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[2020 Gib LR 113]

**ATTORNEY-GENERAL (HATIMI) v. STIPENDIARY  
MAGISTRATE**

SUPREME COURT (Restano, J.): March 6th, 2020

*Tobacco—exportation—unlawful exportation—no offence of unlawful exportation of rolling tobacco under Imports and Exports Act 1986, s.79(3)(a) if tobacco loaded onto car in Gibraltar but not taken out of jurisdiction*

The appellant was charged in the Magistrates' Court with exportation of rolling tobacco contrary to s.79(3)(b) of the Imports and Exports Act 1986.

The appellant had driven towards the Spanish frontier. He had not continued into Spain but turned back. He was stopped by customs officers and admitted to carrying 84.85 kg. of rolling tobacco in the vehicle.

The appellant was convicted of exportation of rolling tobacco contrary to s.79(3)(b) of the Imports and Exports Act 1986.

Section 85 of the 1986 Act provided:

**“Time of exportation.**

85. The time of exportation of any goods from Gibraltar shall be deemed to be the time when the goods are loaded for exportation:

Provided that, in the case of goods of a class or description with respect to which any prohibition or restriction is for the time being in force under or by virtue of any Act, the time of exportation shall be

deemed to be the time when the goods intended to be exported are loaded onto the ship, aircraft or vehicle which is to be used for the transportation of such goods to a destination outside Gibraltar.”

The appellant was convicted on the basis that the tobacco had been exported when it had been loaded into his vehicle.

The appellant appealed by way of case stated on the issue of whether the Magistrates’ Court had been correct to hold that the offence of the exportation of the rolling tobacco had been complete when the tobacco was loaded into the car which the appellant had been driving.

The appellant submitted *inter alia* that (a) the Stipendiary Magistrate’s decision was wrong in law as the goods in question had not been exported: “export” was defined in the Interpretation and General Clauses Act 1962 as “to take or cause to be taken out of Gibraltar by land, sea or air”; (b) the deeming provision in s.85 of the 1986 Act was only temporal in nature and limited to establishing the time of exportation when goods had actually been exported out of Gibraltar but did not have the effect of deeming an exportation of goods where no physical export had in fact taken place; (c) a plain reading of s.85 made it clear that the provision was limited to regulating the time of export and not the physical act of exporting, and that this was in line with the Act’s fiscal and administrative objectives; (d) construing s.85 as giving rise to exportation when goods were loaded onto a transporting vehicle led to absurdity because it would mean that goods loaded and then unloaded for whatever reason would result in an export and import without the goods having moved; (e) if s.85 were construed in the way contended by the respondent, the words “time of” in the opening line of the section would be otiose; (f) by way of comparison, a deeming provision applicable to the exportation of cigarettes (but not rolling tobacco) in s.11(7) of the Tobacco Act 1997 did not include those opening words and provided: “For the purposes of this Act cigarettes is deemed to have been exported from Gibraltar by land at the time when any vehicle in which it is being carried enters the loop road leading to the frontier gates by which vehicular traffic exits from Gibraltar”; and (g) to the extent that s.85 was unclear, ambiguous or absurd, it was not for the courts to fill any legislative gaps, particularly as this was a penal provision.

The respondent submitted *inter alia* that (a) a literal meaning of s.85 contended for by the appellant would lead to absurdity; and (b) the interpretation was also contrary to the intended meaning indicated by statements in *Hansard*.

**Held**, ruling as follows:

Each of the opposing constructions produced an anomalous result. Section 85 of the Imports and Exports Act 1986 was ill-drafted and ambiguous, which could easily be resolved with legislative amendment. Whilst the legislature’s intention might have been to supplement the offence created in s.79(3) of the Act with a deeming provision to assist with the prosecution of the offence, it had failed to do so clearly. Penal

SUPREME CT. ATT.-GEN. (HATIMI) V. STIP. MAG. (Restano, J.)

provisions called for legislative clarity, especially when deeming provisions were concerned. In cases of ambiguity such as this one, a defendant should have the benefit of the doubt. Section 85 should therefore be construed restrictively so as not to displace the need for a physical exportation. Accordingly, the answer to the question raised by the case stated was that the offence of exportation of the rolling tobacco was not established when the tobacco was loaded into the car which the appellant had been driving (para. 23).

**Cases cited:**

- (1) *DCC Holdings (UK) Ltd. v. Revenue & Customs Commrs.*, [2010] UKSC 58; [2011] 1 W.L.R. 44, considered.
- (2) *Fisher v. Bell*, [1961] 1 Q.B. 394; [1960] 3 All E.R. 731, *dicta* of Lord Parker, C.J. considered.
- (3) *Greenalls Management Ltd. v. Customs & Excise Commr.*, [2005] UKHL 34; [2005] 1 W.L.R. 1754, distinguished.

