

H.C.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 104/98

COR: THE HON. MR. JUSTICE RATTRAY, P.,
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN:	NEVILLE LEWIS	PLAINTIFF/APPELLANT
AND	THE ATTORNEY-GENERAL FOR JAMAICA	DEFENDANT/RESPONDENT
AND	THE SUPERINTENDENT OF ST. CATHERINE DISTRICT PRISON	DEFENDANT/RESPONDENT

Dennis Daly, Q.C. Richard Small, Esq., and O. Hilaire
Sobers for the Appellant instructed by Daly, Thwaites
and Company

Lennox Campbell, Senior Assistant Attorney General,
Lackston Robinson and Mark Harrison for the Respondent
instructed by the Director of State Proceedings

September 21, 22 and December 18, 1998

HARRISON, J.A.

This is an appeal from the Order of Walker, J. made on 25th August, 1998, dismissing a summons filed by the appellant Neville Lewis, seeking an interlocutory injunction to stay execution, fixed for 25th August, 1998, until his constitutional motion filed in the Supreme Court is heard.

On 22nd September, 1998, we allowed the appeal, set aside the said order and granted a conservatory order until the hearing of the said constitutional motion. As promised these are the reasons in writing.

A history of the matter follows: The appellant was convicted on 14th October, 1994, for capital murder committed on 18th October, 1992, and sentenced to death; he had been arrested on 11th November, 1992.

On 31st July, 1995, his appeal against conviction to the Court of Appeal was dismissed. On 2nd May, 1996, the Judicial Committee of the Privy Council dismissed his petition for special leave. As a consequence he thereby exhausted his domestic remedies in respect of his conviction.

On 24th May, 1996, the appellant petitioned the United Nations Human Rights Committee complaining of violation of articles 9 and 10 of the International Convention on Civil and Political rights, to which Jamaica is a signatory. On 17th July, 1997, the said Committee stated that the appellant's rights under the said article were violated, in that, inter alia, he was not afforded a trial within a reasonable time, and recommended that he was entitled to a remedy, including compensation.

On 7th August, 1997 published in the Jamaica Gazette were instructions approved by the Governor-General in Privy Council setting a time-frame of six (6) months after the response by the Jamaican Government to the international body to which a convicted person had complained, beyond which execution would not be postponed.

On 12th September, 1997, Messrs Berwin and Co. the appellant's solicitors in London advised the Governor-General's secretary that they intended to file with the Inter-American Commission on Human Rights ("the Commission"), on behalf of the appellant a complaint of contravention of several articles and regulations of the Convention. The Jamaican Government had signed and ratified the Inter-American

Convention on Human Rights on 19th July, 1978 ensuring to the appellant free access to lodge petitions.

On the said 12th September, 1997, a warrant was issued for the execution of the appellant on 25th September, 1997; it was subsequently stayed.

On 2nd October, 1997 the appellant petitioned the Commission complaining of violation of his human rights and on 20th November, 1997 the said Commission advised the Government and requested a response. On 20th November, 1997, the Commission requested the said government to stay the execution pending investigation.

On 2nd December, 1997 the government responded. On 5th January, 1998 the appellant commented on the response.

On 25th May, 1998 the appellant's solicitors wrote to the Governor-General's secretary requesting an assurance that there would be no execution until the Commission had reported on its investigations. On 2nd June, 1998 the Governor-General's secretary advised the said solicitors that the second response by the government having been made on 10th February 1998 the final date of postponement was 10th, August 1998.

On 10th August 1998 the said solicitors wrote to the Governor-General's secretary attaching a copy of a letter from the Commission dated 29th July 1997 and which stated that the latter body had requested the government to stay the execution pending the determination of the complaint at its next regular session during the period 28th September 1998 to 16th October 1998. The said solicitors also requested a stay of execution of the functions under sections 90 and 91 of the Constitution of Jamaica.

The Governor-General's secretary replied that he was unable to give such an undertaking.

