



Civil Appeal No. 5 of 2024

**IN THE COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS  
ORIGINAL CIVIL JURISDICTION  
BEFORE THE HON. ACTING JUSTICE ALEXANDRA WHEATLEY  
CASE NUMBER 2023: No. 112**

Sessions House  
Hamilton, Bermuda HM 12

Date: 19/06/2024

**Before:**

**THE PRESIDENT, SIR CHRISTOPHER CLARKE  
JUSTICE OF APPEAL SIR ANTHONY SMELLIE  
and  
JUSTICE OF APPEAL IAN KAWALEY**

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**Between:**

**DEVON HEWEY**

**Appellant**

**- and -**

**LEGAL AID COMMITTEE**

**Respondent**

Appellant in person assisted by his McKenzie Friend, Mr Eron Hill  
Mrs Shakira Dill-Francois of Attorney-General's Chambers for the Respondent

Hearing date: 19 June 2024

Ruling date: 27 June 2024

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## INDEX

*Judicial review-refusal of Legal Aid Committee to assign case to foreign leading counsel-governing legal principles-McKenzie Friend jurisdiction- Legal Aid Act 1980, sections 5, 12- Legal Aid (General) Regulations 1980, regulation 10 (3)*

## REASONS FOR DECISION

### KAWALEY JA:

#### Background

1. The Appellant appeals by Notice of Appeal dated 22 March 2024 against the decision of the Supreme Court (Alexandra Wheatley, J (Acting) dated 19 March 2024. That decision dismissed the Appellant’s application for judicial review of two decisions of the Legal Aid Committee (“LAC”), principally the December 2023 refusal of the LAC to appoint London-based Mr Richard Thomas KC as counsel for the Appellant.
2. On 19 June 2024, we dismissed the appeal. These are the reasons for that decision.

#### The Supreme Court Judicial Review Proceedings

3. The Appellant was convicted of premeditated murder on 25 February 2013. His conviction was quashed by the Privy Council on 11 April 2022 and on 12 April 2022, this Court ordered a retrial. The retrial is likely to centre on expert evidence in relation to gunshot residue (“GSR”) particles. The Appellant understandably wishes the best possible legal representation at his retrial and his Bermudian counsel have taken remarkably vigorous steps to persuade the LAC to appoint the foreign leading counsel of his choice as counsel for his retrial.
4. Having obtained leave to seek judicial review on 30 March 2023, the Appellant applied by Originating Motion dated 6 April 2023 for declarations that:
  - (1) The decision of the LAC refusing to appoint Mr Richard Thomas KC to represent him at his retrial was unlawful, and/or irrational and/or unreasonable; and
  - (2) The LAC failed to give sufficient reasons for the refusal.

5. This application clearly assumed that the LAC had the statutory power under the Legal Aid Act 1980 (“the Act”) to appoint foreign leading counsel which had been wrongly exercised. The application was argued on both sides on this basis before the Acting Puisne Judge on 2 February 2024. She delivered a meaty 50-page Ruling on 19 March 2024 dismissing the application. As regards the complaint about the refusal to admit foreign leading counsel, the Judge primarily found that such an appointment could not validly be made by the LAC under the statutory scheme.

### **The Appellant’s Appeal**

6. By Notice of Appeal dated 22 March 2024, the Appellant appealed against that decision on eight grounds, seven of which related to the foreign KC decision. By an Amended Notice of Appeal, an additional complaint of apparent bias was advanced, but this was sensibly not pursued at the hearing, since it has no bearing on the legal question as to whether the LAC had the power to appoint a foreign KC, which is the question we decided to determine first.
7. On 13 June 2024, the Appellant applied for McKenzie Friend assistance in the person of Mr Eron Hill (a paralegal) on the basis that this, his challenge to the decision of the LAC, was an “*‘exceptional’ case that gives rise to complex issues of public law*”. On 14 June 2024, the Respondent filed its Submissions. The LAC did not oppose the application altogether but opposed affording rights of audience to Mr Hill on principled grounds. On the merits of the main grounds of appeal, the Respondent submitted that based on the Learned Acting Judge’s interpretation of the legal framework, which the Appellant seemed prepared to accept, the LAC had no power to appoint foreign counsel at all.
8. In Reply Submissions filed on behalf of the Appellant on the morning of the hearing, it was clarified that the Appellant was prepared to assume that no power to appoint foreign counsel existed under the Act. But this was on terms that reliance would instead be placed on regulation 10 (3) of the Legal Aid (General) Regulations made under the Act (“the Regulations”). Two further documents were filed that morning. Firstly, Mr Hill filed an Affidavit in support of the McKenzie Friend application. Secondly, in what was beginning to resemble “kitchen sink” style commercial litigation, the Appellant filed a Re-Amended Notice of Appeal supported by his own Affidavit. In the event, the applications to amend and re-amend the Notice of Appeal were not actually moved at the hearing.

