[2022] JMFC FULL 07

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU 2022 CV 01410

CORAM: THE HONOURABLE MRS. JUSTICE LORNA SHELLY-WILLIAMS
THE HONOURABLE MS. JUSTICE ANNE-MARIE NEMBHARD
THE HONOURABLE MS. JUSTICE CAROLE BARNABY

IN THE MATTER OF the Constitution of Jamaica

A N D

IN THE MATTER OF an Application alleging breach of constitutional rights under sections 13(a); (f); (p); (r); 14 and 16 of the Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act, 2011

A N D

IN THE MATTER OF an Application for constitutional redress pursuant to section 19(1) of the said Charter

BETWEEN **N.O.** **CLAIMANT**

(A child represented by the Children's Advocate)

AND **THE ATTORNEY GENERAL OF JAMAICA** **DEFENDANT**

IN OPEN COURT

Mesdames Jacqueline Samuels-Brown K.C. and Keisha Spence instructed by Mrs. Kaye-Anne Parke for the Claimant

Mesdames Lisa White and Jevaughnia Clarke instructed by the Director of State Proceedings for the Defendant

Heard: 25th and 26th July and 16th November 2022

Constitutional Redress - Sections 14 (3), 16 and 19(1) of the Charter of Fundamental Rights and Freedoms - Existence of parallel legal remedy - Whether claim for constitutional redress constitutes and abuse of court process

Child Care and Protection Act - Sections 65, 71, 72, 76 and 82 - Whether the making of a Correctional Order by a Judge of the Family Court is intra vires the Act

Statutory construction - *Generalia specialibus non derogant* - Section 3(3) Offensive Weapons (Prohibition) Act and section 76(1) Child Care and Protection Act - Whether a child offender is to be sentenced pursuant to charging Act of general application or the Child Care and Protection Act

Habeas Corpus - Time at which relief may be appropriately granted

L. SHELLY-WILLIAMS, N. NEMBHARD, C. BARNABY JJ

INTRODUCTION

[1] This matter concerns a claim for constitutional redress, which was initiated by the Children's Advocate on behalf of a child N.O., who was born on 25 May 2006. It emanates from criminal charges which were laid against N.O. on 21 March 2021, namely, Being Armed with an Offensive Weapon in contravention of section 3(1) of the Offensive Weapons (Prohibition) Act, 2001 and Assault

Occasioning Actual Bodily Harm, contrary to section 43 of the Offences Against the Person Act.

[2] The charge for the offence of Assault of Occasioning Actual Bodily Harm arose as a result of an alleged physical altercation which occurred between the child N.O. and another minor, at a party which took place in the community of Torrington Park, in the parish of St. Andrew.[1] It is not disputed that on 23 March 2021, while N.O. was being processed at the Admiral Town Police Station in respect of that offence, the police removed a six-inch knife from his person.

[3] On 8 April 2021 the police laid Informations against N.O. in respect of the said offences and a Summons to Person Charged was issued in relation to each offence and were served inmately on his mother Ms. Triffina Bell on 14 April 2021.

[4] On 6 July 2021 N.O. pleaded guilty to the offence of Being Armed with an Offensive Weapon, in the Kingston and St. Andrew Family Court, before Her Honour Mrs. Feona Feare Gregory, Senior Judge of the Kingston and St. Andrew Family Court ("the learned judge"), and was sentenced to a two (2) years Correctional Order on 23 September 2021. As a consequence, N.O. has been held at the Rio Cobre Juvenile Correctional Centre from the time of the imposition of the Correctional Order and remains there up to the time of the hearing of the claim. At the time of his arraignment, N.O. was not represented by an Attorney-at-Law but his mother was present and indicated, on enquiry from the learned Judge that she did not intend to get an attorney-at-law to represent N.O.

[5] In March 2022, N.O. was denied leave to appeal in respect of the Correctional Order which was imposed on him, the time for filing an appeal having become spent by the operation of statute.

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[1] See – Department of Correctional Services Probation and Aftercare Services Social Enquiry Report, dated 23 September 2021 and which is exhibited as exhibit **"FFG8"**, to the Affidavit of Her Honour Feona Feare Gregory in Response to the Fixed Date Claim Form, which was filed on 16 May 2022.

[6] By way of a Fixed Date Claim Form filed on 27 April 2022, N.O. seeks the following relief against the Defendant, The Attorney General of Jamaica: -

(1) A Declaration that the child N.O., who was found guilty of section 3(1) of the Offensive Weapons Prohibition Act (2001) by the Kingston and St. Andrew Family Court, holden at Duke Street, was wrongfully given a two (2) year Correctional Order by Her Honour Mrs Feare-Gregory, Parish Judge, on 23 September 2021, as the said Order was made ultra vires;

(2) A Declaration that the right to liberty of the child N.O., pursuant to the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, has and is being unlawfully infringed upon, as Her Honour Mrs Feare-Gregory acted outside the permissible sentencing range of section 3(1) of the Offensive Weapons Prohibition Act, 2001, when making a Correctional Order for two (2) years;

(3) A Declaration that the child N.O.'s right to freedom of movement was infringed upon as he is and continues to be held at the Rio Cobre Juvenile Correctional Centre because the Court erred when making a Correctional Order for two (2) years and that the said Order continues until in or around September 2023;

(4) A Declaration that the child N.O.'s Correctional Order was outside the scope of section 3(1) of the Offensive Weapons Prohibition Act (2001), thereby infringing upon his right to liberty and as a consequence depriving him of his protection of freedom of the person and his protection of the right to due process in accordance with sections 14 and 16 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011;

(5) The relief sought is that the child N.O. be released forthwith from the custody of the State at the Rio Cobre Juvenile Correctional Centre;

(6) Compensation for the breaches of the child N.O.'s constitutional rights;

(7) Such further and other relief as this Honourable Court deems fit; and

(8) Costs.

[7] The claim raises, among other things, the issue of whether a Judge of the Family Court acted ultra vires the applicable legislative framework by imposing a Correctional Order on N.O. pursuant to section 76(1) of the Child Care and Protection Act, in respect of the offence of Being Armed with an Offensive Weapon. Additionally, the claim raises the specific issue of whether, in the circumstances of the instant case, the imposition of the Correctional Order breaches N.O.'s constitutional right to liberty; and as a consequence, deprives him of his protection of freedom of the person and his protection of the right to due process.

