

Privy Council Appeal No. 65 of 2003

The Attorney General for St. Christopher and Nevis Appellant

v.

Alexandre Yakovlevich Rodionov Respondent

FROM
THE HIGH COURT OF JUSTICE OF
ST. CHRISTOPHER AND NEVIS

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 20th July 2004

Present at the hearing:-

Lord Bingham of Cornhill

Lord Steyn

Lord Rodger of Earlsferry

Lord Carswell

Lord Brown of Eaton-
Under-Heywood

[Delivered by Lord Bingham of Cornhill]

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1. On 20 March 2003 the Board granted special leave to the Attorney General to appeal from a judgment of the High Court of Justice of St Christopher and Nevis dated 2 August 2002, which upon application by Mr Rodionov for habeas corpus ordered that he be discharged from custody. In granting special leave, the Board expressly reserved for full argument the question whether it had jurisdiction to do so and to entertain the appeal. Such argument has now been heard. The Board has concluded, not without difficulty, that it had no jurisdiction to grant special leave and has no jurisdiction to entertain the appeal.
 2. Since the Board has heard no argument on the facts and merits of this case, which are the subject of strong dispute between the parties, it is inappropriate to do more than explain how the issue on jurisdiction arises.

3. The Government of Canada requested the extradition of Mr Rodionov from St Kitts and Nevis where he lived and of which he had become a citizen. His extradition was sought in order that he might stand trial in Canada on a charge or charges of conspiracy to defraud. The criminal conduct alleged against him related to the purchase in Russia at a low domestic price of stable isotopes and the resale of the isotopes outside Russia at the much higher price prevailing in the international market, a transaction procured (it was alleged) through bribery in Canada of a senior Russian official responsible, on behalf of the Russian public, for holding a large stock of stable isotopes in Russia. The Governor-General of St Kitts gave his authority to proceed, and after a protracted hearing the magistrate, Mrs Jenkins, found that there was sufficient admissible and cogent evidence to justify the committal of Mr Rodionov to await his return to Canada. She accordingly ordered his committal, duly advising him of his right under section 11(1) of the Fugitive Offenders Act No. 1 of 1969 to make application for habeas corpus.
4. Mr Rodionov sought judicial review of the magistrate's decision to commit, relying on various provisions of the Constitution of St Kitts. This application came before Baptiste J, who on 2 August 2002 dismissed it. Mr Rodionov did not appeal against that judgment, and no question now arises on it. Mr Rodionov also applied for habeas corpus under section 11 of the Fugitive Offenders Act. This application also came before Baptiste J, who heard argument over four days and, on 2 August 2002, gave judgment on this application also. He rejected certain of the grounds relied on by Mr Rodionov but concluded, applying section 11(3) of the Act, that by reason of the passage of time since the offence which Mr Rodionov was alleged to have committed it would, having regard to all the circumstances, be unjust or oppressive to return him to Canada. On that ground he ordered the release of Mr Rodionov.
5. It is common ground between the parties that, by virtue of section 31(3) of the West Indies Associated States Supreme Court (Saint Christopher, Nevis and Anguilla) Act 1975 (No. 17 of 1975), no appeal to the Court of Appeal could be brought against the judge's decision to discharge Mr Rodionov by the Superintendent of Prisons (at that stage the nominal respondent to the habeas corpus application) or the Government of Canada, which had also been represented on the hearing of the application. The same situation would, it is accepted, have obtained had the judge dismissed Mr Rodionov's application. Thus it was that, after some months of delay, the Attorney General petitioned the Board for special leave to challenge the judge's habeas corpus decision, recognising that there was no other procedural means by which the decision could be challenged.
6. In his address to the Board, the Attorney General spoke with eloquence of the threat posed by the growth of international crime and the need for international legal cooperation in bringing serious criminals to justice. While eschewing any comment on this particular case, the Board is in general sympathy with this submission. Its decision on jurisdiction must nonetheless be based on a correct interpretation of the relevant constitutional provisions which now govern appeals from the domestic courts of St Kitts, an independent nation within the Commonwealth, to the Board.
7. In British constitutional theory, the sovereign is regarded as the fountain of justice. Thus, as Viscount Sankey LC explained in *British Coal Corporation v The King* [1935] AC 500, 511-512, it was to the King that, in early days, any subject who had failed to get justice in the King's Court brought his petition for redress, a petition brought to the King in Parliament or to the King in his Chancery. Similarly, from the earliest days of empire, petitions from overseas colonies and plantations went to the King in Council, a practice which continued after the jurisdiction of the Privy Council in English common law cases had been abolished. See, generally, Bentwich, *The Practice of the Privy Council in Judicial Matters*, 3rd ed (1937), pp 2-3. With the growth of the Empire, the need to regulate the exercise of this important overseas jurisdiction became acute. The first important step was taken in the Judicial Committee Act 1833 which, reciting that "whereas, from the decisions of various courts of judicature in the East Indies, and in the plantations, colonies, and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council", established (section 1) the Judicial Committee of the Privy Council. See Howell, *The Judicial Committee of the Privy Council 1833-1876*, (1979), pp 23 *et passim*. To this statutory body were

