

FOURTH SUPPLEMENT TO THE
GIBRALTAR GAZETTE L.R. 4/78.

No. 1,777 of 2nd NOVEMBER, 1978.

LAW REPORTS

*Note: These Reports are cited thus —
(1978) Gib. L.R.*

GARCIA and others v. ATTORNEY GENERAL

Supreme Court
Spry, C. J.

19 June 1978

*Constitutional law—fundamental rights — protection for privacy
—The Constitution, s. 7—Price Control Ordinance, s. 5.*

The plaintiffs, representing the Gibraltar Chamber of Commerce, sought a declaratory judgment on three questions, all arising out of s. 5 of the Price Control Ordinance (Cap. 177), as amended by Ord. No. 3 of 1978, which conferred certain powers of entry on the Consumer Protection Officer and the Assistant Consumer Protection Officer. The first two questions were whether s. 5 itself contravened s. 7 of the Constitution and here the plaintiffs claimed redress. The third was whether the exercise of the powers of entry would be a contravention of s. 7.

HELD: (1) The plaintiffs were not aggrieved by the enactment of the amending ordinance so as to be able to claim redress.

(ii) None of the exceptions contained in s. 7 (2) of the Constitution applied and therefore any exercise of the power of entry would be a breach of the Constitution.

Cases referred to in the judgment

Maharaj v. A.G. of Trinidad and Tobago (No. 2) [1978] 2 W.L.R. 902

D.P.P. v. Nasralla [1967] 2 A.C. 238

de Freitas v. Benny [1976] A.C. 239

Small v. Bickley (1875) 32 L.T. 726

Davies v. Winstanley (1930) 95 J.P. 21

Olivier v. Buttigieg [1967] A.C. 115

Originating Summons

This was an originating summons for a declaratory judgment that s. 5 of the Price Control Ordinance, as amended, contravened the Constitution, with consequent redress, and that the exercise of the powers conferred by the section would contravene the Constitution.

A. V. Stagnetto for the plaintiffs

The Attorney General (J. K. Havers, Q.C.) defendant

22 June 1978: The following judgment was read—

The Price Control Ordinance (Cap. 177) was amended by the Price Control (Amendment) Ordinance, 1978 (No. 3 of 1978), which repealed and replaced s. 5, the new section conferring on the Consumer Protection Officer and the Assistant Consumer Protection Officer (to whom I shall refer collectively as the C.P.O.) the power at any reasonable time to enter any premises and require any person carrying on a business which includes the sale of any uncontrolled supplies or the provision of uncontrolled services to produce for examination accounts, books and other documents relating to that business. The object of this power as set out in the section is to enable a decision to be taken whether such goods or services should be controlled. Failure to comply with any such requirement constitutes an offence.

The plaintiffs, who are the officers of the Gibraltar Chamber of Commerce, claim that s. 5, as replaced, is in conflict with s. 7 of the Constitution of Gibraltar and they claim redress under s. 15 of the Constitution.

Section 7 of the Constitution, so far as it is relevant, reads as follows—

Protection
for privacy
of home
and other
property.

“7. (1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

- (a) in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development or utilisation of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit;
- (b) for the purpose of protecting the rights or freedoms of other persons;
- (c)
- (d)

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

By originating summons, the plaintiffs are asking the court to decide three questions. The first two are whether s. 7 of the Constitution has been, is being or is likely to be contravened by s 5 of the Ordinance and whether the powers conferred upon the C.P.O. are in contravention of s. 7.

The learned Attorney General, who is cited as defendant, has argued that these two questions are misconceived. He submits that it is only an actual search or entry that may offend against s. 7, not a law which confers powers of search or entry. He supported this argument by comparing s. 7 with s. 14, which provides that no law shall be discriminatory. He submitted that there is no evidence that any entry has been or is being made under the powers conferred by s. 5 and no evidence showing any likelihood of any such entry and therefore that so far as the plaintiffs are claiming redress under s. 15 of the Constitution, the application must fail. I think there is substance in these arguments, although I do not go quite as far as the Attorney General. I think the use of the words "that provision" in the exception to s. 7(2) indicates that there may be circumstances in which the enactment of a law would itself call for redress, but so far as the present application is concerned, I agree with the Attorney General. Whether or not the amending Ordinance is ultra vires, I do not think the plaintiffs can be said to be aggrieved by its enactment, so as to be able to claim redress under s. 15. I order that the first two questions be struck out.

Before leaving these questions, however, I would remark that Mr. Stagnetto, who appeared for the plaintiffs, commented on the meaning of the word "redress"; there is a considered opinion on this in *Maharaj v. A.G. of Trinidad and Tobago* (No. 2)(1), a decision of the Privy Council which, while not strictly binding here, since it was interpretative of the Constitution of Trinidad and Tobago, would be treated with the highest respect in the courts of Gibraltar.

The third question is whether, if the C.P.O. were to exercise the powers conferred by s. 5, such exercise would be a contravention of s. 7 of the Constitution. This is an application for a declaratory judgment, not an application for redress, but the Attorney General conceded that it may properly be brought.

