

The Elephant in the Courtroom: An analysis of The Ivory Act 2018, its path to enactment and potential impact on the illegal trade in ivory.

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On the 20th December 2019, Royal Assent was granted to the Ivory Act 2018. The legislation, introduced by Environment Secretary, Michael Gove on the 23 May 2018 was welcomed by politicians and conservation groups as “an extraordinary achievement” and “a landmark in our fight to protect wildlife and the environment”. In passing through the Parliamentary process in only seven months, the Ivory Act was testament to the cross party commitment to tackling the illegal ivory trade, however, its path to enactment has not been plain sailing. Following Royal Assent, the Ivory Act was the subject of a judicial review, brought by a company set up for the purpose by a group of antiques dealers, The Friends of Antique Cultural Treasures Limited. While the Ivory Act is now considered amongst the strictest ivory trade legislation in the world, this paper considers its path to enactment, its likely impact on the trade in ivory artefacts in the U.K. and whether the Act can fulfil the British Government’s aim to make it “one of the toughest bans on the planet”.

Keywords: Elephant ivory, wildlife legislation, conservation, judicial review, antique ivory.

Introduction

In April 2018, the British government's Department for Environment, Food and Rural Affairs (Defra) published its summary of responses to the Department's consultation on a proposal to ban the sale of ivory in the United Kingdom.¹ The consultation process produced one of Defra's largest responses by members of the general public, NGOs and groups affected by the proposed change in legislation on record.² In total, 71,238 responses to the consultation were received. These were made up of 10,623 individual responses, 60,613 campaign responses and 2 petition responses. In total, 87.6% of respondents expressed support for the government's proposed ban, 4.3% expressed opposition, and 8.1% did not express a definitive opinion.³

Part 1 of this paper will discuss the background to the Ivory Act 2018 ("the Act") including the undoubted influences of overseas jurisdictions, the cross party support for

¹ Banning UK Sales of Ivory: Summary of Responses and Government Response. Department for Environment, Food and Rural Affairs, April 2018.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/696474/banning-ivory-consult-sum-resp.pdf> accessed 14 September 2020.

² Jamie Doward, 'Pressure Grows For UK To Bring In Blanket Ban On Ivory Trade' *The Guardian* (2018) <<https://www.theguardian.com/environment/2018/jan/07/government-ivory-trade-ban-uk-bow-to-public-pressure#:~:text=Environmental%20campaigners%20believe%20that%20public,in%20ivory%20in%20the%20UK.>> accessed 14 September 2020.

³ Banning UK sales of ivory. Department for Environment, Food and Rural Affairs. 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/696474/banning-ivory-consult-sum-resp.pdf> accessed 14 September 2020.

the legislative changes introduced by the Ivory Bill 2018 (“the Bill”), the new legislation and in particular, the exceptions permitted within the Act for certain categories of item and an analysis of the responses to the public consultation. Part 2 of the paper will give an analysis of the judicial review brought by members of the antiques trade. Finally, in Part 3, the paper will conclude with a discussion of whether the Act is capable of fulfilling the British government’s aims to ‘end this insidious trade and make sure ivory is never seen as a commodity for financial gain or a status symbol.’⁴

PART 1 – Background to The Ivory Act 2018.

The regulation of the trade in ivory across jurisdictions is regulated by a regime of public international law. In those states that have ratified it, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") works by controlling the import and export of certain designated species which are either at risk of extinction or could become at risk. The UK, as a founder member of the Convention, is one of the 183 countries that has ratified CITES.⁵ Before the United Kingdom left the European Union on the 31 January 2020 and during the transition period (which ends on the 31st December 2020), the UK’s adherence to CITES is implemented by two EU Regulations, namely Council Regulation No 338/97, which sets out the protection of CITES species by regulating trade in them and Commission Regulation No 865/2006 (“the Regulations”) which sets out detailed rules concerning the implementation of

⁴ Department for Environment, Food and Rural Affairs, 'Introduction Of Ivory Bill Boosts Fight Against Elephant Poaching' (2018) <<https://www.gov.uk/government/news/introduction-of-ivory-bill-boosts-fight-against-elephant-poaching>> accessed 14 September 2020.

⁵ List Of Parties To The Convention. CITES. *Cites.org*, 2020.
<<https://www.cites.org/eng/disc/parties/index.php>> accessed 14 September 2020.

Council Regulation No 338/97. The Regulations set out the provisions regarding the issue of permits and certificates in order to create a consistent approach to the import and export of CITES species across the EU Member States. Even as the UK prepares for life after the transition period, EU Regulations continue to be directly applicable to UK law and as such no further UK legislation needs to be enacted to implement them, however the two Regulations do set out certain requirements for Member States to implement their own domestic legislation, including the penalties which will be applied for an offence.⁶

Pending the Act coming in to force, the UK's domestic legislation is laid down in The Control of Trade in Endangered Species (Enforcement) Regulations 1997 ("COTES").⁷ COTES mirrors the Regulations and sets out the penalties applicable for a breach. COTES also deals with trade offences which occur with regards to CITES species within the EU, so a sale of a piece of post- CITES convention ivory by an auction house or an antiques dealer would be dealt with under the COTES regulations.⁸ Most COTES prosecutions have been brought under Regulation 8. Regulation 8 makes it an offence to purchase, offer to purchase, acquire for commercial purposes, display to the public for commercial purposes, use for commercial gain, sell, keep for sale, offer for sale or transport for sale any specimen of a species listed in Annex A to the Principal Regulation.⁹ Both species of modern day elephants, *Elephas Maximus* and *Loxodonta*

⁶ Caroline Cox, 'The Elephant In The Sales Room: Ivory And The British Antiques Trade' (2016) 23 International Journal of Cultural Property.

⁷ The Control of Trade in Endangered Species (Enforcement) Regulations 1997.

⁸ The Magistrates Association, 'Sentencing For Wildlife Trade And Conservation Offences' (The Magistrates Association 2002).

⁹ The Control of Trade in Endangered Species (Enforcement) Regulations 1997.

Africana are Annex A species and as a result COTES applies to all forms of elephant ivory. A breach of Regulation 8, makes any commercial dealing in ivory prohibited. However, the issue with the Regulations and the problem that the British government seeks to address in the Ivory Act, is that they also create certain derogations pursuant to Article 8 of Council Regulation (EC) No. 338/97(1).¹⁰ The derogation which has been the subject of the greatest debate as the one which relates directly to the antiques trade. This derogation, the so-called antiques derogation or worked derogation means that under the COTES controls it is not a breach of the Regulations to sell 'worked' ivory items or items that have an ivory component provided the worked ivory in question pre-dates 1947.¹¹ What is and is not 'worked' has been the focus of several court cases over recent years.¹² To be 'worked' the item must be 'significantly altered from its raw state for jewellery, adornment, art, utility, or musical instruments, and; need no further carving, crafting or manufacture "to effect their purpose'.¹³ The Article 8 rules were extended in May 2014 to add that the item must be 'worked across the entire surface'. It remains unlawful to sell 'unworked' artefacts, regardless of their age. This fact was made clear when on the 24th May 2016, international auction house, Christies, was found guilty of the sale of an unworked ivory and silver hunting trophy. Despite having the traditional silver mounted

¹⁰ Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein 1996.

