[2023] JMCA Civ 39

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA

SUPREME COURT CIVIL APPEAL NO COA2020CV00078

APPLICATION NO COA2021APP00157

BETWEEN	**THE MINISTER OF NATIONAL SECURITY**	**1st APPELLANT**
AND	**THE COMMISSIONER OF POLICE**	**2ND APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD APPELLANT**
AND	**EVERTON DOUGLAS**	**1ST RESPONDENT**
AND	**COURTNEY HALL**	**2ND RESPONDENT**
AND	**COURTNEY THOMPSON**	**3RD RESPONDENT**
AND	**GAVIN NOBLE**	**4TH RESPONDENT**

Miss Lisa White and Louis Jean Hacker instructed by the Director of State Proceedings for the appellants

John Clarke for the 1st respondent

Terrence Williams and Celine Deidrick for the 2nd respondent

Isat Buchanan and Iqbal Cheverria for the 3rd respondent

Miss Sasheeka Richards for the 4th respondent

30, 31 January, 1, 2, 3 February and 21 July 2023

Appeal – Jurisdiction – Notice of application to strike out appeal for want of jurisdiction – Detentions under States of Public Emergency declared pursuant

to section 20 of the Constitution – Proceedings in the Supreme Court on applications for writs of habeas corpus ad subjiciendum – Appeal against findings – No appeal against the decision – Whether an appeal lies from an application for a writ of *habeas corpus ad subjiciendum* – Section 21A of the Judicature (Appellate Jurisdiction) Act – Whether there is an appeal from the Supreme Court from a judgment or order in civil proceedings – Section 10 of the Judicature (Appellate Jurisdiction) Act

Costs – Whether costs of proceedings on appeal to be assessed on an indemnity basis – Whether special costs certificates to issue – The Civil Procedure Rules, 2002, Rules 64.12 and 65.17(3)

BROOKS P

[1] I have had the distinct pleasure of reading, in draft, the judgment of my learned sister McDonald-Bishop JA. I completely agree with her reasoning and conclusion in respect of the striking out of the notice of appeal and the costs order that she has proposed. I also respectfully wish to associate myself with her reasoning concerning the jurisdiction of a single judge of the Supreme Court, in appropriate cases, to consider constitutional challenges which arise as integral parts of *habeas corpus* applications.

MCDONALD-BISHOP JA

Introduction

[2] The Government's utilisation of states of public emergency ('SOEs') as part of its arsenal of crime-fighting tools has become, in recent times, a controversial feature of the country's law enforcement regime. Over a nine-month period, between April 2019 and January 2020, for instance, the Governor-General had declared three SOEs in various parts of the island by virtue of the powers vested in him by section 20 of the Constitution. These SOEs have given rise to judicial challenges regarding the lawfulness of detentions of several persons within them. The proceedings before this court have emanated from several such challenges brought in the Supreme Court by four detainees who were detained by the police in different parts of the island within different SOEs on the premise that they had been concerned "in acts prejudicial to public safety and public order". More specifically, they have been accused and/or suspected of being involved in criminal

activities, which involved the commission of offences such as murder, illegal possession of firearm and ammunition, shooting and robbery with aggravation.

[3] The relevant factual background that led to the proceedings in the Supreme Court may briefly be outlined.

The background

[4] By Proclamation dated 30 April 2019, the Governor-General declared a state of public emergency ('SOE') within the parishes of Saint James, Hanover, and Westmoreland ('Proclamation 1'). While this SOE was still in effect, the Governor-General declared two other SOEs; this time, in parts of the parish of Saint Andrew, under a Proclamation dated 7 July 2019 ('Proclamation 2'), and in parts of the parishes of Kingston and Saint Andrew under a Proclamation dated 26 January 2020 ('Proclamation 3').

[5] The Governor-General declared the Proclamations pursuant to section 20 of the Constitution of Jamaica, which empowers him to make Proclamations declaring a period in which a public disaster or public emergency exists. During these periods, the fundamental rights and freedoms of persons in Jamaica may be curtailed, suspended, or, indeed, infringed by the state, subject to the requisite constitutional justification.

[6] In keeping with the dictates of section 20(2)(b) of the Constitution, the preamble of the three Proclamations made in 2019 and 2020 purportedly conveyed the Governor-General's satisfaction that, among other things, "action [had] been taken or [was] immediately threatened by persons or bodies of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety of the community…".

[7] Pursuant to section 3 of the Emergency Powers Act ('EPA'), the Governor-General, by order, promulgated the Emergency Powers (No 2) Regulations, 2019 ('EPR'), by which the declared SOEs were regulated. Regulation 30(1) of the EPR gave an "authorized officer" the power to:

> "arrest, without a warrant, and detain, pending enquires, any person whose behaviour is of such a nature as to give reasonable grounds for suspecting that he has –
>
> (a) acted or is acting in a manner prejudicial to the public safety; or
>
> (b) has committed, is committing, or is about to commit an offence against [the EPR]."

[8] In accordance with the foregoing regulation, the police (being authorized officers) arrested and detained, without charge, Everton Douglas, Courtney Hall, Courtney Thompson and Gavin Noble ('the respondents') during the relevant SOEs. Gavin Noble and Courtney Hall were detained on 17 May 2019 and 22 June 2019, respectively, within the SOE declared under Proclamation 1. Courtney Thompson was detained on 22 July 2019 within the SOE declared under Proclamation 2, while Everton Douglas was detained on 26 January 2020 within the SOE declared under Proclamation 3.

[9] Under separate detention orders, made pursuant to regulation 33 of the EPR, the Minister of National Security ordered that the respondents be detained until the end of the period of public emergency ('the detention orders').

[10] Those SOEs did not come to an end until 17 August 2020, at which time, the respondents were released. By then, three of them, Courtney Hall, Courtney Thompson, and Gavin Noble had been detained without charge for in excess of one year.

[11] Prior to their release, the respondents objected to their detention before the Emergency Powers Tribunal established in accordance with section 13(10) of the Constitution for review of their detention. However, following the review of the tribunal, they were not released.

The proceedings in the Supreme Court

[12] On 9 July 2020 (also before they were released), the respondents filed separate applications for writs of *habeas corpus ad subjiciendum* ('*habeas corpus*') in the Supreme

Court for the court to examine and determine whether their detentions were lawful. Alternatively, the respondents applied for an order that they be released or that an expedited date be fixed in relation to any application for administrative or constitutional relief. They also asked that the court give directions pursuant to Part 57 of the Civil Procedure Rules, 2002 ('CPR') "as to the manner in which the claim for compensation is dealt with by the court without requiring the issue of any further process". They sought indemnity costs.

[13] The applications were heard by Morrison J ('the learned judge'). On 22 July 2020, the learned judge granted the applications and issued the writs of *habeas corpus,* pursuant to rule 57.3 of the CPR. He also fixed a date for the respondents to be brought before the court. On 27 July 2020, the respondents were brought before the court and a hearing was conducted between 27 and 29 July 2020 concerning the lawfulness of their detentions. The applications were strongly contested by the Minister of National Security, the Commissioner of Police, and the Attorney-General of Jamaica ('the appellants').

[14] The learned judge delivered his decision on 18 September 2020 declaring the detentions of the respondents unlawful. However, by then, the respondents had already been released due to the expiration of the SOEs on 17 August 2020. The reasons for the learned judge's ruling are contained in his written judgment neutrally cited as **The Minister of National Security and others v Everton Douglas and others** [2020] JMSC Civ 267 ('the written judgment').

[15] None of the parties provided this court with a copy of the formal order of the learned judge. However, on its own initiative, the court obtained a copy of the minute of order dated 18 September 2020 relative to the proceedings on that day. The minute of order does not contain any orders made by the learned judge. What it contains are the words: "Draft written judgment delivered". In looking at the written judgment, the only ruling or order, which could be said to have been made by the learned judge, is to be found at paras. [146] and [147], where he stated:

> "[146] Based on the foregoing, I am to rule that the detention of each Petitioner is unlawful.
>
> [147] I make the following orders pursuant to rule 57.6"

[16] However, despite the learned judge stating in para. [147] that he made "the following orders pursuant to rule 57.6", he did not go on to make any orders. By way of information, rule 57.6 of the CPR provides that:

> "On the date fixed for the person detained to be brought before the court, the court must make such orders as are just and, in particular, may give directions as to the manner in which any claim for compensation is to be dealt with by the court without requiring the issue of any further process."

[17] To date, it is not known what orders or directions, pursuant to rule 57.6 of the CPR, were intended to be made by the learned judge as none of the parties, especially the respondents, sought to have the orders clarified and perfected by him. This, notwithstanding, the appellants brought an appeal from the proceedings before the learned judge.

