

In the Supreme Court

Before Mr. Justice Henry

Suit No. C.L. W151 of 1975

Between Phillip Waite Plaintiff

And Chief Electoral Officer
Returning Officer Kingston Eastern
and Port Royal Defendants

January 29, 1976

REASONS FOR JUDGMENT

This matter came before me in Chambers by way of summons for an interlocutory injunction to restrain the defendants from holding a bye-election for a member of the House of Representatives for the constituency of Kingston Eastern and Port Royal on the 18th November, 1975.

On 10th November, 1975, the plaintiff filed a writ seeking a declaration that the plaintiff is entitled to have an identification card issued to him and an injunction as set out. Polling day for the election to which the writ refers having been fixed for Tuesday the 18th November, 1975, the plaintiff applied for an interim injunction as the only remedy available to him. I refused the application, indicating that I would give my reasons in writing. I now do so.

When the summons came on for hearing the Attorney General made the submission in limine that the Court had no jurisdiction to grant the remedy sought, because of the provisions of sec. 16 of the Crown Proceedings Act. That section provides as follows:

" 16 - (1) In any civil proceedings by or against the Crown the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that -

- (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
- (b) in any proceedings against the Crown for the recovery of land or other property the Court shall not make an order for the recovery of land or the delivery of the property, but may

in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.

- (2) The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown. "

It was the submission of the Attorney General that both the defendants are officers of the Crown, their appointments being made by the Governor-General by virtue of sections 62 and 64 of the Representation of the People Act. It was not therefore open to the plaintiff to seek an injunction against the defendants. In support of this submission he cites the cases of Underhill et al v. Ministry of Food 1950 1 A.L.J. 591 and International General Electric Co. of New York Ltd. et. al v. Commissioner of Customs and Excise. In answer to this submission, Mr. Phipps for the plaintiff made three points. The first is that the application has its foundations in the Constitution and that a distinction must be drawn between, on the one hand, actions brought under the ordinary law of the land as between subject and subject or subject and the Crown and on the other hand, actions brought between the subject and the Crown which have their foundation under the Constitution itself. In the latter category relief granted under the Constitution may be granted by the Court. In elaboration of this argument he suggests that section 38 of the Constitution contains mandatory provisions as to what the electoral law must include, that where the electoral law contains provisions designed to satisfy section 38 of the Constitution any failure to obey those provisions would be unconstitutional and that the authorities cited can have no application in a situation where what is being considered is the interpretation of a written constitution. Sub-section (2) of section 38 of the Constitution he suggests strengthens his argument. Section 38 of the Constitution reads as follows:

" 38 - (1) Any law for the time being providing for the election of members of the House of Representatives shall -

- (a) contain provisions designed to ensure that so far as is practicable any person entitled to vote at an election of members of the House of Representatives, shall have a reasonable opportunity of so voting; and

(b) contain provisions relating to the conduct of elections of members of the House of Representatives, including provisions relating to the identification of electors, designed to ensure that as far as is practicable no person shall vote at an election of a member of the House of Representatives -

- (i) who is not entitled to vote; or
- (ii) when he is not entitled to vote; or
- (iii) where he is not entitled to vote:

Provided that this paragraph shall not come into operation until the first day of January 1964.

(2) No election of a member of the House of Representatives shall be called in question on the ground that the law under which that election was conducted was inconsistent with this section. "

Mr. Phipps's argument is that the implication of this subsection is that but for its provision, the Court would have jurisdiction to entertain an action questioning an election conducted under a law which was inconsistent with section 38 and the Constitution, therefore, recognises the jurisdiction of the Court in other actions based on non-compliance with the Constitution or with laws designed to implement its provisions.

The second point which Mr. Phipps makes is that this is not an action brought against the Crown but against statutory officers given statutory functions under the law. These, he says, are officers with functions by virtue of Chapter V of the Constitution and they are not in the same position as officers falling under Chapter VI. The latter are executive officers to whom the Crown Proceedings Act would apply but the former are not.

The final point which Mr. Phipps makes is that section 107 of the Representation of the People Act itself recognises the power of a the Court to postpone/holding of an election since it sets out the circumstances in which that power may not be exercised.

