[2024] JMFC Full 05

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**
**IN THE CIVIL DIVISION**

**CLAIM NO. SU2021CV01893**

**BEFORE: THE HONOURABLE MRS. JUSTICE L. SHELLY-WILLIAMS**
**THE HONOURABLE MRS. JUSTICE S. WOLFE-REECE**
**THE HONOURABLE MRS. JUSTICE T. CARR**

**IN THE MATTER OF** the Jamaica (Constitution) Order in Council 1962

**AND**

**IN THE MATTER OF** the application pursuant to section 19 of the Jamaica (Constitution) Order in Council 1962

| | | |
|---|---|---|
| **AND** | **FREEDOM COME MINISTRIES INTERNATIONAL LIMITED** | **CLAIMANT** |
| **AND** | **THE ATTORNEY GENERAL OF JAMAICA** | **DEFENDANT** |

**FULL COURT**

**Mr. Hugh Wildman & Mr. Duke Foote, instructed by Hugh Wildman and Company for the Claimant**

**Ms. Lisa White and Dimitri Mitchell instructed by the Director of State Proceedings for the Defendant**

**Heard: May 6 and September 25, 2024**

**CONSTITUTIONAL LAW – The Jamaica (Constitution) Order in Council, 1962, section 48 and 49 – Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, sections 17(1) and 20 – Whether section 26(2) of the Disaster Risk Management Act breaches the Claimant's right to freedom of religion guaranteed by section 17(1) of the Charter – Whether breach of the right to freedom of religion by section 17(1) of the Charter is demonstrably justified in a free and democratic society – Whether Regulations under section 26(2) of the Disaster Risk Management Act must comply with section 20 of the Constitution in relation to state of public emergency – Whether section 26(2) of the Disaster Risk Management Act to restrict right to freedom of religion guaranteed by section 17(1) of the Charter is a constitutional amendment in accordance with section 49 of the Constitution – Whether section 26(2) of the Disaster Risk Management Act breaches the separation of powers doctrine – Whether to award damages for breach of constitutional right to freedom of religion – Disaster Risk Management Act, section 26(1) and (2)**

**SHELLY-WILLIAMS SNR.P J, WOLFE-REECE J, CARR J**

**BACKGROUND**

**[1]** The Claimant is registered as a limited liability Company under the Companies Act of Jamaica. The representative of the Claimant averred that it has a membership of over 10,000 persons both nationally and internationally. The purpose of the Claimant was identified as promoting religious activities in and around the community of 51 Molynes Road Kingston 10 in the parish of St. Andrew. The Claimant has approached this Court by filing a claim which seeks relief under section 19 of the Jamaica (Constitution) Order in Council 1962.

**[2]** The Claimant contends that with the emergence of the Covid 19 pandemic the Government of Jamaica amended the Disaster Risk Management Act (DRMA) which sought to implement provisions to address issues directly relevant to the containment and spread of COVID 19 within our borders. They sought to move

this Court to make declarations that the amendments to the DRMA infringed on its democratic right of freedom of movement and their right to engage in religious activity as is guaranteed by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011. (The Charter)

**[3]** The affidavit evidence of the Claimant indicated that due to the restrictions imposed by the Government during the COVID 19 pandemic, the number of attendees at their services was curtailed, and they were unable to engage in the usual activities for which the company was established.

**THE CLAIM**

**[4]** The Amended Fixed Date Claim Form filed on November 5th, 2021, seeks the following Orders: -

1. A Declaration that Section 26(2) of the Disaster Risk Management Act (No. 1 of 2015), and the amendments thereunder and thereto, are in conflict with Section 20 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, rendering the said Section 26(2) and the amendments thereunder and thereto, illegal, null and void and of no effect.

2. A Declaration that the purported restriction of the Claimant's right to freedom to express its religious practices, as guaranteed under Section 17(1) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 by the Defendant, through the amendments and regulations promulgated under Section 26(2) of the Disaster Risk Management Act, is illegal, null and void and of no effect.

3. A Declaration that any restriction on the Claimant's right to freedom to express its religious practices, as guaranteed under Section 17(1) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 must comply with the provisions of Section 49 of the Constitution of Jamaica.

4. A Declaration that the provisions of the Disaster Risk Management Act and in particular, Section 26(2) and the amendments thereunder and thereto, fail to meet the demonstrably justified in a free and democratic society, as measures enacted under the Disaster Risk Management Act are already provided for under Section 20 of the Charter of Fundamantal Rights and Freedoms (Constitutional Amendment) Act 2011, rendering the said provisions of Section 26(2) and the Amendments thereunder and hereto illegal null and void and of no effect.

5. A Declaration that the failure of the Defendant to invoke the provisions of Section 20 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 by having the Governor General proclaim a State of Emergency, in restricting the Claimants right to freedom to express its religious practices, as guaranteed under Section 17(1) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, renders the measures implemented by the defendant under Section 26(2) of the Disaster Risk

Management Act and the amendments thereunder and thereto, illegal null and void and of no effect.

6. A Declaration that in the absence of a proclamation of the Governor General declaring a State of Emergency under Section 20 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, actions taken by the Executive to control the outbreak of the Covid -19 pandemic under Section 26 (2) of the Disaster Risk Management Act and the amendments thereunder and thereto are illegal, null and void and of no effect.

7. A Declaration that Section 26 (2) of the Disaster Risk Management Act and the amendments thereunder and thereto breach the Separation of Powers doctrine which under pins the Constitution, in particular;

    a. The Act, and the amendments thereunder and thereto, make no reference to the authority of Her Majesty's representative; namely the Governor General, in the promulgation of orders and or regulations made pursuant to the Act and the amendments thereunder and thereto.

    b. Make no reference or no provision for the intervention of Her Majesty or the Parliament of Jamaica, in any extension and/ or renewal of the provisions of any order and or regulation under the said Act and the amendments thereunder and

thereto, and by focusing the concentration of power to make such orders and/ or regulations in a single Minister under the Act and the amendments thereunder or thereto.

8. An Order striking out Section 26(2) of the Disaster Risk Management Act and the amendments thereunder and thereto as breaching the Constitution aforesaid and an order for assessment of damages against the Defendant in favour of the Claimant.

**ISSUES**

**[5]** The main issues for consideration are as follows:

1. Whether the Attorney General is a proper party to these proceedings.
2. Whether Amendments and Regulations promulgated under Section 26(2) of the Disaster Risk Management Act restricted the Claimant's right of freedom to express its religious practices and breaches the Claimant's right to freedom of religion guaranteed by section 17(1) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.
3. Whether the restrictions to gathering limits breached the Claimant's right to freedom of religion guaranteed by section 17(1) of the Charter and if so, is it demonstrably justified in a free and democratic society.
4. Whether the Regulations promulgated under section 26(2) of the DRMA could only have been made under section 20 of the Constitution in relation to a state of public emergency and therefore section 26(2) of the DRMA is unconstitutional, null and void.

5. Whether the Government should have promulgated restrictions under the Public Health Act (PHA) as opposed to the DRMA.

6. Whether the enactment of section 26(2) of the DRMA restricts the Claimant's right to freedom of religion guaranteed by section 17(1) of the Charter and if it does, is it a constitutional amendment that is non-compliant with section 49 of the Constitution, therefore rendering it unconstitutional, null and void.

7. Whether the enactment of section 26(2) of the DRMA breaches the separation of powers doctrine and is therefore unconstitutional, null and void.

8. Whether the Claimant should be awarded damages for breach of its constitutional right to freedom of religion guaranteed by section 17(1) of the Charter.

**Issue 1: Whether the Attorney General is a proper party to these proceedings**

**[6]** The Defendants have raised the issue that the Attorney General is not a proper party to the claim. Counsel for the Defendant argued that any such claim must be brought against the decision maker. She relied on Section 13 of the Crown Proceedings Act and the authorities of **Minister of Foreign Affairs v. Vehicles and Supplies Limited**[1] and **George Neil v The Attorney General of Jamaica**[2]

**[7]** Mr. Wildman argued that the Attorney General is properly named as the Defendant as the claim concerns the actions undertaken by the Prime minister and the Minister of Health.