¹¹ Council Regulation (EC) No 338/97, Article 8(3) of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein 1996.

¹². Caroline Cox, 'The Elephant In The Sales Room: Ivory And The British Antiques Trade' (2016) 23 International Journal of Cultural Property.

¹³ Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein 1996.

ends to the tusk in question, it had not been worked across the whole of its surface. It was, in fact, a mounted raw elephant tusk.¹⁴ While a date for the enforcement of the Ivory Act 2018 is awaited, most antiques with an ivory component have enjoyed and continue to enjoy the Article 8 exemption however members of the antiques trade have needed to be very clear in their understanding of the law. Not only is it a question of whether an item is worked or not but the date of the working is also important. Take as an example an ivory bust carved in 1900. As the bust will have been significantly altered from its original state as a raw tusk 47 years before the Regulation cut-off date of June 1947, it can (currently, pending enactment of the Ivory Act 2018) be legally sold in the UK (and indeed the EU) without the need for a CITES certificate. The 1900 bust would still come within the antiques derogation if it had been re-carved, for example to make an ivory bead necklace, before June 1947. However, if the re-carving had been done after that date, it would fall outside the derogation and would currently need a CITES certificate from the Animal and Plant Health Agency's Licensing and Registration Service in order for it to be sold.¹⁵

The Regulations regarding the sale of worked ivory items have been criticised by both the members of the antiques trade and law enforcement officials. Perhaps the major criticism from law enforcement officers of the Regulations is the scope for the inaccurate assessment of objects. Even for an experienced specialist, it is not easy

¹⁴ Reuters Staff, 'Auctioneer Christie's Fined For Putting Undocumented Ivory On Sale'

(Reuters, 2016) <<https://www.reuters.com/article/us-britain-ivory-christies-idUSKCN0YF29Y>> accessed 14 September 2020.

¹⁵ Caroline Cox, 'The Elephant In The Sales Room: Ivory And The British Antiques Trade'

(2016) 23 International Journal of Cultural Property.

to accurately date a piece of carved ivory.¹⁶ Experts who are used to handling ivory may be confident in differentiating between new ivory and ivory that was worked centuries ago taking into account a range of factors including the colour of the ivory and the quality of the carving.¹⁷ However, as the Christie's case shows, not only can it be more difficult to distinguish between ivory that came from an elephant that died in the 1960s and one that died in the 1940s but even experts have struggled to understand and apply the rules.

International moves to end the ivory trade

The difficulty in accurately dating ivory without recourse to scientific dating methods is certainly part of the background to the Ivory Act 2018. However, another lies across the Atlantic in the United States of America. On the 11th February 2014, President Obama's administration published the U.S. government's National Strategy for Combating Wildlife Trafficking.¹⁸ The Strategy set out the 'guiding principles and strategic priorities for U.S. efforts to stem illegal trade in wildlife.' The Strategy acknowledged the U.S. as being 'among the world's major markets for wildlife and wildlife products, both legal and illegal' and set out three strategic priorities to combat wildlife trafficking. These were firstly, to strengthen enforcement measures and to improve efforts in the United States 'to stop illegal trade in wildlife and to enforce laws prohibiting wildlife trafficking'; secondly, to reduce demand for illegally traded wildlife

¹⁶ Caroline Cox, 'The Elephant In The Sale Room: An Inquiry Into The Sale Of Ivory By The British Antiques Trade' (The University of Portsmouth 2017).

¹⁷ Caroline Cox, 'The Elephant In The Sale Room: An Inquiry Into The Sale Of Ivory By The British Antiques Trade' (The University of Portsmouth 2017).

¹⁸ 'National Strategy For Combating Wildlife Trafficking' (*Obamawhitehouse.archives.gov*, 2014)

through public awareness campaigns and outreach programs at home and through public diplomacy abroad to dissuade consumers from purchasing illegally traded wildlife; and finally to expand international cooperation and commitment through diplomacy, international support and participation in ‘the fight against wildlife trafficking’ together with the strengthening of international agreements to protect wildlife.

Following this first step by President Obama, it was followed in June 2016 by his signing of Director’s Order 210.¹⁹ The Order instructed the U.S. Fish and Wildlife Service to strictly enforce existing restrictions on the commercial trade of elephant ivory and on the import, export and sale of items made from other protected species under the antiques exception of the Endangered Species Act 1973.²⁰ Since then the movement of ivory into the US for commercial purposes has effectively been banned, and internal commercial transactions are subject to tightly controlled restrictions that vary from state to state (these are not the subject of this paper). As in the U.K., the U.S. antiques trade opposed the stricter regulations which effectively brought an end to the international trade in antique ivory in the United States. However, the U.S. administration took this step because they recognised that America was a market for artefacts made from elephant ivory and that the home demand drove the increase in the elephant poaching.²¹ Despite

¹⁹ 'Director's Order 210, Administrative Actions To Strengthen U.S. Trade controls For Elephant Ivory, Rhinoceros Horn, And Parts And Products Of Other Species Listed Under The Endangered Species Act (ESA)' (*Fws.gov*, 2016)

²⁰ 'Director's Order 210, Administrative Actions To Strengthen U.S. Trade controls For Elephant Ivory, Rhinoceros Horn, And Parts And Products Of Other Species Listed Under The Endangered Species Act (ESA)' (*Fws.gov*, 2016)

²¹ 'Illegal Wildlife Trade' (*Fws.gov*, 2020) <<https://www.fws.gov/international/travel-and-trade/illegal-wildlife-trade.html>> accessed 18 September 2020.

the fact that the U.S. continues to allow the importation of hunting trophies, it determined to

‘...take every administrative and regulatory action to cut off import of raw and worked elephant ivory where that importation is for commercial purposes. Allowing imports for law enforcement and scientific purposes is in line with the (U.S. Fish and Wildlife) Service’s mission to help conserve African elephants and stop trafficking in African elephant ivory.’²²

The Order allows for some limited exemptions including, ivory that predates the CITES Convention and is being imported to the U.S as part of a house move or an inheritance, musical instruments containing ivory (such as the ivory frog of a violin bow) which will be used for musical performances. For the Obama administration, what differentiated these exemptions from ivory antiques was the fact that,

‘...unlike the commercial antiques trade, none of these types of imports has been used by smugglers to “cover” trafficking in newly poached ivory’.²³

It is this same fear, that new ivory was being sold through British auction houses and antiques dealers that led to the much stricter rules laid out in the Ivory Act 2018.

