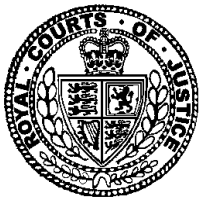

Neutral Citation Number: [2018] EWHC 1822 (Admin)

Case No: CO/3601/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/07/2018

Before :

THE HONOURABLE MRS JUSTICE CARR DBE

- -

Between :

The Queen (on the application of KATHLEEN ELIZABETH SIMONIS)	**Claimant**
- and -	
ARTS COUNCIL ENGLAND	**Defendant**
- and –	
(1) MINISTERO DEI BENI E DELLE ATTIVITÀ CULTURALI DEL TURISMO **(2) THE SECRETARY OF STATE FOR DIGITAL, CULTURE, MEDIA AND SPORT**	**Interested Parties**

- -
- -

Mr Aidan O'Neill QC (Scot) QC and Mr Chris Buttler (instructed by Howard Kennedy LLP) for the **Claimant**
Mr Ben Jaffey QC and Mr Ravi Mehta (instructed by the Government Legal Department) for the **Defendant**

Hearing date: 28th June 2018

- -

Approved Judgment

Mrs Justice Carr:

Introduction

1. The Claimant, Mrs Kathleen Simonis, is a resident of Italy and the owner of an oil painting on wood panel entitled "*Madonna con Bambino*" (116 x 69 cm) ("the Painting"). Although originally (and at the time of the Claimant's purchase in 1990) understood to be a 19th century imitation, the Painting is now attributed to Giotto di Bondone ("Giotto") (or his school) (1266-1337). It is said to have a current estimated value of approximately £10million. It is considered by the Italian authorities to be of exceptional cultural and historical importance.

2. There has been a lengthy history of litigation in Italy regarding the Painting and its export and re-export to and from that country, some of which it is necessary to identify further below. In essence, the Claimant and the Ministero Dei Beni E Delle Attività Culturali e Del Turismo, the Italian Ministry of Cultural Heritage and Activities and Tourism ("the Italian Ministry"), have been in dispute over the validity of a series of export licences and a certificate for free movement issued by the Italian authorities in respect of the Painting.

3. The Painting last arrived in this country upon re-export by the Claimant to London from Italy on 14th February 2007, days after a judgment of the *Tribunale Amministrativo Regionale di Lazio* ("TAR") on 9th February 2007 ("the 2007 Order"). The 2007 Order annulled an Italian ministerial decree of October 2004 ("the October 2004 Decree") replacing an earlier Italian ministerial decree of 10th March 2000 ("the 2000 Decree") which, had it been valid, would have prevented export. On 11th November 2008, however, the *Consiglio di Stato*, the highest Italian administrative court, reversed the 2007 Order ("the 2008 Order"), with the result that the October 2004 Decree remained valid. The *Consiglio di Stato* subsequently also refused an application by the Claimant for a review of that decision. The Painting is currently in storage in London.

4. On 8th April 2015 the Claimant, through her London solicitors, applied to the Defendant, the Arts Council England ("the Council"), for a licence to re-export the Painting to Switzerland under Article 2 of EC Regulation 116/2009 ("Article 2") ("the Regulation"), asserting an unfettered right to move the Painting outside the European Union ("EU"). That application was eventually refused by the Council on 8th May 2017 ("the Decision"). The Council concluded that it was not the "*authority*" "*competent*" under EU law to issue an export licence to Switzerland in respect of the Painting. The "*competent authority*" under EU law for the grant was the Italian authorities. The basis for the Decision was that the Painting had not been "*lawful[ly] and definitive[ly]*" dispatched to the United Kingdom ("UK") from Italy within the meaning of Article 2 (2)(b). The Council offered instead to issue an export licence for the return of the Painting to Italy.

5. The Claimant now seeks to challenge the Decision. She contends that it was wrong in law and seeks a declaration that the Painting was lawfully and definitively dispatched to the UK on 14th February 2007. Her claim for a reference to the Court of Justice of the European Union ("the CJEU") has fallen away, for reasons explained below.

6. It is important to note that the issue in this case is not therefore whether the Painting should be returned to Italy. This is not a claim by the Italian Ministry under the Return

of Cultural Objects Regulations 1994 (as amended) ("the Return Regulations"). The question is rather which Member State ought to take the decision whether or not to grant permission for the Painting to be exported outside the EU, specifically whether or not the Council on the one hand or the Italian Ministry on the other should take that decision.

7. The motivation behind the Claimant's application to the Council for an export licence is said to lie in her grievance that the Italian authorities maintain that, notwithstanding its export to the UK, they have rights over the Painting. This, she contends, subjects it to a form of "*blight"* which adversely impacts the Claimant's fundamental property rights to the full enjoyment and use of the Painting. She states that she wishes to lift the *"blight"* by exporting the Painting lawfully outside the customs territory of the EU, for which purpose she requires an export licence under the Regulation.

8. The Italian Ministry and the Secretary of State for Digital, Culture, Media and Sport ("the SoS for DCMS") have been joined as Interested Parties. The Italian Ministry is the "*competent authority*" in Italy; the SoS for DCMS is the Secretary of State responsible for export licensing under the EU law regime and who delegated responsibility to the Council for determining applications for export licences (pursuant to the Contracting Out (Functions in relation to Cultural Objects) Order 2005). She filed a brief acknowledgment of service in support of the Council's defence. The Italian Ministry participated in the formulation of questions put to the joint expert on Italian law, as set out below. Otherwise, neither Interested Party has played any direct part in the proceedings.

Relevant facts

9. The Claimant acquired the Painting at auction in Florence in May 1990 for 8million lire (circa £3,500). On 24th March 1992 she was issued by the Italian authorities with a permanent export licence for the Painting ("the 1992 licence"), carrying the purchase price (of 8million lire) as the valuation and describing it as "*Panel Painting from the 1800s"*. The 1992 licence was valid for one month from date of issue and could be used only once. It was used to export the Painting to the UK. On 22nd April 1992 the Painting was re-imported into Italy with a temporary import licence valid for five years, carrying a valuation now of 10.75million lire (circa £4,700).

10. In 1992, an article was published by an art expert, Professor Filippo Todini, attributing the Painting to Giotto. In 1993 the Painting underwent restoration in Italy by Professor Umberto Ticci, revealing a medieval painted layer. Professor Ticci thought the Painting to be possibly of 13th century origin and potentially attributable to Giotto. An article was published by an art expert, Professor Filippo Todini, attributing the Painting to Giotto. Other Italian art experts, however, contested the attribution, though not the possible dating.

