R. v. GOVERNOR and COLLECTOR OF CUSTOMS, ex parte A.S. MARRACHE & SONS LIMITED

SUPREME COURT (Schofield, C.J.): August 28th, 1998

Tobacco—licensing—importation—refusal by Collector of Customs to grant import and bonded warehouse licences to foreign-owned company as likely to disrupt sensitive local tobacco trade and encourage smuggling—no breach of EC Treaty, art. 85(1) on restriction of competition or art. 221 on discrimination in investment

Administrative Law—judicial review—oral evidence—application normally heard solely on affidavit evidence—court will not hear witnesses to resolve conflicts in evidence in proceedings seeking declaration of no substantive benefit to applicant unless proceedings to be continued as if commenced by writ for purpose of damages claim

Tobacco—licensing—appeals—Governor to hear appeal from Collector of Customs on basis of existing law—may not defer appeal pending potential determination of point of EC law in other proceedings before court

Administrative Law—public officers—administrative malfeasance—plaintiff seeking damages to show breach of statutory duty or misfeasance in office, i.e. deliberate and dishonest abuse of power, not merely erroneous use of statutory discretion

The applicant applied for judicial review of decisions by the Collector of Customs and the Governor in relation to its application for licences to import tobacco and operate a bonded warehouse.

The applicant entered an agreement with a state-owned Spanish tobacco manufacturer to import and distribute its products in Gibraltar. Under the agreement the Spanish company acquired a beneficial majority shareholding in the applicant and the applicant was to obtain the necessary licences to import the tobacco (to be granted on a shipment by shipment basis) and store it for wholesale. The applicant alleged that at a meeting with the former Collector of Customs prior to the conclusion of the agreement, assurances were given that the licences would be granted when applied for. This was denied by the Collector.

Following a change of Government policy, and a meeting with the Chief Minister at which he expressed concerns about tobacco smuggling from Gibraltar to Spain, the applicant applied to the court challenging the validity of the governing legislation under the EC Treaty. The

licences were later refused. A letter accompanied the refusal, setting out the Collector's reasons, including the smuggling problem and the fact that the applicant's business partner had a monopoly over tobacco production in Spain and might influence the local market to the detriment of free competition. It stated that if the provisions of the EC Treaty did apply to Gibraltar, the Collector's decision was justified on public policy grounds under art 36. A footnote to the letter stated that the applicant might be regarded as a state monopoly for the purposes of art. 37 of the EC Treaty.

The applicant appealed to the Governor against the refusal of the imports licence, but the Governor, despite a court ruling to the contrary, refused to make a decision on the appeal until the court had resolved the question raised earlier by the applicant of the applicability of arts. 30 and 36 of the EC Treaty to Gibraltar. Meanwhile, as a result, the agreement with the Spanish manufacturer was terminated. The applicant sought judicial review of the Collector's refusals and the Governor's decision.

Following the introduction of new legislation governing the licensing of bonded warehouses and storage of tobacco, renewed applications for licences to import and store tobacco were granted. However, the applicant continued to seek declarations clarifying its position, including, *inter alia*, (a) that it had had a legitimate expectation following its meetings with the Collector of Customs and the Chief Minister that its applications for licences would be granted; (b) that the Governor had a continuing duty to hear its appeal against the Collector's refusal of an import licence as soon as possible (even though no such right of appeal existed under the new legislation); (c) that the alleged monopoly held by its Spanish business partner over tobacco production in Spain was not relevant to the grant or withholding of an import licence and a refusal on that ground was contrary to arts. 85(1) and 221 of the EC Treaty governing restriction of competition and equal treatment of EC nationals in investment business; and (d) that the Collector's concern that a saturation of Spanish cigarettes in the local market would lead to more smuggling into Spain, damaging diplomatic relations, was similarly irrelevant.

Held, dismissing the applications:

(1) The Collector had not acted in breach of art. 85(1), which prohibited actions preventing, restricting or distorting competition within the European Community, by concluding that the applicant's proposed enterprise would disrupt the sensitive tobacco trade in Gibraltar. Nor was the refusal in breach of art. 221, proscribing discrimination against nationals of other EC states in the area of investment, since the decision had been taken on the basis of the identity of the applicant's major shareholder as a body capable of disrupting good government, and not on the basis of its nationality (page 360, line 42 – page 361, line 7).

