IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA No. of 2020

Civil Cause No: G 0195/2019

B E T W E E N:

(1) THE CABINET OF THE CAYMAN ISLANDS

(2) THE LEGISLATIVE ASSEMBLY OF THE CAYMAN ISLANDS

Appellants

AND:

SHIRLEY ELIZABETH ROULSTONE

Respondent

AND:

THE NATIONAL TRUST FOR THE CAYMAN ISLANDS

Intervener

NOTICE OF APPEAL

TAKE NOTICE that the Court of Appeal will be moved as soon as Counsel can be heard on behalf of the above-named Appellants On Appeal from that part of the judgment of the Honourable Justice Timothy Owen QC (Actg.) dated the 19th day of February 2020 made upon the trial of Grand Court Cause no. 195 of 2019 during the period 22-23 January 2020, and that part of the same Honourable Judge's ruling on consequential relief dated 2 March 2020:

WHEREBY IT WAS ADJUDGED that:

(i) There is a lack of clarity in the bare language of s. 70 of the Constitution Order 2009 ("the Constitution") concerning the form in which the Legislature must enact legislation to make provision for the holding of a people-initiated referendum.

(ii) The question for the Court is how the requirements of legality, legal certainty, fairness and consistency are best guaranteed given the nature of the right in issue and the apparent purpose behind its enactment.

(iii) A law which authorized and explained the pre-Petition process and subsequent collection of signatures, as well as the process for verifying signatures and certifying the Petition, was necessary to ensure a sound, transparent, fair and legal basis for any people-initiated referendum under s. 70 of the Constitution.

(iv) For this reason, the "law" required by s. 70 must be a general or framework law because it must cover the process of collecting and verifying a petition and any such law must necessarily be general in character.

(v) The rule of law requires that limitations on the right to petition must be prescribed by law rather than left to the discretion of the Elections Office.

(vi) The fact that it is highly likely that the Government will have a strong view on whatever matter of national importance triggers a binding referendum is a further reason in favour of the need for a general law, because a general law, while not necessarily eliminating the risk that the odds may be stacked against those seeking to veto a particular Government policy, is bound to reduce that risk.

(vii) For reasons of legality and on the basis that such a law will best guarantee the constitutional right to a fair and effective vote in a people-initiated, binding referendum, the Referendum Law 2019 is incompatible with s. 70 of the Constitution because it fails to satisfy the requirement for a general law governing all s. 70 referendums and is itself not in accordance with such a law.

(viii) The Referendum Law 2019 is quashed.

FOR ORDERS:

(a) That those parts of the judgment of the Honourable Mr Justice Owen QC (Actg.) dated 19 February 2020 and the same Honourable judge's ruling dated 2 March 2020 be set aside in part, and to the extent identified herein; and

(b) Such further and/or other relief as the Court thinks just.

AND:

The Appellants' Grounds of Appeal are appended hereto.

Dated this day of March 2020.

Attorney General's Chambers

Attorney General's Chambers

To: The above-named Respondent.

And to: Kate McClymont, Broadhurst LLC, Her Counsel

And to: The above-named Intervener and its attorneys, Nelson & Co.

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GROUNDS OF APPEAL

Ground 1: The Learned Judge ought to have held that s. 70(1) of the Constitution Order 2019 makes no prescription as to the form of the "law" that must be enacted, once the signature threshold has been met, to make provision to hold a people-initiated referendum.

1. There is no "lack of clarity" in the language of s. 70 as found by the judge. Rather, s. 70 is silent on the question whether a "law enacted by the Legislature" under s. 70(1) shall be a general law or a bespoke law. The Judge ought to have concluded that s. 70 makes no

prescription as to the form of the legislation that must be enacted, but leaves this to the Legislature.

Ground 2: The Learned Judge erred in his approach and misdirected himself in relation to the task of construction.

