

[2016 Gib LR 1]

**CRUZ (trading as JULNIC HOLDINGS) v. TRADE  
LICENSING AUTHORITY**

SUPREME COURT (Jack, J.): January 29th, 2016

*Tobacco—licensing—refusal of licence—Stipendiary Magistrate to read down exceptional circumstances requirement in 2002 Ministerial Direction—to consider discretion to grant licence even if contrary to public policy*

*Tobacco—licensing—refusal of licence—Collector of Customs, not Trade Licensing Authority or Stipendiary Magistrate, to decide whether applicant's premises suitable for trading and personal suitability to hold licence—to decide whether application bona fide, Stipendiary Magistrate may only consider applicant's failure to use licence to trade in goods other than tobacco for a year together with other evidence of bad faith—to make clear findings of fact to justify conclusion that application not bona fide*

The appellant appealed against the refusal of the Trade Licensing Authority to grant him a licence to engage in the wholesale trade of tobacco.

The appellant had applied for a licence to engage in the wholesale trade of tobacco and other goods. He proposed to trade out of premises on an industrial estate but had no legal right to use those premises. The Trade Licensing Authority (“TLA”) granted him a licence to trade in other goods but not tobacco. He appealed against this decision to the Stipendiary Magistrate, who refused the appeal, and then to the Supreme Court.

The TLA refused to grant the licence to trade in tobacco on the grounds that to do so would be contrary to the public interest under the Trade Licensing Act 1978, s.16(1)(e), and that the needs of the community, either in Gibraltar generally or in the area where the tobacco trade would be carried out, were adequately provided for under s.16(1)(f).

The Stipendiary Magistrate refused the appeal on the grounds that (a) the appellant had no right to use the premises from which he intended to trade; (b) he had not used his licence to trade in goods other than tobacco for a year, which generated suspicion that his application was not *bona fide*; (c) he demonstrated only limited knowledge of the tobacco trade, which was a further indicator that his application was not *bona fide* and that he was not a suitable person to hold a tobacco licence; and (d) granting a licence would be contrary to the public interest as it would

contradict the Government's policy, expressed in the Ministerial Direction of 2002 made under s.16(3) of the 1978 Act in response to the problems in the tobacco trade in the 1990s, of granting wholesale tobacco licences only in exceptional circumstances.

The appellant appealed against the decision of the Stipendiary Magistrate on the grounds, *inter alia*, that (a) the TLA and the Stipendiary Magistrate should not have considered the suitability of his premises for the sale of tobacco or his personal suitability to hold a tobacco licence, as those were matters for the Collector of Customs; (b) his use of his licence to trade goods other than tobacco was irrelevant unless he failed to trade at all for two years and it was reasonable for him to wait and see whether he would be granted a licence for all his proposed trading activities before starting his business; (c) upon reaching the conclusion that it would be contrary to the public interest to grant a licence to trade in tobacco, the Stipendiary Magistrate had failed to consider whether, as a matter of discretion, a licence should nonetheless be granted; and (d) the Stipendiary Magistrate had required the appellant, rather than the TLA, to open the appeal, and this was a procedural error because the TLA had not given reasons for its decision.

**Held**, allowing the appeal:

(1) The appeal would be allowed because the decision of the Stipendiary Magistrate was vitiated by the following errors of law: (a) he had been wrong to hold that the appellant's premises were not suitable for wholesale trading in tobacco, since the TLA had decided that they were suitable for trading goods generally and the question of whether they were suitable for trading tobacco specifically was a matter for the Collector of Customs; (b) the same was true of the question of the appellant's personal suitability to hold a licence to trade tobacco; (c) the Stipendiary Magistrate had been entitled, as part of his decision on whether the application was *bona fide*, to take account of the fact that the appellant had not used his licence to trade in goods other than tobacco for a year but this factor could not be relied on by itself in the absence of other evidence of bad faith; (d) the Stipendiary Magistrate had not made any clear findings of fact to justify his conclusion that the application was not *bona fide*; and (e) he had not followed the authorities requiring him to read down the requirement of exceptional circumstances in the Ministerial Direction and, once he had reached the conclusion that granting a licence to trade tobacco would be contrary to public policy, he had failed to consider whether he should nevertheless exercise his discretion to grant the licence (paras. 21–22; para. 25; paras. 29–30; paras. 33–34; para. 40).

