[1999–00 Gib LR 94]

OUZAA v. GOVERNOR, PRINCIPAL IMMIGRATION OFFICER, ATTORNEY-GENERAL and GIBRALTAR COMMUNITY CARE LIMITED

COURT OF APPEAL (Neill, P., Waite and Glidewell, JJ.A.): March 19th, 1999

Legal Aid and Assistance—refusal of legal assistance—appeal—no judicial review of Chief Justice's decision under Legal Aid and Assistance Rules, r.16(3), dismissing appeal against Registrar's refusal of legal assistance—Chief Justice acting in judicial capacity

Legal Aid and Assistance—refusal of legal assistance—appeal—no further appeal from Chief Justice's decision under Legal Aid and Assistance Rules, r.16(3), dismissing appeal against Registrar's refusal of legal assistance—Court of Appeal Ordinance, s.22 governs appeals from Supreme Court, not from Chief Justice acting by virtue of office

The applicant applied for judicial review of decisions by the respondents denying her the right to reside in Gibraltar and to receive social security benefits, and sought legal assistance to do so.

The applicant, a Moroccan national who had worked in Gibraltar for a number of years, applied to the Supreme Court for a declaration that she was entitled to unlimited leave to remain here and to receive certain social security benefits on the same basis as a British citizen with Gibraltarian status. She was refused legal assistance by the Registrar under r.6(2) of the Legal Aid and Assistance Rules on the ground that she was not ordinarily resident in Gibraltar. The Chief Justice heard her appeal on the papers under r.16(3), and upheld the Registrar's refusal.

Meanwhile, the Supreme Court (Pizzarello, A.J.) dismissed her application for leave to seek judicial review but leave was given by the Court of Appeal.

The Supreme Court (Pizzarello, A.J.) then refused the applicant leave to seek judicial review of the Chief Justice's refusal of legal assistance, on the grounds that (i) the jurisdiction under r.16(3) was a judicial one and was not subject to review or, alternatively, (ii) the Chief Justice, even as a person performing a public function, was not subject to review by the court of which he was head.

The applicant's legal representatives having been given permission to withdraw, the Supreme Court (Schofield, C.J.) dismissed the substantive

judicial review proceedings uncontested. Counsel then filed a notice of appeal within the prescribed time limit, but did not seek leave to appeal. Unaware that the notice had been filed, solicitors acting for the applicant filed a second notice two days outside the time-limit and served it on the respondents five days later.

The applicant then made a renewed application to the Court of Appeal for judicial review of the Chief Justice's refusal of legal assistance or, alternatively, leave to *appeal* out of time against that decision. She also sought leave to appeal against his dismissal of the substantive proceedings and an extension of time (if necessary) in which to do so.

Held, dismissing the applications:

(1) There could be no judicial review of the Chief Justice's decision dismissing the appeal from the Registrar's refusal of legal assistance. The Chief Justice had acted in a judicial rather than administrative capacity under r.16(3) of the Legal Aid and Assistance Rules. Neither the use of the phrase "a person aggrieved" in r.16(3) nor the fact that the appeal was heard on the papers meant that the appeal was a statutory appeal falling outside the ordinary courts system. The Chief Justice was the judicial officer designated by the legislation to hear appeals because he had been the only judge of the Supreme Court at the time the Legal Aid and Assistance Ordinance was enacted. It would be inconsistent with the Supreme Court's system of control over inferior courts and tribunals, which included judicial review, if the Chief Justice were himself amenable to judicial review (paras. 19–22).

(2) Nor could the applicant appeal against the Chief Justice's decision (even if her application were not out of time), since s.22 of the Court of Appeal Ordinance, governing appeals from the Supreme Court, did not confer a right of appeal from the Chief Justice acting by virtue of his office under the Legal Aid and Assistance Ordinance. The latter Ordinance contained a comprehensive code relating to the grant of legal aid and assistance, and r.16(3) of the Rules specified that an appeal from the Registrar's refusal of legal assistance should be to the Chief Justice alone. His decision was final (paras. 23–27).

