A.S. MARRACHE AND SONS LIMITED v. GOVERNOR

COURT OF APPEAL (Fieldsend, P., Davis and Neill, JJ.A.):
February 26th, 1997

Administrative Law—judicial review—leave to apply—renewed application to Court of Appeal—Court of Appeal has jurisdiction under Rules of Supreme Court, O.59, r.14(3) to hear renewed application for leave

Administrative Law—judicial review—leave to apply—renewed application to Court of Appeal—unless by consent, applicant may not amend application so as to challenge decisions made after original application and raise issues not considered by lower court

Administrative Law—judicial review—delay—whether application for leave made promptly to be determined at substantive hearing if detailed examination of evidence required

The applicant applied for judicial review of decisions by the Collector of Customs and the Governor.

The applicant applied to the Collector of Customs for licences to import tobacco products and store them in a bonded warehouse for wholesale in Gibraltar. After several months' delay, the applicant applied to the court challenging the validity of the relevant legislation under the EC Treaty and seeking judicial review of the Collector of Customs's failure to hear its applications, and of the intervention in the applications of the Chief Minister on policy grounds. The court gave leave for the applicant to seek judicial review only of the Collector's actions and the applicant made a renewed application to the Court of Appeal seeking leave in respect of the other matters.

The licences were later refused. The applicant appealed to the Governor against the refusal of the licences, but the Governor refused to decide the appeal until the courts had resolved the question of the applicability of certain provisions of the EC Treaty to Gibraltar.

The applicant, before the Court of Appeal, applied for leave to amend its application to reflect the fact that the Collector of Customs had now decided the applications and to seek review of the Chief Minister's decision to grant import licences to certain other companies and the Governor's decision not to hear its appeal. The respondent challenged the court's jurisdiction to hear the renewed application.

It submitted that (a) the court lacked jurisdiction, since (i) it had no original or residual jurisdiction other than as an appellate court as defined

by ss. 57(1) and 62 of the Constitution, (ii) its jurisdiction could not be extended by rules of court and thus O.59, r.14(3) of the Rules of the Supreme Court, under which an *ex parte* application could be renewed following refusal by the lower court, did not apply here, (iii) even if r.14(3) did apply in Gibraltar, the original application had been made *inter partes* and therefore the present application fell outside it, (iv) under the Supreme Court Ordinance, ss. 2 and 17B(3), no application for judicial review could be made without the leave of that court, and (v) although an appeal from an interlocutory order could be made with leave under s.22(vii) of the Court of Appeal Ordinance, this was not an appeal; (b) the applicant should not be permitted to introduce amendments relating to the grant of licences to other companies or the Governor's decision, since this would raise different issues to those raised before the Supreme Court, and could only be done by consent; and (c) nor should the applicant be given leave to challenge the Governor's failure to amend the governing legislation in accordance with EC law, since any such failure had subsisted since 1987, when the regulations were passed.

The applicant submitted in reply that (a) the court had jurisdiction to hear the application, since (i) s.17B of the Supreme Court Ordinance created a separate code for judicial review proceedings which, in the absence of relevant local rules of court, encompassed O.59 of the English Rules of the Supreme Court, (ii) s.17B(3) did not refer to the leave of the Supreme Court but to that of the Court of Appeal, and (iii) the requirement in the Court of Appeal Ordinance, s.22(vii) that leave be obtained from the Supreme Court applied only to appeals against "interlocutory judgments and orders" and not "decisions" such as a refusal of leave to seek judicial review; (b) the proposed amendments to the application related to matters already before the court in substance; and (c) it had acted as promptly as possible in challenging the validity of the existing legislation under EC law once its own cause of action had arisen.

Held, making the following orders:

(1) The court had jurisdiction to hear the renewed application since the legislature had clearly intended, by s.17B of the Supreme Court Ordinance, to introduce a system of judicial review in line with that operating in England and, in the absence of applicable Gibraltar rules of court, O.59, r.14(3) of the Rules of the Supreme Court conferred jurisdiction on the Court of Appeal to hear an *ex parte* application following refusal by the Supreme Court. Accordingly, the requirement of leave in s.17B(3) was to be construed as meaning the leave of *the Court of Appeal* where the context so required. Furthermore, it was irrelevant for this purpose whether the previous application had been made *ex parte* or *inter partes* (page 73, line 44 – page 74, line 24).

