

[1991–92 Gib LR 203]

**ATTORNEY-GENERAL v. STIPENDIARY MAGISTRATE,  
ex parte GARCIA and SENIOR**

SUPREME COURT (Kneller, C.J.): February 6th, 1992

*Statutes—subsidiary legislation—delegation of legislative power—presumption that delegate intends to legislate intra vires Ordinance and that persons administering legislative scheme exercise powers reasonably, honestly and for benefit of Gibraltar—wisdom of legislative policy irrelevant to judicial scrutiny of regulations*

*Statutes—subsidiary legislation—delegation of legislative power—delegated power limited to executing provisions of Ordinance and incidental matters, by means contemplated—power to sub-delegate rarely conferred, but delegate may appoint appropriate agents to carry out administrative functions in discharge of his statutory duties*

*Tobacco—licensing—exportation—Imports & Exports (Control) Regulations, reg. 9, authorizing licensing of exports, is intra vires Imports & Exports Ordinance, 1986, despite omission of s.79 from list of enabling powers cited in Regulations—s.79 included in phrase “all other enabling powers”—reg. 9 consistent with Ordinance for purposes of Interpretation & General Clauses Ordinance, s.23(d), since power under s.79 “to prohibit, restrict or regulate” exports includes power to prohibit conditionally by licensing*

*Tobacco—exportation—unlicensed exportation—offence of unlicensed exportation validly created under Imports & Exports Ordinance, 1986, s.79(3)(b) and Imports & Exports (Control) Regulations, 1987, reg. 9*

The respondents were charged in the Magistrate’s Court with exporting cigarettes without a licence, contrary to s.79(3)(b) of the Imports and Exports Ordinance, 1986 and reg. 9 of the Imports and Exports (Control) Regulations, 1987.

The Magistrate dismissed a charge of unlicensed exportation of regulated goods against the respondents on the basis that there was no case to answer, reg. 9 (and other related regulations, together with Schedule 4 listing such goods) being *ultra vires* s.79(1) and (2)(b) of the Ordinance and of no effect. The Crown appealed by way of case stated to the Supreme Court. The Magistrate stated that whilst s.79(1) gave the Governor the power to make regulations to prohibit, restrict or regulate

the exportation of goods, he could not exercise those powers by way of licensing. Whereas the Ordinance empowered the Governor to prohibit, restrict or regulate that which was accepted by the legislature to be lawful, the principle of licensing entailed permitting what would otherwise be unlawful. Furthermore, a system of licensing constituted a further and unlawful delegation of power by the Governor (the delegate chosen by the legislature) to the Collector of Customs.

Four questions arose for the court's resolution, namely (a) whether the Regulations generally, and in particular regs. 9, 11, 12 and Schedule 4, conflicted with the Ordinance and were therefore invalid as breaching s.23(d) of the Interpretation and General Clauses Ordinance; (b) whether reg. 9 was validly made under s.79 of the Ordinance; (c) whether the Magistrate had been correct to hold that regs. 9, 11, 12 and Schedule 4 were *ultra vires* and invalid; and (d) whether the Magistrate had properly directed himself in law when dismissing the charge on the ground of no case to answer.

The Crown submitted that (a) the Regulations were validly made under s.79 (included in the phrase "all other enabling powers") as well as the other sections of the Ordinance expressly mentioned in its long title; (b) the Governor's power under ss. 16(1) and 79 of the Ordinance to prohibit, restrict or regulate imports or exports of goods by regulations was unqualified as to the means used; (c) the system established by the Regulations did not conflict with the provisions of the Ordinance for the purposes of s.23(d) of the Interpretation and General Clauses Ordinance; and (d) since the Collector of Customs exercised a purely administrative function in issuing and refusing licences, and since appeals from his decisions lay to the Governor, the latter had not delegated his powers to regulate exports.

The respondents submitted in reply that (a) since the Ordinance, by its long title, purported only to "control" imports and exports from Gibraltar, regulations by which exports could be prohibited were *ultra vires* the Ordinance; (b) the Regulations were not validly made under s.16, since that section related only to the making of regulations on *imports*, nor did ss. 80 (relating to drugs) or 129 (permitting specific regulations to give effect to the Ordinance) authorize the making of such regulations; (c) s.79 was omitted from the listed provisions under which the Regulations were expressed to be made, and the reference to "all other enabling powers" was meaningless; (d) the legislature could not have intended that the Governor should exercise his powers by deeming (in reg. 9) that all goods not specified in Schedule 4 were to be prohibited from export unless licensed by the Collector of Customs, since that would be seriously damaging to Gibraltar's economy; and (e) the use of licensing—purporting to authorize a practice that was otherwise unlawful—was not prescribed by the Ordinance and was inconsistent with its intention to control, rather than prohibit, exports, and therefore in breach of s.23(d) of the Interpretation and General Clauses Ordinance.

**Held**, allowing the appeal:

(1) The court had to interpret the Ordinance in such a way as to promote its policy and objects if possible. Whilst it had a right to scrutinize subsidiary legislation to ensure that those objects were properly implemented, all such measures would be benevolently interpreted on the presumption that persons administering the scheme of the legislation would exercise their powers reasonably, honestly and for the benefit of Gibraltar. Furthermore, the court would be slow to find that the authority responsible for making subsidiary legislation had intended to exceed his powers (paras. 33–34; para. 41).

