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REGINA v SECRETARY OF STATE FOR HEALTH, Ex parte

UNITED STATES TOBACCO INTERNATIONAL INC

[DIVISIONAL COURT]

[1992] QB 353

HEARING-DATES: 5, 6, 7, 8, November 21 December 1990

21 December 1990

CATCHWORDS:

Statutory Instrument - Validity - Whether ultra vires - Oral snuff manufacturer entering into agreement with Government to open factory in United Kingdom - Minister receiving expert advice on risk to health from oral snuff - Minister's proposal to ban oral snuff but not other tobacco products - Duty of minister to disclose expert's advice to manufacturer - Validity of regulations banning oral snuff - Consumer Protection Act 1987 (c. 43), ss. 10, 11 n1 - Oral Snuff (Safety) Regulations 1989 (S.I. 1989 No. 2347)

HEADNOTE:

In 1984 the applicants, a company incorporated in the United States which had for a number of years imported into the United Kingdom portion-packaged oral snuff, had discussions with various Government departments about the possibility of building a factory in Scotland for the manufacture of their product. Following the receipt of advice from the Committee on Carcinogenicity of Chemicals in Food, Consumer Products and the Environment, set up in 1977 to provide the Secretary of State for Health with expert advice, the Government negotiated with the applicants an agreement whereby the applicants undertook not to market their oral snuff to persons under the age of 18. The factory was opened in 1985 and, on 6 June 1986, the agreement was revised to include a requirement that the applicants included with their product a warning of the inherent risk to health from the use of oral snuff. On 17 June, unknown to the applicants, the committee advised the Secretary of State to ban oral snuff. In February 1988, the Secretary of State announced that he proposed to make regulations under section 11 of the Consumer Protection Act 1987 banning oral snuff and on the same day the applicants were invited to make representations. The applicants asked for the evidence relied upon by the Government in deciding to ban oral snuff and they were given a list of relevant references but it was not until they had made their representations that they were told that the proposed ban was based, inter alia, on the committee's advice. The applicants complained to the Secretary of State about the way they had been treated. The Secretary of State replied that the substantive advice had been given by the committee in 1984, that the committee had kept the matter under review and in 1986 they had recommended that oral snuff be banned but he was not willing to disclose the text of the advice given by the members of the committee as they were his professional advisers and the applicants had already been told the gist of that advice. The Oral Snuff (Safety) Regulations 1989 banning oral snuff were laid before Parliament and came into force on 13 March 1990.

On the applicants seeking judicial review and, inter alia, an order of certiorari to quash the Regulations:-

n1 Consumer Protection Act 1987, s. 10: see post, p. 361B-F.

S. 11: see post, pp. 361G-362B.

Held, (1) that the provisions of the Consumer Protection Act 1987 applied to both defective goods and those intrinsically dangerous in that in their use there was a risk of personal injury or death; that the Secretary of State had power under section 11 of the Act to make regulations controlling specific tobacco products notwithstanding the exclusion of tobacco from the provisions of section 10 of the Act giving general protection to consumers; and that, accordingly, the Regulations were intra vires the Act (post, pp. 365A-E, F-G, 372B).

(2) That, although the risk of using oral snuff was not so great as smoking tobacco, the banning of the lesser risk did not conflict with the principle of proportionality and the making of the Regulations was not so disproportionate to the risk as to render the Secretary of State's decision to make the Regulations irrational; that further the Regulations did not conflict with Community law on intra-community trade since the Regulations came within article 36 of the E.E.C. Treaty as being for the protection of public health (post, pp. 366F-367C, F-H, 372B).

(3) That the exercise of discretion by the Secretary of State to ban oral snuff in the public interest could not be fettered by any moral obligation owed to the applicants; and that, therefore, the applicants could not rely on a legitimate expectation that if they performed their obligations under the agreement to control the sales of their product, the Secretary of State would permit their operation to continue (post, pp. 369F-G, 372F-H).

But (4) granting the application, that the Secretary of State had a duty under section 11(5) of the Act of 1987 to consult the applicants before making the Regulations and, having regard to the history of the Government's dealing with the applicants and the very serious effect the Regulations had on the applicants' commercial undertaking, fairness required that the applicants be informed of the matters which had caused the committee to re-evaluate the risk to health in the use of oral snuff; that the advice of independent experts was not to be treated as if it were confidential advice given to the minister by civil servants; and that, since the Secretary of State had neither disclosed nor given the applicants an opportunity to make representations on the expert advice he had received before the enactment of the Regulations, the Regulations would be quashed (post, pp. 369H-370A, B-E, 371F-H, 372H-373B, 376D-G).

INTRODUCTION:

APPLICATION for judicial review.

By an application dated 13 February 1990, the applicants, United States Tobacco International Inc., applied for judicial review of the decision of the Secretary of State for Health dated 13 December 1989 to make the Oral Snuff (Safety) Regulations 1989 prohibiting persons from supplying, offering to supply, agreeing to supply, exposing for supply, or possessing for supply any oral snuff. The applicant sought (1) a declaration that by making the

Regulations, the Secretary of State had acted ultra vires his powers under the Consumer Protection Act 1987 and unlawfully; (2) certiorari to quash the decision to make the Regulations; (3) certiorari to quash the Regulations; (4) an inquiry as to the damages incurred by the applicants and an order for the Secretary of State to pay those damages; and (5) a declaration that the Regulations, on their proper construction, did not prohibit the supply to persons outside the United Kingdom of oral snuff manufactured or packaged in the United Kingdom.

The facts are set out in the judgment of Taylor L.J.

COUNSEL:

Michael Beloff Q.C., Stuart Isaacs and David Pannick for the applicants. Section 11 of the Consumer Protection Act 1987 does not empower the Secretary of State to make regulations prohibiting the supply of a product because of its intrinsic characteristics. Section 11 only gives the Secretary of State power to make regulations prohibiting the use of products which are unsafe because of the manner in which they have been manufactured or presented to the consumer. He must use his discretion under the section "to promote the policy and objects of the Act:" see *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997, 1030 and *Reg. v. Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd.* [1988] A.C. 858, 872. The purpose of the Act is to protect consumers from defective products, not to promote public health in general.

The purpose of the general safety requirement in section 10 was explained in the White Paper which preceded the Act, *The Safety of Goods* (1984) (Cmd. 9302). As to reliance on a White Paper, see *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, 614, 629, 638 and *Duke v. Reliance Systems Ltd.* [1988] A.C. 618, 631.

If, however, the Act of 1987 does confer on the Secretary of State power to ban tobacco products, he must not, in the exercise of the power, have acted irrationally, i.e. in a manner in which no reasonable Secretary of State would act: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223 and *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374. Wednesbury reasonableness requires the Secretary of State not to act disproportionately. The means used by him must be proportionate to

the aim in view, having regard to less drastic alternatives which are open to him: *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374; *Reg. v. Secretary of State for Transport, Ex parte Pegasus Holdings (London) Ltd.* [1988] 1 W.L.R. 990, 1001 and *Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696, 721. The principle of proportionality is of especial importance where one of the grounds of challenge to the Secretary of State's decision arises under Community law: see *Thomas v. Chief Adjudication Officer* [1991] 2 Q.B. 164.

