33 N.Y.2d 609, 301 N.E.2d 542, 347 N.Y.S.2d 571

In the Matter of the Application of William J. Thom, Appellant, for Approval of the Incorporation of Lambda Legal Defense & Education Fund, Inc.

Court of Appeals of New York

Argued June 6, 1973; decided July 3, 1973.

CITE TITLE AS: Matter of Thom (Lambda Legal Defense & Educ. Fund)

HEADNOTES
Attorney and client—legal assistance corporations--order of Appellate Division which denied application for approval of incorporation of legal assistance corporation reversed and matter remitted to that court for reconsideration of application--Per Curiam opinion.

Matter of Thom (Lambda Legal Defense & Educ. Fund), 40 A D 2d 787, reversed.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered November 9, 1972, which unanimously (1) denied an application by petitioner for approval of the incorporation of Lambda Legal Defense & Education Fund, Inc., as a legal assistance corporation, made pursuant to subdivision 5 of section 495 of the Judiciary Law and part 608 of the Rules of said Appellate Division, and (2) dismissed the petition.

APPEARANCES OF COUNSEL
Victor Rabinowitz and Herbert Jordan for appellant.
Louis J. Lefkowitz, Attorney-General (Daniel M. Cohen and Samuel A. Hirshowitz of counsel), in his statutory capacity under section 71 of the Executive Law.

OPINION OF THE COURT

Per Curiam.

The order of the Appellate Division should be reversed and the matter remitted to that court for reconsideration of the application. The determination of that court was unsupportable in finding that the Lambda Corporation was neither benevolent nor charitable in ostensible purpose and that there was no demonstrated need for the corporation. We do *610 not agree, however, that the Appellate Division is without discretion in considering applications for approval under section

495 of the Judiciary Law and sections 608.1-608.9 of the Appellate Division Rules (22 NYCRR part 608). There may be and will undoubtedly arise in the future many applications on behalf of corporations which will not merit approval because of factors related to the responsibility of the sponsors, the method of financing, the scope of activities proposed, and still others not predictable or definable in advance, any or all of which may affect the public interest. Moreover, section 608.2 setting forth the requirements and standards for applications would be senseless unless the several matters required to be included in the application were not subject to discretionary review. Nor do we find any lack of standards, if standards be required, implied or expressed, in the variously detailed rules.

Burke, J.

(Concurring).

The appellant seeks to reverse an order of the Appellate Division which denied his application for approval of "the *** existence *** and incorporation" of the Lambda Legal Defense & Education Fund, Inc. (hereafter Lambda) as a legal assistance corporation and dismissed the petition.

Section 495 of the Judiciary LawFN1 prohibits the practice of law in New York by corporations or voluntary associations, subject to certain limited exceptions set forth in subdivision 5 of section 495 which provides, in relevant part: "This section shall not apply *** to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy, whose existence, organization or incorporation may be approved by the appellate division of the supreme court of the department in which the principal office of such corporation or voluntary association may be located." (Emphasis added.)

FN1 The provisions of section 495 of the Judiciary Law, formerly found in section 280 of the Penal Law, were transferred from the Penal Law to the Judiciary Law by section 131 of chapter 1031 of the Laws of 1965, effective September 1, 1967.

In furtherance of the authority thus vested in the Appellate Divisions by subdivision 5 to approve or disapprove the practice of law by "benevolent or charitable" organizations or by organizations rendering legal services to "persons without means", the First Department promulgated part 608 of its *611 Rules (22 NYCRR part 608, hereafter Rule 608) which sets forth the procedural rules for application and practice pursuant to section 495 of the Judiciary Law. Actually, Rule 608 is a codification of the principles set forth in Matter of Community Action for Legal Servs. (26 A D 2d 354) (hereafter CALS), wherein, noting the Appellate Division's concern for the protection of the public from the potential abuses of the corporate practice of law, minimal standards were called for which would insure that, in dealing with authorized corporate practitioners, "the public

will receive the best available legal services in the same way as those who retain their own private lawyers, with effective recourse to the court for gross professional failure". Among the safeguards suggested in CALS were the requirements that lay control over the operation of the legal assistance corporation be held to a minimum, and that the lawyer-employee of the corporation "'maintain full professional and direct responsibility to his clients for the information and services so received'" thus insuring the independence and inviolability of the lawyer-client relationship (26 A D 2d, at pp. 361-362).

