Neutral Citation Number: [2013] EWCA Crim 158

Case No: 2011/07118

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
MR. RECORDER LEWIS QC
T2011/0017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2013

Before :

LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE WYN WILLIAMS
and
MR JUSTICE GLOBE

- -

Between :

RAMIN POULADIAN-KARI	**Appellant**
- and -	
R	**Respondent**

- -
- -

Miss Clare Montgomery QC and Miss Fiona Jackson for the Appellant
Mr Andrew Marshall for the Respondent

Hearing date: Thursday 24th January 2013

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Approved Judgment

Mr Justice Globe:

1. On 18th November 2011, in the Central Criminal Court before Mr Recorder Lewis QC the appellant was convicted of being knowingly concerned in an attempt to export prohibited or restricted goods, namely, electrical switchgear, contrary to s 68(2) of the Customs and Excise Management Act 1979. On 12th December 2011, he was sentenced to 12 months imprisonment suspended for 2 years with a 200 hour unpaid work requirement. A co-accused, Arbrene Hussain, who pleaded guilty, was sentenced to 6 months imprisonment suspended for 2 years with a 100 hour unpaid work requirement.

2. The appellant's applications for leave to appeal against conviction were referred to the Full Court by the Registrar. At the oral hearing, we gave leave to appeal.

Summary

3. The case concerns an attempt in November 2009 by the appellant, as managing director of GTC Associates Limited ("GTC"), to export electrical switchgear under an invoice numbered 7342 from the United Kingdom to a company in Iran called Iran Tablo Company ("ITC"). Electrical switchgear are "dual-use items" in that they can be used for either civilian or military purposes. An export licence was required for the items listed in 7342 if, prior to export, the exporter had been informed by the authorities that the goods were "dual-use items" which are or may be intended for prohibited purposes. It was the Respondent's case that two letters sent by the authorities to the appellant on the 9th October 2009 and 15th October 2009, in relation to an export licence being required for electrical switchgear in an invoice numbered 7280, had informed the appellant that an export licence was required for like goods in 7342. On 24th November 2009, the goods in 7342 were presented for export at Dover without an export licence having been obtained. The goods were seized and the appellant was prosecuted under Section S.68(2) of the Act.

4. There are three grounds of appeal.

   i) The first relates to the Recorder's refusal to rule as a matter of law that the October letters were incapable of amounting to the relevant notification.

   ii) The second relates to alleged inappropriate and prejudicial comments by prosecution counsel in his final speech.

   iii) The third relates to the Recorder's refusal to discharge the jury after a juror sent a note to the Recorder asking for guidance as to whether he should remain on the jury.

Statute and Regulations

5. S.68 of the Customs and Excise Management Act 1979 states as follows:

   (1) If any goods are-
      a. exported or shipped as stores; or
      b. brought to any place in the United Kingdom for the purpose of being exported or shipped as stores,

and the exportation or shipment is or would be contrary to any prohibition or restriction for the time being in force with respect to those goods under or by virtue of any enactment, the goods shall be liable to forfeiture and the exporter or intending exporter of the goods and any agent of his concerned in the exportation or shipment or intended exportation or shipment shall each be liable on summary conviction to a penalty of three times the value of the goods or [level 3 on the standard scale], whichever is the greater.

(2) Any person knowingly concerned in the exportation or shipment as stores, or in the attempted exportation or shipment as stores, of any goods with intent to evade any such prohibition or restriction as is mentioned in subsection (1) above shall be guilty of an offence under this subsection and may be detained.

6. The definition of "dual-use items" and the relevant enactment which imposed a restriction on the exportation of such items in November 2009 was the Council Regulation (EC) 428/2009 ("the Regulation"). It came into force on 27th August 2009. It had direct effect in the United Kingdom. It replaced similar provisions in the Council Regulation EC 1334/2000 ("the 2000 Regulation"). Paragraph (1) of the recital to the Regulation stated that the 2000 Regulation had been significantly amended on several occasions and, since further amendments were to be made, it should be recast in the interests of clarity.

7. The relevant provisions of the Regulation are as follows:

Article 2

"1. "Dual-use items" shall mean items, including software and technology, which can be used for both civil and military purposes and shall include all goods that can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices."

Article 3

"1. An authorisation shall be required for the export of the dual-use items listed in Annex 1."

"2. Pursuant to Article 4 or Article 8, an authorisation may also be required for the export to all or certain destinations of certain dual-use items not listed in Annex 1."

Annex 1 implements internationally agreed dual-use controls and is a 240 page list of "dual-use items" for which authorisation is required for export by Article 3.1. Each item is particularised in generic form. The goods listed in the invoices in this case are not on that list.

Article 4

"1. An authorisation shall be required for the export of dual-use items not listed in Annex 1 if the exporter has been informed by the competent authorities of the Member State in which he is established that the items in question are or may be intended, in their entirety or in part, for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological, or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons."

