



Neutral Citation Number: [2020] EWCA Civ 374

Case No: C1/2018/1998

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Administrative Court
Mrs Justice Carr DBE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2020

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE GREEN
and
LORD JUSTICE ARNOLD

Between :

THE QUEEN (KATHLEEN ELIZABETH SIMONIS)	<u>Appellant</u>
- and -	
ARTS COUNCIL ENGLAND	<u>Respondent</u>
- and -	
(1) MINISTERO DEI BENI E DELLE ATTIVITÀ CULTURALI E DEL TURISMO	
(2) THE SECRETARY OF STATE FOR DIGITAL, CULTURE, MEDIA AND SPORT	<u>Interested Parties</u>

Mr Aidan O'Neill QC and Mr Chris Butler (instructed by **Howard Kennedy LLP**) for the
Appellant

Mr Ben Jaffey QC and Mr Ravi Mehta (instructed by **Government Legal Department**) for
the **Respondent**

Hearing date: 4th February 2020

Approved Judgment

Lord Justice Green:

A. Introduction/the issues

1. This appeal concerns an oil painting on a wood panel, with measurements of 116 x 69 cm, entitled "*Madonna con Bambino*". It is presently situated in London and is attributed to Giotto di Bondone ("*Giotto*") (1266-1337). It was purchased in 1990 for a relatively nominal sum as a 19th century imitation. Its subsequent authoritative attribution to Giotto means that it has a present value of about £10million and unsurprisingly it is now treated by the Italian authorities as of exceptional cultural and historical importance.
2. The painting arrived in London from Italy on 14th February 2007. But it is common ground in this appeal that under the law of Italy that export was unlawful. This was because an earlier licence held by Mrs Simonis, the Appellant, had expired before the date of export and consequently the dispatch of the painting from Italy was unauthorised under the extant licensing regime.
3. The Appellant wishes to remove the painting to Switzerland, which is outside of the EU. She sought an export licence to this effect from the Arts Council, the relevant competent authority in this jurisdiction. By a decision of 8th May 2017, the Arts Council decided that it had no power in law to grant a licence for the export from the EU of the painting since it was not the relevant competent authority under the applicable EU law. The Arts Council could only acquire jurisdiction to grant such a licence following the *lawful* dispatch to the United Kingdom of the painting; but since the dispatch had been in violation of Italian law, and was hence not "*lawful*", the Arts Council had no power to grant a licence for removal of the painting out of the EU. That power lay with the Italian authorities. In short it was the wrong competent authority to grant any such licence. However, the Arts Council did confirm that it could grant a licence to Mrs Simonis to return the painting to Italy. The competent authority in Italy is the *Ministero dei Beni e delle Attività Culturali e del Turismo* ("*MIBAC*")
4. At the outset of this appeal there were two quite discrete grounds of appeal. The first involved the Appellant arguing that the law which governed the legality of the "*dispatch*" of the painting from Italy was EU law which attributed an autonomous meaning to that phrase and which led to the conclusion that the competent authority was not MIBAC. But in the alternative if this was wrong and "*dispatch*" was governed by Italian law then the second argument was that the relevant Italian law was unlawful, at least in so far as it applied to the facts of the present case.
5. The first ground concerns the identity of the competent authority empowered to govern the "*dispatch*" of a cultural item from a Member State. The Appellant originally argued that since the painting is situated in the United Kingdom the competent authority is the Arts Council which has statutory responsibility in this jurisdiction over the export of cultural items from the EU. The Arts Council, and the Italian competent authority, disagree and say that it is the Italian authority that has jurisdiction. Resolution of this dispute turns primarily upon the construction of the expression "*lawfully and definitively dispatched*" contained in an EU Regulation. What is the body or corpus of law that is implicitly referred to in the word "*lawfully*" which then governs the lawfulness of dispatch? There are three alternatives. This could be a reference back to

national law (by a form of *renvoi*) which would in this case make the relevant law and the governing competent authority either the UK or Italy. Alternatively, the applicable law governing dispatch could be some provision of EU law, in other words the phrase could have an autonomous meaning operating independently of any corpus of national law.

6. Subsequently, the position has changed. As developed fully in oral submissions the thrust of the Appellant's case was that the phrase "*lawfully*" is a reference to national law *but* with a powerful EU and international law overlay in the form of the EU rules on freedom of movement of goods (Articles 35 and 36 TFEU), Article 52 of the Charter of Fundamental Rights on the principle of legality, and A1P1 of the European Convention on Human Rights. Mr O'Neill QC argued that, on the facts of this case, the Italian law requiring notice to be given to the Italian authorities prior to removal of the painting from Italy was an impediment to the free movement of goods (contrary to Article 35 TFEU) and was disproportionate and was not justified under Article 36 TFEU; it was also a violation of the principle of legality set out under Article 52(1) of the Charter; and, it adversely affected the property rights of Mrs Simonis and accordingly fell afoul of A1P1 of the Convention. As such its application to the facts of this case was unlawful and whilst these violations did not result in the Italian law being generally unlawful, they did have the consequence that the Italian law was inapplicable in the case of Mrs Simonis. It followed that since Italian law did not apply and the painting was located in the United Kingdom it was the Arts Council that was the competent authority here and its refusal to accept that status was wrong in law. It will be seen that the way in which the argument was ultimately developed merged the first and second grounds of appeal. The argument is that "*lawfully*" (as the governing law of dispatch) was regulated by a combination of national (Italian) law combined with EU and international law.
7. Mr O'Neill QC adopted the stance that the law was pellucidly clear, in his favour; but if we did not agree then there was the possibility of a reference to the Court of Justice on the issue of the construction of the relevant EU Regulation and/or the legality of Italian law with superior EU law.
8. To analyse properly the various strands to the Appellant's grounds it remains convenient to divide them into two.

B. Preliminary observations on the applicability of EU law post 31st January 2020

9. This appeal was heard on the second working day following the formal departure of the United Kingdom from the European Union. The United Kingdom is in the transitional period which, as matters stand, lasts until 11pm on 31st December 2020. This case concerns: EU treaty provisions; EU regulations and directives; national measures implementing EU law; the Charter of Fundamental Rights; and, the right to make a reference to the Court of Justice. The law which applies during this interim period can, insofar as relevant to this appeal, be briefly summarised as follows.

10. The position is governed by the relevant parts of the Withdrawal Agreement¹. The obligations in the Withdrawal Agreement were given effect to by the European Union (Withdrawal) Act 2018 (“EUWA”) as amended by the European Union (Withdrawal Agreement) Act 2020 (“WAA”) which received Royal Assent on 23rd January 2020². After exit day “Union law” (as defined in the Withdrawal Agreement³) continues to have the same effect as it did prior to exit, until 11pm on 31st December 2020, which is the end of the Implementation Period or “IP”.⁴ The expression “Union law” includes: the Treaty on the Functioning of the European Union (“TFEU”), the Charter on Fundamental Rights (“the Charter”), the general principles of EU law, and the acts of the institution which therefore covers regulations and directives.
11. During the IP: the doctrine of supremacy is retained⁵; national courts remain entitled to disapply inconsistent national law and should apply the usual principles of interpretation⁶; when construing Union law the courts must have “due regard” to the case law of the Court of Justice⁷; and the courts have the power to make a reference to the Court of Justice.⁸ In short, during the IP the law that applies remains as it stood prior to exit day. There are some modifications and exceptions to this position, but these are not relevant to this appeal and I do not need to address them.

C. The Facts

12. I turn now to the facts. The detailed facts are set out in the Judgment of Mrs Justice Carr DBE (“the Judgment”) and do not need to be repeated in this judgment: see Judgment paragraphs [9] - [30]. I summarise below, first, the broad outline of the relevant provisions of Italian law which govern the regulation of the export of cultural goods, and secondly, the salient points in the chronology covering the movements of the painting and developments in its attribution.

- *Relevant Italian law*

13. Articles 35 to 39 of Law 1089/1939 (as amended) (“the 1939 law”) provide for the Italian authorities to license the import or export of important cultural items. Control is exercised over export by a system of time-limited licences and free movement certificates with regular requirements to reapply during which the object must be presented for inspection and accompanied by a declaration of value. Where items have been temporarily imported, under Article 42 re-export is permitted within a period of 5

¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (19th October 2019).

² See generally sections 1, 1A and 1B and 7A EUWA. The European Communities Act 1972 is maintained in force until the end of the IP.

³ Withdrawal Agreement Article 2(a).

⁴ Withdrawal Agreement Articles 4 and 126-127.

⁵ Section 5(1) EUWA.

⁶ Withdrawal Agreement Article 4(2).

⁷ See Article 4(3) and (4) Withdrawal Agreement.

⁸ Withdrawal Agreement Article 86(2).

years. Under Article 153 of Law 363/1913 a licence may only be used once and has a limited period of validity.

