IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
(GLIDEWELL L.J. and CRESSWELL J.)

QBCOF 93/0933/D

Royal Courts of Justice
Strand
London W.C.2

Friday, 26th January, 1996.

Before:

LORD JUSTICE HIRST

LORD JUSTICE AULD

MR. JUSTICE FORBES

- - - -

THE QUEEN

v.

UXBRIDGE JUSTICES

Ex parte DAVID WEBB

- - - -

(Computer Aided Transcript of the Stenograph Notes of John Larking, Chancery House, Chancery Lane, London, W.C.2.
Telephone No. 0171 404 7464
Official Shorthand Writers to the Court)

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MR. M. O'MAOILEOIN (instructed by Messrs. Desmond Pye Partnership, Solicitors, London, SE14 5PL) appeared on behalf of Applicant.

MR. M. BROMLEY-MARTIN (instructed by the Solicitor for H.M. Customs and Excise) appeared on behalf of Respondent.

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J U D G M E N T
(as approved by the Court)

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J U D G M E N T
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LORD JUSTICE HIRST: I will ask Lord Justice Auld to give the first judgment.

LORD JUSTICE AULD: The appellant, Mr. Webb, is a campaigner for the reform of the law relating to obscene publications. He is the honourary director and founder member of an organisation called the National Campaign for the Reform of the Obscene Publications Acts. This is his appeal from the decision of the Divisional Court, constituted by Lord Justice Glidewell and Mr. Justice Cresswell, on 9th June 1993, dismissing his application for judicial review of the refusal of the Uxbridge Justices to state a case for the opinion of the High Court.

The matter concerned the seizure by the officers of Customs and Excise from Mr. Webb on his return to London (Heathrow) from Holland of six video-tapes containing explicit representations of homosexual activity. Mr. Webb maintained in argument before the magistrates, although he did not give evidence, that he had them for the purpose of comparative study of what was freely available in Holland and in the United Kingdom. The officers, however, regarded them as obscene and thus prohibited from import under section 42 of the Customs Consolidation Act 1876. Section 42 prohibits from imporation:

> "Indecent or obscene prints, paintings, photographs, books, cards, lithographic or engravings, or any other indecent or obscene articles."

They accordingly seized them pursuant to their power under section 49(1) of the Customs and Excise Management Act 1979. Section 49(1) provides:

> "Where -

...

(b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment ... those goods shall ... be liable to forfeiture."

Under a procedure provided in Schedule 3 to the 1979 Act Mr. Webb claimed that the video-tapes were not liable to forfeiture, and appeared before the Uxbridge Justices on 27th June 1991 in condemnation proceedings in support of that claim. In the course of the proceedings the magistrates refused an application by Mr. Webb to admit in evidence a copy of a document issued by the Commissioners giving guidance to their officers as to what they should and should not seize. The magistrates' reason for refusal to admit that document in evidence was, according to an affidavit later sworn by their Chairman in the judicial review proceedings,

"that is it was irrelevant in determining whether or not the six video tapes were liable to forfeiture."

The magistrates, contrary to the protests of Mr. Webb, did not view all the six video-tapes. One was selected by the prosecutor and one was selected by him for their viewing. They viewed them in camera. The viewing of the two video-tapes was in speeded up fast forward operation, and Mr. Webb later maintained that the viewing of one of them was incomplete. His complaint was that they should have viewed all six at normal speed and in public.

The magistrates found in favour of the Commissioners, namely that the tapes were obscene and thus liable to forfeiture. In determining the matter of obscenity, the magistrates, in accordance with the ruling of the House of Lords in R. v. Henn

[1981] A.C. 901, adopted the definition in section 1 of the Obscene Publications Act 1959, namely:

> "... an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."

The magistrates also expressed the view that in applying that test they did not have to consider the alleged purpose of the imporation, relying on the authority of R. v. Bow Street Magistrates, ex parte Noncyp Limited [1989] 3 W.L.R. 467, a decision of this court.

