[2005–06 Gib LR 168]

KARENGA LIMITED v. ABDESLAM BEN MUSSA and ATTORNEY-GENERAL

SUPREME COURT (Schofield, C.J.): July 14th, 2006

Landlord and Tenant—rent—rent control—rent control hearing by Rent Tribunal not unfair contrary to Constitution, ss. 1(a) and 8(8) merely because Landlord and Tenant Ordinance limits issues for consideration and eliminates Tribunal's discretion—no breach if Tribunal properly composed and prescribed procedures observed

Constitutional Law—fundamental rights and freedoms—right to privacy—in interpreting protection of "privacy of home" in Constitution, s.1(c), not appropriate to introduce ECHR requirement of "fair balance" between individual protection and general community interest—"peaceful enjoyment of possessions" under Protocol 1, art. 1 different and wider—requiring "fair balance" nevertheless similar concept to not prejudicing "public interest" under s.1

Landlord and Tenant—rent—rent control—Unfair Terms in Consumer Contracts Ordinance inapplicable to variation of rent by Rent Tribunal because validly done to give effect to Gibraltar legislation—straining language to treat landlord as "consumer" suffering disadvantage—may be "supplier" but if tenant ("consumer") fails to object to varied rent or seek redress, Ordinance not engaged

The appellant company appealed against the decision of the Rent Tribunal reducing the rent payable by the respondent for accommodation leased from the appellant.

The respondent agreed to lease the accommodation and paid the agreed rent of £130 per month for four years. He claimed that he did not then know of the existence of the rent restriction provisions and when he duly applied to the Rent Tribunal to fix the rent, it was reduced to £8.50 per month. The appellant company appealed.

It submitted that (a) the combined effect of the relevant provisions of the Landlord and Tenant Ordinance was to limit too narrowly the issues the Rent Tribunal could consider and to remove its discretion to fix a fair and appropriate rent, with the consequence that the appellant was denied the fair hearing guaranteed by ss. 1(a) and 8(8) of the Constitution; (b) the effect of the same provisions was to interfere with its constitutional right (under s.1(c)) to the privacy of its home and property, since it was

appropriate to follow the judicial interpretation of art. 1 of Protocol 1 to the European Convention—which required the court to consider whether the act complained of was being performed in the public interest and accorded with the principle of fair balance between the parties, and the Landlord and Tenant Ordinance signally failed to do so as between landlords and tenants; (c) moreover, s.1(c) was not merely declaratory but set out broader rights than s.7 of the Constitution, and allowed the striking down of offending legislation rather than merely giving the right to compensation for deprivation of property; and (d) the provisions and the decision of the Rent Tribunal were in contravention of the Unfair Terms in Consumer Contracts Directive and the Unfair Terms in Consumer Contracts Ordinance, in that the Rent Tribunal's overriding of the contractual rent agreed by the parties imposed an unfair contractual term not individually negotiated between them, the Government and the Rent Tribunal being considered the "suppliers" and the landlord and tenant the "consumers" for the purposes of the Directive and the Ordinance.

The Attorney-General submitted in reply that (a) there had been no failure to grant the appellant a fair hearing in breach of ss. 1(a) and 8(8) of the Constitution, since the procedures of the Rent Tribunal were dictated by the Landlord and Tenant Ordinance and there was no allegation that the Tribunal had not been properly composed or that it had not followed the correct procedures; that there was no discretion it could exercise was the consequence of the restricted mandate given to it by the legislature; (b) the court could not import into the protection of "privacy" under s.1(c) of the Constitution the "fair balance" test evolved in the case-law on art. 1 of Protocol 1 to the European Convention, since that test was applicable to the "peaceful enjoyment" of possessions, which was different and wider in scope; (c) in any case, the appellant was effectively arguing against the established case-law of the Court of Appeal which held that the Landlord and Tenant Ordinance was a general regulatory law imposing restrictions in the public interest and did not deprive the landlord of property for which compensation should be paid; it did not cease to be in the public interest merely because circumstances had changed over the years it had been in force; and (d) the case did not fall within the terms of the Unfair Terms in Consumer Contracts Ordinance, since the appellant was not, in ordinary language, a "consumer," nor, since it was not a natural person, did it fall within the definition of "consumer" in s.2 of the Ordinance. It might well be considered to be a "supplier" but the tenant, as the corresponding "consumer" was not complaining about the terms of the contract.