to be referred (section 3) "All appeals or complaints in the nature of appeals whatever, which, either by virtue of this Act, or of any law, statute, or custom, may be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule, or order of any court, judge, or judicial officer ...".

8. The second important statutory step in regulating the overseas jurisdiction of the Board was taken by the Judicial Committee Act 1844. Section 1 of the Act provided:

"1. Her Majesty, by order in council, may provide for the admission of appeals from any court in any colony, although such court shall not be a court of appeal.

It shall be competent to her Majesty, by any order or orders to be from time to time for that purpose made with the advice of her privy council, to provide for the admission of any appeal or appeals to her Majesty in council from any judgments, sentences, decrees, or orders of any court of justice within any British colony or possession abroad, although such court shall not be a court of errors or a court of appeal within such colony or possession; and it shall also be competent to her Majesty, by any such order or orders as aforesaid, to make all such provisions as to her Majesty in council shall seem meet for the instituting and prosecuting any such appeals, and for carrying into effect any such decisions or sentences as her Majesty in council shall pronounce thereon: Provided always, that it shall be competent to her Majesty in council to revoke, alter, and amend any such order or orders as aforesaid, as to her Majesty in council shall seem meet: Provided also, that any such order as aforesaid may be either general and extending to all appeals to be brought from any such court of justice as aforesaid, or special and extending only to any appeal to be brought in any particular case: ... Provided also, that nothing herein contained shall be construed to extend to take away or diminish any power now by law vested in her Majesty for regulating appeals to her Majesty in council from the judgments, sentences, decrees, or orders of any courts of justice within any of her Majesty's colonies or possessions abroad."

This section (as it now stands) has been quoted in full, since it was the cornerstone of the Attorney General's argument. He pointed out, correctly, that the section had never been repealed or revoked. He pointed out, again correctly, that the section made express provision for the grant of special leave to appeal on a case by case basis, even though the decision under challenge was not that of a court of errors or a court of appeal: see Howell, *op. cit.*, pp 55-56. He accordingly submitted that the Board had clear jurisdiction to grant special leave to appeal in a case such as the present, despite the lack of any right of appeal to the Court of Appeal under the law of St Kitts. Had matters rested as they stood in 1844, there would have been no answer to this submission, as Mr Fitzgerald QC, representing Mr Rodionov, agreed. But it is clearly established that the

powers conferred on the Board by the Acts of 1833 and 1844, and other later instruments, have superseded the old prerogative power formerly exercised by the King in Council: *Mitchell v Director of Public Prosecutions* [1986] AC 73, 78; *Walker v The Queen* [1994] 2 AC 36, 44; *De Morgan v Director-General of Social Welfare* [1998] AC 275, 284-285. If, properly construed, the Acts of 1833 and 1844 as modified by later instruments do not confer jurisdiction on the Board to entertain this appeal, there can be no reliance on any prerogative power extraneous to these legislative provisions.