> "2. An authorisation shall be required for the export of dual-use items not listed in Annex 1 if the purchasing country or country of destination is subject to an arms embargo……..and if the exporter has been informed by the authorities referred to in paragraph 1 that the items in question are or may be intended, in their entirety or in part, for a military end-use…….. "
>
> "3. An authorisation shall also be required for the export of dual-use items not listed in Annex 1 if the exporter has been informed by the authorities referred to in paragraph 1 that the items in question are or may be intended, in their entirety or in part, for use as parts or components of military items listed in the national military list that have been exported from the territory of that Member State without authorisation or in violation of an authorisation prescribed by national legislation of that Member State."
>
> "4. If an exporter is aware that dual-use items which he proposes to export, not listed in Annex 1, are intended, in their entirety or in part, for any of the uses referred to in paragraphs 1, 2 and 3, he must notify the authorities referred to in paragraph 1, which will decide whether or not it is expedient to make the export concerned subject to authorisation."
>
> "5. A Member State may adopt or maintain national legislation imposing an authorisation requirement on the export of dual-use items not listed in Annex 1 if the exporter has grounds for suspecting that those items are or may be intended, in their entirety or in part, for any of the uses referred to in paragraph 1."
>
> "6. A Member State which imposes an authorisation requirement, in application of paragraphs 1 to 5, on the export of a dual-use item not listed in Annex 1, shall, where appropriate, inform the other Member States and the Commission. The other Member States shall give all due consideration to this information and shall inform their customs administration and other relevant national authorities."
>
> "7. The provisions of Article 13(1), (2) and (5) to (7) shall apply to cases concerning dual-use items not listed in Annex 1."
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> ***Article 13***
>
> "1. The competent authorities of the Member States, acting in accordance with this Regulation, may refuse to grant an export authorisation and may annul, suspend, modify or revoke an export authorisation which they have already granted. Where they refuse, annul, suspend, substantially limit or revoke an export authorisation or when they have determined that the intended export is not to be authorised, they shall notify the competent authorities of the other Member States and the Commission thereof and share the relevant information with them. ……"

8. The Regulation is supplemented by the provisions of the Export Control Order 2008 (SI 2008/3231) ("the Order") which sets out the United Kingdom export licence regime for what is described in the Regulation as an export "authorisation".

Facts

9. The appellant grew up in Iran. He was educated in England and obtained an electrical engineering degree and a doctorate in Pulsed Powered Technology at Cardiff University. In 1992, he returned to Iran to help his father who had founded ITC. In time, he became managing director of ITC with about 300 people working for the

company. Eventually, he returned to England and became involved with GTC which was incorporated in 2003 with a registered address in Guilford. He became managing director. His commercial operations manager was his co-defendant Arbrene Hussain. The company began as a procurement handling company for ITC supplying electrical switchgear for use in industry. The electrical switchgear were procured from multi-national companies, one of which was Schneider Electric who manufactured the goods in England and elsewhere in Europe.

Invoice 7280

10. Prior to June 2009, GTC were sourcing electrical switchgear from Schneider UK to process the 7280 order for ITC. In early June 2009, a freight forwarding company informed GTC that the items might require an export licence because they were dual-use items. This prompted the appellant to open an online account with the Department for Business Innovation and Skills Export Control Organisation ("BIS"). BIS is the competent authority for the United Kingdom within the meaning of Article 4.1 of the Regulation. Opening an online account enabled the appellant to make export licensing enquiries and applications online.

11. On 9th July 2009, the appellant submitted an online application on behalf of GTC for an export licence for the electrical switchgear listed in 7280 to be consigned to ITC in Tehran. There were nine different types itemised. Each type was identified by its generic part number. Specific quantities of each type were to be supplied. A total of 79 items were ordered. The total value of the order was £38,156. The form included various questions in relation to "End-Use Details". One such question related to "WMD End Use Control". It asked whether the appellant had been informed by the Export Control Organisation ("ECO") that the items were or might be intended, in their entirety or in part, for use in connection with chemical, biological or nuclear weapons or the missiles capable of delivering such weapons and, if "yes", to enter the ECO reference. The applicant answered "no". It was common ground that as at 9th July, "no" was the correct answer.

12. On 17th July 2009, the appellant sent an e-mail to Hussain, Schneider and ITC, which referred to delay being caused by the latest restrictions towards shipments to Iran which required that all cargo had to go through an export licence process.

13. In the weeks that followed, ITC became impatient about the delay and queried whether it was possible to ship the goods without an export licence. This culminated in GTC contacting a different freight forwarding company, sending them the invoice and packing list and giving them the go ahead to export the goods before a response to the export licence application had been received. At the beginning of September, the goods were collected and taken to Dover with a view to them being taken to Germany and then on to Iran.

14. When the goods were presented for export at Dover at the beginning of September 2009, the BIS website was down for maintenance purposes. With no means of being able to check the BIS records, an executive decision was taken by an authorised official to allow the export without any check having been made with BIS about the goods referred to in the invoice.

15. On 9th October 2009, after the goods in 7280 had already been exported, BIS sent a letter to the appellant in relation to 7280. The letter said as follows:

> "Thank you for your export licence application of 9th July 2009 ……I write to inform you that, under the Weapons of Mass Destruction end-use control, an export licence is required for this particular export. This is because there are grounds for believing that the export is or maybe intended, wholly or in part, to be used in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or the development, production, maintenance or storage of missiles capable of delivering such weapons. Further details on this control can be found on our website.
>
> This assessment has been made taking into account the information given in your application.
>
> We will continue to process your application. However, if there is a clear risk that the goods would be used in connection with activities relating to the proliferation of weapons of mass destruction or missiles capable of delivering such weapons then the application is likely to be refused. We shall inform you of the outcome of your application in due course."

16. On 15th October 2009, BIS sent a second letter to the appellant with a refusal schedule attached to it. The letter said as follows:

> "Having carefully considered your application, an export licence has been refused for the goods listed in the attached schedule. You may appeal against this decision, but you must do so in writing within 28 calendar days of the date of this refusal letter. In doing so you must provide argument or information that was not available to us at the time of refusal and which could materially affect the decision to refuse. Appeal letters should be addressed to……..If your goods have been refused under one of the Consolidated EU and National Arms Export Licensing Criteria a full copy of the criteria can be found at www.berr.gov.uk/....."

17. The internet or web address/link provided by BIS in the letter was an address for the Department for Business, Enterprise and Regulatory Reform ("BERR") website where guidance was able to be found in relation to current strategic export control legislation in relation to when export licences were required under the regulations.

18. The refusal schedule listed the generic part numbers of all nine items in 7280. In relation to each item, the following reason was given for refusal:

> "Unacceptable risk of diversion to a Weapons of Mass Destruction (WMD) programme of concern."

