[1999–00 Gib LR 176]

R. v. GOVERNOR, COLLECTOR OF CUSTOMS and ATTORNEY-GENERAL, ex parte A.S. MARRACHE AND SONS LIMITED

COURT OF APPEAL (Neill, P., Waite and Glidewell, JJ.A): May 27th, 1999

Tobacco—licensing—importation—Collector of Customs not in breach of domestic law or EC Treaty in delaying decision on applications for import and bonded warehouse licences by foreign-owned manufacturer and distributor whilst seeking policy advice—no time-limit for decision in legislation and reasonable to consult if licences likely to affect Government's control over sensitive local tobacco trade

Tobacco—licensing—appeals—Governor not in breach of domestic law or EC Treaty in delaying hearing of appeal from Collector of Customs pending court's decision on relevant point of Community law

European Community Law—remedies—damages—damages available for breach of Community law if (a) Community law principle intended to confer rights on individuals, (b) breach of principle sufficiently serious and (c) direct causal link between breach and damage suffered by applicant

European Community Law—remedies—damages—breach of Community law justifying award of damages may relate to primary or secondary legislation or administrative act or error—relevant (i) if fundamental Community principle infringed, (ii) whether contrary to previous ECJ ruling, (iii) nature of duty to act, (iv) breadth of discretion if duty to exercise discretion, and (v) effect of act or omission

The appellant applied to the Supreme Court 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 appellant 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 appellant and the appellant was to obtain the necessary licences to import the tobacco (to be granted on a shipment-by-shipment basis) and store it with a view to wholesale distribution.

Despite alleged assurances that the licences would be granted, they were not forthcoming when applied for. The appellant sought declaratory relief relating to the delay and the intervention of the Government, and challenged the validity of the governing legislation under the EC Treaty. The licences were ultimately refused after some five months. The letter setting out the Collector's reasons referred to the problem of tobacco-smuggling between Gibraltar and Spain and the fact that the appellant'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 the Collector's decision was justified on public policy grounds under art. 36 of the EC Treaty and that the appellant could be regarded as a state monopoly for the purposes of art. 37.

The appellant appealed to the Governor against the refusal of the import licence, but the Governor refused to make a decision on the appeal pending a decision by the Court of Appeal in the existing judicial review proceedings on the question of whether arts. 30–36 of the EC Treaty applied to Gibraltar. Meanwhile, the appellant's agreement with the Spanish manufacturer was terminated. The appellant sought judicial review of the Collector's refusal to grant licences and the Governor's refusal to make a decision.

Although renewed applications for the licences to store and sell tobacco were granted to the appellant following the introduction of the Tobacco Ordinance 1997, it continued to seek declarations clarifying its position. The Supreme Court found, *inter alia*, in the appellant's favour that the Governor had been under a duty to determine its appeal against the Collector's decision, but it declined to make a declaration, since the appellant had no arguable claim for damages for loss suffered. The Governor's appellate jurisdiction related to import licences but not to the necessary bonded warehouse licence (which had also been refused), and the appellant could not show that the Governor was guilty of a breach of statutory duty or misfeasance by deliberately abusing his powers. The proceedings in the Supreme Court are reported at 1997–98 Gib LR 348.

On appeal, the appellant submitted that (a) it was entitled to damages in respect of the Collector's failure—whilst considering the matters set out in his letter to the appellant and government policy—to grant an import licence immediately or to decide within five months whether to grant one, and in respect of the Governor's failure to consider the appeal against refusal before the EC legislation issues had been resolved by the courts; (b) the respondents had infringed arts. 6, 52, 58 and 221 of the EC Treaty by their failures; (c) the court should grant a declaration that the reasons given for refusing a licence would not constitute justification on grounds of public policy under EC law; and (d) by an order under O.53, the proceedings should continue as if commenced by writ for the purpose of claiming damages.

The respondents submitted that (a) the Collector's delay in considering the appellant's application had not been unreasonable, since this was an unusual application and it had been necessary to seek advice in view of

the Government's concern to control closely the movement of tobacco in and out of Gibraltar; (b) the matters considered by the Collector in consultation with the Government were not discriminatory on the ground of nationality within the meaning of art. 52 of the EC Treaty, since the objection raised had been to the control of the appellant's shareholder by the Spanish state, rather than the fact that it was a Spanish-registered company; (c) the delay was not itself an infringement of Community law, as the Collector had not acted under a mandatory obligation but instead exercised a discretion; (d) even if the Collector had been obliged to expedite the application, his failure could not give rise to a claim in damages under Community law, since the breach was not sufficiently serious to impose liability on the state; (e) the Governor had not acted unreasonably in refusing to decide the appeal, since at the relevant time the appellant's main opposition to the Collector's decision had been based on arts. 30–36 of the EC Treaty and had challenged the whole licensing regime; and (f) for the reasons above, nor had the Governor been in breach of Community law so as to give rise to a claim in damages.

