COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2021/CLE/gen/00008

IN THE MATTER of Articles 15, 17, 19, 20, 21 and 26 of the Constitution of the Commonwealth of The Bahamas

IN THE MATTER of the Fisheries Act, 2020; and the Immigration (Amendment) Act, 2020

BETWEEN:

1. **MORAZAN ZUNIGA JACKSON**
2. **MARIA MICHELLE JOHNSON**
3. **JAIME REYNALDO PEREZ**
4. **RACQUEL ANTHYNA MAJOR-PEREZ**
5. **FISH FARMERS LTD.**
6. **THREE RO COMPANY (BAHAMAS) LIMITED**
7. **3 KIDS CORP BAHAMAS LTD.**
8. **AUDLEY REANO ZONICLE T/A AUDLEY'S SEAFOOD**
9. **GENEVA BRASS SEAFOODS SUPPLY LIMITED**
10. **~~PARADISE FISHERIES LTD~~.**

Applicants

AND

MINISTER OF AGRICULTURE & MARINE RESOURCES

First Respondent

MINISTER OF FINANCIAL SERVICES, TRADE AND INDUSTRY AND IMMIGRATION

Second Respondent

THE ATTORNEY GENERAL OF THE BAHAMAS

Third Respondent

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Alfred Sears QC with him Mr. V. Moreno Hamilton of Sears & Co. for the Applicants
Ms. Luana Ingraham with her Mr. Basil Cumberbatch of the Attorney General's Chambers for the Respondents

Hearing Date: 20 May, 11 June 2021

Public Law - Constitution – Fundamental rights – Freedom from discrimination – Unrestricted right to work as holders of spousal permits or permanent residency certificates – Discriminatory treatment of Bahamian companies - Infringement of various Articles of the Constitution - Declaratory relief sought in respect of Acts which have not been enforced – Acts, when passed, would prevent non-Bahamians from engaging in commercial fishing in Bahamian waters

Interlocutory relief to prevent Parliament from passing the Acts pending determination of Originating Notice of Motion - Whether court can grant injunctive relief to prevent Acts from coming into force- Whether serious issue to be tried – Adequacy of Damages – Balance of Convenience – Whether court can grant relief prior to enforcement of Acts of Parliament – Whether Applicants can demonstrate that when Acts are passed they would be denied relief – Application dismissed

The Applicants are significant stakeholders in the commercial fishing industry in The Bahamas. They challenged the coming into force of the Fisheries Act, 2020 and the Immigration (Amendment) Act, 2020 ("the Acts") which were assented to by the Governor General on 31 December 2020. Both Acts shall come into force on 22 June 2021.

They approached the Court for injunctive reliefs asserting that the Acts, if enacted, would contravene several of their constitutional rights under Articles 15, 17, 19, 21 and 26 of the Constitution of the Commonwealth of The Bahamas ("the Constitution"). Further, they say that the enactment of the Acts would constitute breaches of various articles of the UN Convention on the Elimination of All Forms of Discrimination Against Women acceded to by The Bahamas on 8 October 1993 and Articles 17 and 23 of the International Covenant on Civil and Political Rights ratified by The Bahamas on 23 December 2008; as well as breaches of Articles 1, 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 3, 6 , 7 (a)(ii), 10(1), 11 of the Covenant on Economic, Social and Cultural Rights ratified by The Bahamas on 23 December 2008.

The Respondents argued that the Acts are not unconstitutional and that the Court must not interfere with the legislative process.

HELD: Dismissing the Applicants' Summons seeking injunctive relief as there is no serious issue to be tried and even if there is, the Respondents are able to compensate in damages. The Court makes no order as to costs as a suppliant applicant seeking the sanctuary of the Court in a matter of some public importance ought not to be condemned in costs. Should the Applicants wish to challenge the constitutionality of the Acts when they become law, they may do so but will have to make substantial amendments to the Originating Notice of Motion (which has not been struck out).

1. Our democracy is predicated on the doctrine of separation of powers and the recognition that it is the function of the Parliament to enact laws while, the Court, as the guardian of the Constitution, is charged with the responsibility to interpret and apply enacted laws.

2. The Court should as far as possible avoid interfering with pre-enactment legislative process except where immediate action is required. Where, therefore, a person aggrieved will not be afforded protection by the Constitution once the legislative process is completed, then Parliamentary privilege will yield to the courts' duty to give the Constitution overriding supremacy: **Attorney General of Trinidad & Tobago v Trinidad & Tobago Civil Rights Association** (Civil Appeal No. 149 of 2005) –Judgment delivered on 18 July 2007 applying **Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong and Another** [1970] AC 1136 where it was held that the court had jurisdiction to interfere at any stage of the law-making process in order to prevent a violation of the Constitution but the settled law is to refuse relief before the completion of the law-making process. [Emphasis added]

3. The Court, pursuant to Article 28 of the Constitution, has the jurisdiction to entertain a claim that is premised upon an assertion that a provision in an Act which is about to be passed is likely to infringe the Constitution but the Court, in such a circumstance, must enquire into such a claim and consider whether the claim is one that is exceptional, unusual and requires the court's intervention at the pre-enactment stage, so as to grant relief.

