SC/CIV/6/99

PHILLIP JOHN MIDDLETON v THE CROWN

WOOD CJ

This matter comes before the court by way of a Reference made on the 2 July 1999 by the Summary Court under the provisions of S16(3) of Schedule 1 of the Falkland Islands Constitution Order 1985 as amended (which for convenience, I shall refer to as "the Constitution"). That Reference arises by way of an application to the Summary Court by Phillip John Middleton, the Complainant in the proceedings (which for convenience I shall term "the substantive proceedings") commenced by him under the provisions of the Employment Protection Ordinance 1989. The Respondent to those proceedings is the Crown.

The facts giving rise to the application are not contested and may be stated briefly.

Mr Middleton (referred to as the Applicant) was employed by the Crown as the Community Education Officer from a date in early 1989. He was the sole occupant of that post. I am told by the Attorney General that the terms of appointment were contained in a letter given to the Applicant referring him in terms to the Falkland Islands Government General Orders (as then applying). Though I am not informed whether the extract from the General Orders submitted by the Crown at page 789 of the bundle is in the same terms as that applying when the Applicant was appointed, I am told that the General Orders have throughout contained a disclaimer which states (at least in the version placed before me):-

"101(3) These Orders do not constitute a contract between the Crown and any officer and do not confer any legal rights upon any officer."

As will be seen below, the Applicant alleges that the relationship was indeed contractual, but at no time has it been suggested to me on his behalf that the appointment was occasioned in any other manner than that set out above.

In the event it would appear that on the 31 December 1998, some nine years after the Applicant's appointment, the post of Community Education Officer was abolished. This had the effect of terminating his employment. The Applicant contended that the termination thus occasioned amounted to an unfair dismissal falling within S 52(1) of the Employment Protection Ordinance 1989, and he commenced proceedings before the Summary Court by way of a Complaint pursuant to the provisions S. 65 of that Ordinance.

The Crown filed a response alleging that the Summary Court did not have jurisdiction to hear the complaint by reason of the provisions of S3 and S52(2) of the Employment Protection Ordinance, and applied for an order dismissing the Complaint.

On the 28th June 1999 the Complainant filed an application in the Summary Court requesting that it refer the question as to whether or not the above mentioned provisions amounted to a contravention of the terms of Chapter One of the Constitution.

As required by the provisions of S16(3) of the constitution – which in such circumstances are mandatory – the court referred the question to the Supreme Court as above.

Though the matter has been placed before this court in the form of an application by the Complainant in the substantive proceedings, with the Respondent in those proceedings appearing as the Respondent in the application before me, this is, strictly speaking, not the case.

S16(3) of the Constitution provides as follows:-

> "16(3) If in any proceedings in any court (other than the Supreme Court, the Court of Appeal or a Court Marshal) any question arises as to the contravention of any of the provisions of Sections 1 – 15 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

Thus the Reference to the Supreme Court is made by "the person presiding in that court", which in this case is the Chairman of the Summary Court.

I take no point in relation to this. It is entirely appropriate that both parties to the substantive proceedings should have the right to appear before this court and to

make representations, and it would in my opinion be quite wrong to fault the proceedings where the issue is of such importance. Suffice it to say that the Supreme Court is seised of this matter by way of a reference by the Summary Court, and it would not, for instance, be open to the Complainant in the substantive proceedings to seek to withdraw the matter from this court. Similarly, it is in my view incumbent upon me to adopt both a more inquisitorial and a purposive approach when seeking to determine the issue referred to it by the Summary Court than would have been appropriate in the more usual contested civil applications coming before the courts.

I now turn to the jurisdiction of the court.

I have set out above the provisions of S16(3) of the Constitution.

S17(1) of the Constitution defines "contravention" for the purposes of S16(3) as:-

> 'Contravention', in relation to any requirement, includes a failure to comply with that requirement, and cognate expressions shall be construed accordingly;

S16 continues:-

> (4) Where any question is referred to the Supreme Court in pursuance of sub-section (3) of this Section, the Supreme Court shall gives its decision upon the question and the court in which the

question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal to the Court of Appeal or to Her Majesty in Council, in accordance with the decision of the Court of Appeal or, as the case may be, of Her Majesty in Council.

(5) The Supreme Court shall have such powers in addition to those conferred by this Section as may be prescribed by Ordinance for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this Section.

(6) The Chief Justice may make rules with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred on it by or under this Section (including rules with respect to the time within which application may be brought and references shall be made to the Supreme Court).

I am advised by both parties, and accept, that there has not been enacted any Ordinance under S16(5), nor any rules made by a Chief Justice under S16(6).

It is common ground that a contravention of a provision falling within Sections 1 – 15 of the Constitution may include the effect of a legislative provision.

In summary therefore, S16 of the Constitution provides two distinct avenues whereby what I may term the constitutionality of some provision, act, or omission may be

determined by the Supreme Court. S16(1) provides a means whereby any person may make a direct application, and S16(3) permits a court either of its own motion or upon the application of a party to the proceedings before it, to refer a question for determination.

I would add that the Reference before the court in these proceedings is the first to be made under either provision.