(2) It was arguable that the TLA should have provided written reasons for its refusal to grant the appellant a licence for wholesale trading in tobacco. Although the Stipendiary Magistrate had been entitled to determine his own procedure in the absence of statutory provision, he was under a duty to be fair to all parties and, since the TLA had not given written reasons for its decision, it had been arguably unfair to require the

appellant to open the appeal. However, this point would not be decided because it had not been raised as a ground of appeal (paras. 17–18).

(3) The matter would be remitted to the Stipendiary Magistrate for a complete rehearing. He should bear in mind that the problems with the tobacco sector that underpinned the requirement of exceptional circumstances in the Ministerial Direction had since been reduced, and he should therefore balance that policy against the appellant’s arguments in favour of the grant of a licence, particularly his argument that the policy was stifling competition in the wholesale tobacco market in Gibraltar (paras. 43–46).

**Cases cited:**

- (1) *Cepsa (Gibraltar) Ltd. v. Stipendiary Mag.*, 1991–92 Gib LR 385, referred to.
- (2) *Furniture Centre Ltd. v. Stipendiary Mag.*, 1980–87 Gib LR 313, referred to.
- (3) *Ghio v. R.*, 2015 Gib LR 122, referred to.
- (4) *R. (Alcantara) v. Development Appeals Tribunal*, Supreme Ct., Claim No. 2013 Misc. 46, March 13th, 2015, unreported, referred to.
- (5) *R. (Hope & Glory Public House Ltd.) v. Westminster Mags. Ct.*, [2011] 3 All E.R. 579; [2011] P.T.S.R. 868; [2011] EWCA Civ 31, referred to.
- (6) *Trade Licensing Auth. v. Ecclesal Ltd.*, 2005–06 Gib LR 11, applied.
- (7) *Zino Davidoff S.A. v. A & G Imports Ltd. (Case C-414/99)*, [2002] Ch. 109; [2002] 2 W.L.R. 321; [2001] E.C.R. I-8691; [2002] 1 C.M.L.R. 1; [2002] All E.R. (EC) 55; [2002] C.E.C. 154; [2002] E.T.M.R. 9; [2002] R.P.C. 20, referred to.

**Legislation construed:**

Trade Licensing Act 1978, s.16(1): The relevant terms of this sub-section are set out at para. 6.

s.16(3): The relevant terms of this sub-section are set out at para. 11.

*C. Finch* for the appellant;

*J.P. Fa* for the respondent.

1 **JACK, J.:** This is an appeal from a decision made as long ago as November 21st, 2011 by Mr. Pitto, the Stipendiary Magistrate. Mr. Pitto dismissed an appeal brought by Julnic Holdings against the refusal of the Trade Licensing Authority (“TLA”) on December 3rd, 2010 to grant a licence to trade as a wholesaler in tobacco under the Trade Licensing Act 1978. The TLA granted a licence to trade in other goods, but not tobacco.

2 I mention four preliminary matters. First, the appeal to the Supreme Court was originally brought in the name of Julnic Ltd. That was a mistake. The appellant should have been Julnic Holdings, the trading name of Mr. John Cruz. With the agreement of the parties, I have amended

the name of the appellant. Secondly, the failure to prosecute the appeal for over four years would ordinarily have made the appeal an abuse of process. Again, however, both parties waived the point. Thirdly, the 1978 Act has, with effect from October 7th, 2015, been replaced by the Fair Trading Act 2015. It was common ground the current appeal nonetheless stands to be determined in accordance with the provisions of the 1978 Act: see the transitional provisions in the 2015 Act, in particular s.100(1)(d). Lastly, Mr. Finch, counsel for the appellant, originally sought to raise a number of matters of European law but did not pursue these.