19. The appellant was not prosecuted for the exportation of the goods in 7280 without an export licence because he had not been "informed" prior to September 2009 of what was required prior to exportation. However, it was the Respondent's case that, the two October 2009 letters "informed" the appellant (the exporter) in compliance with, and satisfaction of, Article 4.1 of the Regulations and therefore the restriction on export was established. Additionally, and for future purposes, the letters informed the Appellant of what was required in relation to exporting any other goods that were

generically specified in 7280. It was the defence case that the letters only applied to invoice 7280 and not to any other invoice.

Invoice 7342

20. On 24th July 2009, Hussain emailed Schneider, with a copy to the appellant, attaching a list of goods that were required for invoice 7342. The list included six types of electrical switchgear which were generically referred to in 7280 but the quantities were different. The email was sent fifteen days after the appellant had made the application for the export licence for 7280 and one week after the appellant had sent the email of 17th July 2009.

21. Agreement was reached in relation to the quantity and prices of the goods in 7342. The invoice was dated 29th October 2009 and was for GTC to supply to ITC in Tehran 14 separate types of electrical switchgear in specified quantities for a total invoice price of £135,250 of which the six types of goods which were identical to those in 7280 amounted to £78,300. There were 508 items in all of which there were 361 items of the six identical types in 7280.

22. On 24th November 2009, the goods were presented for export. The customs declaration form and the copy of 7342 stated that GTC were exporting the items to ITC in Tehran. A copy of the GTC packing list dated 18th November 2009 stated that the freight was travelling from the United Kingdom to the United Arab Emirates and its destination was stated to be for temporary importation and transit to ITC in Tehran and re-export to Pars Special Economic Zone. A customs officer looked at the goods and copies of the documents. On the copy of 7342, he marked the six items on the invoice which matched those on the refusal schedule attached to the letter of 15th October 2009 in relation to 7280. Better copies of the documents were requested.

23. On 25th November 2009, various documents were emailed by GTC to Dover. They were different to the copies that had been produced at Dover. One document was another copy of 7342 which listed the same details of the electrical switchgear but was stamped with the word "original" and was for GTC to supply the goods to GTC Associates International FZE in the United Arab Emirates. A second document was a copy of the packing list of 18th November 2009 which was also stamped with the word "original". The destination on that document was stated to be Abu Dhabi in Dubai and not ITC in Tehran before re-export to Pars Special Economic Zone. The goods were detained pending further investigation including further queries about the destination of the goods.

24. On 27th November 2009, the appellant signed a letter "to whom it may concern" saying that the correct recipient of the goods was GTC Associates International FZC in the United Arab Emirates and not ITC in Iran.

25. On 3rd December 2009, BIS wrote to GTC in the following terms.

> "……..I am writing to inform you under the Weapons of Mass Destruction (WMD) end-use control referred to in the enclosed Note on Current Strategic Export Control

> Legislation, an export licence is required for this particular export. This is because there are grounds for believing that the export is or may be intended, wholly or in part, to be used in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or the development, production, maintenance or storage of missiles capable of delivering such weapons. Further details on the operation of the WMD End-User Control that you may find helpful can be found at http://www.berr.gov.uk/.....If you decide to apply for a licence for the items referred to in this letter, you should note that receipt of this letter constitutes "being informed" and you are required to answer "yes" in response to this question in the export licence application. If there is a clear risk that the goods would be used in connection with activities to the proliferation of weapons of mass destruction or missiles capable of delivering such weapons then the application is likely to be refused……."

26. The attached note on current strategic export control legislation referred in particular to the Order and the Regulation. In relation to "End Use Controls" it stated as follows:

> "***Weapons of Mass Destruction (WMD):*** Provision is made in Article 4 of "the Regulation" and Articles 6, 7 and 8 of "the Main Order" to prohibit in certain circumstances the export and transit, without a licence, of dual-use items not listed in Annex 1 of "the Regulation" to a final destination other than an EU Member State and goods other than dual-use items to any destination if the exporter:
>
> i. has been informed by a competent authority of the Member State where he is established that they are or may be intended, in their entirety or in part, to be used in connection with chemical, biological or nuclear weapons or other nuclear explosive devices, or missiles capable of delivering such weapons; or
>
> ii. ……."

27. The internet or web address/link provided by BIS in the letter was a like email address as had been given to the applicant in the letter of 15th October.

28. It was, and still is, the appellant's case that the letter of 3rd December 2009 was the first notice he had had that an export licence was required for the particular goods listed in 7342. He believed that every export was dealt with separately and had not thought that the goods in 7280 were relevant to the goods in 7342. The letter was received on 7th December 2009. The appellant rang BIS and asked if an export licence would be granted and he was told probably not. On 21st December 2009, the goods were formally seized and the case was referred to Customs and Excise for investigation.

29. After the goods were seized, the appellant made an online rating enquiry on 20th January 2010 asking if an export licence was required for the items listed in 7342. An end-user certificate for 7342 dated 10th January 2010 was attached with the application stating that the end-user was a company in Algeria. There was no reference to ITC in Iran in that document. However, another document recovered in the course of the proceedings was an end-user certificate for 7342 dated 18th October 2009 which stated that the goods in 7342 were to be used in electrical distribution panels being manufactured by ITC in Iran with a final destination being the company in Algeria.

30. In the course of giving evidence, the appellant stated that he did not know that the goods in 7342 were subject to a restriction. He said he had been told by Schneider in

France that they had been exporting similar goods to Iran without any restriction and that there were documents which established that fact. No documents were produced confirming his evidence.

First Ground of Appeal

31. The first ground of appeal is that the Recorder was wrong to rule that the BIS letters of 9th October 2009 and 15th October 2009 were capable of amounting to notification under Article 4.1 and that the issue of whether they did so was a matter of fact for the jury. He should have ruled as a matter of law that they were not capable of amounting to notification and should have ruled them as inadmissible.

