

Javin Johnson v Attorney General of St Vincent and the Grenadines

Case digest of Javin Johnson v Attorney General of St Vincent and the Grenadines

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Prepared April 2024

CASE DIGEST

Javin Kevin Vinc Johnson et al v The Attorney General of Saint Vincent and the Grenadines

The High Court of Justice of the Eastern Caribbean Supreme Court Saint Vincent and the Grenadines

**Claim No. SVGHCV2019/0110, consolidated with SVGHCV2019/0111,
16 February 2023**

First claimant: Javin Kevin Vinc Johnson

Second claimant: Sean Macleish

Defendant: Attorney General of Saint Vincent and the Grenadines

Judge: Justice Esco L. Henry

A Coalition of Churches based in Saint Vincent and the Grenadines was joined as an interested party in November 2019, holding the same position as the Attorney General. In 2021, VincyCHAP, the Grenadines Chapter of the Caribbean HIV/AIDS Partnership, was also added as an interested party, supporting the claimants.

Summary

Same-sex sexual activity is prohibited under sections 146 and 148 of the Criminal Code 1988, which criminalise, respectively, acts of “buggery” and “gross indecency.” These provisions carry a maximum penalty of ten years’ imprisonment. The law was inherited from the British during the colonial period, in which the English criminal law was imposed upon Saint Vincent and the Grenadines.

In 2019, Javin Johnson and Sean Macleish, two gay Vincentian men living in the United Kingdom and the United States of America respectively, filed a legal case which challenged the constitutionality of these provisions. Additionally, VincyCHAP, a local NGO which provides support, testing and other services to those affected by HIV, was joined as an interest party in 2021.

On 16 February 2024, a High Court judge dismissed the case, holding that the claimants did not have standing to bring many aspects of the constitutional challenge because they no longer live in Saint Vincent and the Grenadines, or had failed to provide sufficient evidence of historic rights violations. The judge found that the laws had interfered with the claimants' right to freedom of expression, but concluded this interference was justified on the grounds of public health and morality. The decision was delivered orally in court and a written judgment containing more detailed reasons for the dismissal was issued on 20 February.

Challenged Provisions

Section 146 of the Criminal Code – Buggery

“Any person who – (a) commits buggery with any other person; ... (c) permits any person to commit buggery with him or her; is guilty of an offence and liable to imprisonment for ten years.”

Section 148 of the Criminal Code – Indecent practices between persons of the same sex

“Any person who, whether in public or private, commits any act of gross indecency with another person of the same sex, or procures or attempts to procure another person of the same sex to commit an act of gross indecency with him or her, is guilty of an offence and liable to imprisonment for five years.”

Grounds of claim

The claimants argued that sections 146 and 148 are in violation of the following rights contained in the Constitution of Saint Vincent and the Grenadines ('the Constitution'):

- Right to privacy – Section 1(c)
- Right to personal liberty – Section 3
- Right to protection from inhuman treatment – Section 5
- Right to protection from arbitrary search and entry – Section 7
- Right to freedom of conscience – Section 9
- Right to freedom of expression – Section 10
- Right to freedom of movement – Section 12
- Right to protection from discrimination – Section 13

Remedies sought

The claimants asked the court to:

- Strike down sections 146 and 148 of the Criminal Code or modify the provisions to bring them into conformity with the Constitution, or;
- Issue a declaration that the challenged provisions are unconstitutional, illegal, null, void, invalid and are of no effect;
- Alternatively, claimants sought orders declaring that the challenged provisions abridge, abrogate, infringe, violate and/or contravene their constitutionally rights and are arbitrary, irrational and/or contrary to the common law prohibition of unequal treatment on irrational grounds.

Orders granted

The claims were dismissed in their entirety. The claimants were further ordered to pay the Attorney General prescribed costs of \$7,500.00.