11. On 8th June 1993 the Claimant was granted another permanent export licence for the Painting ("the 1993 licence").

12. In 1995 the Painting returned to Italy from Switzerland on a temporary import licence and then travelled to the United States of America ("the USA") in 1998, with a now declared value of 700million lire.

13. In February 1999 the Painting returned to Italy from the USA. It was inspected on arrival by the Italian authorities. Dr Alia Englen and Dr Guilia Tamanti reported to the Export Office for Antiquities and Art Objects in writing on 19th February 1999, proposing purchase of the Painting by the Italian Ministry. They adopted the attribution of the Painting to Giotto and described the Painting as being of "*extraordinary pictorial quality and in an excellent state of preservation"* concluding:

> *"…the purchase of the painting is proposed as an extraordinary pictorial document of national interest. The acquisition in the collections of the National Gallery of ancient art from Rome in particular would add to the scarce representation of works of primary importance from this period within the museum; so much so that the painting constitutes a moment of fundamental importance of Roman figurative culture."*

14. On 23rd February 1999 the Italian authorities issued a certificate of temporary importation stated to be valid for five years, thus expiring on 23rd February 2004, and non-renewable ("the 1999 licence"). It stated that it replaced a certificate of free movement across the EU during its period of validity. Thus the Painting could be removed from Italy to another EU country without further formality until February 2004.

15. By the 2000 Decree on 10th March 2000, the 1993 licence and all other licences derivative from it, including the 1999 licence, were annulled because (in summary) the nature of the work of art had altered fundamentally as a result of the restoration – it *"became another work of art"*.

16. On 29th January 2004 the Claimant sought an extension of the validity of the 1999 licence. The Council points to this as being significant: it demonstrates that the Claimant knew full well that the 1999 licence would expire later in 2004 absent extension. The application was refused on the basis that it was not capable of renewal.

17. The five year anniversary of the 1999 licence came and went on 23rd February 2004.

18. On 10th March 2004, on appeal by the Claimant, the TAR annulled the 2000 Decree on procedural grounds. On 13th October 2004 a second Ministerial Decree, the October 2004 Decree, was issued to the same effect as the (by now annulled) 2000 Decree. The Claimant challenged this second Ministerial Decree and sought interim relief. Her application for interim relief was unsuccessful, the TAR ruling that *"in a comparative assessment of the conflicting interests, the public interest appears to be pre-eminent, to be pursued with due diligence".* But her substantive appeal succeeded, on 9th February 2007, leading to the 2007 Order. In the 2007 Order the TAR ordered that its judgment be carried out by the Administrative Authority.

19. On 13th February 2007 the Claimant's Italian lawyers wrote a letter in apparent response to a query from Soc. Moretti arl., an art gallery specialising in Renaissance art, stating that the Painting could be legally exported to a country of the EU without prior issue of a (new) certificate of free movement, placing reliance on the contention that the five year validity of the 1999 licence had been automatically extended by operation of law during the period of the litigation. They stated that nor was there any requirement to make prior communication with the Export Office or any other authority in Italy. The

sole requirement was for the freight forwarder to ensure that the Painting was accompanied by the 1999 licence and the original copy of the 2007 Order.

20. The Painting was exported to the UK on 14th February 2007. Mr Jaffey QC for the Council described it as having been "*spirited away"*. Only after it had arrived there, on 23rd February 2007, did the Claimant's Italian lawyers inform the Italian authorities of its dispatch.

21. The Italian Attorney-General launched an appeal against the 2007 Order in February 2008. He also made an application for interim relief, which was rejected on the basis that the Painting had already reached London.

22. On 11th November 2008, by the 2008 Order and upon the appeal of the Italian Ministry issued in March 2008, the *Consiglio di Stato* reversed the 2007 Order. The *Consiglio di Stato* held that the Italian authorities had acted lawfully in revoking the 1999 licence by the October 2004 Decree. By letter dated 16th October 2009 the Italian authorities demanded that the Claimant return the Painting to Italy. The Claimant's request for a review of the 2008 Order was dismissed (in November 2011).

The application and decision by the Council

23. The Claimant applied to the Council on 8th May 2015. Her application was for an individual EU export licence for the permanent export of the Painting from England to the Swiss Free Port (Zurich). The licence was accompanied by a lengthy letter from her solicitors in which reference was made to the Claimant's protracted dispute with the Italian authorities regarding her allegedly unlawful export of the Painting from Italy. It was asserted that the Claimant had the unfettered right to move the Painting outside the EU and so to be granted the licence sought. Specifically, the Painting had been lawfully transported to the UK pursuant to a "*still extant export licence"*. Even if this was not correct, the Italian authorities were time barred from seeking return of the Painting under the Return Regulations, the time limit for recovery being said to have expired in March 2014 (under regulation 6(6) of the Return Regulations).

24. On 24th July 2015 the Italian authorities wrote to the Council asserting that the Claimant was under an obligation to return the Painting, the Painting had not been lawfully and definitively sent from Italy, and that the Council could not issue the licence for which the Claimant had applied.

25. By letter dated 10th August 2015 the Council stated that, following consultation with the Italian authorities, it had concluded that the Painting was not located in the UK following lawful and definitive dispatch. It indicated that it would be able to issue an export licence to return the Painting to Italy.

26. On 16th October 2015 the Claimant's solicitors wrote to the Council under the pre-action Protocol for judicial review. On 30th October 2015 the Council withdrew its decision of 10th August 2015 and indicated that it would make a new decision. For this purpose, it requested further information from the Claimant. On 20th April 2016 the Claimant's solicitors responded to that request with further information. The Council followed up certain matters arising out of that response with the Italian Ministry by letter dated 23rd August 2016. Further exchanges between the parties ensued in September 2016.

27. On 6th April 2017 the Claimant sent a second letter before action. On 8th May 2017 the Council made the decision now under challenge, concluding that there had been no lawful dispatch from another Member State because:

    i) First, the five year period within which the 1999 licence allowed for the Painting to be exported from Italy continued to run during the currency of the annulment proceedings before the TAR and so had expired by the time it gave its judgment in 2007. The Claimant had not discharged the burden of proof on her to show lawful and definitive dispatch on the basis of automatic suspension of the duration of the 1999 licence in the context of pending litigation;

    ii) Secondly, even if the dispatch had been lawful as at 14th February 2007, it retrospectively became unlawful because of the 2008 Order.