32. Miss Montgomery QC and Miss Jackson, neither of who appeared for the appellant below, contend that the BIS letters in relation to invoice 7280 covered the issue of specific authorisation and not general authorisation.

33. In relation to 7280, the application dated 9th July 2009 for an export licence related to the specifically identified dual-item goods in the invoice. There were 79 items in total costing £38,156. The BIS letter of 9th October 2009 referred to the application of 9th July 2009 and stated that an export licence was required "for this particular export". The BIS letter of 15th October 2009 stated that an export licence had been refused for "the goods listed in the attached schedule". The attached schedule listed the goods specified in the invoice. Neither letter stated that the contents meant that the appellant had thereby been "informed" under the 2000 Regulation, which was the predecessor to Article 4.1. On 30th October 2009, the United Kingdom issued a "Denial Notification" under Article 13 of the Regulation, due to there being an unacceptable risk of diversion to a WMD programme of concern. There was no reference to the invoice number of 7280 but the "Denial Notification" clearly related to the invoice because it stated that it related to 79 items of electrical switchgear equipment valued at £38,156 to be supplied to ITC in Iran. It is therefore another indication of it relating to the specific export of the goods in 7280 and nothing more than that.

34. In relation to 7342, the BIS letter of 3rd December 2009 did state that the receipt of the letter constituted being "informed" under Article 4.1 if the appellant decided to apply for an export licence. However, it went on to state that it related to "the items referred to in this letter". That, too, therefore supports the contention that it related to the specific export of the goods in 7342 and nothing more than that.

35. Miss Montgomery contends that the interpretation is consistent with the language of the Regulation. Article 3.1 refers to Annex 1 which lists specific prohibited items. Article 4.1 states an authorisation shall be required to export dual-use items not listed in Annex 1 if the exporter has been "informed" that "the items in question" are or may be intended for prohibited purposes. The language is consistent with a case by case consideration of specific items only and not those of some generic description.

36. The Regulation is the successor to the 2000 Regulation under which 7280 was given consideration. Miss Montgomery relies upon the contents of the Guidance note provided by BERR dated April 2009 on the WMD End-Use Control. The Guidance refers to circumstances where the ECO will and will not require an export licence. If an export requires an export licence, the ECO will give it what is known as "LR End", which means "licence required, end use, rating". If it does not require an export

licence, the ECO will give it what is known as "NLR", which means "no licence required". The Guidance states as follows:

> "If you have previously had your goods rated by us as "NLR" under the WMD end-use control, please note that this rating only applies for that specific export, and to that specific end-user, and only at the time of the application. A more detailed description of the mechanics of processing end-use ratings enquiries and licence applications is included at Annex B."

37. Paragraph 5 of Annex B states:

> "If in a future case for the same or similar goods to the same end-user the exporter does not apply for a rating, but applies directly for an export licence (as he may) and, if advisors continue to take the view that there are no WMD concerns, then the end-use control will not be invoked and the goods will be assessed as being NLR (because they are not on the Control List and the exporter has not been informed). Thus, almost identical applications can result in different ratings (NLR/LR-End – licence approved), though the substantive outcomes are the same (export can proceed). This is a feature of the way the law works rather than any inconsistency on the part of ECO."

38. Miss Montgomery submits that the Guidance refers to specific exports, specific end-users and specific applications. It is therefore consistent with the interpretation for which she contends.

39. In that Article 4.1 and the letters required interpretation, Miss Montgomery submits that, under both European and English law, it was for the judge to have interpreted them as a matter of law. Particular reliance is placed on the cases of *R v Goldstein* [1983] 1 WLR 151 and *R v Spens* (1991) 93 Cr.App.R.194.

40. In *Goldstein*, the House of Lords held that the question of the meaning and effect of Articles 30 and 36 of the EEC Treaty was a question of law within the meaning of section 3(1) of the European Communities Act 1972, and that, accordingly, in a criminal trial it was a question for the judge and not for the jury. In the words of Lord Diplock at page 156E, "nothing could in my view be plainer."

41. In *Spens*, this court held that the construction of documents is generally a matter of fact for determination by the jury, with the exception of binding agreements between one party and another and all forms of parliamentary and local government legislation, which are for the judge to construe as a matter of law. The City Code on Take-overs and Mergers resembles legislation, and is a form of consensual agreement between affected parties, with penal consequences. Accordingly, its construction was a matter of law for the trial judge.

42. Applying the above principles, Miss Montgomery argues that, by analogy, the notification letters of 9th and 15th October required a decision – based on interpretation of the contents – by the trial Judge as to whether they complied with Article 4.1 and as to whether they applied only to the export in question or whether they had a wider effect. In a criminal trial, that was a question of law for the judge and not for the jury. The Recorder should have ruled that the letters were not capable of amounting to evidence of notification under Article 4.1 and he should have ruled them inadmissible, the consequence of which would have led to an immediate acquittal of the appellant.

43. Mr Marshall, who appears for the respondent in this court but who did not appear in the court below, agrees that the Regulation is a European Instrument and that, either by S.3(1) of the European Communities Act, or by general principles of English Law, any question as to the meaning or effect of it should be treated as a question of law. He does not disagree with the principles in *Goldstein* or *Spens*. However, he contends that there is nothing about the meaning or effect of the Regulation that requires any such treatment. The language of Article 4.1 is not obscure and does not require any interpretation. The word "informed" is a word which can be given its natural meaning. The phrase "items in question" can also be easily understood. Annex 1 lists a large number of goods, all of which are referred to in generic form. The natural meaning of "items in question" is to follow a similar generic terminology and there is nothing in the documentation to suggest the contrary.

44. Mr Marshall made the point that the appellant is actually contending for is that there should be a judicial determination on whether the letter(s) not only accord with Article 4.1 but whether their contents are export specific. Mr Marshall contends that such a determination is a matter for the jury as part of their fact-finding function.

