

PUBLIC & ADMINISTRATIVE LAW

SINCLAIR COLLIS LIMITED v SECRETARY OF STATE FOR HEALTH & THE MEMBERS OF THE NATIONAL ASSOCIATION OF CIGARETTE MACHINE OPERATORS

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This case concerned legislation prohibiting the sale of tobacco from automatic vending machines. On 31 May 2008 the Secretary of State published a consultation paper on the “Future Control of Tobacco” and in December 2008 an impact assessment was produced which considered three options for dealing with the sale of tobacco products to persons under 18 years: (1) retaining the status quo; (2) introducing age restriction mechanisms on all tobacco vending machines; or (3) prohibiting the sale of tobacco from vending machines. On 12 November 2009 sections 22 and 23 of the Health Act 2009 (the “2009 Act”) were enacted which provided that “the appropriate national authority may by regulations make provision prohibiting the sale of tobacco from an automatic machine”. This in essence meant that the Secretary of State could no longer legislate to put age restriction mechanisms on vending machines. Consequently in November 2009 the Secretary of State issued a revised consultation considering the two remaining options and in January 2010 a second impact assessment was produced. The policy aim of the ban was to protect children and also to reduce adult cigarette consumption by removing a source of temptation for those who wished to quit smoking. On 17 March 2010 the Protection from Tobacco (Sales from Vending Machine)(England) Regulations 2010 (the “2010 Regulations”) were enacted which prohibited the sale of tobacco from automatic vending machines.

The Claimants challenged the provisions of the 2009 Act and the 2010 Regulations on two grounds:

- i. The legislation breached Article I, Protocol I (“AIP1”) of the European Convention on Human Rights (the “Convention”); and
- ii. The legislation contravened Article 34 of the Treaty on the Functioning of European Union (the “TFEU”).

THE ISSUES

Article I, Protocol I

AIP1 provides that “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

It was accepted that the tobacco vending machines and the goodwill of the businesses involved were possessions for the purposes of AIP1 but there was a dispute as to the impact the ban would have on those possessions. The Claimants argued that the ban would deprive them of their possessions without compensation whilst the Secretary of State contended that the ban would merely control the use of such possessions. In order for the legislation to be compatible with AIP1 the ban must be proportionate and pursue a legitimate aim. However the Claimants contended that whilst the requirement of age-restriction mechanisms might have struck a proportionate balance the outright ban did not.

Article 34 and 36 TFEU

Article 34 TFEU prohibits quantitative restrictions on imports between Member States and all measures having equivalent effect. The Secretary of State accepted that a ban on tobacco sales from vending machines would constitute a quantitative restriction on the importation of tobacco vending machines from other Member States under section 34 TFEU.

Article 36 TFEU provides that Article 34 shall not preclude prohibitions or restrictions on imports justified on the grounds of, amongst other matters, the protection of public health. However the reliance on Article 36 TFEU must be proportionate. The Claimants argued that the ban on the sale of tobacco products from automatic vending machines was unjustified and disproportionate because:

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- i. The only sustainable legitimate aim of the legislation banning the sale of tobacco from automatic vending machines was to reduce the incidence of tobacco smoking by young people under 18; but the Secretary of State at the last moment and wrongly introduced a second aim of encouraging adult smokers to quit smoking. This made the Final Impact Assessment, on the basis of which the Ministerial decision was made, wrong and misleading.
- ii. The Secretary of State made significant errors in identifying and assessing relevant facts. There were errors in the assessments of the benefits resulting from the ban, and the assessment of detriment was superficial and unsupported by the facts.
- iii. The ban was not the least restrictive option. The originally favoured option of restricting under-age purchases from vending machines by electronic means would have been less restrictive and no less effective.
- iv. The ban did not seek to protect public health in a consistent and systematic manner. Age restricted tobacco sales were allowed in shops and the consistent approach would have been to provide for age-restricted access to tobacco vending machines.

