Cases and Materials Relating to Corruption
Volume 2 – Issue 5 – April 2005
And
Cumulative Index for Volume 2

Editor John Hatchard

A joint project of the Commonwealth Legal Education Association, The Commonwealth Magistrates’ and Judges’ Association, The Commonwealth Secretariat and Tiri

Funded by the BMZ Trust Fund for United Nations Development Programme for Accountability and Transparency in support of the Independent Corrupt Practices and Other Related Offences Commission of Nigeria

Editorial Contact: Tiri, 42 Castelnau,
London SW13 9RU
United Kingdom
martin.tisne@tiri.org
http://www.tiri.org
<table>
<thead>
<tr>
<th>TABLE OF CONTENTS</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Administrative Law</strong></td>
<td></td>
</tr>
<tr>
<td>Statutory interpretation -- Public Service Act -- Prohibition on spouse of &quot;public servant&quot; being member of gaming board -- Meaning of &quot;public servant&quot; -- Ordinary meaning and meaning in the Public Service Act to be attached to &quot;public servant&quot;</td>
<td></td>
</tr>
<tr>
<td>Rules of statutory construction -- Literal rule -- Circumstances when court may adopt a different construction</td>
<td></td>
</tr>
<tr>
<td>Constitutional Law -- &quot;Overbreadth&quot; of provision -- Meaning of concept</td>
<td></td>
</tr>
<tr>
<td>Constitution Law -- Whether provision reasonable and justifiable in an open and democratic society -- Constitution of South Africa, section 36(1)</td>
<td></td>
</tr>
<tr>
<td>Poswa v Member of the Executive Council responsible for Economic Environment and Tourism (Supreme Court of Appeal of South Africa)</td>
<td>Pages 5-12</td>
</tr>
<tr>
<td><strong>Whistleblowing</strong> -- Application for a protection visa -- Review of decision of Refugee Review Tribunal -- Consideration of circumstances in which exposure of corruption or &quot;whistleblowing&quot; can give rise to a well founded fear of political persecution -- Whether the material and evidence before the Tribunal raised a case of political persecution</td>
<td></td>
</tr>
<tr>
<td>Zheng v Minister for Immigration &amp; Multicultural Affairs (Federal Court of Australia)</td>
<td>Pages 13-26</td>
</tr>
<tr>
<td><strong>Criminal Law</strong></td>
<td></td>
</tr>
<tr>
<td>Corruption -- Prevention of Corruption Ordinance section 9(1)(b) -- &quot;Any agent who accepts any advantage on account of his showing or having shown favour or disfavour to any person in relation to his principal's affairs or business&quot; -- Whether phrase covers acceptance of past favours</td>
<td></td>
</tr>
<tr>
<td>Misdirection by trial judge -- Failure of defence to object to directions at the trial -- Whether a bar to an appeal</td>
<td></td>
</tr>
<tr>
<td>Misdirection by trial judge -- Whether material</td>
<td></td>
</tr>
<tr>
<td>Launder v HKSAR (Hong Kong Court of Final Appeal)</td>
<td>Pages 27-40</td>
</tr>
<tr>
<td>Offence of official corruption -- -- Scope of phrase &quot;holder of any office … in the service of Her Majesty&quot;-- Whether an Assemblyman or a Minister is &quot;in the service of Her Majesty&quot; -- Section 180 Niue Act 1966</td>
<td></td>
</tr>
<tr>
<td>Jurisdiction -- Jurisdiction of court to entertain the appeal -- Constitution of Niue, article 55A(2)(d)</td>
<td></td>
</tr>
<tr>
<td>Lakatani v The Police (Court of Appeal of Niue)</td>
<td>Pages 41-47</td>
</tr>
</tbody>
</table>
Evidence
Evidence -- Right to remain silent -- Applicant summoned for questioning by National Prosecuting Authority into allegations of corruption -- Constitutionality of power to question any person believed able to furnish any information -- National Prosecuting Authority Act 32 of 1998
Shaik v Minister of Justice and Constitutional Development and Others (Constitutional Court of South Africa) Pages 48-62

Insolvency
Insolvency -- Authority to institute proceedings -- Striking out of new matter in replying affidavit.
Bribes or secret commissions received by employee in course of employment -- Whether deemed to have been received for employer
Ganes & Ganes v Telecom Namibia Limited (Supreme Court of Appeal of South Africa) Pages 63-71

Proceeds of Crime
Proceeds of crime -- Respondent applying fugitive disentitlement doctrine and seeking to register foreign restraint order in England -- Whether contrary to the interests of justice to do so -- Whether contrary to the right to a fair trial to do so -- Test to be applied
Right to a fair trial -- European Convention on Human Rights, article 6 -- Whether article 6 protection applicable to enforcement of foreign judgment made in non-convention State
Government of the United States of America v Barnette and Another (House of Lords) Pages 72-84

Sentencing
Corruption -- Council officer soliciting payments in return for placing company on list of approved contractors -- £40,000 received over six year period -- Length of sentence
Sentence -- Aggravating features -- Gross abuse of trust over a period of six years -- Effect on length of sentence
Co-accused -- Non-custodial sentence imposed -- Whether court should take this into account when considering length of sentence
R v Bush (Court of Appeal, Criminal Division) Pages 85-88

Corruption -- Payment of £700,000 to products manager of an international company in return for contracts -- Length of sentence
Sentence -- Mitigating factors -- Plea of guilty and accused of previous exemplary character -- Effect on length of sentence
R v Myatt and Winkles (Court of Appeal, Criminal Division) Pages 89-93

Index to Volume 2 Pages 94-102
In Poswa, the scope of an anti-corruption provision in the Gaming and Betting Board Act (the Act) was in issue. Here the authority responsible for regulating gambling was said to have "resolutely set its face against the potential for corruption" and sought to establish "non-porous measures for the prevention of corruption". One such measure was by disqualifying from membership of the Gaming and Betting Board any person with a family member who was a "public servant". This was challenged by the appellant, whose wife was a lecturer at a teacher training college, on the grounds that the provision was either absurdly wide under the common law or overbroad in terms of the constitutional protection against unfair discrimination.

The case raises two issues. Firstly it addresses the application of the rules of statutory construction. Here it was conceded by the appellant that Mrs Poswa was a public servant within the ordinary meaning of the expression and within the Public Service Act. However, it was contended that the meaning of "public servant" in the Act was much narrower and must be restricted, for otherwise, it would lead to absurd results. This was rejected by the court which preferred to adopt the literal rule "unless it lead to some absurdity". Bearing in mind that gambling was "a fertile field for corruption" (para 13) the court found that there was no measure of absurdity in the manner in which the legislature had chosen to address the problem.

The second issue centred on whether the provision was reasonable and justifiable in an open and democratic society. Here the court recognises that the provision excluded a significant number of well-qualified persons from serving on the Board but held that the deprivation complained of "seems to weigh lightly against the need to adopt strong measures to quell corruption" (para 19).
Statutory interpretation -- Public Service Act -- Prohibition on spouse of "public servant" being member of gaming board -- Meaning of "public servant" -- Ordinary meaning and meaning in the Public Service Act to be attached to "public servant"

Rules of statutory construction -- literal rule -- circumstances when court may adopt a different construction

Constitutional Law -- "Overbreadth" of provision -- meaning of concept

Constitution Law -- whether provision reasonable and justifiable in an open and democratic society -- Constitution of South Africa, section 36(1)

POSWA v MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR ECONOMIC AFFAIRS ENVIRONMENT AND TOURISM

Supreme Court of Appeal of South Africa
Marais, Schutz and Mpati JJA

12 March 2001, 22 March 2001

The facts appear in para 1 - 6

Cases referred to in the judgment
Bhyat v Commissioner for Immigration 1932 AD 125
Coetzee v Comitis and Others 2001 (1) SA 1254 (C)
R v Heywood (1995) 24 CRR (2d) 189 (SCC)
S v Makwanyane and Others 1995 (3) SA 391 (CC)
South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC)
Standard Bank Investment Corporation Ltd v Competition Commission and Others: Liberty Life Association of Africa Ltd v Competition Commission and Others 2000 (2) SA 797 (SCA)

For the appellant: Mr Quinn

SCHUTZ, JA gave the judgment of the court

[1] In its legislation providing for the establishment of the provincial regulator of gambling, the Gambling and Betting Board of the Eastern Cape ("the board"), the Government of the Province of the Eastern Cape has resolutely set its face against the
potential for corruption. Section 6 of the Act setting up the board (Act 5 of 1997 of that province - "the Act"), among a long list of persons disqualified from being members of the board, included any person who:

"(b) at the relevant time is, or during the preceding 12 months was, a public servant other than ... [and any person who]
(k) is a family member, partner or associate, of a person contemplated in paragraph 6(b) . . ."

[2] Section 1 of the Act defined a "family member" as:

"(a) a husband or a wife, any partner in a customary union according to indigenous law or any partner in a relationship where the parties live together in a manner resembling a marital partnership or a customary union; and
(b) any person related to either one or both persons referred to in paragraph (a) within the second degree through marriage, a customary union or a relationship referred to in paragraph (a) or the third degree of consanguinity." (Emphasis supplied.)

[3] Paragraph (b) of the definition of "family member" was replaced by section 1 (c) of Act 3 of 2000 with effect from 23 June 2000 to read:

"(b) any person to whom one is related in the first degree of consanguinity."

[4] The appellant, Mr Vuyo Poswa ("Poswa"), an attorney, was appointed chairman of the board. In 1998 the respondent, the member of the Executive Council responsible for Economic Affairs, Environment and Tourism ("the MEC") applied to the High Court, Bisho, to have Poswa removed, on the ground that his wife was a public servant, with the consequence that he was disqualified under section 6. Originally two other members of the board, Nonkosi Mhlantla and Mxolisi Dondashe, were cited as second and third respondents, on the grounds that the mother of one and the sister of the other were public servants. The applications against them were withdrawn during the course of the proceedings a quo before White J. The board was cited as the fourth respondent, and together with Poswa, had judgment given against it, but although, again together with Poswa, it was granted leave a quo and noted an appeal, it has since withdrawn as an appellant. There are, therefore, only two parties before us, Poswa and the MEC.

[5] The broad thrust of Poswa's resistance to his removal from the board is that the legislation is unacceptably inhibiting. This stand bifurcates into two contradictory but alternative contentions. The first is that to give the undefined expression "public servant" its literal and ordinary meaning would lead to an exclusion of such extraordinary width that the expression has to be abated by interpretation to a more acceptable degree of exclusion. The second is that, if indeed the expression means what on its face it says it means, then it is "overbroad" and thus unconstitutional.

Construction to be placed on "public servant"

[6] The facts are that Poswa's wife is a member of the lecturing staff of the Masibulele college of education at Whittlesea, an impoverished rural centre situated between Queenstown and Fort Beaufort. The college is state funded and trains teachers under the direction and control of the provincial education department and Rhodes University,
which latter is the certification authority. Mrs Poswa is remunerated by the department and is certainly a member of the "public service" within the meaning of section 8 (1) of the national Public Service Act of 1994 (Proc No 103 of 1994). Section 8 (1) reads in part:

"(1) The public service shall consist of persons who -
(a) hold posts on the fixed establishment:
(i) …
(iv) in state educational institutions …"

[7] Mr Quinn, counsel for Poswa, frankly conceded that he was unable to contend that Mrs Poswa is not a public servant either within the meaning of that Act or within the ordinary meaning of that expression. However, he submitted that the meaning of "public servant" in the Gambling and Betting Act was much narrower than either of those. It had to be restricted for, if it was not, absurd results would follow which could never have been intended by the legislature. He argued in accordance with his client's affidavit that:

"While my wife … [is a] civil servant within the meaning of section 8 … it could not have been the intention of the Provincial Legislature to exclude [me] from membership of the Board for this reason. In [my] case, and in countless similar instances, this gives, and would give rise to, absurdity, inequity, hardship and a result that simply could not have been intended."

[8] His wife, he points out, has no interest whatsoever, direct or indirect, in gambling or related activities. The intention of the legislature must have been, he contends, to refer only to public servants whose employment is reasonably related to gambling and betting activities. To so confine the meaning would be to give effect to the true intention of the legislature. So ran the argument.

[9] The difficulty, which faces any argument which claims better knowledge of what the legislature intended than what the legislature itself appears to have had in mind when it expressed itself as it did, is to establish with reasonable precision what the unexpressed intention contended for, was: cf Standard Bank Investment Corporation Ltd v Competition Commission and Others: Liberty Life Association of Africa Ltd v Competition Commission and Others 2000 (2) SA 797 (SCA) at 812 G-H. Poswa's complaint is not the mere fact that certain persons have been excluded on grounds of occupation or relationship. It is that the barrier of exclusion has been erected too far out. The argument is one of degree, notoriously an area for differences of opinion. The legislature has chosen to use a phrase with a plain ordinary meaning of considerable breadth, and although the phrase is not mentioned in the definition section of the Public Service Act, the effect of section 8 is to provide a detailed definition. One would have thought that when the legislature chose to use the expression "public servant" in the Gambling and Betting Act it intended to use it in a sense conforming at least with the statute dealing with that subject, rather than in some other unspecified narrower sense. This makes it all the more difficult to push out a plain word in favour of its ill-bordered shade.

[10] The literal meaning of an Act (in the sense of strict literalism) is not always the true one, but escaping its operation is usually not easy, most often impossible, for:
"The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment.... [I]n construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the legislature could not have intended." (per Stratford JA in Bhyat v Commissioner for Immigration 1932 AD 125 at 129). (Emphasis supplied).

[11] The effect of this formulation is that the court does not impose its notion of what is absurd on the legislature's judgment as to what is fitting, but uses absurdity as a means of divining what the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend.

[12] The board consists of eight members (section 5). The combined effect of sections 5(1) (e), (f) and (g) and 6 (b) is that five of the eight members will not be bureaucrats. The three who are to be, represent the departments of economic affairs, finance and safety and security. Overall the bureaucrats are not to control the board. Section 6(k) ("family member") supplements these provisions in a manner intended to prevent indirect control. Other subsections of section 6 disqualify from membership of the board persons engaged in political activity (para (d)) and persons having "any direct or indirect interest in gambling activity" (para (e)).

[13] Opinions may differ on how strict or far-reaching the exclusions ought to be. But although the view may legitimately be held that it is going unnecessarily far to exclude all public servants and their spouses, there is not, in my opinion, any absurdity in doing so. Impermeable rules often have advantages over porous ones. An example advanced as exemplifying absurdity is that of a driver in provincial employ. But whether absurdity exists is not to be tested by reference to individual instances, but by asking whether the choice of a broad rule of exclusion is absurd. If it is not, the very foundation for the argument that the legislature could not have meant what it said is lacking. The legislature had the choice of a wide or a more narrow exclusion. It chose the wide one. It is not difficult to understand why. Gambling, whether illegal or legalised, is a fertile field for corruption and it would be stretching judicial nescience to the limits not to acknowledge that the area now falling within the province of the Eastern Cape has had some experience of corruption associated with gambling. If one is to exclude bureaucratic control beyond the limit allowed by section 5 and if one were to limit such exclusion to particular classes or levels of public servants, the first selections would be easy, but they would become progressively more difficult or controversial to establish as one proceeded. If the test selected were to be the one proposed by Poswa - a public servant whose employment is reasonably related to gambling and betting activities - I can foresee unending arguments arising from case to case, and much opportunity for evasion. This situation might be further complicated by the existence of departments with over-arching authority or the movement of bureaucrats from one department to another whilst retaining some measure of influence in the former.

[14] Accordingly I can see no measure of absurdity in what the legislature has chosen and the attack based solely on interpretation fails.

Overbreadth - Unconstitutionality

[15] The underlying premise is the same. The legislature should not have
gone as wide as it did, and its enactment must be cut down. But the garb of reasoning put round the premise changes. The contention is that the means adopted by the legislature for attaining its ends (once the broad interpretation of "public servant" be accepted) are too sweeping, in relation to the objective sought to be attained, and overly broad. This reasoning involves a change of gear. The object is no longer to arrive by means of interpretation at what the legislature actually intended, by acquitting it of an intention to act absurdly; but to convict it of constitutional violation by accepting that it did indeed intend to act excessively, in the court's opinion that is, with the consequence that the court will, in one manner or another, impose its will on the legislation, so as to cancel the excess. The common law method grounded in principles of statutory interpretation may be more gentlemanly, but it may also be less effective in obstinate cases.

[16] Possible ambiguity as to the sphere of operation of the concept of "overbreadth" is explained by O'Regan J in South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC) at 480 D-F, para 18:

"The first question to be asked is whether the provision in question infringes the rights protected by the substantive clauses of the Bill of Rights. If it does, the next question that arises will be whether that infringement is justifiable. At the second stage of the constitutional enquiry, the relevant questions are: what is the purpose of the impugned provision, what is its effect on constitutional rights and is the provision well tailored to that purpose? At both stages, the use of the term 'overbreadth' can be confusing, particularly as the phrase has different connotations in different constitutional contexts. Care should therefore be taken when employing the term"

Footnote 12 (at 480 H-J) expands upon the different manner in which the concept of "overbreadth" is used in the USA and in Canada. It reads:

"In the USA, overbreadth is, effectively, a doctrine of standing. It permits litigants whose own constitutional rights are not affected by a legislative provision to rely on that provision's infringement of the rights of others. See Gunther and O'Sullivan Constitutional Law 13th ed (Foundation Press, 1997) at 1326-7. It is a doctrine which finds application primarily in the context of First Amendment jurisprudence. See, for example, Village of Schaumberg v Citizens for a Better Environment et al 444 US 620 (1979). On the other hand, in Canada, the term 'overbreadth' is a matter which applies at the limitations stage of constitutional analysis to determine primarily whether a legislative provision has an appropriate fit between means and ends, what the Canadian Supreme Court has referred to as 'the minimal impairment' leg of the limitations analysis. See, for example, R v Heywood (1995) 24 CRR (2d) 189 (SCC) at 208; R v Nova Scotia Pharmaceutical Society (1992) 93 DLR (4th) 36 (SCC) at 50 (1992) 10 CRR (2d) 34)."

[17] Poswa alleges that his fundamental rights have been violated by unfair discrimination against him by the State because of his marital status (section 9(3) - equality) or by interference with his right to freely choose his trade, occupation or profession (section 22). A further challenge based on a violation of his right of free association with others (section 18) was dropped on appeal.
[18] It seems to me unnecessary to decide whether Poswa has succeeded in establishing a violation of one or both of the rights relied upon, because I consider that the case can be decided on the application of the limitation clause, section 36(1), which allows a right in the Bill of Rights to be limited by a law of general application to the extent that the limitation is:

"reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance and purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality." (per Chaskalson P in S v Makwanyane and Others 1995 (3) SA 391 (CC) at 436 C para 104, in dealing with section 33 (1) of the interim Constitution.) In the balancing process regard must be had to the provisions of section 33 (1) [of the interim Constitution then in force] and the underlying values of the Constitution, bearing in mind that, as a Canadian judge has said, ‘the role of the Court is not to second-guess the wisdom of policy choices made by legislators’.

[19] The balancing process with which we are concerned is essentially that of weighing the interests of Poswa (and, he adds, millions of other public servants and their spouses) to be appointed to gambling boards, against the need for effective non-porous measures for the prevention of corruption. Poswa seeks to add weight to his case by stating that an exceptionally high proportion of persons in the Eastern Province having the educational qualifications and experience to serve on gambling boards are public servants or their spouses. This may be. But there must be enough others, and I fail to see why public servants who have chosen that vocation should not devote their talents to serving the public in return for their stipend and be content that places on the board are not for them, excepting the three posts out of eight that s 5 enjoin be filled by specified public servants. The deprivation complained of, such as it is, seems to weigh lightly against the need to adopt strong means to quell corruption.

[20] But, says Poswa, it was unnecessary to adopt such extreme means. If the definition had been cut down to include only those reasonably connected with gambling and betting activities, that would have been enough. Would it have been enough? Or can we say that the legislature was wrong to have thought that it would not have been enough? We are back to the problems associated with designing watertight compartments with holes in them, already discussed at some length under the heading of absurdity. We should be slow in a situation such as this, in my opinion, to conclude that the legislature did not know its problem, or badly over-estimated the means needed to cope with it. This is not a case to second-guess the legislature.

[21] So far I have approached the matter as if Poswa's complaint was directed only against para (a) of the definition of family member, read with section 6 (k) (husband of a
public servant). In fact Poswa has also sought to rely on para (b) of the definition, read with section 6 (k) (the one which in its original form comes close to a mediaeval exposition of the prohibited degrees). This he seeks to do even though it has no direct application to his situation. The case against the two parties to whom it might have had application was withdrawn in the court a quo. Poswa's application for leave to appeal against the court's allowing the MEC to withdraw against the former second and third respondents was refused and has not been renewed. The subsection no longer appears on the statute book in its original and arguably unconstitutional form. To my mind para (a) is clearly severable from it.

[22] Under these circumstances should Poswa be allowed to rely on it? I think not. As the summary of the decisions on section 38 of the Constitution in Coetzee v Comitis and Others 2001 (1) SA 1254 (C) at 1262C - 1263G, paras 17.6 and 17.7, shows, that section should be given a generous construction. But I do not think Poswa has brought himself within any of its subsections, however generous one is to be. The nearest is (d) "anyone acting in the public interest". Poswa, however, did not purport to bring an application in the public interest. The MEC brought an application against him for his removal and succeeded, basing himself on para (a). Although para (b)'s ultimate fate may be of interest to other parties, I fail to see how its one-time existence (whether or not it was constitutionally valid) can operate to save Poswa from removal from the board, or why this court should respond to an invitation to decide a question the answer to which would be irrelevant to the real question of whether the relief sought and granted was properly sought and granted. The more so when a finding of constitutional invalidity would have to be confirmed by the Constitutional Court for it to have any effect. The prospect of that court having to devote time and attention to an issue which no longer exists, the resolution of which will have no effect upon the order granted against the appellant and which has not been shown to have any other practical relevance, is a singularly unattractive one. I do not believe that the Constitution requires this court to inflict so sterile an enquiry upon the Constitutional Court. Generosity in according standing in protection of constitutional values is one thing, profligacy in that regard is another.

[23] The appeal is dismissed with costs, such costs to include the costs of two counsel.
Zheng v Minister for Immigration addresses the issue of “whistleblowing”. Encouraging whistleblowing is widely recognised as an important mechanism for unearthing corruption. Such action may attract possible unwelcome consequences on the whistleblower and article 33 of the UN Convention Against Corruption addresses the "Protection of reporting persons" in the following manner:

"Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention".

In Zheng, the issue of whistleblowing arose in the context of an application for a protection visa by a citizen of the People's Republic of China (and his wife) after their arrival in Australia. The applicant claimed to be entitled to the visas on the ground that he was a refugee as defined in the 1951 Convention Relating to the Status of Refugees (as amended). This arose from the exposure by him of the corruption of his superior, a senior bank official in China. As a result, the applicant claimed that he had a well-founded fear of being persecuted for reasons of membership of a particular social group or political opinion if he returned to China.

The case is helpful in that it explores the circumstances in which the exposure of corrupt activities of public officials, or resistance to participating in such activities, can lead to a well-founded fear of political persecution and the evidence required so to prove. In particular, the court undertakes a review of a number of leading cases both from Australia and overseas (see paras 12-34).
Whistleblowing -- Application for a protection visa -- Review of decision of Refugee Review Tribunal -- Consideration of circumstances in which exposure of corruption or "whistleblowing" can give rise to a well founded fear of political persecution -- Whether the material and evidence before the Tribunal raised a case of political persecution

ZHENG v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

Federal Court of Australia
Merkel J

23 August 2000

Cases referred to in the judgment
Addo v Minister for Immigration and Multicultural Affairs (1999) FCA 940
Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225
Balbin v Minister for Immigration & Multicultural Affairs (7 December 1998, unreported)
C v Minister for Immigration & Multicultural Affairs (1999) 94 FCR 366
Canada (Attorney-General) v Ward (1993) 103 DLR (4th) 1
Chen v Minister for Immigration and Multicultural Affairs [1999] FCA 1022
Grava v Immigration & Naturalization Service 205 F.3d 1177 (2000)
Guzman v Minister of Citizenship & Immigration (1999) 93 ACWS (3d) 733
Klinko v Canada (Minister for Citizenship & Immigration) (2000) 184 DLR (4th) 1
Minister for Immigration and Multicultural Affairs v Singh [2000] FCA 845
Minister for Immigration and Multicultural Affairs v Y (15 May 1998, unreported)
Paramanathan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28
Ramirez v Minister for Immigration & Multicultural Affairs [2000] FCA 1000
Satheesumar v Minister for Immigration and Multicultural Affairs [1999] FCA 1285
Sellamuthu v Minister for Immigration and Multicultural Affairs [1999] FCA 247
V v Minister for Immigration and Ethnic Affairs (1994) 92 FCR 355
Vassiliev v Minister for Citizenship & Immigration (1997) 131 F.T.R. 128

For the Applicant: Mr A Krohn
For the Respondent: Mr DJ Batt

MERKEL, J

[1] The applicants, citizens of the People's Republic of China, applied for protection visas after their arrival in Australia. After their applications were refused by a delegate of the Minister and differently constituted Refugee Review Tribunals they applied to the Court under Part 8 of the Migration Act 1958 (Cth) to review the most recent decision of the Refugee Review Tribunal ("RRT"), which affirmed the decision of the delegate of the Minister.
[2] The applicants claim to be entitled to the grant of protection visas on the ground that they are refugees as defined in Art 1A(2) of the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees ("the Convention"). Their claim to refugee status was based essentially on the claim by the first applicant ("the applicant") that he had a well founded fear of being persecuted for reasons of membership of a particular social group or political opinion if he returned to China. The second applicant, who is the wife of the applicant, relied on the applicant's claim of persecution for her entitlement to a protection visa.

[3] The applicant's claim arose from the exposure by him of the corruption of his superior, Mr He, who was the Deputy President and Manager of the Loans Department of the Heping District Branch of the government owned Construction Bank of China. Although a number of grounds were relied upon by the applicants in their review of the decision of the the RRT, it became clear in the course of the hearing that the only ground of substance related to whether the RRT's conclusion that the applicant's exposure of corruption was a criminal, rather than a political, matter involved an error of law on its part.

[4] The applicant also relied upon the ground that, as a "whistleblower", he is a member of a social group. The RRT, however, was plainly correct in regarding the applicant's problems, should he return to China, as being personal to him rather than arising because he is a member of any social group.