**Law and Analysis**

---

[1] [1991]1WLR 550
[2] [2022]JMFC Full 06

**[8]** The first issue to be addressed is whether the Crown Proceedings Act provides that the Attorney General is the proper in cases brought against the Crown or an agent or servant of the Crown. Section 13 (1) & (2) Crown Proceedings Act states

> *1- Civil proceedings by the Crown shall be instituted by the Attorney General.*
>
> *2- Civil proceedings against the Crown shall be instituted against the Attorney General.*

**[9]** In the case of **Davidson v The Scottish Ministers** [2005] S.C.L.R. 249 the House of Lords was called upon to decide whether the Crown Proceedings Act applied to Public cases. Lord Nicholls of Birkenhead opined in paragraphs 15 to 18 of the Judgment that it did not. Lord Nicholls stated: -

> *15.In English law the phrase 'civil proceedings' is not a legal term of art having one set meaning. The meaning of the phrase depends upon the context. For instance, the phrase is often used when contrasting civil proceedings with criminal proceedings. So used, and subject always to the context, civil proceedings will readily be regarded as including proceedings for judicial review.*
>
> *16. This usage was not intended in the 1947 Act. That is clear beyond doubt. Proceedings on the Crown side of the King's Bench Division were the predecessors to applications for judicial review, and the definition of 'civil proceedings' in section 38 of the Act states expressly that 'civil proceedings' does not include proceedings on the Crown side. Thus section 21 was not applicable to Crown side proceedings.*
>
> *17. This is not surprising. Crown side proceedings were the subject of legislative attention and amendment in sections 7 to 10 of the Administration of Justice (Miscellaneous Provisions) Act 1938. Orders of mandamus, prohibition and certiorari were substituted for the ancient writs correspondingly named. Informations in the nature of quo warranto were replaced by injunctions. Rules of court were to be made prescribing the procedure for obtaining the new orders and the new form of injunctive relief. The 1947 Act was aimed at a different target, where reform was overdue.*
>
> *18. Accordingly, with one immaterial exception in section 25, Crown side proceedings were not the subject of reform by the 1947 Act. The remedies available in Crown side proceedings were not affected by the Act. Prerogative writs and orders, including mandamus, had long been issued against officers of the Crown: see Lord Parker CJ in R v Commissioners of Customs and Excise, Ex*

*p Cook [1970] 1 WLR 450, 455. The 1947 Act did not touch this jurisdiction.*

**[10]** The question that arises from the decision of the House of Lords is who then should be the named Defendant, when the Constitutional rights of persons are alleged to be breached by representatives, or servants of the state? The answer to that question can only be answered by common law. In the case of **Maharaj v Attorney-General of Trinidad and Tobago (No 2) Privy Council** [1979] AC 385, the issue was whether the Attorney General was the proper party to a claim for a breach of the constitutional right of an attorney that was sentenced to seven days in prison for contempt of court. The case concerned the breach of the right to liberty other than by due process. Lord Diplock delivering the decision of the Board stated at paragraph 11 of the decision that: -

*"It was argued for the Attorney-General that even if the High Court had jurisdictions, he is not a proper respondent to the motion. In their Lordships' view the Court of Appeal were right to reject this argument. The redress claimed by the appellant under s 6 was redress from the Crown (now the state) for a contravention of the appellant's constitutional rights by the judicial arm of the state."*

**[11]** This position was similarly taken by our Court of Appeal in the case of **Grant and others v Director of Public Prosecutions** 30 WIR 246. This case concerned an application to the Full Court for constitutional redress under section 25 of the constitution. The applicant contended that due to publicity surrounding the case their right to a fair trial by an independent and impartial tribunal was being or was likely to be contravened. The application to the Constitutional court was refused and the applicants then appealed to the Court of Appeal. One issue that had been raised before the Court of Appeal was whether the Attorney General ought to be named as a party to the proceedings. Carberry JA at page 277 of the decision stated: -

*There remains the question of whether the Attorney-General, as a representative of the State, should have been a party to these proceedings? Our considered view on that question and the other arguments canvassed above is set out in our interim judgment of 12th December 1978. There we said:*

*'Finally, we are of the view that the essential nature of these proceedings is an allegation that the judicial system is likely to fail in its obligation under the Constitution to afford to the appellants a fair hearing by an impartial tribunal. The judiciary or the judicial system is itself an arm of the State. The proceedings, at least in so far as they allege contravention of s 20 of the Constitution, therefore involve an .allegation against the State itself and, as such, were properly brought against the Attorney-General. We are therefore of the view that the court below fell into error in dismissing the Attorney-General from the proceedings in limine. '*

**[12]** The case of **Charles v The Attorney General of Trinidad and Tobago** [20022] UKPC 29 concerned a case where the appellant had been charged for murder. His case was tried seven years after he was initially charged. A preliminary examination had been commenced but had to be started de novo before a second judge. The judge dismissed his murder case at the no case submission stage. Mr Charles then filed a claim for breach of his constitutional right of the protection of the law. The Claimant sought compensatory damages, vindicatory damages as well as legal fees. Lord Hamblen JSC in handing down the decision of the Board stated at paragraphs 42 and 43 that:

> *42. Constitutional motions are brought against the State with the Attorney General being joined as a notional party. The claimant does not have to assert that a specific State body, or that individuals within such a body, are responsible for the breach of his or her constitutional rights. What matters is establishing that the State is so responsible.*
>
> *43. The appellant's case clearly alleged that the State was responsible for the alleged breach of his constitutional rights and how it was so responsible. In particular, the State bore responsibility for the "colossal misstep" (see para 19 above) which resulted in the cutting short of the first preliminary inquiry and the need to start a second preliminary inquiry de novo and the consequential prejudice and unfairness suffered by the appellant. That prejudice was not limited to the refusal of the State to pay the legal fees of the appellant's counsel of choice. This is made clear, for example, by the claims made for both compensatory and vindicatory damages.*

**[13]** As it relates to cases of Judicial review the court is aware of the case of **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd. and another** [1991] 1 WLR 552 where Lord Oliver at page 555 para. opined that

> *"[T]heir Lordships entertain no doubt whatever that the Court of Appeal was correct in concluding that the proceedings were not "civil proceedings," as defined by the Crown Proceedings Act, and that the minister and not the Attorney-General was the proper party to proceedings instituted for the purpose of reviewing the exercise of his statutory powers."*

**[14]** However, in the latter case of **John Mussington and another v Development Control Authority and others (Antigua and Bermuda)** [2024] UKPC3 the Privy Council appeared to have adopted a slightly different approach to judicial review cases. This case concerned the building of an airstrip. This was a claim for judicial review; however, it involved decisions made by the Cabinet in the construction of the airstrip. The appellant filed an application for Judicial Review and on appeal to Court of Appeal of the Eastern Caribbean, it was found that he did not have the standing to bring the claim. The Attorney General submitted to the Board that they ought not have been joined as a party to the claim. Lord Boyd, on behalf of the Board found that: -

> *"34. The Attorney General submits that he is not a proper party to the judicial review proceedings as the Government of Antigua and Barbuda did not take any of the impugned decisions: Bahamas Hotel Maintenance & Allied Workers Union v Bahamas Hotel Catering & Allied Workers Union [2011] UKPC 4.*
>
> *35. The Board is satisfied that the Attorney General, as the nominal representative of the Government of Antigua and Barbuda, is a proper party to the proceedings. The decision to build an airport on Barbuda was taken by the Cabinet. The Government made the application for the development permit on 13 July 2018. It is the holder of the development permit and has a clear interest in any remedy that may be imposed if the appellants are successful."*

**[15]** In the case at bar the Claimant is challenging the constitutionality of the amendments and regulations promulgated under the Disaster Risk Management Act passed by Parliament. The claim is a challenge to the provisions empowering the Prime Minister to declare whole or parts of Jamaica a disaster area, as well as to direct the enforcement of measures to guard against or mitigate any risk. Their contention is that the provisions, specifically section 26(2) conflicts with the Constitution. Counsel for the Defendant had urged the court to adopt the position laid down in the cases of **George Neil and Kevin Simmonds**. In the case of

**George Neil** the court was clear in its findings that the Attorney General was not a proper party in those particular circumstances. The case of **Kevin Simmonds** concerned an application for Judicial review and what was being challenged was the Minister's exercise of his statutory powers.

**[16]** We are of the view that the circumstances of this case are distinguishable from the of the cases of **George Neil and Kevin Simmonds**. We find that where there is a challenge to actions taken by the Government, that in the absence of legislation to the contrary, the Attorney General, as the principal legal adviser must be the proper party in the claim. It can also be concluded, based on the dicta from the cases from the Court of Appeal and the Privy Council, that in the absence of legislation to the contrary, the Attorney General is a proper party in Constitutional claims, concerning the Crown, agents and servants of the state, or in cases where the parties are immune from suit.

**Issue 2: Whether Amendments and Regulations promulgated under Section 26(2) of Disaster Risk Management Act restricted the Claimant's right of freedom to express its religious practices and breaches the Claimant's right to freedom of religion guaranteed by section 17(1) of the Charter**

**[17]** Learned Counsel Mr. Widman submitted that the Government of Jamaica wrongly and unconstitutionally utilized the provisions of the DRMA, which has encroached on the Claimant's right to freedom of worship. He argued that the agents of the state, including the police, acted on these implemented measures to restrict the Claimant's right to freedom of worship and that these measures collided with the Constitution. Mr. Wildman's position was that the Claimant's right to freedom of worship under section 17(1) of the Charter was infringed.

