

[2003–04 Gib LR 126]**FORD v. R.**

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Hope of Craighead, Lord Rodger of Earlsferry and Sir Philip Otton): April 9th, 2003

Courts—Judicial Committee of Privy Council—leave to appeal—exhaustion of local remedies—special leave to appeal not granted in practice until all local remedies exhausted—remedies against decision of magistrates’ court that no abuse of process or violation of human rights are statement of case to Supreme Court or application for judicial review

The petitioner was charged in the magistrates’ court with assault.

She was due to appear in the magistrates’ court on June 20th, 2001, having only received written notice to appear on June 12th. She claimed that this therefore constituted an abuse of process as it was a breach of her right to a fair hearing within a reasonable time, under s.8(1) of the Gibraltar Constitution and under art. 6(1) of the European Convention on Human Rights. The magistrates found that there had been proper service in accordance with s.82 of the Magistrates’ Courts Rules 1968, attributing the delay to industrial action within the Post Office. The petitioner then lodged a notice of appeal in the Supreme Court, but was informed that this appeal procedure did not apply to her case and was advised that the procedure she should adopt was to apply to the magistrates’ court for a case to be stated or to seek judicial review. She did not accept this advice and regarded it as having been based on a decision by the Chief Justice against which she was entitled to appeal, and attempted to lodge an appeal against it. The Registry of the Supreme Court refused to accept the notice of appeal on the ground that there had been no decision by the Chief Justice, and explained this to the petitioner whilst repeating the advice about the correct avenues of appeal. She then applied to the Judicial Committee for special leave to appeal.

The petitioner submitted that (a) the rejection of her notice to appeal and advice given by the Registry of the Supreme Court had been based upon a decision by the Chief Justice, against which she was entitled to appeal; (b) the case had been handled badly by the authorities from the outset; (c) she had done everything in her power to obtain justice and had exhausted every local remedy; and (d) events had shown that it was impossible for her to have a fair hearing in Gibraltar.

Held, dismissing the petition:

P.C.

FORD v. R. (Lord Hope of Craighead)

(1) The petition for leave to appeal would be dismissed on the ground that the petitioner had not exhausted all local remedies, which was a precondition for the Judicial Committee to grant special leave to appeal. There had been no determination of the merits of the appeal from the decision of the magistrates by the Supreme Court, or by the Court of Appeal. The petitioner had chosen a route of appeal which was not available to her, but there were routes she could have chosen (*i.e.* the statement of a case for the opinion of the Supreme Court under s.310 of the Criminal Procedure Ordinance or an application for judicial review), and had not therefore exhausted all local remedies (paras. 9–10; para. 12; para. 15).

(2) She had not been entitled to appeal against the rejection of her notice to appeal by the Registry of the Supreme Court because it had not been based upon any decision of the Chief Justice. He had simply given information in an administrative capacity as he was entitled and indeed bound to do (para. 8).

Legislation construed:

Criminal Procedure Ordinance (1984 Edition), s.293: The relevant terms of this section are set out at para. 11.

s.310(1): The relevant terms of this sub-section are set out at para. 12.

(4): The relevant terms of this sub-section are set out at para. 13.

(6): The relevant terms of this sub-section are set out at para. 12.

Magistrates' Court Rules 1973 (L.N. 1973/012), r.2:

“The Magistrates' Courts Rules 1968 of the United Kingdom as amended from time to time shall apply in the magistrates' court in so far as they may be applicable thereto and with such modifications as the circumstances of Gibraltar may require.”

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.8(1): The relevant terms of this sub-section are set out at para. 3.

s.62(5): The relevant terms of this sub-section are set out at para. 9.

Magistrates' Courts Rules 1968 (S.I. 1968/1920), s.82: The relevant terms of this section are set out at para. 4.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953)), art. 6(1): The relevant terms of this article are set out at para. 3.

The petitioner appeared in person;

P. Hamlin and *A.A. Trinidad*, *Senior Crown Counsel* for the respondent.

1 **LORD HOPE OF CRAIGHEAD**, delivering the judgment of the Board: This is a petition for special leave to appeal against a ruling by the magistrates' court of Gibraltar in an application by the petitioner to stay a

summary trial on the ground of abuse of process. The application was dismissed by the magistrates. The petitioner seeks leave to appeal against that finding to their Lordships' Board. It is not the practice for their Lordships to give reasons for the decision which they have taken in an application for special leave to appeal, but they have decided to do so in this case in view of its unusual circumstances.

