properly engaged.
- vii) There was important evidence that the third and fourth justifications (based upon political and diplomatic considerations) were effective and the judge would accord considerable weight and deference to Defra and Parliament upon these matters.
- viii) In the light of his findings about the adequacy of the evidence supporting the trading prohibitions the Judge held that the trading bans were “*not inappropriate*”.
- ix) Bearing in mind the appropriate margin of appreciation or discretion to be accorded to Parliament there were no equally effective, less restrictive, measures that Parliament could have adopted to achieve the objectives sought for the Act.
- x) The Act did not entail an expropriation of property rights but did interfere with the rights of owners of ivory affected by the prohibitions. The principles of respect for property under the Charter and the Convention were thus engaged. This had the effect of requiring the court to adopt a closer scrutiny of the justifications advanced for the restrictions given that they interfered with fundamental rights. Nonetheless, applying that close scrutiny the trading bans were still not disproportionate.
- xi) It followed that the Act was lawful and did not violate Articles 34-36 TFEU, the Charter, or the Convention.

F. The Grounds of Challenge

56. We have set out the ways in which the appellant criticises the analysis of the Judge at paragraphs [3] and [4] above. For the reasons we set out below we do not accept these criticisms. In his considered and careful analysis the Judge applied the correct approach to the evidence. He concluded that he had to make an objective appraisal of the evidence before him, even where it included evidence not before Parliament. He reviewed that evidence individually and collectively and attached to each strand of evidence appropriate weight. He found that in some respects the evidence was lacking but, when viewed overall, there was sufficient evidence to support the justifications advanced for the trading bans. He applied a variegated approach to the margin of appreciation or discretion that the court should attach to the assessment conducted by the state and concluded that, where matters of international politics and diplomacy are in issue, a broader margin is appropriate. He considered that the Act was justified, taking into account the evidence and the margin that Parliament was entitled to in adopting legislation in this field. In arriving at his conclusion, he took account of the fact that the Act did intrude significantly into fundamental property rights and the right to conduct business, but this did not mean that the Act was disproportionate.
57. We can detect no errors in the approach adopted or in the findings made by the Judge about the evidence. He was, in our judgment, right to find that the Act was proportionate and lawful.

58. Below we set out our detailed reasons for upholding the Judgment.

G. The evidence – justifications for the trading bans

59. We start by considering the evidence advanced by Defra to justify the prohibitions and the analysis of the Judge of that material. As already observed (see paragraph [42] above) Defra advanced four reasons justifying the restrictions, which we now address.

- Suppression of the domestic trade (First justification)

60. The first method focuses upon the suppression of domestic, intra-UK, trade in ivory. The respondent argues that the elimination, subject to narrow exceptions, of all opportunity for illegal ivory (including recently poached ivory) to be traded through markets for ivory items, including antique ivory items, in the UK would contribute, albeit indirectly, to the dampening of demand at the international level and, in due turn, the opportunities for elephant poaching. It is said that such a ban would “*substantially reduce the size of the market*”. It would “*reduce customer confusion about whether the trade*” was permissible and would avoid inadvertent trade in items containing poached ivory. The prohibition would “*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*”.

61. The evidence relied upon was summarised in the IA. Most ivory trade was legal, nonetheless the UK featured in several cluster analyses of seizure data by CITES's “*Elephant Trade Information System*” (ETIS) since 2002. This indicated that the UK consistently played a role in an illegal global trade. Between 2010 and 2014, 154 seizure records were reported by the UK to ETIS which reflected a significant increase upon the previous five-year period. 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. There was also a risk that the UK goods market would not distinguish between legal and illegal trade: only goods worked before 1947 could be sold and exported without a permit. The UK market was not directly linked to trade in recently poached ivory, but sales of more recent products and particularly raw tusks potentially presented an increased risk in terms of opportunity to pass off illegally-sourced ivory items as legitimate. The coexistence of legal and illegal items in the market created confusion. Some consumers might consider that they were buying something legal when that was not the case. Asymmetric information between buyers and sellers potentially created economically inefficient outcomes. The IA stated:

“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."

62. Defra also relied upon a UN Office on Drugs and Crime 2010 Report which concluded that the trade in illicit ivory was lucrative only because there was a parallel lawful supply, and ivory could be sold and used openly. Ivory would lose much of its marketability if its acquisition were an illegal act, or if ownership of such status goods had to be concealed. Defra also relied upon an Environmental Investigation Agency ("EIA") Report entitled "*Response to Inquiry into trade in elephants and rhinoceroses in Australia,*" which recorded that various studies showed that the existence of a legal domestic market provided opportunities for the laundering of illegal ivory. That report concluded that it was difficult to differentiate between legal and illegal ivory;

“traffickers use various techniques to launder illegal/new ivory by making it look legal/old/antique”.