The decision of the RRT

[5] The applicant's claims before the RRT were as follows. As from August 1986 he worked in the Bank and, as a result of proficiency in his work, he was promoted to the position of deputy manager of the Loans Department in 1995. A number of companies, without assets, bribed Mr He in order to obtain loans from the Bank. That practice, which had continued for some time, had led to the applicant's immediate predecessor being jailed for ten years. Mr He had been able to escape unscathed as his parents were senior members of the Communist Party. As the applicant refused to be bribed or to co-operate when corrupt loans were being sought he was bypassed in respect of those loans, which were authorised directly by Mr He. After the loans had become bad debts Mr He reported that the loans had been arranged by the applicant with the consequence that the applicant was dismissed from his position at the Bank.

[6] In October 1997 the applicant reported Mr He's corruption to the authorities. Notwithstanding his report, and a further letter of complaint, the applicant was unable to get any response and no investigation of Mr He was carried out. However, after Mr He ascertained that the applicant had reported him for corruption Mr He instigated threats against the applicant's life and that of his family members. Mr He also fabricated a case of corruption against the applicant who then fled to Australia. Since his arrival in Australia the applicant has been told that fabricated charges had been brought against him.

[7] The applicant claimed that he feared that his actions would be considered by the authorities as exposing the Communist Party's crimes and therefore a challenge to government authority. The RRT did not accept that claim and concluded that the
applicant's case was to be looked at "in the context of his employment problems". In that context the RRT made the following findings:

- the applicant had strong ethical objections to being required to act corruptly and it was such objections, rather than any political opinion, which launched him into making an official complaint against his superior;
- in the light of the evidence of ongoing government attempts to control official corruption in China the RRT was not prepared to find that there was official sanctioning of such corruption. Consequently, the mere reporting of corruption by persons such as the applicant would not result in such persons becoming "victims of the state";
- the RRT accepted that the first applicant not only did not get a proper response to his complaint but, upon his superior ascertaining that the applicant was the source of the complaint, the applicant, rather than his superior, became the subject of a corruption investigation;
- the RRT accepted that Mr He’s response of counter-accusing the applicant led the Public Service Bureau to undertake an investigation of the applicant;
- the unsatisfactory response to the applicant’s complaint and the fact that Mr He had instigated a corruption investigation against the applicant did not mean that the "system" was corrupt or that the government did not offer "whistleblowers" any protection.

[8] The RRT then made the following findings in respect of the applicant’s claim of having a well founded fear of political persecution:

"The Tribunal is not satisfied that the subsequent action taken against [the Applicant] by his corrupt superior and the failure of the appropriate organ of discipline within the municipal government structure to act constitute persecution for reasons of political opinion. It is not satisfied that the motive behind the instigation of an investigation into [the Applicant] was political. It was the act of a corrupt man who decided that attack was his best form of defence.

The Tribunal is not satisfied that there was a political ground to the problems faced by the Applicant in his employment. It is not satisfied that a political ground has been established for alleged subsequent events."

[9] The RRT then turned to explain why it was not satisfied that the applicant belongs to any particular social group by virtue of having informed on his corrupt superior and concluded:

"Consequently the Tribunal is not satisfied that any Convention ground has been made out in this matter. [The Applicant’s] problems at work were not political. They were about banking practices. The reaction of his corrupt boss was not political but was an attempt to deflect investigation of himself to investigation of the Applicant. The PSB is the body obligated to carry out investigations and it did so. The Tribunal is not satisfied that this was for any political reason. Neither has the Tribunal been satisfied that the Applicant belongs to a particular social group and for that reason faces persecution if he returns to China."
The Tribunal accepts that it is possible that his former boss has attempted to fabricate evidence against the Applicant and that all suspicions of him have not yet been eliminated. However, it is satisfied that such attempts at fabrication are criminal in nature and not political. It is not satisfied that he has no recourse available to him and is simply at the mercy of a corrupt system. It is satisfied that the government, while like most countries, finding it difficult to control corruption, has in place a structure which encourages and permits the investigation of corruption."

[10] It is plain that in the above findings the RRT rejected the contention put by the applicant that the persecution of which he complained had any political aspect to it. It is significant that the RRT, when discussing the law in relation to the operation of Art 1A(2) of the Convention earlier in its reasons, discussed the Article in general terms without giving any particular consideration as to what constitutes "political opinion" and whether the exposure of corruption per se can give rise to a well founded fear of persecution on grounds of an actual or imputed political opinion. As that issue is one of some complexity, and was raised by the applicant, it is surprising that it did not receive some consideration by the RRT.

[11] Ultimately, counsel for the applicant submitted that the failure of the RRT to consider the political aspects of the applicant's exposure of corruption demonstrated that the RRT erred in law in arriving at its decision. In particular, it was contended that the RRT failed to deal with the applicant's case that his exposure of Mr He's corruption has resulted in him being persecuted by agents of the state because he was perceived to have resisted or not co-operated with those authorities and was therefore seen as a threat to them. It was argued that the RRT assumed, without determining, that exposure of corruption is a criminal matter that is entirely outside of the Convention.

Exposure of Corruption
[12] The issue of whether the exposure of corrupt activities of officials of the state, or resistance to participating in such activities, can lead to a well founded fear of political persecution has been considered in a number of cases both in Australia and overseas.

[13] The most recent Full Federal Court case to consider the circumstances in which resistance to extortion and exposure of corruption can manifest a political opinion so as to attract the protection of the Convention if persecution follows was Ramirez v Minister for Immigration & Multicultural Affairs [2000] FCA 1000 ("Ramirez") at [39]-[42]. The Full Court cited, with approval, Minister for Immigration and Multicultural Affairs v Y (Davies J, 15 May 1998, unreported) ("Y") and another decision of a Full Court in V v Minister for Immigration and Ethnic Affairs (1999) 92 FCR 355 ("V"). The Court cited the following passage of Hill J (at 367) in V:

"The exposure of corruption itself is an act, not a belief. However it can be the outward manifestation of a belief. That belief can be political, that is to say a person who is opposed to corruption may be prepared to expose it, even if so to do may bring consequences, although the act may be in disregard of those consequences. If the corruption is itself directed from the highest levels of society or endemic in the political fabric of society such that it either enjoys political protection, or the government of that society is unable to afford protection to
those who campaign against it, the risk of persecution can be said to be for reasons of political opinion.

It is not necessary in this case to attempt a comprehensive definition of what constitutes 'political opinion' within the meaning of the Convention. It clearly is not limited to party politics in the sense that expression is understood in a parliamentary democracy. It is probably narrower that the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society. It suffices here to say that the holding of an opinion inconsistent with that held by the government of a country explicitly by reference to views contained in a political platform or implicitly by reference to acts (which where corruption is involved, either demonstrate that the government itself is corrupt or condones corruption) reflective of an unstated political agenda, will be the holding of a political opinion. With respect, I agree with the view expressed by Davies J in Minister for Immigration and Ethnic Affairs v Y (unreported, 15 May 1998) that views antithetical to instrumentalities of government such as the Armed Forces, security institutions and the police can constitute political opinions for the purposes of the Convention. Whether they do so will depend upon the facts of the particular case."

[14] In Ramirez (at 42) the Full Court also referred, with approval, to Canada (Attorney-General) v Ward (1993) 103 DLR (4th) 1 ("Ward") in which La Forest J (at 39), in delivering the judgment of the Court, adopted the interpretation of 'political opinion' suggested by Goodwin-Gill, in The Refugee in International Law 1983 at 31 namely, "any opinion on any matter in which the machinery of state, government, and policy may be engaged".

[15] La Forest J observed in Ward (at 38-39) that international refugee protection may extend not only to where the state is an accomplice to the persecution but also to where the state is not an accomplice to the persecution, but is unable to protect the claimant. In such cases international refugee protection may arise even though the claimant may be seen as a threat by a group unrelated, and perhaps even opposed, to the government because of his or her political view point, real or perceived.

[16] In C v Minister for Immigration & Multicultural Affairs (1999) 94 FCR 366 the applicant worked in a Colombian nightclub and witnessed parties at the nightclub attended by Mafia leaders and heard conversations between those people and government officials, including police, about such matters as the transportation of drugs and the provision of financial support for the political campaigns of particular people. The applicant reported these activities to the police through anonymous phone calls. The RRT concluded that the fact that the applicant was aware of, and reported on, illegal activities engaged in by the police, officials and politicians did not assist his case, as it did not demonstrate that the harm he feared was by reason of political opinion. The RRT found that:

"...the applicant husband is being targeted as an individual because of what he knows, what he has exposed and what he might expose, and not for the reasons of his actual or imputed political opinion."
[17] Wilcox J discussed the decisions in V and Y and concluded (at 375):

"Judgment was given in [V] only one month before the Tribunal's decision in the present case. Perhaps that explains the Tribunal member's failure to refer to the decision in her reasons. It is more difficult to understand the omission of a reference to Y, which had been decided twelve months earlier and concerned a case with considerable factual similarity to the case of C. Of course, it is not essential for a Tribunal member to refer by name to any particular case; what is essential is that the member act in accordance with the principles enunciated in the relevant cases. However, the failure of the Tribunal member to cite any of Saliba, Ranwalage or Y, when she cited many less relevant authorities, leads naturally to the suspicion that she was unaware of those cases. That suspicion tends to support the belief that, in her reasons, the Tribunal member used the term 'political opinion' to refer only to the type of political opinion commonly manifested in Australian society; that is, adherence to a political party or support for its policies. Had she been alive to the point that resistance to systemic corruption of, or criminality by, government officers might be regarded as a manifestation of political opinion, depending upon the circumstances, the Tribunal member would surely have gone on to consider whether C's conduct should be so characterised. It would have been an inadequate response for her to say, as she did, that C's fear 'arises from circumstances personal to him ... unrelated to any Convention ground'. Of course, the fear arose from his own activities but whether those activities were related to a Convention ground was the matter requiring determination.

If, contrary to my impression, the Tribunal member did understand that resistance to systemic corruption and illegality might be a manifestation of political opinion, she failed to indicate why C's activities did not answer that description. If that failure occurred, it was a contravention of s430(1)(b) of the Act whereby the Tribunal is required to 'prepare a written statement that ... sets out the reasons for the decision'."

[18] Wilcox J remitted the matter for re-determination by the RRT.

[19] While exposure of corruption or "whistleblowing" can result in persecution by reason of an actual or imputed political opinion the question of whether the fear of such persecution is well founded depends upon the nexus between the exposure or "whistleblowing" and the political persecution feared. In Balbin v Minister for Immigration & Multicultural Affairs (Lindgren J, 7 December 1998, unreported) the applicant argued, inter alia, that she was unwilling to return to the Philippines because of a well founded fear of being persecuted for reasons of her actual or imputed political opinion or membership of particular social group, namely, "whistleblowers". The applicant was a public service officer and had worked for the Metropolitan Water Works and Sewerage Services in Manila. She collected evidence against four officers who were notorious for accepting bribes and reported them. The officers were investigated and three of them were sacked in June 1997. The officers then subjected the applicant to severe harassment. The applicant complained to the authorities but nothing was done to stop the harassment. The RRT considered that while the applicant's conduct may have been motivated by political opinion, there was no evidence to suggest that the men had
any interest in her political opinions. Rather, they were unhappy with her for having exposed their corrupt practices. For the same reason, the RRT did not accept that the applicant feared harm by reason of her membership of a particular social group consisting of "whistleblowers".

[20] Lindgren J concluded that the RRT had not erred in not treating the case as one in which the men directed the acts against "whistleblowers" in general, but rather, as one where the men concerned harassed the applicant because of her particular individual acts against them.

[21] It has also been recognised in Canada that exposing corruption can, in some circumstances, amount to an expression of political opinion. The general position is that opposition to criminal activity per se is not political expression. However, if criminal activity permeates state action, opposition to criminal acts can become opposition to state authorities: see Vassiliev v Minister for Citizenship & Immigration (1997) 131 F.T.R. 128 ("Vassiliev") at 133.

[22] More recently, in Klinko v Canada (Minister for Citizenship & Immigration) (2000) 184 DLR (4th) 14 ("Klinko") (at 15) the trial judge certified the following question for determination by the Federal Court of Appeal:

"Does the making of a public complaint about widespread corrupt conduct by customs and police officials to a regional governing authority, and thereafter, the complainant suffering persecution on this account, when the corrupt conduct is not officially sanctioned, condoned or supported by the state, constitute an expression of political opinion as that term is understood in the definition of 'Convention refugee' in subsection 2(1) of the Immigration Act?"

[23] The applicant and five other businessmen filed a formal complaint with the regional governing authority about widespread corruption among government officials. The evidence was that the government was taking action against widespread corruption at that time in the Ukraine. In the year after the complaint was made, 9000 officials were convicted of economic crimes.

[24] The trial judge had found that the Refugee Board had evidence before it that the Ukraine government did not sanction, condone or support corrupt officials and had procured a substantial number of convictions of corrupt officials. Based on this evidence, the trial judge concluded that it was reasonable for the Refugee Board to find that the State was therefore not "engaged" in the criminal conduct of corrupt police and customs officials.

[25] The Canadian Federal Court of Appeal noted that, in Ward, the Supreme Court accepted that an opinion could be "political" for the purposes of the Act whether that opinion did or did not accord with the official government position. The definition given in Ward to the words "political opinion" was broad enough to cover all instances of political opinion, express or imputed, attracting persecution, including those where the government officially agreed with the opinion. The Court noted that the opinion expressed by the applicant in Klinko took the form of denunciation of state officials' corruption and that led to reprisals against him. The Court stated that it had no doubt
that the widespread government corruption raised by the claimant's opinion is a "matter in which the machinery of state, government, and policy may be engaged" and concluded (at 23) that:

"Where, as in this case, the corrupt elements so permeate the government as to be part of its very fabric, a denunciation of the existing corruption is an expression of 'political opinion'."

[26] The Court also noted that just because the government agrees with the "political opinion", does not mean that it ceases to be a "political opinion" (at 22).

[27] A similar conclusion had been arrived at in Vassiliev. The applicant had refused to launder money through his business. The Court noted that refusing to participate in criminal activity, while laudable, has often been found not to be an expression of political opinion. However, it found that as the criminal activity permeated state action, opposition to those criminal acts became opposition to the state authorities. The Court concluded (at 133):

"On these facts it is clear that there is no distinction between the anti-criminal and ideological/political aspects of the claimant's fear of persecution. One would never deny that refusing to vote because an election is rigged is a political opinion. Why should Mr Vassiliev's refusal to participate in a corrupt system be any different?"

[28] In Guzman v Minister of Citizenship & Immigration (1999) 93 ACWS (3d) 733 the applicant's claim was based on the likelihood that she would suffer physical harm if she returned to Mexico because of her knowledge of corruption in the Tax Department of the Mexican government. The Refugee Board held that witnesses to crime, who were perceived to be a threat to criminals, cannot establish the nexus between the reason they fear harm and the definition of a Convention refugee. This is because as victims of crime, corruption and misuse of official position they cannot establish a link between their fear of persecution and one of the five grounds in the Convention definition. The Court rejected that holding and applied Reynoso v Minister of Citizenship & Immigration (1996) 107 FTR 220, stating that when state corruption was so endemic that the State was unable to protect those who expose it, such persons can become refugees under the Convention. Where the State has taken strong action to combat corruption, the actions of an applicant, in exposing corruption, may be less likely to be found to constitute a challenge to State authority. The Court, however, concluded that the Refugee Board did not undertake the correct analysis, as Mexico may only have been paying lip-service to fighting corruption.

[29] In Berrueta v Minister for Citizenship & Immigration (1996) 109 FTR 159 the decision was returned to the Refugee Board because it had failed to analyse the facts as to whether a challenge to corrupt individuals who had political connections was in fact a challenge to the authority of the government, and whether denunciation of corruption amounted to an expression of political opinion. The Court said (at 160):

"Corruption is prevalent in some countries. To decry corruption, in some cases, is to strike at the core of such governments' authority."
[30] It has been held that exposing corruption in private companies or by private individuals does not constitute a "political opinion". In Becerra v Minister of Citizenship & Immigration (1998) 153 F.T.R. 275 the Board found that the necessary nexus between fear of persecution and one of the Convention grounds was absent. The Board pointed out that the claim was based on allegations of fraud and corruption only involving the private company of a man holding political office. By refusing to cover a fraudulent activity, the principal applicant did not express political opinion, and there was no evidence that one was imputed to her. The Court, in upholding the Board's decision, acknowledged the findings of the Board that the fear of personal vengeance was not a fear of persecution for a Convention reason.

[31] United States' case law also recognises that exposure of corruption may constitute "political opinion" for the purposes of the Convention. In Grava v Immigration & Naturalization Service 205 F.3d 1177 (2000) the applicant claimed that he was subject to persecution as a "whistleblower" for his efforts in uncovering entrenched government corruption by his supervisors. The Board found the "whistleblowing" did not constitute an expression of political opinion. The Court disagreed, stating at 1181:

"Whistleblowing against one's supervisors at work is not, as a matter of law, always an exercise of political opinion. However, where the whistle blows against corrupt government officials, it may constitute political activity sufficient to form the basis of persecution on account of political opinion. See Reyes-Guerrero v INS, 129 F.3d 1241, 1245 (9th Cir. 1999); cf Marquez v INS 105 F.3d 374, 381 (7th Cir. 1997) (writing that political agitation against state corruption might well be a ground for asylum). Refusal to accede to government corruption can constitute political opinion for purposes of refugee status. See Desir v Ilchert, 840 F.2d 723, 729 (9th Cir. 1988). Thus, official retaliation against those who expose and prosecute government corruption may, in appropriate circumstances, amount to persecution on account of political opinion....

The Board erred in concluding that [the applicant's] whistleblowing could not constitute an expression of political opinion because he did not concomitantly espouse political theory. When the alleged corruption is inextricably intertwined with governmental operation, the exposure and prosecution of such an abuse of public trust is necessarily political. See Reyes-Guerrero 192 F.3d at 1245. Thus, in this case, the salient question is whether [the applicant's] actions were directed toward a governing institution, or only against individuals whose corruption was aberrational.

Purely personal retribution is, of course, not persecution on account of political opinion. Thus, retaliation completely untethered to a governmental system does not afforded a basis for asylum. However, many persecutors have mixed motives. In such instances, personal retaliation against a vocal political opponent does not render the opposition any less political or the opponent any less deserving of asylum. See Gomez-Saballos v INS 79 F. 3d 912, 917 (9th Circ, 1996)."

[32] The case law to which I have referred demonstrates that exposure of corruption
can, in a wide range of circumstances, lead to political persecution. Thus, exposure of corruption in circumstances where it so permeates government as to become part of its very fabric can quite easily lead to a fear that the exposure, of itself, may be imputed to be an act of opposition to the machinery, authority or governance of the state. Likewise, refusal to participate in a corrupt state system can also be seen as an expression or manifestation of political opinion as the refusal to participate may be imputed by the authorities to be a challenge to the machinery, authority or governance of the state. Also, as the recent Canadian decision in *Klinko* demonstrates, exposure of systemic corruption may be an expression of "political opinion" even if the state is against corruption but is unable to protect the applicant from persecution on this account. In such a case, however, it may be difficult to establish that the exposure of corruption is a manifestation of a political act such as defiance of, or opposition to, the machinery, authority or governance of the state.

[33] It needs to be emphasised that where individual, rather than systemic, corruption is exposed it is less likely that the act of exposure will be one in which a political opinion will be seen to have been manifested. This is because the exposure in that instance is more likely to be seen as the reporting of criminal conduct rather than as any form of opposition to, or defiance of, state authority or governance.

[34] A critical issue will always be whether there is a causal nexus between the actual or perceived political opinion said to have been manifested by the exposure of corruption and the well-founded fear of persecution: see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 240, 268 and 284. In each case the question of whether the nexus has been established is a question of fact for the RRT.

**Error of law**

[35] The applicant's primary contention to the Court in substance was that, as the RRT assumed that exposure of corruption was not Convention related, it failed to address the case put by the applicant that his exposure of corruption had been perceived to be a political act that threatened or defied the state authorities. However, for that submission to succeed it is necessary to determine whether the material and evidence before the RRT raised a case of political persecution. As has been pointed out by Full Courts in *Addo v Minister for Immigration and Multicultural Affairs* (1999) FCA 940 at [19] and *Minister for Immigration and Multicultural Affairs v Singh* [2000] FCA 845 at [52]:

"The Tribunal is under a duty to review the decision of the delegate on the merits and in doing so must have regard to all of the material and evidence before it and make findings on all of the material questions of fact raised by that material and evidence."

[36] It is not sufficient that an applicant or the legal representative of an applicant contend before the RRT that such a case has been raised by the material or evidence; rather the duty of the RRT is to deal with the case actually raised by the material or evidence. In *Paramanathan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28 at 63 I observed that:

"... the RRT is not to limit its determination to the `case' articulated by an applicant if the evidence and material which it accepts, or does not
reject, raises a case on a basis not articulated by the applicant."

See also *Satheeseumar v Minister for Immigration and Multicultural Affairs* [1999] FCA 1285 at [15] and *Sellamuthu v Minister for Immigration and Multicultural Affairs* [1999] FCA 247 at [23].

[37] Thus, the critical question in the present matter became whether the material and evidence before the RRT raised a case that the applicant had a well founded fear of political persecution by reason of his exposure of the corruption activities of Mr He.

[38] The material provided by the applicant in support of his initial claim for refugee status was that his superior, Mr He, enjoyed a privileged position within the Bank because his parents were high ranking officials of the Communist Party in Beijing. The applicant claimed that the fabricated charges he faces, and for which Mr He was responsible, reflected the manner in which officials of the Chinese Communist Party "and their kinsfolk take advantage of their power to corrupt, to bully and oppress common people". Later, in amplifying his claim the applicant was critical of the role of the Communist Party in China claiming that what he has opposed and exposed was part of the Party's corrupt ruling circle rather than simple "white collar crime". Accordingly, he contended that his present fear of persecution could only be produced under the dictatorship of the Communist Party and, as a consequence, he was unable to secure protection of the government and seek justice in a court. These results were said to flow to him as a sufferer of the Communist Party's corrupt and degenerate political system. He expressed a vehement dislike of the Party and its officials, saying that they constitute "a circle with common interests and protect each other". The applicant then contended that "exposing their crime has exposed the whole CCP's crime". On that basis the applicant claimed his conduct in exposing Mr He's corruption was a "political" act resulting from his "political" opinion.

[39] The difficulty with the applicant's claims is that although he might have viewed his acts as "political" there was no material that suggested that the authorities had viewed, or might view, his acts in exposing Mr He as having any political aspect. In particular, the material and evidence provided by the applicant was bereft of any basis upon which the authorities might perceive his exposure of his superior's corruption as a political act in any of the senses described in the cases to which I have referred. Thus, there was no material or evidence before the RRT that suggested that the Chinese authorities or for that matter, anyone else, perceived the conduct of the applicant to be resistance to, defiance of, or any threat to the authorities or the State or to have any other political aspect to it.

[40] The RRT's acceptance that the applicant's complaints to the authorities concerning his superior's corruption had not been investigated or responded to offered some support for the applicant's fear that Mr He had instigated the investigation of the applicant. However, that suggests that Mr He's influence was such that he was able to divert the corruption investigation requested by the applicant to a corruption investigation of the applicant. While these matters might constitute corrupt activities by the individuals concerned, the issues raised by them remain personal rather than political in the sense that they relate to Mr He's personal influence and conduct in relation to the specific events rather than to any systemic corruption being exposed
by the applicant. The fact that the Bank was government owned or that Mr He's parents were senior Communist Party Officials does not, per se, give the investigation of the applicant a political aspect: cf Chen v Minister for Immigration and Multicultural Affairs [1999] FCA 1022.

[41] Surprisingly, the transcript of the hearing before the RRT did not form part of the Court Book. Although leave was granted to the applicant and the Minister to rely on extracts from the transcript, the extracts upon which they relied did not appear to take the above matters any further. The extracts relied upon by the applicant suggested that one of his predecessors at the Bank had been dismissed for exposing corruption on the basis that "he didn't co-operate with the authority". The extract does not disclose who was being referred to by the applicant as "the authority" although the extracts relied upon by the Minister reveal that the applicant had referred to Mr He, who was second in charge of the Bank, as his "authority". Thus, the extract relied upon by the applicant appears to relate to his claim that he did not co-operate with his superior in relation to the corruption being promoted by him.

[42] In summary, the material and evidence provided by the applicant in support of his application failed to reveal a causal nexus between his exposure of his superior's corruption and the political persecution he claims to fear. Put another way, there is no material or evidence that raises a case that an actual or perceived political opinion has been attributed to the applicant by the authorities as a result of his exposure of Mr He's corruption or by reason of his refusal to co-operate with Mr He in relation to his corrupt activities. Accordingly, the material relied upon by the applicant does not suggest that the authorities, Mr He or the officials in the Public Security Bureau responsible for the investigation of the applicant are doing so for any political reason or on the basis that they believe that there is any political aspect to the applicant's conduct.

[43] Thus far I have only referred to the material presented by the applicant. However, other material, which the RRT accepted, was to the effect that the Chinese authorities were actively campaigning against corruption and were prosecuting corrupt officials thereby further negating any basis for the applicant's conduct being perceived by the authorities to be an attack on the State, the Communist Party, or the municipal authorities. In those circumstances I have concluded that the evidence and material before the RRT did not raise a case that the applicant had a well-founded fear of political persecution.

[44] In these circumstances I am not satisfied that the RRT erred in law in arriving at its conclusions that the failure of the authorities to act on the applicant's complaint and their corruption investigation of him:
• were not politically motivated;
• did not arise from any political ground and were not for any political reason; and
• did not constitute persecution for reasons of political opinion.

Other grounds
[45] Although the applicants contended that there was a breach of section 430(1) and that the RRT had failed to determine certain substantial issues raised by the material I am not satisfied that there was any substance in the matters of which he complained. In my view the reasons plainly comply with section 430(1) and dealt with the
substantial issues raised by the material and evidence before the RRT.

Conclusion
[46] For the above reasons the application must be dismissed with costs.
CRIMINAL LAW

In *Launder v HKSAR* the Chief Executive of W, a merchant bank, was charged with 13 counts of accepting an advantage, contrary to section 9(1)(b) of the Prevention of Bribery Ordinance (the Ordinance). All the counts stated that the advantages were accepted for "showing favour" and the prosecution case was presented on the basis that the advantages had been accepted for present and future favours.