9. The court and appellate structure pertaining to St Kitts has been the subject of several changes over the years. The Attorney General drew attention to the Windward Islands and Leeward Islands (Appeal to Privy Council) Order in Council 1942 (SR & O 1942, I, p.921). At this time there existed a Supreme Court of the Windward Islands and Leeward Islands and a Court of Appeal for the Windward Islands and Leeward Islands. It was provided in section 3 (as amended in 1943) that appeals to the Board might lie from either, as of right or in the discretion of the relevant court,

"Provided that no appeal shall lie direct from any judgment of the Supreme Court of the Windward Islands and Leeward Islands or of a single judge of the Court of Appeal for the Windward Islands and Leeward Islands if an appeal therefrom lies to the Court of Appeal for the Windward Islands and Leeward Islands."

The residual power of the Board to grant special leave was however preserved in section 30:

"Nothing in this Order contained shall be deemed to interfere with the right of His Majesty, upon the humble Petition of any person aggrieved by any judgment of the Court, to admit his Appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose."

10. On the establishment of a West Indian Federation and a Federal Supreme Court in 1957 by the West Indies (Federation) Order in Council 1957 (SI 1957/1364), the right of appeal to the Board was again regulated but the residual power of the Board to grant special leave was again preserved:

"Appeals to Her Majesty in Council from the Federal Supreme Court and superior courts of Territories.

Appeals to Her Majesty in Council from Federal Supreme Court

87. The Federal Legislature may by law confer a right of appeal to Her Majesty in Council from determinations of the Federal Supreme Court made in exercise of jurisdiction conferred on it by or under this Constitution in such cases and subject to such conditions as may be prescribed by or under any such law, but save as provided by any such law there shall

be no right of appeal to Her Majesty in Council from any such determination of the Federal Supreme Court.

Appeals to her Majesty in Council from superior court of Territory

88.(1) There shall be no right of appeal direct to Her Majesty in Council from a determination of a superior court of a Territory except with the leave of the Federal Supreme Court, which shall be granted only in such circumstances as the Federal Legislature may by law prescribe.

(2) The provisions of this article shall not affect any appeal from the superior court of a Territory to Her Majesty in Council for which leave, either conditional or final, has been granted by that superior court before the date on which this article comes into force.

Appeals to her Majesty in Council with special leave

89. For the avoidance of doubt it is hereby declared that nothing in the two last foregoing articles shall be construed as purporting to impair any right which Her Majesty in Council may be pleased to exercise to grant special leave to appeal to Her Majesty in Council from the Federal Supreme Court or from a superior court of any Territory."

11. More immediately pertinent to the present issue is the British Caribbean (Appeal to Privy Council) Order in Council 1962 (SI 1962/1087). In this order, "Court" was defined to mean the British Caribbean Court of Appeal, "Territories" to mean "the territories from the courts of which the Court has, from time to time, jurisdiction to hear appeals", and "Territory" to mean "any such territories". Section 3 contained the governing provision:

"3. Subject to the provisions of this Order, an appeal shall lie –

(a) as of right from any final judgment, where the matter in dispute on the appeal amounts to or is of the value of three hundred pounds sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards; and

(b) at the discretion of the Court, from any other judgment, whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great or general importance or otherwise, ought to be submitted to Her Majesty in Council for decision."

While section 3(b) confers a discretion only on the Court of Appeal, section 3(a) appears to leave open the possibility of appeal against a final judgment of a court below the Court of Appeal, if the monetary condition is met. But such possibility is excluded by sections 23 and 24 of the order:

"23. There shall be no right of appeal direct to Her Majesty in Council from a determination of a court of a Territory.