(2) However, the applicant's ability to flood the Gibraltar market with low-priced Spanish cigarettes, thereby exacerbating the existing problem

of smuggling, was not a relevant consideration for the Collector to have taken into account in refusing the licences, since import licences were to be applied for separately for each individual shipment, and the influx of tobacco would therefore be under his own control (page 361, lines 21–29).

(3) The issue of legitimate expectation was no longer a "live" one in the light of the subsequent grant of the licences sought and was relevant only to damages. Although there was a conflict of evidence in the affidavits as to what had transpired at the meeting between the applicant and the Collector of Customs, which could only be resolved by the calling of witnesses, the court would not hear *viva voce* evidence, since this was inappropriate in judicial review proceedings and would be done only if the proceedings were to be continued as if commenced by writ. The court would not open further contested areas of fact for the purpose of making an unnecessary declaration (page 358, lines 1–14).

(4) The Governor had erred in deferring his determination of the applicant's appeal against the Collector's refusal of an import licence. As the court had already ruled, he had at the time statutory authority to hear such appeals and should have done so in accordance with his understanding of the applicable law, having taken appropriate legal advice. Furthermore, the licensing authority had hitherto acted in line with the legislation as it stood and continued to grant licences on this basis whilst the applicant's appeal was pending. The Governor's actions penalized the applicant for having challenged the legislation. In any event, his decision to wait for the outcome of judicial review proceedings in which the existing legislation had been challenged under EC law ignored the reality that that issue might not ultimately prove sufficiently relevant to warrant a decision at all, and might in fact be dropped from the applicant's case (page 359, lines 11–36).

(5) Thus, grounds existed for declarations to be made in respect of the Collector's refusal of the licences and the Governor's deferral of the appeal. However, such declarations would assist the applicant only if it had an arguable claim for damages for losses suffered. The Governor's deferral may well have resulted in loss to the applicant, but since his appellate powers related only to import licences and not to the operation of a bonded warehouse, which would have been vital to the applicant's business, the value of a declaration was questionable. Furthermore, to obtain damages, the applicant would have to prove that the Governor had been guilty of a breach of statutory duty or misfeasance in public office, namely, the deliberate and dishonest abuse of powers. Since, on the evidence, the Governor's deferral had been erroneous rather than malicious, the applications would be dismissed (page 361, line 34 – page 362, line 37).

Cases cited:

(1) *Three Rivers District Council* v. *Bank of England (No. 3)*, [1996] 3 All E.R. 558; [1996] T.L.R. 245, applied.

(2) *X (Minors)* v. *Bedfordshire County Council*, [1995] 2 A.C. 633; [1995] 3 All E.R. 353, applied.

Legislation construed:

Treaty Establishing the European Community (Rome, March 25th, 1957; UK Treaty Series 29 (1996)), art. 30:

> "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States."

art. 36: "The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports … justified on grounds of public morality, public policy or public security …. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

art. 85(1): The terms of this paragraph are set out at page 360, lines 15–27.

art. 221: The terms of this article are set out at page 360, lines 29–34.

J.P. Wadsworth, Q.C., *D. Whitmore* and *Ms. M.P.C. Grech* for the applicants;

N.J. Forwood, Q.C., *L.E.C. Baglietto* and *F.R. Picardo* for the respondents.

SCHOFIELD, C.J.: A.S. Marrache & Sons Ltd. ("ASM") is a Gibraltar company beneficially owned by the members of the Marrache family. The family has been trading in tobacco for over 100 years and ASM was incorporated in 1946. ASM holds licences pursuant to the Trade Licences Ordinance to sell tobacco by retail and wholesale. The evidence is that ASM previously held a licence for a bonded warehouse and licences to import tobacco and tobacco products but in 1990 ceased the wholesale trading in tobacco because of Mr. Marrache Senior's disapproval of the tobacco smuggling activities being openly carried on from Gibraltar.

In 1996 ASM had a change of heart and entered into an agreement with the Spanish State-controlled manufacturer of tobacco products, Tabacalera S.A. ("Tabacalera"). Previously Tabacalera had distributed its products through a Gibraltar company called Anglo Hispano Ltd. Under the agreement reached with ASM, a company called Tabacmesa took a beneficial interest in 50% of the shares of ASM. Tabacmesa is wholly owned by Tabacalera, 52.6% of the shares of which are owned by the Spanish state. ASM was to lease a new warehouse and obtain a licence to operate the warehouse as a bonded store. The bonded store facility was necessary to avoid ASM being at a disadvantage with competing

wholesalers who all enjoy such facilities. Licences were then required for the importation of each consignment of tobacco or tobacco products.

