[1991–92 Gib LR 129]

R. v. DIRECTOR OF LABOUR AND SOCIAL SECURITY, ex p. CHAINANI TRADING LIMITED, R. CHAINANI and V. CHAINANI

SUPREME COURT (Kneller, C.J), June 25th, 1991

Employment—foreign workers—company director—director's share-holding irrelevant to status as worker or self-employed person and improper consideration in deciding whether foreign worker under Employment Ordinance, ss. 18 and 20 requiring work permit—nature of work is material consideration under Ordinance

Employment—Director of Labour & Social Security—performance of duties—Director required, as administrative decision-maker, to act consistently and fairly in exercising statutory power to grant work permit—policy/procedure to be adopted to ensure fair treatment—duty not to change policy without due warning and opportunity for applicants to be heard

Administrative Law—judicial review—legitimate expectation—applicant for benefit may legitimately expect administrative decision-maker to act in accordance with earlier communicated promise or practice—change of policy to be announced and applicant given opportunity to be heard—no enforcement of earlier policy in favour of applicant if found to be ultra vires and illegal

The applicant company sought judicial review of a decision by the Director of Labour & Social Security to refuse employment permits to its directors.

The second and third applicants were company directors and owners of a tobacco retail business. The company applied on behalf of the third applicant and its managing director to the Director of Labour & Social Security for permits of employment, and was told that the company's managing director was not required to have such a permit. The Director wrote to confirm that the third applicant, as a director, *did* have to have one, because he was not a majority or equal shareholder in the business and therefore could not be considered self-employed. In accordance with this advice, the company's three directors re-organized its shareholding so that all of them held equal numbers of shares and would be considered self-employed. Whilst awaiting confirmation of their status from the Director, the company acquired accommodation for them. It was asked to

supply details of the ordinary directors' proposed day-to-day duties, hours of work and remuneration and replied that as family members they would be running the retail business full-time and would each receive one-third of the profits.

Instead of stating that no employment permits were now needed, the Director advised the company that the two ordinary directors *did* require permits, and invited it to open a vacancy with the Department of Labour & Social Security to enable the Department to send along local candidates for employment. The applicants then commenced judicial review proceedings, seeking a declaration that they did not require permits and that the decision that they did require them be quashed, or that they be granted the necessary permits. Meanwhile, they sought an explanation of why the two directors were not to be considered as self-employed. The Director responded simply that he could not accede to their request and refused to give reasons.

A new policy was then adopted by the Department, requiring that all company directors obtain permits. Directors whom the Department had previously accepted as self-employed (including the first applicant's managing director) were to be granted permits on submitting a formal contract of employment.

The applicants submitted that (a) the Director had failed to consider that a company director, under Gibraltar company law, was not a director as defined in s.18 of the Employment Ordinance; (b) the Director had failed to take into account the commercial reality of their business—that as family members they had all to work full-time in the business to make it profitable and their hours and range of duties far exceeded those an outside employee would be willing to contemplate; (c) given his earlier advice that equal shareholding directors could be considered self-employed, the Director's decision that they needed work permits was in breach of his duty to act fairly and consistently in his dealings with the public, and consequently an abuse of power; (d) permits had been granted to ordinary directors of other companies whom the Department had accepted as self-employed, which was further evidence of unfairness; and (e) the need for a permit depended on the type of work performed by them and not their shareholding in the company: if the work were not clerical, manual or similar work, the company did not need a permit to employ them.

The Director submitted in reply that (a) it was the policy under the Employment Ordinance to give local people the first chance of employment in Gibraltar, and accordingly the Director had properly asked the company to open a vacancy with the Department; he had no discretion to issue permits to the applicants until that process was complied with; (b) the nature of the work performed by the applicants fell within "clerical, manual or other similar work" which defined a non-resident "worker" for the purposes of the Ordinance, and it was irrelevant that they were at the same time company directors; (c) the second and third applicants could own and run their business without working or

residing here themselves, and they had acted prematurely in acquiring premises before their status had been confirmed; and (d) it was not open to the applicant company to seek judicial review since its remedy for the refusal of work permits lay in an appeal to the Control of Employment Appeals Tribunal, under s.23 of the Employment Ordinance.

