[2012] UKPC 31
Privy Council Appeal No 0051 of 2011

JUDGMENT

Carlos Hamilton and Jason Lewis (Appellants) *v* The Queen (Respondent)

From the Court of Appeal of Jamaica

before

Lord Hope
Lord Kerr
Lord Dyson
Lord Reed
Sir Anthony Hooper

JUDGMENT DELIVERED BY LORD HOPE ON

16 August 2012

Heard on 17-18 July 2012

Appellant	*Respondent*
Edward Fitzgerald QC Richard Samuel	Tom Poole
(Instructed by Herbert Smith LLP)	(Instructed by Charles Russell LLP)

LORD HOPE:

1. On 2 April 2001 the appellants were found guilty of the murder of Saleem Hines. They were sentenced to life imprisonment and to serve 25 years in prison before they became eligible for parole. On 24 March 2003 the Court of Appeal of Jamaica (Downer, Bingham and Panton JJA) refused the appellants' application for permission to appeal against their convictions and sentences. They now seek permission to appeal to the Judicial Committee of the Privy Council against the judgment of the Court of Appeal. Their applications for permission to appeal were served on 27 July and filed on 29 July 2011. Rule 11(2) of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 ("the 2009 Rules") provides:

> "An application for permission to appeal must be filed within 56 days from the date of the order or decision of the court below or the date of the court below refusing permission to appeal (if later)."

2. The period that elapsed between the order of the Court of Appeal and the appellants' applications for permission was 8 years and 4 months. In accordance with current practice, and in the exercise of the powers conferred on her by rule 5(1) of the 2009 Rules, the Registrar by entering the case onto the Judicial Committee's record in effect granted an extension of time for the filing of the applications. This was to enable the Board to consider whether or not permission to appeal should be granted. The Board directed that the applications should be put out for an oral hearing before five members of the Judicial Committee, with the appeals themselves to follow if the Board was satisfied that it was in the interests of justice that they should proceed to a full hearing. Concern was however expressed at the length of the delay. The parties were invited to make submissions on the approach that should be adopted in a case such as this, where the applications for permission were lodged long out of time.

The rule

3. Prior to the coming into force of the 2009 Rules the practice of the Board was not to lay down any precise timetable. Paragraph 5 of the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 provided that a petition for special leave to appeal was to be lodged "with the least possible delay" after the date of the judgment from which special leave to appeal was being sought. This reflected the fact that appeals come before the Board from jurisdictions with widely differing characteristics. It was thought preferable to describe the need for expedition in general terms rather than in terms of a given number of days, so as to

enable account to be taken of the particular circumstances of each case. A flexible approach was seen to be particularly necessary in the case of criminal appeals coming before the Board from jurisdictions in the Caribbean. In practice the periods that elapsed between the order that was being appealed and the lodging of the petition for special leave in cases of that kind during this period were invariably well in excess of those that were normal in other cases. In cases of capital murder they varied from about 5 months to 4 years and 6 months and, occasionally, much longer. In non-capital cases the periods that elapsed were almost always much longer, sometimes in excess of 10 years.

4. The coming into force of the 2009 Rules on 21 April 2009 was the product of a different approach. Those Rules were drafted at the same time as the Rules that were to regulate the procedure of the Supreme Court of the United Kingdom as from 1 October 2009. Rule 11(1) of the Supreme Court Rules 2009 provides that the application for permission to appeal must be lodged within 28 days of the order that is being appealed against. It was thought appropriate now to lay down a timetable for appeals to the Judicial Committee as this was the practice that the Supreme Court wished to adopt, but to double the period from 28 days to 56 days in its case. On the whole the setting of a time limit has proved to be salutary, and for the most part it has not given rise to difficulty. Nevertheless it remains commonplace in the case of criminal appeals coming before the Board from jurisdictions in the Caribbean for periods of years rather than days to elapse before the application is made. In *Krishna v Republic of Trinidad and Tobago* [2011] UKPC 18, where special leave was given, the period was 14 years and 8 months. That was an exceptional case in view of the length of the delay. But in another respect it was typical, as the appellant, who had no access to legal aid, had to rely on pro bono assistance. In no case have applications for permission to appeal from these jurisdictions been lodged within the time limit set by rule 11(2) or, indeed, anywhere near the period of days set by that time limit.

