13 November 2020

PRESS SUMMARY

Attorney General of the Turks and Caicos Islands (Respondent) v Misick and others (Appellants) [2020] UKPC 30.
On appeal from the Court of Appeal of the Turks and Caicos Islands

JUSTICES: Lady Black, Lord Lloyd-Jones, Lord Briggs, Lord Hamblen, Lord Stephens.

BACKGROUND TO THE APPEAL

The Appellants are the defendants ("**the Defendants**") in criminal proceedings which began on 7 December 2015 ("**the Criminal Proceedings**") in the Turks and Caicos Islands ("**TCI**"). The Criminal Proceedings are being conducted by Harrison J, without a jury. Though Harrison J is a judge of the TCI Supreme Court, he chose to continue to reside in his native Jamaica, travelling to the TCI when the court is in session. To date, the trial has occupied 490 sitting days, with the prosecution closing its case on 20 September 2018. On 12 March 2020, Harrison J adjourned the Criminal Proceedings following the declaration made by the World Health Organisation the previous day that Covid-19 was a global pandemic.

On 20 March 2020, the Governor of the TCI issued an Emergency Proclamation to prevent and control or contain the spread of Covid-19. On 17 April 2020, the Governor made the *Emergency Powers (Covid-19) (Court Proceedings) Regulations 2020* ("**the Regulations**") which came into force on 20 April 2020. The Regulations provide for remote hearings of criminal and civil proceedings. In particular, Regulation 4(6) provides that: *"The courtroom shall include any place, whether in or outside of the Islands, the Judge or Magistrate elects to sit to conduct the business of the court: Provided always that the video and audio link facility at the said location must be accessible remotely to the court recorder, interpreter in the appropriate cases, parties, counsel and witnesses."* On 23 April 2020, the Crown applied to resume the Criminal Proceedings in accordance with Regulation 4(6). On the 24 April 2020, the Defendants applied to the TCI Supreme Court for declarations that Regulation 4(6) was unlawful on various grounds. On 18 June 2020, the Supreme Court declared that Regulation 4(6) was unlawful to the extent that it purported to create a courtroom outside the jurisdiction of the TCI. All other relief sought by the Defendants was denied. On 20 June 2020, the Attorney General applied to appeal the Supreme Court's declaration. On 7 July 2020, the Defendants also applied to appeal the Supreme Court's decision to deny the other relief sought. On 31 August 2020, the Court of Appeal allowed the Attorney General's appeal but dismissed the Defendants' appeal.

The Defendants now appeal to the Privy Council, advancing two grounds. First, they contend that Regulation 4(6) is in breach of the TCI Constitution, as it purports to allow the Supreme Court to sit outside the TCI ("**the ultra vires issue**"). Second, they contend that the application of Regulation 4(6) to their trial would create an inequality of arms in breach of sections 1 and 6 of the Constitution, as the Defendants would be forced to conduct their cases remotely, whereas the Crown was able to present its case in the 'ordinary way' ("**the inequality of arms issue**").

JUDGMENT

The Judicial Committee of the Privy Council will humbly advise Her Majesty that the Defendants' appeals should be dismissed. Lord Hamblen and Lord Stephens give the advice of the Board.

REASONS FOR THE JUDGMENT

The ultra vires issue

In interpreting Regulation 4(6), the starting point is to ascertain the natural or ordinary meaning of the provision. The words and phrases must be read in their context, in its widest sense, which includes the Regulations as a whole, in addition to the legal, social and historical context **[38]-[41]**. There are a number of relevant contextual features in this case, which include **[44]-[47]**: (i) the fact that the Regulations were made as a temporary measure in response to the Covid-19 pandemic, in an attempt to resume the administration of justice; (ii) the content of the Constitution, which provides that the Supreme Court may only sit within the TCI; (iii) the physical courtroom, which will be used after the pandemic, is in the TCI; and (iv) all the powers of the judge would be exercised in the TCI alone.

The Board holds, like the majority of the Court of Appeal **[31]-[32]**, that Regulation 4(6) does not purport to allow the Supreme Court to sit outside the TCI. Rather, Regulation 4(6) deems the place where the judge sits physically to be part of the courtroom in the TCI **[49]**. First, Regulation 4(6) gives prominence to the "courtroom" before explaining that this will "include" the place from which the judge is connecting remotely, whether that be in or outside of the TCI. In other words, there is only one courtroom, which is in the TCI, and the place where the judge sits physically is deemed to be part of that courtroom **[50]-[51]**. Secondly, this interpretation is supported by the broader legal context within which the Regulations operate, including the Constitution, other legislation governing the Supreme Court's function and principles of international law and comity. These contextual features make plain that the only place in which a Supreme Court judge can exercise his or her authority is in the TCI. An intention to create a courtroom of the Supreme Court in a foreign state, in breach of constitutional and international law, should not be inferred lightly **[53]**,**[60]**. Thirdly, any ambiguity can be resolved on a purposive reading of the Regulations. This purpose can be summarised as ensuring that the administration of justice, including trials, continues during the Covid-19 pandemic in a way that does not endanger public health by reducing the need for people physically to attend the courtroom through the use of video and audio links. The purpose was *not* to permit the Supreme Court to sit outside the TCI. As such, the purpose of Regulation 4(6), properly construed, supports the conclusion that it merely deems the judge to be sitting wherever the court is assembled, notwithstanding his or her actual location. **[55]-[59]**.

Due to the Board's conclusion on the *ultra vires* issue, it is unnecessary to determine the alternative argument that a judge could connect remotely to a courtroom in the TCI from another state by exercising the Supreme Court's inherent jurisdiction to govern its own processes. That said, the Board does recognise the considerable force in the reasoning of Court of Appeal for British Columbia in *Endean v British Columbia* [2014] BCCA 61, which led to the conclusion that, due to evolving technology, it was permissible at common law for a judge, not physically present in British Columbia, to conduct a hearing in a courtroom in that province by telephone or video conference **[62]-[66]**.

The inequality of arms issue

The Board considers that, in effect, it is being invited to interfere in the trial process by making a preclusive ruling as to the trial's future conduct. It is neither necessary nor appropriate for the Board to do so **[67]-[74]**. First, it is impossible to tell how much of the remaining trial will be conducted remotely. Secondly, it cannot be said that it would unfair for any part of the trial to be conducted in this way. Whilst jury trials raise distinct issues, there is no intrinsic reason why video links cannot be used in criminal proceedings. Thirdly, the Defendants are unable to establish by reference to empirical data or otherwise that judge's ability to assess the evidence will be impaired if the defence case is conducted remotely. Fourthly, the general assertion that the public confidence in the fairness of criminal trials would be undermined if the defence case alone is presented remotely is unjustified. It all depends on the particular facts and circumstances. Finally, while it is preferable that the judge is physically present in the court room with the Defendants when evidence is given, there may be circumstances where a remote hearing is justified and it is a matter for the judge to determine whether and how that is done. All these matters are best left for the trial judge, with his long experience of the case at hand.

References in square brackets are to paragraphs in the judgment.

NOTE

This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html.