Held, dismissing the application:

(1) Under ss. 18(1) and (2), and 20 of the Employment Ordinance, employers were required to hold employment permits in respect of a non-resident worker employed as a manual labourer, clerical worker or other similar worker. It was immaterial whether such a worker received any remuneration, or whether he was at the same time a director or principal of the company or firm for which he worked. It was also immaterial whether he performed other work that did not qualify him as a worker. It was for the Director to determine whether the second and third applicants were workers within the terms of the Ordinance, not the court. Under s.21, before granting permits, he had to be satisfied that certain criteria were met, including that there were no registered local persons whom he believed could fill the jobs (paras. 41–43).

(2) The Director, as an administrator, had a duty to treat like cases alike when exercising his statutory powers. Without detailed guidelines and clear, reasoned decisions consistency would be hard to achieve. Inconsistency was generally unfair and left the administrator open to the charge that he had misunderstood his powers. An administrator should adopt a policy or procedure within the statutory framework to ensure consistency and fair treatment. Any change should not be without due warning and applicants should be given the opportunity to be heard. Furthermore, an applicant could legitimately expect that an administrator would act in accordance with an earlier promise or practice unless a change of policy had been announced and he had had the opportunity to challenge it (paras. 44–46).

(3) The application for judicial review would nevertheless be dismissed. The policy underlying the Ordinance, favouring locals for employment over non-residents was not unlawful or unconstitutional, although it discriminated initially against foreigners. The Director had begun by applying a test for employment that was *ultra vires* the Ordinance and illegal (since the Ordinance did not make an employee's shareholding relevant) and the court would not grant judicial review to enforce the earlier illegal policy—but his later policy based on the applicants' role within the business was correct. The facts supported the finding that although the applicants were directors and equal shareholders and did other duties, they were doing clerical, manual and sales staff work, and were consequently "workers" within the meaning of the Ordinance. It was also significant that the company had complied with the Director's request to send their draft employment contracts and was given

a permit to employ its managing director. The Director himself had not yet decided the applicants' status since the company refused to submit fresh applications for permits under the new policy, so he had not yet acted inconsistently in the matter. Furthermore, the applicants' allegations that he had granted permits to another company's directors by changing his mind over their self-employed status were unsubstantiated (paras. 52–57).

(4) Even if the Director had acted inconsistently, unfairly, or contrary to the applicants' legitimate expectation, their remedy was not judicial review but an appeal to the Control of Employment Appeals Tribunal. The company had first to exhaust other remedies before it could seek judicial review (para. 58).

Cases cited:
(1) *Collis Radio Ltd.* v. *Environment Secy.* (1975), 29 P. & C.R. 390; 73 L.G.R. 221, considered.
(2) *HTV Ltd.* v. *Price Commn.*, [1976] I.C.R. 170; (1976), 120 Sol. Jo. 298, considered.

Legislation construed:
Employment Ordinance (1984 Edition), s.5:
"(1) There is hereby established a tribunal to be known as the Control of Employment Appeals Tribunal . . ."
s.18: The relevant terms of this section are set out at para. 43.
s.20: The relevant terms of this section are digested at para. 41.
s.21(1) The relevant terms of this sub-section are digested at para. 42.
s.23(1): "Where the Director—
(*a*) refuses to grant a permit or extend the validity of a permit; or
(*b*) makes a permit subject to any condition; or
(*c*) gives notice under section 22(3) of his intention to revoke a permit—
the employer in any such case, and also the worker in the case specified in paragraph (*c*), may within seven days after being notified in writing of the Director's decision appeal against it to the Control of Employment Appeals Tribunal."

H.K. Budhrani for the applicants;
P. Dean, Senior Crown Counsel, for the Crown.

1 **KNELLER, C.J.:** Chainani Trading Ltd. ("the company") is a company incorporated in Gibraltar. It paid £103,000 on August 18th, 1989 for the leasehold of 303 Main Street, Gibraltar and on those premises it retails confectionery, groceries, souvenirs, spirits, tobacco and wines. Mr. Vinod Chainani and Mrs. Rinku Chainani are and have been, since June 6th, 1989, two of the three directors of the company. On that

day each acquired 20% of the authorized, issued and paid-up share capital of the company. Mr. Haresh Chainani is the managing director of the company and he acquired the remaining 60% of the shares of the company also on June 6th, 1989. Mrs. Rinku Chainani is the wife of Mr. Haresh Chainani.

