[1991–92 Gib LR 107]

R. v. STIPENDIARY MAGISTRATE, ex p. ATTORNEY GENERAL

SUPREME COURT (Alcantara, A.J.): May 21st, 1991

Administrative Law—judicial review—leave to apply—setting aside—locus standi to apply to set aside leave under Rules of Supreme Court, O.32, r.6 limited to respondent in judicial review—person directly affected by civil or criminal decision may invoke court's inherent jurisdiction to set aside leave granted under misapprehension as to facts

Administrative Law—judicial review—material non-disclosure—court requires uberrima fides on part of applicant for leave—leave granted ex parte may be set aside under Rules of Supreme Court, O.32, r.6 or inherent jurisdiction if granted under misapprehension as to facts

The defendants were charged in the magistrates' court with possession of cannabis with intent to supply and the importation of cannabis.

Counsel for the Crown sought an adjournment of the defendants' committal proceedings to permit him to examine and produce evidence newly made available to him. The Stipendiary Magistrate refused the adjournment and the defendants, all 11 of whom were charged with possessing 300 kg. of cannabis, and 3 of whom were charged with importing it, were discharged before they had been committed. They were then re-arrested and granted police bail.

The Attorney-General challenged the decision to discharge them, requesting the Stipendiary Magistrate to state a case for the opinion of the Supreme Court on its validity, but the Stipendiary Magistrate refused. In subsequent correspondence, the Attorney-General indicated that he intended to seek judicial review, and the Stipendiary Magistrate stated he was willing to reconsider his refusal to state a case but did not believe the law allowed him to do so. The Attorney-General applied for leave to seek judicial review, stating in his supporting affidavit that the Magistrate had refused to state a case, and exhibiting the correspondence. Leave was granted.

The defendants applied, as persons directly affected by the decision under review, to set aside leave. They submitted that there had been non-disclosure of material facts since (a) an undisclosed letter from the Stipendiary Magistrate to the Attorney-General, dated the day before the filing of the judicial review application, showed that he had reluctantly agreed to state a case, and the Attorney-General had replied that he

intended to pursue a two-pronged approach, seeking a preliminary ruling in the judicial review proceedings as to how the decision should be challenged; and (b) the court had not been informed that the defendants had been re-arrested after their discharge.

Held, revoking leave to seek judicial review:

(1) The court had power under O.32, r.6 of the Rules of the Supreme Court to set aside leave granted *ex parte* to seek judicial review if it decided that leave clearly should not have been granted. The power existed in respect of leave to review a decision in civil or criminal proceedings (para. 2).

(2) However, the defendants, as persons directly affected by the decision rather than the respondent, could not apply under O.32, r.6, since they acquired no standing in judicial review proceedings until after the originating motion had been entered, whether leave had been granted *ex parte* or *inter partes*. Unlike the respondent, no prerogative order could be made against them in the proceedings (paras. 3–5).

(3) Nevertheless, they could be heard in opposition to the judicial review proceedings under O.53, r.9(1) as persons appearing to the court to be proper persons to be heard, even though they had not been served with notice of those proceedings, and the court had inherent jurisdiction to set aside leave granted *ex parte*, if matters subsequently brought to its attention indicated that leave had been given under a misapprehension (para. 4; para. 19).

(4) Because the defendants were not respondents to the judicial review proceedings, the court could not set aside leave under O.32, r.6, but could do so under its inherent jurisdiction as part of the rule requiring *uberrima fides* to be shown on the part of an *ex parte* applicant for a prerogative writ. In the absence of disclosure of the material facts that the Magistrate was willing, if pressed, to state a case, and that the defendants had been re-arrested, the court had not come to a properly considered decision. Accordingly, it would revoke the leave it had granted under a misapprehension as to the facts (paras. 15–19).

Cases cited:

(1) *Atkinson* v. *US Govt.*, [1971] A.C. 197; [1969] 3 All E.R. 1317, referred to.

(2) *Becker* v. *Noel (Practice Note)*, [1971] 1 W.L.R. 803; [1971] 2 All E.R. 1248n, applied.

(3) *Inland Rev. Commrs.* v. *National Fedn. of Self-Employed & Small Businesses Ltd.*, [1982] A.C. 617; [1981] 2 All E.R. 93, referred to.