(2) The Governor had not unlawfully delegated his power in this instance. The legislature could delegate a part of its power to legislate in the field of imports and exports if it saw fit, and the delegated power was to be exercised in accordance with the intentions expressed in the enabling Ordinance. It entailed authority only to execute the Ordinance's provisions (including incidental matters) by the means contemplated by it. Legislation rarely conferred the power to sub-delegate, but a delegate was entitled to appoint appropriate agents to carry out administrative functions, under subsidiary legislation, in the discharge of his statutory duties. The Governor had properly appointed the Collector of Customs as his agent to implement the Regulations under the Governor's control (para. 28; paras. 30–31; para. 40).

(3) The omission of s.79 from the list of enabling powers specified in the Regulations did not mean that the Governor had acted *ultra vires* in making reg. 9. Section 79 was included in the phrase "and of all other enabling powers," which had been enacted to cover just such a case. Furthermore, the overall objects of the Ordinance clearly contemplated regulations dealing with exports (paras. 36–37; para. 42).

(4) Express words were required in the Ordinance as to the particular legislative power delegated. Although the long title of the Ordinance referred only to the "control" of exports, s.79 of the Ordinance expressly conferred power on the Governor, in his discretion, "to prohibit, restrict or regulate" the export of goods from Gibraltar. It therefore authorized the making of a regulation that forbade exports conditionally, and permissible conditions included the consent, licence or approval of a designated person or body such as the Collector of Customs. None of the Regulations was inconsistent with the provisions of the Ordinance so as to invalidate it under s.23(d) of the Interpretation and General Clauses Ordinance (para. 32; para 37; para. 39; para. 42).

(5) Once satisfied that the power to delegate was exercised lawfully and in good faith, the court did not have to consider the wisdom of the policy behind the Ordinance. The goods not specified in Schedule 4 or otherwise authorized by the Regulations required a licence to allow them to be exported. However, goods taken out of Gibraltar in small quantities by visiting tourists were not being "exported" within the meaning of reg.

9, and it was not for the court to decide whether to prosecute even if they were (para. 34; para. 38).

(6) Accordingly, the Magistrate had misdirected himself in law when he dismissed the charge against the respondents. His finding of no case to answer would be set aside and he would be directed to resume their trial (para. 43).

**Cases cited:**

- (1) *Birmingham & Midland Motor Omnibus Co. Ltd. v. Worcestershire County Council*, [1967] 1 W.L.R. 409; [1967] 1 All E.R. 544, applied.
- (2) *Carltona Ltd. v. Works Commrs.*, [1943] 2 All E.R. 560, applied.
- (3) *Country Roads Bd. v. Neale Ads. Pty. Ltd.* (1930), 43 C.L.R. 126; [1930] V.L.R. 224, applied.
- (4) *Foley v. Padley* (1984), 154 C.L.R. 349; 54 Aust. L.R. 609, applied.
- (5) *Gorris v. Scott* (1874), L.R. 9 Exch. 125; 43 L.J. Exch. 125, applied.
- (6) *Inland Rev. Commrs. v. Baddeley*, [1955] A.C. 572; [1955] 1 All E.R. 525, referred to.
- (7) *Institute of Patent Agents v. Lockwood*, [1894] A.C. 347; (1894), 31 S.L.R. 942, applied.
- (8) *Jackson, Stansfield & Sons v. Butterworth*, [1948] 2 All E.R. 558; (1948), 64 T.L.R. 481, applied.
- (9) *Kruse v. Johnson*, [1898] 2 Q.B. 91; (1898), 67 L.J.Q.B. 782, *dicta* of Lord Russell of Killowen, C.J. applied.
- (10) *Lewisham Borough Council v. Roberts*, [1949] 2 K.B. 608; [1949] 1 All E.R. 815, applied.
- (11) *Minister of Agriculture & Fisheries v. Matthews*, [1950] K.B. 148; [1949] 2 All E.R. 724, applied.
- (12) *Municipal Corp. of City of Toronto v. Virgo*, [1896] A.C. 88; (1895), 64 L.J.P.C. 4, applied.
- (13) *Padfield v. Minister of Agriculture, Fisheries & Food* [1968] A.C. 997; [1968] 1 All E.R. 694, applied.
- (14) *Phillips v. Britannia Hygienic Laundry Co. Ltd.*, [1923] 2 K.B. 832; (1923), 22 L.J.K.B. 389, applied.
- (15) *R. v. British Airports Auth., ex p. Wheatley*, [1983] RTR 466; (1983), 81 L.G.R. 794, referred to.
- (16) *R. v. Burah* (1878), 3 App. Cas. 889, applied.
- (17) *R. v. Health Secy., ex p. US Tobacco Intl. Inc.*, [1992] Q.B. 353; [1992] 1 All E.R. 212, referred to.
- (18) *R. v. Skinner*, [1968] 2 Q.B. 700; [1968] 3 All E.R. 124, applied.
- (19) *Tarr v. Tarr*, [1973] A.C. 254; [1972] 2 All E.R. 295, applied.
- (20) *Utah Constr. & Engr. Pty. Ltd. v. Pataky*, [1965] 3 All E.R. 650, *dicta* of Lord Guest applied.
- (21) *Williams v. Weston-super-Mare Urban District Council (No. 2)* (1910), 103 L.T. 9; 74 J.P. 370, applied.

**Legislation construed:**

Imports and Exports (Control) Regulations, 1987 (L.N. No. 6 of 1987),

reg. 7: The relevant terms of this regulation are set out at para. 16.

reg. 8(1): The relevant terms of this sub-regulation are set out at para. 17.

