Dave Antonio Grant *Petitioner*

v.

(1) The Director of Correctional Services (Jamaica) and
(2) The Director of Public Prosecutions *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL UPON A PETITION FOR SPECIAL LEAVE TO APPEAL,

Delivered the 14th June 2004

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Rodger of Earlsferry
Lord Brown of Eaton-under-Heywood
Dame Sian Elias

*[Delivered by **Lord Nicholls of Birkenhead**]*

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1. Before their Lordships' Board is a petition for special leave to appeal from a decision of the Court of Appeal of Jamaica dated 7 November 2002. By that decision the Court of Appeal, comprising Forte P, Panton and Smith JJA, dismissed an appeal by the petitioner, Mr Dave Antonio Grant, against the refusal of the Full Court of the Supreme Court, comprising Wolfe CJ, Granville James and Karl Harrison JJ, to grant a writ of habeas corpus to secure his release from prison where he was awaiting extradition to the United States. On 14 April 1998 the petitioner had pleaded guilty to a drugs offence before a district judge in Texas. Sentencing was postponed until 10 July 1998, but he failed to appear for sentencing. Instead he fled to Jamaica, of which country he is a citizen. The extradition proceedings were brought for the purpose of completing the case in which the petitioner had entered the plea of guilty.

2. The petitioner's petition for special leave to appeal came before their Lordships' Board on 12 November 2003. On that

occasion a question was raised as to the Board's jurisdiction to hear the petitioner's appeal. The Board adjourned that question to a full board of the Judicial Committee. The Board held that if jurisdiction were found to exist special leave ought to be granted. The question now before the Board is the question of jurisdiction.

3. The basis of the submission that the Board has no jurisdiction is section 21A of the Judicature (Appellate Jurisdiction) Act of Jamaica. Part IVA of that Act, comprising section 21A, makes provision for appeals to the Court of Appeal in proceedings seeking a writ of habeas corpus or a prerogative order:

> "(1) An appeal shall lie to the Court –
>
> (a) in any proceedings upon application for a writ of habeas corpus in a criminal cause or matter against the refusal to grant the writ;
>
> (b) in any proceedings upon an application for an order of certiorari, mandamus or prohibition, in a criminal cause or matter, against the grant of the order as well as against the refusal of such an order.
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> (2) For the purpose of disposing of an appeal under this section the Court may exercise any powers of the court below or remit the case to that court.
>
> (3) The decision of the Court in any appeal under this Part shall be final."

The Solicitor-General submitted that subsection (3) displaced any scope for a further appeal to their Lordships' Board.

4. The nature of the Crown's right to grant special leave to appeal was considered most recently by the Board in *De Morgan v Director-General of Social Welfare* [1998] AC 275. The Board held that the right to entertain appeals to the Privy Council is no longer a wholly prerogative power but is regulated by the Judicial Committee Acts 1833 and 1844. It is not a normal prerogative power of the Crown. Lord Browne-Wilkinson said, at p 285, that it is "at best, a power which is in substance statutory, being regulated by the Judicial Committee Acts, with a vestigial and purely formal residue of the old prerogative powers". Accordingly, express words

are not required to limit or abolish the right to entertain such appeals. It is enough if the statute excluding the right of appeal to the Privy Council shows "either expressly or by necessary intendment" that the power to entertain such appeals is to be abolished.

5. Section 21A of the Judicature (Appellate Jurisdiction) Act does not expressly abolish the Board's power to grant special leave to appeal. The question is whether subsection (3) of that section (the "decision of the Court in any appeal under this Part shall be final") abolishes the Board's power by necessary intendment. Their Lordships consider that it does. Before the enactment of section 21A there was no right of appeal to the Court of Appeal against refusal to grant a writ of habeas corpus or to make a prerogative order, although the Board had power to grant special leave to appeal. Section 1 of the Judicial Committee Act 1844 (7 & 8 Vict c 69) empowered Her Majesty by order in council to hear appeals from any court within a British colony. This power was not confined to appeals from courts of appeal: see *In re Barnett* (1844) 4 Moo PC 453. When the Parliament of Jamaica introduced a right of appeal to the Court of Appeal by section 21A, it made plain by subsection (3) that there was to be no further appeal. Thus, there could be no question of an applicant being entitled to appeal as of right to the Board from a decision of the Court of Appeal. Nor could there be any question of the Court of Appeal having a discretionary right to grant leave to appeal to the Board. Their Lordships can see no basis for concluding that, in these respects, the decision of the Court of Appeal was to be final, but that finality was to leave open an appeal pursuant to special leave granted by the Board. That would not achieve the intended finality.

6. There is a second, more difficult issue. Section 21A of the Judicature (Appellate Jurisdiction) Act was inserted into that Act by the Judicature (Appellate Jurisdiction) (Amendment) Act, 1991. The Act of 1991 was not apt to amend the Constitution of Jamaica. That is common ground. The second question is whether the Parliament of Jamaica is able, by ordinary legislation, to exclude the right of the Privy Council to hear an appeal pursuant to special leave to appeal given by the Board. The answer to this question depends upon whether this right has been written into the Constitution of Jamaica.