The Secretary of State also has a duty to act consistently. This is because the duty to act rationally connotes a duty to treat like cases alike: see *H.T.V. Ltd. v. Price Commission* [1976] I.C.R. 170, 185, 191, 195 and *Reg. v. Inland Revenue Commissioners, Ex parte Preston* [1985] A.C. 835, 852, 865. The Secretary of State must have regard to all relevant factors, but disregard any irrelevant

factors (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223) and he must act impartially and fairly: see *Champion v. Chief Constable of the Gwent Constabulary* [1990] 1 W.L.R. 1. He has a duty properly to make inquiries and to acquaint himself with all relevant facts: see *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014, 1064 and *Prest v. Secretary of State for Wales* (1982) 81 L.G.R. 193, 207. If he errs as to a material fact, he may thereby act ultra vires his powers: see *Reg. v. London Residuary Body, Ex parte Inner London Education Authority*, *The Times*, 24 July 1987.

The applicants had a legitimate expectation that, provided they continued to perform their obligations under the voluntary agreement and there was no strong evidence of risk to health, their operations would be permitted to continue: see *Reg. v. Inland Revenue Commissioners, Ex parte Preston* [1985] A.C. 835 and *Reg. v. Inland Revenue Commissioners, Ex parte M.F.K. Underwriting Agents Ltd.* [1990] 1 W.L.R. 1545. The doctrine of legitimate expectation applies to substantive as well as to procedural matters: see *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm.A.R. 161, 172 and *Reg. v. Secretary of State for the Home Department, Ex parte Ruddock* [1987] 1 W.L.R. 1482. In making the Oral Snuff (Safety) Regulations 1989 the Secretary of State acted unfairly. The Regulations impinged almost exclusively on the applicants as the sole manufacturers and packagers of oral snuff in the U.K. and were likely to have a catastrophic effect on the applicants' business in which the applicants had been encouraged by the Government to invest substantial resources. It is well established that the claims of natural justice are particularly strong where a party is deprived of a right he has previously enjoyed, especially if the deprivation involves a loss of livelihood: see *McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520 and *Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 W.L.R. 1052. Natural justice gives a party the right to know the opposing party's case: see, e.g. *Kanda v. Government of Malaya* [1962] A.C. 322, 337 and *Fairmount Investments Ltd. v. Secretary of State for the Environment* [1976] 1 W.L.R. 1255. The Secretary of State also had a duty to consult the applicants under

section 11(5) and to act fairly during that consultation process: see *Reg. v. Secretary of State for Social Services, Ex parte Association of Metropolitan Authorities* [1986] 1 W.L.R. 1 and *Reg. v. Haberdashers' Aske's Hatcham School Governors, Ex parte Inner London Education Authority, The Times*, 7 March 1989.

As to Community law, (1) the Secretary of State erroneously concluded that he was obliged by the Labelling Directive (89/622/E.E.C.) to impose a ban on the use of oral snuff, and (2) the Regulations of 1989 breach article 30 of the E.E.C. Treaty (Cmd. 5179-II) and are not saved by article 36 of the Treaty.

The Labelling Directive covers all tobacco products, including oral snuff, and shows that Community law adopts the approach that any alleged risks to the consumer should be dealt with by labelling or other requirements short of a ban: see articles 1, 2 and 8 and the second recital of the preamble. The Directive did not prohibit the Secretary of State from relying on voluntary agreements. Article 189 of the Treaty leaves to the member states "the choice of form and methods by which the objective of a Directive is to be achieved." Article 9 of the Directive, consistently with article 189 of the Treaty, only requires member states to adopt laws, regulations and administrative provisions so as to comply with the Directive to the extent that it is necessary to do so.

Article 30 of the Treaty prohibits, as between member states, quantitative

restrictions on imports and all measures having equivalent effect. It is a directly effective provision: see *Pigs Marketing Board v. Redmond* (Case 83/78) [1978] E.C.R. 2347. A prohibition on supply within the United Kingdom necessarily affects intra-Community trade and constitutes a measure having equivalent effect on a quantitative restriction on imports from other member states: see *Procureur du Roi v. Dassonville* (Case 8/74) [1974] E.C.R. 837, 852. Such a prohibition on supply cannot be justified by the United Kingdom either under article 36 of the Treaty or otherwise. The burden of proving that the Regulations of 1989 come within any exception to article 30 rests on the United Kingdom: see *Reg. v. Goldstein* [1983] 1 W.L.R. 151, 154.

The regulations further infringe the Community law principle of proportionality: see *Reg. v. Goldstein and Thomas v. Chief Adjudication Officer* [1991] 2 Q.B. 164. [Reference was made to articles 4, 8(1) and 8(2) of the Labelling Directive.]

David Latham Q.C. and Nigel Fleming for the Secretary of State. The court has power to declare regulations void and of no effect where they are ultra vires the enabling legislation or, alternatively, where there has been an "abuse" of power in relation to their making: see *Hoffmann-La Roche v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse m.b.H* (Case 107/76) [1977] E.C.R. 957. In the analogous situation of byelaws, the court ought to be slow to hold them void for unreasonableness: see *Kruse v. Johnson* [1898] 2 Q.B. 91. The Regulations of 1989 were made under section 11 of the Consumer Protection Act 1987. The provisions of section 10 as to the "general safety requirement" are irrelevant. Section 11 applies to goods, including

tobacco, and the relevant question is the meaning of the word "safe" in section 19.

The applicants do not rely on any express representation or promise as a foundation for the argument regarding legitimate expectation. The representation has therefore to be found by necessary implication but it is unclear what implication is contended for: that there never would be a ban, that there would not be a ban within a reasonable time or that there was no present intention to impose a ban. To imply either of the first two representations would involve a fetter on the Secretary of State's discretionary power to make regulations for the purpose of securing the safety of products. The courts have not permitted such a fetter under the guise of an allegation of estoppel: see *Laker Airways Ltd. v. Department of Trade* [1977] Q.B. 643, 709, 728; *Western Fish Products Ltd. v. Penwith District Council* [1981] 2 All E.R. 204. Nor have they permitted such a fetter on the basis of a breach of legitimate expectation. To imply the third representation would give rise at most to a legitimate expectation that the applicants would be informed of any change in the Secretary of State's intention and given a fair opportunity to put their case. They were so informed and given such an opportunity. The statutory obligation on the Secretary of State is to consult: section 11(5). In so far as it imposed any further duty, it was to give the applicants a fair opportunity to make representations on the issues which concerned the Secretary of State. There was no obligation on him to show the applicants the detailed representations and advice. Providing the Secretary of State acts rationally and fairly within his statutory powers he is entitled to change his policy: see *In re Findlay* [1985] A.C. 318, 338.