(3) The application for leave to appeal against the dismissal of the substantive judicial review proceedings would be dismissed. Having regard to recent case law of the European Court of Justice on a related topic, which weakened the applicant's case, and her failure to prosecute her case diligently despite the considerable latitude given to her by the lower court, it would be improper to revive the substantive proceedings by giving leave to appeal out of time (paras. 28–31).

Case cited:

(1) *El-Yassini* v. *Home Secy. (Case C–416/96)*, [1999] E.C.R. I–1209; [1999] 2 CMLR 32, considered.

Legislation construed:
Court of Appeal Ordinance (1984 Edition), s.11(1): The relevant terms of this sub-section are set out at para. 21.
s.22: The relevant terms of this section are set out at para. 24.

Legal Aid and Assistance Ordinance (1984 Edition), s.5: The relevant terms of this section are set out at para. 25.
s.14(1): The relevant terms of this sub-section are set out at para. 3.
s.18(1): The relevant terms of this sub-section are set out at para. 4.

Legal Aid and Assistance Rules (1984 Edition), r.6: The relevant terms of this rule are set out at para. 6.
r.16(3): The relevant terms of this sub-rule are set out at para. 5.

Ms. E.V.E. Sharpston and *Ms. M.P.C. Grech* for the applicant;
L.E.C. Baglietto for the respondents;
R.M. Vasquez as *amicus curiae.*

1 **NEILL, P.:** The first application before the court is a renewed application by Mrs. Fatima Ouzaa for leave to move for judicial review of the Chief Justice's decision dated October 19th, 1998, dismissing her appeal from the Registrar's decision dated August 26th, 1998, to refuse her application for legal assistance to bring judicial review proceedings against His Excellency the Governor and other respondents.

2 I shall refer to the judicial review proceedings against the Governor, which were commenced by an application on Form 86A dated August 25th, 1998, as "the substantive proceedings." The other applications are concerned with the substantive proceedings themselves.

3 It would be convenient to start by referring to the Legal Aid and Assistance Ordinance and to the Legal Aid and Assistance Rules made under ss. 10 and 18 of that Ordinance. Part I of the Ordinance is concerned with legal aid in criminal proceedings. Part II of the Ordinance is concerned with legal assistance in civil proceedings. Section 13 of the Ordinance sets out the financial conditions of legal assistance. Section 14(1) provides that "application for legal assistance in connection with any proceedings shall be made in writing to the Registrar." Later sub-sections of s.14 provide for an investigation of the applicant's means and of the merits of the case.

4 If the Registrar is satisfied that the matter is a proper one for legal assistance to be given in accordance with the provisions of the Ordinance, she is empowered to issue a certificate to the applicant. There is, however, no provision either in s.14 or elsewhere in the Ordinance for any appeal from the Registrar if a certificate is refused. By s.18(1) of the Ordinance, however, it is provided that "the Chief Justice may make such rules as appear to him necessary or desirable for giving effect to [Part II of the

Ordinance] or for preventing abuses thereof." Section 10 of the Ordinance contains a similar provision empowering the Chief Justice to make rules in connection with criminal proceedings.

5 The Legal Aid and Assistance Rules made under ss. 10 and 18 came into force on January 1st, 1961. Rule 16 of the Rules provides for the procedure to be followed if a certificate is refused. Rule 16(3) is in these terms:

> "Any applicant considering himself aggrieved by the decision of the Registrar as to his entitlement to receive legal assistance or as to the amount of contribution or as to the discharge or revocation by the Registrar of his legal assistance certificate may within fourteen days of receipt of the decision appeal in writing to the Chief Justice."

The Rules make no special provision as to the procedure to be followed on an appeal or as to the persons to be made parties.

6 Eligibility for legal assistance is governed by r.6 of the Rules. Rule 6, so far as is material, provides as follows:

> "(1) Part II of the Ordinance shall have effect subject to the modifications contained in this rule.
>
> (2) Legal assistance under Part II of the Ordinance shall be available only to persons otherwise qualified therefor under the said Part II and who—
>
> (*a*) are ordinarily resident in Gibraltar; or
>
> (*b*) not being ordinarily resident in Gibraltar, are . . ."