(2): The relevant terms of this sub-regulation are set out at para. 17.

reg. 9: The relevant terms of this regulation are set out at para. 17.

reg. 10: The relevant terms of this regulation are set out at para. 17.

reg. 11: The relevant terms of this regulation are set out at para. 18.

reg. 12: The relevant terms of this regulation are set out at para. 19.

Schedule 4: The relevant terms of this Schedule are set out at para. 16.

Schedule 5: The relevant terms of this Schedule are set out at para. 18.

Imports and Exports Ordinance, 1986, s.3(1):

“The Governor shall . . . appoint a Collector of Customs and such customs officers as he may consider necessary for the proper carrying out of this Ordinance.”

s.16(1): The relevant terms of this sub-section are set out at para. 11.

(2): The relevant terms of this sub-section are set out at para. 11.

s.79(1): The relevant terms of this sub-section are set out at para. 12.

(2): The relevant terms of this sub-section are set out at para. 12.

(3): The relevant terms of this sub-section are set out at para. 12.

s.129: The relevant terms of this section are set out at para. 14.

Interpretation and General Clauses Ordinance (1984 Edition), s.23(c):

“Where any Ordinance confers power for any general purpose, and also for any special purposes incidental thereto, the enumeration of the special purposes shall not be deemed to derogate from the generality of the powers conferred with reference to the general purpose.”

s.23(d): The relevant terms of this paragraph are set out at para. 9.

(f): The relevant terms of this paragraph are set out at para. 9.

*P. Dean, Senior Crown Counsel*, for the appellant;

*C. Finch* for the respondents.

1 **KNELLER, C.J.:** This court has been asked to answer these questions of law:

(a) Are the Imports and Exports (Control) Regulations, 1987 (“the Regulations”) generally, and regs. 9, 11, 12 and Schedule 4 in particular, in conflict with the Imports and Exports Ordinance, 1986 (“the Ordinance”) and therefore in breach of s.23(d) of the Interpretation and General Clauses Ordinance?

(b) Is reg. 9 *intra vires* and so validly made under the enabling provisions, ss. 79(1), (2)(b) and 129 of the Ordinance in particular?

(c) Was the learned Stipendiary Magistrate correct in law when he held regs. 9, 11, 12 and Schedule 4 were *ultra vires* the enabling provisions and thus of no effect?

(d) Did he direct himself properly as to the relevant law to be applied, in accepting the submission of “no case to answer” and, in consequence, dismissing the charge?

2 On January 25th, 1991 the Magistrate dismissed a charge against Mr. Jason Garcia and Mr. Wayne Senior (“the respondents”) which alleged that on June 3rd, 1990 they exported 80,000 Winston cigarettes without a permit or licence issued by the Collector of Customs, contrary to s.79(3)(b) of the Ordinance, as read with reg. 9. This was when he accepted that there was “no case to answer.” The Attorney-General was aggrieved by this determination, so, by a notice dated February 9th, he required the Magistrate to state a case for the opinion of this court on those four questions of law and framed them for the Magistrate. The Magistrate could not refuse to state a case because the application was made by the Attorney-General: see the Magistrates’ Court Ordinance, s.62 and the Criminal Procedure Ordinance, s.295.

3 The Magistrate’s case stated was filed on September 23rd, 1991. He set out these facts as the background to the four questions of law. Mr. Garcia took possession of boxes of tobacco on June 2nd, 1990. He and Mr. Senior were in a launch near the ammunition jetty in the Port on June 3rd and the police gave chase in their launch. Mr. Garcia and Mr. Senior hove-to and their launch was found to be loaded with 80,000 Winston cigarettes in boxes. Mr. Senior was transferred to the police launch in exchange for Const. Baglietto, who returned to Coaling Island with Mr. Garcia and the cigarettes in the respondents’ launch.

4 So they were jointly charged before the Magistrate with these alleged offences:

(a) Obstructing the police in the execution of their duty, contrary to s.89 of the Criminal Offences Ordinance.

(b) Using a radio transceiver in a boat within territorial waters without a licence, contrary to s.6(1)(a) of the Wireless Telegraphy Ordinance.

(c) Importing into Gibraltar dutiable goods on which duty has not been paid with intent to defraud Her Majesty’s Revenue in Gibraltar of duty, contrary to s.102 of the Ordinance.

(d) Unlawful possession of dutiable goods on which duty had not been paid, contrary to s.106 of the Ordinance.

(e) Exporting goods, namely, tobacco, which are restricted or regulated by the Collector of Customs, without a permit or licence, contrary to s.79(3) of the Ordinance.

Each respondent pleaded not guilty to all of the above.

5 The Magistrate dealt with these respondents and their charges on June

SUPREME CT. ATT.-GEN. V. STIPENDIARY MAGISTRATE (Kneller, C.J.)

7th, November 6th, 7th and 26th, and December 12th and 21st, 1990 and January 25th, 1991. Charge (c), alleging that the respondents imported into Gibraltar dutiable goods on which duty had not been paid, was withdrawn by the prosecution on November 6th, 1990, presumably because there was no evidence that they were importing the cigarettes into Gibraltar. They were probably doing the opposite by scurrying off with them away from Gibraltar. On June 7th, the Magistrate dismissed charge (a), which was obstructing the police in the execution of their duty, but it is not clear for what reason. It matters not because, mercifully, the Attorney-General has not asked a question of law for the opinion of this court on that result.