²² 'Director's Order 210, Administrative Actions To Strengthen U.S. Trade controls For Elephant Ivory, Rhinoceros Horn, And Parts And Products Of Other Species Listed Under The Endangered Species Act (ESA)' (*Fws.gov*, 2016)

²³ U.S. Fish and Wildlife Service, 'Questions And Answers About Director’s Order No. 210 Administrative Actions To Strengthen U.S. Trade Controls For Elephant Ivory, Rhinoceros Horn, And Parts And Products Of Other ESA-Listed Species' (*Fws.gov*, 2016)
<<https://www.fws.gov/international/pdf/directors-order-210-questions-and-answers.pdf>>
accessed 18 September 2020.

It was not just the United States of America that had taken steps to stem the poaching threat to elephants. Several other jurisdictions have introduced enhanced domestic regulations going beyond the requirements set out in the CITES Convention. In 2015 and 2016 there were a number of announcements from nations which were aimed at combatting the trade in elephant ivory.

China, a country often seen as a major contributor to the illegal ivory trade, imposed a one year ban on the import of African Elephant ivory carvings (this did not include pre-CITES items) on the 26th February 2015.²⁴ In the same year, the country also introduced a one year ban on the importation of African Elephant tusk hunting trophies.²⁵ Both of these actions were seen as a major step forward in elephant conservation but China was to go further. On the 20th March 2016, China announced it was suspending the importation of elephant tusks and ivory carvings (this time, including pre-CITES tusks and ivory artefacts and tusks originating from Africa as hunting trophies) from the 20th March 2016 until the 31 December 2019.²⁶ Action by China was followed by an

²⁴ Michael Martina, 'China Slaps One-Year Ban On Imports Of African Ivory Hunting Trophies' *Reuters* (2015) <<https://www.reuters.com/article/us-china-ivory/china-slaps-one-year-ban-on-imports-of-african-ivory-hunting-trophies-idUSKCN0S90BB20151015>> accessed 18 September 2020.

²⁵ The State Council of The People's Republic of China, 'China Imposes One-Year Ban On Ivory Imports As Hunting Trophies' (2015) <http://english.www.gov.cn/state_council/ministries/2015/10/15/content_281475212270688.htm> accessed 18 September 2020.

²⁶ Convention On International Trade In Endangered Species Of Wild Fauna And Flora, 'Notification To The Parties - China Provisional Measures On The Suspension Of Import Of Tusks And Ivory Carvings Of Elephants 2016/034' (CITES 2016).

announcement from the Hong Kong Government to phase out their domestic ivory trade within a five-year period. This announcement was accompanied by a ban on the import and re-export of pre-Convention ivory into the territory.²⁷

The year also saw several European Union Member States, including France and Germany, adopt stricter measures in relation to their own domestic ivory trades. These included announcements that they would no longer issue re-export certificates for pre-Convention raw ivory.²⁸ Their actions were followed by an EU wide announcement in February 2016, when the European Union published the EU Action Plan against Wildlife Trafficking, aimed at providing a comprehensive framework for collaborative action to fight wildlife crime inside the EU, and to strengthen the European Union's role in the global fight against illegal wildlife trade.²⁹ At the centre of The European Action plan were new regulations to increase the limits on Member States of the EU to issue export and re-export certificates for raw pre-CITES Convention ivory and

²⁷ The Government of Hong Kong Special Administrative Area, 'Government Will Phase Out Local Ivory Trade And Increase Penalties On Illicit Trade In Endangered Species From May' (2018) <<https://www.info.gov.hk/gia/general/201804/23/P2018042000739.htm>> accessed 18 September 2020.

²⁸ Martin Banks, 'France Praised For Ban On Ivory Trade' [2016] *The Parliament Magazine* <<https://www.theparliamentmagazine.eu/news/article/france-praised-for-ban-on-ivory-trade>> accessed 18 September 2020.

²⁹ European Commission, 'EU Action Plan Against Wildlife Trafficking (COM(2016) 87 Final)' (European Commission 2016) <https://ec.europa.eu/environment/cites/pdf/WAP_EN_WEB.PDF> accessed 18 September 2020.

to provide Member States with defined criteria to regulate the trade in antique ivory between Member States.³⁰

Cross party support for change within the British Parliament

In the 2015 Conservative Party Manifesto, then Prime Minister, the Rt. Hon. David Cameron, vowed to ‘press for a total ban on ivory sales’, however this pledge was not echoed in the 2017 Manifesto. By then, the new Conservative Prime Minister, the Rt. Hon. Theresa May, was being accused of ‘bowing to powerful lobbying pressure from the antiques industry’.^{31 32} Lobbying against a ban on ivory sales was vocal and it came from May’s own back benches. At the forefront of the lobbying was Lady Victoria Borwick, a Conservative M.P. and President of the British Antique Dealers’ Association, Borwick told her fellow M.P.s in a debate in the House of Commons on an ivory ban in 2016 that, ‘any ban on antique ivory is cultural vandalism, virtually akin to placing a ban on old books because they may be made from paper that came originally from now-

³⁰ European Commission, 'EU Action Plan Against Wildlife Trafficking (COM(2016) 87 Final)' (European Commission 2016)

<https://ec.europa.eu/environment/cites/pdf/WAP_EN_WEB.PDF> accessed 18 September 2020.

³¹ 'The Conservative Party Manifesto 2015' (*Ucrel.lancs.ac.uk*, 2015)

<<http://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2015/localpdf/Conservatives.pdf>> accessed 18 September 2020.

³² Lucy Pasha-Robinson, 'Conservatives Quietly Bin Pledge To Ban Ivory Trade In 2017 Manifesto' *The Independent* (2017)

<<https://www.independent.co.uk/news/uk/politics/conservatives-ivory-trade-ban-2017-manifesto-scrap-pledge-illegal-poaching-a7748581.html>> accessed 18 September 2020.

endangered trees or antique furniture made from mahogany'.³³ However, during 2016 and 2017, pressure for the government to introduce legislation which banned the sale of ivory in the U.K. grew as the issue received increasing attention. A number of high profile campaigns, including the airing of the BBC documentary *Saving Africa's Elephants*, the highly successful Stop Ivory lobby and HRH, The Duke of Cambridge's statement that he was not '...prepared to be part of a generation that lets these iconic species disappear from the wild. I am not prepared to explain to our children why we lost this battle when we had the tools to win it', led to the announcement by Secretary of State for the Environment, Michael Gove that the government would be introducing to Parliament 'one of the world's toughest bans on ivory sales.'^{34 35}

Analysis of the Public Consultation

The Ivory Bill ("the Bill") was introduced on 23 May 2018 and passed through the Parliamentary process enjoying support from across the House of Commons.³⁶ Introduction of the Bill had been preceded by one of the largest public consultation exercises conducted by a British government. The consultation ran for 12 weeks, from

³³ Backbench Business Committee, 'Volume 618' (Hansard 2016).

