[2019 (1) CILR 510]
DEPUTY REGISTRAR and ATTORNEY GENERAL v. DAY and BUSH
COURT of APPEAL (Goldring, P., Field and Morrison, JJ.A.): April 10th, 2019
Family Law—marriage—same-sex marriage—Grand Court judgment that law to be modified to permit same-sex marriage stayed pending appeal

The respondents sought the right to marry.

In the Grand Court, the respondents, who were both women, sought the right to marry or, in the alternative, declaratory orders to the effect that they were entitled to have their relationship otherwise respected by the state by legislation which recognized and protected their relationship as a civil union. As a matter of Cayman law, opposite-sex couples were able to marry and so enjoy a variety of legal rights and protections, but same-sex couples were not able to marry and were therefore denied access to those rights and protections. The Chief Justice ruled in favour of the respondents to the effect that, once the appropriate formalities were complied with, they could marry. The Chief Justice reached significant and widely applicable decisions regarding the Cayman Islands Constitution Order and the Bill of Rights. He did not accept the appellants' argument that s.14(1) of the Bill of Rights guaranteed the right to marry only for opposite-sex couples. He found that s.2 of the Marriage (Amendment) Law 2008, which defined marriage in terms of a union between a man and a woman, violated the rights of the respondents and others. He rejected the submission that the aim of s.14(1) was the protection and promotion of marriage and family in the traditional sense as understood in the Cayman Islands. He ordered *inter alia* that s.2 of the Marriage Law be modified, so as to bring it into conformity with the Constitution, to define marriage as the union between two people as one another's spouses.

The Government appealed to the Court of Appeal. The appellants' grounds of appeal sought *inter alia* to overturn the Chief Justice's decision in respect of s.14(1) of the Bill of Rights. It was submitted that the Chief Justice gave too much weight to decisions from common law jurisdictions which were not apposite to the present case; that he should have acknowledged that ECHR jurisprudence distinguished the right to recognition/protection of civil unions from marriage; and that in modifying the Marriage Law the Chief Justice exceeded his powers. The appellants sought a stay of the Chief Justice's judgment.

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The respondents submitted that the appellants' grounds of appeal raised technical points which had no prospect of success.

Held, granting a stay:

A stay could be granted for good cause under s.19(3) of the Court of Appeal Law (2011 Revision). A successful litigant was *prima facie* entitled to the fruits of his success and there must be good reason for the court to prevent that. In deciding

whether to grant a stay, the court would consider the grounds of appeal, their likelihood of success and the balance of convenience having regard to the interests of both parties. The overriding feature was the interests of justice in a particular case. The court did not accept the submission that good cause under s.19 required strong grounds of appeal or a strong likelihood of success. That was too high. The court could grant a stay provided the grounds were arguable and the balance of convenience in the particular case lay in favour of a stay. In the present case, although the Chief Justice gave full and fair consideration to the issues before him, there was an argument on the other side. The balance of convenience came down in favour of a stay. The court did not doubt the prejudice raised by the respondents, but there were cogent grounds on the other side. The Chief Justice's judgment concerned the institution of marriage in the Cayman Islands and it could not be right that in respect of that institution there was legal uncertainty pending the decision of the present court on the appeal. The Chief Justice's judgment would also require consequential legislation in many areas. The court therefore concluded that the interests of justice required the imposition of a stay pending the decision of this court (para. 15; paras. 24–29).

Cases cited:

(1) *Frank* v. *Canada (Att. Gen.)*, 2014 ONCA 485, considered.

(2) *Leicester Circuits Ltd.* v. *Coates Brothers plc*, [2002] EWCA Civ 474, referred to.

(3) *NB* v. *LB of Haringey*, [2011] EWHC 3544 (Fam); [2012] 2 FLR 125; [2012] Fam. Law 512, referred to.

Legislation construed:

Court of Appeal Law (2011 Revision), s.19(3):

"(3) No stay of execution or other proceedings shall be granted upon any judgment appealed against save upon payment by the appellant into the Grand Court of the whole sum, if any, found due upon such judgment and the amount of any costs awarded to the other party or parties to the action, or upon good cause shown to the Court or to the Grand Court."

Marriage (Amendment) Law 2008, s.2:

"'marriage' means the union between a man and a woman as husband and wife . . ."

Cayman Islands Constitution Order 2009 (S.I. 2009/1379), Schedule 2, s.5(1): The relevant terms of this sub-section are set out at para. 6.

s.14(1): "Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a family."

