

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 62 of 2020**

B E T W E E N

THE ATTORNEY-GENERAL

Applicant

AND

SHANNON TYRECK ROLLE

And

**LAVAUGHN SHAWN ROLLE
(By his next friend Shannon Tyreck Rolle)**

AND

**CASSHONYA PASHA ROLLE
(By his next friend Shannon Tyreck Rolle)**

Respondents

AND

THE ATTORNEY GENERAL

Applicant

AND

**MAYSON JUNO PIERRE
(By his next friend Julna Pierre)**

AND

**NIKEY PIERRE
(By his next friend Julna Pierre)**

Respondents

BEFORE:

**The Honourable Sir Michael Barnett, P
The Honourable Mr. Justice Isaacs, JA
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Jones, JA
The Honourable Mr. Justice Evans, JA**

APPEARANCES: Mr. Franklyn Williams, with Mrs. Kayla Green-Smith, Mr. Kirkland Mackey, and Ms. Lukella Lindor, Counsel for the Appellant

Mr. Wayne Munroe, QC, with Ms. Bridget Ward, Counsel for the Respondents

DATES: 14 July 2021; 21 July 2021

Civil Appeal – Constitutional Motion – Application for Stay pending Appeal to Privy Council - The Bahamas Islands (Procedure in Appeals to Privy Council) Order 1964 sections 5(b) and 6

On 25 June 2021, the applicant by Summons, applied for a stay of the Court's 21 June 2021 judgment where by a majority decision, the Court dismissed the appellant's appeal and affirmed the decision of Mr. Justice Ian Winder in the court below and awarded costs to the respondents. The application was made pursuant to section 6 and during oral arguments the applicant amended the Summons to invoke section 5(b) of The Bahamas Islands (Procedure in Appeals to Privy Council) Order, 1964. After hearing submissions on the application for stay, the Court reserved its decision.

Held: application under sections 6 and 5(b) for a Stay of the effect of the COA's majority decision of 21 June 2021, is refused with costs to the respondents. In the interests of justice the pending proceedings before Winder J are stayed pending the outcome of the Attorney-General's appeal to the Privy Council.

Winder, J has effectively imposed a stay of the proceedings in his court pending such "**further representations**" that may be made. I understand the Judge's terminology to mean and to include appeals against the legal position he established. To be clear, Winder, J has not yet made any of the Declarations sought by the respondents; and the majority judgment of the Court merely affirmed his interlocutory understanding of the import of Article 6. Any Declaration Winder, J may ultimately grant will be subject to the outcome of the appeal the appellant is preparing to launch before their Lordships in the Privy Council. The case before Winder, J has yet to conclude. In the premises, I am not satisfied that the appellant has demonstrated that we ought to grant a stay of our judgment under sections 6 or 5(b) of the Order.

Norman Washington Manley Bowen v Shahine Robinson, et al Supreme Court Civil Appeal No. 114/2010 considered

Director of Public Prosecutions v Mark Thwaites et al SCCA No. 14/2009 Application No. 39/2009 mentioned

J U D G M E N T

Judgment delivered by The Honourable Mr. Justice Jon Isaacs, JA:

1. By a Summons filed on 25 June 2021, pursuant to section 6 of the Bahamas Islands (Procedure in Appeals to Privy Council) Order, 1964 ("the Order") the appellant applied for a stay of the Court's judgment dated 21 June, 2021 ("the Ruling") where the Court - by a majority decision - dismissed the appellant's appeal and affirmed the decision of Mr. Justice Ian Winder in the court below; and awarded costs to the respondents. The appellant, ostensibly taking their cue from the comments made by the Court, subsequently altered their position to include an argument that their application for a stay was made pursuant to section 5(b) of the Order.

2. It is clear that the appellant's resort to section 6 of the Order is futile. It provides 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." [Emphasis added]

3. The majority judgment of the Court did not require the payment of any money nor did it require the doing of any act. Thus, the condition precedent necessary for the invocation of section 6 is absent. As a result of its absence, there is no basis for the Court to insert itself into the process moving toward a hearing by their Lordships of Her Majesty's Privy Council.

4. Section 5(b) of the Order has now been made the moving force for the appellant's application for a stay as a result of certain interventions by the Court. Notwithstanding that the appellant was seeking to move the Court to consider this additional application, no Summons had been filed by the appellant; only three affidavits had been filed in support of this new approach. Nevertheless, upon the undertaking of Mr. Williams to file the proper amended Summons to reflect the addition of the relief being sought pursuant to section 5(b) of the Order as an alternative to the relief sought pursuant to section 6 of the Order, we heard his and Mr. Munroe's submissions on section 5(b) of the Order.

