

[2005–06 Gib LR 11]

**TRADE LICENSING AUTHORITY v. ECCLESAL  
LIMITED**

COURT OF APPEAL (Staughton, P., Stuart-Smith and Otton, JJ.A.):  
February 11th, 2005

*Tobacco—licensing—refusal of licence—Trade Licensing Authority not bound to refuse application even if grant of licence against public interest—Authority’s discretion in individual application not removed by policy guidance from Minister*

The respondent appealed against a decision of the Trade Licensing Authority (the appellant) to refuse it a licence to sell tobacco products via the Internet.

Following the respondent’s application for a licence to trade in goods, including tobacco products, the chairman of the Authority sought guidance from the Minister of Trade, Industry and Telecommunications. The Minister responded with a direction expressing his concern that the expansion of the tobacco trade could damage Gibraltar’s reputation and thus operate against the public interest. He advised that, whilst he accepted that the Authority had to consider each application on its merits, trade in tobacco products should be discouraged and the issue of licences restricted. Having considered the direction, the Authority refused the application under the Trade Licensing Ordinance, s.16(1)(e), on the ground that the issue of a licence was against the public interest.

The respondent appealed to the magistrate’s court, which held that it was bound by the Ordinance, s.16(3) to give effect to the Minister’s direction and thus had no discretion to grant the licence.

The respondent appealed further to the Supreme Court (Schofield, C.J.), which held that the obligation to follow the Minister’s general direction did not deprive the Authority (nor, on appeal, the Stipendiary Magistrate) of the discretion granted to them by the Ordinance, s.16(1). It set aside the Magistrate’s decision and remitted the appeal to him for rehearing on its merits. The proceedings in the Supreme Court are reported at 2003–04 Gib LR 455.

On further appeal, the Authority submitted that (a) the obligation under the Ordinance, s.16(3) to give effect to the Minister’s directions meant that it was bound to refuse a licence if it felt that to grant one was against the public interest; and (b) this requirement precluded it from exercising its discretion under s.16(1).

The respondent submitted in reply and on cross-appeal that (a) whilst

the Authority had to comply with the Minister's general directions, it was not prevented from exercising its discretion in individual cases, and was, in fact, obliged to do so; (b) principles of public law required a presumption against the fettering of the Authority's discretion by a direction of the Minister; (c) in any event, the direction was *ultra vires*, as it was not merely a general statement of public policy, but amounted to an instruction to the Authority to refuse certain types of application; and (d) neither the Authority nor the Stipendiary Magistrate was an independent and impartial authority within the meaning of the Constitution, s.8(8).

**Held**, dismissing the appeal:

(1) Sections 16(1) and 16(3) of the Trade Licensing Ordinance, correctly interpreted, did not conflict but were able to operate together. The Authority was obliged to give effect to the Minister's general directions under the Ordinance, s.16(3). However, in the absence of clear words to the contrary, it could not be deprived of the discretion conferred on it by s.16(1) and which had to be exercised in individual cases. Moreover (*per* Stuart-Smith, J.A., at para. 28), such a construction of the statute would offend the presumption against fettering a discretion. The Authority was not bound to refuse the grant of a licence, even if it felt that granting one was against the public interest. The appeal would be remitted to the Stipendiary Magistrate for rehearing on its merits (paras. 20–21; para. 28; para. 31).

(2) The Minister's direction was not *ultra vires* since it did not amount to a specific direction to refuse licences of a certain type. On the contrary, the wording used showed that he recognized that the Authority could exercise its discretion in individual cases and was not obliged to refuse applications merely because he expressed a wish to discourage them (para. 22; paras. 29–32).

(3) There were no grounds to suppose that the Authority and the Stipendiary Magistrate were not independent and impartial and the cross-appeal on this issue would be dismissed (para. 22).

