[1999–00 Gib LR 410]

R. v. COMMISSIONER OF POLICE, DURANTE, CORREA and GOVERNOR, ex parte OLIVERA and WRIGHT

SUPREME COURT (Pizzarello, A.J.): February 16th, 2000

Administrative Law—judicial review—discovery—discovery available where necessary for fair disposal of issues or saving of costs—since judicial review concerned with decision-making process, not documents considered by decision-maker, applicant to show error on face of record

Police—disciplinary proceedings—appeal—Governor to consider treatment of other officers accused of related offences—relevant to proportionality of sentence to offence—Chairman of Police Disciplinary Board to investigate matters of concern raised and report to Governor for purposes of appeal

The applicants sought judicial review of decisions by the respondents relating to their dismissal from the Royal Gibraltar Police.

The applicants were charged, along with other officers, with neglect of duty and falsehood in relation to the misapplication of police funds and a subsequent internal investigation. Having attended a preliminary hearing of the Police Disciplinary Board, the second applicant was absent for part of the substantive hearing on medical grounds. His counsel submitted a medical certificate on his behalf but was not instructed to make submissions or cross-examine witnesses in his absence. The hearing continued and both applicants were found guilty of the charges and fined for the neglect of duty offences and dismissed for the falsehood offences. The Commissioner of Police, as Chairman of the Board, stated in his decision that the Board had heard evidence requiring further investigation. The applicants' appeals against the findings of guilt and the sentences imposed were referred by the Governor to the Public Service Commission for its advice. The Commission advised that the findings and sentences should be upheld, and the appeals were dismissed.

The applicants obtained leave to seek judicial review of the sentences imposed on them by the Board (the first three respondents) and the Governor (the fourth respondent), and of the decision to proceed with the disciplinary hearing in the second applicant's absence. The second applicant applied for an order for disclosure by the Board and the Governor of all documents in the possession of the police, the Personnel Department and other Government Departments relating to his referral to the medical board, the Attorney General having refused to release them,

and both applicants applied for an order that the Commissioner of Police disclose whether he had in fact conducted any investigation arising from the evidence heard during the disciplinary proceedings.

They submitted that (a) the correspondence relating to the second applicant's medical boarding was needed for the court to dispose fairly of the judicial review proceedings, since it would show that the respondents had known of his illness and had delayed in referring him to a medical board in order to secure his dismissal before he could be invalided out of the force; (b) the documents could easily be obtained from the Personnel Department, which served the police as well as other Government Departments; and (c) whether the Commissioner of Police had conducted further investigations, particularly regarding the conduct of other officers and their treatment, was relevant to the issue of proportionality between the applicants' offences and the sentences imposed.

The first, second and third respondents submitted in reply that (a) the application did not fall within the ambit of the rules permitting discovery in judicial review, since the documents sought in the first request were not within the power or control of the police, but rather were held by the Personnel Department of the Government which was not a party to the proceedings, and the second request was in the nature of an interrogatory; and (b) the requests were merely a fishing exercise, since judicial review was not sought against the medical board or the Commissioner of Police, and there was no error nor anything unsatisfactory on the face of the record of the Disciplinary Board.

The fourth respondent submitted that (a) the application exceeded the ambit of the judicial review proceedings for which leave had been granted; (b) the Personnel Department was not the agent of the police for the purpose of giving discovery; and (c) the interrogatory relating to the Commissioner of Police's investigations did not concern the Governor, since he was bound only to consider the proportionality between the offence committed by the applicants and the sentence imposed by the Board, and not the comparative treatment of other officers.

Held, ordering disclosure as follows:

(1) The process of discovery was to be used sparingly in judicial review proceedings, as the courts were reluctant to permit applications amounting to "fishing." Since the focus of judicial review was the decision- making process rather than the documents considered by the decision-makers, the applicants would have to establish that the documents they sought were necessary for the fair disposal of the issues in the case or for saving costs, and point to some inaccuracy or something unsatisfactory on the face of the record as the basis for their application. The same principles applied to interrogatories (para. 10).

