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IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE LAING JA (AG)**

SUPREME COURT CIVIL APPEAL NO COA2024CV00055

BETWEEN	THE ATTORNEY GENERAL OF JAMAICA	APPELLANT
AND	PHILLIP PAULWELL	1ST RESPONDENT
AND	PETER BUNTING	2ND RESPONDENT
AND	PAULA LLEWELLYN	INTERVENER

PRESS SUMMARY

Date of Delivery: 20 December 2024

[1] This matter involved an appeal and counter-appeal against the decision of the Full Court of the Supreme Court ('the Full Court') delivered on 19 April 2024, whereby it struck down section 2(2) of the Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023 ('the amending Act'), and declared section 2(1) to be valid. The appellant, the Attorney General of Jamaica, filed a notice of appeal on 23 April 2024 outlining 17 grounds of appeal, by which he seeks to overturn the Full Court's decision on section 2(2) and requesting a declaration that section 2(2) of the amending Act is a valid constitutional amendment. The 1st and 2nd respondents, Messrs Phillip Paulwell and Peter Bunting, respectively, by their counter-notice of appeal filed on 29 April 2024, challenged the Full Court's decision on seven grounds, and asked this court to overturn the Full Court's finding that section 2(1) of the amending Act is a valid constitutional amendment and affirm the Full Court's decision to strike down section 2(2) of the amending Act.

[2] For an appreciation of the issues that were considered by this court a summary of the background leading to the appeal will be provided.

[3] Miss Paula Llewellyn, the incumbent Director of Public Prosecutions ('the incumbent DPP'), was slated to retire on 21 September 2020, at the age of 60 years. She requested an extension of her tenure as DPP, under section 96(1) of the Constitution, which was granted for a period of three years, up to age 63. The incumbent DPP subsequently sought a further extension to continue to age 65. She was ultimately advised that a further extension would not be granted. Two months later, on 25 July 2023, a Bill entitled "An Act to Amend the Constitution of Jamaica to provide for an increase in the retirement age of the Director of Public Prosecutions and the Auditor General, and for connected matters" ('the amending Bill'), was tabled and passed in the House of Representatives. On 28 July 2023, the amending Bill was tabled and passed in the Senate. The amending Bill was opposed by the Opposition members during the debate in both Houses. The justification for the Bill was that the retirement ages of the DPP and the Auditor General was five years shorter than that of other public officers under the updated Pensions (Public Service) Act, 2017.

[4] On 31 July 2023, the Governor-General gave his assent and the amending Bill was gazetted and given force of law. On 15 August 2023, the incumbent DPP wrote to the Chief Personal Officer of the Public Service Commission, indicating that she elected to remain in office until age 65 and this was approved.

[5] Aggrieved by the passing of the amending Act, the respondents filed a claim in the Supreme Court challenging its constitutionality. The Full Court, after considering the issues raised before it, concluded that the amending act was validly passed and resulted in an amendment to section 96(1) of the Constitution. In respect of section 2(2), the Full Court found that the section was invalid and accordingly struck it down as being inconsistent with the supremacy clause of the Constitution.

[6] This court comprising Judges of Appeal Straw, V Harris and Laing (Ag), heard arguments over five days, from 24 to 28 June 2024, on the appeal and counter-appeal. We have given due consideration to the parties' written and oral submissions, relevant authorities and the evidence in this matter, and have ascertained that seven broad issues arose for our determination. Our conclusions on those issues are as follows:

1. Whether section 2(1) of the amending Act is unconstitutional by virtue of a breach of substantive principles of constitutional law.

[7] It is inarguable that there are underlying principles in the Jamaican Constitution that, although not expressly stated, are implicit in the Constitution. These include principles such as the separation of powers, the rule of law, an independent and impartial judiciary and the principles of constitutionalism. However, we are not prepared to say that the Full Court erred in failing to find that section 2 of the amending Act breached the "basic 'deep' structure" of the Constitution which could be interpreted to be broader in scope than the principles referred to above. Similarly, we found that the Full Court did not err in finding that there was no breach of the separation of powers principle. The Full Court was correct that the legislature did not usurp the powers of the executive in the passing of the amending Act. In relation to the proper purpose principle, we also agreed with the Full Court that having regard to the entirety of the evidence in this matter, it cannot be said that the amending Act was enacted for an improper purpose. Ultimately, we conclude that section 2(1) of the amending Act did not breach any of the substantive principles of constitutional law.