(4) *R.* v. *Att.-Gen., ex p. Lagares*, Supreme Ct., 1986 Misc. Nos. 57 & 58, unreported; on appeal, *sub nom. Drew* v. *Att.-Gen.*, C.A., Civ. Apps. No. 9, 10, 12 and 13 of 1986, December 18th, 1987, unreported, *dicta* of Fieldsend, J.A. applied.

(5) *R.* v. *Barnes, ex p. Lord Vernon* (1910), 102 L.T. 860, referred to.

(6) *R.* v. *Home Secy., ex p. Chinoy*, [1991] T.L.R. 189; [1991] C.O.D. 381; (1991), 4 Admin. L.R. 457; *The Times*, April 16th, 1991; *sub nom. R.* v. *Governor of Pentonville Prison, ex p. Chinoy*, [1992] 1 All E.R. 317, applied.
(7) *R.* v. *Ipswich Crown Ct., ex p. Baldwin*, [1981] 1 All E.R. 596; *sub nom. R.* v. *Felixstowe JJ., ex p. Baldwin* (1980), 72 Cr. App. R. 131, referred to.
(8) *R.* v. *Kensington Income Tax Commrs., ex p. Princess Edmond de Polignac*, [1917] 1 K.B. 486, followed.
(9) *R.* v. *Pereira, ex p. Khotoo Bawasab*, [1949] W.N. 96, referred to.
(10) *R.* v. *Thomas* (1901), 18 T.L.R. 71, referred to.

Legislation construed:
Criminal Procedure Ordinance (1984 Edition), s.295(1):

> "Any person who was a party to any proceedings before the magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the Supreme Court on the question of law or jurisdiction involved:
>
> Provided that a person shall not make an application under this section in respect of a decision which by virtue of any law is final."

Rules of the Supreme Court, O.32, r.6: The relevant terms of this rule are set out at para. 18.
O.53, r.9(1): The relevant terms of this sub-rule are set out at para. 4.

P. Dean, Senior Crown Counsel, for the Crown;
C. Finch, J.J. Neish and *B.S. Marrache* for the first three defendants.
The fourth defendant did not appear and was not represented.

1 **ALCANTARA, A.J.:** This is an application by persons directly affected, seeking to set aside leave to apply for judicial review granted by me *ex parte* on consideration of the documents only, on March 4th, 1991. The application for leave was dated March 1st, 1991. Two questions arise from the present application to set aside. One, whether there is power to set aside. Two, whether persons directly affected have standing in this sort of application.

2 That there is power to set aside leave for review is clear by the decision in *R.* v. *Home Secy., ex p. Chinoy* (6). I will set out the judgment on the point as reported (*The Times*, April 16th, 1991):

> "Lord Justice Bingham said that it had been argued that the court had no power to set aside leave granted *ex parte* to apply for judicial review of a decision taken in criminal proceedings. His Lordship rejected that submission.

> Order 32, rule 6 of the Rules of the Supreme Court conferred the power to set aside any order made *ex parte* without limitation.
>
> Finally, there was the principle of law that an order made against a party in his absence should be capable of being set aside.
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> His Lordship could see no reason for there to be a difference between civil and criminal proceedings. The court could exercise its discretion to set aside leave granted *ex parte* if on *inter partes* argument it decided that *ex parte* leave should not have been given.
>
> However, the power should be invoked very sparingly. The courts would grant such an order only in very plain cases. It would be quite wrong to set aside leave which had been granted unless the issue was very clear."

3 As regards the other point of whether a person directly affected has a standing in this type of application, there is no doubt in my mind that the respondent has a right to apply. I have great reservations whether persons directly affected have the same right. The case cited above (*Ex p. Chinoy*) is of no assistance. The applicant in that case was the respondent. Persons directly affected acquire no standing in judicial review proceedings until after leave to apply has been granted and the originating motion has been entered, whether leave to apply has been granted *ex parte* or *inter partes*. Although O.53, r.3(2) speaks of leave being applied for ex parte, there is nothing wrong with seeking leave *inter partes.* In fact, in this jurisdiction on more than one occasion a judge has ordered that the respondent should be served before consideration or re-consideration being given to the question of leave. One such case was *R.* v. *Att.-Gen., ex p. Lagares* (4).