63. The Judge was unimpressed with this evidence. He held that the evidence was *“quite limited”* (Judgment paragraph [53]), there was little or no demand in the UK for non-antique ivory and the evidence that the Act could dampen opportunities to trade ivory illegally in the UK was *“tenuous at best”* (Judgment paragraph [175]). He referred to criticism of the assumptions made in some of the international analysis as to the mechanics of the domestic market and to the absence of any real evidence of the widespread prevalence of trade in illegal items whether internally or via transshipment. In relation to the latter the Judge observed:

“Illegal transshipments 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.”

64. The appellant argued that upon the basis of these findings *“... there is no material connection between such trade and the poaching of elephants today”*, and, these *“... findings should be fatal to at least the ban on domestic trade”*. It is apparent that had the justification for the domestic trading ban been limited to this first category of evidence the judge would have held that the restrictions were disproportionate and unlawful under Articles 34 and 35 TFEU. The Judge’s scepticism was however tempered in two respects. First, he accepted that there was significant evidence that a ban on domestic trade would have beneficial effects at the diplomatic level, ie through a causal mechanism other than that claimed for under the first justification (cf paragraphs [68] – [75]). Second, whilst he held that the evidence that there was an illegal ivory trade in the UK was *“quite limited”* he nonetheless accepted that there was *“much stronger evidence”* that the UK was being used as a form of transport hub for illegally sourced items going to the Far East (Judgment paragraph [53]) and that there was *“a clear overlap between this first objective and the second”*. These two caveats are significant because they explain why the appellant’s argument that the Judge’s findings on the first justifications cannot stand fails. The Judge did find that a domestic trading ban would not *in a quantitative manner* contribute to the state’s objective but at the same time he accepted that such a ban would be effective as components of the political and diplomatic (third and fourth) justifications.

- Suppression of the export trade (Second justification)

65. The second method focused upon the suppression of an indirect causative link between UK exports and demand for ivory on foreign markets. The respondent relied upon a variety of pieces of evidence which the Judge summarised at paragraphs [71] – [94]. It covered such matters as evidence that the UK was being used as a transit route or *“transport hub for illegally sourced items”* which were then exported to the Far East.

66. It is unnecessary in this judgment to describe the evidence. The Judge held that the evidence was “*much stronger*” than in relation to the first justification but was “*not particularly compelling*” (Judgment paragraph [53]). It amounted to a “*melange of evidential shards varying in their weight, anecdote, and inference and/or opinion, the latter often strongly held and emotionally expressed, and therefore not necessarily entirely dispassionate*” (Judgment paragraph [176]). Nonetheless, the judge accepted that there was “*some*” evidence, and we infer from this that it was treated as being material (as opposed to immaterial and to be wholly discounted, as in the case of the first justification).
67. For the Judge the issue was as to the implications to be drawn from this evidence (Judgment paragraph [176]). The Judge concluded that it was sufficient in law to warrant the use of the precautionary principle (Judgment paragraph [181]) which meant that Parliament was entitled to adopt “*bold and robust action*” without having to be convinced by evidence of a causative link (Judgment paragraphs [176] and [181]).

- International moral leadership/provision of assistance and advice to third states (Third and Fourth justifications)

68. The Judge concluded that the third and fourth justifications were interconnected and should be addressed together. The Judge found that the evidence here was far stronger. The evidence for the fourth justification was particularly strong. He summarised the evidence in support of each in his judgment at paragraphs [95] – [110]. The evidence was set out in the witness statement of Mr Pullen. He described the efforts being taken in other states to curb demand and the efforts being made at the international level by the UK. Once again it is unnecessary to recite in detail the evidence. We set out below the main points arising.
69. We start with the IA from which several important conclusions derive. The importance of prohibiting the UK domestic market went “*beyond its current weight in ivory trade flows*”. It would serve to “*send the clearest possible signal that the UK does not tolerate the sale of ivory and takes the strongest possible position against that trade.*” This would enable the UK to influence other countries, especially those with larger ivory markets, to take action to curb the lawful ivory trade which provided a cover for unlawful ivory trade. The existence of the Act, even in its unimplemented form, had already served to influence the plans, policies and actions of third countries. For instance, the Government hosted the fourth International Conference on the Illegal Wildlife Trade in October 2018 at which countries, including Laos and New Zealand, committed to reviewing their domestic legislation on ivory and/or to take steps to close their domestic markets. At the Conference the UK 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. In July 2018, Australia ran a federal Parliamentary inquiry into the trade in elephant ivory and rhino horn. Subsequently, in September 2018, the Parliamentary Joint Committee on Law Enforcement published a report into the trade in elephant ivory and rhino horn in which it 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 referred to the approach of the UK which had been identified by a significant number of stakeholders as “*a model of best practice*”. The committee recorded strong support for the United Kingdom government's proposed ban and legislation.