³⁴ Robert Jobson, 'Prince William: Don't Let Elephants Die Out - End Illegal Trade In Ivory' *Evening Standard* (2016) <<https://www.standard.co.uk/news/uk/prince-william-dont-let-elephants-die-out-end-illegal-trade-in-ivory-a3351601.html>> accessed 18 September 2020.

³⁵ Department for Environment, Food and Rural Affairs, 'Introduction Of Ivory Bill Boosts Fight Against Elephant Poaching' (2018) <<https://www.gov.uk/government/news/introduction-of-ivory-bill-boosts-fight-against-elephant-poaching>> accessed 14 September 2020.

³⁶ House of Commons Hansard, 'The Ivory Bill' (UK Parliament 2018).

6th October 2017 to 29th December 2017 and received 71,238 responses from the general public and interested parties. The purpose of the consultation was four fold. Firstly, the government wished to seek views on their proposal to implement a total ban on ivory sales in the UK, and to prohibit the import and re-export of ivory for sale to and from the UK, including intra-EU trade to and from the UK, where such sales could contribute either directly or indirectly to the poaching of elephants, with some narrowly defined exemptions. Secondly, consultation process acted as a call for evidence on the effect of a sales ban on elephant conservation, the natural environment and businesses, as well as its economic and cultural effect. Thirdly, it sought to seek views on the scope of the limited exemptions proposed by the government, and how they could operate and finally, it sought views on the enforcement and sanctions that should be applied to any breach of the proposed new legislation.³⁷

The Department for Food, Environment and Rural Affairs published the document, *Banning UK sales of ivory: Summary of responses and government response*, in April 2018, providing a precis of the responses to the government's consultation. Of the 71,238 responses received, 10,623 came from individual responses (10,431 were from individual members of the public, 175 were from organisations, and 17 respondents did not give enough information to identify them), 60,613 were campaign responses and 2 were petition responses. The two petition responses (organised by 38 Degrees and The Natural Resources Defence Council) were signed by a total of 66,994 people and the three campaign responses (organised by Stop Ivory, Avaaz and The Natural Resources Defence

³⁷ Department for the Environment, Food and Rural Affairs, 'Banning UK Sales Of Ivory' (Department for the Environment, Food and Rural Affairs 2017).

Council) were supported by a total of 60,613 respondents.³⁸ The consultation response also saw a number of other organisations encourage their supporters to respond. This was done in two ways; either through an online system or by providing suggested points for supporters to raise. These types of responses were seen to be rallied by organisations including WWF, the Musicians Union, Animal Defenders International, The International Fund for Animal Welfare, International Wildlife Bond and Action for Elephants UK.³⁹

The consultation process enabled organisations to select which sector best represented them. This information gave an interesting insight into corporate responders showing that the most represented sector was the fine art and the antiques trade (50 responses), followed by non-governmental organisations (40 responses), the museums sector (21 responses) and the music industry (20 responses). Other sectors represented included auction houses, the tourism industry, repair and restoration businesses, import and export operators, art galleries, research institutes, jewellers and film production companies.⁴⁰

³⁸ Department for the Environment, Food and Rural Affairs, 'Banning UK Sales Of Ivory Summary Of Responses And Government Response' (Department for the Environment, Food and Rural Affairs 2018).

³⁹ Department for the Environment, Food and Rural Affairs, 'Banning UK Sales Of Ivory Summary Of Responses And Government Response' (Department for the Environment, Food and Rural Affairs 2018).

⁴⁰ Department for the Environment, Food and Rural Affairs, 'Banning UK Sales Of Ivory Summary Of Responses And Government Response' (Department for the Environment, Food and Rural Affairs 2018).

The Defra document showed that 87.6% of respondents expressed support for the government's proposed ban while only 4.3% opposed it.⁴¹ Among the reasons given by responders for supporting a ban on the sale of ivory in the U.K. was the positive effect the ban would have on elephant conservation. Respondents also highlighted the important position of the elephant in the Range States' tourism industry. The economic benefits of elephant conservation in terms of the effect of elephants on the tourism industry of the Range States has only recently been considered in any detail. However, recent projects have shown that the positive economic effects can be substantial and that illegal poaching has distinct detrimental consequences.⁴²

The government's proposals did not amount to a total ban on the sale of ivory in the U.K. Instead, a number of exemptions to the ban were advanced and the consultation process sought views on these. While more than 1,700 respondents said that they did not consider that the government should create any exemptions to the sales ban at all but, of those who did give consideration to the proposed exemptions, responses varied between exemption categories. The categories proposed for exemption from a ban were; musical instruments, de minimus items (meaning items with only a small amount of ivory), items of significant artistic, cultural or historical value and items to be sold between accredited museums.

⁴¹ Department for the Environment, Food and Rural Affairs, 'Banning UK Sales Of Ivory Summary Of Responses And Government Response' (Department for the Environment, Food and Rural Affairs 2018).

⁴² Robin Naidoo and others, 'Estimating Economic Losses To Tourism In Africa From The Illegal Killing Of Elephants' (2016) 7 Nature Communications
<<https://www.nature.com/articles/ncomms13379>> accessed 18 September 2020.

By the time of its enactment, the Act had refined the exemptions further and a new category (portrait miniatures had been added.⁴³ In Sections 2 to 5, the Act deals with those items seeking to be exempt on the basis of their outstanding artistic, historical or cultural value. To be considered for an exemption under this category, the item must have been created before 1st January 1918 and have been assessed by ‘an independent advisory institution’ as being of outstandingly high artistic, cultural or historical value which must be ‘the rarest and most important items of their type’.⁴⁴

Section 6 of the Act deals with the exemption of portrait miniatures with a surface area of no more than 320cm² (excluding the frame) produced before 1 January 1918. This exemption was not included in the proposed exemptions set out in the consultation document but was added as a result of the consultation process. Portrait miniatures are portraits created in the 18th and 19th centuries and they are typically painted on a very thin sheet of ivory, although other materials, such as vellum, were used. The sheets of ivory used to create a portrait miniature were generally 1mm thick prior to the 1760s, after which the sheets could be cut more thinly. Given the thickness of the ivory used, they are not of re-workable value and so they are of no interest to the illegal trade. For an item to qualify under this exemption it would need to have been created before 1918 (s. 37(2) and (3)(a)) and meet the following conditions: the item is a portrait miniature and is pre-1918 as defined in section 37(2) and (3)(a), have a visible surface area of the ivory ‘canvas’ of no more than 320cm² (excluding the frame) and be registered under section 10 of the Act. If all of these conditions are not met, the item does not qualify

⁴³ The Ivory Act 2018.