The Summary Court has made a Reference as follows:-

> "Pursuant to the provisions of S16(3) of Schedule 1 to the Falkland Islands Constitution Order 1985 the following issue is referred to the Supreme Court of the Falkland Islands:
>
> 1.1 Do S3 and S52(2) of the Employment Protection Ordinance contravene S13(8) or any other provision of Schedule 1 of the Falkland Islands Constitution Order 1985?
>
> 1.2 If the said provisions do contravene any provisions of Schedule 1 of the Falkland Islands Constitution Order 1985 is the effect of such contravention to apply the Employment Protection Ordinance to Public Officers as if the said provisions were omitted therefrom?"

The Order containing the Reference goes on to make the appropriate directions relating to the substantive proceedings pending determination of the question by the Supreme Court.

The Employment Protection Ordinance 1989, so far as is relevant to the question referred to the Supreme Court, provides:-

> 3(1) Nothing in any subsequent provision of this Ordinance shall apply to employment or service under the Crown.
>
> (2) Without prejudice to the generality of sub-section (1) above nothing in any subsequent provision of this Ordinance shall apply to –
>
> (a) any employment in a public office;
>
> (b) any employment in the Falkland Islands Development Corporation;
>
> (c) any employment or engagement in the Falkland Islands Defence Force;
>
> (d) service or employment as a member of Her Majesty's regular armed forces or in the Royal Fleet Auxiliary; or to

(e) service or employment under Her Majesty's Government in the United Kingdom or under the Government of any other country (including service or employment under the Government of any overseas territory of the United Kingdom and service under the Governments of Northern Ireland, the Isle of Man, Guernsey or Jersey).

52(1) In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer.

(2) This section applies to every employment except insofar as its application is excluded by S3 or by or under any provision of this part.

S3 is set out in full above. Though the question referred by the Summary Court is not qualified by any reference to a sub-section, it is however agreed by both parties and accepted by me that the court should limit its considerations to the provisions of S3(1), and insofar as it may be relevant to the Applicant, S3(2)(a). The circumstances of persons falling within the categories set out in the remaining parts of S3(2) are not further considered by me as having no relevance to the present Reference.

It has helpfully been agreed by the Attorney General and Mr Marlor that should the decision of this court be to answer the question at paragraph 1.1 of the Reference in the affirmative, then the answer to question 1.2 must similarly be in the affirmative – that is, should the provisions of Ss3(1) and 52(2) be found to contravene the Constitution, then the Employment Protection Ordinance should be applied as if the offending provisions were omitted therefrom.

Thus far it would appear that the question for determination by the court is whether or not that part of the Employment Protection Ordinance which seeks to exclude public officers and employment or service under the Crown, and by implication the Crown itself, from the benefits and obligations conferred upon others by the Ordinance, amount to a contravention of any of the provisions of Sections 1 – 15 inclusive of the Constitution.

On the 2nd August 1999 it was directed by a Judge of this court in the matter of the Reference by the Summary Court that the Complainant:-

> Do file and serve a concise statement of the grounds relied upon in order to support the contention that the Employment Protection Ordinance 1989 contravenes the Falkland Islands Constitution Order 1985.

And further that he should:-

In his statement particularise each and every provision of the Constitution that he contends the Employment Protection Ordinance 1989 contravenes and the reason why any such section contravenes the said Constitution.

Further directions were given as appropriate.

In the statement filed on behalf of the Complainant on the 23rd August 1999 such particulars were provided. I set these out in full.

1. Do Sections 3 and 52(2) of the Employment Protection Ordinance 1989 contravene S13(8) or any other provision of Schedule 1 of the Falkland Islands Constitution Order 1985?

2. Do Sections 3 and 52(2) of the Employment Protection Ordinance 1989 contravene any of the provisions of the European Convention on Human Rights?

3. If Sections 3 and 52(2) of the Employment Protection Ordinance 1989 do contravene any of the provisions of Schedule 1 of the Falkland Islands Constitution Order 1985 or any of the provisions of the European Convention of Human Rights is the effect to render any such section invalid?

4. If any of the said sections are rendered invalid by any of the provisions of Schedule 1 of the Falkland Islands Constitution Order 1985 or of any of the provisions of the European Convention on Human Rights is the effect of such invalidity to apply the Employment Protection Ordinance 1989 to Public Officers as if the said sections were omitted therefrom.

5. If the answer to question 4 is that the effect of such invalidity is to apply the Employment Protection Ordinance 1989 to Public Officers as if the said sections were omitted therefrom that the Complainant be entitled to a hearing before the Falkland Islands Summary Court in a claim for unfair dismissal.

It will be seen from the above that the statement purporting to particularise the matters giving rise to the Reference by the Summary Court that the Applicant seeks to raise a new matter. This is as to whether or not the above two sections of the Employment Protection Ordinance contravene any of the provisions of the European Convention on Human Rights (which for convenience I shall refer to as "the Convention"). This is somewhat puzzling, and it raises again the issue which caused me to consider the question as to the mechanism which brought the matter to the Supreme Court. I say this for the following reasons.

S16(1) of the Constitution provides:-

> If any person alleges that any of the provisions of Sections 1 – 15 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

In such circumstances, there is no statutory limitation upon the matters which may form the subject of such an application provided they are relevant to some provision falling within Sections 1 – 15.

