

**SCHILLER v. ATTORNEY-GENERAL**

SUPREME COURT (Kneller, C.J.): March 31st, 1994

*Legal Aid and Assistance—appeals to Judicial Committee—preparation and conduct of case—refusal of legal assistance for appeal to Privy Council not discrimination contrary to European Convention on Human Rights, art. 14*

*Legal Aid and Assistance—appeals to Judicial Committee—preparation and conduct of case—legal assistance unavailable for appeal to Privy Council—intentionally omitted from list of Gibraltar courts under Legal Aid and Assistance Ordinance, Schedule, Part 1, para. 1 and not person to whom case referred by court, under para. 2*

*Legal Aid and Assistance—appeals to Judicial Committee—preparation and conduct of case—Chief Justice cannot make rule under Legal Aid and Assistance Ordinance, s.18(3) to add Judicial Committee of Privy Council to list of courts and tribunals in Gibraltar*

The appellant applied to the Registrar of the Supreme Court for legal assistance to appeal to the Privy Council.

The Supreme Court dismissed the appellant's application seeking judicial review of a decision by the Captain of the Port refusing him a licence to operate a fast launch. When the Registrar and the Supreme Court refused him legal assistance to appeal to the Court of Appeal, on financial grounds, he complained to the European Commission of Human Rights, which dismissed his application on the ground that he had not exhausted all local remedies.

He was later granted legal assistance when his financial circumstances changed, but his appeal from the Supreme Court to the Court of Appeal failed. He was given leave to appeal to the Privy Council under s.62(2)(b) of the Constitution. However, the Registrar of the Supreme Court refused to allow his legal assistance certificate to extend to an action before the Privy Council, stating that the law did not provide for the granting of legal assistance for the purpose of any court proceedings or hearings other than in Gibraltar.

On appeal to the Supreme Court, the appellant submitted that (a) the Registrar's refusal amounted to discrimination against him in the exercise of his fundamental rights, contrary to art. 14 of the European Convention on Human Rights, since he was unable to conduct the appeal personally; (b) legal assistance could be granted by the Registrar under s.12(2) and Part I, para. 2 of the Schedule to the Legal Aid and Assistance Ordinance

for proceedings before the Privy Council, as the Privy Council was a person to whom the case had been referred by the Court of Appeal; (c) the Registrar should amend the existing certificate under r.18(1)(b) of the Legal Aid and Assistance Rules so as to extend it to other proceedings which were part of the same action; (d) the Chief Justice should modify the Schedule to the Ordinance to include the Privy Council as a court before which assistance could be given; and (e) the court should not take into account the cost of granting legal assistance, since it would be paid from the Consolidated Fund.

The respondent submitted in reply that (a) the refusal of legal assistance was justified, since the appellant had not shown reasonable grounds for taking, defending or being a party to the appeal; (b) the Chief Justice had no power to modify the Ordinance to the extent suggested by the appellant, since the intended appeal was not a proceeding that was covered by s.12(2) and para. 1 of the Schedule to the Ordinance; and (c) the Registrar could not amend the certificate to embrace the intended appeal for the same reason.

**Held**, dismissing the appeal:

(1) Since the appellant had obtained leave to appeal from a single judge of appeal, and the respondent had not challenged this, it could not be said that he had no reasonable grounds for taking, defending or being a party to the appeal (page 317, lines 29–32).

(2) However, the Registrar's refusal to grant a certificate for the intended appeal did not amount to discrimination against the appellant on any ground set out in art. 14 of the European Convention on Human Rights (page 317, lines 25–28).

(3) Legal assistance was not available for an appeal to the Judicial Committee, as the Privy Council was not listed in Part I, para. 1 of the Schedule to the Legal Aid and Assistance Ordinance. It was not a court or tribunal in Gibraltar, and unlike the Court of Appeal did not visit to hear cases. Nor did it qualify under para. 2 as a person to whom the case was referred by one of the Gibraltar courts listed, since that would be an absurd way to empower the Registrar to grant legal assistance for such an appeal. The paragraph would cover an arbitrator or the Registrar herself, to whom a case was referred by the courts for arbitration or an assessment of damages respectively. If it had been intended for legal assistance to be available for Privy Council appeals, Part I of the Schedule would say so (page 317, line 33 – page 318, line 11).

(4) Accordingly, the Registrar could not amend the existing certificate to cover proceedings before the Privy Council and the Chief Justice could not make a rule under s.18(3) of the Ordinance to insert the Privy Council into the list of courts and tribunals in Gibraltar. The appeal would be dismissed (page 318, lines 12–18).

**Legislation construed:**

Interpretation and General Clauses Ordinance (1984 Edition), s.2: The relevant terms of this section are set out at page 314, lines 42–44.