On 17th July 1991 Mr. Webb wrote to the clerk to the magistrates enclosing a 19-page document requesting that the magistrates should state a case for the opinion of the High Court. The grounds of his application to state a case may be divided into three categories. The first went to the test of obscenity applied by the magistrates. Mr. Webb's first argument under this head, which he returned to in different ways, was that the magistrates had applied the wrong test when determining whether the video-tapes were obscene. He maintained that the applicable statute was the 1876 Act under which the instant prohibition arose, and that, as it did not define the word "obscene", the word had such an uncertain and subjective quality that it could not found the basis for seizure under the 1979 Act. Mr. Webb's second argument under this head was that the prohibition in section 42 of the 1876 Act contravened the declarations of the rights of freedom of expression and communication to be found in the EEC Treaty and subsequent conventions and domestic legislation respectively

developing and implementing it. He also relied on similar provisions in the United Nations Universal Declaration of Human Rights 1953 and in the European Convention on Human Rights. His third argument under this head was largely one of fact, an expression of his views as to the acceptability of such material and its acceptance by authorities elsewhere in the world.

The second main ground of application to state a case went to the decision of the magistrates to exclude the commissioners' guidance document to their officers as to seizure. He maintained that the magistrates' refusal to admit that document in evidence wrongly deprived him of a defence, namely that the Customs and Excise officers had disregarded it when seizing the video-tapes.

His third main complaint in the application went to the way in which the magistrates had viewed the video-tapes. He maintained that their viewing was inadequate, that it should have been done in public, and, more recently, he complained also of the exclusion of the press.

By a letter of 9th August 1991 the clerk to the justices informed Mr. Webb of their refusal to state a case, because they were of the view that the matters on which he was seeking an opinion of the High Court were, as the clerk put it, "settled matters of law and procedure". Mr. Webb, after some hesitation about his next step, then sought unsuccessfully to appeal out of time to the Crown Court at Isleworth. Following refusal of that application on 31st January 1992, he instituted the present judicial review proceedings, seeking a mandamus to require the justices to state a case.

The Divisional Court, in dismissing Mr. Webb's application, dealt seriatim with his various contentions. Lord Justice Glidewell, with whom Mr. Justice Cresswell agreed, gave the leading judgment. In summary, he held as follows. (1) The magistrates correctly followed the decision of the House of Lords in Henn in applying, as they did, the test of obscenity in section 1 of the 1959 Act. (2) There was clear authority of the Court of Appeal in Noncyp that the prohibition was not contrary to European Union law or other international instruments because of the saving provision in article 36 of the EEC Treaty and similar provisions in other international instruments permitting domestic prohibition or restriction of imports on the ground, inter alia, of public morality. (3) Mr. Webb's argument based on the general acceptability of such material went to matters of fact not capable of being the subject of a case stated.

As to the exclusion of the guidance document, Lord Justice Glidewell expressed the view that the magistrates were correct in regarding the guidance as irrelevant to their determination whether, as a matter of law, these video-tapes were obscene. He added that, in any event, he doubted whether it was a matter which could be the subject of a case stated. As to the magistrates' viewing of the video-tapes, Lord Justice Glidewell held that they were entitled, by virtue of section 141 of the 1979 Act, to declare forfeit all six tapes, although they had only viewed two of them.

Section 141 provides:

> "... where any thing has become liable to forfeiture under the Customs and Excise Acts -

(b) any other thing mixed, packed or found with the thing so liable, shall also be liable to forfeiture."

He said the the ejusdem generis rule applied and that the provision applied to things which were of the same general nature, which was the case here of all the six video-tapes. Lord Justice Glidewell also held that the magistrates had a discretion whether to sit in private if they had good reason for doing so, although they should exercise that power sparingly. As to excluding the press as well as the general public in a case like this, the guidance from the Court of Appeal in R. v. Waterfield [1975] 1 W.L.R. 711 was that normally they should not exclude the press when exercising their power. But it was guidance and not a binding rule, and failure to follow it would not on its own be a likely ground for allowing an appeal against a forfeiture order.

In summary, Lord Justice Glidewell and Mr. Justice Cresswell rejected all of Mr. Webb's detailed arguments, either because they were points of law on which there was already clear authority against Mr. Webb, or because they were matters of fact or judgment not apt for a case stated.