[8] The claim is brought on the bases that: -

(a) *There is no other appropriate remedy that is available to address the Constitutional breaches that are alleged;*

(b) *The Office of the Children's Advocate is a Parliamentary Commission established pursuant to the Child Care and Protection Act, with the mandate to 'protect and enforce the rights of children';*

(c) *Paragraph 14(1)(a) of the First Schedule to the Child Care and Protection Act also provides that the Children's Advocate may, subject to the leave of the court, initiate proceedings, other than criminal proceedings, involving law or practice concerning the rights or best interests of children; and*

(d) *The constitutional issues to be resolved are of exceptional public importance.*

[9] It is our assessment that the pleaded relief are premised on these contentions: -

(a) that the two (2) year Correctional Order made by the learned Judge was *ultra vires* the *Offensive Weapons (Prohibition) Act*, section 3 (1) in particular;

(b) that in making the Correctional Order for (2) years – which is outside the sentencing range of section 3(1) of the *Offensive Weapons Prohibition Act* – the consequences that flowed are that N.O. is being held at a

juvenile correctional centre, and as such, the child's right to liberty and freedom of movement have been and continue to be infringed; and

(c) that the two (2) year Correctional Order being outside the scope of section 3(1) of the *Offensive Weapons Prohibition Act* generally - as distinct from outside the permissible sentencing range – (**unclear about this**) the order infringes upon N.O.'s right to liberty; and in the result, he has been deprived of the protection of freedom of the person and the right to due process as guaranteed by section 14 of the Charter of Fundamental Rights and Freedoms (the Charter).

[10] When read in isolation and indeed, against the backdrop of the grounds stated for pursuing the various relief, the challenge appears to be directed solely at the decision of the Judge of the Family Court qua Children's Court, as distinct from the decision making process. The first ground on which N.O. relies gives credence to this conclusion. It states that "*there is no other appropriate remedy available to redress the Constitutional breaches alleged".* The other grounds are limited to addressing the statutory status of N.O. and state that the constitutional issues raised are of exceptional public importance.

ISSUES AND SUMMARY CONCLUSIONS

[11] In light of the foregoing, the submissions of the parties and the application made by the Claimant at the hearing to amend the claim, which are summarised later, consideration of the following matters determine the claim.

i. **Whether the late stage amendment to the claim should be granted.**

ii. **Whether the Attorney General should be added as a Defendant to the claim.**

iii. **Whether the court should decline to exercise jurisdiction in respect of the claim for constitutional redress.**

iv. **Whether the two (2) year Correctional Order is *intra vires* the CCPA.**

v. **Whether the learned judge erred in arraigning and sentencing N.O. in the absence of legal representation in circumstances where his parent was present and indicated that legal representation would not be sought.**

vi. **Whether it is appropriate to grant a writ of *habeas corpus* where it is alleged that a court has decided wrongly.**

vii. **Whether a Correctional Order is a custodial order within the meaning of the CCPA.**

[12] For reasons set out later in the judgment, we have concluded that it is inappropriate to join the Attorney General as a Defendant to the claim for constitutional redress and should accordingly be removed and substituted as an interested party; that the court should decline to exercise the jurisdiction given to it by section 19 of the Constitution on the ground that it constitutes an abuse or misuse of the process of the court. Further, having perused the CCPA and the OWPA, we find that the Correctional Order imposed on N.O. was intra vires the powers of the learned judge. We also conclude that although the learned judge mislabelled the Correctional Order as non-custodial, she appreciated the terms of the sentence that was imposed; and that a writ of *habeas corpus* could not be granted as N.O.'s liberty was being restrained pursuant to an order of the court after a conviction, which is one of the exceptions prescribed under section 14 of the Constitution.

THE CLAIMANT'S SUBMISSIONS

[13] In addressing the issue of standing, it was submitted on N.O.'s behalf, that the Office of the Children's Advocate ("OCA") is a legislatively appointed Commission of Parliament that has the authority to take the necessary steps to safeguard the rights of children and to protect their best interest. It was argued

that, based on Section 4 and Paragraph 14 (1) of the First Schedule of the **Child Care and Protection Act** ("CCPA"), the OCA has the requisite standing to pursue the Claim.

[14] Learned King's Counsel, Mrs. Jacqueline Samuels-Brown then turned to the issue of whether the claim for constitutional redress is the appropriate remedy to be pursued. She argued that N.O. was left with no other form of redress but to file a claim under section 19 (1) of the Constitution. In support of this position, Mrs. Samuels-Brown KC pointed to the fact that N.O. did not have the option of appealing his sentence. She submitted that N.O. pleaded guilty and was sentenced in September 2021. N.O. had not given a verbal notice to appeal his sentence, nor did he file a written notice to appeal within the stipulated fourteen (14) day period. The application for leave to appeal having been filed out of time, was refused.

[15] Mrs. Samuels-Brown KC indicated that N.O. could not pursue an application for judicial review. She contended that the three (3) month period stipulated by rule 56 of the **Civil Procedure Rules**, 2002 ("the CPR"), within which applications for leave to apply for judicial review are to be filed, would have expired prior to the OCA becoming involved in the case.

[16] Counsel cited and sought to distinguish the case of **Kadian Parkins and Tashana Davis et al** [2021] JMSC Civ. 183, in support of the Claimant's position. She submitted that the only option available was to seek constitutional redress and to apply for a writ of habeas corpus for the release of N.O.

[17] Mrs. Samuels-Brown KC then turned to the issue of whether the sentence of N.O. was ultra vires. She submitted that the sentence as per section 3 (1) of the **Offensive Weapons (Prohibition) Act** ("OWPA") was for N.O. to be given a fine of Four Thousand Dollars ($4,000.00), with a default term of imprisonment of four (4) months. She contended that the learned judge should have sentenced N.O. as per the statute he was charged under, instead of Section 76

of the CCPA**.** She argued that the principle of Generalia .Specialibus Non Derogant applies and such the sentence was ultra vires.

[18] It was acknowledged by Counsel that one of the options available to the learned judge under section 76 of the CCPA is a Correctional Order, however she argued that option should not have been utilized. She drew the Court's attention to section 3(b) of the said Act, which speaks to the fact that parents oftentimes require assistance, and where possible, assistance should be given to support the autonomy and the integrity of the family unit.

[19] It was further argued that the learned judge should have been guided by Section 19 (1) of the **Beijing Rules**, which indicates that the placement of a juvenile in an institution should always be a disposition of last resort and for the minimum amount of time. Mrs. Samuels-Brown KC emphasized section 3(b) (11) of the CCPA, which speaks to the court adopting the least disruptive course of action available.

[20] It was submitted that the OCA should have been notified once N.O. had indicated that he would enter a guilty plea. She argued that the Judge was obliged to enquire from both N.O. and his mother whether they wished to retain counsel. In this case the learned judge made the enquiry of the mother alone. Mrs Samuels-Brown KC further submitted that the Social Enquiry Report ought to have been disclosed to N.O. and his mother prior to sentencing. This would have enabled N.O. and his mother to call evidence in rebuttal, address the issues raised in the report and/or to retain counsel.

[21] Mrs. Samuels-Brown KC argued that prior to making a Correctional Order, the learned judge did not take into consideration issues/procedures that are detailed in the CCPA. She drew this Court's attention to the CCPA which stipulates how the court should treat juveniles that are uncontrollable, those in need of care and protection and those who run afoul of the law. Mrs. Samuels-Brown KC argued that the CCPA had not being correctly utilised.

[22] The final submission made by Mrs. Samuels-Brown KC is that a Correctional Order is a custodial order. This issue seemed to have materialised as the learned judge had made mention in her affidavit that she had not imposed a custodial sentence on N.O.