24. Nothing in this Order contained shall be deemed to interfere with the right of Her Majesty upon the humble petition of any person aggrieved by any judgment of the Court, to admit his appeal therefrom upon such conditions as Her Majesty in Council shall think fit to impose."

Section 23 appears to preclude any appeal from a subordinate court direct to the Board. By section 24, the Board's power to grant special leave is preserved but only, significantly, to a petitioner aggrieved by a decision of the Court of Appeal.

12. The West Indies Act 1967, a statute of the Westminster Parliament, provided (in section 1) for the assumption by certain territories, including St Kitts, of a new status of association with the United Kingdom and (in section 5) for the provision of new constitutions. This enactment was followed by three Orders in Council, all three of them made on 22 February 1967 and coming into operation on 27 February 1967. The first of these was the Saint Christopher, Nevis and Anguilla Constitution Order 1967 (SI 1967/228), giving effect to the Constitution scheduled to the order. Relevant for present purposes are sections 100-101 of the Constitution which provide:

"100. Subject to the provisions of section 33(7) of this Constitution, an appeal shall lie from decisions of the High Court to the Court of Appeal as of right in the following cases –

(a) final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution;

(b) final decisions given in exercise of the jurisdiction conferred on the High Court by section 16 of this Constitution (which relates to the enforcement of the fundamental rights and freedoms).

101.(1) Subject to the provisions of section 33(7) of this Constitution, an appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases –

(a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of fifteen hundred dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of fifteen hundred dollars or upwards, final decisions in any civil proceedings;

(b) final decisions in proceedings for dissolution or nullity of marriage;

(c) final decisions in any civil or criminal proceedings which involve a question as to the interpretation of this Constitution; and

(d) such other cases as may be prescribed by the Legislature.

(2) Subject to the provisions of section 33(7) of this Constitution, an appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases –

(a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and

(b) such other cases as may be prescribed by the Legislature.

(3) An appeal shall lie to Her Majesty in Council with the special leave of Her Majesty from any decision of the Court of Appeal in any civil or criminal matter.

(4) References in this section to decisions of the Court of Appeal shall be construed as references to decisions of the Court of Appeal in exercise of the jurisdiction conferred by this Constitution or any law for the time being in force in Saint Christopher, Nevis and Anguilla."

Section 33(7) of the Constitution relates to the resolution of questions arising in the House of Assembly and has no relevance for present purposes. It is noteworthy that the Constitution provides for appeals to the Board only from the Court of Appeal, and the power to grant special leave is preserved in relation to appeals from the Court of Appeal only. The second relevant Order in Council was the West Indies Associated States Supreme Court Order 1967 (SI 1967/223). This provided for a West Indies Associated States Supreme Court, to serve six states including St Kitts. It was to consist of a Court of Appeal and a High Court of Justice. The third relevant Order in Council is the West Indies Associated States (Appeals to Privy Council) Order 1967 (SI 1967/224). This defined "Court" to mean the Court of Appeal established by the Courts Order, and provided in section 3:

"An appeal shall lie to Her Majesty in Council from decisions of the Court in any proceeding originating in a State in such case as may be prescribed by or in pursuance of the Constitution of that State."

By section 23, the British Caribbean (Appeal to Privy Council) Order in Council 1962 (SI 1962/1087) was prospectively revoked. But it seems clear that appeals to the Board were henceforward to be governed by the Constitution of St Kitts, and the Constitution (as already noted) preserved the grant of special leave only in relation to appeals from the Court of Appeal. The nomenclature of the respective courts was clarified by the West Indies Associated States Supreme Court (Saint Christopher, Nevis and Anguilla) Act 1975 (No. 17 of 1975), which provided (in effect) that references to the Supreme Court should be understood as references to the High Court and references to the Court of Appeal should be understood as references to the Court of Appeal constituted under the Courts Order. This Act did not address appeals to the Board.

