IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No: G 0195/2019

BETWEEN

SHIRLEY ELIZABETH ROULSTONE

Plaintiff

and

(1) THE CABINET OF THE CAYMAN ISLANDS

(2) THE LEGISLATIVE ASSEMBLY OF THE CAYMAN ISLANDS

Defendants

and

THE NATIONAL TRUST FOR THE CAYMAN ISLANDS

Intervener

Appearances:	**Mr. Chris Buttler, instructed by Ms. Kate McClymont and Mr. Richard Parrish of Broadhurst LLC for the Plaintiff**
	Mr. Mark Shaw QC and Ms. Jessica Boyd, instructed by Mr. Michael Smith of the Attorney General's Chambers for the Defendants
	Mr. Tom Lowe QC instructed by Mr. Colm Flanagan, Mr. Nicholas Dixey and Ms. Alice Carver of Nelson & Co for the Intervening Party
Before:	**The Hon Justice Tim Owen Q.C. (Actg.)**
Defendants' Written Submissions on Consequential Matters:	**18th February 2020**
Plaintiff's Submissions in response:	**19th February 2020**
Defendants' Response to Plaintiff's Request to quash order:	**24th February 2020**
Plaintiff's Reply in respect of Relief:	**26th February 2020**

HEADNOTE

Civil Law – Appropriate relief flowing from a finding that legislation is incompatible with the Cayman Islands Constitution Order 2009 – Jurisdiction to make a quashing order.

RULING ON CONSEQUENTIAL RELIEF

Introduction

1. Prior to handing down on 19th February 2020, the parties were provided in advance with a copy of the court's draft Judgment which contained an indication of the order that the court proposed to make. In response to the indication that I was minded, unless persuaded otherwise, to grant relief in the form of an order quashing the ***Referendum (People-Initiated Referendum Regarding the Port) Law 2019*** ("the Referendum Law"), the Defendants lodged written submissions to the effect that a quashing order was neither appropriate nor necessary and urged me to limit relief to a declaration of incompatibility. The Plaintiff responded with a Note on Consequential Matters and submitted that my instinct to quash the Referendum Law was correct.

2. The Plaintiff's case has always been clear that in the event of the Court finding that the Referendum Law is incompatible with the Constitution, the proper remedy would be a quashing order (*see the Statement of Facts and Grounds, para 64.7 and the Plaintiff's Skeleton Argument para 62.1*). And at the substantive hearing, Mr Buttler made oral submissions to like effect, citing in particular Keene LJ's observations in ***R (C) v. Secretary of State for Justice***[1] in support of his argument that there is a strong presumption that *ultra vires* legislation will be quashed.

3. Neither in the Defendants' Detailed Grounds of Resistance nor in their Skeleton Argument dated 17th January 2020 did the Defendants specifically address the issue of relief. Moreover in oral argument Mr Shaw QC did not seek to advance the points on which he eventually relied in his written submissions dated 18th February 2020. I therefore had some sympathy for the point made by Mr Buttler in para 5 of his Note on Consequential Matters dated 19th February 2020 that it was not in dispute at the

[1] [2009] QB 657, para 85

hearing that, unlike in England Wales where primary legislation cannot be *ultra vires* because it is the supreme source of law, in the Cayman Islands primary legislation can be *ultra vires* because the Constitution is the supreme source of law. However in view of the importance of the issue, and in order to give Mr Shaw (who was unable to attend the hand down) a chance to respond to the case law relied upon by Mr Buttler in his Note, I indicated that I would be prepared to receive further brief written submissions from the Defendants and (if appropriate) from the Plaintiff concerning the issue of relief. All parties were content that, having considered these further submissions (which I have now received), I would then hand down a further Ruling setting out my conclusion on the relief to be granted in light of the findings set out in my Judgment of 19th February 2020. This is that Ruling.

Submissions

4. The Defendants argue that in view of s.23 of the ***Cayman Islands Constitution. Order 2009*** ("the Constitution") the Court's power to grant relief is limited to the making of a declaration of incompatibility, leaving it to the Legislature to decide how to remedy the incompatibility. They submit that this approach respects the principle of comity and separation of powers, as understood in the UK legal system, and they rely on a passage from **Zamir & Woolf: *The Declaratory Judgment* 4th Ed.** concerning the Court's power to choose between a 'declaration' and 'quashing' orders generally in relation to administrative decisions. They further submit that other Caribbean Constitutions contain provisions which expressly authorise their courts to strike down primary legislation (see the Constitutions of Jamaica and Trinidad & Tobago) and that I should be wary of implying such a power under Cayman law absent such express provision. Mr Shaw also relies on the observations

of Singh LJ in ***R (Liberty) v. Secretary of State for the Home Department***[2] (a case concerning the compatibility of UK primary legislation with EU law) that:

> *"...there is no automatic rule that, once it is held that or conceded that a provision of primary legislation is incompatible with EU law, the national legislation must immediately be disapplied".*

5. Finally, the Defendants submit that a Court should be slow to quash primary legislation as it reflects the will of a democratically elected Legislature and that a declaration will be sufficient to preclude the taking of any executive or administrative act under the Referendum Law so that a quashing order is simply unnecessary. Mr Shaw claims that the recent decision of Hon Justice Nova Hall (Actg.) in ***Bennett v. The Honourable Speaker of the Legislative Assembly***[3] provides support for this cautious approach to the granting of a quashing order in relation to legislation passed by the Cayman Legislative Assembly.