The provisions of S16(3) however are very different. Here the matter comes before the Supreme Court by way of a Reference from (in this case) the Summary Court. The matters forming the substance of the Reference, although expressed to be mandatory pursuant to a request by a party to the proceedings, nonetheless involve some discretion upon the part of the court – that is, if in the opinion of the court, the raising of the question is merely frivolous or vexatious. Significantly, as has been observed above, it is the (lower) court itself and not one of the parties before it which refers the question to the Supreme Court.

Thus, the question arises as to whether or not the Supreme Court in this case has jurisdiction to consider what, on the fact of it, appears to be a matter outside the terms of reference made by the Summary Court.

First I have considered whether the statement of the Applicant pursuant to the direction of this court on the 2nd August 1999 itself amounts to an application under S16(1) of the Constitution?

The affidavit of Richard Marlor, the Applicant's Legal Practitioner, sworn on the 23rd August 1999 indicates that on the 28th June 1999 the Complainant filed an Application in the substantive proceedings ".... *inter alia* that this matter be referred to the Falkland Islands Supreme Court for the court's determination of the constitutional validity of Sections 3 and 52(2) of the Ordinance. This application was made pursuant to S16(3) of the Falkland Islands Constitution Order 1985 ..... and this matter was so referred by the Falkland Islands Summary Court on the 2nd July 1999."

It is clear therefore that in the opinion of the Complainant – an opinion with which I wholly concur - the matter was being referred to the Supreme Court not by reason of an application under S16(1) made by the Complaint but by reason of a Reference by the Summary Court under S16(3).

Second, I have considered whether it is open to the Supreme Court to determine a question upon a Reference under S.16(3) which has not been referred to it by the Summary Court?

The issue is confused somewhat by subsequent paragraphs of the affidavit of Mr Marlor referred to above. Paragraph 2 of the statement of 23rd August 1999 poses the question as to whether or not the relevant sections of the Employment Protection

Ordinance "contravene any of the provisions of the European Convention on Human Rights". This is echoed in paragraph 9 of the above affidavit. On the other hand, paragraphs 11 and 15 of the affidavit appear to submit that rather than relying specifically upon the provisions of the Convention, the court should interpret S13(8) of the Constitution by reference to the Convention, or as Mr Marlor put it in his affidavit, "that the ECHR should be used to interpret the rights afforded to an individual by S13(8) of the Constitution".

S13(8) provides:-

> Any court or other authority prescribed by law for the determination of 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.

In the response of the Crown dated 6th September 1999 it is submitted at paragraph 2 that the matters raised in paragraph 2 of the "Application" (strictly speaking, paragraph 2 of the Statement of Grounds) have not been placed before this court by the Summary Court. The Crown contends that the only matter for determination by this court is that forming the substance of the Reference by the Summary Court quoted above.

As it is common ground that the court should determine the questions referred to it by the Summary Court, it now falls for me to determine whether or not the court should have regard to the matter raised in paragraph 2 of the Complainants statement referred to above.

In an oral submission by the Attorney General on behalf of the Crown it was said that the court should have regard to the fact that the Convention has not been incorporated in to the law of the Falkland Islands and further that the (Westminster) Human Rights Act 1998 has been neither replicated here nor has it been incorporated into the law of the Falkland Islands. The Attorney General also, quite properly, invited the court to consider whether or not it has inherent jurisdiction to consider matters outside the terms of reference from the lower court.

In relation to the Convention point, the Attorney General sited the judgment of Davis CJ in *R. v. The Director of Fisheries of the Falkland Islands Government ex parte Fu Chun Fishery Co Ltd* (SC/CIV/10/1990 unreported) at pages 45 and 46, and in particular that part of the judgment siting with approval *R. v Secretary of State for the Home Department ex parte Brind* [1991] 2 WLR 588 (HL)

> "Unless and until the European Convention was incorporated into English Law by Parliament there was no basis upon which the doctrine on proportionality as applied by the European Court of Human Rights could be followed by the courts in England (Lord Ackner at P.606A). In my view following the decision in Brind's

case, that is also the provision insofar as the courts in the Falkland Islands are concerned."

Brind was of course an English case decided prior to the enactment of the Human Rights Act 1998, and whilst I differ from the reasoning of the Learned Chief Justice in Fu Chun, it is my view that it would not in any event be appropriate for this court to test the validity of domestic legislation against the Convention *per se*. In my view, unless the Convention is incorporated into the law of the Falkland Islands (a matter quite distinct from its application pursuant to the declarations by the Government of the United Kingdom on the 12th September 1967 and the 14th January 1996) the Convention cannot be applied in this way.

The outline submission of the Complainant filed pursuant to a direction of this court debates whether or not the Constitution is based upon the Convention. It is my view, and I may say that of the Crown in this case, that it is most likely that those drafting the Constitution did indeed have particular regard to the provisions of the Convention. Even the most cursory examination of both documents would lead the reader to such a conclusion. I cannot therefore agree with the observations of my learned predecessor set out at the fourth paragraph at page 45 of his judgment in the Fu Chun case, where the view is expressed that Chapter One of the Constitution derives from the United Nations Universal Declaration of Human Rights of 1948.