The appeal

[18] By amended notice and grounds of appeal filed on 3 August 2021, the appellants filed an appeal from what they said to be are the findings of the learned judge. Interestingly, they have not challenged his 'ruling' that the detentions were unlawful or the 'order' he purportedly made pursuant to rule 57.6 of the CPR. Instead, the appellants are seeking to set aside the learned judge's findings detailed in paras. [84] and [145] of the written judgment. In those paragraphs, in so far as is immediately relevant, the learned judge stated:

> "[84] The return on the writ indicates petitioner is detained under State of Public Emergency. I hold that this return is deficient and that for all the reasons indicated by this Court hereto and which include the following:
>
> (i) There is no valid state of public emergency;

(ii) The detention at the will of the executive is violative of our constitution;

(iii) The detention for criminal offences violates the Emergency Power Act;

(iv) The Emergency Power Act is inconsistent with the constitution;

(v) The material legislative framework is inapplicable to the material proclamation in this matter;

(vi) The detention order did not apply the reasonably justifiable test;

(vii) The detention is impermissible.

…

[145] This court is empowered and bound to enquire into and determine the existence of an emergency by virtue of **section 20 (5) of the Constitution**. In carrying out this function the court is not bound by the doctrine of 'deference' to the executive branch or 'marginal appreciation' to the executive.

In the final analysis, I am unhesitant in holding that:

1. A single judge has the jurisdiction to entertain this application, pursuant to the court's inherent jurisdiction and **section 20 (1) of the Constitution**. A single judge (Lord Mansfield) discharged James Somerset in 1772. A single judge in Turks and Caicos Island declared aspects of the Emergency Powers Regulations unconstitutional on 18 June 2020 in **Missick v Attorney General**. Also in Herbert v Phillips and Charles v Phillips & Sealey, supra confirms the proposition as stated above. In the latter case the Court of Appeal accepted that the Court of first instant [sic] had original jurisdiction to hear the matter.

2. The situation which led to the detention of the objector does not qualify as an emergency or satisfy the situation in **sections 20 (2), 20 (5) of the Constitution**.

3. The Claimant's constitution [sic] rights and **the constitution** itself is [sic] being breached by the current detention and executive detention system.

4. **The Emergency Powers Act**, in its current form, does not apply to the current constitution since it: (a) makes references to section 26 of the Constitution which was repealed; (b) it does not qualify as a law for the purposes of section 13 (9); (c) the EPA is in conflict with the Constitution (d) there is no saving laws or modification clause to assist the court.

5. **The Emergency Powers Regulation**, in its current form, does not apply to the current constitution since it: (a) was passed pursuant to powers from a legislation that cannot be utilized to pass the EPR; (b) the EPR is in conflict with fundamental rights, principles and values implicit in the Constitution (we identified 68 such conflicts – any one which would suffice as sufficient basis to strike the EPR).

6. **The Detention Order** is unlawful since: **(a)** it was passed on the strength of the impugned EPA & EPR; **(b)** the reasons for detention are 'criminal offences' in breach of EPA section 3 (5); **(c)** the imprisonment of the claimant for criminal cases without a proper review breaches the separation of power doctrine; **(d)** the detention order failed to show it considered it 'necessary to exercise the control' test outlined in the EPR, **(e)** the detention order failed to show it applies the standard of reasonably justifiable.

7. **The Proclamation** contained no material information to detail the actual situation that caused the declaration by the Governor General. This, therefore, mean the Defendants would fail to displace an onus placed on them to show the emergency actually exists in the material case.

8. **The detention of the Claimant** is not a measure that the Defendants attempted to show the court is reasonably justifiable to deal with any situation that exists during a state of emergency;

9. The use of **detention order** for **criminal offences** breach [sic] the separation of power [sic] doctrine and cannot be countenanced.

10. There is no justification presented by the Defendant to facilitate a **proportionality** assessment of any legitimate objective behind the Claimant's detention. This, I find to be the egregious overstepping of the bounds of the power of the Executive." (Emphasis as in the original)

[19] The appellants, being aggrieved by the findings of the learned judge, filed their appeal on the following grounds:

"(a) The learned Judge erred in failing to recognise that sitting as a single judge on a Notice of Application for a Writ of Habeas Corpus brought pursuant to Rule 57 of the Civil Procedure Rules ("CPR"), he improperly exercised his discretion to conduct an enquiry pursuant to section 20(5) of the *Constitution* into the constitutionality of the Proclamations made by the Governor General under section 20(2) of the *Constitution*, without the court being constituted as a Full Court and the State thereby being given the fullest opportunity to justify the constitutionality of the Proclamation.

(b) The learned Judge fell into error in failing to recognise that sitting as a single judge on a Notice of Application for a Writ of Habeas Corpus brought pursuant to Rule 57 of the CPR, he should not have exercised his discretion to determine the constitutionality of the *Emergency Powers Act* and the *Emergency Powers Regulations* without the court being constituted as a Full Court, the provisions of Rule 56 of the CPR being complied with by the Respondents; and the State thereby being given the fullest opportunity to justify the alleged constitutional violations.

(c) The learned Judge had little or no regard to the oral and affidavit evidence presented by the Appellants which not only justified the detention of each of the Respondents under the provisions of the relevant Emergency Powers Regulations but provided adequate proof that the

circumstances outlined in section 20 of the Constitution which authorise the Governor General to declare a state of public emergency existed.

(d) The learned Judge erred in finding that on the facts of this case there was no valid state of public emergency that existed and that for a valid one to exist the emergency conditions must exist in the whole nation.

(e) The learned Judge erred in finding that the *Emergency Powers Act* is in conflict with the Constitution since it makes reference to the now repealed section 26 of the Constitution and not to section 20 of the Charter of Fundamental Rights and Freedoms. In so finding the learned judge failed to recognise that the effect of section 25(1) of the Interpretation Act is to construe section 2 of the Emergency Powers Act as referring to section 20 of the Charter of Fundamental Rights and Freedoms.

(f) The learned Judge erred in finding that sections 30 and 33 of the Emergency Powers Regulations are unconstitutional and that the detention orders made by the Minister of National Security were unlawful and that the Respondents' detentions were impermissible.

(g) The learned Judge made contradictory findings, in that on the one hand he found that the Emergency Powers Act is inconsistent with the Constitution while on the other hand he found that the detention of the Respondents was in violation of the very same Act." (Italics as in the original)

The respondents' application to strike out the appeal

[20] On 25 August 2021, the respondents filed an application to strike out the appellants' notice and grounds of appeal (the respondents' application'). The respondents based their application on the following grounds:

"i. The Court may, by rule 1.13 of *The Court of Appeal Rules*, strike out the whole or part of a notice of appeal.

ii. By section 11 (1) of the *Judicature (Appellate Jurisdiction) Act*, there is no appeal to the Court of Appeal from a final decision of the Supreme Court.

iii. The [appellants] purported appeal is against a decision of the Honourable Mr. Justice B. Morrison, in a proceeding upon an application for a writ of habeas corpus ad subjiciendum, that the detentions of the [respondents] were unlawful.

iv. Decisions on an application for habeas corpus ad subjiciendum for the discharge of persons or which find a detention to be unlawful are by law final." (Italics as in the original)

[21] As can be seen, the respondents' application raised a preliminary question regarding the jurisdiction of this court to entertain the appeal. Logically, the hearing of the respondents' application proceeded first as it concerns the question of the jurisdiction of the court and a favourable outcome of that application would have been dispositive of the appeal. However, having heard the respondents' application and the submissions of counsel on both sides, the court reserved its decision on the respondents' application and proceeded to hear full arguments on the substantive appeal in light of the time-table fixed for the hearing of the matter and the court's schedule of other cases for hearing during the period. In so doing, the court adopted the approach of the Privy Council in **Superintendent of Her Majesty's Foxhill Prison and another v Kozeny** [2012] UKPC 10 ('**Kozeny**') explained at paras. [48] and [49] of their Lordships' opinion. At para. [48], the Board stated that "[w]here a question of jurisdiction is raised, it is not uncommon for the court, before deciding the question, also to hear arguments on the substantive merits de bene esse".

[22] Even though there was a specific application to strike out the appeal which would warrant the court considering it as a separate issue, the Privy Council's approach commended itself to the court as it was viewed as convenient and conducive to the saving of judicial time and resources and would not have been unduly prejudicial to any of the

parties. Against this background, I will now proceed to my determination of the respondents' application for the appeal to be struck out.

[23] Based on the grounds filed in support of the respondents' application and counsel's submissions on those grounds, it is found that the resolution of two preliminary questions is determinative of the respondents' application as those questions go to the pivotal issue of jurisdiction. Those two questions are:

(1) whether an appeal lies to this court from proceedings on an application for a writ of *habeas corpus*; and

(2) whether the appeal is from a judgment or order of the learned judge in civil proceedings within the meaning of section 10 of the Judicature (Appellate Jurisdiction) Act ('JAJA').

