

THE STATE

v

TRANSPORT CONTROL BOARD

ex parte

SHORE BUSES LIMITED

[HIGH COURT, 1995 (Pathik J), 19 December]

Revisional Jurisdiction

Judicial Review—an interim stay order may be granted in cases of especial urgency even before leave to move for judicial review has been obtained—Rules of the High Court 1988 Order 53.

Leave to move for judicial review already having been granted the interested party moved to have a stay which had been granted before leave had been obtained set aside. HELD: In cases of urgency the Court has power to make an interim stay order before leave has been granted but in the circumstances continuance of the stay was not justified.

Cases cited:

American Cyanamid Co. v Ethicon [1975] AC 396

R v Secretary of State for the Home Department

ex parte Turkoglu [1988] QB 398

Reddy's Enterprises Limited v. Governor of The Reserve Bank of Fiji (Civ. App. No. 67 of 1990).

Regina v Secretary of State for Transport ex parte Factortame Ltd & Others No. 2 [1990] 1 WLR 818

The Emperor Gold Mining Co. Ltd v The Commission of Inquiry
Civ Action No. 15/1995L

Interlocutory application in the High Court

H. Nagin for the Applicant

M. Raza for the second Respondent

G Pathik J:

By a Motion inter partes dated 8 December 1995 the Interested Party Waiqanake Transport Co Ltd had applied to Court for orders:

- (a) that Waiqanake Transport Co Ltd be joined as an Interested Party to the present proceedings; and

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- (b) for a further order that the stay granted on the 5th day of December 1995 be discharged and/or vacated.

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The above application was heard by me on 13 December 1995. I think I should mention at this stage that after I had written the Decision in this case my attention was drawn on 15th December to the Affidavits of Service (of leave application) filed in the Court Registry on 14th December. The service on the Second Respondent was effected by registered post on 6 December. Had the Affidavit of Service been filed by 13th, when I heard the motion, I would have considered the leave application then.

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Be that as it may, in the present situation I will consider the leave and motion together under the provisions of O. 53 r. 3.

The (a) above was not required to be considered as Mr. Raza was made aware that Waiqanake Transport Co Ltd (WTCL) had already been joined in the Application for Leave to Apply for Judicial Review filed on 4 December 1995. The WTCL was ignorant of this as it had not up to the time of filing its motion received any of the papers and documents herein nor did it receive them even up till the hearing of this Motion according to its counsel.

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That leaves (b) above and leave application for my consideration.

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Mr. Raza submits that in law the interim stay Order, albeit until the hearing of the leave application, should not have been granted. He refers the Court to O. 53 r.8 which under the caption "Application for discovery, interrogatories, cross-examination etc", states, inter alia:

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- "8(1) The Court may hear any interlocutory application in proceedings in an application for judicial review."

He suggests that no interlocutory application should be made until leave is granted (underlining mine for emphasis) and he refers the Court to a passage in Lyons J's decision in The Emperor Gold Mining Co. Ltd v. The Commission of Inquiry (Civ. Action No. 15/1995L) where his Lordship stated, with reference to the principle in Regina v Secretary of State for Transport ex parte Factortame Ltd & Others No.2 [1990] 1 WLR 818, that:

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"in applications for leave, other interim steps cannot be taken until such time as leave has been granted. The rationale behind this of course is that until leave has been given to commence an action, the action as such is a non-entity and consequently no other interim or interlocutory proceedings within that action can take place until the action has some substance."

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- A For these and other reasons on which Mr. Raza elaborated in his submissions he submits that the Court should not have made the interim Order for stay before leave was granted. He is now asking the Court to discharge and/or vacate its order of 5 December 1995.

B At the outset I must state that it was well within the powers of the Court to make the Order at the stage at which it did make for the reasons hereafter appearing.

- C On my interpretation of O. 53 r. 3(8)(a) it was permissible for the applicant to apply by motion for an order for stay for the said Rule does say that "where leave to apply for judicial review is granted" "...and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates ...". Since the motion for stay was filed the Court could not ignore it and it had to be considered at the appropriate stage; the Court on the facts before it in its discretion decided to hear it *ex parte* before hearing the leave application for the reasons stated hereafter, and after hearing made an interim order for stay only "until the hearing and determination of the Application for Leave to apply for a Judicial Review". The most compelling reason to do so was the Transport Control Board's letter of 4 December 1995 which required the parties to attend a meeting with the Secretary to "work out a compromised timetable to operate" on the approved route. In view of the fact that it would only be after a few days that the Court would be considering the leave application and the question of stay, it decided in its discretion to make the said order.