Held, dismissing the appeal:

(1) The appellant had no claim under domestic law arising from the Collector's delay in dealing with its application for licences. The relevant legislation had contained no time-limits for the grant or refusal of licences, and the Collector had not acted unreasonably or irrationally in the circumstances. Following its decision to exert tighter control over trading in tobacco and to curb the export of cigarettes from Gibraltar to Spain, the Government had introduced close monitoring and consultation between central administration and the Collector in relation to the importation, distribution and sale of tobacco in Gibraltar. In this context, it had been reasonable for the Collector to seek guidance when approached by a state-owned Spanish manufacturer and retailer that might place at risk the Government's ability to control the movement of tobacco to and from Gibraltar (paras. 37–39; para. 43).

(2) Although it was accepted that arts. 6, 52, 58 and 221 of the EC Treaty applied to Gibraltar, there was no remedy available to the appellant under the principles of EC law. Since the Collector had acted in the exercise of a discretion, the requirement (if it existed) to act expeditiously did not apply as it might if he had been under some mandatory obligation as a decision-maker (para. 31; para. 45).

(3) More importantly, however, even if he should have made his decision more promptly, his failure to do so did not give rise to a claim in damages under EC law. Damages could be awarded only if the principle infringed had been intended to confer rights on individuals, if the breach were sufficiently serious and if a direct causal link could be shown between the breach and damage sustained by the appellant. Damages could be awarded in principle whether the particular breach related to primary or

secondary legislation or to an administrative act or error. The nature of the breach and whether it infringed a fundamental principle of EC law were relevant to its seriousness, as were the nature of the respondent's duty to act and the effect of the act or omission on the appellant. If the ECJ or European Commission had made a previous ruling to which the respondent should have had regard, that too would be considered. If the duty was to exercise a discretion, the breadth of that discretion was relevant. In the present case, the Collector's delay plainly did not amount to conduct of sufficient seriousness to found a claim for damages (paras. 46–50).

(4) It was unnecessary for the court to decide whether the objections raised by the Collector of Customs and the Government to the grant of licences were discriminatory on the ground of nationality, since the respondent was entitled to succeed on other grounds. However, in the context of art. 52 on freedom of establishment, the court was not convinced of the distinction drawn by the Collector between differentiating the appellant's shareholder from other applicants on the basis of its *identity* as a Spanish state-controlled company, and discriminating against it on the ground of *nationality* (paras. 41–42).

(5) The Chief Justice had erred in finding that the Governor was under a duty promptly to determine the appellant's appeal against the Collector's refusal of an import licence. Given that the appellant's challenge to the refusal at that time was based on arts. 30–36 of the EC Treaty and the legal challenge directed against the entire licensing was still ongoing, the Governor had not acted unreasonably in deferring his decision pending the Court of Appeal's resolution of the relevant issue. Although it might have been wise for him to determine the appeal on the basis of the law at the time as he understood it, his failure to do so could not found a claim in damages under domestic law. Nor had he breached any principle of EC law. If there was a general principle that decisions were to be made expeditiously, it was to be applied according to the facts of each case, and no time-limit applied to the hearing of appeals by the Governor. Even if he had breached this principle, the breach was not sufficiently serious to merit an award of damages. The appeal would be dismissed (paras. 53–57).

(6) The issue of whether arts. 30–36 of the EC treaty applied to Gibraltar had not yet been resolved and would in future require a reference to the European Court of Justice (para. 31).

Cases cited:

(1) *Brasserie du Pêcheur S.A.* v. *Federal Republic of Germany*; *R.* v. *Transport Secy., ex p. Factortame Ltd. (No. 4) (Joined Cases C–46 and C–48/93)*, [1996] Q.B. 404; [1996] E.C.R. I–1029, applied.

(2) *International Fruit Co. N.V.* v. *Produktschap voor Groenten en Fruit (Joined Cases 51–54/71)*, [1971] E.C.R. 1107, considered.

(3) *Norbrook Labs. Ltd.* v. *Ministry of Agriculture, Fisheries & Food (Case C–127/95)*, [1998] E.C.R. I–1531; [1998] 3 C.M.L.R. 809.

Legislation construed:

Treaty Establishing the European Community (Rome, March 25th, 1957; UK Treaty Series 29 (1996)), as amended by the Treaty on European Union (Maastricht, February 7th, 1992; UK Treaty Series 12 (1994)): art. 6: The relevant terms of this article are set out at para. 32.
art. 52: The relevant terms of this article are set out at para. 32.
art. 58: The relevant terms of this article are set out at para. 32.
art. 221: The relevant terms of this article are set out at para. 32.

D.A.J. Vaughan, Q.C., C. Quigley and *Ms. M.P.C. Grech* for the appellant;
N.J. Forwood, Q.C., L.E.C. Baglietto and *F.R. Picardo* for the respondents.

NEILL, P.:

Introduction

1 This is an appeal by A.S. Marrache & Sons Ltd. ("ASM") from the judgment of the Chief Justice of Gibraltar dated August 26th, 1998 dismissing with costs two applications brought by ASM for judicial review. Both applications arose from the fact that ASM was refused certain licences to import tobacco into Gibraltar and to operate a bonded warehouse in Gibraltar. I shall have to consider the two applications in detail later but first I must give an account of the parties to these proceedings and make reference to the background facts.