### **The 1978 Act**

3 Section 3(1) of the 1978 Act forbids any person from trading (a) unless he has a licence, (b) other than at or from the premises specified in the licence, (c) otherwise than in goods specified in the licence, and (d) otherwise than in accordance with the terms and conditions of the licence. (The Act also applies to the carrying on of other specified businesses, but this is irrelevant to the current appeal; Mr. Cruz has always wanted a licence to trade.) There are some immaterial exceptions. Section 4(1) provides that the TLA “may issue licences to trade . . .” There are various provisions for transferring licences and for traders to move premises.

4 Applicants for licences have to advertise their intention. Objectors can give notice of intention to object and are entitled to be heard by the TLA: 1978 Act, s.12. In the current case, 20 objectors, in effect all the subsisting tobacco wholesalers, did make objections.

5 On the hearing of an application, the TLA can take evidence on oath, summons witnesses and documents and “make such investigation as may be necessary in order to ascertain any of the matters which it is required to consider under section 16”: s.15(1).

6 Section 16(1) provides:

“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 is 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; or
- (g) that the issue of the licence would unduly prejudice the implementation of price control under the Price Control Act:

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 Act.”

7 It was common ground between the parties that, unless one of the grounds (a) to (g) were established, the TLA had no power to refuse a licence: *Furniture Centre Ltd. v. Stipendiary Mag.* (2) (1980–87 Gib LR 313, at para. 14). Further, even if one of those grounds were made out, the TLA still had a discretion whether to grant a licence or not: *Trade Licensing Auth. v. Ecclesal Ltd.* (6).

8 In the current case, to give itself jurisdiction to refuse to grant the licence for tobacco wholesaling, the TLA relied solely on s.16(1)(e) (“public interest”) and s.16(1)(f) (“adequate provision”). Mr. Pitto, when hearing the appeal, dismissed Julnic’s appeal on the public interest ground and did not proceed to consider the question of adequate provision.

9 Section 18(1) gives the TLA the power to attach conditions to a licence. Section 20(2) provides:

“Where a licence has been issued in respect of trade and such trade has not been carried on for a period of two years or has not been carried on in respect of all the types of goods for which it was issued, the licensing authority, may, after giving the licence holder the opportunity to be heard, cancel the licence or cancel the licence in respect of such types of goods in which trade has not been carried on as the case may be.”

Section 22(1) gives a right of appeal to the Stipendiary Magistrate and s.22(2) gives a right to a further appeal from the Stipendiary Magistrate to the Supreme Court, but only on a point of law.

10 It was common ground that if I allowed the appeal the matter would have to be remitted to the learned Stipendiary Magistrate for him to determine this second question and any other matters remitted to him.

### **The Ministerial Direction**

11 Section 16(3) provides:

“The Government may give directions to the licensing authority generally with respect to the exercise of its functions under this Act 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.”

The TLA in fact never made a written decision to refuse the licence. Instead, it merely conveyed its decision orally. No point was taken before me on this.

12 The relevant minister, Mr. Keith Azopardi, on August 7th, 2002 did give directions under s.16(3). These provided:

#### **“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 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 latter, 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 scrutinized 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.”

### **The appeal to the Stipendiary Magistrate**

13 Regulation 6 of the Trade Licensing (Appeal) Regulations 1974 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 [1978] Act.”

14 There was some argument before me as to whether the Stipendiary Magistrate’s function was judicial in the strict sense, or whether it was quasi-judicial on the basis that the whole licensing function of the TLA and the Magistrate’s Court on appeal from the TLA was primarily administrative in nature. (In England and Wales, prior to the Licensing Act 2003 (UK), licensing justices, the justices of the peace who granted licences for public houses and off-licences, did have administrative functions.) After discussion, Mr. Finch, who appeared for the appellant, and Mr. Fa, who appeared for the TLA, agreed—in my judgment correctly—that the Stipendiary Magistrate’s role was a judicial not a quasi-judicial function.

15 This, however, led to a second issue which Mr. Finch sought to raise. At the hearing before the Magistrate, Mr. Pitto directed Mr. Finch to open his case. Mr. Finch submitted to me that this was wrong in that it should have been for the TLA to open the case. Since it was for the TLA to establish its objection under s.16(1)(e) and (f), it should have gone first. It was common ground that the hearing before the Stipendiary Magistrate was *de novo*.