6. The Plaintiff urges me to make a quashing Order. Mr Buttler submits that under the Cayman legislative system, the Legislative Assembly's power is limited to making laws which are compatible with the Constitution and where (as here) the Court finds that a law has been passed which is incompatible with the Constitution, it must be held to be *ultra vires*[4]. He argues that it is wrong in principle to follow the approach taken by the Courts in the UK to a finding that domestic legislation is incompatible with EU or ECHR law. This is because under the UK legal system, where Parliament is supreme, primary legislation cannot be *ultra vires* and the solutions crafted by the Courts reflect that fundamental reality. There is simply no justification, argues Mr Buttler, for transposing the approach explained by Singh LJ in the ***Liberty*** decision to the very different legislative structure in the Cayman Islands. The error in the

[2] [2018] EWHC 975
[3] Cause No G0003 of 2018 (28th December 2018)
[4] (see s.59(2) Cayman Constitution).

Defendants' approach to the issue of remedy is that they seek to characterise the Referendum Law as primary not subordinate legislation whereas Caymanian legislation *is* subordinate legislation. It is subordinate to the Constitution (which was made by statutory instrument under the West Indies Act 1962) in exactly the same way that UK secondary legislation is subordinate to primary legislation. Finally, Mr Buttler relies on the principle articulated by Lord Phillips in ***Ahmed v. HM Treasury***[5] (in which the Supreme Court held that subordinate legislation in the form of the Terrorism Order 2006 was unlawful) to the effect that a court should not obfuscate the effect of its judgment by suspending the order it intended to make quashing the Terrorism Order pending the replacement of the invalid restrictions by restrictions that have the force of law.

Analysis

7. The effect of my Judgment is that the Referendum Law is incompatible with s.70 of the Constitution and is, thus, a nullity, incapable of having any legal effect[6]. This is acknowledged by the Defendants in para 5(a) of their Response dated 24th February 2020 but they submit that in light of this legal reality "there can be no need for a quashing order". It appears that the practical reason for opposing a quashing order is to enable the Legislative Assembly to revise or repeal the Referendum Law and that it should be allowed to do so in line with the Court's judgment (see para 4(g) Defendants' Response 24/02/20).

8. In my view, it would be wrong in principle and pointless in practice to refrain from making a quashing order in light of my conclusion as to the incompatibility of the Referendum Law with the Constitution. The relevant principle is the one cited by Lord Phillips in ***Ahmed*** as explained by him in his Judgment at paragraphs 4-8:

[5] [2010] 2 AC 534
[6] (see ***R (Lumba) v. Secretary of State for the Home Department*** [2012] 1 AC 245 at para 66)

"4. *Mr Swift submitted that this court has power to suspend the effect of any order that it makes. Counsel for the appellants conceded that this was correct and that concession was rightly made. The problem with a suspension in this case is, however, that the court's order, whenever it is made, will not alter the position in law. It will declare what that position is. It is true that it will also quash the TO and part of the AQO, but these are provisions that are ultra vires and of no effect in law. The object of quashing them is to make it quite plain that this is the case.*

5. *The effect of suspending the operation of the order of the court would be, or might be, to give the opposite impression. It would suggest that, during the period of suspension of the quashing orders, the provisions to be quashed would remain in force. Mr Swift acknowledged that it might give this impression. Indeed, he made it plain that this was the object of seeking the suspension.*

6. *Mr Swift's submissions are described in the dissenting judgment of Lord Hope DPSC. He did not suggest that the court could or should give temporary validity to the unlawful provisions. He did not suggest that the court could or should purport prospectively to overrule them. He did not suggest that suspension was necessary in order to permit action by the executive which might otherwise appear to be flouting the decision of the court, as it was in Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region (2006) 9 HKCFAR 441. He did not suggest that the suspension would have any effect in law.*

7. *Mr Swift urged the court to suspend the operation of its judgment because of the effect that the suspension would have on the conduct of third parties. He submitted that the banks, in particular, would be unlikely to release frozen funds while the courts orders remained suspended. I comment that if suspension were to have this effect this would only be because the third parties wrongly believed that it affected their legal rights and obligations.*

8. *The ends sought by Mr Swift might well be thought desirable, but I do not consider that they justify the means that he proposes.* ***This court should not lend itself to a procedure that is designed to obfuscate the effect of its judgment****. Accordingly, I would not suspend the operation of any part of the court's order."* (emphasis added)

9. If the Court were to accede to the Defendants' request not to make a quashing order in this case on the basis that the Legislature has both the power and the function to repeal/revise the Referendum Law there is, in my view, a danger of obfuscation. The consequences of my finding that the Referendum Law is a nullity, and thus devoid of legal effect, is that it is incapable of being revised or amended. To decline to quash it for the reason advanced by Mr Shaw would risk giving the impression that

the Referendum Law remains in force pending its revision/repeal. The object of making a quashing order is, as Lord Phillips observed, to make it plain that that is not the case. The Court should not, in my view, encourage the appearance of what would be a legal fiction.

