

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2020APP00057

APPLICATION NO COA2020CV00023

BETWEEN	GREG TINGLIN	1ST APPLICANT
AND	ODEL BUCKLEY	2ND APPLICANT
AND	ARNOLD HENRY	3RD APPLICANT
AND	CLAUDETTE CLARKE	1ST RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND RESPONDENT

Written submissions filed by Hylton Powell for the applicants

Written submissions filed by Chen Green & Co for the 1st respondent

5 May 2020

IN CHAMBERS

(Considered on paper pursuant to paragraph 2.3 of Practice Direction No 1/2020 Emergency Directions - COVID 19, corrected and reissued 25 March 2020 and with the consent of the parties)

MCDONALD-BISHOP JA

[1] This is an application brought by the appellants in the substantive appeal (“the applicants”), who are all members of the Jamaica Defence Force, for a stay of execution pending appeal of an order made by the Full Court (L Pusey,

Dunbar-Green and Nembhard JJ) on 18 February 2020. The Full Court made these orders that form the basis of the appeal:

“(1) That the criminal trial initiated by virtue of the Voluntary Bill of Indictment originally issued in July 2012 by the Director of Public Prosecutions should be restored to the trial list and be permitted to continue;

(2) [By majority] That the Good Faith Certificates or any certificate issued on 22 February 2016 by the Minister of National Security outside of the Emergency Period were issued in circumstances that were manifestly unreasonable and unfair and are therefore null and void.”

The background to the appeal

[2] For expediency and convenience, I would adopt, with slight modification, some of the undisputed background facts as set out in the skeleton arguments of the applicants and the 1st respondent. A broad outline of those facts are as follows.

[3] On 23 May 2010, the Governor-General declared a period of public emergency and the Emergency Powers Regulations, 2010 (“the Regulations”) were promulgated. On 27 May 2010, Mr Keith Clarke was shot and fatally injured during a joint police/military operation at his home at Kirkland Close in the parish of Saint Andrew. On 30 July 2012, following an investigation conducted by the Independent Commission of Investigations (“INDECOM”), the Director of Public Prosecutions (“the DPP”) initiated criminal proceedings

against the applicants in respect of the death of Mr Keith Clarke by the issuance of a Voluntary Bill of Indictment (“the criminal proceedings”).

[4] The 1st respondent, who is the widow of Mr Keith Clarke, also initiated civil proceedings against the 2nd respondent on her own behalf and in her capacity as administratrix of the estate of her late husband. She is seeking, among other things, damages for breaches of constitutional rights as well as damages for personal injuries she allegedly sustained in the incident.

[5] On 22 February 2016, the then Minister of National Security (“the Minister”) issued certificates to each applicant pursuant to regulation 45 of the Regulations, indicating that they had acted in good faith in the exercise of their functions as members of the security forces during the emergency period (“the Good Faith Certificates”). Under the Regulations, these certificates are evidence that the applicants acted in good faith and therefore, are entitled to protection from criminal proceedings as provided for in regulation 45, unless the contrary is proved.

[6] The Good Faith Certificates, therefore, have given rise to a rebuttable presumption in favour of the applicants that they acted in good faith in the exercise of their functions as members of the security forces during the emergency period and has placed the burden on anyone bringing proceedings (in this case, the DPP) to prove otherwise.

[7] On 9 April 2018, the criminal proceedings came on for the trial to commence in the Home Circuit Court. However, counsel, acting on behalf of the applicants, raised a preliminary point that the Good Faith Certificates immunised the applicants from criminal prosecution. During the hearing, the DPP raised questions concerning the validity of the Good Faith Certificates, especially in light of her constitutional powers to prosecute.

[8] The trial judge ruled that the issue of the validity of the Good Faith Certificates should be determined in civil proceedings in the Supreme Court. He then stayed the criminal proceedings, pending a claim being heard by the Full Court.

[9] On 15 June 2018, the 1st respondent filed a claim challenging the constitutionality of the Good Faith Certificates and the Regulations. She sought several declarations to the effect that:

- i. The Good Faith Certificates violate the separation of powers enshrined in the Constitution and are therefore *ultra vires*, null and void;
- ii. The prosecution of the criminal proceedings cannot be legally or constitutionally barred by virtue of the Good Faith Certificates;

- iii. The Regulations are unconstitutional, null and void, to the extent that it purports to grant the Minister the power to grant immunity to the applicants;
- iv. The Good Faith Certificates, having been issued outside of the emergency period, are *ultra vires*, null and void;
- v. The criminal proceedings should be restored to the trial list and permitted to continue; and
- vi. The applicants' actions engaged and infringed the fundamental rights of the 1st respondent and her late husband and cannot, therefore, be excused or justified by the Good Faith Certificates.