2 On September 28th, 1989 the company applied under Part III of the Employment Ordinance ("the Ordinance") to the Director of Labour and Social Security ("the Director") for permits of employment for Mr. Vinod Chainani and Mr. Haresh Chainani. The Director replied on October 24th, 1989 telling the company that Mr. Haresh Chainani, as its managing director, did not have to have a permit of employment. Three days later someone in the company asked the Director to confirm that Mr. Vinod Chainani did not have to have one. The Director wrote on November 23rd, 1989 with the dispiriting news that he *did* have to have one. The Director explained why on January 19th, 1990. It was because he considered that only those who were majority shareholders or held an equal number of shares to the other shareholders could be considered to be self-employed, and it followed that self-employed people did not have to have permits of employment under the legislation here in Gibraltar.

3 So the shareholders and directors of the company decided on February 27th, 1990 to re-organize the shareholding of the company so that Mr. Haresh Chainani, Mr. Vinod Chainani and Mrs. Rinku Chainani each became the registered beneficial owner of one-third of the company's share capital. Having done this, the company applied on March 28th, 1990 to the Director for his confirmation that as Mr. Vinod Chainani and Mrs. Rinku Chainani now held an equal number of shares to those held by Mr. Haresh Chainani they were all to be considered as self-employed for the purposes of the Ordinance and, in consequence, did not have to have employment permits. The three Chainanis presumed that the Director would give that confirmation and then they could all live and work in Gibraltar for some time to come, if not for ever after.

4 The company bought a two-bedroomed flat at Ocean Heights for £44,000 to accommodate these three directors and shareholders. But the Director's reply to the company on May 16th 1990 was that Mr. Vinod Chainani and Mrs. Rinku Chainani had to have permits of employment before they could work in Gibraltar. He advised the company "to open a vacancy" with his department. This manoeuvre is to give the Director an opportunity to send along local British subjects, especially Gibraltarians, to the company for employment if they wished to have people working in the company's retail shop in Main Street.

5 The company, however, applied to this court under the Rules of the Supreme Court 1965, O.53, r.3, on August 16th, 1990, for leave to apply for judicial review of the Director's decision of May 15th, 1990, set out in

his letter dated May 16th, 1990. What the company, Mr. Vinod Chainani and Mrs. Rinku Chainani, who described themselves as directors of the company, wanted was:

> "1. A declaration that the decision of the Director that Mr. Vinod Chainani and Mrs. Rinku Chainani require permits of employment in order to work in Gibraltar was unlawful, invalid and of no effect.
>
> 2. Certiorari to quash his decision.
>
> 3. Further, or in the alternative, mandamus to order the Director to issue the company with permits to employ Mr. Vinod Chainani and Mrs. Rinku Chainani as company directors."

6 On what did they base their application? According to the pleadings, their reasons for coming to this court were that the Director misconstrued the provisions of s.18 of the Ordinance, failed to take into account relevant considerations, and in due course reached a decision which no reasonable Director properly advised could have reached.

7 They provide particulars of what they allege and here they are:

(a) First, the Director failed to take into account the fact that a company director, by virtue of the nature of the duties and obligations imposed and the powers conferred upon him by the law relating to companies here in Gibraltar, is not a worker as defined by s.18(1) and (2) of the Ordinance.

(b) Secondly, the Director failed to take into account the duties that Mr. Vinod Chainani and Mrs. Rinku Chainani were to fulfil in the service of the company, as set out in the letter to the Director on behalf of the company dated May 2nd, 1990.

(c) And then, further or in the alternative, in the light of the criteria or guidelines set out by the Director and sent to the company by his letter of January 19th, 1990 for the treatment of company directors as self-employed persons, the decision of the Director that these applicants required permits of employment to work in Gibraltar was in breach of the Director's duty to act with fairness and consistency in his dealings with the public. This constituted an abuse of his powers as Director under the Ordinance.

8 The applicants admit that there has been some delay in bringing these proceedings but explain the delay as being due to their desire to find out the reasons why the Director thought it necessary for permits of employment to be obtained by the company for Mr. Vinod Chainani and Mrs. Rinku Chainani, and their earnest attempt to put right any defect or irregularity in their application to the Director which might ease the way for him to grant the status they sought without recourse to the litigation that is now before the court.

9 A letter was sent off to the Director on May 18th, 1990 on their behalf, asking him to explain why Mr. Vinod Chainani and Mrs. Rinku Chainani could not be considered to be self-employed persons. The Director took two months to reply and when he did so in his letter dated July 16th, 1990 all he said was that he "was unable to accede to the company's request." Then the company and the Chainanis took legal advice as to their rights and remedies, if any, and one of the options they were given was to comply with the advice of the Director that the company should ask for permits of employment for Mr. and Mrs. Chainani, to tell his department about these appropriate vacancies and to fill in all the forms that seem to be necessary.

