[1980–87 Gib LR 91]

R. v. RENT ASSESSMENT TRIBUNAL, EX PARTE CARINA LIMITED

SUPREME COURT (Davis, C.J.): February 17th, 1982

Landlord and Tenant—rent—assessment of statutory rent—bona fide letting to Gibraltarians—for rent agreed by landlord and tenant to be treated under Landlord and Tenant (Miscellaneous Provisions) Ordinance, s.7A(2) as statutory rent, official certificate required prior to start of residential tenancy to certify proposed letting is bona fide letting to Gibraltarian—certificate not to be issued retrospectively

Landlord and Tenant—rent—assessment of statutory rent—failure of Rent Assessment Tribunal to consider whether requirement under Landlord and Tenant (Miscellaneous Provisions) Ordinance (cap. 83), s.7A(2), mandatory or merely directory, not error of law

The applicant landlord sought judicial review of a decision of the Rent Assessment Tribunal that the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap.* 83), s.7A, did not apply to two of its tenancy agreements.

M and P were tenants of flats owned by C. Both signed tenancy agreements which stated that they were made in accordance with s.7A of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap.* 83), under which a landlord and tenant were entitled to determine the rent payable by agreement. After paying the agreed rent for two years, the tenants applied to the Rent Assessment Tribunal for determination of the correct amount of rent payable in respect of their flats. A date for the hearing of the application was fixed and, in the meantime, C wrote to the Surveyor & Planning Secretary to request a certificate, required by s.7A(2), to verify that the lettings were *bona fide* lettings to Gibraltarians, for the benefit of themselves or other Gibraltarians. C should have requested the certificate prior to the start of the lettings, but had inadvertently failed to do so. The Surveyor & Planning Secretary, however, refused to grant the certificate retrospectively and at the hearing of the application, the Tribunal concluded that the lettings did not fall within s.7A as the certificate had not been granted. It went on to assess the statutory rent payable by the tenants at figures significantly less than their previous rent.

C sought judicial review of the decision of the Tribunal submitting that the Rent Assessment Tribunal had erred in law in holding that the lettings

did not fall under s.7A of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap*. 83) as (a) it had failed to consider whether the requirements of s.7A(2) were mandatory or merely directory and in doing so had come to a decision outside its jurisdiction; (b) its decision conflicted with the evidence of the Surveyor & Planning Secretary, who had expressly stated that he was satisfied that M and P were Gibraltarians and that the lettings were for their benefit as Gibraltarians; (c) the acknowledgement by the Secretary that the requirements of s.7A had been fulfilled dispensed with the need for any further or other certification; and (d) as there were no grounds upon which the Secretary could have refused to grant the certificate prior to the start of the lettings, it ought to be deemed to have been granted.

M and P submitted in response that (a) as the landlord's written application for the certificate had been refused, the lettings did not fall under s.7A of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap*. 83); (b) the Rent Assessment Tribunal had only been called, under s.18(a)(i) of the Ordinance, to determine the correct rent in respect of the two lettings, and in the absence of any argument that s.7A(2) was not mandatory, it had rightly decided that the lettings did not fall within s.7A; and (c) the landlord had not exhausted all available remedies before seeking judicial review of the decision of the Tribunal, he should have either applied for judicial review of the decision of the Secretary or appealed against the decision of the Tribunal.

Held, dismissing the application:

(1) There was no error of law entitling the court to interfere with the decision of the Rent Assessment Tribunal. Whilst the Tribunal, in reaching its decision, could have considered the question of whether the requirement under s.7A(2) of the Ordinance that the landlord obtain a certificate prior to the start of the lettings was mandatory or merely directory, it had not come to a decision outside its jurisdiction simply because it had not done so. The Tribunal had never been asked to consider that question and in the absence of any argument that the section was not mandatory, had rightly decided that the lettings did not fall within s.7A of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap*. 83) (paras. 18–21).

(2) For the certificate to be issued, the Secretary had to be satisfied, *prior* to the commencement of the tenancy, that the proposed letting was a *bona fide* letting to a Gibraltarian for the benefit of a Gibraltarian. The certificate could not be granted retrospectively. The evidence of the Secretary, therefore, that he was satisfied that the lettings fulfilled the necessary requirements and that, had the landlord applied for the certificate at the beginning of the tenancy, it would have been granted, did not dispense with the need for the issue of a certificate under s.7A(2). It was also irrelevant that, had the landlord requested the certificate at the correct time, there would have been no grounds for refusing to issue it. The legislature's intention that the lettings were to be approved by the

Surveyor & Planning Secretary *prior* to the commencement of the tenancy was further evidenced in s.7A(3), which referred to the "prospective tenant," to whom a right of appeal against the Secretary's refusal to issue a certificate was given (paras. 21–24).