The Regulations are non-discriminatory and were made for the purposes of the protection of health. They are therefore either outside the ambit of articles 30

and 34 of the E.E.C. Treaty or fall within the exceptions permitted by article 36: see *Rewe-Zentral A.G. v. Bundesmonopolverwaltung für Branntwein* (Case 120/78) [1979] E.C.R. 649; *P.B. Groenveld B.V. v. Produktschap voor Vee en Vlees* (Case 15/79) [1979] E.C.R. 3409 and *S.A. Magnavision N.V. v. General Optical Council* (No. 1) [1987] 1 C.M.L.R. 887.

Beloff Q.C. in reply. It is well established that the courts will not construe even the broadest powers as extending to the removal of well established liberties, in the absence of plain, unequivocal and specific words to that effect: see, e.g. *Raymond v. Honey* [1983] 1 A.C. 1. The provisions of section 11(1) should be understood as involving an implied limitation that the Secretary of State may not impose a general ban on tobacco.

Cur. adv. vult.

21 December. The following judgments were read.

PANEL: Taylor L.J. and Morland J

JUDGMENTBY-1: TAYLOR L.J

JUDGMENT-1:

TAYLOR L.J: The applicants challenge by way of judicial review the decision of the Secretary of State for Health dated 13 December 1989 to make the Oral Snuff (Safety) Regulations 1989. The Regulations provide

that no person shall supply, offer to supply, agree to supply, expose for supply or possess for supply any oral snuff.

Prior to the making of the Regulations, the applicants, a company incorporated in the United States, was the sole manufacturer in the United Kingdom of portion packaged oral snuff products. Only one other manufacturer, a Swedish company, distributed such products in the United Kingdom. Oral snuff is a smokeless tobacco product put directly into the mouth. It is to be distinguished from nasal snuff and from other smokeless tobacco products such as chewing tobacco. It may consist of dry snuff (fine ground tobacco put loosely in the mouth), moist oral snuff (more coarsely ground and with a higher moisture content, also put in the mouth) or portion packs of snuff. The latter consist of porous sachets somewhat akin to tea bags. A sachet is placed in one position in the mouth between gum and cheek and the tobacco juices are released over a period. The applicants market a brand of portion pack known as "Skool Bandits."

The habit of using oral snuff is known as snuff-dipping. It has long been common in Scandinavia and in the United States. It was introduced to the United Kingdom during the 1939-1945 war to provide for U.S. servicemen stationed here. The first sachet products were introduced from Sweden in 1977. But Skool Bandits were not introduced until 1984 when the applicants, who had previously traded through importers, assumed direct responsibility for marketing their product. They established their European headquarters in Kingston-upon-Thames.

During 1984, the applicants were looking for a manufacturing and packaging base outside the United States. They discussed with the Department of Trade and Industry and the Industry Department for Scotland the possibility of setting up a factory to market these products in Scotland. They were encouraged by the Government departments to do so and were offered a Government grant by way of

incentive. In the result, the applicants built a factory at East Kilbride, near Glasgow, which was opened in 1985. They received £193,357 of Government grant.

The Government was aware of medical opinion as to a causal connection between oral snuff and cancer, especially of the mouth. In 1977, the Committee on Carcinogenicity of Chemicals in Food, Consumer Products and the Environment ("C.O.C.") was set up as a committee of experts to advise the Secretary of State. When the applicants indicated their intention to market Skoal Bandits in the United Kingdom, the committee was asked to advise on the health implications of snuff-dipping. In January 1984, the C.O.C. advised that there was a causal link with oral cancer, although the overall health risk was less than that of smoking. The Government response was to negotiate with the applicants a voluntary agreement whereby the applicants undertook not to market oral snuff to persons under the age of 18. That agreement was made on 18 April 1985. On 6 June 1986, the agreement was revised to include a requirement for health warnings to be given. The revised agreement was to apply until December 1987 but, by letter dated 8 February 1988, it was extended to 30 April 1988. Even after that

letter, there were further discussions about possible variations to the agreement.

Meanwhile, however, on 17 June 1986, the C.O.C. advised the Government to ban oral snuff. No indication or hint of this was given to the applicants. It therefore came as a bombshell when the Secretary of State announced on 26 February 1988 a proposal to make regulations banning oral snuff.

At this stage it is convenient to consider the statutory provisions and the regulation making power the Secretary of State proposed to exercise. Part II of the Consumer Protection Act 1987 provides for consumer safety. Under the heading "The general safety requirement," section 10 provides, so far as is relevant:

"(1) A person shall be guilty of an offence if he - (a) supplies any consumer goods which fail to comply with the general safety requirement; (b) offers or agrees to supply any such goods; or (c) exposes or possesses any such goods for supply. (2) For the purposes of this section consumer goods fail to comply with the general safety requirement if they are not reasonably safe having regard to all the circumstances, including - (a) the manner in which, and purposes for which, the goods are being or would be marketed, the get-up of the goods, the use of any mark in relation to the goods and any instructions or warnings which are given or would be given with respect to the keeping, use or consumption of the goods; . . . (3) For the purposes of this section consumer goods shall not be regarded as failing to comply with the general safety requirement in respect of - . . . (b) any failure to do more in relation to any matter than is required by - (i) any safety regulations imposing requirements with respect to that matter; (ii) any standards of safety approved for the purposes of this subsection by or under any such regulations and imposing requirements with respect to that matter; (iii) any provision of any enactment or subordinate legislation imposing such requirements with respect to that matter as are designated for the purposes of this subsection by any such regulations. . . . (7) In this section 'consumer goods' means any goods which are ordinarily intended for private use or consumption, not being - . . . (d) aircraft (other than hang-gliders) or motor vehicles; . . . (f) tobacco."

Section 11, headed "Safety regulations," provides so far as is relevant:

"(1) The Secretary of State may by regulations under this section ('safety

regulations') make such provision as he considers appropriate for the purposes of section 10(3) above and for the purpose of securing - (a) that goods to which this section applies are safe; (b) that goods to which this section applies which are unsafe, or would be unsafe in the hands of persons of a particular description, are not made available to persons generally or, as the case may be, to persons of that description; and (c) that appropriate information is, and inappropriate information is not, provided in relation to goods to which this section applies. (2) Without prejudice to the generality of subsection (1) above, safety regulations may contain

provision - . . . (j) for prohibiting persons from supplying, or from offering to supply, agreeing to supply, exposing for supply or possessing for supply, goods to which this section applies and component parts and raw materials for such goods; . . . (5) Where the Secretary of State proposes to make safety regulations it shall be his duty before he makes them - (a) to consult such organisations as appear to him to be representative of interests substantially affected by the proposal; . . . (6) The power to make safety regulations shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament . . ."