4. Where an application is made for an interlocutory injunction, in the exercise of the Court's discretion, an initial question falls for consideration, i.e. whether there is a serious issue to be tried. If the answer to that question is yes, then a further question arises: would damages be an adequate remedy for the party injured by the Court's grant of, or its failure to grant, an injunction? If there is doubt as to whether damages would not be adequate, the Court then has to determine where the balance of convenience lies?: **American Cyanamid Co. v Ethicon Limited** [1975] A.C. 396 at 407; **Series 5 Software Ltd v Clarke and others** [1996] 1 All E.R. 853 at 865; **Grenada Co-operative Bank Limited v Valma Jessamy** –Claim No. GDAHCV2013/0313 (unreported) and **Cambridge Ltd v BBC** [1990] 2 All ER 523.

5. Applying the principles derived from the seminal case of **American Cyanamid,** there is no serious issue to be tried.

6. Even if there is a serious issue to be tried, damages would be an adequate remedy. The Respondents are sued in their respective capacities as Ministers of the Government. It cannot be said that the Government will be unable to pay damages should the Applicants be successful at a trial. In any event, the Applicants have claimed damages in their Originating Summons (now converted to an Originating Motion).

7. The Applicants have not satisfied the Court that there is any exceptional or unusual circumstance which justified the Court's interference of the two Acts which will come into force on 22 June 2021.

8. It cannot be said that the Applicants would be deprived of their ability to access relief when the Acts become effective.

9. The issue seeking injunctive relief is premature before the Court. The Applicants may approach the Court if they choose to after the Acts have come into force on 22 June 2021. The Court. as the guardian of the Constitution, is empowered to declare an Act of Parliament that is inconsistent with any constitutional provision, void, to the extent of such inconsistency.

RULING

CHARLES J:

Introduction

[1] The issue which arose in this case is whether the Court should grant an injunction to restrain the Respondents, their employees, servants and/or agents from enforcing sections 31 and 32 of the Fisheries Act, 2020 and the Immigration (Amendment) Act, 2020 pending the determination of the Notice of Originating Summons which was filed on 8 January 2021 and amended to an Originating Notice of Motion on 12 May 2021 ("the Constitutional Motion").

[2] On 11 June 2021, I dismissed the Applicants' Summons filed on 18 March 2021 seeking the injunctive relief on the ground that the Court does not have jurisdiction to prevent Parliament from making and passing legislations since it is within their purview to do so. The Court, as the guardian of the Constitution, is charged with the responsibility to interpret and apply enacted laws. Except for that function, the duty of the courts is to administer Acts of Parliaments, not to question them. Our democracy is predicated upon the doctrine of separation of powers.

[3] Exceptionally, there may be a case where protection intended to be afforded by the Constitution cannot be provided by the courts unless they intervene at an earlier stage. If such an exceptional case should arise, the need to give full effect to the Constitution might require the courts to intervene before the Act comes into force. Pursuant to Article 28 (1) of the Constitution, the Court will be clothed with the jurisdiction to entertain such a claim. In my opinion, the present case does not fall in the category of exceptional or unusual which requires the court's intervention at this stage.

[4] The Applicants have filed a Constitutional Motion which is still pending before the Court. Should the Applicants wish to continue with their challenge with respect to the constitutionality of the Acts, they are at liberty to do so. It is settled law that the Court is empowered to declare an Act of Parliament which is inconsistent with a constitutional provision, void, to the extent of such inconsistency.

[5] I set out below full reasons for my decision.

Brief background

[6] The First Applicant ("Mr. Jackson") and the Third Applicant ("Mr. Perez") are citizens of Honduras. Both men are married to Bahamian citizens and have permanent residency status. Their respective certificates of residency state "*not subject to any condition restricting the right of the holder to engage in any gainful occupation or to reside in the Bahamas*". The Second Applicant ("Mrs. Johnson") is the wife of Mr. Jackson. The Fourth Applicant ("Mrs. Perez") is the wife of Mr. Perez. Mr. Jackson and Mr. Perez have worked as professional commercial fishing divers, on contract, with the Fifth to Ninth Applicants which are commercial fishing enterprises owned by Bahamian citizens. Mr. Jackson and Mr. Perez assert that they are the breadwinners for their respective families.

[7] The Applicants are significant stakeholders in the commercial fishing industry in The Bahamas. They challenged the coming into force of the Fisheries Act, 2020 and the Immigration (Amendment) Act, 2020 ("the Acts") which were assented to by the Governor General on 31 December 2020 and which shall come into force on 22 June 2021. They asserted, among other things, that the Acts, if passed, would contravene several of their constitutional rights under Articles 15, 17, 19, 21 and 26 of the Constitution of the Commonwealth of The Bahamas ("the Constitution") and various articles of the UN Convention on the Elimination of All Forms of Discrimination Against Women acceded to by The Bahamas on 8 October 1993 and Articles 17 and 23 of the International Covenant on Civil and Political Rights ratified by The Bahamas on 23 December 2008. The Acts would also contravene Articles 1, 2 and 5 of the International Convention on the

Elimination of All Forms of Racial Discrimination and Articles 3, 6, 7 (a)(ii), 10(1), 11 of the Covenant on Economic, Social and Cultural Rights ratified by The Bahamas on 23 December 2008.