However, the trial judge repeatedly directed the jury that they could convict if it was proved that the accused accepted the relevant advantage for "showing or having shown favour" to the companies. The accused was convicted on one of the counts but was acquitted on the others. On appeal to the Court of Final Appeal, the accused argued that the judge had misdirected the jury, as the term "having shown favour" related to the past, i.e. before acceptance of the alleged advantage, whereas the term "showing favour", only related to present and future favours.

The Court of Final Appeal allowing the appeal held that section 9(1)(b) drew a distinction between "showing favour" and "having shown favour", i.e. between the present and prospective on the one hand and the past on the other hand. The different meanings of the two expressions had to be observed in the use to which the expressions were put, both in the Ordinance itself and in any indictment charging an offence under the Ordinance. Further the misdirections were material as they related to a central element in the offence charged, namely, what the prosecution must prove if it was to succeed. Thus it could not be said that they would have been disregarded by the jury.

The court also noted that counsel for the accused had not objected to the directions at the trial. Whilst it considered that this might well be an indication that they were not then seen as being prejudicial to his case, this did not constitute a bar to an appeal on that point.
Corruption -- Prevention of Corruption Ordinance section 9(1)(b) -- "Any agent who accepts any advantage on account of his showing or having shown favour or disfavour to any person in relation to his principal's affairs or business" -- Whether phrase covers acceptance of past favours

Misdirection by trial judge -- Failure of defence to object to directions at the trial -- Whether a bar to an appeal

Misdirection by trial judge -- Whether material

**LAUNDER v HKSAR**

*Hong Kong Court of Final Appeal*
*Li CJ, Bokhary and Chan PJJ, Litton and Sir Anthony Mason NPJJ*

14,16 November and 13 December 2001

The facts appear in paras 13 et seq.

**Cases referred to in the judgment**
*A-G v Chung Fat Ming* [1978] HKLR 480
*Customs and Excise Commissioners v Harz* [1967] 1 AC 760, [1967] 2 WLR 197, [1967] 1 All ER 177
*R v Andrews Weatherfoil Ltd* [1972] 1 WLR 118, [1972] 1 All ER 65, (1972) 56 Cr App R 31
*R v Ip Chiu* [1977-1979] HKC 182
*R v Tsou Shing Hing* [1989] 1 HKC 93
*Stirland v DPP* [1944] AC 315, (1945) 30 Cr App R 40

**For the appellant:** Mr Gerard McCoy SC, Mr Alexander King and Mr Edwin Choy

**For the Director of Public Prosecutions:** Mr Michael Blanchflower SC, Mr Bernard Ryan and Mr Gavin Shiu

**LI, CJ**
[1] I agree with the judgment of Sir Anthony Mason NPJ.

**BOKHARY, PJ**
[2] I agree with the judgment of Sir Anthony Mason NPJ.
CHAN, PJ
[3] I agree with the judgment of Sir Anthony Mason NPJ.

LITTON, NPJ
[4] I agree entirely with Sir Anthony Mason NPJ's judgment and would only add a few words as to why I think the proviso to section 83(1) of the Criminal Procedure Ordinance (Cap.221) cannot be applied in this case. I will, for this purpose, adopt the abbreviations used in that judgment.

[5] In considering this matter, it is necessary to view the conviction on count 1 against the background of the entire case.

[6] At trial, the defence was not putting the appellant forward as a man of pristine character. His entire defence was that, in relation to the funds totalling $43,950,000 received from Tan, Chung and Pak, he was, in Counsel's words, "moonlighting": helping those people (and others associated with them) to invest those sums anonymously through the Honeywell account with Impact Finance Ltd, a "fledgling" deposit taking company. The transactions were designed in such a way that the appellant's hand in them was not revealed. This is hardly the activity of an upright banker, and there was no pretence at trial to put him forward as such. But, in a sense, the more disreputable his conduct overall, the greater the care that must be exercised in assessing his culpability on count 1.

[7] At trial, the appellant faced a total of 13 charges, of which ten related to payments by Tan and three by Chung and Pak. Count 1 concerned $4,500,000 from Tan, paid into Honeywell's account with Impact Finance. It was part of the sums totalling $31,950,000 from Tan covered by the other counts in the indictment, on which the appellant was acquitted by the jury. In other words, the jury must have come to the view that in relation to all but $4,500,000 (that is to say, $27,450,000) it was at least possible that the appellant was doing what he said he was doing: investing the money anonymously for Tan: and likewise regarding the sums paid by Chung and Pak totalling $12,000,000, in relation to which the appellant was acquitted altogether.

[8] The only thing which distinguished count 1 from the other counts involving payment from Tan was the manner of transmission of the funds to Impact Finance: But how relevant was that? Given the disreputable nature of the appellant's transactions with Tan in the first place, the episode involving Thomas Bate in the Hyatt Hotel coffee shop on 11 October 1980 was not inconsistent with the appellant's defence.

[9] Over the period from October 1980 to June 1982 very large sums were paid over to the appellant, on the prosecution's case, as "general sweeteners", by way of goodwill payments. The prosecution was unable to be more precise than that in its averment. And if that were in truth the nature of those payments, Tan must have been a remarkably generous man because there was not a scrap of evidence to suggest that the appellant had shown
him or the Carrian Group any particular favour of any kind. There was overwhelming evidence that all the elaborate internal procedures for the granting of facilities by Wardley to the Carrian Group were meticulously followed; the loans were amply secured; and when the security fell below levels as demanded by Wardley, Carrian was promptly required to put in additional security. It is against this background that the exercise of the proviso to section 83(1) of the Criminal Procedure Ordinance must be viewed. The prosecution cannot be said to have an overwhelming case against the appellant on count 1.

[10] Further, the misdirection - that the jury could convict on count 1 for “having shown favour” cannot be brushed aside as being fleeting and immaterial. The trial judge directed the jury's attention to a schedule which showed that prior to October 1980 Wardley had advanced two loans to the Carrian Group: one on 29 February 1980 of HK$92 million and the other on 12 September 1980 of US$7.5 million, and the judge told the jury that the first loan which Carrian had obtained from Wardley was that on 29 February 1980. And yet, on the indictment as it stood, the jury could not have taken those matters into account in convicting the appellant on count 1.

[11] It cannot be said that a jury, properly directed, would inevitably have convicted the appellant. It follows that the appeal must be allowed.

[12] I agree with Sir Anthony Mason NPJ that this is not a case for a new trial, not only because of the very long lapse of time since the events first occurred, but also because of the somewhat nebulous nature of the prosecution case.

SIR ANTHONY MASON, NPJ
[13] This appeal is brought, pursuant to the grant of leave by the Appeal Committee, against the refusal by the Court of Appeal (Stuart-Moore V-P, Mayo V-P and Seagroatt J) of leave to appeal against the appellant's conviction by a jury of accepting an advantage in the sum of $4,500,000, contrary to section 9(1) of the Prevention of Bribery Ordinance (Cap.201) (the Ordinance).

The trials
[14] The appellant was charged in an indictment with thirteen offences of accepting advantages as an agent contrary to section 9(1)(b) of the Ordinance. At the first trial, in May and June 1999, in the Court of First Instance, before Mr Justice Lugar-Mawson and a jury, the jury could not reach a verdict. A new trial was ordered.

[15] At the second trial, from which the present appeal arises, again before Mr Justice Lugar-Mawson and a jury, the appellant was found guilty on 25 March 2000 of count 1 in the indictment and acquitted on the remaining twelve counts. He was sentenced to 5 years' imprisonment, ordered to repay $4,500,000 to HSBC Investment Bank (Asia) Ltd and disqualified under section 168E of the Companies Ordinance (Cap.32), from being a director, liquidator, receiver, or manager of company property, and participating in the management of a company.
The offence of which the appellant was convicted

[16] Section 9(1)(a) and (b) of the Ordinance is in these terms:

Any agent who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his:

(a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or
(b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business,

shall be guilty of an offence.

The particulars given of the first count in the indictment (the count on which the appellant was convicted) were as follows:

Ewan Quayle Launder, on or about the 11th day of October 1980, in Hong Kong, being an agent of Wardley Ltd, without lawful authority or reasonable excuse, accepted or agreed to accept an advantage, namely a gift, fee, reward or commission of HK$4,500,000 Hong Kong currency from George Tan Soon G as an inducement to or reward for or otherwise on account of the said Ewan Quayle Launder showing favour to Carrian Holdings Ltd and/or Carrian Investments Ltd and/or other companies controlled by the said George Tan Soon G in relation to his principal's affairs or business.

The appellant's case

[17] It is not disputed that section 9(1)(b) creates one offence. The consequence is that, under the Indictment Rules (Cap.221, Sub.Leg.), it is possible to frame a charge under section 9(1)(b) alleging acceptance of an advantage for "showing or having shown favour". For some reason which does not appear, the particulars given of all thirteen counts in the indictment allege acceptance of an advantage for "showing" favours, omitting the alternative of "having shown" favours.

[18] Mr McCoy SC for the appellant contended before the Court of Appeal, as he does before this Court, that the trial judge misdirected the jury in law, having regard to the way in which the counts had been drawn, that they could convict the appellant of the offences charged, if "favour" had been shown in the past, that is, before the appellant's acceptance of the alleged advantage. Mr McCoy SC's submission is that the allegation "showing favour" connotes present and future but not past favours.

[19] Mr McCoy SC also submitted that, if the way in which the first count was expressed enabled the prosecution to present its case on the basis of past as well as present and future favours, substantial and grave injustice was occasioned by the trial judge's direction to the jury, that they could convict
even on the basis of past favours. In this respect, the appellant's contention was that the prosecutor's case throughout the trial had been presented on the basis that the relevant advantage had been accepted for present and future favours only, not past favours.

The Appeal Committee's grant of leave
[20] On the basis of these submissions, the Appeal Committee certified that the judgment of the Court of Appeal involved a point of law of great and general importance, namely:

[Is it] an error of law for the trial Judge to repeatedly direct the jury in terms of section 9(1)(b) of the Prevention of Bribery Ordinance (Cap.201), that the [appellant] would be guilty if it was established that the advantage was for "showing or having shown favour", when the particulars of the Count alleged only that the advantage was accepted as an "inducement to or reward for or otherwise on account of showing favour"?

[21] Leave was granted to pursue the certified point of law and the related substantial and grave injustice argument.

[22] In order to consider the certified point of law, it is necessary, first, to outline the prosecution's case and the defence case at the trial and, secondly, to refer to the relevant directions given by the trial judge to the jury. The appellant did not give evidence at the trial. Nor were any witnesses called to support the defence case.

The prosecution case
[23] In 1973, the appellant was employed as a managing director of Wardley Ltd (Wardley) which was the merchant banking subsidiary of the Hong Kong and Shanghai Bank. In January 1980, he was appointed Chief Executive of Wardley. He was a director and a member of the credit committee of Wardley. The credit committee consisted of senior personnel of the merchant bank. They met regularly to consider applications from customers and potential customers for loans and other financial services. The appellant also dealt with underwriting proposals.

[24] The appellant had considerable influence and control over the granting of loans because he was a point of contact between Wardley and its major clients. One such client was George Tan Soon Gin (Tan). He controlled the Carrian group of companies. Two other major clients were Chung Ching Man (Chung) and his wife, Pak Choi Wah (Pak), who controlled the Eda group of companies. Carrian and Eda were granted substantial loans by Wardley between 1979 and 1982. The appellant participated in the granting of these loans. The Eda and Carrian groups went into liquidation in 1982 and 1983 respectively.

[25] The prosecution's case, on the thirteen counts before the jury, was that between October 1980 and June 1982, while he was Chief Executive of Wardley, the appellant received $43,950,000 in the form of corrupt payments.
in connection with the loans given by Wardley to Carrian and Eda. The prosecution alleged that he had received those payments from or on behalf of Tan, who controlled the Carrian group, or alternatively from Chung and Pak, who controlled the Eda group. In association with the receipt of these payments, the appellant began to deposit substantial amounts of money into an account in the name of Honeywell Investment Centre (Honeywell) held at a newly registered deposit taking company named Impact Finance Ltd (Impact). Honeywell was incorporated in 1976 in Panama. In 1979, the appellant took control of Honeywell by acquiring the only two shares which had been issued.

[26] The prosecution alleged that the corrupt payments were made soon after or at about the time Wardley granted new loans or renegotiated existing loans or provided other financial services to the Carrian and Eda companies. In some cases, the alleged bribe monies were said to have come from the bank accounts of relatives of Tan so that the source of the payments would be disguised. In other instances, Pak and Chung made arrangements for cashier's orders to be paid. The alleged corrupt payments were deposited into Honeywell's account with Impact for investment. The Honeywell funds were expended in various ways, including investment in internal interest deposits at Impact, the withdrawal of cash by the appellant, and the forwarding of monies, on the appellant's instructions, to his personal bank accounts in London or to companies or persons associated with him, or to be held in trust by his lawyers in Switzerland.

[27] When Carrian and Eda began to fail in mid 1982, the appellant gave instructions that Honeywell would withdraw its money from Hong Kong. The appellant left Hong Kong in about August 1983, having been transferred to the London office of Wardley. Thereafter, Impact ceased to take further deposits in respect of the Honeywell account.

[28] The broad basis of the prosecution's case in respect of all the charges was that the payments which found their way into the Honeywell account had been made to the appellant and were accepted by him as bribes. The prosecution alleged that these bribes were "general sweeteners" for the appellant in some way to show favour to the companies controlled by the persons who were in reality making the payments. The acceptance of the alleged advantages by the appellant, so the prosecution claimed, related to Wardley's affairs or business.

[29] In both the opening and closing addresses of the prosecution, the case was presented generally as one in which it was alleged that the payments were made to the appellant as bribes or general sweeteners for the accused to show favour to the relevant companies. In opening, counsel for the prosecution said:

"With regard to all of the charges, it is alleged that the payments were made to the accused as bribes or a general sweetener for the accused to, in some way, show favour to the companies controlled by the persons making the payments with relation to their business dealings with Wardleys".
[30] In relation to count one, counsel stated in opening:

"It is alleged that the cash and cheques were given to the accused by George Tan for the accused to show favour to the companies controlled by George Tan".

[31] Likewise, in his closing address, counsel for the prosecution expressed the case in terms of payments accepted for favours to be shown. Two instances will suffice. The first passage from counsel's closing address was in these terms:

"... we say the irresistible inference is that Tan and Chung would have thought that the accused could, as chief executive, exert his influence and consequently, we say, these substantial sums of money were given to him for this purpose".

[32] The second passage was as follows:

"And the prosecution says that common sense dictates that the only explanation is that the payments of these substantial amounts of money to the accused must have been in the expectation that the accused would show favour to them in relation to business dealings with Wardleys, and that the accused must have known or suspected that they were paid for this reason and accepted them on this basis".

[33] The prosecution was unable to link particular payments received by the appellant with any particular loans made or to be made by Wardley to companies in the Carrian and Eda groups. No doubt that is why the prosecution described the payments as "general sweeteners", thereby seeking to avoid linking particular payments received by the appellant with any particular loan transactions, past, present or future.

[34] It was the prosecution's case that, for the charges to be proved, it was unnecessary to show that anything more specific was agreed upon or that the appellant actually did anything to earn these general sweeteners.

Defence case

[35] The case for the defence was presented on the basis that the payments which were made to the appellant had been made by persons who wanted him to invest the money on their behalf. The appellant's case therefore challenged two elements in the prosecution case: first, that when he accepted the payments he was acting for Wardley and was acting in relation to its affairs; and, secondly, that he accepted any "advantages". Further, counsel for the appellant suggested that none of the payments were corrupt and laid emphasis on the fact that the prosecution had been unable to call any evidence of a favour having actually been shown by the appellant to Tan or Chung and Pak.
[36] The nature of the appellant's defence at the trial - that no advantages were accepted and no favour whatsoever was shown - meant that counsel for the appellant in his address to the jury did not distinguish between payments accepted for past favours and payments accepted for future favours.

[37] The central issue in the case was concerned with the appellant's state of mind when he accepted the alleged advantages. It was and is common ground that the appellant's state of mind in accepting the payments was a critical element in the proof of the commission of the alleged offence.

The trial judge's directions
[38] It is not in dispute that the trial judge, when he was directing the jury on the ingredients of the offence, did on no less than six occasions direct the jury that the prosecution must prove that the appellant accepted the relevant advantage as an inducement to or a reward for or otherwise on account of his "showing or having shown favour" to the relevant companies. The trial judge first embarked on this course when he read to the jury the provisions of section 9(1)(b). Thereafter he appears to have had in mind the terms of the section rather than the terms of the indictment.

[39] The direction leaving open the alternative "having shown favour" gained some added force from his Lordship's references to section 11(1) of the Ordinance which negatives certain defences to a charge under section 9(1). In these references to section 11(1), his Lordship, repeating the terms of that provision, spoke of "his doing or having done any act".

[40] No relevant objection was taken at the trial by counsel for the appellant. Nor was any re-direction sought.

The certified point of law
[41] The Court of Appeal took the view that, as a matter of ordinary meaning, the acceptance of an advantage as "an inducement to or reward for or otherwise on account of [the appellant] showing favour" could - and presumably should - be construed as satisfying that a present, past or future favour was contemplated. The Court of Appeal considered that the words omitted from the counts in the indictment, "or having shown", though they removed doubts as to the meaning of "for showing favour", in reality added nothing that was not already plain from the phraseology employed in the indictment.

[42] The respondent seeks to support this interpretation of the expression "showing favour" both in the indictment and in section 9(1)(b) itself. The respondent points out that the Court of Appeal has interpreted the words "or otherwise on account of" in section 9 as applying to a general goodwill payment without the necessity of showing a specific intention on the part of the person charged in relation to a specific act or abstention (A-G v Chung Fat Ming [1978] HKLR 480; R v Tsou Shing Hing [1989] 1 HKC 93). The respondent also points out that the words "on account of" are wide enough to cover payments made "as an inducement to or reward for" (R v Ip Chiu [1977-
[43] The respondent then submits that the words "showing favour" can refer to each limb in the provision, that is, "an inducement to", "reward for" or "otherwise on account of", because the present tense "showing favour" is equally applicable to past or future conduct.

[44] It may be accepted that the expression "an inducement to" looks to future action or abstention. Although the expression "reward for" is commonly applied to past conduct, it is capable of applying also to present or future conduct, while "otherwise on account of" is capable of applying to past, present or future conduct. The use of these three expressions does not throw any significant light on the meaning of "for showing favour". They are all capable of having an application according to their natural and ordinary meaning, whether one adopts the appellant's or the respondent's interpretation of "for showing favour".

[45] It may be that, divorced from their context in section 9(1), the words "for showing favour" ordinarily mean present and future as distinct from past favours. That, however, is not a question which has to be decided in this case.

[46] We are concerned with the natural and ordinary meaning of the words in their context in the statute (Pinner v Everett [1969] 1 WLR 1266 at 1273C- D, per Lord Reid) and here the context is decisive. The words in the indictment take their meaning from the same words as used in section 9(1)(b). The statutory provision provides the relevant context from which the meaning of the words is to be ascertained.

[47] Section 9(1)(b) draws a distinction between "showing favour" and "having shown favour". It is a distinction between the present and prospective on the one hand and the past on the other hand which is repeatedly drawn in the Ordinance. Recognition of the distinction requires that the different meanings of the two expressions must be observed in the use to which the expressions are put both in the Ordinance itself and in any indictment charging an offence under the Ordinance.

[48] The legislative antecedents of section 9(1)(b) provide no support for the respondent's case. Section 9(1)(b) may be traced back to the Public Bodies Corrupt Practices Act 1889 (UK) and the Prevention of Corruption Act 1906 (UK). Section 1(1) of the 1889 Act applied to a public servant who accepted any advantage:

"as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body doing or forbearing to do anything".

[49] In R v Andrews Weatherfoil Ltd (1971) 56 Cr App R 31 at 42, the English Court of Criminal Appeal held that the use of the present tense in the phrase "doing or forbearing to do" in section 1(1) of the 1889 Act was applicable to
past and future conduct, observing that the phrase was simply descriptive of the nature of the activity for the time being contemplated as the subject matter of the inducement or reward.

[50] Section 1(1) of the 1906 Act applied to an agent who obtains or agrees or attempts to obtain any gift or consideration:

"as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business".

[51] The use of the past perfect tense in section 1(1) of the 1906 Act was designed to express Parliament's intention that a reward for a past act without an antecedent agreement would only constitute an offence if it was in respect of any act done after the passing of the Act (R v Andrews Weatherfoil Ltd (1971) 56 Cr App R 31 at 42).

[52] Section 3(1) of the Prevention of Corruption Ordinance (Cap.215), was in terms almost identical to section 1(1) of the 1889 Act. Section 4(2) of that Ordinance was in terms substantially similar to section 1(1) of the 1906 Act, incorporating the past perfect tense in the same way as section 1(1) of the 1906 Act had done.

[53] In view of the similarity between the provisions of the 1889 and 1906 English Acts and their counterparts in section 3(1) and section 4(2) of Cap.215, it is very likely that sections 3(1) and 4(2) would have been interpreted in accordance with what was said in R v Andrews Weatherfoil Ltd (1971) 56 Cr App R 31. What was then said by the English Court of Criminal Appeal, however, can have no application to the differently worded provisions of section 9(1) of the Ordinance which replaced section 4(2) and drew the distinction between "for showing" favour and "for having shown" favour. The same comment applies to section 11 of the Ordinance which, in negating certain defences, draws a distinction between "doing or forbearing to do" and "having done or forborne to do" any act. Although the reason for the change does not appear, it is likely that it arose from doubts that "for showing" favour encompassed past as well as present and future conduct. The use of the past perfect tense in section 1(1) of the 1906 English Act and section 4(1) of Cap.215 would have alerted lawyers and draftspersons to the problem.

[54] Accordingly, the appellant's case on the interpretation of count 1 in the indictment is correct.

Materiality of the direction complained of

[55] The respondent submits that the direction was not material because it would not have influenced the jury to consider the issue erroneously, when the summing-up is considered in its entirety. The references to "having shown favour" constituted a small part of a long summing-up of 120 pages, in which the judge on occasions referred only to "showing favour". Indeed, at the very
beginning of the summing-up, the judge's first reference to this point was simply to "showing favour".

[56] Further, the judge dealt very cursorily with the individual loan transactions. He made a very brief reference to the schedule of the loan transactions between Wardley and the Carrian and Eda groups, which was in evidence, and told the jury that he would not go through them. The schedule gave short particulars of two loan transactions which took place before the acceptance of the payment alleged in the first count. The judge did not invite the jury to consider the loan transactions individually, in particular the two loan transactions before the acceptance of the payment alleged in the first count. The schedule of transactions was adduced simply as background evidence to show the relationship between Wardley and Carrian and Wardley and Eda and to show that the appellant was acting for Wardley when he received the payments.

[57] The respondent argues that, when attention is given to these matters and to the way in which the prosecution based its case on present or future favours as well as the way in which the defence case was presented to the jury, it is not to be supposed that the jury was distracted by the direction complained of from a correct approach to the first count.

[58] In support of this argument, the point is made that no objection to the directions was made by counsel at the trial. The absence of such an objection may well be an indication that the direction was not then seen as being prejudicial to the appellant's case (Stirland v DPP [1944] AC 315 at 328). It is not suggested that the failure to object at the trial constitutes a bar to an appeal on the point at issue.

[59] On the other hand, the directions complained of related to a central element in the offence charged, namely what the prosecution must prove if it was to succeed. And the relevant direction clearly stated that guilt could be established in one of two ways. Considered in this light, it cannot be said that the relevant directions were not material and would have been disregarded by the jury. The jury had before them the schedule of transactions and could have related the repeated directions on "having shown favour" to the two loan transactions which preceded the acceptance of the payment in the first count. The direction in question left it open to the jury as a matter of law to convict on this basis and the possibility that the jury did so has not been and cannot be excluded.

The proviso
[60] Under section 17(2) of the Hong Kong Court of Final Appeal Ordinance (Cap.484), this Court may, for the purpose of disposing of any appeal, exercise any powers of the court from which the appeal lies. One such power exercisable in the present case by this Court is that conferred by section 83 of the Criminal Procedure Ordinance (Cap.221). Section 83(1)(b) provides that, subject to the proviso, the Court of Appeal shall allow an appeal against conviction if it thinks:
"(b) that the judgment of the court of trial should be set aside on the
ground of a wrong decision on any question of law".

The proviso to section 83(1) authorises the Court of Appeal to dismiss the
appeal, "if it considers that no miscarriage of justice has actually occurred".

[61] It is well established that the test to be applied in a case in which the
proviso is invoked is whether a reasonable jury, properly instructed, would, on
the evidence, without doubt convict or would inevitably come to the same
conclusion (Stirland v DPP [1944] AC 315 at 321; Customs and Excise
Commissioners v Harz [1967] 1 AC 760 at 823-4.) The reasonable jury is a
hypothetical jury, not the jury that convicted the appellant. As Lord Morris of
Borth-y-Gest stated in Customs and Excise Commissioners v Harz at 824:

"the test to be followed is not that of seeking to assess what the
particular jury that heard the case would or must have done if it had
only heard a revised version of the evidence. For the purpose of the
test the appellate court must assume a reasonable jury and must then
ask whether such a reasonable jury hearing only the admissible
evidence could if properly directed have failed to convict".

His Lordship was dealing with a case where a jury had convicted after taking
account of inadmissible evidence but in principle the same approach must be
applied to the application of the proviso to a case in which the conviction
results from a misdirection in law.

[62] Mr Blanchflower SC for the respondent submits that this is a case in
which the proviso should be applied. He submits that the transaction which
resulted in the conviction was an extraordinary transaction for a man in the
appellant's position to engage in. According to the evidence, on Saturday 11
October 1980, the appellant met Thomas Bate, the general manager of
Impact in the Hyatt Hotel coffee shop in Tsim Sha Tsui, the appellant's
Wardley office being in Central. In the course of this meeting, the appellant
passed $4,500,000 to Bate comprising $2 million in cash in a shopping bag
and $2.5 million in the form of ten cheques of $250,000 each, drawn on
George Tan Soon Gin's account with the Wing Lung Bank. The appellant
placed the shopping bag under the table and pushed it with his feet across to
Bate. The space for the payee's name in the cheques was blank. The
appellant requested Bate to fill in the payee's name for the reason, according
to Bate, that the appellant did not want his handwriting to appear on the
cheques. Bate then inserted Impact as the payee. Tan's signature appeared
on each cheque. Bate subsequently deposited the cash and the cheques into
Honeywell's account with Impact.