[23] In support of her position, Counsel argued that: -

(i) the left hand margins of Section 81 of the CCPA speaks to "Provisions relating to committal to child correctional centre";

(ii) a Correctional Order restricts the liberty of N.O. and subjects him to the custody and control of the Department of Correctional Services;

(iii) the subject of a Correctional Order is only allowed to leave a juvenile centre upon the application of a process and as such there is no automatic egress and ingress for that subject;

(iv) a Correctional Order is only a rebranding exercise and is in fact a term of imprisonment;

(v) sections 47 to 56 of the **Correctional Act** indicates that time spent in such institutions is time spent in custody; and

(vi) section 56 of the said Act speaks to persons escaping from these institutions and the penalties for persons who harbour the persons who escape.

[24] It was further submitted that N.O. has been deprived of his liberty and as such a writ of *habeas corpus* should be issued for his release. Mrs. Samuels-Brown KC sought to rely on the case of **Douglas, Everton et al v The Minister of National Security, the Commissioner of Police and the Attorney General of Jamaica** [2020] JMSC Civ 267 to bolster her position.

THE DEFENDANT'S SUBMISSIONS

[25] No issue was joined as to the standing of the OCA in bringing the proceedings but learned Counsel Ms. Lisa White took issue with the Attorney General of Jamaica being named as a defendant in the claim. She relied on the case of **Kevin Simmonds v The Minister of Labour and Social Security and the Attorney General** [2022] JMFC FULL 02 in which it was concluded that constitutional claims differed from civil cases, and as such the Attorney General was to be removed from the claim as a defendant and be regarded only as an interested party. She submitted that the learned judge was the decision-maker and as such should be named as the defendant.

[26] Ms. White further submitted that the issues raised by the Claimant in challenging the decision of the learned judge could only properly be considered on an application for judicial review, which the Claimant elected not to pursue.

[27] She argued that in any event, the Correctional Order that was imposed by the learned judge was not *ultra vires*. In support of this position she submitted that the learned judge had abided by the rules as outlined in the case of **R v Cecil Green** (1965) 9 JLR 254. She went on to submit that the learned judge: -

(a) Gave clear directions to N.O. and his mother;

(b) Asked N.O.'s mother whether she would be retaining a lawyer;

(c) Explained the offences to N.O. prior to him being pleaded;

(d) Ensured that N.O. was pleaded in the presence of his mother;

(e) Accepted that N.O. appreciated the difference between the two offences as he pleaded guilty to the offence of Being in Possession of an Offensive Weapon and not guilty for the offence of Assault Occasioning Actual Bodily Harm;

(f) Requested a Social Enquiry report;

(g) Transferred the case for Assault Occasioning Actual Bodily Harm to another court;

(h) Adjourned the case of Being Armed with an Offensive Weapon whilst awaiting the Social Enquiry Report; and

(i) Sentenced N.O. only after receiving the Social Enquiry Report.

[28] Ms. White further submitted that the learned judge sentenced N.O. in keeping with the decision of **R v Pearlina Wright** (1988) JLR 221. She advanced that having taken into consideration the aggravating circumstances and the mitigating circumstances, the learned judge handed down a sentence aimed at rehabilitation. She argued that N.O. was sentenced under Section 76 of the CCPA, which the learned judge had jurisdiction to utilize.

[29] The Court was urged, in seeking to interpret the statutes and in applying the maxim *Generalibus specialia non Derogant*, to consider **Bennion on Statutory Interpretation**, 5th edition. Ms. White argued that the learned judge was presiding over and adjudicating on cases in the Children's Court, which was a court specifically created by Parliament to deal with child offenders as opposed to presiding in the Parish Court which exercised jurisdiction as prescribed under 268 of the **Judicature (Parish Court) Act**. She also pointed the Court to section 4 (1) of the **Judicature (Family Court) Act**, which she argued, gives the court jurisdiction over the offences for which N.O. had been charged.

[30] Ms. White submitted that the general words of section 3 of the OWPA, which is applicable in sentencing any offender, could not override the specific words in section 76 of the CCPA which is applicable for sentencing in the Children's Court. She argued that the provisions of section 76 of the CCPA were not subject to section 3 of the OWPA. She further submitted that Parliament, through the CCPA had caused the specific provisions to override the general provisions of the OWPA in respect of the sentencing of child offenders.

[31] Ms. White advanced that based on the referenced statutes, the learned judge had the authority to try, sentence and generally deal with any offence concerning children under the CCPA. This, she argued, included the offence to which N.O. pleaded guilty. She submitted that section 76 of the CCPA empowered the Judge to depart from the sentencing provisions of the statute under which N.O. was charged and to sentence him as per the CCPA. In light of that, she submitted, that the learned judge could not be regarded as having acted *ultra vires*.

[32] Counsel argued that based on the affidavit of the learned judge, it is clear that she was focused on rehabilitation and the best interest of the child. She argued that a Correctional Order would afford N.O. a stable, disciplined environment, with an opportunity to attend school, receive religious instructions and have access to psychiatric and medical care.

[33] Ms. White argued that the Correctional Order does not breach N.O.'s constitutional rights, as the order fell within the exception under Section 14 of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act.** She submitted that N.O. is being treated humanely and with respect. Ms. White sought to rely on the affidavit of Ms Maulette White, the Director of the Rio Cobre facility to buttress this point.

[34] Ms. White advanced that is deciding which sentence was to be imposed, the learned judge took into consideration section 65 of the CCPA, which speaks to the court having regard to the best interest of the child. That section allows the judge to consider removing the child from undesirable surroundings and ensuring that proper provisions are made for the child's education and training. It was further submitted that the learned judge took into consideration all relevant information prior to handing down her sentence.

[35] It was also submitted that the OCA, in seeking to have N.O. released from the Rio Cobre facility, is in reality asking the court for an order of *habeas corpus*. Counsel, relying on cases such as **The King v The Commanding Officer of**

Morn Hill Camp, Winchester [1917] 1KB 176, argued that the court should not confuse jurisdiction and merit. Ms. White advanced that this court cannot delve into the merits of the decision of the learned Judge, and as such, would not be in a position to grant the order to release N.O.

[36] In response to the question of whether a Correctional Order is a custodial order, Ms. White submitted that such orders are non-custodial. In support of this position, she urged the court to have regard to the **Sentencing Guidelines** which list Correctional Orders as non- custodial.

[37] It was further advanced that section 81 (4) of CCPA points to the fact that the sentence is not with hard labour. Ms. White further submitted that unlike a custodial order, the responsible Minister has the power to release the child or may give the child a temporary leave of absence. Ms. White opined that the learned judge did not sentence N.O. to a term of imprisonment, nor did she commit him to an Adult Correctional Facility.