2 ASM is a limited company which was incorporated in Gibraltar in 1946. Since incorporation, ASM has carried on business trading in, *inter alia*, tobacco and tobacco products. The shareholders in ASM are Tree Corporation Ltd. and Real Estate Investment Ltd. but, save for a period of about a year between May 1996 and 1997, the beneficial interest in the shares in ASM has been held by various members of the Marrache family. During that period of about a year the beneficial interest in 50% of the shares in ASM was held by Tabacmesa S.A., a Spanish company.

3 The Marrache family has been trading in tobacco for about 100 years. It is not suggested that ASM, when wholly under the control of the Marrache family, or any member of the Marrache family as an individual, is an unsuitable person to hold a licence to import tobacco or to operate a bonded warehouse.

4 The first respondent is the Governor of Gibraltar. The Governor's position and powers are governed by the Gibraltar Constitution Order 1969. The legislature of Gibraltar consists of the Governor and the Assembly. Pursuant to ss. 32–35 of the Constitution, legislation in

Gibraltar is ordinarily enacted by means of the Governor granting his assent to a bill passed by the Assembly. The Governor has, however, reserved powers to enact legislation without the consent of the Assembly when he considers it necessary to do so.

5 By virtue of s.45 of the Constitution, the executive power of the Government of Gibraltar is exercised by the Governor on behalf of the Queen. The Governor acts in accordance with the advice of his Gibraltarian ministers in relation to the defined domestic matters, but he is not obliged to follow the advice of the ministers when he is of the view that the matter in issue is not a defined domestic matter. International relations and international treaties do not fall within the category of defined domestic matters.

6 The second respondent is the Collector of Customs. In 1996 the control of the import of tobacco into Gibraltar was governed by the Imports and Exports Ordinance, 1986 and the Imports and Exports (Control) Regulations, 1987, as amended. The regulations added tobacco to the list of goods for which an import licence was required. Pursuant to the 1986 Ordinance, the office-holder responsible for the administration of customs matters in Gibraltar was the Collector. One of his functions was to deal with applications for licences for the importation of tobacco.

7 The third respondent is the Attorney-General for Gibraltar. He was made a party to the proceedings in case it was argued that it was necessary for the Attorney-General to be a party in the event that an award of damages was to be made against the Crown.

The factual background

8 At all times which are material for the purposes of these proceedings the state-controlled manufacturer of cigarettes in the Kingdom of Spain was Tabacalera S.A. The Spanish state owned 52.6% of the shares of Tabacalera. Tabacalera's products were distributed by a wholly-owned subsidiary, Tabacmesa S.A. Both Tabacalera and Tabacmesa were companies incorporated in Spain.

9 Until March 1996 the cigarettes and tobacco products produced by Tabacalera were distributed in Gibraltar through a Gibraltar company called Anglo-Hispano Ltd. ("AHL"). AHL was licensed by the Government of Gibraltar to import Tabacalera products and these products were then retained in Gibraltar. In the spring of 1996, however, disputes arose between Tabacalera and AHL and on March 25th, 1996 Tabacalera gave notice of termination of the distribution agreement between it and AHL.

10 As a consequence of the dispute with AHL, Tabacalera and Tabacmesa entered into discussions with a view to ASM becoming the

distributor of Tabacalera products in Gibraltar. As a result of the discussions between ASM, Tabacalera and Tabacmesa, it was agreed that Tabacmesa would acquire a beneficial interest in 50% of the shares in ASM and that solicitors should be instructed to approach the Collector so that the plans to import the Tabacalera products into Gibraltar using ASM as the distributor could be considered.

11 On April 18th, 1996 two partners in ASM's firm of solicitors, together with Sñr. Javier Terres, the director of marketing and planning in Tabacmesa and also a director of ASM, attended a meeting with the Collector. The venture was explained to the Collector and it was pointed out that a bonded warehouse would be needed and that from time to time licences would be required to import tobacco products distributed by Tabacmesa. Mr. Benjamin Marrache, one of the partners in the firm of ASM's solicitors, has deposed that certain assurances were given by the Collector at that meeting as to the way in which applications for licences would be dealt with, but the Collector himself denies that any assurances were given. This is not an issue which we can resolve.

12 On July 18th, 1996 ASM applied for a licence to operate a bonded warehouse. A bonded warehouse was necessary if ASM was to hold supplies in bond, and the absence of a bonded warehouse would place a prospective wholesaler at a commercial disadvantage. As these proceedings have developed, however, the issue as to a licence for the bonded warehouse has been overtaken by events, and I need make little further reference to this application.

13 On July 24th, 1996 ASM made an application on form CUS 110 for permission to place an order with Tabacmesa for the importation of a quantity of cigarettes manufactured in Spain. The address of Tabacmesa was given as "11701 Ceuta, Spain."

14 Meanwhile, ASM had taken certain steps to implement the agreement with Tabacmesa and Tabacalera. By an agreement signed on May 14th, 1996, 50% of the beneficial interest in the shareholding of ASM was transferred to Tabacmesa. On June 1st, 1996 ASM entered into an agreement for the renovation and refurbishment of premises from which it was proposing to sell the Tabacalera products, and on June 24th, 1996 ASM leased from Gibraltar Commercial Properties Ltd. a warehouse at an annual rent of £43,459.