## The McKenzie Friend Application

9. At the beginning of the hearing, the President indicated that the Court was minded to allow Mr Hill to address the Court as a McKenzie Friend in the interests of ensuring the most efficient conduct of the appeal, which had been fixed for a half-day hearing. The Deputy-Solicitor-General did not pursue her opposition which had been intimated in her written submissions.
10. In the Appellant's McKenzie Friend Application, reference was made to my own decision in *Stowe-v-The Queen* [2016] SC (Bda) 40 App where I held that McKenzie Friends should only be able to address the Court in “*exceptional circumstances*” and doubted that this would be permitted in the future in a “*comparatively uncomplicated*” case (paragraphs 5-6). The Deputy Solicitor-General placed this and other local authorities before the Court. In *Moulder-v-Cox Hallett Wilkinson* [2011] Bda L.R. 40, this Court summarily exercised its discretion to permit a McKenzie Friend to address the Court (the Appellant's wife) without finding it necessary to explain its reasons for doing so. Mr Hill appeared (although it is unclear whether he addressed the Court) before this Court in *Risa Green-v-Tiffany Mahraoui* [2022] CA (Bda) 19 Civ; but the basis on which he was allowed to assist was not explained. Rights of audience were refused for Mr Hill in *Cann-v-Nasir* [2023] 21 Civ, referred to by the Respondent's counsel to suggest that his role needed to be constrained. Additionally, Mr Hill in *Cann* seemingly informed the Registrar that he was given rights of audience in the *Green* case.
11. The present case helps to explain why this Court has been reluctant in the past to lay down rigid principles constraining the undoubtedly exceptional jurisdiction to permit a McKenzie Friend to address the Court. An exceptional jurisdiction is necessarily incapable of clear definition. This appeal raised complicated and important public law questions. The meaning of section 5 of the Act adopted by the Acting Judge in her Ruling was not seemingly relied upon by the LAC at the Supreme Court hearing, discretionary considerations being extensively addressed in evidence and through submissions. A potential constitutional point also arose.
12. Pivotaly, it seemed likely that the Court would be more assisted in presentational and time terms by having submissions advanced by Mr Hill rather than having Mr Hill guiding the Appellant's own presentation. This decision, which implicitly regarded the present circumstances as exceptional, was vindicated as Mr Hill advanced his submissions with admirable clarity, conciseness and courtesy.

## The appeal: the LAC's power to assign foreign counsel

13. Wheatley J (Acting) described the relevant framework under the Act as follows in the Ruling under appeal:

*“20... The Respondent is charged with carrying out the duties set out in the Act as well as in accordance with the Legal Aid (General) Regulations 1980 (the Regulations). Section 5 of the Act provides as follows:*

### *‘Functions of the Committee*

*5(1) The Committee shall in consultation with the Bermuda Bar Council prepare and maintain a list of barristers and attorneys who are in active private practice in Bermuda, from which shall be drawn the names of all counsel who are able and willing to represent applicants and assisted persons; the Committee may prepare rosters of such counsel for the more efficient administration of this Act, and such rosters shall include one of counsel who are willing and able to interview and advise persons charged with criminal offences in the circumstances set out in section 7.*

*(2) The Committee shall receive and consider every application for legal aid made under section 8 and, subject to the following provisions of this Act and any regulations, shall grant a certificate to an applicant in any proper case, with or without provision for payment of contributions by the applicant.’ [Emphasis added]*

22. *Under section 10(2) of the Act, a person charged with an offence listed in the Second Schedule, which includes premeditated murder, is entitled to legal aid as of right (subject to him or her satisfying the means test). There is no dispute in these proceedings that the Applicant satisfied the means test and it is accepted that he is entitled to legal aid as of right in accordance with the Act.*