(2) The applicant would be refused leave to amend its application so as to seek judicial review of (i) the grant of licences to other companies and

(ii) the Governor's postponement of its appeal against refusal of an import licence, since these amendments would call into question decisions post-dating the original application and raise issues which had not been before the Supreme Court and which could only be introduced in a renewed application with the consent of the other parties. The court would, however, grant leave to challenge the validity of the Imports and Exports legislation, which the Supreme Court had refused, since it was impossible, within the scope of an application for leave, to decide whether the applicant had acted promptly in seeking judicial review once it became clear that it would be adversely affected by the governing legislation. Such detailed matters were best left to be determined at the hearing of the substantive application (page 74, line 33 – page 75, line 4; page 75, lines 15–30).

Cases cited:

(1) *Caswell* v. *Dairy Produce Quota Tribunal for England & Wales*, [1990] 2 A.C. 738; [1990] 2 All E.R. 434, observations of Lord Goff of Chieveley applied.

(2) *Lane* v. *Esdaile*, [1891] A.C. 210; (1891), 64 L.T. 666; *sub nom. Payne* v. *Esdaile*, 60 L.J. Ch. 644, considered.

(3) *Poh, In re*, [1983] 1 W.L.R. 2; [1983] 1 All E.R. 287, considered.

Legislation construed:

Court of Appeal Ordinance (1984 Edition), s.2: The relevant terms of this section are set out at page 73, lines 40–41.

s.5: The relevant terms of this section are set out at page 74, lines 18–20.

s.22: "Without prejudice to anything contained in the Constitution of Gibraltar an appeal shall lie to the Court of Appeal from any decision of the Supreme Court other than—

. . .

(vii) without the leave of the Supreme Court or of the Court of Appeal, any interlocutory order or judgment made or given. . . ."

Court of Appeal Rules (1984 Edition), r.46: The relevant terms of this rule are set out at page 73, lines 2–5.

Imports and Exports Ordinance, 1986, s.16(1): The relevant terms of this sub-section are set out at page 66, lines 39–41.

Imports and Exports (Control) Regulations, 1987 (L.N. No. 6 of 1987), reg. 4(1): The relevant terms of this sub-regulation are set out at page 67, lines 1–2.

Schedule 2, as amended by the Imports and Exports (Control) (Amendment) (No. 2) Regulations, 1995, reg. 3: The relevant terms of this Schedule are set out at page 67, lines 6–7.

Supreme Court Ordinance (1984 Edition), s.2: The relevant terms of this section are set out at page 72, lines 39–41.

s.17B(3), as added by the Administration of Justice (Miscellaneous Provisions) Ordinance, 1988, s.4: The relevant terms of this subsection are set out at page 72, lines 32–36.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.57(1): The relevant terms of this section are set out at page 71, lines 41–43.

Rules of the Supreme Court, O.59, r.14(3): The relevant terms of this subrule are set out at page 72, lines 24–27.

Supreme Court Act 1981 (c.54), s.18(1A), as added by the Courts and Legal Services Act 1990 (c.41), s.7(3): The relevant terms of this subsection are set out at page 72, lines 11–15.

B.J.S. Marrache for the applicant;
N.J. Forwood, Q.C., H.J.M. Levy and *L.E.C. Baglietto* for the respondent.

NEILL, J.A., delivering the judgment of the court: This is a renewed application by A.S. Marrache & Sons Ltd. ("ASM") for leave to move for judicial review. The application is made to the Court of Appeal following the decision or order of Pizzarello, A.J. dated November 21st, 1996 whereby he refused part of the relief then being sought by ASM. I use the words "decision or order" deliberately because there is an issue between the parties as to the nature of the ruling made. The renewed application relates to that part of the relief which was refused by Pizzarello, A.J. and also includes an application to amend the original Form 86A to incorporate a claim for certain additional relief. Before turning to consider the renewed application in detail, however, it is first necessary to say something about the background facts.

ASM is a company incorporated in Gibraltar pursuant to the Companies Ordinance and is the holder of licences to trade in, *inter alia*, tobacco and tobacco products pursuant to the Trade Licensing Ordinance. A 50% beneficial interest in the shares of ASM is held by Tabacmesa, a Spanish corporation which is a distributor of tobacco and tobacco products of European Union origin manufactured by Tabacalera, its parent company. 52.6% of the shares in Tabacalera are owned by the Spanish State.