Held, dismissing the appeal:

(1) There was no evidence that the appellant had not received a fair hearing by the Tribunal as required by ss. 1(a) and 8(8) of the Constitution. Its objections were in reality directed towards the process laid down by the Landlord and Tenant Ordinance—that it simply did not give the Tribunal enough power by limiting the issues it could consider—

but as it had been properly composed and had fairly observed the prescribed procedures, there had been no breach of the constitutional requirements (paras. 13–15).

(2) The court was unable to adopt the "fair balance" test laid down in the interpretation of art. 1 of Protocol 1 to the European Convention with regard to the "peaceful enjoyment" of possessions, since the appellant was relying on the different and narrower concept of the "privacy" of property in s.1(c) of the Constitution. Nevertheless, the argument on "fair balance" was really no more than a different formulation of the requirement in s.1 that an individual's enjoyment of his rights and freedoms should not prejudice the "public interest." The court was therefore obliged to consider whether the rent control provisions of the Landlord and Tenant Ordinance, which were unquestionably of a general nature and for the public benefit (even given their present out-dated operation and the lack of provision for periodic review of rent or the methods of calculating them), were constitutional. Since the court was of the opinion that the appellant's claim was not in reality an argument concerning the "privacy of his home" but rather one claiming the "deprivation of property without compensation" (also in s.1(c)), it was bound to follow the existing Court of Appeal authority on that issue and hold that the Ordinance did not offend the Constitution (para. 22; paras. 27–29).

(3) Nor could the appellant call in aid the provisions of the Unfair Terms in Consumer Contracts Ordinance. Not only was it not, in ordinary language, a "consumer" who suffered detriment (by being unable to increase the rent freely), but it was not a natural person as required by the definition of "consumer" in s.2 of the Ordinance. It was possible that the appellant might be considered a "supplier" to the respondent tenant as a "consumer" but the respondent was not complaining about the terms of the contract or seeking redress. In any event, the Ordinance could not apply because (Schedule 1) the contract term had been incorporated into the lease in compliance with Gibraltar legislation (paras. 32–37).

Cases cited:

(1) *Devlin* v. *United Kingdom* (2002), 34 E.H.R.R. 43; [2002] I.R.L.R. 155, distinguished.
(2) *Findlay* v. *United Kingdom* (1997), 24 E.H.R.R. 221; [1997] ECHR 22107/93, distinguished.
(3) *Grape Bay Ltd.* v. *Att.-Gen. (Bermuda)*, [2000] 1 W.L.R. 574; [2000] 1 L.R.C. 167, distinguished.
(4) *J.A. Pye (Oxford) Ltd.* v. *United Kingdom* (2005), 19 BHRC 705, distinguished.
(5) *R. (Khatun)* v. *Newham London Borough Council*, [2005] Q.B. 37; [2004] H.L.R. 29; [2004] L. & T.R. 306, distinguished.
(6) *Rent Tribunal* v. *Aidasani*, 2001–02 Gib LR 21, applied.
(7) *Sporrong* v. *Sweden* (1983), 5 E.H.R.R. 35; [1982] ECHR 7151/75, distinguished.

(8) *Thauerer* v. *Att.-Gen.*, 1999–00 Gib LR 551, referred to.
(9) *Tinnelly & Sons Ltd.* v. *United Kingdom* (1999), 27 E.H.R.R. 249; (1998), 4 BHRC 393, distinguished.

Legislation construed:
Landlord and Tenant Ordinance (1984 edition), s.11(1): The relevant terms of this sub-section are set out at para. 1.
s.30(1): The relevant terms of this sub-section are set out at para. 9.
(5): The relevant terms of this sub-section are set out at para. 9.

Unfair Terms in Consumer Contracts Ordinance (No. 1998–37), s.2: The relevant terms of this section are set out at para. 31.
s.3(1): The relevant terms of this sub-section are set out at para. 31.
s.4(1): The relevant terms of this sub-section are set out at para. 31.
Schedule 1: The relevant terms of this Schedule are set out at para. 36.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), s.1(c): The relevant terms of this sub-section are set out at para. 16

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953), Cmnd. 8969), Protocol 1, art. 1: The relevant terms of this article are set out at para. 20.

K. Azopardi for the appellant;
A. MacDonald and *J. Trinidad* for the respondent;
R.R. Rhoda, Q.C., Attorney-General, appeared in person.

