

Submission and Defra response

Submission from the British Antique Dealers' Association on the Ivory Prohibitions (Exemptions) (Process and Procedure) Regulations 2022 (2022 No, 94)

The Ivory Prohibitions (Exemptions) (Process and Procedure) Regulations 2022 (the "Regulations") have been laid before Parliament in fulfilment of the requirements of, and to supplement information contained in, the Ivory Act 2018 (the "Act"). The Act has not yet come into force, but the Government currently states that it is expected to do so in "Spring 2022".

The Ivory Act 2018 prohibits the commercial trade in objects containing ivory, including antique objects, but it provides for a number of exemptions from that prohibition. One of these exemptions allows the sale of worked items made before 1947 if they contain less than 10 per cent ivory by volume, provided they have been registered on a Defra database.

Another exemption, the subject of this short submission, is described in section 2 of the Act and this allows applications to be made to the Secretary of State for Environment, Food & Rural Affairs for an exemption certificate in respect of an object made from ivory before 1918, which is assessed by leading national museums to be of extremely high artistic, cultural or historical value ("important" objects).

There is no prohibition in the Act against owning objects that contain or are made from ivory, nor against giving such an object to another person or inheriting it under a will.

Regulation 4 of the Regulations due to be scrutinised by your committee provides a list of information, supplementary to that listed in the Act itself, which applicants for section 2 exemption certificates for important objects must provide.

In particular, regulation 4(5) states:

"(5) Where there has been a previous application for an exemption certificate in respect of the same item—

(a) if that application was unsuccessful, the applicant must provide the reference number of the previous application,

(b) if that application was successful, but the exemption certificate issued has been subsequently revoked by the Secretary of State in accordance with section 4(3) of the Act, the applicant must provide the number of the revoked exemption certificate relating to the item."

If an owner of an ivory object is applying for an exemption certificate following a previously unsuccessful application also made by themselves, it would be fairly reasonable to stipulate that they "must" provide the reference number of that unsuccessful application.

However, so far as we understand the legislation, it is perfectly possible and lawful for an owner of an ivory object to have taken possession of it unaware that an unsuccessful exemption certificate application has previously been made by another person, or that a previous certificate has been revoked, or not knowing the reference number of any previous unsuccessful application or revoked licence. For example, the current owner may have been gifted the object or inherited it. To state without qualification, as regulation 4(5) currently does, that an applicant for a certificate "must provide the reference number of the previous application" that was

This document is circulated in confidence for Committee use only and should not be disclosed. Any misdirected copies should be returned to Emily Pughe, House of Lords, London SW1A 0PW.

unsuccessful or "must provide the number of the revoked exemption certificate" appears to put unachievable and unfair requirements into legislation.

We believe that the Regulation wording should be corrected in this respect and suggest it could be more appropriate to have the requirement to supply details of previously unsuccessful or revoked applications qualified by using a phrase such as "where known by the applicant" or "where available to the applicant".

If the present wording is followed to the letter the Regulation could deny an applicant with an important ivory item a certificate for failing to provide information they may not possess and could not be expected to possess. We do not believe this was the intention of the statutory instrument and hope it will be possible to correct this wording.

17 February 2022

Response from the Department for Environment, Food and Rural Affairs

The requirement to provide the reference number of a previous unsuccessful application or as the case may be, the number of the exemption certificate that has been revoked, for an ivory item when making a fresh application under section 2 of the Ivory Act, is so that APHA on behalf of the Secretary of State can, as far as possible, refer this fresh application to a fresh assessor i.e. a different assessor to the one that carried out the first assessment. There is always going to be an element of subjectivity where an expert assesses the item against the section 2(2) criteria, so it is possible that another expert might reach a different conclusion. The intention of this regulation is to allow an applicant making a fresh application to have, insofar as possible, the same chance of success as an initial application.

Drafting the provision in the manner suggested by BADA would not have the intended effect, since the applicant would only be required to provide information about a previous application if it was positively 'known' or 'available' to them at the time of the application ie there would be no duty on the applicant to actively seek out the information insofar as possible.

An applicant could only reasonably be unaware of whether or not a previous application for an exemption certificate had been made if they had acquired the item otherwise than by making a deal (within the meaning of the Act) after the coming into force of the relevant provisions of the Act. If the applicant genuinely does not know whether or not the item has a certificate that has been revoked or whether an application was previously made and refused for the item, they cannot provide the reference number. The "must" in regulation 5(a) and 5(b) can only operate on the basis that the applicant is aware of a previous application in relation to the ivory item. If a person acquires an item in this way and is unaware that a previous application was made, not providing this information would not invalidate their application.

We will be publishing guidance on the 24 February to assist with compliance of the Act, in this guidance we will set out the reason for the requirement to submit the previous application reference number or the revoked exemption certificate number and if that number is not known that it can be left out, so long as the dealer has taken all reasonable steps to check.

[According to this guidance] If someone does not have any information about a previous application or revoked exemption certificate for an item then they can select no to the questions that ask this in the digital ivory registration/certification service. After which they can proceed to the following pages in the service to make an application for an exemption certificate.

23 & 24 February 2022