⁴⁴ Department for the Environment, Food and Rural Affairs, 'The Ivory Act 2018 Explanatory Notes' (TSO (The Stationary Office) 2018).

as exempt and dealing in the item is prohibited, unless the item qualifies under another exemption.

Section 7 of the Act deals with items containing only a small proportion of ivory (known as a “de minimis” exemption) comprising less than 10% ivory by volume and produced before 3 March 1947. For an item to qualify for this exemption in addition to the age requirement, as defined in section 37(2) and (3)(b)), the ivory in it must be integral to the item and as such is necessary to its overall design and/or construction meaning either that it cannot easily be removed or if removed, that the item as a whole could no longer function as intended. An example of this would be an ivory inlay or an ivory escutcheon on a piece of furniture, or a small ivory handle on a piece of tableware. This de-minimis threshold is intended to further ensure that the exemption applies to items in which the ivory content is incidental, and for which the value of the item does not rest in its ivory content. Finally, the item must be registered under section 10 of the Act, prior to it being sold.

The musical instrument exemption was set out in the consultation document and remained an exemption under Section 8 the Act. To qualify under the exemption, the item must be a musical instrument, defined as an item based on the purpose for which it was made.⁴⁵ A musical instrument is defined as an item that was made primarily for the purpose of playing as opposed to, for example, items intended for decorative purposes, or ivory items which may technically be able to be used for musical or rhythmic purposes, but were not intended for such. The definition includes any accessories used to play a musical instrument (such as violin bows which historically

⁴⁵ Department for the Environment, Food and Rural Affairs, 'The Ivory Act 2018 Explanatory Notes' (TSO (The Stationary Office) 2018).

have included a small amount of ivory in the frog) and so may also qualify under the exemption, provided the item satisfies the other conditions of the exemption. The instrument must have been made before 1975, as defined in section 36(2) and (3), this being the date at which Asian elephants were first listed at Appendix I of CITES, indicating that they were considered vulnerable to extinction if trade in their ivory or other parts was not severely curtailed. The ivory content of the instrument must be less than 20% of the total volume of the material of which the instrument is made. The reason for this being that it would prevent the item being reworked and its ivory component being illegally sold. The 20% volume restriction was reached after careful consideration and consultation with musicians and their representatives. Most familiar instruments will come within the threshold, including pianos with ivory keys. Finally, in order to be sold, the instrument must be registered under section 10 of the Act.

Finally, Section 9 of the Act, provides for an exemption allowing for sales to and between ‘qualifying museums’. A qualifying museum under the terms of the Act is a museum in England, the Channel Islands or the Isle of Man, which is shown as being accredited in a list published by or on behalf of Arts Council England, or a museum in Wales, which is shown as being accredited in a list published by or on behalf of the Welsh Government, or a museum in Scotland, which is shown as being accredited in a list published by or on behalf of the Scottish Ministers, or a museum in Northern Ireland, which is shown as being accredited in a list published by or on behalf of the Northern Ireland Museums Council, or in the case of a museum elsewhere in the world, which is a member of the International Council of Museums.⁴⁶ A sale or purchase to or from an International Council of Museums member would involve the export or import of ivory

⁴⁶ The Ivory Act 2018.

from the UK, meaning the transaction must also (currently) comply with existing EU Wildlife Trade Regulations.

In the case of all the proposed exemptions, more respondents opposed them than supported them. In the case of musical instruments, 50.2% of respondents opposed the exemption. For the so-called de minimus items (items containing only a small amount of ivory), 47.2% of respondents opposed the exemption. In respect of those items considered to be of significant artistic, cultural or historical value, 52.4% of respondents opposed the exemption and for items to be sold between accredited museums, 41.1% of respondents opposed the exemption.⁴⁷ The arguments around the proposed exemption for items of significant artistic, cultural or historical value were of particular interest because they show the polarisation of views. The arguments propounded by those who supported the exemption included the need to protect and preserve items of artistic, cultural or historical significance as part of the country's cultural heritage. Supporters also argued that such an exemption would acknowledge that there is a distinction between a market for ivory as a commodity and the market for works of art that are sought for their cultural, artistic or historical significance. However, those opposing the proposed exemption, led by Stop Ivory⁴⁸ (a campaign response that comprised 39,485 identical emails) argued that the exemption would be, 'vague subjective and complicated

⁴⁷ Department for the Environment, Food and Rural Affairs, 'Banning UK Sales Of Ivory Summary Of Responses And Government Response' (Department for the Environment, Food and Rural Affairs 2018).

⁴⁸ Stop Ivory is an independent non-government organisation which aims to protect elephants and stop the ivory trade by implementing the Elephant Protection Initiative.

to administer and enforce' and that the exemption could be used as a loophole for the illegal ivory trade.⁴⁹ However, the proposed exemption was pursued and enacted in the Ivory Act 2018 under section 2 (2) which states that, 'The Secretary of State may issue an exemption certificate for an item only if satisfied that (a) the item is pre-1918, and (b) the item is of outstandingly high artistic, cultural or historical value'.⁵⁰ Respondents' concerns that the exemption may act as a loophole have been addressed in the Act so that certain factors must be considered before an exemption under the category can be granted. These include the rarity of the item and the extent to which the item is an important example of its type. As to how or what will be decided whether the item is rare enough, artistic enough or culturally significant enough is also addressed, in Chapter 30 (The Explanatory Notes) to the Act. Subsection (5) of the Act

'confers a power on the appropriate national authority, through regulations, to prescribe and keep updated the names of institutions which will provide advice to the Secretary of State on whether ivory items meet the criteria for this exemption'.⁵¹

The 'prescribed institutions' must have a specialist expertise in ivory items, and the expertise will cover a range of disciplines or periods (such as oriental art, medieval art, renaissance art) or in scientific, musical and nautical instruments which

⁴⁹ Department for the Environment, Food and Rural Affairs, 'Banning UK Sales Of Ivory Summary Of Responses And Government Response' (Department for the Environment, Food and Rural Affairs 2018).

⁵⁰ The Ivory Act 2018.

⁵¹ Department for the Environment, Food and Rural Affairs, 'The Ivory Act 2018 Explanatory Notes' (TSO (The Stationary Office) 2018).

would historically contain an element of ivory. It is expected that the country's leading museums, academics and other specialist institutions will form the basis of the expertise required but what sort of artefact will meet the seemingly vague criteria of 'rarest and/or most important items of their type' remains to be seen.

