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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CORAM: THE HONOURABLE CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE MARSH
THE HONOURABLE MRS. JUSTICE NORMA MCINTOSH

IN THE MATTER of an Application for Administrative Orders Pursuant to the Jamaica (Constitution) Order in Council 1962.

AND

IN THE MATTER of a Bill entitled "AN ACT to establish the Caribbean Court of Justice"

AND

IN THE MATTER of a Bill entitled "AN ACT to Amend the Judicature (Appellate Jurisdiction) ACT"

AND

IN THE MATTER of a Bill entitled "AN ACT to Amend the Constitution of Jamaica"

CLAIM NO. HCV00217 OF 2004

BETWEEN	EDWARD SEAGA	CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	RESPONDENT

CLAIM NO. HCV 00281 OF 2004

BETWEEN	THE JAMAICAN BAR ASSOCIATION	CLAIMANT
AND	THE HONOURABLE SYRINGA MARSHALL-BURNETT	1ST RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND RESPONDENT

CLAIM NO. HCV 00284 OF 2004

BETWEEN	THE INDEPENDENT JAMAICA - COUNCIL FOR HUMAN RIGHTS (1988) LIMITED	CLAIMANT
AND	THE HONOURABLE SYRINGA MARSHALL-BURNETT	1ST RESPONDENT
AND	THE ATTORNEY GENERAL OF OF JAMAICA	2ND RESPONDENT

CLAIM NO. HCV 00287 of 2004

BETWEEN	JAMAICANS FOR JUSTICE	1ST CLAIMANT
	LEONIE MARSHALL	2ND CLAIMANT
	THE FARQUHARSON INSTITUTE OF PUBLIC AFFAIRS	3RD CLAIMANT

AND	THE HONOURABLE SYRINGA MARSHALL-BURNETT	1ST RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND RESPONDENT

R.N.A. Henriques Q.C., Abe Dabdoub, Patrick Atkinson and Delroy Chuck for Edward Seaga.

David Batts, Miss Carol Vassall, Miss Stacy Powell for the Jamaican Bar Association.

Dr. Lloyd Barnett and Miss Nancy Anderson for The Independent Jamaica Council for Human Rights (1988) Limited.

Richard Small and Donovan Jackson for Jamaicans for Justice

Michael Hylton Q.C., Solicitor General, Miss Simone Mayhew and Miss Gladys Young for the Respondents.

HEARD: April 19, 20, 21, 2004

WOLFE, C.J.

The Government of Jamaica on February 14, 2001 signed an agreement for the establishment of an institution to be known as the Caribbean Court of Justice. The Court is intended to exercise final appellate jurisdiction in respect of all matters now heard by the Judicial Committee of the Privy Council. It is also intended that the Court will exercise original jurisdiction in respect of the interpretation and application of intra-regional trade agreements.

On May 9, 2003 and May 20, 2003 the Senate and the House of Representatives, respectively, by a simple majority in each House, passed a resolution supporting the ratification by Jamaica of the said agreement.

On December 21, 2003 the Honourable Attorney General tabled in the Senate three (3) Bills as follows :-

(a) A Bill entitled "An Act" to make provisions for the implementation of the agreement establishing the Caribbean Court of Justice, and for connected matters.

(b) A Bill entitled "An Act" to amend the Judicature (Appellate Jurisdiction) Act"

(c) A Bill entitled "An Act" to amend the Constitution of Jamaica to provide for abolition of appeals to Her Majesty in Council to make provisions for appeals to the Caribbean Court of Justice, and for connected matters.

The first reading of the Bills was taken in the Senate on December 12, 2003. Notice of the second reading of the Bills was given to the Senate on February 6, 2004 and was scheduled to take place on February 13, 2004.

Having received the claims, herein, the Honourable Attorney General caused the second reading of the Bills to be postponed pending the outcome of the Court proceedings

All the claimants are seeking declarations to the effect that the proposed Bills are unconstitutional for various reasons.

The respondents on the other hand have applied to the Court to have the claims struck out on the bases that –

(i) The statement of claim discloses no reasonable grounds for bringing the claim.

(ii) The claim is premature in that the Bills have not yet been enacted.

(iii) Any irregularity in the conduct of Parliamentary business is a matter for Parliament and is not justiciable in the Courts.

The issue raised by this application to strike out is whether the Court has jurisdiction to intervene in the affairs of Parliament.

The very issue was raised in ***The Bahamas District of Methodist Church in the Caribbean and the Americas and others v Symonette and Others; Poitier and Others v Methodist Church of The Bahamas and Others*** [2000] 5 L.R.C. 196, a decision of the Privy Council.