The import and export of goods into Gibraltar is regulated by the Imports and Exports Ordinance (as amended) ("the IE Ordinance"). By s.16(1) of the IE Ordinance it is provided that "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." In 1987, in pursuance of the powers contained in s.16 of the IE Ordinance, His Excellency the Governor promulgated the Imports and Exports (Control) Regulations, 1987 ("the IEC Regulations"), which were later amended from time to time by amending regulations. Regulation 4(1) of the IEC Regulations

provides that "the goods specified in Schedule 2 may be imported only under and in accordance with a licence granted under these Regulations." In 1995 by the Imports and Exports (Control) (Amendment) (No. 2) Regulations, 1995 the Governor amended the IEC Regulations by adding to the list of goods in Schedule 2 which may be imported only pursuant to a licence: "17. Tobacco or tobacco products other than products which are prohibited imports."

The Collector of Customs ("the Collector") is the office-holder empowered by reg. 5 of the IEC Regulations to grant licences for the import of goods specified in Schedule 2 to those Regulations. In the event of the refusal of a licence by the Collector an appeal lies under the IEC Regulations to the Governor.

By an agreement dated May 14th, 1996, ASM agreed to purchase from Tabacmesa cigarettes and tobacco products manufactured by Tabacalera and to import and distribute these goods in Gibraltar. On or about July 15th, 1996, ASM made an application to the Collector for its warehouse premises at Unit 3, New Harbours to become a licensed bonded store. On July 24th, 1996 ASM submitted to the Collector an application for an import licence in respect of a consignment of cigarettes and tobacco products which it wished to import into Gibraltar pursuant to the agreement of May 14th, 1996. It seems that ASM anticipated that the applications for licences would be dealt with expeditiously and without difficulty. Shortly after the applications were submitted, however, ASM was informed by the Collector that the applications were being considered as a matter of policy at government level and that an immediate answer could not be given.

Early in August 1996 ASM sought and was granted a meeting with the Chief Minister to discuss the applications. Following that meeting Mr. Montado, the Administrative Secretary, wrote to ASM on August 12th, 1996 to say that the matters that had been discussed were under active review but they required further detailed study and consideration and that ASM would be informed when the Government had reached a conclusion.

On September 11th, 1996 ASM's solicitors wrote to the Collector to notify him that as a result of the Collector's failure to approve the application for an import licence, ASM and Tabacalera were suffering substantial loss and damage. It was said that if a decision on the application was not reached an application for leave to move for judicial review would be made to the Supreme Court. In the event, ASM waited for a further month but on October 10th, 1996, in the absence of any decision by the Collector on either of the applications, ASM brought proceedings in the Supreme Court seeking leave to move for judicial review. On October 11th, 1996 Schofield, C.J. ordered that the application for leave should be heard *inter partes* and in chambers on a date to be fixed.

The application to the Supreme Court

I shall have to return later to consider the provisions in the Supreme Court Ordinance under which the application was made. At this stage it is sufficient to refer to the matters set out in the Form 86A in respect of which ASM was seeking relief by way of declarations or other orders. These matters were as follows:

> "(1) The continuing failure of His Excellency the Governor and Commander-in-Chief to amend the Imports and Exports Ordinance and/or the Imports and Exports (Control) Regulations, 1987 so as to bring them into conformity with Community law.
>
> (2) The failure of the Collector of Customs to hear and determine the applicant's application for a licence to import goods.
>
> (3) The failure of the Collector of Customs to hear and determine the applicant's application for a bonded warehouse licence at Unit 3, New Harbours, Gibraltar.
>
> (4) The decision of the Chief Minister of Gibraltar to intervene in the applicant's applications to the Collector of Customs."