Having said that, I agree with the view of Mr Marlor in the above mentioned written submission that the derivation of the Constitution does not assist either with its interpretation or its application.

Thus, it is my opinion that even if the court were minded to consider matters not contained in the Reference from the lower court, it cannot be right for it to test the constitutionality of a domestic statutory provision against an instrument which has not been incorporated into the law of the Falkland Islands. Accordingly, I am not satisfied that the court has jurisdiction to determine the question "Do Sections 3 and 52(2) of the Employment Protection Ordinance 1989 contravene any of the provisions of the European Convention on Human Rights?".

In the light of the above, it is not necessary for me to decide whether the court when considering the Application under S16(3) of the Constitution may have regard to matters not raised in the Reference. I would however say that in my view it does not. If S16(3) of the Constitution were to be interpreted in the wider sense, then it would appear that the sub-section would be unnecessary (insofar as it enables a party to proceedings to seek such a reference), as S16(1) would enable the individual concerned to make such application as he saw fit on any relevant constitutional issue at any stage.

In the event, it was conceded by Mr Marlor before me that the court should limit its considerations to the matters raised in the Reference by the Summary Court.

This is a convenient stage at which to consider whether or not the Convention, and more particularly those decisions of the European Court of Human Rights relating to the Convention may be used as an aid to interpretation of the Constitution in general, and S13(8) thereof in particular.

On behalf of the Applicant it is said that the Convention may be used to resolve ambiguities in domestic legislation. In this context the court is referred to the decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1AC 696, and in particular the judgment of Lord Donaldson MR beginning at paragraph E on page 717.

> "There have been a number of cases in which the European Convention for the Protection of Human Rights and Fundamental Freedoms has been introduced into the argument and has accordingly featured in the judgments. In most of them the reference has been fleeting and usually consisted of an assertion, in which I would concur, that you have to look long and hard before you can detect any difference between the English common law and the principles set out in the Convention, at least if the Convention is viewed through English judicial eyes. However, in this case we are invited to grapple with the fundamental question of the effect of the Convention as distinct from any common law to the like effect.".

The passage goes on to note that the Convention had not been incorporated into the law of England, but continues:-

> "Alternatively, it can review English common and statute law with a view to amending it, and if insofar as it is inconsistent with the Convention, at the same time seeking to ensure that all new statute

law is consistent with it. This is the course which has in fact been adopted. Whether it has been wholly successful is a matter for the European Court of Human Rights in Strasbourg and not for the English courts. By contrast the duty of the English courts is to decide disputes in accordance with English domestic law as it is, and not as it would be if full effect were given to this country's obligations under the Treaty, assuming there is any difference between the two.

It follows from this that in most cases the English court shall be wholly unconcerned with the terms of the Convention. The sole exception is when the terms of primary legislation are fairly capable of bearing two or more meanings and the court, in pursuance of its duty to apply domestic law, is concerned to divine and define its true and only meaning."

Similarly, the Crown submits to this court that since the Constitution was made by Order in Council in 1985, it post-dated the Convention which had entered into force in 1953 and thus it should be presumed that the Privy Council intended that it should be interpreted in conformity with the Convention unless the contrary intention appears.

In support of this, I am referred to *Attorney-General v British Broadcasting Corporation* [1981] AC 303, a decision of the House of Lords. I am referred in particular to the judgment of Lord Fraser at page 352. Paragraph E of that judgment contains the passage:-

"This House and other courts in the United Kingdom, should have regard to the provisions of (the Convention) and the decisions of the Court of Human Rights in cases .... where our domestic law is not firmly settled. But the Convention does not form part of our law and the decision on what that law is is for our domestic courts and for this House."

As has been observed above, it is contended by the Applicant that the relevant provisions of the Employment Protection Ordinance contravene S13(8) of the Constitution which is set out in full above.

Article 6/1 of the Convention provides as follows:-

Right to a fair trial

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.

It will be observed that the wording of S13(8) of the Constitution follows closely the first sentence of Article 6/1.

Though it is perhaps not of great relevance here, it will be noted that the remaining parts of Article 6/1 are followed closely in the provisions of Sections 13(9) and 13(10) of the Constitution.

Whilst of course the decisions of the House of Lords are not binding on this court they are of great authority, and insofar as they relate to this issue, I accept that they set out the law of the Falkland Islands as currently applying. It is of significance that the similarity of the wording as between S13(8) and Article 16/1 is sufficient to make it likely that in the event of any ambiguity in our domestic legislation (in which term I include the Constitution) the decisions of the European Court of Human Rights may be of particular assistance.

Mr Marlor invites me to the view that S13(8) of the Constitution grants the citizen a right – though he concedes not an unqualified right – to have access to the civil courts. Again, the Crown agrees.

I am referred to the decision of the ECHR in *Golder v United Kingdom*, 1975 Series A No 18. At paragraph 25 of that decision it was said:-

"In the present case the court is called upon to decide two distinct questions arising on the text (of Art.6-1):

1. Is Article 6 para 1 limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined?

2. In the latter eventuality, are there any implied limitations on the right of access or on the exercise of that right which are applicable in the present case?