1 **SCHOFIELD, C.J.:**

Introduction

Section 11(1) of the Landlord and Tenant Ordinance 1983 ("the Ordinance") reads:

> "Except where otherwise provided in this Ordinance, the statutory rent of any dwellinghouse to which this Part applies shall be the rent appropriate to that dwellinghouse as calculated in accordance with Schedule 1."

Schedule 1 to the Ordinance provides that the statutory rent for a dwellinghouse or part of a dwellinghouse comprising a self-contained unit with a bathroom shall be £60 per annum per 100 sq. ft. exclusive of rates. This figure was fixed when the Ordinance was enacted and has not been revised since. The Ordinance makes no provision for its revision. The upshot is that many tenants who fall within these statutory provisions pay a small percentage of the current market rent for their dwelling-houses. As a result of the low incomes received from their properties some landlords are unable to keep their properties in good repair, at least

without dipping into their own pockets. Thus many properties within the older parts of the City are in disrepair and, indeed, some landlords prefer to keep their properties vacant rather than undertake expensive refurbishment. This does not help what has been described by Mr. Pinna of the "Action for Housing" group as a serious housing shortage in Gibraltar. Furthermore, Brian Francis, a chartered surveyor with over 30 years' experience in Gibraltar, has given an example of one owner, whose property had a negative value because of the rent restriction provisions, deciding to sell his property to a sitting tenant for £7,000 against a market value, with vacant possession, of £130,000.

2 The problems encountered by landlords as a result of the effects of s.11 of and Schedule 1 to the Ordinance were extensively discussed in the Court of Appeal decision in *Rent Tribunal* v. *Aidasani* (6), in which it was argued that these statutory provisions deprived the landlord of his property and were thus contrary to s.1 of the Gibraltar Constitution. The court held that the effect of Schedule 1 was to deprive the landlord of the sum representing the difference between the contractual rent and the statutory rent. However, the court held, following the decision of the Privy Council in *Grape Bay Ltd.* v. *Att.-Gen. (Bermuda)* (3), that since the Ordinance was a general statute enacted for the public benefit, it could not be held to offend the Constitution. I shall revert to *Aidasani* later in this judgment, but for the purposes of this introduction I should here set out the conclusion of their Lordships' judgment (2001–02 Gib LR 21, at paras. 121–126):

> "121 Having had the opportunity to consider this matter in some detail, we have come to the firm conclusion that this appeal should be allowed. It has not been demonstrated that Schedule 1 of the 1983 Ordinance, which is the specific provision with which we are concerned, is or ever has been in breach of the Constitution of Gibraltar. The 1983 Ordinance was general legislation passed for the public benefit and its character has not changed.
>
> 122 Nevertheless, we are satisfied from the material that has been put before us that the effect of Schedule 1 requires to be reconsidered by the Government and its advisers as a matter of urgency.
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> 123 The Select Committee report in 1983 set out the objectives which the anticipated amendments to the then existing rent control legislation should seek to achieve. Rent control legislation, it was said, should not only protect the interests of tenants but also take into account the interests of landlords. Accordingly, landlords should be able to attain rents that enable them to keep their property in a good state of repair and also allow them to keep a reasonable benefit for themselves.

> 124 It seems clear that the objectives set out in the Select Committee report are not being achieved. Indeed, it was not seriously disputed by anyone who gave evidence before us that the present rents allowed under Schedule 1 are other than unfair to landlords. In addition, we were impressed by the evidence we received to the effect that residential re-development was being inhibited and that the condition of some of the private housing stock was deteriorating.
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> 125 It may be that if consideration is given to Schedule 1 it would be sensible to look at the other provisions in the 1983 Ordinance, including ss. 11A and 22, which relate to the control of rents in the private housing market. We would also suggest that it might be wise to examine the present effectiveness of the reserve provisions in s.80A.
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> 126 The precise scope of any future enquiry into the present system of rent control will of course be a matter for the Government. However, we do not think that it would be right for us to part from the case without expressing our view that the present disturbing situation should not be allowed to continue indefinitely."