10 The Director adopted, and announced in mid-July 1990, a new policy demanding that all company directors should obtain permits of employment. They and their companies were required to submit formal contracts of employment to the Director and those whom he had previously accepted as self-employed would be issued with permits of employment.

11 The Director asked the company and Mr. Haresh Chainani to submit his formal contract of employment on July 19th, 1990. They did so and Mr. Haresh Chainani duly received his permit of employment. Mr. Vinod Chainani and Mrs. Rinku Chainani were then advised that if the Director had properly considered their applications for employment they would have had permits as self-employed persons just as Mr. Haresh Chainani had obtained his first one, and even after the Director changed his policy they would have had their second employment permits just as Mr. Haresh Chainani had his second one.

12 This was borne out by the Director's granting permits of employment to two directors of another company on August 10th, 1990. He had refused to consider them as self-employed, but on studying the representations of Mr. Budhrani, the Director had relented. This persuaded Mr. Vinod Chainani and Mrs. Rinku Chainani that the Director's decision not to issue them with employment permits was wrong in law, unfair, inconsistent, an abuse of his powers and properly the subject of proceedings for judicial review.

13 At the risk of covering some of that ground again, I turn to the correspondence between Mr. Budhrani, for the company, and the Director, between September 27th, 1989 and July 31st, 1990. At first he applied for permits of employment for Mr. Haresh Mulchand Chainani and Mr. Vinod Chainani. Mr. Haresh Chainani was the owner of 60% of the issued and paid-up share capital of the company and Mr. Vinod Chainani had only 20% of it. They had to spend all their time and energy in the company's business, 10 hours a day, 7 days a week, so each needed an employment permit. That was Mr. Budhrani's thinking in late

September 1989. When the company had permits to employ them it would ask for social insurance contribution cards for each "on a self-employed basis." It may be that there is some contradiction there.

14 Little short of a month later, the Director informed Mr. Budhrani that the company did not have to have a permit to employ Mr. Haresh Mulchand Chainani. He did not say so in those words. Instead, he said: "Mr. Haresh Mulchand Chainani does not require a permit of employment in order to carry out his activities within the above-named company." Mr. Haresh Mulchand Chainani, it will be recalled, was the company's managing director and majority shareholder at the end of October 1989, but the Director did not mention those matters then. The Director asked Mr. Budhrani to tell Mr. Haresh Mulchand Chainani to call at the Immigration Department for his identity carnet, and at his own Department to collect his Social Insurance card. This letter was copied to the Principal Immigration Officer and also to the Commissioner of Income Tax.

15 Then there is another document that does not seem to be dated, which states that anybody who wants to be registered as self-employed must produce a certificate of incorporation of the company, the particulars of the directors, the allotment of shares and a Gibraltar identity carnet.

16 A second letter of the same date from the Director refers to Mr. Rinku Chainani (but that must refer to *Mrs*. Rinku Chainani) and says he cannot accede to the request of the company for Mrs. Rinku Chainani to be treated as a self-employed person. It was pointed out to the Director that nobody had asked for Mrs. Rinku Chainani to be treated as a self-employed person. The application had been made by the company to have Mr. Haresh Mulchand Chainani and Mr. Vinod Chainani accepted as self-employed. The Director had already said that Mr. Haresh Mulchand Chainani would be treated as self-employed and Mr. Vinod Chainani was waiting to be designated as self-employed and was not required to have a permit. He, too, wanted to carry out his work as a director of the company.

17 A curt letter came back from the lady who was dealing with all this for the Director, saying that the Director could not agree to Mr. Vinod Chainani's being considered a self-employed person. The company came back again with a letter from Mr. Budhrani asking for the Director's reasons for this decision. A reason was then vouchsafed. Mr. Vinod Chainani held 400 of the company's 2,000 allotted shares and he was therefore a minority shareholder. He could not be treated as a self-employed person. Mr. Vinod Chainani must have a permit of employment.

18 Mr. Budhrani said this was a matter of some surprise. He knew of other shareholders with only 25% to 30% of the share capital in their

companies who had been treated by the Director as self-employed. He would like to know what the Director thought was the minimum percentage of shares a director of any company should hold in Gibraltar before he would be prepared to look upon that director as a self-employed person. The Director's representative replied half-way through January 1990 that anybody who was a majority shareholder or held an equal number of shares to all the other shareholders would be treated by his Department as self-employed.