[10] The Full Court did not consider the declaration sought at paragraph 9(vi) above on account of the decision of this court in **Attorney-General of Jamaica v Claudette Clarke** [2019] JMCA Civ 35.

[11] In considering the remainder of the claim and the remedy being sought, the Full Court arrived at these broad conclusions, in so far as they immediately relate to the declarations that were sought:

- i. The promulgation of the Regulations and the issuance of the Good Faith Certificates are not in violation of the separation of powers doctrine and not otherwise in breach of section 2 of the Constitution.

- ii. The Good Faith Certificates do not fetter the DPP's powers to initiate or pursue action against members of the security forces, and they do not chain the judiciary.
- iii. The Good Faith Certificates are not a bar to the prosecution of the criminal proceedings. They raise a presumption of good faith, which may be rebutted during the trial process.
- iv. The issuance of the Good Faith Certificates after the emergency period did not render them unconstitutional, null and void. The Minister may issue certificates after the relevant emergency period has expired.
- v. (By a majority) The Minister's decision to issue the Good Faith Certificates at the time and in the circumstances he did was unconstitutional because it was manifestly unreasonable and unfair in the light of the delay.
- vi. The criminal proceedings should be restored to the trial list.

[12] The Full Court, in coming to those conclusions, made several findings of fact and law. For present purposes, those aspects of the findings which form the subject of the applicants' challenge on appeal, are detailed below as set out in their notice of appeal:

"i. 'The [Good Faith] Certificates...may be rebutted during the trial process' and 'I see no reason why the [applicants] could not assert the immunity by relying on the certificates, as a preliminary point, before the trial judge and the [DPP] respond with evidence of rebuttal.' (Paragraphs 3 and 35)

ii. Although the Minister had the power to issue Good Faith Certificates after a period of emergency, the Minister's decision to issue them at the time that he did (6 years after the incident during which Keith Clarke died and four years after the preferring of the Voluntary Bill of Indictment) was unconstitutional because it was manifestly unreasonable and unfair (Paragraphs 7, 10, 14 and 157-158)

iii. The granting of the Good Faith Certificates after such a long delay was unreasonable and unfair for the following reasons:

1. They involve actions done during a state of emergency.

2. They stem from an incident involving the loss of life of a householder during a forced entry into his house.

3. They affect the prosecutions and have instituted a legal hurdle for the prosecution some four years after the charge had been laid. (Paragraph 13)"

[13] The applicants are aggrieved by these findings and the order that was ultimately made. They filed some 11 grounds of appeal detailing their complaints. They are that:

"a. The majority erred in law when they failed to give due regard or consideration to the fact that only the following three issues arose for determination:

i. Whether the Good Faith Certificates infringe the principle of separation of powers and are therefore ultra vires, null and void.

ii. Whether the Emergency Powers Regulations are unconstitutional to the extent that they grant the Minister power to grant immunity or Good Faith Certificates.

iii. Whether the certificates are ultra vires, null and void because they were issued outside the period of emergency.

b. The majority erred in law and/or acted outside of their jurisdiction when they considered and based their decision on the Minister's purported delay in issuing the Good Faith Certificates, which was not an issue before the court.

c. The majority failed to give any or any sufficient weight to the nature of the proceedings, being a constitutional claim and not a judicial review claim and in the circumstances took into account the irrelevant factor of the Minister's delay in issuing the Good Faith Certificates.

d. The majority erred in law when, in the absence of any evidence indicating the reasons for the Minister's alleged delay, they found the Good Faith Certificates were manifestly unreasonable and unfair because of the delay in issuing them.

e. The majority erred in law in that they failed to recognise that a delay in issuing the Good Faith Certificates is not a breach of any constitutional provision and/or principle.

f. The majority erred in failing to recognise that there is no duty or legal requirement of fairness to the prosecution. Therefore, Good Faith Certificates cannot be deemed unconstitutional on that basis.

g. The majority erred when they denied the Applicants the protection of the Good Faith

Certificates on the basis of delay in circumstances where there was no time limit in the Emergency Powers Regulations (2010) for issuing them and there are no time limits on when the Applicants could be prosecuted.

h. The majority erred when they denied the Applicants the protection of the Good Faith Certificates on the basis of delay in circumstances where they had no control over when the Good Faith Certificates are issued.