And further at paragraph 28:-

"Again, Article 6 para 1does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right."

At paragraph 35 of the same decision, it was said:-

> "Were Article 6 para 1 to be understood to be concerning exclusively the conduct of an action which had already been initiated before a court, a contracting state could without acting in breach of that text, do away with its courts, or take away their jurisdiction, determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from the danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the court cannot overlook.
>
> It would be inconceivable, in the opinion of the court, that Article 6 para 1 should describe in detail the procedural guarantees afforded to parties in a pending law suit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

I agree entirely, and consider that the minor dissimilarity in the wording between S13(8) and Article 6-1 does not detract from the force of this argument. It is my view that S13(8) of the Constitution guarantees not merely that the courts shall be independent and impartial and that they shall be established and operate in

accordance with the principles enunciated there, but also that individuals should have a right of access to such tribunals. To hold otherwise would render Art 6/1 impotent.

The question thus arises as to whether the Constitution in this regard provides an unfettered right of access by citizens to the courts to determine any issue or dispute arising between citizen and citizen or citizen and the state.

Common sense would suggest that this cannot be so. There are many matters which all of us encounter on a day to day basis which though trivial, may be annoying or disruptive. The discourtesy of another, the lack of availability of a ticket for an event or a journey of one's choosing are not, in the ordinary course of events, matters for the courts. At a more serious level, States commonly, if not invariably, deny direct access to the courts by persons of insufficient age or mental capacity. Further I cannot envisage a situation where a member of the Armed Forces, in the thick of battle, could ever have a justiciable right to require his "employer" to provide a safe system of work and freedom from forseeable harm by way of enemy action.

Similarly, it is common for primary or secondary legislation to provide restrictions upon the availability of certain remedies. The Matrimonial Causes Ordinance does not permit those married for less than one year to seek or obtain a divorce. The Employment Protection Ordinance excludes from certain remedies arising from maternity those whose employers do not employ five, and in some circumstances, 20 or more persons.

Again, in Golder at paragraph 38:-

> "The court considers ..... that the right of access to the courts is not absolute. As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication."

The court goes on to instance restrictions on rights of access to the courts by minors and persons of unsound mind.

In this regard, the Applicant has referred the court to the case of *Mavronichis v Cyprus*, a decision of the ECHR of the 24th April 1998. This was a decision concerning an application to the ECHR alleging that the Republic of Cyprus had breached the provisions of Article 6-1 of the Convention by failing to ensure the timeous determination of an application before a District Court of a claim for damages made by him. The Applicant had been unsuccessful in seeking engagement to a public office, and had successfully applied to the Supreme Court of Cyprus annulling the appointment of the successful candidate. By the time of that order however the post concerned had been abolished. The Applicant had subsequently commenced an action in damages before the District Court, and having secured an award of damages appealed the quantum to the Supreme Court. The Respondent filed a cross appeal.

There was a significant delay in the administration of the claim by the Supreme Court, and the matter came before the ECHR.

The court observed, at paragraph 32 of the decision:-

> "Whilst it is true that the court has held that disputes relating to, *inter alia*, recruitment of civil servants were as general rule outside the scope of Article 6-1 (see, for example, the Neigle v France judgment), it is to be observed that in the instant case the issue of recruitment to a public sector post was not at the heart of the Applicant's civil action.
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> It is to be noted in this respect that the Applicant's aim in instituting the civil action was not to secure his appointment to the post ..... or to have the interview procedure reopened. In any event, neither of those options was possible on account of the fact that the post he had applied for had been abolished by the time he took his civil action. The Applicant brought his civil action against the authorities solely to obtain financial reparation in respect of an administrative act which he had successfully impuned in his recourse action.

In the event, the court decided that the predominately private-law characteristics of the proceedings outweighed the public law characteristics of a Government-Civil Servant relationship which would fall outside the scope of Article 6-1.

Before considering this judgment, I refer to the decision of the ECHR in *Neigle v France*, cited above, and to which I have been referred by the Crown. Here, the Applicant was a former typist who had been employed by a municipal authority and

who sought reinstatement following a period during which she had been granted leave of absence. The court was required to ascertain whether this amounted to a "civil right" within the meaning of Article 6-1.

At paragraph 43 of the decision, the court observed:-

> "In the law of many member states of the Council of Europe there is a basic distinction between civil servants and employees governed by private law. This is ..... that "disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Art.6-1."

The French Government had contended that "disputes in civil service matters normally fell outside the scope of Art 6-1. The only exception was where the dispute directly concerned a pecuniary right and where special powers of the public authorities were not in issue." The court agreed, finding that (at paragraph 44):-

> "The dispute raised by (the Applicant) clearly related to her 'recruitment', 'career' and the 'termination of her service'. It therefore did not concern a 'civil' right within the meaning of Art 6-1."

I do not agree with Mr Marlor's submission that the Mavronichis case aids his client. It may clearly be distinguished from the Neigle case in that the sole issue which had been before the District Court related to the question of compensation arising as a consequence of the earlier decision of the Supreme Court. It did not arise from what,

in the Neigle case, had been termed the "special relationship" existing between public authority and public servant. The Neigle case, on the contrary, concerned just that "special relationship" involving the "recruitment", "career" and "termination of service" of a public officer.