The application for injunctive relief

The legal framework

Jurisdiction

[8] There is no dispute that the Court has the jurisdiction to grant interim injunctions in all cases where it appears to it to be just or convenient to do so, on such terms and conditions as it thinks fit. The jurisdiction is to be found in Order 29 of the Rules of the Supreme Court (“RSC). RSC O. 29 provides, in part, that:

> **“(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or of the matter, whether or not a claim for the injunction was included in that party’s writ, originating summons, counterclaim or third party notice, as the case may be.”**

[9] Section 21 (1) of the Supreme Court Act 1996 provides that:

> **“(1) The Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so.”**

[10] There is also no dispute that the Court’s discretion to grant interim injunctions are very wide and unfettered. However, that discretion must not be arbitrary or capricious.

The law on interim injunction

[11] The procedure to be adopted by the Court in hearing applications for interlocutory injunctions and the tests to be applied, were laid down by Lord Diplock in the seminal case of **American Cyanamid Co. v Ethicon Limited** [1975] A.C 396 H.L. At page 407, Lord Diplock had this to say:

> **"The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which**

> **claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are questions to be dealt with at the trial…So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction relief that is sought.**" [Emphasis added]

[12] According to **American Cyanamid**, when an application is made for an interlocutory injunction, in the exercise of the Court's discretion, an initial question falls for consideration, i.e. whether there is a serious issue to be tried. If the answer to that question is yes, then a further question arises: would damages be an adequate remedy for the party injured by the Court's grant of, or its failure to grant, an injunction? If there is doubt as to whether damages would not be adequate, the Court then has to determine where does the balance of convenience lie?

[13] Some of the key principles derived from the speech of Lord Diplock in **American Cyanamid** (at pages 406 - 409) may be listed as follows:

1. The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.

2. There are no fixed rules as to when an interlocutory injunction should or should not be granted. The relief must be kept flexible.

3. The evidence available to the Court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination.

4. It is no part of the Court's function at this stage to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend **nor to decide difficult questions of law which call for detailed and mature considerations.** These are matters to be dealt with at the trial. [Emphasis added]

5. The object of the interlocutory injunction is to protect the claimant against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour at the trial; but the claimant's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the claimant's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.

6. **Some additional factors that the Court needs to bear in mind are:** (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other to pay; (b) the balance of convenience; (c) maintenance of the status quo, and **(d) any clear view the court may reach as to the relative strength of the parties' cases.** [Emphasis added]

7. Unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the claimant has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

8. The Court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious issue to be tried.

[14] These key principles were adopted and re-stated in **Series 5 Software Ltd v Clarke and others** [1996] 1 All E.R. 853 at 865; **Grenada Co-operative Bank Limited v Valma Jessamy -** Claim No. GDAHCV2013/0313 (unreported) and **Cambridge Nutrition Ltd v BBC** [1990] 2 All ER 523.

Is there a serious issue to be tried?

Discussion

[15] This question is the threshold requirement. Lord Diplock in **American Cyanamid** said that it is sufficient if the Court asks itself: is the applicant's action "not frivolous or vexatious?"; is there "a serious question to be tried"?; is there "a real prospect that he will succeed in his claim for a permanent injunction at the trial"? These may appear to be three subtly different questions but they are intended to state the same test: **Smith v Inner London Education Authority** [1978] 1 All E.R. 411 at 419, C.A. per Browne L.J. See also **Seaconsar v Bank Markazi** [1994] A.C. 438, H.L. and **Canada Trust v Stolzenberg** (No. 2) [1998] 1 WLR 547.

[16] Learned Queen's Counsel Mr. Sears, who appeared for the Applicants, submitted that the Applicants have, in their Constitutional Motion, framed serious questions to be tried relating to breaches of Articles 15, 17, 19, 20, 21 and 26 of the Constitution. According to him, some of the questions and issues that the Court must try in this matter include but are not limited to the following:

(i) Whether sections 31 and 32 of the Fisheries Act, 2020 and the Immigration (Amendment) Act, 2020 constitute discriminatory treatment of the First, Second, Third and Fourth Applicants;

(ii) Whether sections 31 and 32 of the Fisheries Act, 2020 and the Immigration (Amendment) Act, 2020 breach the constitutional rights of the First and Third Applicants and their unrestricted right to work as holders of spousal permits or permanent residency certificates; and

(iii) Whether sections 31 and 32 of the Fisheries Act, 2020 and the Immigration (Amendment) Act, 2020 constitute discriminatory treatment of the Fifth, Sixth, Seventh, Eighth and Ninth Applicants as Bahamian citizens which owned commercial fishing

enterprises and their reasonable expectation to continue to contract the First and Third Applicants.

