[2003–04 Gib LR 386]

COMMISSIONER OF POLICE v. R. (Application of CLUB CLASS HOLIDAYS LIMITED, PORTLAND SERVICES (GIBRALTAR) LIMITED, GILSON, SEDGWICK, CARRERAS and SHELDON)

COURT OF APPEAL (Glidewell, P., Staughton and Stuart-Smith, JJ.A.): March 10th, 2004

Police—commencement of investigation—judicial review—decision of Commissioner of Police to commence criminal investigation not normally subject to judicial review—available only exceptionally where decision taken in bad faith, motivated by malice or for dishonest purposes

Criminal Procedure—proceeds of criminal conduct—money laundering—commencement of investigation—police need only have suspicion of money laundering to commence investigation—neither prima facie evidence nor evidence sufficient to support prosecution needed at this stage

The respondents applied to the Supreme Court for judicial review of the Commissioner of Police's decision to investigate them for money-laundering offences.

The first respondent ("Club Class") was a holiday club—a variation on a timeshare scheme. Members of the public alleged that they had been induced to join the club by false or fraudulent representations made to them and, from the information received, the police launched an investigation into suspected offences of money laundering. They were granted search warrants authorizing them to enter and search the premises occupied by Club Class and the second respondent, and the home of the fourth respondent. In executing the warrants, the police seized documents and other materials, and arrested the third, fourth, fifth and sixth respondents for conspiracy to launder the proceeds of criminal conduct. The respondents were released on police bail.

They applied for leave to proceed with a claim for judicial review against the Commissioner, challenging (a) his decision to initiate and conduct the investigation into alleged money-laundering offences on their part; (b) his determination that they (or any of them) had committed a criminal offence within the meaning of s.2(7) of the Criminal Justice Ordinance; (c) his decision to arrest the third to sixth claimants; (d) his decision to issue and execute the search warrants and remove and retain

under his control the documents and other property; and (e) his decision to freeze the respondents' bank accounts. The application for leave was converted by agreement into the substantive hearing.

The Supreme Court (Pizzarello, A.J.) held that the Commissioner's decision to initiate an investigation was subject to judicial review and that the threshold for commencing an investigation into money laundering was proof of "criminal conduct" (the predicate offence) to a standard which would support a prosecution for that predicate offence, and was, by definition, higher than *prima facie* proof. This level of proof had not been reached and the application for judicial review was therefore granted. In consequence, the court made declarations and orders that (a) the Commissioner's decision to initiate and conduct an investigation into alleged money-laundering offences on the part of the claimants, and therefore also his decisions to obtain and execute the search warrants, retain the property and arrest the respondents, were outside his powers and unlawful; and (b) his decision would be quashed and compensation paid to the respondents.

On appeal against both the granting of leave and the declarations and orders of the Supreme Court, the Commissioner submitted that (a) his decision to commence an investigation was not susceptible to judicial review; (b) in any case, the threshold for commencing an investigation into money laundering was mere suspicion and not proof of "criminal conduct" (the predicate offence) to a standard which would support a prosecution for that predicate offence, as had been held in the Supreme Court, or *prima facie* proof of the predicate offence, as was submitted by the respondents; (c) this was supported by the argument that the provisions of s.20 of the Criminal Justice Ordinance, governing the passing of information from supervisory authorities to the Commissioner, would be made obsolete if *prima facie* evidence were required; and (d) s.6 of the Criminal Procedure Ordinance also by analogy supported the submission that the test was suspicion, as it stated that for an arrest without warrant the threshold was reasonable suspicion and, as an investigation normally preceded an arrest, the threshold for launching an investigation had to be lower or at least the same as for an arrest.

The respondents submitted in reply that (a) although the courts should be wary of interfering with the exercise of the discretion of the Commissioner, in some circumstances it was necessary and judicial review was therefore an appropriate means of scrutiny; (b) since the police had acted outside their powers, this constituted an exceptional circumstance which justified the court's intervention by judicial review; (c) before the Commissioner could properly embark on an investigation of a money-laundering offence, he had to be satisfied that there was *prima facie* evidence that the predicate offence had been committed and, on the facts of this case, he could not have been; and (d) his decision to launch an investigation was therefore susceptible to judicial review, and was in fact improper as it was not based on evidence which reached the appropriate threshold of proof.

Held, allowing the appeal:

(1) The Commissioner's decision to commence an investigation into money-laundering offences on the part of the respondents was not susceptible to judicial review. Judicial review proceedings would not normally be available to challenge a decision of the Commissioner to commence an investigation, since the decision as to whether to investigate was one in his discretion and the exercise of that discretion was one with which the courts should be very reluctant to interfere. In exceptional circumstances, judicial review of such a decision might be available, but would be confined to situations in which the decision had been taken in bad faith, motivated by malice or for dishonest purposes. None of these exceptional circumstances was present in the instant case, and the general rule therefore applied—*i.e.* the decision was not susceptible to judicial review (paras. 43–45).

(2) Even if the Commissioner's decision had been subject to judicial review, the Supreme Court had applied the wrong test for deciding whether the evidence available to the Commissioner justified his commencing an investigation. It had been wrong to conclude that the threshold for proceeding was evidence of the predicate offence which would support a prosecution, that being higher than *prima facie* proof. Similarly, there was no justification for the threshold being even as high as having *prima facie* proof, as there was no valid reason why the Commissioner, before commencing an investigation into such offences, should at that early stage apply different tests to the evidence relating to the different elements of the offence. All that was required was that he should have in his possession evidence that caused him to suspect that an offence of money laundering had been committed (para. 50; para. 54; paras. 60–61).

Cases cited:

(1) *Holgate-Mohammed* v. *Duke*, [1984] A.C. 437; [1984] 1 All E.R. 1054; (1984), 79 Cr. App. R. 120, considered.

(2) *Hussien* v. *Chong Fook Kam*, [1970] A.C. 942, *sub nom. Shaaban Bin Hussien* v. *Chong Fook Kam*, [1969] 3 All E.R. 1626; (1969), 114 Sol. Jo. 55, considered.

(3) *R.* v. *Chief Const. (Kent), ex p. L*; [1993] 1 All E.R. 756; [1991] C.O.D. 446; (1991), 93 Cr. App. R. 416; 155 J.P.N. 636, considered.

(4) *R.* v. *Chief Const. (Warks.), ex p. Fitzpatrick*, [1999] 1 W.L.R. 564; [1998] 1 All E.R. 65, considered.