[38] The final submissions made by Ms. White touched on whether legal representation should have been granted to N.O. She pointed the Court to section 4 of the CCPA which speaks to the discretion of the learned judge to determine whether a case should be adjourned for the child to retain counsel or to have the Children's Advocate notified. She argued that the language of the section allows the learned judge to assess whether the child would require legal representation. Ms. White referred the Court again to **Bennion on Statutory Interpretation,** 5th edition and argued that the court should look at the intent of the legislation. She further argued that section 4 of the CCPA instils no obligation on the learned judge to refer the child to the Children's Advocate or to legal aid. The argument made by Ms. White is that the provision is permissive, not mandatory.

[39] Ms. White went further to submit that the learned judge had given N.O. and his mother the appropriate directions, and the mother of N.O. declined to retain counsel. The court was directed to section 71 of the CCPA which lays out the

procedure to be adopted once the child appears before the court. Reference was made to the affidavit of the learned judge who stated that: -

(a) she had asked the mother of N.O. if she intended to retain an Attorney-at-law and she intended that she did not; and

(b) then explained to N.O. and his mother what was happening and the implications of entering a guilty or not guilty plea. N.O. was then pleaded.

[40] It was submitted that N.O. understood what was explained to him and as such he entered a guilty plea for the offence of Being Armed with an Offensive Weapon and not guilty for the offence of Assault Occasioning Actual Bodily Harm.

[41] Ms. White then advanced the position that N.O. had suffered no loss and that insufficient grounds had been advanced to allow the Court to award damages in this case.

ANALYSIS

Whether the late stage amendment to the claim should be granted.

[42] On the date of the commencement of the instant trial on the 25th July 2022, the Claimant through Mrs. Samuels-Brown KC indicated the intention to rely on "Claimant's Speaking Notes" dated 24th July 2022 - in respect of which an undertaking to file was given. An earlier trial was scheduled before the Full Court as it is presently constituted for the 6th and 7th June 2022 but was adjourned, primarily to enable the Claimant to file and serve an affidavit sworn to by N.O. and a second affidavit of his mother.

[43] Ms. White objected to the proposed reliance on the "Claimant's Speaking Notes" on the basis that they departed from the Fixed Date Claim Form and the submissions filed, and as the submission went, was an attempt by the Claimant to reframe the case. The objection was upheld, and the Claimant was limited to

the matters contained in the pleaded claim which have been set out in preceding paragraphs. Being dissatisfied with the ruling of the court, learned K.C. indicated that she had been instructed to pursue an application to amend the Fixed Date Claim Form to include the following additional relief:

1. *A declaration that the Correctional Order made in relation to the child N.O. by the learned Judge of the Kingston and St. Andrew Family Court was in breach of the provisions of sections 14 and 16 of the Constitution in that the judge did not act on reasonable grounds.*

2. *A declaration that the Correctional Order made in relation to the child N.O. by the learned Judge of the Kingston and St. Andrew Family Court was in breach of fair procedures as stipulated in section 14 of the Constitution.*

3. *A declaration that in entering the verdict guilty against the child N.O. and in imposing a Correctional Order the learned Judge relied on irrelevant, prejudicial or inadmissible material, whereas N.O.'s right to a fair hearing as stipulated by sections 14 and 16 of the Constitution has been breached.*

4. *A declaration that the child N.O. has been denied his constitutional right to examine witnesses against him and/or on his behalf pursuant to section 16 (6) (d) of the Constitution.*

5. *A declaration that a Correctional Order, as is provided for in the Child Care and Protection Act, is a custodial sentence where a child's freedom of movement and liberty as provided in the Constitution is curtailed or derogated from.*

6. *A declaration that in imposing the custodial sentence on N.O. the learned Parish Judge did not act on reasonable grounds or in accordance with fair procedures established by law.*

7. *A declaration that a plea of guilty in response to a charge does not curtail the right to legal representation as provided for by the Constitution at section 16 (6) (c).*

8. *A declaration that the child N.O. was deprived of his entitlement to legal representation as provided by section 16 (6) (c) of the Constitution.*

[44] The proposed amendments were said to be premised on the fact that the affidavit of the learned judge of the Kingston and St. Andrew Family Court filed 26th May 2022, had disclosed the matters considered in arriving at her decision for the first time. The material being already before the court, it was submitted that no prejudice would be suffered by the defendant if leave to amend was granted. Additionally, it was submitted that there were two (2) special features of the case which should move the court to permit the amendments: (i) that the claim relates to the right of the child N.O. whose best interest the court is to have regard, and (ii) that the case raises novel issues of public importance not only for N.O. but for children generally on the interpretation of crucial aspects of the *Child Care and Protection Act* vis a vis the Constitution of Jamaica. The overriding objective of the Civil Procedure Rules was also prayed in aid in submitting that the Claimant should be allowed to place all issues before the court comprehensively and substantially.

[45] On enquiry from the Court as to the reason for the Claimant's failure to make the application for amendment prior to the hearing which was underway, learned K.C. indicated that it had been considered but that there were other orders which were to be complied with and it was not anticipated that the point would be taken, having regard to the *"broad terms"* of the Fixed Date Claim Form. It was also expressed that a concern existed that the application would not be entertained by the court having regard to the time when it would have been made.

[46] The application for amendment was opposed by Ms. White on several bases. In asking that the application be refused, it was submitted by Ms. White that such an application should be made on paper and not orally; that to allow the amendments which were a wide departure from the pleaded case at the stage of the proceedings would not be in keeping with the overriding objectives of dealing justly with cases; that by the proposed amendments the Claimant was asking for relief which was tantamount to judicial review; and that what was being raised now on the proposed amendments should have been apparent on the last occasion when the parties were before the court on 6th June 2022. Counsel argued that if the proposed amendments had been raised on that occasion, it would have put the defendant in a position to properly respond to them.

[47] The Court refused the application for the proposed late-stage amendments. In doing so the court was mindful of its obligation to have regard to the best interest of the child and has sought to be faithful to its discharge. We are of the view however that the imperative of having regard to the best interest of the child, which is also the responsibility of the representative claimant, does not require the court to turn a blind eye to its responsibility of advancing the overriding objective of dealing with cases justly, in which all parties before it, are required to assist. In arriving at a decision as to whether the application for amendment should be granted, the Court took into consideration: -

(a) That the hearing of the Claim had previously been set for the 6th and 7th of June 20223.

(b) On the 6th of June 2022 the Claimant had indicated that they were desirous of filing additional affidavits, including one from N.O. and another from N.O.'s mother. Counsel for the defendant indicated that she would wish to respond to those affidavits.

(c) On the 6th of June 2022 orders were made to ensure the timely disposition of the Claim.

(d) The Claim was then rescheduled to the 25th and 26th of July 2022.

(e) The Defendant filed a late stage application to abridge time to file affidavit evidence which was refused.

(f) The hearing of the Claim was well advanced, when the claimant, orally sought to amend the claim. This was opposed by Counsel for the Defendant on the basis that the application should have been in writing and should have been filed with proper Notice, having regard to its nature.

[48] We have considered and accepted the submissions of learned counsel Ms. White that the amendments would significantly change the nature of the case which the Defendant would be required to meet, the proposed amendments raising as they do issues as to the fairness of the decision-making process, relevance of the Judge's considerations and the reasonableness of the decision of the learned judge of the Family Court qua Children's Court.