Issue (1): Whether an appeal lies from proceedings on an application for a writ of habeas corpus

The respondents' submissions

[24] The respondents, through their counsel, argued that the appellants' grounds of appeal, viewed singularly and cumulatively, are challenging the learned judge's decision on an application for a writ of *habeas corpus* that the detentions of the respondents were unlawful. This decision, they maintained, is final and not subject to appeal. They relied on both the common law and statutory law in support of this contention.

[25] Relying, primarily, on the cases of **Kozeny** and **Secretary of State for Home Affairs v O'Brien** [1923] AC 603 ('**O'Brien**'), counsel for the respondents submitted that, at common law, a decision on an application for a writ of *habeas corpus* that the detention of a detainee is unlawful, is final and not subject to an appeal. Counsel maintained that this is the applicable law as there is no provision in the JAJA which overrides this common law position.

[26] Regarding statutory law, counsel for the respondents argued that sections 11(1)(c) and 21A(1)(a) of the JAJA jointly operate to bar this appeal. Section 11(1)(c) provides that no appeal lies from a decision of a Supreme Court judge "where it is provided by any law that the decision is to be final". Section 21A(1)(a) provides that an appeal lies to the court "in any proceedings upon application for a writ of *habeas corpus* in a criminal cause or matter against the refusal to grant the writ".

[27] Counsel for the respondents contended that given that section 21A(1)(a) confers a right of appeal "against the refusal to grant the writ" but confers no right of appeal against the grant of the writ; this was a deliberate restriction by the legislators of the right to appeal in those proceedings. In bolstering this argument, counsel compared the language used in section 21A(1)(b) of the JAJA where a right of appeal under that provision is conferred "against the grant of the order as well as against the refusal". Accordingly, they argued, the decision of the learned judge on the *habeas corpus* proceedings, which was decided in favour of a grant of the order, would have been final. Therefore, no appeal would lie.

The appellants' submissions

[28] In response, counsel for the appellants contended that the appeal is against (1) the finding of the learned judge that the Proclamations made by the Governor-General under section 20 of the Constitution are unconstitutional; (2) the learned judge's finding that the EPA and the EPR are inconsistent with the Constitution; and (3) the learned judge's treatment of the evidence presented by the appellants. Counsel maintained that the appeal is not against the issuance of the writs of *habeas corpus*, the ruling that the detentions were unlawful or the release of the respondents, and so section 21A(1)(a) of the JAJA is irrelevant.

[29] In commenting on the case of **O'Brien**, counsel for the appellants submitted that the correct principle to be extracted from that case is that no appeal lies on an application for a writ of *habeas corpus* where the discharge of the subject is ordered. Counsel argued that, in the instant case, the learned judge did not and could not have ordered the release

of the respondents because, at the time he delivered his decision, the SOEs had come to an end, and the respondents were already released.

[30] Counsel further argued that the respondents' applications before the Supreme Court were a twinning of the *habeas corpus* applications and constitutional claims for redress. Counsel contended that while it was for the learned judge to determine whether the detentions of the respondents were justified, it was not for him to determine whether the detentions were constitutional. Therefore, given the nature of the findings of the learned judge, especially in relation to the constitutionality of the EPA and the EPR, this court has the jurisdiction to hear and consider the appeal.

Analysis and findings

[31] In analysing this issue as to whether an appeal lies to this court from the decision of the learned judge, against the background of the divergent views of the parties, an apt starting point is an examination of the principle expressed in the case of **The Rev James Bell Cox v James Hakes and (by order) The Right Hon. James Plaisted Baron Penzance** (1890) 15 App Cas 506 ('**Cox v Hakes**'). In that case, the House of Lords had to decide whether the Court of Appeal had jurisdiction to entertain an appeal from the order of the Queen's Bench Division discharging the appellant from custody. Their Lordships, by a majority of five to two, held, as reflected in the headnote, that "[w]here a person has been discharged from custody by an order of the High Court under a habeas corpus the Court of Appeal has no jurisdiction to entertain an appeal".

[32] Lord Halsbury, on pages 514 and 517 of the reported judgment, stated in part:

> "My Lords, probably no more important or serious question has ever come before your Lordships' House. **For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody… If discharge followed, the legality of that**

> **discharge could never be brought in question.** No writ of error or demurrer was allowed: *City of London's Case* (1610) [8 Rep 121b].
>
> …
>
> **The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom**." (Emphasis added)

[33] It was further observed by Lord Herschell, in that case, at pages 527 – 528 of the reported judgment, that:

> "It was always open to an applicant for it, if defeated in one Court, at once to renew his application to another. No Court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it… A person detained in custody might thus proceed from court to court until he obtained his liberty. **And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question**. **There was no power in any Court to review or control the proceedings of the tribunal which discharged him**." (Emphasis added)

[34] In **Kozeny**, the Privy Council accepted **Cox v Hakes** as authority for the proposition that "at common law, where a person has been discharged under a writ of *habeas corpus*, in the absence of an express statutory provision, the Court of Appeal has no authority to entertain an appeal by the detainer" (see para. [21] of **Kozeny**).

[35] The distinguishing feature of the instant case, however, is that while the learned judge found that the detentions of the respondents were unlawful, he made no order for the respondents to be discharged. Assumedly, this was because, by the time he delivered his ruling, the respondents had already been released. It is this peculiarity, in the instant case, that renders the case of **O'Brien** even more instructive than **Cox v Hakes**. The salient facts and issues arising, in that case, are similar to those of the instant case. For that reason, a brief insight into the circumstances of that case is considered necessary.

[36] In **O'Brien**, the Divisional Court refused Mr O'Brien's *ex parte* application for an order *nisi* for a writ of *habeas corpus* directed to the Home Secretary. O'Brien appealed to the Court of Appeal, which found that his detention was illegal. The Court of Appeal reversed the decision of the Divisional Court and granted an order nisi, which they subsequently made absolute. However, although the Court of Appeal made an order directing the issuance of a writ, it made no order directing the discharge of Mr O'Brien because the Home Secretary had declared in an affidavit that he had parted with control over Mr O'Brien's body. By order of the court, the Home Secretary was allowed one week within which to make his return to the writ. Before the week had elapsed, the Home Secretary appealed to the House of Lords challenging the order. This gave rise to the question of whether the House of Lords had the jurisdiction to entertain the appeal.

[37] Their Lordships in the House of Lords, by a majority of four to one, held, as accurately reflected in the headnote (page 603 of the report):

> "No appeal lies from an order of a competent Court for the issue of a writ of habeas corpus where the Court determines the illegality of the applicant's detention and his right to liberty, although the order does not direct his discharge."

[38] The House of Lords made that pronouncement despite the argument of the Attorney-General that the decision in **Cox v Hakes** was distinguishable because, in that case, there had been an order for discharge, and Mr Cox had been actually discharged under that order, while with respect to Mr O'Brien, there was no order for discharge or any actual discharge. In direct response to this argument, Lord Dunedin, on pages 621 to 622 of the reported judgment, opined:

> "…**I have come to the conclusion that the case of *Cox v. Hakes* depended on a broader ground: to wit, that it is a cardinal principle of the law of England, ever jealous for personal liberty, that when once a person has been held entitled to liberty by a competent Court there shall be no further question**.

> It was pointed out by Lord Halsbury that in the older practice under habeas corpus it was allowable for a person seeking his liberty to apply to successive Courts of competent jurisdiction undeterred by previous refusals; but that if he once succeeded in obtaining a judgment in favour of liberty that judgment could no longer be called in question. 'The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom.' **... it seems to me to follow that the mere fact that actual discharge has not taken place does not affect the question. The right to an order for discharge and discharge itself are only the corollaries of the judgment that the applicant is entitled to liberty**..." (Emphasis added)

[39] On pages 640 and 643 of the report, Lord Shaw expressed his opinion in this way:

> "My Lords, I have cited enough from these judgments to make it, in my humble opinion, abundantly clear that the principle underlying the judgment is that **if one Court of law having power to entertain an application for a writ of habeas corpus comes definitely to the conclusion that the applicant is entitled to his discharge, no other Court either by way of review or of appeal can upset that judgment**.
>
> ...
>
> I think the law of England to be long settled to the following effect, i.e., that when **once a legally constituted Court has determined that a subject of the Crown**, **who is an applicant for the issue of a writ of habeas corpus, is entitled to his liberty, such a judgment cannot be overruled either by any other Court or by any Court of review or appeal**. It may be that a discharge may be postponed on account, for instance, of some temporary impediment to the production of the body, but **if the question of right is settled, there can be no appeal or review of that settlement**." (Emphasis added)