**Cases cited:**

- (1) *Cepsa (Gibraltar) Ltd. v. Stipendiary Mag.*, 1991–92 Gib LR 385, followed.
- (2) *Furniture Centre Ltd. v. Stipendiary Mag.*, Supreme Ct., Civ. App. No. 27 of 1985, unreported, followed.
- (3) *R. (Alconbury) v. Environment Secy.*, [2001] 2 All E.R. 929, followed.
- (4) *Seruya (Moses S.) Ltd. v. Stipendiary Mag.*, Supreme Ct., Civ. App. No. 8 of 1985, unreported, followed.
- (5) *Trade Licensing Auth. v. Teziano Ltd.*, 1999–00 Gib LR 540, followed.

**Legislation construed:**

Trade Licensing (Appeal) Regulations (1984 Edition), reg. 6: The relevant terms of this regulation are set out at para. 7.

C.A. TRADE LICENS. AUTH. V. ECCLESAL (Staughton, P.)

Trade Licensing Ordinance (1984 Edition), s.16(1): The relevant terms of this sub-section are set out at para. 3.

s.16(3): The relevant terms of this sub-section are set out at para. 3.

s.17(1): The relevant terms of this sub-section are set out at para. 18.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), s.8(8): The relevant terms of this sub-section are set out at para. 8.

*S. Catania* for the appellant;

*J.E. Triay, Q.C.* for the respondent.

1 **STAUGHTON, P.:** Ecclesal, as I shall call them, applied to the Trade Licensing Authority on May 29th, 2002 for a licence. It was framed as follows:

“Trading in the following goods: Retail sale of toiletries, perfumes, cosmetic products and accessories, perfumes, films, photographic equipment, glassware, souvenirs, tobacco, cigarettes, cigars. Sales are intended to take place via the Internet to non-residents.”

The intention was, as I understand it, to form a contract of sale by use of the Internet with a customer, to receive the price by the same means, and then to dispatch the goods by post from Gibraltar to the customer at some other place. It would seem that the majority, if not all, of the customers would be in the United Kingdom, but I have not found any provision that other destinations were excluded. Duty chargeable in Gibraltar, if any, would be paid by Ecclesal, at any rate in the case of tobacco and its products; duty chargeable in the United Kingdom would be payable by the customer. It was said that this was “cleared with the Postmaster and Customs” in Gibraltar and the United Kingdom. Ecclesal are a limited company incorporated in Gibraltar and have a place of business here.

2 In a minute of a meeting of members of the Authority on July 5th, 2002, it was recorded: “Due to the sensitivity of tobacco, some of the members of the Authority had misgivings about approving this licence and would like the Minister’s views before the licence is approved.” We were not told what the sensitivity of tobacco was.

3 The Trade Licensing Ordinance has this provision:

“16. (1) Subject to the provisions of subsection (2) and of section 17, the licensing authority may in its discretion refuse to issue a licence, if it satisfied—

- (a) that the applicant is under the age of eighteen;
- (b) that the issue of such licence is likely to cause nuisance or annoyance to persons residing or occupying premises in the neighbourhood of the premises in respect of which the licence is sought;

- (c) that the premises on which the applicant intends to conduct his trade or business would not conform to the requirements of any law for the time being in force;
- (ca) that there is already in force a licence in respect of the premises, or any part of the premises, on which the applicant intends to conduct his trade or business;
- (d) that the issue of such licence would conflict with any town planning scheme approved by the Development and Planning Commission;
- (e) that the issue of such licence would operate against the public interest;
- (f) that the needs of the community either generally in Gibraltar or in the area thereof where the trade or business is to be carried on are adequately provided for . . .

...

Provided that a licence shall not be refused under these paragraphs if the applicant—

- (i) is applying for the renewal of a licence in force; or
- (ii) except on the grounds set out in paragraph (b), (c) or (d), is a co-operative society registered under the Co-operative Societies Ordinance.

...

(3) The Governor may give directions to the licensing authority generally with respect to the exercise of its functions under this Ordinance in relation to matters which affect the public interest and the licensing authority shall give effect to any such directions. Whenever a licence is refused on the grounds of public interest the licensing authority shall so state this in its decision.”

4 The Minister of Trade, Industry and Telecommunications replied to the Chairman of the Authority on August 7th, 2002:

**“Re: Tobacco and the Public Interest**

I am aware that from time to time the Trade Licensing Authority has occasion to consider applications for wholesale and retail tobacco licences.