i. The majority erred when they failed to consider that making an adverse finding against the Applicants on the basis of the Minister's alleged delay was itself manifestly unjust and unfair.

j. All three judges erred in finding that the proper forum for challenging, a certificate issued pursuant to Regulation 45(3) is at the criminal trial, instead of recognising that judicial review would be the appropriate forum.

k. All three judges failed to have proper regard to the clear language of Regulation 45(1) the Emergency Powers Regulations which states that **'no action, suit, prosecution or other proceeding shall be brought or instituted against any member of the security forces in respect of any act done in good faith during the emergency period'** so that the appropriate forum to determine whether the Good Faith Certificates are valid could not be during a trial after a prosecution has already been brought." (Emphasis as in original)

[14] In the light of these grounds, the ultimate question for my consideration is whether they are such as to entitle the applicants to a stay of execution of the order of the Full Court, pending the appeal. It is the contention of the 1st respondent that there is no basis on which to properly grant the stay of execution. The 2nd respondent is not objecting and the DPP, who the court is

advised will be making an application to intervene in the appeal, has indicated that she has no objection to the grant of the application. The issue as to whether the stay should be granted is joined between the applicants and the 1st respondent only.

The relevant law

[15] The resolution of the single question of whether the stay should be granted depends, of course, on the application of the relevant law that governs such applications to the circumstances of the case. The law in this area is well-settled. There is, therefore, no need for any detailed exposition on all the relevant authorities treating with the issue. It suffices to say that the approach is for the court to make the order, which best accords with the interests of justice, once it is satisfied that there may be some merit in the appeal (see **Combi (Singapore) Pte Limited v Ramnath Sriram and another** [1997] EWCA 2164).

[16] In a later case, **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065, Clarke LJ stated the applicable principles in these terms:

"Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be

unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

[17] In **Calvin Green v Wynlee Trading Ltd** [2010] JMCA App 3, Morrison JA (as he then was), having had regard to previous authorities, stated that the threshold question on these applications is whether the material provided by the parties discloses at this stage an appeal with some prospect of success. Once that is so, the court is to consider whether, as a matter of discretion, the case is one fit for the grant of a stay, that is to say, whether there is a real risk of injustice, if the stay is not granted or refused.

[18] Therefore, the two primary questions to be considered are:

- i. whether the appeal has some prospect of success; and
- ii. where lies the greater risk of injustice if the court grants or refuses the application.

See also, **Symbiote Investments Limited v Minister of Science and Technology and another** [2019] JMCA App 8, per Brooks JA.

The prospects of success of the appeal

[19] The contention of the applicants is that the appeal has satisfied the first test for the stay of execution. On their behalf, counsel contend that they have a good arguable appeal with some prospect of success on the main issue of

whether the majority of the Full Court erred in law and/or acted outside their jurisdiction when they considered and based their decision on the Minister's purported delay in issuing the Good Faith Certificates. The prospect of success on this issue, they say, inheres in these matters:

- i. The Minister's alleged delay was not an issue before the court and, therefore, there would have been no evidence on which it could properly assess the purported delay.
- ii. In any event, the claim being a constitutional claim and not a judicial review claim, the Minister's alleged delay was an irrelevant factor. It was not a breach of any constitutional provision or principle.
- iii. The differences in the issues and considerations when the court hears a judicial review claim versus a constitutional claim are significant. This is apparent from the difference in the procedure and evidence required to bring both claims.
- iv. The Privy Council has also ruled that constitutional claims should not be used to sidestep the process of judicial review:
The Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 15.

- v. The Full Court has essentially granted a judicial review remedy (quashing the decision to issue the Good Faith Certificates on what are effectively judicial review grounds), in circumstances where the 1st respondent did not have to prove that she satisfied the requirements to be granted leave to apply for judicial review.
- vi. The fundamental flaw in this approach is compounded by the fact that in a contested application in a related matter, the DPP was denied leave to apply for judicial review on the same facts because she could not meet the requirements for leave because of delay.
- vii. The Full Court had no jurisdiction to grant an order based on an issue, which was not brought by the 1st respondent for the court's consideration.

[20] Another issue to be determined in the appeal, according to counsel for the applicants, is whether the majority erred when they denied them the protection of the Good Faith Certificates in circumstances where the court had ruled that there was no time limit under the Regulations for issuing them and the applicants had no control over when they were issued. They contend that the court cannot find, on the one hand, that there was no time limit for the

Minister to issue the Good Faith Certificates, and then, on the other hand, find that the certificates were void because the Minister delayed in issuing them.