14. When a licence is applied for there is a 15-day “*waiting period*” designed to ensure that the cultural importance and value of an object can be assessed by the authorities who thereby have a window in which to seek protective measures such as interim relief from the court to prevent removal.
15. All the provisions referred to above were amended by Law 88/1998. This provides for the issue of time-limited certificates of free circulation which allow the export of items to another EU country without additional formality during the period of validity of the certificate. The item must be submitted for inspection prior to the issuance of any such certificate. There is a system of appeals against a refusal to grant a certificate.
16. In 2004 under the *Codice Urbani*⁹ (“*the 2004 Code*”), the pre-existing law was largely consolidated and codified. The relevant text was before the High Court and the Court of Appeal. It is apparent from the judgment below (cf paragraph [88]) that there was argument as to whether the 15-day waiting period which arises following the application for a licence had changed but it seems that it had not. No one has suggested on this appeal that there is *any* material difference between the 1939 Law and the 2004 Code. At all material times a person in the position of Mrs Simonis had a duty under Italian law to apply for an export licence and thereby give notice to the authorities and abide by the relevant waiting period.

- ***Chronology***

17. The Appellant acquired the painting at auction in Florence in May 1990 for 8m lira, circa £3,500. It was described as a 19th century painting by an imitator of Giotto.
18. On 24th March 1992, the Appellant obtained from the Italian authorities an export licence (“*the 1992 Licence*”) for the painting. It records a valuation of 8m lire for a “*Panel Painting from the 1800s*”. The licence was valid for one month and could be exercised once. The painting was exported under the licence to the UK.
19. On 22nd April 1992, the painting was reimported into Italy under a temporary import licence valid for five years, until 21st April 1997 and on this occasion the valuation as recorded was increased to 10.75m lire i.e. circa £4,700. During restoration organized by the Appellant in Italy performed by Professor Umberto Ticci in 1992 and 1993, two layers of paint were removed dating from the 17th and then 15th centuries and a medieval painted layer was brought to light which was attributed to Giotto himself. This of course increased both the value of the painting and its cultural importance.
20. On 8th June 1993, following restoration, the Appellant was granted another permanent export licence for the export of the painting (“*the 1993 Licence*”). The declared valuation was however only 10.75m lire. The painting was not described as by Giotto.
21. The painting was exported to Switzerland but was returned to Italy under a temporary import licence in 1995 this time with a declared value of 296,677,500 lire (around

⁹ The full title is the “*Codice dei Beni Culturali e del Paesaggio*”.

- £111,000) and then, in 1998, it was exported to the USA. The declared valuation was 700m lire i.e. circa £239,000. It was not on any of these occasions attributed to Giotto.
22. The painting returned to Italy in February 1999. It was inspected at the airport but whilst its evident quality was noted it was not formally identified as being by Giotto. The Italian authorities issued a certificate of temporary importation expressly stated to be valid for five years, expiring on 23rd February 2004, which could not be extended (“*the 1999 licence*”). The certificate noted that it replaced another document - a certificate of free movement across the EU - during its period of validity. The effect of the certificate was that the painting could be removed from Italy to another EU country without further formality for a period of 5 years. However, if upon expiry of the licence the painting was still in Italy the Appellant would need to apply for a fresh export licence. Again, it was not recorded that the painting was by Giotto.
 23. At about this time MIBAC, the competent authority, commissioned an expert report on attribution. This was released on 19th February 1999 and confirmed an attribution to Giotto. The expert report proposed that the painting be purchased by MIBAC for the state. On 10th March 2000, an Italian Ministerial Decree (“*the 2000 Ministerial Decree*”) purported to annul the 1993 licence together with all licences derivative upon it which necessarily included the 1999 licence. This was upon the basis that the cultural value of the painting had fundamentally altered because of the restoration and attribution.
 24. On 29th January 2004, shortly prior to expiry of the 5-year period of validity of the 1999 Licence, the Appellant unsuccessfully sought an extension of the validity of that licence. However, on 10th March 2004, upon application by the Appellant the Lazio Administrative Court (the *Tribunale Amministrativo Regionale*) annulled the 2000 Ministerial Decree on procedural grounds. On 13th October 2004, a second Ministerial Decree was issued which sought to address the procedural defects found to exist in the earlier decree by the court. The Appellant challenged this second Ministerial decree and this challenge also prevailed in the Lazio Administrative Court in a ruling of 9th February 2007.
 25. On 14th February 2007 Mrs Simonis dispatched the painting from Italy to London, notwithstanding that the 1999 licence had expired in 2004. She did not seek a licence for this export as she was otherwise required to do under Italian law. On 23rd February 2007, after the painting had been successfully moved to London, the Appellant’s Italian lawyers sent a letter to MIBAC contending that the 5 year validity of the 1999 Licence had been automatically extended by operation of law during the period of the litigation and this together with the (now expired) 1999 Licence meant, they argued, that the dispatch of the painting to London on 14th February 2007 was lawful. This *modus operandi* of course had the effect of preventing the Italian competent authorities being able to take steps to prevent removal, such as seeking injunctive or protective relief from the courts.
 26. On 11th November 2008, the Italian *Consiglio di Stato* reversed the judgment of the Lazio Administrative Court and held that the Italian authorities had acted lawfully in revoking the 1999 licence. The subsequent request by the Appellant for a review of the decision was dismissed.

27. Before turning to the position under EU and domestic UK law I would record the central conclusion of the Judge on Italian law, having heard from Professor Lenzerini, a joint expert. This conclusion is not challenged in this appeal. The Judge addressed Italian law at paragraphs [66] – [83] of her judgment. It suffices to record that she found that the export of the Giotto by the Appellant was in breach of Italian law because it occurred at a point in time when previous export licences and certificates had expired. The Judge held:

“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 2007 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"”

D. Legislative context

28. I turn now to the relevant EU legislation.

- ***Relevant treaty provisions***

29. There are three types of relevant treaty article: (i) those which address the competence of the EU to legislate and how this relates to the concomitant powers of Member States to legislate in the same field; (ii) those which address the free movement of goods between Member States; and (iii), those which address the *vires* of subordinate legislation in the area of trade in cultural and artistic items.
30. I start with treaty provisions. In broad terms there are three categories of legislative competences under the TFEU. The first covers those areas where the EU has exclusive and sole competence. The second is where the competence is “*shared*” between the EU and the Member States. The third is where the primary legislative competence lies with the Member States and where that of the Union is to support, coordinate or supplement. The present case fits into this third category and it necessarily follows that any legislation adopted at the EU level will fit into a wider framework of laws adopted by the Member States, which might, by definition, diverge considerably as between themselves.
31. Under Article 6 TFEU there is a list of policy areas (which includes “*culture*”) where it is recognised that the Member States retain legislative jurisdiction and where the “*competence*” of the Union is largely secondary and involves “... *actions to support, coordinate or supplement the actions of the Member States*”.

The Article provides:

“Article 6

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

- (a) protection and improvement of human health;
- (b) industry;
- (c) culture;
- (d) tourism;
- (e) education, vocational training, youth and sport;
- (f) civil protection;
- (g) administrative cooperation.”

32. Article 167 TFEU also emphasises the secondary and supportive roles that the EU plays in relation to the cultural life of the individual Member States, a point underscored by the limitation on the use of harmonising measures in Article 167(5):

“1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.”

2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples,
- conservation and safeguarding of cultural heritage of European significance,
- non-commercial cultural exchanges,
- artistic and literary creation, including in the audiovisual sector.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.

5. In order to contribute to the achievement of the objectives referred to in this Article:

— the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,

— the Council, on a proposal from the Commission, shall adopt recommendations.”

33. Academic literature on this point, which was before the court, makes the same point. For instance, Professor Biondi in an early article in the *Common Market Law Review* ((1997) 34(5) CMLR [1173] at page [1176]) states: “*The Regulation and the Directive however, clearly acknowledge the fact that Community rules did not replace national traditions since Member States, as things stand, will not accept uniform rules on the free movement of works of art. Both measures are at pains to make clear that Member States retain the right to define their national heritage and to take the necessary measures to protect it...*”. Other academic analysis was to the same effect.
34. This point is significant when it comes to the argument that EU measures in this area are intended to be comprehensive and that terms therein therefore have an autonomous meaning; it is also relevant when considering the margin of appreciation that should be accorded to Member States when measuring national legislation against free movement rules or other fundamental norms.
35. The second group of provisions are those governing the free movement of goods within the EU. Article 35 TFEU imposes a prohibition upon restrictions on exports between the Member States. It provides that:

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

36. There is a substantial body of case law upon the nature and scope of Article 35, which it is unnecessary to delve into for the purpose of resolving this appeal. The concepts of “*quantitative restrictions*” and “*measures having equivalent effect*” to a quantitative restriction are very broad. A quantitative restriction is exemplified by a classic quota (e.g. only *x* amount can be exported) but, according to well established case law, *all* trading rules or administrative practices enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions on exports and therefore fall within the scope of the prohibition.
37. But this is not the end of the story because under Article 36 TFEU a series of exceptions are set out which include in relation to the protection of national treasures of artistic and historical value, and it is not in dispute in this case that the *Madonna con Bambino* qualifies as such a treasure. Article 36 allows Member States to maintain in respect of their national territory:

“... 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.”