[63] The appellant was the holder of the only two shares in Honeywell and
therefore had the effective control of that company which was a repository of
investments he caused to be made. Apart from the appellant, there was no
evidence of other investors in Honeywell.
[64] For the Chief Executive of the merchant banking arm of one of the world's largest banks to engage in a transaction of this kind was astonishing, to say the least of it. It was a transaction so designed as to conceal the appellant's connection with the payments. Not only did the appellant refrain from giving evidence in denial of the prosecution case, no witnesses were called by the defence. And it might be thought that the defence case that the appellant was undertaking in his own interests investment on behalf of his employer's customers without its knowledge was a rather unlikely venture which did him no credit at all.

[65] Yet the fact is that there was no evidence linking the payments received by the appellant with the making of any particular loans. Nor was there evidence that the making of the relevant loans by Wardley to Carrian and Eda involved any irregularity and there was no specific evidence that the appellant brought his influence to bear in the making of the loans. It is possible that the jury may have considered that the surreptitious transaction on 11 October 1980 was consistent with an attempt to conceal from the appellant's employer his unauthorised investment activities on behalf those controlling Carrian and Eda.

[66] The prosecution case was by no means overwhelming. Why the jury convicted on count one but acquitted on the other counts is by no means apparent. Perhaps the bizarre circumstances in which the payment was made was the critical factor in the jury's mind. Even so, the jury was divided, convicting the appellant by the minimum statutory majority of six to two after extended deliberations. The significance of that division gains some additional force from the jury's failure to reach agreement at the first trial.

[67] In the light of these considerations, it cannot be said that a reasonable jury, properly instructed, would on the evidence without doubt convict the appellant. It is, accordingly, not a case for the application of the proviso, and the appeal should be allowed. In view of the long history of this matter and the fact that there have been two trials, I would make no order for a new trial.

*The substantial and grave injustice point*

[68] It is unnecessary to deal with this ground of appeal.

*Orders*

[69] I would allow the appeal and quash the appellant's conviction.

**LI, CJ**

[70] The Court unanimously allows the appeal and quashes the appellant's conviction. The Court would make no order for a new trial.
In Lakatini the appellant, an assemblyman and a Cabinet Minister, was charged with official corruption. Here the Court of Appeal undertakes a helpful review of the scope of the phrase "holder of any office … in the service of Her Majesty" in section 180(a) of the Niue Act 1966, and, in particular, examines a number of Commonwealth authorities. It holds that the phrase applies to those who form part of the government by serving as a Cabinet Minister. However, an assemblyman is in a very different position being elected by universal suffrage and in no sense to be regarded as in being in the service of Her Majesty.

Offence of official corruption -- section 180 Niue Act 1966 -- scope of phrase "holder of any office … in the service of Her Majesty" -- Whether an Assemblyman or a Minister is "in the service of Her Majesty"

Constitution of Niue, article 55A(2)(d) -- jurisdiction of court to entertain the appeal

LAKATANI v THE POLICE

Court of Appeal of Niue
Casey JA, Hyllier JA, Keith JA

30th November 1995

Cases referred to in the judgment
Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property [1954] AC 584
Ranaweera v Ramachandran [1970] AC 962
Town Investments Ltd v Department of the Environment [1978] AC 359

For the appellant: J O Upton QC and S. Langton
For the respondent: A S Epati

JUDGMENT OF THE COURT

The Appellant Sani Elia Lakatani, was at relevant times an Assemblyman and a Minister of the Niue Cabinet. He has been charged with corruption under section 180 of the Niue Act 1966 which reads

180. Official corruption – Everyone commits the offence of official corruption and is liable to imprisonment for a term not exceeding 5 years who:

(a) Being the holder of any office, whether judicial or otherwise, in the service of Her Majesty, corruptly accepts or obtains, or agrees to accept or attempts to obtain, for himself or any other person any bribe
that is to say, any money or valuable consideration whatever – on account of anything done or omitted to be afterwards done or omitted by him in his official capacity; or

(b) Corruptly gives or offers to any person holding such office or to any other person any such bribe as aforesaid on account of any such act or omissions; or

(c) Whether within Niue or elsewhere, corruptly uses any information acquired by him in his official capacity, to obtain directly or indirectly, an advantage on a pecuniary gain for himself or any other person.

Paragraph (c) was added in 1934 and two of the twenty-four charges are brought under it, the remainder under paragraph (a). It is not clear at this stage which of the charges involved Mr Lakatani’s activities as an Assemblyman and which as a Minister.

On 10 October 1995 Quilliam J dismissed an application that the informations be struck out and that the Appellant be discharged. He gave leave to appeal to this Court on one of the numerous grounds advanced before him, namely

"Whether either an Assemblyman or a Minister as such is the holder of any office, whether judicial or otherwise, in the service of Her Majesty, within the scope of section 180 of the Niue Act 1966".

It has been rightly accepted by both sides that this Court has jurisdiction under article 55A(2)(d) of the Constitution to entertain the Appeal and that leave was properly granted.

From 1910, when they were brought within the boundaries of New Zealand, Niue was administered as part of the Cook Islands and in 1915 the Cook Islands Act established a system of executive government with resident commissioners in both territories together with a system of subordinate local government. Section 218 of that Act created the offence of official corruption in language identical with the present section 180 (a) and (b) of the Niue Act 1966. While there were similarities with sections 126 and 127 of the New Zealand Crimes Act 1908, the Cook Islands provisions had a much wider scope. The New Zealand provisions, appearing in a part concerned with “crimes affecting the administration of law and justice” were limited to judicial corruption and the corruption of justices, constables and public officers employed in any capacity for the prosecution or detention or punishment of offenders. Section 128 also made it an offence to sell public offices or employment. From the outset, the Cook Islands legislation applied beyond those narrowly prescribed areas, to cover the Cook Islands system of government more generally. It was not until 1961 that the New Zealand Crimes Act was extended to include the corruption and bribery of Ministers of the Crown, Members of Parliament, and officials in general, Crimes Act 1961 sections 102, 103, and 105. The original Cook Islands provisions had applied to some of the equivalent persons from the outset. They were not limited to judicial and law enforcement matters and would have appeared to have applied, for instance, to the Resident Commissioners, their Deputies,
Resident Agents and the officers of the Cook Islands Public Service (defined as “the service of His Majesty...”) appointed under Part I of the 1915 Act. The executive government and judicial systems of the Cook Islands (still including Niue) were restructured by an Amendment Act of 1957, and this was followed by the Niue Act 1966 containing comprehensive provisions for the government of that territory independently of the Cook Islands, as well as a code of criminal law. This was part of gradual evolution to Westminster-type parliamentary democracy with the Queen as Head of State, culminating in 1974 with full self-government achieved by the passage of the Niue Constitution Act. It provided for an elected assembly which in turn elects a premier who nominates three of their number for appointment with him as Ministers forming the Cabinet.

As noted above, section 180 (a) and (b) of the Niue Act 1966 defined the offence of official corruption in terms identical to those in the earlier Cook Islands Act of 1915. That territory obtained self-government in 1964, and Mr Upton asked us to note that in 1969 it amended its bribery and corruption provisions to bring them into line with those in the New Zealand Crimes Act of 1961. He submitted that the failure by Niue to enlarge section 180 in the same way after it became self governing left a gap in its criminal law whereby Ministers and Assemblymen can not be guilty of bribery or corruption offences.

On his submissions this extraordinary situation arises because of the qualification in section 180(a) limiting its application to “the holder of any office, whether judicial or otherwise, in the service of Her Majesty.” He accepted that Ministers and Assemblymen were office holders. In his Judgement Quilliam J was satisfied that they were, but considered the expression “in the service of Her Majesty” not apt to describe their status. Nevertheless, with the aid of section 5(d) and (j) of the New Zealand Acts Interpretation Act 1924 (in force in Niue) he reached the conclusion that those words should not prevent section 180(a) being given its plain meaning of rendering all office holders criminally liable for bribery and corruption, in the light of Niue’s changed constitutional situation on gaining self-government.

The relevant provisions of the Constitution dealing with Niue’s executive government and its relationship with the Crown are contained in the following articles:

*The Executive Government Of Niue*

1. Executive authority vested in the Crown – The executive authority of Niue is vested in Her Majesty the Queen in right of New Zealand, and the Governor General of New Zealand is accordingly the representative of Her Majesty the Queen in relation to Niue.

2. Cabinet Ministers of Niue – (1) There shall be a Cabinet of Ministers of Niue (hereinafter referred to as the Cabinet) which shall consist of the Premier of Niue (who shall be a member of the Niue Assembly) and three other members of the Niue Assembly.
(2) Subject to this Constitution, the executive authority of Niue may be exercised on behalf of Her Majesty by the Cabinet, which shall have the general direction and control of the executive government of Niue and shall have such other functions and powers as are conferred on it by law.

3. Minister to be collectively responsible – (1) The members of the Cabinet (hereinafter referred to as Ministers) shall be collectively responsible to the Niue Assembly.

The sole issue in this Appeal is whether Ministers and Assemblymen are “in the service of Her Majesty” within the meaning of those words used in section 180(a). This involves a consideration of the extent to which the expressions “the Crown” or “Her Majesty” (they are interchangeable) are to be taken as symbolic of the executive authority of the state. We were referred to Philip A Joseph’s Constitutional and Administrative Law in New Zealand (1993) and to his article in (1993) NZLJ 126 “The Crown as a legal concept”, in which he discussed relevant material and cases, those in more recent times focussing on the question of Crown immunity and its ability to enter into legal relationships.

It is now well recognised that Ministers in Westminster-type constitutions where the Queen is Head of State are in her service. In constitutional terms, “service” has wider connotations than simply the legal relationship between master and servant, as the following extract from Lord Diplock’s dissenting Judgment illustrates in Ranaweera v Ramachandran [1970] AC 962, 972-973 (his comments were not affected by the majority decision):

"The Constitution of Ceylon takes the form of a constitutional monarchy modelled upon that of the United Kingdom. Under such a constitution all functions of central government of the state, legislative, executive and judicial, are carried out in the name of the reigning monarch. In such expressions as 'servant of the Crown' or member of Her Majesty's or 'member of Her Majesty's service', 'the Crown' and 'Her Majesty' are used not in the personal but in the metaphorical sense to connote the central government of the state. No one would suggest that, except as respects her personal staff, there exists between Her Majesty as a natural person and a 'servant of the Crown' a legal relationship which possesses the characteristics of the relationship of master and servant at common law, namely that Her Majesty can give instructions as to the manner in which the servant of the Crown performs his work. On the contrary, Her Ministers, by their advice, control the manner in which Her Majesty herself performs her duties under public law. Yet so far as I am aware it has never been suggested that Ministers of the Crown are not included in the expression 'servants of the Crown.' So clear was this thought to be by the United Kingdom Parliament in 1947 that in the interpretation section (section 38(2)) of the Crown Proceedings Act 1947 it is provided: 'Officer' in relation to the Crown, includes any
servant of His Majesty and accordingly (but without prejudice to the
generality of the foregoing provision) includes a 'Minister of the
Crown'."

It should be noted that section 2 of the Crown Proceedings Act 1950 (NZ) in
force in Niue contains a corresponding definition of "servant of the Crown." Although Mr Upton submitted this definition could not affect criminal law, it
certainly reinforces the conclusion that in constitutional terms Ministers are in
the service of the Crown. Other observations to the same effect appear in the
judgement of Lord Reid in Bank voor Handel en Scheepvaart NV v
Administrator of Hungarian Property [1954] AC 584, 616 ("Ministers are pre-
eminently Her Majesty’s servants") and in that of Lord Simon of Glaisdale in
Town Investments Ltd v Department of the Environment [1978] AC 359, 398
("the very term Minister ... denoting an origin as the King’s servant, and
continued status as servant or agent of the Crown").

Mr Upton sought to distinguish the constitutional situation in Niue by
emphasising that under article 2(2) executive authority is vested in article 1.
Accordingly he submitted that the Cabinet is the legal equivalent of the
Governor-General in New Zealand; its acts and decisions are the primary and
direct exercise of Her Majesty’s authority in and over Niue; and that Cabinet
Ministers stand in her shoes in exercising that authority. The Crown, he said,
was with any other corporation, must act through duly appointed officers – in
this case duly appointed Ministers, who are principals to the exercise of Her
Majesty’s authority and are accordingly not in Her service. Mr Upton’s use of
the word “principal” suggests a concept of “service”, implying subordination to
the will of another, but, as the cases cited above indicate, this is not the
present constitutional position with Ministers of the crown or other "great
officers" of State.

The Niue Constitution is clearly based on Westminster-style principles and
conventions, with the Monarch as Head of State vested with executive
authority. We are satisfied that the references to Her Majesty in articles 1 and
2 are to be taken as references to the central executive government of Niue.
The passage cited above from Lord Diplock’s judgement in Ranaweera’s case
makes this point very clearly in regard to the then Ceylon Constitution.

In Town Investments Ltd v Department of Environment he comes back to the
same theme at pages 380-381 in a lengthy passage tracing the development
of monarchical government in England, recommending that the word “Crown”
should now be understood simply as "government", embracing the Ministers
of the Crown, their subordinates and civil servants through whom the
executive powers of Her Majesty’s government are exercised. He concluded
with the comment “Executive acts of government that are done by any of them
are acts done by “The Crown" in the fictional sense in which that expression is
now used in English public law.”

In the same case Lord Simon said at page 398, after referring to the symbolic
way in which the words “Her Majesty” are used:
"My Lords, it will I hope, be apparent from the foregoing that 'the Crown' and 'Her Majesty' are terms of art in constitutional law. They correspond, though not exactly, with terms of political science like 'the Executive' or 'the Administration' or 'the Government', barely known to the law, which has retained the historical terminology. So it comes about that Wade and Phillips, Constitutional Law, discussing proceedings by and against the Crown before the passing of the Crown Proceedings Act 1947, stated 'Crown' includes all the departments of the central government (3rd ed (1946, 264) The minister at the head of a department of central government is, of course, part of that department."

These observations lead us to the conclusion that the references to “Her Majesty” as the holder of executive authority in articles 1 and 2(2) of the Constitution are to be understood as references to the central executive government of Niue; and that those who form part of that government by serving it as Cabinet Ministers are to be understood as serving Her Majesty as its embodiment. Accordingly it follows they must also be regarded as holding office in the service of Her Majesty within the meaning of section 180(a).

Assemblymen are in a different position. The Constitution recognises and preserves the classic distinction between the Executive, Legislative and Judicial branches of government, dealing with each topic in separate parts. The Assembly is elected by universal suffrage and in no sense could its members be regarded as being in the service of Her Majesty, either in Her personal capacity or embodiment of the executive government of Niue. Accordingly, they fall outside the provisions of section 180 (a) and as the law of Niue presently stands, they cannot be guilty of the offences of bribery or corruption. This may well be unsatisfactory, but we regret we cannot see our way clear to adopting the robust approach taken by Quilliam J by simply ignoring the words “in the service of Her Majesty” in that sub section. No doubt because we had the benefit of a fuller argument, we can give that expression a meaning which brings Ministers within section 180 (a) as well as members of the public service and the judiciary and anyone else employed by the executive government. Accordingly, a substantial area of the mischief intended to be remedied by the bribery and corruption provisions is effectively covered by this section and the Court would not now be justified in invoking section 5(j) of the Acts Interpretation Act to discard the words “in the service of Her Majesty”, especially in a penal section of this nature, in order to catch wayward Assemblymen. To do so would be to cross the boundary between legitimate interpretation and legislation. This gap in the criminal law is one for the Assembly to remedy.

We would note that the reference to “the service of Her Majesty" does not appear in para (c) of section 180. We do not express a view on the significance of that omission, para (c) not being referred to in the question which we have been asked to answer.
For these reasons the Appeal is allowed in part and the question posed by Quilliam J is answered:

“A Minister, but not an Assemblyman, is the holder of an office in the service of Her Majesty within the scope of section 180 of the Niue Act 1966.”
EVIDENCE

The power of investigative bodies to compel persons to answer questions concerning corruption, fraud and similar offences is found in several jurisdictions. Such provisions often raise constitutional issues centring on the right to remain silent. In Shaik, the provision in question was found in the National Prosecuting Authority Act 32 of 1998 (the Act). Section 28(6) empowered an Investigating Director to summon for questioning "any person who is believed to be able to furnish any information on the subject of the investigation…". The applicant, Mr Shaik, was summoned by the Investigating Director for questioning into allegations of corruption being investigated under the Act. Although a suspect, the applicant had not been charged with any offence covered by the investigation. The applicant then challenged the validity of the proceedings.

The High Court held that section 28(6) of the Act violated the applicant’s right to silence in terms of section 35(1)(a) of the Constitution of South Africa. It found, however, that such infringement was justified under section 36(1) of the Constitution, because the Act served a crucial role in the fight against organised crime and corruption. It further held that the investigation proceedings were not of a judicial or administrative nature and the applicant’s demand for an independent arbiter was ill-founded.

The applicant then applied to the Constitutional Court for leave to appeal. After the application had been lodged, the applicant was charged with certain of the offences that had been the subject of the section 28 enquiry. Argument on appeal was limited to the constitutionality of section 28(6) of the Act because of its alleged incompatibility with the right to a fair trial, in particular with the rights of arrested and accused persons to remain silent. The Constitutional Court held that the reference to “any person” in section 28(6) did not apply to accused persons and therefore the applicant could no longer be examined, because he had become an accused in respect of the offences that were the subject of the section 28 examination.

However, the court makes some very trenchant comments regarding the fact that the wrong section of the Act had been challenged and emphasises that it is essential, in order to ensure fairness to the State and other interested parties, that litigants identify accurately the statutory provisions they are attacking on constitutional grounds. The court also points out that the parties and the High Court restricted the enquiry to the serious offences which formed the subject matter of the section 28 enquiry instead of considering all the offences, some of them substantially less serious, that could be the subject of examination under the section. Accordingly a proper "justification enquiry" under section 36(1) of the Constitution could not be conducted. The Court therefore concluded that it was not in the interests of justice to grant the application for leave to appeal.
Evidence -- Right to remain silent -- Applicant summoned for questioning by National Prosecuting Authority into allegations of corruption -- Constitutionality of power to question any person believed able to furnish any information -- National Prosecuting Authority Act 32 of 1998

SHAIK v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS

Constitutional Court of South Africa
Chaskalson CJ, Langa DCJ, Ackerman J, Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J, and Yacoob J

11 November 2003, 2 December 2003

The facts appear in paras 4 - 7

Cases referred to in the judgment
Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics 1911 AD 13
De Vos v Cooper & Ferreira 1999 (4) SA 1290 (SCA)
Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC)
First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (7) BCLR 702 (CC); 2002 (4) SA 768 (CC)
Fraser v Naude and Others 1998 (11) BCLR 1357 (CC); 1999 (1) SA 1 (CC)
Independent Electoral Commission v Langeberg Municipality 2001 (9) BCLR 883 (CC); 2001 (3) SA 925 (CC)
JT Publishing (Pty) Ltd v Min of Safety & Security 1996 (12) BCLR 1599 (CC); 1997 (3) SA 514 (CC).
National Coalition for Gay and Lesbian Equality and Others v Min of Home Affairs and Others 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC)
Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A)
R v Hugo 1926 AD 268
R v Sachs 1953 (1) SA 392 (A)
S v Baleka and Others 1986 (1) SA 361 (T)

For the applicant: N Singh SC and AA Gabriel
For the second to fifth respondent: MTK Moerane SC and RJ Salmon
ACKERMANN, J. (giving the judgment of the Court)

Introduction

[1] This is an application for leave to appeal\(^1\) against the judgment and order of the High Court in Durban (the High Court) and concerns the constitutionality of certain provisions in section 28 of the National Prosecuting Authority Act\(^2\) (the Act) that deal with examination under oath of certain persons.

[2] The applicant is Mr Schabir Shaik, a businessman and director of companies. First respondent is the Minister of Justice and Constitutional Development (the Minister). Second respondent is the National Director of Public Prosecutions (the NDPP). Third respondent is the Investigating Director: Director of Special Operations (DSO) appointed under the Act. Fourth Respondent is the Deputy Director of Public Prosecutions, Cape of Good Hope (the DDPP). Fifth Respondent is Ms Gerda Ferreira (Ms Ferreira), an advocate employed by and a member of the Directorate of Special Operations.

[3] Section 28 of the Act provides as follows:

“Inquiries by Investigating Director -- (1)(a) If the Investigating Director has reason to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may conduct an investigation on the matter in question, whether or not it has been reported to him or her in terms of section 27.

(b) If the National Director refers a matter in relation to the alleged commission or attempted commission of a specified offence to the Investigating Director, the Investigating Director shall conduct an investigation, or a preparatory investigation as referred to in subsection (13), on that matter.

(c) If the Investigating Director, at any time during the conducting of an investigation on a matter referred to in paragraph (a) or (b), considers it desirable to do so in the interest of the administration of justice or in the public interest, he or she may extend the investigation so as to include any offence, whether or not it is a specified offence, which he or she suspects to be connected with the subject of the investigation.

(d) If the Investigating Director, at any time during the conducting of an investigation, is of the opinion that evidence has been disclosed of the commission of an offence which is not being investigated by the Investigating Directorate concerned, he or she must without delay inform the National Commissioner of the South African Police Service of the particulars of such matter.

(2)(a) The Investigating Director may, if he or she decides to conduct an investigation, at any time prior to or during the conducting of the investigation designate any person referred to in section 7 (4) (a) to conduct the investigation, or any part thereof, on his or her behalf and to report to him or her.

---

\(^1\) In terms of Constitutional Court Rule 18 read with section 167(6) of the Constitution.

\(^2\) No 32 of 1998.
(b) A person so designated shall for the purpose of the investigation concerned have the same powers as those which the Investigating Director has in terms of this section and section 29 of this Act, and the instructions issued by the Treasury under section 39 of the Exchequer Act, 1975 (Act No. 66 of 1975), in respect of commissions of inquiry shall apply with the necessary changes in respect of such a person.

(3) All proceedings contemplated in subsections (6), (8) and (9) shall take place in camera.

(4) The procedure to be followed in conducting an investigation shall be determined by the Investigating Director at his or her discretion, having regard to the circumstances of each case.

(5) The proceedings contemplated in subsections (6), (8) and (9) shall be recorded in such manner as the Investigating Director may deem fit.

(6) For the purposes of an investigation—
(a) the Investigating Director may summon any person who is believed to be able to furnish any information on the subject of the investigation or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before the Investigating Director at a time and place specified in the summons, to be questioned or to produce that book, document or other object;
(b) the Investigating Director or a person designated by him or her may question that person, under oath or affirmation administered by the Investigating Director, and examine or retain for further examination or for safe custody such a book, document or other object: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the Investigating Director, at his or her request be allowed, at his or her own expense and under the supervision of the Investigating Director, to make copies thereof or to take extracts therefrom at any reasonable time.

(7) A summons referred to in subsection (6) shall—
(a) be in the prescribed form;
(b) contain particulars of the matter in connection with which the person concerned is required to appear before the Investigating Director;
(c) be signed by the Investigating Director or a person authorized by him or her; and
(d) be served in the prescribed manner.

(8)(a) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate’s court shall apply in relation to the questioning of a person in terms of subsection (6): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.
(b) No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal
proceedings where the person concerned stands trial on a charge contemplated in subsection (10) (b) or (c), or in section 319 (3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

(9) A person appearing before the Investigating Director by virtue of subsection (6):
(a) may be assisted at his or her examination by an advocate or an attorney;
(b) shall be entitled to such witness fees as he or she would be entitled to if he or she were a witness for the State in criminal proceedings in a magistrate’s court.

(10) Any person who has been summoned to appear before the Investigating Director and who—
(a) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the Investigating Director from further attendance;
(b) at his or her appearance before the Investigating Director—
(i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce;
(ii) refuses to be sworn or to make an affirmation after he or she has been asked by the Investigating Director to do so;
(c) having been sworn or having made an affirmation—
(i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her;
(ii) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true,
shall be guilty of an offence.

(11) . . . . .

(12) . . . . .

(13) If the Investigating Director considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an investigation in terms of subsection (1) (a), the Investigating Director may hold a preparatory investigation.

(14) The provisions of subsections (2) to (10), inclusive, and of sections 27 and 29 shall, with the necessary changes, apply to a preparatory investigation referred to in subsection (13)."
with the acquisition of armaments by the Department of Defence. On 30 August 2001 a search warrant was issued to search, amongst other premises, those of the applicant and of companies in which he had an interest. This search warrant was executed on 9 October 2001.

[5] On 16 November 2001 the applicant was arrested and charged with theft, alternatively various statutory offences. The trial was set down in the Regional Court for 27 May 2002. The DDPP had previously intimated to the applicant’s legal representatives that further charges might be added to those already preferred against the applicant. The applicant’s lawyers in turn advised the DDPP that they intended challenging the above-mentioned search and seizure on constitutional grounds. This gave rise to doubts about the Regional Court’s jurisdiction to hear such a challenge. These matters were argued on 27 May 2002, judgment was reserved and the case adjourned until 27 November 2002 to enable the State to add further charges. The applicant’s legal representatives were advised by the DDPP that such further charges would in fact be the charges of fraud and corruption in connection with the acquisition of armaments referred to in paragraph 4 above.

[6] On 12 July 2002 a summons (the summons) was issued in terms of subsection 28(6) read with subsection 28(7) of the Act, calling on the applicant to appear at the offices of the DSO in Durban on 26 June 2002 to be questioned and to produce certain documents. The applicant duly appeared at the designated venue on the appointed day. Present were the DDPP and Ms Ferreira. The applicant was informed by Ms Ferreira that she was going to act as chairperson of the enquiry and that the DDPP would conduct the questioning. On being asked by the applicant’s legal representatives, the DDPP intimated that he was not going to question the applicant in regard to matters relating to the charges pending against him in the Regional Court, but that he intended doing so in relation to the charges of fraud and corruption in connection with the acquisition of armaments, which the DDPP had previously indicated might be added to the charges pending against the applicant in the Regional Court.

[7] The applicant’s legal representatives objected to the enquiry and, after some discussion, it was agreed that the questioning would be adjourned to 24 July 2003 on condition that the applicant brought legal proceedings on or before 22 July 2003 to set aside the enquiry. The questioning was thereupon adjourned.