On 14th August 1998 a warrant was issued for the execution of the appellant on 27th August 1998.

On 21st August 1998 the appellant filed a writ in the Constitutional Court, seeking, inter alia, declarations that said the Governor-General's instructions were unconstitutional and should be rescinded, that the issue of the death warrant while the appellant's application was before the Commission for consideration was a violation of his rights and unconstitutional and orders that execution be stayed and the warrant rescinded or a conservatory order be made staying execution while the said application was pending before the Constitution.

On 25th August 1998 Walker, J. dismissed a summons by the appellant applying for an interlocutory injunction or conservatory order to stay his execution scheduled for 27th August 1998, until the hearing of his writ by the Constitutional Court and any consequential appeals therefrom; leave to appeal however was granted and execution was stayed for ten (10) days for the purpose of this appeal.

Mr. Richard Small for the appellant argued that in dismissing the summons for the injunction or conservatory order, Walker, J. misdirected himself by making definitive findings on issues which were not before him and which were properly to be determined by the Constitutional Court after full arguments and evidence was heard, and thereby failed to apply the correct test, that is whether or not there were serious issues to be tried. He submitted that those serious issues were, inter alia:

1. Whether or not the Constitutional Court had the power to restrain the state from a threatened breach of the Constitution.

2. Whether or not the said instructions issued by the Governor-General laying down guidelines in respect of applications pending before the Inter-American Commission on Human Rights were in conflict with the observations in the decision of the Judicial Committee of the Privy Council in **Pratt et al. vs. The Attorney-General of Jamaica** (1993) 43 WIR 340 or otherwise.
3. The state having ratified the Inter-American Convention on Human Rights, did the appellant have a legitimate expectation that while his application was pending before the said Commission, the Governor-General would not exercise his powers under the Constitution without awaiting the Commission's determination within the guidelines in the said **Pratt** case and
4. Should the Constitutional Court recognize and protect his legitimate expectation.

He relied also on **Reckley v Minister of Public Safety and Immigration et al** [1995] 4 All ER 8, and **Minister of Foreign Affairs vs Vehicles and Supplies** [1991] 1 WLR 550.

Mr. Campbell advanced no argument in challenge.

An applicant seeking an injunction in interlocutory proceedings, as a general rule need only show that he has a serious question to be tried, namely, "a fairly arguable point". Such proceedings are not intended nor equipped to deal with points of law and facts not yet clearly settled. These would require full and detailed arguments and evidence and mature and reasoned considerations by the court hearing the substantive issues.

We are of the view that Walker, J. had before him several such arguable points on which he should have declined to make definitive findings and refer them instead to the Constitutional Court for determination.

It is still a correct statement of the law that injunctive relief may not be granted against the Crown (section 16(2) of the Crown Proceedings Act), but that does not prevent a court from making a declaration of the rights of the parties, which the Crown would usually respect. This is so, despite, the distinction made by the **House of Lords** in **M vs Home Office** [1993] 3 WLR 433 that injunctions may be granted against ministers and public officials proceeded against in their own names. This matter of the issue of injunctive relief against the Crown was raised before the Board of the Judicial Committee of the Privy Council in **Minister of Foreign Affairs, Trade and Industry vs Vehicles and Supplies et al** [1991] 1 WLR 550. The Board (per Lord Oliver) in declining to make a decision on that matter acknowledged at page 557, that:

“... the point is far from easy...”

and noted that:

“Attention has been drawn to some of the difficulties in this area of the law in a note by H.W. R. Wade (1991) 107 L.Q.R. 4 and there are in addition, considerations regarding the status of Ministers of the Crown which are peculiar to Jamaica.”

He concluded:

“Despite Dr. Rattray’s most helpful address, their Lordships do not think it appropriate to express an opinion on what is, in any event, now a hypothetical as well as an academic question and without having the benefit of a full inter partes argument.”

Mr. Small quite correctly pointed out that the Judicature (Constitutional Redress) Rules, 1963 itself empowers the Constitutional Court to entertain an application “... praying for an injunction or other appropriate order.”