(emphasis added)

38. The third category of provisions are those relied upon by the legislature as the legal basis or vires of the measures of secondary law on the regulation of trade in cultural items. In this case there are two pieces of EU subordinate legislation in issue. They cite Articles 114 and 207 TFEU as their legal bases. Both confer a power or competence to adopt measures of harmonisation. But simply because the EU has jurisdiction to enact legislation does not indicate that it has competence to legislate *fully* to occupy a field. The nature and extent of the competence of the Union to legislate is affected, and circumscribed, by the Treaty provisions referred to above which, in the case of cultural goods, include Articles 6 and 167 TFEU.

- ***The 2009 Export Regulation***

39. I turn now to the relevant subordinate EU legislation. The first piece of legislation was Council Regulation 3911/92 of 9th December 1992. The legal basis was Article 113 EEC which authorises the adoption of uniform EU wide measures in the field of the common commercial policy.
40. This measure was subsequently amended and codified in 2009 in the form of Regulation 116/2009 of 18th December 2008 (“*the Export Regulation*”), which is the measure which now applies. It was adopted under Article 133 EC which was the successor (and is in somewhat different terms) to Article 113 EEC in the field of the common commercial policy. It is now set out in Article 207 TFEU which permits common action in the field of the common commercial policy. Under Article 207(1) the policy is based upon “*uniform principles*”. Under Article 207(6): “*The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.*” The exercise of such powers of harmonisation must be compatible with the broader allocation of competences as between the Union and the Member States. Put another way, the Union is not competent to legislate in a manner which lies outside of its competence.
41. The purpose of the Regulation, as referred to in recital 1, focuses upon the need for rules on trade *with third countries* of cultural goods and sets out measures ensuring that exports of cultural goods from the EU are subject to uniform controls at the Union's external borders. As is explained below the reference to “*uniform*” does not necessarily imply a single, EU based, set of rules; but can include an agreed set or suite of different national laws which, according to an allocation system, mean that only one state regulates exports at any one time.
42. Recital 4 states:
- “(4) Such a system should require the presentation of a licence issued by the competent Member State prior to the export of cultural goods covered by this Regulation. This necessitates a

clear definition of the scope of such measures and the procedures for their implementation. The implementation of the system should be as simple and efficient as possible.”

43. The Regulation imposes upon Member States a duty to introduce export licences in relation to removal from the EU. It is not, primarily, about restrictions upon trade *as between* the Member States. The basic model is not to harmonise national laws but instead to set up a system for the allocation of responsibility to a single national competent authority whose task it then is to grant a licence to export from the EU. Once granted the cultural item in question can move freely within the EU and then be exported from the EU from some other Member State.
44. The measure thus stipulates that there must be a competent authority in each Member State empowered to grant the requisite export licence. It lays down principles for determining *which* competent authority may grant the licence where a cultural item has passed between different Member States. It does not lay down common rules governing whether an item is to be treated as of cultural significance to a Member State, that being a matter for each state under Articles 6 and 167 TFEU. Consistently, it provides that a licence may be refused where the cultural goods in question are covered by domestic laws protecting national treasures of artistic, historical or archaeological value “*in the Member State concerned*” which signifies that the identification and protection of a cultural item may be driven, perfectly legitimately, by national sentiment.
45. Article 2 is the heart of the measure. Article 2(2) confers a power (but not a duty) upon Member States to create an exception from the duty to obtain a licence in the case of cultural goods of “... *limited archaeological or scientific interest*”, provided 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. Article 2(3) addresses the pan-European validity of a licence granted by a single competent authority. Article 2 in full provides:

“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:

(a) by a competent authority of the Member State in whose territory the cultural object in question was lawfully and definitively located on 1 January 1993;

(b) or, thereafter, by a competent authority of the Member State in whose territory it is located following either 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 (1).

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, historic or archaeological value which are not cultural goods within the meaning of this Regulation is subject to the national law of the Member State of export.

46. As to other provisions, Article 1 is entitled “*Definitions*” but all it does is to state that the term “*cultural goods*” shall refer, for the purposes of the Regulation, to the items listed in Annex I. There is no definition of the expression which is in dispute in this case i.e. “*lawful and definitive dispatch*” in Article 2(2)(b). Article 3 requires Member States to notify the Commission of the identity of the competent authorities empowered to issue export licences. Article 4 states that an export licence shall be presented, in support of the export declaration, when the customs export formalities are carried out, at the customs office which is competent to accept that declaration. Article 5 permits Member States to restrict the number of customs offices empowered to handle formalities. Article 6 concerns cooperation between national authorities. Articles 7 and 8 concern the possibility that a committee of Member States will assist the Commission in the taking of measures of implementation of the Regulation. Article 9 imposes a duty on Member States to impose penalties applicable to infringements of the rules but is silent as to the nature or extent of applicable sanctions, leaving that to the individual Member States. Article 10 imposes a broad notification duty on Member States in relation to measures taken under the regulation.

47. Because the Export Regulation is directed at exports from the EU and imposes certain (limited) requirements and duties in that regard it has little of note to say about the substantive content of national law or as to trade as between Member States.

- *The Return Directive*

48. The second measure of EU law referred to, the so-called Return Directive (Directive 2014/60/EU of 15th May 2014), addresses the return of cultural objects unlawfully removed from the territory of one Member State to another Member State. This was adopted under Article 114 TFEU which confers a power of harmonisation upon the Union but does not indicate to what level or depth any particular measure of harmonisation is allowed to go. Again, the power must be read subject to the other provisions of the Treaty upon the delineation of competences.
49. The subject matter of the Return Directive is by its nature apt for coordination at the EU level because it concerns cooperation as between Member States and – again - the allocation of jurisdiction to grant licences to export from the EU. As with the Export Regulation it has little to say about the substantive content of national laws on the protection of cultural items. If an item is found to have been unlawfully removed, then a duty of return arises and the state of the location of the item does not have the power to grant an export licence from the EU. The Return Directive is thus complementary with, and supplements, the system set up in the Export Regulation.
50. Recitals 2 and 3 describe the secondary role played by the EU in this area but also address how and why national laws regulating trade in cultural items can be compatible with Article 36 TFEU:

“(2) The internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the Treaty on the Functioning of the European Union (TFEU). According to Article 36 TFEU, the relevant provisions on free movement of goods do 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.

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

51. In relation to national laws designed to protect cultural items the EU thus plays a “valuable role” in “encouraging cooperation” so as, in effect, to enhance “cultural heritage of European significance”. The secondary and supportive role played by the EU in this area is reflected in many other recitals and in its substantive provisions. It suffices to refer, for instance, to recital 16 which acknowledges the problem of the

illicit trade in cultural items and which encourages the Commission to take a supportive role vis-a-vis the Member States:

“In its Conclusions on preventing and combating crime against cultural goods adopted on 13 and 14 December 2011, the Council recognised the need to take measures in order to make preventing and combating crime concerning cultural objects more effective. It recommended that the Commission support Member States in the effective protection of cultural objects with a view to preventing and combating trafficking and promoting complementary measures where appropriate. In addition, the Council recommended that the Member States consider the ratification of the Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property signed in Paris on 17 November 1970, and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects signed in Rome on 24 June 1995.”

52. Article 3 imposes an obligation on Member States to ensure that cultural objects which have been unlawfully removed from the territory of a Member State are returned in accordance with the provisions of the Directive. There are provisions governing the mechanisms that Member States must apply to the return of cultural products.

53. The Directive has a definitions section covering: “*cultural object*”, “*unlawfully removed from the territory of a Member State*”, “*requesting Member State*”, “*requested Member State*”, “*return*”, “*possessor*”, “*holder*”, and “*public collections*”. Article 2(2)(a) and (b) provides:

“unlawfully removed from the territory of a Member State’ means: (a) 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; or (b) not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal...”

54. It is in my view perfectly clear that the definition of “*unlawfully removed from the territory of a Member State*”, as applied to the present case, would require the Arts Council to determine whether the painting was removed in breach of Italian law. If it was then the Arts Council does not have jurisdiction to grant a licence to export from the EU.

- ***Domestic implementing measures***

55. I refer, for the sake of completeness, to the implementing measures adopted in domestic law. Strictly, an EU regulation, being directly applicable, does not require transposition into domestic law in order for it to have legal effect. By contrast an EU directive must be implemented by measures of domestic law which give it full force and effect. The Export Regulation and the Return Directive have been implemented in the UK by the Return of Cultural Objects Regulations 1994, SI 1994/501 (as amended) (“*the 1994 Regulations*”) and the Export of Objects of Cultural Interest (Control) Order 2003, SI

2003/2759 (“*the 2003 Order*”). It is common ground that nothing in this appeal turns upon the interpretation of the 1994 Regulations or the 2003 Order.