It is not necessary for the purpose of this judgment to refer in detail to the grounds relied on in support of the application for leave. The principal grounds can be summarized as follows:

> "(a) that quantitative restrictions and measures having equivalent effect are prohibited in trade between Member States with regard to both imports and exports by virtue of arts. 30 and 34(1) of the Treaty of Rome and that accordingly the IEC Regulations were unlawful and void;
>
> (b) that even if the IEC Regulations were not unlawful and void the Collector had improperly and unlawfully abdicated his responsibilities to determine the licence applications himself by allowing the Chief Minister to intervene;
>
> (c) that it appeared from conversations with the Acting Collector of Customs at the end of July 1996 and from statements made by the Chief Minister at the meeting on August 8th, 1996 that, in making any decision with regard to the applications for the licences, irrelevant considerations would be taken into account or would be allowed to influence the decisions, including irrelevant political considerations."

The parties named as the proposed respondents to the application were: His Excellency the Governor and Commander-in-Chief, the Collector of Customs, the Chief Minister of Gibraltar and Her Majesty's Attorney-General for Gibraltar.

At the hearing of the application before Pizzarello, A.J. counsel for the proposed respondents put forward a number of arguments in opposition to the application. These arguments included contentions that the applicant had been guilty of delay and also that arts. 30 and 34 did not apply to Gibraltar. The judge came to the conclusion that on the European law

question there was undoubtedly an arguable case. He therefore allowed the application against the Collector and made an order in the following terms:

> "The intended applicant do have leave to move for judicial review limited to the following issues:
>
> (i) the failure of the Collector of Customs to hear and determine according to law the intended applicant's application for a licence to import goods;
>
> (ii) the failure of the Collector of Customs to hear and determine according to law the intended applicant's application for a bonded warehouse at Unit 3, New Harbours, Gibraltar."

However, the judge refused ASM's application for leave to move against the other proposed respondents and also refused the application for interim relief.

On the issue of delay, counsel for the proposed respondents submitted that the question of delay had to be considered against each of the respondents individually. As far as the Governor was concerned there was no excuse for the delay by the applicant. If the Governor were in default he had been in default since 1987 when the IEC Regulations were promulgated. It was therefore argued that from the moment that there was resistance to the applications the applicant should have taken up the question of the legality of the Regulations. It seems that the judge accepted this argument and decided that the application against the Governor had not been made promptly. In relation to the matters raised in paras. (2), (3) and (4) of the application, however, he held that, viewing the question of delay objectively, the application had been made promptly.

The application against the Chief Minister was rejected on the basis that the Chief Minister had no right to intervene in the case because the decision was that of the Collector. If the Chief Minister had intervened improperly it would vitiate the decision of the Collector, but it was the Collector's decision which was important. It seems clear to me that it was the judge's view that the Chief Minister was, in the circumstances, an unnecessary party to these proceedings.

The judge also concluded that if it were found that the Collector had acted contrary to European law, a claim for damages would lie against him. As I understand the matter, the inclusion of the Attorney-General as an intended respondent was rejected on the ground that she too was an unnecessary party.

The renewal of the application

On December 12th, 1996, about three weeks after Pizzarello, A.J. gave his ruling, the Collector wrote to ASM's solicitors to inform them that he had decided to refuse to grant the licences applied for. The letter from the Collector continued as follows:

"The applications have been considered against, *inter alia*, the following background:

(1) All matters concerning the import and export of tobacco are of great concern to the Government of Gibraltar and are matters of public interest in view of the damaging effects which tobacco smuggling has had on Gibraltar and its international reputation. In fact, I am able to inform you that the Government's concern is such that it is presently reviewing all import and export legislation in so far as it affects tobacco generally.

(2) Your supplier and substantial shareholder has a monopoly over tobacco products in Spain and could potentially be in a strong position to influence and control the local tobacco market to the detriment of the free play of competition and/or consumers and/or public policy.

(3) There have already been several cases reported to me of the attempted illegal import of Tabacalera-manufactured cigarettes from Gibraltar. There is also concern that a Spanish state monopoly's involvement in your proposed business should not help bring about a saturation of Spanish cigarettes in the local market at low prices. This may well lead to further smuggling of Spanish cigarettes into Spain (notwithstanding your assurances to the contrary) and, in turn, to further complaints and measures by the Spanish State concerning and affecting Gibraltar.

(4) The Government's concern over tobacco smuggling has led to a moratorium on the issue of all bonded warehouse licences. This moratorium has been in force for some time and there are no reasons which would justify an exception being made for your clients in that respect.