13. The final instrument to which reference should be made is the Saint Christopher and Nevis Constitution Order 1983 (SI 1983/881). This Order, made on attainment by the state of fully responsible status within the Commonwealth, contained in Schedule 1 a new Constitution. This provided (section 1) that St Kitts and Nevis should be a sovereign democratic federal state and, in section 2, that the Constitution should be the supreme law, which should (subject to the provisions of the Constitution) prevail over any inconsistent law. Appeals to Her Majesty in Council were the subject of section 99 which, apart from minor variations irrelevant for present purposes, reproduces section 101 of the 1967 Constitution (quoted in the last paragraph), and exactly reproduces section 101(3). Reflecting the new independence of St Kitts, paragraph 8 of Schedule 2 to the 1983 Constitution provided that the 1967 Appeals to Privy Council Order should have effect as if section 3 (quoted in the last paragraph) were revoked. The provisions governing appeals were now to be found in the Constitution itself, not in a general Order applying to the Associated States and referring to the individual constitutions of each state.
14. The Board has anxiously considered whether, despite the language of these instruments dating back to 1962, there remains in the Board a power to grant special leave in a deserving case even though there is no possibility of appeal to the Court of Appeal under the domestic appellate regime and thus no decision of the Court of Appeal against which a petitioner can seek special leave to appeal. But St Kitts, as just noted, is a sovereign state. While both the 1967 Constitution (section 103) and the 1983 Order (Schedule 2, paragraph 2) afford a qualified measure of protection to existing laws, it is to the 1983 Constitution that reference must now primarily be made to ascertain the rights afforded to those aggrieved by decisions of the High Court or the Court of Appeal. The Privy Council is the final court in the St Kitts hierarchy of courts (*Ibralebbe v The Queen* [1964] AC 900, 921-922; *Electrotec Services Limited v Issa Nicholas (Grenada) Limited* [1998] 1 WLR 202, 204). It is plainly open to the state to regulate access from one tier of its courts to another. It is not surprising that a state should require appellate remedies before its local courts to be exhausted before a litigant seeks access to the Board; and not very surprising that a state should preclude an appeal to the Board from a High Court decision where it has itself precluded an appeal to the Court of Appeal. The Board is constrained to conclude that that is what St Kitts has done.
15. In resisting this conclusion, the Attorney General relied strongly on *Maharaj v Attorney General for Trinidad and Tobago* [1977] 1 All ER 411. In that case a judge of the High Court committed a barrister to prison for seven days for contempt in the face of the court. There was at the time no right of appeal to the Court of Appeal from an order of a judge of the High Court finding a person guilty of contempt of court and ordering him to be punished for it: *Maharaj v Attorney General of Trinidad and Tobago (No. 2)* [1979] AC 385, 391. The barrister was granted special leave to appeal to the Board against the committal order. At the outset of his judgment allowing the appeal, Lord Salmon said (page 412):

"No point was taken on the hearing of the petition for special leave that such an appeal does not lie to Her Majesty in Council, nor was any such point taken in the respondent's case. The point was however raised for the first time as a preliminary objection at the hearing of this appeal. Their Lordships can deal with it quite shortly.

It was conceded on behalf of the respondent that the point would have been unarguable before 1962, since it has long been well settled that it is competent for Her Majesty in Council to entertain appeals against orders of courts of record overseas imposing penalties for contempt of court (*Ambard v Attorney General for Trinidad and Tobago* [1936] AC 322). Their Lordships consider that the point is equally unarguable now for they can discover nothing in the Trinidad and Tobago Supreme Court of Judicature Act 1962 or the Trinidad and Tobago (Procedure in Appeals to Privy Council) Order in Council 1962 which touches Her Majesty's power in Council to entertain appeals against orders of courts of record overseas imposing penalties for contempt of court."