(5) *R.* v. *D.P.P., ex p. Kebilene*, [2000] 2 A.C. 326; [1999] 4 All E.R. 801; [2000] 1 Cr. App. R. 275; [2000] H.R.L.R. 93; [2000] UKHRR 176; (1999), 96(43) L.S.G. 32, *dicta* of Lord Steyn applied.

(6) *R.* v. *Metropolitan Police Commr., ex p. Blackburn (No. 1)*, [1968] 2 Q.B. 118; [1968] 1 All E.R. 763; (1968), 112 Sol Jo. 112, followed.

(7) *R.* v. *Montila*, [2004] 1 W.L.R. 624; [2004] 1 All E.R. 877; [2004] 1 Cr. App. R. 32; (2003), 100(46) L.S.G. 24, considered.

(8) *R.* v. *Southwark Crown Court, ex p. Bowles*, [1998] A.C. 641; [1998] 2 All E.R. 193; [1998] 2 Cr. App. R. 187; distinguished.

(9) *R. (Laporte)* v. *Chief Const. (Gloucs.)*, [2004] 2 All E.R. 874; [2004] UKHRR 484; [2004] A.C.D. 34, not followed.

Legislation construed:
Criminal Justice Ordinance 1995, s.2: The relevant terms of this section are set out at para. 6.
s.3: The relevant terms of this section are set out at para. 6.
s.4: The relevant terms of this section are set out at para. 6.
s.5(7): The relevant terms of this sub-section are set out at para. 7.
s.20(1): The relevant terms of this sub-section are set out at para. 56.
s.20(5): The relevant terms of this sub-section are set out at para. 56.

Criminal Procedure Ordinance (1984 Edition), s.6: The relevant terms of this section are set out at para. 59.

R.R. Rhoda, *Q.C.*, *Attorney-General,* and *Mrs. S. Peralta* for the appellant;
Miss G. Andrews, *Q.C.* and *A. Christodoulides* for the respondents.

1 **GLIDEWELL, P.:**

Basic facts

In October 2002, officers in the Financial Crime Unit of the Royal Gibraltar Police, on the instructions of the appellant, the Commissioner of Police, commenced an investigation into the possible commission in Gibraltar of offences of what is commonly called "money laundering," by the respondent company Club Class Holidays Ltd. and persons associated with that company.

2 According to the respondents' application for judicial review, Club Class is a member of a group of companies which operate a holiday club business. The second respondent ("Portland") is a company administration business which trades from Suite 18, Portland House, Glacis Road, Gibraltar. One of the companies to whom it provides services is Club Class. The respondent Dennis Gilson is the managing director of Portland and part-owner of Club Class. Club Class operates from the offices of Portland in Gibraltar and at offices in Fuengirola in Spain. The respondents Anthony Sedgwick and Jose Carreras Barrionuevo were, at the relevant time, employees of Club Class. The respondent Benham Sheldon was an employee of Portland. Mr. Sedgwick had a home in Gibraltar, the other individual respondents lived in Spain.

3 A holiday club is a method of marketing holiday accommodation and a person joins such a club by paying a capital sum. In the case of Club Class, this sum was about £5,000 or more. In return, the club member is entitled to occupy holiday accommodation for an agreed number of weeks each year at no, or only a modest, further cost. So far, the scheme

resembles that of a timeshare. However, in a holiday club, unlike a timeshare, the member has a choice, from a short list, of the place at which, and of the particular weeks of the year in which, he wishes to occupy accommodation each year.

4 Before October 2002, the Gibraltar Police had received information of complaints made by some persons who had joined holiday clubs, including Club Class, when in Spain. These persons alleged that they had been induced to join the holiday clubs, including Club Class, and to pay the capital sums required for membership, by false and fraudulent representations made to them. The complainants had either not been able to obtain at all the holiday accommodation to which they were entitled as members of the relevant club, or had not been offered accommodation of the standard of that promised before they paid the price for their membership.

5 The investigation by the Gibraltar Police of suspected offences of money laundering in Gibraltar was initiated as a result of information obtained by the police that moneys paid for membership of Club Class, by persons who had agreed to join Club Class in Spain, had been paid into an account with a clearing bank in Gibraltar.

The legislation

6 Before continuing with my summary of the history of this matter, it is convenient to turn to the legislation relating to the offence of money laundering in Gibraltar. This is contained in Part II of the Criminal Justice Ordinance 1995, which is headed "Money Laundering and Other Offences." This is in terms similar to those of the equivalent English legislation. The provisions which are, or may be, relevant in the present case are:

"**Assisting another to retain the benefit of criminal conduct.**

2.(1) Subject to subsection (3), if a person enters into or is otherwise concerned in an arrangement whereby—

(a) the retention or control by or on behalf of another ('A') of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or

(b) A's proceeds of criminal conduct—

(i) are used to secure that funds are placed at A's disposal; or

(ii) are used for A's benefit to acquire property by way of investment,

knowing or suspecting that A is a person who is or has been engaged in criminal conduct or who has benefited from criminal conduct, he is guilty of an offence.

(2) In this section, references to any person's proceeds of criminal conduct include a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of criminal conduct.

. . .

(7) In this Part:

'criminal conduct' means conduct which—

(a) if it occurs in Gibraltar constitutes an indictable offence other than a drug trafficking offence; or

(b) if it does not occur in Gibraltar would constitute such an indictable offence if it had occurred in Gibraltar . . .

Acquisition, possession or use of property representing proceeds of criminal conduct.

3.(1) A person is guilty of an offence if, knowing that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he acquires or uses that property or has possession of it.

(2) It is a defence to a charge of committing an offence under this section that the person charged acquired or used the property or had possession of it for adequate consideration.

. . .

Concealing or transferring proceeds of criminal conduct.

4.(1) A person is guilty of an offence if he—

(a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of criminal conduct; or

(b) converts or transfers that property or removes it from the jurisdiction,

for the purpose of avoiding prosecution for an offence to which this Part applies or the making or enforcement in his case of a confiscation order.

(2) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is or in whole or in

part directly or indirectly represents, another person's proceeds of criminal conduct, he—

(a) conceals or disguises that property; or

(b) converts or transfers that property or removes it from the jurisdiction,

for the purpose of assisting any person to avoid prosecution for an offence to which this Part applies or the making or enforcement in his case of a confiscation order.

(3) In subsections (1) and (2), the references to concealing or disguising any property include references to concealing or disguising its nature, source, location, disposition, movement or ownership of any rights with respect to it."

