[2010–12 Gib LR 21]

R. (RODRIGUES) v. DIRECTOR OF EDUCATION AND TRAINING

SUPREME COURT (Dudley, C.J.): May 13th, 2010

Administrative Law—judicial review—legitimate expectation—no legitimate expectation that children of illegal immigrants entitled to free education without residence permit (arising from Chief Minister's Parliamentary statements that such children not to be denied free school)—only capable of founding expectation that will receive required residency permit

Constitutional Law—fundamental rights and freedoms—protection for privacy of home and other property—"respect for private and family life"—generous and purposive interpretation required—encompasses personal development, relationships, and elementary education—decision not to enrol children of illegal immigrants in free schooling without residence permits violates 2006 Constitution, s.7

The claimant sought judicial review of a decision of the Director of Education & Training on the grounds that it was contrary to Government policy and an alleged breach of her children's Constitutional rights.

The claimant was a Brazilian national who had come to Gibraltar with her two sons. Her partner, also a Brazilian national, had obtained a residence permit. The claimant's application for a residence permit was refused. She sought the admission of her children to a free school, which the Director refused on the ground that they did not have residence permits, as required by the Education and Training Act 1974, s.73(2)(i), no residence applications had been made on their behalf, and steps were being taken to remove the claimant and the children from the jurisdiction. In 2004, the Chief Minister had made a number of policy statements in Parliament about the importance of offering free education to immigrant children, on which the claimant relied.

The claimant applied for judicial review of the Director's decision, submitting that (a) the decision breached her children's legitimate expectation of receiving free education without residence permits, arising from the policy statements made by the Chief Minister in Parliament; (b) the decision violated their right to respect for private life under the 2006 Constitution, s.7, which should be interpreted generously to encompass education and personal development; and (c) there was no reasonable

justification under s.7(3) for the limitation of free educational provision to those with residence permits.

The defendant submitted in reply that (a) the claimant had no legitimate expectation that her children would receive free education without a residence permit; at most, based on the Chief Minister's statements, the expectation could only have been to receive a residence permit; (b) the children's right to respect for their private life under the 2006 Constitution, s.7, did not encompass the right to free education in the absence of a residence permit and the court should grant a wide margin of appreciation to the Government in immigration cases; and (c) even if the s.7 right were engaged, the decision had been reasonably justified on general public interest grounds under s.7(3).

Held, refusing judicial review on the basis that the decision was contrary to Government policy, but finding a violation of Constitutional rights:

(1) There had been no legitimate expectation of receiving free education without a residence permit. The statements of policy made by the Chief Minister could only support a legitimate expectation on the part of the children of illegal immigrants that they would be issued residence permits, which would in turn entitle them to free education under the Education and Training Act 1974, s.73 (para. 19).

(2) The decision had, however, violated the children's right to respect for private life under the 2006 Constitution, s.7(1). Taking into account Strasbourg jurisprudence under art. 8 of the European Convention and art. 2 of the First Protocol to the Convention as an aid to the interpretation of s.7(1), the notion of "private life" would be given a generous and purposive interpretation as encompassing the right to free elementary education, to protect personal development and the ability to build relationships with others. The court was not required to give a wide margin of appreciation to the Government in the context of immigration, as what was in issue was the ability of the children to obtain access to education. No reasonable justification had been demonstrated under s.7(3) for restricting the provision of free education to those with residence permits and it was relevant that the children, as minors, were not responsible for their illegal presence in Gibraltar. In consequence, the decision had violated s.7 of the Constitution (paras. 22–33).

Cases cited:

(1) *Abdulaziz* v. *United Kingdom* (1985), 7 E.H.R.R. 471, distinguished.
(2) *Garland* v. *British Rail Engr. Ltd.*, [1983] 2 A.C. 751; [1982] 2 W.L.R. 918, followed.
(3) *Home Affairs Minister* v. *Fisher*, [1980] A.C. 319; [1979] 2 W.L.R. 889; [1979] 3 All E.R. 21, followed.
(4) *Niemietz* v. *Germany* (1992), 16 E.H.R.R. 97, followed.
(5) *Pretty* v. *United Kingdom* (2002), 35 E.H.R.R. 1, followed.
(6) *R. (Holub)* v. *Home Secy.*, [2001] 1 W.L.R. 1359, considered.

