

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL No. 4 of 1994

BETWEEN:

COWELBY E.H.R. BLAKE

Appellant

and

TERRENCE V. BYRON

(amicus curiae)

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice

The Hon. Mr. Satrohan Singh - Justice of Appeal

The Hon. Ms Monica Joseph - Justice of Appeal (Ag.)

Appearances: The Appellant in person

1994: April 13;

Oct. 03.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

On 21st January 1994, the appellant filed an ex parte originating summons in the High Court. By that summons, he applied to the Court for a declaration: "That the laws of Saint Christopher and Nevis DO NOT and COULD NOT provide for the Governor-General to have any discretion based on the results certified to him by the Supervisor of Elections AND AT THE SAME TIME, provide for a minority Government.

And that as a consequence of such a minority Government my fundamental rights and freedom had been caused and are being caused and are likely to be caused to be impaired because of the enjoyment of unlawful rights and freedoms exercised by Kennedy Simmonds, Sydney Morris, Hugh Heyliger, Constance Mitcham and Joseph Parry where they are maintaining a minority Government Administration thus infringing the rights of myself and members of the electorate.

.. So Kennedy Simmonds ought to be removed by the Governor-General under Section 52 subsection 7 of the Constitution of Saint Christopher and Nevis AND such removal be followed up by a dissolution of the present Parliament under the provision portion of subsection (4) of Section 47 of the Constitution of Saint Christopher and Nevis. THEN the Governor-General ought to issue new writs for General Elections."

By judgment dated 22nd February 1994, *Hylton J* refused the application. The learned judge concluded:

"In the end therefore I hold (1) that there was no evidence before the Court to show that the Applicant had a relevant interest in the issue he sought to litigate. (2) that the process by which he sought to move the Court was not permissible (3) I hold also that even if the Applicant had adduced evidence to show a relevant interest and had sought to move the Court by a Notice of motion or Writ of summons he would still have had the task of satisfying me that Section 52(2) of the Constitution has any other meaning than the plain and inescapable one that following the holding of General Elections the Governor General (in exercising the Executive Authority vested in Her Majesty by Section 52(1) of the Constitution and delegated to him by Section 52(2) had authority to appoint as Prime Minister a Representative who appears to him likely to command the support of the majority of the Representatives."

The appellant is dissatisfied with the judgment and has appealed against it. The questions which we are required to answer in this appeal are (1) whether the High Court could properly have granted the appellant's application on an ex parte originating summons and without making the Attorney-General a party to the proceedings (2) whether the Governor-General's administrative

decision to appoint or retain Dr. Kennedy Simmonds as Prime Minister is justiciable (3) whether there are valid judicial grounds for impugning the Governor-General's decision and (4) whether the appellant has locus *standi* in relation to the application.

(1) The Ex parte summons

The appellant's originating summons confuses public law and public rights thereunder with private law and private rights thereunder. The result is that the procedural requirements for judicial redress at public law for violation of public rights have been confused with the procedural requirements for judicial redress at private law for violation of private rights.

The originating summons is based on two allegations. The first allegation relates to public law and is an allegation that the Governor-General's decision to appoint or retain Dr. Simmonds as Prime Minister and to establish a minority government is unconstitutional. The second allegation relates to private law and private rights and is an allegation that the alleged unconstitutional decision of the Governor-General infringed or impaired or is likely to infringe or impair the appellant's private or personal fundamental rights and freedoms.

Although the originating summons purports to be an application for a declaration, the summons in fact transcends a claim for that remedy. The appellant in effect claims judicial redress at public law by way of a prerogative order of mandamus ordering the Governor-General to remove Dr. Simmonds as Prime Minister, to dissolve Parliament and to issue writs for general elections. No judicial redress at private law is claimed for the alleged infringement or threatened infringement of the appellant's fundamental rights and freedoms unless the originating summons can be interpreted to include a claim for a declaration of such infringement (which infringement incidentally was never proved).

- To the extent to which the originating summons purports to be an application

for an order of mandamus in public law, that order could not be made because the

appellant did not obtain leave to make the application. The appellant could not circumvent R.S.C. Order 44 rule 1(1) which provides that: "No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule".

- In **I.R.C. v Federation of Self-Employed** (1981) 2 A.E.R. 93 at 105, *Lord Diplock* said:

"The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

To the extent to which the originating summons purports to be an application for a declaration that the appellant's fundamental rights and freedoms have been or are likely to be infringed, the originating summons (being an ex parte originating summons) was not the proper procedure for the making of such an application. The Constitutional Redress Rules (the Supreme Court (Constitutional Redress-Saint Christopher, Nevis and Anguilla Rules 1968 No.35) prescribe the procedure for the making of such applications. According to rules 3 and 8, such applications may be made by motion or writ of summons. The Rules do not authorise ex parte applications. The procedural requirement of a writ of summons or motion implies that there is a defendant or respondent and that the proceedings will be *inter partes*. It also contemplates that the **writ** of summons or Notice of Motion will be served on the defendant or respondent.