5. Section 5(b) of the Order provides:

"5. A single judge of the Court shall have power and jurisdiction-

...

(b) generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions, as he shall consider the interests of justice or circumstances of the case require:

Provided that any order, directions or decision made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decision." [Emphasis added]

6. In its effort to convince us that the interests of justice require a stay to preserve the status quo ante, the appellant has filed three affidavits: Kingsley Smith sworn on 29 June 2021; Deputy Permanent Secretary, Donnette Williamson sworn on 13 July 2021; and Geoffrey McPhee, an employee in the Parliamentary Registration Department, sworn on 7 July 2021.

7. At paragraph 4 of his supplemental affidavit filed on 29 June 2021, Kingsley Smith averred as follows:

"I am advised and verily believe that there are thousands of persons who stand to receive Citizenship as a result of the ruling of Justice Winder J. and affirmed by the Majority of this Court to which they would not otherwise be entitled to. Likewise, if the Appeal of the Attorney-General is upheld they would not otherwise be entitled to receive Citizenship. Further, if Citizenship is granted in the circumstances, that is, while the Appeal is pending, such Appeal will be rendered nugatory."

8. Deputy Permanent Secretary Williamson averred, inter alia, that:

"5. This Affidavit is in support of the application of the Attorney-General pursuant to paragraph 5(b) of the Bahamas Islands (procedure in Appeals to Privy Council) Order, for a stay of the operation, the effect of and/or the execution of the ruling pending the hearing of the Appeal.

6. In the days following the Court of Appeal ruling dated the 21st day of June, 2021, I received a number of enquiries concerning the application for and the issuance of passports to persons claiming under the decision of Winder J. These individuals also indicated that they stood to benefit from the said Court of Appeal ruling.

8. I also received an enquiry from an individual who walked into the Passport Office. This particular individual specifically

enquired about the application for and the issuance of a passport based on Winder J.'s decision and the Court of Appeal ruling dated the 21st day of June, 2021 and the fact that this individual's father was a Bahamian." [Emphasis added]

9. Geoffrey McPhee, an employee in the Parliamentary Registration Department, averred as follows:

"5. In the days following the Court of Appeal ruling dated the 21st day of June, 2021, I received a number of inquiries over the telephone from persons who indicated that they stood to benefit from the said Court of Appeal ruling and they wish to know how they might register to vote.

6. I also received an inquiry from a female who walked into the Parliamentary Registration Department. This particular female specifically inquired about registering to vote based on the Court of Appeal ruling dated the 21st day of June, 2021 and on the fact that her father was a Bahamian." [Emphasis added]

10. If these affidavits were filed to convince us that due to the Court's judgment, upholding the decision of Winder, J, the floodgates were opened to a tide of applications for registration as Bahamians, for Bahamian passports and to be registered to vote, they are abject failures. They evince no more than the usual level of interest members of the public may have in a case of some public importance; and cannot give rise to a belief that unless somehow checked, great damage will be done to the polity. Moreover, in the hearing before us, Mr. Williams admitted that there had "not been a flood or a deluge of applications or claims" resulting from our decision (page 18 of the transcript for 14 July 2021).
11. The danger inherent in the imposition of a stay, however, is demonstrated by paragraph 3 of the affidavit of Tamica McPhee sworn and filed on 13 July 2021:

"3. That I have been advised and verily believe that the Bahamas Immigration Department is still deporting individuals especially Haitian Nationals inclusive of minors as shown in the Bahamas Immigration Department press Release #25/21. Attached hereto and shown to me marked "TM1" is a copy of the Press Release."

12. Mr. Williams has suggested that the appellant is willing to give an undertaking to suspend the deportation of persons who claim Bahamian citizenship pursuant to Article 6 of the Constitution. I do not view this as a viable option as it opens the door for everyone apprehended or approached by members of the Immigration Department or any other agency of the State concerned with the regulation of immigrants in the country, to merely state that they lay claim to citizenship pursuant to Article 6 of the Constitution, to cause any

investigation into the legitimacy of their claim to be delayed; and to allow otherwise undeserving persons to continue to reside in the country without let or hinderance.