7. The historical and legislative background is that Jamaica became independent on 6 August 1962. Before independence the Judicial Committee Acts 1833 and 1844 were in force in Jamaica.

Those Acts, together with all other laws in force in Jamaica immediately before independence, continued in force after independence: section 4(1) of the Jamaica (Constitution) Order in Council 1962 (SI 1962/1550). Since independence the legislature of Jamaica has had power to repeal or amend any Act of the United Kingdom Parliament in so far as it is part of the law of Jamaica, including power to make laws having extra-territorial operation: see the Jamaica Independence Act, 1962, section 1(2) and the First Schedule, paragraphs 2 and 3. The "constitutional provisions" of Jamaica may be repealed or amended only in the manner provided in those provisions: paragraph 6. These "constitutional provisions" include the Constitution of Jamaica set out in the Second Schedule to the Jamaica (Constitution) Order in Council 1962. The Constitution of Jamaica provided that the Parliament of Jamaica may make laws for the peace, order and good government of Jamaica: section 48(1). The Constitution may be altered in the manner set out in section 49.

8. The effect of these statutory provisions is that since independence the Parliament of Jamaica has been competent to enact legislation limiting or abolishing appeals to the Judicial Committee of the Privy Council. The reasoning of the Board in this regard in *British Coal Corporation v The King* [1935] AC 500 and *Attorney-General for Ontario v Attorney-General for Canada* [1947] AC 127, in relation to sections 2 and 3 of the Statute of Westminster 1931 (22 Geo 5, c 4) and section 91 of the British North America Act 1867 (30 & 31 Vict c 3), is equally applicable to paragraphs 2 and 3 of the First Schedule to the Jamaica Independence Act 1962 and section 48(1) of the Constitution of Jamaica. But if abrogation of an appeal to the Privy Council would require an alteration to the Constitution the abrogating legislation must comply with the provisions made in the Constitution regarding such an alteration.

9. The relevant provision in the Constitution of Jamaica is section 110. Chapter VII of the Constitution makes provision for the judicature. Part 3, comprising section 110, concerns appeals to Her Majesty in Council:

> "(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases –

(a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;

(b) final decisions in proceedings for dissolution or nullity of marriage;

(c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and

(d) such other cases as may be prescribed by Parliament.

(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases –

(a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and

(b) such other cases as may be prescribed by Parliament.

(3) Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any civil or criminal matter."

10. Clearly, any abrogation of the entitlement conferred by section 110(1) or (2) to bring an appeal from the Court of Appeal to the Board as of right or with the leave of the Court of Appeal would require amendment of section 110. Thus, it can be noted in passing, in so far as section 21A of the Judicature (Appellate Jurisdiction) Act would preclude an appeal to the Board against a decision on a question as to the interpretation of the Constitution, section 21A is ineffectual. In that respect section 21A is inconsistent with section

110(1)(c). Section 2 of the Constitution provides that if any law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall "to the extent of the inconsistency" be void.

11. So much is clear. But would abrogation of appeals to the Board following a grant of special leave by the Board require an alteration to the Constitution? On the face of section 110 the answer to this question is "no". Section 110(1) and (2) grant defined rights of appeal to the Board. Section 110(3) is expressed in negative terms. It does not grant any rights. Entitlement to an appeal to the Board on special leave granted by the Board does not derive from this provision, or any other provision, in the Constitution. Entitlement to such an appeal derives from the Judicial Committee Acts, continued in force on independence along with all other existing laws by section 4(1) of the Jamaica (Constitution) Order in Council 1962. On its face the evident purpose of section 110(3) is confined to ensuring that the rights of appeal to the Board conferred by section 110(1) and (2), which make no mention of the Board's right to grant special leave, are not to be taken impliedly to exclude or affect the latter right. Section 110(3) assumes the existence of such a right, although the draftsman has carefully catered for the possibility of change by using the phrase "any right" rather than "the right".

12. The feature of this interpretation of section 110 which is not altogether satisfactory is the seemingly anomalous result which follows from it. Appeals to the Board (1) as of right or (2) with the discretionary leave of the Court of Appeal cannot be abrogated save by amendment of the Constitution. But, on this interpretation of section 110, the long-stop safeguard, comprising (3) the Board itself granting special leave to appeal, is not written into the Constitution and attracts no constitutional protection. This is surprising. One might have expected that all three routes to the Board would have attracted a similar degree of constitutional protection. One would not expect to find that route (3) attracts a lesser degree of protection than routes (1) and (2).

13. However, whatever may be the explanation of this their Lordships consider the language of section 110(3) does not admit of the interpretation that thereby the right of appeal to the Board on special leave granted by the Board was implicitly affirmed to the extent of endowing this right with a similar constitutional status to the rights expressly granted by section 110(1) and (2).

14. Their Lordships therefore accept the Solicitor-General's submission. They will humbly advise Her Majesty that this petition should be dismissed with costs for want of jurisdiction.