23. *Upon making an application for legal aid, an applicant may state his or her counsel of choice. The assignment of counsel to a legal aided person is set out in section 12 of the Act:*

### *‘Assignment of counsel*

*12 (1) Subject to subsections (2) to (4), whenever a certificate is granted by the Committee, the Committee shall direct the Senior Legal Aid Counsel to assign Legal Aid Counsel to the assisted person.*

*(2) But if the Committee, on the advice of the Senior Legal Aid Counsel, determine that assignment of Legal Aid Counsel in a particular case—*

*(a) is not practical;*

(b) is not appropriate to the nature of the proceedings for which the certificate is granted; or

(c) might give rise to a conflict of interest, the Committee shall direct the Senior Legal Aid Counsel to assign to the assisted person the external counsel of the assisted person's choice.

(3) Notwithstanding subsection (2), if the assisted person's external counsel of choice— (a) is unavailable; (b) is unwilling to take on the case; or (c) refuses to be bound by the Schedule of Fees annexed to the Legal Aid (Scale of Fees) Regulations 1980, the Committee shall direct the Senior Legal Aid Counsel to assign another counsel to the assisted person.

(4) In this section, “external counsel” means counsel whose name appears on the appropriate roster maintained under section 5.” [Emphasis added]...

25. Section 5 sets out the conditions for counsel to be added to the legal aid roster, which are twofold: (i) the barrister is in private practice in Bermuda and (ii) is willing to take on legally aided cases. In addition, section [sic] 13 of the Regulations concerns the Respondent's duty to maintain the legal aid roster (the Roster):

*'Roster of Counsel*

13 (1) The Committee shall maintain separate rosters containing the names of counsel willing to act for assisted persons in—

(a) criminal prosecutions (including criminal appeals) ...

(3) The Committee shall enter on the appropriate roster any limitation as to the number of proceedings per annum in which counsel is prepared to act for assisted persons and shall give effect to such limitation.

(4) For the removal of doubt, it is hereby declared that where any counsel is assigned for the purpose of any proceedings any other counsel in the same firm may act for the assisted person therein. '..

89. I do not accept that once a request is made by a counsel to be included on the Roster on the basis that he or she is in “active private practice in Bermuda” and are ‘able and willing’ to take on legally aided cases that the Respondent must add him or her to the Roster. Section 5 requires the Respondent to in ‘consultation’ with Bar Council prepare and maintain the list for the Roster.

90. Notwithstanding the Respondent's discretionary nature of maintaining the Roster, it is far-fetched to accept that Mr Thomas KC's special admission under section 51(3) of the Act includes him in the category of being in ‘active private

*practice in Bermuda’. Whilst the definition of ‘counsel’ and ‘barristers’ (as set out in paragraph 81 above) includes those counsel admitted under section 51 of the SC Act, I reject that Mr Thomas KC’s special admission constitutes him meeting the requirement of being in ‘active private practice in Bermuda’. Without each of these critical words being defined by statute, their ordinary meanings are applicable. Mr Thomas KC is employed by Doughty Street Chambers in the UK and is not employed with any law firm within Bermuda. Moreover, he is not permitted to appear before any court in Bermuda other than before the Supreme Court at the Applicant’s retrial which is subject to him being funded by legal aid or privately. Consequently, Mr Thomas KC not being on the legal aid roster prohibits him from being appointed as ‘external counsel of the assisted person’s choice’ as defined in section 12(4) of the Act as ‘counsel whose name appears on the appropriate roster...’. The fact that Mr Thomas KC has confirmed that he is available, willing to take on the case as well as agreeing to be bound the legal aid scale of fees is therefore irrelevant as the Respondent would not have had any power to appoint Mr Thomas KC in the first place.”*