7 There is no general definition of "money laundering" in Part II of the Ordinance, but in s.5, which is concerned with "tipping-off," s.5(7) provides:

"In this section 'money laundering' means doing any act which constitutes an offence under section 2, 3 or 4, or in the case of an act done otherwise than in Gibraltar, would constitute such an offence if done in Gibraltar."

Further history

8 On January 15th, 2003, the police applied to the magistrates' court for, and were granted, search warrants authorizing them to enter and search Suite 18, Portland House, the premises occupied by Portland and Club Class, and 3/7 South Barrack Ramp, Gibraltar, the home of Mr. Sedgwick. The officer who applied for the warrants deposed that he had reasonable cause to believe that there were, at both of the said premises, documents and electronic material in respect of, and necessary for the conduct of, an investigation into the offence of conspiracy to launder the proceeds of criminal conduct.

9 On January 23rd, 2003, the two warrants were executed, and quantities of documents and other material were removed from both premises. At the same time, Messrs. Gilson, Sedgwick, Carreras and Sheldon were arrested on the charge of conspiracy to launder the proceeds of criminal conduct. They were all held in custody overnight, but after interview were released on police bail on January 24th, 2003, bound to re-appear in six months' time. As will appear, that time-limit has been overcome by these proceedings.

10 There followed correspondence between Messrs. Marrache & Co., solicitors for all the respondents, the Commissioner of Police and the Attorney-General which did not resolve any issues.

The proceedings

11 On April 9th, 2003, Messrs. Marrache & Co. made application on behalf of all the respondents for permission to proceed with a claim for judicial review against the Commissioner. The decisions alleged to have been made by the Commissioner and challenged in the proceedings are described as follows:

(1) The defendant's decision to initiate and conduct an investigation into alleged money-laundering offences (as defined by Part II of the Criminal Justice Ordinance) on the part of the claimants.

(2) The defendant's determination that the claimants (or any of them), and/or that other persons or persons currently unidentified by the defendant, have committed a criminal offence within the meaning of s.2(7) of the Criminal Justice Ordinance or otherwise.

(3) The defendant's decision to arrest the third to sixth claimants, Dennis Gilson, Anthony Sedgwick, Jose Carreras Barrionuevo and Benham Sheldon, on January 23rd, 2003, to detain them in custody for questioning at New Mole Police Station in the City of Gibraltar until January 24th, 2003, and thereafter to release them upon police bail for a period of six months.

(4) The defendant's decision to issue and to execute search warrants at the offices of the first and second claimants, Portland Services Ltd. and Club Class Holidays Ltd., at Suite 18, Portland House, Glacis Road, Gibraltar on January 23rd and 24th, 2003, and to issue and execute a search warrant at 3/7 Bado's Building, South Barrack Ramp, Gibraltar, the private residential address of the third claimant, Anthony Sedgwick.

(5) The defendant's decision to remove and to retain under his control documents and property belonging to Club Class, Anthony Sedgwick, Benham Sheldon, and documents and property (including moneys) belonging to third parties, including clients of Portland.

(6) The defendant's decision to freeze the accounts or to interfere with their normal operation on or about February 4th, 2003, by purporting to refuse consent to the normal operation of such accounts.

(7) The defendant's decision to continue to freeze the accounts or to refuse to consent to their normal operation, notwithstanding the release of any prohibition on, or refusal of consent to, the normal operation of accounts belonging to other persons supposedly under investigation by him, on or about March 7th, 2003.

12 On May 23rd, 2003, the Attorney-General, on behalf of the Commissioner, filed a response to the application for permission for judicial review. In that response, the grounds on which the claim was, and

is, contested were set out in detail over 15 pages. It was made clear from the outset that the Attorney-General's first and principal point was that the relevant decisions of the Commissioner were not "subject to the control of the courts," *i.e.* not susceptible to judicial review. This, of course, was a ground for contesting the grounds of permission to proceed with the claim for judicial review.

13 The application for permission was set down for an oral hearing before Pizzarello, A.J., starting on July 23rd, 2003. After Miss Andrews, Q.C., for all the respondents, had opened her clients' application, counsel agreed that rather than proceed with the hearing of the application for permission and, if it were granted, rehearse the same issues at the hearing of the substantive application, the full application should be set down for hearing as if permission had been granted, without detracting from the Attorney-General's right to advance his first and principal point. Unfortunately, the order which was then drawn up to reflect this agreement did not do so accurately.

14 Pending the substantive hearing, the Attorney-General, on behalf of the Commissioner, gave the following undertakings:

(1) The third, fourth, fifth and sixth claimants shall be granted police bail by the defendant until October 24th, 2003, provided that, if by that date, judgment has not been handed down in the judicial review, that bail will be extended.

(2) Until further order, the defendant, by himself or any of his officers, shall not make any adverse comment about the claimants or their businesses to any third party.

(3) Subject to, and upon, completion of the exercise referred to under para. (5) below, until further order, the defendant shall keep in safe custody in a secure place all documents and property seized under the search warrants executed on January 23rd and 24th, 2003, and shall not use or disclose them to any third party or any party to these proceedings until after the judgment in the judicial review proceedings is handed down.

(4) Until further order, the defendant shall not continue with his investigations of the claimants under the Criminal Justice Ordinance.

(5) The defendant shall look at the documents and property seized under the search warrants executed on January 23rd and 24th, 2003, and shall extract from them those items which are obviously of a purely personal nature and/or which could not form part of any money-laundering offence, and shall return the said items to the claimants or to the claimants' solicitors so soon as is reasonably practicable. The exercise of extraction shall commence on July 23rd, 2003 and shall be completed not later than 5 p.m. on July 25th, 2003.

15 The challenges under heads (6) and (7) were withdrawn before the start of the substantive hearing before the judge, which commenced on October 8th, 2003. Pizzarello, A.J. gave judgment in the claimants', *i.e.* respondents', favour in a reserved judgment handed down on December 9th, 2003.

16 On December 9th, 2003, the judge granted the following declarations:

(1) The threshold for starting an investigation into alleged money-laundering offences (as defined by Part II of the Criminal Justice Ordinance 1995), on the part of the claimants (or any of them), had not been reached in October 2002, when the defendant started that investigation.

(2) In October 2002, the defendant had no reasonable grounds for suspecting that a money-laundering offence had been committed by any of the claimants.

(3) The defendant's decision in October 2002 to initiate and conduct an investigation into alleged money laundering on the part of the claimants was outside his powers and was unlawful.

(4) The defendant's decisions, in furtherance of such unlawful investigation, to obtain and to execute search warrants at the offices of the first and second claimants on January 23rd and 24th, 2003, and at the private residential address of the third claimant on January 24th, 2003, were unlawful.

