Case Comment: Judicial Review of Ivory Act 2018 Fails

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Case: *R (on the application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2951 (Admin)

Background

The UK is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") which prohibits the trade of raw ivory in all but exceptional circumstances. Notably Article 14(1)(a) gives member parties the right to "adopt stricter measures…". The EU Wildlife Trade Regulations (the Regulations) adopt CITES (Regulation (EC) No 338/97) and implement stricter measures than required of CITES members. The Regulations distinguish trade within the EU and commercial export to outside of the EU as pre-1947 worked ivory items can be traded within the EU without a certificate of authorisation. The EU is moving towards more stringent regulation.

The Ivory Act 2018 (UK) will introduce stricter restraints than both CITES and the Regulations. Section 1 introduces a "prohibition on dealing in ivory" which prevents the buying, selling, hiring, and keeping, exporting or importing for sale or hire of items which are made of ivory or have ivory in them, including pre-1947 worked ivory artefacts. The Act implements both civil and criminal sanctions and is subject to only a few narrow exceptions detailed in sections 2-11. In brief these include pre-1918 items of outstanding artistic value and importance where an exemption certificate has been issued, pre-1918 portrait miniatures, pre-1947 items with less

than 10% ivory content, pre-1975 musical instruments with less than 20% ivory content, and acquisitions by qualifying museums. The explanatory note makes clear that the legislation aims to "… reduce demand for ivory both within the UK and overseas through the application of the sales ban to re-exports of ivory items from the UK…" to protect declining elephant populations.

The Secretary of State relied on four justifications by which the Act contributed to its objectives:

- By reducing the trade of illegal ivory in the UK;
- By reducing the contribution made by UK ivory in sustaining ivory demand in other consumer markets which might support the illegal trade;
- By demonstrating leadership of the UK in closing the commercial trade of ivory; and,
- By supporting other countries to close their domestic ivory markets.

The Claim

Application for judicial review of the Ivory Act 2018 brought by Friends of Antique Cultural Treasures Ltd (FACT). FACT challenged the legislation on two alternative grounds.

1. The UK lacks competence to implement more stringent regulation of ivory trade than EU law provides for where the EU has exercised competence to allow trade without permits.
2. Alternatively, if the UK was permitted to enact more stringent regulations, banning antique ivory trade within the EU, and between the UK and outside countries is disproportionate under EU law or the EU Charter of fundamental rights and/or Protocol 1 Art.1 (A1P1) of the European Convention on Human Rights, which protects the right to the peaceful enjoyment of property.

Decision of the High Court

The application for judicial review was dismissed.

On Ground 1:
It was held that competence was shared despite the Regulations. FACT argued that the EU had exercised total competence through the Regulations and therefore shared competence was displaced under the Treaty on the Functioning of the European Union (TFEU)

Article 2(2), but this argument failed. TFEU Article 193 allows member states to adopt more stringent protective measures towards environmental safeguards than those adopted by the Union under the general provision, Article 192. TFEU Article 4(e) provides that shared competence between the Union and Member states applies to the "environment" as a principal area, and in combination with Article 2(6) which directly engages Articles 192 and 193 it was evident that competence was shared. The Principal Regulation also reflects Article 193. Furthermore, being secondary legislation, the Regulations cannot override the TFEU nor did they purport to. The regulations were of minimum harmonisation.

On Ground 2:
The Court further held that the trade ban was not disproportionate. Proportionality applies in environmental cases as made evident by TFEU Article 193. The legislation could only be compatible with the Treaty if "necessary for effectively achieving the objective of the protection of the life and health of animals" (Criminal Proceedings against Tridon, Case C-510/99 [2003] 1 CMLR 2). Proportionality could not be established by ethical objection in

the absence of evidence and it was noted with reference to R (Lumsdon) v Legal Services Board [2015] UKSC 41 that economic and social justifications require evidence in support, and that moral and political judgements become relevant only where some evidence exists. The court was in an equally appropriate position to assess the evidence as Parliament had been. The precautionary principle applied under TFEU Article 191(2) which justified taking robust action despite some disputed evidence. Notably, following Lumsdon a stricter approach to proportionality applied because the legislation effects the free movement of goods.

The Act did not amount to a total deprivation of property per ECHR A1P1. The degree of interference was reduced by three factors; it prevented dealing not use, the delay in implementation gave opportunity for sale, and sales outside the UK are probably still permitted. However, it was recognised that aspects of the Act relied on were of low quality and understated the impact of the Act on private interests. There was only tenuous evidence that the Act would have a dampening effect on illegal trade within the UK, but slightly stronger evidence that UK sale of ivory items supported ivory demand in other markets and this was not necessary to prove because the precautionary principle applied. Weight was accorded to softer factors including behavioural and stigmatic reasoning, and it was noted that anything contributing to the allure of ivory could affect the illegal market. The third and fourth justifications put forward by the Secretary of State were taken together and were significant, and it was noted that if the UK retained a significant market for ivory it would be unable to take this high moral ground in terms of demonstrating leadership and closing ivory markets of other countries.

The Court held that there were no equally effective measures to serve the stated objectives. FACT had argued that stricter enforcement of the existing regime along with stricter ivory age verification requirements as part of a more onerous registration regime would suffice, but this argument failed largely because it does not satisfy justifications 3 and 4. A further argument that blacklisting certain countries for ivory export would suffice also failed because it would not be conducive to UK's aim of supporting such countries in the fight against ivory trade.

A final argument that the Act was disproportionate stricto sensu on an analysis balancing the benefits gained and the harm caused to the fundamental rights at issue had force but also failed. Only a small number of antique ivory dealers were likely to suffer significant loss.

The decision sets an important precedent for other countries wishing to join the UK in fighting to end the global ivory trade, and will no doubt be welcomed by wildlife and animal welfare campaigners around the globe.