[2003–04 Gib LR 343]

R. (Application of the Government of the United Kingdom) v. STIPENDIARY MAGISTRATE

SUPREME COURT (Schofield, C.J.): January 30th, 2004

Extradition and Fugitive Offenders—committal proceedings—appeals—no appeal by way of case stated, as decision of examining magistrate not final order—decision only questioned by way of judicial review

Committal proceedings were commenced in the magistrates' court against a Mr. Soneji in consequence of the request of the UK Government for his return to the United Kingdom under the Fugitive Offenders Ordinance 2002.

The Stipendiary Magistrate found a *prima facie* case on 9 of the 18 counts charged, but discharged Mr. Soneji on the remaining 9 counts. The Attorney-General, acting for the Government of the United Kingdom, applied for judicial review of the decision to discharge on those 9 counts.

Mr. Soneji submitted that (a) the Attorney-General, being aggrieved at the decision of the Stipendiary Magistrate, should have proceeded to appeal by way of case stated and, having failed to do so, judicial review was not open to him; and (b) the fact that "conviction" had been omitted from the list of orders in respect of which a case could be stated when s.62(1) of the Magistrates' Court Ordinance was revised in 1984, signified that the legislature intended the case stated procedure to be available in respect of any "order, determination or other proceeding of the court" and not just final orders, and even if it had previously been the case that appeal by way of case stated would not have been open to the Attorney-General in this situation, it was now possible for an examining magistrate to state a case and so this means of appeal was now available to the Attorney-General.

The Attorney-General submitted in reply that (a) it was not within the power of an examining magistrate to state a case, since his decision in committal proceedings was not a final determination of the case—consequently, an appeal by way of case stated was not possible, and the only way of questioning his decision was by way of an application for judicial review; and (b) the 1984 Revision of the Magistrates' Court Ordinance did not alter the substantive law, as s.8 of the Revised Edition of the Laws Ordinance expressly stated that it was not within the Law Revision Commissioner's powers to alter the substance of the law.

Held, granting the application:

The Attorney-General's application for judicial review should continue as an appeal by way of case stated was not available to him. It was clear that an examining magistrate did not have the power to state a case since the committal proceedings were not a final determination of the case, and the only available way of questioning his decision was therefore by way of judicial review. This was so even after the alteration to s.62(1) of the Magistrates' Court Ordinance in the 1984 Revision, as the omission of the word "conviction" from the list of orders in respect of which a case could be stated did not alter the substance of the law, and in fact could not have done since the power to revise came from the Revised Edition of the Laws Ordinance, which expressly stated that it was not within the Law Revision Commissioner's power to alter the substance of the law (paras. 11–12).

Cases cited:
(1) *Atkinson* v. *US Govt.*, [1971] A.C. 197; [1969] 3 All E.R. 1317, followed.
(2) *R.* v. *El Kurd*, [2001] Crim. L.R. 234, considered.
(3) *R.* v. *Morpeth Ward JJ., ex p. Ward* (1992), 95 Cr. App. R. 215; 156 J.P.N. 442; 142 New L.J. 312, considered.

Legislation construed:
Criminal Procedure Ordinance (1984 Edition), s.310: The relevant terms of this section are set out at para. 5.

Magistrates' Court Ordinance (1984 Edition), s.62: The relevant terms of this section are set out at para. 6.

Revised Edition of the Laws Ordinance 1981, s.8: The relevant terms of this section are set out at para. 11.

Miss K.K. Khubchand, *Crown Counsel*, for the Government of the United Kingdom;
C. Gomez for Mr. Soneji.

1 **SCHOFIELD, C.J.:** The Government of the United Kingdom has requested the return of Mr. Soneji, pursuant to the Fugitive Offenders Ordinance 2002, for 18 alleged offences. The extradition proceedings came before the Stipendiary Magistrate who found a *prima facie* case on nine counts, but on the remaining nine counts, which relate to an alleged conspiracy to launder the proceeds of drug trafficking, found no *prima facie* case and discharged Mr. Soneji thereon. The Attorney-General, acting for the Government of the United Kingdom, has applied for judicial review of the decision to discharge Mr. Soneji on those nine counts. I determined that the application for permission to proceed should be heard *inter partes* and this ruling is made on that application.