2. Whether the Full Court erred by ruling that section 2(1) of the amending Act did not circumvent, undermine or contradict the constitutionally mandated process for the extension of the term of office of a DPP.

[8] The proviso to section 96(1) of the Constitution sets out the process by which the DPP can obtain an extension of her tenure in office upon attaining the retirement age. By virtue of section 2(1) of the amending Act increasing the retirement age from 60 years to 65 years, the concern raised was that the extension mechanism provided by the Constitution was being circumvented or undermined. Considering the relevant law and

provisions of the Constitution, we find that section 96(1) was not entrenched by infection since the effective extension of the incumbent DPP's retirement age could not affect the office's independence. Additionally, it is our opinion that the amending Act did not circumvent the extension regime to grant the incumbent DPP a second extension. It increased the retirement age of the office holder by legislative intervention which is separate and distinct from the extension mechanism requiring a consultation process between the Prime Minister and the Leader of the Opposition. On the contrary, the incumbent DPP would benefit from the increase in the retirement age to 65 years due to her legitimate status as the officeholder at the time of the amendment. We conclude, therefore, that the Full Court did not err by ruling that section 2(1) of the amending Act did not circumvent, undermine or contradict the constitutionally mandated process for the extension of the term of office of a DPP.

3. Whether the Full Court erred in its ruling on the effect of section 2(1) of the amending Act.

[9] The effect of section 2(1) is to extend the tenure of the incumbent DPP by increasing her retirement age to 65 years. Though the Full Court did not state expressly whether the section applied to the incumbent DPP, it could be inferred that the Full Court concluded that the section did not apply to the incumbent DPP, in the light of the prior extension of her tenure before the promulgation of the amending Act. We find as such that the Full Court erred in limiting the applicability of the section, in this regard. We conclude, therefore, that section 2(1) of the Amending Act is applicable to the incumbent DPP.

4. Whether section 2(2) of the amending Act is in breach of the Constitution.

[10] The Full Court struck down section 2(2) as being inconsistent with the supremacy clause of the Constitution. Section 2(2) was determined by that court to be a material addition that gave the incumbent DPP the right to elect to retire at any time after attaining

the pre-amendment retirement age of 60 years, which right did not exist previously. In determining the validity of section 2(2), the Full Court used the following test:

“whether the [amending Act] is in substance different from that which was originally contemplated by the drafters of section 96(1) or whether the [amending Act] alters what section 96(1) had originally said in the Constitution.”

[11] Both questions were answered in the affirmative. We conclude that that test, as formulated, was problematic and appeared to be a misunderstanding of the law expounded by Lord Diplock in **Hinds v The Queen** [1976] 1 All ER 353. What was required to be determined was whether Parliament conformed to the requirements of sections 2, 48(1) and 49 of the Constitution. In so doing, a determination would be made as to the meaning of the words set out in section 2(2), followed by a determination of whether Parliament was empowered to effect the amendment in the manner that was adopted (as provided by section 49). It is our conclusion that the Full Court fell into error in the interpretation of the effect of section 2(2). Section 2(2) is a transitional provision concerning the incumbent DPP and the words “elect to retire” should be construed to mean to elect to apply for early retirement, that is, before attaining the new retirement age of 65 years. Upon the promulgation of the amending Act, the incumbent DPP automatically benefitted from the increased retirement age by virtue of section 2(1). Section 2(2) did not add to that benefit and is, therefore, not unconstitutional or inconsistent with section 2(1). The Full Court erred in declaring that section 2(2) of the amending Act was an invalid constitutional amendment and is to be severed from the amending Act and struck down as being unconstitutional, null, void and of no legal effect.

5. Whether section 2(1) of the amending Act should be read down and construed as not applying to the incumbent DPP.

[12] The crux of the respondents’ submissions was that if section 2(2) is not declared null and void, section 2(1) should be read down and construed to exclude the incumbent DPP. The objective of the concept of “reading down” is to limit the reach of a statute to conform to a constitutional limitation. Section 2(1), when given its natural and ordinary

meaning, clearly captures the inclusion of the incumbent DPP. Furthermore, section 2 of the amending Act is not retrospective. As such, there is no need to reduce the scope of the section to conform with the Constitution. To do so would improperly intrude on Parliament's legislative objective. Based on our conclusions, this proposition to read down section 2(1) is not accepted.

