

[1999–00 Gib LR 563]

**COMMISSIONER OF POLICE v. OLIVERA and WRIGHT**

**WRIGHT v. COMMISSIONER OF POLICE, DURANTE,  
CORREA and GOVERNOR**

COURT OF APPEAL (Neill, P., Glidewell and Staughton, J.J.A.):  
September 25th, 2000

*Police—disciplinary proceedings—Commissioner as Chairman of Board—Chairman’s statement as Police Commissioner, e.g. that further police investigations desirable, not binding on Police Disciplinary Board or Governor on appeal*

*Police—disciplinary proceedings—appeal—Governor to decide appeal against sentence on material before him—no obligation to adjourn appeal pending further police investigation or to conduct further enquiries—proportionality of sentence to offence to be assessed by reference to established facts*

The respondents sought judicial review of decisions by the Police Disciplinary Board and the Governor relating to their dismissal from the Royal Gibraltar Police.

The respondents were charged, together 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 respondent was absent for part of the substantive hearing on medical grounds. The hearing continued in his absence and both respondents were found guilty of the charges. They were 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. On the advice of the Public Service Commission, the respondents’ appeals were dismissed by the Governor.

The respondents brought proceedings for judicial review of the sentences imposed on them by the Board and the Governor, and of the Board’s decision to proceed with the disciplinary hearing in the second respondent’s absence. The Supreme Court (Pizzarello, A.J.) ordered that the Commissioner of Police disclose whether he had, in fact, conducted any investigation (in particular, relating to the comparative treatment of other officers involved) arising from the evidence heard during the

disciplinary proceedings. However, it refused to order disclosure of all documents in the possession of the police or any Government Department relating to the second respondent's referral to the medical board, on the ground that they were not sufficiently relevant to the application. The proceedings in the Supreme Court are reported at 1999–00 Gib LR 410.

On appeal, the Commissioner of Police submitted that (a) the court had erred in making the order against him, since the question of whether, as Commissioner, he had conducted any investigation was irrelevant to judicial review of the decisions of the Police Disciplinary Board and the Governor; (b) any such investigation could not have been taken into account by the Board, unless the proceedings before it had been adjourned, or by the Governor, since the issue had not been raised in the appeal to him; (c) neither the Board nor the Governor could have compared the culpability of other officers investigated with that of the respondents, since the nature of other possible offences was speculative and no meaningful comparison could be drawn; (d) interrogatories should, in any event, be used only sparingly in judicial review proceedings; and (e) it was in the public interest that police investigations remain confidential.

The respondents argued in reply that (a) to distinguish between the Commissioner's functions was artificial, and, having made his comments in the context of his role as Chairman of the Disciplinary Board he had a duty to conduct an investigation; and (b) the evidence at the disciplinary hearing had disclosed a clear need to investigate the complicity of more senior police officers in the events resulting in the charges laid against the respondents.

On his cross-appeal, the second respondent submitted that the court should have ordered discovery of the documents relating to his medical boarding, since they were relevant to show that the police had known of his illness and, being biased against him, had delayed in referring him to a medical board in order to secure his dismissal before he could be invalidated out of the force.

The Board and the Governor submitted in reply that since the judicial review application concerned the Board's decision to continue with the disciplinary hearing in the second respondent's absence, the material sought was irrelevant.

**Held**, allowing the appeal and dismissing the cross-appeal:

(1) The Supreme Court had erred in ordering the Commissioner of Police to answer the respondent's interrogatory, since the judicial review proceedings concerned the decisions of the Disciplinary Board and the Governor, and not any decision by the Commissioner in his capacity as chief officer of the police as to whether to conduct further investigations. Under the Police (Discipline) Regulations, 1991, the Chairman of the Board need not be the Commissioner and could be another police officer. Furthermore, neither the Board nor the Governor had been requested to adjourn or to defer their decision on sentence to permit further investi-

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gations, and neither had a duty to conduct any. The Governor had only to conduct the appeal on the basis of the material before him, taking into account the advice of the Public Service Commission. The offences had to be judged on their merits and not in relation to other, non-comparable events. The Commissioner's appeal would be allowed (paras. 29–33).