The causes of delay

5. The reason why there are delays in the lodging of applications in cases of this kind is not hard to seek. Most, if not all, prisoners in the Caribbean region are left without continuing legal representation when the proceedings in the Court of Appeal have been concluded. Legal aid is not generally available at that stage, and on the rare occasions when it is available the facilities provided under it are very limited. Almost always these prisoners have to resort to pro bono assistance, which is not easily found. It is harder for non-capital prisoners to obtain it than it is for prisoners on death row, whose cases are given priority by those who practise in this field.

6. There is a system of legal aid in Jamaica. Section 15(3) of the Legal Aid Act states that a legal aid certificate shall entitle the person to whom it is granted to such legal aid as may be specified therein for the preparation and conduct of his defence in the appropriate proceedings or in such of those proceedings as are specified in the certificate. Section 15(4)(c) provides that the expression "appropriate proceedings" includes, in respect of a legal aid certificate granted by a Judge of the Court of Appeal or the Registrar of the Court of Appeal, any appeal from conviction to the Court of Appeal or to Her Majesty in Council. But the information that the Board was given indicates that the resources available for criminal legal aid are very limited, that fees payable for appeals to the Court of Appeal are restricted to a flat rate that covers every aspect of the appeal and that there are frequent complaints about arrears of fees due to attorneys for their services. The Board was told of one case where an informal arrangement was entered into between the Legal Aid Council and Ms Nancy Anderson of the Independent Jamaican Council of Human Rights. She was assigned by the Legal Aid Council to be the Jamaican attorney in an appeal to the Judicial Committee, but she did not receive payment of any fees.

7. It appears therefore that the provision of assistance under legal aid in appeals from the Court of Appeal in Jamaica to Her Majesty in Council exists in theory only. The schedule of prescribed fees for lawyers under the Legal Aid Act does not specify any fees for such appeals. It appears not to have been contemplated that the Legal Aid Council could afford to pay an attorney to undertake work of that kind. The Board was told that there is no provision for legal aid in appeals to the Judicial Committee from Trinidad and Tobago, Grenada, St Vincent and the Grenadines and other independent states in the Eastern Caribbean region. In practice prisoners who wish to appeal from decisions of the Courts of Appeal in the Caribbean states have to rely on pro bono assistance from local attorneys and, especially, from English barristers and solicitors. Legal aid is available for criminal appeals in Bermuda and the Cayman Islands. But there is no legal aid for such appeals from the British Virgin Islands.

8. Prisoners in the Caribbean states who are in need of legal assistance are disadvantaged in other ways. The Board was told that there is no access from a Jamaican prison to landline telephones. Prisoners have access to the outside world by writing letters. But writing materials are not provided by the prison authorities, and many of the prisoners are illiterate. For those who can read and write, letters sent in and out of prison tend to take about four weeks, some take months and some letters go missing. Counsel for the respondent said that those instructing him had been told by the Commissioner of Prisons in Jamaica that prisoners had access to cell phones. But this was disputed by the solicitor for the appellants. Her information was that they were prohibited and that prisoners were punished if they were found to be using one. So they could not be contacted by this means in case they got caught. Ms Juliet Oury, of Oury Clark, solicitors in London, who has

over 10 years' experience of providing assistance to prisoners in Jamaica, said that it was her belief that cell phones were contraband items and that prisoners found in possession of them were disciplined within the prison.

9. The solicitors for the parties were agreed that there is no currently published procedure for prisoners in Jamaica to be informed of their rights of appeal. A prisoner wishing to appeal has to speak to the Superintendent in charge of the prison. Failing that, he can write to the Commissioner of Prisons and request his assistance with the steps necessary to obtain legal representation and appeal. But these opportunities were said by the appellants' solicitor to be theoretical only and never used. It is common ground that the situation in Jamaica at present is that the process is prisoner driven. Unless he makes inquiry, he will not be informed of his appeal rights. The Board has no reason to think that the situation in the other Caribbean states is significantly different.

