R. v. PRINCIPAL IMMIGRATION OFFICER, ex parte BOLD

SUPREME COURT (Kneller, C.J.): August 30th, 1995

Immigration—appeals—procedure—procedure to be adopted on appeal to Governor against decision of Principal Immigration Officer under Immigration Control Ordinance, s.21(1)

Administrative Law—judicial review—alternative remedies—by Immigration Control Ordinance, s.23(1), court may not question decision of Principal Immigration Officer or Governor—statute not circumvented by allegation that decision invalid because lacking in natural justice

Administrative Law—judicial review—alternative remedies—no judicial review if other methods of redress, e.g. appeal to Governor under Immigration Control Ordinance, unless exceptional circumstances—absence from jurisdiction and alleged ignorance of appeal procedure not exceptional

Administrative Law—judicial review—delay—by Rules of Supreme Court, O.53, r.4, application for leave to be made promptly and within three months—may strike out leave if no explanation of delay and case unarguable

The applicant sought judicial review of the respondents' decision not to allow him to reside in Gibraltar.

The applicant, a German national, had obtained a permit to reside in Gibraltar and carried on business here. There was evidence that prior to coming to Gibraltar, he had been convicted of offences of dishonesty in Germany and had served prison sentences for them, although he alleged that he had been released early for good behaviour and had subsequently returned to his business and re-established a good reputation with his creditors. However, it appeared that he had been a persistent offender whose offences had been carried out "with unscrupulous energy," according to the German court, and he had been banned from carrying on in Germany the type of business he now conducted in Gibraltar.

When he discovered the applicant's criminal background, the Chief Immigration Officer, acting on behalf of the Principal Immigration Officer, cancelled his residence permit under s.42(1) of the Immigration Control Ordinance, giving him notice of the cancellation and of the reasons for it, although the applicant was given no opportunity to explain

or deny any of these matters and no explanation of the public policy considerations which led to the decision. The applicant was subsequently deported.

He then lodged an appeal with the Governor, to whom appeals in such matters were to be made by virtue of s.21(1) of the Ordinance. He also informed the Principal Immigration Officer of his intention to appeal. However, he failed to provide the necessary documents to allow the appeal to be disposed of and he later alleged that he had been unable to do so, because (a) he had not been in Gibraltar and could not therefore give the necessary instructions to his legal advisers; and (b) no particular appeal procedure existed in such cases and he had not therefore known how to proceed. The Principal Immigration Officer subsequently informed him that he was not allowed to return to Gibraltar pending the outcome of his appeal.

The applicant obtained from the Supreme Court leave to seek judicial review of the decisions to revoke his permit, to deport him and to refuse to allow him to remain in Gibraltar pending his appeal; his *ex parte* application contained an admission of his criminal convictions but gave no indication of their seriousness or of his ban from conducting his business. This application was made within three months of the decisions complained of, although by no means promptly.

The Principal Immigration Officer, together with the Governor and the Attorney-General, who had been joined as parties ("the respondents"), then made the present application for that leave to be set aside, submitting, *inter alia*, that (a) the court had had no jurisdiction to grant leave to the applicant to seek judicial review because s.23(1) of the Immigration Control Ordinance precluded the court from questioning any decision of the Principal Immigration Officer under the Ordinance; (b) in any case, judicial review was not available to the applicant since he had not exhausted all other methods of redress, namely, his appeal to the Governor under s.21(1), which specifically denied an appellant the right to enter or remain in Gibraltar pending the outcome of such an appeal; (c) the applicant had been guilty of material non-discosure in failing to give the court sufficient details of the seriousness of his criminal convictions, thus vitiating the court's decision to grant him leave on an *ex parte* application; and (d) that decision had also been vitiated by the applicant's delay in making his application, which he had not sought to explain; although he had made his application within three months, as required by O.53, r.4 of the Rules of the Supreme Court, that rule also required that it be made promptly.

The applicant submitted in reply, *inter alia*, that (a) the decisions made by or on behalf of the Principal Immigration Officer contravened the requirements of natural justice in that he had been given insufficient reasons for the decisions and had been given no opportunity to make a case against them; the decisions were thus totally invalid and the provisions of s.23(1) did not therefore apply; (b) similarly, he had been given no proper opportunity to pursue his appeal, since he had neither

been allowed to stay in Gibraltar to instruct his legal advisers, nor given any indication of the proper procedure for appealing; (c) he had given full details of his criminal convictions, which were in any case not relevant since he had clearly been fully rehabilitated; and (d) his delay had properly been explained by the fact that he had been prevented from prosecuting his appeal, as above.