Lord Nichols of Birkenhead delivering the judgment of the Board said at page 207h:

> "This prematurity argument raises questions concerning the relationship of the Courts and Parliament. Two separate, but related principles of the common law are relevant. They are basic, general principles of high constitutional importance. The first general principle long established in relation to the unwritten constitution of the United Kingdom is that the Parliament of the United Kingdom is sovereign. This means that in respect of statute law of the United Kingdom, the role of the Courts is confined to interpreting and applying what Parliament has enacted. It is the function of the Courts to administer the laws enacted by Parliament.
>
> The second general principle is that the Courts recognize that Parliament has exclusive control over the conduct of its own affairs. The Courts will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions.
>
> See ***Prebble v Television New Zealand Ltd.*** [1994] 1 L.R.C. 122 at p. 133 where some of the earlier authorities are mentioned by Lord Browne-Wilkinson. The lawmakers must be free to deliberate upon such matters as they wish. Alleged irregularities in the conduct of Parliamentary business are a matter for Parliament alone".

Having examined the legal position in countries where there is no written constitution and where Parliament is supreme the Learned Law Lord went on to examine the position in common law countries where the written

constitution is supreme and not Parliament. Jamaica falls within this category. See Section 2 of The Jamaica (Constitution) Order in Council 1962.

> "Subject to the provisions of section 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".

Lord Nichols concluded that in jurisdictions where the Constitution and not Parliament is supreme the Courts have the right and duty to interpret and apply the Constitution as the supreme law. In the discharge of that function, if it becomes necessary, the Court will declare that an Act of Parliament inconsistent with a Constitutional provision is, to the extent of the inconsistency void (emphasis mine). See p. 208 g – h.

Lord Nichols cautioned that Courts should avoid interfering in the legislative process and pointed out that the primary and normal remedy in respect of a statutory provision which contravenes the Constitution is a declaration after the enactment has been passed. (emphasis mine)

The Privy Council recognized that there may be the exceptional cases where the rights protected by the Constitution may be extinguished if the Courts do not intervene prior to enactment. In such circumstances, if the consequences of the offending provision may be immediate and irreversible

giving rise to substantial damage or prejudice, the Courts may if necessary intervene before the Bill is enacted.

It is clear from what has been said that the Courts have jurisdiction to hear a claim that the provisions in a Bill if enacted would contravene the Constitution and that the Courts should grant immediate declaratory or other relief.

However, in the words of Lord Nichols, "The exercise of this jurisdiction is an altogether different matter. The Courts should exercise this jurisdiction in the restrictive manner just described". See p. 209 e.

I interpret the statement to mean that in dealing with applications prior to enactment the applicant must show that if the Bill is allowed to be enacted there may be immediate and irreversible consequences giving rise to substantial damage or prejudice.

It is in the circumstances mentioned above that the Court is required to give effect to the supremacy of the Constitution by intervening before the Bill is enacted.

Dr. Barnett in response to the submission of the respondents relied heavily upon the argument that the legislative procedure dealing with the Bills offended the Constitution.

Lord Nichols made it clear, beyond doubt, that even if the complaint is one of irregularity in the law making process or failure to comply with the rules of Parliament regarding the introduction of Bills, the test was still the same, that is, if after enactment the Court has the power to declare the Act void for contravention of the Constitution, it would only be in exceptional circumstances that the Court would intervene prior to enactment. See p.209 f.

In my view the claimants have completely failed to bring their claims within the category of exceptional circumstances. They have failed to show what irreversible damage would be caused if the Bills were enacted into law. They have failed to show that the consequences of enactment of the Bills may be immediate and irreversible resulting in substantial prejudice and damage.

The argument that if the Bills are permitted to be enacted into law the right of appeal to the Privy Council would be extinguished is wholly untenable.

In ***British Coral Corporation v R*** [1935] All E.R. Rep. 139 the Privy Council heard an appeal from Canada after Canada had passed a law abolishing appeals to the Privy Council.

Section 21(A) of the Judicature (Appellate Jurisdiction) Act provides that in matters of extradition the decision of the Court of Appeal is final thus denying a right of appeal to the Privy Council.

In the case of SCCA 48/2001 ***Dave Grant v The Director of Public Prosecutions et al*** the Court of Appeal in Jamaica refused Grant's appeal against an order for Extradition and refused him leave to appeal to the Privy Council, on the basis of section 21(A) of the Judicature (Appellate Jurisdiction) Act.

Notwithstanding section 21 (A) the Judicial Committee of the Privy Council has granted special leave to appeal the decision of the Court of Appeal.

The mere passing of a law does not per se extinguish a constitutional right, if the law which purports to do so is itself null and void. An aggrieved party may pray in aid the jurisdiction of the Court to determine the constitutionality of the offending legislation. If there is a challenge to the constitutionality of the legislation the right remains in force until the question is determined by the Court.