[40] Viscount Finlay, for his part, stated, in part (pages 617 and 619):

> "I agree that the decision in *Cox's Case* does not in terms apply to the present case, but the question remains whether on principle the two cases stand on the same footing.
>
> …**When it has been decided that the detention of any person is illegal he is entitled to be discharged, and I do not think that a detention which ex hypothesi would be unlawful could be relied upon for the purposes of supporting a right of appeal**. The Court of Appeal granted the delay of a week for the return to the writ of habeas corpus. We must, however, I think, look at this case as if O'Brien had been set at liberty, which was his right according to the judgment which the Court of Appeal had just pronounced." (Emphasis added)

[41] Finally, on pages 612 – 614 of the report, Earl of Birkenhead also added his view, stating:

> "…**your Lordships were clearly of opinion that when Lord Halsbury laid it down that the discharge of him who sued for the writ denied any further appeal to the Executive, common sense, the reason of the thing, and the very spirit of our Constitution, asserted the same consequences as inevitable when the Court was precluded for any reason from actually directing discharge, but contented itself by laying it plainly down that the man was in law entitled to be discharged.** It would indeed be a strange and repellent doctrine if we were to hold that the competency of appeal in such a matter depended neither upon a principle of law nor upon anything in the power either of the applicant to do or of the Court to direct, but upon some disability which the Executive could, if it chose to do so, create in methods infinitely various.
>
> …
>
> **My Lords, in moving, as I do, that this appeal be dismissed, I cannot refrain from expressing my satisfaction that the lacuna, if there was one, in the decision in *Cox's Case*, has been happily filled by the present decision in a manner which effectively carries out the evolutionary development of the constitutional liberty of the subject**." (Emphasis added)

[42] The dicta of their Lordships have been extensively detailed above because they have much to commend them for driving home with force and clarity, the principle is that where it is decided upon a writ of *habeas corpus* that the applicant is entitled to be discharged, that decision is not amenable to review. This is so because at the heart of such orders is the liberty of the subject – a fundamental human right. Even more relevant to our deliberations, at this juncture, is the valuable learning derived from their Lordships' pronouncements that the principle expressed in **Cox v Hakes** is not to be treated as being restricted to circumstances where there is an order for discharge and the detainee has been actually discharged. The test, as I understand it, is whether, on an application for a writ of *habeas corpus*, a competent court has determined that the detention of the detainee is unlawful and so the detainee, as a consequence, would be entitled to his release from detention. Once such a determination has been made then, it matters not that there was no actual discharge of the detainee emanating from the decision. As it stands at common law, in those circumstances, no appeal lies from that decision. In the instant case, the learned judge ruled that "the detention of each [respondent] is unlawful" (para. [146]). Therefore, the entitlement of each respondent to a discharge from detention is as good as the actual order for his discharge. The common law, therefore, blocks this appeal.

[43] It follows then that the appeal may only be legitimately entertained if the right of appeal is expressly conferred by statute. However, in this jurisdiction, there is no statutory provision that has altered the position at common law and conferred this right. The genesis of the detention orders is to be found in the allegations by the police that the respondents were involved in the commission of serious criminal offences, and in some instances, suspected of being involved in criminal organisations. As a result of their detention as alleged criminal offenders, the respondents applied for writs of *habeas corpus* for the lawfulness of their detention to be enquired into with a view to their release and/or constitutional and other administrative redress. The applications, therefore, sprang from circumstances that had their roots in the criminal sphere.

[44] The procedure governing applications for *habeas corpus* is provided for only by the CPR and no distinction is made in the CPR between *habeas corpus* in criminal or civil proceedings. Therefore, once the respondents were seeking to approach the Supreme Court for writs of *habeas corpus*, they had no alternative but to initiate those proceedings in accordance with the CPR. The procedural regime for the application of a writ of *habeas corpus* falls within the same realm as the procedural regime under Part 58 of the CPR that deals with applications to the Supreme Court to review a decision by a Judge of the Parish Court regarding bail. In **Alandre Marsden v DPP** [2020] JMCA App 42, it was held by Brooks JA (as he then was) that "[P]art 58 cannot, by "subliminal" implication, convert matters that are criminal, into civil proceedings (see paras. [46] – [48]). Therefore, by parity of reasoning, the application for a writ of *habeas corpus* made pursuant to Part 57 of the CPR does not convert the predicate proceeding that led to the issuance of the writ into civil proceedings.

[45] In all the circumstances, it seems unjust to permit the Government to detain the respondents within a criminal framework and based on alleged breaches of the criminal law and then to treat the enquiry into that detention as emanating from civil proceedings. I would hold, at the very least, that the proceedings arose from the executive action of the state to further the criminal law enforcement machinery of the country. For these reasons, I would refuse to accept the view that because access to the Supreme Court was through the mechanisms of the CPR, the *habeas corpus* applications were civil 'proceedings' and so the respondents should be deprived of the protection of the law, which limit the right of appeal in *habeas corpus* proceedings.

[46] In this regard, there is no express statutory right of appeal under the JAJA upon which the appellants could rely to appeal from the proceedings in the court below, especially when section 21A(1)(a) of the JAJA is considered. There is also nothing in the JAJA from which such a right may be implied. Therefore, in my view, counsel for the respondents, stand on firm footing with the argument that no appeal would lie, at

common law or by statute, from the *habeas corpus* proceedings below in which it was adjudged that the respondents' detentions within the context of the SOEs were unlawful.

[47] However, in a valiant effort to circumvent what has presented itself as an insurmountable jurisdictional hurdle, the appellants contended that the appeal is not against the issuance of the writs of *habeas corpus,* the ruling that the respondents were entitled to be released, or the release of the respondents. Instead, they contended that the appeal is from the learned judge's findings that the Proclamations made by the Governor-General under section 20 of the Constitution as well as the provisions of the EPA and the EPR were unconstitutional. Counsel for the appellants argued that while it was for the learned judge to determine whether the detentions were justified, it was not for him to determine whether the detentions were constitutional.

[48] There is no doubt that the learned judge was mindful of the core question he ought properly to decide, even though the appellants are complaining that he overstepped his bounds. He demonstrated his appreciation of his task at para. [54] of the written judgment, where he stated:

> "[54] The question is, is the Act of Parliament incompatible with the constitution and thus unlawful. **The question for the court is the legality of the imprisonment. The writ is issued for both parties to be present to decide the legality of the detention. If, and only if, the detention is held to be unlawful, the prisoner can, and usually is, released or bailed by order of the court**." (Emphasis added)

[49] Following on his expressed appreciation of his task, and after an evaluation of the constitutional and legislative framework within which the respondents were detained, the learned judge, ultimately, ruled that "the detention of each [respondent] is unlawful" (see para. [146] of the written judgment). An order for the discharge of the respondents would, therefore, have followed as a matter of right had they not already been released. The learned judge's consideration of the propriety of the action of the Governor-General and the constitutionality of the Proclamations and the legislative scheme was carried out

in the context of determining whether the detentions were in accordance with the law. His subsequent pronouncements, regarding those matters, were all part and parcel of his reasoning in coming to the ultimate decision that the detentions were unlawful. Therefore, his decision remained focused on the illegality of the detentions and the entitlement of the respondents to be released, even though, rightly or wrongly, he had regard to the question of constitutionality of some aspects of the SOE regime, including the legislative scheme. Once the learned judge concluded that the respondents were entitled to be discharged from custody, his decision and the reasons for it would have fallen outside the review powers of this court.

[50] Consequently, without the need to express any view as to the propriety or accuracy of the learned judge's approach and pronouncements, regarding the matters complained of, it is sufficient to say that the appellants are seeking to appeal the reasoning and findings of the learned judge, on an application for a writ of *habeas corpus* on which the detentions of the respondents were adjudged unlawful. The respondents were entitled to their freedom and so would have been ordered released by the learned judge had they still been detained. In such circumstances, regardless of the appellants' contention that they are not appealing the decision of the learned judge but only his findings, no appeal lies because the outcome of those proceedings – findings and decision – is not amenable to review by this court. The detainer, being the appellants, is bound by the decision regardless of the reasons for it.

[51] Accordingly, for the preceding reasons, I find that this court has no jurisdiction to entertain the appeal from the findings of the learned judge on the application for a writ of *habeas corpus*. The respondents' application, therefore, succeeds on this issue.

[52] Despite the conclusion on the first issue, which would be determinative of the respondents' application as well as the substantive appeal, I will proceed, nonetheless, to address the second issue. The consideration of the second issue is, partly, in light of the tenacity of the appellants' counsel in advancing the appeal on the basis of section 10 of the JAJA. The other reason is that if I am wrong in my conclusion that the appeal is

barred, having regard to section 21A(1)(a) of the JAJA, then there is an alternative, and even stronger, basis for the court to grant the respondents' application and strike out the appeal. This is the subject of discussion below to which attention is now directed.