R. Sharma and *C. Middleton* for the appellants;

D. McGrath, *S. Ismail* and *K. Leedam* for the respondents.

1 **GOLDRING, P.:**

The Chief Justice's decision

On March 29th, 2019, the learned Chief Justice handed down his judgment. It has immediate and profound consequences and implications, not only for Ms. Day and Ms. Bush but also for the citizens and Government of the Cayman Islands. The Chief Justice's ruling was in such terms as to enable Ms. Day and Ms. Bush, the appropriate formalities once having been complied with, virtually immediately to marry. In the course of his judgment, the Chief Justice reached significant and widely applicable decisions regarding the Cayman Islands Constitution Order of 2009 and the Bill of Rights enshrined within Part 1 of it (and brought into effect on November 6th, 2012).

2 The learned Chief Justice did not accept the appellants' assertions that the wording of s.14(1) of the Bill of Rights guaranteed the right to marry only for men and women as parties of the opposite sex. Neither did he accept that it precluded access to marriage by parties of the same sex. He did not accept the appellants' assertion that s.14(1) specifically provided for the right to marry, that it was "*lex specialis*" as the respondents put it, and that it was impermissible to locate that right elsewhere in the Bill of Rights. The Chief Justice also rejected the appellants' submission that the aim of s.14(1) was the protection and promotion of marriage and family in the traditional sense, as understood in the Cayman Islands.

3 The Marriage (Amendment) Law 2008 preceded the Bill of Rights. Section 2 defined marriage in terms of a union between a man and a woman. The Chief Justice found that the Marriage (Amendment) Law 2008 was based on religious grounds. He did not accept that in construing the Bill of Rights the court should have regard for, and defer to, the democratic will of the Caymanian people, as manifested by the terms of s.2 which, it was said, reflected the plain intention of the Legislature to preserve and protect their traditional view of marriage.

4 In short, the learned Chief Justice concluded that Ms. Day and Ms. Bush have rights to a private and family life and are entitled to the state's respect for those rights by the provision of a legal institution which protects them. Those rights, as the Chief Justice found, include the right to

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found a family. He found that the fact that s.14(1) enshrines the right to marry for opposite-sex couples does not mean that the similar right is not to be located for same-sex couples in s.9, where the rights to private and family life are enshrined. He found too violations of ss. 10 and 16. He said that no principle of constitutional construction allows for a preclusive and discriminatory reading, as he put it, of s.14(1). He said that by its ongoing refusal to recognize and respect Ms. Day's and Ms. Bush's rights, the state was in violation.

5 The learned Chief Justice concluded that the passage of the 2008 amendment to the Marriage Law was impermissible. The subsequent introduction of the Bill of

Rights meant that the Law violates the rights of Ms. Day and Ms. Bush, and all those similarly placed, as a consequence of their sexual orientation. Such violations, as he found, were prohibited by the Bill of Rights and are unconstitutional, and for which there was no justification.

6 The learned Chief Justice concluded that s.5(1) of the Constitution Order required the court to read and construe the Marriage Law with "such modifications, adaptations, qualifications and exceptions as may be necessary to bring (the Law) into conformity with the Constitution." He concluded that the court was required to modify the Law and bring it into conformity. He did so by ordering it to read: "'marriage' means the union between two people as one another's spouses."

7 He also ordered that s.27 of the Law prescribing the marriage declaration be modified to accord with his order.

8 Before turning to the grounds of appeal, the significant implications of the learned Chief Justice's decision are readily apparent. In an affidavit sworn by Celia Middleton on behalf of the appellants, she sets out the consequential legislation in many areas which will be required. We cannot be as sanguine as Mr. McGrath, on behalf of both respondents, about the immediate legislative burden on Government following the Chief Justice's decision.

The grounds of appeal

9 Given the pressure, we shall not set out the grounds in any detail. We annex them to the ruling. In essence, they seek to overturn the learned Chief Justice's decision in respect of s.14(1) of the Cayman Islands Constitution Order 2009 (Grounds 1 and 2); they suggest he should have given weight to the views expressed in negotiations preceding the 2009 Constitution which, it is said, supported the appellants' contention that s.14(1) was intended only to confer a right to marry on opposite-sex couples (Ground 3); he gave too much weight to decisions in various common law jurisdictions which were not apposite to the present case (Ground 4); he was wrong to conclude that the Marriage Law was based

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on religious grounds (Ground 5); he should have acknowledged that ECHR jurisprudence clearly distinguished the right to recognition/protection of civil unions from marriage (Ground 6); and, finally, in modifying the Marriage (Amendment) Law 2008, under s.5(1) of the Cayman Islands Constitution Order 2009, the Chief Justice exceeded his powers (Ground 7).