(2) The second respondent's appeal would be dismissed, since the discovery sought relating to his medical boarding lay outside the ambit of the proceedings dealing with the Disciplinary Board's decision to continue its hearing in his absence. In any event, it appeared from the evidence that neither the Board nor the Governor was responsible for the failure to arrange a medical boarding for him (paras. 35–38).

**Case cited:**

(1) *Payas v. R.*, 1997–98 Gib LR N–3.

**Legislation construed:**

Police (Discipline) Regulations, 1991 (L.N. No. 90 of 1991), reg. 20(3):

“An appeal against a decision of a Disciplinary Board shall be to the Governor.”

reg. 21(3)(b): “[On] an appeal under regulation 20(3):—

- (i) the Commissioner shall, within 10 days of receipt of the Notice of Appeal and any written submissions in support of the grounds of appeal, cause a copy . . . to be sent to the Chairman of the Disciplinary Board . . .”

reg. 22(1): The relevant terms of this sub-regulation are set out at para. 12.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.73(1):

“The Governor, acting in his discretion, may refer to the Public Service Commission for their advice any question that relates to the . . . dismissal or disciplinary control of public officers . . .”

*G. Licudi* for the Commissioner of Police and other members of the Police Disciplinary Board;

*C. Pitto*, *Crown Counsel*, for the Governor;

*J.J. Neish*, *Q.C.* and *D. Bossino* for the respondents.

1 **NEILL, P.:** Before the court are two appeals from the order of Pizzarello, A.J. dated February 16th, 2000 in proceedings for judicial review brought by Mr. Manuel Olivera and Mr. Ian Wright. Where it is convenient to do so, I shall call Mr. Olivera and Mr. Wright “the applicants.” In the first appeal (Civil Appeal No. 5 of 2000) the appellant is the Commissioner of Police (Mr. Alan Castree), who appeals against one part of the judge's order. In the second appeal (Civil Appeal No. 7 of 2000) the second applicant appeals against the other part of the judge's order. We have heard the two appeals together.

2 In 1995 the applicants were Police Constables in the Royal Gibraltar Police and worked as members of the drugs squad under the command of the then Deputy Commissioner of Police, Mr. Mario Payas.

3 Between October 23rd and 27th, 1995 Mr. Payas convened four meetings which were attended by the applicants and other members or former members of the drugs squad, in which he informed them that he had to account for certain moneys which had been spent at various times in the secret purchase of equipment for use in undercover operations. He was in the process of presenting a report to the Commissioner of Police which would result in the matter being resolved. Mr. Payas further informed the applicants that two police officers would be coming from the United Kingdom to investigate the disappearance of Pta. 895,000. He told them that if asked they should state that the Pta. 895,000 had been placed in the safe and that sums of £2,810 and £4,000 had been paid to an informer.

4 On or about October 27th, 1995, the applicants were questioned by two police officers from Scotland Yard about a number of matters and, in the course of the questioning, they gave answers which, in the event, proved to be false or misleading.

5 In June 1996 the applicants were charged with a number of disciplinary offences which included the offences of neglect of duty and falsehood. Meanwhile, Mr. Payas had been charged with criminal offences for which he was later sentenced to a term of imprisonment (see *Payas v. R.* (1)).

6 In due course a Disciplinary Board was established to try the disciplinary offences alleged against the applicants and a number of other police officers. The members of the Board were the new Deputy Commissioner of Police (Mr. Castree), Supt. Durante and Chief Insp. Correa.

7 On July 3rd, 1997 the Disciplinary Board held a preliminary hearing. At that hearing a number of submissions were made by counsel, including submissions as to the composition of the Board and other matters. At the conclusion of these submissions the hearing was adjourned to enable the Board to consider its decision.