Cases cited:

(1) *Anisminic* v. *Foreign Compensation Commn.*, [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208; (1968), 113 Sol. Jo. 55, considered.

(2) *R.* v. *Preston Supp. Benefits Appeal Tribunal, ex p. Moore*, [1975] 1 W.L.R. 624; [1975] 2 All E.R. 807; (1975), 119 Sol. Jo. 285, considered.

Legislation construed:

Landlord and Tenant (Miscellaneous Provisions) Ordinance (Laws of Gibraltar, *cap.* 83), s.7A: The relevant terms of this section are set out at para. 3.

J.E. Triay, *Q.C.*, for the applicant;
J. Levy for the respondents.

1 **DAVIS, C.J.:** This is an application for judicial review of the decision of the Rent Assessment Tribunal, given on May 21st, 1981, that two lettings by the landlord, Carina Ltd. ("Carina"), in one case to Mr. Martinez and in the other to Mr. Pinna, did not fall within s.7A of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap.* 83), and were of communal service tenements, the statutory rent of which fell to be calculated under s.7 of the Ordinance, in accordance with the provisions of Schedule II thereto.

2 The applicant seeks, firstly, an order of certiorari quashing the decision of the Tribunal and remitting the matter to the Tribunal, with a direction that—

> "(i) the lettings are lettings permitted under s.7A of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap*. 83) and that accordingly, the statutory rent is that determined by the landlord in agreement with the tenant and;
>
> (ii) further, or in the alternative, that the provisions of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap*. 83), insofar as they purport to give a statutory tenant the right to take or remain in possession of the property compulsorily on terms other than those agreed between such tenant and the landlord, and do not make any provision for the prompt payment of adequate compensation to the landlord in respect of the compulsory taking of the property by the statutory tenant or the compulsory acquisition of rights therein, is contrary to s.6(1)(c) of the Gibraltar Constitution Order."

And secondly, such further or other relief by way of judicial relief or otherwise as the court may think fit.

3 It was agreed by counsel appearing in this matter that the court's decision should be limited in the first instance to whether or not the lettings were lettings permitted under s.7A of the Ordinance ((i) above). Section 7A, as far as relevant to this application, provides as follows:

> "(1) Notwithstanding the provisions of Section 7, where a dwellinghouse to which this Part applies becomes vacant, the landlord may let the dwelling house by approved transaction at a rent determined by tender or by such other means as the landlord may think fit, and, subject to the provisions of this section, the rent so determined shall be the statutory rent in respect of that dwelling house.
>
> (2) For the purpose of this section, an approved transaction is a letting which the Surveyor and Planning Secretary certifies is a bona fide letting to a Gibraltarian for his own benefit or the benefit of another Gibraltarian.
>
> (3) If the Surveyor and Planning Secretary refuses to grant a certificate under the preceding subsection, the landlord or the prospective tenant may appeal to the Tribunal, who may–
>
> (a) confirm the decision of the Surveyor and Planning Secretary; or
>
> (b) reverse that decision and grant a certificate to the effect specified in subsection (2) of this section, which shall have effect as if it had been granted by the Surveyor and Planning Secretary."

4 The grounds upon which relief by way of judicial review was sought (in relation to this first point) are set out in para. 3 of the applicant's statement, filed under the Rules of the Supreme Court, O.53, r.3, which reads:

> "(a) That the decision of the Rent Assessment Tribunal was erroneous in law in that although the Tribunal was satisfied that the letting was for the benefit of Gibraltarians and otherwise of the nature provided for in that section, it found that the lettings were not within the provisions of s.7A of the Ordinance simply because a certificate required under s.7A(2) had not been issued.
>
> (b) That the said decision cannot be supported by the evidence and is contrary to the evidence, or against the weight of the evidence of the surveyor and planning secretary on oath to the effect that he was satisfied—

(i) that Mr. Pinna and Mr. Martinez were Gibraltarians; and

(ii) that the lettings were lettings for the benefit of Mr. Martinez and Mr. Pinna as Gibraltarians.

(c) That the said determination above is erroneous in law in that the evidence of the Surveyor and Planning Secretary itself constituted a sufficient compliance with both the letter and spirit of s.7A of the Ordinance, or otherwise dispensed with the necessity for any further or other certification.