E. Ground I: “Lawful and definitive dispatch” – the interpretation of Article 2 of Regulation 116/2009 of 18th December 2009 (the Export Regulation)

56. I turn now to the first ground of appeal which focuses upon the meaning of “*lawful and definitive dispatch*” in Article 2(2)(b) of the Export Regulation: see paragraph [45] above.

57. I start by setting out the Appellant’s initial submission which was that the question was, “... *not determined by Italian law*”. The argument was that upon the true construction of the Export Regulation, as an autonomous instrument of EU law, the competent authority was that in which the item in question was located:

“... the Appellant submits that the authorities of the country in which the object is located are the competent authority unless the object is only temporarily located in that country (*i.e.* there was no *definitive* dispatch) or the dispatch offended EU law (for example, the object was stolen). Thus, it will be simple and efficient for authorities to determine whether or not they are the competent authority for the purposes of granting a licence for the export of the object beyond the EU.

It has never been suggested that there was anything unlawful about the dispatch of the Painting from Italy to the UK as a matter of EU (or UK) law.”

58. However, as already explained the argument evolved, though the earlier iterations of the argument were never formally abandoned. I propose to address both of the ways in which the argument was put.

59. In my judgment the Judge was correct. The phrase “*lawful and definitive dispatch*” refers to the law of the state of physical export or dispatch, in this case Italy. There is no basis for saying that the governing law is that of the Member State of receipt of the item (here the United Kingdom) or that there is some autonomous meaning to be attributed to the phrase under EU law which likewise leads to the negative conclusion that Italian law does not govern.

60. This appeal can be resolved by resorting to elementary principles of interpretation.

61. Under Article 2(2) of the Export Regulation two states are referred to which have the power, via their competent authorities, to grant an export licence for export outside of the EU. These are (i) the Member State in whose territory the cultural object in question was lawfully and definitively located on 1 January 1993 (chosen as a cut-off date); or (ii) thereafter, by a competent authority of the Member State in whose territory it is located following lawful and definitive dispatch from another Member State. It is common ground in this case that if the state is that in (i) then it is the competent authority in Italy that is empowered to grant an export licence for Switzerland. But if the state is that in (ii) then it is the state where the cultural item is situated “*following*” lawful and definitive dispatch from another Member State, who can grant the export

licence. This would be the United Kingdom and hence the Arts Council, *if* the painting was lawfully dispatched from Italy.

62. The precondition of a state of *situs* being the competent authority is therefore that the *earlier* dispatch was “*lawful*”. This can, sensibly, only be a reference to the legality of the physical activity of dispatch, which by definition is from a Member State *other* than that to which the cultural item is sent. In the present case the painting is located in the United Kingdom but the physical act of dispatch occurred in Italy and it is common sense – and wholly consistent with the purpose behind the Export Regulation - that the legality of that act should be governed by the law of *that* state.
63. It cannot be contended that the legality of a physical action performed in Italy should be governed by the law of whichever Member State the item finds its way to. That would make the law wholly unpredictable and random. Why for instance would the law of (say) Latvia be allocated the right under EU law to adopt rules governing the legality of dispatch from Malta? The answer is that it would not, and the language of the Export Regulation is inconsistent with any such conclusion as is the purpose and intent behind Articles 6 and 167 TFEU which concerns states having the right to determine their own cultural values. The Appellant’s arguments would, if correct, lead to the unpalatable conclusion that the possessor of an item smuggled out of a country could, by virtue of the success of that unlawful and clandestine conduct, evade the law of the state whose laws have been flouted. If, then, the domestic law of the state of receipt was silent as to the consequences of such unlawful dispatch the clandestine smuggling would go unrecognised and unsanctioned. This is by no means an extreme scenario and applies, in pith and substance, to the present case. It is common ground that (subject to her argument that the Italian law is unlawful) Mrs Simonis dispatched the Giotto unlawfully from Italy but she now argues that this illegality counts for nought in the analysis of her present rights, which she says are to compel the Arts Council to grant an export licence to remove the painting from the EU. The express use of the phrase “*lawfully*” in Article 2 of the Export Regulation would be stripped of meaning if the Appellant’s arguments were correct.
64. The only alternative is therefore that in some way the reference to “*lawful*” has an autonomous meaning in EU law (and is not a *renvoi* to national law). This in my view cannot be the case. On its face the Export Regulation has no rules on “*dispatch*” so that there is no corpus of rules to which lawfulness could attach. This is for the obvious reason that under the terms of the Export Regulation these matters are for the Member States to govern.
65. In written submissions the Appellant advanced a series of finely honed points of construction of the Export Regulation designed to show that properly construed Italian law did not govern. None were repeated during oral submission and most are inconsistent with the Appellant’s own final analysis. I do not address them in detail here. I will however refer briefly to four of the arguments advanced.
66. First it is said (by reference to the fourth recital of the Export Regulation - see paragraph [42] above) that “...*the implementation of the system should be as simple and efficient as possible*”. It is said that “... *it has taken a hard-fought claim for judicial review and the services of a joint Italian law expert to enable the English courts to grapple with the question of whether or not the transfer of the Painting to the United Kingdom from Italy on 14 February 2007 could be said to be lawful as a matter of*

Italian law.” It is argued that the present case is an example of complexity and amounts to strong evidence that the Export Regulation should be construed to avoid such a situation arising which is achieved if it is the state of the location of the item that becomes the competent authority. I do not agree. The reference to simplicity in the recital is merely an exhortation to Member States to adopt straightforward national implementing laws; it is not a lodestar by which to measure the language of the Regulation. But in any event, it is the conduct of the Appellant that has given rise to the complexity. Her decision to refrain from seeking a licence from the Italian authorities in advance of removal and her persistence in this approach across the years has been the cause of this protracted litigation. The system under the Export Regulation is straightforward; the alternative advanced by the Appellant is not.

67. Second, in written submissions the Appellant relied upon the approach of the Court of Justice to phrases such as “*direct descendant*” which was construed by the Supreme Court to have a discrete meaning in EU law in *SM (Algeria) v Entry Clearance Officer (SC(E))* [2018] UKSC 9 at paragraph [25]. It was argued that cases such as these showed how phrases in a measure of secondary EU law could have autonomous meanings. I disagree. The jurisprudence of the Court is clear that a term can have an autonomous meaning where there is no explicit or implicit reference to national law. In the present case the reference is implicitly to national law both because “*lawful*” concerns the dispatch from a Member State, and because there are no rules on “*dispatch*” in the Export Regulation which could serve to regulate removal of a cultural item from a Member State. It is significant, as the Respondent points out, that the Appellant has not identified what, in the absence of rules in the Export Regulation, the content of an autonomous EU test for lawfulness of dispatch would be.
68. Third, the Appellant also argued that the legal structure of the Export Regulation and the Return Directive indicate that the legislator did not intend that the laws of any of the individual Member States should determine the question of where an object was “*lawfully and definitively located*” on 1st January 1993 or whether it had subsequently been “*lawfully and definitively dispatched*” from one Member State to another. The legal bases for the Export Regulation and the Return Directive were harmonising powers directed at harmonising national laws to a common standard across the Union. The assumption sitting behind the argument is that because the measures are harmonising, they necessarily fully occupy the field and therefore leave no space for national law. This is a false premise. In the field of cultural goods, the opposite applies (see paragraphs [29] – [38] above) and leads to the conclusion that there is a major and indeed primary role in the field of cultural goods for national law.
69. Fourth, the Appellant argued that there was no need for the Export Regulation to “*define definitive dispatch by reference to national law*”. It was not the function of the Export Regulation to afford protection against removal from one Member State to another Member State in breach of the former’s laws or administrative requirements. Instead: (i) the function was simply to provide a uniform, EU wide, approach to the issuing of licences for export outside the EU; and (ii), it was the Return Directive which provided remedies against the “*mischief*” of the unlawful removal of national treasures from one Member State to another. The Appellant argued in her written submissions: “... *if the object was unlawfully removed as a matter of national law, the Member State from which the object originated will be notified under the [Export] Regulation and will then be able to secure its return using the mechanism provided by the [Return]*

...Directive. In those circumstances, there is simply no need for the [Export] ... Regulation to define definitive dispatch by reference to national law.” This is in my view illogical. Prevention is better than cure. The existence of the Return Directive is not a reason to deny the state of dispatch the ability to regulate export of items of cultural importance to it, in accordance with its own law, rather than in effect subcontract that protection to a third state with no cultural connection to the item in issue. Allocating legal control to the state with the cultural interest in the item is the quickest, easiest and most effective way of ensuring that cultural goods are properly regulated and national heritage is protected and is consistent with the objectives behind Article 6 and 167 TFEU.