10. In the present case the appellants wrote to Ms Oury in July 2003. This was four months after their appeals to the Court of Appeal had been dismissed. They asked for her assistance with their appeals to the Judicial Committee. But it was not until April 2010 that she instructed Herbert Smith LLP to act for them. Their applications for permission to appeal were lodged 15 months later in July 2011. Counsel for the respondent did not accept that their case is a paradigm of the problems that are inherent in conducting pro bono appeals to the Judicial Committee from the Caribbean jurisdictions. He pointed out that there was a substantial period of delay amounting to almost seven years that is unexplained. His position was that the applications could and should have been lodged much earlier than they were. Reference was made to a letter to the Registrar dated 20 June 2012 by Charles Russell, solicitors for the respondent, in which the writer, John Almeida, says that he was not aware of the appellants' wish to appeal until Herbert Smith gave notice of their intention to his firm on 19 July 2011. This was about one week before the applications for permission were served on them on 27 July 2011.

Suggestions for the future

11. In their letter of 20 June 2012 Charles Russell say that the primary problem lies in a failure to follow the correct procedure. They suggest that the prison authorities and the prosecution should be notified as soon as the prisoner has indicated an intention to apply for permission to appeal to the Judicial Committee. This would enable them to monitor, as well as assist in, the progress of the appeal, to provide any necessary support with documents for the purpose of the application and to deal with any issues that might arise on their production. They also suggest that legal aid could be provided locally to assist with the cost of the production of the documents.

12. In the hearing before the Board Mr Poole for the respondent submitted that permission should only be granted in future cases where substantial and cogent reasons had been given to explain the delay. The longer the delay, he said, the greater was the duty to explain it. He pointed out that there were sound reasons of policy for taking this approach: the interests of justice, the principle of legal certainty and the interests of the victims and their families. There were practical reasons too. Avoiding delay would ensure that the facts of the case were not lost by the passage of time. It would also make it easier, if the conviction was to be set aside, for the appellate court to contemplate ordering a new trial.

13. For the appellants, Mr Fitzgerald QC submitted that account should be taken of the very special problems of indigent would-be appellants seeking permission to appeal from distant locations with no proper system of legal aid. A more generous approach was called for in that situation than would normally be appropriate. He suggested seven criteria that the Board might take into account in considering whether permission should be granted where appeals were brought long out of time: (1) the merits of the case; (2) the explanation for the delay; (3) the difference between these cases and domestic appeals; (4) the length or other severity of any sentence; (5) changes or clarifications during the intervening years in the legal requirements for a fair trial; (6) the constitutional guarantees of a fair hearing; and (7) the competing demands on those instructed on a pro bono basis.

14. The Board was shown a letter to the Registrar dated 12 July 2012 by Simons Muirhead and Burton, solicitors, who have acted as agents in appeals to the Privy Council for many years. They say that they have acted for many death sentence prisoners and that in many of these cases the applications have been filed with the Judicial Committee many months or years after local proceedings have been concluded. They make the point that there are many justifiable reasons for this. In their experience legal aid is not available in most cases in the Caribbean region and, if available, it is very limited. Furthermore, there are very few local lawyers who are prepared to act on a pro bono basis, and even when they can be found they tend to be different from the lawyer who conducted the trial. The vast majority of their initial instructions are through direct written correspondence with the prisoners, which can take many months to reach them. Once they have agreed to act, they seek to secure all the relevant documentation and may need to take further instructions. This may involve meeting the client in prison, sometimes with counsel. In their experience the Board, while conscious of delay and the need to complete appeals expeditiously, has never regarded this as a critical factor in considering whether or not to grant permission. They agree with Charles Russell that, once a Privy Council agent has agreed to act, the agent for the respondent should be informed immediately so that they are on notice, but they point out that this will not assist in cases where Privy Council agents are not instructed. They commend the flexible approach which the Board has adopted in practice, balancing

the problems faced by agents acting in pro bono cases with the need to avoid delay.