4 Although persons directly affected might not have a standing at the stage of application to set aside leave that does not mean that they are left destitute and powerless. Order 53, r.9(1) reads:

> "On the hearing of any motion or summons [the judicial review proper] under rule 5, any person who desires to be heard in opposition to the motion or summons and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the motion or summons."

5 I think I am right in saying that a person directly affected, whether served or not, is not a respondent in the judicial review proceedings. As a result of such proceedings that person might be affected, but no prerogative order can be made against him, as can be made against the respondent proper. I will revert to this matter later. I will now give a very brief and sterile history of the matter before me.

6 On August 15th, 1990, 11 defendants appeared before the magistrates' court charged with being in possession of 300 kg. of

cannabis resin with intent to supply. Three of the said defendants were also charged with importing the said 300 kg. By any standard, these were very serious offences, and the case was going to be tried in the Supreme Court. Before getting there, there first had to be the committal proceedings. The defence wanted to cross-examine a number of witnesses at the committal stage. There were a number of appearances and a number of adjournments. A final day was fixed for the committal proceedings, which were due to start on February 19th, 1991 and take several days.

7 On that day, counsel for the Crown sought a long adjournment to enable him to produce relevant material in the form of audio tapes, which hitherto had not been made available to him. He needed time for the material to be vetted and transcribed. The defence voiced their protest and the Stipendiary Magistrate refused an adjournment and discharged all the defendants. The defendants, after discharge were re-arrested and were given police bail.

8 The prosecution was not at all happy with the way things had turned out, and on February 21st, 1991 the Attorney-General applied to the Stipendiary Magistrate requiring him to state a case for the opinion of the Supreme Court, pursuant to s.62 of the Magistrates' Courts Ordinance and s.295 of the Criminal Procedure Ordinance. What was being challenged was the action of the Stipendiary Magistrate on February 19th, 1991.

9 The Stipendiary Magistrate refused to state a case, being of the opinion that the application was frivolous. Whether he was entitled to refuse is a matter on which I do not intend to rule in the present proceedings. The Stipendiary Magistrate's formal refusal is dated February 22nd, 1991.

10 If the matter had rested there, life would have been easier. But it did not. The Attorney-General and the Stipendiary Magistrate indulged in correspondence. I will give some extracts from this correspondence:

Att.-Gen. to Stipendiary Magistrate [February 25th]:

> "If you are not prepared to change your view, I will have no alternative but to immediately seek leave to institute judicial review proceedings."

Stipendiary Magistrate to Att.-Gen. [February 25th]:

> "I am quite willing to reconsider as I do not wish to complicate matters unnecessarily, but I do not think I can."

Att.-Gen. to Stipendiary Magistrate [February 27th]:

> "The relevant documents supporting an application for leave to proceed for judicial review have been prepared, but if, on reflection,

you are now willing to state a case, it seems that it may be unnecessary for those to be engrossed and filed."

11 The application for leave to apply is dated March 1st, 1991. The application was supported by an affidavit sworn by Mr. Dean, Senior Crown Counsel. The correspondence referred to above was exhibited in full. In para. 5 of the said affidavit, the deponent stated: "I am informed by the applicant and verily believe that at the date hereof, the Stipendiary Magistrate has not stated any case or indicated that he will agree to do so." The first part of that statement is correct. The second part gives rise to doubts, because of a letter from the Stipendiary Magistrate to the Attorney-General dated February 1991 (which must necessarily be February 28th). I extract the following from that letter:

"All that said, if you continue to insist, I propose to state a case—unwillingly, mind you—but the very fact that we are not *ad idem* indicates an area of contention which should be placed before a higher court in whatever procedural manner it is put before it."

12 The inference I draw from the above is that the Stipendiary Magistrate, before March 1st, 1991, when the application was filed in the registry of the Supreme Court, and certainly before March 4th, 1991, was willing to state a case. This must be so because the Attorney-General wrote a letter back to the Stipendiary Magistrate with the date of March 1st, 1991 altered to March 4th, 1991, in which he stated:

"I am particularly pleased that you should now say that 'I propose to state a case,' and shall be pleased if you will kindly do so as soon as possible . . . Accordingly, I have decided that it is appropriate to 'back my horse both ways.' Prior to receiving your memorandum to which I now respond I had submitted to the court the papers referred to in our previous correspondence, for leave to apply for judicial review.