(5) The removal by the defendant in January 2003, and retention by him thereafter, of property belonging to Club Class, Anthony Sedgwick, Benham Sheldon and property belonging to third parties (including clients of Portland) was unlawful.

(6) The defendant's decision to arrest each of the third to sixth claimants on January 23rd, 2003, on a charge of conspiracy to launder the proceeds of crime, was outside his powers and was unlawful.

(7) The claimants are entitled to compensation pursuant to s.15 of the Gibraltar Constitution, and to damages for any losses that they have suffered by reason of the unlawful decisions of the defendant and actions taken pursuant thereto.

17 He also made the following orders:

(1) Each of the aforementioned unlawful decisions be quashed.

(2) The defendant shall forthwith release Dennis Gilson, Anthony Sedgwick, Jose Carreras Barrionuevo and Benham Sheldon from arrest.

(3) The defendant shall, so soon as is reasonably practicable (but in any

event by 4 p.m. on December 19th, 2003, or such extended time as may be agreed by the claimants' solicitors or directed by the court) return or procure the return to their lawful owners of all property (including money together with any accrued interest thereon) and documents removed from the premises of the first, second and third claimants pursuant to the execution of the said search warrants which are still in the possession of or under the control of the defendant.

(4) The defendant shall, as soon as is reasonably practicable (but in any event by 4 p.m. on December 19th, 2003, or such extended time as may be agreed by the claimants' solicitors) deliver up to the claimants' solicitors all copies made by or for the defendant of any documents removed upon the execution of the said search warrants, whether or not the originals of any such documents had been returned prior to the making of this order, including any images or copies taken by the defendant of the claimants' computer hardware or software and/or shall cause the said copies to be destroyed at his cost (the destruction to be verified in such manner as may be acceptable to the claimants' solicitors).

(5) The defendant is restrained, and an injunction is hereby granted restraining him, from making use of any information obtained in consequence of the unlawful searches of the claimants' premises (in particular, but without prejudice to the generality of the foregoing, information derived from any documents, including electronic data, thereby obtained) without the prior permission of the claimants and of any other person to whom such information may belong.

(6) There shall be an inquiry into the damages suffered by the claimants in consequence of the unlawful decisions of the defendant and actions taken pursuant thereto, including any damage to their reputations and damage to their businesses and commercial interests. The amount of compensation to be awarded to the claimants, pursuant to s.15 of the Gibraltar Constitution, shall be assessed at the same time as the inquiry into damages.

18 There then followed directions for the inquiry into damages and the assessment of compensation, and an order that the Commissioner should pay the respondents' costs of the application for judicial review, that part of the costs which arose out of the application for permission to be assessed on the indemnity basis.

19 The Commissioner now appeals against the whole of the judgment of Pizzarello, A.J., the declarations and the orders.

The judgment

20 In reaching his decision, Pizzarello, A.J. considered and decided three issues, which can be summarized as follows:

(a) Was the Commissioner's decision to commence an investigation into the commission, by the respondents, of money-laundering offences susceptible to judicial review?

(b) What was the correct test for the Commissioner to apply in deciding whether the evidence available to him justified him in commencing such an investigation?

(c) Did the evidence available to the Commissioner satisfy that test?

21 On issue (a), the judge decided that the Commissioner's decision was susceptible to judicial review. The Attorney-General in his submissions had relied on *dicta* in the decision of the Court of Appeal in *R.* v. *Metropolitan Police Commr., ex p. Blackburn (No. 1)* (6) as establishing that the decision of the Commissioner, as to whether to initiate a criminal investigation, is not subject to the control of the courts. The judge summarized the counter-argument of Miss Andrews, Q.C., for the claimants/respondents, in his judgment as follows:

> "Not so, argued Miss Andrews. *Blackburn* is authority precisely for the converse proposition, namely that the police are answerable to the law and therefore the Commissioner's decision is susceptible to judicial review and this accords, she submitted, with principle and in Gibraltar answers to the provisions of the Constitution. It is right, she argued, that the court should not be powerless to prevent the Commissioner from using those powers in circumstances where he is not entitled to or does so for an entirely illegitimate purpose. She submits there is a difference in the proposition that the court has no jurisdiction to review certain types of decision taken by the police and the proposition that the court does have such jurisdiction but will exercise it sparingly, bearing in mind the particular nature of the important public function which the police serve, and that it is this latter proposition that reflects the law."

22 Pizzarello, A.J. then said:

> "As to the question of jurisdiction, it is my judgment that Miss Andrews' submissions are correct. I do not accept the learned Attorney-General's submission that the gloss on the proposition that the court will decline to interfere namely 'save in exceptional circumstances,' derives from Lord Steyn in *ex p. Kebilene* . . ."

He added:

> "And so I accept the proposition . . . put forward by Miss Andrews that the court has jurisdiction to review but that, as a matter of public policy, the court would decline to interfere with the Commissioner's decision, save in exceptional circumstances."

He also dismissed another argument advanced by the Attorney-General (to which I shall refer briefly later), in the following words:

> "I must confess that I am inclined to agree with Miss Andrews that the distinction sought to be drawn by the learned Attorney-General, between a review of a decision which is in the negative (which is judicially reviewable) and a decision which is positive (which is not), seems absurd if, the court having jurisdiction, the Commissioner has no grounds to reasonably suspect the claimants of money laundering."

23 On issue (b), the judge posed himself the following question: "That leaves the question regarding the prerequisite [predicated] offence and what springs from it: What is the standard required of the Commissioner to move into a money-laundering investigation?" It will be seen that the judge was there applying the required standard to the predicated offence, *i.e.* the "criminal conduct," the proceeds of which were suspected by the Commissioner to have been transferred to Gibraltar in breach of one or more of the provisions of ss. 2, 3 or 4 of the Criminal Justice Ordinance 1995. The judge answered the question in his judgment, where he said:

> "The least the Commissioner must have, and I agree with Miss Andrews, is *prima facie* proof that the claimants (or each of them) have committed a fraud on Messrs. Geldert and Wood, because that is the only evidence on which he can rely."

Messrs. Geldert and Wood were persons who had complained of being defrauded when they paid moneys to join Club Class in Spain.

24 The judge then said:

> "It is my view that the threshold has to be higher than *prima facie* proof. The threshold has to be evidence which will support a prosecution. Then, and only then, can the Commissioner move into an investigation of the money laundering. As I have indicated above, if that threshold is reached then the Commissioner, in my view, can proceed."