I know that the Trade Licensing Authority is conscious that the Government is concerned that some activities, if licensed, would operate against the public interest.

I have been taking legal advice over the last few weeks to see if

C.A. TRADE LICENS. AUTH. V. ECCLESAL (Staughton, P.)

I could assist your work by clearly confirming to you what Government policy is.

I am advised that I can give directions under s.16(3) of the Trade Licensing Ordinance.

Accordingly, I now enclose my directions under this provision and would be grateful if you took these into account in the consideration of issues of public interest.

**Direction pursuant to s.16(3) of the Trade Licensing Ordinance and statement of policy in relation to the public interest for consideration in applications for tobacco licences**

Pursuant to the authority contained in and vested in me under s.16(3) of the Trade Licensing Ordinance and of all other powers vested in me by virtue of s.48 of the Gibraltar Constitution Order 1969, I hereby direct the Trade Licensing Authority in relation to the following matters that affect the public interest:

1. I am concerned (amongst other issues) about the serious risk of damage to Gibraltar's reputation by an unrestricted or immoderate expansion of the wholesale trade in tobacco and the diversification into or establishment of further and new lines of retail activities from Gibraltar in a manner which may become internationally sensitive.

2. In relation to the letter, I am aware that Customs have had a number of enquiries over the last year or so from parties looking to establish businesses to service specifically an overseas clientele which would contract and order supplies of tobacco via Internet websites.

3. I am therefore issuing these directions, not because the situation is worse than in any of the years since 1996, but because I believe it would assist the Trade Licensing Authority to have this general guidance from me to avoid the risk of there being any doubt as to the parameters of Government policy in this regard.

4. The history of tobacco activity—in particular during the early 1990s—illustrates the need to ensure that holders of licences do not, and applicants for new licences shall not, abuse their position or undertake activities which—

- (i) are impossible or disproportionate in cost to regulate;
- (ii) are unrestricted or unconditional in practice or subject to conditions which are difficult to enforce;
- (iii) whether or not lawful in Gibraltar, result in undesirable activity in Gibraltar or unlawful or undesirable activity elsewhere; or

- (iv) are bound to expose Gibraltar to negative publicity and consequent damage to reputation.

Activity which gives rise to any of these factors would be seriously detrimental to the public interest. The adequate control of these activities has indeed proven to be notoriously difficult in the past.

5. With this in mind, I would like to see the issue of further tobacco wholesale licences strictly curtailed and applications for licences to diversify into new lines of wholesale or retail tobacco business strongly discouraged. I would also like to see the grant of further general retail tobacco licences scrutinised and strictly controlled.

6. I fully accept that the Trade Licensing Authority must consider each application on its merits, in particular, to see whether there are exceptional circumstances that should be taken into account which would justify a grant of such a licence, but I would ask that you bear in mind these directions and the policy view of the Government on the question of what is in the public interest when you come to consider applications of this type.”

- 5 Next there was a further minute of the Authority on August 8th, 2002:

“After taking into consideration the Minister’s directive, the Authority approved the application, except for tobacco, cigarettes and cigars, which they propose to refuse under s.16(1)(e) of the Trade Licensing Ordinance.”

So the Authority proposed to reject the application so far as it concerned tobacco products because the issue of a licence would operate against the public interest.

6 Further submissions were made to the Authority on September 5th, 2002, stating, amongst other things, that Ecclesal had been in touch with the Customs and Excise of the United Kingdom, to whom a return would be provided monthly. It had been suggested by English solicitors that the monthly return was to include also the names of the recipients of the goods in the United Kingdom. The minutes record that the Authority “agreed to refuse tobacco under s.16(1)(e) of the Trade Licensing Ordinance.”

7 Ecclesal thereupon appealed to the Stipendiary Magistrate by way of rehearing pursuant to the provisions of the Ordinance, s.22 and the Trade Licensing (Appeal) Regulations, reg. 6. That provides:

“On hearing an appeal the magistrate shall consider the matter on its merits and shall have all the powers of the duties and obligations of the licensing authority under sections 15, 16, 17 and 18 of the Ordinance.”

C.A. TRADE LICENS. AUTH. V. ECCLESAL (Staughton, P.)

