

In Case 34/79

REFERENCE to the Court under [Article 267 TFEU] by the House of Lords for a preliminary ruling in the proceedings pending before them between

REGINA

and

MAURICE DONALD HENN AND JOHN FRÉDÉRIC ERNEST DARBY

on the interpretation of [Articles 34 TFEU] and 36 [TFEU], bearing in mind the national and conventional provisions prohibiting the importation of articles which are of a pornographic character,

THE COURT

composed of: H. Kutscher, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart and G. Bosco, Judges

Advocate General: J.-P. Warner

Registrar: A. Van Houtte

gives the following

JUDGMENT

Decision

- 1 By order of 22 February 1979, received at the Court of Justice on 1 March 1979, the House of Lords, pursuant to [Article 267 TFEU], referred to the Court a number of questions concerning the interpretation of [Articles 34, 36 and 351 TFEU]: These questions have arisen in the context of criminal

proceedings against the appellants who, on 14 July 1977, were convicted at Ipswich Crown Court of a number of offences. Only one of the charges brought against the appellants is relevant to the present reference -that of being "knowingly concerned in the fraudulent evasion of the prohibition of the importation of indecent or obscene articles, contrary to section 42 of the Customs Consolidation Act, 1876, and section 304 of the Customs and Excise Act, 1952."

- 2 The articles involved in the charge against the appellants formed part of a consignment of several boxes of obscene films and magazines which had been brought into the United Kingdom on 14 October 1975 by a lorry which arrived at Felixstowe by ferry from Rotterdam. The charge related to six films and seven magazines, all of Danish origin.
- 3 The appellants appealed against their conviction to the Court of Appeal of England and Wales. That court dismissed their appeals by judgment of 13 July 1978. On 9 November 1978 the House of Lords granted both appellants leave to appeal. On 29 January 1979, after hearing the appellants, the House of Lords decided that it was necessary to refer to the Court of Justice, in accordance with [Article 267 TFEU], the questions set forth in the order seeking a preliminary ruling.
- 4 The appellants contended that the United Kingdom had no consistent policy of public morality in regard to indecent or obscene articles. In that respect they pointed to differences in the law applied in the different constituent parts of the United Kingdom. They contended furthermore that a complete prohibition of the importation of indecent or obscene articles resulted in the application to importation of stricter rules than those which applied internally and constituted arbitrary discrimination within the meaning of Article 36 [TFEU].
- 5 According to the Agreed Statement of Law accompanying the order seeking the preliminary ruling, it is true that, in this field, the laws of the different parts of the United Kingdom, that is to say, England and Wales, Scotland, Northern Ireland and the Isle of Man, differ from each other and that each is derived from a number of different sources, some of which are to be found in the common law and others in statute.

- 6 According to the same statement, the various laws of the United Kingdom recognize and apply two different and distinct criteria. The first, referred to in the statement as "Standard A", relates to the words "indecent or obscene" which appear in the customs legislation and in certain other legislation and are also used to indicate the ambit of the English common law offence of "outraging public decency". These words convey, according to the statement, a single idea, that of offending against recognized standards of propriety, "indecent" being at the lower end of the scale, and "obscene" at the upper end.
- 7 The second criterion, referred to in the statement as "Standard B", relates to the word "obscene" as used alone in the Obscene Publications Acts, 1959 and 1964, (which apply to England and Wales only) and in describing the ambit of certain common law offences in England and Wales, Scotland and Northern Ireland. According to the statement, this word applies to a more restricted class of material, namely that which tends to "deprave and corrupt" those exposed to the material.
- 8 The Obscene Publications Acts, 1959 and 1964, create certain offences in regard to the publication of obscene articles but exclude from their field of application "obscene articles", as defined therein, if their publication is justified on the ground that it is in the interests of science, literature, art or learning or other objects of general concern.
- 9 The mere possession, for non-commercial purposes, of articles which offend against either Standard A or Standard B is not a criminal offence in any part of the United Kingdom.
- 10 The relevant provisions concerning the importation of pornographic articles are section 42 of the Customs Consolidation Act, 1876, and section 304 of the Customs and Excise Act, 1952. They apply throughout the United Kingdom. Put shortly, they provide that indecent or obscene articles are liable for forfeiture and destruction upon arrival in the United Kingdom and that whoever attempts fraudulently to bring such articles into the United Kingdom shall be guilty of an offence. The seventh schedule to the Customs and Excise Act, 1952, provides a procedure for testing before a court the liability of goods to forfeiture.