Issue (2): Whether the appeal is from a judgment or order of the learned judge in civil proceedings within the meaning of section 10 of the JAJA

[53] In refuting the relevance of the restriction of the right of appeal indicated by section 21A(1)(a) of the JAJA, the appellants contended that the applicable provision that would confer jurisdiction on the court to hear the appeal is section 10 of the JAJA. Pursuant to section 10 of the JAJA, this court has jurisdiction to hear and determine appeals from "any judgment or order of the Supreme Court in civil proceedings". Counsel for the appellants argued that this section is relevant as the *habeas corpus* applications were brought before the Supreme Court under Part 57 of the CPR as civil proceedings. However, counsel for the respondents were of a different view. In so far as is immediately relevant to the resolution of the instant issue, they argued that the appellants' appeal is not directed at a 'judgment or order' of the court below but its findings and, therefore, does not fall within section 10 of the JAJA.

[54] For reasons, which will now be briefly outlined, I find there is merit in the respondents' submissions that section 10 of the JAJA cannot avail the appellants to gain access to this court to appeal the findings of the learned judge.

[55] Section 10 of the JAJA states that:

> "10. Subject to the provisions of this Act and to rules of court, **the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings**, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon…" (Emphasis added)

[56] Even if the proceedings from which the appeal emanates may properly be viewed as civil proceedings, a review of the case law reveals that a party's right of appeal in civil proceedings is against the formal "judgment or order" and not against the reasons for the decision. This was expressed by the English Court of Appeal in the oft-cited case of **Lake v Lake** [1955] 2 All ER 538 and endorsed in many authorities, including several from this court. In **Lake v Lake**, at page 541 of the reported judgment, Sir Raymond Eversheд MR stated:

> "A party's right of appeal (which is, of course, a statutory right) is now regulated by the terms of RSC, Ord 58, r 1. That states that the appellant may, pursuant to s 27(1) of the Supreme Court of Judicature (Consolidation) Act, 1925, appeal from 'the whole or any part of any judgment or order'… Nothing from the cases brought to our attention by counsel for the wife persuades me that by the words 'judgment or order' in the rule or in the sub-section is meant anything other than the formal judgment or order which is drawn up and disposes of the proceedings and which, in appropriate cases, the successful party is entitled to enforce or execute. **In other words, I think that there is no warrant for the view that there has by statute been conferred any right on an unsuccessful party, even if the wife can be so described, to appeal from some finding or statement — I suppose it would include some expression of view about the law — which you may find in the reasons given by the judge for the conclusion at which he eventually arrives, disposing of the proceeding**…" (Emphasis added)

[57] Hodson LJ, at page 543 of the report, expressed his agreement with Sir Raymond Eversheд MR and similarly noted that the statutory requirement conferring the right of appeal (like section 10 of the JAJA) "is only dealing with the formal order and not dealing with the reasons for the decision". His lordship also expressed the view that it does not follow that there is an appealable issue because the judge, in arriving at his conclusion, has determined some matters in a way with which a party might be dissatisfied.

[58] The principle from **Lake v Lake** has been applied by this court in **Allen v Byfield (No 2)** (1964) 7 WIR 69, where Lewis JA, at page 75, observed:

> "…as counsel for the applicant properly conceded, **an appeal is taken, not against what a judge or judges pronounce in court, but against 'the formal judgment or order which is drawn up and disposes of the proceedings and which, in appropriate cases, the successful party is entitled to enforce or execute'**. See per Lord Evershed in *Lake v Lake…*" (Emphasis added)

[59] Further, even more relatively recently in **Sans Souci Limited v VRL Services Limited** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 83/2009, judgment delivered 25 November 2009, Morrison JA (as he then was) observed by reference to **Lake v Lake** and **Allen v Byfield**:

> "41. The real issue in **Lake v Lake** (supra) was therefore to determine, not so much what the order of the court means, but what was the order from which a right of appeal lay. Looked at in this way, **it is hardly surprising that the decision was that an appeal lay from the formal order of the court and not from anything said by the judge in giving his reasons**. This is indeed the principle for which the case was cited as authority by this court in **Allen v Byfield (No 2)** (1964) 7 WIR 69, per Lewis JA at page 75." (Emphasis added)

[60] The authorities are pellucid that the appeal lies from the result, that is the decision or formal order of the court, and not from the pronouncements or findings of the judge in giving his reasons for the decision or order made.

[61] Against this background, the pertinent question must now be asked: what "judgment or order" of the learned judge are the appellants seeking to appeal in order to come within section 10 of the JAJA for the appeal to be heard? It is seen from the notice and grounds of appeal that the appellants are not appealing the ruling or order of the learned judge. In fact, they have been quite explicit, even in oral submissions before this court, that they are not challenging the decision but only the specified findings detailed

in the notice and grounds of appeal. The focus of the appeal is also evident from the orders being sought in the appellants' amended notice and grounds of appeal, namely:

> "(a) That the appeal is allowed.
>
> (b) **That the findings of the learned Judge** at paragraphs 84 and 145 of the judgment are set aside.
>
> (c) Costs of the appeal to the Appellants." (Emphasis added)

[62] It is indisputable then that the appeal is not against any judgment or order of the learned judge as required by section 10 of the JAJA and explained by the relevant authorities.

[63] Indeed, it seems imperative to state, especially for the benefit of the appellants, that the learned judge made no binding declarations of law or granted any constitutional redress that could give rise to a valid complaint that he had granted declaratory and other relief to the respondents, which would have been an appealable order emanating from the challenged findings. Therefore, despite the findings or pronouncements of the learned judge, regarding what he viewed as the unconstitutionality of the Proclamations, the legislative instruments and the SOEs, he made no enforceable judgment or order that was binding on the appellants and, therefore, amenable to an appeal. Indeed, the fact that the EPA still subsists and was, amended by Parliament, following the learned judge's decision, is solid proof that the appellants were not, in the least, affected by the learned judge's pronouncements. Against this background, I am impelled to agree with the respondents that the appeal is misconceived.

[64] Finally, and for completeness, I consider it necessary to address the arguments of counsel for the appellants that the appeal should be entertained because the impugned findings would set a bad precedent and their related concern that other judges of the Supreme Court could follow the learned judge's approach and pronouncements in treating with *habeas corpus* applications. This seems to be an appeal to the court to take steps

to protect the administration of justice from, what counsel seems to view as, the potential perpetuation of 'bad' law. However, this viewpoint of the appellants is not acceptable.

[65] As noted by Lord Herschell in **Cox v Hakes** (para. [33] above], which I find useful to repeat, no court dealing with a *habeas corpus* application is bound by the view taken by any other court of concurrent jurisdiction, or should itself feel obliged to follow the law laid down by any such court. Therefore, the decision of a judge of the Supreme Court in *habeas corpus* proceedings would not be binding on another judge of the Supreme Court treating with a similar application. Another judge hearing a *habeas corpus* application would have the guidance of the well-settled authorities to know they need not consider any other decision on similar cases in that court.

[66] Additionally, the learned judge's decision on the *habeas corpus* proceedings cannot be used to assist the respondents in any subsequent claim in which the legality of their detention is in issue. As was persuasively expressed by Palmer J in the Canadian case of **Ex Parte Byrne** (1883) 22 NBR 427, at page 433:

> "…**the proceedings on *habeas corpus* have no effect whatever in determining the right of the parties in any other proceedings, in which the legality of the commitment is in question**. If an action of false imprisonment is brought, its decision must be reached therein by the Court before whom it is pending, without reference to the summary proceedings on *habeas corpus*…" (Emphasis added)

[67] Accordingly, the findings of the learned judge appealed against are of no precedential value to necessitate or justify the appeal against those findings.

[68] For the foregoing reasons, even if it is accurate to say that the appeal is from civil proceedings in the Supreme Court, I find that the court has no jurisdiction to entertain the appeal as it is not an appeal from "an order or judgment of the Supreme Court" within the meaning and scope of section 10 of the JAJA.

Conclusion on the respondents' application

[69] Having regard to my conclusions on the two issues considered above, I find that no appeal lies to the court from the proceedings before the learned judge, they being proceedings emanating from *habeas corpus* applications in which it was decided that the detentions of the respondents were unlawful. By virtue of that decision, they would have been entitled to be released. Additionally, even if the proceedings could properly be categorised as civil proceedings, the appellants are seeking to appeal findings or pronouncements the learned judge made in coming to his decision, which is not an appeal from a "judgment or order" of the Supreme Court. Accordingly, as the respondents have rightly argued, there were no proceedings in the Supreme Court that have given rise to a right of appeal.