Section 11(7) excludes certain goods from the provisions of that section. The goods excluded are the same as those excluded from the operation of section 10 by section 10(7) except that aircraft, motor vehicles and tobacco are not excluded from the operation of section 11. Section 12(1) provides:

"Where safety regulations prohibit a person from supplying or offering or agreeing to supply any goods or from exposing or possessing any goods for supply, that person shall be guilty of an offence if he contravenes the prohibition."

Section 19(1) provides, inter alia:

"'safe,' in relation to any goods, means such that there is no risk, or no risk apart from one reduced to a minimum, that any of the following will (whether immediately or after a definite or indefinite period) cause the death of, or any personal injury to, any person whatsoever, that is to say - (a) the goods; (b) . . . use or consumption of the goods; . . ."

Section 45 provides that "personal injury" includes any disease and any other impairment of a person's physical or mental condition. Section 19(1) further provides:

"'tobacco' includes any tobacco product within the meaning of the Tobacco Products Duty Act 1979 and any article or substance containing tobacco and intended for oral or nasal use."

On 26 February 1988, the same day as the Secretary of State announced an intention to make regulations banning oral snuff, the department wrote to the applicants pursuant to section 11(5)(a) inviting them to make representations by 26 May 1988. The applicants asked for the evidence relied upon by the Government in deciding to propose the regulations and to be provided with copies of representations made by other interested persons. Their letter of 28 April 1988 and a reminder on 17 May 1988 received no reply from the department. Accordingly, since the deadline for representations expired on 26 May 1988, the applicants lodged representations by letter dated 25 May. They crossed in the post with a letter of the same date from a minister. It enclosed "a list of

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relevant references" in response to the applicants' inquiries as to the evidence relied upon by the Government. It granted the applicants a further month to submit representations. However, the minister declined

to provide the applicants with copies of representations made by other persons. The applicants lodged further representations on 27 June 1988.

On 21 July 1988, an application by the applicants for leave to seek judicial review of the decision refusing them copies of representations made by others was refused by MacPherson J. and the Court of Appeal. On 27 October 1988, the Secretary of State informed the applicants that the Government's proposals were based, inter alia, upon the advice of the C.O.C. that action should be taken to stop the sale of all oral snuff. Thus, the first intimation to the applicants that such advice had been given came 28 months after its receipt by the Secretary of State.

On 16 November 1988 Mr. Africk, president of the applicant company, wrote to the Secretary of State for Health, Mr. Kenneth Clarke, complaining of the way in which the Government had treated the applicants. He said:

"I am very concerned indeed to see that the Government's proposals apparently are based on advice received from the C.O.C. in 1986 that action should be taken to stop the sale of oral snuff. This is the first time we have been informed by the Government that the C.O.C. gave such advice in 1986, and that this is the reason upon which the government relies. We have not had access to whatever report the C.O.C. made in 1986 and we would welcome the opportunity to receive a copy and comment thereon. Quite aside from any scientific or other comments we might have on the substance of the C.O.C. report, I find the omission of that 1986 C.O.C. advice from prior communications difficult to understand."

Mr. Africk went on to review the Government's encouragement of the applicants and the negotiation over voluntary agreements. He added:

"I am very concerned that we have been allowed to continue to operate under this misapprehension when it must have been perfectly clear to your department that we were not aware of either the 1986 C.O.C.'s advice or the Government's reliance on that advice. Another aspect of this matter that also concerns me is, although the Government apparently received advice from the C.O.C. in 1986 recommending action to stop the sale of oral snuff, the proposals to ban our products were not announced until February 1988. During that intervening period we substantially increased our investment in our U.K. operations. The matters raised in this letter underscore our view that the Government's treatment of our company has been unreasonable and unfair."

Three months later, on 23 February 1989, Mr. Clarke replied. In a letter devoid of apology, he wrote:

"You say that you were not aware that the Committee on Carcinogenicity gave advice to the Government in 1986 and that you had understood that our reference to the Committee's advice had applied to that given in 1984. There seems to have been a misunderstanding. The substantive advice on carcinogenicity was given by the committee in 1984 but the matter was kept under review and in 1986 they followed up their earlier advice with a

recommendation that snuff-dipping products should be banned. I am not willing to disclose the text of the advice given in 1984, 1986 or on any other occasion

by my own professional advisers. However, I know you have already been told the gist of it and referred to relevant evidence and reports which were available at the start of the consultation. I am taking this opportunity to send to you some more recent studies which I propose to take into account subject to any further comments that you may wish to offer."

On 13 December 1989, the Regulations were laid before Parliament. They came into force on 13 March 1990. Meanwhile, on 13 February 1990, the applicants applied for leave to apply for judicial review and leave was granted on 23 February 1990.

One of the issues raised for judicial review was whether the Regulations prohibit the manufacture and supply of oral snuff for export from the United Kingdom as contended on behalf of the Secretary of State. This was considered as a preliminary issue by a differently constituted Divisional Court (Mustill L.J. and Schiemann J.) on 10 April 1990. The court concluded in the applicants' favour and granted a declaration that the Regulations do not prohibit the supply to persons outside the United Kingdom of oral snuff manufactured or packaged in the United Kingdom.

Ultra vires?

The first issue raised by Mr. Beloff on behalf of the applicants before this court concerns the power of the Secretary of State to make the Regulations under section 11 of the Act of 1987. It is contended that on a true construction of sections 10 and 11, the decision to make these Regulations was ultra vires.

In broad terms, Mr. Beloff submits that the Act of 1987 and the Regulations are concerned only with consumer protection and safety, not with public health. They are aimed at protecting consumers from defective products not from goods or substances which are intrinsically unsafe. Since the Act must be interpreted so as to promote its policy and objects (*Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997) the court ought to hold that the Secretary of State is not empowered to make regulations banning goods because of their inherently deleterious properties.

More particularly, Mr. Beloff points out that section 10 of the Act lays down the general safety requirement and creates offences of supplying and otherwise dealing with goods which fail to comply with the test. Tobacco is expressly excluded from the provisions of that section. That shows, he submits, that Parliament did not intend to ban tobacco even if it be inherently unsafe. True, tobacco is not excluded from section 11 which empowers the Secretary of State to make safety regulations. But, if tobacco cannot be banned as failing to comply with section 10, the Secretary of State cannot, through the back door, ban it by regulations under section 11. What then is the scope of the Secretary of State's section 11 powers in relation to tobacco? Mr. Beloff says it is confined to dealing with safety risks or defects other than those due to

the inherent nature of tobacco. He gives exploding cigarettes as an instance.

I cannot accept these arguments. There is no basis for confining the objects of the Act so narrowly. The definition of "safe" under section 19 refers broadly to the risk of death or personal injury "to, any person whatsoever." Personal injury is defined in section 45 in the widest terms. Moreover, in the context of oral snuff, the Act is on any view apt to protect the consumer whether one calls its purpose consumer protection or public health.

