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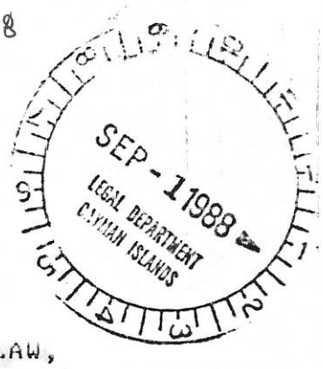

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN.

CAUSE NO. 136/88

IN THE MATTER OF THE CAYMANIAN PROTECTION LAW, 1984 (LAW 24 OF 1984)

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI BY PETER FEDELE TO REMOVE A DECISION OF HIS EXCELLENCY THE GOVERNOR ON 20TH MAY 1988 FOR THE PURPOSE OF ITS BEING QUASHED

Mr. Lamontagne Q.C. instructed by Mr. Timothy Shea of Hunter & Hunter for the Applicant.
Mr. Anthony Smellie for Respondent.

JUDGMENT

COLLETT C.J.

Persuant to leave granted on 31st May, 1988, the applicant Peter Fedele has applied to this Court by notice of motion for an order of certiorari to remove into the Court for the purpose of its being quashed a decision of His Excellency the Governor made on 20th May, 1988 whereby he determined in accordance with the provisions of section 36(g) of The Caymanian Protection Law that the Applicant be declared an undesirable inhabitant of or visitor to the Cayman Islands. That determination was made, in accordance with sections 7 and 8 of the Constitution of the Cayman Islands, after consultation with and in accordance with the advice given to him by the Executive Council.

At the hearing of this motion, a point of law by way of preliminary objection has been taken by Senior Crown Counsel who appears to represent the Respondent. He submits that as a matter of jurisdiction the prerogative order of certiorari may not be issued by this court to His Excellency the Governor acting as Her Majesty's representative in these Islands. In support of that submission he cited the recent case of Dilbert v. Public Service Commission C157/87 in which I refused to permit the amendment of an application

for Certiorari and Mandamus so as to add the Governor as a respondent thereto, after it had become clear that the decision called into question in that case had been that of the Governor himself rather than of the Commission. I refused upon the basis of persuasive authority to the effect that such prerogative writs or orders would not issue out of any colonial court directed to the Governor of the territory concerned, to be found in Re Benn (1964) 6.W.I.R. 500, a decision of Luckhoo CJ. Guyana founded in turn upon the decision of the High Court of Australia in R.v. Governor of the State of South Australia (1907) C.L.R. 1497.

In Vol. 6 of Halsburys Laws of England, 4th Ed. at p.1050 it is stated that no order of mandamus will lie to the Governor in respect of acts which he can perform only with the advice of his Executive Counsel or cabinet or in any other case in which he is acting as representative or agent of the Crown or otherwise in his capacity as Governor; also that this immunity extends in respect of the other prerogative orders, injunctions and other like equitable remedies. Re Benn and the South Australia case are both cited in the footnotes as supporting authority for this proposition; also cited as such authority is an observation of Dixon J. in the more recent High Court of Australia decision of Australian Communist Party v. The Commonwealth (1951) 83 C.L.R.1 at p. 179, that the prerogative writs do not lie to the Governor-General. Mr. Lamontagne for the Applicant has nevertheless submitted that this statement in Halsburys 4th Edition, insofar as it relates to the prerogative orders of certiorari and prohibition, is a bald one unsupported by any consistent line of authority and wrong in principle. This submission now requires examination in the light of the relevant Commonwealth authorities and in the absence of any binding decision to the contrary effect.

The starting place for this examination is the uncontradicted proposition that the prerogative orders of mandamus, prohibition and certiorari will not issue out of any of Her Majesty superior courts directed to the Sovereign personally. That is all part and parcel of the doctrine that the Sovereign may not, except to the extent that a statutory exception has been made, be impleaded

in Her own Courts but no doubt it could also be predicated upon the nature of such orders as being peremptory commands of the Crown directed to the subject which the Crown could not without absurdity direct towards itself.

