[COURT OF APPEAL]

REGINA v. SECRETARY OF STATE FOR EDUCATION AND SCIENCE, *Ex parte* AVON COUNTY COUNCIL

1990 April 11; May 15

Glidewell and Taylor L.JJ. and Sir George Waller

Judicial Review—Interim relief—Stay of proceedings—Secretary of State's decision—Leave to apply for judicial review—Applicant seeking stay of decision under challenge pending determination of application for judicial review—Court's jurisdiction to grant stay—Whether stay to be granted—R.S.C., Ord. 53, r. 3(10)(a)

The local authority was granted leave to move for judicial review of decisions taken by the Secretary of State for Education concerning the reorganisation of education in the county and applied for a stay of the implementation of the decisions pending determination of the application for judicial review. The judge refused on the ground that his jurisdiction to grant a "stay of proceedings" under R.S.C., Ord. 53, r. 3(10)(*a*)[1] pending judicial review did not extend to the Secretary of State's decisions in such circumstances.

On appeal by the local authority:—

Held, dismissing the appeal, that a "stay of proceedings" in R.S.C., Ord. 53, r. 3(10)(*a*) embraced not only judicial proceedings but also extended to decisions of the Secretary of State and the process by which such decisions had been reached; that a distinction was to be made between civil litigation, where an injunction might be ordered at the suit of one party against the other, and public law judicial review, where the decision maker was not in any true sense an opposing party and where the order that the decision should not take effect until the challenge had been determined was to be correctly described as a stay; and that, accordingly, applying that distinction, the relief sought by the local authority was properly a "stay of proceedings" within rule 3(10)(*a*), and the court could in principle stay the Secretary of State's decisions, although the availability of an expedited hearing of the judicial review made it unnecessary to do so (post, pp. 560A–B, 561F–562D, 563D–E).

Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. [1990] 2 A.C. 85, H.L.(E.) and *Reg. v. Licensing Authority Established under Medicines Act 1968, Ex parte Smith Kline & French Laboratories Ltd. (No. 2)* [1990] 1 Q.B. 574, C.A. considered.

Decision of Kennedy J. affirmed on different grounds.

The following cases are referred to in the judgments:

Reg. v. Licensing Authority Established under Medicines Act 1968, Ex parte Smith Kline & French Laboratories Ltd. (No. 2) [1990] 1 Q.B. 574; [1989] 2 W.L.R. 378; [1989] 2 All E.R. 113, C.A.

Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. [1990] 2 A.C. 85; [1989] 2 W.L.R. 997; [1989] 2 All E.R. 692, H.L.(E.)

[1] R.S.C., Ord. 53, r. 3(10)(*a*): see post, p. 560C–D.

No additional cases were cited in argument.

APPEAL from Kennedy J.

On 9 April 1990 the appellant authority, Avon County Council, applied for leave to seek judicial review of three decisions and a transitional provisions order made by the Secretary of State for Education and Science concerning the character and status of two schools in Avon. Kennedy J. granted leave to apply for judicial review on 10 April but refused to grant the local authority's application for a stay pending determination of the application for judicial review. The local authority appealed on the ground that the judge had erred in holding that he had no jurisdiction to grant such a stay.

On 11 April the Court of Appeal dismissed the appeal as an early hearing of the substantive application could be arranged and a stay was therefore unnecessary but, for reasons to be delivered later, held that it did have power to grant such a stay.

The facts are stated in the judgment of Glidewell L.J.

Elizabeth Appleby Q.C. and *Genevra Caws* for the county council.
Presiley Baxendale for the Secretary of State.

The main submissions of counsel are set out in the judgment of Glidewell C.J., at pp. 560B–F, 562D–E, H.

Cur. adv. vult.

15 May. The following judgments were handed down.

GLIDEWELL L.J. On 9 April 1990 the appellant, Avon County Council, which is the education authority for the county of Avon, applied for leave to move for judicial review of (1) three decisions contained in letters dated 30 March 1990 from the Secretary of State for Education and Science to (i) the Director of Education of Avon County Council, rejecting proposals for the reorganisation of secondary education in Bath; (ii) the Chairman of the Governors of St. Mark's Church of England Secondary School rejecting proposals for a significant change in its character; and (iii) the Chairman of the Governors of Beechen Cliff School approving its acquisition of grant-maintained status; (2) The Beechen Cliff School Grant Maintained Status Transitional Provisions Order made by the Secretary of State for Education and Science on 20 March 1990.

The relief sought was expressed as (i) an order of certiorari to quash each of those decisions; (ii) an order of certiorari to quash the transitional provisions order; (iii) direction that the grant of leave to apply for judicial review should operate as a stay upon the implementation of the proposals for Beechen Cliff School to become grant maintained until determination of the application; and (iv) a direction that the hearing of the application be considered for expedition.

On 10 April 1990 Kennedy J. heard oral argument in support of the application. He decided to grant leave to move, and then heard

argument on the county council's application for a stay. He decided that he had no jurisdiction to grant a stay of the Secretary of State's decisions in the circumstances of this case.