3 In 2003, the Government set up a consultative committee to reform the Ordinance but I am told that the committee's recommendations have not been acted upon by the Government. There have been two amendments since the judgment in *Aidasani* was delivered. Under a 1992 amendment to the Ordinance, every dwellinghouse erected on or before January 1st "of the year preceding by 45 years the 1st day of January of the current year" was brought within the provisions. Since *Aidasani*, this creeping 45-year rule has been replaced with a fixed date in 1959, which no doubt is a matter of considerable relief to some landlords in Gibraltar. The second amendment is in s.15 of the Ordinance, which now provides that "a Gibraltarian or other natural person" who has been resident in Gibraltar for at least 10 years may enter into an agreement to pay a rent which, if approved by the Rent Assessor, becomes the statutory rent. Despite these two amendments, the Attorney-General had to concede that there has been no comprehensive review of the Ordinance as envisioned by the Court of Appeal. The upshot is that five years on from *Aidasani*, many landlords are still being deprived of their fair rent, older properties in this City are falling into further disrepair and many are being left vacant in the face of a housing shortage.

51/8 Main Street

4 One victim of the impugned provisions of the Ordinance is the appellant in these proceedings, Karenga Ltd. Karenga owns 51/8 Main Street which falls within the relevant provisions of the Ordinance. The

property is composed of three stores and two shops on the ground floor, which are let out for economic rents totalling £5,200 per month. I have been unable to reconcile the body of the witness statement of Mr. Khubchand, a director of Karenga, with his schedule of income in respect of the two upper floors. However, it appears that company lettings of two flats on the first floor raise a monthly income of £430. There are two owner-occupied flats on the second floor. The respondent, Abdeslam Ben Mussa, rents a first-floor flat the rent for which has been fixed by the Rent Tribunal at £8.50 per month, pursuant to Schedule 1 to the Ordinance. There is one other rent-restricted flat on the first floor from which Karenga derives an income of £40 per month. Other flats on the second floor would come within the rent restriction provisions of the Ordinance and so Karenga prefers to keep them vacant to avoid incurring further liabilities on their upkeep.

5 Mr. Khubchand says that Karenga wishes to conduct major refurbishment works but its costings show that it would require the sum of £485,000. Although Mr. Pinna of the "Action for Housing" group was quick to point to the high rents received by Karenga for the ground floor shops, Mr. Francis has analysed the overall income from the property and has pointed out that it is uneconomic for Karenga to carry out the refurbishments to it.

6 The respondent is a Moroccan worker. By his own description, he is illiterate. Although I do not have details of his income, I think I can safely assume that it is at the lower end of the economic scale. He agreed to rent the flat from Karenga in about August 1999. Karenga says the agreed rent was £130 per month, whereas the respondent says it was £135. The respondent says that he did not know of the rent restriction provisions when he agreed to pay such a rent. Be that as it may, he paid the agreed rent for four years until he referred the matter to the Rent Tribunal. The Tribunal applied Schedule 1 and reduced the rent to £8.50 per month. The respondent feels aggrieved that he paid well over the rent set by the Ordinance for four years. Be that as it may, it seems likely that Karenga would not have rented the flat to him in the first place at £8.50 per month and would have preferred to keep it vacant rather than receive a rent which is more than £100 per month lower than that actually received and, according to the evidence, a small percentage of the market rent. Furthermore, it must have been within the respondent's means to pay the agreed rent of £130 or £135 per month, for he did so with regularity.

7 The upshot is that Karenga has appealed against the decision of the Rent Tribunal and has raised constitutional and other issues which were not before the Court of Appeal in the *Aidasani* case (6). Although the memorandum of appeal sets out a number of grounds of appeal, Karenga's counsel condensed his argument to three grounds. As a preface

to his arguments he stressed that the appeal is a plea to fairness. The overarching theme of the appeal is that the Ordinance, in both procedural and substantive terms, operates unfairly and that the fair balance which it should achieve between the public interest and the interests of landlords and tenants is not achieved and that it is disproportionate and outside the permissible margin of appreciation. Karenga does not seek to argue that rent control legislation is unnecessary and inappropriate in Gibraltar, this being a matter for the legislature to determine. Karenga does argue that the impugned provisions of the Ordinance do not meet the necessary standards prescribed by the Constitution or by European law. I should say here that the main thrust of the Attorney-General's arguments is that the grounds put forward by Karenga are attempts to circumvent the Court of Appeal decision in *Aidasani*, a decision which, of course, binds this court.