70. The evidence of Mr Pullen was also that the positive reception that the Act had received at the international level would be used as a springboard to exert diplomatic pressure upon other states. This was important because as one market closed there was evidence that other markets expanded to take account of “*demand displacement*”. Countries that acted in isolation created a risk of demand displacement which then prevented the policy objective being achieved. An example given concerned the US which applied a near-total prohibition on domestic ivory sales at the federal level in 2016. Surveys conducted by TRAFFIC to establish a new baseline for the US market concluded that the prohibition had led to a marked decline in sales. Six US states had introduced even stricter controls on intra-state trade including exemptions for antiques more restrictive than those applied at the federal level. These were more closely aligned to the exemptions used in the Act. The evidence given by Mr Pullen was that closing the UK market avoided the UK becoming a haven for traders moving out of stricter jurisdictions, such as the USA.

71. A serving 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.”

72. Mr Pullen's evidence was that, in the absence of a domestic ban, “... *the UK's international position would have been weaker*”. He referred to an article written by another former Foreign Secretary, the Rt Hon Lord Hague, who had observed that it would be embarrassing to seek to persuade other states to adopt stringent measures if the UK left its domestic market open. The Foreign Secretary had in September 2016 added:

“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.”

73. Evidence was also placed before the Court that the restrictions imposed by the US and the UK were “*vital elements to the international response*”, not because these were states with high demand for ivory but because the imposition of strict bans in the UK and the US would be perceived elsewhere as “*hugely symbolic*”.
74. It was also relevant that the UK was not acting in isolation. Other states had also adopted increasingly stringent trading bans. In June 2016, the USA introduced 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. 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*”.
75. The Judge found the evidence to be significant. He accepted that there was evidence that the UK was seen as taking a lead and “*importantly*” 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 retained a significant domestic market in antique ivory. There was force in Lord Hague's point about the size of the domestic market being “*embarrassing*”. The Judge did not think that “*size matters*”; those in the most affected markets would “*not draw nice distinctions between the old and the new*”. The strength of the argument was about “*perceptions and behaviours and seeking to support those who are in the front-line of this potentially losing battle*”.

- Conclusion on evidence

76. There is an international consensus which recognises that there is a continued and indeed growing threat to the African elephant and that extant international law and domestic law regimes are failing; more extreme measures are needed. To meet this serious threat one state acting alone cannot succeed. The introduction of an isolated ban risks generating demand shifting or displacement and the policy objective can therefore be achieved only by the creation of an international hegemony and mutual international support which has the effect of minimising the opportunities for demand suppressed in one state to spring back up elsewhere.
77. That is the context in which the trading bans must be seen. They are integral to the efforts of the UK in persuading other states to act likewise. If the UK had not imposed stringent import, export and domestic bans it would lose moral or political credibility at the international plane and it would lose the ability to form an active and influential part of that international hegemony.

78. We find this analysis to be compelling. The criticisms of the appellant, which focus upon the findings of the Judge about the first and second justifications, significantly downplay and underestimate the political and diplomatic dimension to the evidence which includes the judgment calls of two Foreign Secretaries with experience of dealing with the issue at the diplomatic level with third states, and also includes evidence about the reaction of third states (for instance Australia) to the imposition of a stringent ban in the UK. Parliament was in our judgment eminently well placed to evaluate this sort of evidence. The political and diplomatic evidence provides strong justification for both the domestic and the international trading bans contained in the Act. It might well be true, as the Judge found, that the ban imposed by the UK would exert little quantitative economic impact in and of itself (ie the Judge's conclusions on the direct economic impact in the first and second justifications); but that misses the point. The relevance of the trading bans lies primarily in their moral and diplomatic impact upon the international plane and as to that there is evidence, recorded and accepted by the Judge, that the bans in the Act, even as yet unimplemented, are exerting real and not hypothetical effects. We find no fault in the conclusions of the Judge about the evidence.

H. Less restrictive but equally effective methods

79. We turn now to consider the evidence in relation to the challenge that there were equally effective but less extreme measures that Parliament could have adopted, and this meant that even assuming that the ban served a proper objective it was nonetheless disproportionate.