25 By that stage in his judgment, the judge had already conducted a detailed examination of the evidence available to the Commissioner. He therefore applied what he had described as "the threshold" to that evidence, and concluded on issue (c): "For the reasons advanced by Miss Andrews, it is my judgment that the threshold has not been reached on a *prima facie* case."

The appeal

26 The Commissioner appeals against the judge's conclusion on issues (a) and (b). The memorandum of appeal contains the following grounds:

"(1) The learned judge erred in law in holding that a decision by the appellant to commence an investigation is susceptible to judicial review (albeit, in exceptional circumstances).

(2) The learned judge erred in law in holding that the threshold for commencing an investigation into money laundering is proof of 'criminal conduct' (the predicate offence) to a standard of evidence which will support a prosecution for that predicate offence and is, by definition, higher than *prima facie* proof."

27 It will be seen that, if this court concludes that the judge was correct in his conclusion on both issues (a) and (b), the Commissioner does not seek to challenge his conclusion on issue (c), *i.e.* that the evidence available to him when he decided to commence the investigation of money laundering did not reach the threshold, whether that is expressed as "*prima facie* proof" or "evidence which will support a prosecution."

28 I shall consider issues (a) and (b) in turn.

(A) Was the Commissioner's decision to commence the investigation susceptible to judicial review?

29 The judge accepted that Miss Andrews had not been able to refer him to any case in which a police officer's decision to commence an investigation had been held to be challengeable in this court by judicial review. Nevertheless, there is helpful authority on related issues, which gives guidance. The starting point is the well-known decision of the Court of Appeal in *R.* v. *Metropolitan Police Commr., ex p. Blackburn (No. 1)* (6), to which I have already referred. The Metropolitan Police Commissioner made a policy decision in April 1966 not to attempt to enforce a provision of the Betting, Gaming and Lotteries Act 1963 in relation to gaming clubs in London. Mr. Blackburn, a private citizen, complained that illegal gaming was taking place, and applied for an order of *mandamus*, requiring the Commissioner to reverse his policy decision. The Divisional Court refused to grant such an order. By the time Mr. Blackburn's appeal came before the Court of Appeal in January 1968, the Commissioner had reversed his policy, and promised to enforce the provisions of the Act. For that reason, Mr. Blackburn's appeal was dismissed. But for that change of policy, it is apparent from the judgment that it might have succeeded.

30 The main issue in the *Blackburn* case was whether the Commissioner could be ordered by the court to abandon or reverse a general policy of not enforcing a particular statutory provision. That differed from the issue in the present case in two main respects:

(a) It concerned a decision by the Commissioner not to enforce a particular provision, rather than a decision to proceed in a particular way; and

(b) It related to a general policy, not a decision of the Commissioner in relation to a particular case.

31 Nevertheless, there is a passage in the judgment of Lord Denning, M.R. which is of assistance, where he said ([1968] 2 Q.B. at 136):

> "Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law."

32 Miss Andrews submits that, although Lord Denning, M.R. said that ". . . it is for the Commissioner of Police . . . to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought . . . No court can or should give him direction on such a matter," later authorities have made it clear that the making of an arrest or the bringing of a prosecution may be amenable to judicial review, though only in exceptional circumstances. Thus, the courts have jurisdiction to control these activities of the police by judicial review. We should conclude, she urges, that the same principle applies to a decision by the Commissioner to commence an investigation.

33 The first authority to which Miss Andrews refers is *R.* v. *Chief Const. (Kent), ex p. L* and *R.* v. *D.P.P., ex p. B* (3). L, aged 16, was alleged to have committed an offence of assault occasioning actual bodily harm, and B, aged 12, an offence of theft. In most cases, a caution rather than a prosecution would have been considered appropriate for L, and no charge in respect of theft by a 12 year-old. In both cases, the police decided to charge the juveniles, and the D.P.P. declined to discontinue the prosecutions. They sought judicial review to quash these decisions. The Divisional Court decided that the challenge should properly be to the D.P.P.'s decision not to discontinue, since it was the final decision, but refused to intervene in either case. Watkins, L.J. said ([1993] 1 All E.R. at 770):

> "I have come to the conclusion that, in respect of juveniles, the discretion of the CPS to continue or to discontinue criminal proceedings is reviewable by this court but only where it can be demonstrated that the decision was made regardless of or clearly contrary to a settled policy of the Director of Public Prosecutions . . ."

Later, his Lordship added (*ibid.*, at 770):

> "I have confined my views as to the availability of judicial review of a CPS decision not to discontinue a prosecution to the position of juveniles because, of course, the present cases involve only juveniles. My view as to the position of adults, on the other hand, in this respect is that judicial review of a decision not to discontinue a prosecution is unlikely to be available. The danger of opening too wide the door of review of the discretion to continue a prosecution is manifest and such review, if it exists, must, therefore, be confined to very narrow limits."

I comment that this decision made no significant inroads on the *Blackburn* (6) principle.

34 In *R.* v. *D.P.P., ex p. Kebilene* (5), Kebilene and others were charged with offences under the Prevention of Terrorism (Temporary Provisions) Act 1989. At the conclusion of the prosecution case, counsel on their behalf contended that s.16(a) of the Act reversed the legal burden of proof and therefore conflicted with the European Convention on Human Rights. The trial judge agreed, but the D.P.P., on advice, indicated his intention to continue with the proceedings. Kebilene and others sought judicial review of his decision to continue. The Divisional Court ruled in favour of the applicants, and quashed the decision of the D.P.P., but the House of Lords allowed the D.P.P.'s appeal. One of the issues was whether there was a general principle that a decision of the D.P.P. to prosecute in a particular case was not amenable to judicial review. On this issue, Lord Steyn said ([2000] 2 A.C. at 371):

> "My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review. And I would further rule that the present case falls on the wrong side of that line. While the passing of the Human Rights Act 1998 marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal."

Lord Slynn expressly agreed. Lords Cooke and Hope delivered concurring speeches.

35 Miss Andrews refers us to the decision of the House of Lords in *Holgate-Mohammed* v. *Duke* (1). The issue I am discussing did not arise in that case, which was an action for damages for false imprisonment, but in this context Miss Andrews relies on a brief passage in the speech of Lord Diplock, where he said ([1984] A.C. at 443):

> "The *Wednesbury* principles, as they are usually referred to, are applicable to determining the lawfulness of the exercise of the statutory discretion of a constable under section 2(4) of the Criminal Law Act 1967, not only in proceedings for judicial review but also for the purpose of founding a cause of action at common law for . . . false imprisonment . . ."

Miss Andrews submits that Lord Diplock was saying that an alleged false imprisonment would be amenable to judicial review.