14. In summary, it was held that the Act did not empower the LAC to appoint foreign counsel at all because section 12 mandated the appointment of someone on the roster established under section 5, and section 5 contemplated the roster being drawn only from persons in private practice in Bermuda. The Appellant and his advisers had creatively sought to get Mr Thomas KC through the section 5 gate by applying for his special admission to the Bar under section 51 (3) of the Supreme Court Act. The Learned Acting Judge held that being specially admitted for the Appellant’s retrial did not qualify foreign leading counsel for inclusion on the roster under section 5 of the Act. Her analysis was at first blush compelling.
15. This analysis, enthusiastically embraced by the LAC’s counsel, was obviously capable of disposing of most of the appeal, so the President indicated that this Court would address this issue first. Mr Hill accepted that his task was an uphill one and did not spend undue time addressing it. The only point which could be advanced was that once Mr Thomas KC had a work permit and was specially admitted the Bar, he was “*in private practice in Bermuda*” in the requisite sense. He then turned to his alternative point based on regulation 10 (3), foreshadowed in the Appellant’s Reply Submissions. Again, he was compelled to seek to turn straw into gold. Regulation 10 (3) of the Regulations provides as follows:

*“(3) Where it appears to the aided person’s counsel necessary for the proper conduct of the proceedings to take or to apply to the court for leave to take any one or more of the following steps, namely—*

*(a) to add any further party to the proceedings; or*

*(b) to bespeak any official record of any proceedings; or*

*(c) to lodge any interlocutory appeal; or*

(d) to instruct more than one counsel; or

(e) *to set up or set off any right or claim having the same effect as a cross action (other than a counter-claim or set-off arising out of the same transaction and capable of being pleaded as a defence), or to reply to any right or claim so set up or so set off by any other party,*

*he shall (unless the certificate provides for the act in question to be done) apply to the Committee for authority so to do, and no payment shall be allowed on taxation for any such step taken without the approval of the Committee,*“  
[Emphasis added]

16. It was submitted that Regulation 10 (3) (d) conferred a freestanding power to appoint a second counsel which was unconstrained by the restrictions in section 5 of the Act. The difficulty with this point is that it appeared to require construing subsidiary legislation as capable of overriding the provisions of the primary legislation, viz: the Act, under which the Regulations were made. That would require turning the usual rules of statutory construction on their head.
17. It was clear beyond sensible argument that section 5 of the Act, read in a straightforward way, limits the counsel who may be appointed by the LAC instead of Legal Aid Counsel to “*barristers and attorneys who are in active private practice in Bermuda.*” The purpose of the roster is to create a pool of lawyers which can be drawn on from time to time in connection with various cases. A foreign counsel who has been specially admitted to the Bermuda Bar for a particular case cannot possibly be considered to be “*in active private practice in Bermuda*” in the requisite sense, as the Acting Judge rightly found. The Regulations such as regulation 10 (3) could only validly implement these legislative provisions, not nullify them.
18. The LAC was obliged, rather than permitted, to refuse the assignment request in question. The appeal against this decision had to be dismissed. It was, therefore, unnecessary to consider the criticisms of the decision based on grounds which assumed that it was open to the LAC to appoint Mr Thomas KC pursuant to sections 5 and 12 of the Act.

### **The Appeal: discretion to refuse to appoint local counsel who are on the section 5 roster**

19. Mr Hill indicated to the Court that his client in light of its decision to dismiss the main ground of appeal wished to obtain clarity that local counsel of the Appellant’s choice would be appointed. The history of the assignment of counsel is not set out here but appears to have been somewhat tortuous. Against that background and, we assume, with the benefit of clarity acquired from all that has transpired in these proceedings, the



Deputy-Solicitor-General confirmed that provided that suitable local counsel was proposed to represent the Appellant, his choice would be given effect to.

20. No Order was made in relation to the corresponding ground(s) of appeal. This matter should accordingly be adjourned generally with liberty to restore, if required.
21. Mr Hill with well-judged transparency explained that the Appellant was still hoping to find a way of circum-navigating section 5 of the Act, by appointing a local counsel who would “give up” their fees to enable foreign leading counsel to still act. This disclosure afforded the Court the opportunity to strongly signify that no such arrangement would be legally permissible for the LAC to enter into.

### **Constitutional relief**

22. Mr Hill requested a short adjournment to the following morning to address an alternative constitutional argument. The Court declined this request on the grounds that no constitutional motion was properly before the Court in relation to this appeal and the appropriate course would be to file an application under section 15 of the Bermuda Constitution. In addition, the President drew attention to the way that section 6 of the Constitution was drafted and the difficulty that it presented in mounting any constitutional claim.