10 In her submissions on behalf of the appellants, Ms. Sharma submits that the appellants have raised what she describes as "fundamental constitutional challenges." They relate, first, to the scope and extent of the constitutional right to marry, as she puts it, in s.14(1) of the Bill of Rights, and whether a right of marriage for same-sex couples can be located elsewhere in the Bill of Rights, having regard to the clear and

express limitations in s.14(1) and, secondly, the scope of the court's powers of modification under s.5(1) of the Constitution.

11 Ms. Sharma emphasizes that this is the first claim in the Cayman Islands under s.14(1). It goes to the scope of the constitutional right to marriage, whether such a constitutional right can be altered by the introduction of what could be said, as it was put, to be an entirely new category of marriage. That issue arises, she submits, within the context of strongly expressed views about the nature of marriage expressed broadly in the Cayman Islands. Ms. Sharma further submits that the learned Chief Justice was wrong in his determination that s.14(1) was discriminatory. He was wrong to impugn one constitutional provision (s.14(1)) by reference to others. She submits that the real issue which fell for determination was whether the Marriage (Amendment) Law 2008 was discriminatory.

12 As to the application of s.5(1) to modify the Marriage (Amendment) Law 2008, Ms. Sharma submits that that raises issues of wide and important constitutional importance. It calls into question the boundary between the permissible scope of "judicial legislation" as against that of the Legislature. That has importance beyond the present case, she submits. In creating a new form of marriage, the learned Chief Justice went further than he was entitled to.

13 In the result, Ms. Sharma submits that the appellants raise arguable grounds of appeal.

14 Mr. McGrath, on behalf of both respondents, disagrees and does so in bold and detailed terms. He submits that in their grounds of appeal, the appellants are seeking to raise what he describes as "technical points." They do not, as he submits, seek to challenge the Chief Justice's substantive findings of serious, overlapping violations of the Bill of Rights. In a clearly expressed skeleton argument, Mr. McGrath further submits the grounds have no prospect of success. As to Grounds 1 and 2 (the s.14(1) grounds) they run counter to many years of Privy Council

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decisions, and to the position adopted before the learned Chief Justice. Ground 3 (the negotiations ground) is irrelevant to the task of the court in interpreting the statutory provisions. Ground 5 (the finding of the Marriage (Amendment) Law being based on religious grounds) is a question of fact. Grounds 4 and 6 (in broad terms, the Chief Justice's approach to the legal decisions of overseas jurisdictions) were plainly wrong. Ground 7, submits Mr. McGrath (the s.5(1) ground) is "misguided." The Chief Justice, he submits, was plainly entitled to modify the Law as he did.

How this court should approach the application for a stay

15 By s.19(3) of the Court of Appeal Law (2011 Revision), a stay may be granted for good cause. What amounts to good cause to stay an execution of a judgment has been considered in many cases, a number of which have been drawn to our attention. As the cases make plain, a successful litigant is *prima facie* entitled to the fruits of his

success. There must be good reason for the court to prevent that. In deciding whether or not to impose a stay, the court will consider the grounds of appeal, their likelihood of success and the balance of convenience having regard to the interests of both parties. The overriding feature is the interests of justice in any given case, as the observations of Potter, L.J. make plain in the case of *Leicester Circuits Ltd.* v. *Coates Brothers plc* (2).

16 Most of the cases brought to our attention deal with very different factual circumstances from those presently confronting this court. Mr. McGrath places greatest reliance on a first instance *ex tempore* judgment of Mostyn, J. in a case concerning an interim care order of a three-year-old child: *NB* v. *LB of Haringey* (3). In that case, the judge expressed the view (at para. 6) that the principles for imposing a stay "cannot . . . be materially different whatever the nature of the dispute in hand." As to the application of such an order, the judge said, among other things, that a stay was the exception rather than the rule, that in exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered and that (at para. 7) "only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered."

17 Mr. McGrath submits that in the absence of strong grounds of appeal or a strong likelihood of success, no question of imposing a stay can arise. The appellants' grounds of appeal fall woefully short of that, as he submits.

