

## **Legislative Consent Memorandum: Tribunals, Courts and Enforcement Bill**

### **Evidence from the Scottish Council of Jewish Communities**

The Scottish Council of Jewish Communities welcomes the opportunity to provide written evidence to inform the Justice 2 Committee's consideration of the Legislative Consent Motion in relation to the Tribunals, Courts and Enforcement Bill. Our evidence is confined to Part 6 of the Bill, 'Protection of Cultural Objects on Loan' and relates to the possibility that, as currently drafted, the Bill could deny the rightful owners of works of art stolen by the Nazis the opportunity of recovering them.

#### **General objections**

The provisions of Part 6 of the Bill which relate to the Protection of Cultural Objects on Loan are an abrogation of customary law, policy and practice and run counter to the public interest.

A curtailment of Holocaust survivors' legal and moral rights would be incompatible with UK support for the Principles laid down at the 1998 Washington Conference on Holocaust Era Assets principles<sup>1</sup> and would undermine the moral and ethical guidelines set out in the National Museums Directors Conference (NMDC) Statement of Principles and Proposed Action on the Spoliation of Works of Art during the Holocaust and World War II Period<sup>2</sup>.

The Bill also creates a potential conflict between immunity from seizure legislation and legislation relating to the enforcement of judgements made in other jurisdictions, for example, Chapter III of Council Regulation (EC) 44/2001. This Regulation provides for judgments delivered in one EU jurisdiction to be enforceable by the local courts in other member states as if they originated from that jurisdiction. If, therefore, title to an item on temporary exhibition in the UK were the subject of a judgment in another EU state, a question would arise as to whether the proposed statutory immunity should defeat the duty to enforce that judgment. If so there would be significant implications for EU law well beyond the field of cultural property.

We appreciate that museums and galleries experience difficulties in negotiating loans from certain countries, but do not believe that exhibitions should be mounted at the expense of "*removing, from people who have already had mercy, justice and decency removed from their lives, the potential right to their property*" (Lord Janner of Braunstone, House of Lords, 29 November 2006). There is clearly a distinction between cultural property that may be subject to lien as security for an unrelated debt, for which it may be reasonable to grant immunity from seizure, and cultural property that was stolen (and perhaps stolen again – by the Communists from the Nazis) and so is not the property of the lender in the first place.

## **Alternative proposals**

Lord Janner's view has received support in the House of Lords where two amendments<sup>3</sup> relating to the exercise of 'due diligence' have been debated in Grand Committee<sup>4</sup>. These would have required museums and galleries to investigate thoroughly the provenance of proposed loans, but were subsequently withdrawn following assurances from the Parliamentary Under-Secretary for Constitutional Affairs that she '*accept[s] the principle behind the amendments.....and will be looking at that carefully in conjunction with colleagues at the DCMS.*'

'Due diligence' could be enhanced by the creation of an independent, publicly available register of proposed loans similar to that currently required in Switzerland. (The Swiss system<sup>5</sup> requires museums to make a separate application in relation to each item of cultural property for which they wish to obtain immunity from seizure. The application must be submitted at least three months prior to the intended import date, and must include a precise description of the property concerned, its origin, and current owner. This information is published in the Federal Bulletin, after which there is a 30-day period during which objections to the granting of immunity can be registered. The decision to grant immunity from seizure is made by a specialist body and immunity may be granted provided that no-one claims ownership and that the loan agreement stipulates that the cultural property will be returned to the country of origin following the conclusion of the exhibition.)

However, even in combination, 'due diligence' and an independent register would only resolve matters to a limited extent. We are concerned that the Bill would prevent the UK courts from intervening if the true provenance of items of spoliated – which is to say stolen – cultural property from abroad only came to light after they were already on temporary exhibition in the UK. We do not believe that the sovereignty of the courts should be curtailed in this way.

## **ECHR compliance**

We have, moreover, received legal advice that the Bill may be in breach of the ECHR. Provisions governing protection of property on loan engage Convention rights of access to a Court (ECHR Article 6) and protection of property (ECHR First Protocol, Article 1). The ECHR requires that any limitation to these rights must serve a legitimate aim, be proportionate to that aim and in the case of Article 1, Protocol 1 must strike a fair balance between the demands of the community and the protection of the individual's interest.