45. In support of the proposition that the letters were not export specific, Mr Marshall agrees that the letter of 9th October made reference to "this particular export" but did so by reference to the goods listed in 7280. The letter of 15th October also listed the goods in the invoice. They were particular goods, but were goods which were identified by their generic part numbers and not by the serial numbers of unique items. If the appellant's argument is correct, it would mean that the exporter could simply redraw an invoice listing the same goods and not be required to obtain an export licence. Similarly, an exporter who had a number of invoices pending in relation to like goods would not require an export licence for the pending invoices. Such results would produce absurd results and would defeat the aim of the Regulation.

46. He submits that the Article 13 "Denial Notification" would not have been seen by the appellant because it was a notice to other Member States and was not sent to the appellant. In any event, it also does not provide support for the appellant's case. The items referred to in the Notification were still the generic part numbers of certain electrical switchgear goods and not the serial numbers of unique items.

47. He says that the extracts from the Guidance document need to be read in context. The document refers to the importance of the Government ensuring that UK exporters should not contribute knowingly or unwittingly to WMD programmes of concern, whilst also minimising the burden on legitimate trade. It provides a detailed explanation of when the ECO invokes the end-use control in relation to dual-use items which do not automatically require an export licence. It refers to the fact that many exporters prefer to submit a "rating enquiry" to ECO asking for an indication of whether the export requires an export licence. It is in that "rating enquiry" context that there is reference to a "NLR" which can only ever relate to a specific export, to a specific end-user and only at the time of the application. In other words, it is not possible to make an enquiry in relation to specific goods to be sent to a specific end-user at a particular time and then use a positive response to export like goods as part of a subsequent export. The reason is that, by the time of any subsequent export, circumstances may have changed in relation to information relevant to the goods, to the end-user or to other international issues. The "NLR" rating is therefore a specific

rating only. It is a cautious and safe approach to such enquiries. Mr Marshall contends that this case is not concerned with a rating enquiry. It is the converse situation and there is nothing in the Guidance to support the contention that notification of goods requiring an export licence is to be considered on a case by case basis. Indeed, the whole rationale of the Guidance would suggest the opposite.

48. For all of these reasons, Mr Marshall submits that the approach and ruling of the Recorder was correct.

49. There is no issue in dispute between the parties as to the law applicable to the contentions on both sides. The principles in *Goldstein* and *Spens* are accurately stated. Each case, though, was fact specific and neither case was factually similar to the facts to the appellant's case.

50. In *Goldstein* the appellant was prosecuted for importing radio sets into the United Kingdom of a type prohibited by a 1968 United Kingdom statutory instrument. An issue arose as to whether the 1968 prohibition was contrary to Articles 30 and 36 of the Treaty of Rome and was of no effect by virtue of S.2 of the European Communities Act 1972. That depended on whether in English law Articles 30 and 36, upon their true construction, repealed the Statutory Instrument or made it ultra vires. The House of Lords decided that it was the determination of that question which was "incontestably a question as to the meaning and effect of one of the Treaties" which fell fairly and squarely within the meaning of S.3(1) of the 1972 Act and was a matter of law for the judge and not a question for the jury. No analogous issues of construction arise in this case.

51. *Spens* was an appeal from a legal ruling at a preparatory hearing in the Guinness trial. The ruling of the trial judge was that the proper construction of the City Code on Take-overs and Mergers was a matter of law for the judge alone and was not a matter of evidence. It was then for the jury to decide whether or not the Code covered or applied to the facts as they found them to be. In so ruling, the trial judge stated that he was confident that his ruling was in no way inconsistent with the House of Lords decision of *Brutus v Cozens*_(1972) 56 Cr.App.R.799. Watkins LJ, in giving the judgment of this court and affirming the trial judge's ruling, stated:

> "In that case the House of Lords held that the word 'insulting' in section 7 of the Race Relations Act 1965 must be given its ordinary meaning and is not a question of law. Conduct which affronts other people and evidences a disrespect for their rights so that it is likely to cause their resentment and give rise to protest from them is not necessarily insulting behaviour within the meaning of the section. It can be noted from that and from the judgment of Lord Reid that what the House was concerned with was the meaning of the single word 'insulting' and not the construction of a phrase or phrases such as are found in the provisions of the Code. We can well understand how the judge came to observe that he did not consider ruling, as he did, that he was being in any way inconsistent with that decision."

52. The word "informed" and the expression "items in question" in Article 4.1 are also straightforward words which can be given their ordinary meaning. There are no complex phrases such as those in a Take-over Code to be interpreted. We are satisfied that there is nothing within Article 4.1 that required any interpretation as to its meaning or effect.

53. The Recorder had to make a preliminary ruling as to whether the letters were capable of amounting to notification within the ordinary and straightforward meaning of the words of Article 4(1) of the Regulation. He was satisfied that they were so capable. They would only not have been so capable if Miss Montgomery's narrow interpretation of the meaning of the words "items in question" is correct. The Recorder was satisfied that no such narrow interpretation should be given to the words. We agree. Article 3.1 refers to an authorisation being required for the dual-use items listed in Annex 1. When looked at in detail, Annex 1 does not list specific prohibited items. Annex 1 contains over 200 pages of long lists of items which are all particularised in generic form. Article 3.2 refers to authorisation also being required for the export of certain items not listed in Annex 1. When taken together with the reference to Annex 1, this too means items in the general sense. Throughout Article 4, there is continual reference to Annex 1 and to "dual-use items". In the overall context of what is being described, the terminology is in favour of general and not specific particularisation of the "items in question". The Guidance note adds nothing to contradict this conclusion. It was issued in relation to the 2000 Regulation and as a practical guide only to assist exporters as to practice and procedure. It explains what on the face of it might appear to be, but are not, anomalies. It has little or no bearing on the interpretation of either Regulation. In any event, for the reasons advanced by Mr Marshall, its contents do not contradict the finding of the Recorder about the capability of the letters. As such, the Recorder was correct to rule that the letters were capable of amounting to the requisite notification. Whether they did amount to the notification of the appellant was a matter for the jury.