The Constitutional Redress Rules were ratified and saved by paragraph 2(4) of Schedule 2 to the Saint Christopher and Nevis Constitution Order 1983 No. 881

which provides that:

"Where any matter that falls to be prescribed or otherwise provided for under the Constitution by the legislature or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this paragraph), that prescription or provision shall, as from 19th September 1983, have effect (with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution and the Supreme Court Order) as if it has been made under the Constitution by the legislature or, as the case may require, by the other authority or person."

The matters prescribed or provided for by the Chief Justice by or under the Constitutional Redress Rules were matters that fall to be prescribed or otherwise provided for by the Chief Justice under section 18(6) and 96(4) of the Constitution. Therefore, the Constitutional Redress Rules have effect (with necessary modifications) as if made by the Chief Justice under the Constitution. The result is that the application should have been made by motion or writ of summons.

In this case, the necessary defendant or respondent was the Attorney-General who is the person authorised to represent the State and the Head of State (the Governor-General) in legal proceedings. The appellant sought to exclude the Attorney-General from the proceedings by proceeding by way of an ex parte originating summons. The appellant should at least have complied with rule 5 of the Constitutional Redress Rules which provide that:

"Where any application is made to the High Court pursuant to section 16 (now section 18) of the Constitution by motion or by filing a writ of summons and the Attorney General is not a party to the proceedings the applicant or plaintiff shall file an extra copy of the motion and affidavit or affidavits in support thereof or of the writ of summons, as the case may be, and the Registrar shall within 3 days thereafter forward such extra copy or copies to the Attorney General for his information."

The ultimate question which arises is whether a Court can properly rule against a decision of a Head of State or other public authority without giving to the authority prior notice of the grounds

of objection to the decision and a reasonable opportunity to make representations and to be heard on those grounds before the

decision is. condemned. According to the "*audi alteram partem*" rule of natural justice, the answer is in the negative. The Attorney-General (representing the Governor-General) should have been given that notice and opportunity. In the absence of such notice and opportunity, any order made by the High Court on the appellant's originating summons would have been irregular and liable to be set aside.

(2) Justiciability

The Governor-General's decision to appoint or retain Dr. Simmonds as Prime Minister was made under the authority of section 52 of the Constitution which provides that:

"(1) There shall be a Prime Minister of Saint Christopher and Nevis who shall be appointed by the Governor-General.

(2) Whenever the Governor-General has occasion to appoint a Prime Minister he shall appoint a representative who appears to him likely to command the support of the majority of the Representatives.

(7) If, at any time between the holding of a general election of Representatives and the first meeting of the National Assembly thereafter, the Governor-General considers that in consequence of changes in the membership of the Assembly resulting from that election the Prime Minister will not be able to command the support of the majority of the Representatives, the Governor-General may remove the Prime Minister from office.

(10) In the exercise of the powers conferred upon him by subsections (2) and (7) the Governor-General shall act in his own deliberate judgment."

The Governor-General's decision is therefore protected by section 116(2) of the Constitution which provides that:

"Where by this Constitution the Governor-General is required to perform any function in his own deliberate judgment or in accordance with the advice or recommendation of, or after consultation with, any person or authority, the question whether the Governor-General has so exercised that function shall not be enquired into in any court of law. "

In my judgment, section 116(2) of the Constitution is an unequivocal constitutional ouster of the jurisdiction of the High Court to entertain any application for judicial review of a decision made by the Governor-General in the exercise of the constitutional and prerogative powers conferred upon him by section 52 of the Constitution. In this regard, the appellant drew the attention of the Court to section 119(11) of the Constitution which provides that:

"No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this

Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law."

Section 119(11) of the Constitution acknowledges the inherent jurisdiction of the High Court to entertain applications for judicial review of the judicial, quasi-judicial and administrative decisions of public authorities. But section 119(11) must be read subject to section 116(2) of the Constitution which expressly or impliedly excepts or exempts from judicial review any decision made by the Governor-General under section 52 of the Constitution.

The Decision to appoint a Prime Minister or any other minister of Government is one of the many decisions which are made in the exercise of prerogative powers and which are not justiciable or subject to judicial review for the simple reason that the subject-matter of the decision is not amenable to the judicial process. In *C.C.S.U. v Minister for Civil Service* (1985) A.C. 374 (at 418), *Lord Roskill* said:-

"Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another."