(2) The second applicant's medical history was not sufficiently relevant to his application for judicial review of the Board's decision against him on the ground that it had proceeded in his absence. Accordingly, there

was no reason for the correspondence relating to his medical boarding to be examined, even though it could, in all probability, be obtained from the Personnel Department by the Commissioner of Police if the court so ordered (para. 20).

(3) However, the Commissioner of Police would be ordered to give the information sought in the second part of the application, since the circumstances of the case affected the structure, integrity and administration of the police and should have been taken into account when the applicants were sentenced. The Governor should have had before him and considered the response of the Commissioner, as Chairman of the Board, to the evidence adduced, including the results of his investigations into matters of concern raised by that evidence (para. 21).

Legislation construed:
Rules of the Supreme Court, O.24, r.3(1):

> "Subject to the provisions of this rule and rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party."

O.26, r.4(2): "Without prejudice to the provisions of paragraph (1), a party may apply to the Court for an order giving him leave to serve on any other party interrogatories relating to a matter in question between the applicant and that other party in the cause or matter."

J.J. Neish, Q.C. for the applicants;
G. Licudi for the first, second and third respondents;
C. Pitto, Crown Counsel, for the fourth respondent.

1 **PIZZARELLO, A.J.:** There were two matters addressed in the application by summons dated September 30th, 1999:

(a) The second applicant applied for an order that the respondents disclose all documents in the possession of the Royal Gibraltar Police, Personnel Department or any other Government Department relating to the question of the medical boarding of the second applicant, and that all such documents be made available for inspection on behalf of the second applicant.

(b) Both applicants applied for an order that the first defendant disclose whether he has conducted any investigation arising from evidence heard during the course of the disciplinary proceedings which resulted in the dismissal from the Royal Gibraltar Police of the two applicants.

2 There was an affidavit sworn and filed by Mr. Neish, Q.C. That affidavit merely exhibited the correspondence relating to the matters identified in the summons, and at the hearing of the summons Mr. Neish relied, in support of the applicants' application, on the bundle which had been produced to the court on the application for leave to issue proceedings for judicial review. Mr. Neish's case was that these matters arise out of the disciplinary proceedings.

3 As to the first matter, Const. Wright had attended a preliminary hearing but was not at the substantive hearing on medical grounds and a medical certificate was produced to the Board. The correspondence of medical boarding is important. Constable Wright was genuinely ill and unable to attend. The establishment and the police knew this and had committed themselves to a medical board, but they delayed and arranged its deliberation so that the Disciplinary Board would be enabled to deal with Const. Wright before he was medically boarded out. This, Mr. Neish submitted, was relevant to show that "the system" was out to get rid of Const. Wright and was also relevant to show that the senior echelons of the police and the establishment were aware that Const. Wright was unwell.

4 As for the second matter, in his decision the Commissioner of Police said he had heard evidence which required certain investigation. The main argument would be that in all the circumstances the sentences passed were unreasonable, and part of the appellants' case which affects the application for judicial review is that it is relevant and necessary to know what action the police took in relation to other officers caught up in the situation which affected both Const. Olivero and Const. Wright.

5 Mr. Neish submitted that it is necessary, in order to review the reasonableness of the decision on sentence regarding falsehood, to have regard to the no less serious instances of falsehood right up to the Governor and the serious instances of misuse of public funds. Have these not been investigated to date? And if not, why not? And why was the full force of the law brought against these two police officers, when more senior officers appear to have been promoted since then? In judicially reviewing this matter, the court will be entitled to look at the broader picture to see if any reasonable tribunal (and the Governor, in reviewing the Board's decision) could have come to the conclusion they did. It should not be constrained in the straitjacket of the narrow facts relating to Const. Olivero and Const. Wright.

