

Central and Eastern European Moot Court Competition 2007

MOOT PROBLEM

Lucky Luke & ELF

v

The State of Yrettol

1. . Yrettol is a new Member State of the EU, having joined in June 2006. Its population is made up in almost equal proportions of members of two rival religious faiths – the Keepers and the Chancers. Relations between adherents of the two faiths are largely friendly, even if their views differ on a number of points of doctrine; at elections, political parties however largely receive support along religious lines. One of the most marked distinctions between their political world views is that Keepers take a largely paternalistic stance and believe that the State should shield its citizens from all manner of social evils while Chancers think that State interference should be minimal and every citizen should be free to do whatever he pleases as long as he does not interfere with the freedoms of other citizens.
2. Until 2006, Chancers had for several decades had the upper hand in influencing and setting public policy, which had led to a very liberal approach being taken to a number of divisive issues: most drugs such as marihuana, cocaine, and heroin were legalised, as were prostitution, polygamy and gambling. However, increases in crime as well as a high-profile incident involving the President being photographed in compromising positions at an orgy, allowed the Keepers to win a landslide election victory at parliamentary elections in January 2006. The Keepers immediately sought to implement their election manifesto pledges and impose more socially restrictive measures. However, under Yrettol's constitution, only the President has the right to initiate legislation and the President, elected in 2002 for a 10-year term, remained deeply opposed to any restrictions on the freedom of citizens to pursue their leisure activities freely.
3. Nevertheless, by July 2006, senior members of the Keeper community had convinced the President to accept a compromise and cut back on some of the activities which they considered objectionable. As a result he initiates the legislation under a special fast track procedure which enables it to be brought into force within 2 months as the Gambling Control Act 2006. Under the compromise, there would be no changes as regards drug and prostitution control but gambling would be restricted.

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4. In particular, gambling activities were to be brought under the control of a new State-controlled monopoly operator (MINILOT) which would offer only certain types of games involving low stakes (namely that no individual could place a bet of more than €1 per week) and limited jackpots (no individual prize monies could exceed €100). By virtue of the Gambling Control Act 2006, it also became unlawful to offer any other type of gambling opportunities to the public in Yrettol, save through the office of the authorised State operator MINILOT. Specific measures were also introduced to prevent national access in Yrettol to Internet websites, both in Yrettol and abroad, which promoted or offered gambling activities. Any individual caught placing bets illegally would be liable to a criminal sanction which might include imprisonment for up to a maximum of 10 years or an alternative non-custodial community sentence. In the view of the Keepers, these drastic “shock and awe” measures were necessary to scare the public away from the evil that is gambling and rein in crime generally.

5. Lucky Luke (as he is known to his friends due to his skills in gambling) is a citizen of Tcidda, who has recently moved to the neighbouring state of Yrettol, which was his parents’ birthplace before their enforced departure as a result of the repressive measures taken by the Yrettol government in 1992. As a result of Yrettol’s membership of the EU the Yrettol government has relaxed its law on property ownership by exiles and , Luke’s parents have been able to recover their property in Yrettol. Luke therefore agreed to move to Yrettol in order to manage the family holdings. Prior to his arrival in Yrettol Luke had been working for the European Lottery Foundation (ELF), a charitable foundation set up jointly by four of the existing EU member states, including Tcidda. The Foundation has an office in each of the four member states (which triples the expense of running the foundation as each office has a substantial staff). The Foundation runs a weekly European lottery in order to raise funds for environmental purposes. Of the monies raised by the lottery, 20% is used to fund the lottery prizes with the main prize being € 1 million, and 30% is used to cover the running costs of administration of the lottery and the Foundation offices and staff. In addition, 5% is given to each of the four Member State governments to be used nationally for environmental protection and 30% of the funds is given to a special environmental protection support fund set up and administered by the European Commission. For this reason the Commission is a keen supporter of the ELF.

6. Luke had been employed as a working director of the foundation in its Tcidda office and he planned to continue that employment whilst in Yrettol, expanding the lottery for use by Yrettol citizens. He is shocked to find that, when he is in Yrettol, his access to ELF’s internet web site, as well as its Intranet service (which he uses to log onto his e-mail and access confidential Foundation Business files), has been blocked under powers laid down by Yrettol’s Gambling

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Control Act 2006. This makes it impossible for him either to carry on his normal working activities or to promote the ELF's lottery in Yrettol. In addition, he has been threatened with prosecution locally for his attempts to promote ELF to residents in Yrettol due to his employment by the Foundation.

