

[2010–12 Gib LR 32]

**IN THE MATTER OF THE CHIEF MINISTER and
ATTORNEY-GENERAL'S REFERENCE (COMPATIBILITY
OF CRIMINAL OFFENCES ACT 1960, PART XII WITH
CONSTITUTION)**

SUPREME COURT (Dudley, C.J.): July 22nd, 2010

Constitutional Law—declaration of compatibility—interested parties—joined as parties if directly affected by reference proceedings under Constitution (Declaration of Compatibility) Act 2009

Constitutional Law—declaration of compatibility—interveners—permitted to make representations in reference proceedings under Constitution (Declaration of Compatibility) Act 2009 if represent body of opinion and able to make material contribution—unlikely to be sufficiently representative if individual citizen—court may limit time or require only written interventions

The Chief Minister and the Attorney-General brought a reference to the Supreme Court, seeking a declaration, originally under the Civil Procedure Rules, r.40.20, and subsequently also under the Constitution (Declaration of Compatibility) Act 2009, s.2.

The reference requested a declaration on the compatibility of the differing ages of consent for homosexual men, heterosexuals, and lesbians, prescribed by the Criminal Offences Act 1960, Part XII for various sexual activities, with ss. 1, 7, and/or 14 of the Constitution.

The Supreme Court had already allowed the joinder of the Equality Rights Group GGR as an interested party and directed the claimants to place notices in the *Gibraltar Chronicle* inviting all interested parties to file application notices.

The Foreign Secretary made an application to be joined as an interested party, arguing that (a) he was responsible for Gibraltar's compliance with the European Convention on Human Rights; and (b) he was responsible for Gibraltar's relationship with the United Kingdom, which was partly governed by the Constitution.

Unite the Union and the Evangelical Alliance made applications to intervene, arguing that they (a) represented bodies of opinion; and (b) would make material contributions to the proceedings.

Stephen Bossino made an application to intervene, arguing that (a) whilst not representing a body of opinion, he had a genuine and serious

interest in the constitutional issues raised by the proceedings; and (b) he could make a material contribution to the proceedings.

Held, allowing three of the four applications:

(1) In considering which applicants would be allowed to make representations in constitutional reference proceedings under the Constitution (Declaration of Compatibility) Act 2009, and in applications for binding declarations under CPR, r.40.20, the court would maintain the distinction drawn in judicial review proceedings between interested parties and interveners. Public interest groups would be permitted to make representations. Interested parties, who would participate fully in the proceedings, would be joined if they were directly affected by the proceedings. Conversely, the court would only allow interventions if the interveners represented a body of opinion and were able to make a material contribution to the proceedings. The court had a discretion to limit interveners to representations in writing or apply time limits to their oral submissions (para. 8).

(2) Applying that test to the present applicants, the Foreign Secretary was responsible for Gibraltar's compliance with the European Convention on Human Rights and would be joined as an interested party; Unite was a very significant public interest group and although there was reason to doubt that it could make contributions materially different from the arguments raised by the Equality Rights Group GGR, the subject-matter of the proceedings warranted an inclusive approach and it would be allowed to intervene; the Evangelical Alliance, and the churches it represented, played a significant role in the community, would make a material contribution to the adversarial proceedings by adopting a contrary position to that of the respondent and the other interveners, and would be allowed to intervene; but Stephen Bossino, a barrister with a particular interest in constitutional issues, whilst capable of making submissions on the matter, was not sufficiently representative of a body of opinion within the community to be allowed to intervene—indeed, allowing multiple citizen participation would make reference proceedings under the 2009 Act unmanageable (paras. 11–20).

Case cited:

(1) *Northern Ireland Human Rights Commn., Re*, [2002] NI 236; [2002] UKHL 25, *dicta* of Lord Woolf applied.

R.R. Rhoda, Q.C., Attorney-General, and Ms. K. Khubchand, Senior Crown Counsel, for the claimants;

J. Restano for the respondent;

Ms. G. Guzman for the Foreign Secretary;

K. Azopardi and *K. Navas* for Unite the Union;

C. Gomez for the Evangelical Alliance;

S. Bossino, a litigant in person.

1 **DUDLEY, C.J.:** This is an action in which the claimants seek declarations as to—

“... whether, and if so how, the difference in treatment between homosexual men on the one hand and heterosexuals and lesbian women on the other as regards the differing ages of consent for sexual intercourse, buggery and sexual activity in Part XII of the Criminal Offences Act 1960, and therefore the different circumstances in which they can be prosecuted, violates sections 1, 7 and/or 14 of the Constitution?

Alternatively, whether it violates the Constitution on any other ground?”