70. In conclusion for the reasons given above I agree with the Judge, and the Respondent, that the expression “*lawfully and definitive dispatched*” is a reference to the national law in the state of physical dispatch, here Italy. It follows that upon the basis of the joint expert in Italian law as accepted by the Judge the dispatch by Mrs Simonis of the painting from Italy to London was in violation of Italian law.
71. I turn now to the Appellant’s most refined argument, advanced orally, which is that the phrase refers to national law but with an EU and international law overlay. This is, at base, no more than saying that the law is Italian but that this law must be consistent with superior EU and international law norms. This is not a proposition that Mr Jaffey QC, for the Respondent, quibbled with. It is, in pith and substance, a way of expressing the second ground which seeks to test the legality of the application of the Italian law against superior rules of law. I deal with this under Ground II below.

F. Ground II: The compatibility of Italian Law with Article 35 and 36 TFEU

- The Ground of Appeal

72. Under the second ground of appeal the Appellant challenges the legality of the application of Italian law to the removal by her of the painting from Italy. She does so under Articles 35 and 36 TFEU, Article 52 of the Charter of Fundamental Rights, and A1P1.
73. The Appellant explains how the argument came about in the Court below. The conclusion of the joint expert on Italian law (Professor Lenzerini) was that obtaining a new certificate of free movement was a mere formality because the Italian authority would have been obliged to grant it. The Appellant states that neither she nor the Respondent had anticipated that evidence. However, the Lenzerini report post-dated the parties’ original pleadings and accordingly, neither the original pleadings nor supporting evidence addressed the implications of the requirement to obtain a licence being a formality. The Appellant therefore sought permission to rely upon a new ground: that a purely formal requirement to obtain a certificate was an unjustified restriction on intra-Union trade. The Appellant relied on the well known case law of the Court to the effect that even a purely formal obligation to obtain an export licence would violate Article 35 TFEU (see e.g. Case 68/76 *Commission v France – re export licences for potatoes* [1977] ECR 5151, at paragraph [14]). The Judge granted permission to raise the ground on the condition that if she concluded that evidence was needed to justify the restriction the First Interested Party (the Italian competent authority) would be afforded a reasonable opportunity to adduce it.

74. In the event the Judge concluded that she did not need additional evidence. She found: (i) that there was a 15-day waiting period for obtaining the certificate that the Italian authorities were obliged to grant; (ii) that the existence of a duty to give notice under Italian law served to place the authorities on notice that removal from Italy of a cultural item was contemplated, and if needs be to take suitable protective measures (such as the seeking of interim relief); (iii) that this was a matter of intuitive common sense, not requiring specific evidence to justify it; and (iv), that this conclusion pertained even if the grant of a licence was routine or inevitable.
75. I can summarise the essential components of the Appellant's argument in the following manner:
- a) It is common ground that *any* restrictive hindrance to export engages Article 35 TFEU and the burden of proof then falls to the Member State in question to justify that hindrance under Article 36 TFEU.
 - b) Member States must adduce strong evidence by way of justification.
 - c) The obligation to adduce evidence includes clarity about the legal basis of the restriction in issue. In this case the Member State has not identified the law in issue. This is an abrogation of its burden of proof under Article 36 TFEU and also a breach of Article 52 of the Charter of Fundamental Rights.
 - d) Part of the evidential burden on the Member States seeking to show that a restriction is proportionate is to identify and justify the purpose behind the restriction. Absent compelling evidence it was not open to the Judge to infer that a purpose of the Italian legislation was to secure identification of national treasures and/or to secure interim relief prior to export. Any conclusion about purpose was a question of fact which required expert evidence, and there was none. The Appellant though accepts that the joint expert (Professor Lenzerini) had suggested that the "*motivations*" of the Italian competent authority in taking a year to appeal the order of the Lazio Administrative Court may have been an ungrounded assumption that the Appellant would request fresh authorisation before exporting the Painting (see Judgment paragraph [89]). But such speculation fell short of expert evidence on purpose.
 - e) The facts of the present case are unusual such that, even if the legislative regime was generally lawful, its particular application to the facts of this case were not. The case was unusual in that: (i) a fresh certificate was required only because, by the time the Lazio Administrative Court had annulled the second decree (see paragraph [24] above), the temporary licence had expired; (ii) the certificate was only a formality because of the self-executing order of the court, as Professor Lenzerini confirmed; (iii) it was inherently improbable that the Italian legislation was intended to cater for the situation in this case and no assumption could be made that the legislation was intended to cover such a scenario absent expert evidence on the point; and (iv), there was no evidence that the Italian competent authorities would *in fact* have applied for (and had a reasonable prospect

of obtaining) an injunction in response to an application for a certificate on the back of the order of the Administrative Court in Lazio and it is fanciful to suggest that they would have done so, given that it took them over a year to lodge their appeal against the court order and they made no effort to seek the return of the painting under the Return Directive.

- f) The judge misdirected herself (Judgment paragraphs [84] – [85]) in concluding that the principle of international comity required: "*compelling circumstances for a court of one Member State to rule on the (in)compatibility with EU law of another member state's laws, even on specific facts*". She also erred in holding that 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.*" The judge should have held that the overriding duty of any national court was to apply EU law consistently and uniformly across the EU. The principle of comity does not apply within the context of EU law. Measures of national law contrary to EU law cannot be applied.
- g) Finally, if there was any doubt about the above propositions then it was open to the Court to refer the case to the Court of Justice.

- ***Respondent's submissions***

76. The Respondent's submissions can be summarised briefly. It is correct that under EU law national export licensing regimes are a restriction upon the free movement of goods, even where the grant of a licence is routine. However, the judge was (rightly) wary of accepting the Appellant's invitation to opine on the compatibility of the Italian law with EU law (Judgment paragraph [84]). Not to exercise such caution would undermine the system of mutual trust inherent in the EU regime: See, e.g. Case C-399/11 *Melloni v Ministero Fiscal* (EU:C:2013:107) at paragraphs [57] - [59] and *Opinion 2/13 on EU Accession to the ECHR* (ECLI:EU:C:2014:2454) at [191] - [192]. Even the Court of Justice is reluctant to consider such a question on a preliminary reference and requires strong reasons and evidence to do so, as the Court emphasised below (Judgment paragraph [84]).
77. There is no single EU market in national treasures. Article 36 TFEU specifically permits national export licensing regimes over such items and such regimes are the norm. The purpose of a licensing regime is to allow the national authorities to identify *prior to export* potential national treasures through a regime of reporting and inspection and then to enable them to take lawful measures (such as the refusal of a licence or an application for interim relief to prevent removal pending litigation) to ensure that such treasures are not removed from the Member State in breach of national law. That is precisely what the Italian regime does. Such a scheme is permitted and envisaged by Article 36 TFEU. It would be impossible in practice to adopt an effective scheme of protection for national cultural treasures absent such administrative notification and licensing arrangements.

- ***Analysis: Comity / mutual trust / judicial circumspection and vigilance***

78. I propose to deal with the issue in the following way. First, I will deal with the question whether international comity, or any equivalent doctrine of domestic or EU law (such as mutual trust), precludes this court from ruling upon the legality of Italian law. This issue entails considering, albeit relatively briefly, the issue of a reference to the Court of Justice. Second, I will deal with the substantive merits of the complaint.
79. I start by considering the approach that the domestic courts should adopt towards a ground which invites this court to declare inapplicable the laws of a third Member State. As to this the parties agree that the court *does* have the jurisdiction to so act. Nonetheless, the issue is far from straightforward and involves a difficult balancing act between comity and mutual trust, on the one hand, and direct effect and supremacy on the other.
80. Under the doctrine of supremacy of EU law (preserved during the IP – see paragraphs [9] - [11] above) national courts are obliged to give effect to superior EU norms and if needs be declare inapplicable inconsistent domestic law. The prohibition in Article 35 TFEU has direct effect (also preserved during the IP) and is therefore capable of being relied upon before the courts to set aside inconsistent national law. In the ordinary course such powers are exercised by the courts of the state whose legislation is being challenged. In the present case the invitation is to declare inapplicable a foreign law. Since all the courts of the EU are competent to apply the supremacy doctrine there is nothing in principle which precludes such an outcome. Nonetheless, the prospect is potentially controversial for obvious reasons. The courts in Member State A might be ill equipped to understand the intricacies of the law of Member State B. They might not have before them representatives of the authorities from Member State B to give evidence about their laws. They might not understand applicable legislative procedures in Member State B which might hinder their ability to measure its lawfulness or proportionality. They might apply principles of interpretation alien to the foreign system of law which leads to a different conclusion about the scope and/or effect of the foreign law. And if a court does declare a foreign law unlawful that ruling might not apply *erga omnes* throughout the EU and might not be capable of being enforced outside Member State A. The difficulties are legion. The Judge recognised this (Judgment paragraph [84]) and observed that 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*” (Judgment paragraph at [85]).
81. The Respondent cites the principle of the presumption of regularity as between Member States. In *Opinion 2/13 of the Court pursuant to Article 218(1) TFEU* (18th October 2014) on the compatibility of the ECHR with EU law (at paragraphs [191] and [192]) the Court of Justice emphasised that the “... *principle of mutual trust between the Member States is of fundamental importance in EU law*”. It required that each state “... *save in exceptional circumstances, ... consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law*”. In paragraph [192] the Court stated: “... *when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.*” Although this case concerned fundamental

rights the Respondent argues that it highlights why real reticence is to be applied by courts invited to strike down foreign laws as incompatible with EU law.

