Neutral Citation Number: [2011] EWCA Crim 2342
Case Nos: 201105194 C5, 201105196 C5, 201105199 C5, 200105238 C5, 200105239 C5, 200105244 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Basildon Crown Court
HHJ Black
T20110121 and 20110190

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2011

Before :

LORD JUSTICE HUGHES
MR JUSTICE CRANSTON
and
MR JUSTICE HICKINBOTTOM

- -

Between :

KV **JB** **CE** **EM** **AT** **GE**	**Appellants**
-and- **Regina**	**Respondent**

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David Hart QC and Justine Thornton (instructed by **Coole and Haddock**) for **KV, CE, EM and AT**
Denis Barry (instructed by **Andrew Bryce & Co) for BJ**
Denis Barry (instructed by **Shepherd Harris & Co**) **and JB**
Francis McGrath (instructed by **Ennon & Co Solicitors) for GE**
James Goudie QC, Sailesh Mehta and Howard McCann (instructed by **The Environment Agency**) for the **Respondent**
Hearing dates: 12 October 2011

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Judgment

Mr Justice Cranston :

INTRODUCTION

1. This is an interlocutory appeal by the defence under s. 35(1) of the Criminal Procedure and Investigation Act 1996 against certain rulings in the Crown Court. A number of defendants are due to stand trial in respect of counts of transporting or attempting to transport waste destined for recovery in a foreign country contrary to regulation 23 of the United Kingdom Transfrontier Shipment of Waste Regulations 2007. These Regulations set out to criminalise the breach of article 36 of the European Union Waste Shipment Regulation 2006.

2. The issue before us is whether the judge was correct in ruling at a preparatory hearing for the trial that regulation 23 of the UK Regulations and article 36 of the EU Regulation catch all those who are involved in transporting waste for export, from the point of origin where waste is collected and stored for onward transmission to another country, through to the point where the waste is delivered to that country. In reaching that conclusion the judge rejected defence submissions that a defendant only exports waste at some later point, at the extreme when the waste shipped by him leaves the European Community. The judge also rejected submissions that regulation 23 is in breach of European Union law and is ultra vires, and that that regulation is disproportionate and consequently unlawful.

UK REGULATIONS AND THEIR EUROPEAN BACKGROUND

3. Regulation 23 of the Transfrontier Shipment of Waste Regulations 2007, SI 2007 No 1711 ("the UK Regulations"), pursuant to which the defendants are charged, provides:

> "A person commits an offence if, in breach of Article 36(1) [of EU Regulation 1013/2006] he transports waste specified in that Article that is destined for recovery in a country to which the OECD Decision does not apply."

"Transport" in regulation 23 is defined in regulation 5 of the UK Regulations:

> "Meaning of transport and person who transports waste
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> 5–(1) Any reference in these Regulations to transport includes consigning for transport.
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> (2) Any reference in these Regulations to a person who transports waste includes the following persons –
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> (a) the notifier;
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> (b) any transporter of waste, by land or otherwise –
>
> (i) into or in the United Kingdom; or
>
> (ii) from the United Kingdom;
>
> (c) any freight-forwarder; or

(d) any other person involved in the shipment of waste".

4. Article 36(1) of Regulation 1013/2006 of the European Parliament and of the Council of 14 June 2006, [2006] OJ L190 ("EU Regulation 1013/2006") provides:

> "Exports from the Community of the following wastes destined for recovery in countries to which the OECD Decision does not apply are prohibited …"

"Export" is defined in article 2.

> "Export means the action of waste leaving the Community but excluding transit through the Community".

EU Regulation 1013/2006

5. Concern at the international level with the threats to human health and the environment by the transportation of hazardous waste led to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989. Article 2 of the Basel Convention defines "state of export" to mean "a party from which a transboundary movement of hazardous waste or other wastes is planned to be initiated or is initiated". An "exporter" is defined in article 2 as "any person under the jurisdiction of the State of export who arranges for hazardous waste of other waste to be exported". The Convention contains lists of hazardous wastes in its Annexes. Disposal operations are divided into whether or not resource recovery is possible.

