

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 73/2013

MOTION NO 5/2018

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE PUSEY JA (AG)**

BETWEEN	THE COMMISSIONER OF THE INDEPENDENT COMMISSION OF INVESTIGATIONS	APPLICANT
AND	THE POLICE FEDERATION	1ST RESPONDENT
AND	MERRICK WATSON (Chairman of the Police Officers Association)	2ND RESPONDENT
AND	THE SPECIAL CONSTABULARY FORCE ASSOCIATION	3RD RESPONDENT
AND	DELROY DAVIS (President of the United District Constables Association)	4TH RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	INTERESTED PARTY

Richard Small, Terrence Williams, Miss Krystal Blackwood and Mrs Yanique Taylor for the applicant

Mrs Jacqueline Samuels-Brown QC and Miss Althea Grant instructed by FirmLaw for the respondents

Miss Althea Jarrett instructed by the Director of State Proceedings for the interested party

11, 12 and 13 June and 20 December 2018

PHILLIPS JA

[1] I have read in draft the judgment of my brother Pusey JA (Ag) and agree with his reasoning and conclusion. There is nothing that I wish to add.

MCDONALD-BISHOP JA

[2] I have also read in draft the judgment of Pusey JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

PUSEY JA (AG)

[3] This is an amended notice of motion brought by the applicant, the Commissioner of the Independent Commission of Investigations, for conditional leave to appeal to Her Majesty in Council from the decision of the Court of Appeal made on 16 March 2018. The motion is brought pursuant to sections 110(1)(c) and 110(2)(a) of the Jamaica (Constitution) Order in Council, 1962 ("the Constitution"). The applicant also seeks a stay of execution of the judgment of the Court of Appeal, until the hearing and determination of the appeal by Her Majesty in Council.

[4] Prior to examining the merits of the application for conditional leave to appeal to Her Majesty in Council and the competing arguments of the parties with respect to the application for the stay of execution, it is first necessary to set out in brief the evidence which was before the Full Court, the ruling made by them and the decision of the Court of Appeal.

[5] The facts of the case have been thoroughly and comprehensively outlined in the judgment of Phillips JA in the substantive matter, so in this judgment I will refer only to such of them as are relevant to this application.

[6] The respondents are associations or the representatives of associations which represent various groups of police officers. The Independent Commission of Investigations ('INDECOM' or 'the Commission') is the entity created by the Independent Commission of Investigations Act ('the Act') with the responsibility to investigate actions by members of the security forces or other state agents that result in death or injury to persons or abuse of the rights of persons. The remit of INDECOM includes the investigation of police officers who may have committed crimes during the course of the execution of their duties.

[7] On 10 October 2011, the respondents filed an amended fixed date claim form, which contained an application for administrative orders and/or constitutional redress. By their claim, the respondents argued, among other things, that: (i) the applicant's claim to, and purported exercise of, the power to arrest, charge and prosecute police officers, pursuant to section 20 of the Act and the common law, were being made and done respectively without authority and in contravention of the Constitution; and (ii) the claim by the applicant of the power to charge a police officer for any criminal offence arising from circumstances that occurred in the execution of their duties, in the absence of a ruling from the Director of Public Prosecutions ('DPP'), was an infringement of their legitimate expectation of such a ruling.

[8] The Full Court concluded that the Act did not confer a power to charge on the applicant. But that, save in that respect, the declaratory orders that were being sought by the respondents were to be refused.

[9] The respondents appealed against that decision. Among other things, they complained that:

“[1] ...the court below wrongly failed to recognize or accept that by the clear and express words of Section 20, in conferring the powers of a constable on the [applicant], the Act restricted those powers to facilitate only the investigative duties of the [applicant].

[2] ...the court below wrongly failed to recognize or accept that even if the terms of Section 20 were ambiguous in conferring the said powers, such ambiguity should be interpreted with judicial restraint, to exclude rather than to include the power to arrest, as legislation that seeks to confer powers which conflict with constitutional rights must use clear and unambiguous words to achieve that result.

[3] ... the court below wrongly failed to recognize or accept that any reliance by the [applicant] and his investigators on powers at Common Law to charge and initiate prosecutions of members of Police Force, would be inconsistent with the clear and unambiguous statutory regime established by the Act which did not in its terms or necessary intendment provide or confirm such a power.