80. The approach to be applied has been considered in previous domestic cases: *R (Lumsdon) v Legal Services Board* [2016] AC 697 ("*Lumsdon*"); *Scotch Whiskey Association v Lord Advocate* [2017] SLT 1261 ("*Scotch Whiskey*"); *Transport for London v Uber London Limited and others* [2018] EWCA Civ 1213 ("*TFL*"); *British American Tobacco and others v Secretary of State for Health* [2016] EWHC 1169 (Admin), para 662 ("*BAT*"); *EU Lotto Ltd and Ors v Secretary of State for Digital, Culture, Media and Sport* [2018] EWHC 3111 (Admin) ("*EU Lotto*"). This is an area where the respondent's margin of appreciation or discretion is relevant. The main points arising from case law can be summarised as follows:

- (i) The decision maker has a margin of appreciation or discretion which is highly fact and context specific: *Lumsdon* paragraphs [64] and [65]. The evaluation will take account of all relevant circumstances including the conditions prevailing in the relevant market, the circumstances leading up to adoption of the challenged measure, and the reasons given why less restrictive measures were rejected.
- (ii) A measure will be disproportionate if "*it is clear that the desired level of protection could be attained equally well by measures which were less restrictive*": *Lumsdon* paragraph [66]; *EU Lotto* paragraph [104].
- (iii) The burden of proof lies with the decision maker. It is not however to be applied mechanically. There is no duty on the decision maker to prove positively that no other measure could be as effective: *Lumsdon* paragraph [63]; *Scotch Whisky* paragraph [55]; *BAT (ibid)* paragraph [659].
- (iv) The decision maker is not required "... *to consider every possible alternative,*

including those that were never suggested by consultees”: TjL paragraph [37]; EU Lotto paragraph [104].

(v) The mere assertion that some other measure is equivalent and less intrusive is not sufficient: *BAT* (ibid) at paragraph [662]; and equally the fact that some other measure can be envisaged is not enough: *BAT* (ibid) paragraphs [660] – [662].

(vi) It is relevant that a measure is “*general, simple, easily understood and readily managed and supervised*”: *BAT* paragraph [661].

81. The appellant argues that the Act is disproportionate because equally effective but less restrictive and intrusive measures could be envisaged which, therefore, should have been adopted. These focused upon (i) measures (such as age verification) addressing the risk of modern ivory being passed off as antique so as to avoid the prohibition; (ii) a certification scheme for pre-1947 ivory; and (iii) the imposition of a trade ban to certain countries pursuant to Article 5(2)(d) of the Principal Regulation (as has been done for raw ivory).

82. The judge rejected these proffered solutions. At paragraph [113] he observed that the Government had considered a range of alternatives but had rejected them upon the basis that they did not address the political and diplomatic aims of the Act. For instance, in relation to age verification and certification schemes the Judge held:

“... 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.”

83. The effect of all the suggested alternative solutions would broaden the exceptions to the ban and as such dilute the vigour of the international diplomatic and political effort. In relation to the suggestion that instead of imposing a sweeping export ban Parliament should have imposed bans only on those states listed on an international black list the Judge observed that any such regime would require a complex human enforcement mechanism and would make the diplomatic effort more difficult:

“187. ... 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 [sic: or] not it would be entirely justified, would obviously be made. I do not see the need to compound the diplomatic sensitivities in this area.”

84. The Judge also rejected various arguments about the fine tuning of the exceptions.

“189. I consider that the difficulty with the Claimant’s submissions on this issue is that Mr Pullen has clearly explained the logical, policy ... 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. ...the philosophy of the Act is to apply narrow and limited exemptions to the ban, which is not fulfilled by the Claimant’s proposal.”

85. It suffices for us to record that applying the principles established in case law (cf paragraph [80] above) we detect no error in the analysis of the Judge. It is of some significance that the nature of the trading bans and the exceptions to them had been canvassed fully in the CP and had garnered widespread support. The consultation responses had led to some fine tuning to the exceptions in the Act. This was an issue which was fully aired and to this extent the challenge of the appellant now seeks to gain an advantage not achieved by those with a similar interest during the consultation process. Any broadening of the exceptions, which necessarily implied a weakening of the trading prohibitions, would risk weakening the international political and diplomatic effort to persuade third states to impose equally stringent trading bans. Parliament did not adopt a total prohibition on all trade, it accepted in large measure the compromise solution reflected in the Bill. In so doing it properly balanced individual rights with the broader political and diplomatic objectives. We reject this criticism of the reasoning of the Judge.