(7) *R. (Nadarajah)* v. *Home Secy.*, [2003] EWCA Civ 1768, distinguished.
(8) *Timishev* v. *Russia* (2005), 44 E.H.R.R. 37, followed.

Legislation construed:
Education and Training Act 1974, s.50: The relevant terms of this section are set out at para. 8.
s.73: The relevant terms of this section are set out at para. 8.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.7: The relevant terms of this section are set out at para. 21.

European Convention for the Protection of Human Rights and Fundamental Freedoms, First Protocol (Paris, March 20th, 1952), art. 2:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

J. Restano for the claimant;
R.R. Rhoda, *Q.C.*, *Attorney-General*, and *D. Conroy* for the defendant.

1 **DUDLEY, C.J.:** The claimant is a Brazilian national who, together with her sons Jose Rodrigues Benjamin and Joao Pedro Rodrigues Benjamin, born on September 23rd, 2002 and January 28th, 2005 respectively, has been residing in Gibraltar since about August 2006. The present action arises consequent upon a refusal by the defendant to afford the children free full-time education.

Factual background

2 The claimant's partner, Marco Aurelio Benjamin, a Brazilian national, has been resident in Gibraltar since about October 2005, with the benefit of permits of residence that have been renewed regularly since they were first granted. In contrast, the claimant and the children do not have residence permits.

3 It is said for the claimant that shortly after her arrival she sought to regularize her position, but nothing materialized. Apparent from the material before me is that, the claimant having made an application for a work permit, the authorities including the Chief Immigration Officer were, by September 2007, aware both of her and her children's presence. More recently, on April 22nd, 2009, the claimant wrote to the head of the Civil Status Registration Office ("CSRO") seeking to legalize her position. By a letter dated April 27th, 2009, the head of the CSRO, Mr. Flower, informed the claimant that her presence and that of her children was "in breach of

immigration laws and therefore illegal." She was further informed that it was not normally possible for a residence application to be considered whilst she was illegally in Gibraltar. At about that time the claimant was visited at home by Det. Const. Sanchez, who was acting on the Chief Immigration Officer's instructions. It is not in issue that Det. Const. Sanchez informed her that she could not reside in Gibraltar without a residence permit and that she would have to leave the jurisdiction before an application could be considered. Albeit there is a slight distinction between the position as stated by Mr. Flower and Det. Const. Sanchez, for present purposes nothing turns on it.

4 Nothing further happened until July 29th, 2009, when the claimant, together with her lawyer, met with the Acting Director of Education and applied to enrol the children for schooling in Gibraltar. This was followed by a letter from the claimant's solicitors to the Director of Education dated July 31st, 2009, in which they set out the residence status of the claimant, the children and Mr. Benjamin, and relied upon an extract from *Hansard* in which, in answer to parliamentary questions in 2004, the Hon. Chief Minister is said to state Government policy on the entitlement to education by children not legally resident.

5 By letter dated September 9th, 2009, the defendant refused to enrol the children on the grounds that the claimant and her sons did not hold residence permits, that it was the defendant's understanding, on the basis of information provided to him by the CSRO, that requests for legal residence had not been made on the children's behalf and that there was a process in operation to have the claimant and her children seen out of Gibraltar.

6 By letter from the Immigration Department of the Royal Gibraltar Police, dated September 8th, 2009 but received on September 14th, the claimant was informed that she and the children were to cease residing in Gibraltar by September 30th, 2009 and that failure to do so could lead to steps being taken to secure their removal.

7 As yet, the claimant and the children have not been removed from the jurisdiction.

The statutory background

8 The relevant statutory provisions governing the provision of free education to a child of compulsory school age is to be found at s.73, read together with s.50, of the Education and Training Act 1974:

> "50. Subject to the provisions of section 73 it shall be the duty of the parent of every child of compulsory school age residing in Gibraltar, to cause him to receive efficient full-time education which, in the

opinion of the Director, is suitable to his age, ability and aptitude, either by regular attendance at school or otherwise."