8 The Stipendiary Magistrate held that he was bound to give effect to the Minister's direction by reason of s.16(3) and consequently to refuse the application for a licence in respect of tobacco and its products. He went on to say that, if there had been a discretion, he would have granted the licence subject to conditions. He also had to consider an argument on behalf of Ecclesal, that if he had no discretion by virtue of s.16(3) then the section was contrary to s.8(8) of the Constitution, which provides: "Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial . . ."

9 The Stipendiary Magistrate rejected that argument, and others of a similar nature, which would have shown the Minister's direction to be invalid. He held that he could not disregard the statute which gave him the power to exercise an appellate function over the Authority.

10 There was then a further appeal by Ecclesal to Schofield, C.J., when the combined submissions of the parties came to 60 pages, which seems an inordinate number.

11 The Chief Justice held that, despite the general direction of the Minister, there was still a discretion which had to be exercised by the Authority—or, on appeal, by the Stipendiary Magistrate. What he said was this (2003–04 Gib LR 455, at para. 12):

"Once the general direction is given, the Authority is obliged to give effect to it when considering applications for trade licences. This does not mean that, within the general principles of consideration of such applications, combined with its obligations to follow general directions on what is in the public interest, the Authority does not have a discretion."

12 That was the ground on which the Chief Justice set aside the decision of the Stipendiary Magistrate and remitted the appeal to him to hear on its merits. Other grounds had been put forward on behalf of Ecclesal which, if they had been upheld, might well have set aside the Minister's direction altogether. But those other grounds were rejected by the Chief Justice. He said (*ibid.*, at para. 13):

"I must say that there is nothing in my understanding of the statutory scheme which offends natural justice or the right to a hearing before an independent and impartial tribunal, as required by s.8(8) of the Gibraltar Constitution Order."

13 The Authority has appealed against the decision of Schofield, C.J. The central question is how to match the provision in s.16(1) with that in s.16(3). Section 16(1) says that, subject to sub-s. (2) and s.17, the Authority may in its discretion refuse to issue a licence if satisfied that

one of seven reasons is fulfilled. There is a plain inference that otherwise a licence may not be refused. It is true that sub-s. (2) provides that there shall be no discrimination between some nationalities, which would not, in any event, be a ground for refusal of a licence. But surplusage is not unknown, even in a statute.

14 Against that, s.16(3) provides that the licensing authority *shall give effect* to any direction of the Minister with respect to the exercise of its functions in relation to the public interest. At first sight, there appears to be a conflict between the two sub-sections. How can the Authority give effect to a direction of the Minister if it is obliged to exercise its own discretion?

15 Nevertheless, there is authority that the two sub-sections can operate together. In *Furniture Centre Ltd. v. Stipendiary Mag.* (2), Alcantara, A.J. said of s.16: “I think that ‘may’ means ‘must’ in the context of this Ordinance, as a Licensing Authority can only refuse a licence if it is satisfied . . .” that one of the requirements in s.16 is fulfilled. In *Seruya (Moses S.) Ltd. v. Stipendiary Mag.* (4), Davis, C.J. approved what had been said in argument by Mr. Vasquez, that the magistrate erred in law in finding that he had a discretion to allow the appeal—whereas he had only a discretion to *discuss* the appeal against the Authority’s refusal to issue a licence if he were satisfied on evidence (on one of the grounds in s.16(1)). There was no such evidence before the learned magistrate entitling him to exercise his discretion to discuss the appellant’s appeal.

16 In *Cepsa (Gibraltar) Ltd. v. Stipendiary Mag.* (1), Fieldsend, P. said (1991–92 Gib LR 385, at para. 6):

“In my view, these cases correctly state the law in reaching the conclusion that the Trade Licensing Authority must grant a licence applied for unless satisfied that at least one of the circumstances in s.16(1) obtain. If the Authority is so satisfied then, of course, it has a discretion to refuse the licence, and this must be exercised judicially. It is not obliged to refuse the licence.”

