[1999–00 Gib LR 9]

SCHILLER v. ATTORNEY-GENERAL and CAPTAIN OF PORT

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Irvine of Lairg, L.C., Lord Lloyd of Berwick, Lord Hoffmann, Lord Cooke of Thorndon and Lord Hope of Craighead): July 20th, 1998

Administrative Law—judicial review—joinder of parties—applicant may not join alternative defendant on appeal if informed of wrong choice of defendant at early stage and late joinder against interests of justice

Civil Procedure—pleading—inconsistent pleadings—applicant for judicial review may not simultaneously allege that legislation governing administrative decision is ultra vires legislature and also claim unlawfully treated under statutory procedure, thereby impliedly asserting validity of legislation

The appellant applied for judicial review of a decision to refuse him a licence under the Fast Launches (Control) Ordinance 1987.

The appellant applied in 1988 to the Captain of the Port for a licence to use a launch within Gibraltar waters. Under s.4(1) of the 1987 Ordinance, the Captain of the Port had power to grant such a licence only with the approval of the Governor. The appellant inquired of the Governor's office about the progress of his application, and was told to approach the Captain of the Port. The Governor decided to refuse the appellant's application. The Captain of the Port declined to give the appellant reasons for the decision, stating that he was not obliged to do so, and did not inform the appellant of who had taken the decision.

The appellant commenced judicial review proceedings in the Supreme Court against the Captain of the Port, but did not seek to join the Governor as a party to the proceedings. The case for the Crown in these proceedings included, *inter alia*, the assertion that the Governor had taken the decision to refuse the licence. The appellant's application was dismissed. The same defence was raised on his appeal to the Court of Appeal, which upheld the decision of the Supreme Court, on the basis that the correspondence between the appellant and the Captain made it clear that the Governor had refused his approval.

On further appeal to the Judicial Committee, the appellant submitted that (a) he should be given leave to join the Governor as a party to the

appeal; and (b) the Fast Launches (Control) Ordinance 1987 was *ultra vires* the Gibraltar legislature.

The respondents submitted in reply that (a) since 10 years had now passed since the application for a licence, the Governor would be severely prejudiced in his defence of the action if joined at this stage, and the appellant had left it too late to do so; and (b) the appellant should not be permitted at the same time to assert the validity of the Ordinance for the purpose of seeking a proper consideration of his licence application and also to allege that it was *ultra vires* and invalid.

Held, dismissing the appeal:

(1) The Court of Appeal had correctly dismissed the appeal, since the appellant had failed to establish that the refusal of the licence was the decision of the Captain of the Port. Although the appellant could be forgiven for his initial confusion as to the proper person against whom to proceed, it had been made clear to him in the courts below that the Governor was that person. Moreover, now that many years had passed since the decision had been taken, it would not be in the interests of justice to join the Governor as a party to this appeal. Changes of personnel had occurred in the Governor's office and all documents relating to licence applications at the time had since been destroyed (paras. 11–18).

(2) The appellant's submission that the Fast Launches (Control) Ordinance 1987 was *ultra vires* the legislature would also fail, since he could not be permitted to assert the validity of the Ordinance for the purpose of his challenge to the decision under s.4(1), whilst at the same time asserting its invalidity. The appeal would be dismissed (paras. 20–21).

Legislation construed:

Fast Launches (Control) Ordinance 1987, s.4(1): The relevant terms of this sub-section are set out at para. 2.

F.H. Panford and *S.J. Bullock* for the appellant;
P.L. Hamlin and *A.A. Trinidad, Senior Crown Counsel*, for the respondents.

1 **LORD HOPE OF CRAIGHEAD**, delivering the judgment of the Board: This is an appeal from a judgment of the Court of Appeal of Gibraltar (Fieldsend, P., Huggins and O'Connor, JJ.A.) by which, on March 23rd, 1993, for reasons which were delivered on June 2nd, 1993, the appellant's appeal from a judgment of the Supreme Court of Gibraltar (Kneller, C.J.) dated October 19th, 1989 was dismissed.

