IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (CIVIL) 9 of 2019
(Formerly G111 of 2018 and G184 of 2018)

BETWEEN

(1) THE DEPUTY REGISTRAR OF THE CAYMAN ISLANDS GOVERNMENT REGISTRY

(2) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Appellants

AND

(1) CHANTELLE DAY
(2) VICKIE BODDEN BUSH

Respondents

BEFORE The Rt. Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Hon C. Dennis Morrison, Justice of Appeal

Appearances: Ms. Reshma Sharma and Ms. Celia Middleton of the Attorney General's Chambers for the Appellants

Mr. David McGrath, Ms. Sara Ismail and Ms. Kirsty Leedam of McGrath Tonner for the Respondents

Heard: 9 April 2019

Ruling Delivered: 10 April 2019

Ruling Circulated: 15 April 2019

RULING

GOLDRING, PRESIDENT:

The Chief Justice's decision

1. On 29 March 2019 the learned Chief Justice handed down his judgment. It has immediate and profound consequences and implications, not only for Ms. Day and Ms. Bush, but also for the citizens and Government of the Cayman Islands. The Chief Justice's ruling was in such terms as to enable Ms. Day and Ms. Bush, the appropriate formalities once having been complied with, virtually immediately to marry. In the course of his judgment, the Chief Justice reached significant and widely applicable decisions regarding the ***Cayman Islands Constitution Order of 2009*** and the Bill of Rights enshrined within Part 1 of it (and brought into effect on 6 November 2012).

2. The learned Chief Justice did not accept the Appellants' assertions that the wording of section 14(1) of the Bill of Rights guaranteed the right to marry only for men and women as parties of the opposite sex. Neither did he accept that it precluded access to marriage by parties of the same sex. He did not accept the Appellants' assertion that section 14(1) specifically provided for the right to marry, that it was "*lex specialis*" as the Respondents put it, and that it was impermissible to locate that right elsewhere in the Bill of Rights. The Chief Justice also rejected the Appellants' submission that the aim of section 14(1) was the protection and promotion of marriage and family in the traditional sense, as understood in the Cayman Islands.

3. The ***Marriage (Amendment) Law 2008*** preceded the Bill of Rights. Section 2 defined marriage in terms of a union between a man and a woman. The Chief Justice found that the ***Marriage (Amendment) Law 2008*** was based on religious grounds. He did not accept that in construing the Bill of Rights, the court should have regard for, and defer to, the democratic will of the Caymanian people, as manifested by the terms of section 2 which,

it was said, reflected the plain intention of the Legislature to preserve and protect their traditional view of marriage.

4. In short, the learned Chief Justice concluded that Ms. Day and Ms. Bush have rights to a private and family life and are entitled to the State's respect for those rights by the provision of a legal institution which protects them. Those rights, as the Chief Justice found, include the right to found a family. He found that the fact that section 14(1) enshrines the right to marry for opposite sex couples does not mean that the similar right is not to be located for same sex couples in section 9, where the rights to private and family life are enshrined. He found too violations of sections 10 and 16. He said that no principle of constitutional construction allows for a preclusive and discriminatory reading, as he put it, of section 14(1). He said that by its ongoing refusal to recognise and respect Ms. Day's and Ms. Bush's rights, the State was in violation.

5. The learned Chief Justice concluded that the passage of the 2008 Amendment to the Marriage Law was impermissible. The subsequent introduction of the Bill of Rights meant that the law violates the rights of Ms. Day and Ms. Bush, and all those similarly placed, as a consequence of their sexual orientation. Such violations, as he found, were prohibited by the Bill of Rights and are unconstitutional, and for which there was no justification.

6. The learned Chief Justice concluded that section 5(1) of the ***Constitution Order*** required the Court to read and construe the Marriage Law with "*such modifications, adaptations, qualifications and exceptions as may be necessary to bring (the Law) into conformity with the Constitution*". He concluded that the court was required to modify the Law and bring it into conformity. He did so by ordering it to read:

> "'*marriage' means the union between two people as one another's spouses*".

7. He also ordered that section 27 of ***the Law*** prescribing the marriage declaration be modified to accord with his order.

8. Before turning to the grounds of appeal, the significant implications of the learned Chief Justice's decision are readily apparent. In an affidavit sworn by Celia Middleton on behalf

of the Appellants, she sets out the consequential legislation in many areas which will be required. We cannot be as sanguine as Mr. McGrath, on behalf of both Respondents, about the immediate legislative burden on Government following the Chief Justice's decision.