6 On some unrevealed date the respondents were convicted on charge (b), which was that of using a radio transceiver in a boat within territorial waters without a licence. It is not clear whether they were fined but, at any rate, the radio was made the subject of a forfeiture order.

7 The Magistrate ruled on December 12th that the Regulations were “good in form and effective.” But on January 25th, 1991 he ruled that regs. 9, 11, 12 and Schedule 4 were of no effect, and dismissed charge (e) which alleged that the respondents exported the cigarettes, which are goods restricted or regulated by the Collector of Customs, without a permit or licence. It is out of the dismissal of that charge (e) that the four questions arise. We have the Magistrate’s ruling of January 25th, 1991 annexed to the case stated. Here it is:

“1. The Imports and Exports (Control) Regulations are made by the Governor pursuant to ss. 16, 80 and 129 of the Imports and Exports Ordinance and all other powers thereunto him enabling.

2. I have already ruled that these Regulations are formally good. There is a statutory basis on which they stand.

3. The point at present under consideration is: Given that fact, has the Governor gone beyond the authority given to him by the legislature in ss. 16, 79, 80 and 129? Are some of the Regulations or part of them made without authority and may they therefore be pencilled out?

4. Mr. Finch argues that what the Regulations purport to do in relation to exports is to provide for the issue of licences to regulate the exportation of goods. He submits this is wrong because the Imports and Exports Ordinance, under s.79, allows the Governor to make regulations to prohibit, restrict or regulate the exportation of goods. The Governor is not empowered by the legislature to exercise these powers by way of licensing.

5. Mr. Dean submits that a licence is a method of regulation and it is true to say that licences may regulate the course of business or a

particular aspect or aspects of it. But Mr. Finch submits that the concept of a licence in relation to exports is wrong in principle because a licence implies a permission to do something which is prohibited. A licence makes lawful that which would otherwise be prohibited. And he points out very forcibly that the Imports and Exports Ordinance does no such thing. It does the reverse. The Ordinance, by s.79, empowers the Governor to prohibit or restrict or regulate that which the legislature has accepted, as is reflected in the Ordinance itself, to be lawful. The Ordinance does not prohibit or restrict or regulate the export of goods: it leaves it to the discretion of its delegate (the Governor) to do so.

6. I turn, therefore, to the basis of the Governor's power. Section 79(1) states that the Governor may 'by regulations prohibit, restrict or regulate the exportation from Gibraltar of any goods or class of goods.'

7. A regulation is a rule prescribed for the management of some matter or the regulation of conduct; a governing precept or direction.

8. 'Prohibit' means to prevent, forbid, hinder or debar.

9. 'Restrict' means to confine; to keep within certain limits.

10. 'Regulate' means to control, govern or direct by rule or regulation.

11. Mr. Dean argues that, by creating the system of licensing set out in the Regulations, the Governor is doing no more than governing by regulation and the system regulates.

12. In my view, the composition of the expression in s.79(1), given the respective meanings of the words in context, appears to me to give Mr. Finch's argument much substance and cogency. A reading of s.79(2) seems to me to reinforce Mr. Finch's submission. It seems to me that sub-s. (2) is indicating to the Governor the way he should go. I do not think in essence that s.79(2) circumscribes the wide ambit of s.79(1). Indeed, it cannot (s.23(c) of the Interpretation and General Clauses Ordinance), but what else does it do? Is sub-s. (2) otherwise necessary?

13. Mr. Finch elaborates on his submission by arguing that the system of licences propounded by the Regulations goes to the heart of civil liberties: It affects the right to work, for if the starting point is that it is lawful to export, then a system of licences which is controlled by the Collector is no regulation to prohibit, restrict or regulate. The difference is that a regulation is plain for all to read and adhere to but a licence is an administrative action concealing hidden discretions and policies. All of this, suggests Mr. Finch, makes this a matter of grave concern and great principle.



14. When I consider the Regulations as a whole and in particular the provisions of reg. 11 and Schedule 4, Mr. Finch's arguments take on great force, and my view is that the system of licences provided for by the Regulations is *ultra vires*.

15. The reasons for this are two-fold. The first is that I accept Mr. Finch's arguments: there is no power to licence. The second is that the legal result of the system set up by the Regulations is nothing less in essence than the Governor's handing over his powers to regulate to someone else, and it is trite law that a delegate cannot delegate unless a contrary intention appears in the Ordinance.

16. No such intention appears in the Ordinance; nor does the Interpretation and General Clauses Ordinance apply. It seems to me that regs. 9, 11 and 12 and Schedule 4 are of no effect."

8 The Magistrate faithfully set out in summary form the main contentions in his court of Mr. Garcia's counsel, Mr. Finch, and Senior Crown Counsel, Mr. Dean, and I need not repeat them. Both counsel resurfaced in this court and this time Mr. Finch was for both Mr. Garcia and Mr. Senior. Before I distil their submissions on the law I must set out the relevant provisions of the Ordinance, the Regulations and the Interpretation and General Clauses Ordinance, and in this judgment the last shall be the first.

9 The Interpretation and General Clauses Ordinance was effective from the end of May 1962. It was passed "to make further and better provision for the interpretation of Laws." One of the provisions concerns the making of subsidiary legislation and that is set out in s.23, and in this matter it is s.23(d) and (f) that are to be noted. They read thus:

"Where an Ordinance confers power on any authority to make subsidiary legislation, the following provisions shall, unless the contrary intention appears, have effect with reference to the making, issue and operation of such subsidiary legislation.