**[18]** The Claimant relied on the affidavit of its Director, Jefferey Shuttleworth, filed April 19, 2021. Mr Shuttleworth averred that the Claimant would:

a. usually conduct church services 7 days per week.

b. provide support services to members of the community,

c. provide healing to persons who are afflicted,

d. provide clothing food and other benevolent services in the community.

**[19]** He indicated that the Claimant's membership at worship was significantly affected due to the promulgation of the questioned regulations. The Claimant's position was that the effect of these restrictions on gatherings and the inability of persons over 60 years to attend services affected their ability to cater to the religious needs of its congregation.

**[20]** Mr. Shuttleworth in his affidavit concluded and sought to make the distinction that the Claimant did not take issue with the Government of Jamaica taking steps to respond to the Covid-19 pandemic but contended that the utilization of the DRMA to address the pandemic was a clear breach of the Claimant's Constitutional rights.

**[21]** Ms. White, learned Counsel for the Defendant, in contrast submitted that the measures implemented by the Government of Jamaica under section 26(1) of the DRMA did not infringe the Claimant's right to freedom of religion or worship guaranteed by section 17(1) of the Charter. Ms. White contended that the Government did not seek to prohibit religious gatherings or practices but instead, recommended guidelines which were solidified by the Orders. Persons were still free to conduct religious services, but just not in the normal numbers. The restrictions, she argued were only on the number of persons who were allowed to gather, meet and worship at any one time. Counsel further argued that based on the guidelines and the Orders, the Government demonstrated that it respected a citizen's right to freedom of religion by taking steps to facilitate the continued exercise of the right and therefore the right was not engaged or contravened. Counsel relied on the case of **Virgo Dale and ZV v Board of Management of**

**Kensington Primary School, Minister of Education, Attorney General of Jamaica and Office of the Children's Advocate**[3] [2020] JMFC Full 6.

## LAW & ANALYSIS

**[22]** The Disaster Risk Management Act provides:

*Section 26(1) Where the Office reports to the Minister –*

*(a) the existence of any local condition in any part of Jamaica tending to endanger public safety; or*

*(b) that any part of Jamaica appears to be threatened with or affected by a natural or anthropogenic hazard and that measures apart from or in addition to those specifically provided for in this Act, should be taken promptly,*

*the Minister shall give written notice thereof to the Prime Minister*

*(2) The Prime Minister may by order published in a daily newspaper published and circulating in Jamaica or by other broadcast medium*

*(a) declare the whole or any part of Jamaica to be a disaster area or a threatened area and the Order shall be published in the Gazette*

*(b) direct the enforcement of any measures recommended by the Office or any other measures that the Prime Minister thinks expedient for –*

*(i) removing or otherwise guarding against such condition or hazard and the probable consequences thereof; or*

*(ii) mitigating as far as possible any such condition or hazard;*

*(c) require the whole or any part of a declared areas to be evacuated.*

The Charter of Fundamental Rights & Freedoms (Constitutional Amendment) Act 2011 Section 17 (1) states that –

*Every person shall have the right to freedom of religion, including the freedom to change his religion and the right, either alone or in community*

---

[3] [2020] JMFC FULL 6

*with others and both in public and in private, to manifest and propagate his religion in worship teaching practice and observance.*

**[23]** There is no dispute that the Constitution of Jamaica guarantees to every citizen the right to freedom of religion. Section 17 (1) states that this right includes the freedom to change one's religion as well as the ability to spread or promote one's religion by worship, practice or observance in public and or private.

**[24]** The Claimant averred that it is a limited liability company but does not state the type of religion, group or activity that it is affiliated with or practised. The Defendant did not challenge the Claimant on this point and as such the judgment is written on the premise that the Claimant was engaged in religious activities and had standing to file this claim. We adopt this approach based on cases such as the Canadian case of **R V Big M Drug Mart Ltd** (1985) 13 CRR 64, **(Big M)** which sought to define which person or entity could challenge the right to religion. It was stated at paragraph 36 of **Big M** that: -

> *Standing and jurisdiction to challenge the validity of a law pursuant to which one is being prosecuted is the same regardless of whether that challenge is with respect to ss. 91 and 92 of the Constitution Act, 1867 or with respect to the limits imposed on the legislatures by the Constitution Act, 1982.*

**[25]** The learned Judges went on to opine at paragraph 40 of their decision that a corporation can challenge the right to freedom of religion. Paragraph 40 states: -

> *Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant. The respondent is arguing that the legislation is constitutionally invalid because it impairs freedom of religion--if the law impairs freedom of religion it does not matter whether the company can possess religious belief. An accused atheist would be equally entitled to resist a charge under the Act. The only way this question might be relevant would be if s. 2(a) were interpreted as limited to protecting only those persons who could prove a genuinely held religious belief. I can see no basis to so limit the breadth of s. 2(a) in this case.*

**[26]** The law Lords went on to opine in paragraph 41 that: -

> *A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the Charter and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or*

*whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue.*

**[27]** The first issue to be addressed in deciding whether the right to freedom of religion has been breached is to define religion. Religion was defined in the case **Big M** as:

> *"the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal…' And at 105: '(E)very Individual (is) free to hold whatever religious beliefs his or her conscience dictates, provided. Inter alia, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.'*

**[28]** Article 9 of the European Convention provides that:

> *"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
>
> *2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."*

**[29]** Assistance can be gleaned from the United States Supreme Court of **Braunfeld v Brown**, 366 U.S. 599 (1961) at page 607 Chief Justice Warren wrote that: -

> *Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.*

**[30]** Practical examples as to the manner in which freedom of religion can be breached can be gleaned from the Privy Council case of **Commodore Royal Bahamas Defence Force v Laramore** [2017] UKPC 13. This case arose out of a Parade referred to as Coloureds parade and a section of the parade referred to as

‘Parades Off Cap’ and ‘Stand at Ease’. This section of the parade concerned a Christian Prayer. From 1993 to 2006 persons who were not of the Christian faith were allowed to forgo this section of the parade. In 2006 a Memorandum was promulgated that indicated that everyone was to remain throughout the duration of the parade. The appellant changed his religious belief from Christianity to Islam and requested to be excluded from the Christian portion of the parade. In 2007 the appellant left the parade during Christian prayers and disciplinary proceeding were instituted against him. He later filed a claim for breach of right to freedom of religion. Lord Mance is giving the decision of the Board reference and found favour with paragraphs 8 and 10 of the case of **Scott v R** [2004] 123 CRR (2d) 371 which stated that: -

> *“8. The order that was given … was to show ‘respect’ for what was being done and not mere passive toleration. That is to say, it was designed to constrain him to make a public gesture of approval for a religious ceremony in which he did not believe. …*
>
> *10. The fact that the practice of pronouncing prayers at parades and requiring some form of public assent thereto has been hallowed by a tradition of many years in the military as well as other circles cannot justify a breach of the appellant’s Charter rights. We emphasize that what was required of the appellant was active participation in the religious ceremony with which he disagreed. The question of enforced passive participation by mere presence is an entirely different issue and one that we do not reach today.”*

**[31]** Lord Mance went on to state that at paragraphs 25 and 28 of his judgement that: -

> *25. As in Scott, so in the present case the actual issue is whether Mr Laramore was hindered in the enjoyment of his freedom of conscience by being required to take part in a prayers ceremony which included a “caps off” order. It is sufficient for the purposes of this appeal that the Board considers that this positive requirement constituted such a hindrance. The evidence was also addressed to this, the actual situation, rather than the situation as it might have been or be, if the order had been simply to stand on parade during the prayers with cap on, as those of Jewish or Sikh faith were allowed to do by the Canadian Forces’ dress instruction in Scott.*
>
> *28.For the reasons given, the Board considers that Mr Laramore was hindered by the 2006 Memorandum in the enjoyment of his freedom of conscience during the Page 16 regular colours parades during which prayers were said. That leaves for consideration the issue of justification.*

**[32]** The fundamental right of freedom of religion encompasses the right to a belief as well as the right to express same publicly or privately. There is no evidence before the Court that restrictions on gathering limits, pursuant to Guidelines/Orders made in furtherance of containing the spread of Covid-19, interfered with any member of the Claimant from holding a religious belief or expressing same. We find that the evidence placed before this Court failed to demonstrate that the limitations imposed on gathering numbers engaged the right of freedom of religion. We find that on a balance of probabilities the Claimant has failed to show that the right to freedom of religion was engaged by the actions taken under the DRMA.

