R. v. STIPENDIARY MAGISTRATE, ex p. CHELLSONS (GIBRALTAR) LIMITED

Supreme Court
Spry C. J.

23 February 1978

Certiorari—error of law on face of decision—irrelevant factors considered — relevant factocrs ignored — no lack of jurisdiction — whether certiorari will lie
Stare decisis — how far stipendiary magistrate as appellate tribunal required to follow own decisions — party acting to his detriment in reliance on ruling of law.

Trade licencing —amendment of licence — relevant factors — needs of community generally — Trade Licensing Ordinance, ss. 7, 14.

The applicant was a company which had applied to the licensing authority for amendment of its licence to allow it to trade from new premises. The application was refused and an appeal to the stipendiary magistrate was dismissed. On an application for orders of certiorari and mandamus

HELD: (i) Certiorari may lie, although the inferior tribunal acted within its jurisdiction, if it made an error of law which appears on the face of its decision, or if it gave weight to irrelevant factors, or if it failed to give weight to relevant factors.

(ii) Although uniformity of treatment is desirable, a tribunal such as the stipendiary magistrate in his appellate capacity is not bound by its own decisions and may not fetter its own discretion.

(iii) A trader has no right to require amendment of his licence under s. 7 to enable him to trade from new premises.

(iv) A trader who had a licence before the present Ordinance came into force has no special privilege as regards amendment under s. 7.

(v) While the needs of the community generally are a factor that must be taken into account, the needs of particular localities may or may not be relevant.

(vi) The fact that the applicant had acted to his detriment in reliance on a previous ruling of law was a factor to be considered when exercising discretion.

Per curiam. Specific findings of law made by the stipendiary magistrate in appeals from the licensing authority are binding on the licensing authority.

Cases referred to in judgment

Castle Stores Ltd. v. *Licensing Authority*
R. v. *Minister of Health* [1938] 4 All E. R. 32
Anismimic Ltd. v. *Foreign Compensation Commission* [1969] 2 A.C. 147
Merchandise Transport Ltd. v. *British Transport Commission* [1962] 2 Q.B. 173
Bourne v. *Keane* [1919] A.C. 815.

Application

This was an application for an order of certiorari to bring up and quash the decision of the stipendiary magistrate and an order of mandamus directing him to reconsider the appeal.

Sir Joshua Hassan, Q.C., and H. J. M. Levy for applicant.
The Attorney General (J. K. Havers, Q.C.) amicus curiae

2 March 1978: The following order was read—

Chellsons (Gibraltar) Limited, a company incorporated in Gibraltar, is the holder of a licence, granted under the Trade Licensing Ordinance, 1972, to trade in records and tapes, photographic goods, electronics and sound reproducing equipment, watches and clocks, souvenirs and optical goods at 305 Main Street. It applied to the licensing authority for the amendment of its licence to enable it to transfer its business from 305 to 78b Main Street. The application was refused on the ground that

> "the area to which [the company] wanted to move was more than adequately catered for."

The company appealed against that decision to the learned stipendiary magistrate, who dismissed the appeal. There is no further right of appeal. The company now applies for an order of certiorari to bring up and quash the order of the stipendiary

and for an order of mandamus directing him to amend the licence.

The learned Attorney General, who appeared as amicus curiae and to whom the court is indebted, took the preliminary point that the order of mandamus sought was not one that could properly be made. After discussion, Sir Joshua Hassan, Q.C., who appeared with Mr Levy for the company, applied for leave to amend, so that the stipendiary would only be asked to reconsider the appeal. I now give leave to amend as prayed.

The main ground of objection to the decision of the stipendiary is that he expressly departed from a ruling of law made by him in an earlier, similar, appeal: *Castle Stores Limited* v. *Licensing Authority*. It is also alleged that he took into account matters which he was not entitled to take into account and ignored a matter to which he ought to have given great weight.

The learned Attorney General questioned whether this was a case of a kind where certiorari would lie. He cited *R.* v. *Minister of Health* (1), in which Greer, L.J. quoted a passage from the Hailsham Edition of Halsbury, to the effect that where the proceedings are regular upon their face, certiorari will not be granted on the ground that the court below has misconceived a point of law. With respect, I do not think much reliance should be placed on that decision. A doubt whether it was rightly decided was cast in the House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commission* (2), in the judments of Lord Pearce at p. 199 and Lord Wilberforce at p. 210. It is perhaps significant that there seems to be no reference to the *Minister of Health* case in Volume 11 of the Fourth Edition of Halsbury. Be that as it may, the case can, I think, have only a limited authority, since the court then only concerned itself with the narrow question of jurisdiction. In the *Anisminic* case, Lord Reid, at p. 171, after speaking about lack of jurisdiction, went on—

> "But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may give its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural jus-

(1) [1938] 4 All E.R. 32. (2)) [1969] 2 A.C. 147.

> tice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

A little later, on the matter of decisions being equally valid whether right or wrong, he added the proviso

> "subject only to the power of the court in certain circumstances to correct an error of law."