The High Court litigation
[8] In due course, on 15 September 2003 (by agreement with the DDPP), the applicant brought an application in the High Court in which he sought the following relief:
(a) an order setting aside the summons;
(b) “alternatively in addition to [(a)]” an order declaring the provisions of subsection 28(6) of the Act to be unconstitutional and invalid;
(c) alternatively, an order declaring the procedure that the DDPP and Ms Ferreira intended adopting for the questioning of the applicant to be invalid and unlawful; and,
(d) an order directing the respondents to pay the costs jointly and severally.
[9] In the written notice given by the applicant pursuant to Uniform Rule 16A(1) the constitutional issues involved in the application were stated to be:

1. Whether the Applicant’s right to a fair trial is infringed by the summons served on the Applicant requiring that he be questioned in terms of Section 28(6) of [the Act] and to produce documents
2. Whether section 28(6) of [the Act] is unconstitutional and invalid as a result of violating the rights entrenched in Sections 14 [privacy], 16 [freedom of expression], 33 [just administrative action], 34 [access to courts] and 35 [fair arrest, detention, trial] of the Final Constitution.

The constitutional issues were not significantly broadened by any factual or legal averment in the founding affidavits. Other than subsection 28(6), no other provision in the Act was attacked as being constitutionally invalid. The chief thrust of the applicant’s attack, based on section 35 of the Constitution, was that he was being compelled to assist in building a criminal case against himself. Under subsection 35(1)(a) of the Constitution an arrested person has the right “to remain silent”; under subsection 35(3)(h) an accused has the right “to be presumed innocent, to remain silent, and not to testify during the proceedings”; and under section 35(3)(j) an accused has the right “not to be compelled to give self-incriminating evidence.”

[10] In his founding affidavit, the applicant complained about the fact that the questioning was to be chaired by Ms Ferreira who, he contended, could not – as a member of the Directorate of Special Operations – exercise the necessary objectivity required of an independent arbiter. This complaint related to the administrative law attack founded on section 33(1) of the Constitution. The attack based on section 35 of the Constitution was limited to the compulsion to testify brought to bear on the applicant by, (so it was contended) section 28 (6) of the Act. To the extent that the State might have been obliged to justify, under subsection 36(1) of the Constitution, any infringement of the applicant’s section 35 rights, it was – on the case brought by the applicant – obliged to show only that the compulsion to testify was, under the circumstances, justified.

---

4 Uniform Rule 16A(1) reads as follows:

“(1) (a) Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.
(b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.
(c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.
(d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days.”

5 Subsection 35(1) entrenches rights in respect of everyone who is arrested, subsection 35(2) in respect of everyone who is detained, and subsection 35(3) in respect of every accused person.
[11] In the High Court the Minister did not oppose the application and intimated that he abided the decision of the Court. The High Court dismissed both the attack against the validity of the summons and the attack referred to in para 8(c) above, holding that

"... the proceedings at the inquiry are not of a judicial nature, nor do they constitute an administrative act. I agree with the submission by Mr. Moerane that the Applicant's demand for an independent arbiter at the inquiry is ill-founded."

[12] In regard to the attack against section 28(6) of the Act, the High Court found that, on a proper construction, the words “any person” as used in subsection 28(6)(a), did not include an accused person and that accordingly this subsection did not infringe the rights of an accused person under subsection 35(3) of the Constitution. It did find, however, that the subsection infringed the right “to remain silent” under subsection 35(1)(a), but considered such limitation to be justified under section 36(1) of the Constitution on the authority of this Court's judgment in Ferreira v Levin.6 Costs were awarded against the applicant, including the costs of two counsel.

The application to this Court
[13] The applicant obtained a positive certificate from the High Court under Constitutional Court Rule 18 on virtually all the matters raised in his application for a certificate. The only findings of the High Court's judgment challenged in the application are those holding that section 28(6) of the Act is constitutional and valid, and that the procedure for questioning under this subsection does not constitute administrative action and is accordingly not subject to the requirements of section 33(1) of the Constitution. During the course of argument in this Court, however, Mr Singh, who appeared for the applicant, indicated that he would not rely on this second ground and that he was confining his argument to the constitutionality of section 28(6) on the grounds of its incompatibility with section 35(3) of the Constitution.

[14] Events following the granting of a positive certificate by the High Court have complicated the issues. The application to this Court was served on the State Attorney on 22 August 2003 and filed with the Registrar on 26 August 2003. On 25 August 2003 the applicant was formally charged with offences of fraud and corruption under the Corruption Act, being those very offences in respect whereof the summons was issued against the applicant and about which he was going to be questioned.

[15] The second to fifth respondents, in opposing the application in this Court, relied on these supervening events. In their response in terms of rule 18(9)(a), they stated that they were no longer entitled to question the applicant under subsection 28(6)(a). This is an implied acceptance of, and acquiescence in, the High Court's finding that section 28(6) does not apply to an accused person. They moreover stated that they had no intention of questioning the applicant under section 28(6) of the Act. They accordingly contended, that this issue was moot,7 in the sense that it no longer presented an existing or live controversy between the parties, and that the Court ought not to exercise

---

6 Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC).
7 Relying on National Coalition for Gay and Lesbian Equality and Others v Min of Home Affairs and Others 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) fn 18. See also JT Publishing (Pty) Ltd v Min of Safety & Security 1996 (12) BCLR 1599 (CC); 1997 (3) SA 514 (CC).
its residual discretion to hear the matter.\textsuperscript{8} In argument before the Court Mr Moerane, on behalf of the second to fifth respondents, abandoned this stance and requested the Court to decide on the constitutional validity of subsection 28(6) of the Act.

[16] This Court will only grant leave to appeal if it considers it to be in the interests of justice to do so. The prospects of success are important in deciding whether or not to grant leave to appeal, but they are not the only issue to be considered when the interests of justice are being weighed.\textsuperscript{9} There are a number of factors that are relevant to this enquiry. They have to be assessed together.

[17] One of the factors relevant to the interests of justice is whether the dispute is a live one between the parties. In this case the High Court was undoubtedly correct in its conclusion that the words “any person” in subsection 28(6)(a) does not include an accused person charged with an offence that is the subject of a section 28 summons and investigation. Although the word “any” is, on the face of it a word of “wide and unqualified generality” it “may be restricted by the subject matter or the context.”\textsuperscript{10} Here context is all-important.\textsuperscript{11} Giving an unlimited meaning to “any person” in the subsection would mean that, literally, any accused person could be summoned under 28(6) to answer questions in relation to his participation in the offences with which he has been charged. It could not have been the purpose of subsection 28(6) to cut across the well-established rules of criminal procedure and evidence established over centuries that have become part of our law.

[18] One need go no further than section 196(1)(a) of the Criminal Procedure Act\textsuperscript{12} (the CPA) which establishes that an accused is a competent witness, but stipulates that “an accused shall not be called as a witness except on his own application.” It is true that this limitation, if applied literally, would apply only to the actual trial of the offence with which the accused is charged, but to construe “any person” in section 28(6)(a) as including such an accused, would constitute a flagrant circumvention of section 196(1)(a). Such a clash should be avoided by construing “any person” in section 28(6)(a) in a way most favourable to the accused,\textsuperscript{13} and in a way that does not defeat the clear purpose of subsection 196(1)(a) of the CPA.\textsuperscript{14} This is what the High Court did.

[19] The applicant can accordingly not be questioned under section 28 as long as he is being tried on charges covered by the section 28 summons. This summons has not,

\textsuperscript{8} Independent Electoral Commission v Langeberg Municipality 2001 (9) BCLR 883 (CC); 2001 (3) SA 925 (CC) paras 9-11.
\textsuperscript{9} Fraser v Naude and Others 1998 (11) BCLR 1357 (CC); 1999 (1) SA 1 (CC) para 7.
\textsuperscript{10} R v Hugo 1926 AD 268 at 271, per Innes CJ.
\textsuperscript{11} First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (7) BCLR 702 (CC); 2002 (4) SA 768 (CC) para 63.
\textsuperscript{12} Act 51 of 1977
\textsuperscript{13} See R v Sachs 1953 (1) SA 392 (A) 399-400 and S v Baleka and Others 1986 (1) SA 361 (T) at 392J-393F.
\textsuperscript{14} A well-recognised rule of statutory construction was formulated as follows in Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics 1911 AD 13 at 24:

“[E]very part of a Statute should be so construed as to be consistent, so far as possible, with every part of that Statute, and with every other unrepealed Statute enacted by the same Legislature.”
however, been withdrawn and if the criminal charges against the applicant were to be withdrawn, the applicant could still be questioned under the provisions of section 28. The expression of an intention on behalf of the second to fifth respondents not to do so, referred to above, does not amount to a formal undertaking to the Court that this will not occur. The possibility accordingly exists that the applicant could be examined. The issue between the parties which is not currently live, is not necessarily completely extinguished.

[20] It is not necessary, however, to reach a firm conclusion in this regard, because even if the issues were moot, this Court would still have to consider whether it ought to exercise its residual discretion to hear the matter. This would itself involve an enquiry as to whether it would be in the interests of justice to do so, a prerequisite for which being that “any order which this Court may make will have some practical effect either on the parties or on others.”\(^{15}\) There could well be, indeed there are likely to be, other parties who find themselves in the same position as the applicant before being charged with the very offences forming the subject of the summons issued against him. This would therefore be a consideration in favour of granting leave.

[21] There are, however, considerations going the other way. The kernel of the applicant’s attack throughout has been that the section 28 procedure empowers the prosecuting authority to require a suspect to answer questions without giving the suspect full immunity from the consequences of such answers. This attack has been based on section 35 of the Constitution and has been focussed exclusively on subsection 28(6)\(^{16}\) of the Act. Subsection 28(6) is, however, the wrong provision to target. It does no more than describe the Investigating Director’s powers and says nothing about the obligations of the examinee. It neither compels the examinee to heed the summons nor to answer any questions, nor does it stipulate what questions the examinee is obliged to answer, nor what use may be made of any answer, nor what the consequences might be if the examinee should fail or refuse to answer any question. The sting of the section – for purposes of the section 35 attack – is found in subsections 28(8) and (10).\(^{17}\) The punishment for the offence created by subsection 28(10) is not prescribed in the Act and, accordingly, the general enabling provisions of section 276 of the CPA – that empowers, amongst other things, the imposition of imprisonment – apply.

[22] The compulsion to attend, to be sworn in or to make an affirmation, and to answer questions fully, are all stipulated in subsection (10). The extent of examinees’ privilege to refuse to answer questions, and the manner and extent to which answers – that examinees are obliged to give – may subsequently be used against them, are detailed in subsection (8). Indeed, the constitutional attack in the High Court and this Court focussed on the alleged constitutional inadequacy of the direct use immunity\(^{18}\) provided for in subsection (8)(b).

[23] Highlighting the fact that the wrong statutory provision has been attacked is not mere pedantry. It should not be thought that such an omission can always be cured, as

\(^{15}\) The *Langeberg* case above n 8 para 11.

\(^{16}\) Quoted in para 3 above.

\(^{17}\) Quoted in para 3 above.

\(^{18}\) As to which see *Ferriera v Levin* above n 6 paras 134, 152 and 153.
between litigating parties, merely because the arguments addressed by them covered, albeit by implication, subsections 28(8) and (10). It is constitutionally a serious matter for any court to declare a statutory enactment of Parliament – or for that matter of any legislature – invalid, because it constitutes a serious invasion, albeit a constitutionally sanctioned one, by one arm of the state into the sphere of another. Moreover, an order by this Court that a statutory provision is constitutionally invalid, does not operate between the litigating parties only, but is generally binding on all persons and organs of state.

[24] The minds of litigants (and in particular practitioners) in the High Courts are focussed on the need for specificity by the provisions of Uniform Rule 16A(1). The purpose of the rule is to bring the case to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge, in order that they may take steps to protect their interests. This is especially important in those cases where a party may wish to justify a limitation of a Chapter 2 right and adduce evidence in support thereof.

[25] It constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity. This is not an inflexible approach. The circumstances of a particular case might dictate otherwise. It is, however, an important consideration in deciding where the interests of justice lie.

[26] Another consideration, adverse to the granting of leave, is the fact that the High Court in its judgment, and the parties in their arguments here and in the High Court, approached the issue of the constitutional invalidity of subsection 28(6) on the restricted basis that the summons in this case related to the suspected commission of offences of fraud and corruption in contravention of the Corruption Act. It was common cause that such offences are extremely serious. The justification enquiry under section 36(1) of the Constitution, focussed exclusively on the state interest in prosecuting such serious crimes.

[27] This approach is incorrect. It is inconsistent with the principle of objective constitutional invalidity enunciated by this Court. Under the interim Constitution, the relevant part of this principle was formulated as follows in Ferreira v Levin:

“[T]he enquiry is an objective one. A statute is either valid or “of no force and effect to the extent of its inconsistency”. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.”

---

19 Above n 4.
20 Above n 6 para 26.
This principle is equally applicable under the 1996 Constitution.

[28] Accordingly, when the state interest in conferring no more than a use immunity in subsection 28(8) is evaluated, regard must be had – not to the offences referred to in the summons – but to the whole range of offences in respect of which a summons could be issued under subsection 28(6). The “specified offence”, referred to in subsection 28(1), in respect whereof an investigation may be conducted and a person summoned under subsection 28(6), is defined in section 1 of the Act as meaning –

“any matter which in the opinion of the head of an Investigating Directorate falls within the range of matters as contemplated in section 7(1)(a)(aa) or any proclamation issued in terms of section 7(1)(a)(bb) or (1A), and any reference to the commission of a specified offence has a corresponding meaning”.

The matters contemplated in section 7(1)(a)(aa) are:

“offences or any criminal or unlawful activities committed in an organised fashion". (Emphasis supplied).

The matters contemplated in section 7(1)(a)(bb) are:

“such other offences or categories of offences as determined by the President by proclamation in the Gazette.”

[29] Every possible offence is captured by the sweep of subparagraph (aa) of section 7(1)(a), provided only that it is committed “in an organised fashion”. The ambit of subparagraph (bb) of section 7(1)(a) cannot be construed restrictively, so as to limit the offences or categories of offences that may be determined by the President, to offences committed “in an organised fashion”. To do so would be to render subparagraph (bb) tautologous. It is clear that subparagraph (bb) enables the President to proclaim any offence as a “specified offence” for purposes of section 28, whether or not it is committed in an “organised fashion”.

[30] By Proclamation No. R. 102, 1998 of 16 October 1998 offences were proclaimed which included “theft and any offence involving dishonesty” and any offence in contravention of “the Income Tax Act…”; “the Customs and Excise Act…”; “the Sea Fishery Act…”; and “the Drugs and Drug Trafficking Act…”; committed “in an organized fashion or which may endanger the safety or security of the public, or any conspiracy, incitement or attempt to commit any of the abovementioned offences” (Emphasis supplied). The offences covered by section 7(1)(a)(aa) include the most trivial offence, provided it is committed in an organised fashion. This Proclamation includes an attempt to commit theft and any offence involving dishonesty, and it does so without expressly limiting it to attempts made in an organised fashion.
[31] By Proclamation No. R. 123, 1998 of 4 December 1998 (which did not purport to repeal the previous proclamation) the following further offences were added:

“(a) …

(i) …

…

(iv) corruption in terms of the Corruption Act…; or

(b) any other –

(i) economic common law offence; or

(ii) economic offence in contravention of any statutory provision, which involves patrimonial prejudice or potential patrimonial prejudice to the State, any body corporate, trust, institution or person, which is of a serious or complicated nature.”

The common law or statutory “economic” offences referred to need not be committed in an organised fashion, the only qualification is that such offence must be of a serious or complicated nature. No indication is given as to what is meant by “serious” or “complicated” or what criteria the Investigating Director is to use when, under subsection 28(1), such Director is to form a view that there is reason to suspect that a “specified offence” has been or is being committed.

[32] It is inadvisable to attempt any precise circumscription of the offences that may form the subject matter of a subsection 28(6) investigation. Suffice it to say that the offences could be far less serious or damaging to the state than offences referred to in the applicant’s summons. Yet, it was on the basis of all such offences – that could be the subject of a section 28(6) summons – that the justification enquiry should have been done. The wide ambit of section 28(6) was not brought to the attention of the High Court nor appreciated by the litigants in this Court.

[33] The wrong provision in the Act has been targeted for constitutional attack. The potential ambit of section 28 has been misunderstood, with the attendant consequences referred to above. The dispute is not currently a live one between the parties. Under all these circumstances, it is not in the interests of justice to grant leave to appeal in which the thrust of the constitutional attack is not in substance against subsection 28(6) but against subsections 28(8) and (10).

[34] It is necessary, in the public interest, to comment on the way the attack was conducted in this Court. Both in the written and oral argument on the applicant’s behalf, it was strenuously contended that the direct use immunity provided by section 28,\(^{21}\) was constitutionally insufficient and therefore the compulsion to furnish incriminating answers invalid. In support of these contentions, heavy reliance was placed on dicta in a number of judgments of the Canadian Supreme Court.

[35] In Ferreira v Levin this Court considered, in the context of enquiries and the examination of persons under section 417 of the Companies Act 61 of 1973, the constitutional validity of subsection 417(2)(b) that provided the following:

---

\(^{21}\) As already pointed out the compulsion to answer and the direct use immunity are features of subsection 28(8) and not subsection 28(6) of the Act.
“Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him.”

The Court held the provision to be constitutionally invalid and one of the issues was the extent of its invalidity. This in turn revolved around the question as to what form of protection, against the use of such examinees’ answers against themselves in a subsequent criminal trial, would be valid.

[36] There were three choices:
   (a) Transactional immunity, that protected examinees from prosecution in respect of any offence disclosed in their answers;
   (b) Direct and derivative use immunity, that protected the examinees from their answers being used against them and also the exclusion from any subsequent prosecution of evidence derived by the prosecuting authorities from such answers; and,
   (c) Direct use immunity, that protected the examinees from their answers being used against them, and no more.

The Court opted for the last-mentioned. It came to the conclusion that, in the South African context, mere direct use immunity was sufficient, bearing in mind that the trial judge had a discretion – in appropriate cases – to exclude derivative evidence if that were necessary to ensure a fair trial.

[37] In coming to this conclusion, the Court paid close attention to comparable decisions in other jurisdictions, and in particular to the very Canadian authorities relied upon in this Court on the applicant’s behalf. The conclusion reached in Ferreira v Levin on the use of derivative evidence, summarised above, was a broad and general one, and not confined to the statutory provision in question. Although attempts were made by the applicant in this Court to distinguish Ferreira v Levin, these were not convincing. If the applicant’s contention was that the case had been wrongly decided, argument should have been addressed to convince this Court that it has the power to overrule itself and that it ought to do so. This was not done.

A concern relating to section 28 of the Act
[38] There is a concern about the constitutional validity of subsections 28(6), (8) and (10) of the Act. It was not formally raised or dealt with in argument as a ground for attack under section 35 of the Constitution. While refraining from pronouncing on it, the Court cannot allow the concern to pass unmentioned. It relates to the fact that, under subsection 28(6)(b), the “Investigating Director or a person designated by him” questions the person summoned under oath or affirmation, without the necessity of any other person being present, let alone a person who is independent of the Directorate of Special Operations.

[39] This concern is not dispelled by an argument that the Investigating Director could, under the discretion conferred by subsection 28(4), make provision for the questioning

---

22 Above n 6 para 1.
21 Id. See, for example, paras 150-3.
to be presided over by an independent person. The point is that the Investigating Director is not obliged by any of the subsections to do so. This concern must moreover be viewed in the context of subsection (3), that makes it obligatory for all proceedings contemplated in subsections (6), (8) and (9) to take place in camera, and that, under subsection (5), these proceedings are to be recorded “in such manner” as the Investigating Director may deem fit. An Investigating Director could decide to keep a long-hand minute herself, or by the person designated to conduct the examination. Although the person summoned is, under subsection 28(9)(a), permitted to have legal representation, it cannot be assumed that a lawyer will be appointed. The section 28 procedure raises the spectre of the interrogator and interrogatee alone in one room for days, the former asking the questions and making the record, the latter simply answering questions.

[40] The Act raises relatively novel problems about how to reconcile the need for effective control of organised crime with respect for the constitutional protection of a fair trial. More particularly it introduces elements of inquisitorial investigation into what has traditionally been an accusatorial system. The potential tensions involved need to be confronted with properly prepared papers and appropriately focused argument. It would not be in the interests of justice to touch on these matters in a tangential manner on the basis of the application as mounted in the present case.

The costs in the High Court and this Court
[41] The only remaining issue concerns the costs in the High Court that the applicant was ordered to pay. Even assuming, without deciding, that there may be circumstances when it is necessary for this Court to adjudicate on the merits of an appeal for the sole reason of considering an appeal against a costs order, this is not such a case. The merits of the true issues cannot be considered because of the way the attack was launched by the applicant and it is not in the interest of justice, in the circumstances of this case, to grant leave to appeal solely against the costs order in the High Court. In dismissing the application for leave to appeal it is equitable to require all the parties to pay their own costs in this Court.

The order
[42] The following order is made:

1. The application for leave to appeal is dismissed;

2. All the parties are to pay their own costs in this application.

---

24 See, for example, Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) at 863 and De Vos v Cooper & Ferreira 1999 (4) SA 1290 (SCA) para 18.
INSOLVENCY

In *Ganes* the first appellant was in the employ of the respondent company. The company brought a sequestration order against the appellants (husband and wife living in community of property) in which it was alleged that the joint estate of the appellants was insolvent. The respondents claimed that the appellants were indebted to them for large sums of money and that the first appellant had breached his duty of good faith in that he had taken money from various companies for looking after their interests in their dealings with the respondent.

In upholding the claim of the respondent company, the court held that an employer may claim from an employee any bribe, secret profit or commission received by him from a third party without the consent of the employer in the course of his employment or by means of his position as an employee.

*Insolvency – Authority to institute proceedings – Striking out of new matter in replying affidavit.*

*Bribes or secret commissions received by employee in course of employment -- Whether deemed to have been received for employer*

**GANES and GANES v TELECOM NAMIBIA LIMITED**

*Supreme Court of Appeal of South Africa*

*Streicher, Brand and Cloete JJA*

10 November 2003 and 25 November 2003

The facts appear in paras 1-4

**Cases referred to in the judgment**

*Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another 1999 (4) SA 799 (W)*

*Eskom v Soweto City Council 1992 (2) SA 703(W)*

*Jones v East Rand Extension Gold Mining Co Ltd 1903 TH 325*

*Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd 1992 (4) SA 791 (A)*

*Premier Medical & Industrial Equipment (Pty) Ltd v Winkler and Another 1971 (3) SA 866 (W)*

*R v Zackey 1945 AD 505*

*Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168*

*S v Safatsa and Others 1988 (1) SA 868 (A)*

*Shepstone & Wylie and Others v Geyser NO 1998 (3) SA 1036 (SCA)*

*Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4*

*Uni-Erections v Continental Engineering Co Ltd 1981 (1) SA 240 (W)*
3.2

3.1

3.3

3.4

3.5

STREICHER, JA

[1] This is an appeal against an order granted by Knoll J in the Cape of Good Hope Provincial Division in terms of which the joint estate of the appellants, who are married in community of property, was finally sequestrated.

[2] The first appellant was in the employ of the respondent as its Manager: Procurement from 1995 until 2 July 2000 when he resigned. In terms of a contract between the respondent and Dresselhaus Scrap Metal CC ('Dresselhaus') Dresselhaus was appointed as the exclusive purchaser of all respondent’s scrap copper. The first appellant was, by virtue of his position as Manager: Procurement, responsible for the implementation and administration of the contract.

[3] On 12 July 2001 the respondent brought an urgent ex parte application for a sequestration order against the appellants. The founding affidavit was deposed to by one Gunther Hanke. He alleged that the joint estate of the appellants was insolvent. The appellants were, according to him, indebted to the respondent in at least the following amounts:

3.1 N$1 184 403,80 (it is common cause that N$1 equals R1) being a claim by the respondent against the appellants in respect of a loss suffered by the respondent as a result of the first appellant having deliberately under-invoiced Dresselhaus in respect of copper sales.

3.2 N$416 295,08 being a claim by the respondent against the appellants in respect of monies paid by the respondent to the Receiver of Revenue, Namibia.

3.3 N$37 748,20 being the balance due and owing by the first appellant to the respondent in respect of a housing subsidy over-paid in error by the respondent to the first appellant.

3.4 N$11 235,44 being the balance due and owing by the first appellant to the respondent in respect of a car allowance received by the first appellant while he was not entitled to such allowance.

3.5 N$1 800 000,00 being an amount owing to the respondent by the first appellant in respect of copper received by Dresselhaus but not invoiced by the first appellant.

[4] According to Hanke the MCW Trust, a trust controlled by the appellants, on 4 January 2001 purchased a Mercedes Benz CL 500 motor vehicle for a purchase price of R972 000 for the appellants’ use. Hanke said that payments made by the first appellant in respect of the assets acquired by him must have come from a source other than his salary of approximately N$16 000 per month. He said, furthermore, that a trustee would be in a position to conduct an urgent investigation into the financial affairs of the appellants as it was evident that the first appellant "was involved in a variety of unlawful and corrupt transactions giving rise to extensive unlawful 'commission' payments to him".

[5] The court a quo granted a provisional sequestration order and issued a rule nisi calling upon the appellants to show cause why a final sequestration order should
not be granted. A provisional trustee was appointed and before delivery of the appellants’ answering affidavit the appellants and their two children were, in terms of section 152 of the Insolvency Act 36 of 1936 (‘the Act’), interrogated before a magistrate.

[6] In their answering affidavits the appellants did not refer to the interrogation in terms of section 152. The first appellant denied most of the instances of alleged under-invoicing and stated that to the extent that Dresselhaus was under-invoiced such under-invoicing was not intentional and did not cause any loss to the respondent. He denied, furthermore, that the respondent suffered any loss in respect of copper received by Dresselhaus and not invoiced by the first appellant. According to the first appellant his liabilities amounted to approximately N$923 848,52 and the value of his assets to R4 045 000 including R1 800 000 being the value of a 100% interest in Mintmark (Pty) Ltd. He, therefore, denied that he was insolvent.