15 It seems clear that the solicitors acting for ASM had anticipated that the application for an import licence would be dealt with and approved almost immediately. This did not happen, however, and on July 26th, Mr. Benjamin Marrache wrote to Mr. Montado, the Administrative Secretary in the Government, as follows:

"I have tried to contact you all morning as we have been informed by Customs and Excise that—

(a) our client's contract with Customs in relation to the bond stores has been put on hold;

(b) the application for the importation of Tabacalera products (on which duty will be paid) to Gibraltar, which normally takes 10 minutes to process, will not be approved.

The reason given to me personally is that it is for 'political reasons,' and that until the Government gives the go-ahead they have been instructed to leave all matters on hold.

I can assure you that the agreement which has been entered into with Tabacalera specifies clearly that its products will be strictly controlled, and a full relation of all customers of the agents in Gibraltar will be in the possession of suppliers.

Having regard for the fact that Tabacalera S.A. has been under pressure from its Spanish distributors to make representations to the Spanish Government on the subject of tobacco exports from Gibraltar, we are sure that you sympathize with our client's desire to assist and to co-operate with the Gibraltar authorities as they do in Spain.

We would be grateful if you could assist us by reviewing this matter urgently, as we are being pressed by Madrid who believe the delay suffered is tantamount to discrimination against a Spanish national company trading in Gibraltar. In fact the one reason that this venture is proceeding is because of the new climate in Gibraltar which confirms, by the presence of Tabacalera, that the climate has changed locally."

16 On July 29th, Mr. Benjamin Marrache wrote to Mr. Peter Caruana, the Chief Minister, to draw attention to the problem which had arisen and asking for an urgent meeting. On August 8th, 1996 Mr. A.S. Marrache and Sñr. Terres attended a meeting with the Chief Minister. As a result of that meeting ASM gave an undertaking that ASM would not distribute US or English brands of cigarettes manufactured by Tabacalera.

17 No approval of the applications for licences, however, was forthcoming. On September 11th, 1996 ASM's solicitors wrote a formal letter to the Collector in which they stated that they had advised ASM that the discrimination being conducted against tobacco products of Spanish manufacture was in breach of European law. The letter continued:

"In the circumstances, our client has instructed us to say to you that if your decision approving the application is not received in

these offices within the next 24 hours, we are to apply to the Supreme Court of Gibraltar for leave to move for judicial review.

The proposed respondents to the application would be you and the Ministers concerned. Our client will seek declarations as to the effect in Gibraltar of the relevant European legislation and the consequent invalidity of much of the Gibraltar primary and secondary legislation which is applicable to tobacco products, damages for the losses suffered and, since our client alleges unlawful discrimination against Spanish products under European law, appropriate interlocutory relief.

In the light of the serious nature of the breaches of law that our client complains of, we propose to apply to the court *ex parte* on notice and so the Government may be fully aware of our instructions, we are copying this letter to H.M. Attorney-General for Gibraltar."

The first application for judicial review

18 On October 10th, 1996 ASM lodged its Form 86A in Action 1996 Misc. No. 56. I shall refer to this application from time to time as "the first application." By that application, ASM sought declaratory and other relief in respect of the following matters:

1. The continuing failure of the Governor 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 according to law the applicant's application for a licence to import goods.

3. The failure of the Collector of Customs to hear and determine according to law 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.

19 The application for leave to move was heard *ex parte* on notice on October 25th, 1996. On November 1st, Pizzarello, A.J. granted leave to move in relation to the failure to hear and determine ASM's applications for licences. However, the judge refused leave to move in relation to the other issues. On November 27th, ASM filed an originating notice of motion for an order for relief in the terms and on the grounds set out in the Form 86A as limited by the order granting leave. On the same day ASM renewed its application for leave to the Court of Appeal in respect of the matters for which leave had been refused by Pizzarello, A.J.

20 On December 12th, 1996 the Collector wrote to ASM notifying ASM that the applications for licences had been refused. This is an important letter and it is necessary to set it out in full. The Collector wrote:

> "I write further to your application for an import licence dated July 24th, 1996 concerning a quantity of cigarettes and tobacco consigned from Messrs. Tabacmesa S.A. of Ceuta, Spain and for a bonded warehouse licence at Unit 3, New Harbours, Gibraltar. As indicated by my counsel at the court hearing which took place on November 7th, 1996, I am now in a position to determine those applications. I regret to inform you that I am refusing to grant the licences applied for.
>
> 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 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."

The asterisk in the letter dated December 12th indicated a footnote which was in the following terms: "Your client may well be a state monopoly of a commercial character for the purposes of art. 37 of the EC Treaty."