28. The Council maintains its first conclusion, but does not seek to uphold the second (alternative). As a result, the Claimant's application for a preliminary reference to the CJEU under Article 267 of the Treaty on the Functioning of the European Union ("TFEU") (to determine whether the applicable law for determining the question of lawfulness under Article 2(2)b) is that applicable at the time that the facts occurred) has fallen away.

29. The Council repeated that it would be able to issue the Claimant with an export licence to return the Painting to Italy. It would then be for the Italian Ministry to decide whether or not to grant an export licence to Switzerland.

30. The Claimant commenced these proceedings on 25th July 2017.

Grounds of challenge

31. Originally, the Claimant sought to rely on two grounds:

    i) A claim that the Painting was lawfully dispatched pursuant to the 2007 Order;

    ii) A direct challenge to the 2008 Order.

32. Permission to pursue the second ground was (inevitably) refused on the basis of lack of jurisdiction.

33. Upon the granting of permission on the first ground, as set out in more detail below, a joint expert on Italian law, Professor Federico Lenzerini ("Professor Lenzerini"), was instructed by the parties. In the light of his opinions:

    i) the Council has adopted his arguments and in doing so abandoned several points otherwise previously relied upon (including that which gave rise to the Claimant's application for a reference to the CJEU);

    ii) the Claimant has raised new arguments (in her skeleton argument of 14th June 2018) as follows:

        a) First, Professor Lenzerini is wrong to contend that the Painting was not lawfully dispatched as a matter of Italian law;

b) Secondly and in the alternative, if Professor Lenzerini was correct to contend that the export of the Painting was defective as a matter of Italian law, the defect was purely technical in character and thus could not render the dispatch unlawful as a matter of EU law.

34. On 20th June 2018 the Claimant issued an application for permission to advance these arguments. I allowed full argument to proceed on a "rolled-up" basis.

35. I grant permission to the Claimant to proceed on both grounds, though only conditionally in respect of the second ground. As will be seen below, the Claimant submits that the requirements of Italian law as identified by Professor Lenzerini can only be justified under EU law by evidence as to the necessity and proportionality of the regime in question on the facts. This challenge is, as reflected in the Claimant's application, a new ground. Were I to find it necessary for the Council to adduce evidence from the Italian authorities to meet it, I would grant an adjournment for the Council to have a reasonable opportunity to do so. Thus the permission that I grant on the second new ground is conditional upon the Council having that opportunity, if necessary.

Export licensing regime for cultural goods

EU law

36. The common law has been replaced by the provisions of EU law in relation to free movement of goods. Article 35 of TFEU ("Article 35") provides for the free movement of goods in the following terms:

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

37. This freedom of movement is, as Mr O'Neill QC for the Claimant graphically put it, "*the very DNA"* of EU law. Reference was made to Case 53/76 *Procureur de la Republique v Bouhelier and others* [1977] ECR 197 at [16] and Case 68/76 *Commission v France - re export licences for potatoes* [1977] ECR 515 at [14] – [16]:

> *"…apart from the exceptions for which provision is made by Community law itself Articles 30 and 34 preclude the application to intra-Community trade of a national provision which requires, even purely as a formality, import or export licences or any similar procedure….the imposition of any special export formality constitutes an obstacle to trade by the delay which it involves and the dissuasive effect that it has upon exporters."*

38. However, a system to protect Member States' cultural goods was also recognised as being necessary within the competence of the EU. That competence (in the field of "*culture*") is limited to "a*ctions to support, coordinate or supplement the actions of the Member States"* (see Article 6(c) of TFEU).

39. In this regard, the EU system established has two complementary aspects:

i) first, the creation of common EU law wide licensing rules on the export of cultural goods outside the EU. Such common rules were necessary to ensure that

free movement of goods within the EU did not lead to works of art constituting "*cultural goods"* in one Member State being taken to another Member State's territory operating more liberal export rules and so becoming a gateway to allowing other Member States' "*cultural goods"* passing beyond the EU external borders; and

ii) secondly, the establishment of arrangements to allow a Member State to recover its cultural goods located in other Member States.

40. It is the first aspect of the system that is of direct relevance for present purposes.

41. Article 36 of TFEU ("Article 36") provides for an exception to the general principle of free movement established in Article 35 as follows:

> *"The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of …the protection of national treasures possessing artistic, historic or archaeological value…Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."*

42. It has been said that as an exception to the fundamental principle of free movement of goods, Article 36 is to be strictly construed: see Case 7-68 *Commission v Italy: re Italian Art Treasures Tax* [1968] ECR 424 (at 430, 431).

43. The EU export licensing regime for cultural goods is governed by the Regulation which codifies and consolidates the cultural goods export licence regime. It entered into force in March 2009, in substitution for and repealing Council Regulation (EEC) No 3911/92 (which came into force in March 1993). As a directly applicable EU regulation, the Regulation does not in principle require any implementing provisions of national law to give it binding force and create rights and obligations in all Member States. However, the Export of Objects of Cultural Interest (Control) Order 2003 (as amended) prohibits the export of objects covered by the Regulation except with a licence granted by the SoS for DCMS.

44. In the recitals to the Regulation its purpose is identified as being "*to ensure that exports of cultural goods are subject to uniform controls at the Community's external borders"*. It is stated that "*[t]he implementation of the system should be as simple and efficient as possible."*

45. It is common ground that the Painting falls within the definition of "*cultural goods"* in that (by reference to para. A3 and Section B of Annex I):

i) It is a painting "*executed entirely by hand in any medium and on any material*";

ii) It is more than 50 years old;

iii) It does not belong to its "*originator*"; and

iv) Its value at the time of the application for an export licence exceeded €150,000.

46. As set out in Article 2 of the Regulation, a single "*competent authority"* of a Member State has the power to grant an export licence to remove cultural goods from the EU:

> *"Article 2*
>
> *Export licence*
>
> *1. The export of cultural goods outside the customs territory of the Community shall be subject to the presentation of an export licence.*
>
> *2. The export licence shall be issued at the request of the person concerned:*
>
> *…*
>
> *b) … by a competent authority of the Member State in whose territory [the cultural object] is located following….lawful and definitive dispatch from another Member State, or importation from a third country, or re-importation from a third country after lawful dispatch from a Member State to that country.*
>
> *However, without prejudice to paragraph 4, the Member State which is competent in accordance with points (a) or (b) of the first subparagraph is authorised not to require export licences for the cultural goods specified in the first and second indents of category A.1 of Annex I where they are of limited archaeological or scientific interest, and provided that they are not the direct product of excavations, finds or archaeological sites within a Member State, and that their presence on the market is lawful.*
>
> *The export licence may be refused, for the purposes of this Regulation, where the cultural goods in question are covered by legislation protecting national treasures of artistic, historical or archaeological value in the Member State concerned.*
>
> *Where necessary, the authority referred to in point (b) of the first subparagraph shall enter into contact with the competent authorities of the Member State from which the cultural object in question came, and in particular the competent authorities within the meaning of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.*
>
> *3. The export licence shall be valid throughout the Community.*
>
> *4. Without prejudice to the provisions of paragraphs 1, 2 and 3, direct export from the customs territory of the Community of national treasures having artistic, historical or archaeological*

> *value which are not cultural goods within the meaning of this Regulation is subject to the national law of the Member State."*

47. Thus, where cultural goods have arrived from another Member State, the receiving state is "*a competent authority"* for the purpose of issuing a licence for export outside the EU if there has been *"lawful and definitive dispatch"* from the other Member State.