[4] ...The court below wrongly failed to give sufficient regard or recognition to the long-standing practice and custom of the DPP to issue a ruling before members of the police force can be arrested and charged for criminal offences arising from circumstances that occur in the execution of their duties, and also failed to give sufficient regard to the legitimate expectation of the [respondents] to such a ruling.”

[10] The appeal was heard by Phillips, Brooks and F Williams JJA. All three judges were in agreement that the appeal against the decision of the Full Court was to be

allowed in part. It was held that the Full Court had correctly recognised that the Act does not confer the power to charge on the applicant. However, the court considered that the Full Court had incorrectly declined to grant further declarations. Accordingly, it was ordered that:

- "(i) [INDECOM] is not empowered by section 20 of the Act, statute or common law to arrest, charge or prosecute any person for any criminal offence;
- (ii) Section 20 of the Act does not empower the [applicant] or any of his investigative staff to arrest, charge or prosecute any person for any criminal offence."

[11] By a majority (Phillips JA dissenting), the Court of Appeal further ordered that:

- "(iii) section 33 of the Act did not create an offence which would ordinarily empower the [applicant] or any of his investigative staff to arrest any person for a breach of that section;
- (iv) The Act does not abrogate the common law right possessed by the [applicant] and each member of his investigative staff, in their respective private capacities, to initiate a private prosecution against any person for any criminal offence under section 33 of the Act;
- (v) Subject to the restrictions that exist at common law, the Act does not abrogate the common law right possessed by the [applicant] and each member of his investigative staff, in their respective private capacities to arrest or charge any person or initiate a private prosecution against any person for any criminal offence; and
- (vi) The [applicant] and his investigative staff may exercise their said private rights at common law without first obtaining a ruling from, or the permission of, the [DPP].

..."

The reasons for the decision of the Court of Appeal

[12] All three judges were in agreement that the Act does not empower INDECOM, the applicant or his investigative staff to arrest or prosecute any person for any criminal offence. In expressing her reasons for arriving at this conclusion (with which the other judges of the panel agreed), Phillips JA reasoned as follows (at paragraphs [87] and [88] of her judgment):

"[87] When the ordinary and natural meaning of the words used in section 20 are construed, it is evident that section 20 of the Act does not expressly confer upon INDECOM, the [applicant] and his investigative staff the power to arrest, charge and prosecute police officers. In my view, the words used in section 20 are neither ambiguous nor obscure. The natural and ordinary meaning of the words contained in section 20 of the Act gives INDECOM, the [applicant] and his investigative staff the like powers, authorities and privileges given by law to a constable only for the purposes of giving effect to sections 4, 13 and 14. In other words, it seems to me therefore, that INDECOM, the [applicant] and his investigative staff, in exercising duties under the Act, shall have those like powers, authorities and privileges given to the constable in order to comply with sections 4, 13 and 14, but for no other purpose.

[88] Taken cumulatively, sections 4, 13 and 14 all address the manner in which INDECOM will undertake investigations pursuant to the Act..."

[13] Phillips JA further noted, (at paragraph [122]) that section 20 of the Act does give the applicant and his investigative staff the "like powers, authorities and privileges" of a constable for the purpose of giving effect to sections 4, 13 and 14 of the Act.

However, this does not mean that the applicant and his investigative staff would fit within the definition of a "constable" or a "police officer", as they are not members of the Jamaica Constabulary Force or any other force, nor do they hold any rank. Sections 4, 13 and 14 of the Act refer to the wide investigatory powers that the applicant and his investigative staff possess. As such, Phillips JA concluded that the applicant and his investigative staff were given the like powers of a constable so as to facilitate performance of their functions within the meaning of sections 4, 13 and 14 of the Act, all of these being functions in relation to INDECOM's statutory obligation to investigate.

