

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 165/2009

MOTION NO. 10/2010

**BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.**

BETWEEN	IAN HAYLES	APPLICANT
AND	DONOVAN HAMILTON	RESPONDENT

Abraham Dabdoub and Gayle Nelson instructed by Dabdoub, Dabdoub and Co. for the applicant

Ransford Braham and Mrs Nesta-Claire Smith-Hunter instructed by Ernest A. Smith & Co. for the respondent

20 and 27 September 2010

PANTON, P.

[1] On 20 September 2010 the applicant herein applied to the court by way of notice of motion for leave to appeal to Her Majesty in Council from a decision of the court (Panton, P., Harris and Dukharan, JJA) handed down on 17 June 2010.

[2] Appeals to Her Majesty in Council are provided for by section 110 of the Constitution. Under section 110(1) an appeal lies as of right from decisions of the Court of Appeal in the following cases –

- “(a) Where the matter in dispute ... 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.”

[3] Under section 110(2), an appeal lies from a decision of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in civil proceedings where –

- “(a) ... 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 ... and
- (b) such other cases as may be prescribed by Parliament.”

At the outset, it should be mentioned that it has not been argued, in relation to the appeal contemplated by the applicant herein, that Parliament has made any prescription under either section 110(1)(d) or 110(2)(b).

[4] The genesis of the matter is a fixed date claim form filed by the respondent against the applicant seeking, among other things, a declaration that the respondent, being a citizen of the United States of America and the holder of an American passport, the number of which is stated, is by virtue of his own act, under an acknowledgment of allegiance, obedience or adherence to a foreign power or state, and as such is disqualified for election as a member of the House of Representatives.

[5] The applicant, as is his right, chose not to file a defence to the claim. Instead, he filed an application to have the claim struck out on the basis that the Supreme Court of Jamaica lacks jurisdiction to hear the claim, and that the claim being one which questions the election of a member of the House of Representatives was not brought in accordance with the Constitution and the Election Petitions Act. It should be noted that the claim makes no allegation in respect of the conduct of the election itself; rather, it focuses on the constitutional status of the applicant at the time of the election.

[6] The Supreme Court, Donald McIntosh, J presiding, refused to strike out the claim, and the subsequent appeal against this refusal was dismissed by the Court of Appeal (Panton, P., Harris and Dukharan, JJA). The court, in dismissing the appeal, ordered that the fixed date claim form, except for paragraphs 1 and 2, may be proceeded with in the usual way. This means that had it not been for

the proceedings initiated by the applicant, the matter would most likely have been determined by now.

[7] In making his oral submissions in respect of the instant application, Mr Abe Dabdoub for the applicant stated that the application could have been made under section 110(1) of the Constitution, which provides for an appeal as of right. He did not say why in the face of that right, he chose the more difficult route under section 110(2)(a). The logical inference is that he realized that he would have been hard put to show that the application has a place within the provisions of that subsection.

[8] Mr Ransford Braham, for the respondent, was of the view that the application had been made under section 110(1). Surprisingly, it appears that he would not have opposed it had it been so. The fact is though, that section 110(1) does not apply to the instant situation. Mr Braham was however more interested in the question of the stay of the proceedings in the Supreme Court as it was his view that even if leave was granted to the applicant there should be no bar to the continuation of the proceedings in the Supreme Court. It is sufficient to say that we think it would be risky and perhaps unwise not to grant a stay of proceedings in the court below, if leave were to be granted to appeal to Her Majesty in Council.

[9] In seeking the leave of the Court of Appeal to appeal, the applicant has listed eight questions which he says arise for submission to Her Majesty in Council. No useful purpose will be served by repeating in this judgment all the questions that have been posed as there is a central theme that covers them. However, mention may be made of question number (iii) which is as to whether the Court of Appeal erred "in failing to consider or appreciate the significance of section 4 of the Jamaica (Constitution) Order in Council, 1962 and its effect on section 44 of the Constitution of Jamaica". The relevant portion of that section is subsection (1), and it reads thus:

"4. – (1) All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

This subsection clearly provides for the continuation in force of any law in force before the Constitution came into being. In the context of this case, the question is wholly irrelevant as the judgment of the Court of Appeal recognizes that the Election Petitions Act is in force.

[10] The central theme of the questions posed and the arguments put forward by Mr Dabdoub is that the fixed date claim form was not filed within twenty-one days after the return had been made of the applicant as a member of the House of Representatives. Question number (iv), it may be mentioned, is as to whether the Court of Appeal erred "in deciding that there is no time limit specified in the Constitution of Jamaica for a challenge to be mounted in respect of someone who has been elected but did not have the necessary qualification for such election at the time of the election". It is an undisputed fact that there is no time limit specified in the Constitution. However, Mr Dabdoub is apparently seeking to create an amendment of the Constitution by means of the Election Petitions Act. If Parliament had intended to import the provisions of the Election Petitions Act into section 44 of the Constitution, it would have said so in clear terms.

[11] Since 1 January 2003, proceedings in the Supreme Court must be commenced with the filing of a claim form. Where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact, a fixed date claim form must be used – rule 8.1(4)(d) of the Civil Procedure Rules, 2002. In the instant case, the respondent is seeking the court's decision on the question whether the applicant has been validly elected as a member of the House of Representatives. That is what section 44 of the Constitution is about. The respondent has narrowed the question to make it relate to whether the applicant is the holder of a specific, numbered United States of America passport

and whether he has by his own act placed himself under an acknowledgment of allegiance, obedience or adherence to a foreign power or state, in contravention of section 40(2)(a) of the Constitution. There is no basis for any contemplation of the provision as to twenty-one days in the Election Petitions Act as this claim is seeking a determination under the Constitution which has placed no time limitation on the filing of a fixed date claim form.

[12] Mr Dabdoub, in answer to the court, said that it is a question of the route used which is in issue. In other words, he was saying that it is a question of procedure. That, with respect, seems to define the mode of the applicant in these proceedings, that is, to use a technical approach to prevent the hearing of the complaint in the fixed date claim form. However, the technicalities that have been raised are fictional. In addition, it ought not to be ignored that this Court has repeatedly indicated that matters of procedure are not appropriate for submission to Her Majesty in Council for determination.

[13] There is a final hurdle that the applicant has not been able to clear. Section 44(1) of the Constitution provides that any question whether a person has been validly elected as a member of the House of Representatives shall be determined by the Supreme Court or, on appeal, by the Court of Appeal whose decision shall be final. Subsection (2) of that section permits the institution of proceedings for such determination by any person. In the face of those provisions, it is incomprehensible that it can be contended not only that the

Supreme Court has no jurisdiction, but that there is room for Her Majesty in Council to be asked to make a determination in this matter which is likely to ultimately affect the question of the validity of the election of a member of the House of Representatives (although we recognize that thus far this matter is only at the interlocutory stage). The Constitution has clearly excluded such an eventuality, and this court must pay due respect to that.

[14] In the circumstances, there is no lawful justification for forming or expressing an opinion that there is any question involved in the proposed appeal which is of such great general or public importance requiring submission to Her Majesty in Council.

[15] Accordingly, the motion is dismissed, along with the application for a stay of the proceedings in the Supreme Court, with costs to the respondent to be agreed or taxed.

MORRISON, J.A.

I agree.

PHILLIPS, J.A.

I agree.