...

(d) No subsidiary legislation shall be inconsistent with the provisions of any Ordinance.

...

(f) Any reference in any subsidiary legislation to 'the Ordinance' shall be read and construed as meaning the Ordinance conferring the power to make such subsidiary legislation."

10 Then we move to the Ordinance which came into operation on January 1st, 1987. Its long title is: "AN ORDINANCE to control imports into

and exports from Gibraltar and to provide for the imposition and collection of duties of customs, and for matters relating thereto.” So, that is what it is for.

11 Now we have to delve into it and pluck out ss. 16, 79(1), (2)(b) and (3), and 129 because much of the dispute in this case milled around them. Here they are:

“16. (1) The Governor may, if he thinks fit, from time to time, by regulations prohibit, restrict or regulate the importation of any goods or class of goods.

(2) A person who—

- (a) imports any goods the importation of which is prohibited; or
- (b) imports any goods the importation of which is restricted or regulated except in accordance with the restriction or regulation applicable,

whether such importation is prohibited, restricted or regulated under this Ordinance or under any other law, is guilty of an offence and is liable, on summary conviction, to a fine of three times the value of the goods or £500, whichever is the greater.”

And there is the power for the Governor to prohibit, restrict or regulate the importation of any goods or class of goods. He has a discretion to exercise. He gives effect to this power if he thinks fit to use it by regulations.

12 Likewise, he can control exports:

“79. (1) The Governor may, if he thinks fit, from time to time, by regulations prohibit, restrict or regulate the exportation from Gibraltar of any goods or class of goods.

(2) Regulations made under this section may—

- (a) specify any goods or class of goods, either generally or in any particular manner;
- (b) prohibit, restrict or regulate the exportation either to all places or to any particular country or place;
- (c) require the goods to be consigned to a person authorized by the regulations to receive the goods; and
- (d) require the production, within a specified time, of evidence to the satisfaction of the Collector of the due delivery of the goods to the consignee.

(3) A person who—

SUPREME CT. ATT.-GEN. V. STIPENDIARY MAGISTRATE (Kneller, C.J.)

- (a) exports any goods the exportation of which is prohibited; or
- (b) exports any goods the exportation of which is restricted or regulated, except in accordance with the restriction or regulation applicable,

whether such exportation is prohibited, restricted or regulated under this Ordinance or under any other law, is guilty of an offence and is liable on summary conviction to a fine of three times the value of the goods or £500, whichever is the greater.”

13 Note that the Governor’s power to prohibit, restrict or regulate exports if he thinks fit by regulations is defined in greater detail (in s.79(2)) than is his power to control imports (in s.16). One of the detailed powers is that by regulations he may “prohibit, restrict or regulate the exportation [of any goods or class of goods] either to all places or to any particular country or place.” That is in s.79(2)(b).

14 Also under the heading “Additional powers of the Governor” in the Ordinance comes this section:

“129. The Governor may make regulations for carrying into effect the provisions of this Ordinance and in particular, but without prejudice to the generality of the foregoing, may make regulations—

- (a) prescribing the particulars that are to be included in any inward or outward manifest;
- (b) prescribing the rents, charges and fees to be taken for the receipt, storage and delivery of dutiable goods in from a Government store or transit shed;
- (c) requiring importers and other persons concerned with the importation of goods—
  - (i) to furnish to the Collector in such form as he may require, such information as is in his opinion necessary for a proper valuation of the goods; and
  - (ii) to produce any books of account or other documents of whatsoever nature relating to the purchase, importation or sale of the goods by those persons;
- (d) prohibiting the removal from Government stores of goods of any description, either absolutely or subject to any conditions or restrictions;
- (e) prescribing the terms and conditions on which motor spirit may be imported in bulk and stored in Government stores or private bonded stores, as to the payment of duty thereon and the release of the same for local consumption or for export.”

15 It is time now to turn to the Regulations. They declare that they were made by the Governor of the day “in exercise of the powers conferred on him by sections 16, 80 and 129 of the Ordinance and all other enabling powers.” Pausing there for a moment, s.16 gives him power to control by regulations the importation of goods. Here we are dealing with the exportation of goods. Section 80 creates the offence of exporting a controlled drug and provides the penalty for doing so. It does not create any power for the Governor or anyone to make regulations about exporting anything. It is an error. It is, as we have seen, under s.79 that he may by regulations control exports. There is another power, however, that enables him to make these regulations. Section 129 empowers the Governor to make regulations for carrying into effect the provisions of the Ordinance, so that is why it has been mentioned.

16 The Regulations are deemed to have come into operation on January 1st, 1987. Exports from Gibraltar are dealt with in regs. 7–14 and Schedules 4, 5 and 6 inclusive. “The goods specified in Schedule 4 may be exported to any destination” provided that their export has not been “specifically prohibited, restricted or regulated” (reg. 7). The specified goods (Schedule 4) are:

“Commercial traveller’s [*sic*] samples.

Supplies exported to Her Majesty’s Forces.

Personal effects other than—

- (a) articles wholly or mainly of gold or platinum, or
- (b) diamonds, precious and semi-precious stones, pearls and articles mounted or set with [them].

Foodstuffs personally carried by individuals up to a maximum of 12.70 kg. [about 30 lb.] in weight.”