[21] Counsel further submit that to make a ruling which denies to the applicants the ability to rely on the Good Faith Certificates and placing the burden on them to prove that they acted in good faith in the criminal proceedings on the basis of delay of the Minister (and not their own delay) was itself manifestly unjust and is an excellent arguable ground of appeal. They contend that the majority of the Full Court, by ruling that the applicants cannot rely on the Good Faith Certificates, has placed the burden on them to provide evidence that they acted in good faith so that they can be immune from the trial, rather than placing the burden on the prosecution. This gives rise to serious issues of the applicants' right to a fair trial and due process.

[22] In response, counsel for the 1st respondent has raised what they refer to as a "preliminary point". This is that, "there is absolutely no truth to the applicants' assertion that the Full Court acted outside of its jurisdiction" when it acted on what the applicants argue is a "purported delay" in the absence of evidence of delay. The question as to whether there is delay, they say, is a question of fact for both the Full Court and this court because all relevant dates have been agreed and are unchallenged. According to counsel, "to invite the Court of Appeal to disturb the findings of the Full Court on the issue of delay is an attempt by the [applicants] to suggest that this Court should intervene so as to deprive the Constitutional Court of its discretion to analyse all the evidence

before it and come to a conclusion on the critical Constitutional issue of fairness".

[23] Counsel submit further that the contention that the matter is one that should be dealt with by way of administrative action is without merit since the court has powers of rectification that can adequately address any procedural defects which may exist.

[24] They maintain that the claim that the applicants are being denied the protection of the Good Faith Certificates is not supported by the ruling of the Full Court since all three judges "are united on the ruling that valid 'good faith certificates' would not grant immunity to the applicants but could only be used as part of their defence in the criminal trial". They contend that even a successful appeal has no real prospect of preventing the trial of the applicants, "which trial the court has a duty to ensure is done in a timely manner in the interest of justice to all parties involved".

Analysis and findings

[25] It is accepted that while I am entitled to form a provisional view of the likely success of the appeal, I am not required at this stage to conduct a detailed analysis of all the grounds of appeal with a view to disclose a reasoned view of what I believe to be the likely outcome of the appeal. I am only required to be satisfied that, at least, one ground, which could resolve the appeal in favour of the applicants, is arguable with some prospect of success.

However, in order to arrive at this conclusion, I must evaluate the broad issues to which the grounds of appeal have given rise. Having done so, against the background of the relevant law, the decision and reasoning of the three judges of the Full Court and the submissions of the parties, I form the view that the applicants have satisfied the first requirement for a stay of execution. The reasons for this conclusion will now be outlined.

[26] The Full Court was constituted to enquire into alleged breaches of the Constitution as contended by the 1st respondent in her claim. The claim of unconstitutionality had emanated from the power exercised by the Minister in granting immunity to the applicants with the issuance of the Good Faith Certificates. One issue which arose for consideration within this context, related to the question of whether the Regulations ran afoul of the Constitution by endowing the Minister with the power to grant immunity from prosecution or the Good Faith Certificates. This question was answered in the negative. The Full Court found no infringement of the separation of powers doctrine and section 2 of the Constitution.

[27] It also found that the issuance of the Good Faith Certificates did not encroach upon the constitutional powers of the DPP.

[28] On the question of whether the Good Faith Certificates, which were issued outside of the period of emergency, were *ultra vires*, and therefore null and void, all three judges found that not to be so.

[29] It is seen that none of the bases on which the 1st respondent's claim of unconstitutionality was grounded was upheld by the Full Court.

[30] L Pusey and Nembhard JJ found unconstitutionality in the issuance of the Good Faith Certificates on the basis of delay, which Counsel for the 1st respondent agree was not an issue that was raised for the consideration of the Full Court.

[31] Apart from the fact that the issue of delay in the issuance of the Good Faith Certificates was not an issue before the Full Court, it is also observed that, even more significantly, there is no explicit finding of a breach of any particular provision of the Constitution by this delay. It is noted, for instance, that L Pusey J in paragraph [9] of the judgment had made the point that, "statutory powers that affect constitutional rights must be exercised in a just, fair and reasonable manner" and that, "where those statutory powers have been exercised in a manner that is clearly unfair and unjust, the court, in exercising its constitutional role, must invalidate those acts". The learned judge, however, had not identified the constitutional right that he found to have been infringed by the delay in the exercise of the Minister's power under the Regulations.