It is entirely disproportionate to deny access to justice, particularly when the object of a Holocaust survivor's claim may be the only tangible reminder of their lost family or home. It would also be entirely unjust to prioritise cultural exchange over moral rights. The government's position (Explanatory Notes 611) that the Bill merely provides '*a temporary limitation on one form of relief available to a claimant in this jurisdiction*' is not tenable, as it is only valid if the item of cultural property were afterwards returned to a jurisdiction in which a claim could be made – and even then the greater cost of pursuing a case in another jurisdiction may prevent a claimant from pursuing a claim.

The advice we have received suggests that the Bill may be in contravention of Article 6 because the restriction of an individual's right to access UK courts is not proportionate to the stated aim of '*assisting museums and galleries, protecting the welfare of an important sector of the UK economy and of facilitating public access to works of art and cultural objects from other countries*' (Explanatory Notes: 611).

We have also been advised that the Bill may be in breach of Article 1, Protocol 1 because, contrary to the view expressed in the Explanatory Notes (612) the Bill is not proportionate and does not '*strike a fair balance between the rights of the claimant and the public interest*', especially since the situation in point is that the true owner may not even have been aware of the whereabouts of the stolen cultural property (or even aware that it had not been destroyed) prior to its public appearance in an exhibition. More limited anti-seizure regulations (for example to exclude criminal claims) might satisfy the requirement of museums and galleries for immunity, and, in combination with a proper notification or information scheme, would go further to strike a fair balance between the demands and the community and the protection of an individual's interest.

### **The issue for the Scottish Parliament**

The Scottish Parliament is required by the Scotland Act to legislate in accordance with ECHR, and this responsibility should not be disregarded when delegating legislation to the UK Parliament by means of a Legislative Consent Motion.

We therefore urge the Committee to recommend to the Scottish Parliament that the Legislative Consent Motion should only be passed on condition that Ministers press for amendments to the Bill to ensure ECHR compliance and protection for the rights of the true owners of stolen works of art. This compliance – and the demands of natural justice - could be facilitated by:

- The exclusion from immunity to seizure of all title-based claims relating to cultural property of which the claimant was dispossessed contrary to law; and the power for the UK Courts to intervene where satisfied there are grounds for a claim.
- A statutory obligation to research the provenance of proposed loans to appropriate audit standards including the power to compel full disclosure of that provenance and the identity of the lender. Immunity should be provided only on condition that the works of art in question are not stolen.
- The creation of a publicly available full independent register of loaned art to enable the owners of stolen cultural property to locate it and submit a claim.
- A requirement to publish lists of any potential loans found to be stolen etc even where the loan does not go ahead.

- The introduction of a power to prevent sale of cultural property that is the subject of a claim and temporarily on exhibition in the UK to ensure laundering does not take place.

We would be pleased to respond to any questions from the Committee about the implications of Part 6 of the Tribunals, Courts and Enforcements Bill, and will gladly provide additional information to help inform their consideration of the Legislative Consent Motion

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Note: The Scottish Council of Jewish Communities is the representative body of all the Jewish communities in Scotland comprising Glasgow, Edinburgh, Aberdeen and Dundee as well as the more loosely linked groups of the Jewish Network of Argyll and the Highlands, and of students studying in Scottish Universities and Colleges.

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<sup>1</sup> Washington Conference on Holocaust Era Assets

[http://www.lootedartcommission.com/lootedart\\_washingtonprinciples.htm](http://www.lootedartcommission.com/lootedart_washingtonprinciples.htm)

<sup>2</sup> NMDC Statement of Principles and Proposed Action on the Spoliation of Works of Art during the Holocaust and World War II Period

[http://www.nationalmuseums.org.uk/spoliation\\_statement.html](http://www.nationalmuseums.org.uk/spoliation_statement.html)

<sup>3</sup> Amendments 131 and 132

<http://www.publications.parliament.uk/pa/ld200607/ldbills/005/amend/ml005-ic.htm>

<sup>4</sup> Hansard col GC128

<http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/61214-gc0007.htm>

<sup>5</sup> Swiss Federal Office of Culture information about 'Return Guarantee'