7. Luke believes that the provisions of The Gambling Control Act 2006 are contrary to Articles 43 and 49 of the EC Treaty. Luke believes that the strong controls imposed by the four Member States who set up the European Lottery act as a sufficient safeguard to protect customers from the dangers of excess gambling. These controls include compulsory on-line registration of all those wishing to gamble and financial limits restricting each individual registered to the purchase of a maximum of 100 tickets @ €1 per ticket from each lottery organised. Luke believes that the lottery gives greater economic opportunities to Yrettol citizens and so contributes to the Yrettol economy.
8. When Luke writes to the Yrettol government to complain about the restrictions imposed on him, the Yrettol government argues that any restrictions on free movement are justified under Articles 45 and 46 of the EC Treaty as well as the case law of the Court of Justice of the EC (the ECJ).
9. Luke disputes this. He has heard that the real reason why Yrettol passed of the Gambling Control Act 2006 was to generate income directly for Yrettol through the taxing of the monopoly and the exclusion of foreign operators (who would have paid taxes abroad). In addition, the President of Yrettol is known as a keen gambler himself and has said publicly that he does not think excess gambling is actually a problem in Yrettol. Luke has been told that the President commissioned a private report on gambling, whose brief was to investigate both the dangers as well as the fiscal effect of gambling in Yrettol. This report was presented to the President in July 2006 on the day prior to his agreeing to initiate the Gambling Control Bill. Luke therefore believes that the conclusions of the report confirm that the President's decision to initiate and fast track this legislation was for purely economic reasons. He has therefore requested the Yrettol government gives him access to the report which he wants to support his case.
10. Luke applied for disclosure was refused under Yrettol national law. Luke is advised by his Teidda office that his claim for disclosure of the report may be assisted by Article 5 of EU Regulation 1049/1, as it is common knowledge that the Yrettol delegation was present at a Council meeting of EU Member States in Brussels in July 2006 which discussed the effects of gambling in the EU. The Yrettol government is believed to have strongly opposed gambling at

that time and put forward both oral and written submissions to that effect. In addition, the Yrettol representative quoted extensively from the commissioned report during the course of the meeting.

11. As a result Luke sought disclosure of the minutes of the meeting in Brussels where the report was quoted, as well as the representations of the Yrettol government with the report annexed, on the basis that these are documents within the meaning of paragraph 5(1) of Regulation 1049/1. Although the Yrettol government has the minutes in its possession, it rejected the request for disclosure, and refused to seek advice on this issue from the Council of the EU. It argued that it was not bound by Regulation 1049/1 as this had not been transposed into Yrettolian as required when this became an official EU language on Yrettol's accession in 2006. In fact due to a lack of sufficient Yrettolian translators at the EU only 25% of EU law is expected to be translated into Yrettolian by January 2007 and Regulation 1049/1 is not expected to be available in Yrettolian until January 2008. Yrettol had previously been a party to a 2002 Association Agreement with the EU which required Yrettol to start the process of harmonising its law with the requirements of European Community law. The Association Agreement also contained a term similar to Article 10 TEC.

Luke therefore initiates a claim both in his own right and in his capacity as a director of the ELF before the Yrettol High Court seeking

- a declaration that the minutes and written submissions of the Yrettol government with report attached should be disclosed to him under the provisions of the Regulation 1049/1; and
- a declaration that the provisions of the Gambling Control Act 2006 are contrary to Articles 43 and 49 of the EC Treaty in so far as it prohibits access to activities such as those provided by the European Lottery foundation either in person or by access through the internet and
- a declaration that by its refusal either to recognise or allow him to carry out the terms of his employment with the European Lottery Foundation, and so making the exercise of his employment contrary to national law and also subject to criminal sanction, Yrettol is acting contrary to the provisions of Articles, 43 and 49 of the EC Treaty.

The Yrettol High Court stays proceedings and refers the following questions to the Court of Justice of the EC under Article 234 EC:

- 1 a) Is a Member State entitled to justify the restrictions under the provisions of Articles 45 and 46 in relation to the freedom to provide services provided for in Article 49 of the EC**

Treaty in circumstances where the restrictions were imposed in pursuit of objectives which may include fiscal advantage, where the restrictions both limit the attainment of EC objectives and when the President and Parliament of the Member State concerned may in fact pursue different objectives with those restrictions?

b) If the answer to Question 1a) is in the affirmative and measures such as those imposed by Yrettol are in principle capable of being justified, are they proportionate to the aim pursued? If this is a matter for the national court to decide, what considerations should it take into account?

(2) Is a Member State entitled to introduce measures, including imposing a criminal penalty, such as under the Gambling Control Act 2006 which restrict the ability of an EU citizen employed by an entity established in his home Member State to carry out his work in that Member State?

(3) Is a new Member State bound by the provisions of EU law such as Regulation 1049/1 even when such regulation has neither been translated nor transposed into in its own language which has been designated an official language of the EU? Does the principle of co-operation in Article 10 TEC impose such an obligation on a Member State?

(4) Are the Council minutes/submissions of the Yrettol government, documents covered by the provisions of Art. 5 (1) of the Regulation and if so in what circumstances can a government refuse to disclose them?

(5) What are the limits, if any, which EC law imposes on Member States as regards the imposition of criminal sanctions? Are measures such as those imposed by the Gambling Control Act 2006 capable of falling within such limits?