[17] Firstly, Mr. Sears QC correctly submitted that, in construing constitutional provisions, a broad and generous approach is required to give individuals the full measure of the rights and freedoms referred to in the Constitution: **Minister of Home Affairs v Fisher** [1980] AC 319 - per Lord Wilberforce at pp.328-329. In **AG v Whiteman** (1991) 39 W.I.R. 397 at p. 412, Lord Keith of Kinkel, in delivering the opinion of the Board said:

> **"The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights."** [Emphasis added]

[18] Also, in **Benjamin v Minister of Information and Broadcasting** [2001] UKPC 8; 58 W.I.R. 171, the Privy Council endorsed a generous interpretation of the right to freedom of expression. Mr. Benjamin, an Attorney-at-law, hosted a radio programme on Radio Anguilla, a government-owned and controlled station. He was responsible for the format and getting sponsorship. In 1997, the programme was summarily suspended by the government after it dealt with the contentious political matter of the lottery. The Board examined section 11 of the Anguilla Constitution which defines freedom of expression as including the right not to be hindered in the enjoyment of his or her freedom of expression and the freedom to receive and impart ideas without interference. At [28], Lord Slynn of Hadley said:

> **"Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."**

[19] Lord Slynn continued at [29]:

> **"Lord Wilberforce said at page 328:-**
>
> **These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."**

[20] At [30], Lord Slynn referred to a dictum of Lord Diplock in **Attorney General of The Gambia v. Momodou Jobe** [1984] AC 689 at p.700H:

> **"A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction."**

[21] This interpretive principle, however, does not free the Applicants from the requirement of substantiating their claim both in law and fact to prove a breach. Therefore, an applicant who alleges a breach must demonstrate that there has been a violation of the constitutional principle in respect to him.

[22] Mr. Sears QC next argued that Article 21 of the Constitution and Article 17 of the Covenant on Civil and Political Rights, acceded to by The Bahamas on December 4, 2008, afford protection to persons in The Bahamas against interference with family life and emphasizes upon the importance of preserving well established family ties.

[23] In this respect, learned Queen's Counsel relied on the case of **Rattigan v. Chief Immigration Officer** (1994) 1 LRC 343. The case concerned three female Applicants, citizens of Zimbabwe, who married foreign husbands. The foreign husbands applied for permits to work or reside in Zimbabwe but their applications were denied by the Immigration Authority of Zimbabwe on the ground that they had no scarce skill to offer the country. The Applicants argued that the decision of the Chief Immigration Officer to deny the applications of their husbands frustrated their desire to establish matrimonial homes in Zimbabwe. The Applicants also contended that the refusal of the Chief Immigration Officer, to issue a residence

permit or an alien permit to their husbands and the requirement that their husbands leave Zimbabwe violated their fundamental and unqualified right as citizens to freedom of movement because if their husbands were compelled to leave, their rights to reside in Zimbabwe would be directly affected because they would have to leave also in order to secure and maintain their marital and family relationships. The Court held that the Applicants' right to freedom of movement, the right to reside in any part of Zimbabwe and the right to enter and to leave Zimbabwe had been contravened by the decision of the Chief Immigration officer not to permit their foreign husbands to reside with them in Zimbabwe.

[24] The next case that Mr. Sears QC referred to is **Salem v Chief Immigration Officer and Another** (1994) 1 LRC 354. The brief facts are the applicant, a citizen of Zimbabwe by birth and a permanent resident there, sought to extend the ruling in **Rattigan** (above) to include her own right to freedom of movement and the right of her husband, a foreign national, to lawfully engage in employment or other gainful activity in Zimbabwe. The Supreme Court of Zimbabwe allowed the application and ordered the Chief Immigration Officer to issue to the husband of the applicant a letter to enable him to remain in Zimbabwe on the same standing as any other foreigner who was a permanent resident and that he be accorded the same rights as were enjoyed by all permanent residents of Zimbabwe including the right to engage in employment or other gainful activity in any part of Zimbabwe.

[25] Another authority cited by Mr. Sears QC is **People's Union for Democratic Rights and Another v. Ministry of Home Affairs** (1986) LRC (1986) LRC (Const) 548. Two Non-Political Organizations concerned with the protection of the fundamental rights of the freedom of people in India filed court proceedings seeking reliefs on behalf of the survivors of the victims of the riots which followed the assassination of the Indian Prime Minister. They asked the Court to direct the appointment of a Commission of Inquiry. The Petition was resisted on several grounds one of which was that the issues in question involved national security. The High Court of India held that although the judicial process was unsuitable for reaching questions on issues of national security, where a decision was challenged

on the ground that it had been reached by a process of unfairness, the Government was under an obligation to produce evidence that the decision had in fact been based on grounds of national security.

[26] Mr. Sears QC also cited the cases of **The Attorney General of Grenada v Muhammed Ehsan** (GDAHCVAP2019/0020) and a plethora of related cases including the case of **Abdulaziz, Cabales and Balkandale v The United Kingdom** (Application no. 9214/80; 9473/81 and 9474/81) to support his contention that there are likely to be breaches of respective articles of the Constitution if the Acts are enforced.