**Issue 3: Whether the restrictions to gathering limits breached the Claimant 'right to freedom of religion guaranteed by section 17(1) of the Charter is demonstrably justified in a free and democratic society**.

**[33]** Mr. Wildman submitted that the measures implemented under section 26(2) of the DRMA, breached the Claimant's right to freedom of religion under section 17(1) of the Charter and were not demonstrably justified in a free and democratic society. Counsel supported this submission by relying on the principles that were applied in the case of **Director of Public Prosecution of Jamaica v Mollison**[4].

**[34]** Ms. White submitted that if the Court disagrees with the Defendant's position that there was no breach of the right to freedom of religion, then the restriction of the freedom of religion was demonstrably justified in a free and democratic society. Counsel urged the Court to the proportionality test, as laid down in the case of **R v. Oakes**[5]. Ms White submitted that this test details what is to be determined in concluding the allowable restrictions in a free and democratic society.

---

[4] [2003] UKPC 6
[5] [1986]1 SCR 103

**[35]** Counsel for the Defendant relied on the cases of **Julian J Robinson v Attorney General**[6] and **Jamaica Bar Association v The Attorney General and the General Legal Council**[7] para 512 – 521 per McDonald-Bishop JA. Ms. White submitted that in the event the court found that the Claimant's right to Freedom of Religion had been breached, then it was justified as a necessary response to the Covid-19 pandemic in the form of the measures under the DRMA. Ms White's position was that the measures were to mitigate the effects of the highly contagious and infectious disease. She urged the Court to find that based on the modes of transmission of the disease, the measures enforced were necessary and therefore proportionate to the legitimate aim of curtailing and mitigating the effects of the disease to prevent large-scale infections and save lives. Therefore, the measures contained in the Guidelines/Orders made under section 26(2) of the DRMA and the amendments and regulations promulgated thereunder were demonstrably justified in a free and democratic society and lawful.

**[36]** Counsel for the Defendant drew the Court's attention to the case of **Dominic Suraj and others v Attorney General of Trinidad and Tobago; Satyanand Maharaj v Attorney General of Trinidad and Toboago**[8]**.** Ms White argued that the Privy Council having considered the covid crisis, utilised the proportionality test to conclude that the measures taken were constitutional. Counsel highlighted paragraph 51 to support her position.

**[37]** Learned Counsel Ms. White submitted that the four prongs relating to the proportionality test had been satisfied, and as such the Claimant's rights, even if it had been breached, it was a breach that was necessary in a free and democratic society. The Defendants relied on the affidavit evidence of Mrs. Bisasor-McKenzie,

---

[6] [2019] JMFC Full 04

[7] [2020] JMCA Civ 37

[8] [2022 UKPC 26

who averred that based on the research, there was significant risk to life through the spreading of the virus.

## LAW AND ANALYSIS

**[38]** We have already determined that the Claimants have failed to show on a balance of probabilities that their right to freedom of religion as pleaded has been engaged. In the event, however that the right had been breached, we will consider whether it was justifiable in a free and democratic society.

**[39]** The Canadian Court of **Oakes** sets out the criteria that must be met for the Court to find that there is a justification to limit the guaranteed constitutional rights in a free and democratic society. They are:

1. The objective which the measure or measures responsible for limiting a Charter right are designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom.

2. Once a sufficiently significant objective is recognised, the party seeking to limit the Charter right must show that the means chosen are reasonable and demonstrably justified. The courts will be required to balance the interests of the persons or groups whose rights are or are likely to be infringed, with those of society.

**[40]** In the Jamaican case of **Julian Robinson (supra**), in addressing the issue of whether the provisions of the National Identification and Registration Act would likely violate certain fundamental rights Sykes, C.J. explored the principles set out in the **R v Oakes.** The learned Chief Justice set out at paragraph 108 the considerations when testing proportionality. The Chief Justice stated at paragraph 108 that:

> *a) the law must be directed at a proper purpose that is sufficiently important to warrant overriding fundamental rights or freedoms;*

> *b) the measures adopted must be carefully designed to achieve the objective in question, that is to say rationally connected to the objective which means that the measures are capable of realising the objective. If they are not so capable then they are arbitrary, unfair or based on irrational considerations;*
>
> *c) the means used to achieve the objective must violate the right as little as possible;*
>
> *d) there must be proportionality between the effects of the measures limiting the right and the objective that has been identified as sufficiently important, that is to say, the benefit arising from the violation must be greater than the harm to the right.*

**[41]** Sykes CJ concluded that the Court must assess the requisite breach and to balance the resulting consequences. He stated at paragraphs 109-110:

> *[109] In respect of (d), if the consequences of the measure on individuals or groups are very severe then the objective must be shown to be of great importance in order to justify the severity of the consequences and if this is not shown then the law will be unconstitutional.*
>
> *[110] It is at (d) that one finds the courts engaging in a balancing exercise. What is it that is balanced? The balancing that is being done arises because on the one hand there is a limiting law and on the other is the constitutional right or freedom. The court takes account of the benefit to be gained on the one hand and the harm on the other. What this requires is an assessment of whether the benefit to be gained by the violation is outweighed by the severity of the harm to persons. If the harm caused is greater than the benefit, then the law is unconstitutional. This component of the proportionality test is asking that there be a proper relationship between benefit to be gained and harm caused.*

**[42]** In applying the accepted legal principles of proportionality to this case, we have examined the affidavit evidence of Dr Jacqueline Bisasor McKenzie.[9] Based on the affidavit evidence it was indicated that the purpose of promulgating the Regulations/Orders under the DRMA were to:

a. address the management of pending the disaster,

[9] Filed January 27, 2022

b. seek to mitigate disaster,

c. reduce the risks associated with disaster,

d. and all other issues associated with the disaster.

**[43]** In any country the government carries the responsibility to ensure the safety of its people. In executing this responsibility, the implementation of laws and measures is a necessary tool.

**[44]** The circumstances surrounding the COVID-19 pandemic were unprecedented. The affidavit evidence of Dr Jacqueline Bisasor McKenzie was that the Government had gathered information from several countries. There was information as to how contagious the virus was and the way it was being spread. There was also information that there were confirmed cases of persons who were infected with the virus in Jamaica. Based on the information that had been available, the Government then made decisions for the benefit of the entire country to combat this infectious virus. The question that arises is whether, based on the information that was available to the Government, the measures taken were proportionate?

**[45]** On the affidavit evidence of Dr Bisasor McKenzie, the Chief Medical officer of Jamaica, she outlines that the measures of containment were based on scientific evidence and research. She outlined the mode of transmission of the virus, and at paragraph 8 of her affidavit she stated:

> *"The "Three C's" are used to describe settings where transmission of COVID 19 virus spreads more easily. These are:*
>
> *Crowded places*
>
> *Close Contact settings especially where persons have conversations in close proximity.*
>
> *Confined and enclosed spaces with poor ventilation*

She gave extensive evidence and data collected in other countries that showed the high rate of infection after persons congregated in religious gatherings. She opined that the response to COVID-19 pandemic had to be rapid and effective and non- pharmaceutical interventions have been shown as effective in reducing the transmission of the virus.

**[46]** What were the measures that were instituted by the Government based on the information in their possession? There were numerous measures promulgated which we would not be able to reproduce in this judgment. A sample of such measures was taken from Section 19(1) of The Disaster Risk Management (Enforcement Measures) (No.12) order, 2020 which states that:

> *During the period from September 8, 2020, to September 30, 2020, the following provisions apply in respect of gatherings at places of worship (which shall be construed as meaning churches or other official places of worship however described)—*
>
> > *(a) in respect of gatherings indoors at the place of worship, the number of persons permitted to gather at any time shall not exceed one person for every 40 square feet of the area concerned, and (for the avoidance of doubt) gatherings outdoors conducted by the place of worship shall not exceed—*
> >
> > > *(i) 15 persons at a time, during the period from September 8, 2020, to September 22, 2020; and*
> > >
> > > *(ii) 20 persons at a time, during the period from September 23, 2020, to September 30, 2020;*
> >
> > *(b) paragraph 12(b) and (c) (physical distancing and wearing of masks) continue to apply;*
> >
> > *(c) the temperature of each person seeking entry onto the premises of the place of worship shall be checked, and no person whose temperature when so checked gives rise to a suspicion that the person is ill shall be permitted entry;*
> >
> > *(d) hand washing, or hand sanitization, facilities shall be provided at each entrance to the place of worship, and each person seeking entry shall wash or sanitize that person's hands upon entry;*
> >
> > *(e) entrance to and exit from the place of worship shall be controlled so that—*