23. Section 6 of the Constitution provides as follows:

*“6. (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*

*(2) Every person who is charged with a criminal offence –*

...  
*(d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice or, where so provided by any law, by a legal representative at the public expense; ...* [Emphasis added]

24. The Acting Judge had set out this section before embarking upon her analysis of the Statutory scheme. Section 6 (2) (d) guarantees a criminal defendant’s right to be represented by either the lawyer of his own choice or (where a law so provides) “*a legal representative at the public expense.*” There is quite clearly no constitutional right to a publicly funded lawyer of your own choice. Parliament is free to choose what level of choice, if any, a criminal legal aid applicant is entitled to enjoy in the counsel

assignment process, subject to ensuring that counsel of the level of competence reasonably required to provide adequate representation is made available.

25. This distinction helps to explain why the statutory processes for admitting foreign counsel to the Bermuda Bar under section 51(3) of the Supreme Court Act 1905 runs on a parallel track to the process for assigning counsel to a legally aided person under sections 5 and 12 of the Act. Section 51(3) requires neither the Court, the Minister responsible for Immigration nor the Bar Council whom the Minister consults before granting a work permit, to have regard to whether the special admission applicant is on the roster under section 5 of the Act. Such applicants will ordinarily be privately funded foreign counsel as the Act only contemplates that publicly funded external counsel will be drawn from lawyers in private practice in Bermuda.
26. Although there is no constitutional route for asserting the right for the LAC to appoint a criminal defendant's counsel of choice, it might still in extreme circumstances be possible to validly complain of a breach of the fair hearing right under section 6(1), which are the core fundamental rights section 6 protects in relation to criminal proceedings. Indeed, the main policy function of the Act (in relation to criminal cases) is to facilitate the enjoyment of the fair hearing rights protected by section 6(1) of the Constitution. It is well recognised that a conviction may be set aside on the grounds that the fairness of a trial has been compromised by inadequate representation. It is clear from the record that the LAC is alert to the need to ensure that lead counsel has appropriate experience.
27. If the LAC were to assign a counsel who was demonstrably unsuitable to conduct a premeditated murder defence requiring the analysis of GSR evidence to the Appellant, he might be able to complain in advance of the trial that the relevant decision interfered with his fair trial rights under section (1) of the Constitution. Such an eventuality seemed to us unlikely based on a cursory review of the section 5 roster which the LAC made available to the Court at our request after the hearing. It is appreciated, however, that there is often a difference between counsel theoretically available and counsel who are actually available, having regard to potential conflicts and other commitments. After all it is a notorious fact that the number of senior lawyers involved in active criminal private practice is disturbingly small. But the present status of the Appellant's application provides no obvious basis for the advancement of such a constitutional complaint.
28. When reflecting on the constitutional implications of the failure of the Act to provide for even the possibility of foreign counsel being appointed, I initially assumed that the Act could be read in modified form, pursuant to section 5 of the Bermuda Constitution Order 1968 as conferring on the LAC a power to appoint foreign legal counsel where this was necessary to avoid contravening an applicant's section 6(1) fair hearing rights. That thought only led to a legal dead end, because section 5 of the Constitution only

applies to “existing laws” at the time of the promulgation of the Constitution, which the Act (enacted post-1968) clearly is not.

29. Amending the Act to introduce more flexibility might, at some juncture, be worthy of consideration, although it is not immediately obvious whether this would ease the LAC’s ‘pain’ or simply provide another ‘stick for their backs’.

## **Conclusion**

30. For the above reasons on 19 June 2024, we dismissed the Appellant’s appeal against the Supreme Court’s 19 March 2024 dismissal of his judicial review application complaining of the LAC’s refusal to appoint foreign leading counsel for his defence.

### **SIR ANTHONY SMELLIE JA**

31. I agree. While the outcome of the Applicant’s appeal is compelled by the present state of the statutory scheme, the circumstances of his case have brought to the fore the importance of having a strong and experienced Bar for the administration of criminal justice in Bermuda.

### **SIR CHRISTOPHER CLARKE, P**

32. I agree. I very much hope that the Appellant and the LAC will cooperate so as to secure a suitable pair of Bermuda counsel to represent the appellant at the retrial, which needs to be heard as soon as is reasonably possible. Lead Counsel will need to be someone who can realistically be expected competently to cross-examine the experts in relation to the various issues as to the significance (or lack of it) in relation to the presence of one, two or three components of gunshot residue. In order for matters to proceed it will obviously be necessary for the Appellant to make clear which Bermudian counsel he now seeks to have appointed.