Mr. O'Maoileoin, who appears for Mr. Webb on this appeal, has not sought to renew or, at any rate, to persist in any of Mr. Webb's unsuccessful arguments before the Divisional Court. He prefaced his sole ground of complaint, with the concession necessary to that ground, that the proper test of obscenity is to be found in section 1 of the 1959 Act. He said that Mr. Webb was engaged at the time in lawful research involving comparative studies to enable his organisation to make representations to various governments. He said that the purpose, as Mr. Webb

declared to the Customs officers when he arrived at Heathrow, in bringing in those video-tapes was lawful research. It followed, Mr. O'Maoileoin submitted, that the tapes were not likely to be read by anybody whom they were likely to deprave and corrupt so as to come within the definition of "obscenity" in section 1 of the 1959 Act. He submitted that the magistrates, although lighting on the correct test, did not apply it. He argued that they should have examined the applicant's purpose in importing these video-tapes. Because the applicant did not give evidence to the magistrates, although he made submissions, Mr. O'Maoileoin had to couple with that argument an application for leave to call fresh evidence which would go to Mr. Webb's stated intention or purpose in the importation.

The difficulty with that argument, as Mr. O'Maoileoin had to concede, is that it was not the subject of Mr. Webb's detailed application to state a case. And it was not a ground of Mr. Webb's application to the Divisional Court for an order of mandamus requiring the justices to state a case. It is in fact the reverse of all that Mr. Webb has previously argued. Up to now he has maintained that the test of obscenity in the 1959 Act was the wrong test for the magistrates to apply. Now he maintains that it was the right test, but that in applying it they wrongly failed to have regard to his purpose in importing the video-tapes.

In my view, it is impossible for this court to embark on the only question before it, namely whether the Divisional Court came to the correct conclusion of law on the matter as it was put to them and the magistrates. Mr. O'Maoileoin all but conceded that

in his responsible and well-reasoned argument. Moreover, the authority of Ali v. Secretary of State for the Home Department [1984] 1 All E.R. 1009, a decision of this court, is clear authority against the reception of new evidence in such proceedings at this stage, whether the point of law is a new or an old one. I need only quote from a passage in the judgment of Sir John Donaldson M.R. at page 1014F-G. He said:

> "It is not the function of this court as an apellate court to re-try an originating application on different and better evidence. We are concerned to decide whether the trial judge's decision was right on the material available to him unless the new evidence could not have been made available to him by the exercise of reasonable diligence or there is some other exceptional circumstance which justifies its admission and consideration by this court."

The matter is, as I have indicated, further complicated here by the fact that, not only is it now sought to introduce new evidence which could have been introduced before, it is sought to do so for the purpose of raising a point of law which is the contrary of what was argued before.

In my judgment, for all those reasons, this appeal is hopeless, and I would dismiss it.

MR. JUSTICE FORBES: I agree and have nothing to add.

LORD JUSTICE HIRST: I also agree.

(Order: Appeal dismissed with costs against Legal Aid Board on usual terms; legal aid taxation of appellant's costs)

LORD JUSTICE HIRST: Mr. O'Maoileoin, thank you very much. Is there any further application you have?

MR. O'MAOILEOIN: My Lord, my client is legally aided.

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LORD JUSTICE HIRST: You ask for legal aid taxation?

MR. O'MAOILEOIN: Yes.

LORD JUSTICE HIRST: We will award that. Thank you very much indeed.

B MR. O'MAOILEOIN: I am very much obliged.

MR. BROMLEY-MARTIN: My Lord, I ask for the usual order in making an application for costs.

LORD JUSTICE HIRST: Against the Legal Aid Board?

MR. BROMLEY-MARTIN: Yes, my Lord.

C

LORD JUSTICE HIRST: First, Mr. O'Maoileoin, are you on a nil contribution?

MR. O'MAOILEOIN: Yes, my Lord.

LORD JUSTICE HIRST: Then we will make no order for costs against the appellant himself, but we will make the usual order that the

D costs be paid by the Legal Aid Board, but suspended for ten weeks on the normal terms that if the appropriate Area Director wishes to contest that, then of course he may apply to the court to do so. The appeal is dismissed with costs. Thank you both very much indeed.

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