8 On July 28th, 1997 the Disciplinary Board reconvened and the Chairman announced the Board's decision on the earlier submissions. The applicants were informed that a date for the substantive hearing would be fixed. It is to be noted that both applicants attended the hearing on July 3rd, 1997. They also attended on July 28th, but it appears from the record that Mr. Wright decided not to be present for the second part of the hearing on that day.

9 The substantive hearing of the charges against the applicants and the other officers took place between January 19th and 28th, 1998. At the conclusion of the hearing, Mr. Olivera was found guilty of six charges of

neglect of duty and of one charge of falsehood, and Mr. Wright was found guilty of one charge of neglect of duty and one charge of falsehood. The sentences imposed on both officers on the charges of neglect of duty were fines. For the offences of falsehood both officers were sentenced to dismissal from the service but without loss of pension benefits.

10 It is to be noted that Mr. Olivera attended the substantive hearing but did not give evidence. Mr. Wright did not attend before the Disciplinary Board but his counsel, Mr. Neish, handed in a medical certificate on his behalf. I shall read a passage from the record:

“The Chairman of the Board said: ‘I do believe that Mr. Wright is not joining us today,’ and Mr. Neish replied: ‘That is correct, Mr. Chairman. I have a letter addressed to whom it may concern from Dr. Cecil Montegriffo,’ and then the Chairman said:

‘Thank you very much, thanks Mr. Neish. The Board were aware of this and I accept this note from Dr. Montegriffo. The Board will continue to hear the evidence against Mr. Wright if this is acceptable within the terms of the Board or the disciplinary hearing.’

Mr. Neish replied: ‘That is a matter for the court, Mr. Chairman. I have no instructions to make any submissions or cross-examine any officer on behalf of Mr. Wright in these circumstances.’ And the Chairman replied: ‘Yes, thank you very much. The Board is quite prepared to hear the evidence in Mr. Wright’s absence. Thank you.’”

It will be seen that by January 1998, Mr. Castree had become the Commissioner.

11 On February 2nd, 1998 the applicants gave notice of their intention to appeal both against the findings of guilt and in relation to the punishments which had been imposed. On February 27th the applicants delivered their grounds of appeal and their submissions in support of the appeal. On May 8th, 1998 a response to these submissions was delivered on behalf of the Disciplinary Board. On May 18th, 1998 a reply to this response was delivered on behalf of the applicants.

12 The appeal against the decision of the Disciplinary Board lay to the Governor under reg. 20(3) of the Police (Discipline) Regulations, 1991, made under the Police Ordinance. On receipt of the appeal documents, the Governor, in exercise of “his statutory rights under s.73 of the Gibraltar Constitution Order” and in accordance with reg. 22(1) of the 1991 Regulations, decided to “refer the appeal to the Public Service Commission for their advice.”

13 On September 15th and 16th, 1998 the Public Service Commission sat to hear the submissions of counsel in relation to the appeal. It was

agreed with counsel that the proceedings before the Commission should be conducted on the papers and by way of argument. No evidence was heard. On October 14th, 1998 the Public Service Commission tendered its advice to the Governor. The Commission advised, in relation to the findings against the two applicants, that the findings of guilt should be upheld. The Commission also advised that the sentences imposed should be upheld against both applicants. The Commission added:

“We are also satisfied that deliberate falsehoods told to senior officers in the course of an investigation merited Wright’s and Olivera’s dismissal from the service without loss of pension rights. To hold otherwise would be to undermine society’s expectations of law enforcement officers.”

By letters dated October 23rd, 1998 the applicants were informed that their appeals had been dismissed.

14 On January 20th, 1999 the applicants applied for leave to apply for judicial review. In their notice of application the applicants sought an order of certiorari quashing the decisions of the Governor and the Disciplinary Board, and also an order reinstating both applicants in their posts as Police Constables in the Royal Gibraltar Police.

15 On March 25th, 1999 leave was granted to the applicants to move for judicial review in respect of: (a) the sentences imposed on them; and (b) the decision to proceed with the disciplinary hearing in the absence of Mr. Wright.