The grounds of appeal

9. Given the pressure, we shall not set out the grounds in any detail. We annex them to the ruling. In essence, they seek to overturn the learned Chief Justice's decision in respect of section 14(1) of the ***Cayman Islands Constitution Order 2009*** (grounds 1 and 2), they suggest he should have given weight to the views expressed in negotiations preceding the 2009 Constitution which, it is said, supported the Appellants' contention that section 14(1) was intended only to confer a right to marry on opposite sex couples (ground 3), that he gave too much weight to decisions in various common law jurisdictions which were not apposite to the present case (ground 4), that he was wrong to conclude that the Marriage Law was based on religious grounds (ground 5), that he should have acknowledged that ECHR jurisprudence clearly distinguished the right to recognition/protection of civil unions from marriage (ground 6), and finally, that in modifying the ***Marriage (Amendment) Law 2008***, under section 5(1) of the ***Cayman Islands Constitution Order 2009***, the Chief Justice exceeded his powers (ground 7).

10. In her submissions on behalf of the Appellants, Ms. Sharma submits that the Appellants have raised what she describes as "*fundamental constitutional challenges*". They relate, firstly, to the scope and extent of the constitutional right to marry, as she puts it, in section 14(1) of the Bill of Rights, and whether a right of marriage for same sex couples can be located elsewhere in the Bill of Rights, having regard to the clear and express limitations in section 14(1) and, secondly, the scope of the Court's powers of modification under section 5(1) of the constitution.

11. Ms. Sharma emphasises that this is the first claim in the Cayman Islands under section 14(1). It goes to the scope of the constitutional right to marriage: whether such a constitutional right can be altered by the introduction of what could be said, as it was put, to be an entirely new category of marriage. That issue arises, she submits, within the

context of strongly expressed views about the nature of marriage expressed broadly in the Cayman Islands. Ms. Sharma further submits that the learned Chief Justice was wrong in his determination that section 14(1) was discriminatory. He was wrong to impugn one constitutional provision (section 14(1)) by reference to others. She submits that the real issue which fell for determination was whether the ***Marriage (Amendment) Law 2008*** was discriminatory.

12. As to the application of section 5(1) to modify the ***Marriage (Amendment) Law 2008***, Ms. Sharma submits that that raises issues of wide and important constitutional importance. It calls into question the boundary between the permissible scope of "*judicial legislation*" as against that of the Legislature. That has importance beyond the present case, she submits. In creating a new form of marriage, the learned Chief Justice went further than he was entitled to.

13. In the result, Ms. Sharma submits that the Appellants raise arguable grounds of appeal.

14. Mr. McGrath, on behalf of both Respondents, disagrees and does so in bold and detailed terms. He submits that in their grounds of appeal, the Appellants are seeking to raise what he describes as "*technical points*". They do not, as he submits, seek to challenge the Chief Justice's substantive findings of serious, overlapping violations of the Bill of Rights. In a clearly expressed skeleton argument, Mr. McGrath further submits the grounds have no prospect of success. As to grounds 1 and 2 (the section 14(1) grounds) they run counter to many years of Privy Council decisions, and to the position adopted before the learned Chief Justice. Ground 3 (the negotiations ground) is irrelevant to the task of the court in interpreting the statutory provisions. Ground 5 (the finding of the ***Marriage (Amendment) Law*** being based on religious grounds) is a question of fact. Grounds 4 and 6 (in broad terms, the Chief Justice's approach to the legal decisions of overseas jurisdictions), was plainly wrong. Ground 7, submits Mr. McGrath, (the section 5(1) ground) is "*misguided*". The Chief Justice, he submits, was plainly entitled to modify the Law as he did.

How this court should approach the application for a stay

15. By section 19(3) of the ***Court of Appeal (2011 Revision)***, a stay may be granted for good cause. What amounts to good cause to stay an execution of a judgment has been considered in many cases, a number of which have been drawn to our attention. As the cases make plain, a successful litigant is prima facie entitled to the fruits of his success. There must be good reason for the court to prevent that. In deciding whether or not to impose a stay, the court will consider the grounds of appeal, their likelihood of success and the balance of convenience having regard to the interests of both parties. The overriding feature is the interests of justice in any given case, as the observations of Potter LJ make plain in the case of *Leicester Circuits Limited v Coates Brothers Plc* (EWCA Civ 474).

16. Most of the cases brought to our attention deal with very different factual circumstances from those presently confronting this court. Mr. McGrath places greatest reliance on a first instance ex tempore judgment of Mr. Justice Mostyn in a case concerning an interim care order of a three year-old child: *NB v LB of Haringey* (EWHC 3544 (Fam)). In that case, the judge expressed the view that the principles for imposing a stay "*cannot...be materially different whatever the nature of the dispute in hand*". As to the application of such an order, the judge said, among other things, that a stay was the exception rather than the rule, that in exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered and that "*only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered*".