13. However, the offer that "the Government of The Bahamas, is prepared to give an undertaking, pending the determination of this appeal, not to deport any person claiming under Article 6 and the declaration of the Court, the interpretation of Article 6" (page 20 of the transcript for 14 July 2021) is noted; as is such forbearance as the appellant is willing to exercise in light of this Court's judgment.
14. What would be the effect of the Court's judgment if a stay was not granted? A Declaration is nothing more than a statement of what the law is. Morrison, JA referred to Zamir & Woolf's 'The Declaratory Judgment', 2nd edn. para. 1.02 at paragraph 10 of his judgment in **Norman Washington Manley Bowen v Shahine Robinson, et al** Supreme Court Civil Appeal No. 114/2010 to demonstrate the difference between a declaratory judgment and an executory judgment:

"A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive, judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the plaintiff's rights; if the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. Thus the court may, for example, declare that the plaintiff is the owner of certain property, that he is a British subject, that a contract to which he is a party has or has not been determined, or that a notice served upon him by a public body is invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position."

15. In **Bowen**, the appellant sought to stay a decision of Jones, J whereby he had declared the seat for the constituency of Saint Ann North Eastern, vacant. While refusing to grant the stay, Morrison, JA formulated the issue to be decided as "the further question that now arises, which is whether the court has any power to stay execution of a purely declaratory order"; and "whether a stay of execution is appropriate in the case of a purely declaratory judgment". [See also **Director of Public Prosecutions v Mark Thwaites et al** (SCCA No. 14/2009, Application No. 39/2009, judgment delivered 5 March 2009) mentioned in **Bowen**.]

16. It must be noted that 2.11 of the Jamaican Court of Appeal Rules, 2002 does not contain a provision in similar terms to section 5(b) of the Order, to wit: the Court may "**make such order and to give such other directions, as [they] shall consider the interests of justice or circumstances of the case require**".
17. As in this case, Winder, J's interlocutory ruling, does not require the appellant to do anything. The allegation that there may be thousands of persons who may be affected by Winder, J's decision which was upheld in this Court, does not set off any alarm bells since anyone seeking to avail themselves of Article 6 still face the hurdle that is presently being addressed by Winder, J in the second act of the trial, to wit, the exercise alluded to by him at paragraph 39 of his judgment:

"39. In the circumstances therefore, having established the legal position, rather than conclude the application with a decision which may be adverse to either side, who may wish to make further representations, in light of my legal finding, I will to adjourn this matter and give directions as to how further representations may be made and/or evidence may be adduced, if necessary, prior to a final determination on the evidence."
18. In my view, Winder, J has effectively imposed a stay of the proceedings in his court pending such "**further representations**" that may be made. I understand the Judge's terminology to mean and to include appeals against the legal position he established. To be clear, Winder, J has not yet made any of the Declarations sought by the respondents; and the majority judgment of the Court merely affirmed his interlocutory understanding of the import of Article 6. Any Declaration Winder, J may ultimately grant will be subject to the outcome of the appeal the appellant is preparing to launch before their Lordships in the Privy Council. The case before Winder, J has yet to conclude.
19. In the premises, I am not satisfied that the appellant has demonstrated that we ought to grant a stay of our judgment under sections 6 or 5(b) of the Order. I would dismiss the application for a stay of the effect of our judgment.
20. The matter does not end there however, because during the hearing before us, Mr. Munroe signaled his preference that the action before Winder, J continue "with the second part of the case". This seems to foreshadow his intention to move Winder, J to proceed with the case involving his clients. I hold the view that the continuation of the case should await the determination of the appeal to the Privy Council. Thus, to that extent I am willing to avail myself of the power contained in section 5(b) of the Order, to wit, "to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require" to direct that the proceedings before Winder, J be stayed pending a determination of the appeal to the Privy Council or such other order as may be made by the Court.

Conclusion

21. In the result, I would dispose of the matter as follows:

1) The Attorney-General's application under sections 6 and 5(b) for a Stay of the effect of the COA's majority decision of 21 June 2021, is refused with costs to the respondents;

2) In the interests of justice and in view of Mr. Munroe's stated intention to resume the proceedings in the court below, we direct that the pending proceedings before Winder J be stayed pending the outcome of the Attorney-General's appeal to the Privy Council.

The Honourable Mr. Justice Isaacs, JA

22. I agree.

The Honourable Sir Michael Barnett, P

23. I agree also.

The Honourable Madam Justice Crane-Scott, JA

24. I also agree.

The Honourable Mr. Justice Jones, JA

25. I am also in agreement.

The Honourable Mr. Justice Evans, JA