I am advised by my legal advisers that arts. 30–36 of the EC Treaty do not apply to Gibraltar. I consider that even if they did, the requirement and refusal of a licence to yourselves would (in the light of (1) and (2) above) nevertheless be justified on public policy grounds under art. 36."

Elsewhere in the letter it was suggested that ASM might well be a state monopoly of a commercial character for the purposes of art. 37 of the EC Treaty.

Meanwhile, on November 27th, 1996 ASM had applied by way of an *ex parte* originating notice of motion for an order that leave to apply for judicial review be granted in so far as leave had been refused by Pizzarello, A.J. on November 21st. On January 2nd, 1997 Schofield, C.J. directed that the application should be heard by the Court of Appeal on a date to be fixed with notice given to the proposed respondents.

The application came on for hearing before this court on February 26th, 1997. At this hearing ASM applied for leave to amend the matters in respect of which relief was sought. If these proposed amendments are

granted the amended Form 86A will relate to the following matters:

"(1) The continuing failure of His Excellency the Governor and Commander-in-Chief to amend the Imports and Exports Ordinance and/or the Imports and Exports (Control) Regulations, 1987 so as to bring them into conformity with Community law.

(2) The failure of the Collector of Customs to hear and determine until December 12th, 1996 the applicant's application for a licence to import goods.

(3) The failure of the Collector of Customs to hear and determine until December 12th, 1996 the applicant's application for a bonded warehouse licence at Unit 3, New Harbours, Gibraltar.

(4) The decision of the Chief Minister of Gibraltar and/or Government of Gibraltar to grant to five importers special or exclusive rights to import tobacco products.

(5) The decisions of His Excellency the Governor and Commander-in-Chief dated 5th February 1997 not to determine the applicant's appeals from the decisions of the Collector of Customs."

It will be seen that para. (1) remained in its original form and that the amendments to paras. (2) and (3) merely reflected the fact that on December 12th, 1996 the Collector wrote to ASM's solicitors to inform them that the applications for the two licences had been refused. Paragraphs (4) and (5), however, pose different considerations which I shall have to examine in more detail later. At this stage it is sufficient to refer to the fact that para. (5) is concerned with the letter dated February 5th, 1997 sent on behalf of the Deputy Governor to ASM's solicitors to inform them that the Governor had decided to defer the statutory appeal proceedings in relation to the applications for licences "until the applicability of arts. 30–36 to Gibraltar has been resolved by the courts."

Before I consider the proposed amendments in paras. (4) and (5) and the question of delay in relation to para. (1), however, I must first examine the preliminary objection raised on behalf of the proposed respondents by Mr. Nicholas Forwood, Q.C. to the effect that this court has no jurisdiction to consider this renewed application at all.

The jurisdiction of the Court of Appeal

The argument advanced by Mr. Forwood in support of his contention that this court had no jurisdiction was on the following lines, although I have supplemented it by the inclusion of some additional references:

"(1) The source of the jurisdiction of the Court of Appeal for Gibraltar is statutory and is contained primarily in s.57(1) of the Constitution. Section 57(1) is in these terms: 'There shall be a Court of Appeal for Gibraltar which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law.'

(2) The jurisdiction of the Court of Appeal is further regulated by s.62 of the Constitution which specifies the cases in which an appeal

lies to the Court of Appeal from decisions of the Supreme Court as of right and the cases in which an appeal lies only with the leave of the Supreme Court or the Court of Appeal.

(3) The Court of Appeal has no original or residual jurisdiction and, in the absence of any provision in primary legislation, the jurisdiction of the court cannot be extended by rules of court.

(4) Accordingly, the Court of Appeal for Gibraltar has no jurisdiction to entertain a renewed application *ex parte* under O.59, r.14(3) of the English Rules of the Supreme Court. The Court of Appeal in England is in a different position because—

(a) s.18(1A) of the Supreme Court Act 1981 provides that 'in any such class of case as may be prescribed by Rules of the Supreme Court, an appeal shall lie to the Court of Appeal only with the leave of the Court of Appeal or such court or tribunal as may be specified by the Rules in relation to that class';

(b) O.59, r.1B, made under s.18(1A), prescribes the classes of case where appeals lie only by leave. Section 18(1A) was inserted into s.18 by s.7 of the Courts and Legal Services Act 1990;

(c) applications to the Court of Appeal for leave to appeal to the Court of Appeal are governed by O.59, rr. 1A, 1B and 14(2);

(d) notwithstanding the fact that O.59, r.1 is expressed to apply to 'every *appeal* to the Court of Appeal,' O.59, r.14(3) makes specific provision for the renewal of an *ex parte* application. The wording of r.14(3) is important: 'Where an ex parte application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal ex parte within 7 days after the date of the refusal.'