(d) That as there was no ground upon which the certificate of the Surveyor and Planning Secretary, sought in writing on January 6th, 1981, could have been refused, it ought to have been deemed to have been given."

5 The facts giving rise to this application are as follows. On July 14th, 1978, Mr. Martinez and Carina entered into a written agreement that the rent for a flat in No. 23 Naval Hospital Rd., to be occupied by Mr. Martinez, should be £12 per week. The agreement was to be valid for a period of three years starting on October 15th, 1978 and specifically stated that it was made "in accordance with the provisions of s.7(a) [*sic*] of the Landlord and Tenant (Miscellaneous Provisions) Ordinance 1959." On January 20th, 1979, Carina entered into an identical agreement with Mr. Pinna in respect of another flat in No. 23 Naval Hospital Rd., except that in that case the letting started on the date of execution of the agreement.

6 It appears from the Rent Assessment Tribunal's record that after the tenants had been in occupation of their respective flats for about two years, paying the agreed rent of £12 per week, they both applied to the Tribunal, under s.18 of the Ordinance, to determine the correct amount of rent payable by them for their flats in No. 23 Naval Hospital Rd. The hearing of the tenants' applications was fixed for October 17th, 1980, but in fact did not come to hearing until May 21st, 1981.

7 Meanwhile, by a letter dated January 6th, 1981, Carina wrote to the Surveyor & Planning Secretary (Mr. Byrne) enclosing copies of the agreements signed by Messrs. Martinez and Pinna and applied for his certificate that the lettings were *bona fide* lettings to Gibraltarians as required by s.7A(2) of the Ordinance. As stated in his letter, the need to obtain this certificate had inadvertently been overlooked. Further correspondence ensued between Carina's solicitors and the Surveyor & Planning Secretary until, by a letter of April 10th, 1981, the Surveyor & Planning Secretary refused to grant his certificate. Paragraphs 2 and 3 of his letter are as follows:

"I am advised that s.7A contemplates that, before a letting is entered into, I must be satisfied that it is a *bona fide* letting to a

Gibraltarian for the benefit of a Gibraltarian. That is a condition precedent to the letting which comes within the ambit of the section.

I am accordingly advised that approval cannot properly be given retrospectively."

8 On receiving this communication, it was open to Carina, as I see it, to appeal to the Tribunal (under s.7A(3) of the Ordinance) against the Surveyor & Planning Secretary's refusal to grant a certificate under s.7A(2). Alternatively, as this was a matter involving possibly difficult questions of law, it was also open to Carina to apply to the Supreme Court, under the Rules of the Supreme Court, O.53, for judicial review of the Secretary's decision. While it appears from a statement made by counsel for Carina, that Carina considered applying for judicial review of the Secretary's decision, this was not proceeded with, nor did Carina appeal against the Secretary's decision. The reason for Carina's omitting to proceed with either of these courses of action was, I imagine, because of the imminence of the application to the Tribunal by Messrs. Martinez and Pinna to have their rents determined.

9 It appears to me, however, for reasons which I will go into later, that it would have been advisable for Carina to have lodged an appeal against the secretary's decision with the Tribunal, and to have applied for it to deal with the appeal before or in conjunction with the tenants' application for determination of rent. As it was, at the proceedings before the Tribunal on May 21st, 1981, Mr. Pinna and Mr. Martinez gave evidence, as did Mr. Byrne, the Surveyor & Planning Secretary. Mr. Pinna and Mr. Martinez did not dispute that they were Gibraltarian, and Mr. Byrne stated in his evidence that he was satisfied that the two tenants were Gibraltarian and that, had the application been made to him when the premises were vacant, he would have been satisfied that the lettings in question were *bona fide* lettings to Gibraltarians for their benefit, as required by s.7A(2).

10 In addressing the Tribunal, counsel for the two tenants submitted that the precondition for the application of s.7A to the lettings of the premises—the certificate of the Surveyor & Planning Secretary required by s.7A(2)—had not been satisfied and that, accordingly, s.7A did not apply to the lettings. The Tribunal's minutes show that counsel for Carina submitted that the landlord's omission to obtain the Secretary's certificates in respect of the two lettings was an "unmeritorious" ground for presenting the tenants' application to the Tribunal. In answer to the question of a member of the Tribunal as to when the Secretary's certificate had been applied for, counsel said that this had been done about four months previously and submitted that there had been an error in law in the Secretary's ruling that he could not issue a certificate retrospectively. He submitted that the Secretary's evidence before the Tribunal constituted a sufficient certificate for the purposes of s.7A(2).