The petition gave to Lambda, which had previously been approved by the Commissioner of Education as a not-for-profit corporation, the following corporate purpose: "The Corporation is organized to seek, through the legal process, to insure equal protection of the laws and the protection of civil rights of homosexuals." In the petition, which was modeled upon the previously approved application of the Puerto Rican Legal Defense and Education Fund, Inc., Lambda proposed, among other things "(a) to initiate or join in judicial and administrative proceedings whenever legal rights and interests of significant numbers of homosexuals may be affected; (b) to provide to homosexuals information which will broaden their awareness of their legal rights and obligations; (c) to inform the legal community and the public of the goals, methods and accomplishments of the Corporation". Additionally, it was proposed that Lambda would provide legal services without charge "in those situations which give rise to legal issues having a substantial effect on the legal rights of homosexuals". It is not disputed that Lambda's petition complied in all respects with the requirements of Rule 608, pursuant to which other legal assistance organizations have been authorized to practice law. *612

Despite the compliance of Lambda's petition with Rule 608, and the recommendation of various bar associations that Lambda's application be approved,FN2 the Appellate Division denied and dismissed the application, declaring: "The stated purposes are on their face neither benevolent nor charitable *** nor, in any event, is there a demonstrated need for this corporation. It is not shown that the private sector of the profession is not available to serve this clientele, nor that, as to indigents, the existing legal assistance corporations are not available. A supplemental affidavit does indicate a lack of desire on the part of some attorneys who work pro bono publico to take the cases of homosexuals, but this appears to be no more than a matter of taste, and it is not established that lawyers are completely lacking. The averment does not show that the persons concerned will be without legal services unless this corporation is approved for the purpose." The court went on to conclude: "it seems to us that we should not put our imprimatur upon any corporation which seeks approval to practice law for no more reason than that it claims to represent a minority."

FN2 Section 608.2 requires submission of each petition to the Association of the Bar of the City of New York, the New York County Lawyers Association and the Bronx County Bar Association for consideration. In regards the Lambda petition, both the New York County Lawyers Association and the Association of the Bar recommended approval of the application. In a Memorandum submitted by the Committee on Professional Responsibility of the Association of

the Bar, it was noted: “We have carefully reviewed New York cases interpreting the terms 'benevolent or charitable' and have concluded that the purposes of the LAMBDA Legal Defense & Education Fund are within the meaning of Judiciary Law § 495. It seems established that all the purposes of an accepted charitable institution need not be charitable, nor need its services be limited to the poor. See [Matter of] Green v. Javits, 7 Misc 2d 312 (Sup. Ct. Spec. Term N.Y. Co. 1957), affd. [4 A D 2d 869].”

For reasons set forth hereinafter, we would reverse.

The threshold issue on this appeal concerns the validity of the Appellate Division's determination that Lambda did not qualify for section 495 (subd. 5) approval since its stated purpose -- to protect the legal rights of homosexuals, a minority -- was “neither benevolent nor charitable”. Petitioner contends, with justification, that the disapproval of Lambda's application on the ground that its purpose was not charitable or benevolent was inconsistent with the Appellate Division's prior approval of the Puerto Rican Legal Defense and Education *613 Fund, Inc. (PRLDEF), and that the equal protection clause thus requires consideration of Lambda as a charitable organization.

Section 495 (subd. 5) excepts from the proscription against the corporate practice of law organizations organized “for benevolent or charitable purposes” or “for the purpose of assisting persons without means”. In February of 1972, the Appellate Division approved the section 495 (subd. 5) application of the PRLDEF, which set forth the following as its corporate purpose: “To initiate or join in judicial and administrative proceedings affecting legal rights and interests of substantial numbers of Puerto Ricans and to conduct related informational and research programs”. The PRLDEF petition did not purport to limit its services to indigents; it must, therefore, be concluded that its application was approved as being that of an organization organized for “benevolent or charitable” purposes -- that the Appellate Division considered the rendering of free legal services in furtherance of the rights of a minority to be a charitable or benevolent purpose. As the petitioner points out, the characterization of such free legal services as charitable finds support in decisional law (see Matter of Green v. Javits, 7 Misc 2d 312, affd. 4 A D 2d 869; Dohrenwend v. Board of Educ., 227 N. Y. S. 2d 505).