2 The grounds for judicial review are, briefly stated, that the

Stipendiary Magistrate erred in law and/or came to an irrational decision in ruling that there was no *prima facie* case on the nine counts and in particular he misapplied the English Court of Appeal decision in *R.* v. *El Kurd* (2). However, for the purposes of these proceedings we do not have to concern ourselves with the substantive grounds of the judicial review proceedings. Mr. Gomez, acting for Mr. Soneji, opposes the application to proceed on one discrete point. He argues that the Attorney-General, on being aggrieved by the decision of the Stipendiary Magistrate, should have proceeded to appeal by way of case stated and, having failed to do so, judicial review is not open to him. He argues that the proper procedure for the Attorney-General to follow in a case such as this, where substantial issues of fact need to be considered, is for him to appeal by way of case stated, citing as his authority for that proposition the English Divisional Court decision of *R.* v. *Morpeth Ward JJ., ex p. Ward* (3).

3 Whether or not substantial issues of fact fall to be considered in these proceedings is a moot point, but it follows from the submissions of Mr. Gomez that if an appeal by way of case stated was not available to the Attorney-General then judicial review must be open to him. Mr. Gomez concedes as much and accepts that there must be some Supreme Court supervision of the Stipendiary Magistrate in extradition proceedings.

4 It was held in the House of Lords decision of *Atkinson* v. *US Govt.* (1), that magistrates had no power to state a case in extradition proceedings. Their Lordships held that prior to the enactment of the Magistrates' Courts Act 1952, examining magistrates had no power to state a case. Section 87 of the 1952 Act made provision for appeal by way of case stated in terms very similar to those contained in the old s.100 of the Gibraltar Magistrates' Court Ordinance 1961, as duplicated in s.310 of the Criminal Procedure Ordinance 1961. Their Lordships held that as a matter of statutory interpretation the words of s.87 of the 1952 Act limited the matters in respect of which a case could be stated to final decisions, whereas an examining magistrate's decision was not final in effect. Furthermore, that the Magistrates' Courts Act 1952, was a consolidating provision and therefore could not affect the settled law which was that examining magistrates were not empowered to state a case for the opinion of the High Court.

5 The Gibraltar courts would be constrained to follow the House of Lords in its interpretation of a statute, and the powers given by that statute, where the wording of the Gibraltar Ordinance so closely followed the English statute. I think, therefore, it can be regarded as settled by *Atkinson* that under our old s.100 of the Magistrates' Court Ordinance 1961, and s.310 of the Criminal Procedure Ordinance 1961, an examining magistrate, including a magistrate conducting extradition proceedings, had no power to state a case. Come the 1984 Revision of the Laws,

s.310(1) of the Criminal Procedure Ordinance was re-enacted in its previous form, which as I say, closely followed the English provision. It reads:

> "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 on law or is 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:
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> Provided that a person shall not make an application under this section in respect of a decision which by virtue of any law is final."

6 However, s.62(1) (the new version of s.100) made its way into the 1984 Edition of the Laws in a form which was slightly but, says Mr. Gomez, significantly different. It reads:

> "Any person who was a party to any proceeding before the court or is aggrieved by the order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is 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:
>
> Provided that a person shall not make an application under this section in respect of a decision which by virtue of any law is final."

7 The distinction between the two is that in the latter provision the word "conviction" is omitted in the second line, apparently restricting the right to appeal by way of case stated to a party to a proceeding before the court or a person aggrieved by "the order, determination or other proceeding of the court."