[27] He argued that with respect to Mrs. Johnson and Mrs. Perez, because of the absolute prohibition of their husbands from engaging in their profession as commercial fishing divers, the prohibition will in effect be an arbitrary and unlawful interference with the family life of Bahamian wives and their foreign husbands. He relied on the cases of **Dow v. Attorney General** (1992) LRC 623 and **Aumeeruddy-Cziffra and Others v. Mauritius,** (1981) United Nations Human Rights Committee, Case No 38 as well as the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

[28] Mr. Sears QC further submitted that Mr. Jackson and Mr. Perez, as holders of spousal permits or permanent residency certificates, are being deprived of their reasonable expectation to continue to practice their profession as commercial fishing divers in The Bahamas, in breach of their constitutional right to due process and the secure protection of the law, pursuant to Articles 15 (a), 19 and 20 (4) of the Constitution, without any rational and proportionate justification and strict and narrow derogation. In that regard, he relied on the Grenadian case of **Muhammed Ehsan** (supra) and **Petrus v. State** (1985) LRC (Const).

[29] Further, Mr. Sears QC submitted that the discriminatory impact of sections 31 and 32 of the Fisheries Act, 2020 and the Immigration (Amendment) Act, 2020 on the Fifth to Ninth Applicants deprived them of their reasonable expectation and constitutional guarantee under Articles 15, 19, 20 and 26, without rational and proportionate relation to the objects of the Acts.

[30] Accordingly, says Mr. Sears QC, there are serious issues to be tried.

[31] Learned Counsel for the Respondents, Ms. Ingraham, rejected these submissions asserting that there are no issues to be tried, much less serious ones. She argued that the Applicants' claim is frivolous and vexatious and they have failed to prove that their fundamental rights are likely to be infringed with the passing of the Acts. She submitted that Articles 15, 17, 19, 20 and 21 are not concerned with this case and are therefore irrelevant. She submitted that Article 15 is inapplicable as it is a perambulatory section and is not given enforceability status by Article 28 which effectively provides for the enforcement of fundamental rights. In other words, Article 15 creates no free-standing rights under the Constitution: **Newbold v Commissioner of Police** [2014] 4 LRC 684. Further, the Applicants have not suffered inhuman or degrading treatment or punishment (Article 17) or had the privacy of their home or property violated (Article 21) by virtue of the impending passing of the Acts or at all. She also submitted that Article 19 concerns protection from arbitrary arrest or detention. The Applicants were not arrested or detained save for Audley Reano Zonicle who alleged, in his Supplemental Affidavit, that he was arrested and detained by members of the Royal Bahamas Police Force. She further submitted that that matter should be brought by separate proceedings as it concerns a tort and not a matter of public policy. Accordingly, Article 19 does not apply. Then, Article 20 has nothing to do with this case.

[32] Counsel referred to the case of **Factortame Ltd and Others v Secretary of State for Transport No. 1** [1990] 2 A.C. 85. In that case, the applicants, companies incorporated under United Kingdom law and their directors and shareholders, most of whom were Spanish nationals, owned between them 95 deep sea fishing

vessels registered as British under the Merchant Shipping Act 1894. The statutory regime governing the registration of British fishing vessels was radically altered by Part II of the Merchant Shipping Act 1988 and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988, both of which came into force on 1 December 1988. Vessels previously registered as British under the Act of 1894 were required to be re-registered under the Act of 1988, subject to a transitional period permitting their previous registration to continue in force until 31 March 1989. The 95 vessels in question failed to satisfy one or more of the conditions for registration under section 14(1) of the Act of 1988, and thus failed to qualify for registration as British fishing vessels by reason of being managed and controlled from Spain or by Spanish nationals or by reason of the proportion of the beneficial ownership of the shares in the applicant companies in Spanish hands. The applicants, by application for judicial review, sought to challenge the legality of the relevant provisions of the Act and Regulations of 1988 on the ground that they contravened the provisions of the E.E.C. Treaty and other rules of law given effect thereunder by the European Communities Act 1972 by depriving the applicants of enforceable Community rights. The Secretary of State contended that Community law did not in any way restrict a member state's right to decide who was entitled to be a national of that state or what vessels were entitled to fly its flag and that, in any event, the legislation of 1988 was in conformity with Community law and designed to achieve the Community purposes enshrined in the common fisheries policy.

[33] It was stated, obiter, that *"the applicants say that they will suffer irreparable damage. If they do, that is, in a sense, the intention: that they should stop that particular profitable activity. It is Parliament's economic choice that the benefit of the fishing quota should go to the genuine British fishing fleet".* Likewise, the Applicants in these proceedings say they would be adversely affected but the Parliament of The Bahamas has made the economic choice that the benefit of the fishing quota should go to genuine Bahamian citizens.