2 The appellant had applied to the Supreme Court for judicial review of a decision to refuse his application for a licence to use a fast launch in the territorial waters of Gibraltar. His application was made to the

Captain of the Port of Gibraltar on February 3rd, 1988 under the Fast Launches (Control) Ordinance 1987. Section 4(1) of the Ordinance is in these terms: "The Captain of the Port may, with the approval of the Governor, grant to the owner of a fast launch, or to a person intending to purchase a fast launch, a licence to use it in the territorial waters of Gibraltar."

3 It is common ground that the launch *Dee Dee*, which the appellant had purchased at an Admiralty auction in December 1987, was a fast launch within the meaning of that expression as defined in s.2 of the Ordinance. By a letter dated May 16th, 1988, the appellant was advised by the Captain of the Port that his application had been refused. He asked the Captain of the Port to give reasons for the refusal. By a letter dated May 31st, 1988 the Captain of the Port declined his request. The appellant then commenced these proceedings for judicial review of the refusal.

4 The appellant was represented by counsel, Mr. Frank Panford, in the hearing before their Lordships' Board, but all the proceedings in the courts below were conducted by the appellant himself as a litigant in person and he had prepared his own written case. In the skeleton arguments which he appended to his written case, the appellant set out various grounds for submitting that the judgment of the Court of Appeal was wrong and should be reversed. Mr. Panford, who had been instructed only a few days before the hearing, found himself in some difficulty in supporting all of those grounds. He decided to argue the appeal on only some of them, and he set out his reasons for those which he could support in a separate skeleton argument.

5 At the end of his submissions he invited their Lordships to deal with two of the grounds in the appellant's own skeleton arguments which his client had wished to be argued but which he himself had not felt able to present on his behalf. In these two grounds the appellant submits that the Fast Launches (Control) Ordinance 1987 is *ultra vires* the Gibraltar legislature. Their Lordships will deal with these grounds at a later stage in this judgment. At the outset, however, before dealing with the grounds on which Mr. Panford argued the appeal, they wish to express their appreciation to him for the care which he took to prepare and present his client's case. Their Lordships were greatly assisted by his arguments, in the course of which he said everything that could properly be said on his client's behalf.

6 The appellant has explained in his written case that he learned, after registering his launch on the UK Small Ships Register, that she came into the category of a "fast launch," and that by reason of the Ordinance he required a licence issued by the Captain of the Port before he could use her in the waters off Gibraltar.

7 Under the previous legislation, which was contained in Part IVA of the Port (Amendment) Rules 1986, the licensing of fast launches for use in Gibraltar waters was at the sole discretion of the Captain of the Port. But a new system was introduced by the 1987 Ordinance. This has made it necessary for the Captain of the Port to obtain the approval of the Governor before issuing any such licences. Under the terms of the Fast Launches (Forms, Fees, etc.) Regulations 1987, the application for the grant of a licence must be made to the Captain of the Port, and the licence, if granted, is issued by him. But he is not authorized to issue the licence unless this has the approval of the Governor. This is made plain by the wording of s.4(1) of the Ordinance. So each application for the issue of a licence must be considered both by the Captain of the Port and by the Governor before a decision is taken to issue the licence to the applicant. A decision to refuse the application may be taken by the Captain of the Port without reference to the Governor, but a decision by the Captain of the Port that a licence should be issued may be overruled by the Governor. A decision is needed by both of them which is favourable before a licence can be issued to the applicant.

8 It is plain from the correspondence which was filed with the appellant's application for leave for judicial review that he was aware of the need for the Governor to approve the application. On March 15th, 1988, having had no reply to his application for a licence for six weeks, he wrote to the Governor's office saying that he had been led to believe that the application was being held up in that Department and asking for confirmation together with a reason for this. On March 16th, 1988 he was told that such matters were not dealt with at all by that office and he was advised to approach the Captain of the Port.