Legal Aid and Assistance Ordinance (1984 Edition), s.11: The relevant terms of this section are set out at page 315, lines 6–10.

s.12: The relevant terms of this section are set out at page 315, lines 12–26.

s.18(3): The relevant terms of this sub-section are set out at page 316, lines 16–23.

Schedule, Part I: The relevant terms of this Part are set out at page 315, lines 31–38.

Schedule, Part II: The relevant terms of this Part are set out at page 315, line 41 – page 316, line 14.

Legal Aid and Assistance Rules (1984 Edition), r.16(1): The relevant terms of this sub-rule are set out at page 316, lines 27–35.

r.18(1): The relevant terms of this sub-rule are set out at page 316, lines 37–42.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex I, s.15(1): The relevant terms of this sub-section are set out at page 314, lines 33–37.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; Treaty Series 71 (1953)), art. 14: The relevant terms of this article are set out at page 314, lines 25–29.

The appellant appeared in person.  
*H.J.M. Levy* for the Crown.

**KNELLER, C.J.:** Mr. Schiller bought the launch *Dee Dee* at an auction in Gibraltar some time in December 1987 and registered her in the Small Ships Registry opposite the number 24578. She comes within the definition of a “fast launch” for the purposes of the Fast Launches (Control) Ordinance, 1987. On February 3rd, 1988 he applied to the Captain of the Port of Gibraltar for a licence to operate *Dee Dee* and the Captain of the Port rejected his application on May 16th, 1988.

Mr. Schiller applied to this court on August 18th, 1988 for leave to apply for judicial review which, after a hearing *inter partes*, was granted on December 5th, 1988. His application for judicial review was dismissed by the Supreme Court on October 19th, 1989. He filed his notice of intended appeal to the Court of Appeal for Gibraltar on October 30th, 1989. He represented himself throughout all this part of his litigation.

He wanted legal assistance to brief a solicitor and/or barrister to conduct his appeal but the Registrar of the Supreme Court refused his application on November 15th, 1989. He appealed to me as Chief Justice

and his appeal was rejected. At that time his income and/or capital exceeded the limits set out in s.13(1) of the Legal Aid and Assistance Ordinance (“the Ordinance”). He did not proceed with his appeal to the Court of Appeal and, by the effluxion of time, it was deemed to have been withdrawn on January 3rd, 1990.

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Undaunted, he referred his grievances to the European Commission of Human Rights, but that tribunal repelled his application for relief. The respondent submitted that he must exhaust all the rights he had in Gibraltar, including making an appeal to the Court of Appeal, and if that failed, proceeding to the Judicial Committee of the Privy Council.

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On April 6th, 1990 he became entitled to legal aid here because his income, together with that of his spouse, did not exceed £5,000 a year and/or their capital was not more than £350, and it appeared he could not afford to proceed without legal assistance. He applied for legal aid for his appeal from the Supreme Court to the Court of Appeal on January 22nd, 1992, which was granted, and on July 21st, 1992 counsel was appointed to represent him.

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Mr. Schiller’s application for an extension of the time in which to file the record of his appeal from the Supreme Court’s rejection of his application for judicial review was unopposed and granted on January 11th, 1993. The Court of Appeal heard his appeal on March 23rd and dismissed it the same day. The reasons for doing so were delivered on June 2nd, 1993.

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Mr. Schiller asked the learned Registrar if the legal aid certificate issued to him for his appeal to the Court of Appeal would—

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“cover actions to and including the application [for leave] for the matter to be taken to the Privy Council? Since this is clearly an integral part of the appeal process and has strict time limits to be observed I assume you will agree that the withdrawal of aid at this point would be wrong?”

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The Registrar replied on April 23rd, 1993: “I am prepared to continue the legal aid certificate to cover the application for such leave. You will appreciate that I cannot grant legal aid for any action before the Privy Council.”

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Mr. Schiller’s reply on May 4th, 1993 was:

“I had always assumed that legal aid would or could be made available so that all domestic remedies in regard to the matter at hand could be exhausted as required by the European Convention on Human Rights and as submitted to the Commission of Human Rights by the government. Are you now saying that legal aid for taking this matter to the Privy Council cannot be provided?”

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The Registrar answered on May 11th:

“I confirm our conversation yesterday to the effect that the law in Gibraltar does not provide for the granting of legal aid for the purpose of any court proceedings or hearings other than in Gibraltar.