"73. (1) Subject to subsection (2A) no fees shall be charged either for admission to Government schools or for education provided in such schools in respect of any child of compulsory school age residing in Gibraltar.

(2) For the purpose of subsection (1) a child shall be deemed to be residing in Gibraltar only if he is in Gibraltar under the provisions of the Immigration, Asylum and Refugee Act or the Temporary Protection Act 2005, and—

(i) does not require a permit or certificate to reside in Gibraltar;

(ii) has a certificate of permanent residence;

(iii) has a valid permit of residence issued under section 18(1)(f) of the Immigration, Asylum and Refugee Act;

(iv) has, or is entitled to, a permit of residence under the Temporary Protection Act 2005;

(v) is an applicant or dependant family member of an applicant under the Asylum Regulations 2008; or

(vi) has refugee status or subsidiary protection status under the Asylum Regulations 2008."

9 It is not in dispute that the children do not fall within the statutory criteria entitling them to free education.

The issues

10 The legality of the defendant's decision is challenged on two distinct grounds: (a) breach of policy which renders the decision illegal; and (b) violation of the children's constitutional right under s.7 to respect for "private life."

11 Although the claimant's and the children's residency status is highly relevant in relation to the statutory provisions underpinning the defendant's decision, it is not in dispute that, if established, the right to free education is a limited right which would not prevent the state from enforcing immigration controls to secure the removal of the claimant and the children from Gibraltar (*R. (Holub)* v. *Home Secy*. (6)).

Breach of policy

12 The claimant relies upon its interpretation of Government policy as enunciated by the Chief Minister in reply to Parliamentary questions. Given the nature of the submissions, it is useful to set out extensively some of the passages from *Hansard*:

> ". . . [T]he Government took the policy decision that either it enforced immigration laws and expelled from Gibraltar and physically saw out illegal child immigrants . . . or otherwise had a moral obligation to provide them with schooling. What was not acceptable . . . was that the Government should turn a blind eye to their presence for lack of courage to apply the immigration legislation and then deny them free schooling . . . The way that that was dealt with was that in effect they get residence permits. So it is true that these people are getting residence permits as a means of compliance with the Education Ordinance that requires that in order for entitlement to free schooling."

And later:

> ". . . I think the policy is that in respect of children of which the administration is aware that they are in Gibraltar and the administration chooses not to enforce the statutory rights to have them or to seek the necessary judicial orders to have them seen out of Gibraltar, that they are then admitted into schools on the basis that these children should not be allowed to fester as non-persons. Either they are illegal immigrants who should not be in Gibraltar and they are seen out of Gibraltar, or they are admitted into schools, but they should not fall in between either of those so that they are here with the knowledge of the administration but denied schooling . . ."

Even later:

> ". . . We must not allow children to come in if we do not want them to come in and if they do come in clandestinely and they are discovered, then they should be either seen out of Gibraltar or educated, but I do not think there are any circumstances in which this community can know that there are children of school age in Gibraltar, choose not to apply the immigration legislation to them and then deny them education."

13 In an affidavit filed for the purposes of these proceedings, Mr. Garcia, the Chief Secretary of the Government of Gibraltar, explains Government policy on the following terms:

> "It is only where the Authorities are aware of the illegal presence in Gibraltar of someone not legally entitled to reside here, and have chosen not to enforce their statutory powers to see them out of

Gibraltar, that the Director of Education would admit and enrol such children, who are not ordinarily entitled to free education."

14 Earlier in the affidavit, in the context of the present case:

"I am informed and verily believe that steps have been taken to see the claimant and her sons out of Gibraltar as they are currently unlawfully residing in Gibraltar. In such cases it is Government's policy not to admit to education those whom the authorities are actively seeking to see out of Gibraltar."

15 Mr. Restano's submission is that the nuanced position adopted by Mr. Garcia has the effect of denuding the policy of any substance and is not consistent with a reasonable interpretation of the policy, which is not to allow children to "fester as non-persons" and to provide schooling for children other than those that are in fact about to be deported. He submits that his interpretation of the policy is consistent with the approach in other European jurisdictions including the United Kingdom, where children in deportation centres are afforded access to education until actual deportation.