48. The second aspect of the EU system referred to above is the regime under which Member States can seek the return of cultural objects unlawfully removed from their territory to that of another Member State, now contained in the Directive 2014/60/EU of 15th May 2014 on the Return of Cultural Objects unlawfully removed from the territory of a Member State ("the Return Directive").

49. The provisions of the Return Directive were implemented into UK law by the Return Regulations whereby a Member State has a right of action against the possessor or, failing him, the holder, for the return of a cultural object which has been unlawfully removed from its territory. By Regulation 6(5), provided that the claim is not time-barred under Regulation 6(6), the competent court shall order the return of the object where it finds it to be covered by the request for return and to have been removed unlawfully from the national territory of the Member State. Under Regulation 6(6), so far as material, proceedings must be brought within three years after the competent central authority of the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder. By Regulation 7, where return of the object is ordered, the competent court shall order the requesting Member State to pay the possessor "*fair compensation*".

50. The Claimant points to the fact that here the Italian Government has chosen not to pursue a claim under the Return Regulations, and that time for any such action has now expired. The Council highlights not only that a claim by the Italian authorities would have to be predicated on "*unlawful"* removal but also that it would involve potentially protracted and costly foreign litigation, alongside an obligation to pay compensation.

Italian licensing law

51. In general terms, Italy controls the export of cultural objects through a system of time-limited export licences and free movement certificates. Re-applications are required regularly, and on each re-application the cultural object must be presented for inspection and accompanied by a declaration of value.

52. The Italian authorities can license or refuse to license the import or export of cultural objects. The parties proceeded before the hearing on the basis that the relevant provisions were contained in Articles 35 to 39bis of Law 1089/1939 ("the 1939 Licensing Law"). Where an object has been imported temporarily, re-export within 5 years is permitted (Article 42 of the 1939 Licensing Law). A licence may only be used once and has a limited period of validity (Article 153 of Law 363/1919). Law 88/1998 amended these provisions, providing for the issue of time-limited certificates of free circulation (Article 36). Such certificates would permit the export of items to another EU country without further formality during the period of validity. Before any issue, the cultural object must be presented for inspection. The certificate of free movement

will be issued by the export office no earlier than 15 days and no later than 40 days after presentation. There is a route of appeal against a refusal.

53. In a written post-hearing submission, however, the Claimant submitted that the 1939 Law was in fact repealed in its entirety by the Law of 22nd January 2004 n.42 ("the 2004 Licensing Law") (referenced in the October 2004 Decree), a matter to which I will have to return below.

The case for the Claimant

54. Mr O'Neill advanced the case for the Claimant (in summary only) as follows:

i) As a matter of directly effective EU law the Claimant has a right to transfer her property from one Member State to another;

ii) The meaning of "*lawful*" in Article 2(2)(b) is a matter to be determined by reference to EU law, which is a matter for legal submission. Professor Lenzerini is only an expert on Italian municipal law. The requirements of Italian law may be of "*some (albeit limited) background relevance"*, but they are certainly not determinative of the question of lawfulness. The correct approach is to treat the question of lawfulness as an autonomous concept, not referring it down to national law: see by analogy the reasoning in *SM (Algeria) v Entry Clearance Officer (SC(E))* [2018] 1 WLR 1035 ("*SM Algeria"*). There the court was addressing the term "*direct descendant"* in Article 2(2)(c) of the Immigration (European Economic Area) Regulations 2006. Baroness Hale, having referred to *Secretary of State for the Home Department v Rahman* (Case C-83/11) [2013] QB 249, point 39, said (at [25]):

> *"There is nothing in article 2(2)(c) to suggest that the term "direct descendant" should be interpreted in accordance with the national law of the host member state. This is in contrast with article 2(2)(b), which expressly relates the concept of registered partnership to the laws of the member state where it was contracted and to the treatment of such a partnership in the laws of the host member state. It would appear, therefore that "direct descendant" is an autonomous term in EU law which should be given a uniform interpretation throughout the Union."*

"*Lawful and definitive dispatch"* is therefore said to be a discrete rule of EU law;

iii) If the Council was to rely on Article 36, it was for the Council to show the requirement for an export licence for the Painting to be justified. It had not done so. Simple assertion is not enough. Reliance was placed in particular on Case C-333/14 *Scotch Whisky Association and others v Lord Advocate* [2016] 1 WLR 2238 ("*Scotch Whisky")* (at [52] to [54]); Case C-151/14 *Commission v Republic Cyprus (re Law on Pensions)* [2016] 2 CMLR 1 ("*Cyprus Pensions")* (at [54] to [57]); Case C-148/14 *Deutsche Parkinson Vereinigung EV v Zentrale zur Bekampfung Unlauteren Wettbewerbs EV* [2017] 2 CMLR 1 ("*Deutsche Parkinson"*) (at [34] to [37]). In *Scotch Whisky* the CJEU (on a reference from the Court of Session) said this:

> *"52. It must be observed that, in the light of the case law cited in para 35 above, it is for the member states to decide on the level of protection of human life and health which they propose to provide, for the purposes of article 36FEU, while taking into consideration the requirements of the free movement of goods within the European Union.*
>
> *53. Since a prohibition such as that which arises from the national legislation at issue amounts to a derogation from the principle of the free movement of goods, it is for the national authorities to demonstrate that that legislation is consistent with the principle of proportionality, that is to say, that it is necessary in order to achieve the declared objective, and that that objective could not be achieved by prohibitions or restrictions that are less extensive, or that are less disruptive of trade within the European Union: Criminal proceedings against Franzén (Case C-189/95) [1997] ECR I-5909, paras 75 and 76 and Rosengren v Riksäklagaren, para 50.*
>
> *54. In that regard, the reasons which may be invoked by a member state by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that state, and specific evidence substantiating its arguments: Proceedings brought by Lindman (Case C-42/02) [2005] STC 873; [2003] ECR I-13519, para 25; Commission of the European Communities v Kingdom of Belgium (Case C-227/06) [2008] ECR I-46 para 63 and the ANETT case [2012] 2 CMLR 45, para 50."*

iv) This failure to justify the requirement for an export licence through evidence or analysis means that the Claimant's rights under Article 35 are unaffected; she had the right to remove the Painting without licence or formality. Under the 2007 Order the Painting was no longer declared a national treasure, nor was any export ban in existence;

v) Even if the meaning of "*lawful and definitive"* is a matter of purely Italian law, the evidence of Professor Lenzerini is not sufficiently reliable for the Court to be able to adopt it. In this case, the presumption is that Italian law is the same as English law, which leads one back to EU law;

vi) As the final fall-back position, even if Professor Lenzerini is right, and there was a requirement for the Claimant as a formality to obtain a licence, that requirement is incompatible with the peremptory EU law requirements of the free movement of goods and so falls to be disapplied: see *R (Miller and another) v Secretary of State (SC (E & N))* [2017] UKSC 9 [2018] 1 WLR 1035 (at [67])*; Spa Granital v Amministrazione Dell finanze Dello Stato* Case No 170/84; *Lennox (trading as R Lennox & Son) v Industria Lavorazione Carni Ovine (ILCO)* [2004] 1 CMLR 11. In *Lennox* the Advocate General's opinion stated (at [83] to [85]):

> *"…Since the judgment in the Granital case, it has been settled law that all Italian courts….are obligated to disapply Italian law to the extent to which it is incompatible with Community law. There is no obvious reason why an English court should not proceed in the same manner when applying Italian law….*
>
> *Account must also be taken of the fact that the English court is required, under its own legal system, to refrain from applying legal measures at variance with Community law. If that court were not to refrain from applying Italian legal rules that are contrary to Community law, its decision would breach Community law and give rise to an infringement of the Treaty by the United Kingdom."*

The meaning of lawful and definitive dispatch: EU or national law

55. It is not suggested that the dispatch on 14th February 2007 was not "*definitive"*, in the sense of being merely a temporary loan, for example. The focus in this case is the meaning of the word "*lawful".* That term is not expressly defined in the Regulation. Nor is there to date any reported authority on how the question of lawfulness under Article 2(2)(b) is to be approached (perhaps because it has not been thought to be controversial hitherto), nor have I been taken to any legal commentary on the question.

56. It was common ground before me that the Court is required to reach its own decision on whether or not the dispatch of the Painting from Italy to London on 14th February 2007 was *"lawful and definitive"* within the meaning of Article 2, since it is a question of law and a public body cannot divest itself of jurisdiction by reason of any incorrect decision of law.

57. The EU framework of Articles 35 and 36 governs the legality of national laws. Thus, under Article 35, a national law that contains quantitative restrictions will be unlawful. Under Article 36, there is an exception, in that a national law that contains prohibitions or restrictions on imports, exports or goods in transit justified on grounds of the protection of national treasures possessing artistic, historic or archaeological value will not be unlawful. Thus, EU law is at all times seeking to address and regulate national law. Article 2, as part of a secondary and subordinate regulation, then must be construed consistently with and cannot depart from this overarching framework. It contemplates the question of lawfulness in terms of national law.

58. There is support to be gained for this approach in the complementary Return Directive, which does define what is "*unlawful*" removal for its purpose (at Article 2):

> *"For the purposes of this Directive, the following definitions apply:*
>
> *…*
>
> *(2) "unlawfully removed from the territory of a Member State" means:*

> *removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation (EC) No 116/2009…."*

59. This is entirely consistent with the notion that the question of lawfulness under Article 2(2)(b) is measured by reference to national laws. The reference to breach of the Regulation confirms that, quite separately, export without an export licence in breach of Article 2(1), for example, will also make that export unlawful.

60. By Article 36 EU law expressly preserves discrete subsidiary areas, including the protection of national treasures, which it recognises are matters more properly falling to be regulated by the laws of individual Member States, rather than by EU law as a whole. It would be counter-intuitive for Article 36, which itself speaks expressly in terms of "*national*" treasures, to impose a single definition of lawfulness in respect of the dispatch of national treasures wheresoever situated within the Member States. What may be a national treasure in one state may not be a national treasure in another. Different Member States may (justifiably) operate different regimes for the control of the movement of national treasures through prohibitions and restrictions. As the recital to the Return Directive records:

> *"(3) Under the terms and within the limits of Article 36… Member States retain the right to define their national treasure and to take the necessary measures to protect them. Nevertheless, the Union plays a valuable role in encouraging co-operation between Member States with a view to protecting cultural heritage of European significance, to which such treasures belong."*

61. Against that background, the purpose of Article 2 can be seen to be to identify which Member State will be the "*competent authority"* for the purpose of issuing a licence. It can be seen as a co-ordinating provision. It identifies the "*competent authority"* as the last Member State from which there has been "*lawful and definitive"* dispatch. If a national treasure is unlawfully removed from a Member State, one can see why that Member State should be the competent authority, rather than the receiving Member State.

62. Article 2(4), which is *"[w]ithout prejudice"* to the rest of Article 2, is not inconsistent with, nor does it in any way undermine this conclusion. Rather, it makes special provision for cases involving an object that is a national treasure but nevertheless not within the definition of "*cultural goods*" in the Regulation. The explicit reference to national law does not make the omission of such a reference elsewhere in Article 2 of any significance. The Regulation merely carves such cases out of the co-ordinating regime elsewhere in Article 2.

63. Equally, the word "*lawful*" is not an autonomous term of the type considered in *SM (Algeria),* where the phrase "*direct descendant"* was being scrutinised in a quite different legislative context. Here the Regulation is concerned with identification of which national legal system applies to determine whether the export is lawful. It is not giving an autonomous meaning to a discrete concept or term.

64. I therefore reject the Claimant's submission that whether or not a dispatch is "*lawful*" in Article 2(2)(b) of the Regulation is to be judged by reference to EU law as an autonomous concept. Rather it is to be judged by reference to the law of the Member State of dispatch, here Italy. That is not to say, as the Council accepts, that there may not then be a further legitimate question as to whether or not the requirements of that law offend EU law and so fall to be disapplied. But the relevant national law is the benchmark of lawfulness in Article 2(2)(b).