[34] Ms. Ingraham also relied on the case of **Cheney v Conn** [1968] 1 WLR 242. Ungoed-Thomas, J stated at p. 247:

> **"However, I shall just mention another limb to the taxpayer's argument; namely, that any unlawful purpose for which a statutory enactment may be made vitiates the enforcement of that statute. As was pointed out for the Crown, if that argument were correct it would mean that the supremacy of Parliament would, in effect, be overruled. If the purpose to which a statute may be used is an invalid purpose, then such remedy as there may be must be directed to dealing with that purpose and not to invalidating the statute itself. What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country is illegal. The result therefore is that on this ground, also, the tax payer's case fails…The terms of the statute in this case are perfectly binding upon the courts of this country."**

[35] Ms. Ingraham next argued that the Applicants have also failed to establish that the enforcement of the Acts is discriminatory pursuant to Article 26 of the Constitution. Article 26(1) provides as follows:

> **"Subject to the provisions of paragraphs (4), (5) and (9) of this Article, no law shall make any provision which is discriminatory either of itself or in its effect."**

[36] In Article 26(3), "discriminatory" means:

> **"…affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description".**

[37] And in Article 26(4) it provides that **Paragraph (1) of this Article shall not apply to any law** so far as that law makes provision –

(a) …

(b) with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, The Bahamas of **persons who are not citizens of The Bahamas** or

(c) with respect to adoption, **marriage**, divorce…."

[38] Ms. Ingraham submitted that the core of the Applicants' claim is that the Acts are discriminatory in contravention of Article 26 of the Constitution and in general, infringe their constitutional rights, particularly that of Mr. Jackson and Mr. Perez. However, by a noticeably clear definition above, it is shown that the Acts reserved fishing for Bahamian citizens and so restricts not only Mr. Jackson and Mr. Perez but everyone who is not a citizen of The Bahamas.

[39] In any event, says Ms. Ingraham, if the Acts are proved to be discriminatory, which the Respondents aver they are not, a claim of discrimination does not apply to persons who are not citizens of The Bahamas. Therefore, Mr. Jackson and Mr. Perez' application must fail. These are powerful arguments.

[40] The principal application before me is whether or not this Court should grant an interlocutory injunction to prevent the Respondents from enforcing the Acts pending the determination of the Constitutional Motion.

[41] I must therefore remind myself of some of the applicable principles referable to interlocutory injunctions specifically that (i) the evidence available to the Court at the hearing of the application for an interlocutory injunction is incomplete; it is given on affidavit and has not been tested by oral cross-examination and (ii) It is no part of the Court's function at this stage to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend **nor to decide difficult questions of law which call for detailed and mature considerations.** These are matters to be dealt with at the trial. That said, the Court may form any clear view of the relative strength of the parties' case.

[42] On a proper analysis, it seems to me that the cases relied upon by the Applicants are all distinguishable as Mr. Jackson and Mr. Perez have not been deprived of their right to reside and work in The Bahamas.

[43] On the other hand, Counsel for the Respondents have relied on the cases of **Factortame Ltd**, **Cheney v Conn, Gordon Newbold and ors v The Attorney of the Commonwealth of The Bahamas and the Government of the United States of America** [2014] UKPC 12 as well as **Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v The Hon. Vernon J. Symonette M.P. and 7 Others (Bahamas)** [2000] UKPC 31 (**"the Bahamas Methodist Church case"**), all of which seem very applicable to the issue which confronts this Court.

[44] The issue of the jurisdiction of the Court to 'interfere' in the pre-enactment legislative process, as this Court is asked to do, was dealt with in **the Bahamas Methodist Church case**. At paras 29 to 33 of the Judgment, Lord Nicholls, in delivering the Opinion of the Board, stated:

> **"29 … In other common law countries their written constitutions, not Parliament, are supreme. The Bahamas is an example of this. Article 2 of its Constitution provided that "This Constitution is the supreme law of the Commonwealth of The Bahamas". <u>Article 2 further provided that, subject to the provisions of the Constitution, if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.</u> Chapter V of the Constitution made provision for a Parliament of The Bahamas, comprising Her Majesty, a Senate and a House of Assembly. Article 52 provided that "subject to the provisions of this Constitution" <u>Parliament may make laws for the peace, order and good government of The Bahamas.</u> Thus, in The Bahamas, the first general principle mentioned above is displaced to the extent necessary to give effect to the supremacy of the Constitution. <u>The courts have the right and duty to interpret and apply the Constitution as the supreme law of The Bahamas. In discharging that function the courts will, if necessary, declare that an Act of Parliament inconsistent with a constitutional provision is, to the extent of the inconsistency, void. That function apart, the duty of the courts is to administer Acts of Parliament, not to question them.</u>**
>
> **30. Likewise, the second general principle must be modified to the extent, but only to the extent, necessary to give effect to the supremacy of the Constitution. Subject to that important modification, the rationale underlying the second constitutional principle remains as applicable in a country having a supreme, written constitution as it is in the United Kingdom where the principle originated.**