82. The Appellant does not accept this and argues that:

“... the obligation placed upon all national courts and national authorities is to ensure that EU law is applied uniformly across the EU. Just as an English court does not apply any presumption that English law is compatible with EU law, neither should an English court when faced under the rules of private international law with determining as a matter of fact what Italian law is, assume or presume that Italian law conforms to the requirements of EU law. The principle of international comity does *not* apply within the context of EU law which is a supranational system of law with primacy over contrary national law provisions. Instead the application of foreign law and the regular concomitant difficulties of comprehension and interpretation of foreign legal rules cannot give rise to anything that may stand in the way of securing the primacy of EU law. The primacy of EU law holds true in both the English and the Italian legal systems. Measures of national law that are contrary to EU law cannot be applied. The fact that the law is applied by the court of another Member State does not deprive it of its link to EU law: Case C-220/01 *Lennox v ILCO* EU:C:2002:592 (AG Alber, Opinion 17 October 2002) [2004] 1 CMLR 11 at §§ 83-4.”

83. In Case C-220/01 *Lennox* the Advocate General did indeed, as the Appellant submits, see no fundamental problem with a national court “*assessing the national provisions of a Member State other than that of the referring court...*” (Opinion paragraph [87]). However, in Case 244/80 *Foglia v Novello* [1981] ECR 3045 the Court, whilst acknowledging that a national court could rule upon foreign law and if needs be declare it incompatible with EU law, nonetheless emphasised the need for great care. At paragraph [30] the Court, having rehearsed some of the difficulties including the possibility that private parties might artificially seek to deploy the reference procedure to mount a collateral challenge to foreign laws, stated that if a reference was made to it the Court itself would need to “*display special vigilance*”. An illustration of the Court exercising such vigilance is Case C-318/00 *Bacardi Martini v Newcastle United Football Ltd* (21st January 2003) [2003] ECR I-00905. There the High Court made a reference in the course of a tortious dispute between private law litigants in the midst of which the Claimant sought to raise the illegality of a French law regulating the advertising of alcohol in the context of EU free movement rules. The Judge accepted that a determination of this issue was “*necessary*” to enable the court to give judgment on the underlying tortious issue. The Court of Justice disagreed and held that the issue of the legality of the French law was hypothetical and not properly connected to a true *lis* arising in the national civil litigation. The Court declined to entertain the reference citing *Foglia* as authority for the proposition of the need to apply “*special vigilance*” in such cases.

84. Applying these principles to the present case the Judge did not reject the proposition that, in principle, she could rule upon the legality of a foreign law. She held correctly only that she should exercise “*considerable caution*”. This court can rule upon the legality of the Italian law but would, taking its cue from the approach of the Court of Justice, exercise considerable caution and vigilance. It would have to be satisfied that the issue was properly arguable and that a ruling was truly necessary to enable it to give judgment. It would need to be astute to the risk or possibility that the appellant was seeking to deploy the good offices of the court for the purpose of a collateral challenge to a foreign law that should by rights have been brought in the foreign court in issue. It would wish to ensure that it was fully equipped with all relevant information to perform the task and it might well wish to ensure that it had representatives of the foreign state before it so that it could receive submissions on the foreign law from those with a direct public interest in the outcome.
85. Assuming that the court felt properly equipped and that the issue was really necessary in order to decide the *lis* before it, it would then have to decide whether it should proceed to give a ruling or make a reference. This is a matter of discretion for a court other than one of final instance. It seems to me that if such a situation arose and the court concluded that a serious argument about illegality had been raised requiring resolution, then the likely and optimal course would be to make a reference. The Court of Justice can hear from all the Member States, from the Union institutions (such as the Commission and Council) and obtain relevant information from the state whose law is being challenged. The Court can take a more rounded and well informed view of the issue, than could the domestic court. True it is that ultimately all that the Court of Justice can do is to answer questions posed by the referring court but the case law is replete with examples of the Court framing its answers to the national court in such a way as to make the position of the Court of Justice on the ultimate issue of law transparently clear. Moreover, answers given by the Court to references from national courts do not just bind the referring court, they apply *erga omnes*, i.e. they state the law generally. If the Court does consider that the foreign law is in breach of superior EU norms, then the foreign state can draw its own conclusions and the EU Commission can commence infraction proceedings if the Member State in question declines to draw the necessary conclusions.
86. In conclusion this court can rule on the incompatibility of the Italian law. If the Appellant’s arguments are seriously arguable, we have the power to make a reference raising the issue. I turn now to the merits of the argument and whether in the light of that assessment a reference should be made.
- ***Analysis - Compatibility of Italian law with Articles 35 and 36 TFEU and the state’s burden of proof***
87. I turn now to consider whether Italian law is in breach of superior EU law, namely Articles 35 and 36 TFEU and Article 52 of the Charter of Fundamental Rights. For the reasons set out below I do not consider that this challenge is arguable or comes close to a threshold whereby I would consider that a reference was appropriate. In any event even if I had done so I would not, on discretionary grounds, have made a reference. I first address the application of Article 35 and 36 TFEU. This brings in Article 52 of the Charter of Fundamental Rights.

88. It is common ground that the Italian licensing regime engages Article 35 TFEU. Mr O’Neill QC, for the Appellant, argues that this conclusion suffices and that there is no further burden upon his client. The burden now shifts to the Respondent to justify the restriction with full and comprehensive evidence. In this regard Mr O’Neill QC was insistent that there was no duty on his client to spell out, with full particulars, the exact provisions of Italian law that were being objected to - that task fell to the state seeking to justify the restriction as part of its burden and standard of proof. I do not agree with this analysis. It is a point of some significance because specification of the restrictive measure in question is central to the Respondent state knowing exactly what it must defend. In this case it is relevant that the Appellant does not challenge the basic Italian law on export control. It is acknowledged that there needs to be a system of export controls to protect the artistic and cultural heritage of the Italian state. So, there is no challenge to the system as a whole and the Respondent does not have to adduce evidence to meet that challenge. Equally, there is no challenge to the modalities of the licence application system. For instance, it is not said that the process of applying for an export licence is unduly protracted or expensive or complicated. And so the Respondent does not have to meet that challenge either.
89. In the course of oral argument, and after some considerable pressing from the court, the Appellant clarified that all that was being challenged was: (i) the application of the licensing regime to the Appellant herself in the very particular circumstances of this case; and specifically (ii), those provisions of the licensing regime which imposed upon Mrs Simonis the duty to apply for a licence and thereby give advance notice to the Italian authorities that she intended to remove the painting from Italy.
90. But even in this reduced form Mr O’Neill QC still launched a vigorous attack upon the Respondent for failing, he said, to provide details of the relevant provisions of the Italian law. It was in this connection that Mr O’Neill QC relied upon Article 52(1) of the Charter of Fundamental Rights concerning the “*Scope of guaranteed rights*”:

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

It was argued that this meant that it was the burden of the state to establish that the restriction was “*provided for by law*” and they had not been able to do this. In particular, the Respondent’s case focused upon the notice obligation in the 1939 law but not the new law which came into operation in the 2004 Code. It was incumbent upon the Respondent as part of its duty under Article 36 and Article 52 to spell out exactly what it was that they said Mr Simonis had done unlawfully, and the Respondent had not done this.

91. With respect, there was more than an air of artificiality about this argument. There can be no real or sensible dispute as to the source of the duty on Mrs Simonis to provide notice to the Italian authorities of her intention to remove the painting from Italy. It is not in dispute that such a duty arose under the 1939 Law. The 1939 law and the 2004

Code were in the bundles before the High Court and the Court of Appeal. The Judge below pointed out that the case advanced by the Appellant was based *expressly* upon the 1939 Law and the duty therein to apply for a licence and thereby afford notice to the authorities. No one argued before her that there was no equivalent provision in the 2004 Code or that otherwise there was no obligation upon her imposed by Italian law to apply for a licence and thereby provide the authorities with notice. The Judge did record a dispute about whether the 15 day waiting period had been codified (it had). The judge identified the restriction at the heart of the challenge as being a duty to give notice. There is no challenge to her conclusion on this. If the Appellant was seriously in doubt as to the source of her duties under Italian law then it was well within the ability of her legal advisers to prove such an assertion by reference to the law. She has after all been advised throughout by Italian lawyers and she was embroiled in litigation with the Italian authorities in 2004 when the new Code came into being. To suggest that her legal team is unable to identify the target of their challenge and that the burden of identifying the restriction lay with the Respondent is artificial and unsustainable.