6. Having regard to the purpose of the Basel Convention, and in the light of the economic value of recovering materials and energy from waste, the Organisation for Economic Cooperation and Development ("the OECD"), has adopted Decision C (2001) 107/final, on the control of transboundary movements of waste destined for recovery operations ("the OECD decision"). The OECD decision develops the framework provided by the Basel Convention.

7. The European Community became a party to the Basel Convention in 1994 as a result of Council Decision 93/98/EEC, and it established rules to comply with the Convention by adopting Regulation (EEC) 259/93. In the light of amendments to the latter, and subsequent Commission Decisions, a new instrument was adopted in 2006, EU Regulation 1013/2006. That establishes procedures and control regimes for the shipments of waste depending on the origin, destination and route of shipment, the type of waste shipped and the type of treatment to be applied at destination: article 1(1). It applies to shipments between Member States, imported into the Community, exported from the Community, or in transit through the Community: article 1((2) ("Scope").

8. Recital (1) of EU Regulation 1013/2006 establishes as its main and predominant objective "the protection of the environment, its effects on international trade being only incidental". Supervision and control of shipments of waste are important to take account of the impact on the environment and human health: recital (7). Shipments of hazardous waste should be reduced to a minimum, consistent with the environmentally sound and efficient management of such waste: recital (9). Recital

(19) refers to the need to provide procedural safeguards for the notifier, both in the interests of legal certainty and to ensure uniform application of the Regulation and the proper functioning of the internal market. In recital (28) there is reference to the need to protect the environment and to clarify the scope of the prohibition on exports of hazardous waste to countries to which the OECD decision does not apply. Recital (33) details Member States' obligations to take steps to ensure that any permitted exports of waste are managed in an environmentally sound manner throughout the period of shipment. The recitals refer to the aim of harmonising measures throughout the European Union: recitals 2(7), 2(16) and 2(19).

9. As well as the definition of export, already noted, article 2 in title 1 of EU Regulation 1013/2006 contains definitions of import, transport, and shipment. Import is the entry of waste into the Community, excluding transit through it: article 2(30); transport is the carriage of waste by road, rail, air, sea or inland waterways: article 2(33); and shipment is the transport of waste destined for recovery or disposal which is planned or takes place between, amongst other places, one country and another: article 2(34). Article 2(35) defines illegal shipment as meaning any shipment of waste effected without notification, consent or contrary to Article 36. Article 2(10) defines holder in terms of the producer or possessor of waste. Article 2(15) contains an elaborate definition of notifier. In the case of a shipment originating from a Member State, that is essentially the person who intends to carry out a shipment of waste, or who intends to have a shipment of waste carried out, and to whom the duty to notify is assigned under the Regulation. Notifiers are listed in article 2(15) in an order of ranking. In general where notification to the authorities is required, if it is not given by a person occupying a higher-ranking position, it must be given by the next down.

10. The Regulation is then divided into titles, depending on the origin, destination and route of shipment. Title II covers shipments within the Community with or without transit through non member countries. Article 3 sets out a procedure of prior written notification and consent for shipments of certain categories of waste destined for disposal or recovery in the recipient Community country. The procedure starts with identifying a notifier. Where the notifier intends to ship waste, he has to notify and provide certain documents to and through the competent authority of despatch, in England the Environment Agency: article 4. The documents must include a contract between the notifier and consignee and a financial guarantee: articles 4(4)-(5), 5,6. The contract must require the notifier to take the waste back in certain circumstances such as if it has been effected as an illegal shipment: article 5(3)(a). Article 18 requires waste to be accompanied by certain information. The take-back obligations are in articles 22 (where a shipment cannot be completed as intended) and article 24 (when a shipment is illegal). If an illegal shipment is the responsibility of the notifier, he has the take-back obligation.

11. Title III deals with shipments exclusively within Member States. Article 33 requires them to establish an appropriate system for the supervision and control of shipments of waste exclusively within their jurisdiction.

12. Title IV covers exports from the Community. Chapter 1 of that title deals with exports of waste for disposal: these are prohibited, except to EFTA countries: article 34. Procedures for export to EFTA countries are set out in article 35. Where waste is exported from the Community and destined for disposal in EFTA countries which are

parties to the Basel Convention, the provisions of title II apply, subject to specified variations.