On its face this ruling supports the Attorney General's argument, since Mr Fitzgerald did not point to any material difference between the legislative regime in Trinidad and that in St Kitts. The economy of Lord Salmon's reasoning, however, leaves room for doubt whether the point was very fully argued. At the date of the only authority cited, there had been no legislative move to restrict the very wide statutory power conferred by section 1 of the 1844 Act. And it does not appear that the respondent's objection was taken in the present form, since the question is not whether the right to entertain appeals against orders imposing penalties for contempt of court had been "touched" by the 1962 Act and the 1962 Order applicable to Trinidad and Tobago but whether the effect of the Act and the Order (the terms of which were not quoted) had the effect of precluding appeals otherwise than from the Court of Appeal. This cannot, in the opinion of the Board, be regarded as compelling authority on this point.

16. The Attorney General also relied on *Heath v Government of the United States of America* [2002] UKPC 33, (2002) 61 WIR 189. In this case the United States Government sought the extradition from St Kitts of Heath and two other alleged drug traffickers. A magistrate declined to commit Heath and his associates and ordered their discharge. A judge of the High Court quashed (or intended to quash) the magistrate's order and remitted the matter to him. The magistrate took the view that his original order had not been quashed and declined to proceed. There was then a further application to the High Court judge, who ruled that the magistrate's order had been quashed and again directed him to proceed. Against that decision Heath and his associates sought special leave to appeal to the Board. On the hearing of the petition for special leave, the Board was informed, counsel for the petitioners asserted that the Board had jurisdiction, relying on *Maharaj*. But there was little discussion of the question, since leading counsel for the US Government accepted that the Board had jurisdiction. In the judgment of the Board delivered by Lord Hutton no reference is made to this aspect. It is unfortunate that jurisdiction should have been accepted in such circumstances, but in the absence of any reasoned judgment this case provides no authority

on the jurisdictional issue. It cannot outweigh what we have found to be the effect of the governing legislative instruments.

17. In resisting the Attorney General's appeal, Mr Fitzgerald advanced a second and independent argument: that as a matter of fundamental common law principle no appeal will lie by the Crown against an order for the discharge of an applicant for habeas corpus. In support of this submission he was able to cite a formidable body of authority including *Cox v Hakes* (1890) 15 App Cas 506, 514-519; *Secretary of State for Home Affairs v O'Brien* [1923] AC 603, 609-610; Sharpe, *The Law of Habeas Corpus*, 2nd ed (1989), pp 201 *et passim*. Hence, it was argued, the need to amend the law, as was done in England and Wales by section 15 of the Administration of Justice Act 1960. To this argument the Attorney General responded that, however clearly the common law rule might have been established in England and Wales, no such clear-cut rule had been applied overseas. He was able to rely on the authority of Sharpe (*op. cit.*, p.206):

"The only exceptions to the rule that an order of release could not be appealed were child custody cases and appeals to the Privy Council. In child custody cases, the issue is that of the child's interest rather than personal liberty and for this reason, an order transferring custody was appealable. Colonial appeals to the Judicial Committee of the Privy Council are in the nature of a petition to the royal prerogative. They do not require legislative sanction and the decision in *Cox v Hakes* does not prevent the Privy Council from hearing an appeal against an order of release on habeas corpus."

The Board was addressed on certain of the cases cited as authority for this paragraph, among them *King-Emperor v Deshpande* (1946) 115 LJPC 71; *King-Emperor v Banerji* (1945) LR 72 Ind App 241; *Attorney General for Canada v Fedorenko* [1911] AC 735; and *The United States of America v Gaynor* [1905] AC 128. But none of these authorities is entirely free of difficulty and it may be, as Mr Fitzgerald argued, that they can be distinguished. Since the Board has felt constrained to accept that it has no jurisdiction on the first ground argued by Mr Fitzgerald, it is unnecessary to resolve this second issue, which would be better resolved in a case where the outcome depended on it.

18. For these reasons the Board will humbly advise Her Majesty that it has no jurisdiction to entertain this appeal. The appellant must pay the respondent's costs of this appeal.