I. Other criticisms relating to the application of the proportionality test

86. We turn now to the more specific criticisms of the approach the Judge adopted to the proportionality test.

- Wrongful use of the precautionary principle/reliance upon inadequate evidence

87. The Appellant criticises the Judge for using the precautionary principle. In his judgment the Judge concluded that the trading bans were justified upon the basis of the precautionary principle. He said this in particular in relation to the second justification, but it would also seem to have guided his thinking more generally. The appellant argues that his approach was wrong for three reasons: (i) neither the Appellant nor the Respondent had relied upon that principle before the High Court; (ii) it was inapplicable in principle since it could only be used if invoked prior to its operation and it had no role as an after the event justification; and (iii), in any event, it could only be used where the means used to mitigate a risk could be established, by reference to strong contemporaneous scientific evidence, to bear a proper causal connection or nexus to the achievement of the mitigation of the risk in question, and there was no such evidence in this case.
88. We disagree. We start with nomenclature. Criticising the Judge for using the expression “*the precautionary principle*”, when it had not been used by the parties, misses the point and elevates form over substance. The Judge did use the language of the precautionary principle in the context of the common ground fact that the elephant population in Africa was dramatically threatened by the demand for ivory and that CITES, and other international and national measures, had failed to prevent widescale poaching. The need for stringent action was acknowledged at the international level and the actions taken by Parliament were directed towards that risk.
89. It is wrong to overstate the respondent’s case. It has never been said that the Act can make more than a contribution to the mitigation of the risk; nor is it claimed that the UK acting alone can succeed in resolving the problem; and nor has it been claimed that there is a neat, clear and direct, causal connection between the trading bans in the Act and achievement of the goal of mitigation of the risk of extinction of the African elephant. What matters is whether there is an identified risk and whether there is a connection between the action taken and the risk. The Judge examined carefully the causal connections claimed. He set out that there was a widespread international acceptance that national restrictions needed to be taken to address the risk. We have set out the evidence and the analysis above. We can see no reason why this approach should not be described as a “*precautionary*” approach.
90. The decision maker has a margin of appreciation. In *Lumsdon* the Court accepted for instance (at paragraph [115]) that the precautionary approach could be applied by regulators of the legal professions in the field of standards of criminal advocacy: “*A precautionary scheme of this kind provides a high level of public protection, precisely because it involves an individual assessment of each provider wishing to practise at an upper level, and it places a corresponding burden on those affected by it. Whether such a level of protection should be provided is exactly the sort of question about which the national decision maker is allowed to exercise its judgment within a margin of appreciation ...*”. See for an application of this discretion to legislation in the field of gambling: *EU Lotto* paragraph [89].
91. We reject the suggestion that the principle applies only where it is specially invoked before the event. The precautionary principle is not a mantra to be invoked; it is a description of a broad approach adopted by states to mitigate identifiable risk. There is no discernible reason in law or logic why the risk should always be a future one, yet to eventuate. In this case the risk has already materialised (elephant numbers *were* rapidly declining notwithstanding international efforts) but it is also a continuing (and hence

future) risk and steps are needed now to prevent the situation worsening and to halt and reverse the negative trend in African elephant populations. In any event, even if the label was wrongly used by the Judge, nonetheless, on the facts, his conclusion was still in our view justified. We consider that Parliament was acting within its margin of appreciation or discretion and the Judge was correct so to find.

92. As to the argument that the Judge erred in failing to require the Respondent to justify the Act with up to date scientific evidence, the appellant relied heavily upon the judgment in Case C-487/17 *Verlezza* at paragraph [57] (“*Verlezza*”) where the Court observed that (in accordance with Article 191(2) TFEU) the precautionary principle was a foundation of EU environment policy and emphasised that in accordance with case law:

“...a correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for the environment of the waste concerned, and, second, a comprehensive assessment of the risk to the environment based on the most reliable scientific data available and the most recent results of international research...”

93. It is argued in this case, applying this judgment, that the Act was not justified upon the basis of “*the most reliable scientific data available*” or “*the most recent results of international research*”. It followed that the judge erred when endorsing the evidence base upon which Parliament relied. The paragraph relied upon by the Appellant in *Verlezza* must be seen in context. In paragraph [58] the Court went on to address the situation arising when (as is not infrequently the case) the evidence is insufficient, inconclusive or imprecise, yet a risk of environmental harm remains “*likely*”. In such circumstances a state remains competent to act pre-emptively to address the identifiable risks where:

“58. ... it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to the environment persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective.”

94. This proposition is well established in case law: see eg *Queisser Pharma*, C-282/15, EU:C:2017:26, paragraph 57 and case law cited therein. An illustration of a case where the Court accepted, without the state having to rely upon detailed evidence, a restriction upon trade based upon moral and “*dignity*” grounds (which were reflected in domestic constitutional law) see Case-36/02 *Omega Spielhallen v Oberburgermeisterin der Bundesstadt Bonn* (14th October 2004). The domestic courts have also considered this issue upon several occasions. The position was summarised in *EU Lotto* (ibid) at paragraph [58] where the Court explained that: normally the most up to date evidence should be used; the intensity of the scrutiny applied to the evidence is highly context specific; there are no fixed rules as to the types of evidence required; the courts generally applied a closer scrutiny to justification advanced by a state after the event (although it is proper for the state to adduce new evidence during court proceedings that was not available to the decision maker); in some cases a measure could properly be

justified on limited evidence; and, it is important to avoid an “*overly schematic approach*”. The same point was made by the Supreme Court in *Lumsdon* (judgment paragraph [56]) and has been applied by the Court of Appeal recently in *Simonis v Arts Council* [2020] EWCA Civ 374 at paragraphs [93] – [100]. In those two cases the Court was addressing cases where the justification for a measure included the political and where the requirement for detailed evidence might be relatively minimal. In some cases the justification might be obvious or intuitive.