Held, granting the respondents' application and setting aside the applicant's leave to seek judicial review:

(1) On an appeal under s.21(1) of the Ordinance, the appropriate procedure was as follows. First, an appellant should lodge notice of his appeal with the Governor within seven days of the decision complained of, following which, within a further seven days, he should serve on the Governor and the respondents the grounds of his appeal, bundle of documents, list of legal authorities, summary of agreed facts (if any) and skeleton arguments—which the present applicant had failed to do. Had he done so, the respondents should then have served on the Governor and the applicant their documents, list of authorities and arguments within 14 days of receiving the applicant's bundle. The applicant should then have served his submissions and authorities in reply, if any, following which it would have been for the Governor either to dispose of the appeal on the basis of these documents, or to allow oral submissions, before making his decision (page 112, lines 14–42).

(2) Appealing to the Governor in this way was the only possible method of complaining of the decisions of the Principal Immigration Officer, since by s.23(1) of the Ordinance, no court could question either the Principal Immigration Officer or the Governor in such matters. In failing to put before the court the provisions of either s.21(1) or s.23(1) when making his *ex parte* application for leave to seek judicial review, the applicant had been guilty of material non-disclosure, because (a) in the light of s.21(1), the applicant could not argue, as he now sought to do, that he was entitled to remain in Gibraltar pending the outcome of his appeal to the Governor, nor that the appeal had not been pursued because he had not known the proper procedure for appealing, which was that set out in holding (1) above; and (b) likewise, he should have put before the court the provisions of s.23(1), which was a "preclusive clause" prohibiting any sort of challenge to the decision through the courts, and it could not be argued that in being fundamentally invalid for lack of natural justice, the decisions complained of were outside the scope of s.23(1); indeed, it was disingenuous to argue that the court was already aware of these statutory provisions. Moreover, the applicant had not told the whole truth regarding the nature of his criminal convictions. Such lack of candour on his part should have resulted in the court's refusing even to consider the merits of his application (page 112, line 43 – page 114, line 33; page 115, line 22 – page 116, line 37).

(3) In any case, it would only be in exceptional circumstances that an applicant would be allowed to proceed to seek judicial review without having first exhausted all other methods of relief and in the present case the appeal to the Governor had not been pursued. Furthermore, neither the fact that the applicant was not in Gibraltar (which in any case did not prevent him from giving instructions to his legal advisers), nor that he had been allegedly unaware of the proper appeal procedure, amounted to such exceptional circumstances as to allow him to proceed (page 114, line 41 – page 115, line 21).

(4) Lastly, the applicant had been guilty of inordinate and inexcusable delay in making his application. Although it had been made within three months of the Principal Immigration Officer's decision, as required by O.53, r.4 of the Rules of the Supreme Court, it had nevertheless not been made promptly, as that rule also required, nor had he given any explanation for the delay. Whilst an application by a respondent to set aside leave should only be granted if it were clear that the applicant's case was truly unarguable, in the present case the delay, the material non-disclosure and the applicant's failure to pursue his appeal, were fatal to his application. For these reasons, the respondents' application to set aside the applicant's leave to apply for judicial review would be granted (page 116, line 37 – page 118, line 13).

Cases cited:

(1) *R.* v. *Barnes, ex p. Lord Vernon* (1910), 102 L.T. 860.
(2) *R.* v. *Bromsgrove District Council, ex p. Kennedy*, [1992] C.O.D. 129.
(3) *R.* v. *Chief Const. (Merseyside), ex p. Calveley*, [1986] Q.B. 424; [1986] 1 All E.R. 257.
(4) *R.* v. *Cornwall County Council, ex p. Huntingdon*, [1992] 3 All E.R. 566; affirmed, [1994] 1 All E.R. 694, considered.
(5) *R.* v. *Education Secy., ex p. Standish*, [1993] T.L.R. 571.
(6) *R.* v. *Environment Secy., ex p. Kent*, [1990] J.P.L. 124; [1990] C.O.D. 78.
(7) *R.* v. *Environment Secy., ex p. Ostler*, [1977] Q.B. 122; (1976), 75 L.G.R. 45.
(8) *R.* v. *Greenwich JJ., ex p. Aikins*, Div. Ct., *The Times*, July 3rd, 1982.
(9) *R.* v. *Home Secy., ex p. Al-Nefeesi*, [1990] C.O.D. 106.
(10) *R.* v. *Home Secy., ex p. Angur Begum*, [1989] C.O.D. 398; [1989] Admin. L.R. 110.
(11) *R.* v. *Home Secy., ex p. Doorga*, [1990] C.O.D. 109; *sub nom. Doorga* v. *Home Secy.*, [1990] Imm. A.R. 98.
(12) *R.* v. *Home Secy., ex p. Mannan*, Queen's Bench Division, *The Times*, March 29th, 1984.
(13) *R.* v. *Home Secy., ex p. Swati*, [1986] 1 W.L.R. 477; [1986] 1 All E.R. 717.
(14) *R.* v. *Independent Television Commn., ex p. T.V.N.I. Ltd.*, [1991] T.L.R. 606.