*(i) a physical distance of at least 182.88 centimetres (or 6 feet) is maintained in respect of each person; and no physical contact (such as hugs or handshakes) occurs between the persons:*

*(f) between each service conducted at the place of worship-*

*(i) there shall be a break of sufficient duration to ensure that physical distancing requirements of this section can be complied with; and*

*(ii) the pace of worship shall be sanitized;*

*(g) choir gatherings and performances shall not be permitted at the pace of worship; and*

*(h) a person who becomes ill, or exhibits flu-like or respiratory symptoms, while at the place of worship shall not be permitted to remain at the place of worship.*

**[47]** The purpose behind the regulations and Orders were to stop the spread of an infectious virus for the entire country. The measure was carefully designed so as not to stop the activities of the churches/religious groups, as it allowed for the services as well as outreach programs to continue. What the Government did, was merely to limit the numbers of persons who attended in church, in a confined space, to reduce the spread of the virus. It is accepted that the Claimant, had a congregation of 10,000 persons, and limiting the number of persons who could attend their service to 50, in person, could possibly have some effect on the Claimant. However, the Claimant gave no evidence as to whether they were unable to have service electronically, or by any other means. The question is whether the preference to have large church service was more important than keeping the congregants safe from the possibility of being infected by the COVID-19 virus. We find that the benefit of limiting the number of persons at a religious service was greater that the possibility of the congregants being exposed to and possibly being infected by the virus and later spreading it to other persons.

**[48]** We find, that based on the evidence, the measures adopted were carefully designed to achieve the objective of reducing the rate of transmission. It is

accepted that the onslaught of the pandemic on the world called for a quick response to containment to save lives. Whilst the measures might have generally interfered with the rights of citizens, the benefit from the restriction on gathering limits was greater than the harm to the fundamental rights protected by the Charter and was demonstrably justified.

**Issue 4: Whether the Regulations promulgated under section 26(2) of the Disaster Risk Management Act in response to the COVID 19 pandemic conflicts with section 20 of the Constitution in relation to a state of public emergency and therefore section 26(2) of the DRMA is unconstitutional, null and void**

**[49]** Mr. Wildman argued that section 26(2) of the DRMA collides with section 20 of the Constitution because the enactment of the said DRMA was not done in accordance with the constitutional requirements of section 20.

**[50]** Counsel submitted that the fact that there was no declaration of a state of emergency and no declaration made by the Governor General, resulted in a breach of section 20 of the Constitution. Mr Wildman concluded this submission that the failure to comply with section 20 of the Constitution in the enactment of the amendment and Regulations/Orders thereunder, rendered same unconstitutional.

**[51]** Ms. White submitted that there are two state of public emergency (SOPE) regimes that exist, one under the Constitution and the other under the DRMA. She argued that they do not conflict with each other, and the Government of Jamaica may elect which regime to utilize in response to a public emergency. Counsel contended that there is no constitutional requirement that the Government's response to the Covid-19 pandemic must be by way of the SOPE mechanism in section 20 of the Constitution.

**LAW & ANALYSIS**

**[52]** Section 20 of the Charter, (the interpretation) section provides as follows:

***"period of public disaster"*** *means any period during which there is in force Proclamation by the Governor-General declaring that a period of public disaster exists;*

***"period of public emergency"*** *means any period during which*

*(a) Jamaica is engaged in any war;*

*(b) there is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; or*

*(c) there is in force a resolution of each House of Parliament supported by the votes of a two-thirds majority of all the members of each House declaring that democratic institutions in Jamaica are threatened by subversion;*

***"service law"*** *means the law regulating the discipline of a defence force or police officers.*

*(2) A Proclamation made by the Governor General shall not be effective for the purposes of subsection (1) unless it is declared that the Governor General is satisfied*

*(a) that a public emergency has arisen as a result of the imminence of a state of war between Jamaica and a foreign State;*

*(b) that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life;*

***(c) that a period of public disaster has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity, whether similar to the foregoing or not.***

*(3) A Proclamation made by the Governor General for the purposes of and in accordance with this section (a) shall~ unless previously revoked, remain in force for fourteen days or for such longer period, not exceeding three months, as both Houses of Parliament may determine by a resolution supported by a two-thirds majority of all the members of each House; (b) may be extended from time to time by a resolution passed in like manner as is prescribed in paragraph (a) for further periods, not exceeding in respect of each such extension a period of three months;' (c) may be revoked at any time by a resolution supported by the votes of a two-thirds majority of all the members of each House. (4) A resolution passed by a House for the purpose of paragraph (c) of the definition of "period of public emergency" in subsection (1) may be revoked at any time by a resolution of that House supported by the votes of a majority of all the members thereof. (5) The court shall be competent to enquire into and determine*

*whether a proclamation or resolution purporting to have been made or passed under this section was made or passed for any purpose specified in this section or whether any measures taken pursuant thereto are reasonably justified for that purpose.".*

**[53]** The Charter defines the circumstances that can be deemed to be periods of public emergency. One such circumstance is by way of proclamation by the Governor General that a SOPE exists. Pursuant to Section 20(2) for such a proclamation by the Governor General to be effective he must declare that he is satisfied that:

> *(a) that a public emergency has arisen as a result of the imminence of a state of war between Jamaica and a foreign State;*
>
> *(b) that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life;*
>
> ***(c) that a period of public disaster has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity, whether similar to the foregoing or not.***

**[54]** The Court accepts that the Constitution is the supreme law of the land, and that any legislation passed which conflicts with the provisions of the Constitution would be rendered null and void and without any legal effect. The provisions of Section 20 are not mandatory in nature. The DRMA also contemplates and gives authority to the Prime Minister if there is a disaster. This leads to the question as to whether there is a difference between Section 20 of the Constitution and the DRMA?

**[55]** A disaster is defined in the DRMA as:

> *"disaster" means the occurrence or threat of occurrence of an event or other calamity, whether caused by an act of God or otherwise, which –*
>
> *(a) Results or threatens to result in loss or damage to property, damage to the environment or death, ill health or injury to persons on a scale which requires emergency intervention by the state; and*
>
> *(b) May result from fire, accident an act of terrorism, storm, hurricane, pollution, disease, earthquake, drought, flood, the widespread dislocation of the essential services, or other calamity;*

**[56]** Section 26 of the DRMA empowers the Prime Minister to declare disaster areas where there are threats with or affected by a natural or anthropogenic hazard. This power emanates from a report made by the Office of Disaster Preparedness and Emergency Management to the Minister, who in writing must notify the Prime Minister.

**[57]** In the DRMA **"hazard"** is defined as natural or man- made phenomenon which is likely to cause physical damage economic loss or threaten life, well- being or property." In our assessment of the provisions of the DRMA, the Prime Minister is empowered with much wider powers to combat not only a disaster but also the threat of a disaster. This must be juxtaposed against the position in Section 20 of the Constitution where there is a requirement that an earthquake, hurricane flood fire outbreak of pestilence, or outbreak of any infectious disease has already occurred for a State of Emergency to be declared.

**[58]** The number of persons affected by the COVID-19 virus was quite small at the time when the Regulations/Orders were promulgated that sought to lessen and curtail the outbreak of the virus. This would fall into the category of a threat of a disaster as opposed to the actual occurrence of a disaster.

**[59]** We therefore cannot agree with Mr. Wildman's submissions in this regard. We do not accept that that use of the DRMA was a means of circumventing the Constitution. We find that there was no conflict between the provisions of the Section 20 and the DRMA.

**Issue 5: Whether the Government should have promulgated restrictions under the Public Health Act as opposed to DRMA.**

**[60]** Mr Wildman raised the issue as to whether the Covid 19 restrictions should have been managed under the Public Health Act (PHA) as opposed to the DRMA. The rational for this submission was that the PHA predates the Constitution and as such was preserved under the savings law clause in the constitution. Mr. Wildman argued that the case of **Suraj v AG** supports this position. Mr**.** Wilman made further

submissions that acknowledged that the PHA was only promulgated in 2015, however, he maintained that it was essentially the same Act that predated the Constitution and as such it was saved under the savings laws clause.

**[61]** Counsel for the Defendant argued that the DRMA was the appropriate Act to institute the Covid 19 restrictions. Ms. White's position was that the DRMA had a wider scope to address all the Covid 19 related issues. Ms Whie made further submissions that indicated that the 2015 PHA could not be deemed to have been saved by means of the savings law clause.

**LAW AND ANALYSIS**

**[62]** The Public Health Act of 2015 (PHA) has repealed and replaced the Public Health Law that had existed prior to the promulgation of the Constitution. The repealed and replaced PHA in fact has combined two Acts namely the Public Health Law and Vaccination Act. Mr. Wildman had argued in his further submissions dated the 13th of August 2024 that the PHA retained several of the sections of the Public Health Law and as such the savings law clause still applied to it. Mr. Wilman, however failed to indicate the sections of the Act that had been saved.

