

**SCHILLER v. CAPTAIN OF PORT**

COURT OF APPEAL (Kneller, C.J.): April 28th, 1994

*Courts—Judicial Committee of Privy Council—security for costs—condition of leave to appeal to Privy Council under s.4 of Gibraltar (Appeals to Privy Council) Order 1985 that appellant gives security for costs cannot be waived by Court of Appeal—unaffected by power of single Judge of Appeal to make order in interests of justice under s.5(b)*

*Courts—Judicial Committee of Privy Council—security for costs—only Privy Council may grant special leave to appeal as poor person under Judicial Committee (General Appellate Jurisdiction) Rules, dispensing with requirement to provide security for costs*

The Attorney-General sought an order that the respondent provide security for the costs of his upcoming appeal to the Privy Council.

The respondent applied to the Captain of the Port for a licence to operate a fast launch which he had purchased at auction. His application was rejected and appeals to the Supreme Court and the Court of Appeal were also refused. He was then granted leave to appeal to the Privy Council by a single judge of the Court of Appeal.

The Attorney-General sought an order that the respondent should provide £12,000 as security for the costs of the appeal. He submitted that s.4 of the Gibraltar (Appeals to Privy Council) Order 1985 required the court to make an order for security for costs.

The respondent submitted in reply that (a) he should be exempted from the obligation to provide security by the exercise of powers of a single Judge of Appeal to make an order or give directions in the interests of justice under s.5(b) of the 1985 Order; and (b) he should also be granted special leave to appeal as a poor person.

**Held**, ordering that security be given:

The application would be granted, as it was normal for the court to require security for the costs of an appeal to the Judicial Committee. Indeed, under s.4 of the Order, leave to appeal should only be given on condition that the appellant gave security for the costs, and the power under s.5(b) of the Order did not affect this. In limited circumstances, the Judicial Committee would grant special leave to appeal as a poor person under the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982, Schedule II, in which case the appellant would not be required to provide security for costs, but the Court of Appeal had no power to grant such leave (page 343, lines 38–43; page 344, lines 25–36; page 345, lines 7–21).

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**Cases cited:**

- (1) *Daily Telegraph Newsp. Co. Ltd. v. McLaughlin*, [1904] A.C. 776.
- (2) *Fletcher v. Income Tax Commr.*, [1972] A.C. 414; [1971] 3 All E.R. 1185.
- (3) *Lopes v. Valliappa Chettiar*, [1968] A.C. 887; [1968] 2 All E.R. 136.

**Legislation construed:**

Gibraltar (Appeals to Privy Council) Order 1985 (S.I. 1985/1199), s.4:  
The relevant terms of this section are set out at page 342, lines 27–45.

s.5: The relevant terms of this section are set out at page 343, lines 2–13.

s.7: The relevant terms of this section are set out at page 343, lines 15–18.

s.11: The relevant terms of this section are set out at page 343, lines 20–31.

s.15: The relevant terms of this section are set out at page 343, lines 32–33.

Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (S.I. 1982/1676), Schedule II, r.2:

“No appeal shall be admitted unless either—

(a) leave to appeal has been granted by the Court appealed from;  
or

(b) in the absence of such leave, special leave to appeal has been granted by Her Majesty in Council.”

*J. Blackburn Gittings, Attorney-General*, for the Crown.

The respondent appeared in person.

30 **KNELLER, C.J.:** Mr. Schiller has applied to the Captain of the Port twice in recent years for a licence to operate the fast launch *Dee Dee*, which he purchased in an auction ordered by the Admiralty Marshal. His applications were refused.

35 He went to the Supreme Court for judicial review of the decision of the Captain of the Port but he failed to get it. Then he took himself off to the European Commission of Human Rights, which sent him back to Gibraltar to pursue his legal remedies. He asked the Court of Appeal for Gibraltar to overturn the ruling of the Supreme Court dismissing his application for judicial review, but his appeal was dismissed. Undaunted, he asked for leave to appeal from the Court of Appeal to Her Majesty in Council, which was granted here by a single judge of the Court of  
40 Appeal, and the Attorney-General did not ask the full Court of Appeal to set it aside.