[49] We were also in agreement with the submissions made by Ms. White that the proposed amendments were aimed at the decision-making process of the learned judge, which would be amendable to challenge on an application for judicial review. The proposed amendments were not made in pursuit of an application for judicial review, which as seen later in these reasons for decision, the claimant deliberately elected not to pursue, preferring to go directly to a constitutional challenge.

[50] To allow the proposed amendments in all of these circumstances would have been prejudicial to the defendant who would be required to answer a case which was not anticipated. While it is readily acknowledged that a further adjournment of the trial could have been ordered to permit the filing of further affidavits and submissions if the amendments were granted, we regarded it as inimical to advancement of the overriding objective and the interest of justice to adopt such a course, particularly where the matters which are said to have given rise to the

need for amendment were within the claimant's knowledge for two (2) months and no application for amendment was made ahead of what was an adjourned trial date.

Whether the Attorney General should be added as a Defendant to the claim.

[51] A Preliminary objection was made by Ms. White concerning whether the Attorney General was to be named as the defendant in this claim. In arriving at a decision we considered a number of cases including the Privy Council 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. C opined thus as to whether the Attorney General should be named as a respondent instead of the Minister of Foreign Affairs, Trade and Industry whose exercise of statutory powers was being challenged by way of judicial review.

> *[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.*

[52] Barnaby J, in the case of **Kevin Simmonds v The Minister of Labour and Social Security and another** [2022] JMFC Full 02, relying on the case of ***Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd and another*** *[1991] 1 WLR 552*, stated at 193 that:-

> *[she] accept[ed] that the addition of the Attorney General as a party to judicial review claims and constitutional claims, which are sui generis, pursuant to the CPA is improper. Accordingly, the Attorney General is removed as a defendant and designated an "Interested Party" on account that the office is required to be served with claims for constitutional relief pursuant to the Civil Procedure Rules (hereinafter called the CPR) and may make submissions to the court in that capacity on such claims.*

[53] In keeping with these authorities, we find that the decision maker in this case is the Senior Parish Court Judge for Kingston and St. Andrew Family Court who is to be named as the Defendant in this claim, with the Attorney General being named only as an interested party.

Whether the court should decline to exercise jurisdiction in respect of the claim for constitutional redress.

[54] It is beyond dispute that the decision-making process of a Judge of the Parish Court is amenable to judicial review. As to the scope of this remedy, it was expressed by Barnaby J in **Kevin Simmonds v the Minister of Labour and Social Security and the Attorney General of Jamaica** [2022] JMFC FULL 02 as follows.

> *[195] Judicial review is a unique remedy which is available to persons who are aggrieved by the unlawful exercise of public law duties. It is used "… to check a usurpation of power by [public functionaries who have been charged by Parliament to perform public duties], to the disadvantage of the ordinary citizen, or to insist on due performance by such bodies of their statutory duties and to maintain due adherence to the laws enacted by Parliament…":* R v IRC, ex p National Federation of Self-Employed and Small Businesses Ltd *[1982] AC 617, 656, HL per Lord Roskill.*
>
> *[196] The jurisdiction of the court on an application for judicial review is accordingly supervisory. As held per curium in* Chief Constable of the North Wales Police v Evans *[1982] 1 WLR 1155, and reflected in the dicta of Lords Brightman and Hailsham at pp. 1173 and 1160 respectively,*
>
> > ***[j]judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.***

… [it] is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.

[197] In the well settled and oft cited Council of Civil Service Unions and ors. v Minister for the Civil Service [1984] 3 WLR 1174, Lord Diplock at p. 1196 said this of the grounds for judicial review.

… Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community…

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

*By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated

> Provincial Picture Houses Ltd. v. Wednesbury Corporation *[1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system…*
>
> *I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice…*
>
> ***[Emphasis added]***

[55] As earlier indicated, there was no application for leave to apply for judicial review and none of the prerogative orders available by that procedure was sought by the Claimant on the proposed amendments or otherwise. This notwithstanding the Claimant's appreciation, as expressed in the "*Skeleton Submissions of the Claimant"* filed on 3rd June 2022 that judicial review was capable of providing a remedy. After reproducing the procedure under Part 56 of the CPR for judicial review in those submissions, the Claimant states as follows.

> *27.* ***We would therefore have had to seek leave to apply****. While we are also pursuing Habeas Corpus, the law aforementioned recognises the limitation of that process, which compels the authority with custody of the subject, 'to produce the body' for the Court to determine the legitimacy of the subject's detention or imprisonment. The writ (of*

Habeas Corpus), when granted, possesses no declarative powers, which limits its efficacy in the instant circumstances.

28. Based on the facts of the instant case, the circumstances of the child N.O. requires urgent and immediate redress. N.O. has been in a Correctional Facility from September 2021. At the time this matter was brought to the attention of the Office of the Children's Advocate some 6 months later, the avenue to seek redress from the Court of Appeal was no longer available because N.O. had been prejudiced from the outset as he was pleaded and sentenced without legal representation and/or advice; there was no counsel who became aware of his circumstances until time had run for the timely pursuit of an appeal. Additionally, the option for redress in Judicial Review would fall to the favourable discretion of a Court. It is our contention that N.O.'s constitutional rights have been, and continue to be infringed upon. The Constitutional Court is the most immediate alternative due to the special circumstances of this case, outside of the Habeas Corpus application which has already been sought…

31. Even if this Full Court were to opine that Judicial Review could have been an alternative, this Full Court should have regard to some key factors which are unique to this case. The first is that the right to access Judicial Review is not automatic unlike the option to seek redress in a contract claim as in Kedian Perkins *cited above. N.O. would have to obtain an extension of time and seek leave to apply.*

[Emphasis added]

[56] This conveniently returns us to the Claimant's Fixed Date Claim Form and the claim for constitutional redress.

[57] So far as relevant, section 19 of the **Charter of Fundamental Rights and Freedoms** provides as follows in respect of constitutional redress.

(1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter

which is lawfully available, that person may apply to the Supreme Court for redress.

(2) …

(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

(4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.