17 Mr. Triay, Q.C. observes that in none of those cases was there a direction of the Minister, which was to be given effect under s.16(3). That would appear to be correct. In *Trade Licensing Auth. v. Teziano Ltd.* (5), Neill, P. said (1999–00 Gib LR 540, at para. 4): “By s.16(1)(e) it is provided that the Licensing Authority may in its discretion refuse a licence if it is satisfied that ‘the issue of such licence would operate against the public interest . . .’” So that case was one under s.16(1)(e), public interest. But it does not appear that there was any direction from the Minister in that case.

18 Nevertheless, I consider that the authorities are to some extent of value in showing that in all cases until now it has been supposed that



C.A. TRADE LICENS. AUTH. V. ECCLESAL (Staughton, P.)

discretion must be exercised before a licence can be refused by the Authority or the Stipendiary Magistrate. As Otton, J.A. observed in the course of the argument, s.17 has this provision:

“(1) The licensing authority shall refuse to issue a licence to any person who—

- (a) is an undischarged bankrupt . . . or
- (b) has . . . been convicted of an offence against the Bankruptcy Ordinance.”

There is plainly a contrast between the requirement of discretion in s.16 and the absence of it in s.17.

19 Also significant, in my opinion, is the admission of the Minister in his direction, para. 6: “I fully accept that the Trade Licensing Authority must consider each application on its merits,” but I would not agree with his next requirement: “in particular, to see whether there are exceptional circumstances which would justify a grant of such a licence . . .” That, as it seems to me, is a reversal of the burden of proof which is to be found in s.16(1).

20 The Chief Justice, in his summary on this issue, emphasized that the Government was entitled to give directions to the Authority generally; it could give directions on policy in connection with the public interest. Once the general direction was given, the Authority was obliged to give effect to it when considering applications for trade licences. But this did not mean that the Authority no longer had a discretion.

21 I wholly agree with that view. In para. 5 of the direction the Minister expressed his wishes, as he did in para. 6. The Authority was required to have agreed to the Minister’s wishes as general directions, but it was not compelled to comply with them without discretion in individual cases. As is said in the Trade Licensing (Appeal) Regulations, reg. 6:

“On hearing an appeal the magistrate shall consider the matter on its merits and shall have all the powers of the duties and obligations of the licensing authority under sections 15, 16, 17 and 18 of the Ordinance.”

22 There remain the other issues raised by way of cross-appeal. There are, I think, four main headings of Mr. Catania’s argument, apart from his submissions on the interpretation of s.16. Some I would reject, as did the Stipendiary Magistrate and the Chief Justice; others have fallen by the wayside, by reason of the conclusions which I have reached on interpretation. I state my conclusions on these issues very briefly:

1. The presumption of compliance with principles of public law, and against dictation. I have reached those conclusions without assistance from these presumptions.

2. The presumption against fettering discretions. Again I have reached my conclusions without assistance from this presumption.

3. The direction was *ultra vires* because it was aimed at particular traders rather than general considerations. The direction was a general one and was therefore not *ultra vires*.

4. The Authority and the Stipendiary Magistrate were not independent and impartial, and their decisions were contrary to s.8(8) of the Constitution. They were independent and impartial.

23 Nevertheless, I would dismiss this appeal on the interpretation of the Ordinance.

24 **STUART-SMITH, J.A.:** Two questions arise on this appeal. The first relates to the construction of s.16(1) and s.16(3) of the Trade Licensing Ordinance and the relation of the two sub-sections. The second relates to the proper construction and effect of the Minister's direction of August 7th, 2002.

#### **The construction and effect of s.16(1) and s.16(3) of the Ordinance**

25 Mr. Triay, Q.C. submitted that s.16(1) empowered the Authority with a discretion to grant or refuse a licence; that is not strictly correct. As Alcantara, A.J. pointed out in *Furniture Centre Ltd. v. Stipendiary Mag.* (2), the effect of s.4 and s.16(1) is that the Authority must grant a licence unless it is satisfied that one of the conditions set out in s.16(1)(a)–(f) is made out. If one or more of such conditions is made out, the Authority is not bound to refuse a licence, it has a discretion to refuse or grant it.

