RE MR. JUSTICE MARKS & ANOR;

EX PARTE BORIS BELJAJEV

ORAL JUDGMENT DAWSON J.

(delivered 16/5/1991)

RE MR. JUSTICE MARKS & ANOR;

EX PARTE BORIS BELJAJEV

I have already indicated that I am prepared to make orders nisi for the issue of the writs sought in this matter, returnable upon the same day as is fixed for the hearing of the applicant's application for special leave to appeal against the decision of Marks J. revoking his bail. There remains the question whether I should order the stay, as is sought by the applicant, of Marks J.'s order pending the return of the orders nisi.

Under O.55, r.10, I am empowered to direct a stay of the proceedings in question upon granting an order nisi for prohibition. There is also the inherent power of the Court to give such a direction. It was not contended, nor do I think it could be, at least in the circumstances of the present application, that the considerations which should guide the exercise of my discretion differ according to whether I am proceeding pursuant to O.55, r.10 or the inherent power.

In either case, special circumstances must exist which would justify making the direction sought and, it seems to me, what constitutes special circumstances must depend upon the particular context in which the application is made. Such a direction is warranted where, if the applicant were ultimately successful, any order which the court might make would be futile or nugatory in the absence of a stay. In those circumstances an order preserving the status quo might be justified. But the discretion to direct a stay may, I think, extend more more widely than that, provided always that there must be special circumstances which justify such a course.

In this case I do not think that it is helpful to speak in terms of futility or the preservation of the status quo. In one sense, any order which the court might ultimately make in favour of the applicant might be futile because it could not restore his liberty between now and the time of such an order. But an ultimate order restoring the applicant's liberty pending the commencement of his trial, which is the real matter at stake, could hardly be described as futile. Nor is it by any means clear what is the status quo in this matter. Under s.4(2) of the *Bail*

Act 1977 (Vict.) bail ought not to be granted to a person in the position of the applicant save in exceptional circumstances. Judge Kelly was of the view that special circumstances existed but Marks J. was of the contrary view. Before Judge Kelly granted bail on 11 April this year the applicant had been in custody awaiting trial for some 2¼ years. There is no one status quo in those circumstances.

No doubt in some situations even a slight deprivation of liberty might suffice to justify a stay. But in the context of this case it would be unrealistic not to recognize that the time which will elapse between now and the return of the orders nisi is relatively short - about three weeks. No doubt the applicant could use those three weeks for the preparation of his defence at his trial (which is presently fixed to commence on 2 September 1991), but in the whole scheme of things a period of three weeks is relatively insignificant. Even if that be not so, the trial date is, presumably, not entirely immutable.

The present application amounts, in effect, to an application for the continuation of the bail granted by Judge Kelly until the return of the orders nisi. The

principle which has been applied by this Court in considering applications for bail pending appeal is there must be a compelling reason, such as the expiry of the sentence before the application can be heard, for the application to be successful. I do not think that any different principle applies in this case and I do not think that I am compelled by the circumstances to grant the application for a stay. The application is refused. Otherwise I make the orders nisi in the form sought, returnable on 4 June 1991.