**[63]** The case that was relied on by both Counsel in relation to this issue was the Privy Council case of **Suraj (supra).** This is a case from Trinidad and Tobago where the issue to be decided was whether the Regulations passed under the Public Health Ordinance was unconstitutional. In the decision of **Suraj** the Court was called upon to determine whether the Public Health (2019 Novel Corona virus) Regulations, 2020 were constitutional. The Minister of Health in the twin island republic of Trinidad and Tobago made regulations under the Public Health Act which limited the numbers allowed to gather. Both Appellants were charged with breaches of the Regulations. It was their submission that the regulations were unconstitutional and inconsistent with fundamental human rights protected by the constitution including the right for respect for private and family life, freedom of

movement, freedom of conscience and religious belief and observance and freedom of association.

**[64]** Lord Sales and Lord Hamblen in delivering the judgement on behalf of the Board noted that the Regulations utilised by the Minister was not saved under the savings laws clause. The Law Lords accepted that the Public Health Ordinance predated the constitution and as such was saved under the savings laws clause. The Law Lords went on to state paragraphs 116 to 118 that: -

> *116 There is, however, an obvious and important distinction between an authorised executive or administrative act in the implementation of an existing law and the issue of regulations under such a law. Such regulations are themselves laws. Regulations such as the Rules are law and they are "new" rather than "existing" law unless they fall within the definition of existing law set out in section 6.*
>
> *117. Mr Roe further argued that unless the savings for existing law extended to regulations made under the Ordinance, the saving of the Ordinance as existing law would be deprived of any or any real effect. That is not the case. As the Board's analysis and conclusion on Issue (1) demonstrates, it is perfectly possible to issue regulations under the Ordinance which impinge upon but do not infringe rights under section 4 of the Constitution.*
>
> *118. Had it been necessary to determine this issue, the Board would therefore have concluded that the Rules were not saved under the exception for existing law set out in section 6 of the Constitution.*

**[65]** The Law Lords opined earlier in the said decision that the Regulations that were in issue were proportionate based on the Covid 19 pandemic. They stated at paragraph 101 that: -

> *101. On this aspect of the case the Board endorses the reasoning of Boodoosingh J at first instance. If his judgment had depended on this point, he would have found that the Rules were a proportionate response to the management of the pandemic in the circumstances which applied when they were promulgated and during the period they were maintained in place. As he explained in his judgment, the spread of Covid-19 had been "rapid and pervasive" with the result that healthcare systems were placed under great strain and many people lost their lives. Based on scientific advice, governments around the world, including in Trinidad and Tobago, felt the need to act quickly by implementing restrictions on rights and freedoms that would previously have been unthinkable. There was a need to respond urgently in the face of the pandemic, which called for*

*consideration of a range of economic, social and political factors in relation to which a significant measure of respect was to be accorded to the judgment of the executive and the legislature. The uncontradicted evidence of the Minister of Health, Mr Terrance Deyalsingh, and the Chief Medical Officer, Dr Roshan Parasram, was to the effect that the Rules were introduced on the basis of expert scientific advice which indicated that severe impacts would be likely to result if no action was taken. The evidence was that controlling gathering and enforcing social distancing were critical elements in a strategy to check the spread of the disease. The measures taken were similar to those taken in a range of other democratic states. The regulations were amended on several occasions and it was clear that there had been constant monitoring of the status of the virus in Trinidad and Tobago with adjustments being made in the light of that. At the same time, persons in the position of the appellants had procedural protections available to them, in terms of access to the courts to contest the lawfulness and constitutionality of the measures being taken.*

**[66]** The Board went on to find at paragraph 105 of the decision that: -

*105. There is good reason to think that the framers of the Constitution intended that the regime in the Constitution should not displace the regime in the Ordinance. Both regimes set out useful powers which provide the government with options about how to proceed in the face of a public health emergency. It would be undesirable to drive government to seek to suspend individual rights too readily by forcing it to use the powers under the constitutional regime. A government which decides to respond to a difficult public health issue cautiously and with restraint, by employing powers under the Ordinance which have to comply with the individual rights in section 4, should not then be exposed to legal challenges based on the contention that the President ought instead to have declared a public emergency under section 8. The public interest requires that the government should be able to respond flexibly and with confidence that the measures it takes will not be unduly at risk of legal challenge. The framers of the Constitution cannot have intended that the authorities would be presented with a difficult dilemma about which powers they should use in the face of a public health crisis.*

**[67]** We find that the Public Health Law that predated the constitution had been repealed and replaced by the Public Health Act of 2015. Mr. Wildman failed to point to any section of the PHA that would have been identical or even similar to the Public Health Law that pre-dated the constitution. The PHA, having been passed after the passage of the promulgation of the Constitution would be on the same level, and have the same status as the DRMA. It would have been left to the Government to decide which statute would best be utilised in addressing the COVID 19 pandemic.

**Issue 6: Whether the enactment of section 26(2) of the Disaster Risk Management Act to restrict the Claimant's right to freedom of religion guaranteed by section 17(1) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 is a constitutional amendment and therefore non-compliant with section 49 of the Constitution renders it unconstitutional, null and void**

**[68]** Mr. Wildman submitted that any amendment to the entrenched provision of the right to freedom of worship in section 17(1) of the Charter, must be undertaken in accordance with section 49 of the Constitution. He argued that the enactment of section 26(2) of the DRMA did not comply with the amendment mechanism in section 49 of the Constitution. The Claimant contends that there has been a circumvention of the required procedure to amend entrenched provisions of the Constitution by promulgation of the amendment to the DRMA. Counsel relied on two decisions of the Privy Council, **Suraj**[10] and **DPP v Mollison**[11].

**[69]** Mr. Wildman further submitted that the Defendant's evidence failed to address the issue of whether the measures under the DRMA complied with the Constitution and Public Health Act. Counsel argued that the cases of **Suraj and Maharaj** support their submission that the measures that exist under the Public Health Act and the emergency powers under the Constitution could have been utilized. Mr. Wildman's position was that the amendment of the DRMA promulgated thereunder should have been in accordance with section 49 of the Constitution. Mr. Wildman argued that the failure to do so renders the amendment and Regulations/Orders thereunder unconstitutional.

**[70]** Ms. White submitted that the amendment and Regulations/Orders under the DRMA are not unconstitutional as they are made in keeping with section 48 of the Constitution. She argued that Parliament is empowered under the Constitution to

---

[10] [2022]UKPC 26
[11] [2003]UKPC 6

make laws for the peace, order and good governance of Jamaica. The rights, although guaranteed, were not absolute and Parliament does have the power to interfere with those rights where it demonstrably justified to do so in a free and democratic society. Counsel concluded that the powers given to the Prime Minister under the DRMA may restrict fundamental rights, and that such restriction is not outside of the ambit of ordinary legislative activity.

**[71]** The Defendant contends that different pieces of legislation govern actions that may be taken on the emergence of disasters and there is no unconstitutionality in the Government electing one of those means afforded to it by the legislature. Ms. White argued that the Minister acted intra vires in promulgating the legislation, therefore the DRMA is not unconstitutional.

**LAW & ANALYSIS**

**[72]** Section 49 addresses alterations to the provisions of the Constitution. It provides as follows;

> *"49.(1)* ***Subject to the provisions of this section Parliament may by Act of Parliament passed by both Houses Constitution. alter any of the provisions of this Constitution or (in so far as it forms part of the law of Jamaica) any of the provisions of the Jamaica Independence Act, 1962.***
>
> *(2)* ***In so far as it alters- (a) sections*** *13, 14, 15, 16,* ***17****, 18, 19, 20, 21, 22, 23, 24, 25, 26, subsection (3) of section 48, sections 66, 67, 82, 83, 84,85, 86, 87, 88, 89,90, 91, 94, subsections (21, (3), (4), (3, (6) or (7) of section 96, sections 97, 98, 99, subsections (3), (41, (3, (6), (71, (8) or (9) of section 100, sections 101, 103, 104, 105, subsections (31, (4), (3, (6), (7), (8) or (9) of section 106, subsections (I), (21, (41, (3, (6), (7), (8, (9) or (10) of section 111, sections 112, 113, 114, 116, 11 7, 1 18, 1 19, 120, subsections (2), (3), (4), (5), (6) or (7) of section 121, sections 122, 124, 125, subsection (1) of section 126, sections 127, 129, 130, 131, 135 or 136 or the Second or Third Schedule to this Constitution; or*
>
> *(b)* ***section 1 of this Constitution in its application to any of the provisions specified in paragraph (a) of this subsection,***
>
> ***a Bill for an Act of Parliament under this section shall not be submitted to the Governor-General for his assent unless a period of three months has elapsed between the introduction of the Bill into the***