The facts

2 On November 14th, 2001, an information was laid before the magistrates alleging that on August 20th, 2001, in Gibraltar the petitioner unlawfully assaulted Ms. Davina Clancy, contrary to s.96 of the Criminal Offences Ordinance. It followed, upon a complaint which Ms. Clancy made to the police on August 20th, 2001, that the petitioner had assaulted her by pushing her in the chest with an envelope and impeding her passage when she was in Main Street. It appears that the incident came about because the parties were in dispute about payment for tiling work which the petitioner's husband, Daniel Ford, had carried out for Ms. Clancy in her house at 11 Rosia Steps.

3 The petitioner's application that there had been an abuse of process was heard by the magistrates on November 11th, 2002. She claimed that there had been an unreasonable delay in the service upon her of the summons to appear in the magistrates' court on June 20th, 2002, to answer the allegation of assault. Her complaint was that she did not receive any written notice to appear in that court until June 12th, 2002. The summons had been issued on November 17th, 2001. It bore a posting day of May 24th, 2002, which was also the date of posting according to the court's records, but it was marked as having been posted on June 11th, 2002. The petitioner submitted that there had been a violation of her right to "a fair and public hearing within a reasonable time," under s.8(1) of the Gibraltar Constitution Order 1969, that her rights "to a fair and public hearing within a reasonable time," under art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, had also been breached and that there had been malpractice on the part of the prosecution and of the court also.

4 The magistrates delivered their judgment on December 9th, 2002. They found that there had been proper service in accordance with s.82 of the Magistrates' Courts Rules 1968, "by sending it by post in a registered letter" [the Rules are applicable in Gibraltar by virtue of the Magistrates' Court Rules 1973, r.2]. They attributed the delay between the recorded posting of the summons and its receipt by the petitioner to industrial action in the Post Office. They held that there had not been an unreasonable delay, that there had been no malpractice and that the petitioner's human rights had not been breached.

P.C.

FORD v. R. (Lord Hope of Craighead)

5 The petitioner was not satisfied with this decision, and she decided to appeal against it. On December 13th, 2002, she lodged a notice of appeal in the Supreme Court of Gibraltar. On January 14th, 2003, she was informed by a member of the court's staff that the Chief Justice, Schofield, C.J., had read the notice of appeal and had confirmed that the procedure which she had chosen did not apply to her case. The member of staff advised her orally that the procedure which she should adopt was to apply to the magistrates' court for a stated case or to seek judicial review. The petitioner did not accept this advice, which she regarded as a denial of her right to appeal against the ruling by the magistrates. She also regarded the advice which she had been given as having been based on a decision by the Chief Justice against which she was entitled to appeal. On January 16th, 2003, she attempted to lodge a notice of appeal against it. The Registry of the Supreme Court refused to accept her notice of appeal on the ground that there had been no decision by the Chief Justice, so the notice of appeal was incompetent. In a letter dated February 19th, 2003, the Registrar of the Supreme Court reiterated that there had been no such decision. She repeated the advice about the avenues of appeal against the magistrates' ruling which had been already given to the petitioner on several occasions by her deputy.

The petitioner's reasons for seeking leave

6 The petitioner presented her application for special leave to appeal in person in the hearing before their Lordships' Board. She explained that she is Russian and that her husband is English. They had gone to live in Gibraltar about two years ago. The background to the incident between her and Ms. Clancy was that a cheque, which had been sent to her husband for the tiling work, had bounced when it was paid in to the bank. She said that it was only Ms. Clancy's word against hers as to what had happened, that she was entitled to the presumption of innocence and that the case against her should now be stopped. She criticized the way in which the case against her had been handled from the outset by the authorities. She said that she had done everything that was in her power to obtain justice, and that she had exhausted every remedy. Events had shown that it was impossible for her to have a fair hearing in Gibraltar. It was a matter of very great importance to her that her argument, that there had been an abuse of process, should be heard by their Lordships' Board.

7 Their Lordships were impressed by the clarity of the petitioner's argument, to which they have listened with great care. They are aware that she has had a distinguished career as an athlete. She was a member of the Russian National Swimming Team and has a Masters' degree in rowing from a university in Lithuania. They were left in no doubt about the depth and sincerity of her belief that there has been an abuse of process in her case and that her human rights have been violated.