As to the exclusion of tobacco from section 10 but not from section 11, I see no inconsistency in the Secretary of State's exercising his powers under the latter section to prohibit the supply of specific tobacco products. We were referred to the Government White Paper, *The Safety of Goods* (1984) (Cmd. 9302), which preceded the Act of 1987 and were invited to have regard to it in construing the Act on the authority of *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591 and *Duke v. Reliance Systems Ltd.* [1988] A.C. 618.

It is clear that tobacco was excluded from section 10 of the Act because "the application of a general duty could raise particular problems" in the context of tobacco. Clearly Parliament baulked at using section 10 to outlaw at a stroke the supply of any tobacco product to anybody. Nevertheless, the Secretary of State was empowered under section 11 to make such provision as he considers appropriate to prohibit the supply of specific tobacco products either generally or to a particular class of persons. For example, it would clearly be within the powers of the Secretary of State under section 11(1)(b) and (2)(j) to prohibit the supply of cigarettes with a tar content above a certain level. So to do would not be inconsistent with Parliament's having refrained from applying section 10 to tobacco generally.

Mr. Beloff sought, however, to press home his argument by way of *reductio ad absurdum*. If the Secretary of State can ban a particular tobacco product by regulations, he could ban tobacco altogether. He could also ban motor vehicles altogether. In theory, this may be right but it is wholly unrealistic. By section 11(6), the power to make regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament. Moreover, the Secretary of State would be open to judicial review on grounds of irrationality.

In my judgment, the terms of section 11(1)(b) and (2)(j) clearly empower the Secretary of State to make regulations such as those challenged here and the argument based on *vires* is misconceived.

Next, Mr. Beloff claims that in a number of respects the Secretary of State's decision was perverse, irrational, disproportionate and based upon errors and irrelevancies.

Scientific controversy

He fastened on a phrase in the affidavit of Mr. Burroughs, an assistant secretary who is head of the relevant branch of the Department of Health. Mr. Burroughs said:

"The reputation of the experts contributing to the relevant scientific publications is such that no genuine controversy can be recognised

regarding a positive and causal relationship between snuff dipping and oral cancer."

It is submitted that there is genuine controversy and the failure to recognise it was a basic error. The applicants rely on the evidence of a number of highly qualified doctors who say that neither epidemiological studies of humans nor laboratory studies on animals prove the causal relationship. However, none of those doctors expresses a conclusion negating causation. They merely say, causation is not proven. As against that, authorities worldwide, with

responsibility for public health, have accepted that a causal connection exists. They include the World Health Organization, the International Agency for Cancer Research and the United States Surgeon-General. No contrary view has been expressed by any similar responsible body. In these circumstances, I am not persuaded that the phrase "no genuine controversy" in the sense of no significant controversy amounted to an error or misdirection such as to vitiate the Secretary of State's approach.

New products

On the day the Regulations were laid before Parliament, the Secretary of State said: "The Government's action should nip this dangerous new habit in the bud." A press release said: "The habit of snuff dipping is new to this country. It was unknown until a few years ago when a product called 'Skoal Bandits' appeared."

The applicants say these statements are wrong; there is nothing new about oral snuff which has been available for many years. However, the Government statements do not claim that oral snuff or even knowledge of its existence is new. The newness claimed relates to the habit of using it. A habit, in national terms, implies frequent use by many people, and this habit is perceived as being closely associated with the applicants' product, Skoal Bandits. It ill lies in their mouths to say the latter is not new since the promotional blurb they put in each pack of Skoal Bandits emphasises their newness. The word "new" appears five times.

Proportionality

Mr. Beloff argues that the banning of oral snuff was a disproportionate step to guard against the perceived risk. He referred to the principle of proportionality recognised in Community law and mentioned by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410E, as a possible future criterion for the exercise of judicial review. However, for the purposes of this case, Mr. Beloff accepted that proportionality should be considered simply as a facet of irrationality. Was the decision to make the Regulations so disproportionate to the risk as to be irrational?

The Secretary of State expressed concern about the potential for the spread of snuff-dipping among young people. This was based upon reports from the United States and Sweden about the growth of the habit there amongst the young. The applicants argue that there is no evidence of such growth here. In any event, the risk to the young could be minimised by continuing to rely on voluntary agreements instead of

introducing a total ban affecting all age groups. It is further argued that since the Government accepts that smoking, which is not banned, involves a greater risk of cancer than oral snuff and since chewing tobacco is not banned, it is disproportionate and perverse to discriminate against oral snuff.

However, these are matters of judgment. The Secretary of State's avowed object is to nip in the bud what he is advised is a dangerous habit. To wait, despite warning evidence from abroad, until it is in full flower here before acting would defeat that object. Smoking and tobacco chewing have been well established habits for so long as to be difficult to reverse. But to say that because a greater risk to health cannot readily be eliminated, effective steps should not be taken to prevent a new albeit lesser risk developing is a

fallacious argument. Whether steps short of a total ban would be ineffective to protect the public may be arguable, but in my judgment it is not an irrational view.

Community law

A further argument was based on Community law. Mr. Beloff contended that the Regulations are in breach of article 30 of the E.E.C. Treaty (Cmd. 5179-II) which prohibits quantitative restrictions on imports and all measures having equivalent effect. The prohibition of the supply of oral snuff in the United Kingdom affects intra-Community trade and is a measure, it is argued, having the equivalent effect to a quantitative restriction on imports from other member states. It therefore infringes article 30: *Procureur du Roi v. Dassonville* (Case 8/74) [1974] E.C.R. 837, 852.

Further, Mr. Beloff refers to the Labelling Directive adopted by the Council of the European Economic Communities on 13 November 1989 (89/622/E.E.C.). That requires, by article 4, certain warnings to be carried by tobacco products. By going further than the Directive and imposing a total ban, the Secretary of State fell foul of the principle of proportionality since the Council must be deemed to have regarded the Directive as a sufficient measure.

The answer to these submissions is to be found in one article in the Treaty and one in the Directive. Article 36 of the Treaty provides, so far as is relevant:

"The provisions of articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of . . . the protection of health and life of humans . . ."

Article 8.2 of the Council Directive (89/622/E.E.C.) provides:

"The provisions of this Directive do not affect the right of the member states to lay down, in compliance with the Treaty, requirements concerning the import, sale and consumption of tobacco products which they deem necessary in order to protect public health, provided such requirements do not imply any changes to labelling as laid down in this Directive."

Provided that the Secretary of State's decision to make the Regulations was otherwise lawful and rational, the effect of these two provisions is to defeat the challenge based on Community law.

Volume of representations

In a statement by the Secretary of State to the House of Commons and a press release of 13 December 1989, reference was made to the process of consultation. It said: "A large number of representations were received, the vast majority of which were in favour of a ban." The applicants argue that the number of representations in favour of a ban was an irrelevant consideration. All that mattered was the content. Again, they fastened on a turn of phrase by Mr. Burroughs, who said in his affidavit: "The impact of the representations did not depend solely on the numbers for and against but also on the content of the representations."