45 Now the Attorney-General asks for an order that Mr. Schiller provide £12,000 as security for costs because the Crown will have to instruct a London firm of solicitors accustomed to preparing briefs for counsel who appear before the Judicial Committee of the Privy Council, and

the chosen solicitors and counsel will have to be well paid for their work.

Mr. Schiller resists this application because he does not have £12,000 to spare and no one will provide it for him. *Dee Dee* is worth very little now, and he and Mrs. Schiller live on a boat here which is their only home and he does not wish to mortgage it. He has been granted a legal aid certificate for the purpose of contesting the Attorney-General's quest for security for costs, so it would be wrong to make him find £12,000 before he can proceed with his appeal to Her Majesty in Council. It would also, in his view, be unjust to stifle his appeal, for which he has been given leave. 5 10

The Attorney-General doubts that this court has jurisdiction to make no order as to security for costs. Mr. Schiller maintains that it has, or at any rate the Chief Justice has, and the jurisdiction should be exercised in his favour or else his quest for justice will be stultified. They cited law to support their submissions and I turn to it now. 15

The Gibraltar (Appeals to Privy Council) Order 1985 ("the Order"), as its title suggests, sets out the procedure to be followed by an applicant seeking leave to appeal from the Court of Appeal for Gibraltar to the Judicial Committee of the Privy Council. It is a UK Statutory Instrument which was made on July 31st, 1985, came into operation on September 1st, 1985, and was reproduced as Legal Notice No. 113 of 1985 in the Second Supplement to the *Gibraltar Gazette*, dated October 31st, 1985. Among other details of its history, it revoked the Appeal Order in Council, Gibraltar, 1909 (see S.R. & O. Rev. XI, 3rd ed., at 369). 20 25

Section 4 of the Order states:

"Leave to appeal to Her Majesty in Council in pursuance of the provisions of this Order shall, in the first instance, be granted by the Court only—

- (a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay the costs of the appeal (as the case may be); and 30 35
- (b) upon such other conditions (if any) as to the time or times within which that appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose." 40 45

Section 5 states:

- “A single judge of the Court shall have power and jurisdiction—
- (a) to hear and determine any application to the Court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the Court;
  - (b) generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require:

10        Provided that any order, directions or decision made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decision.”

Section 7 provides:

15        “...[The applicant] may provide security in any manner that the Court may approve in his case, and for the avoidance of doubt it is declared that such security may with the approval of the Court consist in whole or in part of a deposit of money.”

Section 11 states:

20        “Where an appellant, having obtained an order granting him conditional leave to appeal, and having complied with the conditions imposed on him by such order, fails thereafter to apply with due diligence to the Court for an order granting him final leave to appeal, the Court may, on an application in that behalf made by the respondent, rescind the order granting conditional leave to appeal notwithstanding the appellant’s compliance with the conditions imposed by such an order, and may give such directions as to the costs of the appeal and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires.”

The security entered into by the applicant will “be dealt with in such manner as the Court may think fit to direct” if the appeal is dismissed for not being effectually prosecuted by the applicant (s.15).

35        And that concludes the references, or the relevant references, in the Order as to security for the costs of an appeal from the Court of Appeal to the Judicial Committee.

40        The Judicial Committee was instituted by a UK Act, namely, the Judicial Committee Act 1833, and the law which it applies is that of the country or dependent territory from which the appeals come. Appeals are admitted only by the court appealed from or, in the absence of such leave, by special leave of Her Majesty in Council (see Judicial Committee (General Appellate Jurisdiction) Rules Order 1982, Schedule II, r.2).

45        The powers of this court to grant leave are regulated by Orders in Council and/or local legislation, including the Gibraltar Constitution

Order 1969, Annex I, s.62, the Court of Appeal and Supreme Court Ordinances and their Rules. These provide for appeals as of right because of, say, the value of the subject-matter in dispute, as in Mr. Schiller's application, but he still has to obtain leave, which the court has no discretion to refuse (*Lopes v. Valliappa Chettiar* (3)).