16 In England, the Magistrates Court Rules 1981, rr. 34 and 14 provide for the appellant against a decision of an authority such as the TLA to call his evidence first. This, however, is against a background where an authority against whom an appeal is brought will generally have had to give reasons for its decision: see *R. (Hope & Glory Public House Ltd.) v. Westminster Mags. Ct.* (5). Thus an appellant in England will know in detail what the case is which he has to meet.

17 Whether the TLA should have given reasons in the current case was not a matter argued by Mr. Finch. Arguably it should have: *R. (Alcantara) v. Development Appeals Tribunal* (4) (at paras. 25–26), particularly in the light of the second sentence of s.16(3) of the 1978 Act. If the TLA had given reasons, then the course adopted by Mr. Pitto of having the appellant make his case first would have been wholly unobjectionable.



18 The Stipendiary Magistrate, in the absence of any statutory provision, was entitled to determine his own procedure, subject to the duty to be fair to all parties. Since the TLA had not given written reasons for its decision, there might perhaps be scope for criticizing the procedure adopted by the learned Magistrate as being unfair to the applicant. However, this is not a matter raised expressly by the appellant in its memorandum of appeal and Mr. Fa objected to Mr. Finch taking the point. In my judgment, Mr. Fa is correct. Unless the matter was raised as one of the grounds of appeal, it was not open to Mr. Finch to argue the point.

**Mr. Pitto's judgment**

19 I turn then to the judgment given by Mr. Pitto against which the appeal is brought. The learned Magistrate first dealt with a concern which he had about the premises from which Mr. Cruz intended to trade. He said:

“4 The appellant intends to trade out of Unit 1, Eaton Park Industrial Estate. The premises do not belong to the appellant, who appears to be allowed their use rent free, as the owner/occupier does not need them, or need all of the available space. Its current use is variously described by Mr. Cruz as store/garage/workshop but with spare space. It may be that the owner/occupier is not using the premises. The owner/occupier was not present in court, has not been identified, and no evidence reflecting the arrangements described by Mr. Cruz in evidence adduced or exhibited.

...

7 ... It would, in my judgment, be wrong to grant a licence, especially so in the case of tobacco wholesale licences, for premises to which the appellant has no right. The court has heard no evidence from the owner/occupier of Unit 1 expressing his consent to the proposed licence.”

20 Mr. Finch makes two points in relation to this. First, he points out that it was common ground before the Stipendiary Magistrate that the TLA had approved these premises for trading in the goods (other than tobacco) for which a licence was granted. Secondly, he points out that, under the Tobacco Act 1997, the approval of premises for the wholesale or retail sale of tobacco was a matter for the Collector of Customs: see s.6(3)(a) of that Act. In these circumstances, it was not, he submitted, for Mr. Pitto to determine the suitability of 1 Eaton Park Industrial Estate for Mr. Cruz's proposed wholesale tobacco business when he considered the public interest question. (This submission only applies to s.16(1)(e). The Stipendiary Magistrate would, of course, have to consider the geographical situation of the premises for the purposes of s.16(1)(f).)

21 In my judgment, Mr. Finch is right on this. The Collector of Customs is likely to be much better placed than either the TLA or the Stipendiary Magistrate to determine the suitability of premises for wholesale trading in tobacco. I readily accept that premises which are suitable for trading in one type of goods may be unsuitable for other goods, such as tobacco. Here, however, the TLA has determined that the premises are suitable for trading goods generally. The TLA was unconcerned by the fact that (as Mr. Pitto says) Mr. Cruz appeared to have “no right” to the premises and adduced “no evidence from the owner/occupier of Unit 1 expressing his consent to the proposed licence.” It was Mr. Cruz’s lack of legal right to use the premises (rather than, say, the physical characteristics of the unit) which Mr. Pitto considered rendered the premises unsuitable. Yet the Stipendiary Magistrate should not, in my judgment, have gone behind the determination by the TLA that the premises were *generally* suitable for trading goods.