This matter of error of law was dealt with more fully in the judgment of Lord Morris of Borth-y-Gest, but I think it will suffice if I quote a single sentence from p. 182—

> "If a tribunal while acting within its jurisdiction makes an error of law which it reveals on the face of its recorded determination, then the court, in the exercise of its supervisory function, may correct the error unless there is some provision preventing a review by a court of law."

There is no provision in the Trade Licensing Ordinance, 1972, preventing such review.

I think these passages sufficiently summarize the law that I have to apply and, on that basis, I consider that the grounds of complaint are such that, if established, they would entitle me to interfere. It would still, of course, be for consideration whether in all the circumstances I ought to interfere, since the prerogative orders are discretionary.

Sir Joshua submitted that the stipendiary had made an error of law that appears on the face of his decision, when he expressly departed from his own earlier decision in the *Castle Stores* appeal, which had, in Sir Joshua's submission, been correctly decided.

The learned Attorney General argued that it was no more than a rule of convenience that a tribunal such as the stipendiary should follow its own decisions and that failure to do so could not be a ground for quashing a decision. I am in broad agreement. As Devlin L.J., said, in *Merchandise Transport Ltd.* v. *British Transport Commission* (1) at p. 193—

> "In my opinion a series of reasoned judgments such as the tribunal gives is bound to disclose the general principles upon which it proceeds. I think that it is not only inevitable but also desirable. It makes for uniformity of treatment and it is helpful to the industry and to its advisers to know in a general way how particular classes of applications are likely to be treated. But the tribunal may not, in my opinion, make rules which prevent or excuse either itself or the licensing authorities from examining each case on its merits."

Here, however, the position is different. In the *Castle Stores* appeal, the stipendiary gave an interpretation of the Ordinance, a matter of pure law. In the present appeal, he qualified that interpretation so as, in effect, to reverse it. If, as Sir Joshua submits, the first interpretation was correct, there must, I think, be an error of law on the face of the record. It is necessary, therefore, to examine the *Castle Stores* decision.

The appeal, like the present one, arose out of s. 7 of the Ordinance, which, so far as is material, reads as follows—

> "The licensing authority may, on the application of a licence holder who wishes to trade or carry on a business from new premises, amend a licence to enable the licence holder to do so."

(1) [1962] 2 Q.B. 173.

It was argued before the stipendiary that in the context "may" meant "shall" but he rejected this and held that the authority had a discretion, which had to be exercised judicially and within the spirit of the Ordinance. This has not been criticized and I accept it as correct.

The Ordinance does not give any express indication of the factors the licensing authority should take into account in deciding whether or not to amend a licence. In my opinion, this leaves the authority free to consider all relevant circumstances in exercising its discretion, bearing in mind that this is an ordinance which operates in restraint of trade and that the powers it confers should not be used arbitrarily. I think the authority is certainly entitled to take into consideration the matters set out in s. 14 as grounds for refusing a licence, particularly paras (b), (c) and (d). Paragraph (a) has no application. Paragraph (e) does not arise, as I am informed that no directions have been given under subs. (2). Paragraph (f), with which I shall deal in more detail shortly, may sometimes but will not, I think, usually, be relevant.

The stipendiary went on to say that

> "a licensee has an inherent right to trade from any place which is conducive to the enhancement of his business and should be allowed to move to new premises if such is his desire."

I think the use of the words "inherent right" was inappropriate and unfortunate. The stipendiary realized this in the present appeal, when he substituted the words "strong prima facie right." I think it would be better not to refer to rights at all. All that s. 7 is really doing is providing a simplified procedure whereby a person who wishes to change his premises may obtain a licence for the new premises without having to give notice under s. 10. I think it would have been better if the stipendiary had confined himself to saying that an application for amendment should not be refused without good reason.

Reverting to the *Castle Stores* appeal, the stipendiary went on to qualify his reference to an inherent right by saying

> "However, whenever a licence has been granted specifically to cater for a particular area the Licensing Authority would be justified in refusing to amend the licence if the licensee were to move to a different area which is, or was, already well-catered for."

I thought it proper to enquire of counsel whether there was any authority for introducing this factor of the needs of particular "areas" and I was told that there was none, but that it it had always been assumed by the licensing authority, the stipendiary as the appellate tribunal and by practitioners that this was a factor of importance. It appears to have been derived from s. 14(1)(f) of the Ordinance, which permits the licensing authority in its discretion to refuse a licence where

> "the needs of the community generally in the trade or business is [sic] to be carried on are adequately provided for:".

I think, with respect, that while there will be cases where the needs of a particular locality will be a proper factor to be considered, there is no justification for enlarging this into a factor of universal application. Indeed, I think in doing so the authority has fallen into the error of fettering its own discretion. Where some classes of goods are concerned, it is a convenience to the public to be able to buy in the immediate neighbourhood —this applies particularly to such goods as groceries, fresh vegetables and cigarettes—but this does not apply to expensive and sophisticated goods which people do not normally expect to buy in their own localities. Where such goods are concerned, I think the licensing authority need only consider whether the number of shops in Gibraltar dealing in such goods is sufficient for the needs of the community, regardless of where they may be situate, and when they are dealing with applications for amendment under s. 7 there is, of course, no question of any increase in the number of such shops.