21 On January 6th, 1997 ASM decided to appeal to the Governor against the refusal by the Collector to issue the licences. On February 5th, 1997 a letter was sent to ASM's solicitors conveying the Governor's decision. The letter was in these terms:

"His Excellency duly noted your request that the appeal be determined before the end of January 1997. As you are aware, your client's appeal raised very substantial questions as to the applicability or otherwise of arts. 30–36 of the EC Treaty to Gibraltar. These are fundamental issues of law and are considered to be central to the determination of your client's appeal. His Excellency is of course aware of the nature of your client's original application for leave to apply for judicial review and of your client's intention to renew such application as against him before the Court of Appeal for Gibraltar, presumably at its forthcoming session.

He is also aware of the fact that leave was granted to proceed against the Collector of Customs and that substantive judicial review proceedings have followed from such leave and are pending. His Excellency is conscious of the fact that the intended judicial review proceedings against the Collector require the court to determine the applicability to Gibraltar of arts. 30–36.

Given that this issue is already before the court on your client's applications, and given that it may well be germane to the determination of your client's appeal, His Excellency considers it desirable and necessary that the issue should be determined by the court prior to his reaching a decision on your client's appeal. Rather than prejudging such a major point of law himself, His Excellency seeks to be guided and assisted by the findings of the court on arts. 30–36 before determining your client's appeal.

In the circumstances, I am directed by His Excellency to inform you that he has decided to defer the statutory appeal proceedings until the applicability of arts. 30–36 to Gibraltar has been resolved by the courts."

22 The renewed application for judicial review came on for hearing before the Court of Appeal for Gibraltar on February 26th, 1997. At this hearing ASM applied for leave to amend the matters in respect of which relief was sought. If the amendments had been allowed, the amended Form 86A would have related to the following matters:

> "(1) The continuing failure of 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 February 5th, 1997 not to determine the applicant's appeals from the decisions of the Collector of Customs."

23 The Court of Appeal gave judgment on March 11th 1997 (reported at 1997–98 Gib LR 63). Leave was granted to move for judicial review against the Governor in respect of the matters referred to in para. 1 of the Form 86A. Leave was also given to make the small amendments to paras. 2 and 3. Leave was refused, however, to include the matters in paras. 4 and 5. It was stated that it seemed to be clear from the judgment of Pizzarello, A.J. that he was concerned with the events of July and August 1996 and that it would be inappropriate to amend the application in the way sought. Leave was also refused to claim relief against the Attorney-General. This refusal was in the light of a concession by the Collector that no point would be taken, with regard to the claim for damages, to the effect that the Attorney-General should have been a party. No similar concession was made in relation to the second application.

The second application for judicial review

24 On April 10th, 1997 ASM filed a second application for leave to move for judicial review (1997 Misc. No. 21). This application related to the decision of the Governor dated February 5th, 1997 not to determine the applicant's appeals from the decisions of the Collector dated December 12th, 1996. The relief sought included a declaration that the Governor was

under a continuing duty to hear and determine the appeals as soon as reasonably practicable in accordance with the judgment of the court.

The period between May 1997 and March 1998

25 On or about May 9th, 1997 Tabacmesa determined the distribution agreement with ASM on the grounds that ASM had been unable to obtain the necessary licences to import tobacco into Gibraltar. In the course of the next few months the beneficial interests in the shares in ASM which had been held for about a year by Tabacmesa were transferred back to members of the Marrache family.

26 On October 23rd, 1997 Pizzarello, A.J. gave leave to move in respect of the second application (1997 Misc. No. 21) and directed that this application should come on for hearing at the same time as the first application, which by then had been amended to take account of the amendments allowed by the Court of Appeal in March.

27 A few days later, on October 30th, 1997 a new Ordinance relating to the control of tobacco was passed—the Tobacco Ordinance 1997. This Ordinance came into force on November 13th, 1997.

The hearing before the Chief Justice

28 On March 31st, 1998 the two applications (1996 Misc. No. 56 and 1997 Misc. No. 21) came on for hearing before Schofield, C.J. The hearing lasted four days. A third application relating to an application for a retail and wholesale tobacco licence under the Tobacco Ordinance 1997 was not proceeded with because on the first day of the hearing, the Collector informed ASM that a licence would be granted. By then Tabacmesa no longer had any beneficial interest in any shares in ASM.

29 By the conclusion of the hearing before the Chief Justice on April 3rd, 1998 it had also come to light that there was no statutory right of appeal to the Governor against the refusal of the application for a bonded warehouse licence and that this part of the application for judicial review in 1997 Misc. No. 21 was therefore misconceived. In addition it had become clear that the application for a declaration relating to the 1986 Ordinance and the Regulations made thereunder had been overtaken by events. Thus the 1986 Ordinance had been replaced by the 1997 Ordinance, the legality of which ASM decided not to challenge in these proceedings. It should also be recorded that the Chief Justice refused to allow an amendment to the Form 86A relating to the first application so as to include a challenge to the Collector's refusal of a licence. There is no appeal against this part of the Chief Justice's decision.