16 On September 30th, 1999 a summons was issued on behalf of the applicants, seeking certain interlocutory relief in the judicial review proceedings. First, Mr. Wright sought an order against the three members of the Disciplinary Board and against the Governor that they should disclose all documents in the possession of the Royal Gibraltar Police, the Personnel Department and other Government departments relating to the question of the medical boarding of Mr. Wright, and that all such documents be made available for inspection on behalf of Mr. Wright.

17 In addition, by the same summons, both applicants applied for an order that the Commissioner of Police disclose whether he had “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 applicants.

18 The summons was heard by Pizzarello, A.J. on November 16th, 1999. It will be convenient to deal with the two applications in the summons separately. I shall deal first with the application by both applicants which forms the subject-matter of Civil Appeal No. 5 of 2000, *i.e.* the appeal by the Commissioner.

**The interrogatory to the Commissioner**

19 It was accepted that the application in the second paragraph of the summons dated September 30th, 1999 was in effect an interrogatory directed to the Commissioner of Police. The question posed was whether he had conducted any investigation arising from evidence heard during the course of the disciplinary proceedings.

20 It was argued, on behalf of the applicants, that the Commissioner of Police had made it clear, as the Chairman of the Disciplinary Board, that he intended to apply a common standard of fairness in dealing with all officers who had committed offences. Attention was drawn to some of the words used by the Commissioner of Police before the sentences of the Board were pronounced. He said: "I had hoped that this hearing would enable me to close the door on this sad affair but the Board has heard matters presented in evidence which may need to be investigated further."

21 It was said that the punishment of the two applicants should not be considered in isolation and that the Commissioner of Police should have investigated the other officers whose alleged misconduct had been referred to in the course of the proceedings. The fairness and the proportionality of the sentences on the two applicants could not be judged without the result of these investigations being known.

22 Pizzarello, A.J. gave his ruling in chambers on February 16th, 2000. In substance, he accepted the arguments on behalf of the applicant. In his written ruling, he said (1999–00 Gib LR 410, at para. 21):

"... 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."

23 The judge therefore made the order sought under the second paragraph of the summons and ordered the Commissioner of Police to disclose to the applicants whether he had conducted any investigation arising from the evidence heard during the course of the disciplinary proceedings.

24 The Commissioner has appealed. In the memorandum of appeal he set out in six paragraphs the errors which he suggested the judge made in

making the order for disclosure. The main ground, and the ground that was principally relied on in oral argument before us, was that the question of any subsequent investigation by the Commissioner was irrelevant to any matter which the court could look at in judicial review proceedings relating to the decision of the Disciplinary Board or the decision of the Governor on appeal.

25 This argument was developed on the following lines:

(a) The judicial review proceedings were concerned with the decisions of the Disciplinary Board and of the Governor. They were not directed to any decision made by the Commissioner in his investigatory role.

(b) As for the decision of the Board, it was clear that subsequent investigations could not have been taken into account unless there had been an adjournment before the sentences were passed. No adjournment had been sought by either applicant, and it was to be remembered that Olivera was represented by leading counsel.

(c) As to the decision of the Governor, it was to be noted that there was no mention of any subsequent investigations in the appeal documents relating to the appeal to the Governor. One of the grounds relied on in support of the appeal against the findings of guilt was that the applicants had been unfairly selected for disciplinary proceedings, but this complaint related to a selection made at the end of the extensive earlier investigations. The appeal to the Governor did not introduce any issue about later investigations.

(d) In any event, neither the Board nor the Governor could have made any comparison with the culpability of any officer subsequently investigated without conducting a mini-trial. The comparison would not have been of like with like. The practice sometimes adopted of postponing the sentencing of a defendant who has pleaded guilty until after the trial of co-defendants provided no satisfactory parallel. In such cases the offences are known and closely linked. In the present case the nature of other offences, if any, was unknown and speculative.

26 It was further argued that it should be remembered that interrogatories are to be used sparingly in judicial review proceedings, and that account should also be taken of the fact that it was in the public interest for police investigations to be kept confidential.