13. Chapter 2 of Title IV is concerned with exports of waste for recovery. Section 1 covers exports to non-OECD Decision countries. We have already set out the export prohibition to non-OECD Decision countries in article 36(1). Article 36(2) provides that the take-back obligations of articles 22 and 24 apply to exports in breach of article 36(1). Article 37 deals with the procedures for recovering specific types of waste. Section 2 of chapter 2 turns to exports to OECD decision countries. Article 38 is the substantive provision.

14. Title VII, chapter 1, contains additional obligations in articles 49-56. Article 49 establishes the obligation on the notifier and other undertakings involved in a shipment of waste to take the necessary steps to ensure that the waste that is shipped is managed without endangering human health and in an environmentally sound manner throughout the period of shipment. Article 50(1) of the Regulation (entitled Enforcement in Member States) provides that:

> "Member States shall lay down the rules on penalties applicable for infringement of the provisions of the Regulation and should take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive." Member States must notify the Commission of their national legislation relating to prevention and detection of illegal shipments and penalties for such shipments".

15. Enforcement measures include spot checks on shipments: article 50(2). Article 55 provides that Member States may designate specific customs offices of entry into and exit from the Community for shipments of waste leaving the Community.

The UK Regulations

16. EU Regulation 1013/2006 is automatically part of English law. Under Article 288 of the Treaty on the Functioning of the European Union (TFEU), a Regulation is binding and directly applicable in Member States. That treaty obligation is given effect in English law by the European Communities Act 1972, under which all treaty and other Community obligations from time to time become part of English law without further enactment: s. 2(1). Section 2(2) of that Act then provides, insofar as relevant:

> "Subject to Schedule 2 to this Act, at any time after its passing … any designated Minister or department may by regulations make provision
>
> (a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

> (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;
>
> and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid."

17. As their introductory words provide, the UK Regulations 2007 were made under section 2(2) of the European Communities Act 1972. So too were amending regulations the following year, (the Transfrontier Shipment of Waste (Amendment) Regulations 2008, SI 2008 No 9). Regulation 4(2) provides that expressions used in the UK Regulations that are also used in EU Regulation 1013/2006 "have the same meaning in these Regulations as they have in the Community Regulation". General requirements for the shipment of waste under the UK Regulations include in regulation 17 the protection of the environment.

> "17. A person commits an offence if he fails to comply with Article 49(1) (the management of shipments of waste in an environmentally sound manner and without endangering human health)."

18. Regulation 23, under which these defendants have been charged, and which we set out earlier, is in Part 5 of the Regulations, "Export of waste to third countries". Regulation 36, an additional duty in Part 8, makes it an offence for the operator of a facility, who knows or has reasonable grounds to suspect that waste brought to the facility is an illegal shipment, to fail to notify the competent authority immediately and to comply with their instructions.

General principles of interpretation

19. When interpreting European Union legislative instruments, an English court does not deploy the ordinary principles of statutory construction but rather those so-called principles of teleological construction established by the jurisprudence of the Court of Justice of the European Union: HP Bulmer v Bollinger [1974] Ch 401, 425. One aspect of that is that the substantive provisions of an instrument are to be interpreted in the light of its objectives, which are most readily available in the recitals.

20. Illustrative of these principles is Case C-215/04, Marius Pederson A/S v Miljostyrelson. That concerned the interpretation of Regulation (EEC) 259/93, which as we have seen was the predecessor of the EU Regulation 1013/2006, with which this case is concerned. In circumstances where waste was gathered together from multiple producers by a collector who collated the waste and then exported it, article 2(g) of the Regulation provided that the relevant collector, rather than the producer, could provide the required notification in connection with the shipment when it was not possible for the producer of the waste to do so. The ordinary meaning of article 2(g) was that a collector could only provide the required notification in circumstances were it was impossible for the producer to do so, for example where the producer had

become insolvent and was wound up. Thus it would be insufficient if it was merely impractical or inexpedient for the producer to comply with the notification requirements. However, in the light of the imperative to interpret the Regulation in a manner which facilitated its object of furthering environmental protection, the European Court of Justice construed the language of article 2(g) to permit collectors to supply notifications based on expediency:

> "[16] In the light of one of the objectives of [the Regulation], as set out in the ninth recital … [that] the prior notification to the competent authorities of shipments of waste enabling them to be duly informed, so that they may take all necessary measures for the protection of human health and the environment, it is necessary to give a wide interpretation of the phrase "where this not possible"
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> …
>
> [19] [T]he situation was that the producer of the waste is unknown or that the number of waste producers is so great and the individual contribution of each of them so small that it would be unreasonable for each individually to be required to notify the transport of the waste may justify the licensed collector being considered as the notifier of a shipment of waste for recovery."