First question

- 11 The first question asks whether a law of a Member State which prohibits the import into that State of pornographic articles is a measure having equivalent effect to a quantitative restriction on imports within the meaning of [Article 34 TFEU].
- 12 That article provides that "quantitative restrictions on imports and all measures having equivalent effect" shall be prohibited between Member States. It is clear that this provision includes a prohibition on imports inasmuch as this is the most extreme form of restriction. The expression used in [Article 34 TFEU] must therefore be understood as being the equivalent of the expression "prohibitions or restrictions on imports" occurring in Article 36 [TFEU].
- 13 The answer to the first question is therefore that a law such as that referred to in this case constitutes a quantitative restriction on imports within the meaning of [Article 34 TFEU].

Second and third questions

- 14 The second and third questions are framed in the following terms:

"2. If the answer to Question 1 is in the affirmative, does the first sentence of Article 36 [TFEU] upon its true construction mean that a Member State may lawfully impose prohibitions on the importation of goods from another Member State which are of an indecent or obscene character as understood by the laws of that Member State?

3. In particular:

- (i) is the Member State entitled to maintain such prohibitions in order to prevent, to guard against or to reduce the likelihood of breaches of the domestic law of all constituent parts of the customs territory of the State?

- (ii) is the Member State entitled to maintain such prohibitions having regard to the national standards and characteristics of that State as demonstrated by the domestic laws of the constituent parts of the customs territory of that State including the law imposing the prohibition, notwithstanding variations between the laws of the constituent parts?"

It is convenient to consider these questions together.

- 15 Under the terms of Article 36 [TFEU] the provisions relating to the free movement of goods within the [Union] are not to preclude prohibitions on imports which are justified *inter alia* "on grounds of public morality". In principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory. In any event, it cannot be disputed that the statutory provisions applied by the United Kingdom in regard to the importation of articles having an indecent or obscene character come within the powers reserved to the Member States by the first sentence of Article 36 [TFEU].
- 16 Each Member State is entitled to impose prohibitions on imports justified on grounds of public morality for the whole of its territory, as defined in [Articles 349 and 355 TFEU and Article 52(1) TEU], whatever the structure of its constitution may be and however the powers of legislating in regard to the subject in question may be distributed. The fact that certain differences exist between the laws enforced in the different constituent parts of a Member State does not thereby prevent that State from applying a unitary concept in regard to prohibitions on imports imposed, on grounds of public morality, on trade with other Member States.
- 17 The answer to the second and third questions must therefore be that the first sentence of Article 36 [TFEU] upon its true construction means that a Member State may, in principle, lawfully impose prohibitions on the importation from any other Member State of articles which are of an indecent or obscene character as understood by its domestic laws and that such prohibitions may lawfully be applied to the whole of its national territory even if, in regard to the field in question, variations exist between the laws in force in the different constituent parts of the Member State concerned.

Fourth, fifth and sixth questions

18 The fourth, fifth and sixth questions are framed in the following terms:

- "4. If a prohibition on the importation of goods is justifiable on grounds of public morality or public policy, and imposed with that purpose, can that prohibition nevertheless amount to a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36 [TFEU]?
5. If the answer to Question 4 is in the affirmative, does the fact that the prohibition imposed on the importation of such goods is different in scope from that imposed by the criminal law upon the possession and publication of such goods within the Member State or any part of it necessarily constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States so as to conflict with the requirements of the second sentence of Article 36 [TFEU]?
6. If it be the fact that the prohibition imposed upon importation is, and a prohibition such as is imposed upon possession and publication is not, capable as a matter of administration of being applied by customs officials responsible for examining goods at the point of importation, would that fact have any bearing upon the answer to Question 5?"

19 In these questions the House of Lords takes account of the appellants' submissions based upon certain differences between, on the one hand, the prohibition on importing the goods in question, which is absolute, and, on the other, the laws in force in the various constituent parts of the United Kingdom, which appear to be less strict in the sense that the mere possession of obscene articles for non-commercial purposes does not constitute a criminal offence anywhere in the United Kingdom and that, even if it is generally forbidden, trade in such articles is subject to certain exceptions, notably those in favour of articles having scientific, literary, artistic or educational interest. Having regard to those differences the question has been raised whether the prohibition on imports might not

come within the second sentence of Article 36 [TFEU].