9 When on May 16th, 1988 he was told by the Captain of the Port that his application had been refused, no reasons were given. On being asked why the application had been refused, the Captain of the Port replied by letter dated May 25th, 1988 stating, under reference to what he described as its "non-approval," that there were no statutory obligations under s.4 of the Ordinance to provide reasons for the decision not to grant a licence. The appellant was not told in terms in this or any subsequent letter whether the decision not to issue the licence had been taken by the Captain of the Port himself or was the result of its non-approval by the Governor.

10 In his notice of application for leave to apply for judicial review dated August 18th, 1988, the applicant stated that the decision in respect of which he sought relief was the decision of the Captain of the Port that had been given to him by letter dated May 16th, 1988. The reliefs which he sought were (a) mandamus to order the Captain of the Port to change his decision and to grant him a licence or, in the alternative, to give lawful reason why such a licence should not be issued; (b) certiorari to quash the

decision; (c) a declaration that the decision was unfair, improper and an abuse of power; and (d) damages. His application was directed only against the Captain of the Port and, as his representative, the Attorney-General. He did not seek to make the Governor a party to the proceedings in the Supreme Court. Nor did he seek to do so at any later stage until the matter came before the Board for the hearing of his appeal.

11 The appellant may perhaps be forgiven for not having sought to make the Governor a party to the proceedings at the outset. The correspondence which passed between him and both the Governor's office and the Captain of the Port was unhelpful on this point. Furthermore, Mr. Panford informed their Lordships that his client had at all times had complete faith in the Governor. His belief was that it was the Captain of the Port and not the Governor who had taken the decision of which he complains. But it was made clear by Crown Counsel at the hearing in the Supreme Court in May 1989 that the position of the Captain of the Port was that the decision to refuse the licence was not his but that it had been taken by the Governor. The judge's notes of Crown Counsel's argument record him as saying that the Captain of the Port had not issued the licence because the Governor did not approve of it, that no application had been made against the Governor and that there was no decision of the Captain of the Port to set aside.

12 In the Court of Appeal, where these points were repeated in the course of his argument by the Attorney-General, it was held that this was enough to decide the appeal. This appears from the following passage in the judgment of O'Connor, J.A. and Fieldsend, P.:

> "The first hurdle facing the applicant is that he must show that it was the decision of the Captain of the Port not to grant a licence. Unless it appears that he decided not to grant a licence, the proceedings appear to be incompetent. On the evidence, it appears probable that it was not the Captain of the Port who refused a licence, but the Governor who declined to approve the granting of a licence. That appears to be a clear implication in the Captain's letter of May 31st, 1988, and the explanation of his being 'unable' to answer Mr. Schiller's queries.
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> Furthermore, in his letter of May 25th, 1988, the Captain had referred to 'the non-approval' of a licence. It is the Governor, not the Captain, who decides whether to approve or not. That is also quite consistent with the expression 'has been refused' in the Captain's letter of May 16th, 1988.
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> Before the Chief Justice, Crown Counsel stated that the decision not to issue a licence was made by the Governor. The Attorney-General repeats that statement before us."

They held that judicial review could not issue against the Captain of the Port, as it was not established that the refusal of a licence was his decision. In his concurring judgment, Huggins, J.A. said that he too thought that the correspondence showed that it was the Governor's unwillingness to approve the issue of a licence which led to its refusal.

13 Their Lordships have not been persuaded that the Court of Appeal was not entitled to reach this view on the evidence. It is clear that it is for the applicant, in an application for leave for judicial review, to show that the decision of which he complains was taken by the party against whom he has chosen to direct his application. In this case the appellant could, in view of the terms of s.4(1) of the Ordinance, have brought his application against both the Captain of the Port and the Governor. That would have been the right course for him to have taken if he was in doubt or was lacking in sufficient evidence as to which of them was responsible for the decision about which he was complaining.