GROUNDS OF THIS APPLICATION

21. In this application the defendants challenge the judge's rejection of a number of submissions which they advanced at the preparatory hearing. In particular the judge rejected the submission that a defendant only exports waste to a non-OECD decision country within the meaning of regulation 23 of the UK Regulations, and article 36 of EU Regulation 1013/2006, when the waste shipped by him physically leaves the Community, that is to say, when it crosses the land border of, or passes outside the territorial waters of, the last Member State. The defendants contend that the UK Regulations criminalise a wider range of participants in the export of shipment chain than was intended by articles 36 and 50 of the EU Regulation and are therefore incompatible with EU law and ultra vires. They also contend that the strict liability and other features of the offence established by the Regulations render them disproportionate and ultra vires under European Union law. As Mr Hart QC helpfully did, we elide some of the written grounds with one another.

Ground 1: meaning of export in article 36

22. It will be recalled that the defendants are charged under regulation 23 of the UK Regulations, which creates an offence if a person, contrary to article 36 of EU Regulation 1013/2006, transports specified waste to a non-OECD decision country. Article 36 prohibits export, export being defined in article 2(31) as the action of waste leaving the Community but excluding transport through it. Pursuant to this definition, the defendants submit that an export does not occur until the waste actually leaves the Community. Alternatively, some defendants submit, the offence is committed at the earliest when the waste starts on the final journey which will lead to it leaving the

Community, and this is ascertained in practice by examining the movement of the waste in question against the background of the bill of lading which evidences the contract of carriage governing its movement out of the Community.

23. In his ruling the judge referred to the definitions of export, transport and shipment in article 2 of the EU Regulation, and to the obligation in recital 33 on Member States to ensure that permitted exports of waste are managed in a sound environmental manner throughout the period of shipment. The judge continued:

> "4 … This would additionally suggest that "export" and "shipment" are to be read as involving the same actions, and thus, that the action of "exporting" waste begins at the point of collection where the duty on the collector or notifier to provide the required notification arises.
>
> 5. I disagree with the defence submission that "export" is to be defined as excluding the action of the party who initiates the shipment of waste. For the purposes of the EU Regulation, waste which leaves the Community is "exported"; the transport of waste between countries is a "shipment" and the means of such transport include carriage by road, rail, air, sea or inland waterway. "Export" therefore covers the action of waste leaving the community by whatever means of transport is determined and from a point at which the waste to be transported is first collected and stored.
>
> …
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> 7. Thus, all the actions covered by the EU [Regulation] are types of shipment, one form of which would be "export", differentiated in this regard by reference to its destination being outside the border of the Member State where the waste originally accumulates."

24. The judge then referred to the first recital of the Regulation and said that if there were any ambiguity in the meaning of export as set out in articles 36 and 50, EU law would require him to prefer an interpretation which most advances the stated objective of furthering the protection of the environment (para. 8). The article 49 obligation, he concluded, must apply throughout the action of the transport of the waste from its point of origin in the relevant Member States of despatch, including cases where the waste is to be exported. In his view, the reference to notifier confirms that the initiator of the shipment participates in its export (para 9). As for article 50, obliging Member States to impose penalties and conduct spot checks with shipments, this must apply to all exports. In this respect the judge concluded:

> "11. It is manifestly clear from the above that EU regulation uses the word "export" as a means of encompassing various forms of transport and defines the term by reference to both the point of collection and despatch and its final destination. It follows, therefore, that article 36 is to be construed in such a way as to prohibit shipments (or transport) of proscribed waste

> to non-OECD countries, that prohibition encompassing all stages in the export chain from point of origin in the Member State of despatch onwards. Accordingly, the Member State must impose appropriate penalties on those who are found to be in breach of the regulation. "