17 Under reg. 8(1), “any goods arriving in Gibraltar in transit or through bills of lading or otherwise may be exported without licence to any country.” By reg. 8(2), they are “in transit” only if (a) they are passing from and to different points outside Gibraltar,

“(b) the final destination of the goods beyond Gibraltar has been identified by the consignor before the goods arrive in Gibraltar; and

- (c) the goods are removed from Gibraltar within 14 days of such importation or such longer period as may be approved by the Collector in any particular case.”

Subject to all that, “no goods shall be exported except under and in accordance with a licence granted by the Collector” (reg. 9, *i.e.* the

SUPREME CT. ATT.-GEN. V. STIPENDIARY MAGISTRATE (Kneller, C.J.)

regulation of which complaint has been made). “. . . [N]o arms or military equipment may be exported to the Republic of South Africa” (reg. 10).

18 If the Collector of Customs grants an export licence under reg. 9 it is valid for the person named in it and cannot be “transferred or assigned without the permission of the Collector” and it “may be subject to all or any of the conditions set out in Schedule 5, as the Collector may think fit” (reg. 11).

“Conditions which may be imposed by the Collector in granting an export licence [include]—

- (a) that the export shall be effected within the time specified in the licence;
- (b) that satisfactory evidence be produced to [him] . . . that the goods covered by the licence have reached the ultimate destination specified in the licence;
- (c) that notification of export shall be given in the form set out in . . . Schedule 6; [and]
- (d) such other conditions as the Collector may think fit to impose.” (Schedule 5.)

19 Finally, anyone “aggrieved by the refusal of an import or export licence or by any condition imposed upon the grant of a licence may appeal to the Governor” (reg. 12).

20 It is now appropriate to return to the submissions of Mr. Dean and Mr. Finch in this court. Mr. Dean pointed out that there is no qualification of the word “may” in ss. 16 and 79 of the Ordinance which empowered the Governor by regulations to prohibit, restrict or regulate the import or export respectively of any goods or class of goods. He can do so “if he thinks fit, from time to time.” The Regulations set up the system for enforcing the prohibition, restriction or regulation of the import or export of all goods or any class of goods. These regulations were subsidiary legislation but not inconsistent with the provisions of the Ordinance and so did not fall foul of s.23(d) of the Interpretation and General Clauses Ordinance.

21 It was the Governor, continued Mr. Dean, who appointed the Collector (s.3(1)). The Collector’s issue or refusal to issue licences was an administrative action. There was no delegation by the Governor in the prohibition, restriction or regulation of the importation or exportation of goods by regulations just because it was the Collector who issued or refused licences if they were required. Appeals from the Collector’s decisions lay to the Governor, who thus retained control of the powers vested in him under and by the Ordinance.

22 Mr. Finch sought to uphold the decision of the learned Magistrate: first, because the Regulations were *ultra vires* the Ordinance; secondly, because the Governor could not delegate to the Collector the exercise of his powers under the *Ordinance*; and thirdly, the Regulations were an outrageous infringement of the civil liberties of all who visited, lived in or went forth from Gibraltar.

23 So far as concerned their being *ultra vires* the Ordinance, Mr. Finch submitted that the Regulations' form and intent should be scrutinized. Furthermore, the court should test them by asking if the legislature intended that the Governor should exercise these powers in such a way. Did it mean to say that all goods save those in Schedule 4 cannot be exported under the Regulations without licences? If that were so, the export of souvenirs, cigarettes, clothing and chocolates (he missed out umbrellas) by tourists or visitors would be a criminal offence, which would be a ludicrous result, since Gibraltar's economic survival depends on these exports, all of which occur without licences. In practice, those exportations occurred without licences, but it was not what happened in practice but rather what the legislature intended that was the appropriate test for whether or not the Regulations were reasonable. If tourists could take out boxes of cigarettes without licences, why could the respondents not do the same in a little boat?

24 The export of cigarettes without a licence was an absolute offence, yet there was no machinery for applying for a licence. There were no published criteria for the likely grant or refusal of a licence. There was no right of appeal. The long title of the Ordinance, he maintained, revealed that it was merely to control imports into and exports from Gibraltar, not to prohibit them.

25 So far as exports were concerned, the Regulations could not be made under ss. 16, 80 and 129 because s.16 conferred powers on the Governor to make regulations for the *importation* of goods, s.80 created the offence of exporting controlled drugs, and s.129 gave him additional powers to make regulations for five other matters but not the export of goods from Gibraltar. This had been brought to the attention of the prosecution in 1990 but no amendment to the Regulations had been made. The phrase "and of all other enabling powers" confined the powers to those cited, namely, ss. 16, 80 and 129. The Magistrate was wrong to hold that the Regulations, so far as the export of goods was concerned, were "formally good."

26 Even if s.79 had been cited, Mr. Finch submitted, the Governor could not control the export of any class of goods by prohibiting its export save by a licence from the Collector, who was instructed to issue none for the export of cigarettes. Other Ordinances (*e.g.* the Fast Launches (Control) Ordinance) have granted the Governor the power to

SUPREME CT. ATT.-GEN. V. STIPENDIARY MAGISTRATE (Kneller, C.J.)

licence or refuse to licence someone to do something, but it was not so provided in the Ordinance. The power to control by regulations is given to the Governor and he cannot give it to the Collector or anyone at the Marina or Waterport.