14 In the event, what he chose to do was to bring the proceedings only against the Captain of the Port. That being so, he must be taken to have assumed the burden of showing that it was the Captain of the Port and not the Governor who took the decision. But his difficulty lies in the fact that there is nothing in the correspondence which directly supports that view of the evidence. As the Court of Appeal has held, such inferences as may be drawn from it point the other way. They suggest that the licence was refused because the Governor took the decision to withhold approval. Moreover, statements were made at the bar, both by Crown Counsel to the Chief Justice and by the Attorney-General to the Court of Appeal, that the decision had been made by the Governor. There can be no doubt that the courts below were entitled to rely on these statements, which were consistent with the evidence in the correspondence.

15 Their Lordships consider that the Court of Appeal was fully entitled, in the light of this information, to hold that the appeal was bound to fail on this ground. It follows that on this single ground the appeal to their Lordships' Board must also be dismissed. The remedies which the appellant seeks are all directed against the Captain of the Port. They are all sought on the assumption that the decision to refuse the licence was his decision, so he is the person who should be ordered to change that decision or to give lawful reasons why the licence should not be issued. But these reliefs are worthless if, as the Court of Appeal has held, the decision was not that of the Captain of the Port but of the Governor.

16 The Captain of the Port has no authority over the Governor. He cannot direct him to give his approval. Nor can he require the Governor to give reasons for his decision to withhold approval for transmission to the applicant. If these reliefs are required, they should have been sought

against the Governor and not the Captain of the Port. The appellant has chosen the wrong party against whom to direct his application.

17 Mr. Panford, appreciating this difficulty, sought leave to join the Governor as a party to the proceedings before the Board. Mr. Hamlin, who appeared for the respondents, informed their Lordships that he had instructions from the Governor to the extent only of enabling him to resist that application. He pointed out that the application for leave to seek judicial review was commenced in 1988. It was only now, almost 10 years later, that the application to join the Governor as a party was being made. There had been two changes of liaison officer in the Governor's office since that date. All the files for applications for such licences for the period prior to 1993 had now been destroyed along with other old files. If relief had been sought at the outset, evidence to support the decision might have been available. As it was, the Governor would now be seriously prejudiced by the delay. If the application were to be granted it would be necessary for the hearing to be adjourned, as he had no instructions to represent the Governor in the appeal. So the Governor would be unrepresented.

18 Their Lordships were not persuaded that it would be in the interests of justice for the Governor to be made a party to these proceedings at this very late stage. The appellant was told as early as May 1989, during the hearing before the Chief Justice, that the Captain of the Port's position was that the decision was that of the Governor. The point was made with even greater emphasis in March 1993 in the Court of Appeal, when the case was decided against him on this ground. So it cannot be said that the appellant has remained until now in a state of justifiable ignorance. It is plain that if a fresh application for leave to apply for judicial review against the Governor were to be made now, 10 years after the decision was taken, it would be dismissed on the ground that it was far out of time. For these reasons their Lordships were in no doubt that the application to join the Governor as a party should be refused, so they refused the application.

19 The only other points with which their Lordships require to deal in this judgment are the two grounds in the appellant's skeleton argument to which Mr. Panford drew their attention at the end of his argument. In these grounds the appellant asserts, for various reasons, that the Fast Launches (Control) Ordinance 1987 is *ultra vires* the Gibraltar legislature. It is not necessary to set out the details of the argument in order to explain why their Lordships are satisfied that these grounds cannot be entertained in these proceedings and why they must be rejected as irrelevant.

20 The appellant's application was for a licence to be granted to him under s.4 of the Ordinance. The reliefs which he seeks in his application

for judicial review assume that he was entitled to have his application for a licence dealt with lawfully. They assume the validity of the Ordinance. The appellant cannot on the one hand seek a remedy from the court which assumes its validity and on the other assert its invalidity. His argument, if upheld, would destroy the entire basis on which his application has been made. He cannot be allowed to maintain a position which is so plainly self-contradictory. On this short ground, their Lordships consider that the challenge which he seeks to make to the validity of the Ordinance in these proceedings is incompetent.

21 For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.