It is equally clear that Governors of dependent territories of the Crown as a class do not partake of the Sovereign's general immunity from suit. A Colonial Governor may be sued in the courts of his colony in contract or in tort, whether or not his acts or omissions are alleged to have occurred in the course of his official duties there: see Hill v. Biggs (1841) 3 Moore 465 and Musgrave v. Pulido (1879) 5 App. Cas. 102. He does not enjoy vice-regal status in the sense of being a person to whom the full prerogative powers of the crown have been delegated: see Commercial Cable Company v. Government of Newfoundland (1916 2AC 610 at p.616. The validity of his official acts may generally be called into question in appropriate proceedings brought against him as a defendant in the courts of the territory: see Hochoy v. N.V.G.E. and others (1964) 7 W.I.R. 174. It further appears that the Governor or other officer administering a territory may be answerable to the issue of a writ of habeas corpus out of the superior courts of the territory: see Eshugbayi Eleko v. Officer Administering the Government of Nigeria (1931) AER 44(P.C.), despite the decision to the contrary of Luckoo CJ. in Benns case (Supra), which purported to distinguish it.

In a Colony such as the Cayman Islands which does not yet enjoy a fully responsible self-government, it is evident that there are differences in regard to the autonomy of the powers of the Governor from that appertaining for instance to the Governors of the constituent States of the Commonwealth of Australia or the Lieutenant-Governors of the Provinces of Canada. In such self-governing but federated entities the respective Governors or Lieutenant-Governors are the executive heads of their respective states or Provinces and thus the Sovereigns representative therein in relation to State or Provincial matter as contrasted with Federal affairs: see Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick (1892) A.C. 437. There are of course similar differences in the respective positions of Colonial

Governors and Governors-General of independent dominions of the Crown within the Commonwealth.

Under the constitution of the Cayman Islands, the Governor is appointed by a commission from Her Majesty and holdsoffice at Her Majesty pleasure. He is invested for the purpose of administering the government of the Islands with such powers and duties as are conferred or imposed upon him by the Constitution or any other law and subject to Royal instructions issued by Her Majesty. (section 1). He appoints the official members of Executive Council (section 5) and of the Legislative Assembly (section 17). He alone can summon the Executive Council to meet (section 13). He is constitutent part of the legislative process leading to the enactment of local laws (section 29 and 31). He may make grants and dispositions of Crown Lands under the public seal (section 52), grant pardons or respite sentences (section 53) in each case acting in Her Majesty's name and on her behalf. He is also empowered to dismiss for cause or exercise disciplinary control over the holders of such offices.

While it is clear that the entire plenitude of the prerogative powers exercisable by the Sovereign have not been delegated to the Governor of the Cayman Islands by this constitution or indeed by any other vehicle, I am unable to conclude that the compendium of what has indeed been conferred is not sufficient to establish the Governor as the Sovereign's representative in the Islands. There is no compelling reason to invoke the rule of construction 'inclusio unius exclusio altesius' in the examination of this Constitution. The very nature of the specific powers and responsibilities so conferred and the purpose for which they are expressly conferred upon him, namely the administration of the government of the Islands, are such as to constitute him the Chief Executive Officer performing, insofar as the Sovereign has seen fit to delegate them, the administrative functions of the head of state, and it follows ineluctably that he is to perform them on behalf of the Sovereign, that is to say as agent or representative of the Sovereign in the Colony.