(5) …

[Emphasis added]

[58] In agreeing with the reasoning and conclusions of Barnaby J in **Simmonds** to constitute the majority on the constitutional aspect of that claim - that the court should decline to exercise the jurisdiction given to it under section 19 of the Constitution on the basis that the claim constituted an abuse or misuse of court process - C. Brown-Beckford J opined thus, and we believe correctly so: -

[2] [that while one may have been inclined to the view that as recent authorities suggest that there should be a generous approach to constitutional interpretation, the decisions of ***Ramanoop*** *and other similar authorities … may no longer be persuasive on the issue of circumscribing applications for constitutional redress, the Judicial Committee of the Privy Council (Privy Council) recently settled the question* in ***Brandt v Commissioner of Police and Others*** *[2021] UKPC 12 (Brandt). In Brandt, the Privy Council considered a provision similar to Section 19 of our Charter of Rights and Freedoms…*

[3] Lord Stephens, writing for the Board, in upholding the decision of the Court of Appeal of the Eastern Caribbean Supreme Court (Montserrat) that the application for an administrative order was an abuse of process said:

> *34. … Abuse of process must involve something which amounts to a misuse of the process of litigation. However, whilst the categories of abuse of process of the court are not fixed there are clear examples which are relevant to this appeal.*
>
> *35. First, to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court's process in the absence of some feature "which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate". The correct approach to determining whether a claim for constitutional relief is an abuse of process because the applicant has an alternative means of legal redress was explained by Lord Nicholls, delivering the judgment of the Board in Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328 at para 25, as follows: "…where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power." There are examples of the application of that approach in cases such as* ***Harrikissoon v Attorney General of Trinidad and Tobago*** *[1980] AC 265 at 68,* ***Jaroo v Attorney General of Trinidad and Tobago*** *[2002] 1 AC 871 at para 39 and most recently, in* ***Warren v The State (Pitcairn Islands) [2018] UKPC 20*** *at para 11. This approach prevents unacceptable*

> *interruptions in the normal court process, avoids encouraging technical points which have the tendency to divert attention from the real or central issues, and prevents the waste and dissipation of public funds in the pursuit of issues which may well turn out to be of little or no practical relevance in a case when properly viewed at the end of the process. This approach also promotes the rule of law and the finality of litigation by preventing a claim for constitutional relief from being used to mount a collateral attack on, for example, a judge's exercise of discretion or a criminal conviction, in order to bypass restrictions in the appellate process (see eg* ***Chokolingo v Attorney General of Trinidad and Tobago*** *[1981] 1 WLR 106 at 111–112).*

[59] There is no question of bypassing restrictions in the appellate process here, in light of an appeal against the decision of the learned Judge in respect of N.O. being out of time. The available parallel remedy, as admitted by the claimant is judicial review. In **Kemrajh Harrikissoon v Attorney General of Trinidad and Tobago** (1979) 31 WIR 348, 349 Lord Diplock in delivering the opinion of the Board in dismissing the appeal stated: -

> ***The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action****. In an originating application to the High Court under section 6(1),* ***the mere allegation that a human right or fundamental freedom of the applicant has***

been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court *under the subsection* ***if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.***

[Emphasis added]

[60] In **Attorney General of Trinidad and Tobago v Siewchand Ramanoop** [2005] UKPC 15, Lord Nicholls in delivering the decision of the Board put the approach to determining whether the constitutional jurisdiction of the court is to be exercised this way,

> *In* Harrikissoon *the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Speaking in the context of judicial review as a parallel remedy, Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have.* ***Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made "solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right":*** *[1981] AC 265, 268 (emphasis added).*
>
> ***In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at***

> ***least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process.*** *A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.*
>
> ***[Emphasis added]***

[61] A challenge to the *vires* or legality of making the two (2) year Correctional Order in respect of N.O. who pleaded guilty to Being Armed with an Offensive Weapon contrary to section 3 (1) of OWPA could undoubtedly be the subject of enquiry on an application for judicial review. If it was found that it was *ultra vires* the power given to a Judge of the Family Court qua Children's Court, it would be competent to the court to so declare and make an order of *certiorari* to quash the said Correctional Order, thereby extinguishing the authority pursuant to which N.O. is being held at the correctional facility. Damages is also a relief available by those proceedings. Judicial review therefore appears to us to have been capable of providing adequate relief to the claimant but was not pursued.

[62] The claimant has simply elected to forego it, preferring the "automatic" claim for constitutional redress. To allow the processes of the court to be used in this manner will no doubt encourage parties to elect to forego alternative or parallel adequate remedies afforded to them by law to prevent or arrest alleged abuse of power by judicial, quasi-judicial, and administrative authorities in favour of a claim for constitutional relief.

[63] As the authorities cited above demonstrate, an applicant is not entitled to invoke the jurisdiction of the court to grant constitutional redress for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful "administrative" action where that remedy would provide adequate means of redress. That leave is required to apply for judicial review, and that it is discretionary, is not a special feature which indicates that this means of legal redress would not be adequate, had it been engaged by the

Claimant. The Court accordingly declines to exercise the jurisdiction given to it by section 19 of the Constitution on the basis that the constitutional claim is an abuse or misuse of the court processes.

Whether the two (2) year Correctional Order is *intra vires* the CCPA.

[64] If the conclusion were to be otherwise, and to the extent that we are able to provide clarity on the subject, we will address the matter of the *vires* of the two (2) year Correctional Oder. At this juncture we will also address the issue as to whether the Correctional Order offends the *generalia specialibus non derogant* rule in respect of which the following has been expressed.

> *When the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms.* **Barker v Edger** *1898 A.C 748, 754 (P.C).*

[65] N.O. was charged with the offence of Being Armed with an Offensive Weapon contrary to section 3(1) of the OWPA which provides that *'a person shall not, without lawful authority or reasonable excuse, knowingly have with him in any public place any offensive weapon falling within paragraph (a) or (b) of the definition of "offensive weapon".'* Pursuant to section 3(3), a person who contravenes section 3(1) *"… commits an offence and is liable on summary conviction before a Judge of the Parish Court to a fine not exceeding four thousand dollars and in default of payment to imprisonment for a term not exceeding four months."*

[66] The Family Court for Kingston and St. Andrew was established pursuant to section 3 of the *Judicature (Family Court) Act.* The court is expressly given jurisdiction to *"… try or otherwise deal with offences, causes, or matters, as provided in that behalf in any of the enactments for the time being specified in the Schedule"* prescribed by section 4 of the said Act. Among the enactments

specified in the Schedule, and so far as is relevant, is the *Child Care and Protection Act,* section 71 (1) of which provides thus.

> *The Minister responsible for justice shall cause to be established courts, to be known as Children's Courts, which shall be constituted in accordance with the provisions of the Third Schedule and, when so constituted and sitting for the purpose of exercising any jurisdiction conferred on them by this or any other enactment, shall be deemed to have, subject to the provisions of this Act, all the powers of a Parish Court; and the procedure in the Children's Court, subject to the provisions of this Act, shall be the same as in the Parish Court.*

[67] Pursuant to section 4 of the Third Schedule to the *Child Care and Protection Act,*

> *[t]he Family Court shall be the Children's Court and shall be deemed to be duly constituted as such, at any sitting of a Family Court for the purpose of exercising its jurisdiction in the capacity of such Children's Court notwithstanding that it be constituted of a single Judge of a Family Court.*

[68] From the foregoing provisions, while the Judge of the Family Court qua Children's Court is "deemed" by statute to have all the powers of a Judge of the Parish Court when exercising any jurisdiction conferred by any enactment, those powers are expressly made *"subject to"* the provisions of the *Child Care and Protection Act*. There is therefore a special scheme established through the various pieces of legislation for dealing with children who come into conflict with the law, to which powers exercised by a Judge of a Children's Court under other enactments are subject. In respect of criminal charges brought against a child, section 72(1) of the *Child Care and protection Act* clearly states that: -