(15) *R.* v. *Jockey Club Licensing Cttee., ex p. Wright*, [1991] C.O.D. 306.
(16) *R.* v. *Kensington Income Tax Commrs., ex p. Princess Edmond De Polignac*, [1917] 1 K.B. 486; (1916), 86 L.J.K.B. 257.
(17) *R.* v. *Lambeth London Borough Council, ex p. Walters*, [1994] 2 F.C.R. 336; [1993] T.L.R. 483.
(18) *R.* v. *Stratford-on-Avon District Council, ex p. Jackson*, [1985] 1 W.L.R. 1319; [1985] 3 All E.R. 769.
(19) *Smith* v. *East Elloe Rural District Council*, [1956] A.C. 736; [1956] 1 All E.R. 855.
(20) *Traffic Commn*. v. *Gillingwater*, C.A., Civ. App. No. 2 of 1990, September 21st, 1990, unreported.

Legislation construed:

Immigration Control Ordinance (1984 Edition), s.20(1): The relevant terms of this sub-section are set out at page 112, lines 9–10.

s.21(1): "Any person aggrieved by the refusal of the Principal Immigration Officer to issue a permit or by the cancellation of a permit by the Principal Immigration Officer may appeal against such decision to the Governor, within seven days of such refusal or cancellation, but shall not during such seven days, or while the appeal is being considered by the Governor, be entitled to enter or remain within Gibraltar."

s.23: The relevant terms of this section are set out at page 113, lines 1–6.

s.42(1): The relevant terms of this sub-section are set out at page 111, lines 16–20.

s.45: The relevant terms of this section are set out at page 111, lines 25–34.

s.45(4), as added by the European Communities Ordinance, 1988, s.5: The relevant terms of this sub-section are set out at page 111, lines 36–37.

Rules of the Supreme Court, O.53, r.4:

"(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.

(2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.

(3) Paragraph (1) is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

L.E.C. Baglietto and *F.R. Picardo* for the applicant;
C. Finch for the respondent.

KNELLER, C.J.: On October 14th, 1994, I granted *ex parte* leave to Mr. Uwe Bold to move for judicial review of (i) the Chief Immigration Officer's decision, said to have been made on behalf of the Principal Immigration Officer on August 3rd, 1994, purporting to cancel Mr. Bold's permit of residence in the interest of public policy and requiring him to leave Gibraltar by September 3rd; (ii) the decision of someone in the Immigration Department to arrest, detain and forcibly eject Mr. Bold from Gibraltar into Spain on September 2nd without any or any proper due process authorized by a court of competent jurisdiction; and (iii) the decision of the Principal Immigration Officer of September 6th, 1994 to prohibit absolutely Mr. Bold's re-entry into Gibraltar, notwithstanding his pending appeal to His Excellency the Governor against the decision of the Chief Immigration Officer. Mr. Bold sought the following relief: (a) an order of certiorari to quash those decisions; and/or (b) an order of mandamus to compel the Principal Immigration Officer to permit Mr. Bold to re-enter and to remain in Gibraltar pending the hearing of his appeal; (c) a declaration that the said decisions were unreasonable and/or unlawful and/or should be reconsidered according to law; and/or (d) an order of mandamus to compel the Governor to hear and determine Mr. Bold's appeal according to law within a reasonable time, and/or a declaration that he should do so; and (e) damages.

The grounds on which that relief was sought at the time the *ex parte* leave was given were as follows. Mr. Bold is a German national and a European Community national under the laws of Gibraltar, in particular, for the purposes of the Immigration Control Ordinance. He applied formally for a permit to reside in Gibraltar and the Principal Immigration Officer, acting under the powers granted to him by the Ordinance, issued a permit to Mr. Bold which was in proper form.

Mr. Bold had business interests in Gibraltar. He was a company director and the principal beneficial shareholder of Barnato Diamond Industries Ltd., which has its registered office at 3 Bell Lane, Gibraltar. He was engaged in "legitimate economic activity" in Gibraltar, as his solicitor puts it, and so he was entitled to conduct his business under the EEC Treaty and associated laws.

But Mr. Bold had a criminal record. He had been sentenced to seven years' imprisonment for offences of dishonesty. He alleged that they were not for violence or the misuse of controlled drugs, and that he was released on parole when he had served only three years of the seven years because he was a model prisoner. Then he honoured the conditions of his parole and re-established his business. He had a good reputation; so much so that his bankers gave him a good reference. But the Chief Immigration Officer discovered that Mr. Bold had a criminal record and on behalf of the Principal Immigration Officer gave him notice on August 3rd that his permit of residence was cancelled and that he must leave Gibraltar by September 3rd.