The grounds of appeal

8 There were three grounds of appeal argued before me. Briefly stated they are:

(1) That the combined effect of ss. 11, 15, and 30 of and Schedule 1 to the Ordinance deprive the Rent Tribunal of any discretion or any real discretion and thus offend ss. 8(8) and 1(a) of the Constitution by depriving the appellant of a fair hearing;

(2) That the effect of the impugned provisions of the Ordinance amounts to an interference with the appellant's peaceful enjoyment of his property and thus offends s.1(c) of the Constitution; and

(3) The impugned provisions are in contravention of the Unfair Terms in Consumer Contracts Directive 93/11 and/or the Unfair Terms in Consumer Contracts Ordinance.

Ground 1—Right to a fair hearing

9 Section 30(1) of the Ordinance reads:

> "Where any contract, other than a contract of tenancy to which section 15 applies has been let, then subject to the provisions of this section, the landlord or the tenant may in the prescribed form apply to the Rent Tribunal to determine—
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> (a) what is the correct amount of the statutory rent payable in respect of the dwellinghouse under this Part; and
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> (b) whether and to what extent the amount of the statutory rent as so determined may be increased or decreased in accordance with this Part."

Sub-section (5) of s.30 reads:

> "Where the Rent Tribunal determines the statutory rent in respect of any dwellinghouse under this section, that rent shall be the statutory rent for the dwellinghouse as at the date at which it is to be determined."

The argument on this ground of appeal is that the effect of ss. 11 and 30 as read together with Schedule 1 to the Ordinance is that the Rent Tribunal was bound to find that the rent assessed by the Rent Assessor, *i.e.* £8.50 per month, was the statutory rent in respect of 51/8 Main Street. The effect of the statutory provisions was mandatory in nature and deprived the Rent Tribunal of any discretion to determine what was a fair or appropriate rent.

10 The argument is that the absence of a real discretion means that in the majority of cases there is a short hearing and a cursory investigation of the matter once it is clear that the dwellinghouse is one to which Part III of the Ordinance applies. An applicant is denied a fair hearing because the absence of a real discretion amounts to a significant procedural bar which prevents a full and fair investigation and determination of s.30 applications. In effect, an unfair outcome is achieved because of an unfair procedure. A procedure which debars any real consideration of issues or fails to provide a tribunal with discretion prejudges the determination and is a denial of a fair hearing and of the right to due process. The impugned provisions of the Ordinance which in effect mandate a certain pre-conceived result infringe an applicant's right to a fair hearing prescribed by s.8(8) of the Constitution and also the right to the protection of the law as prescribed by s.1(a) thereof.

11 Mr. Azopardi, for Karenga, referred me to two decisions of the European Court of Human Rights ("the ECHR"), namely *Tinnelly & Sons Ltd.* v. *United Kingdom* (9) and *Devlin* v. *United Kingdom* (1), in which a certificate issued by the Secretary of State removed an issue from the sphere of the court proceedings. The argument of the appellants in those cases was that the issue of the certificates blocked their right of access to the court. In finding for the appellants in each case, the ECHR said that the right of access to the court guaranteed by art. 6 of the European Convention cannot be displaced by the *ipse dixit* of the executive.

12 I was also referred to the decision of the ECHR in *Findlay* v. *United Kingdom* (2), in which it was held that the appellant, who was the defendant in proceedings before a court martial, did not receive a fair hearing before an independent and impartial tribunal.

13 I must say I do not find these cases particularly relevant in the context of the present case. In the first place it is not the *ipse dixit* of the executive which displaces any discretion which the Rent Tribunal may exercise but the provisions of the very statute which creates the Tribunal.

In the second place, Mr. Azopardi's arguments are not against the composition of the Rent Tribunal and the conduct of the various participants in the Tribunal; they are against the process laid down by the Ordinance.

14 I agree with the Attorney-General that what defeats Karenga is the lack of power given to the Tribunal by the Ordinance and not the procedures of the Tribunal. Sections 8(8) and 1(a) of the Constitution cannot transpose into domestic law substantive rights which do not exist and the Rent Tribunal cannot exercise a discretion which is outwith the parameters laid down by the Ordinance. The Ordinance has created a Tribunal to determine certain issues and as long as the composition of and the procedures before the Tribunal are such that the issues are fairly tried then ss. 8(8) and 1(a) of the Constitution are not engaged. True it is that the issues which the Tribunal are called upon to determine are narrow. But there are issues upon which the Tribunal has to make a decision, for example whether the particular provisions of the Ordinance apply to the parties. On those narrow issues the Tribunal must make a fair determination.

15 The upshot is that on the first ground I am unable to say that Karenga is denied a fair hearing or due process merely because the issues which the Ordinance calls upon the Tribunal to determine are limited.