Rule 6(2) then sets out a number of other conditions which, if satisfied, entitle the individual concerned to legal assistance.

7 On August 25th, 1998 the applicant made an application to the Registrar for assistance to bring the substantive proceedings. The application was refused. On August 26th, 1998 the Registrar wrote to the applicant's solicitor as follows:

> "I cannot see how, under the existing legislation in Gibraltar, I can grant legal assistance to your client, as she does not come within [any] of the categories which would render her eligible. Legal assistance is therefore refused."

8 The applicant appealed. In the memorandum of appeal it was asserted that the applicant was resident in Gibraltar and had been resident for over 20 years. It is important to record, however, that at the hearing before this court on March 16th, 1999 it was accepted by counsel appearing for the applicant that if the applicant's status were to be judged by the domestic

law of Gibraltar alone, she would not satisfy the residence requirements in r.6(2)(*a*). It was also said in the memorandum of appeal that the decision of the Registrar to refuse to grant legal aid to her was contrary to the Co-operation Agreement between the European Community and the Kingdom of Morocco, signed in Rabat on April 27th, 1976 and approved on behalf of the Community by Council Regulation No. 2211/78.

9 The appeal came before the Chief Justice in chambers on October 16th, 1998. He gave judgment on October 19th. The judgment contains a useful summary of some of the relevant facts. He said:

> "Fatima Ouzaa is a 68-year-old Moroccan national who worked in Gibraltar from 1977 to 1994. She contributed to the Gibraltar Social Insurance Scheme all her working life and receives a Gibraltar old age pension. When Mrs. Ouzaa ceased employment she was informed by the Immigration authorities in Gibraltar that she was not entitled to a residence permit or an identity card and that in order for her to be able to come to and go from Gibraltar she would need a multiple visa.
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> In March 1998 Mrs. Ouzaa visited Morocco and stayed there for four months. She returned to Gibraltar on July 14th, 1998 and on her return her passport was held by the immigration authorities. She was told that she would not be allowed to remain in Gibraltar for more than one week. When Mrs. Ouzaa's solicitors wrote seeking reconsideration of the position she received a letter from the Director of Status signed on behalf of the Chief Secretary, making an offer to permit her to remain in Gibraltar for one month on her undertaking to leave at the end of her visit."

The applicant was dissatisfied with this offer and after taking advice instituted the substantive proceedings.

10 In his judgment, the Chief Justice referred to some of the arguments which had been addressed to him at the hearing of October 16th and then said:

> "In my judgment, given the material before her, it was not possible for the Registrar to come to a decision other than that the applicant, Mrs. Ouzaa, is not ordinarily resident within Gibraltar and therefore does not qualify for legal assistance under r.6(2)."

11 Meanwhile, the substantive proceedings, in the form of an application for leave to move for judicial review, had come before the Supreme Court. Pizzarello, A.J. heard the application on September 1st, and gave judgment on September 8th. He refused leave to move. He concluded that the applicant had not established an arguable case that she was a resident. He said:

"As far as residence is concerned, for the applicant to have that right she must be a worker in the sense of being a member of the labour force. EC Law recognizes that matters of employment and of residence are ruled by domestic law. By domestic law the applicant's residence permit expired on June 30th, 1995. That permit was ancillary to her being a member of the labour force and when she ceased to be that, she properly, by domestic law, ceased to reside in Gibraltar. I do not think there is any arguable case and so I refuse leave to move for judicial review. . ."

12 The applicant then renewed her application for leave for hearing by the Court of Appeal. The renewed application came before the Court of Appeal on September 18th, 1998, when it was adjourned so that evidence could be filed on behalf of the applicant to counter a submission on behalf of the intended respondents that the application for judicial review should be refused in any event on the ground that the applicant had not been frank with the court.