***House of Representatives and the commencement of the first debate on the whole text of that Bill in that House and a further period of three months has elapsed between the conclusion of that debate and the passing of that Bill by that House.***

*(3) In so far as it alters this section; sections 2, 34, 35, 36, 39, subsection (2) of section 63, subsections (2), (3) or (5) of section 64, section 65, or subsection (1) of section 68 of this Constitution; section 1 of this Constitution in its application to any of the provisions specified in paragraph (a) or (b) of this subsection; or any of the provisions of the Jamaica Independence.*

*a Bill for an Act of Parliament under this section shall not be submitted to the Governor-General for his assent unless- (i) a period of three months has elapsed between the introduction of the Bill into the House of Representatives and the commencement of the first debate on the whole text of that Bill in that House and a further period of three months has elapsed between the conclusion of that debate and the passing of that Bill by that House, and (ii) subject to the provisions of subsection (6) of this section, the Bill, not less than two nor more than six months after its passage through both Houses, has been submitted to the electors qualified to vote for the election of members of the House of Representatives and, on a vote taken in such manner as Parliament may prescribe, the majority of the electors voting have approved the Bill. (4) A Bill for an Act of Parliament under this section shall not be deemed to be passed in either House unless at the final vote thereon it is supported- (a) in the case of a Bill which alters any of the provisions specified in subsection (2) or subsection (3) of this section by the votes of not less than two thirds of all the members of that House, or (b) in any other case by the votes of a majority of all the members of that House. (5) If a Bill for an Act of Parliament which alters any of the provisions specified in subsection (2) of this section is passed by the House of Representatives- (a) twice in the same session in the manner prescribed by subsection (2) and paragraph (a) of subsection (4) of this section and having been sent to the Senate on the first occasion at least seven months before the end of the session and on the second occasion at least one month before the end of the session, is rejected by the Senate on each occasion, or (b) in two successive sessions (whether of the same Parliament or not) in the manner prescribed by subsection (2) and paragraph (a) of subsection (4) of this section and, having been sent to the Senate in each of those sessions at least one month before the end of the session, the second occasion being at least six months after the .first occasion, is rejected by the Senate in each of those sessions, that Bill may, not less than two nor more than six months after its rejection by the Senate for the second time, be submitted to the electors qualified to vote for the election of members of the House of Representatives and, if on a vote taken in such manner as Parliament may prescribe, three-fifths of the electors voting approve the Bill, the Bill may be presented to the Governor-General for assent. (6) If a Bill for an Act of Parliament which alters any of the provisions specified in subsection (3) of this section is passed by the House of Representatives- (a) twice in the*

*same session in the manner prescribed by subsection (3) and paragraph (a) of subsection (4) of this section and having been sent to the Senate on the first occasion at least seven months before the end of the session and on the second occasion at least one month before the end of the session, is rejected by the Senate on each occasion, or (b) in two successive sessions (whether of the same Parliament or not) in the manner prescribed by subsection (3) and paragraph (a) of subsection (4) of this section and, having been sent to the Senate in each of those sessions at least one month before the end of the session, the second occasion being at least six " months after the first occasion, is rejected by the Senate in each of those sessions, . that Bill may, not less than two nor more than six months after its rejection by the Senate for the second time, be submitted to the electors qualified to vote for the election of members of the House of Representatives and, if on a vote taken in such manner as Parliament may prescribe, two-thirds of the electors voting approve the Bill, the Bill may be presented to the Governor-General for assent. (7) For the purposes of subsection (5) and subsection (6) of this section a Bill shall be deemed to be rejected by the Senate if-, (a) it is not passed by the Senate in the manner prescribed by paragraph (a) of subsection (4) of this section within one month after it is sent to that House; or (b) it is passed by the Senate in the manner so prescribed with any amendment which is 'not agreed to by the House of Representatives. \. . (8) .For the purposes of subsection (5) and subsection (6) if this section a Bill that is sent to the Senate from the House of Representatives in any session shall be deemed to be the same Bill as the former Bill sent to the Senate in the same or in the preceding session if, when it is sent to the Senate, it is identical with the former Bill or contains only such alterations as are specified by the Speaker to be necessary owing to \he time that has elapsed since the date of the former Bill or to represent any amendments which have been made by the Senate in the former Bill. (9) In this section- (a) reference to any of the provisions of this Constitution or the Jamaica Independence Act, 1 962, includes references to- any law that alters that provision; and (b) "alter" includes amend, modify, re-enact with or without amendment or modification, make different provision in lieu of, suspend, repeal or add to.*

**[73]** Section 49 addresses specifically the procedure to be followed for alterations/ amendments to the constitution. It goes further to state how alterations to respective sections are required to be undertaken. This is distinguishable from the procedure of the enactment of ordinary legislation which may affect the fundamental rights and freedom guaranteed by the Charter. The issue is whether ordinary legislation can be promulgated that interfere/impacts charter rights, or whether these changes must be by way of an amendment under section 49 of the constitution?

**[74]** This issue was addressed in the case of **Suraj** where at paragraph 50 of the judgment Lords Sales and Hamblen stated at para 50.

> *"The Board addressed this question of interpretation of the Constitution in Suratt, in which it decided that the rights and freedoms in section 4 are to be read as subject to that implied qualification. Prior to the Board's ruling in that case it had been recognised both by the Board and by the local courts that the rights in section 4 (and those they replicate set out in the 1962 Constitution) are liable to be read as subject to implied limitations. In the majority judgment delivered by Lord Steyn for the Board in Roodal v The State [2003] UKPC 78; [2005] 1 AC 328 he observed (para 20): **"The bill of rights under the 1976 Constitution was cast in absolute terms. There are undoubtedly implied limitations on these guarantees.** One such limitation may derive from section 53 of the Constitution which vests in Parliament the power to make laws for the peace order and good government of Trinidad and Tobago: see Demerieux, Fundamental Rights in Commonwealth Caribbean Constitutions (1992), at pp 87-89 …". Demerieux cites the judgment of Wooding CJ in the Court of Appeal in Collymore v Attorney General (1967) 12 WIR 5 in which, speaking of the equivalent rights in the 1962 Constitution, he said (p 15): "the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country. In like manner, their constitutionally-guaranteed existence notwithstanding, freedom of movement is no licence for trespass, freedom of conscience no licence for sedition, freedom of expression no licence for obscenity, freedom of assembly no licence for riot and freedom of the press no licence for libel." The Board carefully explained in Panday v Gordon [2005] UKPC 36; [2006] 1 AC 427, paras 17-23 (Lord Nicholls of Birkenhead) **that the rights in section 4 should be read as subject to limitations and not as absolute rights. (Emphasis applied)***

**[75]** It is accepted that the Constitution of Trinidad and Tobago is not identical to that of Jamaica. However, the principles regarding the effect that ordinary legislation may have on those fundamental rights is applicable to our constitutional interpretation. The Privy Council noted further at para 68:

> *"68. A very large part of ordinary legislation, passed by Parliament for good reasons of the public interest, must inevitably interfere with or operate as restrictions on those rights. In the Board's view it is not plausible to suppose that the framers of the 1962 Constitution and the current Constitution intended to disable Parliament from taking ordinary legislative action in the public interest. The natural solution to accommodate the inevitable friction which always exists between individual fundamental rights and democratic decision-making in a constitutional liberal democracy like Trinidad and Tobago is that conventionally adopted so often in such states, namely to*

> *require that interference with such rights should be permitted in the public interest, but only if the interference is proportionate to a legitimate aim."*

**[76]** We adopt the Privy Councils analysis at paragraph 74. We find that it would amount to an absurdity that in circumstances of enacting an ordinary piece of legislation that may affect a fundamental right that it would require the provisions of Section 49 to be followed. At para 74 the Board stated:

> *"…. The solution which the framers of the Constitution must have contemplated is that Parliament should create general powers for public officials by ordinary legislation in the usual way and that in exercising those powers those officials would be obliged to respect the fundamental rights in section 4, subject to a proportionality qualification which would allow them to take effective action in the public interest and to protect the rights of all."*

**Issue 7: Whether the enactment of section 26(2) of the Disaster Risk Management Act breaches the separation of powers doctrine and is therefore unconstitutional, null and void**

**[77]** Mr. Wildman submitted that the enactment of section 26(2) of the DRMA collides with the Constitution because in the enacting process, there was no conforming with the integral requirements of the separation of powers doctrine, which is a critical feature of the Jamaican Constitution. Counsel argued that in the enacting or promulgation process there had been no declaration of a state of emergency, no proclamation by the Governor General and no conforming with the amendment mechanism in section 49 of the Constitution. Counsel relied on **Hinds v The Queen**[12] and posited a view that to grant powers to the Prime Minister under the DRMA to make Regulations/Orders is a serious breach of the separation of powers doctrine. He submitted, relying on the **Mollison** case, that this act results in an erosion or obliteration of the distinction of separation of powers between the executive and legislature.

