

“International Transport Roth GmbH and Others v The Home Office”

By Sir Nicholas Lyell QC
JUDGMENT: 5th December 2001

The judgment in *International Transport Roth -v- Home Office*, delivered on Wednesday 5th December 2001, is a landmark decision, which shows that the fundamental freedoms embodied in the Treaties of European Union and the European Convention on Human Rights can play a real part in the protection of the citizen against unfairness and “legislative overkill” from draconian legislation.

In a 130 page judgement following eight days of argument, Sullivan J ruled that the clandestine entrants provisions contained in sections 32-37 of the Immigration and Asylum Act 1999 which entitled the United Kingdom Immigration Service (in the name of the Home Secretary) to impose penalties of £2000 per clandestine entrant on road hauliers whose vehicles are penetrated by stowaways, are incompatible both with the right to a fair trial under Article 6 of the ECHR and, in relation to the power to detain vehicles, with the protection of property under Article 1 of Protocol 1 of the ECHR.

He further ruled that the penalty regime, albeit not intended to, operated as a restriction upon the right to free movement of goods and freedom to provide services under Articles 28 and 49 of the EC Treaty and were not justifiable on public policy grounds - both because they were not in compliance with the ECHR, and because they were a disproportionate response to the acknowledged problem of clandestine entry. They amounted, in the words of Lord Steyn in *R v. A (No. 2)* [2001] 2 WLR 1546, at 1652 to “legislative overkill”.

The net effect is that - unless the Home Office can overturn the judgement on appeal - the legislation will have to be withdrawn and rewritten to take account of the fact that what is purportedly a “civil” regime under the control of the Home Secretary is in fact a criminal regime under which liability must be decided by a court or other independent tribunal and to which all proper criminal safeguards, in particular the right to a caution and to legal assistance, must be applied. The regime as a whole must also be proportionate. This aspect will be of particular interest before the Court of Appeal. Without expressly spelling-out the ingredients of a proportionate scheme, and while recognising that the Government has a wide margin of discretion, Sullivan J. was expressly critical of the Home Office’s failure in their “regulatory impact assessment” to consider, let alone give reasons for

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rejecting, either a civil or a criminal regime based on objective negligence. In contrast, they created a regime in which not only did the Home Secretary purport to judge his own cause, but also relied on what Sullivan J. regarded as a largely unnecessary and unreasonable reversal of the burden of proof.

Despite the claimants' success in striking down the regime as being contrary to both EC and ECHR law, certain matters need further consideration.

One of the major unfairnesses which the claimants will raise by respondent's notice on the appeal is Sullivan J's decision that the cumulative system of flat rate penalties of £2000 per stowaway, which leads to an average fine where vehicles are penetrated of £12,000, is disproportionate and contrary to the requirements of EC law that penalties for cross-border offences should not go beyond the legitimate objective of the legislation. *Donckerwolke; Skanavi; and Pastoors [p.92 of judgment]*. The Judge was rightly critical of the fact that the regime allowed no distinction between the circumstances of a driver or small haulier who had done his best in difficult circumstances but who, owing to a minor mistake, could be said to be negligent and therefore found himself faced with a huge penalty, and perhaps a much larger firm who had taken very little trouble to secure their vehicles, but had been fortunate to be invaded by only one or two clandestine entrants. A regime based on criminal penalties up to level 5 (maximum £5,000) per clandestine entrant would give the Government ample powers to regulate and seek to control an important problem while maintaining the necessary flexibility to avoid the manifest injustices arising from the current scheme.

Sir Nicholas Lyell QC of Monckton Chambers was leading counsel for the claimants.