[7] In regard to the discrepancy between the salary earned by the first appellant and the assets acquired by him the first appellant stated that his salary was not his only source of income but that he in addition thereto "received certain payments from certain third parties in return for certain advices and in the capacity as a consultant". He denied that he had received any unlawful commissions.

[8] In the replying affidavit delivered by the respondent, Hanke said that in the course of further investigations and the interrogation referred to it had emerged that the first appellant had substantial further claims against the appellants. He alleged that the first appellant, during the tenure and in the course of his employment with the respondent, in breach of his fiduciary duty to the respondent, "received numerous secret and unauthorised payments in the nature of bribes and/or 'commissions' from the following entities/persons with whom (respondent) was contracting from time to time in at least the following amounts":-

<table>
<thead>
<tr>
<th>Entity</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dresselhaus Scrap CC / its member Mr Weakley</td>
<td>R 305 550,90</td>
</tr>
<tr>
<td>Global Telecom (Pty) Ltd / its director Mr Davies</td>
<td>R 742 426,74</td>
</tr>
<tr>
<td>Energy Procurement Services (Pty) Ltd ('EPS'),</td>
<td>R1 253 185,00</td>
</tr>
<tr>
<td>Rousant International, Aquick International</td>
<td></td>
</tr>
<tr>
<td>Telephone Manufacturers of South Africa (Pty) Ltd ('Temsa')</td>
<td>R  445 955,06</td>
</tr>
<tr>
<td></td>
<td>R 2 747 117,70</td>
</tr>
</tbody>
</table>

[9] Documentary proof of these payments were annexed to the replying affidavit. Hanke stated that the first appellant admitted at the interrogation that he received between R600 000 and R700 000 from Dresselhaus or Weakley, in excess of R1,5m from Global Telecom and approximately R1,7m from EPS, Rousant and Aquick ("hereinafter jointly referred to as "EPS"); that certain of the payments were made to him in cash and were not deposited into any banking account; and that the payments were made to him to ensure his continued support for these concerns in their business dealings with the respondent. In regard to the appellants’ assets the respondent said that the first appellant was the beneficial owner of only 50% of the shares in Mintmark (Pty) Ltd.
[10] The appellants thereupon delivered an application to strike out certain paragraphs in and annexures to the respondent’s replying affidavit, more particularly the paragraphs and annexures dealing with the first appellant’s admissions at the interrogation. The appellants contended that these paragraphs and annexures should be struck out on the ground that they constituted "new matter and/or new causes of action".

[11] On 23 October 2001 the matter came before Oosthuizen AJ. Two preliminary matters were argued, namely, the question whether the application for sequestration had been authorised by the respondent and the striking out application. Oosthuizen AJ held that there was sufficient proof that the proceedings were duly authorised and also dismissed the striking out application save in respect of one paragraph. In so far as the striking out application was dismissed he held that the relevant paragraphs and annexures did not constitute new matter in that the respondent was replying to the first appellant’s denials that he had accepted payment of unlawful and unauthorised commissions and that the acquisition of assets by him indicated irregular conduct on his part. He held, furthermore, that the material complained of did not constitute a new cause of action. He nevertheless proceeded to hold that, in any event, even if it were accepted that the material complained of constituted new matter he had a discretion to permit new matter in the replying papers. In the light of the fact that the material complained of were not known to the respondent when the founding papers were drawn he exercised his discretion in favour of the respondent and granted leave to the appellants to deal with the matter which the appellants wanted to have struck out.

[12] In his supplementary answering affidavit the first appellant did not deny that he gave the aforesaid evidence at the interrogation. However, he stated that he received only the payments in respect of which documentary proof was annexed to the replying affidavit. He gave no explanation for his evidence at the interrogation that some of the payments received by him were made in cash and said that the amounts mentioned by him at the interrogation were merely estimates. He stated that the payments received from Dresselhaus and Weakley were loans; that the payments received from Global Telecom were made to him in consequence of advice given by him to Global Telecom relating to business opportunities and in particular to wireless technology; and that the payments received from EPS were made to him “in consideration for consultancy services (he) had rendered to EPS, affording them advice concerning business opportunities”.

[13] Temsa has at all material times been a supplier of payphones to the respondent and the first appellant was responsible for the administration of the relevant contracts. As regards the amount of R445 955,06 received from Temsa it appears from a reading of the supplementary replying affidavit and the reply thereto that the first appellant acquired a close corporation Lynco CC for the purpose of channelling money through this entity. A Mrs Helberg held the member’s interest as the first appellant’s nominee. An agreement was concluded between Temsa and Lynco in terms of which Lynco would pay 5% of the value of goods supplied by Temsa to any entity in any African state other than the Republic of South Africa. The contract for supply of goods by Temsa to respondent fell within the ambit of this agreement. The first appellant caused invoices in respect of the 5% commission
payable to him by Temsa to be raised in the name of Lynco. A total amount of R445 955 was so received by Lynco in respect of goods supplied by Temsa to the respondent. After payment of administration expenses the amounts received from Temsa were paid to the first appellant except in one instance when it was on the instruction of the second appellant paid to a third party.

[14] According to the first appellant the agreement referred to was concluded in consideration for consulting services rendered by him to Temsa and in particular for introducing Temsa to business opportunities in inter alia the Democratic Republic of Congo. At no stage did he promote Temsa to the respondent.

[15] The first appellant denied that the respondent was entitled to payment of the amounts received by him from Dresselhaus, Global Telecom, EPS and Temsa. He did, however, concede that he held a 50% and not a 100% interest in Mintmark (Pty) Ltd. It follows that on the appellants’ own version their assets amounted to R4 045 000 less R900 000 i.e. R3 145 000.

[16] The court a quo found that in accepting these payments the first appellant acted in breach of a fiduciary duty owed by him to the respondent which rendered him liable to account to the respondent for the gain which accrued to him as a result thereof. It found, furthermore, that the first appellant’s liability to the respondent in respect of such payments together with the other liabilities of the appellants exceeded the value of their assets and granted a final sequestration order against them.

[17] Upon application by the appellants the court a quo refused them leave to appeal against the finding by Oosthuizen AJ that there was sufficient proof that the proceedings were duly authorised; granted leave to the appellants to appeal to this court against the dismissal by Oosthuizen AJ of the striking out application; and granted leave to the appellants to appeal against the whole of its judgment. In regard to the court a quo’s judgment the appellants contended that the court a quo erred in finding that their insolvency had been proved.

Authority to institute proceedings

[18] In their heads of argument the appellants asked that leave be granted to them to appeal against the finding by Oosthuizen AJ that the proceedings were duly authorised and that their delay in applying for such leave be condoned. They proffered no explanation for their delay in applying to this court for leave to appeal against that finding. In this regard the appellants relied on S v Safatsa and Others 1988 (1) SA 868 (A) where Botha JA said at 877C-F:

"If this Court is of the view that in a ground of appeal not covered by the terms of the leave granted there is sufficient merit to warrant the consideration of it, it will allow such a ground to be argued. This is well illustrated by the judgment of Schreiner ACJ in R vMpompotshe and Another 1958 (4) SA 471 (A) at 472H - 473F. In my view, however, it requires to be emphasised that an appellant has no right to argue matters not covered by the terms of the leave granted. His only 'right' is to ask this Court to allow him to do so. In Mpompotshe's case supra, Schreiner ACJ referred to 'matters which this Court
should think worthy of consideration’, and to the power of the Court 'to condone the delay and grant leave to appeal on wider grounds than those allowed by the trial Judge'. A formal petition for leave to appeal on wider grounds is not an indispensable prerequisite, since the matter is before the Court whose members would be conversant with the record, but the remarks I have quoted show that the Court will certainly decline to hear argument on an additional ground of appeal if there is no reasonable prospect of success in respect of it."

[19] There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings were duly authorised. In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See Eskom v Soweto City Council 1992 (2) SA 703(W) at 705C-J).

The striking out application

[20] Save in respect of an amount of R22 747,66 the court a quo did not find that the respondent’s claim for loss suffered as a result of Dresselhaus having been under-invoiced or not having been invoiced, had been proved. The respondent did not contend that the court a quo erred in this regard. It contended that the court a quo correctly found that the appellants were insolvent as a result of the respondent’s entitlement, as against the appellants, to payment of the aforesaid amounts received by the first appellant from Dresselhaus, Global Telecom, EPS and Temsa.

[21] To the extent that the respondent relies on the evidence contained in the replying affidavit as constituting evidence of additional liabilities by the appellants, rendering their joint estate insolvent, such evidence did constitute new matter as contended by the appellants. However, in terms of section 12(2) of the Act a court may on the return day of a provisional sequestration order, if not satisfied that the debtor is insolvent, require further proof of such insolvency. It follows logically that the court also have a discretion to allow such further proof in a replying affidavit, subject, of course, to the debtor being granted an opportunity to deal with the new matter. Whether, in particular circumstances, an application for sequestration should
in terms of the section be dismissed or whether further proof of insolvency should be allowed is a matter relating to the conduct of the business of the court hearing the application. In respect of such a matter “different judicial officers, acting reasonably, could legitimately come to different conclusions on the same facts”\(^1\). In these circumstances there can be no doubt that the discretion conferred on the court by section 12 is a discretion which has been referred to as a discretion in the strict or narrow sense i.e. it is for the court hearing the application to decide whether or not to allow further proof. A court of appeal can only interfere if the court which heard the application exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons.\(^2\)

[22] The appellants did not make out a case for interference with Oosthuizen AJ’s judgment on the aforesaid basis. Instead of doing so counsel for the appellants submitted that the material complained about should have been struck out for a number of reasons of which Oosthuizen AJ was unaware. Oosthuizen AJ can obviously not be held to have failed to exercise his discretion judicially on the basis of facts of which he was unaware. There is, therefore, no reason to deal with the grounds upon which it was submitted that Oosthuizen AJ should have exercised his discretion in favour of the appellants.

**Insolvency**

[23] The first appellant did not deny that he testified at the interrogation that he received payments from Dresselhaus, Global Telecom and EPS to ensure his continued support for them in their business dealings with the respondent. He did not give an explanation for his evidence either. In the circumstances the reason given in his supplementary affidavit for these payments cannot be taken seriously and does not raise a genuine dispute of fact in this regard. The court a quo, therefore, correctly found that the payments admittedly received by the first appellant from Dresselhaus, Global Telecom and EPS were made to the first appellant to secure his support in their business relationship with the respondent. The appellants’ counsel did not contend that the court a quo erred in this regard.

[24] On the appellants’ own version the amount admittedly received via Lynco from Temsa was paid as a commission in respect of goods supplied by Temsa to the respondent.

[25] As an employee of the respondent and in the absence of an agreement to the contrary the first appellant owed the respondent a duty of good faith. This duty entailed that he was obliged not to work against the respondent’s interests; not to place himself in a position where his interests conflicted with that of the respondent; not to make a secret profit at the expense of the respondent; and not to receive from

\(^1\) The words of Cloete J in *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 806G.

\(^2\) *R v Zackey* 1945 AD 505 at 511; *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd (‘Perskor’)* 1992 (4) SA 791 (A) at 800C-G; and *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1044J – 1045F.
a third party a bribe, secret profit or commission in the course of or by means of his position as employee of the respondent.  

[26] The employer may claim from an employee any bribe, secret profit or commission received by him from a third party without the consent of the employer in the course of his employment or by means of his position as employee. The English law is to the same effect. In Chitty on Contracts 28th ed vol 1 para 30-172 the English Law is stated thus:

"Where an agent receives from a third party a bribe, secret profit or commission in connection with his principal’s affairs his principal is entitled to claim it; the same principle holds in regard to the relationship of employer and employee."

[27] In the present case the first appellant breached his duty of good faith to the respondent. He took money from Dresselhaus, Global Telecom and EPS in return for looking after their interests in their dealings with the respondent whereas in terms of his employment contract with the respondent he was obliged to look after the respondent’s interests. These payments clearly constituted bribes. Although the first appellant denied that he promoted the interests of Temsa in its business dealings with the respondent, the agreement to pay and the payment of commission to him in respect of payphones supplied to the respondent was likely to serve as an incentive to the first respondent to promote Temsa’s interests in their dealings with the respondent. These payments, therefore, similarly constituted bribes received by the first appellant.

[28] Counsel for the appellants did not contend that the payments were not in the nature of bribes and that they were not received by the first appellant in breach of a duty of good faith to the respondent. In their heads of argument they submitted that even if it is accepted that the duty owed by an employee to an employer is a fiduciary one the employer may not claim payment from the employee of secret profits or commissions where these take the form of bribes. There is no merit in this contention and it was not advanced in oral argument before us. What was argued before us was that the payments received from Dresselhaus were in return for under-invoicing Dresselhaus, that the respondent did not suffer a loss in respect of such under-invoicing and that the amounts so received by the first appellant were, therefore, not recoverable.

[29] However, the appellants never contended in their affidavits that the payments received from Dresselhaus were received in return for under-invoicing Dresselhaus. But, in any event, the respondent’s claim is not a claim for damages. Bribes or secret commissions received by an employee in the course of his employment or by means

---

3 Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 177; Premier Medical & IndustrialEquipment(Pty)Ltd v Winkler and Another 1971 (3) SA 866 (W) at 867H-877A; and Uni-Erections v Continental Engineering Co Ltd 1981 (1) SA 240 (W) at 252D-253F.
4 Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4 at 20-21 and 33-34; Jones v East Rand Extension Gold Mining Co Ltd 1903 TH 325 at 335.
of his employment in breach of his fiduciary duty to the employer are deemed to have been received for his employer.5

[30] It follows that the respondent has a valid claim against the first appellant for repayment of the amount of R2 747 117,70. In addition to that liability the appellants admitted liabilities in an amount of R1 057 131,18 which amount is made up as follows:

Fifty percent of respondent’s claim
  referred to in para 3.2 N$208 147,54
Respondent’s claim referred to in para 3.3 N$ 37 748,20
Respondent’s claim referred to in para 3.4 N$ 11 235,44
Sundry loan creditors N$800 000,00

These liabilities exceed the appellants’ assets by more than R650 000. It follows that the appellants are insolvent.

Conclusion
[31] The appeal is dismissed with costs.

BRAND JA and CLOETE JA concurred

5 Transvaal Cold Storage Co Ltd v Palmer supra at 20.
The Bulletin has included several judgments relating to the freezing and forfeiture of the proceeds of corruption and related offences. The case of *Barnette* is a useful addition in that it examines issues arising from an application to register a foreign restraint order.

Here the United States Government wished to register a confiscation order made by a US district court against B's assets in England, a process permitted where the English court was of the opinion that its enforcement would not be contrary to the interests of justice. B contended that to enforce the foreign order would be to act in a way that was incompatible with her right to a fair trial enshrined in article 6 of the European Convention on Human Rights. The appellant (and her husband) had previously filed appeals to the US Court of Appeals against the order of the district court but the court had dismissed both appeals on the basis of the fugitive disentitlement doctrine. Under this doctrine the court had a discretion to refuse to hear or decide the appeal on the ground that the appellant was a fugitive from justice.

The House of Lords held that article 6 was capable of being applied to the enforcement in a convention state of the judgment in another state whether or not that state was a party to the Convention. However, an extreme degree of unfairness needed to be established amounting to a virtually complete denial or nullification of article 6 rights (see paras 26-7). Although the application of the fugitive disentitlement doctrine could be regarded as failing to secure all article 6 protections, it could not be described as a flagrant denial of B's rights or a fundamental breach of the article.

*Proceeds of crime -- Respondent applying fugitive disentitlement doctrine and seeking to register foreign restraint order in England -- Whether contrary to the interests of justice to do so -- Whether contrary to the right to a fair trial to do so -- Test to be applied*

*Territoriality principle -- Right to a fair trial -- European Convention on Human Rights, article 6 -- Whether article 6 protection applicable to enforcement of foreign judgment made in non-convention State*
GOVERNMENT OF THE UNITED STATES OF AMERICA v BARNETTE and ANOTHER

Lord Steyn, Lord Slynn of Hadley, Lord Hoffmann. Lord Clyde. Lord Carswell
House of Lords
22 July 2004

The facts appear in paras 5-16

Cases referred to in the judgment
Abdulaziz, Cabales and Balkandi v United Kingdom (1985) 7 EHRR 471
Ashingdane v United Kingdom (1985) 7 EHRR 528
Bensaid v United Kingdom (2001) 33 EHRR 205,
Drozd and Janousek v France and Spain (1992) 14 EHRR 745
Einhorn v France (Application No 71555/01, 16 October 2001
Pellegrini v Italy (2002) 35 EHRR 44
Poltrimol v France (1993) 18 EHRR 130
R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27; [2004] 3 WLR 58
R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 3 WLR 23
Soering v United Kingdom (1989) 11 EHRR 439
Tomic v United Kingdom (Application No 17837/03, 14 October 2003)
United States of America v Montgomery [2001] UKHL 3; [2001] 1 WLR 196

For the appellant: Mr Lewis QC

LORD STEYN
My Lords,
[1] I have had the privilege of reading the opinion of my noble and learned friend Lord Carswell. I agree with it. I would also dismiss the appeal.

LORD SLYNN OF HADLEY
My Lords,
[2] I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Carswell. For the reasons he gives I agree that the appeal should be dismissed.

LORD HOFFMANN
My Lords,
[3] I have had the advantage of reading in draft the speech of my noble and learned friend Lord Carswell. For the reasons he gives, with which I agree, I would dismiss this appeal.

LORD CLYDE
My Lords,
[4] I have had the opportunity of reading in draft the speech to be given by my noble and learned friend Lord Carswell and I agree that the appeal should be dismissed for the reasons set out in that speech. I expressly reserve my opinion on the question whether
the operation of the fugitive disentitlement doctrine would if it had taken place in a Convention state have constituted a breach of Article 6.

**LORD CARSWELL**

My Lords,

[5] The appellant's former husband Larry Barnette was charged with defrauding the United States Government of sums of money totalling some $15 million, and was convicted in 1984 on a number of counts of fraud and related offences, including offences under the Racketeer Influenced and Corrupt Organisations Act ("RICO"). He was sentenced to a term of imprisonment and also ordered to pay $7 million to the United States by way of restitution and to forfeit his 900 shares in Old Dominion SA ("ODSA"), a Panamanian company controlled by him through which he had passed proceeds of his fraudulent activity.

[6] In August 1983, shortly before he was indicted for fraud, Mr Barnette transferred 800 of his 900 shares in ODSA to the appellant, who was at that time still married to him. The US court ruled that under RICO the US Government's title to the 800 shares antedated the transfer to the appellant, with the consequence that they were forfeited and had to be surrendered, or their value accounted for, notwithstanding the transfer to the appellant.

[7] Mr Barnette and the appellant fought a vigorous rearguard action in an attempt to avoid confiscation of the shares or their value, details of which are set out in paragraphs 4 to 11 of the opinion of my noble and learned friend Lord Hoffmann in Government of the United States of America v Montgomery [2001] UKHL 3; [2001] 1 WLR 196, to which I would refer. After lengthy and complex litigation the US district court made an order on 18 August 1995, whereby it held both the appellant and Mr Barnette in contempt and ordered them to pay by way of forfeiture the sum of $4,217,833.01, representing the value of the ODSA shares as at 15 October 1984 (the date of the order for forfeiture of the shares) after setting off the $7 million already paid. Following this order Mr Barnette brought a motion on 24 August 1995 seeking credit for a sum seized from accounts in the name of ODSA in Liechtenstein. The US Government brought a motion on 28 August 1995 to revise the sum ordered to be paid by the addition of substantial interest and a sum for reimbursement of costs and expenses incurred. The order of 18 August 1995 was revised by a further order of 15 November 1995, which gave effect to the credit sought by Mr Barnette and ordered payment of interest at US Treasury rates from January 1985 to June 1995. The final effect of these orders was an increase in the total sum payable by the appellant and Mr Barnette to $11,767,754, plus a further sum for costs and expenses.

[8] In August 1983 the appellant left Mr Barnette and subsequently remarried, being now Mrs Montgomery. She renounced her US citizenship in April 1992 and moved to London in May 1992, with the intention of taking up residence there. She became a citizen of St Kitts and Nevis in June 1994 and lost her US nationality in November 1994. On 15 December 1992, when she was out of the jurisdiction, the US court made an order for discovery against her, but she failed to comply with it. When the US Government brought a motion to increase the liability of the appellant and Mr Barnette as assessed on 18 August 1995, the appellant did not file any brief in opposition. The judge in the Administrative Court in the present confiscation proceedings found that the
The appellant had sufficient notice of the Government motion of 28 August 1995 to be able to oppose it if she chose. She did, however, take part in the proceedings to the extent that she supported an application by Mr Barnette claiming credit for certain sums and a motion by him seeking further time to respond to the US Government's motion. The order of 15 November 1995 was made by the district court after consideration of the documents without an oral hearing.

[9] The appellant and Mr Barnette filed appeals to the US Court of Appeals against the order of the district court. The appellant filed a substantial brief and was represented by counsel. At the end of the hearing the court invited further submissions on the issue whether in view of the "fugitive status" of the appellant and Mr Barnette it should not entertain their appeal at all. The appellant submitted a brief on this issue, but the court on 20 November 1997 dismissed both appeals on the basis of the fugitive disentitlement doctrine. Under this doctrine the court had a discretion to refuse to hear or decide the appeal, on the ground that the appellant was a fugitive from justice.

[10] The doctrinal basis for the discretion was described by the US Court of Appeals in the following passage from its judgment in para 7:

"The rationales [sic] for this doctrine include the difficulty of enforcement against one not willing to subject himself to the court's authority, the inequity of allowing that 'fugitive' to use the resources of the courts only if the outcome is an aid to him, the need to avoid prejudice to the non-fugitive party, and the discouragement of flights from justice….

That any judgment rendered by this court can be viewed by the Barnettes as merely advisory (and their compliance therewith optional) is our main concern in deciding the government's motion to dismiss this appeal. Impossibility of enforcement was the initial reason for the establishment of the fugitive disentitlement doctrine….

The Supreme Court has refused to allow application of disentitlement when enforcement is possible despite the appellant's absence …Here, however, possession of the forfeited property, Old Dominion stock, lies with Kathleen Barnette - outside the reach of the government…..In this appeal, we seriously doubt any decision rendered against the Barnettes could be enforced against them."

The court went on to say that the basis for the district court's decision to hold the appellant in contempt:

"was not the conviction of her husband, but instead her refusal to comply with clear orders from the court regarding property she claimed to own that was the subject of the forfeiture judgment. Nonparties that actively aid and abet a party in violating a court order may be held in contempt of court."

The court found on the facts that the appellant was not a clearly innocent party in the government's effort to collect the shares of stock owned by her. It stated that she acted in concert with him to hide assets and transfer funds, resulting in inaccessibility to these
monies by the government. She admitted in a sworn statement that she moved the assets of ODSA to avoid the criminal forfeiture judgment. She had fought the forfeiture every step of the way and her continuing failure to furnish discovery was regarded by the district court as part of the Barnettes' overall scheme to evade the forfeiture judgment. It went on in para 15 of its judgment:

"Based upon her past conduct - including leaving the country - and continued noncompliance with court orders, Kathleen Barnette seems to intend not to submit herself to the authority of the United States courts, including this one. Therefore, we have no confidence that, should we decide this case on the merits and hold that the district court properly entered the contempt order against her, Kathleen Barnette would recognise that court's authority and forfeit the stock at issue or present herself for incarceration.

Kathleen Barnette is a fugitive from the contempt order and the ensuing bench warrants. Her status as a fugitive, like her husband's, flouts this court's authority by effecting the very stay that was prohibited by this court's denial of her motion to stay the contempt judgment pending appeal.

Applying the principle of disentitlement, Kathleen Barnette should not be entitled to an appeal in this court when she has repeatedly refused to abide by prior court orders, removed herself to the United Kingdom (beyond our reach), and renounced her United States citizenship."

[11] The respondent government seeks in these proceedings to register the confiscation order under section 97 of the Criminal Justice Act 1988, with a view to enforcing it by process against assets of the appellant in the United Kingdom. In aid of the confiscation process it obtained a restraint order in September 1997, whose validity was finally upheld by your Lordships' House in the appeal of Government of the United States of America v Montgomery [2001] 1 WLR 196. Section 97 provides:

"(1) On an application made by or on behalf of the government of a designated country, the High Court may register an external confiscation order made there if:

(a) it is satisfied that at the time of registration the order is in force and not subject to appeal;
(b) it is satisfied, where the person against whom the order is made did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them; and
(c) it is of the opinion that enforcing the order in England and Wales would not be contrary to the interests of justice.

(2) In subsection (1) above 'appeal' includes -
(a) any proceedings by way of discharging or setting aside a judgment; and
(b) an application for a new trial or a stay of execution.

(3) The High Court shall cancel the registration of an external confiscation order if it appears to the court that the order has been satisfied by payment of the
amount due under it or by the person against whom it was made serving imprisonment in default of payment or by any other means."

It is common case that the United States is a designated country, by virtue of the Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991 (SI 1991/2873), as amended by an amendment order of 1994 (SI 1994/1639), and that the confiscation order made by the US district court is an external confiscation order, which is in force and not subject to appeal. Nor has the judge's ruling been challenged that the appellant had due notice of the proceedings. The issue between the parties is whether it would be contrary to the interests of justice to register the order.

[12] The appellant has based her case upon the proposition that if a court in a state which is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") were to shut her out from pursuing an appeal, as the US Court of Appeals did, it would constitute a breach of article 6 of the Convention, which provides:

"1. 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.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
a) a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b) to have adequate time and facilities for the preparation of his defence;
c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

It was argued on her behalf that for a court in this jurisdiction to register the confiscation order and so enforce the order of the US Court of Appeals would be to act in a way which was incompatible with a Convention right, which is made unlawful by section 6 of the Human Rights Act 1998.
[13] In the Administrative Court [2002] EWHC 1113 (Admin) Stanley Burnton J held that the US proceedings would be classed as criminal if they took place in a country that was a party to the Convention, which made article 6(3)(c) applicable. On the Strasbourg authorities stemming from Ashingdane v United Kingdom (1985) 7 EHRR 528 and Poitrimol v France (1993) 18 EHRR 130 the judge held that if the United States had been a party to the Convention article 6 would have required the Court of Appeal to consider the appellant's appeal on the merits. Neither of these conclusions was the subject of argument before your Lordships, though Lord Woolf CJ in the Court of Appeal reserved his opinion on whether the US proceedings constituted "the determination of a criminal charge" within the meaning of the phrase in article 6(1). For the purposes of this appeal I am content to assume that the operation of the fugitive disentitlement doctrine by the US Court of Appeals would, if it had taken place in a Convention state, have constituted a breach of article 6.