The county council immediately appealed to this court. We heard the appeal on 11 April 1990. Like Kennedy J., we considered first whether the court had jurisdiction to grant a stay of the Secretary of State's decision. We decided that the court has such jurisdiction. However, when it then became clear to us that an early hearing of the substantive application could be arranged, we considered that a stay was unnecessary, and declined to grant a stay. I now give my reasons for my conclusion that the court has power to grant a stay of the Secretary of State's decision.

Miss Appleby, for the county council, submits that the power to grant a stay is expressly given in R.S.C., Ord. 53, r. 3(10). This provides:

> "Where leave to apply for judicial review is granted, then (*a*) if the relief sought is an order of prohibition or certiorari and the court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the court otherwise orders; (*b*) if any other relief is sought, the court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ."

The primary relief sought is an order of certiorari. Miss Appleby submits that the phrase "a stay of the proceedings," though at first sight applicable to proceedings in a court, must have a wider application. Today, many applications for judicial review are for orders of certiorari to quash decisions of decision-making bodies other than courts, including government ministers, local authorities and other bodies whose decisions are susceptible to judicial review. Thus the phrase "a stay of the proceedings" in relation to such bodies must mean "a stay of the process by which the decision challenged has been reached, including the decision itself." Miss Baxendale, for the Secretary of State, argues that Miss Appleby's submissions give to the word "proceedings" a meaning it does not bear. The power in Ord. 53, r. 3(10)(*a*) to grant a stay of proceedings relates only to proceedings of a court.

There are two recent authorities on this subject which are relevant. In *Reg. v. Licensing Authority Established under Medicines Act 1968, Ex parte Smith Kline & French Laboratories Ltd. (No. 2)* [1990] 1 Q.B. 574 the licensing authority proposed to use confidential information supplied by Smith Kline & French with its application for a product licence in order to evaluate similar applications from competing companies. Smith Kline & French applied for a declaration, an order of prohibition and an injunction, to prevent such use. The judge at first instance granted a declaration to that effect, but the Court of Appeal reversed his decision. Smith Kline & French then applied for an interim injunction restraining the use of the information, pending the determination of their petition for leave to appeal to the House of Lords.

This court dismissed the application. However, the majority of the court (Woolf and Taylor L.JJ.) were of the opinion that the court had

power to grant both declaratory and injunctive relief against officers of the Crown. Moreover, all the members of the court, including Dillon L.J., were of the view that the phrase "the proceedings" in R.S.C., Ord. 53, r. 3(10)(*a*) should be construed widely, so that in an appropriate case a stay could be ordered under that rule against the Crown: see Dillon L.J., at p. 596B–C, Woolf L.J., at p. 602B, and Taylor L.J., at p. 604C–D. Dillon L.J., however, took the view that the order sought in that case was of the nature of an injunction, not a stay, and that there is no power to grant an injunction against officers of the Crown.

Dillon L.J.'s view regarding the limitation on the court's powers to grant injunctions was upheld in *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 85, and the decision of the majority in the *Smith Kline & French* case on this issue was thus overruled. The reasoning in the speech of Lord Bridge of Harwich, with which the other members of the House all agreed, can be summarised as follows: (1) before the passing of the Crown Proceedings Act 1947, an injunction could not be granted in proceedings on the Crown side; (2) the Act of 1947 gave the right to sue the Crown in civil proceedings, but by section 38(2) of the Act the phrase "civil proceedings" was expressly defined to exclude proceedings on the Crown side; (3) thus the power to grant declarations in lieu of injunctions under section 21 of the Act of 1947 did not apply to proceedings on the Crown side; and (4) section 31 of the Supreme Court Act 1981 (upon which Woolf and Taylor L.JJ. relied as giving power to grant injunctive relief against the Crown) did not alter the effect of the Act of 1947.

It should be noted, however, that in *Factortame* their Lordships were not concerned with, and did not consider, the power of the court to stay a decision made by an officer of the Crown under R.S.C., Ord. 53, r. 3(10)(*a*). On this issue the views expressed by Woolf and Taylor L.JJ. in the *Smith Kline & French* case, though obiter, remain unaffected by the decision in *Factortame*.

In the *Smith Kline & French* case Dillon L.J. was of the opinion that the interim relief sought in that case was not properly described as a stay, but was in the nature of an interim injunction. What is the nature of the interim relief sought by the appellant in the present case?

