



# CONSTITUTIONAL COMMISSION

## An Explanation of the Constitutional Issues Arising from the Day and Bodden Bush Litigation

### INTRODUCTION

In April 2018 the Cayman Islands General Registry rejected the marriage application of two women: Chantelle Day, a Caymanian ("the First Petitioner"); and her British partner, Vicki Bodden Bush ("the Second Petitioner") (together "the Petitioners").

As a result the Petitioners were unable to marry in the Cayman Islands. At this time there was also no provision for civil unions in the Cayman Islands and so the Petitioners had no functional equivalent to marriage available to them. In addition to being unable to marry or to enter into a civil union in the Cayman Islands this situation gave rise to a number of associated challenges for the Petitioners, including: the immigration status of the Second Petitioner and her ability to work in the Cayman Islands; and the rights of the Petitioners to found a family together with their adopted child.

In the premises the Petitioners felt that they had no option but to challenge the decision in the Courts. This then set in train a legal process that has progressed from the Grand Court through the Court of Appeal and ultimately to the final court of appeal for the Cayman Islands, the Judicial Committee of the Privy Council ("the Privy Council") in London, England. This litigation therefore provides an excellent illustration of the operation of the judicial arm of government as established in the Cayman Islands Constitution ("the Constitution").

In the course of this litigation the matter has also required legislative input and, consequently, it serves as a case study of how the judicial and legislative arms of government interact under the Constitution and of the different sources of legislation that are facilitated by the Constitution.

Much has already been written specifically on the topic of same-sex marriage and civil unions and, no doubt, there will be further analysis of these matters in the wake of the final decision handed down by the Privy Council. This informational note, however, is not intended to be a commentary on the merits of the various decisions handed down by the different Courts. Rather, the objectives here are to use the issues arising from the Day and Bodden Bush litigation to highlight various aspects of the Constitution and, in so doing, to assist the general public in understanding the constitutional context in which these complex issues have been considered.

# THE DECISION

On 12 April 2018 the Petitioners attended the Cayman Islands General Registry in person to apply for a special license to marry. A "special license" was required because at the time of the application both of the Petitioners resided outside of the Cayman Islands.

On 13 April 2018 the Deputy Registrar refused to grant a special license to marry ("the Decision") on the basis that the Marriage Act defined marriage in the Cayman Islands as a union between a man and a woman only and thus did not encompass the proposed same-sex union.



## Cayman Islands General Registry

# THE CHALLENGE

The Petitioners resolved to challenge the Decision initially by way of judicial review on 31 July 2018 and latterly on 28 September 2018 via a constitutional challenge ("the Challenge"). The Petitioners contended that the Decision breached various rights enshrined in the Bill of Rights within the Constitution.

The Honorable Chief Justice sitting in the Grand Court considered this Challenge and, in a lengthy judgement handed down in March 2019, concluded that:

- The Petitioners had rights to private and family life and are entitled to expect the State to respect those rights through the establishment of a legal institution that protects those rights.
- While one section of the Bill of Rights enshrines the right to marry of opposite-sex couples, this does not mean that a similar right could not be located for same-sex couples elsewhere in the Bill of Rights and specifically in the section pertaining to the right to private and family life.
- The rights in the Bill of Rights should be given a generous and purposive interpretation so as to give individuals the full measure of the rights and freedoms referred to.
- The on-going failure to provide a framework for the recognition and protection of the Petitioner's rights breached various rights in the Bill of Rights, including the right to private and family life, as well as the right to freedom of conscience and the right to manifest their belief in marriage.

- The violations of the Petitioners' rights were premised on their sexual orientation and were therefore also discriminatory.
- No justification for such discrimination was permitted under the Bill of Rights.
- The amendment to the Marriage Act, which affirmed the definition of marriage relied upon for the purposes of the Decision, preceded the Constitution; and it was therefore an "existing law" when the Constitution came into effect and, as such, was construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring the law into conformity with the Constitution.
- As part of the checks and balances established in the Constitution to enable the judicial arm of government to address past actions or current inactions by the local legislative or executive branches of government, the Court was therefore able to modify the Marriage Act to permit same-sex marriage and thereby bring it into conformity with the Constitution.
- Accordingly, the definition of marriage in the Marriage Act was substituted by the following: "marriage" means the union between two people as one another's spouses.