19 At the end of February 1990 the company and the directors had reorganized themselves so that all the Chainanis (and this is where Mrs. Rinku Chainani makes her entry into this saga) held just one-third of the issued share capital of the company. A copy of the minutes of a meeting of the directors of the company dealing with the transfer of the shares, and copies of the share certificates issued to the three Chainanis, reflecting the fact that they all had the same number of shares within the company, were sent by Mr. Budhrani to the Director, who was asked to rule that Mr. Vinod Chainani and Mrs. Rinku Chainani were regarded by him to be self-employed for the purposes of the Ordinance.

20 The Director's representative asked the company in mid-April to send back some details of the duties that Mr. Vinod Chainani and Mrs. Rinku Chainani would be engaged in, their hours of work and whether or not they would be paid any remuneration. The reply in early May was that these two Chainanis would be working each day in the running of the business of the company, tending to its customers and its suppliers, preparing its accounts and reporting at the meetings of its directors and shareholders on the performance of its statutory obligations. Mr. Budhrani reminded the Director that this company was open for business for no less than 12 hours per day, 7 days a week, and that in this sort of company each director was expected to devote as much time as was necessary for the efficient conduct of its business. He then revealed that the company would pay all the Chainanis directors' fees representing one-third of the profits of the company for each of them.

21 What was the answer of the Director, or those who wrote on his behalf, to all this "sweet reasonableness"? Mr. Vinod Chainani and Mrs. Rinku Chainani had to have permits of employment if they wanted to work in Gibraltar. They were to come along to the Director's Department and "open a vacancy." Mr. Budhrani reminded the Director that by an earlier letter the Director had stated that "persons who are majority shareholders or hold an equal number of shares to the other shareholders are to be considered as self-employed." Why, asked Mr. Budhrani, could Mr. Vinod Chainani and Mrs. Rinku Chainani not be considered self-employed? The Director sent back a letter in mid-July 1990 saying he was unable to give his reasons.

22 The next thing that happened was that the Director sent a letter to Mr. Haresh Mulchand Chainani some time in July 1990 (and there is no specific date for this letter but it was received on July 19th, 1990), telling him that he would now need a permit of employment in order to carry out his activities within the company and he must get that permit before July 31st, 1990. Three copies of a contract of employment, together with a form L2 had to be completed and returned to the Director's department (counter No. 6) as soon as possible together with Mr. Haresh Mulchand Chainani's passport.

23 The Chainanis, Mr. Budhrani added, were Hindu Indian nationals from Bombay: economic immigrants who, together, had put £100,000 of their savings and borrowings into the company, bought the leasehold premises for £103,000 and a flat for £44,000 in Ocean Heights, and mortgaged the flat to the hilt. They were directors, majority shareholders and working all hours of the day, seven days a week. They paid themselves out of the profits. Clearly they were self-employed, and not manual or clerical workers or anything of a similar nature. The commercial reality was that the company would fail if it were to employ anyone who would only agree to work, perhaps, 39 hours per week or maybe a little longer if paid overtime with, say, the right to have one or more hours off for a mid-day meal, in Spain or Gibraltar.

24 Mr. Dean countered all this with a chronology of the moves of the Chainanis. The Chainanis purchased the lease of the premises on August 18th, 1989. The company applied for permits for Mr. Haresh Mulchand Chainani and Mr. Vinod Chainani on September 28th, 1989. The Director had asked the company on April 19th, 1990 for information on matters which would help him decide just what the work of Mr. Vinod Chainani and Mrs. Rinku Chainani would be, and they purchased the flat on April 30th, 1990. The company and the Chainani directors could still count the flat and shop as assets of the company and, indeed, use them as such. The directors could run the company and its business without living here in Gibraltar. The issue of a work permit, Mr. Dean conceded, would lead to the issue of a residence permit. And perhaps that is just what this application is all about.

25 The Director did not file an affidavit in reply, presumably on advice, and because he did not believe he had to give any reasons for his decision, or any further reasons for it.

26 The court must turn to the submissions of counsel on all this; just what they were and what persuaded the court to come to the decision it does at the end of this judgment. Mr. Budhrani cited the long title of the Employment Ordinance, its ss. 18, 20, 21 and 23, together with the decision in *HTV Ltd.* v. *Price Commn.* (3); and Mr. Dean relied on the same authorities. Not unexpectedly, each counsel reached different

conclusions on the facts and the law. Mr. Budhrani submitted that the Director's decision should be reviewed and reversed, while Mr. Dean urged the court to do no such thing.

