

JERSEY / JUDGMENT

AB v AG [2020] JCA 131 (06 July 2020)

[2020] JCA 131

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Court of Appeal 6 July 2020 Before : James McNeill, QC., President, Clare Montgomery, QC., and Helen Mountfield, QC. Between AB Applicant And HM Attorney General Respondent judgment of the court the President: 1. The Applicant has applied for leave to appeal to the Judicial Committee of the Privy Council the decision of this court set out in our Judgment dated 29 May, AB v AG (Capacity)

[2020] JCA 094 . An application for an extension of time in which to lodge grounds for leave was made but did not give any good reason as to why, with due diligence and giving priority to this important matter, the date for seeking leave could not have been met; and it was refused. The appellant had taken the precaution of presenting grounds and we deal with the application on those grounds. Grounds for seeking leave 2. First, the Applicant indicated that he believed that he had uncovered a number of irregularities and mistakes in our judgment which had resulted in our failing properly to consider the tests on appeal: but did not specify which. 3. Second, he wished to challenge our approach to certain Strasbourg authorities, upon which he had made submissions orally and in writing at the hearing, and which we dealt with in our judgment; but he did not specify what in our approach to these authorities made our ultimate decision wrong. 4. Third, the Applicant submitted that it is a matter of public interest that human rights are observed and that Jersey has a just Court of Appeal; but did not indicate any point of law in our judgment of such general public importance that we should grant leave. 5. Fourth, the Applicant indicated that he did not believe that, in an application for leave, he was limited to points of law and need only demonstrate that 'something has gone wrong'. We consider that an application for leave to appeal to the Privy Council needs to demonstrate an arguable error of law of general public importance which ought to be dealt with by the Privy Council at this time, so such a position is not one upon which this court could grant leave. 6. Fifth, the Applicant indicated that he had concerns as to our placing a time limit of one hour upon the length of time for the making of oral submissions at his appeal, of which he was notified before the date of the hearing, and as to the manner of our dealing with his response to our draft judgment. Test for leave to appeal 7. The test on this court granting leave to appeal to the Judicial Committee was set out by this court in Bisson v JPCA

- [2017] JCA 192 by Lord Anderson JA. It is as follows. 8. The Privy Council grants leave to appeal: "in civil cases for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee at that time, bearing in mind that the matter will already have been the subject of judicial decision and may already have been reviewed on appeal; an application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground" (Privy Council Practice Direction 3, para 3.3.3(a)). 9. The modern approach of the Court of Appeal to applications for permission to appeal to the Privy Council was set out in *Boru Hatlari Ile Petrol Taşıma AŞ and others v Tepe İnşaat Sanayii AŞ*
- [2016] JCA 199D , paras [23]-[30]. The Court of Appeal cited (at [18]) the comment of Lord Reed in the United Kingdom Supreme Court in the case of *Uprichard v Scottish Ministers*
- [2013] UKSC 21 , 2013 SC (UKSC) 219 at [59], in which he described the practice of the Courts of Appeal of England and Wales and of Northern Ireland in the following terms: "Appeals against any order or judgment of the Court of Appeal in England and Wales or in Northern Ireland can be brought only with the permission of the Court of Appeal or of this court. In practice, the Court of Appeal normally refuses permission so as to enable an appeal panel of this court to select, from the applications before it for permission to appeal, the cases raising the most important issues." 10. The Court of Appeal continued: "23. We begin by observing by reference to paragraph 3.3.3(a) of the JCPC Practice Direction that permission to appeal (or "leave" as it is in Art 14(a) of the 1961 Law) will only be granted by the Appeal Panel of the Judicial Committee of the Privy Council "in civil cases for applications that... raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee at that time". As that is the threshold which the Appeal Panel will apply in the event that we refuse leave and an application is made to the Privy Council for special leave, it appears to this Court that we would not be permitted to adopt a lower threshold. Indeed, it may be said that a court of appeal in such a situation should actually adopt a stricter threshold simply because the Appeal Panel of the Judicial Committee can permit an appeal to proceed even where leave or permission has not been given by the court of appeal below, whereas the Judicial Committee cannot prevent the pursuing before it of an appeal where leave or permission should not have been given by that court of appeal.
24. This approach appears to be consistent with what was said by Lord Reed in his judgment at para [59] in *Uprichard*. His Lordship further explained his reasoning at para [60] where he went on to say: "The public interest is served, in relation to appeals from England and Wales and Northern Ireland, by the rule that permission to appeal is granted only for applications that, in the opinion of the appeal panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. An application which in the opinion of the appeal panel does not raise such a point of law is refused on that ground (Supreme Court Practice

Direction 3.3.3). The reasons for adopting that approach were explained by Lord Bingham of Cornhill, at the time when the final court of appeal was the House of Lords, in *R v Secretary of State for Trade and Industry, ex p Eastaway* [

[2000] 1 WLR 2222] (p 2228): 'In its role as a supreme court the House must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist.'" ... 29. This Court is satisfied that having regard to the formulation provided in the JCPC Practice Direction and its equivalence to that in the Supreme Court Practice Direction, and the resulting relevance of the practice described by Lord Reed in *Uprichard* (which is a decision already noted in this Court), this Court ought also to follow the same practice. This means that we should only grant leave to appeal to the Privy Council if we are satisfied that the arguable point or points of law which have been identified are of such clear public importance that they merit consideration by the Privy Council now. In approaching the issue in this way, we are conscious that the phrase used in paragraph 3.3.3(a) is "which ought to be considered by the Judicial Committee at that time". That obviously encompasses a consideration as to the immediacy of the need to address the point of law which can really only be judged by the Appeal Panel of the Privy Council. The result is that even where it can be said that there may exist an arguable point of law, we would also need to be sure both as to the existence of that point of law and of its importance, as well of its need for determination at this time, before we should grant leave. That is the result of the practice described by Lord Reed in *Uprichard* and the reasons for which were described by Lord Bingham in *Eastaway* . The practice has been adopted in relation to applications for permission to appeal to the Supreme Court, and given that the respective Practice Directions are identical in this respect we can see no reason why this Court should not follow the same practice." 11. Following that approach, it is the practice of this Court to grant leave in a case such as this only if it can be sure that there is (i) an arguable point of law, (ii) of general public importance, (iii) that needs to be determined by the Privy Council at the present time. This Court may be well placed to judge the general public importance (for Jersey) of a point of Jersey law: *I v J*

[2017] JCA 045B , para 3. But the third test - that the point needs to be determined by the Privy Council at the present time - is one which this Court will normally be slow to find satisfied, given the many competing claims on the time of the Privy Council, and the unique ability of the Appeal Panel to assess their relative importance and immediacy.

Determination

12. The matters set out in paragraphs 2 to 6 above do not, in our judgment, set out with any degree of precision points of law which can be so properly appraised as to identify whether they are arguable, or, even if identifiable, of such general public importance that they should be passed to the Privy Council for determination at this point. 13. The application is refused. *Authorities AB v AG (Capacity)*

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