

JERSEY / JUDGMENT

Welsh v Deputy Judicial Greffier

[2009] JCA 145C (24 July 2009)

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COURT OF APPEAL 24 July 2009 Before : The Hon. Michael Beloff, Q. C., President J. W. McNeill, Esq., Q. C.; and J. V. Martin, Esq., Q. C. Between John Alan Welsh Applicant And The Deputy Judicial Greffier Respondent Advocate D. Gilbert for Welsh. Application for leave to appeal against the decision of the Deputy Judicial Greffier to refuse funding for the applicant in order for him to apply for leave to appeal to the Privy Council against the refusal to apply for Judicial Review.

JUDGMENT

bELOFF JA:

Introduction

1. This is an appeal brought pursuant to the Court of Appeal (Civil) Judicial Review Rules 3(i) against the refusal of the Royal Court on 11 th June 2009 to grant leave to apply for judicial review of the decision of the Respondent ("the Decision") not to grant funding to the Applicant and his co-defendants to seek leave to appeal the Court of Appeal's decision of 12 August 2008 to the Privy Council. The funding would cover the cost of Privy Council agents and English Counsel. 2. The ex parte application had been made on 21 April 2009, on behalf of the Applicant pursuant to the provision of Royal Court Rule 16/2(2) of the Royal Court Rules, 2004, as amended ("the Royal Court Rules") supported by an Affidavit from Advocate Fitz which exhibited, inter alia , an Advice from Mr Lovell-Pank Q. C., provided on a pro bono basis, about the merits of a putative appeal to the Privy Council. Background facts giving rise to the appeal 3. On 20 March 2008 in a Judgment handed down, following a preparatory hearing on 10, 11, 12 and 13 March 2008, Commissioner Sir Richard Tucker ("the Commissioner") refused to stay the current criminal proceedings as an abuse of process, on the ground that the investigating and prosecuting authorities involved in the case have acted in contravention of the rule of law ("the stay judgment"). 4. On 4 April 2008 the Commissioner refused leave to appeal the stay judgment. 5. On 29 April 2008 the Commissioner refused to rule as inadmissible certain evidence which was obtained illegally ("the admissibility judgment"). 6. On 8 May 2008 the Commissioner refused leave to appeal the admissibility judgment. 7. On 12 August 2008 the Court of Appeal refused leave to appeal

of both the stay judgment and the admissibility

judgment.

8. On 29 August 2009 correspondence was entered into between Messrs BakerPlatt (then acting for Mr Warren, a co-accused of the Applicant) and the Respondent requesting provision out of public funds to enable Leading Counsel to be instructed to advise the Applicant and his co-defendants on the merits of an appeal to the Privy Council. 9. On 30 January 2009, the Respondent refused such funding. 10. On 24 March 2009, having recently been appointed to act for Mr Welsh, Advocate Fitz started corresponding with the Respondent (on behalf of all defendants) requesting him to reconsider his position. 11. On 27 March 2009 the Respondent again refused funding. The Test 12. The latest learning on the test for the grant of leave to apply for Judicial Review is set out in the case of *Sharma v Browne Antoine*

[2007] 1 WLR 780 where Lord Bingham said:- (4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628 and Fordham, *Judicial Review Handbook* 4 th ed (2004), p 426." (Para 14.) This exegesis, in my view, elaborates what is meant by " ... an arguable case that a ground for seeking Judicial Review exists which merits a full investigation at a full oral hearing with all parties and all the relevant evidence" (*Yates -v- Minister of Planning and the Environment*

[2006] JRC 167), a decision of the Royal Court. 13. In my view what we must consider is the Decision itself. Ms Gilbert for the Applicant accepted this approach. 14. The power of the Respondent to determine whether or not to grant legal aid is not to be found in any statute or indeed recorded in any document: like Topsy it just grewed. It is helpfully described by the Amicus in paragraph 10 of his Advice:- "The Legal Aid Vote is the fund from which disbursements incurred by lawyers acting under the scheme (including, in some circumstances, the cost of obtaining advice from foreign counsel) and, occasionally, fees in respect of particularly onerous cases, are paid. It also bears the costs of court appointed amici curiae. The fund is administered by the Deputy Judicial Greffier, whose role in this regard appears to have developed through practice, rather than by reference to particular legal provisions. There is no statutory provision in Jersey law in this regard and I am unaware of any criteria set for the exercise by the Deputy Judicial Greffier of this administrative function. The budget is provided by the Treasury. The rationale for the existence and operation of this fund appears to be the recognition by the state that the Legal Aid burden is a heavy one and in certain circumstances it is proper for the state to assist the legal profession in the discharge of that burden." 15. The relationship between the Legal Aid Scheme (administered by the Batonnier) and the Legal Aid Vote (administered by the Deputy Judicial Greffier) was referred to in *AG v Travis* , Jersey Unreported 2000/23 p.3; and *AG v Michel and Gallichan*