**Legislation construed:**

Imports and Exports Act 1986, long title: The relevant terms of the long title are set out at para. 9.

s.85: The relevant terms of this section are set out at para. 4.

s.91B(1): The relevant terms of this sub-section are set out at para. 7.

Interpretation and General Clauses Act 1962, s.2: The relevant terms of this section are set out at para. 7.

Tobacco Act 1997, s.11(7): The relevant terms of this sub-section are set out at para. 11.

Customs and Excise Management Act 1979 (c.2), s.79(3): The relevant terms of this sub-section are set out at para. 12.

*C. Finch* for the appellant;

*C.J. Ramagge* for the respondent.

1 **RESTANO, J.:** This is an appeal by way of case stated pursuant to s.62 of the Magistrates' Court Act brought by the appellant, Azziddin El Ghalouri Hatimi, against the decision of Charles J. Pitto, Stipendiary Magistrate, who found the appellant guilty of the offence of exportation of rolling tobacco contrary to s.79(3)(b) of the Imports and Exports Act 1986 on the basis that the tobacco had been loaded onto the appellant's car but not actually physically exported from Gibraltar. Mr. El Ghalouri Hatimi received a severe fine and the rolling tobacco found in his car was forfeited.

**The facts**

2 On March 19th, 2018, the appellant entered the loop road leading onto the frontier gates on British Lines Road, which is a one-way road leading

to the Spanish frontier. He did not continue into Spain but instead left the loop and drove back onto Winston Churchill Avenue when he was stopped by customs officers, who he informed that he was turning back because he had realized that he did not have his passport on him. When asked whether he had anything in the car which he should not, he said that he did not, but upon being informed that his car was going to be searched he admitted to carrying 84.85 kg. of rolling tobacco. During a search of the car, the appellant's passport was found and the appellant was later convicted of the offence referred to above.

### **Statutory framework**

3 Section 79(3)(b) of the Imports and Exports Act 1986 (“the Act”) prohibits the exportation of restricted goods without a licence.

4 Section 85 of the Act provides as follows:

#### **“Time of exportation.**

85. The time of exportation of any goods from Gibraltar shall be deemed to be the time when the goods are loaded for exportation:

Provided that, in the case of goods of a class or description with respect to which any prohibition or restriction is for the time being in force under or by virtue of any Act, the time of exportation shall be deemed to be the time when the goods intended to be exported are loaded onto the ship, aircraft or vehicle which is to be used for the transportation of such goods to a destination outside Gibraltar.”

5 Prior to an amendment made on February 22nd, 1990 (1990–01) to the proviso of s.85 of the Act, it provided that the time of exportation “shall be deemed to be the time when the exporting ship, aircraft or vehicle departs from Gibraltar.”

### **The issue**

6 The case states that the issue in this appeal is as follows:

“Was the court right to hold that [the] offence [of] the exportation of the rolling tobacco was complete when the tobacco was loaded on the car which the Defendant was driving?”

### **Submissions**

#### ***The appellant***

7 The appellant submits that the Learned Stipendiary's decision is wrong in law. He submits that the goods in question were not in fact exported and that the appellant, for whatever reason, changed his mind on the way to the frontier. In this regard, the appellant relies on the definition

of “export” in the Interpretation and General Clauses Act 1962, namely: “to take or cause to be taken out of Gibraltar by land, sea or air.” The appellant submits that the deeming provision contained in s.85 of the Act is only temporal in nature and limited to establishing the time of exportation when goods have actually been physically exported from Gibraltar but does not have the effect of deeming an exportation of goods where no physical export has in fact taken place, as is the case here. To support the submission that exportation by land can only take place by means of a physical act of export at the land frontier, the appellant also relies on s.91B(1) of the Act which provides as follows:

“No person shall, without the written approval of the Collector, export or attempt to export tobacco or any other article or goods by land other than through the pedestrian or vehicular gates at the frontier or through the commercial gate at the frontier when it is open for authorized commercial traffic under the supervision and control of a customs officer.”

8 Mr. Finch further commends the guidance provided by the Supreme Court of the United Kingdom on the construction of deeming provisions in *DCC Holdings (UK) Ltd. v. Revenue & Customs Commrs.* (1) ([2011] 1 W.L.R. 44, at paras. 36–40) and summarized in *Understanding Legislation, A Practical Guide to Statutory Interpretation* (Hart, 2018) as follows:

(1) One should start by ascertaining, so far as possible, the purpose of a deeming provision’s enactment, and specifically “for what purposes and between what persons the statutory fiction is to be resorted to” ([2011] 1 W.L.R. 33, at para. 37).

(2) The words of the deeming provisions should then be generally given “their ordinary and natural meaning, consistent as far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained” (para. 38).