95. In the present case the chain of causation between the action of a single state and the restoration of elephant numbers in Africa is, by its nature, complex and hard to prove with exactitude. Yet, the risk to which the UK is responding is well accepted at the international level and the chosen mechanism, based upon diplomatic and moral effects of taking leadership, is widely acknowledged. The absence of hard scientific data cannot, in context, amount to an obstacle to the United Kingdom taking precautionary measures justified on largely diplomatic and political reasons.
96. Finally on this point, in terms of the approach to be adopted where (as here) an IA that is relied upon as setting out the evidence base for a measure is found to be deficient, Mr de la Mare QC cited the judgment of the High Court in *BOSCA et ors v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin) (“*BOSCA*”) where the Court annulled a statutory instrument where the justification for the measure was said to be found in an IA but, on analysis, the evidence referred to in the IA simply did not stack up. In this case the failure of Defra to conduct a full IA, as acknowledged by the RPC (see paragraphs [37] above), was analogous and *BOSCA* illustrated the approach that the Judge should have taken. In our view *BOSCA* is a different type of case. There the justification for the measure was said to be reflected in technical and economic evidence contained in the IA, but on analysis it simply was not. Here the case for the measure is not rooted in technical or economic data but in strong political and diplomatic considerations which are amply described in the IA. The omission from the IA of significant evidence is, in the final event, immaterial to the analysis of the Judge in this case.

- Failure to take account of the failings in the IA and the according of too much deference to Parliament

97. The next criticism is that the Judge accorded too much deference to the decision maker which is described as Defra and Parliament. It is of course Parliament and not Defra that is the decision maker; but the latter acts in these proceedings in effect as the interlocutor for Parliament. The substance of the complaint arises from the criticisms of the RPC of the IA and the fact that Parliament proceeded to adopt the Act in the face of what are said to be serious evidential failings. With respect the criticism overlooks two important points.
98. First, the Judge acknowledged that there *was* a material failure on the part of those preparing the IA and, it follows, an inadequacy in the evidence placed before Parliament (cf Judgment paragraph [170]). But that gap was plugged in the evidence and analysis before the Court. The Woodnewton Report and the detailed response of the respondent were considered fully by the Judge. Proportionality is concerned with the outcome not the quality of the process that leads to the decision or act being challenged: see eg *R (on the application of Begum) v Denbigh High School* [2006] UKHL 15 at paragraph [3]. In a case under the Convention the proportionality of a measure when measured

against fundamental rights is “*a matter for the court*”: *Belfast City Council v Miss Behavin’ Ltd* [2007] UKHL 19 at paragraph [88] applying *R (SB) v The Governors of Denbigh High School* [2006] 2 WLR 719 (*Denbigh*). In that latter case Lord Bingham observed:

“29. the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's convention rights have been violated.

30. ...[T]he court's approach to an issue of proportionality under the convention must go beyond that traditionally adopted to judicial review in a domestic setting...There is no shift to a merits review, but the intensity of review is greater than was previously appropriate.... The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time.... Proportionality must be judged objectively, by the court.”

99. The approach adopted by the Judge was, in these circumstances, justified. The omission from the evidence before Parliament of a comprehensive analysis of the economic impact of the ban and the resultant underestimation of adverse effects was a flaw in the procedure but it was remedied by the Judge considering all the evidence which included that which filled the void.
100. Second, in any event, when carrying out an objective appraisal of the evidence supporting the trading bans the Judge *did* discount the margin of discretion or appreciation that he accorded to the decision maker in respect of the matters where the evidence was lacking. He set the position out very clearly in paragraph [171] where he stated: “*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*”. In addition, he addressed himself to the difficult question of how he could reconcile the fact that the court had to assess the evidence objectively for itself with the according of an appropriate margin of appreciation or discretion to Parliament. In this respect (cf Judgment paragraph [163]) he adopted the analytical approach described by the High Court in *BAT* (*ibid*) at paragraphs [453], [454], and no criticism is made by the appellant of this reasoning. The criticism of the Judge is, therefore, misplaced since he carefully correlated the failings in the IA with the appropriate margin of appreciation or discretion to be applied to the assessment of the decision maker on that facet of the case. In short, he did precisely that which it is said he failed to do.

- Violation of the principle of respect for property/absence of a right to compensation

101. We turn to the final complaint which is that the Judge erred in failing to take due account of the fact that the trading bans undermined fundamental rights, primarily the right to respect for property (under A1P1 and Article 17 of the Charter). Article 16 of the Charter (on the right to conduct a business) was also referred to though very lightly, given that it is a highly qualified and weaker right. There are two elements to this argument. The first is that the existence of these fundamental rights should have

translated into the judge according a far narrower margin of appreciation or judgement to the decision maker than he did. The second element emerged more strongly in the written submissions on appeal and is that, absent a compensation scheme, the trading bans in the Act could never be proportionate.