[14] At paragraph [195] of his judgment, Brooks JA similarly reasoned that:

"[195] I also agree with Phillips JA that neither section 20, nor any other section of the Act, authorises the [applicant], or any of INDECOM's investigators, to arrest or prosecute any person in relation to any offence arising out of any incident, which they may be investigating. It necessarily follows that the Act does not authorise them to arrest or prosecute any police officer in relation to any offence, arising out of any incident, which they are investigating. I accept that the powers, authorities and privileges, as are given to a constable, are bestowed, by section 20 of the Act, on the [applicant] and INDECOM's investigators, only for the purposes of investigation. The [respondents] may properly be granted a declaration to that effect. The Full Court was therefore correct in its acknowledgement of a restriction on the power to charge, when it included the following statement in its order: '[s]ubject to [the] fact that the Act does not confer a power to charge...'"

[15] The learned judges of appeal were also in agreement that, since INDECOM is not a juristic person, it does not have the common law right to arrest or prosecute persons. Brooks JA noted that the Act did not confer any legal personality on INDECOM. As such, INDECOM is not authorised by the Act to sue or be sued or to initiate any prosecution

against anyone. The learned judges of appeal further noted that INDECOM, not being a juristic person, would have no common law right or any other authority to institute a private prosecution complaining about any offence in respect of any incident being investigated by the applicant or any of INDECOM's investigators. Furthermore, INDECOM is not empowered to institute any private prosecution in respect of any breach of section 33 of the Act.

[16] The court was, however, at variance in relation to a single issue. This was in relation to Phillips JA's conclusion that the Act impliedly restricts the right of the applicant and his investigative staff from exercising their common law right to arrest, charge and prosecute. This is so, she noted, as their role is to have consultations, complete investigations and submit reports to the persons named in the Act. This was expressed by her, at paragraph [185] of the judgment, as follows:

"[185] ... I have also concluded that the [applicant] and his investigative staff have no power to arrest, charge and prosecute by statute or at common law as private citizens. Indeed, in my view, it would be absurd and contrary to Parliament's intention for the applicant and his investigative staff to be given vast powers under the Act to investigate and then utilise their rights as private citizens to arrest charge and prosecute ..."

[17] Brooks JA, with whom F Williams JA agreed, expressed a different view with respect to this issue. He reasoned that the applicant and his investigative staff did in fact possess common law powers which were not available to INDECOM itself. Both Brooks and F Williams JJA concluded that neither the applicant nor his investigative staff was prohibited from exercising the common law right to arrest and prosecute as

private citizens. This can be seen from paragraph [221] of the judgment, where F Williams JA reasoned that:

"[221] In a nutshell, I espouse the view that: whereas INDECOM, not being a juristic person, does not have the right, either by the Act or at common law to prosecute or arrest, the position is not the same with the Commissioner of INDECOM and INDECOM's investigators. The Commissioner and the investigators have, at common law, the right of every other private citizen to bring prosecutions for alleged breaches of section 33 of the Act or for any criminal offence, and also, in limited circumstances, to effect arrests. This common law right has not been abrogated in any way."

[18] Brooks JA further puts it into context when he indicated that the applicant and his investigative staff were not divested of their common law right to arrest and prosecute individuals as private citizens, although INDECOM had no such right. He then went on to point out at paragraph [216] that these rights are to be exercised cautiously. He cautioned:

"[216] Those persons should, however, exercise their rights very cautiously. There will be practical difficulties in exercising those rights. It is unlikely, in respect of any incident that INDECOM has been called upon to investigate, that the [applicant] or any of INDECOM's investigators would have been witnesses. They would necessarily be acting on information gleaned from others. They do not have the powers or protection that constables have in relation to arrest and prosecution. The better course for them to adopt would be to refer the results of their investigations to the DPP and allow that official to decide the step to be taken."

The application for leave to appeal to Her Majesty in Council

[19] The applicant now seeks leave to appeal to Her Majesty in Council from the ruling of the Court of Appeal. The applicant has advanced two alternative foundations upon which to ground its application. The first is that, pursuant to section 110 (1)(c) of the Constitution, the Court of Appeal's decision is a final decision in a civil proceeding, which involves the interpretation of the Constitution and the applicant is accordingly entitled to the grant of leave as of right.

[20] The second foundation for leave advanced by the applicant, is that the matter is of great general or public importance pursuant to section 110(2)(a) of the Constitution.

