

**IN THE MATTER OF DUYONOV, MIRZA, SPRYGIN
and IVANOV**

SUPREME COURT (Schofield, C.J.): January 30th, 1997

Legal Aid and Assistance—appeals to Judicial Committee—preparation and conduct of case—legal assistance not available for preparation of case and conduct of hearing of appeal to Judicial Committee—not included in list of courts in which assistance available in Legal Aid and Assistance Ordinance, Schedule, Part I, para. 1—appeal not referral by Court of Appeal under para. 2

Legal Aid and Assistance—appeals to Judicial Committee—preparation and conduct of case—failure of Gibraltar legislation to provide legal assistance is failure to ensure access to fair and public hearing contrary to European Convention on Human Rights, art. 6(1) but not contrary to Gibraltar Constitution, s.8(8)

Legal Aid and Assistance—appeals to Judicial Committee—preparation and conduct of case—Chief Justice may not make rules to provide for legal assistance for appeals to Privy Council under Legal Aid and Assistance Ordinance, s.18(3), since power only to modify existing rules and no rules currently exist—for legislature to provide legal assistance for such appeals

The applicants sought legal assistance for the preparation of an appeal to the Judicial Committee of the Privy Council.

The Governor ordered that the applicants, Russian seamen, be removed from Gibraltar and that they be detained pending their removal. The Supreme Court (Pizzarello, Ag. C.J.) subsequently held that the order was unlawful but the Court of Appeal (Fieldsend, P., Davis and O'Connor, JJ.A.) reinstated it (in proceedings reported at 1995–95 Gib LR 376).

The applicants appealed to the Judicial Committee of the Privy Council and applied for legal assistance. The Registrar of the Supreme Court determined that they were entitled to legal assistance for the preparation of the appeal record but not for the preparation of the case and conduct of the hearing before the Privy Council.

On appeal against the Registrar's decision, the applicants submitted that (a) although the Privy Council was not included in the list in para. 1 of Part I of the Schedule to the Legal Aid and Assistance Ordinance, which specified the courts for proceedings in which legal assistance was available, legal assistance was nevertheless available under para. 2

because it was the practice of the Privy Council to treat appeals and petitions as if they had been referred to it by the lower court, in this case the Court of Appeal, which did appear in the list; (b) this result was consonant with the requirement of art. 6(1) of the European Convention on Human Rights, which entitled everyone to a fair and public hearing in the determination of his civil rights or of any criminal charge against him; in any case, (c) it was wrong that legal assistance should be available in all courts except the Privy Council; (d) not to provide legal assistance in such cases was also contrary to s.8(8) of the Constitution, which provided that every person had a right to a fair hearing before an independent and impartial court; and (e) since for the above reasons the applicants were entitled to legal assistance, the Chief Justice should make rules under s.18(3)(c) of the Legal Aid and Assistance Ordinance to provide for cases such as the present one.

Held, dismissing the appeal:

(1) Although it did not seem proper that the system for legal assistance did not apply to appeals to the Privy Council, the court had to give effect to the intention of the legislature which, by the omission of the Privy Council from the list in para. 1 of Part I of the Schedule to the Legal Aid and Assistance Ordinance, was clearly that legal assistance was not to be made available for the conduct of cases before that tribunal. Given that clear intention, it was not possible to hold that the appeal was a matter referred to the Privy Council by the Court of Appeal, to which para. 2 would apply; rather, it was an appeal by a party to the proceedings (page 50, line 42 – page 51, line 23).

(2) An appeal to the Privy Council was a complicated matter which was difficult for a person who was not legally represented to pursue and in denying the applicants legal assistance in the present case, the Gibraltar legislation failed to guarantee them access to a fair and public hearing as required by art. 6(1) of the European Convention. However, it could not be said that the legislation was also *ultra vires* the Constitution, since s.8(8) merely required that a court determining an individual's legal rights be independent and impartial and hear the matter within a reasonable time (page 53, lines 1–28).

(3) Unfortunately, it was not possible to remedy the situation by the exercise of the Chief Justice's power to make rules under s.18(3)(c) to provide for legal assistance in the Privy Council to applicants who had obtained such assistance in the lower courts. That power allowed the Chief Justice to meet such a situation by modifying existing rules and not by creating new ones and since no such rules existed at present, the power could not be exercised. It was for the legislature to bring Gibraltar's legislation on legal assistance into conformity with the requirements of the European Convention (page 53, line 29 – page 54, line 16).

Cases cited:

- (1) *Airey v. Ireland*, October 9th, 1979, European Ct. of Human Rights, Series A, No. 32; (1979), 2 E.H.R.R. 305, followed.
 (2) *Schiller v. Captain of Port of Gibraltar*, 1995–96 Gib LR 303, followed.

Legislation construed:

Legal Aid and Assistance Ordinance (1984 Edition), s.12(2): The relevant terms of this section are set out at page 50, lines 9–11.

s.18(3): The relevant terms of this sub-section are set out at page 53, lines 34–41.