Written decision

Standing

The High Court found that the claimants had standing to pursue limited aspects of their claim, namely their claims in relation to historic breaches of the right to freedom of expression, freedom of conscience and the protection against inhuman and degrading treatment enshrined under sections 5, 9 and 10 of the Constitution (paragraphs 176, 184 and 257).

It held however that they lacked the requisite standing to advance many other aspects of their claims, by virtue of them ceasing to be residents of Saint Vincent and the Grenadines or failing to provide sufficient evidence of historic rights violations. In reaching this decision, the court considered the introductory wording to the Constitution, finding that the words “in Saint Vincent and the Grenadines” cover any person who is present in the state at the time of the alleged constitutional violation (paragraph 150).

Right to personal liberty – section 3 of the Constitution

The claimants submitted that there had been past and present breaches of their right to personal liberty, as guaranteed by section 3 of the Constitution. They submitted that the provisions had affected their ability to make important and fundamental life choices and/or their psychological integrity.

In relation to the claim that the provisions had impacted the claimants’ psychological integrity, the court held that they lacked standing to do so, as “they produced no expert evidence of any such effects” and were concerned by “their attempts at self-diagnosis” (paragraph 171).

The claimants submitted that the provisions breached section 3 of the Constitution by affecting their present ability to make important and fundamental life choices. They pleaded that they had no personal autonomy to live their own lives and make decisions of fundamental personal importance, such as whether to enter into a relationship, engage in sexual conduct or whether to exile themselves from Saint

Vincent and the Grenadines. However, the court held that the claimants lacked standing to present these effects as breaches of section 3 of the Constitution, as they were not present in the state of Saint Vincent and the Grenadines “either immediately before or within a reasonable short period before or since the filing of the claims.” The claimants had not shown that they “are or were in the jurisdiction at the relevant times and that they were at that time affected in any of those ways by the consequences of the challenged provisions.” In relation to the forced exile element of the claim, the court stated that this was captured by the challenge under section 12 of the Constitution (paragraphs 172 – 174).

Right to protection from inhuman treatment - section 5 of the Constitution

The claimants submitted that there had been past and present breaches of their right to protection from inhuman and degrading treatment, as guaranteed by section 5 of the Constitution.

The court applied the same reasoning that they used in relation to the claim made under section 3 of the Constitution. It held that the claimants did not have standing to bring a constitutional challenge in relation to present breaches of section 5, as they are and were not present in Saint Vincent and the Grenadines at the relevant times (paragraph 175).

However, in relation to past breaches of section 5 of the Constitution, the court held that the claimants had the necessary standing to pursue this aspect of their claim (paragraph 176).

Turning to the merits of this aspect of the section 5 claim, the court considered the case law on degrading treatment arising from targeting a person on the basis of a defined characteristic, such as sexual orientation. The claimants submitted that the harm caused by the Criminal Code provisions met the minimum level of severity required to bring the claims within section 5 of the Constitution, and that the infringement of their right to protection from inhuman treatment could not be justified by the defendant.

However, the court held that the claimants had fallen short of establishing that they had suffered inhuman treatment in violation of section 5 of the Constitution. The court found that there was no connection between the past inhuman and degrading treatment the claimants asserted that they had suffered, and the existence of the Criminal Code provisions. Furthermore, the court held that even if this connection was shown, the treatment did not cross the threshold of severe punishment required by section 5 of the Constitution (paragraphs 214 – 221).

Right to protection from arbitrary search and entry – section 7 of the Constitution

The claimants submitted that there had been breaches of their right to protection from arbitrary search and entry of their person and property, as guaranteed by section 7 of the Constitution. They submitted that the Criminal Code provisions placed them under threat of such search due to their sexual orientation, and that the provisions irrationally targeted them on this basis (paragraph 177).