[21] The applicant has identified five questions, which he contends arise from the decision of the Court of Appeal and which ought to be submitted to Her Majesty in Council. The questions are:

- "a) Whether the INDECOM is a person or authority within the meaning of section 94 of the Constitution, and therefore has the capacity to initiate a prosecution. If yes, how should this authority be exercised?
- b) Whether [the Act] authorises the [applicant] and/or the investigative staff of the Commission, in furtherance of their statutory functions, to initiate prosecutions arising out of a completed or ongoing investigation.
- c) Whether section 20 of [the Act] confers on the investigative staff, the same powers, privileges, and authorities of arrest as granted to a Constable.
- d) Whether the [applicant] or his investigative staff may, in laying an information charging a member of the

Security Forces or a specified official, obtain a summons or a warrant, to cause, or secure, the attendance of the defendant.

- e) Whether prosecutions brought by the [applicant] or the Commission's investigative staff in their respective private capacities are subject to the following limitations and difficulties:
- i. that the person laying the information ("the prosecutor") must have witnessed the offence;
 - ii. that there will be impediments to the prosecutor securing the attendance of witnesses;
 - iii. that there will be difficulty in marshalling evidence; and
 - iv. they would not have the defences that would be available to a Constable for malicious prosecution."

[22] In the light of these questions, the fundamental issues that arise for consideration on this motion are (i) whether the questions identified by the applicant involve an interpretation of the Constitution; and (ii) whether, in the alternative, they have satisfied the criterion of being of "great general or public importance or otherwise" for conditional leave to be granted for an appeal to be made to Her Majesty in Council.

Whether an appeal lies as of right pursuant to section 110(1)(c) of the Constitution

[23] Section 110(1)(c) of the Constitution provides that:

"110. – (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) ...;

(b) ...;

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

...”

[24] In order for an appeal to lie as of right to Her Majesty in Council under this subsection, it must be established that the decision of the court is a final one in criminal, civil or other proceedings, and involves a question as to the interpretation of the Constitution.

[25] It is clear that the applicant would have met the first criterion that the decision from which the appeal to Her Majesty in Council should be brought is a final decision in a civil proceeding.

[26] The crucial question that arises for consideration is therefore whether the decision involves an interpretation of the Constitution as the applicant argues. Counsel for the applicant, Mr Small, contends that the questions as posited at paragraph [21] above, involve an interpretation of the Constitution, in particular, sections 13(3)(a) and 94 of the Constitution.

[27] Counsel for the applicant argues that the right to liberty, pursuant to section 13(3)(a) of the Constitution, was construed by the Court of Appeal, when they found that section 20 of the Act, ought not to be interpreted so as to confer on INDECOM's staff the like powers, authorities, and privileges of arrest enjoyed by a constable.

[28] Section 13(3)(a) of the Constitution reads:

"13. -(3) The rights and freedoms referred to in subsection (2) are as follows -

- (a) the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted;

..."

[29] Phillips JA's discussion with respect to the issue of a citizen's right to liberty was confined to the issue of whether Parliament had intended to legislate to give the applicant and his investigative staff the power to deprive a citizen of that right. She concluded that, if Parliament so intended, this ought to have been specifically stated.

This was said by the learned judge of appeal, in the following terms:

"[136] I must also say that section 13(3)(a) of the Constitution guarantees every citizen the right to liberty. Lord Browne-Wilkinson in **Regina v Secretary of State for The Home Department, Ex parte Pierson** [1998] AC 539, at page 575 cited a general principle that 'basic rights are not to be overridden by general words of a statute since the presumption is against the impairment of such basic rights'. Indeed he continued at page 575:

'A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.'

[137] Thus, if Parliament had intended to legislate to give the [applicant] and his investigative staff the power to deprive a citizen of his liberty, that intention ought to have

been specifically stated. Indeed, under the Custom's Act, as already stated, customs officers, are specifically given the power to effect arrests. Although I acknowledge that private citizens do have the power to arrest, this is limited to instances where they actually witness the crime and moreover, INDECOM cannot assert its rights as a private citizen, since the powers it purports to exercise are conferred by statute. In fact, the [applicant] and his investigators would be powerless to pursue any arrest in their capacity as private citizens without the vast authority given to them under the provisions of the Act to obtain information and records and take control of incident scenes inter alia in the conduct of their investigations. If they were to effect arrests as private citizens they would be doing so without the protection of the Act and based on information received and not based on any moral certainty which runs contrary to the principles surrounding arrests by private citizens at common law. Consequently, the common law powers of arrest and also the statutory powers to effect arrests, cannot be ascribed to the [applicant] and his investigative staff and the Full Court's finding in that regard is erroneous."