27 Mr. Budhrani's submission was as follows. The Director has the power to grant a permit to an employer to employ someone who fulfils all the statutory requirements in those sections. He is not bound by what description the employer gives to the work of the man he wants to employ. For example, Mr. Budhrani suggested, a bank may say the man to be employed is a director, but if that man is a director only because his father is the major shareholder and the son's work is that of a book-keeper, then the son is a worker and not self-employed. The Director, in other words, must concentrate on classifying the work the man is going to do. The applicant employer does not need a permit to employ a non-resident to do work which is not clerical, manual or otherwise. Those are the criteria that must be applied by the Director.

28 All this is, according to Mr. Budhrani, the law and, reassuringly, common-sense. The tests have nothing to do with shareholding and they should not be applied differently to three applications by one employer, because that does not reflect the law, is capricious and therefore merits judicial review.

29 The Director has the powers and duties, and must (for he has no discretion) act fairly and consistently and decide whether a man, according to the Ordinance, is a worker or not. If the Director has a policy, continued Mr. Budhrani, then he must apply it fairly. Here the Director failed to do this when he ruled that a majority shareholder is not a self-employed person, because that was a definition which was not set out in the Ordinance.

30 The Director was also acting beyond the scope of his powers, something that was most apt for judicial review. The Director compounded this error by stating that majority shareholders, or those who held an equal number of shares to the other shareholders, were self-employed, because that is not to be found in the Ordinance and is clearly irrelevant.

31 Then, when the Chainanis, on that advice or opinion of the Director, reorganized their shareholdings to comply with what the Director told them, the Director asked them to describe the duties of Mr. Vinod Chainani and Mrs. Rinku Chainani. This, in fact, accords with the provisions of the Ordinance. He also asked them to specify the hours of work and their remuneration which were matters that are not reflected in the Ordinance and, again, are irrelevant.

32 The Director ruled that they needed permits, and when the company asked him for his reasons, although he had given his reasons before he

changed his policy, he said on the second time round that he was unable to do so.

33 Later the company was told by the Director it now had to apply for a permit to employ Mr. Haresh Mulchand Chainani even though the Director had previously ruled that he did not need one because he was a director with the majority shareholding and was therefore considered to be self-employed. The Director had this new policy from about the middle of July 1990 and even that was not consistent with the requirements set out in the Ordinance.

34 Mr. Budhrani conceded that it was correct that the Ordinance did not insist that the Director should give reasons for refusing an applicant a permit to employ a non-resident, but without such reasons the applicant could not foresee when such a non-resident would be exempt, or would not be able to appeal from the decision of the Director. Anyway, Mr. Budhrani pointed out, the Director had given reasons before the change of policy and they were outwith the Ordinance.

35 Later, on August 10th, 1990, the same Director under the same Ordinance had given two permits of employment to two directors of a different company who had previously been denied the status of self-employed persons. This decision was after the Director had made his change of policy. It was a sobering thought, remarked Mr. Budhrani, that had Mr. Vinod Chainani and Mrs. Rinku Chainani had the same shareholding as Mr. Haresh Mulchand Chainani on November 6th, 1990, they too would have been given their permits to work here.

36 Mr. Dean's reply was that the policy of the Ordinance was to give the "locals" the first chance of employment as workers here. The court should investigate what the Chainanis' work was, whatever it was called, just as the Director had to do. There had, indeed, been a change of policy on all this. On May 16th and 18th, 1990 the Director invited the company to "open a vacancy" with his Department for Mr. Vinod Chainani and Mrs. Rinku Chainani, and to fill in a contract of employment for Mr. Haresh Chainani, respectively, and then apply for permits. But the company, Mr. Vinod Chainani and Mrs. Rinku Chainani did not do so. Instead, three months later, they asked the court to review the Director's decision. The company and Mr. Haresh Chainani meanwhile, meekly applied by submitting his contract, and the consequence was the company was given a permit to employ Mr. Haresh Chainani.

37 The company, however, set out the duties of Mr. Vinod Chainani and Mrs. Rinku Chainani in its letter of May 2nd, 1990 to the Director, who, standing back from them, decided that they were to do clerical or manual work or work of a similar nature. They were workers, although they might also be directors. They were not self-employed people. The company had not suggested that it employed anyone else as a worker. A retailer such as the company could not carry out its retail business without such workers. Remuneration was immaterial.