36 That case is authority for the proposition that, in deciding whether an arrest without warrant is lawful or not, a court must apply the *Wednesbury* test, *i.e.* that the arrest was only unlawful if the officer's decision that he had reasonable cause to suspect the claimant of committing an offence was perverse, or was made in bad faith, or in disregard of a relevant consideration. The speech of Lord Diplock, with whom all other members of the House agreed, contains this helpful summary (*ibid.*, at 445):

> "My Lords, there is inevitably the potentiality of conflict between the public interest in preserving the liberty of the individual and the public interest in the detection of crime and the bringing to justice of those who commit it. The members of the organised police forces of the country have, since the mid-19th century, been charged with the duty of taking the first steps to promote the latter public interest by inquiring into suspected offences with a view to identifying the perpetrators of them and of obtaining sufficient evidence admissible in a court of law against the persons they suspect of being the perpetrators as would justify charging them with the relevant offence before a magistrates' court with a view to their committal for trial for it.
>
> The compromise which English common and statutory law has evolved for the accommodation of the two rival public interests while these first steps are being taken by the police is two-fold:
>
> (1) no person may be arrested without warrant (i.e. without the intervention of a judicial process) unless the constable arresting him has reasonable cause to suspect him to be guilty of an arrestable offence; and arrest, as is emphasised in the Judges' Rules themselves, is the only means by which a person can be compelled against his will to come to or remain in any police station.

(2) a suspect so arrested and detained in custody must be brought before a magistrates' court as soon as practicable, generally within 24 hours, otherwise, save in a serious case, he must be released on bail (Magistrates' Courts Act 1980, section 43(1) and (4)).

That arrest for the purpose of using the period of detention to dispel or confirm the reasonable suspicion by questioning the suspect or seeking further evidence with his assistance was said by the Royal Commission on Criminal Procedure in England and Wales (1981) (Cmnd. 8092) at paragraph 3.66 'to be well established as one of the primary purposes of detention upon arrest.'"

37 *R.* v. *Chief Const. (Warks.), ex p. Fitzpatrick* (4) was a decision of the Divisional Court in a challenge by way of judicial review to the issue of search warrants. The Attorney-General properly concedes that the decision by a magistrate to issue a search warrant may, in very limited circumstances, be susceptible to judicial review, but that is not an issue in this case.

38 *Fitzpatrick* was also concerned with circumstances in which the actions of police officers who seize material may be challenged by judicial review, on the grounds that they have taken material which they are not authorized to take by the warrant. The decision is authority for the proposition that such a challenge may only be mounted on *Wednesbury* grounds, *i.e.* that in deciding whether to seize particular types of material, the officers failed to take proper account of the wording of the warrant, or acted perversely, seizing material which clearly did not come within that wording. This is not an issue which Pizzarello, A.J. considered in his judgment. I note in particular, a passage from the judgment of Jowitt, J. in *Fitzpatrick*, with which Rose, L.J. agreed, where he said ([1999] 1 W.L.R. at 579):

"Judicial review is not a fact finding exercise and it is an extremely unsatisfactory tool by which to determine, in any but the clearest of cases, whether there has been a seizure of material not permitted by a search warrant. In my judgment a person who complains of excessive seizure in breach of section 16(8) should not, save in such cases, seek his remedy by way of judicial review but should rely on his private law remedy when he will have a tribunal which will be able to hear evidence and make findings of fact unfettered by *Wednesbury* principles. In an appropriate case the court in a private law action is able to grant interlocutory relief on a speedy basis on well recognised principles so that in all but the clearest cases of a breach of section 16(8) judicial review has only disadvantages and no advantages when compared with the private law remedy."

The result in that case was that the only part of the challenge to the seizure which succeeded was in respect of documents relating to a Housing Association with which one of the claimants was associated, which clearly were not relevant to the suspected offences under investigation. With that exception, the challenges all failed.

39 Miss Andrews has referred us to the very recent decision of a Divisional Court in England in *R. (Laporte)* v. *Chief Const. (Gloucs.)* (9). The claimant, Ms. Laporte, who was opposed to the war against Iraq, was on one of three coaches travelling from London to an R.A.F. base in Gloucestershire in order to join a demonstration. The Chief Constable was genuinely concerned about hard-line protesters and believed that incidents of serious violence might take place. He was anxious to preserve the peace and to enable peaceful protest to take place so he instructed the police to prevent the coaches from proceeding to the base. Police officers stopped the coaches and ordered them to return to London, escorting them on the way. Ms. Laporte sought judicial review, contending that the Chief Constable's decision to stop the coaches was unlawful, and that her detention and forcible return to London infringed her right to liberty under art. 5 of the European Convention of Human Rights. The court found in her favour on the second, but not the first, of these claims. Before doing so, however, the court had to consider whether the decisions made by the Chief Constable were susceptible to judicial review at all. May, L.J. dealt with this shortly. He said ([2004] 2 All E.R. 874, at para. 3):

> "[3] Richards J. gave permission to apply for judicial review. He reserved for the decision of this court whether judicial review is an appropriate procedure. The defendant articulates—somewhat mutedly in the face of lack of enthusiasm from the court—a submission that this is in substance a false imprisonment claim entitling the parties to trial by jury. He submits with somewhat greater persuasion that the issues are more suitable for a witness action with full disclosure and oral evidence, including cross-examination. In my judgment, judicial review is not inappropriate. As to disclosure, I doubt if the claimant has any documents of critical importance. The defendant has been able to put all their relevant documents before the court in evidence. There is some force in the plea for oral evidence, but the claimant does not challenge the factual accuracy or good faith of the defendant's evidence. Since the claimant has chosen judicial review proceedings, the defendant's evidence is to be taken as it stands."

40 That decision is not binding upon this court, and with all due respect to May, L.J., I doubt whether it was correct. It is a major principle of administrative law that judicial review will not normally be appropriate if

some other remedy is available to the claimant. In Ms. Laporte's case, she could obviously have brought an action for unlawful imprisonment, in which the same issues could have been ventilated. I believe the Divisional Court took the pragmatic view that it had all the necessary material before it and could thus proceed to decide the issues. Strictly, in my view, it should have done so by ordering that the proceedings should continue as if begun by writ. I do not regard that decision as casting any light on the issue we are currently considering.