13 The adjourned application came back before the Court of Appeal on November 9th, 1998. By that time, as I have already related, the appeal to the Chief Justice against the Registrar's refusal of a certificate for legal assistance had already been determined. At the hearing on November 9th, the applicant was represented by Mr. Stuart Isaacs, Q.C. and Mr. Clive Lewis, who had come from England for the hearing, and by Ms. Grech. After hearing detailed argument, the court granted leave to move in respect of two matters: (a) her application for a declaration that she was entitled to remain in Gibraltar; and (b) her application that she was entitled to certain social security payments. An undertaking was given on behalf of the Governor, the immigration authorities and the Attorney-General that the applicant might be permitted to remain in and leave and enter Gibraltar without interference pending the determination of the substantive proceedings. But a tight timetable was imposed. I shall refer to parts of the judgment which I gave on November 9th:

"The application for judicial review seeks two principal forms of relief. First, a declaration that Mrs. Ouzaa is entitled to unlimited leave to remain in Gibraltar, and secondly, a declaration that she is entitled to certain social security provisions on the same basis as a British citizen with Gibraltarian status, and in particular, for so long as she is resident in Gibraltar, any special non-contributory benefit payable to Gibraltarians with her financial and personal circumstances.

The nature of the application and the way that the applicant wished to put her case before the court is explained in Form 86A and supplemented in the skeleton arguments and now fully

explained by Mr. Isaacs in his admirable submissions to us. Mr. Isaacs very fairly, I think, recognizes the formidable difficulties that stand in his way. This is a case which requires consideration of the Co-operation Agreement between Morocco and the European Community. The Agreement has been the subject of a number of cases decided both in this court and in the European court, but it is Mr. Isaacs's submission that the main point for consideration in this case—whether this lady has a right to remain as a pensioner—is something which has never been the subject of any specific decision. I think that is something that ought to be dealt with at a full hearing before the Supreme Court.

The second part of the application is opposed by Mr. Baglietto, in his very clear and formidable submissions, on the basis that the relief that Mrs. Ouzaa is claiming is of too vague a kind and is out of time. It is said she must have known for a long time that she was not receiving these payments and that the court should not allow that claim to proceed either. Here, again, I see the difficulties but I do not think that it would be right to rule at this stage that this matter cannot proceed and I would therefore be disposed to give leave in respect of this declaration also. The matter, in my judgment, should come on for hearing as soon as possible, but I do not think that it is possible for the Chief Justice, who ought to hear this case, to hear it before the end of the year. But it should come on, unless there are very cogent reasons to the contrary, in January, and if there is an appeal, that should be heard if possible at the next sitting of this court, if the matter does proceed to an appeal. This matter should be determined one way or another as soon as possible."

14 On November 9th, the Court of Appeal then gave directions and provision was made for the service of affidavit evidence. At that stage it was represented to the court, and the matter proceeded on the footing, that the counsel who appeared from England had been good enough to offer their services on a *pro bono* basis. The possibility of some challenge to the decision of the Chief Justice three weeks before was not raised.

15 On November 23rd, 1998 the parties were informed that the hearing before the Chief Justice would take place on January 19th, 1999. Preparations for this hearing then proceeded. On December 16th, 1998, the intended respondents filed affidavit evidence in opposition to the substantive application. That was in accordance with the directions given by the Court of Appeal on November 9th. On December 23rd, 1998, however, a Form 86A was filed on behalf of the applicant seeking judicial review of the refusal of legal assistance. However, as I understand the matter, it was not until January 5th, 1999 that the legal advisers to the

intended respondents to the substantive proceedings became aware of the fresh judicial review proceedings seeking to challenge the decision of the Chief Justice of October 19th.

16 The helpful chronology which has been prepared by counsel on behalf of the applicant sets out the events of the next two months.

(1) On January 5th, 1999 the applicant's solicitor filed a summons to vacate the date fixed for the hearing of the substantive application. This summons came before the Chief Justice on January 13th, when the applicant sought to adjourn the substantive hearing pending the determination of the application for judicial review of the decision of October 19th. This application was refused by the Chief Justice but the substantive hearing was re-listed for February 15th, 1999.