[32] Similarly, Nembhard J, for her part, also did not purport to explicitly identify the constitutional right that was infringed. She based her finding of unconstitutionality on these matters as she put it in paragraph [158]:

"I find that the delay in the issuing of the Good Faith certificates is manifestly unreasonable and unfair. Furthermore, the effect of the Good Faith Certificates would be to reverse the burden of proof at the trial of the criminal proceeding, which, at this time and in the circumstances of this case, would not be fair. It is for that reason that I find that the Good Faith Certificates are unconstitutional, null and void and of no effect."

[33] The learned judges based their decision on what was perceived to be unreasonable, unjust and unfair in the Minister's late issuance of the Good Faith Certificates. The question does arise as to whether a finding that the delay in issuing the Good Faith Certificates is "manifestly unreasonable and unfair" is a proper basis on which to declare them null and void and unconstitutional within the context of this claim. It seems to me that the issue of whether it was open to the majority to make such a finding and declaration of unconstitutionality, on the basis they did, is a burning one for an enquiry by this court.

[34] I conclude, after a consideration of the issues arising from the grounds of appeal that, at minimum, grounds of appeal (a) to (f), which relate to the Full Court's treatment of the issue of delay, are arguable with more than a fanciful prospect of success.

[35] I also find that the question as to what is the most appropriate forum to resolve the question surrounding the validity of the Good Faith Certificates is a significant one for the consideration of this court.

[36] Regulation 45(1) of the Regulations reads:

"Subject to paragraph (2), no action, suit, prosecution or other proceeding shall be brought or instituted against any member of the security forces in respect of any act done in good faith during the emergency period in the exercise or purported exercise of his functions or for the public safety or restoration of order or the preservation of the peace in any place or places within the Island or otherwise in the public interest."

[37] It does seem on the wording of this provision that a serious question arises as to when, how, and by what proceedings should the issue surrounding the validity of the Good Faith Certificates be resolved. The applicants contend that the Full Court erred in finding that the criminal trial is the appropriate forum; instead of recognising that judicial review would be the appropriate forum. However, the majority of the Full Court has declared the Good Faith Certificates null and void and, so, based on that ruling, there could be no question concerning their validity at the trial. The pronouncement as to proper forum would, therefore, have been addressed in passing by the majority. It was Dunbar-Green J, in her minority decision, who concluded that the matter should be dealt with at the trial as a preliminary point. The dicta of the three judges, regarding the criminal proceedings being the appropriate forum, strictly speaking, therefore, does not form part of the decision (*or ratio decidendi*) of the court.

[38] What is clear, however, is that the issue of the validity of the Good Faith Certificates is inextricably bound with the issue of the appropriate forum for the resolution of the dispute that arose between the applicants, on the one hand,

and the 1st respondent and the DPP, on the other hand, in the criminal proceedings. It follows that if this court should find, upon the determination of the appeal, that the Full Court erred in declaring that the Good Faith Certificates are null and void on the basis of delay, the issue of the resolution of their validity, which is challenged by the DPP, would still remain a live one for resolution. The DPP would be required to prove that the applicants were not acting in good faith at the time in question in her effort to rebut the presumption that would have arisen in their favour. The issue as to the appropriate forum or by what proceedings should this issue be ventilated would have to be settled by this court.

[39] For this reason, it cannot be said that the points raised on grounds of appeal (j) and (k), relating to the appropriate forum, are irrelevant, unarguable and devoid of merit. The complaint embodied in those grounds have given rise to a question which is worthy of investigation by this court, and it cannot be said, with any degree of conviction, that they are without any prospect of success.

[40] I also find it difficult to appreciate the 1st respondent's reliance in her submissions on the court's powers of rectification under rule 26.9 of the Civil Procedure Rules, 2002 ("the CPR"). She invoked this provision in arguing that the contention of the applicants that the matter is one that should have been dealt with by administrative action is without merit. I cannot foresee that this court would, at the hearing of the appeal, accept this contention of the 1st

respondent as an appropriate response to the case being advanced by the applicants on appeal.

[41] The Full Court could not have invoked rule 26.9 of the CPR, to convert what was a constitutional claim into one for judicial review, which the applicants are contending would have been the appropriate administrative claim. A different procedural regime, as well as different substantive principles of law, would apply to applications for judicial review. This court would also not be empowered to invoke that provision in dealing with the issues raised on the appeal. This argument of the 1st respondent is a weak response to the application for stay of execution of the order of the Full Court that the trial should proceed.