27 On behalf of the applicants, on the other hand, it was argued that it was artificial to distinguish between the role of the Commissioner as the head of the police and his role as the Chairman of the Board. In the light of his remarks in passing sentence, he should have carried out some further investigations.

28 Counsel emphasized that these were junior officers and that the



record disclosed that other officers, against whom no proceedings had been brought—as far as was known—had acted improperly. Our attention was drawn in particular to passages in the record of the hearing before the Board showing clearly that one officer had, in fact, admitted complicity in the provision of a false report to the Governor.

29 I can well understand the judge's comment that the circumstances surrounding the case affected the integrity and the administration of the Royal Gibraltar Police, but it is also important to bear in mind the decisions to which these proceedings relate and the nature of proceedings for judicial review.

30 The decisions that will be under consideration when the substantive hearing takes place are the decision made by the Disciplinary Board and the subsequent decision of the Governor on appeal. The proceedings will not be directed to any decision made by the Commissioner as the chief officer of police, nor, in particular, to any decision made by him in that capacity regarding further investigations. It is, of course, the case that in this instance the Chairman of the Disciplinary Board was Mr. Castree—first when he was Deputy Commissioner and later, in January 1998, after he had become Commissioner—but it is clear from reg. 21(3)(b) of the 1991 Regulations that the Chairman of the Disciplinary Board may be an officer other than the Commissioner.

31 The Disciplinary Board had to reach decisions on the evidence then before it. There was no request for an adjournment before the sentences were passed. I cannot see that the Board was under any duty to postpone sentence until further enquiries into other matters were carried out. It is to be remembered that detailed and prolonged enquiries had already taken place before the hearing on July 3rd, 1997.

32 I turn to consider the position of the Governor. It was not suggested in the documents constituting the appeal to him that the matter could not be resolved until the Commissioner of Police had carried out further enquiries. Furthermore, it was not for the Governor in his appellate capacity to initiate any enquiries. He had to make a decision on the basis of the material before him and in the light of the advice received from the Public Service Commission. The offences had to be judged on their merits. In my view, there was no obligation on the Governor (particularly in the absence of any request for a postponement) to defer a decision until the result of further enquiries—which might or might not take place and which might be concerned with events which would disclose no satisfactory basis for comparison with the cases of Mr. Olivera and Mr. Wright—was known.

33 I would therefore allow the appeal by the Commissioner.

**Documents relating to the medical boarding of Mr. Wright**

34 An application for the disclosure of documents relating to the medical boarding of Mr. Wright formed the subject-matter of the first part of the summons dated September 30th, 1999, and is the subject of Civil Appeal No. 7 of 2000.

35 I understand that Mr. Wright will seek to argue, on the hearing of the judicial review proceedings, that he was the victim of bias and that there was undue delay in arranging an appointment for him to attend a medical board that could have considered his discharge from the police on medical grounds. The suggestion will be that the authorities wished him to be discharged for misconduct rather than on medical grounds.

36 I have read the letters that passed between Mr. Wright's solicitors and the Personnel Manager between September 26th, 1997 and August 21st, 1998. As these letters may be referred to in the course of the judicial review proceedings themselves, I do not propose to comment on their contents. It seems clear, however, that if there was a failure to arrange a medical board at the right time it was not the responsibility of the Disciplinary Board or of the Governor in his appellate capacity. Indeed, at this stage I am not prepared to assume that there was a legal obligation on anyone to arrange a medical board for Mr. Wright.

37 However that may be, I am quite satisfied that the discovery sought lies wholly outside the ambit of the present proceedings which concern the decision of the Disciplinary Board to continue with the hearing in Mr. Wright's absence. I would therefore agree with the judge that this application should be dismissed.

38 For these reasons, I would therefore allow the appeal by the Commissioner and dismiss the appeal by the second applicant.

**GLIDEWELL and STAUGHTON, J.J.A.** concurred.

*Appeal allowed. Cross-appeal dismissed.*

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