17. Mr. McGrath submits that in the absence of strong grounds of appeal or a strong likelihood of success, no question of imposing a stay can arise. The Appellants' grounds of appeal fall woefully short of that, as he submits.

18. Furthermore, Mr. McGrath points to the prejudice to his clients were a stay to be granted. Without going into detail, it is set out movingly in an affidavit sworn by Ms. Day, which we have read with great care.

19. Of the authorities drawn to our attention, only one bears any comparison, as it seems to us, with the present case; namely, a decision of the Court of Appeal for Ontario, in

Sharpe v Duong and the Attorney-General of Canada (2014 ONCA 485). That case concerned a challenge to the provision that denied some non-residents of Canada the ability to vote in Canadian elections. The particular applicants had been resident in the United States for more than five years. At first instance, the judge found a violation of the applicants' rights under a section of the Canadian Charter, which in broad terms gave each citizen of Canada a right to vote. The judge, in what was described as a "*lengthy and carefully considered judgment*", struck down the provision of the act limiting their right to vote and modified its wording so as to comply with the Charter.

20. The Attorney-General appealed. The judge at first instance had refused the Attorney-General's application for a stay. At paragraph 12 of the Appeal Court's judgment, this was said:

> "*It is common ground that to obtain a stay the Attorney-General must satisfy the familiar three-part test and show:*
>
> 1. *That there is a serious question to be determined.*
> 2. *That irreparable harm to the public interest will be suffered should the stay not be granted; and*
> 3. *That the balance of convenience and public interest considerations favour a stay*".

21. The court went on to consider the issue of a serious question to be tried. At paragraph 13, the court said:

> "*...I share the application judge's concern that the objectives identified by the Attorney-General as being sufficient to justify limiting the right to vote as broad, symbolic and rhetorical...However, I do not say that the Attorney-General has failed to show that the appeal is arguable. While the application judge gave full and fair consideration of the section 1 issue...there does appear to be an argument to be made on the other side*".

22. The court decided that irreparable harm could not be shown.

23. In paragraph 26, under the heading "*balance of convenience*", the court, in refusing a stay, but in words which bear repetition, said:

> "*In my view, the balance of convenience in this case favours refusal of a stay. I reach that conclusion for the following reasons...this is not the typical case where a complex statutory scheme or administrative apparatus has to be dismantled or constructed in order to give effect to the trial judgments. In such cases, the balance of convenience will typically favour a stay to avoid the cost and disruption that would flow from implementing a new regime based upon a trial judgment that may need to be undone in the event of a successful appeal*".

Our conclusion

24. We cannot accept that for good cause to be shown under section 19 requires, as Mr. McGrath submits on the basis of Mr. Justice Mostyn's observations, that strong grounds of appeal or a strong likelihood of success must be demonstrated. That in our judgment puts it too highly. Provided the grounds are arguable, and the balance of convenience on the facts of the case in question lies in favour of a stay, the court may grant one.

25. We have considered the arguments on the merits with care. To adopt the careful language used by the Court of Appeal of Ontario, we cannot say, for the reasons given by Ms. Sharma, that the Appellants have failed to show that the appeal is arguable. While the learned Chief Justice, in a most careful and detailed judgment gave full and fair consideration to the issues before him, there is, in our judgment, and again reflecting the words of the Court of Appeal of Ontario, an argument on the other side.

26. We turn to the balance of convenience.

27. As we have said, we have read Ms. Day's moving affidavit. We do not doubt the prejudice of which she speaks. However, it does seem to us there are cogent grounds on the facts of this case which go the other way. The learned Chief Justice's judgment concerns the institution of marriage in the Cayman Islands. As Ms. Sharma put it, it

cannot be right that in respect of that institution there is legal uncertainty, pending the decision of this court. As it is put in paragraph 10 of Celia Middleton's affidavit:

> "*If a stay...is not granted and the (Petitioners)/Respondents and any other couples similarly placed were to solemnise a marriage while the appeal remains pending, the consequential rights and responsibilities that inextricably flow from the institution of marriage... could result in an anomaly until there is a final ruling in the matter*".

28. We are conscious too, although this weighs less in our decision, of the consequential changes referred to in paragraphs 11 and 12 of Ms. Middleton's affidavit. We do observe that there appears to have been no provision by the Legislature of the possibility of an adverse decision by the learned Chief Justice.

29. In the result, and not without some hesitation, we have concluded that the interests of justice do require an imposition of a stay in this case pending the decision of this court.

30. We should finally add that it is our present intention to hear this appeal at the next sitting of this court in August of this year.

31. We reserve the question of costs, which can be revisited at the end of the appeal.