Ground 2—Protection of property

16 Karenga argues that the impugned provisions of the Ordinance offend its right to privacy of its property as protected by s.1(c) of the Constitution, which reads:

> "1. It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely—
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> . . .
>
> (c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation,
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> and the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

17 There are two limbs to this provision. First, there is the right of the individual to protection for the privacy of his home and other property and, secondly, the right of the individual to protection from deprivation of property without compensation. *Aidasani* (6) was a case in which it was argued that the second limb of s.1(c) had been contravened, and indeed it was held that the landlord had been deprived of his property. However, for reasons to which I shall revert, it was held that the deprivation did not offend s.1(c). Karenga has put its argument on the basis of the first limb of s.1(c), and submits that there has been a breach of its right to protection for the privacy of its property.

18 Mr. Azopardi, for Karenga, cited in support of his argument various decisions of the ECHR in its interpretation of art. 1 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). He argues that the test to be applied in cases involving interference with property requires consideration, not only of whether the act complained of is being carried out in the public interest, but whether it accords with the principle of fair balance between the parties. The argument is that the Ordinance does not strike a fair balance between landlords and tenants.

19 *Sporrong* v. *Sweden* (7) was a case in which planning permits issued and construction restrictions made under Swedish legislation were held to contravene art. 1. The majority judgment of the ECHR said (5 E.H.R.R. 35, at para. 69):

> ". . . [T]he Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights [See, *mutatis mutandis*, Belgian Linguistic Case (No. 2) (1968) 1 E.H.R.R. 252, para. 5]. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1."

20 *J.A. Pye (Oxford) Ltd* v. *United Kingdom* (4) was a case in which a challenge was made to the provisions of the English Limitation Act 1980 which relate to adverse possession. In holding that the provisions did offend art. 1 the ECHR said (19 BHRC 705, at para. 44):

> "The national authorities are in principle better placed than the international judge to appreciate what is in 'the public interest'. The court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is in the public interest unless that judgment is manifestly without foundation."

And further (*ibid.*, at para. 46):

> "46. An interference with the peaceful enjoyment of possessions must nevertheless strike a 'fair balance' between the demands of the public or general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of art. 1 as a whole, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions or controlling their use."

21 However, the Convention has not been incorporated into Gibraltar law and the provisions of art. 1 of Protocol 1 are substantially different from s.1(c) of our Constitution. This court can derive assistance from cases decided by the ECHR in appropriate circumstances (see *Thauerer* v *Att.-Gen.* (8) (1999–00 Gib LR 551, at paras. 17 and 19)). But in my view this is not such a case. Article 1 of the Convention speaks of "peaceful enjoyment" of possessions whereas s.1(c) of the Constitution speaks of the right to "privacy" of property. I accept the submissions of the Attorney-General in this regard, that the Court cannot incorporate the ECHR "fair balance" test to provisions which are so different from those of the Convention. The right to "privacy" involves rights such as protection from search or entry into premises and is narrower than a right to "peaceful enjoyment". Mr. Azopardi correctly argues that s.1(c) of the Constitution is not merely declaratory and sets out rights which are enforceable distinct from the rights under s.7 which set out rights relating to the protection for privacy of property in greater detail than those contained in s.1(c) (see *Aidasani* (6) (2001–02 Gib LR 21, at paras. 94–96)). It may well be that circumstances could arise where the rights set out under s.7 are not offended yet the right to privacy of property contained in s.1(c) is offended. Be that as it may, I cannot adopt a test laid down in the interpretation of the words "peaceful enjoyment" in the interpretation of the word "privacy".

22 In the course of argument, Mr. Azopardi sought to distinguish the case of *Aidasani* and submitted that the principle set out therein did not apply to his case which is founded on the right to privacy rather than the right to protection from deprivation of property contained in the second limb of s.1(c) of the Constitution.