[http://www.vms-ams.ch/fileadmin/vms-ams/docs/Info\\_R\\_ckgabegarantie\\_2005\\_11\\_23\\_e.pdf](http://www.vms-ams.ch/fileadmin/vms-ams/docs/Info_R_ckgabegarantie_2005_11_23_e.pdf)

## Appendix

### Lord Janner of Braunstone QC in the House of Lords (29 November 2006)

*Hansard col. 787:*

<http://www.publications.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds06/text/61129-0006.htm>

**Lord Janner of Braunstone:** My Lords, I listened with interest to my noble friend Lord Howarth of Newport. He referred to the *Times* correspondence page, which today carries a very interesting letter from him occupying a column. I am only sad that he does not understand that the key to this legislation should be justice, decency and morality. It should not be about removing now, from people who have already had mercy, justice and decency removed from their lives, the potential right to their property.

At present, if a Holocaust survivor sees a painting or object that belonged to his or her family, they can go and claim. If the Bill becomes law in its present form, if they see such property, they will be unable to prevent the people who have brought that property and exhibited it in this country at least keeping it, hiding it or taking it home. That is totally wrong and immoral and is not a fair balance.

Yes, my noble friend is right to refer to the misery suffered by people in the Holocaust. Yes, I declare an interest. My entire family that lived on the Continent, with the exception of those in Denmark, was wiped out by the Nazis. Yes, I declare an interest. I served in the British Army of the Rhine as a war crimes investigator. We know what the Nazis did. We know how property was stolen. We know who bought it. Yes, I have an interest. I recently came back with the noble Lord, Lord Hunt of Wirral, from another attempt to get the Vatican to hand over property. It has not handed over any of the items that were put into its care by people who knew they were being taken away by the Nazis and would probably be murdered. Not one item has been returned by the Vatican.

Yes, I am referring also to visits to Austria, which has passed a law stating that property taken from people who were murdered in the Holocaust should be handed back to their families. But that has not prevented a range of excellent painting, which belonged to people who now live in this country and who provided us with the details, being put by the Austrians into a gallery that is open to the public, but is privately owned so that the law does not affect it. But 50 per cent of the directors of that gallery are appointed by the Viennese, so the family cannot get the paintings back. This is not justice and, with respect, neither is it justice to say, "The rights you have now are going to be diminished". It is not justice to say, "This Bill will retain certain rights and you can take action in the international court". That is not the way to treat people.

The provisions are hidden away in Part 6 of a Bill that mainly deals with other matters, as this debate has done today. That is not the way to obtain decency, fairness and justice. Part 6 provides British institutions with immunity from potential prosecution or seizures of objects brought to the United Kingdom for public display and temporary exhibition for up to 12 months, either at one location or many. The potential is that spoliated, stolen artwork cannot be restored to the true owners, if they turn up, unless an order has been made by a court. Meanwhile, people can take those objects—it is

theirs. Why? The answer we are given is, “If we can’t do this, we will not get exhibitions in this country. People will not want to bring their art here”. Well, if it is stolen art, I do not want them to bring it here, and I am sure that other Members of this House do not want that.

The Bill does not define which objects are protected. They should be cultural objects. The period of protection is not carefully thought through. There is nothing to ensure that items on loan are not brought into the United Kingdom on a semi-permanent basis. Items can be sold while they are on display in the United Kingdom. The safeguards for the true owners of such property, who have been robbed of them, are totally insufficient. It is not justice, it is not fair and it is certainly not something that I would have expected to happen in this country.

In many ways, the Bill is incompatible with the United Kingdom’s support for the principles laid down in the 1998 Washington Conference on Holocaust-Era Assets, which I attended. It overrides our existing law, policy and practice on illicitly traded works of art, and art stolen by the Nazis. Britain stood up against the Nazis when no one else did. My father was a Member of the other place for years, a leader of the Jewish community who stayed through the Blitz with my mother while I was shipped off to Canada for four years because they believed the Nazis were going to invade—thank God they did not. Do not give them something back like this.

How could it be right, if an artefact is proved to be stolen property, that it is not attacked when it comes here for an exhibition? “Well, maybe they would not want to put artwork into exhibitions here if they knew they were in that danger”. Well, too bad. We do not want to be a place which exhibits stolen art. This part of the Bill should be removed, not least because this county stood alone against the Nazis. To allow it back in is a disgrace.