At the hearing of the summons, I reserved my decision on this preliminary point. I am, however, of the opinion that it succeeds and that I have no jurisdiction to entertain the application for an interim injunction. It is clear on the authorities cited by the Attorney General that:

- (a) the Court cannot grant an injunction against the Crown but may in lieu thereof grant a declaration;
- (b) the declaration is a final remedy and there is no power to grant either an interim injunction or an interim declaration;

- (c) the Court cannot grant an injunction (or an interim injunction) against an officer of the Crown if its effect would be the grant of such a remedy against the Crown.

These restrictions arise by virtue of the provisions of section 16 of the Crown Proceedings Act. That Act was enacted subsequent to the enactment of section 107 of the Representation of the People Act and therefore in so far as section 107 may be said to be inconsistent with the specific provisions of the Crown Proceedings Act, that Act must prevail.

In so far as the second point made by Mr. Phipps is concerned, the Constitution itself makes no distinction between officers who have functions by virtue of Chapter V, as such, and those falling under Chapter VI. I can see no reason for holding that the definition of officer of the Crown contained in the Crown Proceedings Act should be restricted in the manner suggested by him.

The first point made by Mr. Phipps was the one which proved most attractive. It would seem that the effect of subsection (2) of section 38 is to indicate that any attempt to question an election on the ground that the law under which it is conducted is inconsistent with section 38 must be made before that election is conducted and not after. The obvious way to raise that question is by applying for an injunction. Any law, therefore, which seeks to fetter the power of the Court to grant an injunction in those circumstances would seem to be contrary to the spirit of the Constitution and to that extent void by virtue of section 2 of the Constitution. In the instant case the application does not proceed on the basis that the law is inconsistent with the Constitution but on the basis that there has been an infringement of the law which was enacted to comply with the requirement of the Constitution. It would seem that the Constitution must have contemplated applications being made for an injunction to restrain the relevant officers of the Crown from proceeding with an election to be conducted on the basis of such infringements of that law as would be tantamount to having a law inconsistent with section 38. By analogy, therefore, it would seem that in those cases also the Crown Proceedings Act to the extent that it infringes the spirit of the Constitution would be void. I have to consider, however, whether in fact the Crown Proceedings Act

infringes the spirit of the Constitution. It is true that it prohibits the Court from granting an injunction against the Crown but the alternative remedy - a declaration - which it provides is to my mind equally effective. The Act, however, by virtue of the decisions cited, also prohibits the grant of an interim injunction against the Crown without providing for an alternative remedy and it^{is} in this regard that I have had to consider whether it does not breach the spirit of the Constitution. I have come to the conclusion that a prospective plaintiff is not left without remedy since, having filed his writ, he could apply for and be granted a sufficiently early date for the trial of the action to enable in appropriate circumstances a declaration being granted by the Court prior to the election in question. I am of the view that the Crown Proceedings Act is not, therefore, void under section 2 of the Constitution and that the Court has no jurisdiction to grant the interim injunction sought on the summons. In the event that I am wrong on this point, however, I now proceed to indicate my views on merits of the application itself.

The application for the interim injunction is based on the fact that in breach of the provisions of section 9 of the Representations of the People Act, the Chief Electoral Officer has failed to issue identification cards to the applicant or to any of the persons whose names appear on the official list of electors. Such persons are, it is argued, deprived of the right to vote by subsection (5) of section 34 of the Act and although subsection 7 of section 34 purports to allow each person to vote in the circumstances therein set out it is argued firstly that those circumstances do not arise here, because the Chief Electoral Officer has not merely failed to cause the identification cards to be delivered but has failed to issue them and secondly, that subsection (7) fails to satisfy the second limb of the requirements of section 38 of the Constitution i.e. preventing unqualified persons from voting. Subsections (5) and (7) of section 34 of the Act are as follows:

Subsection (5):

" Notwithstanding anything to the contrary no elector shall receive a ballot paper or be permitted to vote unless -

- (a) he produces to the presiding officer his identification card or other prescribed document establishing his identity :