[70] For all the foregoing reasons, I would hold that the respondents succeed on their application to strike out the appellant's appeal for want of jurisdiction.

The disposal of the appeal

[71] It logically follows that the success of the respondents on their application is dispositive of the appeal. However, the question arises as to whether it would be proper for the court to express its views on the substantive grounds of appeal given that the appeal was fully argued. In **Kozeny**, the Board instructed at para. 48 that where this happens, "it may well be inappropriate for the court to say anything about the substantive merits if it concludes that it has no jurisdiction to do so". Their Lordships, nevertheless, went on to state that "in some circumstances, where the court has heard full argument on the merits, there is real value in the court expressing its views on the issues, especially if the court is (or but for the jurisdictional point would be) the final court of appeal". In that regard, the Board found a reason to express its view on some of the principal points of substance that were raised before them because it concluded that its views on those matters could be of assistance to the courts in the Bahamas in the future.

[72] Having considered their Lordships' approach and reasoning in **Kozeny**, I form the view that it could be of some real value in this court expressing its views on one aspect of the appellants' appeal. The need for the court to express its view relates to the issue of whether the single judge could have considered constitutional questions on the *habeas corpus* application during the hearing in open court. The focus of the court on this issue could guide the consideration of *habeas corpus* applications in the Supreme Court, even if the views expressed can only be regarded as persuasive.

[73] The need to consider the selected issue emanates from the appellants' argument that the learned judge could not consider or ought not to have considered matters pertaining to the constitutionality of the Proclamations and legislative scheme on the *habeas corpus* applications. The proper forum, they said, is the Full Court, which comprised a bench of three judges.

[74] It seems pertinent to note, as a starting point, that in evaluating the detention of an individual within the legal framework of a SOE, one cannot divorce the legality of that detention from the constitutionality of it. This is, simply, because, the detentions were made in the exercise of powers conferred by the Constitution. The Governor-General had purportedly acted under a power conferred on him by the Constitution in declaring the SOEs, which led to the respondents' detention upon the Minister's orders. The respondents had approached the court for protection of their constitutional right to liberty to which they were entitled but which was abrogated or infringed through the constitutional and concomitant legislative mechanisms deployed by the State.

[75] Furthermore, in treating with the question whether a single judge in *habeas corpus* proceedings may enquire into the constitutionality of the detentions, regard must be had to the nature and purpose of the writ of *habeas corpus* in issue in this case. In Halsbury's Laws of England, Volume 88A (2018) para. 144, the learned editors noted:

> "The writ of habeas corpus for release is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable

> detention whether in prison or in private custody. It is a prerogative writ by which the Sovereign has a right to inquire into the causes for which any of his subjects are deprived of their liberty…If there is no legal justification for the detention, the party is ordered to be released."

[76] Additionally, in further considering the nature of *habeas corpus* proceedings, I would highlight, for present purposes, the helpful observations of Martin JA in the Canadian case of **R v McAdam** 1925 CanLII 319 (BC CA); [1925] 4 DLR 33 (case relied on by the respondents) that:

> "It must clearly appear, I apprehend, from all these high authorities that the constitutional right *ex debito justitiae*, to the 'swift and imperative remedy'… afforded by this 'very high prerogative' and 'transcendent' writ in English Law, is a civil right, **the assertion of which in all cases is by its own peculiar and summary procedure which does not vary in essentials whether the custody be under criminal process, or civil, or military, or naval, or private, or governmental executive Act, or otherwise: its whole procedure with its 'peculiarities' is extraordinary and entirely apart and distinctive from the ordinary proceedings that it reviews, and brings the person detained thereunder before the Court or Judge so that the appropriate remedy may be applied.** 'It was not' (as Lord Halsbury puts it …) 'a proceeding in a suit but was a summary application by the party detained… It was as Lord Coke described it festinum remedium'. And 'The essential and leading theory of the whole procedure is the immediate determination of the right of the applicant's freedom.'" (See page 55 of the reported judgment)

[77] Similarly, the pronouncements of the Privy Council, in another case brought to the court's attention by counsel for the respondents, **Eshugbayi Eleko v Officer Administering the Government of Nigeria and another** [1928] AC 459, are worthy of special note within this context. There, the Board opined, in part, at page 467 of the reported judgment:

> "**The writ of habeas corpus is a high prerogative writ for the protection of the liberty of the subject**, and it

> would be a startling result if a statute enacted primarily for the simplification of procedure should have materially cut down that protection." (Emphasis added)

[78] Therefore, the decision to be made on an application for a writ of *habeas corpus* is whether the detention of the detainee is lawful or unlawful. In coming to that decision, the court will have to examine the reasons for and the circumstances of the detention as well as the State's justification for it. Matters going to the resolution of these questions will necessitate an examination of the actions of the executive and the legislative measures utilised by the State within the framework of the Constitution. It is the Constitution, which provides that "Parliament shall pass no law and no organ of the state shall do any act that abrogates, abridges or infringes" any person's fundamental rights without lawful justification (see section 13(2)(b) of the Constitution).

[79] Within this context, the learned editors of Halsbury's Laws of England, Volume 88A (2018), para. 146, further stated:

> "**In any matter involving the liberty of the subject the action of the Crown or its ministers or officials is subject to the supervision of the judges on habeas corpus**. The judges owe a duty to safeguard the liberty of the subject not only to the subjects of the Crown but also to all persons within the realm who are under the protection of the Crown and entitled to resort to the courts to secure any rights which they may have, and this whether they are alien friends or alien enemies. **It is this fact which makes the prerogative writ of the highest constitutional importance, it being a remedy available to the lowliest subject against the most powerful. The writ has frequently been used to test the validity of acts of the executive and, in particular, to test the legality of detention under emergency legislation**." Emphasis added.

[80] The learned editors, in expanding on the supervisory powers of the judges over the actions of the Crown, its ministers or officials on *habeas corpus*, stated, by way of footnote to the same para. 146, that:

> "If it is clear that an act is done by the Executive with the intention of misusing its powers, the court has jurisdiction to deal with the matter on an application for a writ of habeas corpus, although the custody of the applicant may be technically legal and the point is not strictly before the court having regard to the form in which the application is made: *R v Governor of Brixton Prison, ex p Sarno* [1916] 2 KN 742."

[81] Therefore, in the light of the nature, purpose and scope of the writ of *habeas corpus*, it cannot be said, without more, that *habeas corpus* proceedings before a single judge should not, cannot or ought not to involve issues relating to the constitutionality of the action of the State and the legislative scheme within which the detention was made.

[82] In addressing this issue as to the twinning of an application for enquiry into the lawfulness of a detention with a constitutional challenge in *habeas corpus* proceedings, the recent decision of the Privy Council in **Jean Rony Jean Charles v The Honourable Carl Bethel (in his capacity as Attorney General of the Bahamas) and others** [2022] UKPC 51 ('**Charles v Bethel**'), cited by the respondents, could prove quite instructive. In that case, the Board recognised one of the principal issues for their determination to be whether the appellant was entitled to seek constitutional redress in the context of an application for *habeas corpus* before a single judge. The application for the writ of *habeas corpus* was dismissed but the single judge granted constitutional redress that was applied for within the context of the *habeas corpus* application. On appeal, Barnett JA (one of the three appellate judges) reasoned, in so far as is relevant, that the *habeas corpus* having been brought to an end, the court ought not to have considered any further applications in that action arising out of the detention of the applicant. He opined that the court ought to have required the applicant to institute new proceedings if he wanted to seek constitutional redress because, in his view, an "application for a writ of habeas corpus is a discrete action and should always remain a discrete action" (para. 16 of the Privy Council's judgment).

[83] It would suffice for present purposes to highlight paras. 20 to 24 of the judgment of the Board, where attention was given to the implication of Barnett JA's dictum. In para.

20, their Lordships authoritatively stated that it was competent for the appellant to raise an application for constitutional redress by motion in his application for *habeas corpus*. Their Lordships revisited the provisions of article 28 of the Bahamian Constitution (similar to section 19 of our Constitution) and noted:

> "It is clear from the wording of paragraph (1) of article 28 and the expansive nature of what is provided in paragraphs (4) and (5) that the Constitution does not lay down any formal procedures to be followed when an applicant seeks constitutional redress and that it seeks to facilitate the exercise by the Supreme Court of its constitutional jurisdiction."

[84] Their Lordships reinforced the principle that a person who alleges that his or her fundamental rights are threatened or have been contravened should have unhindered access to the court: **Jaundoo v Attorney-General of Guyana** [1971] AC 972, 982-983 ('**Jaundoo**'). Their Lordships, at the same time, recognised one qualification to that principle, as stated by Lord Diplock in **Jaundoo** at page 983, that:

> "There is only one qualification needed to this statement. It is implicit in the word 'redress'. The procedure adopted must be such as will give notice of the application to the person or the legislative or executive authority against whom redress is sought and afford to him or it an opportunity of putting the case why the redress should not be granted."