From this it is argued that one of the factors considered must have been the number of representations in favour of a ban; so the Secretary of State took

into account an irrelevant factor.

I am not convinced that numbers are wholly irrelevant. If a cogent point is made by one consultee, no doubt it will be carefully weighed. But if most of those consulted turn out to be concerned about the same point, why should the Secretary of State not regard that as a relevant consideration? How much additional weight he should attach to the numbers supporting an argument over and above the cogency of its intrinsic appeal to him is a matter for political judgment.

Legitimate expectation

The applicants are understandably aggrieved that after leading them on, the Government should then strike them a mortal blow by totally banning their products. They point out they were influenced in opening their factory in East Kilbride in 1985 by the encouragement of Government departments and by Government grant. After advice from the C.O.C. in 1984, the Government was concerned about the risks to health. But the approach they adopted was to seek and reach voluntary agreement with the applicants not to market their product to those under 18 years of age and to include health warnings. This was stated by Government ministers on a number of occasions to be the approved policy. The applicants adhered to their undertakings and were thanked for their co-operation. Negotiations about revision of the agreement continued in the period between 1986 to 1988. As already noted, the C.O.C. had recommended a ban on oral snuff in June 1986, but the Government did not disclose that to the applicants until 27 October 1988. Although Mr. Clarke was unrepentant at the time, Mr. Latham conceded in argument that the failure to inform the applicants of the C.O.C.'s advice was "unfortunate."

In these circumstances, the applicants contend they had a legitimate expectation that, provided they continued to perform their obligations under the voluntary agreement and absent the emergence of stronger evidence as to the risk to health, their operations would be permitted to continue. This alleged expectation is not based on any express promise or representation but is said to be implied by the course of conduct.

Mr. Beloff relies upon the speech of Lord Templeman in *Reg. v. Inland Revenue Commissioners, Ex parte Preston* [1985] A.C. 835, 866G-867B and the judgment of Bingham L.J. in *Reg. v. Inland Revenue*

Commissioners, Ex parte M.F.K. Underwriting Agents Ltd. [1990] 1 W.L.R. 1545, 1569G-1570B. He claims that the decision to ban the applicants' products is tantamount to a breach of contract or a breach of representation and, as such, is an abuse of power. However, a minister cannot fetter a discretion given him under statute. Providing he acts within his statutory powers, rationally and fairly, he is entitled to change his policy. Thus, in a case concerning prisoners' rights to parole, *In re Findlay* [1985] A.C. 318, 338, Lord Scarman said:

"But what was their legitimate expectation? Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can legitimately expect is that his case will be examined individually in the light of whatever policy the Secretary of State sees fit to adopt provided always that the adopted policy is a lawful exercise of the discretion conferred upon him by the statute. Any other view would entail the conclusion that the unfettered discretion conferred by the statute upon the minister can in

some cases be restricted so as to hamper, or even to prevent, changes of policy."

In *Reg. v. Secretary of State for the Home Department, Ex parte Ruddock* [1987] 1 W.L.R. 1482, there is a relevant passage which I cite with some diffidence, but which was expressly approved by the Court of Appeal in *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm.A.R. 161, 172. I said, at p. 1497:

"On those authorities I conclude that the doctrine of legitimate expectation in essence imposes a duty to act fairly. Whilst most of the cases are concerned, as Lord Roskill said, with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where *ex hypothesi* there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course such promise or undertaking must not conflict with his statutory duty or his duty, as here, in the exercise of a prerogative power. I accept Mr. Laws' submission that the Secretary of State cannot fetter his discretion. By declaring a policy he does not preclude any possible need to change it."

In the present case, if the Secretary of State concluded on rational grounds that a policy change was required and oral snuff should be banned in the public interest, his discretion could not be fettered by moral obligations to the applicants deriving from his earlier favourable treatment of them. It would be absurd to suggest that some moral commitment to a single company should prevail over the public interest. Accordingly, although it is regrettable that the applicants were kept in the dark for so long about the recommendation of a ban, I do not consider their plea of legitimate expectation can be upheld.

Fairness

Nevertheless, the special circumstances and history of this matter were very relevant to the Secretary of State's duty under section 11(5)(a)

to consult the applicants. The extent of that duty is not specifically laid down under the section. The applicants sought by analogy to rely on section 13(2) and Schedule 2. Those provisions relate to the service of prohibition notices and the Schedule lays down in detail the requirements of consultation in that context. I cannot accept that those provisions should be imported into section 11(5)(a). Had Parliament so intended, it would have said so.

However, there are three reasons why consultation pursuant to section 11(5)(a) in the present case required a high degree of fairness and candour to be shown by the Secretary of State. First, the history. Although the applicants cannot successfully rely on the doctrine of legitimate expectation, the fact is that they were led up the garden path. The Secretary of State must have realised once the C.O.C. had recommended a ban in 1986 that if he accepted that advice, he would be executing a *volte face* which would seriously affect the applicants. Secondly, although the Regulations are of general application, they impinged almost exclusively on the applicants as the sole manufacturers and packagers of oral snuff in the United Kingdom. Thirdly, the effect of the Regulations was likely to be catastrophic to the applicants' business in the United Kingdom, a business in which they had been encouraged by the Government to invest substantial resources. It is well established that the claims of natural justice are particularly strong where a party is being deprived of a right previously enjoyed, especially if it involves loss of livelihood: see *McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520 and *Reg. v. Barnsley Metropolitan Borough*

Council, Ex parte Hook [1976] 1 W.L.R. 1052. For these reasons it was important that the Secretary of State, when he eventually decided to propose the Regulations, should give the applicants a full opportunity to know and respond to the material and evaluations which led him to such a striking change of policy.

Mr. Beloff complains of unfairness in two aspects of the consultation process. First, he renews his attack on the non-disclosure of representations by other interested parties. This was the subject of the application for judicial review rejected by the Court of Appeal on 21 July 1988: Reg. v. Secretary of State for Social Security, Ex parte United States Tobacco International Inc. (unreported), 21 July 1988; Court of Appeal (Civil Division) Transcript No. 634 of 1988. Lord Donaldson of Lynton M.R. said there was "no basis for the contention that each representor should be entitled to see the other representations." He accepted the Secretary of State's submission that if he was minded to have regard to any fresh point deriving from the representations and unknown to the applicants, he would apprise the applicants of the point but otherwise he was not under obligation to disclose the 300 representations. Nothing has changed so far as that is concerned, and I see no reason to take a different view at this stage.

Mr. Beloff's second complaint, however, is of much greater weight. The applicants' request to be shown the advice or reasons for the C.O.C.'s recommendation to ban oral snuff was refused by the Secretary of State in his letter of 23 February 1989 quoted above. It is quite clear that that advice was crucial.