54. We add the following. Even if we had decided that it was for the judge to have made a full ruling in law, in our judgment and for the reasons advanced by Mr Marshall, we are satisfied that the October 2009 letters did amount to the relevant notification of authorisation for the goods in 7342. For both reasons, the safety of the conviction is not impugned. The first ground of appeal fails.

Second ground of appeal – inappropriate and prejudicial comments by the prosecution

55. Miss Montgomery complains about two aspects of the prosecution final speech of Mr Green QC CB.

56. The first complaint relates to comments Mr Green made about the appellant's evidence that he didn't know he needed an export licence. The appellant relied in part on the fact that there were records or documents that would demonstrate that the relevant electrical switchgear were available for export to Iran from other European Union member states including Schneider Electric in France. No documents were produced in support of the oral evidence. There was no specific cross examination by Mr Green about whether such documents existed. However, in his final speech, he made a comment about the non production of the documents. His exact words were "We have of course no evidence of this at all. We only have his assertion, his declaration that he has a file full of documents in support of this, a file which seems to have remained closed". Reliance is placed on *Browne v Dunn* (1893) 6 R 67 and *Fenlon & Neal* (1980) 71 Cr.App.R.307 at page 313. The essence of those decisions is that, if in the course of a case it is intended to suggest that a witness is not telling the truth about a particular point, then he should be cross examined about it so that he may have an opportunity of explaining what has been said and of advancing further facts in confirmation of the evidence that has been given. That was not done here. By

the time the comment was made in the final speech, it was too late to introduce the documents into evidence. Accordingly, Miss Montgomery argued, the comment should not have been made and it was highly prejudicial to the appellant's case.

57. Mr Marshall refers to an exchange that took place just before speeches commenced. The Recorder sought clarification from Mr Rimmer, who was then representing the appellant, that, although there had been reference to documents from Schneider Electric, nothing had been put in evidence. Mr Rimmer confirmed that no documents had been put in evidence. It is in this context that Mr Green's comment needs to be considered. The appellant said the documents existed. They backed up his evidence. He chose not to produce them. The comment that was made was factually correct. It reflected the evidence that had been given. No part of the comment invited speculation. It was not improper to have made the comment. It was not suggested that there were no other supplies or that the existence of the files was a fabrication. There are passages in the cross examination by Mr Green that included the general proposition that the appellant was lying in relation to not having knowledge of the restriction. Further, no complaint was made about the comment at the time or immediately after it had been made such that the Recorder could have addressed any such complaint in the summing-up. In such circumstances, there is no credible basis for any suggestion that the comment was unfair or prevented the appellant from having a fair trial

58. Miss Montgomery's second complaint relates to what Mr Green said about the end user certificates. During cross examination, Mr Green had questioned the authenticity of the end user certificates which suggested that the goods would be shipped to Algeria. The appellant was asked about grammatical errors in the documents. In his closing speech, Mr Green invited the jury to consider the authenticity of the documents. It is contended on behalf of the appellant that it was inappropriate to have done so. There was no evidence that BIS had expressed any concern about their authenticity and no questions had been asked about them when the BIS witnesses had given evidence. No expert witness with specialist knowledge of such certificates had been called to give evidence about them. The originals had not been shown to the jury. There had been no evidence given as to the mechanics of issuing an end user certificate. The jury should therefore not have been invited to consider the authenticity of the certificates.

59. In response, Mr Marshall draws our attention to the similarities and dissimilarities on the face the documentation about which no expert evidence was required. The appellant had been cross examined about all such matters. In the course of cross examination he was asked whether they were genuine documents and from where he had got them. At various parts of the cross examination, it had been suggested to the appellant that he had been lying. The appellant was relying on the end user certificates to support his case that he knew where the goods were going to and that they were not going to Iran to support Weapons of Mass Destruction. The comment made in the closing speech about their authenticity was therefore justified. Further, no complaint was made about this comment at the time and before the judge summed up the case.

60. In relation to the documents, we are satisfied the appellant was relying on other companies trading with Iran in support of his case that he didn't have knowledge of any restriction on exportation. In that it was part of his case, it was open to him to have introduced the documents into evidence as part of his evidence in chief. He

knew that it was being alleged that he had knowledge. He was cross examined on the basis that he was lying when he said he didn't have knowledge. It was open to him to have introduced the documents in re-examination. He did not do so. In such circumstances, the comment that was made was not unfair. It was factually correct.

61. In relation to the end-user certificates, we are satisfied that the appellant was relying on them to support his case that he did not intend to evade the restriction on exportation. He was cross examined about what appeared on the face of them. The direct questions about them and the general attack on his credibility were sufficient to put the authenticity of the documents in issue. In the context of what was being alleged, expert evidence about the certificates was unnecessary.

62. In both cases, the defence had the opportunity to reply and to make complaint to the Recorder. No complaint was made. Nothing was suggested to be included in the summing-up. The jury were directed to try the case on the evidence before them and not to speculate about evidence not before them. In the course of this appeal we have not been invited to consider any documents or other material which might have served to demonstrate that the cross examination was unfair or based on a false premise. For all of these reasons, we are satisfied that neither comment was unjustified. We are equally satisfied that neither comment impugns the safety of the conviction. The second ground of appeal fails.

Third ground of appeal – wrong decision to dismiss the application to discharge the juror or jury

63. The trial started and the case was opened on Tuesday 8th November 2011. By lunchtime on Wednesday 9th November, there had been an extensive opening and the court had heard material evidence from two freight forwarding agents.