(3) However, where applying this approach leads to “an unjust, anomalous or absurd result” (para. 37), then “the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction” (para. 38).

(4) In deciding how far it is permissible to depart from the ordinary meaning of the words of a deeming provision, one must “take into account the fact that one is construing a deeming provision” (para. 39). This is not to disapply normal rules of construction (which would be contrary to principle), but rather to accept that it is unrealistic to expect the legislature precisely to delimit when and how far “artificial assumptions” should be made.

(5) In applying deeming provisions, one must also “treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so” (para. 38).

9 The appellant submits that the purpose of the Act is fiscal and refers to its long title which states that the Act is a measure “to control imports into and exports from Gibraltar and to provide for the imposition and collection of duties of customs, and for matters relating thereto.” He submits that this is reinforced by *Greenalls Management Ltd. v. Customs & Excise Commr.* (3). In particular, he refers to Lord Hoffmann’s speech where he states ([2005] UKHL 34, at para. 8) that s.93(2)(e) of English Customs and Excise Management Act (“CEMA”) 1979 gives the commissioners power to make regulations enabling them to allow goods to be removed from warehouses without payment of duty “in such circumstances and subject to such conditions as they may determine.”

10 Further, the appellant submits that a plain reading of s.85 makes it clear that this provision is limited to regulating the time of export and not the physical act of exporting and that this is in line with the Act’s fiscal and administrative objectives. The appellant submits that this approach does not lead to injustice or absurdity and that it is not appropriate to extend the statutory fiction any further. On the other hand, he submits that construing s.85 as giving rise to an exportation when goods are loaded onto a transporting vehicle leads to absurdity because it would mean that goods loaded but then unloaded for whatever reason would result in an export and import taking place without the goods having moved from the premises where the loading and unloading has taken place.

11 The appellant also submits that if s.85 of the Act is construed in the way the respondent is contending for, the words “time of” in the opening line of the section are otiose and the section would read more properly without them. By way of comparison, the appellant relies on the fact that a deeming provision applicable to the exportation of cigarettes (but not rolling tobacco) contained in s.11(7) of the Tobacco Act 1997 does not include those opening words and states as follows:

“For the purposes of this Act cigarettes is [*sic*] deemed to have been exported from Gibraltar by land at the time when any vehicle in which it is being carried enters the loop road leading to the frontier gates by which vehicular traffic exits from Gibraltar.”

12 The appellant also refers by way of comparison to s.79(3)(a) of CEMA on which s.85 is based and which has been subsequently replaced by CEMA 1979. This provides insofar as is material as follows:

“79 (3) The time of exportation of any goods from the United Kingdom shall be deemed to be—

- (a) where the goods are exported by sea or air, the time when the goods are shipped for exportation;
- (b) where the goods are exported by land, the time when they are cleared by the proper officer at the last customs station on their way to the boundary:

Provided that in the case of goods of a class or description with respect to the exportation of which any prohibition or restriction is for the time being in force under or by virtue of any enactment which are exported by sea or by air, the time of exportation shall be deemed to be the time when the exporting ship or aircraft departs from the last port or customs airport at which it is cleared before departing for a destination outside the United Kingdom.”

13 The appellant submits that the commentary in *Halsbury’s Laws of England*, vol. 12 (4th ed.), on s.79(3)(a) of CEMA 1952 puts it beyond doubt that actual exportation must take place before the time for exportation becomes relevant, otherwise the goods would be deemed to be exported before reaching a customs duty point before the export documentation could be prepared.

14 Finally, the appellant submits that, to the extent that s.85 is unclear, ambiguous or absurd, it is not for the courts to fill any legislative gaps especially as we are concerned with a penal provision. In support of this submission the appellant relies on *Fisher v. Bell* (2), where it was held that a shopkeeper who exposed an offensive weapon for sale in his window did not offer it for sale contrary to the Restriction of Offensive Weapons Act 1959, s.1(1). Lord Parker, C.J. stated as follows ([1961] 1 Q.B. at 399–400):

“In those circumstances I am driven to the conclusion, though I confess reluctantly, that no offence was here committed. At first sight it sounds absurd that knives of this sort cannot be manufactured, sold, hired, lent, or given, but apparently they can be displayed in shop windows; but even if this—and I am by no means saying it is—is a *casus omissus* it is not for this court to supply the omission. I am mindful of the strong words of Lord Simonds in *Magor and St. Mellons Rural District Council v. Newport Corporation*. In that case one of the Lords Justices in the Court of Appeal had, in effect, said that the court having discovered the supposed intention of Parliament must proceed to fill in the gaps—what the Legislature has not written the court must write—and in answer to that contention Lord Simonds in his speech said: ‘It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation.’”