- [2007] JLR 553 para 16. The description of how payments are made from the Legal Aid vote shows that it is indisputably the product of a public law power, exercised by a public officer, concerned with the allocation of public funds: and so is amenable to judicial review on the conventional public law grounds. See *Manning and Environment Committee v Lesquende*
- [1998] JLR 1 . 16. The Legal Aid Guidelines approved 30 September 2005 are illuminating in that they emphasise the essentially discretionary nature of the exercise of provision of legal aid for legal advice and assistance. In short summary and so far as material, the grant of a legal aid certificate by the Batonnier will guarantee payment out of the legal aid fund only of out-of-pocket expenses (absent a Costs Order in favour of the lawyer concerned or legally aided individual: (para 1.3.2 p.5). If there is a favourable opinion on the merits of an appeal to the Court of Appeal in criminal proceedings, the advocate has a responsibility to ensure that the Department of the Judicial Greffe is made aware of the application for legal aid (1.4.1.19 (e) p.13) but I can detect no duty imposed on the Greffier to approve the application or disburse the funds in any particular circumstances. 17. Ms Gilbert informs us from the Bar that it is usual for such financial support to be granted by the Greffier on receipt of a favourable opinion: and I shall assume that to be correct. She argues on that basis that by analogy the Respondent should have relied on Mr Lovell-Pank Q. C.'s opinion which advised that an application for special leave be made (para 2) to grant the funds requested. 18. The Respondent's justification for his refusal of provision of public funds in connection with an appeal to the Privy Council is comprehensively set out in his letter of 27 March 2009 which summarises the history of the request and its rejection. There was indeed a quintuple refusal: on 18 September 2008, on 30 September 2008, on 28 January 2009, on 30 January 2009, and finally on 27 March 2009 itself. 19. Although the phraseology used in the various letters from the Respondent was not identical, essentially his refusal was based on the fact that, in his view, the case did not "pass the threshold whereby there is a reasonable prospect that the Privy Council might interfere with the decision of the Jersey Courts" (para 31). He had well in mind the Advice of Mr Lovell-Pank Q. C. which suggested that, taken together, the actions of the executive and judiciary were a "sad day for the rule of law in Jersey" (Advice para 29) but that even Mr Lovell-Pank Q. C. saw "no guarantee of leave being given let alone winning the appeal itself" (ditto). The Respondent made it clear that his view was "informed by the fact that a Q. C. [actually a former High Court Judge] and three Q. C.s sitting as judges of appeal have refused leave to appeal" [para 30] and not solely on his own assessment (ditto). He also noted that the original decisions of the Commissioner were discretionary decisions both as to whether any abuse of process required a stay and as to whether the admission of any item of evidence was unfair (ditto). 20. Courts are naturally reluctant to grant judicial review in any area where a public officer or body declines to make a discretionary disbursement of public funds (see e.g. *In the matter of the X Children*