In his assessment as to whether a proposed Prime Minister is likely to command the support of the majority of the representatives, the Governor-General is free to consult not only the representatives themselves but other persons who should know how the representatives are likely to behave under certain pressures and circumstances. In ***Adegbenro v Akintola*** (1963) A.C.614 at 629, *Viscount Radcliffe* (delivering the judgment of the Privy Council in an appeal from the

Federal Supreme Court of Nigeria) said:

"By the words they have employed in their formula, "it appears to him," the judgment as to the support enjoyed by a Premier is left to the Governor's own assessment and there is no limitation as to the material on which he is to base his judgment or the contacts to which he may resort for the purpose. There would have been no difficulty at all in so limiting him if it had been intended to do so."

If the decision of the Governor-General to appoint a Prime Minister was made subject to judicial review, the results could be horrendous. It would mean that the Head of State might be required to divulge sensitive confidential opinions and information imparted by the Representatives and other persons and would be exposed to all the undesirable consequences of such disclosure. Public Policy dictates that the Head of State should be spared those consequences.

The answer to the question who is "likely to command the support of the majority of the Representatives" is subjective and the Constitution makes it subjective to the Governor-General's personal judgment. The answer is an elusive issue which is not justiciable. As Lord Brightman said in **Reg. v Hillingdon**

L.B.C. Exp. Puhlhofer (1986) 1 A.C. 484 at 518:-

"Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

The Constitution itself provides the procedure for determining whether the Governor-General's decision and the opinion on which the decision was based were correct. That procedure is a motion of no confidence in the government. The outcome of such a motion would establish conclusively whether or not the Prime Minister in fact commands the support of the majority of the representatives.

(3) Grounds for impugning the decision

Assuming (without accepting) that the Governor-General's decision is justiciable or subject to judicial review, the decision can only be impugned on one of three established judicial grounds on which decisions of public authorities may

.be impugned at a judicial review. These grounds are illegality, irrationality and procedural impropriety. These words are used in their broad technical senses in the context of judicial review.

Since illegality and procedural impropriety do not arise in this case, irrationality is the only ground available to the appellant. In this regard, I gratefully adopt the definition of "irrationality" elaborated by Lord Diplock in

C.C.S.U. v Minister for Civil Service (supra) where he said (at p410):

"By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 **K.B.** 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* (1956) A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker.

"Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."

There is no evidence or justification for the conclusion that the Governor General's decision was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." There is therefore no valid ground for impugning the Governor-General's decision at a judicial review.

But even if the appellant had proved that the Governor-General's decision was illegal, irrational or procedurally improper, the appropriate remedy would have been a declaration of nullity of the decision and an order of certiorari quashing the decision. The order of mandamus sought could not have been made because such an order would have gone beyond the bounds of judicial review.

A Court (hearing an application for judicial review of the decision of a public authority) is not empowered to usurp the powers of the authority by substituting its own opinion or decision for the decision of the authority which is the constitutionally, statutorily or legally authorised decision-maker. The purposes of a judicial review of a public authority's decision are merely to determine whether the decision is legal, rational and procedurally proper, and if not, to make such orders as may be necessary to protect individuals affected by the decision from the illegality, irrationality or procedural impropriety of the decision.

In *Chief Constable v Evans* (1982) 3 A.E.R. 141 at 154, Lord Brightman

said:

"Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

In *Re Amin* (1983) 2 A.C. 818 at 829, Lord Fraser said:

"Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer."

The decisions to remove the Prime Minister, to dissolve Parliament and to issue new writs for general elections are decisions made in the exercise of prerogative powers and discretion which the Constitution has specifically conferred upon the Governor-General. The grant of the mandamus sought would be a usurpation of those powers. It would amount to the making or dictation by the Court of those decisions which the Constitution has reserved specially for the Governor-General as Head of State. The application for the mandamus implied in the appellant's originating summons was therefore correctly refused .

(2) Locus Standi

In so far as the appellant's application is for an order of mandamus in public law, the appellant is required to show that he has a sufficient interest in the mandamus. In so far as the application is for a declaration or other relief in private law or based on the appellant's fundamental rights and freedoms, the appellant is required by section 96 of the Constitution to show that he has a relevant interest in the declaration or other relief.

Having elected to decide this appeal on the merits of the application and on the conclusion that the application itself is unmeritorious, it is unnecessary to decide whether the appellant has locus standi either by way of a sufficient interest

or by way of a relevant interest in the subject matter of the application.

For these reasons, I would dismiss the appeal and affirm the learned judge's refusal of the appellant's application.

I concur.

(Sgd) SIR VINCENT FLOISSAC

Chief Justice

I concur.

(Sgd) SATROOIAN SINGH

Justice of Appeal (Ag.)

I concur.

(Sgd) MONICA JOSEPH

Justice of Appeal (Ag.)