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- You are therefore ineligible for legal aid in respect of your proposed approach to the Privy Council.”
- Back came Mr. Schiller on May 17th, 1993 with the submission that the Registrar should amend the certificate where, in her opinion, it had become desirable for the certificate to extend to other proceedings being part of the same action, cause or matter to which the certificate related. He then went on to submit that the Ordinance empowered the Chief Justice to modify the provisions and the Governor to amend its Schedule. 5
- The Registrar would have none of that and, on May 17th, 1993, wrote to Mr. Schiller to tell him he had misread the Ordinance, and quoted chapter and verse to the effect that she could not grant legal aid to anyone appealing to the Privy Council from the Court of Appeal for Gibraltar. 10
- There is more of this correspondence, but none of it advances the positions taken by Mr. Schiller and the Registrar. Mr. Schiller appeals from the learned Registrar’s decision refusing him legal aid for his intended appeal to Her Majesty in Council. He was given leave to appeal to the Judicial Committee under s.62(2)(b) of the Constitution on September 27th, 1993, by a single judge of the Court of Appeal for Gibraltar. 15
- The following provisions of the Council of Europe’s Convention for the Protection of Human Rights, the Gibraltar Constitution Order 1969, the Interpretation and General Clauses Ordinance, the Legal Aid and Assistance Ordinance and its Rules were cited: 20
- Article 14 of the Convention is in these terms:
- “The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, birth or other status.” 25
- The heading of Chapter 1 of the Constitution reads as follows: “Protection of Fundamental Rights and Freedoms of the Individual.” The relevant provisions of s.15(1) read: 30
- “If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress.” 35
- The “foregoing provisions” of the Chapter include s.1, “Fundamental rights and freedom of the individual”; s.3, “Protection of right to personal liberty”; and s.13, “Protection of freedom of movement.” 40
- Section 2 of the Interpretation and General Clauses Ordinance defines the word “court” in that Ordinance “and in any other Ordinance ... unless the context otherwise requires,” as meaning “any court of competent jurisdiction in Gibraltar...”
- The long title to the Legal Aid and Assistance Ordinance is: 45

“An Ordinance to make better provision for the granting of free legal aid and assistance to persons of small means, to enable the cost of such legal aid and assistance for such persons to be defrayed out of the consolidated fund, and for purposes connected therewith.”

5 Part II relates to civil proceedings and s.11 states that—

“unless the context otherwise requires,—

‘court’ means any court, tribunal or person in respect of proceedings before which or whom legal assistance may be given under the provisions of this Part;

10 ‘legal assistance’ means legal assistance under this Part...”

Section 12 states:

“(1) The provisions of this Part provide for, and relate only to, legal assistance in connection with proceedings before courts and tribunals in Gibraltar not being proceedings in respect of which a certificate may be granted under Part I.

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(2) The proceedings in connection with which legal assistance may be given are any proceedings of a description mentioned in Part I of the Schedule, except proceedings mentioned in Part II of that Schedule.

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(4) A person shall not be given legal assistance in connection with any proceedings unless the Registrar is satisfied that such person has reasonable grounds for taking, defending or being a party thereto and may also be refused legal assistance if it appears to the Registrar unreasonable that he should receive it in the particular circumstances of the case.”

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Part I is confined to criminal proceedings.

So, for which proceedings can legal assistance be given under s.12? Their description is set out under Part I of the Schedule to the Ordinance and here they are:

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“1. Proceedings in any of the following courts—

(a) Supreme Court;

(b) Court of First Instance;

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(c) magistrates’ court in its civil jurisdiction in domestic proceedings;

(d) Court of Appeal.

2. Proceedings before any person to whom a case is referred in whole or in part by any of the said courts.”

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And what are the excepted proceedings? They are tabulated in Part II of the Schedule in this way:

“1. Proceedings wholly or partly in respect of—

(a) defamation;

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(c) the loss of services of a woman or girl in consequence of her rape or seduction;

- (*d*) the inducement of one spouse to leave or remain apart from the other.
2. Relator actions.
3. Proceedings for the recovery of a penalty where the proceedings may be taken by any person and the whole or part of the penalty is payable to the person taking the proceedings. 5
4. Election petitions under the House of Assembly Ordinance.
5. In the Court of First Instance, proceedings for or consequent on the issue of a judgment summons and, in the case of a defendant, proceedings where the only question to be brought before the court is as to the time and mode of payment by him of debt (including liquidated damages) and costs. 10
6. Proceedings incidental to any proceedings mentioned in this Part of this Schedule.”
- Finally, s.18(3) of the Ordinance declares that— 15  
 “the Chief Justice may also make rules modifying any provisions of this Part so far as appears to the Chief Justice necessary to meet the circumstances where—  
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 (*c*) a person begins to receive legal assistance after having consulted a solicitor in the ordinary way with respect to the same matter or ceases to receive legal assistance before the matter in question is finally settled...” 20
- Moving to the Legal Aid and Assistance Rules, there were two that were relied upon, namely, rr. 16(1)(*d*) and (*e*) and 18(1)(*b*). The terms of r.16(1) are: 25  
 “If the Registrar refuses an application for a certificate he shall notify the applicant, stating that the application has been refused on one or more of the following grounds:—  
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 (*d*) that the applicant has not shewn that he has reasonable grounds for taking, defending or being a party to the proceedings; or  
 (*e*) that it appears unreasonable that he should receive legal aid in the particular circumstances of the case.” 35
- Rule 18(1) reads:  
 “The Registrar may amend a certificate—  
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 (*b*) where, in the opinion of the Registrar, it has become desirable either for the certificate to extend to other proceedings, being part of the same action, cause or matter to which the certificate relates...” 40
- On all that, Mr. Schiller submitted that he should have legal assistance for his proceedings right up to and including Her Majesty in Council. The cost of it was not a consideration to be taken into account by the court or 45