(5) The jurisdiction of the Supreme Court to entertain applications for judicial review is subject to the express limitation contained in s.17B(3) of the Supreme Court Ordinance which provides that—

> 'no application for judicial review shall be made unless the leave of the court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.'

'The leave of the Court' referred to in s.17B(3) is the leave of the Supreme Court. By s.2 of the Ordinance 'court' is defined as meaning 'the Supreme Court of Gibraltar and includes the Chief Justice, and any additional judge thereof, whether sitting in court or in chambers or elsewhere . . . .'

(6) There has been no extension of the Court of Appeal's jurisdiction in Gibraltar similar to that effected in England by O.59, r.14(3). Accordingly, although no rules of court have been made relating to an application for judicial review as was contemplated by

s.17B(1) of the Supreme Court Ordinance the applicant cannot rely on r.46 of the Court of Appeal Rules. Rule 46 is in these terms: 'In any case not provided for by these rules the practice and procedure for the time being of the Civil Division of the Court of Appeal in England shall be followed as nearly as may be.'

(7) In an appropriate case an application could come before the Court of Appeal following the refusal by a single judge, but such an application would be by way of an appeal and would be an appeal from an interlocutory order which in accordance with s.22(vii) of the Court of Appeal Ordinance would require the leave of the Supreme Court or the Court of Appeal. In the present case, however, the applicant was not moving the court by way of appeal and, in any event, an appeal was now much too late and no leave had been sought from the Supreme Court.

(8) In any event, even if O.59, r.14(3) were held to apply, the present application falls outside the provisions of r.14(3) because the hearing before Pizzarello, A.J. was *inter partes*."

In opposition to this argument, counsel for ASM put forward the two principal contentions that—

(a) s.17B of the Supreme Court Ordinance (which was introduced into the Ordinance in 1988) contained a separate code for judicial review proceedings and that, in the absence of any special rules of court made in Gibraltar, all the relevant provisions both of OO. 53 and 59 are relevant and applicable; and

(b) by virtue of the opening words of s.22 of the Court of Appeal Ordinance an appeal lies to the Court of Appeal "from any decision of the Supreme Court . . . ." The word "decision" is to be contrasted with the words "interlocutory order or judgment" in s.22(vii).

In support of his second submission, counsel referred to *In re Poh* (3) where the principle laid down in *Lane* v. *Esdaile* (2) was applied so as to preclude an appeal to the House of Lords from the dismissal by the Court of Appeal of an *ex parte* application for leave to move for judicial review. It was there held that the refusal of leave was not a judgment or order of the Court of Appeal.

I can deal with ASM's second submission very shortly. I am not persuaded that in construing s.22 of the Court of Appeal Ordinance, any distinction can be drawn between "decision" and "order or judgment" in s.22(vii). The other paragraphs in s.22 do not permit any such distinction to be made. Furthermore, it is provided by s.2 of the Court of Appeal Ordinance that, "unless the context otherwise requires . . . 'judgment', in relation to a civil appeal, includes any decree, order or decision." Accordingly, if the matter had to be decided exclusively by reference to s.22, I would hold that the application fell within s.22(vii).

I have come to the conclusion, however, that on its proper construction, s.17B of the Supreme Court Ordinance was intended to introduce into the

law of Gibraltar a system of judicial review similar to that available in England. It seems to me to be quite clear that in the absence of any rules of court in Gibraltar, O.53 of the Rules of the Supreme Court is to be applied as far as may be without any qualification. Furthermore, if the words "leave of the Court" in s.17B mean the leave of the Supreme Court *only*, so that any application to the Court of Appeal is therefore precluded, it seems to me that, for the reasons explained in *Lane* v. *Esdaile* and *Re Poh*, it might be impossible to renew an application by way of an appeal in the strict sense.