23 In *Aidasani*, in holding that the impugned provisions of the Ordinance did not offend s.1(c) of the Constitution, the Court of Appeal followed the Privy Council decision in *Grape Bay Ltd.* v *Att.-Gen. (Bermuda)* (3). In that case a company, Grape Bay Ltd., was formed in Bermuda for the purpose of operating restaurants under a franchise agreement with McDonald's, the American fast food company. When the

Minister for Finance gave the necessary consent for Grape Bay Ltd. to be registered as a local company there was a storm of opposition from those who did not think that it was appropriate for a fast food chain such as McDonald's to operate in Bermuda. As a result the Minister for Finance set up a committee to review Government policy on franchises. A private member tabled a Bill in the House of Assembly, the object of which was to prohibit the operation of restaurants such as McDonald's in Bermuda. During the passage of the Bill, which was delayed on its first passage by the Senate, Grape Bay Ltd. took certain steps in pursuit of its initial agreement with McDonald's. When the Bill became law, Grape Bay Ltd. challenged it as offending its right to protection from deprivation of property under the Bermuda constitutional provision which is in the same terms as our s.1(c). The Privy Council held that Grape Bay Ltd. had not been deprived of any property and thus there had been no contravention of the Constitution.

24 In *Aidasani* (6), Neill, P. cited the following passage from the *Grape Bay* case ([2000] 1 W.L.R. at 583):

> "It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid . . . The give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest. The principles which underlie the right of the individual not to be deprived of his property without compensation are, first, that some public interest is necessary to justify the taking of private property for the benefit of the state and, secondly, that when the public interest does so require, the loss should not fall upon the individual whose property has been taken but should be borne by the public as a whole. But these principles do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application which is enacted for the public benefit. This is so even if, as will inevitably be the case, the legislation in general terms affects some people more than others. For example, rent control legislation restricts only the rights of those who happen to be landlords but nevertheless falls within the general principle that compensation will not be payable. Likewise in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, the New York City's Landmarks Preservation Law restricted only the rights of those people whose buildings happened to have been designated historic landmarks. Nevertheless the Supreme Court of the United States held that it was a general law passed in the public interest which did not violate the Fifth Amendment prohibition on taking private property without compensation."

Neill, P. then went on to say (2001–02 Gib LR 21, at para. 103):

> "It is first necessary to consider the nature of the legislation. Does it satisfy the two relevant tests (a) of being of general application and (b) of having been enacted for the public benefit? It is then necessary to consider the facts and the effect of the legislation on the property concerned. If the legislation passes the two tests and the legislation does not effect any transfer or property from the owner, it seems to us that the principle applies and that no compensation is payable even though the effect on the value of the property remaining in the hands of the owner is reduced to vanishing point."

25 The Court of Appeal determined that the Ordinance is of general application and thus satisfied the first test. The court then went on to consider the second test of whether the impugned provisions were enacted for the public benefit and came to the conclusion that they were so when the Ordinance was passed in 1983. The court also held that the legislation had not lost its characteristic of being legislation of general application passed for the public interest in the intervening years. In the following passage (*ibid.*, at paras. 117–120), the court held that it should not delve into matters of policy which the courts are ill-equipped to do:

> "117 The imposition of any system of rent control involves the consideration of issues of social policy of great difficulty, and as Lord Bingham pointed out in *Ex p. Spath Holme Ltd.* (8) ([2001] 1 All E.R. at 215), in the context of the Rent Acts (Maximum Fair Rent) Ordinance 1999 in the United Kingdom, it was for ministers to judge where the balance between the competing interests of landlords and tenants should be struck.
>
> 118 It is right to emphasize that the courts have a role if a challenge is made on the basis of a written constitution or an international convention, and in other circumstances where judicial review is sought of a ministerial decision. But, even if the application to a court is appropriate and justified on the facts, the court must approach its task with great caution. Thus, although, as in the present matter, the parties may be able to adduce carefully prepared and cogent evidence, it must be borne in mind that it may be difficult in the context of court proceedings to collect all the relevant material, and that, in any event, the evaluation of that evidence may involve questions of policy with which a court of law is ill-equipped to deal.
>
> 119 If one applies these considerations to the present case, it is apparent that the picture that slowly emerged before us was rather different from the stark picture before the Chief Justice. Thus, for example, it is now apparent that there are still a substantial number

> of vulnerable people who of necessity have to look to the private housing market for affordable housing. The balance between their needs and those of landlords, who may be seriously disadvantaged by the operation of Schedule 1, is a matter for the application of political judgment. Secondly, we are far from clear as to the precise extent of the hardship in Mr. Aidasani's case and whether that might have been mitigated by a prudent adherence to the provisions of s.80A. Indeed, the operation of s.80A in the current housing market remains unclear.
>
> 120 The more we looked at this case, the more apparent it became that a just solution to what is a serious problem could not be reached without a full enquiry, which we were not equipped to carry out."