It has been submitted to me by Mr Marlor that though it is conceded that there was a public law element in the relationship, this is outweighed by the private law element. Whilst he would not appear to be suggesting to me that the Applicant was employed under the terms of a contract of service with the Crown, he nonetheless contends that the relationship is essentially contractual in nature. He refers me to another English case, that of *R v Lord Chancellor's Department, ex parte Nangle* [1991] 1 AllER 897.

There, a civil servant sought a Judicial Review of the decision of the Head of the Personnel Management Division of the Lord Chancellor's Department confirming the imposition of a penalty arising from an internal disciplinary matter. In that case, the Queen's Bench Division found that the relationship was in essence contractual, and that the decision of the above mentioned officer had been made pursuant to an informal resolution process which lacked the characteristics of a public law body.

In turn, the Attorney General has referred me to an earlier decision of the Queen's Bench Division in *R v Civil Service Appeal Board, ex parte Bruce* [1988] 3 AllER 686. The decision in this case had been considered in Nangle but had been distinguished on the facts. Whereas Nangle had held that Judicial Review did not lie because of the essentially private law nature of the relationship, the court in Bruce

took the opposing view. The court was of the opinion that the appointment of the civil servant concerned arose by reason of a letter of appointment referring to the Civil Service Handbook. Whilst the court considered that there would be nothing in essence unconstitutional (in terms of English law) about civil servants being employed by the Crown pursuant to contracts of service, that was not the case in that instance at that time. There, the decision which the Applicant sought to have reviewed was that of the Civil Service Review Board. Because the essence of the relationship was one of public law, and because of the more formal nature of the decision considered, Judicial Review would lie. It would not however be granted because the Applicant had available to him the statutory remedy (available in the English courts by reason of appropriate enabling legislation) to apply to an Employment Tribunal.

The court in Nangle approved Bruce on its own facts.

Having considered this group of cases, I consider that the Applicant's relationship with the Crown is akin to the Neigel and Bruce situations rather than Mavronichis and Nangle. As I indicated above, whilst none of the authorities cited to me are binding upon this court, I accept that these are strongly persuasive, and I follow them. I conclude that the Applicant was not employed under a contract of service and that his relationship with the Crown is essentially of a public law nature.

My reasons are as follows.

S76 of the Constitution provides:-

> "Subject to provisions of this Constitution, the Governor, acting in his discretion or after consultation with such persons or authorities may be prescribed by Ordinance, may, in Her Majesty's name and on Her Majesty's behalf –
>
> a. Make, confirm and terminate upon any public office;
>
> b. Exercise disciplinary control over public officers;
>
> c. Except as otherwise prescribed by law, make and termination appointments to any other office in the service of the Crown in a civil capacity in the Falkland Islands, and, except as otherwise prescribed by law, all such appointments should be held during Her Majesty's pleasure."

"Public Office" is defined in S89(1) of the Constitution as being any office of emolument in the public service and includes an office of emolument in the Police Force.

That the Applicant was employed by the Crown in the office of Community Education Officer is not in dispute. That such employment falls within S76 of the Constitution is certain. That his employment came to an end upon the abolition of that post is similarly not in dispute.

Whilst it has been contended by Mr Marlor that the relationship between the Applicant and the Crown is actually contractual *in nature*, it has not been contended that any such contract existed. It was noted above that on the contrary, the letter of appointment said to have been issued to the Applicant in 1989 made reference to the General Orders which sought to deny any intention to enter into a contractual relationship.

It has long been held at the common law of England and Wales, and in a number of colonial jurisdictions, that public officials hold office at the pleasure of the Crown, following on from the principle that to hold otherwise would be to fetter the discretion of subsequent holders of sovereign authority.

Modern law – see for example Golders above – has continued to recognise the special relationship between the Crown and its officers.

The Applicant, in his complaint to the Summary Court, sought to establish that he was dismissed, and that, notwithstanding that the dismissal purported to arise as a consequence of the abolition of the post held by him, it amounted to an unfair dismissal within the meaning of S.52(1) of the Employment Protection Ordinance.

In his original complaint he sought reinstatement (though that request was subsequently withdrawn) and compensation.

In my view the predominant aspect of any such proceedings would relate to the basis of and the reason for the termination of the Applicant's employment and the fairness or otherwise of that termination. Any pecuniary award could only arise as a consequence of a finding in relation to these other matters. These are circumstances far more closely allied with those in Neigle than Mavronichis.

Before dealing with the consequences of the above finding, it is helpful to consider the position as it would have been immediately prior to the enactment of the Employment Protection Ordinance, that being at a time after the enactment of the Constitution.

At that time, no employee in the Falkland Islands, whether under a contract of service with an employer or a public official employed under the terms of contract or under the prerogative had any recourse to an action based upon the concept of "unfair dismissal". Where a contract existed, it was open to a party to such contract to seek redress in the event of a breach. Provided however the terms of the contract were adhered to, there was no other remedy available. It has not been suggested to me by either party that a public officer engaged under the prerogative (or more specifically in the terms set out at S76 of the Constitution) would have had recourse to any remedy other than possibly that of judicial review under what was later to become Order 53 of the Rules of the Supreme Court of England and Wales as applied to the Falkland Islands.