[14] In the Court of Appeal the appellant's case relied heavily on the decision of the European Court of Human Rights in Soering v United Kingdom (1989) 11 EHRR 439, to which I shall refer in more detail later. The same argument was founded upon this authority as that which had been advanced before Stanley Burnton J, that to enforce the order of the US court would be acting incompatibly with the appellant's Convention rights under article 6 of the Convention and article 1 of the First Protocol. Lord Woolf CJ, with whose judgment Kennedy and Scott Baker LJJ agreed, did not base his approach to the case on the provisions of the Convention. In para 25 of his judgment, at [2003] 1 WLR 1916, 1924, he set out his reasons for distinguishing the Soering decision:

"The Soering case is dealing with a very different situation from that which we have to consider on this appeal. In the Soering case the action of the court in this jurisdiction would be the direct cause of the breach of the prohibition in article 3 which is one of the most fundamental provisions of the Convention. Here it cannot be said even if the conduct of the district court and the Court of Appeals in the United States has been inconsistent with the standards of conduct required by article 6 or article 1 of the First Protocol, that the decision to register under the 1988 Act gives rise to any breach of article 6 of the Convention. This is for the simple reason that any conduct which could be a breach of the Convention in the United States had already taken place prior to the English proceedings. In any event, the reference in paragraph 113 of the judgment in the Soering case to a future flagrant breach of article 6 was no more than a dicta which should not be applied to the enforcement of a court order of a non-contracting state. Furthermore, if there was any breach by the United States courts of article 6 (which I do not accept) that breach was certainly not flagrant."

He pointed out that there are difficulties in seeking to judge the procedures of a court in a jurisdiction to which the Convention does not apply by applying article 6. The standards required by the Convention might be a guide to the court in determining for the purposes of section 97 what was in the interests of justice, but it was preferable not to become too closely engaged with the jurisprudence relating to article 6, which could be somewhat technical. The Court of Appeal held on examination of the facts of the case that it would not be contrary to the interests of justice to register the order.
[15] Notwithstanding the views of Lord Woolf CJ which I have quoted, it is in my opinion necessary to consider whether registration of the order would constitute a breach of article 6 of the Convention. In doing so I would observe that in my judgment the case belongs to the category classified by Lord Bingham of Cornhill in R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 3 WLR 23 as "foreign cases" rather than "domestic cases". In the latter category, exemplified by Abdulaziz, Cabales and Balkandi v United Kingdom (1985) 7 EHRR 471 and Bensaid v United Kingdom (2001) 33 EHRR 205, the treatment by a state within its jurisdiction of a person resident there is such that that treatment may constitute a breach of one of the articles of the Convention. Conversely, in a "foreign" case, such as those concerning the expulsion of aliens seeking entry, the complaint is that the act or omission of the state may expose the applicant to treatment in another state which, if committed by a Convention state would constitute a breach of one or more of the provisions of the Convention.

[16] The gravamen of the appellant's complaint is that she was treated unfairly by the US Court of Appeals and that registration of the confiscation order, by giving effect to its terms and exposing her to its consequences, engages the responsibility of the English court. Mr Lewis QC argued on behalf of the appellant, first, that article 6 was directly engaged, because it was incumbent on the English court to satisfy itself that the American proceedings satisfied the guarantees enshrined in article 6 and, secondly and in the alternative, that article 6 was indirectly engaged, in that the English court by registering the confiscation order has exposed the appellant to the consequences of the American proceedings which were conducted in breach of the requirements of article 6.

[17] In considering these arguments it is necessary to have regard to the territoriality principle, governing the territorial reach of the Convention and its limitations, aptly described in para 86 of the judgment of the European Court in Soering v United Kingdom 11 EHRR 439, 466:

"Article 1 of the Convention, which provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1,' sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a contracting state is confined to 'securing' ('reconnaître' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of states not parties to it, nor does it purport to be a means of requiring the contracting states to impose Convention standards on other states."

[18] Given this territorial limitation, it is difficult to see how registration of the US court's order could constitute a direct breach of its terms, for there can be no suggestion that the hearing afforded to the appellant in the registration proceedings failed to meet any of the requirements of the article. It was argued on behalf of the appellant, however, that the decision of the European Court in Pellegrini v Italy (2002) 35 EHRR 44 was an authority in her favour which was indistinguishable from the present case.

[19] Pellegrini's case turns on the relationship between the Italian civil courts and the Ecclesiastical Court of the Rome Vicariat, a church court classed by the European Court as a court of the Vatican (properly the Holy See), a state which is not a party to the Convention. The applicant Ms Pellegrini was married to Mr A Gigliozi in 1962 in a
religious marriage, which had legal effect in Italy. In 1987 she sought a decree of judicial separation from the civil court in Rome and in 1990 she was granted a decree and an order for maintenance was made in her favour. Meanwhile Mr Gigliozzi brought proceedings in the ecclesiastical court for annulment of the marriage on the grounds of consanguinity. By a judgment given in December 1987 the ecclesiastical court annulled the marriage. The applicant forthwith brought an appeal to the Roman Rota, an Italian civil court, complaining that the procedure adopted in the ecclesiastical court had deprived her of her right to a fair hearing under article 6 of the Convention. Under the terms of a Concordat made between Italy and the Vatican a judgment of the ecclesiastical courts annulling a marriage may be made operative in Italy at the request of one of the parties through a judgment of the competent appeal court. The Rota upheld the annulment and its decision was affirmed on appeal to the Florence court of appeal and the Court of Cassation, both of which were of opinion that the procedure adopted by the ecclesiastical court did not amount to a violation of the applicant's rights.

[20] The European Court allowed Ms Pellegrini's application, finding that the procedure in the ecclesiastical court was insufficient to satisfy the requirements of article 6. In considering the application of article 6 to the issue the court stated, at pp 51-52, para 40:

"The court notes first of all that the declaration of nullity of the applicant's marriage was issued by the Vatican courts and then made operative by the Italian courts. The Vatican has not ratified the Convention, and the application is moreover directed against Italy: the task of the court is therefore to enquire not into whether the proceedings before the ecclesiastical courts complied with article 6 of the Convention, but into whether the Italian courts, before granting confirmation and execution of the said annulment, duly checked that the proceedings relating thereto satisfied the guarantees contained in article 6; such a check is required, in fact, where the judgment for which confirmation and execution is sought emanates from the courts of a country which does not apply the Convention. Such a check is all the more necessary where execution would have serious implications for the parties."

[21] Mr Lewis placed this decision at the forefront of his argument whereby he submitted that article 6 was directly engaged in the present case. The relationship between the Italian courts and the Vatican courts depends, however, on the terms of the Concordat, a special legal relationship between states. Article 8(2) of the Concordat provides, in an English translation, so far as material:

"The judgments of nullity of marriage pronounced by ecclesiastical tribunals, together with the decree of execution issued by the superior controlling ecclesiastical authority, shall be declared, at the request of the parties or of one of them, effective within the Italian Republic by judgment of the competent Court of Appeal, upon verifying:

(A) that the ecclesiastical judge was the competent judge to adjudicate the action, the marriage having been celebrated in accordance with the present article;"
(B) that in the proceedings before the ecclesiastical tribunals the right to sue and to defend in court has been assured to the parties in a way not dissimilar from what is required by the fundamental principles of the Italian legal system;

(C) that the other conditions required by the Italian legislation for the declaration of efficacy of foreign judgments are present."

Article 6 of the Convention, to which Italy is a party, has been "enacted in the Italian legal order", according to Professor Roberto Baratta and Professor Andrea Giardina. Moreover, article 111 of the Italian Constitution provides that jurisdiction is exercised through fair trial ("giusto processo") as regulated by the law. The Italian courts were accordingly specifically obliged to ensure that the procedure was sufficient to satisfy the terms of article 6 of the Convention, as well as article 111 of the Italian Constitution. The decision in Pellegrini is therefore in my opinion dependent on the particular effect of the Concordat, and is not authority for the conclusion which the appellant's counsel sought to draw from it. I therefore do not consider that the appellant's argument based on direct engagement of article 6 is well founded.

[22] The Strasbourg jurisprudence has, however, developed an exception to the principle of territoriality, which may conveniently be described as giving indirect effect to provisions of the Convention. The fons et origo of this doctrine is to be found in the decision of the European Court in Soering v United Kingdom (1989) 11 EHRR 439. The applicant sought to resist his extradition to the United States to face trial on a charge of capital murder. The United Kingdom Government contended that the risk of a capital sentence being either imposed or carried out was low, especially in light of the assurances which it had obtained, and that that risk was insufficient to make the applicant's extradition a breach of article 3 of the Convention. The court rejected this contention and also held that the risk of the applicant's having to endure the "death row phenomenon" exposed him to a real risk of treatment going beyond the threshold set by article 3. It emphasised the high degree of importance to be attached to the observance of the obligations of article 3, which it described, at p 467, para 88, as "one of the fundamental values of the democratic societies making up the Council of Europe". In this regard it stated at para 87:

"In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.'"

The court concluded accordingly that a risk that the applicant might be subjected to torture, inhuman or degrading treatment or punishment was sufficient to engage the responsibility of a contracting state under article 3 when considering extradition.

[23] The applicant in Soering also submitted that the procedure in Virginia, which did not afford legal aid for collateral challenges in the Federal courts, was such that extradition
would involve a breach of article 6 of the Convention. On this issue the court stated, at p 479, para 113:

"The right to a fair trial in criminal proceedings, as embodied in article 6, holds a prominent place in a democratic society. The court does not exclude that an issue might exceptionally be raised under article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk."

[24] The European Court has affirmed on a number of occasions the existence in principle of the possibility in a suitable case of invoking article 6. The context has generally been that of extradition or expulsion of aliens seeking admission to the country concerned, but in my opinion it is capable of being applied to the enforcement in a Convention state of a judgment obtained in another state, whether or not the latter is an adherent to the Convention. No decision was cited to your Lordships in which the court went so far as to hold that an act of extradition or expulsion amounted to a breach of article 6, and in all of the reported cases the European Court has strongly emphasised the exceptional nature of such a jurisdiction and the flagrant nature of the deprivation of an applicant's rights which would be required to trigger it.

[25] These authorities were discussed in detail in the recent decisions of the House in R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 3 WLR 23 and R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27; [2004] 3 WLR 58 and it is unnecessary to set them out in detail again in this judgment. It is sufficient to refer only to two of these cases. In Einhorn v France (Application No 71555/01, 16 October 2001), an extradition case, the court stated at para 32 of its judgment that:

"it cannot be ruled out that an issue might exceptionally be raised under article 6 of the Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of justice in the requesting country ..."

In Tomic v United Kingdom (Application No 17837/03, 14 October 2003), an expulsion case, the court reaffirmed the principle in very similar language at para 3 of its judgment:

"The court does not exclude that an issue might exceptionally be raised under article 6 by an expulsion decision in circumstances where the person being expelled has suffered or risks suffering a flagrant denial of a fair trial in the receiving country ..."

[26] In the Ullah case [2004] 3 WLR 23 and the Razgar case [2004] 3 WLR 58 the House accepted the validity of these propositions, but also underlined the extreme degree of unfairness which would have to be established for an applicant to make out a case of indirect effect. It was of opinion that it would have to amount to a virtually complete denial or nullification of his article 6 rights, which might be expressed in terms familiar to lawyers in this jurisdiction as a fundamental breach of the obligations contained in the article.
"According to the court's case-law, certain provisions of the Convention do have what one might call an indirect effect, even where they are not directly applicable. Thus, for example, a state may violate articles 3 and/or 6 of the Convention by ordering a person to be extradited or deported to a country, whether or not a member state of the Convention, where he runs a real risk of suffering treatment contrary to those provisions of the Convention (Soering v United Kingdom [11 EHRR 439]); other hypothetical cases of an indirect effect of certain provisions of the Convention are also quite conceivable.

The same argument applies in reverse, so to speak; a contracting state may incur responsibility by reason of assisting in the enforcement of a foreign judgment, originating from a contracting or a non-contracting state, which has been obtained in conditions which constitute a breach of article 6, whether it is a civil or criminal judgment, and in the latter case whether it imposes a fine or a sentence of imprisonment."

In so far as this dictum suggests that enforcement of a foreign judgment might in principle give rise to responsibility on the part of a Convention state, I have no difficulty in accepting its correctness. It is to be observed, however, that in the following sentence Judge Matscher went on to say "This must clearly be a flagrant breach of article 6", so recognising the exceptional nature of the circumstances which could give rise to such responsibility. I therefore do not understand him to have meant to lay down any wider proposition than that which the House has accepted in the Ullah case [2004] 3 WLR 23 and the Razgar case [2004] 3 WLR 58.

[27] Counsel for the appellant referred to a passage in the concurring opinion of Judge Matscher in Drozd and Janousek v France and Spain (1992) 14 EHRR 745, 795, in which he said:

[28] I should mention also that the distinguished scholar Judge J-P Costa of the European Court has taken a different view of the effect of Pellegrini 35 EHRR 44. He expressed the opinion extra-judicially ((2002) Rivista internazionale dei diritti dell'uomo 435, 437-9) that Pellegrini goes beyond Soering and Drozd, so that it may be said to have overtaken those decisions. With all respect due to an authority of Judge Costa's eminence and to the opinions of the eminent academic commentators adduced on behalf of the appellant, I adhere to the view that the decision in Pellegrini turned upon the particular requirements in Italian law of the Concordat and that the flagrant denial test is still applicable, as is recognised by recent decisions of the European Court such as Einhorn and Tomic. The observation at the end of the penultimate sentence of the passage which I have quoted from Pellegrini (para 20 above) is too frail a peg on which to hang the contrary theory.

[29] When one comes to apply these principles to the present case, the conclusion is in my opinion quite clear. The fugitive entitlement doctrine is not an arbitrary deprivation of a party's right to a hearing, but is intended to be a means of securing proper obedience to the orders of the court. As Lord Woolf CJ said at p 1928, para 35 of his judgment:
"Where a party is guilty of contempt there may be no other sanction available if he is outside the jurisdiction of the court. The reason for the doctrine being applied by the United States Court of Appeals in Mrs Montgomery's case was not to vindicate the dignity of the court, but because the court thought that it was the only available sanction which could achieve obedience to the order of the court."

Although the application of the fugitive entitlement doctrine may be regarded as failing to secure all of the protection required by article 6 of the Convention, it is a rational approach which has commended itself to the Federal jurisdiction in the United States. As such it could not in my opinion be described by any stretch as a flagrant denial of the appellant's article 6 rights or a fundamental breach of the requirements of that article. It follows that the appellant's argument based on the indirect engagement of the responsibility of the United Kingdom must fail.

[30] The same reasons are relevant in considering the issue whether it was contrary to the interests of justice to enforce the confiscation order by registering the judgment of the US district court. As Stanley Burnton J and the Court of Appeal have pointed out in their judgments, the appellant was by no means shut out from taking part in the proceedings. The merits of her contentions had been fully considered at first instance and on appeal she filed a brief and was represented by counsel. When the issue of fugitive disentitlement was raised by the court she was able to file a brief relating to this issue. Moreover, it seems to me a material consideration that the US Court of Appeals found that she had been taking active steps to hide assets and transfer funds in an effort to evade the forfeiture judgment. I accordingly agree with the conclusion of Stanley Burnton J and the Court of Appeal that it would not be contrary to the interests of justice to register the judgment.

[31] I would therefore dismiss the appeal.
SENTENCING

Both volumes have included a variety of decisions on the principles of sentencing in corruption cases. The two cases included here both provide useful additional analysis. In Bush, issues such as the gross abuse of trust and the persistent nature of the conduct are seen as aggravating features. In Myatt the impact of a plea of guilty and the accused’s previous exemplary character are key considerations. In both cases, the sentences, relative to those of their respective co-accused are also an issue.

The court in Myatt also deals succinctly with the argument that the victim company, Snap on Tools, did not suffer loss when its products manager accepted large bribes from Myatt:

"There may have been no loss to Snap on Tools, but that is not the point in corruption cases. The loss here is that suffered by other potential suppliers deprived of the fair chance to compete in a free, fair and open market. The number of such potential losers and extent of their loss cannot be quantified. It is one thing to say Snap on Tools suffered no loss; it is quite another thing that both these men derived very large sums of personal benefit from their corrupt activities". (at para 15).

Corruption -- Council officer soliciting payments in return for placing company on list of approved contractors -- £40,000 received over six year period -- Length of sentence

Sentence -- Aggravating features -- Gross abuse of trust over a period of six years -- Effect on length of sentence

Co-accused -- Non-custodial sentence imposed -- Whether court should take this into account when considering length of sentence

R v BUSH

Court of Appeal (Criminal Division)
Gage and Cox, JJ

March 27, 2003

Cases referred to in the judgment
Bennett and Wilson [1996] 2 Cr App R (S) 162
Dearnley and Threapleton [2001] 2 Cr App R (S) 201
Foxy (1995) 16 Cr App R (S) 879
Wilcox (1995) 16 Cr App R (S) 197

For the appellant: A. Colman
GAGE, J

[1] On August 5, 2002, at the Central Criminal Court, this applicant was convicted of corruption, contrary to common law, and was sentenced to four years imprisonment. He renews his application for leave to appeal against sentence following refusal by the single judge. We grant leave.

[2] The facts are these. In about 1990 the appellant (as he now is) was working for the London Borough of Wandsworth. He approached a Mr Ringer who ran a company called Crosspath Ltd which repaired and installed heating systems and water treatment equipment. The two had become acquainted when Mr Ringer's company began to do work for the council. The appellant said that he could make things better for Mr Ringer: that he could put his company on the contracts list. This would allow the company to tender for larger jobs for the council. The appellant asked for payment of £100 a week to be sent to his home address in Surrey. Mr Ringer agreed and began to make the payments. The sentence passed by the recorder was on the basis that the appellant had received payments for a period of about six years from 1992 to 1998. During the course of that time he was the heating manager for the council. Acting in this capacity the appellant could not guarantee that Crosspath Ltd would be successful in tendering. The process was strictly regulated. He was able to nominate the company as one of those who were given the opportunity to tender. It did not appear that he had done this with any improper frequency.

[3] In addition to the regular weekly payments the appellant made other demands. On two occasions he asked for £1,000 in cash. Although Mr Ringer was unwilling and he told the appellant that he was getting greedy, he did make those payments. The appellant also asked Mr Ringer in around 1995 or 1996 to do some work at his home. Mr Ringer supplied goods and workmen. The work included the dismantling of a shed, the paving of an area, laying the foundation for a patio and some general decorating. Mr Ringer made no charge for that work.

[4] In addition, in about 1995 or 1996 a bathroom suite costing £2,453.70 was ordered in the name of Crosspath Ltd from a company in South London. Mr Ringer called the appellant and said that he did not have that money. The appellant told him to pay for it out of the firms account and that he would pay him back. The suite was ordered, but the appellant did not pay Mr Ringer back immediately. Mr Ringer stopped making his weekly payments. The appellant approached him to demand that they start again.

[5] In 1998 Mr Ringer called the appellant and told him that he could not continue with the payments; work had dried up. The company Crosspath Ltd was removed *688 from the Approved Contractors List at the council and because of lack of work it went into liquidation. The money for the bathroom suite was repaid to Mr Ringer in 1999 when he made a further request for repayment. The money was paid from a building firm who said that the appellant was a client of theirs.

[6] Over the period of six years the appellant obtained an additional income of about £5,000 a year. When all the other benefits are taken into consideration, the total benefit to the appellant was around £40,000. When he was interviewed on arrest he denied the offence.
[7] The victim of this offence, Mr Ringer, pleaded guilty on re-arraignement to corruption on August 8, 2002. On that date he was ordered to serve a community punishment order of 150 hours. He gave evidence for the prosecution at the trial of the appellant.

[8] The appellant is a man of good character. He is now aged 49. There were no reports before the court.

[9] The grounds of appeal put before us today are threefold. First, it is submitted that by reference to decisions of this Court the sentence of four years was manifestly excessive in relation to the level of corruption. Secondly, it is submitted that the sentence is wrong in principle because of the disparity between the sentence of four years and the non-custodial sentence passed upon Mr Ringer. Thirdly, it is submitted that in the course of argument when a submission that no prejudice to the public had been caused by this arrangement, the recorder said that that meant that the appellant had double-crossed Mr Ringer. It is submitted that that was an indication that a point of mitigation was not taken properly into account.

[10] In the course of his submissions Mr Colman has referred the Court to a number of decisions. It is right to point out that they are all decisions relating to offences under the Prevention of Corruption Act. The maximum sentence for the statutory offence is seven years. However, we have been told, and accept from Mr Colman, that the reason that the appellant was charged under the common law offence of corruption is because the prosecution did not think that the statutory offence would survive a submission based on Article 6 of the Human Rights Act, the point being that the statutory offence of corruption reverses the burden of proof. Accordingly it is submitted to us, and we accept, that we should deal with this matter on no different basis than those decisions that relate to statutory corruption.

[11] The highest sentence passed appears to be in Foxly (1995) 16 Cr App R (S) 879. In that case a public servant received a sentence of four years’ imprisonment. The differences from this case are stark: the sum involved in Foxly was £2 million; the corrupt conduct had continued over a number of years; the sentencing judge stated that he would have set a starting point at six years but for the age and poor health of Mr Foxly; his appeal against a sentence of seven years was dismissed.

[12] Mr Colman has referred the Court to a number of other cases. We have looked at Wilcox (1995) 16 Cr App R (S) 197, Bennett and Wilson [1996] 2 Cr App R (S) 162, and Dearnley and Threapleton [2001] 2 Cr App R (S) 42. It has been submitted to us that a number of factors can be drawn from those decisions: first, that the pattern of sentencing for the sort of sums involved in the case before us is lower than four years; secondly, that the absence of prejudice to the public is a factor to be taken into account; thirdly, that in relation to a number of these decisions the amounts received were similar, albeit received over a shorter period of time.

[13] In this case the appellant solicited the bribes. His corrupt conduct persisted over a period of six years. It represented on any view a gross abuse of trust of his position as a public servant and was motivated by greed. Although the sums received were not as substantial as in some cases, it is the persistent conduct which is an aggravating feature of this case. However, on the
other side, the fact is that the sentence of four years was, on the decisions that we have been referred to, right at the top of the scale. In addition, we do not think it right totally to discount the sentence passed upon Mr Ringer. True it is that he was in a wholly different position. He pleaded guilty. His involvement was plainly much less than that of the appellant and he gave evidence for the prosecution against the appellant.

[14] However, there is a substantial difference between a non-custodial sentence and a sentence of four years. Taking all these factors into account, in our judgment the sentence of four years’ imprisonment was excessive, and manifestly excessive. In our judgment, the appropriate sentence for this conduct is two-and-a-half years imprisonment. Accordingly, we quash the sentence of four years and substitute for it a sentence of two-and-a-half years.

[15] In this particular case we have granted leave to appeal. The appellant is not present. He has the right to attend and to make further representations to the Court. We give him no encouragement to do so. The appeal will be allowed and the order for the sentence of two-and-a-half years will stand unless within seven days from today the appellant notifies the court that he wishes to be here in person to conduct his appeal.
Corruption -- Payment of £700,000 to products manager of an international company in return for contracts -- Length of sentence

Sentence -- Mitigating factors -- Plea of guilty and accused of previous exemplary character -- Effect on length of sentence

R v MYATT and WINKLES

Court of Appeal (Criminal Division)
Mr Justice David Clarke and His Honour Judge Brodrick

January 27, 2004

Cases referred to in the judgment
Bennett and Wilson (1996) 2 Cr App R (S) 879
Foxley (1995) 16 Cr App R (S) 879

For the appellants: Andrew Fisher

MR JUSTICE DAVID CLARKE:

[1] On 23rd May 2003 in the Crown Court at Northampton the appellants pleaded guilty and were sentenced as follows: the appellant Myatt to three years' imprisonment for a single offence of corruption, the appellant Winkles, to four years' imprisonment for a single count of corruption. Each of them was also disqualified from being a company director pursuant to section 2 of the Company Directors Disqualification Act 1986 for a period of seven years. They appeal against sentence by leave of the single judge.

[2] The facts, in summary form, are these. Snap on Tools Ltd are a major international company based in the United States who sell tools in this country through franchised dealers. They both manufacture and supply their own brand tools, but they also purchase tools from other suppliers for resale under their own label, Blue Point. The appellant Winkles began his employment with that company in 1995 and in the following year he became products manager, responsible for securing the production and sourcing of products for resale under the Blue Point label. Because of the profile of the company and the high profit margins, there was great competition between companies to secure contracts to supply products to Snap on Tools. The appellant Myatt was a businessman who, through Winkles, secured contracts to supply to Snap on Tools very substantial amounts of products. In return for that -- and here lie the offences of corruption committed by these men -- Winkles received large payments of cash from Myatt. In order to supply and source the many different products involved, Myatt created three separate companies: Teambar Promotions Ltd, Precision Equipment Supplies Ltd and Essential Industrial Supplies Ltd.
[3] The criminal investigation was preceded by civil proceedings, in which Snap on Tools alleged fraud and unlawful profiteering based on an allegation of systematic overpricing. This led in due course to the prosecution of these two men for conspiracy to defraud and, in Myatt’s case, false accounting. On the day of trial, after extensive investigation and reports by forensic accountants, it was accepted that the allegation of overpricing was not sustainable, and the further counts of corruption were added to the indictment, count 5 against Myatt and count 6 against Winkles.

[4] The case before the court was that, between September 1997 and April 2001, Winkles corruptly received from Myatt sums totalling over £700,000. That was reflected in the two single counts to which we have just referred: count 5 against Myatt for corruptly giving that consideration exceeding £700,000 to Winkles; count 6 against Winkles for corruptly accepting it.

[5] That money was paid into five different bank accounts, four of which were in business names, one of those being South Coast Charter. There was evidence that Winkles, whose salary was £36,000 per annum, was living well above his means. In that period, he purchased three Mercedes cars, a Mitsubishi car, a Porsche motorcar, two yachts, jewellery and luxury items. In return, Myatt gained for his companies the security of continuous business and profits. His companies paid no salaries or dividends, but it was calculated that in the relevant period Myatt’s share of the profits exceeded £913,000.