Provided that where a prescribed document establishing identity has been issued in substitution for an identification card only that document shall be produced to and accepted by the presiding officer; or

- (b) in respect of that elector all the conditions specified by subsection (7) are satisfied. "

Subsection (7):

The conditions to which paragraph (b) of subsection (5) refers are -

- (a) that the elector is unable to produce his identification card or other prescribed document establishing his identity or use it for the purposes of establishing his identity by reason of the fact that the Chief Electoral Officer has not yet pursuant to section 9 caused it to be delivered to him or that it has been lost, stolen, destroyed, mutilated or defaced;
- (b) that the elector shall take the oath of identity in the form set out in the Second Schedule and otherwise establish his identity to the satisfaction of the presiding officer.

I am of the view that subsection (7) is intended to apply inter alia to a situation where a prospective voter is unable to provide his identification card because the Chief Electoral Officer has failed to cause it to be delivered to him, whatever the cause of that failure may be i.e. whether because the Chief Electoral Officer has failed to "issue" the card at all or because the card although "issued" has failed to reach the intended holder. To my mind subsection (7) is designed to maintain a balance between on the one hand facilitating all eligible persons in exercising the right to vote and on the other hand preventing those not entitled to vote from voting. In its original form the subsection facilitated an elector who was unable to produce his identification card only if that card had been lost, stolen, destroyed, mislaid, or defaced. If he could not produce it because he had never received it from the Chief Electoral Officer, as the law stood, he was unable to vote. The amendment in 1966 was designed to cure this defect, and it does not seem to me that Parliament could have intended to facilitate only an elector who could establish that the Chief Electoral Officer had issued, but not delivered his identification card.

In so far as the second point is concerned, to my mind subsection (7) is, if anything were likely to satisfy the requirements of the

second limb of section 38 of the Constitution than subsection (5). An identification card discloses merely the name and height of the holder and his registration number. It does not include a photograph of the holder and by itself can do nothing to prevent "bogus voting." The mere production of an identification card (which is all that subsection (5) requires) cannot by itself positively identify the holder. It is by reference to the registration record card that a presiding officer is able to satisfy himself as to the identity of an elector. That card (Form 16 in the Schedule to the Rules contained in the First Schedule to the Act) contains far more details in relation to an elector and is available at each polling station in respect of each elector on the list of electors at that polling station. It is the card to which, no doubt, a presiding officer would refer when an elector seeks to "establish his identity to the satisfaction of the presiding officer" in accordance with paragraph (b) of subsection (7). In these circumstances it seems to me far more likely that the second limb of section 38 of the Constitution would be satisfied than in circumstances where a person simply produces an identification card which he claims to be his. Be it observed that in the latter case an elector is not required to establish his identity to the presiding officer but may only be required to take the oath in Form 10 in the Second Schedule. It may be that Parliament contemplated that an identification card would live up to its name and be a positive means of identification of the holder, but certainly the card produced as Exhibit 1 in this matter can hardly be so classified. Be that it may, it seems to me that as the law now stands, a person to whom no identification card has been issued is not by reason thereof deprived of his right to vote and, that being so, I can see no justification for granting the interim injunction sought.

It is argued that section 9 of the Act is designed to give effect to section 38 of the Constitution and that both are mandatory. Whatever may have been the position prior to 1966, it seems clear that the amendment to section 34 of the Act which provided for a situation

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where "the Chief Electoral Officer has not yet pursuant to section 9 caused an identification card to be delivered" must be regarded as an indication that section 9 is directory only and not mandatory. One of the principal objects of the Representation of the People Act is to provide for the holding of elections. This object should not, I think, be defeated by the failure of the Chief Electoral Officer to observe any procedure prescribed in the Act unless the consequence of that failure is either to deprive qualified persons of the right to vote or to permit unqualified persons to vote. I am of the view that even if the Court has jurisdiction to entertain the application it ought to be refused on the ground that the failure of the Chief Electoral Officer to issue identification cards to electors would not deprive those electors of their right to vote and would not facilitate unqualified persons in voting or attempting to vote at the election.