6 Mr. Neish informed the court that he had requested the Attorney-General to release the information he sought, but the request had been refused—hence the summons. The application brought is properly within the scope of O.24, r.3.

7 Mr. Licudi, on behalf of the first, second and third respondents, opposed the application. He made three brief points:

(a) This is not an application which falls within the rules allowing discovery. The requests made are totally irrelevant within the narrow issues to which the application for judicial review is directed.

(b) The sentence is in respect of a falsehood, and proceedings in regard to the medical board have not themselves been made the subject of an application for judicial review.

(c) The request is a fishing exercise and that is not appropriate.

8 As for the first part of the application for discovery, the documents sought are not in the power and control of the first three respondents. Discovery is sought of Government material which the respondents do not have. That material is in the hands of the Personnel Department, *i.e.* in the control of Government, which is not a party. The Attorney-General cannot be joined because there is no decision of his.

9 As for the second part of the application, what is sought is more akin to interrogatories than discovery, but the principles are the same. (Mr. Neish conceded that para. (b) of the application is in the nature of an interrogatory). The first three respondents were members of the Disciplinary Board. The Commissioner is separate from the Board and in his capacity as Commissioner his role as Chairman of the Board is distinct. His investigation as Commissioner is not undertaken as a member of the Board.

10 Looking at general principles, Mr. Licudi refers to de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th ed., para. 1–159, at 91 (1995):

> "Discovery is available on judicial review as are other interim measures but the courts have stated that it should be used sparingly if the procedure is to be a success; the decisions are characterised by a judicial reluctance to encourage 'fishing'. The applicant will have to establish that documents are necessary for disposing fairly of the case or for saving costs; if the applicant's case does not take off unaided, the courts will be reluctant to assist and it has been stated that discovery will only be allowed where there is something on the face of the record or in an affidavit which suggests an inaccuracy or which is otherwise unsatisfactory. The Court of Appeal has been unwilling to allow discovery of reports referred to in affidavits because the supervisory nature of judicial review meant that what was under consideration was the decision-making process, not the contents of documents considered by the decision-maker or his or her state of mind."

So the accent is on "sparing," "with reluctance" and "not for fishing." There has to be something unsatisfactory on the face of the record, especially as here there is no substantive affidavit in support. Under O.26, r.4 and the notes at paras. 26/4/9 and 26/4/11, at 509 and 510 in regard to interrogatories, the principles are the same.

11 Dealing with para. (a) of the application, the proceeding taken by Const. Wright depends entirely on the construction of the Regulations, so what is the point of trawling through the correspondence when judicial review has not been sought against the medical board? There is no affidavit, so one is left with an error on the face of the record and no part of the record had been identified as flawed, so it is not known what errors are suggested, and all the court has to do is to look at the record to see if there is an error—nothing to do with extraneous documents and so it is a fishing exercise.

12 The transcript of January 19th, 1998 reads:

> "*C.O.P.*: I do believe that Mr Wright is not joining us today.
>
> *Neish*: That is correct, Mr. Chairman. I have a letter addressed to whom it may concern from Dr. Cecil Montegriffo.
>
> *C.O.P.*: Thank you very much, thanks Mr. Neish. The Board was aware of this and I accept this note from Dr. Montegriffo. The Board will continue to hear evidence against Mr. Wright if this is acceptable within the terms of the Board for the disciplinary hearings.
>
> *Neish*: That is a matter for the Board, Mr. Chairman. I have no instructions to make any submissions or cross-examine any officer on behalf of Mr. Wright in these circumstances.
>
> *C.O.P.*: Yes, thank you very much. The Board is quite prepared to hear the evidence in Mr. Wright's absence. Thank you."

That is the decision and it is only a matter of construction. If there is an error it is there in the construction.