Mr. Stagnetto argued that s. 7(1) confers a right on the individual protecting him from any entry on his premises without his consent. Subsection (2) then provides certain exceptions, themselves governed by the qualification that the provision or the thing done must be reasonably justifiable in a democratic society. Mr. Stagnetto argued that nothing in para. (a) is relevant and that "rights and freedoms" in para. (b) must relate to rights and freedoms entrenched in the Constitution. It is conceded that paras. (c) and (d) have no relevance. Finally, Mr. Stagnetto argued that while powers of entry may be reasonable where a breach of the law is suspected, it is not reasonable to confer such powers merely to collect information for the purpose of deciding whether the control of particular goods or services is desirable.

The Attorney General submitted that the balance of public and private interests must always be considered. He argued that the Constitution does no more than enshrine the principles of law generally accepted in the United Kingdom, where powers of entry exist that are not restricted to circumstances where an offence is suspected. I think, with respect, that what were enshrined in the Constitution were the fundamental rights and freedoms already enjoyed in Gibraltar (see s. 1 and *D.P.P. v. Nasralla* (2) and *de Freitas v. Benny* (3)). Section 32 of the Constitution gives the Legislature power to make laws, but only subject to these enshrined rights. I think it is immaterial that there are provisions similar to s. 5 in England, because England has no written constitution.

(1) [1978] 2 W.L.R. 902.

(2) [1967] 2 A.C. 238.

(3) [1976] A.C. 239.

The Attorney General went on to argue that s. 5 only gives a right of entry, not a right of search, and entry can only be made at reasonable times. He submitted further that the protection against entry should be construed as protection against the exercise of powers after entry. The only further power conferred is to require the production of documents, which does not offend any fundamental right. Moreover, he argued that entry at reasonable times meant during business hours, when, at least where shops are concerned, there is an implied consent to entry by anyone. Therefore, the C.P.O.'s right is no more than that of any ordinary citizen, and having entered, he can do no more than request production of books and if it is refused, must take his leave.

With respect, I am not persuaded by these arguments. A request for production of books has a sanction behind it, because failure to comply is a criminal offence. I agree that business hours would be "reasonable times" within the meaning of the section but I am by no means sure that reasonable times is necessarily restricted to business hours. Neither *Small v. Bickley* (1) nor *Davies v. Winstanley* (2) is authority for such a proposition. I agree that there is an implied permission to enter on shop premises, though I think it is restricted to entry for limited purposes, but in any case s. 5 gives the power to enter "any premises" and that may well include office premises to which the public have no access.

In my opinion, the proper approach to the question is this. First, we are dealing with entry without the consent of the owner of the premises—when the owner consents, there is no problem—therefore, *prima facie* s. 7 of the Constitution applies. Secondly, we must look to see if any of the exceptions contained in subs. (2) applies: I cannot see that any does. If entry were restricted to cases where gross profiteering was suspected, it might be possible to argue that public morality was involved, but s. 5 is not so restricted. The level of legitimate profit may vary between different classes of goods and the fact that in relation to particular goods a trader may be making a profit higher than the C.P.O. considers desirable in the public interest, does not necessarily mean that the trader's conduct is immoral.

(1) [1875] 32 L.T. 726.

(2) [1930] 95 J.P. 21.

The only other exception that might be relevant, and the one which the Attorney General invoked, is that in para. (b), the protection of the rights and freedoms of other persons. Mr. Stagnetto submitted that those words must mean rights and freedoms protected by the Constitution. The Attorney General suggested that they might include a right to have consideration given to the need for price control to be applied to certain goods or services, since this is the accepted method of protecting the public from exploitation. I do not think so. I think the reference to the rights and freedoms of others, when read in the light of s. 1 of the Constitution, must mean the fundamental rights.

If any of the exceptions had applied, the third step would have been to consider whether it had been shown that the exercise of the powers was not reasonably justifiable in a democratic society; that does not arise in the present case.

I do not ignore the importance of price controls in a restricted community in times of inflation, but I think the Constitution must be interpreted and applied strictly. Moreover, I do not think it is open to this court to weigh the public good and the private interest and to prefer the former, when the provision intended to protect it infringes the Constitution. In the judgment of the board delivered by Lord Morris of Borth-y-Gest in *Olivier v. Buttigieg* (1) it was said—

“their Lordships consider that where ‘fundamental rights and freedoms of the individual’ are being considered a court should be cautious before accepting the view that some particular disregard of them is of minimal account. This is not to say that a court is required to spend its time upon matters which may be ‘merely frivolous or vexatious’The present is no such case but rather one where an important question of principle is involved.”

I think those words are appropriate to the present case. This is not a frivolous matter, but one which seriously affects the business community, since under s. 5 a person has to produce all the books of his business, even though the C.P.O.'s need may be for information concerning only a minor part of that business.

(1) [1967] A.C. 115, at p. 136.

Accordingly, there will be a declaratory judgment in favour of the plaintiffs that the exercise by the Consumer Protection Officer or the Assistant Consumer Protection Officer of the powers conferred by s. 5 of the Price Control Ordinance would be in breach of the Constitution.