64. During the short adjournment a note was passed to the judge from one of the jurors which said as follows:

> "His Lordship,
> The reason for this note is that I am afraid my professional endeavours may have an effect in my view of this case.
> In my current role as "Europe, Middle East and Africa Head of Structured Trade Finance" at "…", I am confronted more often than not with the supervision of similar transactions to the one covered in this process.
> Through the prosecution explanation provided during the past day and a half, there are several details that will entail automatic rejection of the transaction in compliance grounds at my institution.
> I am aware it is my duty to judge the case based on the information provided during the court proceedings. Saying that, I found it difficult to forget about specific details of the case that at least in my professional environment are definite red signals.
> My second worry is that I may drive the discussions and conclusions of my fellow jury members in my own conclusions right or wrong.
> If his Lordship considers that this is of no effect to the fairness of the process for the defendant, I am more than happy to continue engaged in the case as a member of the jury, though it is my belief that the above information should be disclosed in favour of a fair process.
> Sincerely yours
> Signed (name of juror)"

65. The Recorder raised the matter with counsel.

66. Mr Green, for the prosecution, submitted that the situation was no different to having a barrister on the jury. The juror was entitled to apply his own common sense to the evidence. What he was not allowed to do was to import his own specialist knowledge to other jurors. The note showed he was plainly not biased and had no particular animus against the defendant. It was the reverse. He wanted his information to be known. Any difficulty could be cured by a direction befitting the circumstances.

67. Mr Rimmer, for the defence, took a different view. He submitted that whilst the juror should be given credit for bringing his concerns to the attention of the court, he had knowledge outside the experience of the court and there was strong indication of bias based on his own experience of international trade finance work. He had a particular view with regard to the practices identified in the trial. He had said that he would find it difficult to divorce himself from his professional training. He was concerned that he might impart or seek to impart his reasoning from his own professional knowledge on other jurors. There was a danger of some contamination with other jurors having already occurred. For all of these reasons, the situation could not be cured by a robust direction to the jury to consider the evidence and to divorce themselves from anyone's professional calling. It was a situation where the whole jury had to be discharged.

68. In the course of his ruling, the Recorder indicated that he had considered the issue of apparent bias and referred to what he called the line of cases from *Porter v Magill* onwards. He reminded himself that the test of apparent bias was whether or not a fair-minded observer would have a reasonable suspicion that the tribunal of fact would be biased. In his judgment, the fact that the juror had brought the information to the court's attention in the most careful and fair-minded way dispelled any possibility that he was biased against the appellant. It was true that he might well have more in-depth knowledge of the workings of freight forwarding than other jurors but that was no reason for him being excluded from jury service. The jury were obliged to follow directions which would be given to them by a judge. He intended to give a careful direction to them that they must only determine the case on the evidence in the courtroom. In such circumstances, there was no good reason to discharge the juror. There was also therefore no issue about contamination of the rest of the jury. The application for their discharge was refused.

69. The Recorder then asked for the jury to return and gave them his direction. He referred to the fact that one member of the jury had sent him a note explaining that the juror had some professional knowledge of the freight forwarding position about which evidence had been adduced during the last two days. He stated that every juror brought his or her own experience of life and common sense to the jury system which was one of the strengths of the system. As a result, there was no impediment in sitting on a case in which a juror might have some professional understanding. Indeed, it might be of some benefit. However, the case was to be tried on the evidence given in the courtroom and not on any other evidence. That didn't mean that jurors could not bring their own commonsense to bear on the evidence adduced in the trial upon which the case was to be decided. He thanked the juror who had written the note. He told the juror it was the right thing to have done. He concluded by saying that, in the circumstances, the case could carry on.

70. In summing-up, the Recorder further reminded the jury that they had to decide the case only on the evidence that had been placed before them.

71. Miss Montgomery contends that the Recorder was wrong not to have discharged the jury. She raises a number of issues.

72. First, she raises concern about the impact of the specialist knowledge of the juror on the rest of the jury. The juror had some specialist knowledge about freight forwarding. The issue of freight forwarding and export procedure involved expert evidence. If the juror was going to express expert views of his own to other jurors, the appellant was not in a position to challenge what they were. Reliance is placed on various analogous observations in *Lawrence v The General Medical Council* [2012] EWHC 464 (Admin) to the effect that a decision made on the basis of an expert view that had not been the subject of evidence and argument should be avoided. She relies on *R (on the application of Kaur) v Institute of Legal Executives Appeal Tribunal* [2011]] EWCA Civ 1168 to the effect that a disqualifying feature may be external knowledge such that a person on a Tribunal may rely on a subjective appreciation of facts and will express them to the rest of the jury in a way that cannot be challenged.

73. Secondly, she raises concern about the juror's impartiality which she claims is apparent from the text of the note. There was a real fear that any opinion expressed by him would be adverse to the appellant. In the note, he referred to finding it difficult to forget what he regarded in his professional environment were "definite red signals".

74. Thirdly, she submits that the Recorder failed to conduct a proper process to decide the issue as to whether there was apparent bias. He didn't conduct any investigation as the nature and extent of the juror's specialist knowledge. In addition to making enquiries about the juror's expert knowledge, the Recorder should also have made enquiries of the juror and jury so as to find out what, if anything, the juror had said to other jurors and to satisfy himself that there was no danger of the jury reaching a conclusion on the basis of facts or expert opinions already expressed by the juror. Further, having decided to continue, the Recorder failed to give the jury a sufficient direction to deal with the problem. If anything, the direction given to the jury compounded the danger by indicating that a juror's professional understanding of the case might be of benefit to other jurors. The Recorder's direction for the jury to try the case on the evidence in the case did nothing to protect against such risks. In accordance with the judgement in *Hanif v Khan* [2011] ECHR 2247, the directions of the Recorder failed to provide sufficient guarantees to exclude the objectively justified doubts as to the juror's impartiality.