> **31. Their Lordships consider that this approach points irresistibly to the conclusion that, so far as possible, the courts of The Bahamas should avoid interfering in the legislative process. The primary and normal remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, *made after the enactment has been passed,* that the offending provision is void. This may be coupled with any necessary, consequential relief. However, the qualifying words "so far as possible" are important. This is no place for absolute and rigid rules. Exceptionally, there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the courts unless they intervene at an earlier stage. For instance, the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice. If such an exceptional case should arise, the need to give full effect to the Constitution might require the courts to intervene before the Bill is enacted. In such a case parliamentary privilege must yield to the courts' duty to give the Constitution the overriding primacy which is its due.**
>
> **32. Their Lordships consider that this approach also leads ineluctably to the conclusion that the courts have jurisdiction to entertain a claim that the provisions in a Bill, if enacted, would contravene the Constitution and that the courts should grant immediate declaratory or other relief. The courts have power to enquire into such a claim and consider whether any relief is called for. In their Lordships' understanding, that is what is meant by "jurisdiction" in this context. The exercise of this jurisdiction is an altogether different matter. The courts should exercise this jurisdiction in the restrictive manner just described.**
>
> **33. One of the constitutional complaints made in the main action relates, not to the contents of the Bill, but to an alleged irregularity in the law-making process: failure to comply with the requirements of the Rules of the House of Assembly regarding the introduction of private Bills. In their Lordships' view the principles discussed above are equally applicable to this complaint. If after enactment the court would have power to declare that the Act is void for contravention of the Constitution, it would be only in exceptional circumstances that the court would intervene at an earlier stage.** [Emphasis added]

[45] In my opinion, the following basic principles can be extrapolated from **the Bahamas Methodist Church case** namely:

1. Our democracy is predicated upon the doctrine of separation of powers and the recognition that it is the function of the Parliament to enact laws while the Court, as the guardian of the Constitution, is charged with the responsibility to interpret and apply **enacted** laws.

2. The Court should as far as possible avoid interfering with pre-enactment legislative process except where immediate action is required. Where, therefore, a person aggrieved will not be afforded protection by the Constitution once the legislative process is completed, then Parliamentary privilege will yield to the courts' duty to give the Constitution overriding supremacy: **Attorney General of Trinidad & Tobago v Trinidad & Tobago Civil Rights Association** (Civil Appeal No. 149 of 2005) – Judgment delivered on 18 July 2007 at [18] applying **Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong and Another** [1970] AC 1136 where it was held that the court had jurisdiction to interfere at any stage of the law-making process in order to prevent a violation of the Constitution but the settled law is to refuse relief before the completion of the law-making process. [Emphasis added]

3. Pursuant to Article 28 of the Constitution, the court does have the jurisdiction to entertain a claim that is premised upon an assertion that a provision in a proposed legislation is likely to contravene the Constitution but the Court, in such circumstance, must enquire into such a claim and consider whether the claim is one that is exceptional, unusual and requires the court's intervention before the pre-enactment stage, so as to grant relief

4. The court is empowered to declare any legislation that is inconsistent with any constitutional provision, void, to the extent of such inconsistency.

[46] In the present case, the question which must be addressed is whether the Applicants' Summons require urgent action (in the form of an injunction) and whether the Applicants would not be afforded constitution protection when the Acts become effective on 22 June 2021. Learned Queen's Counsel Mr. Sears argued that once the Acts are passed, irreversible prejudice would have been occasioned to Mr. Jackson and Mr. Perez in the sense that they cannot practise their professions as commercial fishing divers and will cause arbitrary and unlawful

interference with the family life of Bahamian wives and their husbands. He also argued that if sections 31 and 32 of the Fisheries Act, 2020 and the Immigration (Amendment) Act, 2020 are passed, the Fifth to Ninth Applicants would be deprived of their reasonable expectation and constitutional guarantee under Articles 15, 19, 20 and 26, without rational and proportionate relation to the objects of the Acts.

[47] In my view, the approach taken by the Privy Council in **the Bahamas Methodist Church case** and Warner JA in **Trinidad & Tobago Civil Rights Association** is the same approach that I should take in this case. The paramount issue is whether the Applicants have demonstrated that the Acts, when enacted, would cause them to be deprived of their ability to access relief because the objective of the law would have been achieved.

[48] The pivotal grievance of Mr. Jackson and Mr. Perez is that since they are not Bahamian citizens, when the Acts are passed on 22 June 2021, their right to work in The Bahamas as commercial fishing divers, will be infringed. They say that they hold spousal permits or permanent residency certificates which give them an unrestricted right to work as commercial fishing divers. Now, according to them, that right will be taken away on 22 June 2021 and, as such, the Acts contravene various articles of the Constitution and their unrestricted right to work derived from their spousal permits/ residential certificates.

[49] However, the Applicants have not demonstrated to me that there are any exceptional or unusual circumstances which justified the Court's interference with the enforcement of the Acts. Put differently, it cannot be said that the Applicants would be deprived of their ability to access the Court for relief once the Acts come into force. Once passed, the Applicants may choose to amend the present Constitutional Motion (which has not been struck out) to challenge the constitutionality of the Acts or they may choose to withdraw the present Constitutional Motion and initiate a new action. If the Court, in the discharge of its duties, finds that any aspect of the Acts is inconsistent with the Constitution, then

the Court, as the guardian of the Constitution will jealously defend same and any aspect of the Constitution would be declared void, to the extent of the inconsistency.