We disagree with the definitive finding of the said judge as to "... the clear provisions of section 16(2) of the Crown Proceedings Act." This was a serious triable issue.

In addition, the guidelines contained in the said instructions approved and issued by the Governor-General setting a limit of six months from the date of response by the state to the Commission after which execution would not be postponed, meant that the second response having been submitted by the state on 10th February, 1998 execution was consequently fixed for 27th August 1998. This limiting period of six months for the determination by the international body of the complaint by the appellant seems to be in conflict with the recommended period of eighteen months adverted to by the Board in **Pratt et al vs Attorney-General et al** (supra)

The Board (per Lord Griffiths) said, at page 361:

"The final question concerns applications by prisoners to the IACHR and the UNHRC. Their Lordships wish to say nothing to discourage Jamaica from continuing its membership of these bodies and from benefitting from the wisdom of their deliberations. It is reasonable to allow some period of delay for the decisions of these bodies in individual cases but it should not be very prolonged. The UNHR does not accept the complaint unless the author "has exhausted all available comestic remedies".

and at page 362:

"It therefore appears to their lordships that, provided that there is in future no unacceptable delay in the domestic proceedings, complaints to the UNHRC from Jamaica should be infrequent and, when they occur, it should be possible for the committee to dispose of them with reasonable dispatch and (at most) within eighteen months."

The rationale of **Pratt's** case therefore, on this issue, is that within a period of eighteen months from the date on which the appellant had exhausted his domestic remedies in respect of his conviction, his complaint to the international body would have been made and its report completed. This said period of activity must fall within the period of five years from the date of his sentence because any intended execution beyond that date would attract the complaint of cruel and inhuman punishment. The appellant's petition in respect of his conviction having been dismissed on 2nd May 1996 any complaint to the Commission would have been expected to have been dealt with within the succeeding eighteen months expiring on 2nd November 1997. The appellant filed his petition with the Commission on 2nd October 1997. From this date the Commission, on the reasoning in **Pratt's** case, would have eighteen months to complete its work. It is an arguable point therefore that the appellant could entertain the legitimate expectation that, any intended execution would await the Commission's report.

A treaty entered into by the executive of a sovereign state does not automatically become a part of the domestic law unless it has been incorporated by legislation. Only then do any rights and obligations arise thereunder with reference to its nationals. (**MacLaine Watson & Co. Ltd. vs. Department of Trade and Industry** [1989] 3 All ER 523 at 544). When Jamaica signed and ratified the Convention on Human Rights on 19th July 1978 ensuring to its nationals access to petition the Commission, that act did not bind the domestic courts, nor the Governor-General in the exercise of its functions under the Constitution. Despite not being bound in law, the domestic courts will give due consideration and respect to such a treaty and assume

that the executive will respect it. The Board in *Pratt et al vs. Attorney-General* (supra) had endorsed this view. It maintained at page 353:

“... Jamaica being a signatory to the International Convention on Civil and Political Rights and to the Optional Protocol, the views of the UNHRC should be afforded weight and respect but were not of legally binding effect; and ... the like considerations applied to the IACHR.”

In *Fisher vs Minister of Public Safety and Immigration et al* (unreported) Civil Appeal No. 27/98, Commonwealth of the Bahamas, where the appellant, having exhausted all his domestic remedies, including a constitutional motion in the Judicial Committee of the Privy Council, and now was appealing from a request to grant a stay of execution, Carey, J.A., nevertheless, expressed the view, that:

“... the appellant may justifiably have a legitimate expectation that the Government will enable him to address his petition to the IACHR and will respond to requests for information and consider any report or recommendations of that body provided they are received in a timely manner.”

We therefore concluded that Walker, J failed to ask the correct question and apply the proper test, that is, whether there were serious issues to be argued (*Reckley vs Minister of Public Safety and Immigration et al* [1955] 4 All E.R. 8), and as a consequence he fell into error. For these reasons we allowed the appeal.