30 The Chief Justice delivered his judgment on August 26th, 1998 (reported at 1997–98 Gib LR 348). It is now apparent, however, that

some of the matters argued before him, and indeed raised in the memorandum of appeal to this court, were not matters which were properly in issue in the two applications for judicial review as finally constituted. I should also draw attention to the fact that it is now accepted that the determination of the question whether arts. 30–36 of the EC Treaty apply to Gibraltar will require a reference to the European Court of Justice. Accordingly, with all due respect to the careful judgment of the Chief Justice, I propose to confine my attention in the main to the arguments which were addressed to this court. Before I do so, however, I think it will be convenient to set out the text of the provisions in the EC Treaty on which, in the context of the arguments before us, ASM relies.

The provisions of the EC Treaty

31 The provisions of the EC Treaty to which we were particularly referred were arts. 6, 52, 58 and 221. As I mentioned earlier it is now common ground that there is a difficult question as to whether arts. 30–36 applied to Gibraltar and that this is a point which at some stage may need to be referred to the European Court of Justice. It is accepted, however, that arts. 52, 58 and 221 apply to Gibraltar and also that art. 6 applies, at least in so far as it is to be construed in conjunction with arts. 52 and 58.

32 The text of the relevant articles is as follows:

> "Article 6
>
> Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
>
> The Council, acting in accordance with the procedure referred to in Article 189c, may adopt rules designed to prohibit such discrimination.
>
> Article 52
>
> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such

establishment is effective, subject to the provisions of the Chapter relating to capital.

Article 58

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profitmaking.

Article 221

Within three years of the entry into force of this Treaty, Member States shall accord nationals of the 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 claims in the Court of Appeal

33 The relief sought by ASM has undergone a number of metamorphoses in the course of these proceedings. It is sufficient, however, to refer to the relief which is now claimed in this court. It can be stated as follows:

1. A declaration that—

   (a) the failure of the Collector of Customs to grant the application by ASM for an import licence on July 24th, 1996; and/or

   (b) the failure of the Collector to decide whether to grant such a licence before December 12th, 1996; and/or

   (c) the failure of the Governor to consider ASM's appeal against the refusal of the Collector to grant an import licence until the EC issues had been resolved by the courts,

constituted infringements of arts. 6, 52, 58 and/or 221 of the EC Treaty upon which ASM can rely.

2. A declaration that the reasons advanced by the Governor and the Collector do not constitute justification on the grounds of public policy permitted by EC law.

3. An order pursuant to the Rules of the Supreme Court, O.53, rr. 7 and 9(5) that these proceedings on the issue of damages continue as if begun by writ.

34 It will be seen, therefore, that by its claim as now refined ASM is seeking declaratory relief to the effect that the failure by the Collector to give a decision on the import licence for about four months and the failure by the Governor to consider ASM's appeal until the ECJ had resolved the questions relating to arts. 30–36 both constituted infringements of certain other articles of the Treaty of Rome. These infringements will then be relied on as the basis of a claim for damages. I shall return later to consider the issue of damages, but it is important to record at the outset that the question of recovering damages under EC law does not appear to have been argued, certainly not at length, before the Chief Justice in 1998.

35 I shall consider first ASM's case in regard to delay by the Collector. In simple terms the case for ASM on the first application can be stated to be as follows:

(a) the reasons for the delay by the Collector were that he was considering and taking into account the matters to which he finally gave expression in his letter of December 12th, 1996;

(b) the Government policy to which he had regard was that set out in the affidavit of Mr. Montado (the Government Administrative Secretary) dated January 31st, 1997;

(c) these reasons and this policy were discriminatory and contravened arts. 6, 52, 58 and 221 of the Treaty of Rome; and

(d) the court should make a finding that the articles had been contravened and accordingly grant a declaration.

It was stressed that there is clear authority for the proposition that discrimination cannot be justified on economic grounds.

36 I have already set out the text of the letter of December 12th, 1996. I should therefore refer next to passages in Mr. Montado's affidavit. Mr. Montado recorded the fact that prior to 1995 a substantial amount of tobacco had been exported to Spain out of Gibraltar in fast launches and that these activities had led to complaints and bad publicity and to calls for steps to be taken to tighten the control of tobacco exports. The complaints from Spain included complaints that the export of cigarettes (especially American brands) from Gibraltar to Spain posed a serious commercial disadvantage to Tabacalera, which was understood to enjoy a monopoly over the manufacture, distribution and sale of cigarettes in Spain.

37 In the light of the concern which had been expressed, the Government took a number of measures to tighten the control over trading in tobacco. On July 5th, 1995 an operation was undertaken which involved the detention and seizure of fast launches based in Gibraltar. In

addition, the Government restricted the number of importers of US brands of cigarettes and, among other measures, imposed a quota system whereby initially each wholesaler was only allowed to distribute 20 cases of US brands a day so as to restrict the number of such cigarettes available in High Street shops.

38 Furthermore, according to the affidavit, in order to ensure the success of the Government's commitment to curb the export of cigarettes to Spain, the Government decided—

> "that there should be close monitoring and consultation between the central administration . . . and the Collector (and, indeed, the Commissioner of Police) on matters of policy in relation to the control of fast launch activity and to the importation, distribution and sale of tobacco in Gibraltar generally."

Mr. Montado added that it became the practice for the Collector to seek policy guidance on a matter which had acquired significant public interest, "not least in the context of Gibraltar's reputation and of public order generally."