On April 18th, 1996 and prior to the conclusion of the agreement with Tabacalera, members of the Marrache family had a meeting with Henry Smart, the then Collector of Customs. Present at the meeting was a representative of Tabacalera, Xavier Terres. It was the Collector's duty to grant or refuse applications for licences for bonded stores and for the importation of tobacco and tobacco products. There is a dispute, evident from the affidavits, as to what transpired at that meeting. It is sufficient for our purposes to record that ASM came away from the meeting confident that it had received assurances that the relevant licences would be granted and, on that understanding, entered into the agreement with Tabacalera, contracted to refurbish its retail shop at a cost of £100,000 and leased from the Crown a warehouse at a rent of £43,459 per annum.

On July 18th, 1996 ASM applied for a bonded warehouse licence and on July 24th, 1996 applied for a licence to import a consignment of tobacco. ASM learned that the applications had been referred by the Collector to the Government for guidance on its policy in connection with such applications. There had been a change of Government between ASM's meeting with the Collector on April 18th, 1996 and the application for licences in July 1996 and, indeed, a change of Government policy with regard to the importation of tobacco and tobacco products, which included a moratorium on the grant of licences for new bonded stores for tobacco and tobacco products.

When they learned that there might be difficulties in obtaining the licences, representatives of ASM had a meeting with the Chief Minister which took place on August 8th, 1996. Xavier Terres of Tabacalera was present at the meeting. Again, the account of this meeting as recorded by a representative of ASM does not exactly accord with the account as recorded by Mr. Montado, the then Administrative Secretary. Be that as it may, it is accepted by the respondents that at that meeting the Chief Minister mentioned that Spanish tobacconists had complained of the damage done to their businesses by tobacco smuggling from Gibraltar and that they would complain further if cigarettes supplied by Tabacalera ended up in Spain. He also expressed surprise that a Spanish company wanted to trade with Gibraltar whereas other Spanish State-owned companies such as Telefonica refused to do so or to recognize Gibraltar's international telephone code. When the Chief Minister asked whether Tabacalera intended to import American brands of cigarettes into Gibraltar he was told that that was not the intention and an undertaking was given in writing immediately after the meeting that Tabacalera would only import Spanish-manufactured cigarettes into Gibraltar.

In Mr. Montado's minute of the meeting it is recorded that the Chief Minister considered that there were three issues for decision, namely: (a)

whether the Gibraltar Government wished to take a political stand in the light of the Telefonica disputes; (b) whether the Government would be prepared to authorize Tabacmesa to have a bonded store for Tabacalera cigarette products; and (c) whether a quota should be imposed on Spanish cigarettes, given that this already applied to goods with a ready demand in Spain and which were susceptible to smuggling.

The Chief Minister promised ASM a decision on the following Monday. That was four days after the meeting. On that Monday Mr. Montado wrote to ASM to inform it that he was not in a position to give it a reply. On August 15th Messrs. Marrache & Co., on behalf of ASM, wrote to the Chief Minister explaining how the delays in obtaining the licences were affecting ASM. No response had been received by September 11th, 1996 and Marrache & Co. then wrote to the Collector seeking a decision within 24 hours, failing which an application would be made for judicial review. After waiting a further month, and there still being no decision from the Collector, ASM filed proceedings seeking leave to move for judicial review. The application for leave was heard *inter partes* on November 20th, 1996.

[The learned Chief Justice set out the relief sought in the application, including a challenge to the Imports and Exports (Control) Regulations, 1987 under EC law. Following an application to the Court of Appeal for leave to apply for judicial review on grounds which had been refused by the Supreme Court, the Collector of Customs refused to grant the licences and wrote to the applicant setting out his reasons. The applicant appealed to the Governor against the refusals but was informed that a decision on the appeal was to be deferred until after the applicability of arts. 30–36 of the EC Treaty to Gibraltar had been resolved by the courts. This was despite a ruling by the court that he should determine the appeal on the basis of available legal advice. An amended application to the Court of Appeal was filed in respect of the Collector's refusals and the applicant also applied for and was granted leave to apply for judicial review of the Governor's deferral of its appeal against the refusal. The applications (1996 Misc. No. 56 and 1997 Misc. No. 21) were consolidated. The learned Chief Justice continued:]

I should add that as a consequence of ASM's inability to perform its functions under the agreement, ASM's agreement with Tabacalera was terminated. Tabacmesa subsequently sold its interest in ASM back to shareholders representing the Marrache family.