22 Insofar as there are aspects of the premises which particularly impact on their suitability for trading in tobacco (as opposed to trading goods in general), that is, in my judgment, a matter for the Collector of Customs to determine rather than the TLA or the Stipendiary Magistrate on appeal from the TLA. Accordingly, in my judgment, the learned Magistrate did err in law in this aspect of his determination.

23 Mr. Pitto’s second reason for his refusal of the appeal was as follows:

“8 The appellant’s failure to operate the licence for a year and the differing reasons given for this take me to another area relevant to the determination of this appeal. The appellant, and by extension Mr. Cruz and his brother, are presented as experienced businessmen with a long history of trading in tobacco, here and abroad. Yet the appeal is riddled with imprecision and vagueness. I dealt above with the issue of the premises, but the same vagueness surrounds the reasons for the failure to use a licence for a year.”

24 Mr. Finch argues that the use made by Mr. Cruz of the licence actually granted by the TLA is irrelevant. Under s.20(2) of the 1978 Act, any licence holder had two years before any question of revocation of the licence could be considered by the TLA. It was not unreasonable for Mr. Cruz to wait to see whether he would get a licence for all his proposed trading activities before starting the business.

25 I agree that, *on its own* and without other evidence, the failure to trade in the goods for which the licence was granted would be irrelevant. The learned Stipendiary Magistrate is, however, entitled to consider the overall *bona fides* of an application, especially when considering a particularly sensitive business such as wholesale tobacco trading. The fact that Mr. Cruz had not begun to trade at all was a legitimate factor to

consider when looking at the other matters relied upon by the TLA for refusing the licence for tobacco.

26 I thus turn to the third reason given for the refusal of the appeal. The learned Magistrate said:

“9 I find that the vagueness which underpins the appellant goes beyond personal style or approach; it goes to the very credibility of their application. This is especially so in the case of two experienced businessmen. By contrast to Mr. John Cruz, Mr. Lima and Mr. Cottrell [the witnesses for the TLA] readily displayed detailed and precise knowledge of their trade.”

27 The negative view of the credibility of the application was explained in a long series of rhetorical questions in the previous paragraph of the judgment. The basis of the criticism of Mr. Cruz’s knowledge of the trade is not set out in the judgment. The transcript of evidence suggests that it is based on Mr. Cruz’s failure adequately to explain how he would prevent counterfeit goods coming onto the market.

28 So far as his decision on the credibility of the application is concerned, it is, with all due respect to the learned Magistrate, a little difficult to discern from his series of rhetorical questions precisely what his determinations of fact were. Sometimes, of course, rhetorical questions give their own answer, but not in this instance. For example, the question is posed: “Do they [the appellant] intend to apply for a transfer [of the licence to other premises] as soon as they are granted their licence?” but not answered. Even if Mr. Cruz did intend to apply for new premises to be authorized for his business, the Magistrate does not explain how this affects the credibility of his application for a licence. A would-be businessman is entitled to change his place of business—so long, obviously, as he obtains the necessary authorizations.

29 I accept, if there is no evidence of a viable business plan, that that would permit a fact-finding tribunal to find that the licence was not being sought *bona fide*. However, Mr. Pitto does not make any firm findings of fact on which to imply bad faith on Mr. Cruz’s part. Rather, the series of rhetorical questions merely gives rise to suspicion. Indeed, it is not clear what the suspicion is. It may be that the business is suspected to be not viable because of Mr. Cruz’s inexperience (although he says he has previous involvement in the tobacco business); the business may be thought not viable for other reasons, for example the risk that Mr. Cruz might unwittingly pass on counterfeit goods or the risks of relying on a supplier of tobacco from Abu Dhabi. The judgment does not say.

30 The failure to make sufficient findings of fact to justify the conclusion made is an error of law, as is the failure to give adequate reasons.

31 Mr. Finch, however, raises another matter. The learned Magistrate, he submitted, should not have considered Mr. Cruz's personal suitability for a licence for tobacco at all; that should have been a matter for the Collector of Customs. In effect, he repeated his submissions as regards the licensing of the premises.