It is to be noted that there is no reference to a renewed application to the Court of Appeal in O.53 and the special provision in O.59, r.14(3) for a renewed application is included in an Order which regulates the *appellate* jurisdiction of the English Court of Appeal.

In my judgment, s.17B introduced a special code for judicial review proceedings in Gibraltar and, by necessary implication, it included the relevant part of O.59. It may be observed that s.2 of the Supreme Court Ordinance contains definitions which are to apply "unless the context otherwise requires." It may also be observed that by virtue of s.5 of the Court of Appeal Ordinance, the Court of Appeal has "all the powers and duties conferred or imposed on the Supreme Court in the exercise of its original or appellate jurisdiction." In these circumstances, I would hold that the Court of Appeal for Gibraltar has jurisdiction to entertain this renewed application. I do not consider that this jurisdiction is affected by the circumstance that in this particular case the judge ordered that the hearing below should be *inter partes* rather than *ex parte* on notice.

I turn, therefore, to the question of the amendments.

The proposed amendments

It was argued on behalf of the proposed respondents that the amendments to paras. (2) and (3) of Form 86A should be left to the trial judge. Technically this may be right but, for my part, I see no objection to making the position clear at this stage and I would be disposed to allow these amendments.

The other amendments, however, are quite different. It was argued by counsel for ASM that the proposed amendment to para. (4) merely made the application relating to the Government clearer and more precise. I cannot accept this submission. It seems clear from the judgment of Pizzarello, A.J. that he was concerned with the events of July and August 1996. The decision in relation to the five named companies may raise quite different issues which were not before Pizzarello, A.J. I would disallow this amendment.

The position is even clearer in relation to para. (5). Counsel for ASM accepts that in general applications for judicial review, being concerned with procedural propriety, relate to decisions which have already been reached. It may well be that, by consent, later decisions arising out of the same subject-matter can be conveniently included in a renewed application,

but in the absence of such consent the matter must be looked at strictly. On this basis I can see no satisfactory ground for allowing the letter of February 5th, 1997 to be included in the renewed application. I would disallow this amendment also. I would only add this: We have not been addressed on the merits of the opposing arguments as to whether or not the letter of February 5th amounted in the circumstances to a constructive refusal. Nevertheless, it may be helpful to emphasize that at the stage of the grant of leave, the court is only concerned with whether there is an arguable case.

I come finally to the question of delay in relation to para. (1).

Delay in relation to para. (1) of Form 86A

It will be remembered that the judge concluded that the applicant had not acted promptly in relation to the matters raised in para. (1) of his Form 86A. With respect, however, it seems to me that in order to reach a decision as to whether or not the applicant acted promptly it would be necessary to carry out a more detailed investigation of the facts than would be appropriate on the hearing of an application for leave. It is true that the agreement between ASM and Tabacmesa for the importation of cigarettes and tobacco products was made on May 14th, 1996 but applications for licences were not made until July 1996 and, as I understand the matter at present, the applicant believed at that time that the applications would be dealt with almost at once and in the usual manner. Furthermore, I have in mind a passage in the speech of Lord Goff of Chieveley in *Caswell* v. *Dairy Produce Quota Tribunal for England & Wales* (1) ([1990] 2 A.C. at 747) where he indicated that in many cases detailed questions should be left to be explored in depth on the hearing of the substantive application.

Accordingly, I would not reject the applicant's application in respect of para. (1) at this stage.

Conclusions

In these circumstances, I would reject the argument that this court lacks jurisdiction to entertain the renewed application. But, save to the very limited extent of the amendments to paras. (2) and (3), I would refuse the proposed amendments to Form 86A. I would, however, allow the application in relation to para. (1).

The question then arises as to the appropriate parties to these proceedings. On the hearing of the appeal counsel for the proposed respondents made a concession in the following terms:

> "It is conceded by the Collector that, within the framework of the judicial review proceedings in respect of which leave was given on November 21st, 1996, no point will be taken, with regard to the claim for damages, by reason of the fact that the Attorney-General is not a party thereto."

It was made plain by counsel that this concession was also given on behalf of the Governor. In these circumstances the respondents to the application will be His Excellency the Governor and Commander-in-Chief of the City of Gibraltar and the Collector of Customs. The other proposed respondents will not be parties.

To the extent indicated, I would allow this renewed application.

Order accordingly.