I have dealt with this at some length, as it is a matter which arises also on Sir Joshua's second submission.

Returning to the decision in the *Castle Stores* appeal, the stipendiary went on to say that as the appellants "had a licence to trade in Gibraltar by virtue of being in existence before the Ordinance came into force," they were entitled to move to a better location, even though it was one in respect of which re-

fusal of a new licence would be justified. I can find nothing in the Ordinance to support this proposition. The Ordinance contains four provisions for the benefit of persons trading or carrying on business in Gibraltar prior to the operative date fixed by the Ordinance. They were exempted, under s. 10(3), from the requirement of giving notice of intention to apply for a licence under the Ordinance; they could not be refused a licence on any of the grounds contained in s. 14(1); no condition could be imposed under s. 16(1) in their licences which would prevent such persons selling any goods that they had been selling on the operative date; and they received their first licences without fee under s. 5(4). That is the extent of the benefit conferred on the "sitting" traders. As regards transferring to other premises, I cannot see that they are in any different position from new licensees.

Sir Joshua, in support of the stipendiary's statement, instanced the case of a tenant who might have to leave the premises he occupied at the operative date because at the end of his tenancy, his landlord wished to occupy them himself. In my opinion, that would be a factor which the licensing authority could properly, and no doubt would sympathetically, take into account but it would certainly not give the tenant a right to require the amendment of his licence to relate to any particular premises.

If, as I hold, the reason for allowing the *Castle Stores* appeal was wrong, it follows that the failure to follow it in the present appeal cannot amount to an error of law on the face of the record, and Sir Joshua's first submission must fail.

Sir Joshua then submitted that the stipendiary had erred in taking into account a matter which he ought not to have taken into account, that is, the number of shops of a similar nature within a limited sector of Main Street. This brings in again the matter of particular "areas", with which I have already dealt in general terms. Applying the principles I have formulated to the particular case, the class of goods in which the applicant deals is not among the day-to-day necessaries; indeed they are goods that are probably sold more to tourists than to residents. Also, the particular "areas" to which the licensing authority and the stipendiary refer are not what would ordinarily be thought of as residential areas but merely sectors of the main shopping street of Gibraltar. Going back to the wording of s. 14(1)(f), I cannot see that in deciding whether the needs of the community generally are adequately provided for as re-

gards electronics and sound reproducing equipment and so on, it makes the slightest difference whether the applicant carries on its trade at 78b or 305 Main Street. It has not been suggested that any other provision of the Ordinance has any relevance.

Sir Joshua's third submission was that the stipendiary had erred in that he had failed to take into account a matter which he should have considered, that is,the fact that the company had laid out a substantial sum in reliance on the statement of law in the *Castle Stores* appeal. In his decision on the present appeal, the stipendiary, referring to his earlier decision, said—

> "I should first explain that whenever I make a statement of general principle in any appeal it is intended as a guideline and not as a precedent binding the licensing authority or even this tribunal in the future exercise of its discretion."

I agree, of course, that decisions of the stipendiary are not binding on himself but I think that where he makes specific findings of law, they are binding on the licensing authority. That is by the way. The argument put forward by Sir Joshua is that where the stipendiary has made an unqualified statement of law in one appeal and a person has acted on it to his detriment in a matter leading to a similar appeal, the stipendiary ought to follow his earlier decision even though he believes it to be wrong, while expressing himself in terms that leave no doubt for the future.

I think there is substance in this argument, although I do not go quite so far. I think there is some help to be derived from the reasoning in the line of cases exemplified by *Bourne* v. *Keane* (1).. Those were cases where decisions of inferior courts had stood for a long time and rights had been acquired in reliance on them, and in such circumstances the highest court has sometimes considered it right as a matter of judicial policy to uphold the decision even though considering it wrong, because of the injustice that would otherwise result. The position here is, of course, entirely different: a decision was given a mere three years ago, which may well have been right but which was given for reasons which I consider wrong, and one person, the applicant, has in consequence acted to its apparent detriment. But we are not now dealing with rights but with the exercise of a discretion and I think that in exercising his discretion, the stipendiary should have regarded the fact that the applicant had

(1) [1919] A.C. 815.

been misled as one of the factors to be considered; not necessarily as the decisive factor but as one of some considerable weight.

I think, then, that there are two grounds on which I might make the orders sought. I should have hesitated to make them on the first ground alone, that the number of shops in arbitrarily determined sectors of Main Street selling the particular class of goods concerned was a factor which the licensing authority and the stipendiary should not have taken into account, but the second is, in my opinion, weightier, that the stipendary should have taken into account the injury which the applicant would suffer because of its reliance on the earlier statement of law. Taking the two together, I think it right to interfere. There will be an order of certiorari to quash the decision of the stipendiary and an order of mandamus directing him to reconsider the appeal in his discretion according to all relevant considerations and to the exclusion of all irrelevant considerations