6. Does "consultation" as required by section 96(1)(b) of the Constitution mean "agreement" between the Prime Minister and the Leader of the Opposition?

[13] This discussion is largely academic as the respondents are not relying on the resolution of this issue to support their position. The Full Court expressed that "...[t]he only lawful way to extend the tenure of a DPP is by way of an agreement between the Prime Minister and Opposition Leader". We have noted the analysis emanating from the case of **Whitfield v Attorney General** (1989) 44 WIR 1 that the word consultation does not mean an agreement is to be reached between the Prime Minister and the Leader of the Opposition. We agree with this position. We conclude that the Full Court erred in its statement that an agreement is required.

7. Did the Full Court give the parties a reasonable opportunity to make representations insofar as it concerns its finding that section 2(2) of the amending Act granted the incumbent DPP the power to give herself an extension of her term in office?

[14] The essence of the complaint raised by this issue is that the Full Court arrived at a construction of section 2(2) that was not advanced by any of the parties and no submissions were invited from counsel regarding the court's interpretation. It is appreciated that the right to be heard is an integral part of the right to a fair trial. In this matter, the Full Court was tasked with determining, among other things, what was constitutionally permissible by the amending Act. Consequently, the Full Court had to consider the proper interpretation to be given to section 2(2). With this in mind, the parties were given the opportunity to make oral and written submissions to the Full Court regarding the proper construction to be placed on section 2(2), together with the reasons

for their suggested interpretations. The fact that the parties did not avail themselves of this opportunity, whether because they did not anticipate the Full Court's interpretation or for any other reason, is not, in our view, a proper ground of complaint. We are, therefore, of the opinion that the right to be heard was satisfied. The court heard submissions, considered them, and opted for its independent view of the effect of section 2(2). The appellant, having concluded that the construction applied by the Full Court was incorrect, had the option to mount a challenge on appeal, which was done. This ground of appeal fails.

Concluding remarks

[15] It is our determination that the Full Court was correct that section 2(1) of the amending Act was validly passed. It was, however, wrong in failing to determine that section 2(1) was applicable to the incumbent DPP. The incumbent DPP, whose tenure had been previously extended to age 63 is entitled to the benefit of the increased age for retirement by virtue of section 2(1). There is no basis to read down section 2(1) as not applying to the incumbent DPP.

[16] Concerning section 2(2), we have determined that the Full court erred in their interpretation of this section. It did not provide an option to the incumbent DPP to remain in office by circumventing the extension mechanism mandated by the Constitution and was validly passed by Parliament.

[17] For the foregoing reasons, the following orders are made:

1. The appeal is allowed.
2. It is declared that section 2(2) of the Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023 is a valid constitutional amendment.
3. Judgment entered for the appellant.
4. The counter-appeal is dismissed.

5. We affirm the decision of the Full Court that section 2(1) of the Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023 is a valid constitutional amendment.
6. Accordingly, given the failure of the Full Court to so declare in the proceedings below, and for the avoidance of doubt, it is declared that section 2(1) applies to the incumbent DPP.
7. Costs of the appeal and costs below to the appellant to be paid by the respondents and to be agreed or taxed unless the respondents within 14 days of the date of this order file and serve written submissions for a different order to be made in relation to costs. The appellant shall file written submissions in response to the respondents' submissions within seven days of service upon them of the respondents' submissions. The court will thereafter consider and rule on the written submissions.
8. The court would make no order as to costs concerning the intervener unless within 14 days of the date hereof, the intervener or any other party files submissions for a different costs order to be made.
9. If no submissions are made within the time specified at paras. 7 and 8 above for different costs orders to be made, the orders made herein as to costs shall stand as the final order of the court.

The appellant was represented by Allan Wood KC, Ransford Braham KC, Neco Pagon, Ms Kathryn Williams, and Stephen Nelson instructed by Livingston, Alexander & Levy. The respondents were represented by B St Michael Hylton KC, Kevin Powell, Duane Allen, and Ms Timera Mason instructed by Hylton Powell. The intervener was represented by Douglas Leys KC and Ms Samoi Campbell instructed by Samoi Campbell.

DISCLAIMER: This summary is provided for the sole purpose of assisting members of the public with understanding the Court of Appeal's decision in this matter. It does not form part of the reasons for the court's decision and should not be used as a substitute for the judgment of the court, which is the only authoritative record of the court's reasons. The full judgment of the court

will be made available to counsel and to the public through the court's website at www.courtsofappeal.gov.jm.

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