The Chief Justice

8 Their Lordships must deal first with the argument that the advice which the petitioner received from the Registry of the Supreme Court was a decision taken by the Chief Justice judicially against which she was entitled to appeal. It is plain that there was no such decision, nor did anything happen at that stage that could possibly be described as having been in violation of the petitioner's human rights. The Chief Justice was acting, as he was entitled and indeed bound to do, in an administrative capacity. He was simply asked to confirm the view which had been taken by the staff in the Registry that the petitioner's notice of appeal had followed the wrong procedure, and he did so. He then instructed the member of staff to offer advice to the petitioner about the other avenues of appeal that were open to her. He was doing his best to be helpful and there are no grounds on which the action which he took can reasonably be criticized.

Exhausting the remedy

9 Section 62(5) of the Gibraltar Constitution Order provides that "nothing in this section shall affect any right of Her Majesty to grant special leave to appeal to Her Majesty in Council from the decision of any court in any civil or criminal matter." Although that sub-section is in the widest terms, the practice of the Board is to insist that a petitioner must be able to demonstrate that all local remedies have been exhausted before leave to appeal can be granted. The petitioner did not seek to challenge this practice. Her argument is that she has exhausted all her local remedies and that she has been left with no alternative.

10 Their Lordships cannot accept this submission. There has been no determination of the merits of any appeal against the magistrates by the Supreme Court, let alone by the Court of Appeal of Gibraltar, from whose decisions only an appeal lies, in practice, to their Lordships' Board. There is no doubt that the decision of the magistrates that there had been no abuse of process could have been taken to appeal. Unfortunately, the route which the petitioner chose to appeal against it was the wrong route.

11 Section 293 of the Criminal Procedure Ordinance provides that "(1) a person convicted by the magistrates' court may appeal to the Supreme Court—(a) if he pleaded guilty, against his sentence; (b) if he did not, against the conviction or sentence." This is the procedure which the petitioner chose to follow, but it does not apply to her case. She has not been convicted by the magistrates' court. All that has happened so far is that a ruling has been made against her, as a result of which the case has been set down for trial. This is not to say that the petitioner is left without a local remedy. The alternatives have already been pointed out to her on more than one occasion. In the hope that she will feel able to accept the

P.C.

FORD v. R. (Lord Hope of Craighead)

view of the Board on this point, their Lordships will simply repeat what has already been said about them.

12 Section 310(1) of the Criminal Procedure Ordinance provides:

“Any person who was a party to any proceedings before the magistrates’ court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the Supreme Court on the question of law or jurisdiction involved . . .”

There is a time limit of 14 days, but s.310(6) provides that “where justices refuse to state a case, the Supreme Court may . . . make an order of mandamus requiring the justices to state a case.”

13 The petitioner refused to accept that this avenue of appeal was open to her because s.310(4) provides that “on the making of an application under this section in respect of a decision any right of the applicant to appeal against the decision to the Supreme Court shall cease.” But her objection is based on a misunderstanding of this sub-section. Its purpose is to avoid a duplication of appeals on the same point where two different routes are available. It has no application to the situation in which she finds herself at this stage in the proceedings, and there is no risk of her being prejudiced by it.

14 The other avenue which remains open to the petitioner is to seek judicial review of the decision by the magistrates. This remedy too is subject to a time limit, but it can be extended if a good reason can be shown for doing so: 1 *Civil Procedure 2002*, para. 54.5.4, at 1160.

Conclusion

15 For these reasons, their Lordships will humbly advise Her Majesty that the petition should be dismissed. There is no doubt, however, that the time and trouble which has now been expended on this case is out of all proportion to its importance. This point appears to have been appreciated at an early stage in these proceedings by the magistrates. The prosecution had offered to dispose of the case by withdrawing the charge if the petitioner was willing to agree to being bound over by the court. The petitioner objected to this on the ground that the prosecution were attempting to intimidate her. The magistrates dealt with this point at the end of the judgment which they issued on December 9th, 2002. They pointed out that the prosecution did not act incorrectly in offering this solution and that it was normal in similar cases for it to do so. But they acknowledged that a defendant had the full right not to agree to this, in which event the hearing would proceed.

16 In the course of their discussion of this point, the magistrates described the offence which had been alleged against the petitioner as a very minor one. Their Lordships respectfully agree with that assessment. The petitioner is perfectly entitled to refuse to agree to being bound over, to maintain her innocence and to insist on her right to a fair trial. The decision as to whether it is still worth maintaining the proceedings against her is a different matter. It is, of course, a matter for the prosecutor and not for the Board, but it has occurred to their Lordships that the prosecutor may wish to consider, in the public interest, whether the expense, time and trouble which further proceedings in this case will undoubtedly cause are really justified.

Petition dismissed.