25. In the defendants' submission the judge failed in this reasoning to attribute any independent meaning to the action of waste leaving the Community in the definition of export in EU Regulation 1013/2006. Instead, he elided the meaning of export with the meaning of shipment and transport. Yet shipment and transport have different meanings and roles to play in the EU Regulation. Export in the defendants' submission is the narrowest of these three concepts. Shipment is the transport of waste destined for recovery or disposal which is planned or takes place, including between a county and another country. Thus every export involves a shipment, but not every shipment destined for export is an export, since a shipment may be planned but never eventuate. The definition of transport – the carriage of waste by road, rail, air, sea or inland waterways – means that not every transport is an export: waste does not have to leave the Community to fall within this definition. As far as the judge's finding at paragraph 9 is concerned, and its reference to the general obligation in article 49 to manage waste throughout its shipment, the defendants submit that identifying the various obligations concerning shipment in the movement of waste prior to that of crossing the Community boundary does nothing to elucidate the meaning of export.

26. Differentiating between these different concepts of export, shipment and transport is essential, submit the defendants, since the EU Regulation is introducing a number of different regimes regulating movements of waste. These need a wider definition of shipment. Thus in some of them, particularly movements of waste from one Community country to another, the movements are permitted either with notification to the recipient country or with the latter's consent. The system of prior notification and consent has nothing to do with a case where the allegation is of a prohibited export to a non-OECD decision country. Thus the only connection between article 36 and the procedures for notification and consent in Title II is that the obligation to take waste back applies to waste illegally exported under article 36, just as it does under the intra-Community regime. Contrary to the judge's ruling, being a notifier, and therefore potentially liable for take-back costs, has nothing to do with whether one is an exporter under article 36.

27. The exception "excluding transit through the Community" in the definition of export is said to support the defendants' reading. The purpose of this exception, they say, is to exclude from the prohibition, for example, an export of waste from the USA which passes through the EU on its way to Turkey. The exception is only needed if otherwise the physical exit from the Community would be caught by the prohibition. If the whole journey was the concept in issue it would not be an export out of the Community, in the example it would be an export from the USA to Turkey.

28. As to the judge's reference to the protective purpose of the EU Regulation, as set out in recital (1), he was wrong to conclude that that was capable of resolving any ambiguity in the construction of the concept of export, given the clear meaning of the different concepts of shipping and transport. To be set against that protective purpose

was the well accepted principle against criminalisation of behaviour except in clear cases.

29. In our view the starting point in considering the correctness of the judge's findings is the language of article 36 of the EU Regulation, coupled with the definition of export in article 2(31). Exports from the Community of specified wastes, destined for recovery in non-OECD decision countries, are prohibited, with exports being defined to mean the action of waste leaving the Community, excluding transport through the Community. The prohibition in article 36 thus contains two simple, but key, concepts. First, the waste must be destined for recovery in the foreign country and secondly, export means the action of waste leaving the Community. In our judgment, on the plain language, waste can be destined for recovery in a non-OECD decision country long before it reaches the point of leaving the Community. Secondly, the action of waste leaving the community has both a transactional and temporal character. In our judgment it is a process commencing once the waste is destined for that country at its point of origin, and continuing until the waste reaches its ultimate destination in the foreign country.

30. This conclusion is strengthened by the reference to other parts of the Regulation. Immediately before the definition of export in article 2(31) is the definition of import in article 2(30), any entry of waste into the Community, excluding transit through the Community. The difference in expression is significant. Had the drafters intended an export of waste to mean an actual exit from the Community, they would have used the same approach for export as they did for import, for example, export is any exit of waste out of the Community. By using the concept of the action of waste leaving the Community, destined for recovery elsewhere, they must have meant more than waste simply exiting the Community. The exclusion from the definition of export of transit through the Community cannot detract from the otherwise clear meaning of export. Use of the expression is, in our view, neutral as to the main thrust of the definition.

31. In their submissions as to the narrow meaning of export, the defendants make much of the distinction between export on the one hand, and shipment and transport on the other. In our view this takes the meaning of export nowhere. The terms do perform different functions in the EU Regulation, but that would be expected, given that they are separately defined. However. it is clear to us from provisions such as recital (33), the definition of illegal shipment in article 2(35), article 1 on scope, and articles 35 and 36(2), that export is a form of shipment, defined by reference to the destination. There is also the obligation in article 49, which applies throughout the action of the transport of the waste from its point of origin in the relevant Member State of dispatch and includes cases where the waste is to be exported. Particularly persuasive in our view is article 50, the obligation on Member States to impose penalties and conduct spot checks, which is expressed to apply to shipments. That provision must apply to export, when export is listed as a sub-set of shipment in Article 1(2).