Between 1984, when the C.O.C. advised the Secretary of State of the risks attached to oral snuff, but did not recommend a ban, and 1986, when they did so recommend, no significant new evidence had emerged. What had changed was the committee's evaluation of the existing evidence. It is true that the applicants were referred to a number of scientific studies and reports which were before the C.O.C. and the Secretary of State. However, Mr. Burroughs says in his affidavit:

"The information made available to members of the Committee of Carcinogenicity was not limited to the references listed since each had their own experience and literature sources to draw on."

The change in the C.O.C.'s evaluation of the evidence and their consequent recommendations were a very important, if not the most important, factor in persuading the Secretary of State to ban oral snuff. Accordingly, the applicants wanted to see what reasons had led the committee, on unchanged evidence, to change its view so that they could respond to those reasons.

The Secretary of State's refusal to disclose, as he put it, "the text of the advice given in 1984, 1986 or on any other occasion by my own professional advisers" was adamant. He said the applicants had been "told the gist of it." But all they were told was the conclusion, namely, that a ban should be introduced, not the grounds for reaching it. The only reason advanced by counsel for the refusal of disclosure, other than the existence of an inflexible rule to that effect, was that the members of the C.O.C. might feel inhibited in expressing their views if they could be identified by those affected.

I find this unconvincing. The C.O.C. members are scientific experts of integrity and standing. Their function is to apply their expertise to the

evaluation of scientific evidence, to reach conclusions and make recommendations. I cannot believe that they would be affected by the suggested inhibitions. Even if there were anything in the point, it could be overcome by suitable editing or blacking out of names. The Secretary of State did not even vouchsafe a summary of the committee's reasons - only the conclusions.

One cannot help feeling that the denial of the applicants' request was due to an inbuilt reluctance to give reasons or disclose advice lest it give opponents fuel for argument. One can understand and respect the need for ministers to preserve confidentiality as to the in-house advice they receive on administrative and political issues from their civil service staff. But here, the advice was from a body of independent experts set up to advise the Secretary of State on scientific matters. I can see no ground in logic or reason for declining to show the applicants the text of the advice. In view of the total change of policy the Regulations would bring about and its unique impact on the applicants, fairness demanded that they should be treated with candour. To conceal from them the scientific advice which directly led to the ban was, in my judgment, unfair and unlawful.

It may well be that, in the end, the decision reached by the Secretary of State may prove to be wise and in the public interest, but such a draconian step should not be taken unless procedural propriety has been

observed and those most concerned have been treated fairly. Although the Regulations were subject to annulment by negative resolution of the House of Commons but were not so annulled, Parliament would be concerned only with the objects of the Regulations and would be unaware of any procedural impropriety. It is therefore to the courts, by way of judicial review, that recourse must be had to seek a remedy. In my judgment, the applicants are entitled on this ground to an order of certiorari to quash the Regulations.

JUDGMENTBY-2: MORLAND J

JUDGMENT-2:

MORLAND J: I entirely agree with the reasoning and conclusions stated in the judgment of Taylor L.J., and I too have reached the decision that the Secretary of State for Health in making the Oral Snuff (Safety) Regulations 1989 acted unlawfully in that he acted unfairly to the applicants and in breach of natural justice. Under section 11(5) of the Consumer Protection Act 1987 the Secretary of State is under an obligation to consult; the relevant words of the subsection are:

"Where the Secretary of State proposes to make safety regulations it shall be his duty before he makes them - (a) to consult such organisations as appear to him to be representative of interests substantially affected by the proposal; (b) to consult such other persons as he considers appropriate; . . ."

The applicants were clearly an organisation which would be substantially affected by the Secretary of State's proposal to make the Regulations. It was against a background of governmental encouragement to the applicants that they set up their European manufacturing and packaging factory at East Kilbride. They commenced their commercial operations in the United Kingdom in 1985 and they entered into voluntary agreements undertaking not to market oral snuff to persons under the age of 18. They increased their investments in the United

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Kingdom and throughout were fully co-operative with the Department of Health in entering further voluntary agreements in relation to the marketing of Skoal Bandits and oral snuff. I consider certain particular aspects of the department's conduct during the consultation period prior to the Regulations being laid before Parliament as lamentable.

The applicants were entitled to expect that their commercial operations would be allowed to continue and expand subject to their compliance with the voluntary agreements unless there were good and substantial reasons for a change in Government policy. However, they must have been aware that their expectations could never fetter the Secretary of State's duty to promote and safeguard the health of the public. That is a duty which must, in my judgment, override private commercial expectations and interests. The right of government to change its policy in the field of health must be unfettered. This is so even if the basic scientific evidence remains unchanged or substantially unchanged. Reconsideration and re-evaluation of that evidence may call for a change of policy. That is an entirely proper province of government and, in my judgment, should not be questionable in this court.

However, where there is a duty, and in this case a statutory duty, to consult, in my judgment the Secretary of State is required to make that

consultation genuine and ensure that an organisation which is affected by his proposals is given a proper opportunity to respond to the material upon which the Secretary of State is making his proposed regulations. He has in law a duty to be fair and to act in accordance with natural justice. What measures up to the standard of fairness and natural justice must depend on the facts of the individual case. In this case where the applicants, a foreign company, were positively encouraged to embark upon a substantial commercial operation in this country for the European market and where, as in this case, they have co-operated fully in entering voluntary agreements with the Department of Health, in my judgment a very high standard of fairness and openness on the part of the Department of Health was required.

On 17 June 1986 the C.O.C. advised the Government to introduce a ban on oral snuff. On 26 February 1988 the Secretary of State announced his proposal subject to consultation to make regulations to ban oral snuff products. On 25 May 1988 and 27 June 1988 the applicants lodged with the Secretary of State representations why, in their contention, the Regulations should not be made. Not until 27 October 1988 did the Secretary of State inform the applicants that the Government's proposal was based on the advice of the committee, given in 1986.

So that the reasoning of my conclusion can be understood, I consider I should set out in full here substantial parts of letters passing between Mr. Africk, the president of the applicant company, and the Secretary of State. By letter dated 27 October 1988, the Secretary of State wrote to Mr. Africk:

"The Government's proposals are based on advice from the Committee on Carcinogenicity (C.O.C.) and similar advice from other prestigious scientific bodies. The C.O.C. first considered the habit of snuff dipping in 1984 and concluded that it was causally associated with oral cancer. Their initial reaction was that warnings should be issued about the risks. This was done though the chief medical officer's letter of April 1985. The C.O.C. continued to examine the long-term implications of the habit becoming popular in the U.K. and

in 1986 advised that action should be taken to stop the sale of oral snuff. I did not claim that this involved 'new science.' Recommendations from the C.O.C. and other such bodies represented the evaluation of available scientific evidence and as such were an important guide to policy. You will understand that when governments are faced with a large volume of scientific evidence, sometimes conflicting, they must rely on the evaluation and distillation of the body of information by the best experts available. That is why bodies such as the C.O.C. are set up and why I referred to their conclusions at the meeting. You are of course free to challenge these conclusions and I understand you have already done so in your representations. It is then for us to weigh up all the evidence available and reach a conclusion."