The stated purpose of the Lambda petition was substantially identical to that of the Puerto Rican Defense Fund; indeed the petitioner admits having modeled the Lambda petition on the PRLDEF application. There is thus no justification for a finding that one was motivated by charitable goals while the other was not. Accordingly, the Appellate Division erred in finding the purposes of Lambda neither “benevolent nor charitable”.

Upon concluding that Lambda was a charitable organization, a more troublesome issue arises -- whether in the case of a properly submitted application, which fully complies with Rule 608 in a

case such as this, there remains in the Appellate Division any discretion as to the approval or disapproval thereof. We think not.

The petitioner contends that Lambda's proposed activities are protected by the First Amendment, and that under the United States Supreme Court's decisions the Appellate Division may not restrict or prohibit such activities (citing N. A. A. C. P. v. Button, 371 U. S. 415; Railroad Trainmen v. Virginia Bar, 377 U. S. 1; Mine Workers v. Illinois Bar Assn., 389 U. S. 217; *614 United Transp. Union v. Michigan Bar, 401 U. S. 576). Were this merely a case of the State prohibiting a group such as Lambda from employing or selecting attorneys to represent them and then soliciting and referring cases for litigation in furtherance of the groups rights, Button and its progeny would be dispositive, for, as the Supreme Court recently stated: “The common thread running through our decisions in NAACP v. Button, Trainmen, and United Mine Workers is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment” (United Transp. Union v. Michigan Bar, 401 U. S. 576, 585). Accordingly, based upon First Amendment principles, Lambda, or any such group formed to further common-legal rights, is entitled to employ attorneys to represent them and to seek out cases which will advance their common goals. To the extent that section 495 of the Judiciary Law would frustrate such activity by undue restriction or prohibition, it runs afoul of the First Amendment.FN3

FN3Section 495 of the Judiciary Law 1973270043;00035;;LQ;NYJUS495;1000091;Thus, unless Lambda, or any similar group or association formed to further group legal rights, is approved by the Appellate Division pursuant to section 495 (subd. 5), its members would be precluded from exercising their First Amendment rights under Button and its progeny. Accordingly, either section 495 is unconstitutional, in part, or the approval of the Appellate Division for such constitutionally protected activities must be granted as a matter of course.

There is involved here, however, more than the mere employment of attorneys or solicitation of cases in furtherance of group rights. The petitioner is seeking permission to practice law as a corporate entity. While the practice of law has always been subject to State regulation and is not, per se, protected by the First Amendment (see Schware v. Board of Bar Examiners, 353 U. S. 232; Konigsberg v. State Bar, 353 U. S. 252; cf. United Transp. Union v. Michigan Bar, 401 U. S., at p. 581), State regulation of the practice of law is, of course, subject to constitutional strictures; any qualification upon the practice of law *615 must have a rational connection with the applicant's fitness or capacity to practice law, and must be applied in such a manner as to comport with the equal protection clause of the Fourteenth Amendment (Schware v. Board of Bar Examiners, 353 U. S., at p. 239). As Mr. Justice Black stated for the majority in Konigsberg: “We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association” (353 U. S., at p. 273).

In enacting section 495 (subd. 5) of the Judiciary Law, the Legislature has extended the right to practice law to certain groups and corporations, and has placed in the Appellate Division the authority and responsibility to oversee the enforcement thereof. In setting forth Rule 608, a regulatory scheme which, as suggested in CALS, is designed to protect the public from abuses by prohibiting lay control over the legal functions of corporately-employed attorneys and by fixing client responsibility in the individual attorney rather than in the corporate practitioner, the Appellate Division has effected controls over the corporate practice of law which, on their face, may be applied in a nondiscriminatory fashion. Once, however, an applicant has complied with Rule 608, in a case such as this, by filing a petition specifying all the requisite information, the Appellate Division may not, as it attempted to do here, exercise its discretion by selectively approving applications based upon a determination as to whether there is a need for the legal services sought to be offered by each applicant. It is of no consequence -- it bears no rational connection to the valid regulation of the practice of law -- that there exist in "the private sector" attorneys who are willing to handle the class of cases with which the applicant proposes to deal. Accordingly, it would violate equal protection of the law to distinguish between similarly situated minorities on such an irrational basis.