If, as I hope and expect, the court grants my application for leave to proceed for judicial review, I will take an early opportunity of raising as a preliminary point for determination and seeking the court's direction thereon, whether it is appropriate for your decision to be challenged by way of case stated or judicial review."

13 I have been referred to the following authorities on the question of whether the present challenge to the Stipendiary Magistrate should be by case stated or by way of judicial review: *R.* v. *Ipswich Crown Ct., ex p. Baldwin* (7); *R.* v. *Barnes, ex p. Lord Vernon* (5); *R.* v. *Pereira, ex p. Khotoo Bawasab* (9); *R.* v. *Thomas* (10); and *Atkinson* v. *US Govt.* (1).

14 Mr. Finch, counsel for some of the persons directly affected, invites me to order that the Attorney-General should be put to his option: case

stated or judicial review. Mr. Neish, for some of the other persons directly affected, invites me to discharge the leave to apply because of the Attorney-General's insistence that a case should be stated. Mr. Dean, for the Attorney-General, invites me to give directions as to how the Attorney-General should proceed: by case stated or judicial review.

15 With all due respect, I decline their respective invitations. What I am concerned with is whether there are good grounds for the leave to apply to be set aside. A very helpful case, which was brought to my attention by Mr. Neish is *R.* v. *Kensington Income Tax Commrs., ex p. Princess Edmond de Polignac* (8). The headnote to that case states ([1917] 1 K.B. at 487):

> "*Held*, that the rule of the Court requiring uberrima fides on the part of an applicant for an ex parte injunction applied equally to the case of an application for a rule nisi for a writ of prohibition.
>
> *Held*, therefore (affirming the decision of the Divisional Court) that, there having been a suppression of material facts by the applicant in her affidavit, the Court would refuse a writ of prohibition without going into the merits of the case."

I am of the opinion that an application for leave to apply for judicial review requires *uberrima fides* in the same manner as was required for a rule nisi of a prerogative writ.

16 In this case I am not prepared to say that there has been any abuse of the process of the court by the Crown, as has been argued by counsel for the persons directly affected. I find that there has been non-disclosure by the applicant for leave to apply of relevant facts giving rise to a suppression of facts. I was not made aware on March 4th, 1991 that the Stipendiary Magistrate had consented to state a case. Nor was I made aware that the defendants had been re-arrested with the intention of eventually committing them for trial.

17 As Fieldsend, J.A. said in the Gibraltar Court of Appeal in *Drew* v. *Att.-Gen.* (4), referring to *Inland Rev. Commrs.* v. *National Fedn. of Self-Employed & Small Businesses Ltd.* (3):

> "The purpose of requiring an applicant for judicial review to obtain leave is to ensure that frivolous, vexatious and hopeless cases are not brought, so causing delay and disruption of the bodies and tribunal likely to be affected by such proceedings."

A judge, when considering whether to grant leave to apply for judicial review, must be in a position to say that the application is a proper one, or one which can be labelled as above. In the absence of full disclosure, a judge is not able to come to a considered decision. That is what happened in this case. There was no need to tell me the name of the horse or the

odds, but I needed to know about the race. Similarly, there was no need for me to know the specific reason for which the defendants were re-arrested, but I was entitled to know that they had been re-arrested.

18 In this case the respondent is not seeking to set aside the leave to apply under the Rules of the Supreme Court, O.32, r.6, which simply states: "The Court may set aside an order made *ex parte*" neither is the respondent seeking to support the present application by the persons directly affected. In the circumstances, I do not think that I can accede to the application by the persons directly affected pursuant to the above rule. Once more, I express my doubts as to whether the persons directly affected have the standing at this stage of the judicial review proceedings.

19 Notwithstanding what I have said so far, I do not think that I am completely helpless in the matter. I intend to rely on a short note by Lord Denning in *Becker* v. *Noel (Practice Note)* (2), where he stated ([1971] 2 All E.R. at 1248):

> "I am quite clear that not only may the court set aside an order made ex parte, but where leave is given ex parte it is always within the inherent jurisdiction of the court to revoke that leave if it feels that it gave its original leave under a misapprehension on new matters being drawn to its attention."

Leave to apply is revoked.

Order accordingly.