Mr. Africk replied to the Secretary of State by letter dated 16 November 1988:

". . . I am very concerned indeed to see that the Government's proposals apparently are based on advice received from the C.O.C.

in 1986 that action should be taken to stop the sale of oral snuff. This is the first time we have been informed by the Government that the C.O.C. gave such advice in 1986, and that this is a reason upon which the Government relies. We have not had access to whatever report the C.O.C. made in 1986, and we would welcome the opportunity to receive a copy and comment thereon.

"Quite aside from any scientific or other comments we might have on the substance of the C.O.C. report, I find the omission of that 1986 C.O.C. advice from prior communications difficult to understand. In 1986, we were engaged in discussions with your department concerning a revised agreement, the terms of which were agreed in June 1986. We were, in fact, told on 24 October 1986 that the revised agreement was in the then Secretary of State's weekend dispatch box for signature, and on 27 October an official from your department confirmed that the Secretary of State had actually signed the agreement, and it merely awaited ratification from the relevant departments in Wales, Northern Ireland and Scotland. You know that the revised agreement was never concluded, although the Government has on subsequent occasions relied on the terms of that revised agreement both in Parliament and elsewhere. I refer, in particular, to that agreement's requirement which applies a health warning to our products.

"We were, of course, aware of the advice the Government received from C.O.C. in 1984, because that advice was passed on to us and led to our supplying your department with further medical and scientific evidence relating to our products. In the light of that evidence, and, notwithstanding the advice previously received from the C.O.C. in 1984, the Government entered into an agreement with us in April 1985.

"You have seen from our representations and correspondence with your department that we had understood any reference by the Government to advice received by it from the C.O.C. was reference only to the advice received in 1984.

"I am very concerned that we have been allowed to continue to operate under this misapprehension when it must have been perfectly clear to your department that we were not aware of either the 1986 C.O.C.'s advice or the Government's reliance on that advice.

"Another aspect of this matter that also concerns me is, although the Government apparently received advice from the C.O.C. in 1986 recommending

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action to stop the sale of oral snuff, the proposals to ban our products were not announced until February 1988. During that intervening period, we substantially increased our investment in our U.K. operations."

The Secretary of State delayed inexplicably for three months before answering Mr. Africk's request for a copy of the committee's advice. By letter dated 23 February 1989 the Secretary of State wrote to Mr. Africk:

"You say that you were not aware that the Committee on Carcinogenicity gave advice to the Government in 1986 and that

you had understood that our reference to the committee's advice had applied to that given in 1984. There seems to have been a misunderstanding. The substantive advice on carcinogenicity was given by the committee in 1984 but the matter was kept under review and in 1986 they followed up their earlier advice with a recommendation that snuff dipping products should be banned. I am not willing to disclose the text of the advice given in 1986 or on any other occasion by my own professional advisers. However, I know you have already been told the gist of it and referred to relevant evidence and reports which were available at the start of the consultation. I am taking this opportunity to send to you some more recent studies which I propose to take into account, subject to any further comments you may wish to offer."

The affidavit put in on behalf of the Secretary of State was made by Mr. William Burroughs whose particular responsibility was to head the branch of the Department of Health concerned with tobacco and health. In paragraph 62 of his affidavit he said:

"The Committee on Carcinogenicity of Chemicals in Food, Consumer Products and the Environment is an advisory committee made up of experts in that field. The committee was established in 1977 and advises the Secretary of State for Health and the Department of Health on matters within its terms of reference. Department of Health civil servants provide the secretariat for the committee. The committee does not produce reports as such. It meets about four times a year, and its conclusions are recorded in the minutes of its meetings. The Secretary of State through the Department of Health takes note of the conclusions and its recommendations which form part of the picture leading to any necessary administrative action."

In paragraph 63 he said:

"Although the minutes and conclusions of the meetings are regarded as confidential the substance of the committee's advice to the Secretary of State may where appropriate be made public."

In paragraph 69 he said:

"The information available to members of the Committee on Carcinogenicity was not limited to the references listed, since each had their own experience and literature sources to draw on."

Dealing with the Secretary of State's refusal to disclose the advice of the committee, Mr. Burroughs said:

"The Secretary of State does not disclose detailed advice given to him by his professional advisers unless this raises matters which he considers should be

disclosed in the public interest. In this case he considered that he should disclose the recommendations made to him by the committee in relation to oral snuff, and he did so on 27 October 1988. The company were aware from the beginning that the proposed ban was based on the committee's advice that snuff dipping is causally associated with oral cancer."

Mr. Latham submitted on behalf of the Secretary of State that it would not be in accordance with good administration to reveal the advice given by the committee as he said in argument: "Departments of state are jealous, without any doubt at all, about the advice given to ministers. Advice of this sort should in fact not be disclosed." He submitted that there were two bases for this, first the risk of disclosure might inhibit candour in the advice given to ministers and the second was that the advisory committee might be inhibited in its task because without the assurance that its advice would be secret to the minister, both the presence and active participation of the people on the committee might not be obtained and their advice might be lacking in candour.

For my part I regard this submission as having no realistic basis at all. This particular committee consisted of scientific experts. They were carrying out an evaluation and analysis of scientific evidence. They used their own experience and knowledge in doing that task. Their conclusions were the conclusions of scientific experts on primary scientific evidence. I cannot believe that scientists of the quality to be expected to be serving on a committee of this kind would be in any way inhibited if they considered that their conclusions were revealed to interested parties.

In my judgment the advice given by this committee is wholly different from the sort of advice given by civil servants to a minister when considering what decision to take in many cases of a political nature; for example the type of advice given to a minister by his staff in his private office in relation to the overall effects, the pros and cons of a particular course of policy or a particular decision. For example, in this case the Secretary of State may well have been given advice in relation to the effects of a ban on Skoal Bandits so far as unemployment might result in East Kilbride, the effect so far as the revenue from tobacco duty was concerned and the political fall-out from a decision of that kind. That sort of advice is wholly different from the technical advice of a technical committee on technical evidence and, in my judgment, bearing in mind the treatment of these applicants from 1984 onwards, it was a matter of both fair dealing and natural justice that during the consultation process the applicants should have been provided with the conclusions and advice given by the C.O.C. The applicants were entitled to expect legitimately fair dealing from the Secretary of State in the circumstances. This the Secretary of State failed to give them during the consultation process. He failed to give them an opportunity of responding to the conclusions and advice of the committee upon which he relied.

For those reasons, in my judgment, his decision was flawed and therefore unlawful and so I would declare. In my judgment, the applicants are entitled to an order of certiorari to quash the Regulations.

DISPOSITION:

Application granted with costs.

Order of certiorari.

SOLICITORS:

Solicitors: Taylor Joynson Garrett; Treasury Solicitor.

G. F.

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