Schedule, Part I: The relevant terms of this Part are set out at page 50, lines 14–22.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; Treaty Series 71 (1953)), art. 6(1): The relevant terms of this paragraph are set out at page 51, lines 33–42.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p. 3602), Annex 1, s.8(8): The relevant terms of this sub-section are set out at page 53, lines 15–20.

S.R. Bossino for the applicants;
A.V. Stagnetto, Q.C. as *amicus curiae*.

25 **SCHOFIELD, C.J.:** On November 17th, 1995, German Duyonov and
 four other Russians were put ashore in Gibraltar. They had been led to
 believe that they were being landed in Canada. They immediately
 surrendered themselves to the immigration authorities. The Governor
 then issued an order for their removal from Gibraltar and for their
 detention pending such removal. The order was renewed from time to
 30 time but on September 3rd, 1996, Pizzarello, Ag. C.J. determined that
 such order was unlawful. The Court of Appeal formed a different view
 and on October 4th, 1996, delivered a judgment in which it said that the
 Governor's orders were within his powers under s.59(1) of the
 Immigration Control Ordinance.

35 Four of the five Russians, respondents to that appeal, have now
 appealed to Her Majesty's Privy Council. They applied for legal
 assistance for those purposes and the Registrar has formed the view that
 they are entitled to such legal assistance for the purposes of preparation of
 the appeal record, but that the Legal Aid and Assistance Ordinance makes
 40 no provision for legal assistance for the preparation and conduct of the
 hearing before the Privy Council. The four applicants have now appealed
 against the Registrar's decision. The Registrar's decision follows my
 judgment in *Schiller v. Captain of Port of Gibraltar* (2), in which I held
 that legal assistance was available under the provisions of the Legal Aid
 45 and Assistance Ordinance for the preparation of the record for the

purposes of an appeal from the Court of Appeal to the Privy Council and for the purposes of any directions in connection therewith. My judgment was written on the assumption that legal assistance is not available for the purposes of preparation and conduct of the appeal hearing before the Privy Council. Mr. Bossino, for the applicants, argues that such an assumption was wrong. 5

Section 12 of the Legal Aid and Assistance Ordinance defines the scope and conditions of legal assistance in civil proceedings. Section 12(2) reads: “The proceedings in connection with which legal assistance may be given are any proceedings of a description mentioned in Part I of the Schedule, except proceedings mentioned in Part II of that Schedule.” Part II of the Schedule has no relevance to the applicants’ application. Part I of the Schedule reads: 10

“DESCRIPTION OF PROCEEDINGS.

1. Proceedings in any of the following courts— 15

(a) Supreme Court;

(b) Court of First Instance;

(c) magistrates’ court in its civil jurisdiction in domestic proceedings;

(d) Court of Appeal. 20

2. Proceedings before any person to whom a case is referred in whole or in part by any of the said courts.”

Mr. Bossino argues that although Her Majesty’s Privy Council is not one of the courts listed in para. 1 of Part I of the Schedule, an appeal to the Privy Council is a referral by the Court of Appeal to Her Majesty and therefore comes within the provisions of para. 2. The argument goes that the nature of the procedure on appeal from our Court of Appeal to the Privy Council shows that on an ordinary interpretation of the provisions setting out that procedure, an appeal to the Privy Council is referred to it by the Court of Appeal. Mr. Bossino also took me through the passages in 10 *Halsbury’s Laws of England*, 4th ed., paras. 770–774, at 356–359, relating to the jurisdiction of the Judicial Committee of the Privy Council. He relied in particular on this passage (*ibid.*, para. 770, at 357): 30

“Until 1909 the practice was to make a special order referring all petitions and appeals lodged in the Privy Council Office in November of any year to the Judicial Committee, but as this practice was found to be uncertain and inconvenient it was ordered that all petitions and appeals to the Sovereign in Council were to be referred to the Judicial Committee as if a special order had been made. It is by virtue of this order that petitions and appeals to Her Majesty in Council are now referred to the Judicial Committee.” 35 40

This ingenious argument is tempting, for it does not seem proper that we have a legal assistance system which does not apply to our highest appellate tribunal. It seems unfair that an impecunious litigant has to appear before the highest court in the Commonwealth without the benefit 45

of legal advice. A further temptation to follow the argument is presented by my desire to construe the statutory provisions for legal assistance in a way which allows Gibraltar to follow its international obligations on human rights. However, in construing a statutory provision, I must endeavour to give effect to the intention of the legislature. Had the legislature intended to include proceedings before Her Majesty in Council in the list of proceedings for which legal assistance may be given, it would have said so clearly in the Schedule. An appeal to the Privy Council is just that. It is an appeal by a party to the proceedings against a decision of the Court of Appeal. It is not a referral of a proceeding by the court. A party petitions the Privy Council: a case is not referred by the Court of Appeal to it. The passage quoted above from para. 770 of *Halsbury* does not help Mr. Bossino's argument, for it relates to the referral by Her Majesty to the Judicial Committee of the Privy Council once the appeal has reached the office of the Privy Council. It does not relate to a referral to the Privy Council by the lower court. Reluctantly, therefore, I conclude that legal assistance is not available to an appellant for the purposes of preparation and presentation of an appeal at the hearing before the Privy Council. The type of proceedings covered by para. 2 of Part I of the Schedule to the Legal Aid and Assistance Ordinance is the type of proceedings mentioned by the Registrar in his letter rejecting the application, *i.e.* a referral by the court to an expert for the purposes of assessment of damages.