[85] The Board, having reiterated that principle, also noted that Lord Diplock had added that the qualification above did not prevent the court from making conservatory orders *ex parte* and before notice was given if the urgency of the case so required.

[86] Importantly also, their Lordships underscored the "well-established constitutional jurisprudence of the Board", notably, espoused by it in such cases as **Minister of Home Affairs v Fisher** [1980] AC 319, 328–329, and **Seepersad v Commissioner of Prisons of Trinidad and Tobago** [2021] UKPC 13. The now well-recognised principle is that provisions of the Constitution must be given a liberal interpretation in order to give individuals the full measure of the rights and freedoms, which the Constitution confers.

[87] Their Lordships, having noted these long-established tenets of constitutional law, then stated at paras. 23 and 24:

> "23. There is also authority from the local Bahamian Courts which upholds the use of an **oral motion or informal means to invoke the Supreme Court's jurisdiction** under article 28 of the Constitution…
>
> 24. In the face of this authority, **the Board would be surprised if the judges of the Court of Appeal in their judgments were holding that as a general rule a constitutional challenge could not be made in an action for habeas corpus and that separate legal proceedings were required**. **Barnett JA's statements at paras 53 and 54 of his judgment, which the Board has quoted in para 16 above, are certainly capable of bearing that meaning.** Mr Poole, however, argues that that is not what the Court of Appeal was saying… It is not necessary in this case for the Board to analyse in any detail the judgments of the Court of Appeal. **It is sufficient to state that if the judgments were correctly interpreted as saying a separate action is needed as a general rule and that the evidence contained in Clotilde's affidavit and in the Return was not available for consideration in the constitutional challenge, those conclusions would be in error**." (Emphasis added)

[88] It is palpable from the pronouncements of the Privy Council that there is no hard and fast rule of general application that constitutional challenges against the State, which relates to the question of the legality of the detention of a detainee, cannot be heard by a single judge on a *habeas corpus* application. Furthermore, there is nothing in the Constitution, statute or the rules of court to say, those matters must, be considered by a bench of more than one judge.

[89] Simply put, section 20 of the Constitution, by virtue of which the respondents were detained, has no express provision of the procedure to be adopted to invoke subsection 20(5) of the Constitution, which is in contention in the proceedings. Furthermore, there is nowhere within the definition of "court" under section 20 of the Constitution that "court" means the Full Court.

[90] Counsel for the appellants have sought to pray in aid the provisions of rule 56.8 of the CPR in making the point that the constitutional challenge ought to have been heard by the Full Court. However, the appellants' reliance on that provision is misplaced. Nowhere in Part 58 does it state, expressly or by implication, that a Full Court must hear an application for constitutional relief. The fact that the 'practice' has always been for hearing to be done by a Full Court, as argued by counsel, does not, without more, make it wrong for a single judge sitting in open court (as in the instant case) to hear a constitutional challenge.

[91] Accordingly, there is nothing in the provision of section 20 of the Constitution, which should be read as restricting the respondents' access to the court for the lawfulness of their detentions to have been investigated. The appellants have pointed to no authority in support of their contention that a single judge in open court, in considering the legality of the detention of an individual on a *habeas corpus* application, arising from detention within the framework of a SOE, cannot take into account the provisions of section 20(5) of the Constitution.

[92] It is apparent that the Privy Council's willingness to accept that a constitutional challenge may properly be made in proceedings on an application for *habeas corpus* is influenced by the nature and purpose of the writ of *habeas corpus* as indicated above at paras. [75] to [77]. In light of the foregoing, the court must be guided by the nature and purpose of the writ of *habeas corpus* against the background of the constitutional rights and freedoms to which applicants are entitled, on the one hand, and the rights and responsibilities of the State to ensure law and order is maintained, on the other. However, fundamentally, the court must appreciate that, ultimately, the writ is for the protection of the liberty of the subject.

[93] It may be said then that a single judge of the Supreme Court, approached for constitutional relief on a *habeas corpus* application, is bound to have regard to the need to protect the applicant and this would necessitate construing the Constitution liberally to give the applicant the full measure of the rights and freedoms the Constitution confers.

[94] That having been said, the crucial limitation to a single judge addressing the constitutional challenge, I believe, would be that the State, through the Attorney-General, must be notified of the claim for redress and the specific challenges of the detainee to his detention, and be afforded a reasonable opportunity to respond. If an order is made granting constitutional redress, in the absence of any reasonable opportunity afforded to the State to respond, then that order could be impeached on the grounds of procedural unfairness. It seems that in appropriate circumstances, an appellate court could remit the matter for the State to be given the opportunity to be heard (see **Charles v Bethel**). Of course, this would be in keeping with the rules of natural justice. In this case, the learned judge made no order on the *habeas corpus* application granting any relief on constitutional grounds to the respondents that could be viewed as being detrimental to the appellants' interests.

[95] It should also be noted that while a single judge may consider a constitutional challenge on a *habeas corpus* application, this does not apply in all cases. The Privy Council in **Charles v Bethel** clearly made this point at para. [32] of the judgment. There, their Lordships stated that where there are substantial disputes as to fact it will be rare that a summary procedure is appropriate. Citing previous authorities from Trinidad and Tobago, their Lordships reiterated that, a summary procedure is not suited for deciding substantial factual disputes except in the simplest of cases. See **Jaroo v Attorney General of Trinidad and Tobago** [2002] UKPC 5; [2002] 1 AC 871, para. 36 per Lord Hope and **Attorney General of Trinidad and Tobago v Ramanoop** [2005] UKPC 15; [2006] 1 AC 328, para. 22 per Lord Nicholls.

[96] Counsel for the appellants have also brought to the court's attention an authority from Kenya, which shows that in that jurisdiction, the Constitution of Kenya 2010, provided that a constitutional challenge that involves a substantial question of law ought not to be determined by a single judge (article 165(4)). See, in this regard, the case of **Coalition for Reform and Democracy (CORD) and Another v Republic of Kenya and Another** [2015] 3 LRC 409, 453 to 456 (**'CORD v Kenya**').

[97] However, unlike the Kenyan Constitution, which was under consideration in **CORD v Kenya**, our Constitution (as well as the CPR) is silent as to the factors to be considered in determining what constitutional challenges are inappropriate for hearing by a single judge and so should be referred to a bench of more than one judge. This is a question that would fall for consideration by a judge of the Supreme Court having conduct of the proceedings, in the first instance, such as at a first hearing of a claim or application or at a case management conference. The case law referred to above has disclosed several pertinent factors for consideration. However, quite apart from the fact that the authorities from which it emanates are only persuasive (albeit strongly so), it is clear that the list of factors is not exhaustive. Therefore, the ultimate determination regarding the most appropriate forum is still left to the judgment, wisdom and discretion of a judge of the Supreme Court having been guided by relevant legal principles and the questions of law or fact to be resolved in each case.

[98] As it stands, there is nothing in the circumstances of this case, which could lead to a conclusion that the respondents' constitutional challenge in the *habeas corpus* proceedings could not have been addressed by the single judge in open court. All that would have been required was for the appellants to be given the right to be heard on those particular issues and before any constitutional relief could have been granted to the respondents on the basis of the challenge. However, as it turned out, the learned judge granted no relief consequent upon any findings he made relative to the constitutional challenge. As already indicated, there is nothing he did regarding those matters that adversely affected the appellants. Consequently, the grievance of the appellants that they were not given an opportunity to be heard, regarding the issues raised about the constitutionality of the Proclamations and legislative scheme, is now purely of academic interest. In sum, this grievance, regarding the appellants' right to be heard, would be ineffectual as a basis for the court to hold that they have a right of appeal from the decision of the learned judge on the *habeas corpus* applications.

[99] Besides these comments, I would refrain from expressing any further views on the merits or otherwise of the other points raised in the notice and grounds of appeal in the light of the conclusion that the court has no jurisdiction to entertain the appeal and that it should be struck out as a consequence.

Costs

[100] The respondents, through their counsel, have requested that they be awarded costs on an indemnity basis for proceedings in this court and the court below and that the court issue a special costs certificate for two counsel where relevant.

(a) Costs of the proceedings below

[101] With respect to the respondents' request for costs in the court below to be awarded by this court, counsel for the appellants noted that the learned judge made no orders with respect to costs and that, in any event, the respondents did not challenge the decision of the learned judge not to have made an order for costs. Counsel also referred the court to section 11(1)(e) of the JAJA in arguing that where an appeal is with respect to costs only, permission to appeal is required and the respondents did not obtain such permission.