32 Section 6(1) of the Tobacco Act gives the Collector an "absolute discretion [to] issue a wholesale or retail licence, subject to such terms, conditions and restrictions as he considers necessary or expedient." This absolute discretion is subject to s.6(6) and (7), which forbids him to issue a licence to persons (or companies with shareholders) who are guilty of various criminal offences involving smuggling and other relevant wrongdoing.

33 Again, in my judgment, the Collector is better able than the TLA or the Stipendiary Magistrate to gauge the particular suitability of a person to hold a licence permitting tobacco trading. This does not prevent the TLA or the Magistrate from considering the suitability of an applicant *generally* for a licence to trade goods. If such an applicant were unsuitable to trade goods generally, then it would be legitimate to consider him unsuitable to trade tobacco. However, if (as here) Mr. Cruz is generally suitable to be a trader in goods, it should be for the Collector of Customs to determine whether the applicant was nonetheless unsuitable to hold a licence to trade in tobacco. It would otherwise be possible, on exactly the same evidence and facts, for the TLA to determine that an applicant was suitable for holding a licence to trade in tobacco, but for the Collector to disagree. That would bring the law into disrepute and cannot have been intended by the legislature.

34 It is not clear what precisely the learned Stipendiary Magistrate determined as regards Mr. Cruz's personal suitability for holding a licence for tobacco trading. However, it would not, in my judgment, have been for him to make such a determination.

35 Lastly, Mr. Finch argued that the learned Magistrate's final conclusion was flawed. The last paragraph of the judgment (before dealing with a point of European law) stated:

"10 Given the history of the tobacco trade in Gibraltar, and mindful of the Ministerial Directive, and having heard the evidence and observed the witnesses, I am satisfied that to grant the tobacco licence would be contrary to the public interest as envisaged in s.16(1)(e)."

Mr. Finch submits that the judgment never considers whether, as a matter of discretion, a licence should nonetheless be granted.

36 It is now well established that the TLA and, on appeal, the Stipendiary Magistrate do have a discretion to grant a licence, even where one of

the paragraphs of s.16(1), including s.16(1)(e), has been established: *Cepso (Gibraltar) Ltd. v. Stipendiary Mag.* (1) (1991–92 Gib LR 385, at para. 6, *per* Fieldsend, P.), citing earlier authority.

37 Likewise, it is now established that the reference in para. 6 of the Ministerial Direction, which I have set out above in para. 12, to “exceptional circumstances [to] justify a grant of . . . a licence” needs to be read down. Staughton, P. in *Trade Licensing Auth. v. Ecclesal Ltd.* (6) held (2005–06 Gib LR 11, at paras. 19–21):

“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.’”

38 Stuart-Smith, J.A. was to the same effect (*ibid.*, at paras. 29–32) when discussing the Ministerial 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 [said in the report to be appearing for the TLA, but more likely to be appearing for the applicant], 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.* . . . 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.”

39 Otton, J.A. concurred with both judgments.

40 The learned Stipendiary Magistrate did not direct himself in accordance with this guidance from the Court of Appeal. He mentions the Ministerial Direction, but does not explain what approach he took to it. He does not express himself to be exercising a discretion and gives no indication (if he were exercising a discretion) of what factors weighed in favour and against the application for a licence. Again, this is, in my judgment, an error of law.

### **Conclusion**

41 It follows that the appeal should be allowed. The matter needs to be remitted to the Stipendiary Magistrate for him to consider—

(a) whether the issue of a licence to the appellant to trade wholesale in tobacco and cigarettes would operate against the public interest;

(b) whether 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; and

(c) if either or both of (a) and (b) are made out, whether he should nonetheless issue a licence as a matter of discretion.

42 In considering (a), the question of Mr. Cruz’s particular suitability to hold a licence for tobacco trading is not a matter for the Stipendiary Magistrate; it is a matter for the Collector of Customs. Likewise, the question of the particular suitability of 1 Eaton Park Industrial Estate for wholesale trading in tobacco is a matter for the Collector of Customs, not the Stipendiary Magistrate. Since the TLA is satisfied of the general suitability of Mr. Cruz and the premises, in practice this means that the Stipendiary Magistrate’s inquiry will be limited to the *bona fides* of the application, which can include issues as to its viability and the practicality of Mr. Cruz’s business plan, and to the matters raised in the Ministerial Direction.