The story does not end there. A new Tobacco Ordinance was enacted by the House of Assembly, to which assent was given by His Excellency the Governor on October 30th, 1997. The Ordinance came into force on November 13th, 1997. ASM took the view that the Ordinance was incompatible with European Community Law and, whilst the Ordinance

was in Bill form, notified the Attorney-General that it would seek to challenge the validity of the legislation by way of judicial review.

The Chief Minister has made Regulations under the new Tobacco Ordinance. The Ordinance and Regulations provided a whole new regime for the licensing of warehouses for the storage of tobacco and tobacco products and the method of, and fees for, applications to be made to the Collector in that connection. This regime has overtaken the regime previously in force under which ASM's applications for a bonded warehouse licence and for an import licence were made and has made redundant ASM's appeals to the Governor from the Collector's refusal on December 12th, 1996 to grant its applications.

On February 6th, 1998 ASM submitted to the Collector applications for a warehouse licence and for a retail tobacco licence. By March 17th, 1998 the Collector had not communicated his decision on those applications to ASM.

[The learned Chief Justice described how a further application challenging the new legislation and seeking to compel the Collector to determine the new licence applications was withdrawn when the Collector agreed to grant the licences. The applicant withdrew its challenge to the Governor's deferring its appeal against the Collector's earlier refusal of a bonded warehouse licence when it discovered that no such right of appeal existed, but persisted in relation to the appeal against refusal of an import licence and with its substantive application for judicial review of the earlier refusals on a number of grounds. It sought declarations as to the relevant criteria for the grant or renewal of licences including, *inter alia*:]

> "That the applicant had a legitimate expectation that its applications for a bonded warehouse licence and licences to import tobacco and/or tobacco products would be granted." [1996 Misc. No. 56]
>
> "That His Excellency was under a continuing duty to hear and determine the ASM's appeal against the decision of the Collector of Customs to refuse its application for a licence to import tobacco as soon as reasonably practicable in accordance with the judgment of this Honourable Court;
>
> That the following considerations are not relevant to the grant or withholding of a licence to import European Union tobacco or tobacco products:
>
> . . .
>
> (e) any purported monopoly of supply of Tabacalera over tobacco products in Spain;
>
> . . .
>
> (h) concern that Tabacalera's involvement in the applicant's proposed business might bring about a saturation of Spanish

> cigarettes in the local market at low prices which would lead to further smuggling of Spanish cigarettes into Spain and in turn to further complaints and measures by the Spanish state concerning and affecting Gibraltar . . . ." [1997 Misc. No. 21]

If those, or any of those, declarations are granted, ASM seeks an order that damages claimed in both applications be assessed pursuant to O.53, r.7 of the Rules of the Supreme Court and that both applications proceed as if commenced by writ.

[The learned Chief Justice noted the existence of two further summonses in the proceedings: the first regarding the calling of the former Collector of Customs and Administrative Secretary to give oral evidence, which was withdrawn; and the second in relation to an extension of time to serve the originating notice of motion in 1997 Misc. No. 56 out of time, the success of which, the learned Chief Justice stated, would depend on the success of the substantive application. He continued:]

I shall deal with the question of whether ASM is entitled to the declarations it seeks, or any one of them, *seriatim*, and then go on to determine whether I should order that damages claimed in the applications be assessed and that the applications should proceed as if commenced by writ.

1996 Misc. No. 56

As a preface to consideration of the declarations sought in this first application I ought to set out the reasons given by the Collector of Customs for refusing the licences. They are contained in his letter of December 12th, 1996 in which, after informing ASM of his decision, he continues:

> "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 insofar 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 export 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.

Having taken into account the above and the circumstances of this matter generally and having considered all the representations you have made to me, I have, in the exercise of my discretion, decided to refuse the licences requested, as stated above."

It is against that background that one must consider the declarations sought, although bearing in mind that the validity of the Collector's decision is not the subject of this application.