However, the court held the claimants did not have sufficient standing to bring a constitutional challenge under section 7 of the Constitution. The court reaffirmed that sexual orientation was not an essential element of the section 146 offence (paragraph 180). Additionally, the claimants had not satisfied the court that they had committed either of the Criminal Code offences whilst they resided in Saint Vincent and the Grenadines. As a result, the claimants could not show that their right to protection from arbitrary search and entry was violated and thus had no standing to bring a claim under section 7 of the Constitution (paragraphs 181 and 182).

Rights to freedom of conscience and freedom of expression – sections 9 and 10 of the Constitution

The claimants submitted that there had been past, present and potential future violations of their rights to freedom of conscience and freedom of expression, as guaranteed by sections 9 and 10 of the Constitution respectively. The claimants gave evidence that the expression, manifestation and exercise of their sexuality had been restricted, in breach of their section 9 and 10 rights.

The court found that the claimants only had standing to pursue their claims based on alleged past breaches of sections 9 and 10 of the Constitution.

The court considered the case law on whether the rights to freedom of conscience and freedom of expression had been engaged. In relation to the claimants' right to freedom of conscience under section 9 of the Constitution, the court held that there had not been an infringement, questioning whether the right to freedom of conscience conferred by section 9 conceived of or contemplated the right to engage in same-sex sexual intimacy or otherwise express one's sexuality (paragraph 252).

In relation to the claimants' right to freedom of expression under section 10 of the Constitution, the court found that this had been infringed by the defendant, holding that the claimants had established that the existence of the Criminal Code provisions "operated to curtail, suppress and/or eradicate the expression of an integral part of their identity in both public and private" (paragraph 257).

Such infringements were nonetheless found to be reasonably justifiable on public health grounds, concluding that "the thought of a public health crisis occasioned by an unstemmed deluge of new HIV cases is a real and serious concern which reasonably justifies a public health response of the kind embedded in the challenged provisions." (paragraph 267). The judge further held that there was an absence of evidence demonstrating a direct causal relationship between striking down the criminalising provisions and a reduction in HIV infection rates (paragraph 266).

The court also found that the infringement of the claimants' right under section 10 of the Constitution was justified on the basis of public morality. It accepted the defendant's submissions that the state had a legitimate interest in maintaining the Criminal Code provisions in furtherance of public morality objectives.

Right to freedom of movement – section 12 of the Constitution

The claimants submitted that there had been violations of their right to freedom of movement, as guaranteed by section 12 of the Constitution, as the existence of the provisions had caused their de facto expulsion from Saint Vincent and the Grenadines (paragraph 159).

The court found that the claimants had standing to pursue their claims under section 12 of the Constitution, as they had made out an “arguable case” that they had endured de facto expulsion from Saint Vincent and the Grenadines (paragraph 185).

However, the claim under section 12 of the Constitution was dismissed on its merits.

Right to protection from discrimination – section 13 of the Constitution

The claimants submitted that there had been violations of their right to protection from discrimination, as guaranteed by section 13 of the Constitution.

The court held that the claimants did not have standing to pursue their claims under section 13 of the Constitution. The court commented that the claimants made no specific allegations of past discrimination to themselves, and only made a “generalized contention of the effect of the challenged provisions on same sex males” (paragraph 160). The claimants had not shown that the “lifestyle” of homosexuality was “practiced” by either of them. Thus, the claimants could not make out that the Criminal Code provisions were presently discriminatory in effect to them personally, but only that the provisions had some effects on same-sex couples in general.

Right to privacy – section 1(c) of the Constitution

The court considered the justiciability of the introductory wording included at section 1 of the Constitution. Referring to the judgment of Lord Mance in *Campbell-Rodrigues v Attorney General of Jamaica* [2014] UKPC 12, which had considered a similar provision contained in the Constitution of The Bahamas, the court held that section 1 of the Constitution was not justiciable, noting that it

“bestows no separate fundamental right or constitutional protection” and that the claimants were therefore “unable to invoke it for the purposes of maintaining a claim for breach of their avowed right to protection of the privacy of their home” (paragraph 191).