- 20 According to the second sentence of Article 36 [TFEU] the restrictions on imports referred to in the first sentence may not "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".
- 21 In order to answer the questions which have been referred to the Court it is appropriate to have regard to the function of this provision, which is designed to prevent restrictions on trade based on the grounds mentioned in the first sentence of Article 36 [TFEU] from being diverted from their proper purpose and used in such a way as either to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products. That is not the purport of a prohibition, such as that in force in the United Kingdom, on the importation of articles which are of an indecent or obscene character. Whatever may be the differences between the laws on this subject in force in the different constituent parts of the United Kingdom, and notwithstanding the fact that they contain certain exceptions of limited scope, these laws, taken as a whole, have as their purpose the prohibition, or at least, the restraining, of the manufacture and marketing of publications or articles of an indecent or obscene character. In these circumstances it is permissible to conclude, on a comprehensive view, that there is no lawful trade in such goods in the United Kingdom. A prohibition on imports which may in certain respects be more strict than some of the laws applied within the United Kingdom cannot therefore be regarded as amounting to a measure designed to give indirect protection to some national product or aimed at creating arbitrary discrimination between goods of this type depending on whether they are produced within the national territory or another Member State.
- 22 The answer to the fourth question must therefore be that if a prohibition on the importation of goods is justifiable on grounds of public morality and if it is imposed with that purpose the enforcement of that prohibition cannot, in the absence within the Member State concerned of a lawful trade in the same goods, constitute a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36 [TFEU].
- 23 In these circumstances it is not necessary to answer the fifth and sixth questions.

Seventh question

- 24 The seventh question asks whether, independently of the questions posed above, a Member State may lawfully impose prohibitions on the importation of such goods from another Member State by reference to obligations arising from the Geneva Convention, 1923, for the suppression of traffic in obscene publications and the Universal Postal Convention (renewed at Lausanne in 1974, which came into force on 1 January 1976), bearing in mind the provisions of [Article 351 TFEU].
- 25 [Article 351 TFEU] provides that the rights and obligations arising from agreements concluded before the entry into force of the Treaty between one or more Member States on the one hand, and one or more third countries on the other, are not to be affected by the provisions of the Treaty. However, to the extent to which such agreements are not compatible with the Treaty, the Member State concerned is to take all appropriate steps to eliminate the incompatibilities established.
- 26 It appears from a comparison of the foregoing considerations with the provisions of the Conventions to which the House of Lords refers that the observance by the United Kingdom of those international Conventions is not likely to result in a conflict with the provisions relating to the free movement of goods if account is taken of the exception made by Article 36 [TFEU] in regard to any prohibitions on imports based on grounds of public morality.
- 27 The answer to the seventh question should therefore be that, in so far as a Member State avails itself of the reservation relating to the protection of public morality provided for in Article 36 [TFEU], the provisions of [Article 351 TFEU] do not preclude that State from fulfilling the obligations arising from the Geneva Convention, 1923, for the suppression of traffic in obscene publications and from the Universal Postal Convention (renewed at Lausanne in 1974, which came into force on 1 January 1976).

Costs

- 28 The costs incurred by the Government of the United Kingdom and by the

Commission, which have submitted observations to the Court, are not recoverable.

29 As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the House of Lords by order of 22 February 1979, hereby rules:

- 1. A law of a Member State prohibiting any importation of pornographic articles into that State constitutes a quantitative restriction on imports within the meaning of [Article 34 TFEU].**
- 2. The first sentence of Article 36 [TFEU] upon its true construction means that a Member State may, in principle, lawfully impose prohibitions on the importation from any other Member State of articles which are of an indecent or obscene character as understood by its domestic laws and that such prohibitions may lawfully be applied to the whole of its national territory even if, in regard to the field in question, variations exist between the laws in force in the different constituent parts of the Member State concerned.**
- 3. If a prohibition on the importation of goods is justifiable on grounds of public morality and if it is imposed with that purpose the enforcement of that prohibition cannot, in the absence within the Member State concerned of a lawful trade in the same goods, constitute a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36 [TFEU].**

4. In so far as a Member State avails itself of the reservation relating to the protection of public morality provided for in Article 36 [TFEU], the provisions of [Article 351 TFEU] do not preclude that State from fulfilling the obligations arising from the Geneva Convention, 1923, for the suppression of traffic in obscene publications and from the Universal Postal Convention (renewed at Lausanne in 1974, which came into force on 1 January 1976).

Kutscher

O'Keefe

Touffait

Mertens de Wilmars

Pescatore

Mackenzie Stuart

Bosco

Delivered in open court in Luxembourg on 14 December 1979.

A. Van Houtte

Registrar

H. Kutscher

President

Robert Schütze European Union Law Lisbonist