- [2009] JCA 083 para 72). However, the Respondent in a postscript to the same letter of 27 March 2009 denied that his refusal was influenced by considerations of cost. "My approach has been to consider whether the case passed the threshold test and that decision is made without regard to the likely cost." I shall assume that this is only because the sum apparently involved was £6,000. Had it been, say, fivefold that sum he would not sensibly have excluded it from consideration. 21. In my view, even putting cost considerations to one side, the Respondent's analysis cannot be stigmatized as irrational. The test for judicial review on that ground is a high one, conceptually distinct from a merits appeal (*R (Daly) v Home Department*
- [2001] 2 AC 532 paras 28 and 29). Others (like the Applicant's legal team) might have reached a different conclusion to the Respondent, but that is irrelevant. He was entitled to conclude that the prospects of the Privy Council granting special leave were insufficient ("no reasonable prospect") to justify any expenditure of public monies balancing all the factors referred to in paragraph 16. The Applicant's contention that because the Privy Council can grant leave, the Respondent cannot properly evaluate the chances of its doing so by reference to available material seems to be a non-sequitur. 22. In particular I note that those in the Courts of Jersey who had to consider the executive's actions in obtaining evidence to seek to inculcate the applicant (and others) of extremely serious drug related offences were not insensitive to the criticisms made of the executive. The Court of Appeal endorsed the Commissioner's view that they were "most reprehensible", "unlawful" and "most regrettable" (JCA judgment para 53.) But that makes the Court of Appeal's refusal of leave all the more significant. They well appreciated the factors which would militate against the Privy Council nonetheless overruling the judgment of the Jersey Courts at this stage of Jersey criminal proceedings. 23. I would add there is no right to have a lawyer of one's choosing at public expense under Article 6(3)(c) of the ECHR, now part of Jersey law: nor does other Jersey domestic law guarantee it; nor is a defendant in criminal proceedings entitled to such as an aspect of the principle of equality of arms, merely because the prosecution have instructed counsel, and irrespective of any assessment of the merits of such defendant's case. There is a Strasbourg jurisprudence on the circumstances in which a state may be obliged to provide legal assistance to a person: but it does not assist this applicant in these circumstances. 24. I should add that, of course, the consequence of refusing leave for judicial review of the Registrar's decision would not be that the Applicant is barred from seeking to challenge the Court of Appeal's decision in the Privy Council. That route, if otherwise available, remains open to him. What it does is to debar him from making use of public funds in that exercise. I accept that he would be less well equipped than counsel to advance argument, (although he could, for example, rely on written contentions made on his behalf to the Court of Appeal,) but that consideration (of which the Respondent could not have been unaware) cannot be dispositive. The Royal Court's Decision 25. The Learned Bailiff's reasons can be summarised as follows:- (i) he had to be satisfied that an arguable case that the decision of the Respondent, involving (as it did) the exercise of a discretion, was unlawful, unfair or irrational; (ii) the Respondent

had to take into account the merits of the case as set out in (a) Counsel's Advice. The Opinion provided by Mr Lovell-Pank Q. C. was qualified by a caveat that "leave to appeal to the Privy Council is finely balanced. There is no guarantee of leave being given let alone winning the appeal itself";

- (b) the reasoning of the Royal Court and the Court of Appeal; in particular that the Court of Appeal found no sufficient reason to grant leave to appeal to the Privy Council; (iii) as to funding, "The Greffier is the custodian of public funds in relation to the payment of various legal costs and disbursements. It is axiomatic that public funds are not a bottomless pit. Decisions must be made which call for the exercise of discretion." 26. The Learned Bailiff also noted:- (i) the "very long delays" which have occurred in bringing the prosecution of these defendants to trial and "that any further delay of the trial should be avoided, if at all possible"; (ii) the proceedings were still at an interlocutory stage and in any event, if the defendants were convicted, the arguments that they wished to put to the Privy Council could still be advanced on appeal at that stage. 27. Accordingly, the Learned Bailiff found that the Respondent's decision was not unlawful, unfair or irrational. 28. In my view, as I have already stated, the real issue before us is the vires of the Respondent's decision. If it was ultra vires, it cannot be immunised from quashing by this Court simply on the basis that in declining to give leave to challenge it, the Royal Court was exercising a discretion which is normally impeachable only on limited grounds. See *UCC v Bender*

[2006] JLR 269 para 32.4. In reality the Learned Bailiff was making a factual assessment [i.e. was the Respondent's decision irrational?] which would precede the exercise of a discretion, rather than exercising a discretion himself. We have to make the same assessment ourselves. 29. In so concluding I do not suggest that the Learned Bailiff's approach was in any way flawed: only that it would not matter if it were, and with no disrespect to the comprehensive contrary contentions filed on the Applicant's behalf, I do not lengthen this judgment by debating matters without practical significance. 30. I would therefore refuse this application for leave to appeal. *McNEILL JA* 31. I agree. *MARTIN JA* 32. I also agree. Authorities Court of Appeal (Civil) Judicial Review Rules 2000. *Sharma v Browne Antoine*

[2007] 1 WLR 780 . *Yates -v- Minister of Planning and the Environment*

[2006] JRC 167 . *AG v Michel and Gallichan*

[2007] JLR 553 . *Manning and Environment Committee v Lesquende*

[1998] JLR 1 . *In the matter of the X Children*

[2009] JCA 083 . *R (Daly) v Home Department*

[2001] 2 AC 532 . *UCC v Bender*

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