> *Subject to the provisions of this section [the provisions of which are not immediately applicable],* ***no charge against a child*** *and no application in relation to a child in need of care or protection* ***shall be heard by any court of summary jurisdiction which is not a Children's Court****.*
>
> ***[Emphasis added]***

[69] So far as is relevant, the legislation goes further at section 76 (1) to provide that

> *Where a child has been found guilty of any offence before a Children's Court, that court may, subject to the provisions of this Act, make an order-*
>
> *(a) dismissing the case;*
>
> *(b) for probation under the Probation of Offenders Act;*
>
> *(c) placing the child, either in addition to or without making any order under this section for a specified period not exceeding three years, under the supervision of a probation and after-care officer or some other person to be selected for the purpose by the Minister;*
>
> *(d) committing the child to the care of any fit person, whether a relative or not, who is willing to undertake the care of the child;*
>
> *(e) in accordance with subsection (7) [which provides for the making of curfew, mediation, or community service orders], if the child's parent or guardian consents to the making of the order;*
>
> *(f) sending the child to a juvenile correctional centre;*
>
> *(g) ordering the parent or guardian of the child to pay a fine, damages or costs;*
>
> *(h) ordering the parent or guardian of the child to enter into a recognizance for the good behaviour of such offender.*

[70] Being under the age of eighteen (18) and therefore a "child" as defined by the CCPA, and it being alleged that N.O. contravened a provision of the criminal law in the parish of St. Andrew, he was, in our view, properly brought before the single Judge of the Family Court for Kingston and St. Andrew qua Children's Court. Having pleaded guilty to the offence, the learned judge was empowered to make any of the orders available at section 76 (1), including sending the child to a juvenile correctional centre subject to the prohibition at section 79 of the Act, which is not immediately relevant, but provides that no child under the age

of twelve years is to be sent to a juvenile correctional centre unless the court is satisfied that the child cannot suitably be dealt with otherwise.

[71] Section 81 (4) of the CCPA prescribes that *"*[w]*here a court orders a child to be sent to a juvenile correctional centre, the order shall be the authority for the child's detention in a juvenile correctional centre for such period as shall be specified in the order, not being a period ending after the date on which the child attains the age of eighteen years."* A child who is detained and being conveyed to or from a juvenile correctional centre is deemed to be in legal custody pursuant to section 81 (5).

[72] In the foregoing premises we find that the Judge of the Family Court qua Children's Court acted *intra vires* the legislative scheme which regulates her power to sentence a child offender.

Whether the learned judge erred in arraigning and sentencing N.O. in the absence of legal representation in circumstances where his parent was present and indicated that legal representation would not be sought.

[73] A matter of concern which arose on the evidence before us and which was the subject of written and oral argument, was the absence of legal representation for N.O. in proceedings before the Judge of the Family Court qua Children's Court.

[74] It is not disputed that N.O. was not represented by an attorney-at-law at the time of entering the guilty plea. It is nevertheless the evidence of the learned judge that she asked N.O.'s mother who was present when the matter came on for hearing whether she had or intended to retain an attorney-at-law. N.O.'s mother indicated that she had not and did not. It is also the learnes judge's evidence that she *"enquired whether they needed one"* and mother had indicated "no", whereon mother's consent was sought and obtained for N.O. to be pleaded. It is the averment of the learned judge that this followed an explanation to N.O. and his mother of what was happening and the implications of pleading "guilty" or "not guilty". The particulars of the explanation supplied was not provided but

that is perhaps understandable having regard to the nature of the pleaded case, which does not challenge the decision-making process by the learned judge.

[75] N.O.'s mother now says in these proceedings that the learned judge had said something about having a lawyer on the first court date but that she did not understand that the case could be put off in order to get one. It is N.O.'s evidence that while he cannot recall all the details of what transpired at court, he has no memory of being informed that he could get a lawyer or that there was a Children's Advocate. It is his averment that had that been explained to him, he would have remembered because he would have wanted a lawyer.

[76] There was no cross-examination of the witnesses by either party but on the evidence available to us we find it to be more probable than not, that the learned judge, certainly ahead of taking the "guilty plea" pursuant to which she made the Correctional Order the subject of the Claimant's challenge, had enquired whether the assistance of an attorney was required and that it was indicated to her that it was not. Additionally, there is no dispute, and it is in fact the evidence before this court, even on the claimant's own case, that on a search of N.O.'s person and in the presence of his mother, whilst both were at a police station following an alleged altercation involving N.O., a knife was found on his person. It was this finding which led him to be charged with Being Armed with an Offensive Weapon. While he was also charged with Assault Occasioning Bodily Harm, he pleaded guilty to the former offence and pleaded not guilty to the latter charge.

[77] The foregoing brings into sharp focus the provisions of section 4 (3) of the *Child Care and Protection Act* which states thus.

> *Where in any proceedings a child is brought before the court and **it appears** that the child is in need of legal representation in those proceedings, the court shall -*
>
> *(a) refer the case to the Children's Advocate or, if the court thinks fit, grant a legal aid certificate in such circumstances as may be*

prescribed;

(b) if the court thinks fit, adjourn the proceedings until such time as the court considers sufficient to allow for, as the case may be -

(i) the Children's Advocate to consider the case; or

(ii) the necessary arrangements to be made for the child to obtain legal representation pursuant to the legal aid certificate; and

(c) cause to be delivered to the children's advocate a notice of its determination under this section.

[Emphasis added]

[78] It was submitted on behalf of the learned judge that the section is permissive and not mandatory; and that it required the judge to exercise a discretion in respect of the legal representation for N.O. in the proceedings. We are attracted to the submission.

[79] It is our view that by prefacing *"the court shall"* with, *"it appears that the child is in need of legal representation in those proceedings"* as stated in the chapeau of section 4 (3) of the *Child Care and Protection Act,* the Parliament intended the court to come to a view - consistent with the ordinary meaning of the word "appears" in the English language and the context within which it is used in the section - that the child in the proceedings before it is in need of legal representation.

[80] Where the court comes to such a view, the section then mandates, as evidenced by the use of the word *"shall",* that one or other of the options at section 4 (3) (a) be exercised in respect of the child, that is, refer the case to OCA or grant a legal aid certificate in such circumstances as may be prescribed. The court may then adjourn the proceedings to enable OCA to consider the case under the first option or to enable arrangements to be made for the child to obtain legal representation pursuant to the legal aid certificate on exercise of the second option. Whatever option is pursued; the court is required to cause notice of the determination made by it under the section to be given to OCA.

[81] In the circumstances it cannot be said that the learned judge acted *ultra vires* the CCPA in failing to refer the proceedings before her to OCA or grant a legal aid certificate. We do not understand the Act to require a child in proceedings before the court to have an attorney-at-law, and while circumstances of a particular case might favour a child having that kind of representation even where the parent or guardian indicates that it is not needed, that appears to us to be among the matters challengeable by way of judicial review. As stated earlier however, the claimant elected not to pursue that relief in what we have found is an abuse or misuse of the court's process. It appears to us that any challenge as to constitutionality of the exercise of the discretion given to the court under section 4(3) of the Act would go to constitutionality of the discretion granted by the Parliament to the court and that was not pleaded by the Claimant, nor was it the subject of any of the proposed late stage amendments.