Mr. Bold was not given an opportunity to be heard in his own defence, admit or deny that he had any previous convictions for any offence, explain its circumstances or his subsequent history or to learn what public policy led the Chief Immigration Officer abruptly to cancel the residence permit. It would have saved a lot of expense and time if the Chief Immigration Officer had taken this sensible course. No charges or proceedings were brought against Mr. Bold under the Ordinance or any other laws of Gibraltar.

The notice should have been given by the Principal Immigration Officer, according to Mr. Bold, since there was no evidence that he had authorized the Chief Immigration Officer in writing under s.4(2) of the Ordinance to exercise that power. On this and other grounds, Mr. Bold's Gibraltar lawyers say that there has not been a decision by the Principal Immigration Officer; the Principal Immigration Officer, however, declares that he made that authorization in writing before Mr. Bold arrived here.

The notice was never served on Mr. Bold but upon Albert Koch, his business agent in Gibraltar, and then not until August 17th. But when Mr. Koch received it, it came to Mr. Bold's attention the same day. On August 18th, Mr. Bold told his legal advisers in Gibraltar to institute his appeal to the Governor under the Ordinance against this notice requiring him to leave Gibraltar by September 3rd. The appeal was prepared and lodged and, according to his solicitor, Mr. Bold was an appellant under the Ordinance and had the right to re-enter and to remain here in Gibraltar until his appeal was heard and determined, or until a competent court of law in Gibraltar ordered him to leave. And yet on September 2nd at 5 p.m., the day before he was required to leave Gibraltar, Mr. Bold was escorted from a restaurant here by agents of the Immigration Department and/or the Royal Gibraltar Police Force, taken to the frontier and persuaded to cross it into Spain. Mr. Bold's counsel chides the escort for doing this "unceremoniously," whatever that may mean.

His solicitor telephoned the Principal Immigration Officer, who told him that he did not know Mr. Bold or anything about his case, but that he would ask for information and then relay it to Mr. Bold's solicitor; however, this did not happen. The Attorney-General of the day declined to investigate Mr. Bold's complaint. A member of the Deputy Governor's staff agreed to make enquiries and she contacted Mr. Bold's solicitor to say that she had contacted the Principal Immigration Officer, who had advised her that Mr. Bold could not re-enter Gibraltar. After that, Mr. Bold has been unable to prosecute his appeal because he has had no directions on what procedure he should follow. He did not know what the case against him was. He was denied reasonable access to his solicitor and the courts in Gibraltar. All in all, Mr. Bold says he was treated contrary to the rules of natural justice and unfairly.

More background has since been supplied for this case and I now set it out. Mr. Bold is 40. His permit of residence, No. 21386 dated September 28th, 1993, was valid for five years. On July 8th, 1994, he had signed a Reservation Agreement in the name of Meamas Bold with the Queensway Development Co. Ltd. for the leasehold of Apartment 21 and car parking space 718, together valued at £440,000, because at that time he found Gibraltar such a congenial place in which to live and work.

On November 3rd, the Governor, the Attorney-General and the Principal Immigration Officer applied by a notice of motion dated November 3rd for the *ex parte* leave which I had granted Mr. Bold to move for judicial review to be set aside. Pausing there for a moment, I doubt that the Governor and the Attorney-General should have been added as parties by the Principal Immigration Officer's legal advisers without leave of the court. I recall that I ordered Mr. Bold to serve copies of his application on them so that they would know what Mr. Bold was alleging against them and what relief he was seeking. They need not have been made parties.

The motion was amended with leave on November 9th and then the grounds put forward were as follows:

(a) Mr. Bold had no right to make an application for leave and the court had no jurisdiction to grant leave to move for the judicial review of the Principal Immigration Officer's decision to cancel Mr. Bold's residence permit by virtue of the provisions of s.23 of the Ordinance;

(b) Mr. Bold had not fully exhausted his other remedies, notably, his pending appeal to the Governor under s.21 of the Ordinance;

(c) he had been guilty of material non-disclosure to the court, *inter alia*, by not revealing the full seriousness of his previous convictions;

(d) he had been dilatory in obtaining leave;

(e) the decision he complains of is a matter of private rights and private laws and should be pursued only by writ; and

(f) his claim for an order of mandamus to compel the Principal Immigration Officer to permit him to re-enter and to remain in Gibraltar pending the determination of his appeal to the Governor, a declaration that the Principal Immigration Officer's decision was unreasonable and/or unlawful and should be reconsidered according to law, and mandamus to compel the Governor to hear and determine his appeal according to law in a reasonable time or a declaration that he should do so, should all be struck out because they were frivolous, vexatious and an abuse of process since the court had no jurisdiction to grant such relief while his appeal was pending.