13 In the grounds of appeal, on this point, it is suggested:

> "A medical certificate was produced to the Disciplinary Board from the Consultant Psychiatrist of the Gibraltar Health Authority, which certificate was cursorily disregarded and the proceedings ordered to continue. Constable Wright will further contend that if the conditions of employment applying to him had been fairly and properly applied he should have been sent for a medical before the disciplinary hearing was held by the Board. Constable Wright contends that the delay in referring him to a medical board was unlawful, premeditated and co-ordinated with the timing of the disciplinary

hearing in order to deprive him of the opportunity of being medically boarded out of the service. In the premises, it is alleged that the disciplinary proceedings against Const. Wright are a nullity."

14 All those are allegations which do not amount to evidence. And there is no evidence that there were machinations to which this request is directed: no evidence on affidavit nor error on the face of the record to justify those documents to come in. It is nothing more than an application in the hope that something might turn up, and that is regarded as "an illegitimate exercise, at least in the absence of a prima facie reason to suppose that the deponent's evidence is untruthful": see *de Smith, Woolf & Jowell* (*op. cit.*, para. 15–032, at 671). As to para. (b) of the application, it and the fax of August 5th, 1999 are fishing.

15 Mr. Pitto adopts Mr. Licudi's submissions. He submits that the application is going beyond the limits of what leave has been given for. Furthermore, para. (b) does not concern the fourth defendant. Those matters lie in the domain of the police and the Governor is not seised of this when he is considering the appeal from the Disciplinary Board. The Governor is bound to consider the proportionality *qua* offence committed by the applicants and on which they have been found guilty. The Governor does not have to take regard of the situation of other police officers. They were dealt with differently.

16 In reply, Mr. Neish submitted that it was wrong to suggest that the Governor should circumscribe his review of the sentence to the narrow proportionality of the sentence to the offence. There was the matter of falsehood which relates to the applicants but there were other serious matters of falsehood on the part of other officers which ought to have been considered. And different stances were taken as between the several police officers who were caught up in the Deputy Commissioner's web of deceit. And if there has been no investigation, it reinforces the thrust of the "proportionality" issue which is the heart of the matter.

17 On the question of discovery there is only a narrow range of documents concerned. There are allegations of *mala fides* in respect of the decision to proceed in the absence of Const. Wright and they are necessary to dispose fairly of the case. With regard to the submission for the respondent that these documents are in the control of the Personnel Department, an arm of the Government which is not a party to this application, and that there cannot for that reason be an order directed against it, that cannot be right. The Personnel Department, in Mr. Neish's submission, is an organ of Government which serves all departments and acts for the Royal Gibraltar Police and it is within the Commissioner's jurisdiction to require production of these documents.

18 Mr. Licudi submitted that the Personnel Department is another and distinct arm of Government.

19 Mr. Pitto submitted that the Personnel Department is not an agent of Royal Gibraltar Police.

20 In my view, Mr. Licudi is right with regard to the application in para. (a). Constable Wright appeals against the findings of guilt against him on the grounds that the proceedings against him were conducted in his absence whilst he was medically unfit to attend. There is no substantial reason why his medical history should be the subject of scrutiny in this application for judicial review. I therefore do not have to deal with the difficulties in relation to production from the Personnel Department, but I hazard the opinion that Mr. Neish is right in his submission that, were it necessary, it would be within the Commissioner of Police's power to require them from the Personnel Manager for the purpose of complying with an order of the court—the Personnel Department being the instrument through which the Commissioner is enabled to progress such matters.

21 As to para. (b) of the application, I am of the opinion that the circumstances of this matter so affect and affected the structure, integrity and administration of the Royal Gibraltar Police that due consideration of all those circumstances has to be taken into account when a sentence is imposed. I do not agree that the Governor must look narrowly at the proportionality of the offence *qua* offence when reviewing a sentence. He ought to consider the reaction of the Chairman of the Disciplinary Board to the evidence that was brought before the Board, and the Commissioner ought to have (I know not whether he has done so already) followed up the matters which caused the Chairman concern and placed the results before the Governor for his consideration. I make the order requested in para. (b) of the summons.

Order accordingly.