[102] I agree with counsel for the appellants that the respondents would have no entitlement to costs in the court below as no order was made by the learned judge with respect to costs and this was not challenged by the respondents in this court by way of a counter-notice of appeal. The respondents' submissions that they be awarded costs in the proceedings below are therefore, rejected.

(b) Costs of the appellate proceedings

[103] As it relates to the proceedings before this court, the respondents are the successful party. Their application for the appeal to be struck out has succeeded. They are entitled to the costs of that application and ought to be awarded those costs.

[104] Regarding the appeal that has been struck out, there had been full submissions filed by the respondents in response and the court had heard oral arguments, in full, having elected to follow the approach in **Kozeny**. So, while it cannot be said that the respondents have succeeded on the substantive appeal, they were impelled to respond to it by the filing of written submissions and in keeping with the courts' order that the substantive grounds be argued. In all the circumstances, the respondents should not bear the costs of an appeal that ought not to have been brought. They are entitled to the costs occasioned by the filing and prosecution of the appeal. Indeed, these costs would be analogous to, if not the same as, costs thrown away. The court should, therefore, award costs of the appeal that has been struck out to the respondents.

[105] I would propose that the costs of the respondents' application and costs occasioned by and resulting from the filing and prosecution of the appeal that has been struck out be awarded to the respondents to be agreed or taxed.

(c) Whether costs are to be assessed on an indemnity basis

[106] In considering whether the awarded costs are to be assessed on an indemnity basis, I found the case of **Mayor and Burgesses of the London Borough of Southwark v IBM UK Ltd** [2011] EWHC 653 (TCC) to be quite helpful. In that case, Akenhead J noted the applicable principles derived from the English Civil Procedure Rules and enumerated at para. [4] what he regarded as "unexceptionable propositions", derived from case law, governing the award of costs on an indemnity basis. He noted these propositions that are found to be highly persuasive:

> "(a) An award of costs on an indemnity basis is not intended to be penal and regard must be had to what in the circumstances is fair and reasonable: *Reid Minty v Taylor* [2002] 1 WLR 2800, paragraph 20.
>
> (b) Indemnity costs are not limited to cases in which the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when

the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation: *Reid Minty*, paragraph 28.

(c) The court's discretion is wide and generous but there must be some conduct or some circumstance which takes the case out of the norm: *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (A Firm)* [2002] Cr App Rep 67, paragraphs 12, 19 & 32

(d) The conduct must be unreasonable to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight: *Kiam v MGN Ltd (No 2)* [2002] 1 WLR 2810, para 12.

(e) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, but the pursuit of a hopeless claim, or a claim which the party pursuing it should have realised was hopeless, may well lead to such an order: '[T]o maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs': *Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd* [2006] BLR 45, paragraph 27 and *Noorani v Calver* [2009] EWHC 592 (QB), paragraph 9.

(f) There is no injustice to a Claimant in denying it the benefit of an assessment on a proportionate basis when the Claimant showed no interest in proportionality in casting its claim disproportionately widely and requiring the Defendant to meet such a claim: *Digicel (St Lucia) Ltd v Cable & Wireless plc* [2010] 5 Costs LR 709, paragraph 68.

(g) If one party has made a real effort to find a reasonable solution to the proceedings and the other party has resisted that sensible approach, then the latter puts himself at risk that the order

for costs may be on an indemnity basis: *Reid Minty*, paragraph 37.

(h) Rejection of a reasonable offer to settle will not of itself automatically result in an order for indemnity costs but where the successful party has behaved reasonably and the losing party has behaved unreasonably the rejection of an offer may result in such an order: *Noorani*, paragraph 12.

(i) Rejection of 2 reasonable offers can of itself justify an order for indemnity costs: *Franks v Sinclair (Costs)* [2006] EWHC 3656."

[107] Having considered the propositions above, I would posit that this is not an appropriate case for the court to make an order for costs to be assessed on an indemnity basis. I do not find any conduct on the part of the appellants in relation to these proceedings that could be deemed so unreasonable as to take the case out of the norm. The learned judge had made findings that could (and did) reasonably invoke serious concerns on the part of the appellants regarding the validity and operability of the EPA legislative regime. What should have been obvious to the appellants is that the learned judge had made no binding and enforceable order or judgment on those matters to render them appealable.

[108] However, what may be viewed as a misguided effort to approach this court, by way of section 10 of the JAJA, should not be penalised by an award of indemnity costs. As stated at proposition [4](d) in para. [106] above, "the conduct must be unreasonable to a high degree", and "'unreasonable' in this context does not mean merely wrong or misguided in hindsight". In all the circumstances and having regard to the pronouncements of the learned judge, it cannot fairly be said that the appellants' conduct, in bringing the appeal, was unreasonable to a high degree, having regard to what they viewed as being at stake as a consequence of the findings they sought to challenge.

[109] Accordingly, I would refuse the respondents' application for costs to be assessed on an indemnity basis.

(d) Whether special costs certificates to be issued

[110] On the question of whether special costs certificates should be issued to the respondents represented by two counsel, I am guided by rule 64.12 of the CPR, which is applicable to this court by virtue of rule 1.18(1) of the Court of Appeal Rules 2002. Rule 64.12 empowers the court to grant a special costs certificate in these proceedings, and directs that, in considering whether to grant a special costs certificate on the hearing of an application or at the trial (which would be modified within this context to mean the hearing of the appeal), the court must take into account matters set out in rule 65.17(3).

[111] In so far as is relevant to these proceedings, rule 65.17(3) of the CPR states that in deciding what would be reasonable the court must take into account all the circumstances, including any orders that have already been made; the conduct of the parties before as well as during the proceedings; the importance of the matter to the parties; the time reasonably spent on the matter; whether the matter is appropriate for a senior attorney-at-law or an attorney-at-law of specialised knowledge; the care, speed and economy with which the matter was prepared; and the novelty, weight and complexity of the matter.

[112] Having regard to the matters to be considered, it is noted that the determination of the respondents' application was limited to two issues, which cannot reasonably be described as complex or novel to require the involvement and attendance of two counsel to represent any respondent. Therefore, there is no basis to grant a special costs certificate for the hearing of the application, which in any event, was treated as a preliminary point within the hearing of the substantive appeal.

[113] Concerning the appeal, counsel for the respondents made combined submissions, as the issues in all cases were identical. Mr Clarke appeared for the 1st respondent and Ms Richards for the 4th respondent, but the responsibilities for submissions were shared. There was nothing so different, complex or novel about the appeals of the 2nd and 3rd respondents that would necessitate the attendance of a senior and a junior counsel for each of them. Essentially, given the collective submissions of counsel for the respondents,

each respondent had the benefit of the input of more than four counsel, which would have reduced the burden on one counsel for each respondent.

[114] It is further considered, as counsel for the appellants pointed out, that up to a late stage in the proceedings, the respondents were represented by only one counsel – a relatively experienced counsel in the person of Mr Clarke – until notices of change of attorneys were filed for three respondents.

[115] Having regard to the common case for the respondents, the circumstances surrounding their representations, including the joint submissions on their behalf (written and oral), I see no compelling need to issue a special costs certificate for any of them.

[116] Accordingly, the applications for special costs certificates are refused.

Conclusion

[117] I would hold that this court has no jurisdiction to entertain the appellants' appeal. The 'ruling' of the learned judge that the detentions of the respondents were unlawful is not appealable at common law or by statute and, in any event, was not the subject of the appeal. Instead, the appellants appealed the findings of the learned judge on which his 'ruling' was based. Those findings, standing alone, are not amenable to an appeal as the learned judge made no order or judgment in civil proceedings relative to the impugned findings to trigger the exercise of the court's jurisdiction under section 10 of the JAJA as contended by the appellants.

[118] Accordingly, the respondents' application to strike out the notice of appeal succeeds.

[119] I would propose that an order be made by this court in terms that the notice of appeal is struck out for want of jurisdiction with costs of the respondents' application and the costs of and occasioned by the filing and prosecution of the appeal that has been struck out be awarded to the respondents to be agreed or taxed.

STRAW JA

[120] I have read, in draft, the judgment of my learned sister, McDonald-Bishop JA. I entirely agree, also, with her reasoning and conclusion in respect of the striking out of the notice of appeal and the costs order that she has proposed. I would adopt her reasoning concerning the jurisdiction of a single judge of the Supreme Court that should be considered, where appropriate, in constitutional challenges, which arise as integral parts of *habeas corpus* applications.

BROOKS P

ORDER

1. The respondents' application that the amended notice and grounds of appeal filed on 3 August 2021 be struck out is granted.

2. The appellants' amended notice and grounds of appeal filed on 3 August 2021 is struck out for want of jurisdiction.

3. Costs of the respondents' application and the costs of and occasioned by the filing and prosecution of the appeal that is struck out, to the respondents to be agreed or taxed.