92. In short, there is an evidential burden on a claimant to show that *prima facie* a measure falls within Article 35 TFEU. This includes doing the very best that can be done to identify *with precision* the actual measure in dispute so that, then, the state can marshal its arguments and evidence in as focused a way as it can in order to meet its burden of proof. In my view the analysis of the Judge was correct. In this case the gravamen of the Appellant's objection is that she was subjected to a duty to provide advance notice of her intention to remove the painting. The Judge found that such an obligation existed under Italian law. There is no serious basis upon which that finding can be challenged and, in truth, the Appellant does not say that such an obligation does not exist, and indeed it is the nub of her case that it does exist. Such an obligation does, *prima facie*, fall within Article 35 TFEU. It is that notice requirement (and not any wider part of the system) which therefore requires justification under Article 36 TFEU. In particular – since she does not challenge the system as a whole but only its application to her – it is the applicability of the notice obligation to her on the present facts which has to be justified.

- ***Analysis: The need for evidence to justify a duty of prior notice as part of an export licensing regime***

93. I turn to the justification found by the judge for the obligation in dispute. There are two issues to address: (i) whether the justification of the obligation to give notice can be decided without evidence; (ii) whether in any event the notice obligation is justified under Article 36.
94. The Appellant argues that the Judge erred in concluding that the justification for the notice requirement was a matter of intuitive common sense not requiring evidence. The Appellant cites a series of cases, predominantly concerned with national restrictions imposed in the gambling market, which led to references to the Court of Justice raising questions about the legality of those national measures with EU rules in particular on the analogous treaty provisions relating to free movement of services: See e.g. Case C-390/12 *Pfleger* (ECLI:EU:C2014:281); Case C-685/15 *Online Games* (ECLI:EU:C:2017:452); ("*Online Games*"); and, Case C-3/17 *Sporting Odds Ltd* (ECLI:EU:C:2018:130) ("*Sporting Odds*").

95. In a number of those cases the Court has identified the need for Member States to adduce evidence to justify the restrictive measures in question. Mr O'Neill QC drew our attention to various paragraphs which appear to make the adducing of evidence mandatory and he deduces from these cases that it is mandatory in all cases for Member States to defend restrictions with evidence, thereby excluding the possibility that a measure can be justified by reference to logic or common sense: See *Pfleger* (ibid) paragraph [50]; *Online Games* (ibid) paragraph [66]; and *Sporting Odds* (ibid) paragraph [60].
96. In my view this argument is unsustainable. There are three reasons for this.
97. First, the absolute way in which the argument is advanced makes no sense. It amounts to the proposition that even where there is no doubt as to the justification behind a measure because it can be inferred or deduced as a matter of plain common sense or logic that the State must *still* adduce evidence as to the justification, however superfluous that is. And a failure to adduce that superfluous evidence would render the law in question unlawful. There is no magic *per se* in the adducing of evidence. What matters is that the Member State satisfies the court that the measure in issue is justified. That might be through evidence, or submissions and argument, or a combination of both. The Court in all of the cited cases was merely calibrating the requirement on a Member State to adduce evidence against the need of the national court to satisfy itself that the justification being advanced was well made. There is no absolute duty to adduce evidence. There is a duty to adduce such material as is needed to enable the Court to perform its task. But what that material will be will vary from case to case, from industry to industry, and from issue to issue. In an appropriate case it might be no more than evidence of the restriction itself (i.e. the act, instrument or measure comprising the measure complained of) which suffices to enable the court to draw an ineluctable conclusion about its purpose.
98. Second, the cases cited by the Appellant are references from national courts and all arise out of very specific factual circumstances. These are overwhelmingly gambling cases where there is a long history of references to the Court of Justice and where it is apparent that there are many different justifications advanced for restrictions upon gambling in different Member States spanning religious and moral considerations, concerns about addiction and consumer protection, and the policy of some states to introduce national lotteries to generate funds for good causes. The justifications are many and various and are predicated upon complex social and economic national factors. The cases heard before the Court of Justice are replicated in this jurisdiction in cases also involving gambling (see e.g. *Gibraltar Betting and Gambling v Secretary of State for Culture, Media and Sport* [2014] EWHC 3326 (Admin)). The proportionality of the national restrictions in issue in all these cases raised difficult factual and evidential questions and it was unsurprising therefore that the states seeking to justify such restrictions on trade needed to adduce relevant evidence. These cases do not in my view assist the Appellant's analysis in the present case where the impugned restriction is fundamentally different in nature.
99. Third, the view I have expressed about the gambling cases is supported by the observations of the Supreme Court in *R (Lumsdon) v Legal Services Board* [2015] UKSC 41. As was made clear by Lords Reed and Toulson: "... *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. ...” (ibid paragraphs [56]). The Court also observed, in relation to the appropriate judicial scrutiny of such restrictions, that where “... a national measure does not threaten the integration of the internal market, for example because the subject matter lies within an area of national rather than EU competence, a less strict approach is generally adopted. That also tends to be the case in contexts where an unregulated economic activity would be harmful to consumers, particularly where national regulatory measures are influenced by national traditions and culture” (paragraph [37]). In addition, caution had to be applied when seeking to draw lessons from dicta of the Court of Justice arising in cases in particular sectors, since it was apparent from the case law as a whole that there were differences in the application of the proportionality test as between different activities (judgment paragraph [34]). There is no one cap which fits all. In my view the cases cited by the Appellant do not compel the conclusion that the state must adduce evidence, however superfluous, irrespective of whether the justification for the restriction is obvious or a matter of common sense.

100. In short there is no obligation in every case imposed upon the state to adduce evidence to justify a restriction. It will always depend upon the facts and the context. It follows that in some cases recourse to common sense, logic, or intuition might suffice all of which can operate without the need for evidence.

- *Analysis: The justification for a duty of prior notice*

101. I turn now to consider whether the duty on putative exporters to give notice as part of a licence application system is justified under Article 36 TFEU. In my view it manifestly is and there was no need for the Respondent to adduce evidence to make good this obvious conclusion.
102. First, the duty on Member States to impose a licensing regime to cover exports from the EU is imposed by the Export Regulation. It is hard to see how a licensing regime can operate absent some form of a duty on those seeking a licence to apply for one. The Appellant does not say that *prima facie* a duty to apply and provide notice is not integral to an effective licensing regime. Under the Export Regulation the duty to apply and give notice is subject to only limited exceptions but these are for categories of cultural items into which the Giotto painting does not fit: see paragraph [45] above. Italy was therefore under an obligation to impose the licensing regime upon Mrs Simonis and she had a duty to comply. Indeed, under Article 9 of the Export Regulation Member States are required to impose sanctions for breach. The argument advanced by the Appellant that her facts are exceptional cannot therefore succeed. There is no exception in the Export Regulation for a case such as hers. On this basis the suggestion that Italy is in breach of EU law founders because all that Italy was doing was applying the Export Regulation to her. Mr O’Neill QC, in oral argument, sought to circumvent this by arguing that when Mrs Simonis removed the painting from Italy she was not seeking to dispatch the painting *from* the EU, which is what the Export Regulation is concerned with, and therefore the obligation upon her to give notice hindered a purely intra-EU dispatch ie from Italy to the UK, which is not a dispatch from the EU. Therefore, the duty in the Export Regulation to impose a licence requirement did not apply. This seems highly contrived. This case is all about removal from the EU. London is the hub of the international art market and Italy is a

major source of art works. The elephant in the room is that a better price is likely to be realised on the international market than from a forced sale to the state in Italy and of course Mrs Simonis now seeks a licence from the Arts Council to remove the painting out of the EU, to Switzerland. In short, a notice requirement introduced as part of an export licensing regime is integral to such a system and since the system itself is justified by an EU regulation it is in my view impossible to say that the notice obligation is not likewise justified.