2 The action was originally brought by the Chief Minister and the Attorney-General pursuant to the Civil Procedure Rules, r.40.20, which empowers the court to make “binding declarations whether or not any other remedy is claimed” albeit, as the commentary to the rule makes clear, the jurisdiction to grant declaratory relief is not derived from the rule, which merely allows for the grant of a declaration in the absence of other relief.

3 Following the enactment of the Constitution (Declaration of Compatibility) Act 2009, the claim was amended to reflect that the claim was also being pursued pursuant to the provisions of the Act.

4 Section 2 of the Act empowers the Chief Minister or any other Minister authorized by him to seek declaratory relief from the Supreme Court as to whether any Act, subsidiary legislation or any Bill for an Act, or any provision thereof is compatible with the Constitution. The section specifically allows for the relief to be sought whether or not there is any other party to the proceedings. Section 4 empowers the Chief Justice to make rules with respect to the practice and procedure appertaining to applications made under the Act. As yet, I have not made any such rules. As may be apparent, this is the first application made under the Act.

5 What fall for consideration at this juncture are the principles which are to be applied in determining which parties are to be allowed to join the action and in what capacity.

6 On March 4th, 2010, I allowed the joinder of the Equality Rights Group GGR as an interested party and directed that notification of the claim was to be given by the claimants by placing conspicuous notices in the *Gibraltar Chronicle* stating that anyone wishing to be joined to the action as an interested party should file an application. A number of individuals and organizations filed the requisite application notice, albeit only those set out above as appearing seek to have these considered.

7 For Unite, Mr. Azopardi submits that terminology is worth exploring and draws the distinction between “interested parties” and “interveners.” For the purposes of judicial review proceedings, the CPR, r.54.1(2)(f) defines an interested party as “any person (other than the claimant and defendant) who is directly affected by the claim.” In contrast interveners do not have a direct stake in the outcome of proceedings. In *Re Northern Ireland Human Rights Commn.* (1), Lord Woolf described the practice of intervention in the following terms ([2002] NI 236, at para. 32):

“The intervention is always subject to the control of the court and whether the third person is allowed by the court to intervene is usually dependent upon the court’s judgment as to whether the interests of justice will be promoted by allowing the intervention. Frequently the answer will depend upon whether the intervention will assist the court itself to perform the role upon which it is engaged. The court has always to balance the benefits which are to be derived from the intervention as against the inconvenience, delay and expense which an intervention by a third person can cause to the existing parties.”

8 These, of course, are not judicial review proceedings or indeed an action pursuant to the Constitution, s.16, with an individual alleging contravention or likely contravention of the rights protected by the Constitution. Rather, they are Constitutional proceedings in the purest sense, in that a public issue falls to be determined in the abstract without a specific individual alleging a contravention. In those circumstances, it is important that this court be flexible in allowing public interest groups to be afforded a voice in the proceedings, albeit whilst maintaining the distinction between interested parties and interveners. Intervenors are to be allowed to participate subject to the caveat that they are representative of a body of opinion and are able to make a material contribution to the proceedings which goes beyond a restatement of what may be advanced by a party. Important also is that their contributions be subject to time limits or, if necessary, limited to representations in writing such that their contributions do not impose a disproportionate burden on the conduct of the proceedings.

9 I shall deal with the applicants in turn but before doing so it is right that I highlight two issues. The first is that although the claim is drafted in what can broadly be described as neutral terms, the inclusion of a Statement of Objective and Reasonable Justification would suggest that the stance to be taken by the claimants is that the provisions which fall to be considered do not breach the Constitution. The second is that, as alluded to earlier, I have already allowed the joinder of the Equality Rights Group GGR as an interested party in circumstances in which I did not take account of the distinction which is to be drawn between interested parties and interveners.

10 It may be that given the nature of the proceedings and the fact that the Equality Rights Group GGR (Gib Gay Rights) is an organization with a very distinct interest in the outcome of this action that I may in any event have allowed their joinder as an interested party as opposed to an intervener. But even if the outcome may have been different, it would now be unjust to change their status in the proceedings in a manner which could reduce their participation or rights of appeal which they may have as a party but not as an intervener.

The Secretary of State for Foreign and Commonwealth Affairs

11 The Foreign Secretary seeks to be joined as either claimant, defendant or interested party. Essentially what is said for him is that he has a direct interest in the case for two reasons:

(a) he is responsible for Gibraltar's compliance with the European Convention on Human Rights and would be the defending party should any proceedings in connection with the provisions be brought before the European Court of Human Rights; and

(b) he is responsible for relations between the United Kingdom and Gibraltar, which are, in part, governed by the Constitution and therefore has an interest in the interpretation of its provisions.