(2) On January 19th, a summons for further and better discovery was filed with the court. This summons was heard by the Chief Justice on January 21st, when he dismissed the application.

(3) The substantive proceedings came back before the Chief Justice on February 16th, 1999. A number of additional matters were heard by him on that date. I shall have to return to the February 16th hearing a little later.

(4) Meanwhile, the application for leave to apply for judicial review of the Chief Justice's decision of October 19th in relation to legal assistance had been referred to Pizzarello, A.J. He decided to deal with the matter in writing. In his written decision, Pizzarello, A.J referred to the relevant legislation and then continued as follows:

> "The Chief Justice is the Chief Justice of Gibraltar (Interpretation and General Clauses Ordinance). By the Gibraltar Constitution Order 1969, s.56(2), 'the Supreme Court shall, subject to section 59 of this Constitution, consist of one judge, that is to say, the Chief Justice.' Where the Chief Justice exercises his discretion under r.16(3) he is, in my opinion, exercising a jurisdiction as a judge of the Supreme Court and so judicial review cannot apply. Alternatively, if, as the applicant puts forward, he may be said to be a person or body which performs public duties or functions . . . he is not subject to the supervisory jurisdiction, by way of judicial review, of the Supreme Court of which he is head, since he has done precisely what is now required of him. The application is refused."

(5) On February 9th, 1999, following the refusal of leave by Pizzarello, A.J., the applicant renewed her application for leave and sought a hearing of her renewed application before this court.

(6) I shall now return to the hearing before the Chief Justice on February 16th. As I understand the matter, at the hearing on February

16th, 1999 the Chief Justice made the following orders and gave the following directions *inter partes*:

(a) He refused an application on behalf of the applicant that he should disqualify himself from the proceedings.

(b) He refused to vacate the hearing date for the hearing of the substantive proceedings pending the determination of the issue of legal assistance. This was in effect an affirmation of the decision which he had reached in January.

(c) He refused leave to appeal from his earlier decision of January 13th, 1999 to vacate the hearing date for the hearing of the substantive proceedings.

(d) He made an order allowing the applicant's solicitors to withdraw from the record in respect of the substantive proceedings.

(e) (As an ex-officio member of the Court of Appeal) he refused leave to appeal from his own decision of January 21st, 1999 dismissing the application for further discovery.

At the conclusion of these applications, at which both parties were present, counsel and solicitors on behalf of the applicant withdrew. The Chief Justice then heard an uncontested application on behalf of the intended respondents that the substantive proceedings should be dismissed. This application was acceded to and an order dismissing the substantive proceedings was made.

(7) It is common ground that the applicant had 14 days within which to appeal from the order dismissing the substantive proceedings. It is also common ground that leave to appeal was required. Unfortunately, however, leave was not sought and there was confusion both about the preparation and the service of the notice of appeal. Ms. Grech, as counsel for the applicant, settled a notice of appeal which was lodged with the court on February 24th, eight days after the Chief Justice made his order. In the course of the next few days, however, Ms. Grech left the jurisdiction for a short period and the other lawyers dealing with the matter on behalf of the applicant were unaware that a notice of appeal had been settled.

(8) On the directions of the Court of Appeal, the case was mentioned to the court on Wednesday, March 3rd. On that occasion it was thought by all those in court that no notice of appeal had been lodged, let alone served on the intended respondents. A further notice of appeal was therefore prepared and lodged on the following day, March 4th. A copy of the notice of appeal stamped with the seal of the court, however, did not reach the intended respondents' solicitors until March 9th.

(9) On Friday, March 5th, 1999, the Court of Appeal gave further directions as to the hearing of any applications by the applicant. The court first made an order confirming that the undertakings which had been given to the court on November 9th, 1998 could be treated as discharged, though a fresh undertaking was given on behalf of the intended respondents that if the applicant wished to attend any future hearing of the substantive proceedings, if restored, she would be free to do so and would be able to enter the jurisdiction for that purpose. The court then directed that the applications to be heard on March 16th would be the application for leave to appeal from the order of the Chief Justice of February 16th dismissing the substantive proceedings, together with any application for an extension of time for service of the notice of appeal and also, if the substantive proceedings remained in being, the application for judicial review of the decision of the Chief Justice dated October 19th, 1998.