**The respondent**

15 The respondent submits that first and foremost the legislative purpose of the proviso contained in s.85 of the Act must be established: see *Bennion on Statutory Interpretation*, 7th ed., at para. 17.8 (2019) which states as follows:

“The intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further.”

16 The respondent submits that s.85 of the Act is not fiscal but is found in Part VII of the Act which contains the offence of exportation of prohibited goods. Further, s.85 clearly differentiates between all exports (the first part of that section) and the export of prohibited or restricted goods (the second part of that section). In the respondent’s submission, the second part of the section is clearly linked to and supplements the criminal offence created by s.79 and is not fiscal or administrative in nature. The respondent also points to the use of the words “at the time” in s.11(7) of the Tobacco Act to show that the meaning behind these words is not temporal.

17 The respondent further submits that a literal meaning of s.85 contended for by the appellant leads to absurdity as it would mean that the so-called proviso contained in the second part of s.85 does not create an exception to the first part of s.85 but largely repeats the first part of the section, only specifying that loading would take place “onto the ship, aircraft or vehicle which is to be used for the transportation of such goods to a destination outside Gibraltar.” Further, it would mean that the amendment of the Act in 1990 was pointless, as the pre-1990 version of the Act deemed the time of exportation to be when the exporting ship, aircraft or vehicle left Gibraltar, which is what the appellant says the position is subsequent to that amendment. To support his submissions that this is not what Parliament intended, the respondent refers the parliamentary debate which took place when the Act was amended and which is recorded in *Hansard*. In particular, he refers to the passage in *Hansard* where, in promoting the amendment the Attorney General stated as follows:

“In addition to the provisions which this Bill contains affecting imports and exports per se, it contains important amendments to existing criminal provisions and I have therefore agreed to present it to the house.”

18 Further, in respect of the amendment to s.85, the Attorney General stated as follows:

“. . . it is considered that the present provision specified respectively in the section at the beginning and in the proviso, are capable of



ambiguity and uncertainty and the Collector or Customs who, of course, has many duties and responsibilities under this ordinance, wishes there to be no doubt when the exact time of exportation is deemed to have occurred.”

19 The respondent submits that this extract from *Hansard* puts paid to the appellant’s submission that the amendment related to a fiscal measure, given that the Attorney General refers to amendments to “existing criminal provisions” and shows that the collector wanted to be clear about when the time of exportation is said to have occurred.

### **Analysis**

20 In ascertaining the purpose of the deeming provision contained in s.85 of the Act, I do not find *Greenalls Management Ltd. v. H.M. Customs & Excise Comms.* (3) of assistance as that case was concerned with specific fiscal measures allowing for the removal of goods without payment of duty. Similarly, I do not consider that *Halsbury’s* commentary on s.79(3)(b) of CEMA takes matters much further, as that provision is in materially different terms to s.85 of the Act.

21 The extract from *Hansard* relied on does not assist either and raises questions of its own. In particular, if the purpose of the amendment to s.85 of the Act in 1990 was to bring forward the point at which exportation was deemed to have taken place for the purposes of the criminal offence of illegally exporting goods, why did the Attorney General not explain any of this when moving the amendment and instead say that the purpose of the amendment was to remove uncertainty and ambiguity? Indeed, this statement would suggest that the amendment was designed to do nothing more than clarify matters. *Hansard* can only be relied on when it provides clear guidance (especially in relation to a penal provision) and in my judgment this is not such a case.

22 A comparison with the deeming provision contained in the Tobacco Act for the purposes of cigarette exports (also a prohibited or restricted activity) is instructive, especially the fact that s.85 opens with the words “The time of exportation” (and comes under the heading: “Time of exportation”) whilst s.11(7) of the Tobacco Act does not. Whilst this goes some way to showing that s.85 should not be likened to s.11(7) of the Tobacco Act, it does beg the questions why the time of exportation would be relevant to the exportation of prohibited or restricted goods in the absence of physical exportation. Further, if the proviso is only temporal in nature, why is it expressed as an exception to the general rule applicable to lawful exportations?

**Conclusion**

23 In my judgment, each of the opposing constructions produces an anomalous result and there is no getting away from the fact that s.85 is ill-drafted and ambiguous, a fact which both parties accepted and which could easily be resolved with a legislative amendment. Whilst the legislature's intention might well have been to supplement the offence created in s.79(3) of the Act with a deeming provision to assist with the prosecution of this offence, it has failed to do so clearly. Penal provisions call for legislative clarity especially when deeming provisions are concerned and in cases of ambiguity such as this one, a defendant should have the benefit of the doubt. It is therefore my judgment that s.85 should be construed restrictively so as not to displace the need for a physical exportation. Accordingly, the answer to the question raised by the case is that the offence of exportation of the rolling tobacco was not established when the tobacco was loaded onto the car which the appellant was driving.

*Ruling accordingly.*

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