The Board's approach

15. The Board has no intention of departing from the direction in rule 11(2) of the 2009 Rules that an application for permission to appeal must be filed within 56 days from the date of the order or decision of the Court below or the date of the court below refusing permission to appeal. Constitutional guarantees of the kind set out in article 20(1) of the Jamaica (Constitution) Order in Council 1962, which requires any person charged with a criminal offence to be afforded a fair hearing within a reasonable time, extend to post-conviction appellate proceedings including those before the Judicial Committee. As the Board held in *Ford v Labrador* [2003] UKPC 41, [2003] 1 WLR 2082, para 16, the jurisprudence of the European Court of Human Rights provides guidance as to the meaning and effect of such provisions: see also *Minister of Home Affairs v Fisher* [1980] AC 319, per Lord Wilberforce at pp 328-329. Restricting access to the courts by the imposition of time limits is not incompatible with the European Convention, so long as the very essence of the right is not impaired, the restriction pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved: *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, para 59; *Stubbings v United Kingdom* (1996) 23 EHRR 213, paras 53-55; *Pérez de Rada Cavanilles v Spain* (1998) 29 EHRR 109, para 44. It has not been suggested that rule 11(2) of the 2009 Rules fails to meet this standard.

16. Rule 11(2) of the 2009 Rules states that an application for permission to appeal must be filed within 56 days from the date of the order or decision of the Court below or the date of the court below refusing permission to appeal. There is an element of flexibility, in that this period may be extended or shortened by the Registrar under the power given to her by rule 5(1). But a decision to extend the period for filing an application for permission to appeal does not deprive the respondent of the right to object to the granting of permission on the ground that the application was made out of time. Such an objection, if made, will always be referred to the Board for its consideration and the Board will expect to be provided with an explanation for the delay. As a general rule, the longer the delay, the more convincing and weighty the explanation will need to be. The question will always be whether, having regard to all the circumstances, it is in the interests of justice that the time limit should be extended.

17. The circumstances that contribute to the problem of delay in the case of criminal appeals that come before the Board from the Caribbean are exceptional, for all the reasons that have been outlined above. But the question for the Board is

no different. In these cases, too, the overriding consideration will be whether it is in the interests of justice that the time limit should be extended. Weight will always be given to the merits of the appeal and to the severity of the sentence. The stronger the case appears to be that the appellant may have suffered a serious miscarriage of justice, the less likely it will be that the application will be rejected on the ground that it is out of time. The Board will also be sympathetic to the problems faced by death sentence prisoners, and those in non-capital cases who have been sentenced to very long periods of imprisonment, who have to rely on the services of those who provide legal services pro bono. Those who provide such services free of charge have other demands on their time. So, while they will be expected to progress their cases as quickly as possible, it would be unreasonable to expect them to adhere to the same exacting standards as are expected of those who provide professional services for remuneration.

18. There are nevertheless steps that can, and should, be taken to minimise the risk of unreasonable delay. The prosecuting authorities should be notified as soon as a prisoner has indicated an intention to apply for permission to appeal to the Judicial Committee, with a view to enlisting their help in obtaining the relevant documents as soon as possible. It is in the public interest that help should be made available with a view to minimising delay in the prosecution of the appeal, and the Board will expect the prosecuting authorities to provide it. A copy of the notification should be available for production to the Registrar when the application is being lodged. Steps should also be taken at the same time to inform those who normally act as Privy Council agents for the State concerned. The appellant's agents have nothing to lose and much to gain by involving the respondent's agents in the progress of the case from the outset. They can be expected to offer their assistance in obtaining the relevant documents as soon as possible if problems are encountered with the prosecuting authorities.

19. The Board has every confidence that those who regularly practise before it will continue to maintain the high standards of professional conduct and mutual co-operation which do so much to assist in the handling of appeals that have to rely on the pro bono system. The best way of reducing the opportunity for delay lies in the early exchange of information. While the contribution which Ms Oury has made to the provision of legal services to prisoners in Jamaica deserves much praise, it is a pity that she did not inform Charles Russell of the appellants' intention to apply for permission before she delayed so long in instructing Herbert Smith to act for them. There were extenuating circumstances, and she is not to be blamed for what happened. But there is every possibility that if she had provided that information at the outset the delay in bringing their case before the Board would have been less extreme than it in fact was.

Permission in this case

20. The appellants were sentenced to very long periods of imprisonment, and the Board was of the opinion that there was sufficient merit in the grounds of appeal to justify referring their case to a full hearing. Much of the period of delay is unexplained. But the case has been handled throughout pro bono, and it is in the interests of justice that the appeals should be heard. Very properly, Mr Poole did not resist Mr Fitzgerald's submission that permission to appeal should be granted. An order to that effect was made, and the case then proceeded to a full hearing before the Board.