17 When the case came on for hearing on March 16th, the applicant was represented by Ms. Eleanor Sharpston of counsel from England, in addition to Ms. Grech. Mr. Vasquez appeared as *amicus curiae* and Mr. Baglietto appeared on behalf of the intended respondents. Ms. Sharpston had prepared for the court a substantial skeleton argument and she referred us to this document in addition to an earlier skeleton argument dated February 9th, 1999 which had been written by Ms. Grech. In the light of the material which was put before the court and the importance of the submissions, it was decided that the court should hear full argument in so far as appropriate within the confines of the applications for leave.

18 Ms. Sharpston began her submissions by drawing attention to the background facts and also to the background law, of which she had prepared a valuable summary. She stressed the importance of the principles of Community law relating to privacy and effectiveness and drew attention to the relevant provisions of the European Convention on Human Rights and Fundamental Freedoms. The authorities of the European Court of Justice set out in her skeleton argument were referred to by Ms. Sharpston and she pointed to particular passages in some of these authorities in support of her argument. The court was much indebted to Ms. Sharpston for her submissions. She underlined the importance of the case and the difficulty which the applicant would have if she did not have legal assistance. Indeed, the presentation of her case without legal assistance would be, it was submitted, impossible.

19 It was against that background that the court came to consider the relevant applications. It will be convenient to deal first with the application for leave to move for judicial review of the decision of the Chief Justice on October 19th, 1998. It was Ms. Sharpston's submission that in considering the appeal from the Registrar, the Chief Justice was acting in

the capacity of a statutory appellate authority and that accordingly his decision was susceptible to judicial review. Ms. Sharpston drew attention to the wording of r.16(3) of the Legal Aid and Assistance Rules and in particular to the words "any person aggrieved. . ." She submitted that this formula was a strong indication that the appeal to the Chief Justice was a statutory appeal. Moreover, the appeal was to the Chief Justice rather than to the Supreme Court. This was a further indication that the Chief Justice, when considering an appeal under the relevant rules, was acting in an administrative capacity rather than in a judicial capacity. The absence of any specific procedural provisions and the fact that the appeal was "in writing" without the need for any formal document provided further confirmation that this form of appeal lay outside the ordinary court system.

20 The arguments of Ms. Sharpston were opposed by both Mr. Vasquez as *amicus* and by Mr. Baglietto on behalf of the intended respondents. It was submitted that in dealing with appeals from the Registrar the Chief Justice was clearly carrying out a judicial function, and that in that capacity he was not amenable to judicial review.

21 I am afraid I am unable to accept Ms. Sharpston's submission. The formula "a person aggrieved" is not a clear indication that some statutory mechanism is being used. Indeed, it may be noted that in the Court of Appeal Ordinance the opening words of s.11(1) are: "Where a person is aggrieved by a judgment of the Supreme Court and wishes to appeal to the Court of Appeal. . ." However, as Mr. Baglietto pointed out in his skeleton argument, the Registrar herself is a judicial officer of the Supreme Court so that it is not surprising that in making provision for an appeal from her decision the words "Chief Justice" are used. I have no doubt that in making his determination on such an appeal the Chief Justice was acting in a judicial capacity.

22 It is to be remembered that until fairly recently the Chief Justice was the only judge of the Supreme Court, though provision was made for the appointment of an additional judge. No such appointment had been made at the time when the Legal Aid and Assistance Ordinance came into effect on January 1st, 1961. It is the function of the Supreme Court in Gibraltar to exercise control over inferior courts, including tribunals. This control is exercised in part by means of judicial review and it would be quite inconsistent with such a system of control by the Supreme Court to include a provision that the senior (and at one time the only) judge of that court was himself amenable to judicial review.