27 The authorities cited by counsel yielded these principles:

(a) A power to regulate does not cover a power to prohibit because to regulate means that a permitted practice is to continue but be controlled. A delegated authority to regulate, if construed strictly, would not include a power to prohibit, and when the legislature intends to delegate power to prevent or prohibit, it does so or should do so by express words. So, without such express words, there is no authority for making it unlawful to do something lawful in a lawful manner: see *Municipal Corp. of City of Toronto v. Virgo* (12).

(b) The usual decisive test as to whether the exercise of a statutory power is within it (*intra vires*) or without it (*ultra vires*) is whether or not the person exercising it rationally believed he was exercising it for the purpose for which the legislature granted it: see *Birmingham & Midland Motor Omnibus Co. Ltd. v. Worcestershire County Council* (1) ([1967] 1 W.L.R. at 422).

(c) If the word “regulating” is to include a power to prohibit permanently, the draftsman can add the words “or prohibiting,” or, to include the power to prohibit temporarily, the words “or suspending”: see *Tarr v. Tarr* (19).

(d) The objects of the Ordinance should be taken into account, and those are to be found in its long title and provisions: see *Tarr v. Tarr*.

(e) If the context requires it or it is suitable, however, the word “regulate” can include prohibiting an activity (see *R. v. British Airports Auth., ex p. Wheatley* (15)), or making it subject to the grant of permission (see *Foley v. Padley* (4)).

(f) If the power in law is there, the only barrier to its exercise would then be whether its exercise was reasonable or unreasonable: see *Birmingham & Midland Motor Omnibus Co. Ltd. v. Worcestershire County Council* (1) ([1967] 1 W.L.R. at 420 and 422).

(g) One view of the enacting provision in subordinate legislation is that there is no need for its recitation and a simple reference in a different style of printing from the section of the Ordinance that enables it to be made will do. Redundant words and useless verbiage, including the phrase “and all other powers him thereunto enabling,” should be excised: see *Thornton’s Legislative Drafting*, at 321–322 (1970).

28 No decisions of a superior court of Gibraltar on all this were cited, and I cannot find one. My approach, step by step, to the questions of law

is this. The Ordinance is the primary form of legislation in a colony or other dependent territory. It sometimes gives power to an official to make regulations which are a form of subsidiary legislation. They are to carry into effect the provisions of the Ordinance. The House of Assembly has the power to legislate in the field of imports and exports to and from Gibraltar. It may delegate part of this power to someone if it thinks fit.

29 Why does it do so? Sometimes, because it cannot directly exert its will in every detail, it does not have the time to look at all the necessary small print. Or because an interval is necessary between adopting the outline of the legislation and settling its detail. There may have to be consultation with interested parties. Experience of the working of the legislation may be necessary, and successive amending Bills are to be discouraged. So, the legislature often lays down its intention in outline in the enabling Ordinance. The effectuation of it is delegated to the chosen official, who tries to do that by regulations which can be adjusted as necessary from time to time.

30 The delegate must not go beyond the legislature's intentions set out in the enabling Ordinance: see *Gorris v. Scott* (5) (L.R. 9 Exch. at 130); and *Phillips v. Britannia Hygienic Laundry Co. Ltd.* (14) ([1923] 2 K.B. at 842). He has to serve, promote and remain true to its object: see *Institute of Patent Agents v. Lockwood* (7) ([1894] A.C. at 360, *per* Lord Herschell, L.C.). This was how the Judicial Committee of the Privy Council put that in *Utah Constr. & Engr. Pty. Ltd. v. Pataky* (20) ([1965] 3 All E.R. at 653, *per* Lord Guest) quoting the High Court of Australia. Power delegated by an enactment—

“does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends.”

31 Sometimes, but rarely, the legislature confers on the delegate a power to sub-delegate: see s.1 and Schedule 1, para. 7 of the Fair Trading Act 1973. Usually it does not do so and then he cannot sub-delegate his power conferred by the enabling Ordinance (*delegata potestas non potest delegare*). This is because the legislature has put its trust and confidence in its chosen agent: see *R. v. Burah* (16) (3 App. Cas. at 906); and *Jackson, Stansfield & Sons v. Butterworth* (8) ([1948] 2 All E.R. at 564–566). That rule, however, does not preclude the delegate from making regulations and having them carried out by appropriate agents under his control and providing for this in the regulations. Ministers and



other functionaries, with their hosts of diverse duties, have to make use of their officials, even in discharging their statutory duties: see *R. v. Skinner* (18).

32 “. . . [W]hen the purpose of a power includes both prohibiting and regulating, it must authorize a [regulation or] by-law which forbids conditionally, although the conditions may properly be described as regulatory”: see *Country Roads Bd. v. Neale Ads Pty. Ltd.* (3) (43 C.L.R. at 134). And if the power authorizes prohibition, complete or partial, conditional or unconditional, the condition may be the consent, or licence, or approval of a person or body: see *Williams v. Weston-super-Mare Urban District Council (No. 2)* (21), and see generally *Foley v. Padley* (4).

33 The courts’ role, in my judgment, is to interpret the Ordinance so as to promote its policy and objects if possible: see *Padfield v. Minister of Agriculture, Fisheries & Food* (13). They have a right to scrutinize delegated legislation, and usually supervise stringently even by-laws, and more so than other forms such as regulations. But Lord Russell of Killowen, C.J. said of by-laws of local authorities, in *Kruse v. Johnson* (9) ([1898] 2 Q.B. at 99): “They ought to be supported if possible. They ought to be, as has been said, ‘benevolently’ interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered.” And in *Williams v. Weston-super-Mare Urban District Council (No. 2)*, Cozens-Hardy, M.R. declared (103 L.T. at 11) that the courts “ought to assume, and assume strongly, that the local authority is exercising their duty honestly and doing their best for the benefit of the locality, they being entrusted by Parliament with powers for that express purpose.”