103. Second, even if (to test the Appellant's argument further) in 2007 all that Mrs Simonis wished to do was dispatch the painting for some intra-EU purpose, the analysis would not change. Again, the short answer is that in the field of cultural goods all Member States are entitled to put in place licensing rules which compel the provision of prior notice of dispatch from that state. And this remains so even where it is predictable that the authority will grant the licence sought, whether as a formality or otherwise. In all cases the state is entitled to apply a system of prophylactic, advance, verification. Otherwise no state could prevent wholesale avoidance of the system to the obvious detriment of its national culture. Therefore the argument (premised as it is upon the suggestion in the expert report that the authorities would be bound to grant a new licence) that in such cases Italy has no right to operate a verification procedure, involving prior notice, simply misses the point. Italy is always entitled to verify that a putative exporter is properly entitled to dispatch the item from Italy and onto the wider international market.
104. Third, I agree with the Judge that this conclusion is a matter of intuitive common sense which does not depend upon evidence. But insofar as evidence is relevant in September 2019 the European Commission issued a report¹⁰ on the implementation of the relevant EU legislation governing exports and the return of cultural items unlawfully removed from Member States ("*the Commission 2019 Report*"). This was placed before the Court by the Appellant. It was not said that we could not take this new evidence into account as part of a proportionality assessment and in our analysis of whether the Judge erred: see e.g. *Scotch Whisky Association v Lord Advocate* [2017] UKSC 76 at paragraph [17].
105. The report reinforces the importance of measures designed to ensure close supervision of exports. In paragraph [4.1] the Commission states:
"The Regulation lays down uniform rules for the control of cultural goods before their export from the Union's customs territory in order, on the one hand, to maintain free movement within the internal market, and on the other, to protect the national treasures of the Member States. Overall, Member States consider that the Regulation has achieved these objectives. However, areas for improvement have also been identified.

¹⁰ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, on the implementation of Council Regulation (EC) No 116/2009 of December 2008 on the export of cultural goods 1 January 2014 - 31 December 2017 (Com (2019) 429 final (26th September 2019)).

In particular regarding the fight against the illicit trade in cultural goods, the Regulation has performed quite well. Most Member States consider its licencing system a very important instrument to ensure the legality of trade with third countries, especially when it comes to cultural goods which require an export licence regardless of their value (e.g. archaeological objects, parts of monuments, etc.), whereas for other categories of cultural goods there have been cases where the object was deliberately undervalued to be exported without licence.

...

Other means identified by Member States to improve the overall performance of the Regulation include guidance for understanding the terms 'definitively and lawfully located' that determine the Member State which is competent to issue the export licence. This would prevent unscrupulous operators from temporarily moving a cultural good to a different Member State only for the purposes of applying for a licence in a Member State other than the one which designates and protects the object as a national treasure.”

106. The Commission identifies two misuses of licensing systems which resonate in this case. First, there is the deliberate under-estimation of value of cultural goods in export applications with a view to diverting attention from true value and true cultural significance. In this case there is some evidence of such a practice – see paragraphs [19] – [21] above. Second, there is the situation described of “*unscrupulous*” traders misusing the temporary licence regime by obtaining consent temporarily to dispatch an item to another Member State and then applying to the authorities of a second Member State to obtain a full licence to export from the EU permanently. Once the item has left the EU and been sold on the open market the chances of the interested state recovering the work for the benefit of its citizens are negligible. Mr O’Neill QC bridled strongly at the suggestion that this case was comparable. In my view it is. Here Mrs Simonis did not even apply for a temporary licence. She took matters into her own hands and removed the painting from Italy, providing notice to the Italian authorities after the event, as a *fait accompli*. And she now seeks to compel the Arts Council to grant her a licence to dispatch the painting from the EU, notwithstanding opposition from the state most directly interested. To my mind, and whatever the ultimate merits or otherwise of the position of Mrs Simonis, the present facts are at least a paradigm illustration of just why a state must be able to verify in advance the position of proposed exports.
107. The Commission 2019 Report also provides evidence of the way in which exceptions to national licensing regimes are operated in practice and as to the reasons arising for refusing licences. It appears that only one state operates a system of exceptions thereby underscoring the importance that is attached to universal verification. But it also indicates that a high percentage of applications are granted and provides evidence that almost all states impose what the Appellant terms “*formalities*” facilitating verification. The report provides evidence of the sorts of misuses and abuses of the

system that occur which serve to show why systems of verification predicated upon advance notice are logical and necessary. Paragraphs 4.6 and 4.7 provide:

“4.6 Exemption from export licence requirement: Only one of the respondent Member States reported that they have made use of the possibility not to require an export licence, as provided for in Article 2(2), for items which are considered of limited archaeological or scientific interest. The main argument for making use of the possibility is that archaeological objects which are not the direct product of excavations are deemed to have limited scientific value because of their separation from their archaeo-historical context.

4.7 Reasons for rejecting a licence application: Only few Member States have refused to issue an export licence because the cultural goods in question were covered by national legislation protecting national treasures of artistic, historical or archaeological value in accordance with subparagraph 3 of Article 2(2). In most cases, an export licence application is rejected or withdrawn by the applicant for other reasons such as: insufficient proof of licit provenance; non-compliance with the applicable rules; the object is a fake; or the issue of which Member State is competent to issue the licence has not been resolved. Cases where the applicant refuses to provide further information on provenance when requested and then immediately withdraws their application are rare. When that happens, the majority of Member States reject the application, inform the applicant and, if there is suspicion of illicit provenance, they also inform the appropriate law enforcement authorities about the case.”

108. Fourth, I address briefly the Appellant’s argument that because Professor Lenzerini suggested that the Italian authorities would be required to grant a licence as, so it was argued, a formality that this in itself justified the conduct of Mrs Simonis and is dispositive of the Article 36 TFEU analysis. For the reasons given that is not the case. The state has a powerful right, even in the case of formalities, to apply a protective, *ex ante*, verification process. But in any event, I do not accept the Appellant’s analysis of the implications of the expert evidence. The point is that whilst the expert did indicate that in his view the authorities would be bound to grant an export licence: (i) he was clear that this had to be *upon application* by Mrs Simonis; and (ii), the duty on the authorities to grant a licence was for technical reasons which could be capable of being unravelled under Italian law. In other words, the grant of a licence might not have been the end of the story and whilst any complications and legal difficulties were being resolved the authorities could seek interim relief from the courts to prevent dispatch from Italy.
109. Finally, the argument is also advanced that the notice requirement is not the least restrictive measure that could be imposed and for this reason it is unjustified as disproportionate under Article 36 TFEU. There is nothing in this point. The Commission 2019 Report says that the licensing system has been reasonably successful in controlling exports i.e. there is evidence that the system works. Further, it is not suggested that the process of making an application is especially burdensome, expensive or time consuming. The posited (superior – less restrictive) alternative is the Return Directive. It is said that this is a perfectly workable, existing, mechanism

which operates following dispatch and can adequately address those cases where there is a dispute between an exporter and a state. I disagree. Any comparison between an easily worked and successful licence application system and the exigencies of the operation of the Return Directive and the risk of full scale foreign litigation that it can give rise to (and which this case illustrates) demonstrates just why an advance notice obligation as part of a licence application regime is just about as good as it gets in terms of proportionality.

- *A1P1*

110. Finally - A1P1. This argument did not loom large. The Appellant puts the argument in the following way. The Return Directive balances the interests of a Member State seeking recovery of its national treasures with the legitimate property rights of the owners of those cultural objects. So, Article 8(1) requires the competent authority of the requesting Member State to bring proceedings within three years of becoming aware of the location of the cultural object and of the identity of its possessor or holder. Here the Italian authorities brought no proceedings within the required time frame for return of the painting from the UK. Article 10 of the Return Directive provides that where “... *return of the object is ordered, the competent court in the requested Member State shall award the possessor fair compensation according to the circumstances of the case, provided that the possessor demonstrates that he exercised due care and attention in acquiring the object*”. It also provides that the “... *requesting Member State shall pay that compensation upon return of the object.*” The duty to pay compensation ensures observance of the fundamental rights (Article 17 of the Fundamental Charter and A1P1) for respect for their property. None of these safeguards are provided for in the Export Regulation. Applying the principle *generalia specialibus non derogant* this tells against construing the more general provisions of the Export Regulation in a way that indirectly achieves the same ends but without the accompanying safeguards, alternatively it is an argument in favour of concluding that the Italian law is disproportionate under Article 36 TFEU. I disagree with the premise behind this argument. The Export Regulation balances the rights of the State with those of the owner. It is not unlawful by reference to standards of fundamental and human rights for a state to regulate the export of cultural items. If and insofar as there is, however, an issue under, for instance, A1P1 then that is a right that can be pursued by Mrs Simonis in the Italian courts. Nothing in EU law or for that matter Italian or English law can prevent Mrs Simonis from pursuing any right to compensation that she believes that she has in Italy which is the state allegedly depriving her of her rights. Nothing in these asserted rights affects either the construction or the validity of the Italian law.

- *Conclusion on reference to the Court of Justice*

111. Although in theory this Court could refer the legality of the Italian law to the Court, I do not consider that a reference is justified. There is no arguable case that Italian law is invalid. In any event a reference is a matter of discretion. If the Appellant is so confident that she would be entitled to an export licence as of right, then she has not had the courage of her conviction and accepted the offer of an export licence back to Italy from the Arts Council. If she is correct, then upon return of the painting to Italy she will obtain the necessary export licence. Doing this would be a quicker, cheaper

and less complex and controversial way of resolving this issue than a reference to the Court of Justice.

G. Conclusion

112. For all the above reasons I would reject this appeal.

Lord Justice Arnold:

113. I agree.

Lord Justice Underhill:

114. I also agree.