38 They have not been refused permits yet. The Director had no choice but to instruct the company to open up a vacancy with his Department for each of them. The Director cannot issue the company with such permits unless it and the proposed employees comply with the requirements of the Ordinance. He had no discretion in all this. He has to apply the law. The company had not bothered to comply with the requirements of the law.

39 Suppose the Director had refused the company such permits. What, asked Mr. Dean, was its remedy? It could appeal to the Control of Employment Appeals Tribunal: see ss. 5 and 23.

40 Now I can turn to the relevant law and set it out shortly. The Employment Ordinance was enacted on December 3rd, 1953 and came into force on May 1st, 1954. Its long title is "AN ORDINANCE TO CONTROL EMPLOYMENT AND TO REGULATE CONDITIONS OF EMPLOYMENT." Section 5 establishes the Control of Employment Appeals Tribunal, and s.23(1)(a) gives the employer a right to appeal within seven days of being notified in writing of the decision of the Director refusing to grant a permit to the company to employ someone as a worker.

41 "Part III—Restrictions on Employment" begins with non-residents and s.18 defines a "resident of Gibraltar" and a "worker." Section 20 prohibits the employment of anyone as a worker who is not a resident of Gibraltar without first notifying the manager of the Central Employment Exchange of the particulars of the vacancy to be filled, or the employment of a non-resident without a permit, which the Director only is thereby empowered to grant.

42 Section 21 deals with the issue of permits for non-residents. The Director may not issue a permit for the employment of a "worker" who is not resident unless the Director is satisfied that all the requirements set out in s.21(1) have been fulfilled. These include, in my homely terms:

(a) there is no registered local whom the Director opines can do the job;

(b) the terms and conditions are satisfactory in law;

(c) the employer has made adequate efforts to find a local;

(d) the employer is going to employ the non-resident in the job;

(e) the employer's draft written contract with the intended "worker" has been approved by the Director;

(f) decent accommodation is available for the worker.

43 Let me return for a moment to the definition of a "worker" in s.18(1). Shorn of its phrases that are irrelevant to this case, a "worker" means "any person to whom [the] Ordinance applies, who is to be employed as a servant by way of manual labour, clerical work or

otherwise and whether or not in receipt of any salary, wages or remuneration in respect of such employment . . .” When it comes to non-residents, then for the purpose of ss. 20–26 of the Ordinance, a “worker” (again in my simpler words) is a person who undertakes clerical or manual or similar work. It is also immaterial (s.18(2)) “that he does or does not receive any salary, wages or other remuneration in respect of that work” or “that where he undertakes that work for . . . a company or a firm, he is also a director or principal of that company or firm” or that, “while undertaking that work, he also holds any other position or performs any other function or work that is not the position or a function or work of a worker.”

44 Turning now to something quite different, treating like cases alike or being consistent is an administrative virtue and, without doubt, good government. It is, presumably, the purpose of bureaucratic process. Taxpayers, for example, should be treated in the same way as other taxpayers in similar circumstances. The Ordinance is the statutory framework and the administrator should set out a policy or procedure to try to ensure consistency and fair treatment if he can. Yet human nature and circumstances being what they are, namely, infinitely variable, all that is difficult to achieve without detailed guidelines, or so I think. The appeals system and an insistence on sufficient and clear reasons for decisions, *pace* the Attorney-General and Mr. Dean, should help the administrator.

45 The English cases reveal that an administrator has a duty of consistency: see *Collis Radio Ltd.* v. *Environment Secy.* (1). The administrator may adopt a policy or general rule provided that it is within the statutory framework for dealing with such applications. He can change both, provided that he does so with due warning and gives the applicant an opportunity to be heard once again. Inconsistency is usually unfair, and the court may intervene to prevent this because it wishes to enforce fair administration and good government. It did so in *HTV Ltd*. v. *Price Commn.* (2) on the ground that, being inconsistent, the Commission must have misunderstood its power.

46 Besides, an applicant can legitimately expect that the administrator will act consistently with an earlier promise or practice unless a change of policy has been announced and the applicant has had an opportunity to challenge it: see generally *Foulkes's Administrative Law*, 7th ed., at 253–254 (1990) (certainty) and at 272–277 (legitimate expectation) and the authorities cited.