THE FINDINGS OF SIR ANTHONY MAY, PRESIDENT OF THE QUEEN'S BENCH DIVISION

The Nature of the Legislation

The judge held that the challenge to both the 2009 Act and the 2010 Regulations should be regarded for these purposes as equivalent to a challenge to primary legislation enacted by the national legislature to protect the nation's health. The 2010 Regulations were to be seen in this light because the Secretary of State had little choice as to the content of the regulations following the 2009 Act and the 2010 Regulations were made by Parliament on affirmative resolution. The Judge looked to the reality of the position, which he held was that the Secretary of State was implementing the will of Parliament.

Legitimate Aim

The relevant legislative aim was said to be that of Parliament which enacted the legislation. The legislative aim was not that of the Minister who promoted the draft legislation which was amended by Parliament. Evidence of Parliament's legislative aim was gathered from the terms of the legislation itself and the admissible contextual background. In this instance the legislative aim of Parliament was to ban the sale of tobacco products from automatic machines in order to reduce the availability of cigarettes and their use by persons under 18 years, thereby protecting their health. It was to be inferred from Parliament's actions that it did not consider that the requirement for mandatory age restriction technology on vending

machines would achieve that legislative aim. A ban would also necessarily prevent adults from buying cigarettes from vending machines, and this might incidentally contribute to a reduction in adult smoking.

The aim was legitimate as Parliament was properly entitled to conclude that the ban would have the effect in particular of reducing the availability and take up of cigarettes by those under 18. It was obvious, and open to Parliament to conclude that, if you shut off one source of tobacco supply, there will be some reduction in smoking.

Article 1, Protocol 1

The judge found that the legislation in question did not deprive the Claimants of the use of their possessions but rather controlled the use of those possessions. As a result compensation did not need to be paid before a fair balance could be considered to have been struck. A fair balance would be struck if the legislature could properly take the view that the benefit to the community of the legislation outweighed the detriment to the individual. The court will respect the legislature's judgment as to whether a fair balance has been struck unless it is manifestly without foundation.

The important thing was that Parliament properly took into account the effect of the ban on the Claimants' possessions. The judge found that this was sufficiently done in both impact assessments despite the existence of discrepancies in some of the calculations. Parliament did not need to be concerned with a precise money calculations when considering the benefits and detriments of the proposed legislation. The true comparison was between an unquantifiable health benefit and the broad scale and nature of the detriment which a ban would cause.

The question for the court was whether the Parliamentary judgment that the general community interest in reducing the take up of cigarettes by those under 18 to the benefit of the nation's health and an incidental possible benefit for adults outweighed the relevant rights derived from Article 1 of the First Protocol was manifestly without foundation so as to be disproportionate. The judge was not persuaded that it was.

Article 34 and 36 TFEU

The judge held that where quantitative restrictions on imports are sought to be justified on the ground of the protection of human health, and the measure is effected by primary

legislation of the national legislature, the legislature's margin of discretion is broad and the court will not interfere unless the measure was in error as being manifestly unreasonable or inappropriate.

The court has to ask whether the measure is appropriate to secure the attainment of the objective and does not go beyond what is necessary to attain it. The judge held that the comparison was essentially the same as was considered under AIPI and for the same reasons he found that the legislation was not unjustified or disproportionate. The judge said that in the present case, the ban was appropriate to attain the legislative aim which he had identified, and did not go beyond what was necessary, given the Parliamentary judgment that a scheme for age restriction technology was inadequate. The ban on vending machines was not in error as being manifestly unreasonable or inappropriate. Its enactment was within the legislature's margin of discretion and the Secretary of State had established that it was justified for the purposes of Article 36 TFEU.

Nicholas Paines QC and Ian Rogers were instructed by the Secretary of State for Health.

Permission to appeal was granted on 2 February 2011. The appeal has been expedited and will be heard on 7-9 March 2011.

In addition Nicholas Paines QC, Ian Rogers and Owain Draper are instructed by the Secretary of State in the challenge to the prohibition of tobacco displays in shops. This will be heard on 11-15 April 2011.

Ian Rogers is also representing the United Kingdom in the case of Philip Morris v Norway before the EFTA Court which concerns the challenge to the Norwegian tobacco display ban.