With the enactment of the Employment Protection Ordinance, the position of the private sector employee changed radically. A new concept was introduced whereby even if an employer had terminated the employment in accordance with the terms of a contract, it would nonetheless be incumbent upon the employer to justify such termination by reference to criteria set out in the Ordinance.

What then of the public servant?

It has long been held in the United Kingdom and a variety of Commonwealth jurisdictions that unless a statutory provision expressly or by necessary implication binds the Crown, then it does not do so. In this respect I am referred by the Attorney General to *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58. I am further referred to S67 of the Interpretation and General Clauses Ordinance which provides:-

> "67 – No Ordinance shall in any matter whatsoever affect the right of or be binding upon the Crown unless it therein expressly provides or unless it appears by necessary implication that the Crown is bound thereby."

I have not been referred to any provision whereby it is said the Crown is bound by necessary implication. The Employment Protection Ordinance of course contains no express provision by which any part of it is stated to bind the Crown.

What then is the effect of the above conclusions?

This court has found that the Applicant was a civil servant employed under the terms of the Prerogative and S76 of the Constitution and not under the terms of a contract. This would preclude any possible action in contract even if it were alleged by him that the Crown was in breach of some term of his appointment. As has been observed above, both at common law and by reason of the provisions of S67 of the Interpretation and General Clauses Ordinance, such a person could not be afforded the protection of the Employment Protection Ordinance in the absence of some enabling provision similar to that in the law of England and Wales – see for example S191 of the (Westminster) Employment Rights Act 1996.

Somewhat surprisingly therefore the Ordinance contains the express *exclusion* of public servants from the ambit of the legislation. Why is this, if the Crown would not in any event have been bound?

I am referred by Mr Marlor to the preamble to the Bill which was later enacted as the Employment Protection Ordinance. The explanatory memorandum was set out in the following terms:-

> "Introductory
>
> The attached Bill is very firmly based on the provisions of the Employment Protection (Consolidation) Act 1978 of Great Britain as amended up to early 1986. In point of fact it may be regarded as, for the most part, modifying and adapting the provisions of that Act to the

circumstances of the Falkland Islands. There are however a number of significant departures from the provisions of the British Act –

(a) .....

(b) .....

(c) .....

(d) It excludes the public service entirely from the provisions of the Bill (for reasons which are explained below)

The Bill seeks to confer rights on employees which are fair and reasonable and which have statutorily formed part of the rights of employees in Great Britain for many years .....

Part One of the Bill

This part is introductory. It is important to note the provisions of Clause 3. This would have the effect of excluding 'Crown employment' from the subsequent provisions of the Bill. *It is intended, so far as the public service is concerned that rights of public officers will be governed by the provisions of a Public Service Ordinance and General Orders made under it."* (my emphasis)

The court has had the unusual, if not unique, benefit of having before it the draftsman of that legislation, namely the Attorney General, who represents the Crown in these

proceedings. When asked why it was felt necessary to include what was to become S3(1), the Attorney General said that this was to ensure that elected members would be in no doubt as to the consequence which would follow from the enactment of the Bill. It would, in the opinion of the Attorney General, provide the opportunity for them to modify or remove the provision, or, though this was not put to the court, presumably to make some enabling provision which would indeed bound the Crown.

I find this explanation unpersuasive. The object could well have been achieved without the inclusion of S3(1) and with only slight amendment to the explanatory memorandum.

That is however not a matter for this court. In the event it would appear that elected members enacted the Bill in the full knowledge that Crown employment was excluded, but in the expectation that at some future date further legislation would be brought forth to deal with their position.

In the eleven succeeding years since that memorandum was written no Public Service Ordinance has been enacted.

Whether by reason of the provisions of S67 of the Interpretation and General Clauses Ordinance, or by reason of the seemingly tautologous provision contained in S3(1) of the Employment Protection Ordinance it would appear that the position of the public servant remained unchanged as a result of the enactment of the Employment Protection Ordinance. The position of such a person was neither better nor worse.

What had occurred, of course, was that statutory rights granted to others in "private" employment were not afforded to the public servant.

It has not, so far as I am aware, ever been contended on behalf of the Applicant that the failure to award the benefit of the provisions of the Employment Protection Ordinance to Crown servants contravened the anti-discrimination provisions set out in the Constitution, in particular at S12. This provides:-

> "12(2) ..... no person shall be treated in a discriminatory manner by any person acting by virtue of any law when the performance of the functions of any public office of any public authority."

Discriminatory is defined in S12(3) as:-

> "Affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions or affiliations, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description."

It is conceded by Mr Marlor that in the absence of an enabling provision to the contrary, the Employment Protection Ordinance would, even in the absence of a provision in the terms of S3(1) not have assisted an aggrieved public servant. In

fairness, he does not ask the court to find that the bar effected either at common law or by reason of S67 of the Interpretation and General Clauses Ordinance amounts to a contravention of any provision of the Constitution, but asks that the court take a somewhat wider view of the Reference by the Summary Court and to consider whether the absence of some enabling provision which would have the effect of applying the Ordinance to public servants would of itself contravene S13(8) of the Constitution.