These reasons explain how the Collector ultimately approached the applications and must give some indication of whether the declarations sought were in fact necessary. I refused to add to the notice of application prayers for declarations which would call his reasoning into question. The action 1996 Misc. No. 56 was filed, it will be remembered, before the Collector's letter set out above. Furthermore the legislation under which the licences were sought has been repealed so there is now no power in the Collector to grant such licences. ASM declares that it has proceeded with this application for two reasons. First, to found an application for damages and, secondly, to establish criteria for the grant of licences under the new legislation.

Let me now deal with the declarations sought in 1996 Misc. No. 56 *seriatim*.

[The learned Chief Justice declined to make the declarations sought as to the relevant criteria for grant or refusal of imports or bonded warehouse licences on the basis that there was no evidence that the factors which the applicants alleged had wrongly been considered had in fact been taken into account. In relation to the issue of legitimate expectation, he continued:]

"(e) a declaration that ASM had a legitimate expectation that its applications for a bonded warehouse licence and licences to import tobacco and tobacco products would be granted."

Benjamin Marrache, who represented ASM at the meeting with the Collector on April 18th, 1996 deposed that at the meeting—

> "we explained the whole proposed venture to the Collector and in particular the need for a bonded warehouse and for periodic licences to import tobacco products distributed by Tabacmesa. The Collector said that he considered the venture would have positive benefits for the Gibraltar economy. He confirmed—
>
> (a) that on receipt of the necessary application he would approve a bonded store for ASM at New Harbours in succession to the old store which ASM had held at Fortress Mews; and
>
> (b) that licences to import Tabacalera tobacco products from Spain would be granted expeditiously."

This is categorically denied by the Collector, who denies that ASM explained the whole proposed venture to him or that he, the Collector, said that he considered that the proposed venture would have positive benefits for the Gibraltar economy. He goes on to say:

> "10. Further, Mr. Marrache alleges in his first affidavit that I told him that licences to import Tabacalera tobacco products from Spain would be granted expeditiously. I categorically refute that I did or that I would have made any such statement or any statement to that effect. The policy of the Government of Gibraltar (which term includes the previous administration) in relation to the importation of tobacco has been to adopt strict measures so as to curb tobacco smuggling. For this reason I would not have made such sweeping statements as Mr. Marrache alleges. The requirement of an import licence whenever an application is made is one of the mechanisms put in place to guard against the proliferation or renewal of such activity.
>
> 11. As Collector of Customs for the Government of Gibraltar in every case where it is proposed to import a substantial quantity of tobacco I am circumspect in the exercise of my discretion. I do not consider that I should act arbitrarily and without regard to the policy of the Government in relation to such matters. It was therefore proper for me to have sought the guidance of the Chief Minister on matters of policy. After due consideration of any policy matters when dealing with a substantial application such as this I take my decision independently as required by law. Clearly, in such a scenario I could not have made the statements that Mr. Marrache now purports to attribute to me."

There is then a replying affidavit by Benjamin Marrache and the submission of his file note in respect of the meeting ASM had with the Collector in which the Collector allegedly said that he would grant the licences. There is also a difference of emphasis between ASM's version of its meeting with the Chief Minister and that of the Chief Secretary.

There is clearly a conflict of fact here which could only be decided by seeing and hearing the witnesses in court. On the material before me I cannot make a finding that ASM have proved the legitimate expectation they claim. This is not a matter which can be decided on affidavits. ASM acknowledges this by its application for the court to hear the witnesses *viva voce*. However as the only live issue, apart from costs, is the issue of damages, I would only hear the witnesses if I were to make the orders sought by ASM that 1996 Misc. No. 56 proceed as if commenced by writ. It is usually inappropriate for evidence to be heard *viva voce* in judicial review proceedings, and in the circumstances of this case, where I clearly find against ASM on all other grounds of claim in this first application, I do not consider I should open further contested areas of fact. ASM has not made out its claim of legitimate expectation on the material before me and I do not order evidence to be heard *viva voce.*

1997 Misc. 21

Of course, with the change of legislation there is now no power in the Governor to hear and determine the appeal against the refusal of the Collector to grant ASM a licence to import tobacco and tobacco products. But ASM seeks the declarations set out above for the reasons it sought the declarations in the first application. Under this application I shall deal with each claim for declaration in turn to determine whether there are grounds for the grant of the declaration sought. I shall then consider whether, in the exercise of my discretion, I do grant any such declarations. My last consideration will be whether I order the application to proceed for the assessment of damages as if begun by writ.