39 In his affidavit, Mr. Montado referred to the letters written by ASM's solicitors at the end of July 1996, and continued:

> "From these letters it was clear that this was no ordinary application and that the applicant was being backed by a major Spanish state-owned company or, indeed, that the applicant was involved in a proposed trade venture by such a Spanish company. The reference to the employees of a Spanish state company having their personnel ready to assist and control the Gibraltar operation did not allay the Government's concerns. The thought of a major state-owned Spanish manufacturer and wholesale retailer capable of flooding Gibraltar with its products at low prices and seconding its personnel to Gibraltar presents a potential risk to the Government's ability to control the passage of tobacco in and out of Gibraltar and thus the risk of mass exportation of Spanish brands from Gibraltar into other countries, particularly into Spain, increasing the risk of a resurgence in fast launch activity."

40 On behalf of the Collector it was contended that the claim by ASM should be rejected on a number of grounds. It was pointed out that ASM did not pursue any claim for damages on the basis of a breach of statutory duty and that the claim based on misfeasance was considered and specifically rejected by the judge. No challenge to this part of the Chief Justice's judgment was made in the memorandum of appeal. Furthermore, the delay by the Collector could not be characterized as unreasonable or irrational. He was entitled, in view of the importance of the matter and the fact that this was an unusual application, to seek advice from the Government.

41 It was also argued on behalf of the Collector that even if one considered the merits of the objections raised by the Collector and by Mr. Montado, these objections were not discriminatory in a relevant sense. Article 52, it was argued, is concerned with discrimination on the grounds of nationality. The objections to an import licence would have been equally compelling if one had been dealing simply with a Gibraltar company which was under the control of the Spanish state. The problem was not that Tabacmesa was Spanish but that it was controlled by the Spanish state. The "Spanish" state was not a national characteristic. In support of this argument a reference was made to the judgment of the Chief Justice where he said (1997–98 Gib LR at 360–361):

> "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 would take judicial notice, to disrupt the good government of Gibraltar."

42 I am afraid I remain unconvinced by this further argument on behalf of the Collector and, with respect, feel unable to draw the distinction made by the Chief Justice between "identity" and "nationality." It is, however, unnecessary to express a concluded view on this point because, in my judgment, the Collector is entitled to succeed against ASM on his other grounds.

43 In my view, ASM has no claim in domestic law arising from the delay of some months in dealing with the application for a licence. No time-limit was imposed by the legislation and, in the circumstances, it seems to me impossible to say that the Collector acted irrationally or unreasonably. Indeed, as I understood the argument, it was not contended with any force on behalf of ASM that if one considered only the question of domestic law, there was any cause of action against the Collector. I would only add that it may be necessary in some future case to consider a possible argument that a failure to apply Community law is actionable under domestic law on grounds akin to a breach of statutory duty because such a failure is contrary to the European Communities Act 1972.

44 I turn, therefore, to consider the claim against the Collector by reference to the principles of Community law. The question may be posed: Did the delay by the Collector infringe some principle of Community law?

45 ASM referred the court to the decision of the ECJ in *International Fruit Co. N.V.* v. *Produktschap voor Groenten en Fruit* (2) in support of the proposition that it was a principle of EC law that decisions should be made expeditiously. The facts of this case, however, are different from those in the *International Fruit* case where the obligations imposed on the decision-maker were mandatory. In this case the Collector had a discretion, though of course it had to be exercised lawfully.

46 However, my principal reason for rejecting ASM's claim against the Collector is that I am quite satisfied that even if the Collector should have acted more promptly, his failure to do so could not properly found a claim for damages under Community law. It is to be remembered that judicial review proceedings involve an exercise of discretion by the court and, as a general rule, relief will only be granted where the applicant can show that he will gain some tangible advantage. One must therefore consider the basis on which damages are awarded in cases involving a breach of EC law.

47 I turn to the judgment of the Fifth Chamber of the ECJ in *Norbrook Labs. Ltd.* v. *Ministry of Agriculture, Fisheries & Food* (3) which was delivered on April 2nd, 1998. I should refer to passages in paras. 106–107 where it was said ([1998] E.C.R. at I-1598–1599):

> "It must be remembered . . . that . . . the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty . . .
>
> It is clear from the . . . case-law that three conditions must be satisfied for a Member State to be required to compensate for damage thus caused: the rule of law infringed must have been intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties . . ."

48 In the present case it is the second condition which is of particular relevance. In para. 109 of its decision the Fifth Chamber in *Norbrook Labs. Ltd.* drew attention to a number of cases in which the second condition had been examined by the ECJ (*ibid.* at I-1599–1600). One of these cases was the decision of the European Court in *Brasserie du Pêcheur S.A.* v. *Federal Republic of Germany* (1). The decision was given in March 1996. I should refer to the following passages in the judgment of the European Court. In paras. 55–57 it was said ([1996] Q.B. at 499):

> "55. As to the second condition, as regards both Community liability under article 215 and member state liability for breaches of

> Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the member state or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.
>
> 56. The factors which the competent court may take into consideration include the clarity and precision of the rule breached; the measure of discretion left by that rule to the national or Community authorities; whether the infringement and the damage caused was intentional or involuntary; whether any error of law was excusable or inexcusable; the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.
>
> 57. On any view, a breach of Community law would clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case law of the court on the matter from which it is clear that the conduct in question constituted an infringement."