12 Possibly both are justified, but certainly the first provides a substantial ground upon which to seek joinder.

13 Given that we are, in so far as the claim is framed under the Act, in uncharted territory, there was, at the hearing, some tentative esoteric argument as to whether for the purposes of the relief sought under the Act an interested party would have a right of appeal and therefore whether the Foreign Secretary should in fact be joined as claimant or defendant. To my mind there is little merit in embarking upon these barren arguments. There is a duality to the proceedings in that the declaratory relief is sought both under the inherent jurisdiction of the court and pursuant to the Act. Probably in either case, but certainly to the extent that any declaratory relief is granted under the court's inherent jurisdiction, a party to the action dissatisfied with the outcome would be entitled to appeal the decision. It matters not what the nomenclature might be provided that he is a party. In the absence of rules, I am inclined to follow the language of judicial review proceedings with which jurisdiction this action possibly finds its closest parallel and therefore will order the joinder of the Foreign Secretary as an interested party.

Unite

14 Unite the Union, seeks to intervene in the action with the benefit of the same costs order made in respect of Equality Rights Group GGR,

namely that it will bear its own costs and not be responsible for any other party's costs.

15 Premised upon a historical review of its activities in Gibraltar, tracing its roots to the late 19th century, it is said that its role has been broader than the improvement of workers' rights and also included the promotion of civil rights. It is the largest workers' organization in Gibraltar representing several thousand members and is committed to a strong policy of equality and non-discrimination.

16 It is said for Unite that although like the Foreign Secretary it will argue that a lack of equality between the ages of consent is unconstitutional, it would advocate resolution of the issue by Parliament or referendum but not through an Order in Council. At this juncture my tentative view is that should the provisions be found to be unconstitutional, how the issue is then resolved will not necessarily fall for determination in these proceedings. However, that tentative view is subject to an issue which has already been flagged up, namely the interpretation of the Act. Section 3(3) provides that a declaration under the Act in respect of a provision "does not affect [its] validity, continuing operation or enforcement."

17 As regards the substantive issue which falls to be determined, UNITE says it will advance "unique arguments." No real inkling of what these might be is given.

18 It is beyond doubt that Unite is a very significant public interest group in this community and, if it has a material contribution to make on this issue should be allowed to do so. I am slightly more circumspect as to whether it will in fact make a contribution which goes beyond a restatement of what may be said by Equality Rights Group GGR or the Foreign Secretary but, given the particular nature of these proceedings, I err on the side of being inclusive and allow its intervention upon its bearing its own costs and not being responsible for any other party's costs—and also subject to its being limited in time and as regards the presentation of its submissions in such manner as I shall direct in due course.

The Evangelical Alliance

19 Given the constituent members of the Evangelical Alliance, particularly the Methodist Church and the role it has played and continues to play in our community, without hesitation I conclude that it overcomes the first hurdle and properly comes within the concept of a public interest group representative of a body of opinion. I am similarly persuaded that it will make a valuable contribution to the proceedings, not least because as regards the substantive issue before me it adopts a position which is possibly more robust than that adopted by the claimants and contrary to that adopted by the other parties and interveners. In our adversarial system the judgment of the court is in the largest measure dependent upon what is

placed before it by the parties and in a case of some public importance such as this the court is best served by hearing arguments which cover as much of the spectrum as possible. In those circumstances, the Evangelical Alliance is also granted permission to intervene subject to the same costs regime that applies to Equality Rights Group GGR and Unite.

Stephen Bossino

20 I turn to the final applicant seeking to join the action. Mr. Bossino is a barrister with an interest in constitutional law who for the purposes of the present application appears as a litigant in person. I do not doubt Mr. Bossino would be capable of making substantive submissions in the subject-matter or upon the constitutionality of the Act itself. However, I am of the view that his interest in the subject-matter is not sufficient to entitle him to appear before the court in that, other than as a citizen, he has no interest in the outcome of the proceedings. One may applaud the fact that individual citizens may hold strong views upon the constitutionality of statutory provisions, but, without denigrating the importance of individual views in the evolution of civil society, for the purpose of allowing participation in proceedings of this nature it is important that those participants are representative of a body of opinion within the community. Whilst it may not necessarily arise in the present case, to rule otherwise would result in my establishing a precedent which could allow for multiple participation by individual citizens making future proceedings under the Act wholly unmanageable. For those reasons, Mr. Bossino's application is refused.

21 Orders are made accordingly and I shall hear the parties and interveners as to the directions I should order to bring the action to a substantive hearing.

Orders accordingly.