102. In relation to the first argument in its Statement of Facts and Grounds the appellant argued that “...*the intensity of review for proportionality is at its highest in contexts, such as the present, where a member State is purporting simultaneously to restrict both a fundamental freedom (freedom of movement of goods) and fundamental rights (the right to property and to conduct a business)*”. The judgment of the Supreme Court in *Lumsdon* was relied upon in support of this proposition (cf paragraphs [23] and [37] - [38]).
103. There is a significant degree of overlap between this argument and those criticising the Judge for conducting an inadequate assessment of the evidence and the according of excessive deference to Parliament. We deal with the point briefly. The Judge was aware that fundamental rights were in issue and he squarely addressed their significance in relation to the intensity of the scrutiny that he had to apply to the evidence. This is not, therefore, a case where the Judge overlooked a relevant consideration or applied an incorrect test. At base the criticism is another way of saying that the appellant disagrees with the Judge’s acceptance of the respondent’s evidence. We do not repeat our conclusions on this; we do not accept this complaint.
104. We turn now to the second element in the argument, which concerns compensation. From our reading of the pleadings and from the Judgment below it did not loom large in argument. It was though a live issue and it has been elaborated upon in written submissions before this Court where it is contended that: “[t]here is no other way save for compensation adequately to mitigate the impact of the Act given its drastically curtailed exemption”.
105. The Judge referred briefly to the issue. He stated at paragraph [168] that, had the case entailed a “*complete deprivation of a property right*”, then “*compensation would probably have to be paid in order to render the interference proportionate*”. This was not, however, a case of complete deprivation since the right of ownership remained unaffected because the prohibitions were focused upon trading in ivory, not possession. Before the Judge the appellant argued that the Act was “*disproportionate stricto sensu*” (Judgment paragraph [192]). In common parlance this means no more than that there should be a proper relationship between the advantages to be gained by the objective of the measure and the harm caused to fundamental rights in achieving that goal. In *Lumsdon* the Supreme Court observed that it was not always identified as a limb of proportionality in the case law of the Court of Justice but that, when it was raised as a ground of challenge, the Court tended to examine it as a discrete issue: see the analysis of the case law in *BAT* at paragraphs [429] and [680ff].
106. For his part, the Judge did treat it as a discrete matter (Judgment paragraph [192]). It was the aspect of the case which caused him the “*greatest difficulty*”. He described the test as entailing “... *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.*” At paragraph [193] he summarised the Appellant’s argument:

“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.”

107. The reference of the Judge to sledgehammers and nuts is to the classic formulation of Lord Diplock in *R v Goldstein* [1983] 1 WLR 151 at pages 154, 155 which concerned justifications for an import ban on citizen band radios which, in the absence of a proper justification, would have violated the prohibition on state measures restricting the importation of goods between Member States. Lord Diplock defined the ingredients of the test and encapsulated its essence:

“To demonstrate what it is required to demonstrate in order to enable a state to avail itself of the derogation from article 30 for which article 36 provides, it is necessary to adduce factual evidence (1) to identify the various mischiefs which the challenged restrictive measures were intended to prevent, (2) to show that those mischiefs could not have equally effectively been cured by other measures less restrictive of trade, and (3) to show that the measures were not disproportionately severe having regard to the gravity of the mischiefs against which they were directed. This last mentioned consideration involves the concept in Community law (derived principally from German law) called "proportionality". In plain English it means "*You must not use a steam hammer to crack a nut, if a nutcracker would do.*"

108. This test has required reformulation subsequently, but it assists in identifying a key vice of a measure which is disproportionate; that it interferes to an intolerable degree in private freedoms and is intolerable because the legitimate objective behind the measure could be achieved by less draconian means.
109. The test to be applied is well established in case law. A1P1 and Article 17 of the Charter (which are to be read consistently) apply where there is either an expropriation of property (which refers to a compulsory vesting of a person's ownership in property in the state or a person or entity chosen by the state) or to a "*control of use*" (whereby ownership remains with the proprietor but rights of ownership are curtailed). In the case of expropriation, the case for compensation is strong and case law indicates that it will be exceptional for it not to be payable. In the case of control of use, however, the obligation to compensate is much weaker. In *R v Secretary of State for Health ex p. Eastside Cheese Co* [1999] 3 CMLR 123 the Court of Appeal considered the case for compensation in non-deprivation cases:

“56. ... In a deprivation case the availability of compensation is a relevant consideration. In *Case A/301-A Holy Monasteries v. Greece*, the European Court said:

‘In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 only in exceptional circumstances.’