[42] I am propelled to go on further to state that even if, for argument sake, it may be said that the Full Court had such power of rectification under rule 26.9 of the CPR, to be exercised in the circumstances of this case, it did not purport to exercise that power before coming to its findings that the Good Faith Certificates were null and void. There is nothing to suggest, from the reasoning of the three judges, that they saw it fit to treat the matter before them as anything, or in any way, other than as a constitutional claim.

[43] I find, on a preliminary assessment of the grounds of appeal that there are, at least, eight grounds (which amount to more than half the grounds of

appeal) that warrant a close enquiry by this court. I find them to be arguable with some prospect of success.

[44] The applicants have surmounted the first hurdle for the grant of the stay. I will now proceed to examine the second limb of the two-staged test, which is, whether the greater risk of injustice lies in granting or refusing the stay.

The risk of injustice

[45] The applicants contend that there would "plainly be a risk of injustice" if a stay is refused. They argue that if the criminal proceedings continue, without them being able to rely on the Good Faith Certificates, and the appeal eventually succeeds, they would have no remedy. The appeal would essentially be rendered nugatory, they say. On the other hand, the applicants opine, that the only risk of injustice to the 1st respondent is in having to wait for further time for the outcome of the criminal proceedings. Such risk, they say, is equally or even more greatly borne by them, who have been facing an impending murder trial for many years. It is further contended on behalf of the applicants that in the present case, where they are the ones more likely to suffer irreparable harm, and there is no risk of similar or any significant harm to the 1st respondent, the court ought to grant the stay.

[46] The 1st respondent's response to this argument is that the effect of the Full Court's decision is that "there can be no such bar that prevents the trial".

She contends that the order that the trial be restored to the list does not put the applicants in peril.

Analysis and findings

[47] Again, I find myself unable to accept the position taken by the 1st respondent. The challenge raised to the Full Court's findings go to the very heart of the question of whether the criminal proceedings should proceed or not. If the Full Court is found to have been wrong in declaring the Good Faith Certificates null and void, then they would stand for all intents and purposes. This situation would have serious implication for the trial of the applicants because the Good Faith Certificates would stand on the presumption that they acted in good faith and, therefore, enjoy immunity from prosecution. This would warrant a hearing, given the position of the DPP, taken in the court below, that the applicants did not act in good faith. The contrary would have to be proved by her.

[48] Related to this issue, is the question of the proper forum for the resolution of that dispute. In this regard, the court could also rule that the criminal proceedings are not the appropriate forum for the determination of the validity of the Good Faith Certificates. With that ruling, the validity of the certificates could still fall to be determined as a preliminary issue before another forum before the trial may proceed. It becomes evident to me that the progress of the criminal proceedings stands to be critically and adversely affected by the determination of the appeal.

[49] I do accept that the delay in the disposition of the criminal proceedings must be a matter of grave concern for the 1st respondent. She has been in pursuit of justice for almost a decade. However, the circumstances of this case and the issues regarding the Good Faith Certificates are not only unusual but unprecedented. The situation requires careful consideration by the courts. The applicants, who were at the time of the incident, serving members of the security forces and, purportedly, acting in the execution of their functions during a dark period in our nation's history, are in peril of losing their liberty for a very long time. The matter does have grave consequences for them.

[50] If the stay is not granted and the trial proceeds, the appeal could, indeed, be rendered nugatory. It would also result in a waste of precious judicial time and resources to proceed with a trial, only to find that it has to be aborted because of a successful appeal, which is not, at all, improbable or impossible. I accept that the 1st respondent will not suffer any marked prejudice or, at any rate, any greater prejudice than the applicants if the trial is stayed pending the appeal. The grant of the stay would produce the least irremediable risk of injustice than refusing it.

[51] I conclude that not only the balance of justice but also the balance of convenience, are in favour of granting the stay of execution of the Full Court's decision that the criminal trial should proceed.

Conclusion and disposal

[52] The applicants have shown that they have an appeal that is more than arguable with some prospect of success. They have also managed to establish that a refusal of the application for the stay would result in more injustice to them in all the circumstances than it would to the respondents. Their application, therefore, succeeds.

Order

[53] Accordingly, I order that:

- i. The application for a stay of paragraph (1) of the decision of the Full Court made on 18 February 2020 is granted from the date hereof, 5 May 2020, until the determination of the appeal or until further orders.

- ii. Costs of the application to be costs in the appeal.