---

[12] [1977]AC195

**[78]** Ms. White on behalf of the Defendant emphasized that there are two separate regimes that can be used in response to natural disasters. When comparing these regimes, the PHA applies after a state of affairs has arisen, while under the DRMA the Prime Minister is empowered to act pre-emptively to prevent the spread of Covid-19. On the other hand, under the Constitution, a state of public emergency exists once declared by the Governor General after declaring that a public disaster exists, and a Proclamation is made accordingly. Ms, White, relying on the case **Suraj** submitted that these pre-conditions demonstrate that if there are two or three regimes that co-exist, the use of one of them does not render the actions of the government unconstitutional.

**[79]** Ms. White argued that under the Public Health Act, the Minister is empowered to make the Order while under the Constitution it is the Governor General who is empowered to make the declaration and thereafter Parliament enacts an Act in respect of the period of emergency. There is no material difference between the Prime Minister under the DRMA and the Minister under the Public Health Act. Counsel referred the Court to the Eastern Caribbean Court of Appeal case of **J Astaphan and Co Ltd v Comptroller of Customs of Dominica**[13] Ms White submitted that there is no breach of the separation of powers doctrine by the powers granted to the Prime Minister to promulgate legislation in response to a disaster such as Covid-19 under section 26(2) of the DRMA.

**LAW & ANALYSIS**

**[80]** The Doctrine of the Separation of Powers is a well-established principle which seeks to establish and maintain the powers given to each arm of government. The Claimant submitted that the measures enacted under the DRMA amounts to a

---

[13] 1996 56WIR 153

removal of the power specifically assigned to the legislature and places it in the hands of the Executive, which violates the doctrine of the separation of powers.

**[81]** In **Moses Hinds v. R**[14] the Privy Council in addressing the doctrine of separation of powers and judicial independence emphasized the importance of the doctrine. The Court was charged to determine whether provisions of the Gun Court Act which sought to transfer powers specifically given to the Judiciary, to a body created by the Executive was constitutional. They concluded that the principle of separation of powers was implicit in the Constitution. Parliament had no power to transfer the discretion to determine the severity of punishment from the Judiciary to a Board created by the Executive.

**[82]** The circumstances being determined in the case at bar are somewhat different, but the principle remains sound in law. Mr. Wildman has submitted that the provisions under the DRMA allow the Executive to pass laws which affected the fundamental rights of citizens without the control of the legislation.

**[83]** The issue of the separation of powers was opined upon in several Privy Council cases. In the case of **Browne v R (St. Christopher and Nevis**) [1999] UKPC 21 at paragraph 6 of the decision Lord Hobhouse delivering the decision on behalf of the Board stated: -

> *Hinds was a decision of the Privy Council on appeal from the Court of Appeal of Jamaica. Jamaica, like St. Christopher and Nevis, has a constitution which follows the "Westminster" model. These constitutions are drafted upon the principle of separation of powers. A statute had set up a "Gun Court" to try persons charged with firearms offences. Section 8 of the statute prescribed a mandatory sentence of detention at hard labour during the Governor-General's pleasure for certain offences, determinable by the Governor-General on the advice of a five-man review board of which only the chairman was a member of the judiciary. Various defendants who had been convicted before the court and sentenced in accordance with section 8 appealed contending that the sentence was unconstitutional. The*

[14] 1977 UKPC AC 195

*appeals succeeded. Lord Diplock giving the opinion of the Board said, at pp.225-6:-*

> *"In the field of punishment for criminal offences, the application of the basic principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model makes it necessary to consider how the power to determine the length and the character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of power. ... In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence - as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments ... What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."*

**[84]** In the case of **Suraj** at paragraphs 119 and 120 the Lord Lords stated that: -

> *119. The appellants argued that the Ordinance itself is unconstitutional and inconsistent with the notions of a sovereign democracy and constitutional supremacy, insofar as it vests in the Minister the sole, unsupervised, power to make infringing regulations without reference to Parliament, as they contend happened in this case. The assumption that the Minister still has powers to pass laws of the same width and scope after independence as he had enjoyed before independence undercuts the supremacy of the Constitution, expressly guaranteed by section 2, by which the previous colonial constitutional order founded on parliamentary supremacy was overridden - see, for example, Guyana Geology and Mines Commission v BK International Inc [2021] CCJ 13 AJ (GY).*
>
> *120. The short answer to this issue is that the Rules are not infringing regulations, but, had they been, they would have been unconstitutional by reason of sections 4 and 5 of the Constitution. In any event, as made clear by the Board's judgment in Chandler (No 2), general notions of a sovereign democracy and constitutional supremacy cannot Page 45 be separated or untethered from the specific provisions of the Constitution - see, in particular, paras 75 to 95. As made clear in addressing Issue (2), the Constitution does not mean that the Rules could only have been made under sections 7 to 12 of the Constitution concerning public emergencies and for the Minister to have partly overlapping powers under the Ordinance is not unconstitutional. It follows that the use of such powers cannot be contrary to notions of a sovereign democracy and constitutional supremacy as reflected in the Constitution. It is entirely compatible with the notion of a sovereign democracy that powers can be conferred on a Minister to make subordinate legislation; that is indeed a common feature in democracies.*

*Constitutional supremacy is respected by the checks available to ensure that the Rules are consistent with the provisions of the Constitution.*

**[85]** We adopt the position laid down in the **Suraj** and we find that the Prime Minister and the Minister in promulgating the Regulations/Orders to contend with the Covid 19 pandemic did not breach the principle of separation of powers.

**Issue 6: Whether the Claimant should be awarded damages for breach of its constitutional right to freedom of religion guaranteed by section 17(1) of the Charter**

**[86]** Mr. Wildman submitted that based on **Mervin Cameron v AG**[15], that once the Clamant has established on a balance of probabilities that there has been a constitutional breach, the Claimant is entitled to be awarded damages for breach of his constitutional right. Mr Wildman submitted that the claim should be referred for an assessment of damages hearing.

**[87]** Ms. White submitted that the Claimant did not seek damages in its Amended Fixed Date Claim Form. Ms White argued further that damages do not always flow as the Claimant is required to provide evidence of the infringement to assist the Court in quantifying any damages. Finally, she argued that an assessment of damages hearing would not be an appropriate use of judicial time since damages can be ascertained by the Full Court at the time it grants the Order.

**[88]** We find that the Claimant has not been able to show that there has been any breach of its constitutional rights afforded them by the Charter of Fundamental Rights and Freedoms (2011). The award of damages is therefore not an issue that would detain this, Court. We however deem it important to say that each case turns on its own factual circumstances. We note that the Constitutional Court is competent to assess damages. It is therefore incumbent on Claimants to assert and plead any losses incurred by him/them and place evidence before the Court

---

[15] [2018] JMFC FULL 1

to assess same. The failure of a litigant to plead and prove same, may result in him losing an opportunity to recover any incurred loss.

**[89]** We therefore find the Claimant has failed to prove his claim on a balance of probabilities.

**CONCLUSION**

**[89]** In summary the Claimant has failed to establish his claim on a balance of probabilities. The court concludes that the right to freedom of religion was not engaged. We have considered that even if Claimant had established that its rights were breached, we find the measures implemented to curtail the effects of the COVID 19 pandemic were demonstrably justified in a free and democratic society. We found that the provisions of the DRMA did not conflict with Section 20 of the Constitution and there was no breach of the principles of separation of powers. The Government was free to choose the most appropriate method under its legislative authority to handle the pandemic while ensuring that the fundamental rights and freedoms of the citizens of Jamaica were respected subject to the test of proportionality. The Claimant therefore is not entitled to any relief in damages.

**DISPOSITION**

**[90]**

1. We find that where there is a challenge to actions taken by the Government, in the absence of legislation to the contrary, the Attorney General, as the principal legal adviser must be the proper party in the claim. It can also be concluded, based on the dicta from the cases from the Court of Appeal and the Privy Council, that in the absence of legislation to the contrary, the Attorney General is a proper party in Constitutional claims, concerning the Crown, agents and servants of the state, or in cases where the parties are immune from suit.

2. All the Declarations sought in the Amended Fixed Date Claim Form filed on 5th of November 2021 are refused.

3. No order as to cost.