It is therefore apparent that, although reference was made to section 13(3)(a) of the Constitution, as part of the legal framework in which the right to arrest should be viewed, no pronouncement was made as to the rights under that section, or the extent of the constitutional protection which they were intended to secure.

[30] The applicant's second basis for contending that leave ought to be granted as of right is that the consideration by the Court of Appeal as to the role of the DPP, in the exercise of the right to initiate and conduct prosecutions by officers of public bodies, involved an interpretation of section 94 of the Constitution.

[31] In relation to section 94 of the Constitution, the Court of Appeal considered subsections (3), (4), (5) and (6), which provide that:

"(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -

- (a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;
- (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and
- (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(4) The powers of the Director of Public Prosecutions under subsection (3) of this section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.

(5) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (3) of this section shall be vested in him to the exclusion of any other person or authority:

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the Court.

(6) In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

[32] The court's consideration of section 94 of the Constitution was restricted to the question of whether the applicant and his investigators are empowered to exercise the power to prosecute:

- i. as private citizens;
- ii. by utilising “all the powers of a constable” which it claimed had been conferred on it under the Act (section 20); and/or
- iii. by virtue of INDECOM being a public body.

The decision of the Court of Appeal rested on the interpretation of the Act and the applicable common law. No interpretation of section 94 of the Constitution was attempted by the court.

[33] The principle set out in **Eric Frater v The Queen** [1981] 1 WLR 1468, that the courts must be vigilant to ensure that a constitutional point is not fabricated to become the foundation of an appeal to Her Majesty in Council, becomes relevant. It is true that the respondents in their original application to the Supreme Court did frame part of their claim as an application for constitutional relief. However, I cannot agree that the Court of Appeal's decision involved a question on the interpretation of the Constitution within the meaning of section 110(1)(c). The questions as posited by the applicant therefore do not arise for consideration under this section.

Whether an appeal lies to Her Majesty in Council pursuant to section 110(2)(a) of the Constitution

[34] It now arises for determination whether leave to appeal to Her Majesty in Council ought to be granted pursuant to section 110(2)(a) of the Constitution. Section 110(2)(a) of the Constitution reads as follows:

“(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;”

[35] Several cases have outlined the principles that are to be considered by this court in determining whether the questions which the applicant may wish to submit to Her Majesty in Council falls within the framework "of great general or public importance or otherwise". The criteria of what is to be considered as being of great general or public importance have been set out by this court, notably in **Norton Wordworth Hinds and Others v The Director of Public Prosecutions** [2018] JMCA App 10, where, at paragraph [32], Phillips JA stated that:

"[32] There are several cases which have dealt with the issue as to how the phrase 'of great general or public importance or otherwise' should be viewed by this court in relation to the question which the applicant may wish to submit to Her Majesty in Council. A question 'of great general or public importance' is one that is regarded as being subject to serious debate. It must be not just a difficult question of law but an important question of law that not only affects the rights of particular litigants but one whose decision will bind others in their commercial and domestic relations. It must not merely be a question that the parties wish to have considered by the Privy Council in an effort to see whether the Law Lords would agree with the decision of the Court of Appeal. It must be a case of gravity involving a matter of public interest, or one affecting property of a considerable amount or where the case is otherwise of some public importance or of a very substantial character..."