Was the dispatch of the Painting on 14th February 2007 lawful as a matter of Italian law?

65. On this basis, I turn to consider whether or not the dispatch of the Painting on 14th February 2007 was lawful as a matter of Italian law. Being foreign law, its terms fall to be determined as a matter of fact (see for example the comments of Leggatt J (as he then was) in *Rahmatullah v MOD and FCO* [2014] EWHC 3846 (QB) at [31])). In determining what is foreign law, a court is required to take into account any expert evidence, but is not bound by it. The court is the ultimate judge of the facts and the law established before it (see for example the statement of Elias LJ in *Al-Jedda v Secretary of State of Defence (No 2)* [2011] QB 773 (at [191])). That does not, however, mean that the court can adopt interpretations of foreign law which have not been addressed in the expert evidence. The effect of foreign sources of law is primarily a matter for expert evidence (see *Serdar Mohammed v MOD* [2014] EWHC 1369 (QB) at [66]).

The expert evidence of Italian law: Professor Federico Lenzerini

Procedural background

66. On 28th November 2017 Edis J, having provisionally formed the view that the relevant governing law to determine lawfulness was Italian law as I have now firmly concluded, ordered that the Claimant, the Council (and in so far as they wished to participate, the Interested Parties) should jointly instruct an expert on Italian law to address the following two central questions (alongside some subsidiary related issues):

    i) The effect of the 2008 Order to uphold the appeal of the Italian Ministry of Culture and Tourism against the 2007 Order either in removing or confirming the lack of any lawful authority of the Claimant's dispatch of the Painting from Italy to the UK;

    ii) Whether or not the 2007 Order to annul the October 2004 Decree and to order that the order be given effect by the Italian Ministry of Culture and Tourism had the effect of providing or restoring lawful authority, at least as at 14th February 2017, for the Claimant to dispatch the Painting from Italy to the UK.

67. In due course, Professor Federico Lenzerini, Doctor of Jurisprudence at Siena University, was appointed by agreement between the parties. He is an eminent Italian jurist and a specialist in the Italian law of cultural property.

68. For reasons to which I will come in due course, Professor Lenzerini's opinion is that the Painting was not lawfully dispatched on 14th February 2017 as a matter of Italian law.

69. The Claimant has made various unsuccessful subsequent attempts to challenge Professor Lenzerini's evidence evidentially. First, she applied for permission to cross-examine Professor Lenzerini. That application was refused by Lewis J on 18th June 2018. He commented that paragraph 47 of the Practice Direction to CPR 35 noted that single joint experts do not normally give oral evidence and that written requests should be put before any request for cross-examination. There was no basis for departing from the general position that a single joint expert will not normally give oral evidence. Any criticisms of Professor Lenzerini's report could and should have been put by way of written questions. In any event, there was no basis for considering that Professor Lenzerini's report, read fairly, was inaccurate or incomplete on the two issues on which Edis J ordered expert evidence. The court had utilised the expert evidence provisions to obtain expert evidence on the meaning and effect of the Italian case law. That, not cross-examination, was the appropriate means of dealing with the facts at issue in the case.

70. Then on 21st June 2018 the Claimant sent further written questions to Professor Lenzerini for him to address. That was in breach of CPR 35.6, being both outside the 28 day limit for questions and a second set of questions. Finally, on 26th June 2018, two days before the hearing, the Claimant served a witness statement dated 25th June 2018 from a M. Alessandro Pallottino, an advocate and senior partner at Nomikos, a law firm in Rome. I refused permission to rely on this evidence at the outset for a number of reasons. In summary, first, the only relevant evidence that M. Pallottino could give was expert evidence and the Claimant did not have permission to rely on evidence from another expert on Italian law. Secondly, there was no good explanation for the lateness of the evidence. The Claimant had been in receipt of Professor Lenzerini's report and supplemental answers since early to mid-May 2018. M. Pallottino's involvement with the Claimant and the Painting goes back to 2004, and he advised and represented her throughout the Italian proceedings. Thirdly, amongst other things, M. Pallottino could not be said to be independent. He stated that he had advised the Claimant on the lawfulness of exporting the Painting well before the current dispute. Additionally, had the evidence been admitted, there would (at least arguably) have been a wide-ranging waiver of legal privilege by the Claimant. Fourthly, absent an adjournment, there could be no meeting of the experts as provided for in CPR 35.12. Nicol J had made it very clear in his order of 13th April 2018, in the context of considering directions relating to the joint expert evidence that "*[e]verything must be done to see that that date is an effective hearing"*.

The opinion of Professor Lenzerini

71. Professor Lenzerini's opinions are set out in an expert report dated 9th May 2018 on questions put to him by the parties, including by the Italian Ministry. He provided a supplementary report dated 24th May 2018 in response to supplemental questions put to him by the Claimant on 17th May 2018.

72. Professor Lenzerini states at the outset that the effect of the 2008 Order was to confirm the lack of any lawful authority in respect of the Claimant's dispatch of the Painting from Italy to London in February 2007. However, he confirms (in his supplementary answers) that one should apply the case law and jurisprudence as it stood as at 14th February 2007 in determining the lawfulness of dispatch on that day.

73. As to that, Professor Lenzerini's opinions of Italian law can be summarised materially as follows:

i) As at 14th February 2007 the 2007 Order was fully executive;

ii) However, the 2007 Order, although fully executive, could not provide or restore lawful authority for dispatch on 14th February 2007. The administrative authorisation which could possibly have provided authority was the 1999 licence. That licence had expired on 23rd February 2004 and so was no longer valid:

> *"...[the 2007 Order]…although it annulled the ministerial decree of 13 October 2004 and was, as just clarified, fully executive – could not, in itself, produce the effect of providing or restoring lawful authority, at 14 February 2007, for the claimant to dispatch the painting from Italy to the [UK]. In fact, the administrative authorisation which could possibly legitimate the shipping of the painting from Italy to the [UK] was [the 1999 licence]… However, the said temporary import licence had expired on 23 February 2004….and, therefore, at 14 February 2007, it was no longer valid";*

iii) Following the 2007 Order, therefore, the Claimant was required to obtain a new certificate of free movement in order to dispatch the Painting to the UK;

iv) The Italian administrative authority would have had an obligation to grant such a new licence by virtue of the fact that the TAR had ordered that its decision was to be fully executive. The very fact of such an order supported his conclusion that the Claimant had an obligation to apply for one:

> *"per effect of [the 2007 Order] the Italian administrative authority had an obligation to grant a new licence authorising the Claimant to dispatch the painting to the [UK], by virtue of the fact that, in such a decision, the TAR ordered that the latter was given effect by [the Italian Ministry]. Consistently, the very fact of including this order in the judgment seems to indicate that the Claimant had a duty to obtain a new licence before dispatching the painting to the [UK]."*

74. Professor Lenzerini rejected the Claimant's central contention that the 1999 licence was automatically extended under Italian law during the period in which she could not use it because of the 2000 Decree and the October 2004 Decrees:

> *"In my opinion, it cannot be held that the five-year period of validity of [the 1999 licence] had been automatically suspended – and, subsequently, extended – for a period of time corresponding to the sum of the periods during which the Claimant had been prevented from using it – ie from March 2000….to 10 March 2004, as well as from 13 October 2004 …to 9 February 2007…*

> *In fact – according to Italian administrative law in force at the relevant time – the Claimant had to request to the TAR the suspension of the validity of the 2000 Decree, a request which might be expected to be accepted by the TAR. Following the suspension (if accepted), the Claimant could well have used [the 1999 licence], until its expiration date, to dispatch the painting to the [UK]….a person who presented a legal action before a TAR against an act of the administrative authority, and considered that he/she could suffer serious and irreparable harm per effect of the ongoing execution of such an act, had to request the suspension of the said act…."*

75. This was not a case of "*absolute hindrance"* when the validity of a licence would be automatically suspended. The authority relied upon by the Claimant (*Section V of the Consiglio di Stato No. 597 of 3 February 2000*) concerned:

> *"a precautionary measure (relating to a building permit), hence an issue totally different from the one which is the object of our case. In the context of the latter, in fact, we are dealing with an act of "administrative self-defence" ... against which the Claimant could have obtained protection through requesting the suspension of its validity to the TAR."*

76. Italian law will only automatically extend the validity of a licence where there has been "*absolute hindrance"* to use. Even when an appeal has been lodged, there is no automatic suspension, because "*such an automatic suspension might be detrimental to the public interest, especially for the reason that, if the automatic suspension of the contested provision would occur, appeals against administrative acts might be proposed for the sole reason of extending their period of validity…"* Here there was no absolute hindrance; the Claimant had the alternative means of applying for interim relief in the form of suspension.

77. Professor Lenzerini maintained his conclusion of unlawfulness throughout his original and supplementary answers, dealing with all questions posed by the parties.

78. The Claimant makes a series of detailed attacks on the reliability of Professor Lenzerini's opinion and submits that I should reject it accordingly. I address below the main points of contention. In broad terms, however, I find his evidence to be reliable. Thus, for example, although criticism is made of his view as to the scope of a particular authority as expressed in his original answers, he readily clarified the position in his supplementary answers. His reasoning and conclusions are both consistent and coherent.

79. The Claimant submits that Professor Lenzerini proceeds on an error of fact that vitiates his legal conclusion on the question of automatic suspension, namely the fact that the Claimant did in fact seek interim suspension (in 2000 and 2004) and failed. On each occasion it was held that the public interest in preserving Italy's cultural heritage and maintaining the Painting in Italy was held to prevail. I do not consider this to be a sound argument. It was not put to Professor Lenzerini by any of the parties at the appropriate time. The principle identified by Professor Lenzerini rests on the availability of an alternative remedy, not on the outcome of any attempt to pursue it. The Claimant's

attempts in fact underscore the correctness of Professor Lenzerini's conclusion that the 1999 licence had (otherwise) expired.

80. The Claimant submits correctly that the 1999 licence could not be extended in validity. However, she then goes on to suggest that there was therefore nothing that could be done to ensure its continued validity. However, she could have applied for interim relief, as she in fact did (albeit unsuccessfully). Had she ultimately succeeded, she could then have applied for a new licence.

81. The Claimant also seeks to rely on the 1992 licence as a basis for lawful dispatch in 2007. This is difficult to accept in circumstances when that licence was valid for one month only and could be used only once (as it was in fact). Criticism by reference to whether or not the Painting gained "foreign status" is not to the point. The Painting was re-imported into Italy in 1999 on a temporary import certificate. By not re-exporting it within the 5 year validity period of that licence the Claimant lost the right to do so without a fresh licence.

82. Finally on her core complaints, the Claimant contends that Professor Lenzerini's conclusion that the 1999 licence had expired in February 2004 is undermined by the fact of the October 2004 decree which would have been pointless in such circumstances. This is answered by Professor Lenzerini in his supplemental answers:

> *"…even though [the series of licences] could not be used by the Claimant to export the painting to the [UK], for the reason that their period of validity had expired, the [Italian Ministry] may have thought that the TAR judgment nonetheless attributed a right to the Claimant to export the painting to the [UK]. At that point, in the absence of a new act annulling the relevant licences, the Claimant might have well exercised such a right, through requesting an extension (or renovation) of the period of validity of the above licences to the Italian administrative authority, extension which the administration was bound to grant, because, in its judgment, the TAR had ordered that its decision was given effect…by the administrative authority….[The Italian Ministry] may have considered it to be appropriate to adopt a new decree of annulment of the licences in point, in order to prevent the Claimant from obtaining an extension of the period of validity of such licences to which she would have been otherwise entitled per effect of the judgment of the TAR (which ordered that it was given effect)."*

(In circumstances where the 1999 licence could not be renewed, it would appear that Professor Lenzerini's reference to the possibility of her applying for an "*extension (or renovation)"* is properly to be understood as a reference to an application for a re-issue of such a licence.)

83. Standing back, therefore, I accept the evidence of Professor Lenzerini and find as a fact that as a matter of Italian law as at 14th February 2017 the Claimant was required to apply and obtain a new certificate of free movement in order to export the Painting from Italy to London. She did not do so or obtain one. Accordingly, the dispatch of the Painting on 14th February 2007 was not "*lawful*" for the purpose of Article 2.

Does Italian law on the facts of this case offend EU law?

84. By way of context, it will only be in compelling circumstances that a court of one Member State will rule on the compatibility with EU law of another member state's laws, even on specific facts. The approach of the CJEU itself is instructive: thus on the preliminary reference in Case C-318/00 *Bacardi-Martini* [2003] ECR 1-905 (at [45] to [46]) the court stated:

> *".....the Court must display special vigilance when, in the course of proceedings between individuals, a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community law."*

85. A domestic court, recognising the principle of comity, will proceed with considerable caution in assessing the legality of another Member State's laws from an EU perspective.