Mr. Bossino has referred me to a decision of the European Court of Human Rights in *Airey v. Ireland* (1), in which, by a majority of five members to two, the court held that in failing to make statutory provision for legal aid to an applicant wishing to pursue a decree of judicial separation, the respondent State, in that case the Republic of Ireland, was in breach of its obligations under art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention is recognized in Gibraltar. Article 6(1) of the Convention reads:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

The majority of the court in the *Airey* case held that although the applicant had a right of access unrepresented before the Irish court, without being legally represented she did not have an effective right of

access. The court said (European Ct. of Human Rights, Series A, No. 32, at 12): “The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective . . .” The test adopted by the court was whether the applicant’s appearance before the Irish court would be effective in the sense of whether she would be able to present her case properly and satisfactorily. The court decided in that case that it would not be effective. The court went on (*ibid.*, at 15–16):

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“It would be erroneous to generalize the conclusion that the possibility to appear in person before the High Court does not provide Mrs. Airey with an effective right of access; that conclusion does not hold good for all cases concerning ‘civil rights and obligations’ or for everyone involved therein. In certain eventualities, the possibility of appearing before a court in person, even without a lawyer’s assistance, will meet the requirements of Article 6 § I; there may be occasions when such a possibility secures adequate access even to the High Court. Indeed, much must depend on the particular circumstances.

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In addition, whilst Article 6 § I guarantees to litigants an effective right of access to the courts for the determination of their ‘civil rights and obligations’, it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme—which Ireland now envisages in family-law matters . . . constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court’s function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 § I (see, *mutatis mutandis*, the National Union of Belgian Police judgment of 27 October 1975, Series A no.19, p.18, § 39, and the above-mentioned Marckx judgment, p.15, § 31).

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The conclusion appearing at the end of paragraph 24 above does not therefore imply that the State must provide free legal aid for every dispute relating to a ‘civil right’.

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To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 § 3 (c) dealing only with criminal proceedings. However, despite the absence of a similar clause for civil litigation, Article 6 § I may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.”

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In the context of the present application, it must be accepted that the procedures before the Privy Council are complicated and do not readily lend themselves to presentation by a litigant who is not legally qualified. Furthermore, in this appeal there are matters of law, as indeed there are in most appeals which reach the Privy Council, which it will be difficult for a layman to present. Following the *Airey* case, I find that in denying the applicants access to legal assistance to present these appeals, the Gibraltar legislation does not conform to the obligations imposed by the Convention.

10 In determining that our legal assistance provisions do not conform to an obligation under the Convention, I do not go as far as Mr. Bossino asks me to go and hold that the provisions offend our own Constitution. He refers me to s.8(8) of the Gibraltar Constitution Order 1969 and asks me to draw a parallel with art. 6(1) of the Convention. Section 8(8) reads:

15 “Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.”

20 Whereas art. 6(1) of the Convention concerns itself, *inter alia*, with access of an individual to a fair and public hearing and was rightly so interpreted in the *Airey* case, s.8(8) of the Constitution simply provides that any court or other authority set up to determine legal rights shall be independent and impartial and parties before it shall be given a fair hearing within a reasonable time. Section 8(8) is differently framed from the Convention and does not go as far as art. 6(1) of the Convention by alluding to access to a court.

30 What orders am I to make given the above findings? Mr. Bossino has referred me to s.18(3) of the Legal Aid and Assistance Ordinance, which empowers the Chief Justice to make rules over and above the general provisions for rule-making contained in s.18(1). The relevant portion of s.18(3) reads:

35 “The Chief Justice may also make rules modifying any provisions of this Part so far as appears to the Chief Justice necessary to meet the circumstances where—

40 . . .
(c) a person begins to receive legal assistance after having consulted a solicitor in the ordinary way with respect to the same matter or ceases to receive legal assistance before the matter in question is finally settled”

45 Mr. Bossino argues that I may make a rule in the present case under that provision. The first point to make is that there are no existing rules under s.18(3) which cover this type of application. The second point is that in giving the Chief Justice power to modify the Part of the Ordinance which

provides for legal assistance in civil proceedings, I am sure that the legislature did not mean to give me the power to grant legal assistance outside the scope of those courts specifically provided for in the Ordinance. *The Shorter Oxford English Dictionary* defines the verb “modify” in the following way: “To make partial changes in; to alter without radical transformation.” It would be far removed from a partial change and it would be a radical alteration in the provisions of Part II of the Legal Aid and Assistance Ordinance if the Chief Justice were to extend the application of its provisions beyond the scope intended by the legislature and to proceedings before courts expressly excluded by the wording of the Ordinance. 5 10

The upshot is that I am unable to allow the appeal and grant legal assistance in this case and must leave it to the legislature to bring the statutory provisions within our obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms. 15

Order accordingly.