10. No countervailing principle applies in my view to restrain the Court from making a quashing order in this case in light of the incompatibility found. Mr Shaw's reliance on statements made by Judges in relation to UK domestic primary legislation is inapt for the reasons given by Mr Buttler. A key reason given by Singh LJ in the ***Liberty*** case for holding back from issuing a coercive remedy against the Government was that there is no automatic rule that once a Court holds that a provision of primary legislation is incompatible with EU law, the national legislation must be dis-applied. He referred to the delicate constitutional context of a supreme Westminster Parliament and the binding nature of EU law and concluded that it was neither necessary nor appropriate to make a quashing order in circumstances where the Government had made clear its intention to introduce amending legislation. The difference between the constitutional context under consideration by Singh LJ and that which applies here in the Cayman Islands is, in my view, fundamental. As Mr Buttler rightly submitted, the Cayman Legislative Assembly's power to legislate is limited to making laws which are compatible with the Constitution and any law which is incompatible is therefore *ultra vires*. In these circumstances, the strong presumption that *ultra vires* legislation will be quashed applies[7].

11. I do not regard the decision in ***Bennett*** (see para 5 above) as providing reasoned support for the principle that *ultra vires* legislation remains valid in the Cayman Islands unless and until the Legislature acts so that the power of the Court is limited

[7] (see *per* Keene LJ in ***R (C) v. Secretary of State for Justice*** [2009] QB 657 at para 85)

to making a declaration of unconstitutionality. It is clear from paragraph 114 of the Judgment of Hon Justice Nova Hall (Actg.) that it was accepted by the Plaintiff that the relevant provisions of the Legislative Assembly (Immunities Powers and Privileges) Law (2015 Revision) remained valid law unless and until the Legislature acts. Absent explanation it is unclear how a declaration that the relevant sections of the 2015 Law are unconstitutional and of no effect (see para 131 of Justice Nova Hall's Judgment) can be reconciled with a holding that the law remains valid unless and until the Legislature acts. Indeed such a situation seems to me to be incoherent and unsound and it is to be noted that neither ***Lumba*** nor ***Ahmed*** were cited to the Court. In circumstances where ***Bennett*** is not binding on me[8] I decline to accept the principle assented to by the parties (and apparently accepted by the Judge) that under the Cayman legal order, legislation that is incompatible with the Constitution remains valid unless amended by the Legislature.

12. As for the Defendants' reliance on s.23 of the Constitution, I do not regard the fact that where a piece of primary legislation is found to be incompatible with the Bill of Rights the Court must make a declaration of incompatibility, leaving it to the Legislature to decide how to remedy the incompatibility, to mean that the Court has no power to quash in relation to the breach found in this case by reference to s.70 of the Constitution. The fact that the Court's remedial powers are expressly limited in relation to breaches of Part I of the Constitution but not so restricted in relation to breaches of Part IV (where s.70 is located) is in my view an argument against the Defendants' construction.

13. Finally, from a practical perspective there is nothing to be achieved by the Court declining to make a quashing order in circumstances where the Government has

[8] (see ***R v. HM Coroner ex p Tal*** [1985] QB 67)

indicated that it is planning to pass a new, general Referendum Law later in 2020 and where, in any event, I have granted permission to appeal to the Cayman Islands Court of Appeal (CICA) and stayed any relief pending appeal. The reality is that if an appeal is pursued, the Court of Appeal will review the correctness both of my finding of the incompatibility of the Referendum Law with the Constitution and my conclusion as to the appropriate relief which flows from it. If no appeal is ultimately pursued, then the fact of the quashing order will make clear to all concerned what the effect of the Court's order is and the appropriate steps can then be taken to ensure that a general Referendum law is enacted in place of the specific law enacted to address the cruise port issue in light of the Petition organised by CPR Cayman.

Conclusion

14. For the reasons given in this Ruling, I declare that the First and Second Defendants' decision to make the Referendum (People-Initiated Referendum Regarding the Port) Law 2019 was unlawful because it was incompatible with s.70 of the Cayman Islands (Constitution) Order 2009. I also make an order quashing the Referendum Law. I invite the parties to draw up an Order to reflect the terms of my Judgment and this Ruling. The Order should also address the agreed order as to costs as between the Plaintiff and the Defendants, my grant of leave to the Defendants to appeal to the Court of Appeal and my grant of a stay on relief pending any appeal.

Dated this 2nd day of March 2020

Honourable Mr. Justice Tim Owen Q.C. (Actg.)
Acting Judge of the Grand Court