26 How, if at all, is this discretion to refuse a licence affected by s.16(3)? That sub-section provides:

“The Governor may give directions to the licensing authority generally with respect to the exercise of its functions under this Ordinance in relation to matters which affect the public interest and the licensing authority shall give effect to any such directions . . .”

27 In my judgment, a direction given under this sub-section does not affect the exercise of the discretion by the Authority. What it does do, or may do, is to assist or enable the Authority to be satisfied or not that the issue of a licence could operate against the public interest. It is still a matter for the Authority to exercise its discretion to grant or refuse this licence.

28 Mr. Triay, Q.C. submitted, and the Stipendiary Magistrate accepted, that the words “the licensing authority shall give effect to any such directions” meant that if, as a consequence of this direction, the Authority concluded that the grant of a licence would operate against the public

C.A.            TRADE LICENS. AUTH. v. ECCLESAL (Stuart-Smith, J.A.)

interest, the Authority was bound to refuse a licence. I can see no warrant for this construction at all. Such a construction would require clear words to deprive the Authority of the discretion granted by s.16(1). Such clear words are to be found in s.17, which provides that the Authority “shall refuse to issue a licence to any person” who is an undischarged bankrupt or committed a bankruptcy offence in the previous five years. Such a construction is, to my mind, contrary to the clear and express words contained in s.16(1). Moreover, as Mr. Catania pointed out, it offends the presumption against fettering a discretion.

**What is the proper construction and effect of the direction?**

29 Paragraphs 1–3 are in the nature of a preamble. Paragraph 4 sets out four undesirable circumstances which the Government is anxious to avoid. Mr. Catania, as I understand it, has no criticism to make of this paragraph. He does, however, criticise para. 5. He accepted in argument that if this paragraph had read something along these lines: “Having regard to the matters set out in para. 4, I do not wish to encourage licences for diversifying into new lines of wholesale or retail tobacco business . . .,” the direction would be unobjectionable, being a general statement of public policy. But he submitted that the words “and applications . . . strongly discouraged” went too far and amounted to a specific direction to refuse licences for this sort of business. He submitted that this was so because the only way strongly to discourage applications was to refuse them. If this were so, I would agree with Mr. Catania, because the Minister cannot give a direction to refuse applications of a certain type. This is usurping the functions of the Authority. What he can do is to state his policy in relation to such business. But discourage is not the same as refuse. An analogous example can be taken from planning law. It is the UK Government policy, expressed in many directives, to discourage development in the green belt. But it is up to the planning authority to decide in individual cases whether to allow development, notwithstanding such discouragement.

30 In *R. (Alconbury) v. Environment Secy.* (3), Lord Slynn of Hadley said ([2001] 2 All E.R. at 975):

“It is for elected Members of Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for these objectives to be set out in legislation, primary and secondary, in ministerial directions and in planning policy guidelines. Local authorities, inspectors and the Secretary of State are all required to have regard to policy in taking particular planning decisions . . .”

To my mind, this passage illustrates the different functions of the Minister in giving a direction generally on policy and the Authority in giving effect to or having regard to the policy in individual cases.

31 The Minister only has power to give directions generally, under s.16(3). He has no power to give specific directions. In my judgment, if para. 5 is understood in the manner I have indicated, I do not think the Minister has purported to give specific directions effectively requesting or directing refusal of certain types of applications.

32 Mr. Catania also took exception to part of the wording in para. 6. In my judgment, this paragraph recognises correctly that the decision in individual cases is for the Authority. I think, however, that there is force in Mr. Catania’s criticism of the reference to “exceptional circumstances.” There are cases where a statutory provision may require exceptional circumstances for the exercise of discretion in derogation of the general rule. But the discretion is not so limited in s.16(1)—it is quite general. There may be a number of reasons why the Authority would exercise its discretion in favour of an applicant, for example, if the offending matters were trivial or technical, would shortly be corrected or could be governed by conditions attached to this licence. It seems to me, however, that the words “in particular” before the words “to see whether there are exceptional circumstances” indicate that this is only intended to be an example of the sort of matter which might affect the Authority’s exercise of its discretion. So understood, it is not to my mind objectionable.

33 For these reasons I would dismiss this appeal.

34 **OTTON, J.A.** concurred.

*Appeal dismissed.*