41 The other authorities to which I have referred establish the following propositions:

(a) A policy decision by a Chief Officer of Police not to prosecute in cases in a particular category may be susceptible to judicial review on the application of a person who has a sufficient interest;

(b) A decision by a Chief Officer of Police to prosecute in a particular case, or in England a decision by the D.P.P. not to discontinue such a prosecution, will not, however, normally be susceptible to judicial review. The only exception to this normal rule would be where there was evidence that the prosecution was brought or continued dishonestly or in bad faith, or in an exceptional circumstance, there being no reported cases in which such an exception has been established; and

(c) The actions of police officers in executing a search warrant may be challenged by judicial review, but only on *Wednesbury* grounds.

42 There are two reasons why the courts have adopted the policy outlined in these propositions. The first arises out of the principle of administrative law to which I have referred: that judicial review is not normally appropriate in a case where the applicant has another legal remedy available. Where a prosecution is brought or continued, the defendant has the legal remedy of the trial process and, if necessary, an appeal, possibly preceded by an application to quash the proceedings as being an abuse of process. If the prosecution fails, he may in appropriate cases have a right of action. But a person such as Mr. Blackburn, who is aggrieved by a failure to prosecute as a result of a policy decision, has no remedy other than judicial review. The second reason is that, if judicial review proceedings are permitted, they will inevitably cause delay (of which the circumstances of the present case are a good example). Delay in the prosecution of a crime, or I would add in its investigation, is often the enemy of justice. The courts are therefore keen to ensure that the normal processes of criminal procedure are followed as speedily as is reasonably possible.

43 The claimants' case, in relation to the decision to apply for search warrants and arrest, was dependent on the first proposition that the investigation was unlawful. If it was, then everything that followed was

also unlawful. There was no special or freestanding challenge to the validity of the search and arrest, and certainly not one that could be pursued by an application for judicial review.

44 This brings me to the interpretation which Miss Andrews asks us to adopt of the phrase "an exceptional circumstance" in *Kebilene* (5). Her submission is that, if the police act outside their powers, either without any authority or in excess of the powers they do have, this constitutes an exceptional circumstance which would justify the court in intervening by way of judicial review. Quite apart from the logical point that this is a circular argument, it is contrary to normal principles of construction, and I am satisfied that the submission is wrong. The whole phrase used by Lord Steyn was—"absent dishonesty or mala fides or an exceptional circumstance." I have no doubt that in its context, the last phrase meant "an exceptional circumstance similar to dishonesty or mala fides."

45 How do the propositions I have set out above apply in relation to a decision to investigate the possible commission of suspected offences? Such an investigation is, of course, the first stage of the process which may or may not lead to a charge, a prosecution and a trial. To paraphrase what Lord Denning said in *Blackburn (No. 1)* (6) ([1968] Q.B. at 136, see para. 31 above), the decision whether or not to investigate is one to be made by the Commissioner in the exercise of his discretion, and that discretion is one with which the courts should be very reluctant to interfere. I would therefore decide that as a matter of principle, judicial review will not normally be available to challenge a decision by the Commissioner to commence an investigation into the possible commission of criminal offences. If such a remedy ever were to be available, it would only be because the decision to investigate was shown to have been taken in bad faith, motivated by malice or for dishonest purposes.

46 There is no suggestion here that the Commissioner was so motivated. The case for the claimants was, and is, that the evidence available to the Commissioner did not give him reasonable grounds to suspect that money laundering offences had been committed. Even if that were correct, it would not, in my judgment, provide the sort of wholly exceptional basis for a challenge by way of judicial review. For this reason, I would hold that the Commissioner's decision to initiate and conduct an investigation into alleged money-laundering offences was not susceptible to judicial review. I would allow the appeal on this issue.

(B) What was the correct test for the Commissioner to apply in deciding whether the evidence available to him justified him in commencing an investigation?

47 There is no specific provision in Part II of the Criminal Justice Ordinance 1995 which answers this question.

48 Miss Andrews submitted to Pizzarello, A.J. that it is an essential part of an offence of money laundering, under any of ss. 2, 3 or 4 of the 1995 Ordinance, that criminal conduct, as defined in s.2(7), has been committed, whether by the person suspected of money laundering or by some other person or persons. She called such criminal conduct "the predicate offence," a term which the judge adopted. That submission is correct in relation to most of the provisions of those sections, but not correct in relation to s.4(2) (see para. 53).

49 Miss Andrews then submitted to the judge that it is necessary to consider the test to be applied by the Commissioner in relation to the predicate offence separately from the test to be applied in relation to the suspected money laundering offence. She submitted that, before the Commissioner could properly embark on an investigation of a money laundering offence, he had to be satisfied that there was *prima facie* evidence that the predicated offence had been committed. She further submitted that "it was necessary for [the Commissioner] to have identified each of the claimants or some other identified person as someone who can be said *prima facie* to have committed the indictable criminal offence" (from Pizzarello, A.J.'s judgment).

50 The judge accepted that these submissions by Miss Andrews, except perhaps the last, to which he did not refer, were correct. In his judgment, he said:

> "But what, in my judgment, criminal conduct cannot mean, for the purpose of Part II of the Criminal Justice Ordinance, is that the Commissioner can rely on reasonable grounds to suspect that certain conduct which would constitute an indictable offence has occurred. The least the Commissioner must have, and I agree with Miss Andrews, is *prima facie* proof that the claimants (or each of them) have committed a fraud on Messrs. Geldert and Wood, because that is the only evidence on which he can rely."

Later, he said:

> "It is my view that the threshold has to be higher than *prima facie* proof. The threshold has to be evidence which will support a prosecution. Then, and only then, can the Commissioner move into an investigation of the money laundering. As I have indicated above, if that threshold is reached then the Commissioner can, in my view, proceed. For the reasons advanced by Miss Andrews, it is my judgment that the threshold has not been reached on a *prima facie* case."

51 The Attorney-General points to the distinction between evidence which establishes a *prima facie* case, *i.e.* evidence which would justify a conviction if no other evidence were put before the court, and evidence

which will support a prosecution. The Attorney-General submits, and I agree with him, that the latter appears to be a reference to the evidential test derived from the *Code for Crown Prosecutors* (1992) in England, to be applied by prosecutors in the Crown Prosecution Service when deciding whether to proceed with a prosecution. This test is that there is enough evidence to provide a reasonable prospect of conviction, which the *Code* explains as meaning evidence on which a jury or a bench of magistrates, properly directed, is more likely than not to convict. Obviously this is a higher standard than a *prima facie* case. Miss Andrews did not, and does not, contend for this higher test. She continues to argue that the correct test is: Does the evidence constitute a *prima facie* case? In enunciating the "evidence which will support a prosecution" test, I am confident that the learned judge fell into error, perhaps inadvertently.