34 The court, in short, should not be quick to find that the person by whom the regulations were made intended to make provisions that were *ultra vires*: see 44 *Halsbury’s Laws of England*, 4th ed., para. 1002 (footnote 3), at 635. So far as judicial control is concerned, all that the court should do is to see that the power anyone claims to exercise is one which the legislature gave him and that he exercised it in good faith. The wisdom or good sense of the Ordinance’s policy and so forth is not for scrutiny by the court: see *e.g.* Lord Greene, M.R. in *Carltona Ltd. v. Works Commrs.* (2) ([1943] 1 All E.R. at 564); *Lewisham Borough Council v. Roberts* (10); and *Minister of Agriculture & Fisheries v. Matthews* (11).

35 The *reductio ad absurdum* is a cogent argument sometimes (see Viscount Simonds in *Inland Revenue Commrs. v. Baddeley* (6) ([1955] A.C. at 592)) but not so much these days, for the remedy for irrationality is judicial review. Thus, if a Secretary of State can ban a particular type of tobacco his claim to ban tobacco altogether would be without merit: see

Taylor, L.J. in *R. v. Health Secy., ex p. US Tobacco Intl. Inc.* (17) ([1992] 1 All E.R at 219–220).

36 Turning to the form of the local regulations, they should have a heading revealing their subject-matter, a title by which they should be cited, the dates they were made and begin to take effect, together with a reference to the powers under which they are made. Another view of the words “and of all other powers enabling him in that behalf” is that it is an “ancient sweeping-up formula” and a “precaution in case any relevant power is missed out”: see Bennion, *Statutory Interpretation*, para. 61, at 150 (1984).

37 All that English and Australian law is, in my respectful view, good law, and I shall now apply it to this case. I find that s.79 of the Ordinance enables the Governor, in his discretion and if he thinks fit, from time to time, to prohibit, restrict or regulate the exportation from Gibraltar of any goods or class of goods. Section 79 is not set out among the powers conferred on him by the Ordinance at the outset of the Regulations. It has been missed out but, in my judgment, it is put in place by the phrase “and of all other enabling powers,” which is not mere verbiage but wisely included to cover such a case as this, where a relevant power has been missed out. Add to that the provisions of the Ordinance, which is “to control imports into and exports from Gibraltar and to provide for the imposition and collection of duties of customs, and for matters relating thereto” and it is clear that the unfortunate omission of s.79 is not fatal to the regulations that deal with exports. And see also s.23(c) of the Interpretation and General Clauses Ordinance.

38 All other goods may only be exported in accordance with a licence granted by the Collector of Customs (reg. 9). The export of tobacco is lawful if it is done in accordance with such a licence. The same applies to scent, souvenirs, umbrellas, chocolates, and foodstuffs if more than 12.7 kg. in weight and not carried by an individual or individuals (Schedule 4), but those who trail across the frontier or back to their ocean cruise liners or yachts with the usual amount of scent, souvenirs, umbrellas and chocolates cannot realistically be held to be exporting them, and if they are, the decision whether to prosecute them or not to do so is not one for the courts to make.

39 Mark this: the legislature has expressly left it to the Governor to make regulations to control exports from Gibraltar. He may, by such regulations, prohibit, restrict or regulate the export of any goods or class of goods. The powers emphatically include that of prohibiting their export. The legislature put that in express words in s.79. He has a discretion to exercise and he may make these regulations if he thinks fit, from time to time. None of the regulations are inconsistent with the provisions of the Ordinance, so they do not offend against s.23(d) of the Interpretation and General Clauses Ordinance.

SUPREME CT. ATT.-GEN. V. STIPENDIARY MAGISTRATE (Kneller, C.J.)

40 Here, the Governor has made these regulations. He has not delegated that power to anyone. He has provided in the same regulations for appropriate agents under his control to carry out the regulations, and that, also, is not delegating his authority.

41 The court assumes these powers are being exercised honestly and for the benefit of Gibraltar.

42 I now answer the questions of law in this way:

(a) The Imports and Exports (Control) Regulations, 1987 generally, and regs. 9, 11, 12 and Schedule 4 in particular, are not in conflict with the Imports and Exports Ordinance, 1986 or in breach of s.23(d) of the Interpretation and General Clauses Ordinance.

(b) Regulation 9 is *intra vires*, and was validly made under the enabling powers and in particular s.79(1) and (2)(b) and s.129 of the Ordinance.

(c) The learned Stipendiary Magistrate was incorrect in law when he held that regs. 9, 11, 12 and Schedule 4 were *ultra vires* the enabling provisions and of no effect.

(d) He did not direct himself properly as to the relevant law to be applied, or in accepting the submission of “no case to answer,” or in dismissing the charge of exporting 80,000 Winston cigarettes without a licence granted by the Collector of Customs, contrary to s.79(3) of the Imports and Exports Ordinance, 1986.

43 The upshot is that the Stipendiary Magistrate’s finding of “no case to answer” will be set aside and he will be directed to reconvene the court for the purposes of resuming the trial of the remaining charge and to proceed to determine the guilt or otherwise of Mr. Garcia and Mr. Senior.

*Order accordingly.*

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