47 The attention of the court was not called to any decision of a Gibraltar court and I have not discovered one. The practice and procedure in these matters in Gibraltar should be based on those obtaining in England. It is right and proper for this court to follow respectfully the English authorities and that is what this court will now do.

48 Returning, at last, to this particular case, the court in applying the relevant law to the facts in the exercise of the discretion vested in it, repels the application for judicial review, a declaration, certiorari and mandamus.

49 It behoves this court to set out the reasons for the exercise of its discretion in this way, not least to help the company and the Chainanis to appeal (for any court may err without being the less for doing so, unless it does so frequently enough to suggest more than understandable human error), and maybe more especially to help any Minister or administrator and the Director to grasp what he has to do in dealing with applications which the company, the Chainanis or others may make under the Ordinance in its present form.

50 The fact is that it must be very difficult to apply the Ordinance (which began in 1954) to the conditions obtaining in Gibraltar in 1989, 1990 or 1991, if only because the conditions of employment and those who want employment here have changed so greatly.

51 The Crown properly made no issue of the delay which the company, Mr. Vinod Chainani and Mrs. Rinku Chainani indulged in before making this application for judicial review. Such delay can be fatal to an application for review. The court will make nothing of the delay.

52 This court has a discretion, clearly, to allow or disallow this application for judicial review. As with all discretions, it must exercise it judicially, which means, quite simply, that it must not be based on prejudice, whim or fancy. This Ordinance, mercifully, does not give the court any power to declare or decide whether any Chainani is in the circumstances a "worker" within the terms of this Ordinance. The legislature bestowed this on the Director. The court should take into account that the company and Mr. Haresh Mulchand Chainani accepted the Director's offer to send in their draft employment contract, and the Director gave the company a permit to employ Mr. Haresh Mulchand Chainani.

53 It is said that the Director "cleared" two directors of a different company after his "policy" on such matters changed. The applicants coyly reveal no more details, and they did not have to do so, but the consequence is that in such an application—a civil application—they took this course at their peril because they have not shown on the balance of probabilities that the Director has acted unfairly.

54 The facts do, however, underline that the Director, or his subordinates, maybe, on instructions from "on high," started off on an obviously incorrect course when he, or they, chose as the criterion the intended employee's shareholding in the company. There is nothing to support this approach in the Ordinance. Such a test was *ultra vires* the Ordinance. That first policy was wrong and illegal. So this court cannot

now return the Director to such a policy and make him apply it to the company or any Chainani.

55 The Director was "off course"; he "tacked," to continue with this nautical phraseology, and chose the second policy. He asked: "Just what is the work that Vinod and Rinku will do?" That was, Mr. Budhrani, Mr. Dean and this court agree, what the Ordinance specifies that the Director should do. He was then acting *intra vires*. The Director asked the company, Mr. Vinod Chainani and Mrs. Rinku Chainani to apply for vacancies for employment with his Department, and asked the company to send in draft contracts of employment for each Chainani. That too is in accordance with the Ordinance. So he was then "on course." The company and Mr. Haresh Mulchand Chainani complied, as I have pointed out before, but the company and the other Chainanis did not.

56 The Ordinance reflects the will of the legislature and at first blush discriminates initially but not finally or exclusively in favour of "locals" against those defined as "non-residents," and this is not *ultra vires* the Constitution.

57 The facts and the relevant law in all this underline the court's findings that although Mr. Vinod Chainani and Mrs. Rinku Chainani are directors and equal shareholders and do other duties, they are, in reality, probably doing clerical, manual and sales staff attendants' work. They are "workers" within the Ordinance's definition. The Director has not so held yet because the company will not submit fresh applications to him for these permits, and so there is no inconsistency yet.

58 But if that is wrong, and the Director has acted inconsistently and so unfairly and contrary to the applicants' legitimate expectation, then their remedy was to appeal within seven days of his decision to the Employment Appeals Tribunal. There is no suggestion that such a tribunal did not exist. If it did not exist, the company had a right to apply for judicial review to this court because they had no other remedy to exhaust first. They have done so but failed to persuade the court to exercise its discretion to grant their application for a declaration and/or orders for *certiorari* or *mandamus* to go forth.

59 Costs follow the event, and the applicants must pay the costs of and occasioned by their application.

60 *Order*: The application is refused. The applicants are to pay the costs of and occasioned by the application. Leave to appeal, if necessary, is granted.

Application dismissed.