An illustrate example of such an object, which is given in the Explanatory Notes to the Act is a piece in the Victoria and Albert Museum's collection. *The Crucified Christ (c 1275-1300)* is an ivory figure was made in Europe at the later end of thirteenth century. It is said to be one of the finest surviving ivory carvings of the crucified Christ from the Gothic era. Such an item holds such historic importance that, should something similar be offered for sale following the Act becoming law, it would in all likelihood fall under the exemption.

PART 2 - An analysis of the Judicial Review

Following its cross party support, the Ivory Bill 2018 gained Royal Assent on the 20th December 2018. Secretary for the Environment, Michael Gove announced in a Defra press release that, 'It is an extraordinary achievement to have passed this Act of Parliament... The speed of its passage through Parliament shows the strength of feeling on all sides of the House on this critical issue'.⁵² It was intended that the Act would come into force during the later part of 2019. However, more than eighteen months later, the Ivory Act has yet to come in to force.

The claim for Judicial Review

⁵² Department for Environment, Food & Rural Affairs, 'World-Leading UK Ivory Bill Becomes Law' (2018) <<https://www.gov.uk/government/news/world-leading-uk-ivory-bill-becomes-law--2>> accessed 18 September 2020.

After Royal Assent was granted, a group of antique dealers and collectors joined forces and applied for judicial review of the Ivory Act 2018. The group formed a company called The Friends of Antique Cultural Treasures Limited (“FACT”) and brought a claim for Judicial Review founded on two grounds. Firstly, that the UK lacks competence to legislate on a basis which is more stringent than that provided by EU law where the Union has exercised its competence to allow certain trade in antique ivory (being worked ivory dated prior to 1947). Secondly, and in the alternative, FACT argued that if the UK was free under EU law to legislate more stringently, the ban is disproportionate under EU law and/or the EU Charter of Fundamental Rights and/or Article 1 Protocol 1 of the European Charter of Human Rights. FACT argued there were more proportionate means of achieving the Act’s objectives and contended that the restrictions contained in the Act would undermine the fundamental right to property and, as far as specialist antique dealers are concerned, their right to conduct a business. The case was heard by Mr Justice Jay in the High Court and following two days of evidence across the 16th and 17th October 2019, his judgement was given on the 5th November 2019.

In respect of FACT’s first claim, Mr Justice Jay relied on the Treaty on the Functioning of the European Union (“TFEU”) and held that it gives Member States the ability to ‘adopt more stringent measures than those adopted by the Council pursuant to Article 192 [TFEU], which is the general provision dealing with environmental safeguards’.⁵³ For Mr Justice Jay, the EU and Member States retained shared competence in this area of law and the principal EU Regulation regulating the trade in protected

⁵³ *R(On the Application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2019], EWHC 2951 (High Court of England and Wales).

species, more specifically, did not exhaust the Member States' ability to impose more stringent protective measures. In respect of this claim, therefore, Mr Justice Jay, found in favour of the Secretary of State.

In respect of the second ground, namely the proportionality of the Act, Mr Justice Jay found that the nature of the rights at stake, including the fundamental freedoms guaranteed by the EU Treaty, dictated the application of a stricter approach to proportionality. FACT argued that the measures contained in the Act were tantamount to a deprivation (by depriving members of the antiques trade their right to carry on their business). For those who built collections of antiques over the years and held such antiques, for example, to fund their pension in later years (like several witnesses giving evidence to support the Claimant), the monetary value of their antiques would be lost. Dealers specialising in antique objects which often contain ivory, such as Japanese netsuke, would no longer be able to hold these items to sell and will be forced to either close longstanding businesses or, FACT argued, relocate their businesses to a different country. Against this, the Department for Environment, Food & Rural Affairs contended that it would remain perfectly possible (and indeed legal) to value and appreciate an ivory object for its aesthetic purposes. This however was an argument of little comfort for those whose collections and stock would become effectively worthless over night as a result of the Act.

One of the Claimant's key arguments was that Defra had not provided any evidence that the legitimate trade in antique ivory in the UK demonstrated any direct, or even indirect, casual link to fuelling the illegal ivory trade. FACT also challenged Defra's argument that collectors of antique objects could be confused by modern ivory stained with tea to make it look antique. The Judge 'strongly doubt[ed] that good quality pre-1947 items are being sold in significant numbers in the sort of Far Eastern markets which

trade in the recently harvested [ivory]’.⁵⁴ In addition to their claim of a lack of evidence that the legitimate antique market fuels the illegal ivory trade, the Claimant brought two further evidential challenges the legislative process. These were firstly, that the evidence on which Defra had relied to demonstrate that the UK is a large exporter of ivory to the Far East is misleading because the majority of ivory exports from the UK to the Far East cited in the figures were in fact piano keys, which are recorded individually. As the trade and export of piano keys will continue under the Act under the musical instrument exemption, the Claimant argued that the Act would have very little effect on these figures.⁵⁵ Secondly, the Claimant argued that Defra’s assessment of the impact of the Act was not fit for purpose.⁵⁶

Defra’s impact assessment for the Ivory Bill was reviewed by the Regulatory Policy Committee (“RPC”) prior to its publication in the final form.⁵⁷ The

⁵⁴ *R(On the Application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2019] High Court of England and Wales, EWHC 2951 (High Court of England and Wales).

⁵⁵ *R(On the Application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2019] High Court of England and Wales, EWHC 2951 (High Court of England and Wales).

⁵⁶ *R(On the Application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2019] High Court of England and Wales, EWHC 2951 (High Court of England and Wales).

⁵⁷ Regulatory Policy Committee, 'Prohibiting The Commercial Dealing Of Ivory In The UK Department For Environment, Food And Rural Affairs' (RPC 2018)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/900761/RPC-4171_2_-

RPC assesses the quality of evidence and analysis used to inform Government's regulatory proposals. Although the RPC granted the impact assessment a green rating, the RPC had some concerns with Defra's assessment. For example, it found that DEFRA's assessment of the impact on private individuals and their collections was 'not fit for purpose' and that Defra's assessment of this aspect of the Ivory Bill needed to be significantly strengthened.⁵⁸ Defra was unable to provide any evidence that they had sought to address the RPC's recommendations to understand the impact on collectors and also on businesses. Mr Justice Jay stated in his judgment that Defra's Impact Assessment 'considerably understates the impact of the Act (then the Bill) on businesses, and fails completely to deal with collectors, whether they are amateur or expert. The RPC said in terms that these facets of the Impact Assessment were "not fit for purpose", but the unfitness and the lacunae identified by this expert body have largely been ignored [by DEFRA].'⁵⁹

However, Mr Justice Jay did accept Defra's submissions that the exemptions should be narrowly defined to demonstrate that the UK is willing to close down its own commercial trade in ivory, set an example to other countries by leading on elephant conservation, pro-actively contributing to change, and by supporting those states

DEFRA_Prohibiting_the_commercial_dealing_of_ivory_in_the_UK_opinion__final_.pdf>
accessed 25 September 2020.