[50] Presently, there is no exceptional or unusual circumstance which exists for the Court to interfere with the legislative process of preventing the Acts from being passed. The law is clear that the Court should, as far as possible, avoid interfering with the pre-enactment legislative process for to do so would be tantamount to meddling in the affairs of the Parliament. In **Coalition To Protect Clifton Bay & anor v The Hon. Frederick A. Mitchell MP and Ors** [2016/PUB/con/00016], this Court expressed similar views at paras. 44 to 46 of that Judgment. I stated:

> **"[44] That said, the Court acknowledged that, as a general rule, it should `not meddle in the affairs of Parliament but leave it to regulate its own internal affairs. At the ex parte on notice hearing on 22 April 2016, the Court reverberated this general rule when it cited with approval the dictum of Ramdhani J (Ag.) in the case of Hon. Mark Brantley (Leader of the Opposition) et al v Hon. Curtis Martin (Speaker of the House of Assembly) Claim No. SKBHCV2013/0090. The judge stated at [65]:**
>
> > **"Thus in the normal case, the Court has no right to insert itself within the sacred walls of Parliament to dabble with the internal affairs of Parliament. The Court has no business there…. [Emphasis added]**
>
> **[45] This is so, because the Bahamas Constitution, a Westminster model constitution, has a distinct feature which inheres in Constitutions based on that model which is the separation of the three branches of government, namely the Executive, the Legislature and the Judicature. The significance and effect of this doctrine have been examined in a number of cases in the Caribbean region starting with Hinds v The Queen [1976] 24 W.I.R. 326. It was held:**
>
> > **"Even though the Constitution does not expressly provide for Separation of Powers of the Executive, Legislature and Judicature, it is necessary by implication that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus even though the Constitution does not contain any express prohibition upon the exercise of legislation powers by the Executive or of judicial powers by either**

the Executive or Legislature, the doctrine of separation of powers still applies.

It is a well-established rule of construction applicable to constitutional instruments such as the Jamaican Constitution that the absence of express words to that effect does not prevent the legislature, the executive and the judicial powers of the state being exercisable exclusively by the Legislature, by the Executive and by the Judicature respectively."

[46] This Court does not underrate that the separation of powers doctrine is one of the "'immutable imperatives' guiding the elaboration of a Westminster model constitution, and that the 'separation of powers is considered to be the backbone of any constitutional democracy': per Pollard J in AG for Barbados v Joseph and Boyce (2006) 69 WIR 104 at [58].

[51] In **Trinidad & Tobago Civil Rights Association** (supra), Warner JA opined, at para. 19:

> **"I think it would be alarming if the executive could be rendered powerless to carry out its legislative agenda, if it could be frustrated in the courts by unmeritorious challenges as a stage prior to enactment. The rule of law demands that powers are not exercised arbitrarily."**

[52] Undoubtedly, such challenges would not only open the floodgates for a litany of unmeritorious actions but more importantly, they would cripple the Executive from passing laws for the 'peace, order and good government of the country."

[53] Returning to whether there is a serious issue to be tried, I find that there is no serious issue to be tried and, as such, I will refuse to grant the injunctive relief sought by the Applicants to prevent the Respondents for enforcing the Acts which will come into effect on 22 June 2021.

[54] In the event that I am wrong to come to the above conclusion, I shall carry on with the next issue of adequacy of damages.

Adequacy of damages

[55] It is the duty of the Court to consider whether the Applicants will be adequately compensated by an award of damages at trial. In **American Cyanamid,** Lord Diplock said at page 408:

> **"If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."**
> [Emphasis added]

[56] Learned Queen's Counsel Mr. Sears submitted that, if injunctive relief is not granted, the Applicants will face irreparable harm that cannot be remedied by adequate damages. The harm includes possible collapse or bankruptcy of their businesses, interruption of third-party contracts, loss of good will and damage to their reputation and creditworthiness, insufficient income to take care of their family, loss of mortgages and the frustration of the desire to maintain marital and family relationships and marital home in The Bahamas.

[57] In paragraph 13 of the declarations and relief sought, there is a claim for "damages and/or vindicatory damages". It is my view that since the Applicants are claiming damages, it must be an adequate remedy or they would not be claiming the same.

[58] In the event that I am wrong to come to this view, the Respondents are Ministers of Government, sued in their respective ministerial capacities, and therefore, it cannot be said that the Government will be unable to compensate in damages.

Balance of convenience

[59] This issue does not arise for consideration.

Other issues raised

[60] A few other issues were raised by Ms. Ingraham which do not need to be addressed given the outcome.

Conclusion

[61] For all the reasons stated, I will dismiss the Applicants' Summons seeking an injunction to prevent the Acts from coming into effect on 22 June 2021 on the ground that the Court does not have jurisdiction to question the constitutionality of Acts about to be enforced save in exceptional or unusual cases. The present case does not fall in that category. However, once the legislative process is completed, an aggrieved person may approach the Court to challenge the constitutionality of an Act or Acts. The Court is empowered to declare an Act of Parliament that is inconsistent with any constitutional provision, void, to the extent of such inconsistency.

[62] With respect to costs, I shall make no order since, to my mind, a suppliant applicant seeking the sanctuary of the court in a matter of public importance, ought not to be condemned in costs.

[63] Finally, as this matter came before me when I was the duty judge, it will be returned to the Listing Office to be placed before a judge in the Public Law Division.

[64] Time to appeal begins from today, 21 June 2021 and not from the date of the oral decision.

Dated this 21st day of June 2021

Indra H. Charles
Justice