43 So far as the Ministerial Direction is concerned, it is now of some antiquity, dating as it does to 2002. The notorious problems associated with the tobacco sector in the 1990s are now, if not eliminated, at least

reduced. Mr. Pitto's own initiative to increase fines on tobacco smugglers has contributed to the improved enforcement of the anti-smuggling legislation: see Mr. Pitto's announcement reported in the *Gibraltar Chronicle*, January 17th, 2014. His increase in fines was subsequently approved by the Court of Appeal: *Ghio v. R.* (3).

44 In reconsidering whether to issue a licence to the appellant, the Stipendiary Magistrate will need to consider whether, in the circumstances of Gibraltar in 2016, the particular concerns raised by the Minister in para. 4 of his Direction will be met in relation to this application.

45 As regards para. 5 of his Direction, the learned Magistrate will need to balance the Government's policy of curtailing the grant of fresh tobacco wholesale licences against the matters raised by the appellant. In this regard, the policy in para. 5 is expressly based on the concerns outlined in para. 4 of the Direction. Thus paras. 4 and 5 must be read together. Insofar as the Stipendiary Magistrate considers that the concerns in para. 4 have been answered by the appellant, he will need to consider whether that counterbalances the restrictive policy stated in para. 5.

46 As regards the other points raised on behalf of the appellant, Mr. Finch's main submission is that the wholesale tobacco market in Gibraltar has been allowed to develop into a cartel, with the biggest three wholesalers commanding a dominant market share. A rigid application of the restrictive policy in para. 5 would, he argues, have the tendency to preserve the interests of established businesses whilst stifling competition from fresh competitors. The Stipendiary Magistrate will need to consider this argument carefully and balance it against his consideration of paras. 4 and 5 of the Direction.

47 As regards counterfeiting, the learned Stipendiary Magistrate will need to make findings about the risk on the facts of this case of counterfeit goods being passed. Even if he decides there is no particular risk in relation to counterfeits, he may also wish to ask for submissions about any problems arising from Mr. Cruz's intention to import cigarettes from Abu Dhabi. Once genuine goods are put on the open market in the European Economic Area ("EEA"), any rights of a trademark holder are considered to have been waived and the goods can be sold anywhere in the EEA. Otherwise, the single market would be liable to be partitioned. However, the placing of genuine goods on the open market outside the EEA (such as in Abu Dhabi) does not automatically result in this exhaustion of trademark rights. In such cases, a trademark holder in the EEA can object to the importation of the goods into the EEA, even though they are genuine branded items: *Zino Davidoff S.A. v. A & G Imports Ltd.* (Case C-414/99) (7). If the Magistrate concluded that the importation of cigarettes from Abu Dhabi might raise this problem, it would be a relevant consideration in considering the public interest question.



48 As to (b), counsel did not address me on any particular matters for the learned Stipendiary Magistrate to consider.

49 As to (c), on the assumption that (a) or (b) are satisfied, the Stipendiary Magistrate will need to list the considerations which tell for and against the grant of a licence and will then need to explain the weight he attaches to each consideration when reaching a final decision on whether, as a matter of discretion, to grant or refuse the licence.

50 Matters of procedure are a matter for the Stipendiary Magistrate to determine on the rehearing of this matter. The learned Magistrate may, however (it is a matter for him), consider it useful to ask the TLA to make a short document, say one or two pages long, in which it specifies the precise objections which it has to the application. The Stipendiary Magistrate may be assisted by that in determining which side should present its case first.

51 It was common ground that the hearing before the Stipendiary Magistrate should be a complete rehearing *de novo* and that any issue of unmet demand would need to be considered as at the date of the rehearing, not any earlier date.

52 I shall hear counsel on the form of the order and on costs.

*Appeal allowed.*

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