⁵⁸ *R(On the Application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2019] High Court of England and Wales, EWHC 2951 (High Court of England and Wales).

⁵⁹ *R(On the Application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2019] High Court of England and Wales, EWHC 2951 (High Court of England and Wales).

that have already taken action to reduce demand for ivory, reduce incentives to poach ivory.⁶⁰ Whilst the Judge found that certain aspects of Defra’s assessment of the Act were deficient and that the impact of the Act on private rights would be significant, he nonetheless held that the measures imposed by the Act were not inappropriate and that no equally effective measures were available to achieve the Act’s objectives. He therefore concluded that, with ‘...some regret, because I remain sympathetic to the Claimant’s case and have much appreciated Mr de la Mare’s submissions, these considerations, and the others I have addressed in this judgment, serve to outweigh the rights and interests of those represented by the Claimant...This claim for judicial review must be dismissed’.⁶¹ So, despite expressing some sympathy with the Claimant and acknowledging that ‘important and wide-ranging issues’ that had been raised, Mr. Justice Jay dismissed FACT’s challenge but in doing so he also allowed an appeal to the Court of Appeal.

The Court of Appeal hearing - 24th – 25th February 2020

FACT took up the permission and on the 24th and 25th February 2020, the appeal of the failed High Court judicial review case was heard at the Royal Courts of Justice in London. Specifically, the appeal was brought on the grounds as to ‘whether the ban on the trade in antique ivory to be introduced by the Ivory Act 2018 satisfies the applicable standards of proportionality under EU law, the EU Charter of Fundamental Rights, and/

⁶⁰ *R(On the Application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2019] High Court of England and Wales, EWHC 2951 (High Court of England and Wales).

⁶¹ *R(On the Application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2019] High Court of England and Wales, EWHC 2951 (High Court of England and Wales).

or Article 1 Protocol 1 ECHR'.⁶² FACT argued that the evidence used to justify the Act was inadequate and, alternatively, even if the Act were justified, it was disproportionate because less restrictive but equally effective measures could have been used. The Lord Justices considered these criticisms under three headings in their judgement. These were firstly, the wrongful use by Mr Justice Jay of the precautionary principle and his acceptance of inadequate evidence to support the bans; secondly, the failure to take account of the failings in the Impact Assessment which preceded the Bill and the according of too much deference to Parliament; and finally, the violation of the principle of respect for property and the wrongful failure to require a right to compensation.⁶³

The Court of Appeal found no fault in the Mr. Justice Jay's original reasoning in his High Court judgement in relation to FACT's arguments and was particularly persuaded by the political and diplomatic aims cited by Defra as justifications for the Act's stringent measures: namely the perceived role of such measures in fostering international co-operation in tackling the threat to elephants. The alternative measures proposed by FACT, to control the ivory trade in the U.K. through a wider range of exceptions to the Act, were considered to have the effect of weakening the Act's political and diplomatic impact. As a result, The Court of Appeal concluded that they could not be said to be equally effective.

⁶² *R (On the application of The Friends of Antique Cultural Treasures Limited) -v - The Secretary of State for the Department of Environment, Food & Rural Affairs* [2020] Court of Appeal (Civil Division), CO/1273/2019 (Court of Appeal (Civil Division)).

⁶³ *R (On the application of The Friends of Antique Cultural Treasures Limited) -v - The Secretary of State for the Department of Environment, Food & Rural Affairs* [2020] Court of Appeal (Civil Division), CO/1273/2019 (Court of Appeal (Civil Division)).

Another argument raised by FACT on appeal was that the High Court had not considered what the Claimant saw as failings of the Act's Impact Assessment. The argument raised in this respect was that the Impact Assessment showed insufficient evidence of 'a proper, scientific, nature to justify the trading bans and that the Judge erred in concluding otherwise'.⁶⁴ Firstly, the Claimant questioned the adequacy of the evidence supporting the justifications relied upon to justify the trading bans and secondly, the question of whether less restrictive and intrusive but equally effective measures could have been adopted by Parliament than the stringent prohibitions imposed by the Act. The Court of Appeal noted that, whilst the High Court had acknowledged certain problems with the Impact Assessment, it had also remedied this by considering additional evidence in court. In this respect, the Court of Appeal was referring to the fact that the Impact Assessment, while being declared 'fit for purpose' by the independent Regulatory Policy Committee, responsible for evaluating the quality of evidence and analysis used to inform regulatory proposals, it had also highlighted certain shortcomings in the assessment including the impact of the new legislation on small businesses who were currently engaged in the sale of antique ivories. In February 2019, the British Antiques Dealers' Association had commissioned the Woodnewton Report, seeking responses from its members as to the likely impact of the Act on their businesses. In particular, the report considered 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 to the Woodnewton survey and the report concluded that the effect of the ban on businesses

⁶⁴ *R (On the application of The Friends of Antique Cultural Treasures Limited) -v - The Secretary of State for the Department of Environment, Food & Rural Affairs* [2020] Court of Appeal (Civil Division), CO/1273/2019 (Court of Appeal (Civil Division)).

engaged in the sale of antique ivories was ‘... the most significant area of economic impact and the one covered to least effect in the Government’s Impact Assessment’.⁶⁵ The report stated that some businesses would close and others have to relocate, that some staff would be made redundant; and that some businesses would suffer a reduction in turnover and profit; and that some professionals such as restorers or academics would experience a reduction in demand for their services or struggle to continue with their work. However, the report was not able to ‘quantify any of these effects’.⁶⁶

The issues with the Impact Assessment had been of concern to Mr Justice Jay in the High Court hearing but the Court of Appeal were satisfied that he had dealt with this by taking evidence from Richard Pullen, the official within Defra with responsibility for domestic wildlife and ivory. Mr. Pullen, in his witness statement evidence confirmed 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 on the impact (£72.4 million over ten years) and those in the Woodnewton report (£116.7 million over 10 years) was attributable to the fact that Defra measured only the impact upon business in the Impact Assessment and not on businesses and individuals (as in the Woodnewton report). In his witness statement he said that,

⁶⁵ Woodnewton Associates, 'BADA Survey Of The Economic Impact Of The Ivory Act 2018' (Woodnewton Associates 2020) <<https://www.bada.org/news/bada-survey-economic-impact-ivory-act-2018>> accessed 18 September 2020.

⁶⁶ Woodnewton Associates, 'BADA Survey Of The Economic Impact Of The Ivory Act 2018' (Woodnewton Associates 2020) <<https://www.bada.org/news/bada-survey-economic-impact-ivory-act-2018>> accessed 18 September 2020.