75. In conclusion, she submits that, in accordance with the judgment of Lord Bingham in *R v Abdroikov, Green and Williamson* [2007] 1 WLR 2679 at 15, the fair minded and informed observer must adopt a balanced approach and is to be taken as a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious. In the circumstances of the juror's note and what happened in relation to it, such an observer would conclude that there was a real possibility that the juror was biased.

76. Mr Marshall disagrees. In relation to Miss Montgomery's first point, even if the juror had expertise in the relevant area, he shouldn't have been prevented from sitting on the jury. The fact that a juror has expertise doesn't automatically mean that person

cannot serve on a juror. By way of example, there would be no automatic bar to an accountant sitting on a fraud case. However, the juror did not have expertise. He had special knowledge obtained in relation to compliance issues in a merchant banker environment. The juror didn't have expert or special knowledge in relation to the export licences which were the subject matter of the indictment. Further, none of the questions for the jury involved conclusions about expert evidence or the special knowledge of the juror. The questions to be decided were all straightforward questions of fact. The juror didn't have any expertise or special knowledge to answer any of those questions. There was therefore no secret unchallengeable evidence that the juror could give to assist other jurors in answering the questions.

77. In relation to Miss Montgomery's second point, the juror's own behaviour of informing the court of his concerns rebuts any suggestion of bias. The note came at an early stage of the trial and the observation about "definite red signals" could therefore only have been a provisional view. It was expressed before any direction in answer to his query, before further evidence had been called, before submissions had been made in final speeches and before directions had been given about the law and how to approach the evidence.

78. In relation to Miss Montgomery's third point, there was no need to conduct an enquiry of either the juror or jury. The juror's note provided sufficient detail upon which to base a decision. The Recorder's direction to the jury was clear and concise. They were all directed to concentrate on the evidence in the case and nothing else.

79. In conclusion, Mr Marshall submits that the resolution of the issue was a matter of discretion for the Recorder as to whether he discharged the juror or jury. He directed himself properly as to the test to be applied. There is nothing to suggest he exercised his discretion wrongly. There is nothing to suggest the juror and jury didn't carry out their functions with fairness and in accordance with the Recorder's directions. In this regard, it is of significance that no complaint was made about the juror by any other juror.

80. With these submissions in mind, we address the facts. The juror who wrote the note was openly concerned that his "professional endeavours" might have an effect in his view of the case in that he had special knowledge of an aspect of the case derived from his role as "Europe, Middle East and Africa Head of Structured Trade Finance at …" and the fact that he was "confronted more often than not with the supervision of similar transactions to the one covered in this process". The note was detailed and contained more information than might ordinarily have been obtained from a juror sending a note to a judge. This is not one of those cases where more information was essential before a decision could be made. We are unconvinced that the Recorder would have obtained any information of further significance about the juror's professional knowledge, expertise or experience by conducting a more detailed enquiry into the juror's background. The Recorder had sufficient information in the note from which to make an informed decision. The issue is whether the Recorder made the correct decision to permit the juror to remain on the jury and whether his direction to the remaining jurors was sufficient to address the matters that had arisen.

81. The juror was the person who had drawn his concerns to the attention of the court. The diligence of the juror in sending the note and the way he articulated his concerns were indications of him seeking help and guidance. We are entirely satisfied from the

actions of the juror and the contents of the note that he was taking his duties very responsibly and that, personally, and to the best of his ability, he was deeply committed to returning a true verdict according to the evidence which would be presented at court. As such, he was not biased against the defendant. However, the fact that we are satisfied that the juror was not biased against the defendant does not resolve the question of whether a fair minded and informed observer would have concluded that there was a real possibility of unconscious bias.

82. The note speaks in unequivocal terms of "automatic rejection of the transaction in compliance grounds at my institution". "Automatic" is a very strong word. It is much stronger than "possible" or even "likely". The juror recognised that, although he would proceed in accordance with the evidence, he would find it "difficult to forget" that some of the specific matters asserted by the prosecution would amount to "definite red signals". In other words, in his world, these transactions would be prohibited.

83. It is also relevant that, whilst his last paragraph underlines the juror's determination to be fair, it also asks for the rest of the jury to be made aware of his knowledge and experience. He was asking for the others to be warned about the matters he had raised so that, in their discussions, the remaining jurors should take into account and make allowances for any views that he might express which were adverse to the defendant, notwithstanding his determination to be fair.

84. In his direction to the jury, the Recorder stated that he had received a note from a juror explaining that he had some professional knowledge of freight forwarding, but he did so in terms that it was no impediment to sitting on the jury and that the knowledge and experience that he had might be of benefit to their discussions. That direction did not alert the jury as a whole to the caution they should exercise in relation to any views being expressed by the juror who had written the note. If anything, it did the reverse. The direction that the case was to be tried on the evidence given in the courtroom and not on other evidence was correct, but was insufficient in the context of a full understanding of the contents of the note and the underlying possible risk of unconscious bias inherent within it. The juror's special knowledge and experience was directly related to the issue which arose for decision in the trial. The jury had to decide whether, in the circumstances, the defendant was entitled to act as he did or whether his actions were prohibited. In the juror's professional knowledge and experience, his unconscious prejudice was that there were "definite red signals" and there would be "automatic rejection" of the transaction such that the defendant's actions would have been prohibited. That issue was not addressed in either the decision to permit the juror to remain on the jury or in the direction to the whole jury once a decision had been taken to permit the juror to remain on the jury.

85. For these reasons, we are driven to the conclusion that, on the particular facts of the case, a fair minded and informed observer would have concluded that there was a real possibility of unconscious jury bias such that a fair trial was not possible. Accordingly, justice has neither been seen to be done nor, in such circumstances, can the safety of the conviction be sustained. The conviction must be quashed.