The last ground which I have just set out was abandoned. The first issue, then, is whether Mr. Bold had the right to apply for judicial review and the court had the power to grant such leave? To answer this, it must be remembered that he is a German and therefore a national of an EEC state who was a director and principal beneficial shareholder of a

company known as Barnato Diamond Industries Ltd., Suite 9, Portland House, Glacis Road, Gibraltar, as set out in the heading to a letter from his Gibraltar solicitors to the Principal Immigration Officer dated August 17th.

In his letter to Mr. Bold ("of Marina Bay Consultants Ltd., Suite 9, Portland House, Glacis Road, Gibraltar") of August 3rd, the Chief Immigration Officer told him:

> "It has come to our notice that you have a criminal record and that you have served a sentence for a number of serious criminal offences.
>
> Under the provisions of s.42(1) of the Immigration Control Ordinance and in the interests of public policy, I am cancelling your permit of residence and I give you notice that you must leave Gibraltar by September 3rd, 1994."

Section 42(1) of the Ordinance reads:

> "In the interests of public policy, public security or public health, the Principal Immigration Officer may refuse to allow a Community national to enter Gibraltar or may refuse to issue a Community national who has entered Gibraltar with a residence permit or may cancel a residence permit."

Where did the Chief Immigration Officer find the power to require Mr. Bold, a Community national, to leave Gibraltar? It is in s.45(1)(*d*) for one whose residence permit has been cancelled. And why the 30-day period of notice? That is specified in s.45(2)(*b*), which reads as follows:

> "A notice issued under subsection (1) shall specify the date by which the Community national shall leave Gibraltar. Except in cases of urgency the date shall not—
>
> . . .
>
> (*b*) in cases where . . . a residence permit has been cancelled be less than thirty days after the service of such notice."

Section 45(3) states:

> "A Community national aggrieved by a requirement to leave Gibraltar may appeal to the Governor within seven days of the notification to him of such refusal."

Finally, s.45(4), as added by the European Communities Ordinance 1988, s.5, declares: "This section does not apply to Community nationals pursuing or intending to pursue self-employed activities."

Mr. Bold's Gibraltar lawyers wrote to the Governor on August 17th telling him the Chief Immigration Officer's information of August 3rd, namely, that he had cancelled Mr. Bold's permit of residence and had given notice that he must leave Gibraltar by September 3rd; that that notice had been received by Mr. Bold on August 16th because Mr. Bold was in Germany dealing with business matters; and that he appealed against that decision and notice under the terms of s.45(3) of the Ordinance. By another letter of the same date, Mr. Bold's Gibraltar

solicitors told the Principal Immigration Officer that Mr. Bold had put in his notice of appeal to the Governor under s.45(3) of the Ordinance.

The special provisions relating to Community nationals in the Ordinance are to be found in ss. 39–51A inclusive, presumably because EEC legislation or the comity of nations or reciprocity requires it or all three do. The Principal Immigration Officer's advisers maintain that Mr. Bold's permit of residence was cancelled under s.20(1) of the Ordinance, which provides: "The Principal Immigration Officer may at any time cancel any permit issued under this Ordinance." I doubt that that was so because in the Chief Immigration Officer's letter to Mr. Bold, he is told that his permit was cancelled under the provisions of s.42(1), one of the special provisions applicable to Community nationals such as Mr. Bold.

It is right, however, that by virtue of s.21(1) of the Ordinance, Mr. Bold has a right of appeal to the Governor against the cancellation of his permit of residence. He had to exercise it within seven days of the cancellation of the permit. He was not entitled to remain in Gibraltar during those seven days or while the appeal is being considered by the Governor.

Mr. Bold's appeal is not being processed because although his legal advisers in Gibraltar gave notice of appeal to the Governor and the Principal Immigration Officer, in fact no grounds of appeal, bundle of documents, skeleton arguments or summary of agreed facts or authorities have followed it and his legal advisers have been given leave by Harwood, A.J. to be removed from the record because they cannot obtain instructions from him. His Gibraltar solicitors have not been replaced, or so I believe.

A complaint was made of the lack of rules of procedure or directions for the process of such appeals. The answer is that unless the Governor otherwise orders of his own motion or on the application of any party to the appeal, the appellant should within seven days of lodging his notice of appeal serve on the Governor and the respondent his grounds of appeal, bundle of documents, list of authorities and summary of agreed facts, if any, and skeleton arguments. The respondent should then file and serve on the Governor and the appellant his bundle of documents, list of authorities and arguments within 14 days of receiving the appellant's bundle. The appellant would then have seven days to file and serve his submissions and other authorities, if any, in reply. The Governor can then decide the appeal on the basis of these documents or, having read them, hear oral submissions made by or on behalf of the appellant and the respondent at the same hearing. He will then make his own decision. This has been the procedure in appeals to His Excellency under other Ordinances.