86. The Claimant placed great emphasis on the absence of any evidence from the Council to justify what she depicted as a purely technical requirement for her to apply for a new export licence (and/or for an extension to the 1999 licence). She also pointed to the existence of less restrictive measures, namely the route available to the Italian Ministry under the Return Regulations, as evidence of disproportionality. The Council had failed to discharge the burden of proof on it to show that, in their specific application to the facts of this case, the requirements identified by Professor Lenzerini were necessary to achieve the legitimate aim allowed for by Article 36 of protecting Italy's national treasures.

87. In my judgment, the position is overstated for the Claimant. The requirement for her to apply for a licence was not purely technical. It required the Claimant to give notice to the Italian authorities of her intention to remove the Painting from Italy. The fact that the Claimant did not apply for a licence (or inform the Italian authorities that she had removed the Painting until after the event) is telling in this context. It is inconsistent with any submission to the effect that the giving of notice would have been a pointless, empty exercise.

88. There was a spirited debate as to what type of application the Claimant should have made and whether or not a 15 day waiting period would have applied (by reference to Articles 35-39bis of the 1939 Licensing Law). The Council submitted that her application would have carried a mandatory 15 day waiting period (under Article 37(3)). The Claimant took issue with this. She submitted (for the first time after the hearing) that the 2004 Licensing Law had replaced the 1939 Licensing Law in its entirety, bringing into effect the new *Codice dei Beni Culturali e del Pasesaggio,* the Cultural Goods and Landscape Code, also known as the *Codice Urbani*. There is no evidence of Italian law before the court to support (or even address) this contention. It is contrary to the Claimant's instructions to Professor Lenzerini, which proceeded expressly on the basis that the 1939 Licensing Law applied. Moreover, in so far as it is even permissible for me to dip into these new waters in these circumstances, the Council identifies in response that there is a materially identical waiting period provision in (Article 68 of) the *Codice Urbani*.

89. What matters for present purposes is that, on any view, some notice to the Italian authorities would be involved. Such notice would, for example, have enabled the Italian authorities, in the context of the litigation, to seek interim relief preventing such removal. As Professor Lenzerini himself put it (in the context of having been asked as to the relevance or otherwise of no appeal having been lodged by the Italian Ministry as at 14th February 2007):

> *"…Although it is hard to envisage the motivations or circumstances determining the choices made by [the Italian Ministry], one may suppose that it did not act promptly because it was confident that the Claimant would not have dispatched the painting to the [UK] without requesting a new authorisation to the administrative authority. In fact, as previously noted…it is reasonable to assume that the TAR, through ordering that its decision was given effect…by [the Italian Ministry] presupposed that the Claimant had a duty to obtain a new licence before dispatching the painting to the [UK]."*

90. Nor does the existence of the regime under the Return Directive lead to the conclusion that the requirement for a licence is disproportionate. The regime under the Regulation and the Return Directive are complementary, not exclusive. As has already been pointed out, litigation by the Italian Ministry under the Returns Regulation in the English courts would have required, alongside proof of unlawful removal in what would (presumably) have been contested foreign litigation, the payment of compensation to the Claimant.

91. As for the absence of any direct evidence on the rationale for the licensing regime, the requirement for evidence is very far from absolute. Context is everything. *Scotch Whisky* involved a consideration of the legality of Scottish legislation imposing minimum pricing units for the retail selling of wines in the context of, amongst other things, available scientific data. *Cyprus Pensions* involved a consideration of Cypriot pension laws including age-based rules which unfavourably treated individuals working outside Cyprus in another Member State, the EU or an international organisation. *Deutsche Parkinson* involved the free movement of pharmaceutical products and the legality of German legislation providing for a system of fixed prices for the sale by pharmacies of prescription only medicinal products for human use.

92. In *R (Lumsdon) v Legal Services Board* [2016] AC 697 Lord Reed and Lord Toulson JJSC (with whom the other members agreed) examined the principle of proportionality in EU law (at [23] to [26]) and the division of responsibility between the CJEU and national courts (at [27] to [32]). They then went on to consider the nature of the test of proportionality, stating at [56]:

> *"The justification for the restriction tends to be examined in detail, although much may depend on the nature of the justification, and the extent to which it requires evidence to support it. For example, justifications based on moral or political considerations may not be capable of being established by evidence. The same may be true of justifications based on intuitive common sense. An economic or social justification, on*

> *the other hand, may well be expected to be supported by evidence…."*

93. It is indeed instructive to note that, following the judgment of the CJEU in *Scotch Whisky,* the Supreme Court (at [2018] 2 CMLR 6) went on to reject the challenge based on lack of evidence in that case. Lord Mance (with whom the other members agreed) commented (at [48]) that it was not for any court to "*second-guess the value which a domestic legislator"* might put on health, the issue there in hand. It was for Member States, within the limits imposed by the TFEU, to decide what degree of protection they wished to assure. He saw *"very limited scope for the sort of criticism that the petitioners make about the absence of EU market evidence."*

94. Here it is difficult to imagine what evidence could materially have advanced the arguments. It is common ground that the Painting is a single and unique object of art recognised as being genuine and of great cultural and historical significance. Where to strike the balance between public interest in protecting a nation's cultural heritage and the private interests of art owners falls pre-eminently within the scope of the Italian authorities' moral or political judgment. The existence of a licensing regime (even if the grant of a licence is routine or even inevitable) which allows the national authority to identify national treasures prior to export and then to take lawful measures, such as the seeking of interim relief, in such circumstances and on the facts of this case is entirely understandable – or to put it another way, a matter of intuitive common sense, not requiring specific evidence to justify it.

95. If I were wrong in this conclusion, and evidence were necessary, as reflected in the granting of conditional permission, I would have acceded to the Council's request to afford the Italian Ministry a brief opportunity to provide such evidence. The issue is of potentially far wider importance than the specific facts of this case, even though the Claimant seeks to root her arguments in those facts. It is right that the matters arise only in response to the opinions of Professor Lenzerini. However, as a matter of fact, this aspect of the case has been developed for the Claimant in the very late stages of this claim. The Claimant's position only crystallised shortly before or at the hearing itself. To allow the Council and/or the Italian Ministry such an opportunity would be a fair response to the granting of permission to advance it.

Conclusion

96. For all these reasons, I would dismiss the claim. The Council is not the "*competent authority"* under EU law to issue an export licence to Switzerland in respect of the Painting.

97. I invite the parties to draw up an order reflecting this and to agree any consequential matters, including costs, so far as possible, but not without first thanking counsel for their courteous and able assistance in this matter.