Whether it is appropriate to grant a writ of *habeas corpus* where it is alleged that a court has decided wrongly.

[82] The Claimant has applied for a writ of *habeas corpus*, that is for N.O. to be released from the custody of the State. Writs of h*abeas corpus* are governed by rule 57 of the CPR which states that: -

> *(1) An application for the issue of a writ for Habeas Corpus ad subjiciendum must be made to the court.*
> *(2) An application under paragraph (1) may be made without notice but must be supported by evidence on affidavit.*
> *(3) Such evidence must be given by the person restrained stating how that person is restrained.*
> *(4) However, if the person restrained is not able to make the affidavit it may be made by some person on that person's behalf and must state why the person restrained is not able to make the affidavit.*
> *(5) The application must be heard in open court unless it is made on behalf of a minor when it must be heard in chambers.*

[83] An application for a writ of *habeas corpus* should be dealt with expeditiously by the court as the liberty of the individual is at stake. The urgency of such applications is captured in rule 57.3 (1) which states that: -

> *(1) The court may –*
>
> (a) *forthwith make an order for the writ in form 23 to issue;*
>
> (b) *or adjourn the application and give directions for notice to be given*
>
> *(i) to the person against whom the issue of the writ is sought; and*
>
> *(ii) to such other person as the court may direct*
>
> *(2) The court may also order that the person restrained be released.*
>
> *(3) An order under paragraph (2) is sufficient warrant to any person for the release of the person under restraint.*
>
> *(4) On making an order for the writ to issue the court must give directions as to the date, time and place of hearing*

[84] **Halsbury's Laws of England** (Volume 88A (2018)) describes the general nature of *habeas corpus*. It states that:-

> *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 her subjects are deprived of their liberty. By it the High Court and the judges of that court, at the instance of a subject aggrieved, command the production of that subject. If there is no legal justification for the detention, the party is ordered to be released. Release on habeas corpus is not, however, an acquittal, nor may the writ be used as a means of appeal.*

[85] In the case of **Regina v Secretary of State for the Home Department Ex parte Chablak** (1991) WLR 23rd August 1991, Lord Donaldson of Lyminton M.R.

gave guidance as to the approach that is to be adopted by the courts on applications for writs of h*abeas corpus*. He stated at page 894 that: -

> *Since the foundation for an application for a writ of habeas corpus is the fact that he is being detained otherwise than in legal custody, it is necessary to inquire whether these conditions are met. If they are, there is no room for the issue of a writ of habeas corpus. If they are not, it should and would issue.*

[86] In the case of the **King v The Commanding Officer of Morn Hill Camp** [1917] 1KB 176 Darling J opined at page 180 that: -

> *If the magistrate had had no jurisdiction in the matter, this writ might have been an available remedy; but such writs are not to be obtained by confusing jurisdiction with merits. The writ of habeas corpus does not lie wherever a Court decides wrongly. It lies where a person is detained without justification.*

[87] Section 14 of the Constitution clearly states that a person should not be deprived of his liberty, however there are exceptions to this right. One such exception is captured in Section 14 (b) of the Constitution, which states that: -

> *No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances*
>
> *a…*
>
> *b. in execution of the sentence or order of a court whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted; …*

[88] In this case, N.O. was charged with the offence of Being Armed with an Offensive Weapon. He was pleaded and opted to enter a guilty plea in the presence of his mother. He was then sentenced by the learned judge sitting in the Children's Court.

[89] The submission that N.O. is detained without justification cannot be sustained. The Constitution allows for a judge to detain a person in execution of the sentence or the order of the court. We have found that the Correctional Order to which N.O. was sentenced is *intra vires* the powers of the learned judge as it was an available sentencing option under the CCPA. We therefore find that the application for *habeas corpus* for N.O. to be released from the Rio Cobre facilities is not a remedy that is available to him on detention, following his conviction for a criminal offence.

Whether a Correctional Order is a custodial order within the meaning of the CCPA.

[90] The final issue that arose is whether a Correctional Order is a custodial sentence. The learned judge in her affidavit averred that she had imposed a non- custodial sentence on N.O. She indicated that her stance was in keeping with the **Jamaica Sentencing Guidelines** which defined Correctional Orders as non-custodial sentences. The learned judge sought to support her position by highlighting that N.O. has the option of petitioning the relevant Minister to be released from the facility that he is being housed.

[91] The learned judge further averred and placed reliance on Section 78 (4) of the CCPA which states that: -

> *A child shall not be sentenced to imprisonment, whether with or without hard labour, for any offence, or be committed to an adult correctional centre in default of payment of any fine, damages or costs.*

[92] A Correctional Order is defined in CCPA as *"an order made by a court sending a child to a juvenile correctional centre".* There is no definition of a juvenile correctional centre in CCPA but section 2 of the **Corrections Act** nevertheless gives some assistance, a juvenile correctional centre is regarded as a correctional institution.

[93] In considering whether a Correctional Order is to be **regarded (I added an ed)** as a custodial sentence, consideration was had to section 81 (5) of CCPA which states that "a *child detained under any correctional order and while being conveyed to or from any juvenile correctional centre shall be* ***deemed*** *to be in legal custody."* **[Emphasis added]**

[94] In the face of this "deeming provision" the learned judge may be said to have mislabelled the sentence she imposed on N.O. as being "non-custodial". The question is whether or not anything turns on this fact. In imposing her sentence, the learned judge came to the decision that N.O. should be removed from his place of residence; assessed the circumstances of the case and gave reasons for her decision. The learned judge then went on to detail the intended purpose of her order, which were among other things, to ensure that N.O. receives the education he is entitled to. It is clear that in imposing the Correctional Order the learned judge fully appreciated all it entailed. We find that nothing turns on the label assigned by the learned judge on the sentence she imposed.

COSTS

[95] In the circumstances of the foregoing, the claim is to be determined against the Claimant. While costs may in fact be ordered on conclusion of a claim for administrative relief, having regard to the fact that the case raised questions relevant to the due administration of justice and concerns a commission of Parliament and a member of the judicial branch of government, we do not believe an award of costs against the Clamant is appropriate. We therefore conclude that there should be no order as to costs.

ORDER

1. The Attorney General is to be removed as a defendant and is to be named as an interested party. The office of the Senior Parish Court Judge for the Kingston and St Andrew Family Court is to substituted as the defendant.

2. The claim for constitutional redress is refused.

3. The application for habeas corpus is refused.

4. No order as to costs.

5. The Claimant's Attorneys-at-Law are to prepare, file and serve these Orders.

_____

L. Shelly-Williams

Puisne Judge

_____

A. Nembhard

Puisne Judge

_____

C. Barnaby

Puisne Judge