> "(1) A declaration that His Excellency the Governor was under a continuing duty to hear and determine ASM's appeal against the decision of the Collector to refuse its application for a licence to import tobacco as soon as reasonably practicable in accordance with the judgment of this court."

The reference to the judgment of this court is a reference to the judgment of Pizzarello, A.J. on his determination of the application for leave to proceed with this application. When the appeal was lodged with the Governor there was outstanding, and still a live issue in the first application, a prayer for a declaration that the Imports and Exports (Control) Regulations, 1987, as amended, then in force were contrary to art. 30 and not saved by the derogation provided in art. 36 of the Treaty of Rome (as amended). An argument was made before Pizzarello, A.J. that His Excellency would prefer to defer his consideration of the appeal against the Collector's decision pending the court's determination on the application of arts. 30 and 36 of the Treaty. Pizzarello, A.J.'s reaction to this is contained in his judgment, in which he said:

> "The point that the Governor is the statutory authority to hear an appeal is well made in my opinion. It follows that the Governor will

take the law as he believes it to be. If his understanding is that EC Treaty, arts. 30 and 36 do not apply, then he puts those matters to one side and deals with the appeals on that basis. If his understanding is that those articles do apply he will deal with the appeal accordingly. The fact that proceedings in a like matter are before the court should not stop his adjudication."

Despite that opinion, with which I respectfully agree, on February 5th, 1997 the Deputy Governor wrote to ASM's solicitor that the Governor had decided to defer the appeal proceedings "until the question of applicability of arts. 30–36 to Gibraltar has been resolved by the courts."

In that His Excellency the Governor was in error. As pointed out by Pizzarello, A.J., His Excellency had a duty to hear and determine the appeals in accordance with the law as he understood it. It was wrong for him to assume the course the proceedings in judicial review would take and to assume that at the proceedings the point he hoped to have a determination on would be in fact determined. In the course of court proceedings grounds can be taken and later dropped. What appears at first blush to be the central point in the case often becomes peripheral. The course of these proceedings I think adequately demonstrates this. The Governor should have determined the appeal on his understanding of the law and should not have sought to anticipate the progress of the application for judicial review.

Furthermore, we have evidence that during the period that ASM's appeal to the Governor was pending import licences were being granted to other applicants. They must have been granted on the basis that the legislation in force at the time was not contrary to the EC Treaty. Why then refuse to consider ASM's application for a licence pending the outcome of its challenge to the legislation? That amounts to a punishment for doing what is not unlawful—challenging the legislation.

It may be that the Supreme Court was seised of a point of law which could be decisive of the appeal before him. But the licensing authority and the Governor had, up to ASM's challenge, quite rightly been acting in accordance with the legislation in force at the time. Licences continued to be granted under that legislation. The Governor acted unreasonably in refusing to hear appeals properly before him, particularly in the light of Pizzarello, A.J.'s judgment.

There follow ASM's application for four declarations which are a duplication of four claims in the first application. For the reasons I stated in connection with the rejection of those claims in 1996 Misc. No. 56 I do not consider these are grounds for granting the declarations.

"(2) A declaration that consideration of the purported monopoly of supply of Tabacalera S.A. over tobacco products in Spain is not relevant to the grant or withholding of an import licence."

It will be recalled that in his letter of December 12th, 1996, in which he signified his refusal to grant the licences sought the Collector said:

"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 free play of competition and/or consumers and/or public policy."

The Collector added a footnote to the letter: "Your client may well be a state monopoly of a commercial character for the purposes of art. 37 of the EC Treaty." There is a matter which clearly exercised the mind of the Chief Minister and has been passed on to the Collector as a consideration of Government policy.

ASM's position is that this consideration offends arts. 85(1) and 221 of the EC Treaty and that it has been punished for doing something which was not illegal. Article 85(1) of the EC Treaty is applied to States by art. 90. It reads:

"1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

. . .

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Article 221 reads:

"Within three years of the entry into force of this Treaty, Member States shall accord nationals of other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 58, without prejudice to the application of the other provisions of this Treaty."

The respondents' argument is that in considering Tabacalera's monopoly over tobacco products in Spain and its potential influence over the Gibraltar tobacco market they are not exercising discrimination on the grounds of nationality but on the grounds of the identity of the person who would control the enterprise. Article 85(1) prohibits actions "which have as their object or effect the prevention, restriction or distortion of competition within the common market."