11 Unsurprisingly, counsel for the tenants opposed this last submission and pointed out that the landlord's written application for the Surveyor & Planning Secretary's certificate under s.7A(2) had been refused and in this court the refusal, as conveyed in the Secretary's letter of April 18th, 1981, is in evidence.

12 The Tribunal gave its decision in the following terms:

> "We are satisfied that the two flats which are the subject of these applications, are within Part 2 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (*cap*. 83). According to the evidence, we are also satisfied that the lettings are not within the provisions of s.7A as a certificate has not been granted under s.7A(2), as such they are both communal service tenements. The statutory rent payable, with effect from July 1st, 1979, calculated as per Schedule 2, Part 1 is as follows: Flat 23/1 (Pinna)—£6.35 per month; Flat 23/3 (Martinez)—£8.46 per month."

13 Mr. Levy, who appears for the tenants in this application, has raised a point which I think requires determination before I go any further. He submits that, in an application for judicial review, it is the function of the superior court to determine whether it appears from the record of the inferior tribunal that the decision was erroneous in law. He submits that in the present case, the Rent Assessment Tribunal was never called upon to decide if the Surveyor & Planning Secretary was wrong to refuse his certificate under s.7A(2), and that the questions of law raised in this court by Mr. Triay for the applicant as to whether the requirement in s.7A(2) for the Secretary's certificate is mandatory or merely directory, were never raised before the Tribunal. Mr. Levy submits that the Tribunal was called upon, under s.18(a)(i), to determine what the correct rent was in respect of the two lettings and in the absence both of any certificate under s.7A(2), and of any argument that this sub-section was not mandatory, the Tribunal rightly decided that the lettings did not fall within s.7A. Accordingly, the rents fell to be calculated under s.7 in accordance with the provisions of the Second Schedule to the Ordinance.

14 Mr. Levy referred me, in this connection, to *R.* v. *Preston Supp. Benefits Appeal Tribunal, ex p. Moore* (2). This case related to applications for orders of certiorari in respect of the decisions of two Supplementary Benefits Appeal Tribunals. Lord Denning, M.R. said ([1975] 1 W.L.R. at 628):

> "The two cases before us arise out of applications for an order of certiorari. They are brought under the established power of the High Court to supervise inferior tribunals. The High Court can quash any decision of an inferior tribunal for error of law which appears on the face of the record. The 'record' is generously interpreted so as to cover all the documents in the case. An 'error of law' is also

> interpreted generally so as to include a wrong interpretation of a statute, or a wrong application of it to the facts of the case. But certiorari is a discretionary remedy. And the important question in these cases is how far the High Court should interfere with the decisions of the tribunals on supplementary benefits."

15 Mr. Levy also referred me to *Anisminic* v. *Foreign Compensation Commn.* (1) and to the opinion of Lord Morris of Borth-y-Gest ([1969] 2 A.C. at 182):

> "The control which is exercised by the High Court over inferior tribunals (a categorising but not a derogatory description) is of a supervisory but not of an appellate nature. It enables the High Court to correct errors of law if they are revealed on the face of the record."

And later (*ibid.*):

> "If a tribunal while acting within its jurisdiction makes an error of law which it reveals on the face of its recorded determination, then the court, in the exercise of its supervisory function, may correct the error unless there is some provision preventing a review by a court of law. If a particular issue is left to a tribunal to decide, then even where it is shown (in cases where it is possible to show) that in deciding the issue left to it the tribunal has come to a wrong conclusion, that does not involve that the tribunal has gone outside its jurisdiction. It follows that if any errors of law are made in deciding matters which are left to a tribunal for its decision such errors will be errors within jurisdiction."

16 As Mr. Levy points out, on the refusal by the Surveyor & Planning Secretary to grant his certificate in respect of the lettings, as required by s.7A(2), Carina could have appealed against the Secretary's refusal to the Tribunal under s.7A(3). Alternatively, as apparently intended at one stage, Carina could have applied for judicial review of the Secretary's decision. But Carina did not appeal to the Tribunal against the Secretary's refusal to grant a certificate, nor, in my view, did counsel for Carina Ltd. ever raise for the consideration of the Tribunal the question raised in this court as to whether the lettings fell within s.7A, even though the Secretary had not granted his certificate because s.7A(2) was merely directory and there had been substantial compliance with the intention of the legislature seen when looking at s.7A as a whole.