The Principal Immigration Officer's counsel relies on s.23 of the Ordinance for the application to set aside the *ex parte* leave to move for judicial review granted to Mr. Bold. That section provides:

"(1) No court shall question and no appeal shall lie to any court from any decision of the Principal Immigration Officer under the Ordinance or from any decision of the Governor hereunder.

(2) In this section 'decision' means any grant, renewal, refusal or cancellation of any permit which may be issued under this Ordinance."

I am persuaded that that is correct. Mr. Bold's permit of residence, it will be remembered, was cancelled by the Principal Immigration Officer and it was his decision, so this court cannot question it. No appeal lies to any court from that decision.

The point is this. Section 23(1) is what is known as a "preclusive clause." It prohibits any opportunity for challenging the decision in the courts. The only right of appeal is to the Governor under s.21(1), which prescribes, usually on specified grounds, the time within which it can be made and forbids any challenge outside that period. This affects the jurisdiction of this court: see, for example, *Smith* v. *East Elloe Rural District Council* (19), *R*. v. *Environment Secy., ex p. Ostler* (7) and *R*. v. *Environment Secy., ex p. Kent* (6). In *R*. v. *Cornwall County Council, ex p. Huntingdon* (4), Brooke, J. explained it in this way ([1992] 3 All E.R. at 576):

". . . [I]t is, in my judgment, incumbent on practitioners who are responsible for drafting their clients' statement in Form 86A under R.S.C. Ord. 53 to draw the court's attention to any relevant preclusive clause and to explain the reasons why they contend that it does not bar any application to the High Court otherwise than in accordance with its terms. If this is done, then there will be significantly less risk of a judge granting leave for an application for judicial review in circumstances in which Parliament has provided that that route for attacking the validity of a decision complained of should not be open, and of respondents being put to the trouble of and expense of having to make an application to set aside that leave."

The provisions of s.23 of the Ordinance should have been brought to the attention of this court, but they were not. It will not do for Mr. Bold's counsel to say that they were known to the court. Mr. Bold's application was an *ex parte* one and this failure was a material omission. So too was the absence of any reference in Mr. Bold's papers to s.21(1) of the Ordinance, because it is relevant to Mr. Bold's application for an order for mandamus to compel the Principal Immigration Officer to permit him to remain in Gibraltar while his appeal against being required to leave Gibraltar is being heard by the Governor. Section 21(1) provided Mr. Bold with the right to appeal against the decision of the Principal Immigration Officer which cancelled his permit of residence. The appeal had to be lodged within seven days of the decision. But that sub-section goes on to say that during those seven days while the appeal is being considered by the Governor, the appellant is not entitled to enter or to

remain in Gibraltar. These statutory provisions should have been disclosed to the court. They affected the issue of whether or not the court should give leave *ex parte*.

Mr. Bold's counsel sought to distinguish Mr. Bold's application on the ground that the decision of the Principal Immigration Officer to cancel Mr. Bold's permit of residence was fundamentally invalid for lack of natural justice, *i.e.* Mr. Bold was given no opportunity to contest it by reference to how his self-employment and status of being a Community national constituted an exemption from notice to leave by virtue of s.45(4), or explain how it came about that he had a criminal record and had served a criminal sentence for a number of criminal offences, or to mitigate with references to his subsequent life of propriety. It was fundamentally invalid and therefore it was not a decision.

I cannot accept that that submission is correct. Why not? The Ordinance contains a "preclusive clause" and prescribes an opportunity for challenge on specified grounds, together with a period within which that challenge can be made. It prohibits any challenge outside that period. Questions as to the validity of actions taken under that Ordinance can therefore only be raised on the specified grounds in the prescribed time and manner. The jurisdiction of the court is excluded in the interest of certainty in respect of any other challenge. This is so whether the body whose decision is sought to be impugned was quasi-judicial or administrative and whether or not the decision sought to be impugned is fundamentally invalid. It follows that the court had no jurisdiction to grant judicial review of the decision to cancel Mr. Bold's residence permit and the *ex parte* grant of leave to apply for judicial review must be set aside: see *R.* v. *Cornwall County Council, ex p. Huntingdon* (4), *R.* v. *Greenwich JJ., ex p. Aikins* (8) and *R.* v. *Home Secy., ex p. Mannan* (12).