16 It is said for the claimant that the defendant's failure to act in accordance with Government policy amounts to an error of law. In support of that proposition, Mr. Restano relies upon the English Court of Appeal's decision in *R. (Nadarajah)* v. *Home Secy.* (7), an appeal by the Secretary of State against decisions that the detention of two asylum seekers under the Immigration Act 1971 was unlawful. In a concluding paragraph of his judgment in which the asylum seekers are referred to as N and A, Lord Phillips, M.R., as he then was, stated ([2003] EWCA Civ 1768, at para. 72): ". . . [T]he detention [of A] was unlawful for the same reason that N's detention was unlawful. It was at odds with the Secretary of State's policy, as made public."

17 Premised upon this statement it is said that failure to act in accordance with policy amounts to an error of law. Mr. Restano seeks to derive a principle which is exceptionally wide ranging from a single sentence. When *Nadarajah* (7) is properly considered, it is, I think, clear that it deals with a far narrower issue, where, dealing with N's detention Lord Phillips said (*ibid*., at para. 72):

"The only basis upon which the Immigration Service could treat his removal as imminent was by applying that aspect of the Secretary of State's policy which had not been made public . . . The Secretary of State cannot rely upon this aspect of his policy as rendering lawful that which was, on the face of it, at odds with his policy, as made public."

18 The added difficulty in seeking to assert the illegality of the decision is that the policy, as interpreted by Mr. Restano, is not one which

establishes a basis for the exercise of a statutory power but rather is one which appears to create an obligation in excess of the defendant's statutory obligation.

19 In those circumstances, I am of the view that the only basis upon which the policy statement can be relied upon is as establishing a legitimate expectation. In that regard, although submissions were advanced as to whether or not answers to Parliamentary questions can constitute policy, it is, for present purposes, unnecessary to consider the point given the terms of the Chief Minister's replies. Particularly relevant, in my view, is the reference in the first passage to the effect that illegal immigrants are issued with residence permits so as to entitle them to come within the ambit of the Education and Training Act, as opposed to a statement to the effect that free education is provided notwithstanding the absence of a residence permit. From that perspective, the Director of Education & Training cannot be said to be the proper defendant given that on the policy as enunciated by the Chief Minister (if it amounts to such) it is apparent that the defendant would in any event only allow access to free education after a residence permit has issued. That approach has the benefit that the defendant then acts within the strictures of the Education and Training Act, s.73.

20 On this ground the application for judicial review fails.

Section 7 of the Constitution

21 The second ground upon which the application is pursued is to the effect that the requirement of legal residence to entitle the children to free education amounts to a violation of their right to respect for private life under the Gibraltar Constitution 2006, s.7. The material provisions are:

> "7.(1) Every person has the right to respect for his private and family life, his home and his correspondence.
>
> . . .
>
> (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—
>
> (a) in the interests of defence, the economic well-being of Gibraltar, public safety, public order, public morality, public health, town planning, the development or utilisation of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit . . .

> except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

22 Section 7 is framed in similar terms to the European Convention on Human Rights, art. 8 ("ECHR"). By virtue of the Constitution, s.18(8), this court is enjoined *inter alia* to take account of decisions of the European Court of Human Rights when dealing with any question which has arisen in connection with the rights and freedoms protected by the Constitution, Chapter I. That said, and albeit to state the obvious, the role of this court is to interpret and apply s.7 rather than art. 8.

23 In *Niemietz* v. *Germany* (4), the court said (16 E.H.R.R. 97, at para. 29):

> "The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life.' However, it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.
>
> There appears, furthermore, to be no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world."

24 This broad approach to "private life" has also been taken up by the European Court of Human Rights in more recent decisions. In *Pretty* v. *United Kingdom* (5), reviewing an earlier decision the court said (35 E.H.R.R. 1, at para. 61): "Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world."