Examination of the proposed Bills does not disclose that if they are enacted into law the consequences of the offending provisions may be immediate and irreversible giving rise to substantial damage or prejudice.

I quote from p.199 letter c of the Judgment in the Bahamas case :-

> "In the instant case, no case was made for treating the proceedings as exceptional and thus the court was bound not to intervene in the pre-enactment legislative process. However once the Act had become law, the existing action against the Bill remained an adequate and suitable proceeding in which to consider the constitutional issues".

For the reasons stated herein I hold that this Court ought not to exercise its jurisdiction to intervene prior to enactment of the Bills.

Marsh J,

The applicants sought from the Court various declarations that three Bills, which were laid in the Senate, were unconstitutional. Further declarations were sought that the procedure adopted for the Bills' passage violated the provisions of the Constitution. The Bills which the claimants sought to impugn are these: -

(i) A Bill entitled "An act to establish the Caribbean Court of Justice."

(ii) A Bill entitled "An Act to amend the Judicature (Appellate Jurisdiction) Act."

(iii) A Bill entitled "An Act to Amend the Constitution of Jamaica."

The applicants' reasons for seeking these declarations vary.

Subsequent to these applications being filed, the respondents have themselves applied to the Court to have these claims struck out for the reasons that: -

(a) The statement of claim discloses no reasonable grounds for bringing the claim.

(b) The claim is premature in that the Bills have not yet been enacted.

(c) Any irregularity in the conduct of Parliamentary business is a matter for Parliament and is not justiciable in the Courts.

The issue raised and the question to be answered are the same.

Does the Court have jurisdiction at this early stage, i.e. at the stage of the Bill, to intervene in the affairs of Parliament?

This same issue was raised and discussed in the ***Bahamas District of Methodist Church in the Caribbean and the Americas and others v. Methodist Church of the Bahamas and others (2000) 5 L.R.C. 196***, a decision of the Privy Council. Two general principles were enunciated by Lord Nichols of Birkenhead, who in delivering the Board's judgment said, inter alia,

> ***"… The first general principle long established in relation to the unwritten constitution of the United Kingdom is that the Parliament of the United is sovereign. This means that in respect of statute law of the United Kingdom the role of the Court is confined to interpreting and applying what Parliament has enacted. It is the function of the Courts to administer the laws enacted by Parliament." (emphasis mine)***
>
> ***The second general principle is that the Courts recognize that Parliament has exclusive control over its own affairs. The Court will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions … The lawmakers must be free to deliberate upon such matters as they wish. Alleged irregularities in the conduct of parliamentary business are a matter for Parliament alone………. "The Court must be ever sensitive to the need to refrain from trespassing or even appearing to trespass."***

The distinction between the United Kingdom where Parliament is supreme and countries where the written constitution holds that supremacy was made.

In the latter situation, as in the case of the Constitution of Jamaica, the Courts have the right and duty to interpret and apply the Constitution as the supreme law (of Jamaica).

> "In discharging this function, the Court will, if necessary, declare that an Act of Parliament inconsistent with a Constitutional provision, is to the extent of the inconsistency, void."

Lord Nichols warned that the Courts (of the Bahamas) should avoid interfering with the legislative process. He declared that the primary and normal remedy in respect of a statutory provision, the content of which is in contravention of the Constitution, is a declaration made "after the enactment has been passed that the offending provision is void." This admonition can be extended to Jamaica.

The exception of this general rule was recognized by the Privy Council. There may be situations where the rights sought to be protected by the Constitution, cannot be protected unless the Court acts at an earlier stage.

> "In these situations, the consequences of the offending provision may be 'immediate' and 'irreversible' and give rise to substantial damage or prejudice."

The Courts, may, where such an exceptional case arises, intervene before the Bill is enacted into law. This would be to give effect to the overriding primacy of the Constitution.

The exercise of the Courts jurisdiction should be in the "restrictive manner just described."

Where the applicant seeks to avail himself of an application for a declaration where a Bill is being impugned, it is a prerequisite that the applicant must show that if the Bill is allowed to become law, the consequences will be "immediate and irreversible and give rise to substantial damage or prejudice."

The response to the respondent's submission was essentially that the applications were for declarations that the process being implemented for the passage of the 3 Bills tabled in the Senate is contrary to the Constitution in that it fails to conform with section 49 of the Constitution. (See paragraph 2 of the Response to Second Respondent's Application for Court Orders). This was the main thrust of Dr. Barnett's submission. His submission was adopted by the other applicants.

Lord Nichols, having stated that "one of the constitutional complaints made, related not to the contents of the Bill, but to an alleged irregularity in the law making process", declared with noted emphasis, that the test

remained the same. The test was that if the Bill is void as being in contravention of the Constitution, it would only be in exceptional circumstances that the Court would intervene at the stage of a Bill.