8 Mr. Gomez's argument is that their Lordships in *Atkinson* (1) attached significance to the word "conviction," in holding that the case stated procedure did not apply to proceedings before an examining magistrate and only applied to proceedings which were final in effect. The point was succinctly stated in the speech of Lord Guest ([1971] A.C. at 244–245):

> "Mr. Buzzard, as amicus curiae, gave the complete answer, in my view, when he said that a stated case was only competent for a final determination. This conclusion was reached by an examination of section 87 where 'other proceeding' had to be interpreted ejusdem generis with the words 'conviction, order or determination' which are final proceedings. As the decision of committing magistrates or the chief magistrate under the Extradition Acts was not a final determination, a stated case was incompetent."

9 Mr. Gomez's argument is that the use of the word "conviction" gave the section the flavour of finality upon which the House of Lords based the decision in *Atkinson*. Without it, there is nothing in the section to denote finality. By deleting the word "conviction" in s.62(1) of the Magistrates' Court Ordinance, the Gibraltar legislature must have intended the case stated procedure to be available in respect of all "orders, determinations or other proceeding of the court" and not just final orders.

10 Attractive as that argument may appear at first blush, I think that if it had been the intention of the legislature in the 1984 Revision of the Laws to change the pre-existing substantive law as enunciated in *Atkinson* then it would have said so in clear words and would not have re-enacted s.310(1) of the Criminal Procedure Ordinance to include the word "conviction" and thus create an ambiguity. However, Mr. Gomez's submissions fall on something far more substantial than my view of the intention of the legislature. In *Atkinson*, Lord Upjohn stated that even if he had reached the conclusion that upon a true construction of s.87 of the Magistrates' Courts Act 1952, a power was created in an examining magistrate to state a case, he felt no doubt that the 1952 Act, being a consolidating Act, did not alter the existing law. He expressed himself thus (*ibid.*, at 249):

> "But, my Lords, the Magistrates' Courts Act is a consolidation statute, so that the strong presumption arises that no alteration in the existing statutory law was thereby enacted. But the long title tells us that it was enacted with corrections and improvements under the Consolidation of Enactments (Procedure) Act, 1949. So your Lordships looked at the Lord Chancellor's Memorandum, which is an essential feature of the procedure under that Act, to see whether the relevant enacting words in the Act were introduced under the 1949 Act, and it is quite clear that no relevant alterations to the existing statutory law were thereby introduced; so the presumption stands unaffected in any way.
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> My noble and learned friend, Lord Reid, in his speech has traced in detail the statutory and judge-made law upon this matter and has shown that it was settled law before 1952 that examining or committing justices had no power to state a case. I entirely agree with that opinion and cannot usefully add anything thereto.
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> In this state of affairs, even if I had reached the conclusion that upon the true construction of the Act alone it did create a power in examining or committing magistrates to state a case, I feel no doubt that the presumption applies and that section 87 most certainly is not clear enough in its express wording to displace the presumption and alter the previous clearly accepted law."

11 Mr. Gomez has argued manfully that the 1984 Revision of the Magistrates' Court Ordinance was more than a consolidating exercise and that by the 1984 Revision the legislature made a substantive change in s.62 thereof. However, that cannot be the case. The 1984 Revised Edition of the Laws, which effected the deletion of the word "conviction" from s.62(1) of the Magistrates' Court Ordinance, was authorized by the Revised Edition of the Laws Ordinance 1981, which empowered the Commissioner to prepare a "revised and consolidated edition of the statute law." Section 8 of that Ordinance reads:

> "The powers conferred on the Commissioner by this Ordinance shall not be taken to confer on him or to imply in him any power to make any alteration or amendment in the matter or substance of any law or any part of the law."

12 It follows that the amendment to s.62(1) of the Magistrates' Court Ordinance effected by the 1984 Revision could not have made any change to the substantive law which was as determined by their Lordships' House in *Atkinson* (1). The law remains unchanged and an appeal by way of case stated was unavailable to the Attorney-General in these proceedings.

13 I therefore grant permission for this action to proceed.

Application granted.