- E In the procedure adopted by me I have the support in the following passage which I quote from the book Judicial Review by Superstone and Goudie (1992) under the caption "Interlocutory Injunctions and Stays" at p.363:

F "The White Book suggests that a judge could grant interim relief before granting leave in an especially urgent case (*sed quaere*). (The approach of Donaldson MR to pending proceedings in R v Secretary of State for the Home Department, ex parte. Turkoglu [1988] QB 398 at p.401D might be relevant to this issue)"

- G As I stated earlier this was a case of special nature where interim relief should have been granted for a limited period. This point was discussed in Ex p Turkoglu (*supra*) and it does not support Mr. Raza's contention. The stay application was ancillary to the leave application and not a stay application *in vacuo*. I find the following passage from the judgment of Donaldson M.R. in Turkoglu (*supra*) at p.401 apt in this case thus enabling the applicant to apply as it did:

"In my judgment you cannot apply to the High Court for bail

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unless the High Court is seised of some sort of proceeding. It may be seised of an application for leave to apply for judicial review or it may be seised of the substantive application. So long as it is seised of either of those applications, you can apply to the High Court and the court can grant or refuse bail.

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If leave to apply is granted, then that application immediately becomes merged in the substantive application. So there is a continuous underlying proceeding of which the High Court is seised and no problem arises. If the application for leave to apply is adjourned, the High Court is still seised of the application."

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I would like to refer to the following useful passage on the question of "*interim relief*" from the book *Textbook on Administrative Law* by Leyland, Woods and Harden (1994) p.313 which could be borne in mind in considering an application of the nature before the Court for interim relief:

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18.3.1.1 Interim relief. As soon as an injunction is granted, it has the immediate effect of protecting a person's rights. Interim (interlocutory) injunctions in particular may be granted *ex parte* (by virtue of the plaintiff's application in the absence of the other party) and it will be obvious that interim relief of this kind is particularly appropriate in certain circumstances. If, for example, a decision has been taken that will result in a person being deported, a TV programme being broadcast, or a building being demolished. In any of these situations, the applicant is seeking to argue that by going ahead not only will the body concerned be acting *ultra vires*, but that once the action has been taken it will be too late to prevent irrevocable damage from being done. Having regard to these circumstances, the interim injunction serves to prevent the execution of the decision until a hearing has taken place. This raises the question as to whether the courts should have the power to order such relief before leave for judicial review has been granted and, crucially, before the other side has had any chance to present evidence. It should be noted, however, that because of the danger of abuse by vexatious applicants, interim relief will be granted only sparingly by the courts, depending on the 'balance of convenience' as explained by Lord Diplock in his judgment in *American Cyanamid Co. v Ethicon* [1975] AC 396." (underlining mine for emphasis)

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As far as the leave application is concerned, having considered the Affidavit filed in support I hereby grant leave to apply for judicial review without a hearing [O. 53 r. 3(ii)].

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A Mr. Raza has raised a valid point as to the stage when a stay could be considered; subject to what I have stated above about the manner in which I dealt with this application on its own special facts, I interpret Or 53 r8(a) to mean that at the time of considering the application for leave the Court is empowered to consider a stay application so that if "the Court so directs" then the grant of leave "shall operate as a stay of the proceedings". I am supported in this view by the notes to Supreme Court Practice 1993 Vol I p.842 where it states, in a similar provision to ours as in Or 53 r 8(a):

B "6. Interim/interlocutory orders - it is possible to apply for interim relief, e.g. A stay pending the hearing of an application for judicial review (O. 53 r 3(10)(a))

C Therefore, even if an application is made separately for stay on a motion, as in this case, the proper time to consider it would be immediately after the leave has been granted (O. 53 r 3(8)). Having granted the leave this is what I now proceed to do.

D As for application by Mr. Nagin for stay to continue and by Mr. Raza for its discharge, all I need say is that after considering the arguments advanced I am not satisfied on the affidavits and the submission by Mr. Nagin that they are of sufficient weight to enable me in the exercise of my discretion to make an order for stay to continue. With reference to the passage quoted from Wade all I wish to comment is that in every case there is a danger that the decision appealed from may turn out to be void or ultra vires etc and therefore in my view they cannot be reasons for the grant of stay.

E In coming to the decision to which I have come I have considered the factors which ought to be taken into account in an application of this nature such as the nature of case, prejudice to the parties and balance of convenience. This is how Sir Moti Tikaram J.A. (now President) dealt with application in chambers for Stay Order in Reddy's Enterprises Limited and The Governor of the Reserve Bank of Fiji (Civ. App. No. 67 of 1990).

F The basis of the Court's approach to the grant of stay is the need for the applicant to show a strong prima facie case. This the applicant has not done. Looking at the nature of the case, it is a case where both parties have been given routes and both will be prejudiced, the applicant less than the Respondent, as the former already has other routes and is an existing operator of many years' standing, if stay was granted. The balance of convenience favours the refusal of stay on the facts and circumstances of this case.

G To conclude, upon considering the affidavits and the arguments advanced by both counsel, I consider that this is not a case in which a stay of the decision of the Transport Control Board is warranted. The application of the balance of convenience principles dictates that the Court ought not to interfere with the

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decision but that the judicial review proceedings determine the decision which is being challenged.

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In the outcome, leave to apply for judicial review is granted and I refuse to order a stay or the continuance of the interim stay which is therefore discharged. The costs are to be costs in the cause.

(Leave granted.)

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