

Art and cultural assets news - winter: Update on the case of Iran v Barakat

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In our Summer Issue last year, we reported on a decision of the English High Court by which Iran was denied the ability to bring a claim in England for the return of ancient artifacts illegally excavated in its territory. That decision was based on two grounds: (i) that the antiquities laws of Iran were insufficient, or insufficiently clear, to enable it to bring an action in England for “conversion”, that is, to recover movable property “belonging” to it; and (ii) that the English Courts will not entertain an action by a foreign State to “enforce” that state’s penal or “public” laws.

The Court of Appeal has now reversed that decision, holding on the first issue, that Iran enjoyed both title to and an “immediate right to possession” of the antiquities under the laws of Iran. The Court went on to say that had it not formed that view, it would have concluded that Iran enjoyed an “immediate right to possession” under the law of Iran, which of itself would suffice to found a claim in conversion in England.

On the second issue, Iran asserted a claim based upon title to antiquities which formed part of Iran’s national heritage, title conferred by legislation that was nearly 30 years old. This was a “patrimonial” claim, not a claim to enforce a public law or to assert sovereign rights, and it was not a penal law. The Court went on to say that if it was wrong in the view that this was not a claim to enforce foreign public law, then it did not consider that it should be precluded by any general principle that Courts in England would not entertain an action whose object was to enforce the public law of another state. There were positive reasons of policy why a claim by a state to recover antiquities which formed part of its national heritage and which otherwise complied with the requirements of private international law should not be shut out by that general principle. Conversely, it was certainly contrary to public policy for such claims to be shut out.

The Court said that there was international recognition that states should assist one another to prevent the unlawful removal of cultural objects including antiquities. There were international instruments which had the purpose of preventing unlawful dealing in property which was part of the cultural heritage of states. The UK was party to some of them. Those instruments illustrated the international acceptance of the desirability of protection of the national heritage. A refusal to recognize the title of a foreign state, conferred by its law, to antiquities unless they had come into the possession of such state, would in most cases render it impossible for this country to recognise any claim by such a state to recover antiquities unlawfully exported to the UK.

This last point met an argument by the Defendant, The Barakat Gallery Limited, that a state’s title to such property could only be considered a patrimonial claim entitled to recognition, if the state had at some point reduced the property in question into its actual physical possession – which, of course, is characteristically not the position with antiquities looted from illegal excavations.

This result is a tremendous gain for source nations.