52 The issues are, therefore, whether the judge was right to adopt Miss Andrews' two-stage approach, *i.e.* to consider first the test to be applied by the Commissioner in relation to the offence which constitutes the criminal conduct and, then, whether *prima facie* evidence is the correct test at that stage.

53 In this context, Miss Andrews has referred us to the decision of the House of Lords in *R.* v. *Southwark Crown Court, ex p. Bowles* (8). That arose out of a challenge to the making of an order under s.93H of the Criminal Justice Act 1988, requiring the applicant, an accountant, to produce to the police documents relating to the affairs of two of her clients. The House held that if the dominant purpose of the application was to investigate whether a crime had been committed rather than into the proceeds of criminal conduct, the application should be refused. I do not consider that this decision is of any assistance to us in considering the issue under discussion.

54 The Attorney-General has referred us to the decision in the Court of Appeal, Criminal Division in the case of *R.* v. *Montila* (7). Section 93C of the Criminal Justice Act 1988 is in the same terms as s.4 of the Criminal Justice Ordinance 1995. The issue in *Montila* was whether, in order to prove an offence under s.93C(2) (s.4(2) of the Ordinance), it is necessary for the prosecution to prove that the property was in fact the proceeds of crime, or whether it sufficed to prove that the defendant knew or had reasonable grounds to suspect that it was. The court ruled that the latter is the correct construction of the statute—what is needed is proof of the defendant's state of mind, whether what he believed was correct or not. This does tend to support the Attorney-General's submission that it is not necessary for the police to adopt the two-stage approach.

55 I can therefore find no justification for the two-stage approach. It is, of course, correct that each of the offences set out in ss. 2, 3 and 4 of the 1995 Ordinance contains a number of elements, each of which has to be

proved as to make the jury sure before a defendant can be convicted, but that is so with many criminal offences. I can see no valid reason why the Commissioner of Police, before commencing an investigation into such offences, should apply different tests to the evidence available to him at that early stage relating to the different elements of the offence. To adopt an analogy suggested by the Attorney-General, if a person is found in possession of a large quantity of electronic equipment, do the police have to apply one test in relation to the issue whether the property was stolen and another thereafter before they decide to investigate an offence of handling stolen property? In my judgment the answer is, clearly not. They must apply the same test in relation to all the elements of the offence being investigated.

56 What then should that test be? As I have said, there is no direct answer in Part II of the 1995 Ordinance, but there is some assistance to be derived from s.20, which is in Part III, a part concerned with measures to prevent money laundering. Section 20(1) provides:

> "Subject to subsection (2), where a supervisory authority—
>
> (a) obtains any information; and
>
> (b) is of the opinion that the information indicates that any person has or may have been engaged in money laundering,
>
> the authority shall, as soon as is reasonably practicable, disclose that information to a Police or Customs Officer."

A supervisory body is defined in s.19(2) as including such persons as the Financial Services Commissioner and the Commissioner of Banking. Section 20(5) provides:

> "Any information—
>
> (a) which has been disclosed to a Police or Customs officer by virtue of the preceding provisions of this section; and
>
> (b) which would, apart from the provisions of subsection (4), be subject to such a restriction as is mentioned in that subsection;
>
> may be disclosed by the Police or Customs Officer, or any person obtaining the information directly or indirectly from him, in connection with the investigation of any criminal offence or for the purposes of any criminal proceedings, but not otherwise."

57 The Attorney-General submits that if the police receive such information from a supervisory authority, they would be under a duty to launch an investigation into whether a money-laundering offence had occurred. If, however, at that stage the police had no more information

than that contained in the supervisory authority's report, it would be most unlikely that the information would constitute *prima facie* evidence. Almost certainly at that stage, the police would have no more than a suspicion that an offence might have been committed—a suspicion based on the supervisory authority's report. If they were unable to commence an investigation because the evidence available to them did not meet a *prima facie* evidence test, that would nullify the whole point of the provisions in s.20, the Attorney-General argues. He submits that suspicion must be enough to justify the police in commencing an investigation.

58 The distinction between reasonable suspicion and *prima facie* evidence was explained by Lord Devlin, giving the judgment of the Privy Council in *Hussien* v. *Chong Fook Kam* (2). That was an appeal arising out of an action for false imprisonment. The point at issue was the power of a police officer to make an arrest under the Criminal Procedure Code of Malaysia. Lord Devlin said ([1970] A.C. at 948):

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.' Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage."

He added (*ibid.*, at 949):

> "There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all . . . Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case."

59 Section 6 of the Criminal Procedure Ordinance governs the power of a police officer to arrest without a warrant. In part, it provides:

> "Any police officer may, without prejudice to any other powers of arrest conferred by this Ordinance or any other law, without a warrant, arrest—
>
> . . .
>
> (b) any person whom he suspects on reasonable grounds of having committed or of being likely to commit any offence punishable by imprisonment, whether on indictment or summary conviction . . ."

60 The Attorney-General argues that, since an investigation normally precedes an arrest, the test for starting an investigation must be lower

than the reasonable suspicion required in order to effect an arrest—mere suspicion is enough. Alternatively, he argues, the test for investigation cannot logically be higher than that for arrest—reasonable suspicion suffices as the standard to be applied before an investigation is commenced.

61 In my judgment, it is somewhat semantic to seek to draw a distinction between reasonable suspicion and mere suspicion. The word "mere" really adds nothing. What is required is suspicion. Obviously, suspicion must have some basis, otherwise there is no ground to suspect. But how strong the suspicion should be before the Commissioner reasonably decides to launch an investigation will depend on a number of factors, including the gravity of the potential offence and the resources at his command. It is essentially a matter for his discretion. This reinforces the conclusion, to which I have already come, that judicial review is wholly inappropriate to challenge the Commissioner's decision to launch an investigation.

62 In relation to the test which the Commissioner should apply when deciding whether to commence an investigation, I am in general agreement with the Attorney-General's submissions. I therefore conclude that if the Commissioner has in his possession evidence which causes him to suspect that an offence of money laundering has been committed, he is entitled in law, and indeed in most cases will be under a duty, to investigate the commission of that offence.

Conclusion

63 If I had not already decided that the appeal should be allowed on the first main issue, I would allow it on the second issue.

64 It follows that there is no need for this court to consider the respondent's cross-appeal, or any of the evidence, including the Commissioner's application to submit further evidence.

65 I would therefore allow the appeal, and set aside all the orders made and declarations granted by Pizzarello, A.J.

66 **STAUGHTON, J.A.** concurred.

Appeal allowed.