[6] When interviewed on 13th March 2001, Winkles made no comment. He was interviewed again some four months later, when he gave an explanation related to a man called McGee, who, he said, wanted to purchase a substantial share of South Coast Charter and the purchase money was coming to him through Myatt’s companies to hide it from McGee’s wife with whom McGee was going through divorce proceedings. It was put to him that accountants’ records made no reference to money coming from McGee, but Winkles made no comment.

[7] Myatt was interviewed on 22nd November 2001. He denied that any payments made to Winkles were dishonest. He claimed that they were for hire of boats and fees for surveying businesses that he may wish to purchase. Where there was no invoice, he offered an explanation of him owing money to McGee. McGee did not want his wife to know about the money and thus the money was paid to Winkles as an investment in Winkles’ business ventures.

[8] Myatt is a man of previous good character. There was before the court a substantial bundle of character references and testimonials, which we have read. Winkles, however, had, many years before, in 1982, a previous conviction for theft from his employers, for which he had received four years’ imprisonment.

[9] The learned judge passing sentence first addressed Winkles, pointed out that he was in a position of considerable trust with Snap on Tools, added that he bore in mind the basis of the plea and the mitigation, particularly that no loss could be proved by the prosecution to the company, and went on:
“Common sense tells us that payments of that order from your co-defendant would never have been made if very substantial benefit was not expected from such a corrupt relationship.”

He went on:

“Quite sophisticated devices were employed to conceal this corruption from your employers and others. You yourself set up companies to receive these very large sums. You then embarked on a lavish lifestyle, purchase of a yacht for £250,000; luxury cars.”

He then referred to the previous conviction and went on to pass the sentence to which we have referred.

[10] In the course of his remarks he also mentioned the case of Bennett and Wilson (1996) 2 Cr App R (S) 879, which had been referred to by counsel, but he pointed out:

“That is a wholly different case where all that was involved was the loan of two cars for a limited period of time.”

He then passed sentence on Myatt, referring to his previous good character and the references, and the amount of corrupt payments of over £700,000 that were made. He added:

“You concealed these payments by a quite sophisticated system of companies and bogus invoices.

You were playing for very high stakes here. The corrupt relationship enabled you to do some £4.8 million of business with Snap on Tools from which you obtained a very considerable benefit. It appears that you were sharing the profits equally between you and Mr Winkles. Such a relationship strikes at the heart of fair and free commercial enterprise.”

He went on to refer to good character once again and the effects of the sentence on Myatt’s family, but he went on to pass the sentence of three years’ imprisonment.

[11] On behalf of both men it has been cogently and economically argued by Mr Fisher, who now appears for both, that the sentences imposed by the learned judge were manifestly excessive; that they were completely out of scale with proper sentences for these offences; that there was no loss to Snap On Tools once the allegation of overpricing was abandoned; that the appellants were sentenced as though they had defrauded the company of the very large sums involved; and that they had not stolen anything. On behalf of Winkles, it is said that it was not his job to make purchasing decisions, but to find sources of supply, which he did very successfully. Many of the products obtained through Myatt’s companies were at lower prices or of better quality, or both, than those available elsewhere. It is urged upon us, further, that this was not corruption in public office and that no public money was involved, and both men have suffered very substantially arising from this conduct. Judgment has been obtained against them for recovery of the money unlawfully obtained and both have surrendered their assets and been
declared bankrupt. Both had the matter hanging over them for two years before sentence was passed. They would have been ready to admit corruption from a much earlier stage so long as it was not on the basis of overpricing and fraud on the company. So it is said that they should not be deprived of substantial credit for their pleas of guilty on account of them being entered at the date of trial. The judge pitched the level of sentencing, it is said, altogether too high. Counsel for Winkles described it in his written grounds as “completely out of scale”.

[12] On behalf of Myatt, very substantial evidence of his good character and standing was before the court. He had raised substantial sums for charity and community activities, but also took an active part, in that he and his wife had been foster parents to a succession of children who were difficult to place. He has a particularly close relationship with his young son.

[13] We have been referred to two decisions which it could be said are at opposite end of the scale. In Foxley (1995) 16 Cr App R (S) 879, the sentencing judge’s sentence of four years’ imprisonment was upheld. This was a case of a public servant convicted by the jury of corruptly receiving very large sums of over £2 million in connection with Ministry of Defence contracts. The judgment shows that that would have been a sentence of six years but for particular mitigating factors related to the age of the appellant in that case, his state of health and other particular mitigation. It is noticeable that in that case the arguments in mitigation are echoed in the present case, in that there was no actual loss to the Ministry of Defence since there was no suggestion there of inferior goods or excessive prices.

[14] At the other end of the scale, reference was made to Bennett and Wilson, in which a sentence of nine months was reduced to four months. But this is of very little weight when one sees that the corruptly given benefits were trivial by comparison with the present case. It was a case involving the loan of two company cars to a civil servant. There was in that case a three-year delay before the institution of proceedings, which the court took into account.

[15] In our judgment the judge here was completely right when he spoke of “conduct striking at the heart of free and fair commercial enterprise”. There may have been no loss to Snap on Tools, but that is not the point in corruption cases. The loss here is that suffered by other potential suppliers deprived of the fair chance to compete in a free, fair and open market. The number of such potential losers and extent of their loss cannot be quantified. It is one thing to say Snap on Tools suffered no loss; it is quite another thing that both these men derived very large sums of personal benefit from their corrupt activities.

[16] It seems to us that the only question is whether, in the light of the pleas of guilty, the saving of court time and other mitigating factors, the judge pitched his level of sentencing too high. We are persuaded that, by comparison with Foxley’s case, he did, but we take the Foxley starting point as six years rather than four, in the light of the age and health factors which applied in his case. Foxley, however, did not plead guilty; these defendants did. The amount involved, though very large, was very much less large than in his case, and we are not here dealing with a public servant and public money. Taking all these factors into consideration, we have reached the conclusion that these sentences were too high and should be reduced. In the case of Winkles, we quash the sentence of four years and substitute a sentence of three years’ imprisonment. In Myatt’s case, we quash the sentence of three years and substitute two years. This preserves
the disparity between the two appellants, marking the previous exemplary character of Myatt and the personal mitigation in his case. It may be noticed by some that to reduce the sentences in this way has the effect of increasing the amount of disparity. However, Myatt will remain, as we shall mention in a moment, subject to the continuing burden of the company directors disqualification order which is an important feature of the sentence in this case.

[17] He did not seek leave to appeal against the company directors disqualification order. It seems to us that he had no basis for appealing against it. Mr Fisher, who has taken over conduct of his case in the light of the order of the single judge that the one counsel should appear both, has urged that the length of that disqualification is too long and should be considered by this court, not a matter on which leave is granted.

[18] We have, however, considered that argument on its merits. We reject it, having regard to the wide-scale dishonest conduct of the affairs of the companies controlled by Myatt as disclosed by the facts of this case. That seven-year disqualification stands.

[19] Winkles appeals against the order in his case. He is on firm ground in arguing that his offences were not committed in connection with the promotion, formation, management or liquidation of a company and he was therefore not within section 2(1) of the Act to which we have referred. It seems to us that he, not having been a director, nor involved in the management of a company, the court did not have jurisdiction to make the order in his case, and it must therefore be quashed.

[20] The appeals against sentence are accordingly allowed to the extent indicated in this judgment.
CUMULATIVE SUBJECT INDEX FOR VOLUME 2

ADMINISTRATIVE LAW

Application for judicial review -- Order 53 -- Powers of the High Court -- Admissibility of viva voce evidence -- Basic principles to be applied
Chiluba v Attorney General
Supreme Court of Zambia (2003) Issue 4 p.43

Judicial review -- Application for orders of certiorari and mandamus -- Circumstances when such orders can be made
Chiluba v Attorney General
Supreme Court of Zambia (2003) Issue 4 p.43

Rules of statutory construction -- Literal rule -- Circumstances when court may adopt a different construction
Poswa v Member of the Executive Council responsible for Economic Affairs Environment and Tourism
Supreme Court of Appeal of South Africa (2001) Issue 5 p.5

Statutory interpretation -- Public Service Act -- Prohibition on spouse of "public servant" being member of gaming board -- Meaning of "public servant" -- Whether ordinary meaning to be attached to "public servant"
Poswa v Member of the Executive Council responsible for Economic Affairs Environment and Tourism
Supreme Court of Appeal of South Africa (2001) Issue 5 p.5

Statutory interpretation -- Ambiguity in anti-corruption statute -- Whether court may look at the legislative history of a statute to aid interpretation
United States of America v Kay and Murphy
United States Court of Appeals, Fifth Circuit (2004) Issue 4 p.4

Statutory interpretation -- Whether court should adopt a liberal construction of anti-corruption legislation
Special Investigating Unit v Nadasen
Supreme Court of South Africa (2001) Issue 1 p.24

Statutory interpretation -- Ambiguity in anti-corruption statute -- Whether appropriate for court to consider title of statute to help resolve ambiguities
United States of America v Kay and Murphy
United States Court of Appeals, Fifth Circuit (2004) Issue 4 p.4

Whistleblowing -- Application for a protection visa - review of decision of Refugee Review Tribunal -- Consideration of circumstances in which exposure of corruption or "whistleblowing" can give rise to a well founded fear of political persecution -- Whether the material and evidence before the Tribunal raised a case of political persecution
Zheng v Minister for Immigration & Multicultural Affairs
CONSTITUTIONAL LAW

Constitutional Law -- "Overbreadth" of provision -- Meaning of concept
*Poswa v Member of the Executive Council responsible for Economic Affairs Environment and Tourism*
Supreme Court of Appeal of South Africa (2001)  
Issue 5 p.5

Constitutionality of the appointment of a serving judge to head an anti-corruption commission
*South African Association of Personal Injury Lawyers v Heath & Others*  
(Constitutional Court of South Africa, 2000)  
Issue 1 p.7

Freedom of expression -- Scope of the right -- Constitution of Grenada, section 10 -- Criminal libel -- Criminal Code of Grenada, section 252(2) -- Whether crime of libel inconsistent with constitutional right to freedom of expression -- Principles of interpretation to be adopted
*Worme and Grenada Today Limited v Commissioner of Police*
Judicial Committee of the Privy Council (2004)  
Issue 4 p.65

Presumption of innocence -- Burden of proof -- Whether prosecution to prove publication of the defamatory matter made "unlawfully" -- Constitution of Grenada, section 8(2)
*Worme and Grenada Today Limited v Commissioner of Police*
Judicial Committee of the Privy Council (2004)  
Issue 4 p.65

Parliament -- Scope of power to lift immunity from prosecution on former president for alleged corruption -- Constitution of Zambia, article 43(3)
*Chiluba v Attorney General*
Supreme Court of Zambia (2003)  
Issue 4 p.43

Parliament -- Whether court may review decision of the National Assembly to remove the immunity from prosecution of a former president -- Section 34 National Assembly (Powers and Privileges) Act
*Chiluba v Attorney General*
Supreme Court of Zambia (2003)  
Issue 4 p.43

Right to be heard -- Whether article provides right for former president to be heard by the National Assembly -- Constitution of Zambia, article 43(3)
*Chiluba v Attorney General*
Supreme Court of Zambia (2003)  
Issue 4 p.43

Search and seizure -- Power to authorise search and seizure warrants for purposes of a "preparatory investigation" -- Whether power contravened constitutional right to privacy - Principles of constitutional interpretation to be applied
*Investigating Directorate: Serious Economic Offices v Hyundai and Another*
Constitutional Court of South Africa (2000)  
Issue 2 p.48

Whether court may review the decision of the National Assembly to remove the immunity from prosecution of a former president -- Section 34 National Assembly (Powers and Privileges) Act
*Chiluba v Attorney General*
Supreme Court of Zambia (2003)  
Issue 4 p.43

Whether provision reasonable and justifiable in an open and democratic society -- Constitution of South Africa, section 36(1)
*Poswa v Member of the Executive Council responsible for Economic Affairs Environment and Tourism*
**CRIMINAL LAW**

**Bribery -- Representation agreement -- Factors to be considered when determining genuineness of agreement**
*Acres International v The Crown*
Court of Appeal of Lesotho (2003)  
Issue 3 p.44

**Bribery -- Representation agreement -- Factors to be considered when determining genuineness of agreement**
*Lahmeyer International GmbH v The Crown*
Court of Appeal of Lesotho (2003)  
Issue 3 p.70

**Corruption -- "Any agent who accepts any advantage on account of his showing or having shown favour or disfavour to any person in relation to his principal's affairs or business" -- Whether phrase covers acceptance of past favours -- Prevention of Corruption Ordinance section 9(1)(b)**
*Launder v HKSAR*
Hong Kong Court of Final Appeal  
(2001)  
Issue 5 p.27

**Corruption -- Whether offence involves element of dishonesty**
*The Queen v Leolahi*
(Court of Appeal of New Zealand, 2000)  
Issue 1 p.63

**Criminal libel -- Constitutionality of offence**
*Worme and Grenada Today Limited v Commissioner of Police*
Judicial Committee of the Privy Council (2004)  
Issue 4 p.65

**Evidence -- Admissibility -- Evidence of payments by other contractors to intermediary -- Whether evidence against the appellant**
*Lahmeyer International GmbH v The Crown*
Court of Appeal of Lesotho (2003)  
Issue 3 p.70

**Jurisdiction of court to entertain the appeal -- Constitution of Niue, article 55A(2)(d)**
*Lakatini v The Police*
Court of Appeal of Niue (1995)  
Issue 5 p.41

**Mens rea -- Offence of "corrupt use of official information" -- Whether accused must know the information obtained "in a criminal manner"**
*The Queen v Leolahi*
Court of Appeal of New Zealand, 2000  
Issue 1 p.63

**Misdirection by trial judge -- Failure of defence to object to directions at the trial -- Whether a bar to an appeal**
*Launder v HKSAR*
Hong Kong Court of Final Appeal  
(2001)  
Issue 5 p.27

**Offence of official corruption -- Scope of phrase "holder of any office … in the service of Her Majesty" -- Whether an Assemblyman or a Minister is "in the service of Her Majesty" -- section 180 Niue Act 1966**
*Lakatini v The Police*
Court of Appeal of Niue (1995)  
Issue 5 p.41
Presumption of innocence -- Burden of proof -- Whether prosecution to prove publication of the defamatory matter made "unlawfully" -- Constitution of Grenada, section 8(2)
*Worome and Grenada Today Limited v Commissioner of Police*
Judicial Committee of the Privy Council (2004)  
Issue 4 p.65

Right to freedom of expression -- Scope of the right -- Whether crime of libel inconsistent with constitutional right to freedom of expression -- Principles of interpretation to be adopted -- Constitution of Grenada, section 10 -- Criminal Code of Grenada, section 252(2)
*Worome and Grenada Today Limited v Commissioner of Police*
Judicial Committee of the Privy Council (2004)  
Issue 4 p.65

Scope of the offence bribery of foreign public officials -- Meaning of the phrase "in order to assist in obtaining or retaining business" -- Whether offence extended to bribing customs officials for purposes of reducing customs duties and sales taxes -- Foreign Corrupt Practices Act
*United States of America v Kay and Murphy*
United States Court of Appeals, Fifth Circuit (2004)  
Issue 4 p.4

Sentence -- Appropriate procedure for determining sentence for corporation
*Lahmeyer International GmbH v The Crown*
Court of Appeal of Lesotho (2003)  
Issue 3 p.70

"State official" -- Meaning of -- Whether includes public officer seconded to a statutory body
*Sole v The Crown*
Court of Appeal of Lesotho (2003)  
Issue 3 p.11

Voters -- Acceptance of bribe from parliamentary candidate -- When act constitutes criminal liability
*Ah Him v Amosa*
Supreme Court of Samoa (2001)  
Issue 1 p.46

**ELECTORAL MALPRACTICE**

Electors -- Acceptance of bribe from parliamentary candidate -- When criminal liability established
*Ah Him v Amosa*
Supreme Court of Samoa (2001)  
Issue 1 p.46

Gifts -- Presenting gifts to supporters by parliamentary candidate -- When a corrupt practice
*Ah Him v Amosa*
Supreme Court of Samoa (2001)  
Issue 1 p.46

**EVIDENCE AND PROCEDURE**

Admissibility -- Evidence of payments by other contractors to intermediary -- Whether evidence against the appellant
*Acres International v The Crown*
Court of Appeal of Lesotho (2003)  
Issue 3 p.44

Application to re-open defence case -- Applicable principles
*Sole v The Crown*
Court of Appeal of Lesotho (2003)  
Issue 3 p.11
Burden of proof -- Criminal libel -- Presumption of innocence -- Whether prosecution to prove publication of the defamatory matter made "unlawfully"
*Worme and Grenada Today Limited v Commissioner of Police*
Judicial Committee of the Privy Council (2004) Issue 4 p.65

Circumstantial evidence -- Rule in *R v Blom* -- Principles of inferential reasoning -- When to be applied
*Sole v The Crown*
Court of Appeal of Lesotho (2003) Issue 3 p.11

Corroboration -- Whether recipient of bribe can corroborate the evidence of another bribee
*Ah Him v Amosa*
Supreme Court of Samoa (2001) Issue 1 p.46

Disclosure of evidence to defence -- Application by defence for disclosure of documents -- Alleged failure to receive all relevant documents -- Whether a miscarriage of justice -- Principles to be applied
*The Queen v Dawson*
Court of Appeal of New Zealand (2004) Issue 4 p.33

Expert witness -- Refusal of the trial judge to permit accused to call expert witness -- Whether constituting a misdirection
*Sole v The Crown*
Court of Appeal of Lesotho (2003) Issue 3 p.11

Indictment -- Retrospective operation and constitutionality -- Criminal Procedure and Evidence (Amendment) Act 2001
*Sole v The Crown*
Court of Appeal of Lesotho (2003) Issue 3 p.11

Investigation undertaken by private individual -- Whether police under an obligation to ensure impartial and objective assessment of the evidence before commencement of criminal proceedings
*The Queen v Dawson*
Court of Appeal of New Zealand (2004) Issue 4 p.33

Jurisdiction -- No evidence that corrupt agreement made in Lesotho -- Whether jurisdiction established where the harmful effect occurred within Lesotho -- Evidence required to prove harmful effect
*Sole v The Crown*
Court of Appeal of Lesotho (2003) Issue 3 p.11

Loss of evidence by prosecution -- Approach to be taken by the court -- Duty placed on prosecution to provide explanation
*The Queen v Dawson*
Court of Appeal of New Zealand (2004) Issue 4 p.33

Right to silence -- Evidential value -- Whether drawing of an adverse inference from silence of accused unconstitutional
*Sole v The Crown*
Court of Appeal of Lesotho (2003) Issue 3 p.11
Right to remain silent -- Applicant summoned for questioning by National Prosecuting Authority into allegations of corruption -- Constitutionality of power to question any person believed able to furnish any information -- National Prosecuting Authority Act 32 of 1998
Shaik v Minister of Justice and Constitutional Development and Others
Constitutional Court of South Africa (2003) Issue 5 p.48

Search warrant -- Scope of statutory powers of Independent Commission Against Corruption to issue a search warrant
Commissioner of the Independent Commission Against Corruption v Ch'ng Poh
Judicial Committee of the Privy Council (1997) Issue 1 p.41

Search and seizure powers -- Power to authorise search and seizure warrants for purposes of a "preparatory investigation" -- Whether power contravened constitutional right to privacy - Principles of constitutional interpretation
Investigating Directorate: Serious Economic Offices v Hyundai and Others
Constitutional Court of South Africa (2000) Issue 2 p.48

INDICTMENT

Sufficiency of indictment -- Crown unable to supply detailed information about time and place of corrupt bargain
Sole v The Crown
Court of Appeal of Lesotho (2003) Issue 3 p.11

Sufficiency of indictment -- Whether indictment needs to go further than "tracking" the language of the statute -- Foreign Corrupt Practices Act
United States of America v Kay and Murphy
United States Court of Appeals, Fifth Circuit (2004) Issue 4 p.4

INSOLVENCY

Authority to institute proceedings -- Striking out of new matter in replying affidavit deemed to have been received for employer
Ganes & Ganes v Telecom Namibia Limited
Supreme Court of Appeal of South Africa (2003) Issue 5 p.63

Bribes or secret commissions received by employee in course of employment -- Whether deemed to have been received for employer
Ganes & Ganes v Telecom Namibia Limited
Supreme Court of Appeal of South Africa (2003) Issue 5 p.63

JURISDICTION

Jurisdiction -- No evidence that corrupt agreement made in Lesotho -- Whether jurisdiction established where the harmful effect occurred within Lesotho -- Evidence required to prove harmful effect
Sole v The Crown
Court of Appeal of Lesotho (2003) Issue 3 p.11

MUTUAL ASSISTANCE

Mutual assistance request to Canada from Russia to obtain documents in pursuance of a corruption investigation -- Whether documents could be sent in the following circumstances: (a) where they were not specifically referred to in the request; (b) where the documents might
relate to offences that were the subject of an amnesty order in the requesting state; (c) where some documents were or may not be not relevant to the investigation

In re Pokidyshhev and Rodionov
Court of Appeal for Ontario (1999) Issue 2 p.34

Effect of failure by requesting country to specify type of legal assistance required

In re Pokidyshhev and Rodionov
Court of Appeal for Ontario (1999) Issue 2 p.34

ORGANISATION AND POWERS OF ANTI-CORRUPTION COMMISSIONS

Appointment of a serving judge to head an anti-corruption commission -- Whether constitutional

South African Association of Personal Injury Lawyers v Heath & Others
Constitutional Court of South Africa (2000) Issue 1 p.7

Statutory interpretation of anti-corruption legislation -- Whether court should adopt a liberal construction

Special Investigating Unit v Nadasen
Supreme Court of South Africa (2001) Issue 1 p.24

Search warrant -- Scope of statutory powers of Independent Commission Against Corruption to issue a search warrant

Commissioner of the Independent Commission Against Corruption v Ch’ng Poh
Judicial Committee of the Privy Council (1997) Issue 1 p.41

PROCEEDS OF CRIME

Proceeds of crime -- Respondent applying fugitive disentitlement doctrine and seeking to register foreign restraint order in England -- Whether contrary to the interests of justice to do so -- Whether contrary to the right to a fair trial to do so -- Test to be applied

Government of the United States of America v Barnette and Another
House of Lords (2004) Issue 5 p.72

Right to a fair trial -- European Convention on Human Rights, article 6 -- Whether article 6 protection applicable to enforcement of foreign judgment made in non-convention State

Government of the United States of America v Barnette and Another
House of Lords (2004) Issue 5 p.72

SENTENCING

Co-accused -- Non-custodial sentence imposed -- Whether court should take this into account when considering length of sentence

R v Bush
Court of Appeal (Criminal Division)(2003) Issue 5 p.85

Corporation -- Appropriate procedure for determining sentence

Acres International v The Crown
Court of Appeal of Lesotho (2003) Issue 3 p.44

Corruption -- Payment of £700,000 to products manager of an international company in return for contracts -- length of sentence

R v Myatt and Winkles
Court of Appeal (Criminal Division)(2004) Issue 5 p.89
Deterrent sentence -- Need to take into account both aggravating and mitigating features
_Acres International v The Crown_
Court of Appeal of Lesotho (2003) Issue 3 p.44

Deterrent sentence -- Senior customs official pleading guilty to corruption -- Need for deterrent sentence -- Whether custodial sentence appropriate -- High level of trust and systematic course of corruption as aggravating factors -- Effect of failure of trial judge to address expressly the mitigating factors
_The Queen v Nua_
Court of Appeal of New Zealand (2001) Issue 2 p.68

Mitigating factors -- plea of guilty and accused of previous exemplary character -- effect on length of sentence
_R v Myatt and Winkles_
Court of Appeal (Criminal Division)(2004) Issue 5 p.89

Sentence -- Aggravating features -- Gross abuse of trust over a period of six years -- Effect on length of sentence
_R v Bush_
Court of Appeal (Criminal Division)(2003) Issue 5 p.85

Sentence -- Council officer soliciting payments in return for placing company on list of approved contractors -- £40,000 received over six year period -- Length of sentence
_R v Bush_
Court of Appeal (Criminal Division)(2003) Issue 5 p.85

Use of concurrent and consecutive sentences on different counts -- When appropriate
_Sole v The Crown_
Court of Appeal of Lesotho (2003) Issue 3 p.11

**STATUTORY CONSTRUCTION**

Ambiguity in anti-corruption statute -- Whether court may look at the legislative history of a statute to aid interpretation
_United States of America v Kay and Murphy_
United States Court of Appeals, Fifth Circuit (2004) Issue 4 p.4

Ambiguity in anti-corruption statute -- Whether appropriate for court to consider title of statute to help resolve ambiguities
_United States of America v Kay and Murphy_
United States Court of Appeals, Fifth Circuit (2004) Issue 4 p.4

Literal rule -- Circumstances when court may adopt a different construction
_Poswa v Member of the Executive Council responsible for Economic Affairs Environment and Tourism_
Supreme Court of Appeal of South Africa (2001) Issue 5 p.5

Principles of constitution interpretation -- Right to freedom of expression -- Scope of the right -- Whether crime of libel inconsistent with constitutional right to freedom of expression -- Constitution of Grenada, section 10 -- Criminal Code of Grenada, section 252(2)
_Worme and Grenada Today Limited v Commissioner of Police_
Judicial Committee of the Privy Council (2004) Issue 4 p.65
Whether court should adopt a liberal construction of anti-corruption legislation
Special Investigating Unit v Nadasen
Supreme Court of South Africa (2001) Issue 1 p.24

WORDS AND PHRASES

Scope of phrase "holder of any office ... in the service of Her Majesty"-- Whether an Assemblyman or a Minister is "in the service of Her Majesty"
Lakatini v The Police
Court of Appeal of Niue (1995) Issue 5 p.41

"Public servant" -- Public Service Act -- Prohibition on spouse of "public servant" being member of gaming board -- Meaning of "public servant" -- Whether ordinary meaning in the Public Service Act to be attached to "public servant"
Poswa v Member of the Executive Council responsible for Economic Affairs Environment and Tourism
Supreme Court of Appeal of South Africa (2001) Issue 5 p.5

"State official" -- Meaning of -- Whether includes public officer seconded to a statutory body
Sole v The Crown
Court of Appeal of Lesotho (2003) Issue 3 p.11

Meaning of the phrase "in order to assist in obtaining or retaining business"
United States of America v Kay and Murphy
United States Court of Appeals, Fifth Circuit (2004) Issue 4 p.4