26 Mr. Azopardi submits that the *Grape Bay* principle has no application to the case he is arguing. He does not seek compensation for a deprivation of property but a striking down of legislation which affects his client's right to protection for the privacy of his property.

27 It appears to me that Mr. Azopardi is making submissions on issues which were not raised before the Court of Appeal in *Aidasani* (6). Although he states his argument on the "fair balance" test as applied by the ECHR, the argument appears to stretch to the "public interest" test which is the test laid down by our Constitution. The questions that come to mind are these. If a statute is passed purporting to be in the public interest, or starts its life as being in the public interest, and the evidence before the court is that it is, in fact, not (or is not now) in the public interest, is the court prevented from testing its constitutionality because of the passage cited above from the *Grape Bay* (3) case? Where the evidence demonstrates that a statute does offend a person's right to protection for the privacy of his property or does deprive a person of his property in circumstances where compensation is not payable and further that the public interest is not served by its provisions, are the courts not, albeit reluctantly, obliged to pronounce on its constitutionality?

28 Mr. Azopardi has, for quite obvious reasons, shied away from inviting this court to refuse to follow *Aidasani*. Instead, he asks me to distinguish his arguments from that case, and seeks to put his arguments on the first limb of s.1(c), that of protection for the privacy of his client's property. To my mind, the case he seeks to argue should not be based on the first limb of s.1(c) but should be based on the second limb, that of deprivation of property without compensation. This is not a case which engages Karenga's right to privacy of its property and the questions he raises are not questions which I can answer, being bound as I am by the Court of Appeal decision in *Aidasani*.

29 In the circumstances I find against Karenga on Ground 2.

Ground 3—Unfair contractual term

30 In applying the impugned provisions of the Ordinance, the Rent Tribunal overrode the contractual rent agreed between the parties. Karenga argues that in so doing an unfair contractual term which was not individually negotiated between the parties was imposed. This, says Karenga, is contrary to the terms of the Unfair Terms in Consumer Contracts Ordinance ("the UTCCO") which was passed as a result of the Unfair Contract Terms Directive ("the UCTD") which gives redress to consumers who have been subject to unfair terms in contracts concluded with a seller or supplier.

31 By s.3(1) of the UTCCO, the Ordinance "applies to any term in a contract concluded between a seller or supplier and a consumer where the said term has not been individually negotiated." Section 4(1) provides that an "unfair term" means "any term . . . which causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer." In s.2, "consumer" is defined as "a natural person who in making [the contract] is acting for purposes which are outside his business."

32 In this case it cannot be argued that Karenga is the "consumer." Not only does the position of the landlord not conform to one's concept of "consumer" but Karenga, not being a natural person, does not fall within the definition of "consumer" in s.2.

33 It could be said that Karenga, as landlord, is the supplier. However, although Karenga may argue that the impugned provisions operate to the tenant's detriment in that the landlord cannot afford to maintain the premises in good condition, that does not get over the hurdle that the tenant in this case is not seeking any redress and is not complaining about the terms of the contract. In fact the tenant is quite content with the terms laid down by the Rent Tribunal.

34 Mr. Azopardi has referred me to the English Court of Appeal decision in *R. (Khatun)* v. *Newham London Borough Council* (5), in which the Council's policy in relation to its provision of accommodation for homeless persons under the Housing Act 1996, was challenged. It was held that for the purposes of the UCTD the Council was the "seller or supplier" and that the prospective tenant was the "consumer".

35 In the instant case Mr. Azopardi seeks to persuade me that the Government and the Rent Tribunal are the "suppliers" and that the landlord and the tenant are the "consumers" for the purposes of the UTCCO. I am unpersuaded by his arguments. In my judgment, to make the finding he seeks would be to impose a strain on language which cannot have been in the minds of those who drafted the UCTD and the UTCCO.

36 In any event, the UTCCO applies subject to the provisions of Schedule 1 (see s.3(1)). The relevant part of Schedule 1 reads:

"The Ordinance does not apply to—

. . .

(e) any term incorporated in order to comply with or which reflects—

(i) statutory or regulatory provisions of Gibraltar; or

(ii) the provisions or principles or international conventions to which the member States, Gibraltar or the Community are party."

37 In my judgment the UTCCO does not apply to the contractual terms which were imposed by the Rent Tribunal and the appeal must fail on Ground 3.

38 The upshot is that, having rejected the three grounds of appeal, I dismiss it.

Appeal dismissed.