In a matter such as this, I think this must be right, and is consistent with what I termed above a purposive approach. In this I am aided by the helpful observation by the Attorney General referring the court to the provisions of paragraph one of Schedule 3 to the Constitution, which provides:-

> "1(1) The existing laws shall, as from the appointed day, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution."

Accordingly, if the admittedly tautologous provision in S3(1) were indeed to contravene the provisions of S13(8) of the Constitution, then likewise by reason of the provisions of paragraph 1 of Schedule 3 to the Constitution, insofar as they relate to the Applicant, then S67 of the Interpretation and General Clauses Ordinance would fall foul of the same provision. Similarly, the common law rule as in the Bombay case would fall to be interpreted in the light of the Constitution.

If the Applicant is right, as is contended by Mr Marlor, that the non-application to Crown Servants of the Employment Protection Ordinance amounts to a denial of a fundamental right (that is not to be unfairly dismissed) then it must follow that the failure to recognise such a right for any employee between the date of the enactment of the Constitution and the enactment of the Employment Protection Ordinance must similarly have contravened the provisions of S13(8) of the Constitution.

In my view, that cannot be so. I do not accept that in terms of the Constitution, the right not to be "unfairly" dismissed is a fundamental right afforded constitutional protection. The concept of "fair" and "unfair" dismissal is entirely a creation of statute. It enables certain classes of employee to challenge their dismissal on specified grounds notwithstanding that the terms of the contract between employer and employee may not have been breached. The basis on which the fairness of a dismissal may be challenged reflect the public concern to give some protection to the essentially weaker party in a relationship from arbitrary acts by the employer.

Accordingly, whilst the Applicant is denied a remedy under the provisions of S65 of the Employment Protection Ordinance, I am not satisfied that such denial (whether by reason of S3(1), 3(2)(a) and S52(2) of that Ordinance, or whether by reason of the absence of some enabling provision) amounts to a negation of a civil right pursuant to provisions of S13(8) of the Constitution.

Where does this leave the Applicant?

The Applicant is unable to rely on a contract of employment. Indeed, his position would appear to be entirely that which would have existed had the Employment Protection Ordinance not been enacted.

Is he thus denied all remedy?

Nothing in the decision of this court should be construed as indicating that the Applicant has or has not been in some way wronged by his former employer. I do not know, nor is it within my jurisdiction to enquire, as to whether the Applicant was made redundant in the proper sense of that word, or whether his employment was terminated upon some basis or in some manner inappropriate to the circumstances. As is indicated above, the court is satisfied that the relationship between a civil servant and the Crown in the Falkland Islands is essentially a public law relationship.

In his oral submission to the court, Mr Marlor has contends that Judicial Review cannot lie against the Governor acting upon the advice of Executive Council in matters of civil service termination of employment.. The Attorney General expresses the contrary view. Mr Marlor cites the Australian case of *Ex Parte McWilliam* [1947] 47 SR 401 (NSW) when read with S.76 of the Constitution. The Crown cites (among others) the well known English case of *Council of Civil Service Unions and Others v. Minister for the Civil Service* [1985] HL – often referred to as "the GCHQ case".

I will address this matter briefly as the question as to whether Judicial Review may or may not lie in the present case does not, in my view, assist the court in determining the Reference under S.16(3). Suffice it to say that the principles, and

more particularly the extent of the application of Judicial Review has developed rapidly in recent years, and the limitations placed upon the grant of prerogative writs and orders in many of the older cases is no longer good law in England and Wales, and have little persuasive authority in the Falkland Islands. I approve the following extract from a passage from the judgment of Lord Diplock in the GCHQ case at p.1027 paragraph c:-

> That a decision of which the ultimate source of power to make it is not a statute but the common law (whether or not the common law is for this purpose given the label of "the prerogative") may be the subject of judicial review on the ground of illegality.... Is I think established .... I see no a priori reason to rule our irrationality as a ground for judicial review of a ministerial decision taken in the exercise of prerogative powers .... I leave this as an open question to be dealt with on a case to case basis ....

It is my view that the decision to terminate the employment by the Governor of the Falkland Islands in the matter of civil service employment in the circumstances of the Applicant is susceptible to Judicial Review. This is not to say that any application would necessarily succeed even if leave to proceed were granted upon an application by him.

What elected members choose to enact as a matter of policy is for them to determine, subject of course to the overriding provisions of the constitution, and it is not for the courts to interfere. Whilst it may be that the generalised exclusion of civil servants from the normal application of employment law is somewhat out of step with modern thinking, it would appear that in enacting the Employment Protection Ordinance,

members were made well aware of its effects. It can only be a matter of speculation as to whether the Ordinance would have taken its present form had it been appreciated that a Public Service Ordinance would not reach the statute book for at least a decade, if at all.

The decision of this court is set out in the Order of the 18 November 1999 addressed to the Summary Court and appended hereto.

Quite properly, there is no application for costs and no order is made.

James Wood,

Chief Justice.