[36] The following guidance was also given by McDonald-Bishop JA in the decision of

The General Legal Council v Janice Causewell [2017] JMCA App 16:

"[27] The principles distilled from the relevant authorities may be summarised thus:

i. Section 110(2) involves the exercise of the court's discretion. For the section to be triggered, the court must be of the opinion that the questions, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.

ii. There must first be the identification of the question involved. The question identified must arise from the decision of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.

iii. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue, which requires debate before Her Majesty in Council. If the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.

iv. Thirdly, it is for the applicant to persuade the court that the question identified is of great general or public importance or otherwise.

v. It is not enough for the question to give rise to a difficult question of law; it must be an important question of law or involve a serious issue of law.

vi. The question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations.

vii. The question should be one of general importance to some aspect of the practice,

procedure or administration of the law and the public interest.

viii. Leave ought not to be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with the court.

ix. It is for the applicant to persuade the court that the question is of great general or public importance or otherwise."

[37] In the light of this guidance, I form the view that the first question that has been submitted by the applicant does not arise from the decision of the court. Nor does it raise an issue worthy of serious debate, the answer to which is determinative of the appeal.

[38] On a close review of the other questions, the primary concerns that may be deduced are whether:

- i. the Act empowers INDECOM, the applicant and his investigative staff to arrest, charge and prosecute members of the security forces;
- ii. INDECOM, the applicant and his investigative staff have the power to arrest, charge and prosecute members of the security forces at common law; and
- iii. if INDECOM, the applicant and his investigative staff have the power to arrest, charge and prosecute at common law, there are any

restrictions on the exercise of those powers and if so, what are those restrictions.

In my view, these issues do arise from the decision of the Court of Appeal, and the answers to the questions posed by the applicant in this regard would be determinative of the appeal. They also raise issues worthy of serious debate by Her Majesty in Council.

[40] I find that this matter falls squarely within the ambit of the criterion of "great general or public importance or otherwise", in the following ways:

- i. Police officers and other members of the security forces who have an important role in the society and the state are significantly affected.
- ii. All citizens who may have a complaint against police officers and other members of the security forces will be affected by the decision, as it relates to the authority and scope of INDECOM, the applicant and his investigative staff.
- iii. The evidence before the court is that there are some 58 matters at the time of the hearing of this application, which had been initiated by INDECOM investigators.

[41] In my view, whilst the criteria set out in section 110(1)(c) of the Constitution for conditional leave to be granted as of right have not been satisfied, this is a case in

which conditional leave to appeal to Her Majesty in Council should be granted by virtue of section 110(2)(a) in respect of the following issues:

- i. Whether INDECOM has the authority, by virtue of the Independent Commission of Investigations Act, other statutory provision or the common law, to initiate a prosecution in respect of any offence arising from a completed or ongoing investigation conducted by it. If the answer to this question is in the affirmative, how should the authority be exercised?
- ii. Whether the Commissioner and/or the investigative staff of INDECOM are authorised by the Independent Commission of Investigations Act to initiate a prosecution arising from a completed or ongoing investigation conducted by INDECOM.
- iii. Whether section 20 of the Act, which confers on the Commissioner and the investigative staff of INDECOM the like powers, authorities and privileges given by law to a constable for the purpose of giving effect to sections 4, 13 and 14 of the Act, also confers the said like powers, authorities and privileges given by law to a constable for other purposes, for example the power to arrest.
- iv. Whether prosecutions initiated by the Commissioner and/or the investigative staff of INDECOM, in the exercise of their common law right as private citizens or in their respective

private capacities, are subject to any restrictions or limitations. If the answer to this question is in the affirmative, what are such restrictions or limitations?

I have excluded the specific questions raised by the applicant under question (e) of the application. These issues arose out of the cautionary words given by Brooks JA and they were not part of the determinative reasoning of the court.

Application for stay of execution

[42] The Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962, rule 6, outlines the conditions which are to be met, in order for a judgment of the Court of Appeal to be stayed, pending an appeal to Her Majesty in Council. Rule 6 reads as follows:

"6. Where the judgment appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as Her Majesty in Council shall think fit to make thereon."

[43] The wording of rule 6 indicates that where the judgment being appealed from requires an appellant to 'pay money or *do any act*', the court, in granting leave to appeal shall either direct that the judgment is carried into effect or that it is suspended pending the appeal. If the judgment is directed to be carried into effect, the person in

whose favour the judgment was given shall, before its execution, enter into good and sufficient security.