17 In view of the remark of counsel for Carina, recorded in the Tribunal's minutes, that Mr. Byrne's refusal to grant a certificate was wrong and that proceedings to make him grant the requisite certificate had been instituted in the Supreme Court, it does not appear to me that counsel's submission that Mr. Byrne's ruling that he could not issue a certificate retrospectively was an error in law, put the Tribunal on notice

that this was a matter it could and should decide. In fact, in view of counsel's statement that proceedings had been instituted in the Supreme Court on the question of the Surveyor & Planning Secretary's refusal to grant a certificate, it is curious that counsel did not apply at the outset for the Tribunal's proceedings to be adjourned pending the Supreme Court's decision.

18 While it can, I think, be argued that the Tribunal could, of its own accord, have given consideration to the question whether the Surveyor & Planning Secretary had erred in refusing to grant his certificate, the fact is that it appears not to have done so, and in my view there is no error on the face of the record justifying the intervention by this court by way of judicial review.

19 Furthermore, it cannot be said in my view, as submitted by counsel for Carina before the Tribunal and by Mr. Triay in this court, that Mr. Byrne's evidence before the Tribunal—that he was satisfied that Messrs. Martinez and Pinna were Gibraltarian and that, had his certificate been applied for when their premises were vacant, he would have been satisfied that the letting of the flats to them were *bona fide* lettings to Gibraltarians for their own benefit—constituted a sufficient certificate for the purposes of s.7A(2), in the face of Mr. Byrne's refusal to grant his certificate contained in his letter of April 10th, 1981.

20 Nor am I satisfied that the Tribunal came to a decision outside its jurisdiction so as to justify this court's intervention in coming to its decision without apparently considering whether the requirements of s.7A(2) were mandatory or merely directory, substantial compliance with which would have entitled Carina to a certificate (and that the Surveyor & Planning Secretary was therefore wrong in refusing to grant his certificate), as submitted by Mr. Triay for Carina.

21 However, even if I am wrong on this latter point, and it can be held that the Tribunal exceeded its jurisdiction in coming to its decision, and in this connection I note the remark in *De Smith's Judicial Review of Administrative Action*, 4th ed., at 121 (1980):

> "The fact of the matter is that the courts have defined jurisdictional control in a manner broad enough potentially to obliterate the doctrine that certiorari will lie to quash for a non-jurisdictional error of law only if it appears on the face of the record,"

I have come to the conclusion, in spite of Mr. Triay's persuasive arguments on behalf of the applicant, that s.7A(2) is mandatory and that unless the Surveyor & Planning Secretary has granted his certificate prior to the transaction—in this case the agreement entered into by Carina with Mr. Martinez and then Mr. Pinna—the letting is not an "approved transaction" within the meaning of s.7A. That this was the intention of the legislature is

borne out, in my view, by the wording of s.7A(1), which provides that, if a dwelling house becomes vacant, the landlord "may let the dwelling house by approved transaction." As I read this provision, it requires the transaction to be approved, as provided for in s.7A(2), prior to the letting of the dwelling house.

22 That it was the legislature's intention that approval of the transaction by the certificate of the Surveyor & Planning Secretary under s.7A(2) should be a condition precedent to the letting, if it is to be brought within s.7A, is further borne out by the reference in s.7A(3) to the "prospective tenant" to whom a right of appeal is given against the Secretary's refusal to grant his certificate.

23 It appears to me that the clear intention of the legislature was that, before a landlord could obtain the benefit of s.7A, he must have submitted his proposal to let the vacant premises to the Surveyor & Planning Secretary, so that the Secretary, on behalf of the Government, might be satisfied that it was a *bona fide* letting to a Gibraltarian for the benefit of that or another Gibraltarian and certify to that effect. In my view, this provision is mandatory. Therefore, unless the proposed letting is so approved by the Surveyor & Planning Secretary, it does not fall within s.7A and the landlord does not obtain the benefit of that section if the letting has not first been approved by the Surveyor & Planning Secretary as laid down in s.7A(1) and (2). The fact that on later examination it turns out to be a letting to a Gibraltarian, for his benefit, is immaterial. This may seem unfair if, as claimed in this case, application for approval of the proposed letting by the Surveyor & Planning Secretary was inadvertently overlooked and both parties to the letting were content that s.7A should apply to it, but in my view that is the law.

24 Accordingly, I have come to the conclusion that an order of certiorari will not lie on the ground that the Tribunal erred in law in finding that the lettings in question were not lettings falling within s.7A of the Ordinance.

Application dismissed.