18 Furthermore, Mr. McGrath points to the prejudice to his clients were a stay to be granted. Without going into detail, it is set out movingly in an affidavit sworn by Ms. Day, which we have read with great care.

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19 Of the authorities drawn to our attention, only one bears any comparison, as it seems to us, with the present case, namely, a decision of the Court of Appeal for Ontario, in *Frank* v. *Canada (Att. Gen.)* (1). That case concerned a challenge to the provision that denied some non-residents of Canada the ability to vote in Canadian elections. The particular applicants had been resident in the United States for more than five years. At first instance, the judge found a violation of the applicants' rights under a section of the Canadian Charter, which in broad terms gave each citizen of Canada a right to vote. The judge, in what was described (2014 ONCA 485, at para. 5) as a "lengthy and carefully considered judgment," struck down the provision of the act limiting their right to vote and modified its wording so as to comply with the Charter.

20 The Attorney General appealed. The judge at first instance had refused the Attorney General's application for a stay. At para. 12 of the appeal court's judgment, this was said:

"It is common ground that to obtain a stay the Attorney General must satisfy the familiar three-part test and show:

1. that there is a serious question to be determined;

2. that irreparable harm to the public interest will be suffered should the stay not be granted; and
3. that the balance of convenience and public-interest considerations favor a stay."

21 The court went on to consider the issue of a serious question to be tried. At para. 13, the court said:

"I share the application judge's concern that the objectives identified by the Attorney General as being sufficient to justify limiting the right to vote are broad, symbolic and rhetorical . . . However, I do not say that the Attorney General has failed to show that the appeal is arguable. While the application judge gave full and fair consideration of the s. 1 issue, there does appear to be an argument to be made on the other side."

22 The court decided that irreparable harm could not be shown.

23 Under the heading "Balance of convenience," the court, in refusing a stay but in words which bear repetition, said:

"[26] In my view, the balance of convenience in this case favours refusal of a stay. I reach that conclusion for the following reasons.

[27] First, this is not the typical case where a complex statutory scheme or administrative apparatus has to be dismantled or constructed in order to give effect to the trial judgment. In such cases, the balance of convenience will typically favour a stay to avoid the

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cost and disruption that would flow from implementing a new regime based upon a trial judgment that may need to be undone in the event of a successful appeal."

Our conclusion

24 We cannot accept that for good cause to be shown under s.19 requires, as Mr. McGrath submits on the basis of Mostyn, J.'s observations, that strong grounds of appeal or a strong likelihood of success must be demonstrated. That in our judgment puts it too highly. Provided the grounds are arguable, and the balance of convenience on the facts of the case in question lies in favour of a stay, the court may grant one.

25 We have considered the arguments on the merits with care. To adopt the careful language used by the Court of Appeal of Ontario, we cannot say, for the reasons given by Ms. Sharma, that the appellants have failed to show that the appeal is arguable. While the learned Chief Justice, in a most careful and detailed judgment, gave full and fair consideration to the issues before him, there is, in our judgment, and again reflecting the words of the Court of Appeal of Ontario, an argument on the other side.

26 We turn to the balance of convenience.

27 As we have said, we have read Ms. Day's moving affidavit. We do not doubt the prejudice of which she speaks. However, it does seem to us there are cogent grounds on the facts of this case which go the other way. The learned Chief Justice's judgment concerns the institution of marriage in the Cayman Islands. As Ms. Sharma put it, it

cannot be right that in respect of that institution there is legal uncertainty, pending the decision of this court. As it is put in para. 10 of Celia Middleton's affidavit:
"If a stay . . . is not granted and the (Petitioners)/Respondents and any other couples similarly placed were to solemnise a marriage while the appeal remains pending, the consequential rights and responsibilities that inextricably flow from the institution of marriage . . . could result in an anomaly until there is a final ruling in the matter."
28 We are conscious too, although this weighs less in our decision, of the consequential changes referred to in paras. 11 and 12 of Ms. Middleton's affidavit. We do observe that there appears to have been no provision by the Legislature of the possibility of an adverse decision by the learned Chief Justice.
29 In the result, and not without some hesitation, we have concluded that the interests of justice do require an imposition of a stay in this case pending the decision of this court.

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30 We should finally add that it is our present intention to hear this appeal at the next sitting of this court in August of this year.
31 We reserve the question of costs, which can be revisited at the end of the appeal.
Ruling accordingly.
Attorneys: *Attorney General's Chambers* for the appellants; *McGrath Tonner* for the respondents.