I have not been persuaded that arts. 85 and 221 of the EC Treaty have been breached by the policy set out in the Collector's letter. It seems to me to be perfectly reasonable for the Collector, when considering whether to grant a licence, to look at the identity of the applicant to see if such

applicant has the capacity to disrupt an extremely sensitive trade within Gibraltar, and in so doing his consideration is not one of competition but is one of greater public policy. The basis of his decision is not the nationality of the applicant but its identity as a body which has the potential, and has demonstrated a willingness evidenced in the material before me and about which I think the court could take judicial notice, to disrupt the good Government of Gibraltar.

In the event I do not consider there are grounds for granting the declaration sought.

[The learned Chief Justice set out other matters on which he declined to make the declarations sought and continued:]

> "(5) A declaration that concern that Tabacalera's involvement in ASM's proposed business might bring about a saturation of Spanish cigarettes in the local market at low prices, which would lead to further smuggling of Spanish cigarettes into Spain and further complaints and measures by the Spanish State concerning and affecting Gibraltar, is not relevant to the grant or withholding of a licence to import tobacco or tobacco products."

A licence was needed for each single importation of cigarettes. It was therefore up to the Collector in his overall supervisory capacity to control the flow of cigarettes into Gibraltar. He could grant an applicant a licence to import a quantity of cigarettes and, if he felt the market was saturated, he could deny the same applicant a further licence to import. It could not be in Tabacalera's hands to saturate the market to create an overflow which would be smuggled out of Gibraltar.

For this reason I do not consider this was a relevant consideration to the grant of an import licence.

[The learned Chief Justice set out two further matters on which he declined to make declarations and continued:]

It will be seen from the above that there are two matters in the prayers sought upon which I would consider the grant of a declaration, namely: (1) that His Excellency was under a continuing duty to hear and determine ASM's appeal against the decision of the Collector to refuse its application for a licence to import tobacco as soon as reasonably practicable; and (5) that concern that Tabacalera's involvement in ASM's proposed business might bring about a saturation of Spanish cigarettes in the local market which might lead to further smuggling of Spanish cigarettes into Spain is not relevant to the grant or withholding of a licence to import tobacco or tobacco products. In those two matters I find there are grounds for granting the declarations sought and I must now decide whether I should grant them.

It is argued by the respondents that no useful purpose will be served by the grant of those declarations because the jurisdiction is ended, the relief would serve no useful purpose and the declarations are wrong, inappropriate or hypothetical. However, a delay in His Excellency considering the appeal against the Collector's decision may well have resulted in loss, by reason of the delay to ASM. It may be a decision upon which damages may be sought, and I say that without forming any view on the matter.

The only reservation I would have in granting the declarations is ASM's case that without a bonded warehouse licence it would not be economically viable to import tobacco and tobacco products. In having pursued a misconceived appeal to His Excellency against the refusal of the bonded warehouse licence, ASM lost its place in the judicial review procedure and may well not be minded to pursue the question of the import licence without the bonded warehouse licence being in force. However, that is a matter upon which I have not been addressed.

Would I be minded to allow the matter to go forward on damages in these proceedings, rather than leaving ASM to pursue a fresh action on a writ? As I understand the position in this case, ASM, to be entitled to damages at common law, would have to prove either a breach of statutory duty or misfeasance in public office (see *X (Minors)* v. *Bedfordshire County Council* (2)). ASM accepts that it has no right of action for breach of statutory duty. ASM argues that if a statutory discretion is exercised intentionally in the specific knowledge that it will stop ASM trading then it is outside the ambit of discretion. Anyone looking at the matter objectively would know that the delay in considering the appeal by His Excellency would hurt ASM. However, it was held in *Three Rivers District Council* v. *Bank of England (No. 3)* (1) that the test of misfeasance in public office was concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer. On the material before me, there is nothing to suggest that His Excellency was involved in a deliberate and dishonest abuse of power. His decision to defer the consideration of the appeal until the court had made a determination on an issue of law may have been erroneous but it was understandable in all the circumstances.

For those reasons I would not, in any event, order 1997 Misc. No. 21 to go forward as if commenced by writ. The two actions are therefore dismissed with costs to the respective respondents.

Applications dismissed.