49 It is right to recognize that the law relating to the award of damages against a Member State for a breach of Community law is still in the stage of development. Certain matters, however, seem to be plain:

(1) An award of damages can be made whether the default by the Member State relates to primary legislation, to secondary legislation or to some administrative act or omission.

(2) Regard will be had to the nature of the breach and whether or not it infringes some fundamental principle of Community law.

(3) It will be relevant to consider whether the act or omission is one where the state has an absolute duty to act or whether it has a discretion, and where there is a discretion, the width of the discretion.

(4) It is also relevant to consider whether there has been any prior ruling by the European Commission or by the European Court itself to which the Member State should have had regard.

(5) It is also relevant to consider the effect of the act or omission on the person affected.

50 I return to the facts of the present case. Here again it is important to underline the fact that we are not concerned in these proceedings with the merits of the letter of December 12th, 1996. The issue relates to the delay by the Collector in reaching a decision. I am quite satisfied that this delay would not amount to conduct of sufficient gravity to found a claim for damages under Community law.

51 I turn, therefore, to the claim against the Governor. The Attorney-General is merely a party to the second application because of the claim for damages and because it was not conceded on behalf of ASM that his presence could be dispensed with. It is first necessary to consider the Governor's decision to postpone any adjudication of the appeal, from the standpoint of domestic law. Can it be said that the Governor's decision was unreasonable in a *Wednesbury* sense? In this context it is necessary to draw attention to an error which was made by the Chief Justice in his judgment. I refer to a passage of the judgment (1997–98 Gib LR at 358–359):

> "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. 30–36 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 challenged legislation? That amounts to 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."

52 It is accepted that the Chief Justice was in error in his implied criticism that the Governor had ignored or acted contrary to the guidance given by Pizzarello, A.J. The passage from the judgment of Pizzarello, A.J. to which the Chief Justice referred formed part of the ruling given by Pizzarello, A.J. on October 23rd, 1997, when he granted leave to move for judicial review in respect of the second application. The Governor reached his decision nearly 10 months before Pizzarello, A.J. expressed any view about the Governor's duty. It is to be remembered that when the matter was before Pizzarello, A.J. in November 1996, the Collector had not yet notified his decision to ASM and, accordingly, no question of an appeal to the Governor had arisen. The application to appeal to the Governor was made on January 6th, 1997.

53 The fact that the Chief Justice made an error as to the date of the judgment of Pizzarello, A.J. does not, however, conclude the matter. Thus, the Chief Justice himself expressed the view that the Governor was under a duty to hear and determine the appeals. I regret to say that I am unable to agree with the Chief Justice on this point. In February 1997 it appeared that the central challenge to the stance taken by the Collector was based on arts. 30–36 of the Treaty. The refinements to the arguments which were introduced later had not at that stage been fully explained. It is also to be remembered that in February 1997 ASM was challenging the whole licensing regime.

54 In these circumstances, I cannot see that the Governor was in breach of any rule of domestic law. It may be that it would have been wise for him to have made a decision on the material then before him and in the light of the law as he then understood it to be, but his failure to take that course cannot in my view ground any claim for damages.

55 I turn to the question of Community law. Here again, ASM relies on the *International Fruit Co.* case (2) in support of an argument that the Governor was under a legal obligation to reach a decision expeditiously. But even if one accepts that in the *International Fruit* case a general principle of Community law as to expedition was being enunciated, the principle has to be applied to the facts of each particular case.

56 In February 1997 and indeed for many months thereafter ASM was challenging the whole fabric of the import legislation. Reliance was placed in particular on arts. 30–36. A decision on the application of arts. 30–36 was expected to be made by the Court of Appeal. I am very far from satisfied that in deciding to defer his decision the Governor was in breach of any principle of Community law.

57 I shall, however, assume for the moment that the Governor was in breach. Was this breach a serious breach such as to satisfy the second condition? In my view, it was plainly not. No precise time-limit was laid down by Community law. Nor could it be said that by declining to rule the Governor was acting in a manner which was manifestly contrary to Community law. In these circumstances I would dismiss this appeal.

58 As will be apparent, my reasons for dismissing the appeal are somewhat different from those relied upon by the Chief Justice. I would also emphasize that I have confined my decision to the facts of the present case. The proceedings have followed an unusual course. As I identified earlier, the claims relate to a period of delay by the Collector and an alleged failure to adjudicate by the Governor. The court had the advantage of detailed and very skilled arguments on important principles of EC law. In the end, however, I have not found it necessary to examine these detailed arguments in this judgment. It may be necessary to do so in some other case when the applicability of the articles to which we were referred, and in particular of art. 52, is central to the decision.

WAITE and **GLIDEWELL, JJ.A.** concurred.

Appeal dismissed.