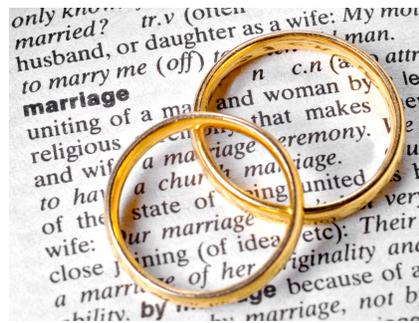
## THE APPEAL

In April 2019 the Cayman Islands Government subsequently appealed the decision of the Honourable Chief Justice based on three primary points:

- Firstly, it was asserted that there were implications arising from the Grand Court's judgement for other types of marriages, such as polygamous marriage, and it was therefore unclear whether Government would now be bound to give effect to or recognise such marriages if, for example, an application for a marriage license was made for a man to marry multiple wives.
- The second concern related to the extent of the powers of the Court under section 5(1) of The Cayman Islands Constitution Order 2009 to modify legislation on matters such as the right to marry, bringing into question the appropriate separation of powers under the Constitution, and whether by exercising these powers under section 5(1) the Court had exceeded its mandate under the principle of separation of powers.

- And a third concern was whether, given the language in section 14(1) of the Constitution, it was open to the Court to find that the right to marry and found a family could be located in other rights within the Bill of Rights, namely, sections 9 and 10 of the Constitution.

In November 2019 the Court of Appeal overturned the original decision of the Grand Court. However, while the Court of Appeal found merit in the legal arguments advanced by the Cayman Islands Government it still concluded that the Petitioners were entitled, expeditiously, to legal protection in the Cayman Islands that is functionally equivalent to marriage. So, rather than the Courts resolving the matter by modifying the existing to law to establish conformity with the Constitution, the Court of Appeal directed the Cayman Islands legislature to rectify what still amounted to a breach of the Bill of Rights in the Constitution and the European Convention on Human Rights ("the ECHR"); and, if the Parliament failed to at least provide legal protection that was functionally equivalent to marriage, then the United Kingdom should recognise its responsibility for ensuring that the Cayman Islands complies with its responsibilities under the Constitution and its international obligations, including the ECHR.



# THE DOMESTIC PARTNERSHIP BILL

Some months later, on 26 June 2020, a Bill to provide for domestic partnerships and for incidental and connected purposes ("the Domestic Partnership Bill") was published in an effort to comply with the direction of the Court of Appeal and to establish a functional equivalent to marriage for same-sex couples.

However, this legislative resolution was not accepted. In July 2020 the Cayman Islands Parliament debated the Domestic Partnership Bill over the course of three days and, at the Second Reading on 29 July 2020, the Domestic Partnership Bill was defeated by a vote of 9 to 8.



# THE CIVIL PARTNERSHIP ACT

Following the failure to pass the necessary legislation in the usual way in the local Parliament, it fell to the United Kingdom to address the situation and to ensure compliance with the direction of the Court of Appeal.

Under section 81 of the Constitution His Excellency the Governor has reserved powers to legislate for the Cayman Islands; and it was through these powers that the Governor was able to alter the terminology slightly from the Domestic Partnership Bill and to give assent to the Civil Partnership Act, along with 11 other consequential pieces of legislation. These actions were undertaken in line with instructions from United Kingdom Ministers to uphold the rule of law and to comply with the ECHR, in accordance with the Governor's responsibilities under section 55(1)(b) of the Constitution.

So in spite of the inability of the Cayman Islands Parliament to resolve the situation, even by way of a functional equivalent to marriage as opposed to same-sex marriage itself, another legislative power in the Constitution was utilised, albeit only to establish civil partnerships for same-sex couples as a functional equivalent to marriage. The Governor assented to the compromise position in the Civil Partnership Act on 4 September 2020.



# THE FINAL APPEAL

This legislative compromise resolution was not, however, the end to this constitutional saga. Back over in the judicial branch of government, the Petitioners had appealed the Court of Appeal judgement to the Privy Council. The issues left to be argued before the Privy Council were:

- Whether the Bill of Rights in the Constitution of the Cayman Islands provided the Petitioners with a right to access the institution of marriage; and
- If so, whether the Order of the Grand Court of the Cayman Islands - which modified the Marriage Act so as that "marriage" was defined to mean "the union between two people as one another's spouse" - should be restored.

The Privy Council heard this case on 23 and 24 February 2021, and at the time of writing this explanatory note the Privy Council had yet to hand down its final judgement.



## CONCLUDING REMARKS

Notwithstanding that the final judgement from the Privy Council is still pending, the Day and Bodden Bush litigation has already given rise to a number of important constitutional issues of note, including:

- The function of appellate courts and their role in analysing important constitutional issues in cases that come before them;
- The interplay between the judicial and legislative branches of government, particularly in connection with the protection and enforcement of fundamental human rights, and especially where persons in a minority group are seeking to rely upon these rights in the Constitution; and
- The use of the Governor's reserve legislative powers, which, following the enactment of the Civil Partnership Act, were not removed from the Constitution as had previously been proposed.