‘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.’⁶⁷

In addition, Mr. Pullen added that,

‘...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’.⁶⁸

Turning to FACT’s claim that the High Court did not take proper account of the Act’s impact on fundamental rights, including the right to respect for property, the Court of Appeal found that the High Court ‘squarely addressed’ the significance of these rights (paragraph 103). More specifically, no compensation scheme was required to make the ban proportionate because this was not a case of complete deprivation of a right. Under the Act, as well as the narrow trade exceptions, the ownership and gifting of ivory continue to be allowed.

⁶⁷ *R (On the application of The Friends of Antique Cultural Treasures Limited) -v - The Secretary of State for the Department of Environment, Food & Rural Affairs* [2020] Court of Appeal (Civil Division), CO/1273/2019 (Court of Appeal (Civil Division)).

⁶⁸ *R (On the application of The Friends of Antique Cultural Treasures Limited) -v - The Secretary of State for the Department of Environment, Food & Rural Affairs* [2020] Court of Appeal (Civil Division), CO/1273/2019 (Court of Appeal (Civil Division)).

The Appeal judgment highlights the four justifications for the Act put forward by Defra namely, to suppress demand for ivory through a ban on domestic trade; to suppress demand for ivory through a ban on international trade; to persuade third-party states to impose stringent bans through international leadership and finally, to support countries that have imposed stringent bans through the giving of advice and support. These justifications mirror the statements made in the Final Impact Assessment published on 23rd May 2018, in which it was stated that the objective of the Ivory Act 2018 was to ‘ensure that the UK plays a leading role in ending the illegal trade in ivory’ and that a total ban would demonstrate that “we are world leaders in the fight against the ivory trade” by providing ‘a commitment to close legal ivory markets (and) reduce the demand for ivory’.⁶⁹

It is understandable that, from the perspective of the antique ivory trade, the first justification seemed especially unfair given that, as acknowledged in the Court of Appeal judgment, Mr Justice Jay had confirmed at first instance that there was ‘little or no demand in the UK for non-antique ivory’ and that the evidence to suggest that the Ivory Act could have some meaningful effect on the illegal trade of ivory in the UK was ‘tenuous at best’. He also concluded that the evidence for an indirect link between UK ivory exports and demand for illegally sourced ivory on foreign markets was ‘not particularly compelling’.

⁶⁹ Department for the Environment, Food and Rural Affairs, 'Prohibiting The Commercial Dealing Of Ivory In The UK' (Department for the Environment, Food and Rural Affairs 2018) <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0215/IA182205_01.pdf> accessed 18 September 2020.

Not surprisingly, the criticisms of FACT on appeal focussed on the judge's findings regarding the lack of material connection between the antique ivory trade and the poaching of elephants should be "fatal to at least the ban on domestic trade". Indeed, the Appeal judges held that if the justification for the domestic trading ban had been limited to this first category of evidence, the judge would have held that the restrictions in the Ivory Act were indeed disproportionate and unlawful. However, Defra's justifications were not limited to this first category and it was the role of the Ivory Act in conveying international leadership and providing support for third party countries in their fight against elephant poaching that ultimately meant FACT's appeal would fail. Defra emphasised the government's motivation for the Ivory Act from the outset, and the courts (both the High Court and the Court of Appeal) saw no reason to underestimate the significance of the Act in this political and diplomatic context. While the almost total trading ban in the Ivory Act may seem harsh on the genuine and honest antiques trade, the courts presumably agreed that 'if the UK had not imposed stringent import, export and domestic bans it would lose moral or political credibility at the international plane' and that the UK's standing and ability to advise on an international level was the most persuasive argument in support of the Act.⁷⁰

PART 3 - Conclusion

On the 10th August 2020, the Supreme Court announced that a final appeal to them would not be permitted. This brought FACT's challenge to an end. Although a date has, at the time of writing, not been given, Defra have said that they will now bring the Ivory

⁷⁰ *R (On the application of The Friends of Antique Cultural Treasures Limited) -v - The Secretary of State for the Department of Environment, Food & Rural Affairs* [2020] Court of Appeal (Civil Division), CO/1273/2019 (Court of Appeal (Civil Division)).

Act 2018 into force as soon as possible. In order to do that, however further regulations will need to be placed before Parliament to effect the necessary secondary legislation to ensure the Act's smooth implementation. Statutory guidance is also expected on matters to be taken into account when assessing whether an item is of outstandingly high artistic, cultural or historical value, as well as issues such as application fees or measures concerning the appeals process.

In 2018, when the Ivory Bill was put before Parliament, ministerial written assurances were given that there would be a consultation process involving stakeholders before the publication of the non-statutory administrative guidance. This would be intended to assist stakeholders understand the provisions of the Ivory Act and how to assess whether items would meet the exemptions in the Act. Such a consultation will be important to the antiques trade in particular. They were, as the judicial review process showed against the Act but a further consultation and secondary legislation will be vital in order that the antiques trade may understand how the Act is to be complied with before it comes into force. As well providing clarity as to the derogations, there is also scope for the regulations to broaden the derogation because the Act states that 'any other matters specified in regulations made by the appropriate national authority' may be taken into account. Although frustrating for the antiques trade, this is not unusual. The main Act, having gained Royal Assent in 2018, serves as the 'flagship' of the legislation with the statutory instrument providing the working detail. Defra have not, as yet, given a date for the consultation on this secondary legislation and the Act cannot come into force until this process has happened. However, once in force, the Act will stand as one of the most rigorous pieces of wildlife conservation legislation in the world and as such will fulfil the British government's aim of demonstrating the UK's leadership in the field of elephant conservation as well as a carrion call to other jurisdictions to take similar steps to close

their own domestic ivory markets. When the Act was passed, the Government's press release headlined it as, 'World-leading UK Ivory Bill becomes law'.⁷¹ Having thereby gone some way to achieving its stated aim of world leadership by passing the Ivory Act 2018, the judicial review process, Brexit and then the coronavirus pandemic have all contributed to the delay in the Act coming into force. It is to be hoped that, as the second anniversary of the passing of the Ivory Act approaches, it will achieve the aim of being 'a landmark in our fight to protect wildlife and the environment'.⁷²

⁷¹ Department for Environment, Food & Rural Affairs, 'World-Leading UK Ivory Bill Becomes Law' (2018) <<https://www.gov.uk/government/news/world-leading-uk-ivory-bill-becomes-law--2>> accessed 18 September 2020.

⁷² Department for Environment, Food & Rural Affairs, 'World-Leading UK Ivory Bill Becomes Law' (2018) <<https://www.gov.uk/government/news/world-leading-uk-ivory-bill-becomes-law--2>> accessed 18 September 2020.

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