Furthermore, such a subjective determination as is proposed here lacks the necessary standards to insure a nondiscriminatory result. The danger of discrimination which inheres in such a standardless approval is, in our opinion, evidenced by the determination in question here. We can perceive no rational distinction in the need for group legal services as between Puerto Ricans and homosexuals. Both groups are minorities subject *616 to varied discriminations and in need of legal services. Absent evidence to the contrary, it must be assumed that the services of private attorneys are equally available or unavailable to both groups.

In sum, the Appellate Division erred in denying and dismissing the instant petition. There was no rational basis for its finding that Lambda was not organized for "charitable and benevolent purposes" within the meaning of section 495 of the Judiciary Law. And, since Lambda's petition complied with Rule 608, there was no discretion in the Appellate Division to disapprove the application.

Regarding the petitioner's contention that the section 495 delegation of authority to the Appellate Division to approve the applications lacks adequate standards to govern such determinations,FN4 suffice it to say that if, as suggested above, the statute is construed to leave no discretion in the Appellate Division -- if approval is granted in a nondiscriminatory manner -- then the lack of standards will not render the statute constitutionally infirm (Shuttlesworth v. Birmingham, 394 U. S. 147, 155; Cox v. New Hampshire, 312 U. S. 569, 577).

FN4 At least one commentator has also suggested that the section 495 delegation of authority to "approve" may be unconstitutional for lack of adequate standards. (See Botein, The Constitutionality of Restrictions on Poverty Law Firms: A New York Case Study, 46 NYU L.

Rev. 748, 751-752.) However, as Professor Botein points out, the Supreme Court has recently upheld a similarly vague delegation to the Appellate Division vis-à-vis the admission of individuals to practice law (see Law Students Research Council v. Wadmond, 401 U. S. 154).

The order appealed from should be reversed, the petition reinstated and the matter remitted to the Appellate Division.

Gabrielli, J.

(Dissenting).

In ruling that the Appellate Division's unanimous determination is "unsupportable", the majority is according that court, which was acting in an administrative capacity, a narrower range of discretion than normally is accorded an administrative agency. The test applied by a court exercising the administrative review function is whether a rational basis undergirds the determination appealed from. Section 495 of the Judiciary Law clearly gives the Appellate Division discretion to approve or not to approve organizations applying to practice law for benevolent or charitable purposes. *617 This is recognized in the majority's Per Curiam statement which proceeds abruptly to the conclusion of unsupportability without advising as to how or why a rational basis is lacking.

The Appellate Division has fully explained its determination in a detailed statement. The finding that the organization's stated purposes "are on their face neither benevolent nor charitable" is fully supported in the record unless the operative words "benevolent" and "charitable" are to be accorded other than their well-understood meaning. In the last two paragraphs of its statement, the court has laid down the factor of financial inability to afford legal representation as at least one important guideline to be applied. The concurring opinion in this court makes much of the assertion that in a prior application invoking the Puerto Rican Legal Defense and Education Fund, Inc., the court's approval was based solely on the charitable purpose of helping a minority ethnic group, not because of the members' indigency, but solely because of their minority status in the society. However, the Appellate Division in its statement here appealed from noted there is no parallel since "the latter's [PRLDEF] application demonstrated clearly that indigence is rife amongst the intended clientele. It does not appear that discrimination against homosexuals, which undoubtedly exists, operates to deprive them of legal representation." I am unable to see why that distinction is without effect, as must the rest of this court. And even assuming, without agreeing, that there is some measure of inconsistency between the determination in the Puerto Rican case and the one now before us, at least on the question of indigency as a criterion, we again find the Appellate Division accorded lesser powers by the majority than would be accorded any other administrative agency exercising discretionary and regulatory powers. The Appellate Division in regulating these matters has seen fit to draw some lines which are not without rational bases. The court is normally loath to interfere with agency regulation in areas delegated

to the agency by the Legislature. Yet here the signatories to the concurring opinion have substituted their judgment in the matter for the judgment of those to whom the responsibility was delegated; and those subscribing to the Per Curiam statement, although remitting the case for reconsideration, seem to have given the court below very little to reconsider. *618

The majority has, in effect, taken the regulatory function away from the Appellate Division in this case and for that reason I must dissent.

Judges Breitel, Jasen, Jones and Wachtler concur in Per Curiam opinion; Judge Burke concurs in an opinion in which Chief Judge Fuld concurs; Judge Gabrielli dissents and votes to affirm in a separate opinion.

Order reversed, without costs, and matter remitted to the Appellate Division for further proceedings in accordance with the opinion herein.