57. Such a rule is readily understandable where the State is itself assuming ownership of property belonging to another, or where property is being transferred from one citizen to another. It appears to us to have very much less force where, in a case such as the present, the object of the measure is to restrain the use of property in the public interest. ...”

110. In the case of a control of use the Strasbourg Court has applied a test of “*fair balance*”. Mr de La Mare QC cited by way of illustration the judgment of the Grand Chamber in *Chassagnou and others v France* (29th April 1999) which concerned the *Loi Verdeille*, ancient hunting rights in France which traced their origins, as the Court explained, to before the French revolution. The law in question involved the mandatory transfer of certain hunting rights from private land to approved municipal hunters’ associations (*Associations communales de chasse agréées* – “ACCAs”) and approved inter-municipality hunters’ associations (*Associations inter-communales de chasse agréées* – “AICAs”) (judgment paragraph [13]). The Court held that this was a control of use case (judgment paragraph [71]) and, applying a fair balance test, held that there was a violation of A1P1, and fair compensation was due:

“85. In conclusion, notwithstanding the legitimate aims of the *Loi Verdeille* when it was adopted, the Court considers that the result of the compulsory-transfer system which it lays down has been to place the applicants in a situation which upsets the fair balance to be struck between protection of the right of property and the requirements of the general interest. Compelling small landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified under the second paragraph of Article 1 of Protocol No. 1. There has therefore been a violation of that provision.”

111. A summary of the fair balance test is set out in *BAT* (ibid) at paragraphs [732] - [735] and [791] - [799]. Mr de la Mare QC in his submissions accepted that the present case involved “*control of use*” (ivory can no longer be traded, but it can be held and passed on as a gift or bequest), but argued that the control was so extreme in form and nature as to be tantamount to (or at least a near equivalent of) full expropriation. He relied upon Article 52 of the Charter (see paragraph [54] above) to contend that in substance the very essence of the right to hold ivory had been taken from owners. In our judgment there was no obligation upon Parliament to introduce a compensation scheme.

112. First, Parliament conferred upon the Secretary of State a discretion as to when to bring the Act into force (see paragraph [9] above). As of the date of this judgment those affected have had about 30 months during which to take steps to realise the value of their ivory items. We accept that this might not be a complete solution for all those affected, but we were informed that the decision to defer the coming into force of the Act was a deliberate step taken to assist those with ivory to sell and thereby realise its value during a lengthy transition period. This is in our judgment an important mitigating consideration which militates strongly in favour of the absence of a formal compensation scheme in the Act. It is also of some relevance that the Act was heralded by a full consultation where the prospect of a ban was fully canvassed. The world was on notice of the risk of a control of use well before the Act was passed.
113. Second, if Parliament had been compelled to introduce a compensation scheme we see the force in the point that this would have amounted to a signal to other states that they were bound to do likewise, especially in a case where the UK was seeking to adopt a stance of moral and political leadership. If the stance of the UK in relation to third countries had been that they should adopt stringent measures but also pay compensation, this would have undermined the international effort to curb the trade. The states with the largest ivory trades are often not the wealthiest; if a curb on trade had to be accompanied by compensation, it is easy to understand how this would curb the willingness of those states to impose trading restrictions in the first place.
114. Third, no evidence was placed before the Judge (or this Court) which identified who would be entitled to compensation, and for what and as to the due amounts. In the course of submissions to the Court it appeared that ivory goods in the domestic market fell into three broad categories: (1) items of great rarity and historic or artistic quality; (2) items of no real value, whether viewed on their own or as part of another object; and (3), the remaining undifferentiated mass covering the full spectrum between categories (1) and (2), of which some may be held for business and some not. Category (1) would include items within the “Rare and Most Important” exemption and the “Museum” exemption; category (2) would include but not be limited to the “Minimal Content” exemption but would not warrant compensation in any event. See paragraph [40] above for a description of these exemptions. There is no evidence as to how many items might fall within category (3) and what their average value might be. This is a yet further reason why we conclude that Parliament was under no obligation to introduce a compensation scheme.
115. Finally, we very briefly mention Article 16 of the Charter on the freedom to conduct business (see paragraph [53] above). This is a highly qualified right: see analysis in *BAT* at paragraphs [858] - [864]. It could not, in our judgment, serve to afford the appellant a remedy where none of the other, far more directly relevant, rights relied upon have succeeded. We reject the argument under this head.

Conclusion

116. In conclusion the Judge was correct in his analysis and reasoning. The enactment by Parliament of the trading bans contained in the Ivory Act 2018 was lawful. The restrictions do not violate the EU rules on the free movement of goods nor the fundamental rights to respect for property rights or to conduct business contained in A1P1 or the Charter. We dismiss this appeal.

Judgment Approved by the court for handing down.

R on app of The Friends of Antique Cultural Treasures Ltd v
DEFRA