32. Given that we are persuaded, on the plain words of article 36, that the judge was correct to reject the defence submissions, there is no need to resort to the legislative purpose. Had we needed to, the predominant purpose of protecting the environment, set out in recital (1) and elsewhere in the EU Regulation, would have led us to the same conclusion. That purpose is underpinned by the background of the EU Regulation in the Basel Convention, and by the precautionary principle for environmental protection contained in article 174(2) of the EC Treaty. Not least in

this regard is the reality that, if the defence case were correct, avoidance of the article 36 prohibition would be facilitated, and its enforcement, either by prosecution or interception of the cargo, virtually impossible, certainly if its breach occurs only at the point that the waste actually leaves the Community. That interpretation in no way advances the predominant purpose of environmental protection.

Ground 2: width of regulation 23 of the UK Regulations

33. It will be recalled that regulation 23 of the UK Regulations creates an offence where a person, in breach of article 36(1) of EU Regulation 1013/2006, transports the waste, transport being defined in regulation 5 of the UK Regulations. Thus the prerequisite to breach of regulation 23 is a breach of article 36. The judge ruled that regulation 23 reflects the requirements placed on the United Kingdom by the EU Regulation and that no issue of disharmony or inconsistency arises: para. 12. The defendants submit that the judge erred, since transport in regulation 5 of the UK Regulations is given a much wider meaning than the term export in the EU Regulation, and insofar as relevant, the definition of transport in article 2(33). Regulation 23 must therefore be given a narrower meaning, to ensure no disharmony with the EU Regulation, and thus its validity.

34. We have already held that the proper interpretation of articles 36 and 50 of the EU Regulation 1013/2006 is that Member States are required to prohibit shipments of proscribed waste to non-OECD decision countries, that such prohibition must encompass all stages in the export shipment chain from point of origin in the Member State of dispatch onwards, and that the Member State must impose appropriate penalties on those who breach the prohibition. It follows that regulations 23 and 5 of the UK Regulations faithfully transpose the United Kingdom's obligations. There is no issue of disharmony between EU and domestic law, nor is there any altering of the scope of the EU Regulation. In our view the judge was correct in concluding at paragraph 5 that export covers the action of waste leaving the Community, by whatever means of transport. Every export must be by way of transport, since a breach of article 36 of the EU Regulation can only occur by transporting waste to a non-OECD decision country. In other words a breach of article 36 will result in a breach of regulation 23. The export will be by means of transport and that includes those persons identified by regulation 5 of the UK Regulations. It follows that a narrow construction of regulation 23 is not required by the EU Regulation.

Ground 3: regulation 23 is in breach of EU law and/or ultra vires

35. Since we have rejected the constructions of article 36 of EU Regulation 1013/2006 which the defendants proffer, and do not consider that regulation 23 of the UK Regulations extends beyond its scope, in our judgment there is nothing in this ground. Nor is there any issue of ultra vires of the UK Regulations under section 2(2) of the European Community Act 1972.

36. We offer only this. In advancing their grounds, the defendants emphasised the risks to harmonisation from regulation 23, coupled with regulation 5. In other words, exports would have a different meaning in the United Kingdom as compared with other Member States. We take some comfort from the jurisprudence that the risks of this occurring are very remote. Under the previous instrument, Regulation (EEC) 259/93, shipment was not defined. In the course of its judgment in Case C-277/02,

EU Wood Trading GmbH v Sonderabfall-Management-Gesekkschaft Rheinland-Pfaiz mbH, the European Court of Justice held that a shipment of waste meant the entirety of its movement from the point of departure of the waste in the state of dispatch until the completion of its treatment in the state of destination. The Court said that it was appropriate to place the term in its context and to interpret it according to the spirit and purpose of the provisions in question: [32] The Court made reference to the environmental purpose: [34]. It continued:

> "In the Community system thus established by the Regulation, it is clear that the objectives with which the Community legislature invested it seeking the protection of health and the environment could be compromised if, having regard to its purpose, the shipment of waste between Member States was not perceived in its entirety, that is to say from the point of departure of the waste in the State of dispatch to the end of its processing in the State of destination": [35].