[44] The question therefore arises as to whether the order of the Court of Appeal was such that the applicant had been directed to do any act. In fact, no such orders were made and the orders were declaratory. This has been accepted by the applicant and is evidenced in its written submission, which states that, "... the stay of execution being sought in the present application can properly be granted by the court in respect of the orders of the Court of Appeal, notwithstanding the fact that they appear, on their face, to be declaratory orders".

[45] In determining whether a stay may be imposed with respect to orders which are declaratory in nature, much assistance can be gleaned from the decision of Morrison JA (as he then was), in **Norman Washington Manley Bowen v Shahine Robinson and Another** [2010] JMCA App 27, where, after referring to the passage by Mr P W Young QC, in 'Declaratory Orders', 2nd Edition, (at paragraph 2408), he said (at paragraph [13]):

"The effect of the court's order is not to create rights but merely to indicate what they have always been ... Because of this, if an appeal is lodged against a declaratory order, conceptually there can be no stay of proceedings ..."

[46] I therefore reject the applicant's contention that a stay ought to be granted because the order of the Court of Appeal has caused some disharmony and confusion in relation to cases that are currently being prosecuted before the various courts. The applicant has indicated that the uncertainty which they contend exists, has necessitated

them entering into a memorandum of understanding with the DPP to carry out prosecutions. The fact of this memorandum of understanding between the applicant and the DPP for the prosecution of matters is an indication that there are alternative arrangements that have been made to mitigate against any perceived injustice and/or harm, pending the hearing of the appeal to Her Majesty in Council.

[47] I therefore cannot agree with the applicants' arguments that the decision of the court is such that a stay would be applicable. The decision of the Court of Appeal determined the rights of the parties. No orders were in fact made directing any of the parties to act in a certain way, or which could be enforced by execution if disobeyed. Conceptually therefore, there can be no stay of the decision. The applicant is, therefore, not entitled to a stay of execution of the judgment.

[48] In the circumstances, I would accordingly grant conditional leave to appeal to the applicant pursuant to section 110(2)(a) of the Constitution, for the issues outlined in paragraph [41] above to be considered by Her Majesty in Council.

PHILLIPS JA

ORDER

- 1) The application for conditional leave to appeal to Her Majesty in Council, from the decision of the Court of Appeal made on 16 March 2018, as of right, pursuant to section 110(1)(c) of the Constitution, is refused.

2) Leave to appeal to Her Majesty in Council, from the decision of the Court of Appeal made on 16 March 2018, is granted pursuant to section 110(2)(a) of the Constitution, in respect of the following questions:

(i) Whether INDECOM has the authority, by virtue of the Independent Commission of Investigations Act, other statutory provision or the common law, to initiate a prosecution in respect of any offence arising from a completed or ongoing investigation conducted by it. If the answer to this question is in the affirmative, how should the authority be exercised?

(ii) Whether the Commissioner and/or the investigative staff of INDECOM are authorised by the Independent Commission of Investigations Act to initiate a prosecution arising from a completed or ongoing investigation conducted by INDECOM.

(iii) Whether section 20 of the Act, which confers on the Commissioner and the investigative staff of INDECOM the like powers, authorities and privileges given by law to a constable for the purpose of giving effect to sections 4, 13 and 14 of the Act, also confers the said like powers, authorities and privileges given by law to a constable for other purposes, for example the power to arrest.

(iv) Whether prosecutions initiated by the Commissioner and/or the investigative staff of INDECOM, in the exercise of their common law right as private citizens or in their respective private capacities, are subject to any restrictions or limitations. If the answer to this question is in the affirmative, what are such restrictions or limitations?

3) Leave to appeal is being granted on the following conditions:

(a) The applicant shall within 90 days of the date of this Order, enter into good and sufficient security in the sum of \$1000.00, for the due prosecution of the appeal and payment of all such costs as may become payable by the applicant in the event of his final leave to appeal not being granted, or of the appeal being dismissed for want of prosecution, or of the Judicial Committee ordering the applicant to pay costs of the appeal;

(b) The applicant shall, within 90 days of the date of this Order, take the necessary steps to procure the preparation of the record and the dispatch thereof to England; and

4) The costs of the application to await the determination of the appeal to Her Majesty in Council.