the Attorney-General because it would be paid out of the Consolidated Fund. Refusing legal assistance for the intended appeal on financial grounds would be contrary to art. 14 of the Convention. Such assistance was not confined to a court on Gibraltar soil. Her Majesty in Council was a person to whom these proceedings were to be referred by the Court of Appeal for Gibraltar and so they were proceedings for which the Registrar can give a certificate for legal assistance and aid under s.12(2) and Part I, para. 2 of the Schedule to the Ordinance.

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The matters in issue were Mr. Schiller's fundamental rights under the Constitution and, he submitted, it would be unjust to withhold legal assistance and aid to him at this point. He could not deal adequately with the appeal himself. The Privy Council would grant him legal aid and waive the court fees if he swore an affidavit that he was not worth £100 but he cannot do so. The intended appeal ought not to be halted without the leave of the Court of Appeal.

Mr. Levy submitted that the Registrar and the Chief Justice could not make an order that Mr. Schiller be given legal assistance and aid for his intended appeal to Her Majesty in Council because it was a proceeding that was not covered by s.12(2) and Part I of the Schedule to the Ordinance. The Registrar cannot amend the certificate to embrace the intended appeal for the same reason. There are limits to legal aid and assistance in Gibraltar for local proceedings as seen in Part II of the Schedule to the Ordinance, *e.g.* defamation and election petitions. There is none in the United Kingdom for planning appeals or public inquiries.

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I do not see that the Registrar's refusal to grant a legal aid certificate to Mr. Schiller for his intended appeal to Her Majesty in Council amounts to discrimination against him on any ground set out in art. 14 of the Convention.

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His appeal is "a civil proceeding" and what he is asking for is "legal assistance." He has the single judge's leave to appeal which the respondent has not challenged, so it cannot be said he has no reasonable grounds for taking, defending or being a party to them.

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Mr. Schiller can be given legal assistance in civil proceedings by the Registrar only for proceedings in the Supreme Court, the Court of First Instance, the magistrates' court in its civil jurisdiction in domestic proceedings and the Court of Appeal, or for proceedings before any person to whom a case is referred in whole or in part by any of those courts. There are some matters for which Mr. Schiller could not have legal assistance, such as a defamation action and proceedings incidental to it.

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The Judicial Committee of the Privy Council is not a court or tribunal in Gibraltar and, unlike the Court of Appeal for Gibraltar, does not visit Gibraltar to hear appeals. Had the House of Assembly intended to make legal assistance available for litigants in civil proceedings before the Privy Council's Judicial Committee, it would have done so by adding it to



Part I of the Schedule to the Ordinance. Nor can Her Majesty in Council be a person to whom a case is referred in whole or in part by any of the courts in Gibraltar set out in the first paragraph of Part I of the Schedule to the Ordinance, because that would be an absurd way of providing the Registrar with power to grant legal assistance to someone appealing to Her Majesty in Council. 5

It gives the Registrar power, however, to give a legal assistance certificate to someone, say an arbitrator, to whom a case is referred, in whole or in part, by any of the specified courts or tribunals in Gibraltar. It could cover a case referred in whole or in part to the Registrar for assessment of damages by any of those courts or tribunals in Gibraltar. 10

That being so, the Registrar has no power to amend Mr. Schiller's certificate to extend to proceedings before Her Majesty in Council because it is partly the same cause or matter to which the original and renewed certificates relate. Similarly the Chief Justice, in my view, could not make a rule under s.18(3) of the Ordinance to insert the Judicial Committee of the Privy Council into the lists of courts and tribunals in Gibraltar. 15

Accordingly, Mr. Schiller's appeal from the Registrar is dismissed. He had a legal aid certificate for this appeal so it would not be appropriate to make an order that he pay the costs of it. 20

*Appeal dismissed.*

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