None of the applicants has satisfied me that any of the claims seeking declarations concerning the impugned Bills falls within the circumstances which Lord Nichols described as being immediate and irreversible in their consequences and which will cause substantial and irreparable damage or prejudice.

It was argued that the Bills, if they become law, would remove any right of appeal to the Privy Council. However, in the case ***British Coal Corporation v. R. (1935) AC 501,*** Canada had passed a law which abolished appeals from Canada to the Privy Council. Despite this, the Privy Council still heard this appeal from Canada.

In proceedings concerning matters of Extradition, Section 21(A) of the Judicature (Appellate jurisdiction) Act, provides that the Court of Appeal is the final Appellate Court. This, prima facie, denies any right of appeal in such proceedings to the Privy Council. Despite this statutory denial of a right of appeal to the Privy Council, Dave Grant, who appealed unsuccessfully to the Court of Appeal of Jamaica and was also refused leave to appeal to the Privy Council, was granted special leave by the Privy

Council to appeal the decision of the Court of Appeal. See ***Vide S.C.C.A. 48/2001 Dave Grant v. The Director of Public Prosecutions etal.***

The need for the Court to intervene at this early stage, the stage of the Bills, has not been established by the applicants. Nothing has provided a case for treating these applications as exceptional. The right of the applicants to apply for suitable declarations if and when these Bills are enacted into law, is not affected. Lord Nichols has expressed it this way;

> ***"However, once the Act had become law, the existing action against the Bill remained an adequate and suitable proceeding on which to consider the constitutional issues."***

I adopt that statement of the law. This Court ought not at this "early stage" to intervene, prior to the Bills becoming law and I so hold.

N. E. McIntosh, J.

I have had the opportunity to read the written reasons of the Honourable Chief Justice and Marsh, J. for the decision which was given in this matter on April 21, 2004 and, as they accord with my own reasons, they need not be repeated. It is sufficient simply to say that based on the submissions and the authorities relied on I too concluded that the Claimants did not show that their claims were exceptional, warranting the court's intervention at the pre-enactment stage of the parliamentary process.

I wish, however, to add a comment in relation to a submission on what the court's approach should be to claims of the nature of those involved in these proceedings. The reliefs sought by five of these Claimants differed from that sought by the Independent Jamaica Council for Human Rights, the Claimant for whom Dr. Barnett appeared. The latter claimed relief on the ground that the proposed legislation is ultra vires the legislative power of parliament while the other Claimants based their claims on their contention that the terms of the three Bills were unconstitutional, for several reasons.

Dr. Barnett sought to make a distinction in the court's approach to these challenges, submitting, as I understood it, that although in both instances the test in **Bahamas District of The Methodist Church in the Caribbean and the Americas and Others v The Hon. Vernon Symmonette MP and Others P C**

(2000) 59 WIR 1, applied, a Claimant whose challenge was to the parliamentary process would automatically pass the test. That test, according to Lord Nichols, would require the court to intervene at the pre-enactment stage only in the exceptional case:

> **"where the protection intended to be afforded by the constitution cannot be provided by the courts unless they intervene at an earlier stage"**

for instance where

> **" the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice"**

According to Dr. Barnett's submission, the challenge to the parliamentary process would automatically qualify as exceptional because the court, "has a duty to intervene if a controlled Parliament is embarking upon a course which is clearly in excess of the powers granted to it." This, according to Dr. Barnett is what the authorities show. There was, it seems, no automatic qualification for challenges involving conflicts between the terms of the proposed legislation and the constitution.

I can find no support in the authorities cited for this submission and agree with the Solicitor General that in both instances the Claimant must satisfy the test in the **Bahamas District of The Methodist Church** case. There is no

automatic qualification to the ranks of exceptional cases. In each of the two categories Dr Barnett identified, a claimant must show that the protection provided by the constitution cannot be provided unless the court intervenes at this early stage by showing for instance that the consequences of the passage of these Bills would be immediate and irreversible and give rise to substantial damage or prejudice or that there would be no remedy available to the Claimant once the Bills have been enacted. Any duty to intervene is subject to the claim passing that test. Once the Claimant is able to show that the case is exceptional then, as Lord Nichols said,

> **"parliamentary privilege must yield to the court's duty to give the Constitution the overriding primacy which is its due"**

These Claimants did not show that there would be any immediate and irreversible consequences if the court did not intervene at this early stage. They did not show that there would be no remedy available to them after the legislative process was complete. Accordingly, the remedy which Lord Nichols described as the "normal remedy" would be theirs, that is,

> **"a declaration made after the enactment has been passed, that the offending provision is void",**

coupled with any necessary, consequential relief.

In the final analysis, no case was made for treating these proceedings as exceptional and therefore no basis for the Court's intervention before the three Bills have been passed.