In my view, this question comes back to the issue whether the phrase "a stay of the proceedings" is apt to include decisions made by the Secretary of State, and the process by which he reached such decisions. If I am correct in my view that the phrase is wide enough to embrace such decisions, it follows that what is sought is just as much a stay as it would be in relation to a decision or judgment of an inferior court. It is not properly described as an injunction, which is an order directed at a party to litigation, not to the court or decision-making body. Of course, in some respects an application for judicial review appears to have similarities to civil proceedings between two opposing parties, in which an injunction may be ordered by the court at the suit of one party directed to the other. When correctly analysed, however, the apparent similarity disappears. Proceedings for judicial review, in the field of public law, are not a dispute between two parties, each with an interest to protect, for which an injunction may be appropriate. Judicial review, by way of an application

for certiorari, is a challenge to the way in which a decision has been arrived at. The decision-maker may take part in the proceedings to argue that his, or its, decision was reached by an appropriate procedure. But the decision-maker is not in any true sense an opposing party, any more than an inferior court whose decision is challenged is an opposing party. Thus the distinction between an injunction and a stay arises out of the difference between the positions of the persons or bodies concerned. An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has finally been determined is, in my view, correctly described as a stay. For these reasons I am of the opinion that a decision made by an officer or minister of the Crown can, in principle, be stayed by an order of the court.

If I am correct in my view that the essential question is whether the phrase "a stay of proceedings" is apt to include decisions, and the process of arriving at such decisions, made by persons and bodies other than courts of law, and the answer is that it does not include such decisions and processes, it would follow that the courts have no jurisdiction, in judicial review proceedings, to stay decisions of local authorities or other non-judicial decision-making bodies. In other words, the court's jurisdiction or lack of it to order a stay is not dependent on whether the decision-maker is an officer or minister of the Crown. That the court should have the power to order a stay of a decision of a local authority pending the conclusion of a challenge to the decision-making process by way of judicial review I regard as apparent. I have sought to explain my reasons for concluding that the courts indeed have such a power.

In addition to her general challenge to the court's power to stay a decision of an officer or minister of the Crown, Miss Baxendale, for the Secretary of State, advances another argument, based upon the particular statutory provisions under which the Secretary of State's decision in this case was made, to support the proposition that the court has no power to order a stay.

The Transitional Provisions Order made by the Secretary of State on 20 March 1990, and his decision to approve the acquisition of grant-maintained status by Beechen Cliff School, were respectively made under the provisions of the Education Reform Act 1988. Section 62 of that Act deals with proposals for the acquisition by a school of grant-maintained status. By section 62(11) the Secretary of State may approve the proposals published by the governors. The date proposed in the proposals for their implementation then becomes the "incorporation date" (section 104(3)) on which the initial governing body is incorporated (section 62(14)); the school's property is transferred to the initial governing body (section 74(1)); the county council ceases to be under a duty to maintain the school (section 74(5)), and the Secretary of State assumes that duty (section 52(1)); and contracts of employment of teachers and other staff are transferred to the initial governing body (sections 75(6) and 74(9)).

Miss Baxendale argues that all these effects are the direct result of the statutory provisions, and a court cannot stay the effect of a statute.

In my opinion, this argument is based on a logical fallacy. The effect of a stay would not be to nullify the various statutory provisions. It *would* be to defer the date for the implementation of the proposals until the judicial

review proceedings were concluded. If the Secretary of State's decision were not quashed, the various statutory provisions would then take effect.

There is nothing unusual about a challenge to a ministerial decision being accompanied by a deferment of the date when the decision will take effect. Some statutes provide for this expressly: see, for example, section 245(4)(*a*) of the Town and Country Planning Act 1971, under which the court may by interim order suspend the operation of an order made or action taken by the Secretary of State which is challenged by an application under section 245(1); and section 24(1) of the Acquisition of Land Act 1981 which contains similar provisions relating to the compulsory purchase of land. These examples are taken from statutes which contain specific statutory provisions for challenging the ministerial decisions to which they apply. The Education Reform Act 1988 contains no specific provisions by which decisions of the Secretary of State on matters which, under the Act, fall to him to decide may be challenged. Nevertheless, it is accepted that such a decision, or rather the method by which it was made, is open to challenge by judicial review. There is no impropriety, or challenge to Parliamentary sovereignty, implicitly in the court having power to defer the date at which such a decision takes effect. Such a deferment, pending the court's final decision, would be the effect of a stay.

It is for these reasons that I conclude that the court has jurisdiction, in appropriate circumstances, to order a stay of the implementation of decisions such as those under challenge in these proceedings, pending the final resolution of that challenge.

TAYLOR L.J. I agree with the reasoning and conclusions of Glidewell L.J., and would further adopt the reasoning of this court in *Reg. v. Licensing Authority Established under Medicines Act 1968, Ex parte Smith Kline & French Laboratories Ltd. (No. 2)* [1990] 1 Q.B. 574, without repeating it, on the issue of whether a stay can be ordered to bind the Crown.

I would add only one further observation. The wording of Ord. 53, r. 3(10) is in the widest terms. The introductory phrase "Where leave to apply for judicial review is granted . . ." appears to cover the whole field of judicial review. Had it been intended that "the proceedings to which the application relates" in sub-paragraph (*a*) should refer only to judicial proceedings, one would have expected that curtailment to have been specified either in the introductory phrase or by qualifying the word "proceedings" in sub-paragraph (*a*).

SIR GEORGE WALLER. I agree.

Appeal dismissed with costs.

Solicitors: Sharpe Pritchard for County Solicitor, Avon County Council; Treasury Solicitor.

[Reported by MISS BARBARA SCULLY, Barrister]