The history of the office of Governor in the Cayman Islands is of some significance in assessing the capacity of that officer to represent the Sovereign here. Before 1962 the Governor of Jamaica was designated as the Governor of the Cayman Islands also. It follows that the Commissioner, later renamed the Administrator of the Islands could not before that date have been considered as the Sovereigns representative. Subsequently in 1962 when the link with Jamaica was severed, it is arguable that the administrator thereupon assumed that representative capacity but nothing in the instant case turns upon that date and the argument has not been persued. Since 22nd August, 1972, when the present constitution came into effect, it is in my view impossible to reach any logical conclusion except that the Governor is to be regarded as the Sovereign's representative in the Islands. The changes wrought in the constitutional status of the Island's government by successive orders of Her Majesty in Council under the West Indies Act 1962 have been such as to establish separate political representative and administrative institutions for the Colony and thus to effect important changes in the political character of the Cayman Islands and in the status of its chief administering officer - i.e. the Governor. The absence of fully responsible self-government seems irrelevant in that connection. It was reasons such as these which led Wilson J. with whom Aickin J. agreed in the High Court of Australia decision Re Toohey exparte Land Council, (1981) A.L.R. 439, to hold that the Administrator of the Northern Territory of Australia, had become the representative of the Crown therein as the result of changes wrought by Federal Australian Legislation. The dissent of Gibbs C.J. on this point seems to have been grounded partly at least on the absence of any commission of appointment or of instructions from Her Majesty, which considerations do not, as we have seen, affect the post of Governor in the Cayman Islands.

What then is the effect upon the present application of my holding that His Excellency the Governor is indeed the Sovereigns representative in the Cayman Islands? Counsel for the applicant has submitted that notwithstanding this he ought yet to be regarded as amenable to the prerogative orders in general and to certiorari in particular emanating from this Court. Counsel has pointed to the

expanding scope of judicial review of administrative action over the past three decades and to the number of new targets which the appellate courts in England and elsewhere have held to be within its purview. These include the English non-statutory Criminal Injuries compensation Board, the take-over panel, Prison Governors and Ministers of the Crown is respect of the exercise of powers derived from the Royal Prerogative rather than from statute. There are also rather startling dicta in the Privy Council decision of Teh Cheng Po v. Public Prosecutor of Malaysia (1980) AC 458 which suggest that mandamus could be issued to the individual members of the cabinet of an independent Commonwealth state commanding them to advise the Sovereign in a particular manner.

There is in the United Kingdom now a days legislation - s. 31 of the Supreme Court Act, 1981 - which regulates the remedy of Judicial review. Similar Legislation appears to have been exacted in New Zealand. No such legislation exists in the Cayman Islands where the essential nature of the remedies of mandamus, prohibition certiorari remains as a manifestation of the Royal prerogative untrammeled by any statutory gloss. It is trite law that none of these orders anymore than the old writs which they replace will go from the courts to any of the Superior Courts of record or to the Legislature. Why then, if the highest judicial and legislative authorities of a territory are immune from the compulsion of these orders, should the highest executive authority in the territory be subjected to it? It can only be because these high judicial or legislative authorities partake of the Royal authority of the Sovereign that their immunity has came to be recognised and by the same token the representative of the Sovereign exercising within the territory the delegated power of administering its government on the Sovereign's behalf should equally and properly be immune to the same extent.

Nor can I see any rational distinction to be drawn in this respect between the orders of certiorari and prohibition on the one hand and that of mandamus on the other. If mandamus will not go to a Governor of Southern Australia to compel him to issue a writ of election, then presumably prohibition would not go to prevent him

from issuing ~~me~~ one or certiorari to recall the writ once issued and to bring it before the appropriate court to be quashed. The law has recognised that these are not appropriate remedies against such authorities in the state.

Now ~~(illegible)~~ in my judgment will certiorari go from this court to His Excellency the Governor of the Cayman Islands to bring up and quash a determination at which he has arrived after taking advice from the Executive Council to deem a person not possessing Caymanian Status to be an undesirable inhabitant or visitor to these Islands pursuant to section 36 (g) of the Caymanian Protection Law. Legal remedies may well be available to a person who feels himself aggrieved by a determination of this kind but certiorari is not one of them.

Accordingly, the preliminary objection here succeeds. The present application has been misconceived. It is, therefore, dismissed with costs. The stay which was ordered on 31st May, 1988 is now discharged.

Dated 1st September, 1988.