Where there is an ouster clause in the relevant legislation that may arguably bar a right to judicial review, this should be brought to the attention of the court even if the applicant, in this case Mr. Bold, and/or his legal advisers takes the view that the ouster clause can be avoided: see *R.* v. *Cornwall County Council, ex p. Huntingdon* (4).

Having held that in the circumstances of this case the court is precluded by the laws of Gibraltar from entertaining applications for judicial review of a decision of the Principal Immigration Officer to cancel Mr. Bold's residence permit and to require him to leave Gibraltar within the next 30 days, that is sufficient for the Principal Immigration Officer's application to succeed but as I may be wrong on that issue, I shall go on to deal with the other points raised in his notice of motion.

A second reason for discharging the leave to move for judicial review which was advanced by counsel for the Principal Immigration Officer was that Mr. Bold had not exhausted the remedy which the Ordinance provides. He had not pursued his appeal to the Governor. The court, save in exceptional circumstances, requires an applicant for judicial review of

an administrative decision to look first for relief by any other available method. So where an Ordinance provides for an appeal, there is no room for judicial review unless the applicant distinguishes his case from those for which the appeal was provided: *R.* v. *Chief Const. (Merseyside), ex p. Calveley* (3); *R.* v. *Home Secy., ex p. Swati* (13).

Mr. Bold's counsel argued that the procedure for appealing to the Governor was unknown, but I cannot accept that as an excuse for not urging the appeal. Counsel himself participated in the appeal of a police officer to the Governor from the decision of a disciplinary board of the Gibraltar Police Force by way of a satisfactory procedure agreed with the Attorney-General of the day.

Other matters raised as explanation for not getting on with the appeal included the impossibility of getting Mr. Bold's instructions when he was not in Gibraltar. I am not persuaded of that because instructions from clients all over the world crackle into the offices of lawyers in Gibraltar by telephone and fax for litigation here and lawyers travel from Gibraltar to Spain, England, Portugal and elsewhere for consultations and conferences with their clients. Exceptional circumstances defy definition, but the circumstances of Mr. Bold's complaints are not exceptional. I would discharge the leave to apply for judicial review on that ground as well.

The third ground of the Principal Immigration Officer's application is that Mr. Bold was guilty of material non-disclosure in the papers he put before the court. He had the duty *uberrimae fidei* to put before the court all relevant information available to him. Counsel and solicitors must satisfy themselves that they are fully aware of all the material facts which ought to be disclosed to the court: *R.* v. *Barnes, ex p. Lord Vernon* (1), *R.* v. *Kensington Income Tax Commrs., ex p. Princess Edmond De Polignac* (16), *R.* v. *Greenwich JJ., ex p. Aikens* (8) and *R.* v. *Jockey Club Licensing Cttee., ex p. Wright* (15). This applies to a greater extent if the applicant has no knowledge of the local law or language or both. Lack of candour can be taken into account when a respondent asks for the leave to seek judicial review to be set aside. The merits of the application for leave will not even be considered if relevant material facts are suppressed in the application. Mr. Bold was informed in writing by the Principal Immigration Officer that as a matter of public policy his previous convictions for criminal offences were the reason for the cancellation of his residence permit and the order to depart from Gibraltar.

Through the Chief Immigration Officer, the Principal Immigration Officer wrote to Mr. Bold on August 3rd, 1994 and stated that Mr. Bold had a criminal record and that he had served a prison sentence for a number of serious criminal offences. The grounds prepared for Mr. Bold on which relief was sought, it will be recalled, said that he had been sentenced to a term of imprisonment of seven years in Germany for offences of dishonesty but that those offences did not involve violence or

prohibited substances. Mr. Bold was a model prisoner and was released after serving approximately three years on parole. He had honoured his parole commitment and had re-established himself. The applicant was, so to speak, a "born again" businessman and currently enjoyed a good reputation even with bankers.

The fact is that when Mr. Bold applied for parole, presumably for the first time, on September 26th, 1988, he was refused because the court, Landgericht, Ulm, declared that Mr. Bold had been convicted of crimes in which a degree of "unscrupulous energy" had been shown. The court also disbelieved the evidence that he had provided about his future intentions. His character was evidenced by his previous convictions, which included one in 1976 for failing to report a traffic accident and fleeing from the scene; attempted theft in 1977; tax evasion in 1977; drunken and dangerous driving without a valid driving licence in 1979; arson in 1979; drunken and dangerous driving without a valid driving licence and falsification of a document and drunken and dangerous driving again in 1984; fraudulent activities in 1986 in Stuttgart in which 80 clients between them provided an amount of DM4.5m. to Mr. Bold, who used them in setting up corporate vehicles in foreign jurisdictions for his own benefit; and finally one concerning a Gibraltar company and involving fraudulent information conveyed by letter and telephone by him or on his behalf to 15 clients who were enticed into investing with him an amount of DM435,000 and US$22,000. The order for his release on parole did not end before June 1996. The Gibraltar Government was asked to supervise his parole here in Gibraltar by the German court, but the Gibraltar Government declared it had no jurisdiction to do so. The respondent claims that Mr. Bold was banned for five years by the German court from dealing with any property which would include trading in diamonds.