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When an applicant applies for leave to appeal the court must first be satisfied that the value of the matter in dispute entitles him to leave as of right (see, e.g. *Fletcher v. Income Tax Commr.* (2)). If he clears that hurdle the court makes an order granting leave conditionally. What are the normal conditions? They include such matters as security for costs and the preparation and dispatch of the record of the court to London.

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Special leave to appeal in civil matters, which is what Mr. Schiller's grievances are, may be granted by the Judicial Committee when the Court of Appeal has refused leave or the applicant has failed to apply to the Court of Appeal for leave properly in accordance with local procedure, e.g. the application is out of time, or the subject-matter is not within the definition in the Order or the Ordinances. The granting of special leave is in the discretion of the Judicial Committee and it is unlikely to be granted unless some substantial point of law or public importance is involved or the appeal will raise serious issues of personal status or property of considerable value is affected (*Daily Telegraph Newsp. Co. Ltd. v. McLaughlin* (1)). The fact that the court wrongly refused to grant conditional and/or final leave as of right will not, by itself, entitle the applicant to special leave (*Lopes v. Valliappa Chettiar* (3)).

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This court, in my finding, has no power to grant an applicant leave to appeal as a poor person. The UK legal aid provisions have not been extended to proceedings before the Judicial Committee. The same is so, in my judgment, for Gibraltar's legal aid provisions, as Mr. Schiller has recently learned.

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An intending appellant may apply, however, for special leave to appeal as a poor person by lodging the right documents, a certificate by counsel that he has reasonable grounds of appeal, together with his affidavit stating his interest in the appeal and that he is not worth £500 without what he wears (see Judicial Committee (General Appellate Jurisdiction) Rules, r.8). If he obtains special leave to appeal as a poor person he is not required to provide security for costs or to pay any fees (r.9).

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The learned contributor to the paragraphs on the practice in appeals to the Judicial Committee in Atkin, 5 *Encyclopaedia of Court Forms in Civil Proceedings*, 2nd ed., para. 16, at 19 (1997) adds:

“The Court abroad will normally require lodgment of security as a condition of the grant of leave, and it is frequently when the appellant is unable to lodge this that it becomes necessary for him to seek special leave as a poor person.”

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Here, in this application, Mr. Schiller obtained conditional leave and the Crown did not ask the court when consisting of three judges to vary,

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5 discharge or reverse it. Later, as Chief Justice, I refused Mr. Schiller's application for legal aid and assistance to go to the Judicial Committee because Gibraltar's legal aid provisions do not apply to such a step (see *Schiller v. Att.-Gen.*, 1993-94 Gib LR at 310). There seems to be no right of appeal from that decision. There is nothing, however, to prevent him appearing before the Judicial Committee in person.

10 The Attorney-General's application for the lodging of £12,000 by Mr. Schiller as a condition is, in my view, covered by the provisions of the Order. It is normal for the court to require it even when Mr. Schiller tacks, and claims his appeal relates to his rights under s.15 of the Constitution.

15 Indeed, I doubt that the court can waive it. It seems to me that the general powers of one judge of the Court of Appeal under s.5(b) of the Order, in respect of any appeal pending before the Judicial Committee, to make such order and to give such directions as he shall consider the interests of justice or circumstances of the case require, do not dilute the terms of s.4 of the Order. These specify that leave to appeal to the Judicial Committee shall, in the first instance, be granted by the Court of Appeal only upon condition of the appellant entering into good and sufficient security for costs to the satisfaction of the court. I do not accept that the power under s.5(b) of the order can or should set aside the normal practice of the Court of Appeal abroad.

20 There was no suggestion that £12,000 was not a reasonable amount to ask for, so I shall make the order sought in that sum, payable within 30 days. Mr. Schiller has a legal aid certificate for this application, so it would be inappropriate to make him pay the costs of this application.

25 He may apply in writing within 14 days of the date hereof to the Registrar of the Court of Appeal for Gibraltar to have this decision varied, discharged or reversed.

*Orders accordingly.*