37. There is also the Dutch Supreme Court Case No 08/05020. There containers of waste were stopped at Rotterdam in April 2004, having come from Belgium. The containers left Rotterdam at the end of May 2004, bound for Malaysia. The appellants argued that the indictment should have alleged an illegal traffic in May rather than April 2004. The Court concluded that the appellant's argument was based on too limited an interpretation of the phrase shipment of waste and therefore that shipment started long before. Shipment of waste included a planned shipment of waste.

Ground 4: failure to take account of Parliamentary material

38. The defendants contend that the Parliamentary material demonstrates that the intention behind the UK Regulations was to enforce EU Regulation 1013/2006. Since the judge was correct in his conclusion that that was what the UK Regulations did, and do not extend the scope of offences beyond those provided in the Regulation, there was no need for him to address the Parliamentary material.

Ground 5: proportionality

39. It is said that the judge erred in ruling that the offence created by regulation 23 of the UK Regulations is proportionate and therefore within the scope of article 50 of EU Regulation 1013/2006. The defendants also refer to recital (19) of the Regulation, the need to provide procedural safeguards for the notifier in the interest of legal certainty. Yet regulation 5 of the UK Regulations defines a person involved in transport as wider than those falling within the category of notifier. Thus the UK Regulations do not comply with that obligation. The creation of a strict liability offence, punishable by up to two years imprisonment, which can be committed by such a wide range of individuals and organisations, is not proportionate. The scope of regulation 5(2) would include arrangers, freight forwarder, persons who transports the waste to the point of embarkation, the operator of any port facility and their sub-contractors, those who load a container on a ship, and the shipping company and their employees. There is nothing in the UK Regulations, it is said, to protect individuals who are not culpable for the harm caused by any wrongful transhipment of waste.

40. In general there is no issue of proportionality under EU law with respect to strict liability offences: Case C-326/88, Public Prosecutor v Hansen [1991] ICR 277, [14]. The defendants point out that there are none of the standard defences in the UK Regulations to the commission of an offence under regulation 23, which one would expect if regulation 23 was a strict liability offence: cf. Environmental Protection Act 1990, s. 33(7). Hansen, they point out, was a case involving a fine, not imprisonment. In response the prosecution refers to the offence which an employer commits under section 33(1)(a) of the Health and Safety at Work Act 1974 for failure to discharge any of the duties set out in sections 2-7 of that Act. We note, however, that some of those duties are qualified by terms such as reasonable practicability.

41. The judge assumed that strict liability was what was intended by the drafters of the UK Regulations. The phraseology of regulation 23 compared with, say, regulation 36 of the EU Regulations, quoted earlier, supports that conclusion. The contrary has not been argued before us. Assuming that this is an offence involving strict liability, it does not, in our judgment, fail for disproportionality for that reason. Sentence in a court in England or Wales is at large and discretionary; there is ample power in the court to avoid imprisonment, or indeed serious punishment, if a defendant has genuinely offended entirely without fault. The theoretical possibility of a transporter of waste being duped into transporting it without any means of knowing he is doing so would exist also if the offence were limited in the way contended for by the defendants to physical crossing of the last Member State boundary. For both environmental and public health reasons, the handling of waste is very closely managed under EU Regulation 1013/2006 and the international instruments to which we have referred, the Basel Convention and the OECD decision. That involves imposing considerable duties of supervision and enquiry on those who handle such material. Regulation 23 catches anyone breaching article 36(1), anyone involved in a prohibited export. That is a wider category than notifier, which is just one of the categories falling within regulation 5, where transport and person who transports are defined. As we have found, when regulation 23 prohibits transport of waste in breach of article 36(1), it states what article 36(1) intended. The UK regulations do not widen the scope of article 36(1) but merely give effect to it when read in conjunction with the definitions in article 2 of the EU Regulation. We are not persuaded by the defendants' arguments that regulation 23, coupled with regulation 5, is disproportionate.

42. This appeal must accordingly be dismissed.