From the above, it is clear that Mr. Bold was economic with the truth about his criminal record and that his legal advisers were either misled or did not ask sufficiently searching questions of him: the court was not therefore in possession of the full facts in this matter. It is clearly contrary to public policy to let Mr. Bold establish himself on the Rock when it is essential that the perception of Gibraltar and its finance centre is that those who establish companies here, even under a pseudonym, are people of integrity. The application succeeds on the third ground.

The Principal Immigration Officer's next submission was that Mr. Bold had delayed in applying for relief. Applications must be made promptly and in any event within three months of the date on which the grounds for the application *ex parte* arose: see O.53, r.4(1) and, in England, the Supreme Court Act 1981, s.31(6). Time runs from the date when the ground for the application for leave to move for judicial review first arose. For certiorari it will be the date of the judgment, order, conviction or proceeding: O.53, r.4(2). Time can be extended if the court considers, in the exercise of its discretion under O.52, r.4(1), that there is good

reason for extending the time within which the application should be made: see *R.* v. *Independent Television Commn., ex p. T.V.N.I. Ltd.* (14) and *R.* v. *Stratford-on-Avon District Council, ex p. Jackson* (18).

Mr. Bold had notice of the decision of the Principal Immigration Officer on August 17th, 1994. He appealed to the Governor the next day but did not apply for leave to move for judicial review until September 27th, 1994. It was within the three months but it could not be said to be prompt and there is no explanation for that delay, apart from various attempts to try and find out if he might be allowed back into Gibraltar before the appeal had been heard by the Governor and, at the outset, an attempt to find out more about the reasons for the cancellation of his residence permit, which were clear enough from the letter which came to him from the Principal Immigration Officer.

It is correct that applications to set aside leave for applying for judicial review should be made sparingly and only on the grounds that either the applicant's case was truly unarguable, or that important and material non-disclosure had taken place: see *R.* v. *Home Secy., ex p. Al-Nefeesi* (9), *R.* v. *Home Secy., ex p. Angur Begum* (10), *R.* v. *Home Secy., ex p. Doorga* (11) and *R.* v. *Bromsgrove District Council, ex p. Kennedy* (2).

Through his counsel, Mr. Bold complains that the reasons given are insufficient. It is true that if an administrative act is brought up for judicial review and judicial review is refused, reasons should be given in addition to acting fairly and without bias: see *R.* v. *Lambeth London Borough Council, ex p. Walters* (17), *R.* v. *Education Secy., ex p. Standish* (5) and Spry, P. in *Traffic Commn.* v. *Gillingwater* (20). The reasons given by the Chief Immigration Officer were that Mr. Bold had a criminal record, he had served a sentence for a number of serious criminal offences and all this had come to the Chief Immigration Officer's notice so in the interest of public policy, his permit of residence was cancelled. Mr. Bold knew what his record was. He knew he had not revealed it when applying for the permit. I find that the Chief Immigration Officer's reasons were sufficient for Mr. Bold and his lawyers to decide whether or not to exercise his right to appeal to the Governor, which they did. The Chief Immigration Officer acted fairly and without bias.

There was a delay which has not been explained adequately. So on the fourth ground, the application of the Principal Immigration Officer also succeeds.

Mr. Bold's allegation of trespass, assault and false imprisonment are matters of private law and redress for them should be sought by writ, but cancellation of a residence permit and the method of doing it are matters of public law. I would not fault Mr. Bold on the respondent's last ground in the motion on notice.

Generally, however, this was an application by Mr. Bold which in the end turned out to have been granted on material which did not include important and relevant facts, so there was non-disclosure which is fatal to

Mr. Bold's application and makes it unarguable. There was also inexcusable delay and a failure to exhaust a remedy provided by the Ordinance. The upshot is that the leave granted by this court on October 14th, 1994 to Mr. Bold must be set aside.

The Principal Immigration Officer also asked for an order that Mr. Bold should pay the Principal Immigration Officer's costs in these proceedings, including the cost of the notice of motion, all to be taxed. Costs follow the event, so that order will be made (although I have a faint feeling it may be a futile one).

Leave to move for judicial review granted by this court on October 14th, 1994 is to be set aside. Mr. Bold will pay the respondent the costs of these proceedings, including the costs of the notice of motion and all if not agreed to be taxed.

Application allowed; leave set aside.