2. The Judge proceeded on the basis that the Court's task was to ascertain whether a general or bespoke law would "*best guarantee*" the requirements of legality, legal certainty, fairness and consistency and the s. 70 right to a fair and effective vote in a people-initiated referendum. That was the wrong approach. In considering whether a s. 70 referendum may in principle be legislated for by means of a bespoke piece of legislation such as the Referendum Law, the question for the Court, was whether such a bespoke law could, in principle, sufficiently protect the constitutional right to vote in a people-initiated referendum. If a bespoke law may, in principle, sufficiently protect the constitutional right to vote in a people-initiated referendum, then its bespoke nature cannot be a basis for a finding of unconstitutionality.

3. Further and in any event, the Judge's observations in paragraphs 60-64 of the Judgment as to the respects in which the constitutional right to a people-initiated referendum would be better protected by a general law are an insufficient basis for finding that primary legislation passed by a democratic Parliament is unconstitutional, given the high bar and heavy burden applicable to such a challenge: Surratt v Attorney General of Trinidad and Tobago [2007] UKPC 55 at paragraph 45, citing Grant v R [2006] UKPC 2 at paragraph 15.

Ground 3: The Learned Judge's conclusion that a general law is required to regulate the petition process does not support his conclusion that, once a petition has been verified, as in this case, a referendum under s. 70 may not then be regulated by a bespoke law such as the Referendum Law.

4. The Judge reasoned that a general law is required to regulate referendums under s. 70 because the petition and verification processes must be regulated by a general law: paragraph 62 of the Judgment. That conclusion does not follow from the premise. The view (even if correct) that the petition and verification processes (which would necessarily precede the enactment of any specific law) are required by the Constitution to be regulated by a general law does not compel the conclusion that the (later) referendum itself must

also be regulated by a general law, or that the "law" which s. 70 requires be enacted to "make provision for" a referendum must be general in form.

Ground 4: The Learned Judge's conclusion that a general law will "reduce the risk" that "the odds may be stacked against" those seeking to veto a Government policy does not support his conclusion that the law required by s. 70(1) is a general law.

5. The Judge concluded that s. 70 requires the enactment of a general law because a bespoke law carries with it a greater risk that the Government will sponsor regulatory provisions that are designed to favour one outcome in the referendum.

6. This reasoning is illogical and/or otherwise erroneous:

   (i) It is the Legislature, not the Government, that has the role of enacting legislation under s. 70(1). The Legislature can be expected to discharge its constitutional role of acting as a check on Government.

   (ii) In the case of any bespoke law that sought to "stack the odds" against petitioners in a way that was inconsistent with their rights under s. 70, it would be the substance, not the form of the law that rendered it unconstitutional.

   (iii) In terms of substance, a general law may contain the same substantive regulatory provisions as a bespoke law and may in principle, in the same ways and to the same degree, interfere with or undermine the right to a fair and effective people-initiated referendum under s. 70. Generality does guard against unconstitutionality, as the Judge acknowledged in paragraph 63 of the Judgment.

   (iv) Were a bespoke law to contain provisions that were contrary to or served to undermine the people's right to a fair and effective referendum under s. 70, the substance of that law could be challenged on judicial review. The bespoke nature of the law would not lessen the degree of protection provided by s. 70 of the Constitution or the Court's adjudication.

   (v) Were a bespoke law to contain no regulatory provisions that were objectionable as a matter of substance, it could not reasonably be held to undermine the democratic

right under s. 70 simply because it purported to deal only with the referendum at hand and not with referenda generally.

Ground 5: The Learned Judged erred in quashing the Referendum Law rather than limiting himself to declaratory relief.

7. Consistently with the principles of comity and separation of powers, and in circumstances where a declaration is sufficient for all practical and legal purposes, the Judge erred in purporting to quash the Referendum Law, rather than limiting the relief granted to declaratory relief.

The Appellants reserve the right to rely on other grounds of appeal not set out herein.