23 This conclusion is sufficient to dispose of the renewed application for leave to move for judicial review of the Chief Justice's decision of October 19th, 1998 to dismiss the appeal against the refusal of legal assistance to the applicant. As, however, in the course of her submissions in reply, Ms. Sharpston asked the Court of Appeal to consider the

possibility of giving leave to appeal out of time from the decision of the Chief Justice if it concluded that judicial review did not lie, it is right that I should say something about this alternative argument, even though I am quite satisfied that in any event the application is so late that it should be rejected on its merits.

24 Part III of the Court of Appeal Ordinance is concerned with appeals in civil cases. Section 22 governs the right of appeal. The opening words of this section are as follows: "Without prejudice to anything contained in the Constitution of Gibraltar an appeal shall lie to the Court of Appeal from any decision of the Supreme Court other than. . ." In the following paragraphs a number of exceptions are set out. The question therefore arises whether, because of the wide words used at the beginning of s.22, an appeal would lie from the decision of the Chief Justice dismissing an appeal from the Registrar refusing the grant of legal assistance in civil proceedings. This is not a matter on which we had detailed argument because it did not arise directly on the main application by the applicant. Nevertheless, as at present advised, I am satisfied that s.22 does not apply to such a decision.

25 It seems to me that the Legal Aid and Assistance Ordinance and the Rules made thereunder constitute a self-contained code which contains all the relevant provisions relating to the grant of legal aid and assistance. It is to be noted that although the Chief Justice is the senior judge of the Supreme Court, his functions in relation to legal assistance (and indeed to criminal legal aid) are imposed on him specifically in his capacity as Chief Justice. Thus, an appeal under r.16(3) does not lie to the Additional Judge of the Supreme Court sitting in that capacity. It may also be noted that in s.5 of the Legal Aid and Assistance Ordinance, whereas both sub-ss. (1) and (2) refer to an "appeal to the Supreme Court," sub-s. (3) provides that an appellant who has been refused legal aid for the purpose of an appeal is to apply to "the Chief Justice."

26 I am therefore of the opinion that when dealing with legal assistance (and indeed with legal aid) the Chief Justice acts by virtue of his office, though in a judicial capacity. Accordingly it follows that a decision of the Chief Justice under the Legal Aid and Assistance legislation is final and that there is no right to appeal to this court against such a decision.

27 For these reasons, I do not consider that the applicant has any remedy either by way of judicial review or by way of appeal in respect of the decision of the Chief Justice with regard to legal assistance.

28 I come next to the application for leave to appeal against the dismissal of the substantive proceedings on February 16th. It is not necessary to deal separately with the applications for extension of time, though unhappily the necessity for these applications underlines the fact,

to which I drew attention in my judgment on November 9th, 1998, that sometimes this matter has not been dealt with with the care which it merits.

29 In considering the application for leave, one must take account of the importance of the case and the background facts and law to which Ms. Sharpston has eloquently drawn attention. The court must also have regard to the circumstances in which the dismissal took place, and it cannot be overlooked that considerable latitude has been given to the applicant at every stage of these proceedings. A challenge to the decision of October 19th was not made for more than two months after the decision was given.

30 We have also had our attention drawn by Mr. Baglietto to the judgment of the European Court of Justice in *El-Yassini* v. *Home Secy*. (1), which was given on March 2nd, 1999. That decision was given on a reference under art. 177 of the Treaty of Rome and related to art. 40 of the EEC-Morocco Co-operation Agreement. At the hearing on November 9th, 1998, Mr. Stuart Isaacs, Q.C. acknowledged that there were difficulties in the applicant's case. Ms. Sharpston realistically recognized that these difficulties have been increased by the decision in *El-Yassini*.

31 On any application to set aside judgment the court must have some regard to the strength of the applicant's case. Ms. Sharpston has said everything that could possibly have been said on behalf of the applicant but I have come to the firm conclusion that it would not be right for this court to make an order which would have the effect of reviving these proceedings. I would dismiss the application for leave to appeal against the dismissal of the substantive proceedings.

WAITE and **GLIDEWELL, JJ.A.** concurred.

Applications dismissed.