25 Although I have not been referred to any judgment of the European Court of Human Rights in which the right to free elementary education is encompassed within art. 8, such absence of authority is not surprising given the provisions of Protocol 1, art. 2: "No person shall be denied the right to education . . ."

26 In *Timishev* v. *Russia* (8), the court had this to say (44 E.H.R.R. 37, at paras. 63–64):

> "The Court reiterates that, by binding themselves not to 'deny the right to education' under Art.2 of Protocol No.1, the contracting states guarantee to anyone within their jurisdiction a right of access

> to educational institutions existing at a given time . . . Article 2 of Protocol No.1 prohibits the denial of the right to education. This provision has no stated exceptions and its structure is similar to that of Arts 2 and 3, Art.4(1) and Art.7 of the Convention ('No one shall . . .'), which together enshrine the most fundamental values of the democratic societies making up the Council of Europe. In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Art.2 of Protocol No.1 would not be consistent with the aim or purpose of that provision . . . There is no doubt that the right to education guarantees access to elementary education which is of primordial importance for a child's development."

27 Protocol 1 applies to Gibraltar by virtue of the United Kingdom's declaration made on the February 25th, 1988 pursuant to art. 4 of the Protocol.

28 Although art. 2 of Protocol 1 does not find an equivalent in our domestic legislation, Mr. Restano cogently argues that the court should have recourse to it when construing the Constitution. In *Garland* v. *British Rail Engr. Ltd.* (2), Lord Diplock stated ([1983] 2 A.C. at 771):

> ". . . [I]t is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it."

29 There is also no ignoring that in interpreting the constitutional provisions protecting fundamental rights the court should adopt a purposive and generous interpretation (*Home Affairs Minister* v. *Fisher* (3)).

30 For his part, the Attorney-General submits that art. 8 does not encompass the right to education and therefore, by analogy, neither does s.7 of the Constitution. If one adopts a strict approach to the interpretation of the ECHR and the Protocol, that must be right, given that if the right to a free education is caught by art. 8 then art. 2 of Protocol 1 would serve no purpose. Although an approach which is well suited to applications in the Chancery jurisdiction of this court, it is not one which I find apposite in the context of the interpretation and protection of fundamental rights.

31 As I understand it, the second strand to the Attorney-General's submissions is that if s.7 of the Constitution is engaged, then by analogy with art. 8 jurisprudence, the state is to be afforded a generous margin of appreciation given that the issues touch upon immigration policy

(*Abdulaziz* v. *United Kingdom* (1)). In my view, to adopt such an approach in the present case is to misconstrue the nature of the right allegedly being breached. As previously indicated, what is in issue is not the immigration rights of the children but rather their ability to access education pending their removal from Gibraltar or the grant of residence permits. There is no ignoring that whilst the claimant may have chosen to remain in Gibraltar in breach of the relevant immigration provisions, the children, given their age, clearly will have had no input as regards that decision. I struggle with the notion that they should somehow be sanctioned and deprived of access to education because of the acts and decisions of their mother.

32 Of course, a s.7 right is capable of exclusion on the basis of lawful justification under s.7(3). The argument may be made out that s.73 of the Education and Training Act provides the legal authority through which to exclude from free education children who do not have a permit of residence. What is, however, not readily apparent is which of the criteria found in s.7(3)(a) are engaged. The Attorney-General alludes to the general public interest but in my view such a wide ranging concept needs to be considered in light of the specific s.7(3)(a) criteria. Of these, the only one which may apply is that of "economic well being," but in the absence of any evidence in that regard, and indeed as to how it is also "reasonably justifiable," I am of the view that the argument cannot be sustained.

33 It is, in my view, self-evident that the full measure of social development by children is inextricably linked with, and dependent upon, access to education. Viewed from that perspective, the analogy between working life and education as a means to establish relationships with the outside world is in my view apparent. By analogy with ECHR jurisprudence, and given that this court is enjoined to adopt a generous and purposive approach to the interpretation of the fundamental rights protected by the Constitution, I have no difficulty in interpreting s.7 of the Constitution as encompassing the right to free elementary education. To do this is also to ensure that there is no possible breach of international obligations.

Orders accordingly.
