[2024] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE BROWN-BECKFORD JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV00069

IN THE MATTER of the Constitution of Jamaica

AND

IN THE MATTER of an Application alleging breach of constitutional rights under sections 13(3)(c), 13(3)(g), 13(3)(h), 13(3)(i), 13(3)(j)(ii), 13(3)(k), 13(3)(r), 13(3)(s) and Section 17 of the Charter of Fundamental Rights and Freedoms

AND

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

BETWEEN	**DALE VIRGO**	**1ST APPELLANT**
AND	**ZV (By her mother and next friend SHERINE VIRGO)**	**2ND APPELLANT**
AND	**BOARD OF MANAGEMENT OF KENSINGTON PRIMARY SCHOOL**	**1ST RESPONDENT**
AND	**MINISTER OF EDUCATION**	**2ND RESPONDENT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**3RD RESPONDENT**
AND	**OFFICE OF THE CHILDREN'S ADVOCATE**	**INTERVENER**

B St Michael Hylton KC, Miss Daynia Allen and Isat Buchanan instructed by Isat Buchanan for the appellants

Ms Althea Jarrett KC and Miss Jevaughnia Clarke instructed by the Director of State Proceedings for the 1st -3rd respondents

Ms Kaye-Ann Parke instructed by the Office of the Children's Advocate for the Intervener

13, 14 October 2021 and 15 July 2024

Civil procedure – Court at first instance refusing leave to appeal to 1st applicant and continuing case with 2nd applicant – 1st applicant not seeking leave to appeal from this court – Both applicants filing joint appeal – Whether 1st applicant has an appeal before this court

Constitutional law – Fundamental rights and freedoms – Right to family life – Right to freedom of expression – Right to freedom of religion – Right to education to the primary level – Publicly funded school requiring student to remove dreadlocks to attend institution – Whether school's hair grooming policy breaches constitutional rights and freedoms

Constitutional law – School's policy on hair grooming in breach of student's fundamental rights and freedoms – Whether policy justified in a free and democratic society

Table of Contents

Heading	Paragraphs
Introduction	[1] - [5]
The factual background	[6]- [14]
The ruling of the court below	[15]
Grounds of appeal	[16] - [18]
This court's approach to review	[19]

The court's approach to considering alleged breaches of constitutional rights	**[20] - [35]**
Issue a. Whether Mr Virgo had legal standing to bring the claim (grounds a. and d.)	**[36] - [38]**
Issue b. Whether the Full Court adopted the incorrect approach for considering alleged breaches of constitutional rights, and consequently, incorrectly framed the issues to the alleged breaches of ZV's constitutional rights (ground b.)	**[39] - [43]**
Issue c. Whether the policy breached ZV's constitutional rights (Grounds c., e. and f.)	**[44] - [167]**
Freedom of expression	**[45] - [82]**
Freedom of religion	**[83] - [101]**
Right to publicly funded tuition in a public educational institution at the pre-primary and primary levels	**[102] - [124]**
Right to equitable and humane treatment by any public authority	**[125] - [155]**
Right to respect for and protection of private and family life and privacy of the home	**[156] - [167]**
Whether the breaches were demonstrably justifiable	**[168] - [182]**
Summary and conclusion	**[183] - [187]**
Costs	**[188] – [190]**

BROOKS P

Introduction

[1] Mr Dale Virgo and his minor daughter, ZV (represented by her mother and next friend, Mrs Sherine Virgo), (together, for convenience only, 'the appellants'), claim that their constitutional rights, as recognised in the Charter of Fundamental Rights and Freedoms contained in Chapter III of the Constitution ('the Charter'), were breached. Those rights, they assert, include the right to freedom of religion and the freedom of expression. Their discontent was created when Kensington Primary School ('the School'), a government-owned primary school, informed Mr and Mrs Virgo that ZV could not attend the School wearing her locked hairstyle. The Virgo family are not Rastafarian but wear their hair in what they describe as "dreadlocks".

[2] In response to the School's stance, the appellants brought a constitutional claim against the Board of Management of the School ('the Board'), the Minister of Education ('the Minister') and the Attorney General of Jamaica (under the Crown Proceedings Act) ('the 3rd respondent'). These parties, where convenient, will be collectively referred to as 'the respondents'. The appellants claimed redress under the Constitution of Jamaica for the alleged breaches.

[3] The Office of the Children's Advocate ('the OCA') is mandated to protect children's rights. It intervened in the litigation to advocate for upholding ZV's rights.

[4] The Full Court of the Supreme Court of Jamaica considered the appellants' claim. It found that Mr Virgo had no standing to institute the claim, since it found he was not affected by the School's stance, and held that ZV's constitutional rights had not been breached. In this appeal, the appellants and the OCA seek to overturn the Full Court's decisions.

[5] An outline of the background is necessary to fully appreciate the issues involved.

The factual background

[6] In or about April 2018, Mrs Virgo applied to enrol ZV in the School. The School accepted the application, and, on 1 May 2018, Mrs Virgo signed a contract issued by the School for ZV to be registered there as a student. The School hosted an orientation session on 9 July 2018 and Mrs Virgo and ZV attended. Both wore dreadlocks to the event. During the session, Mrs Virgo was given the School's handbook with its rules.

[7] The principal, at the time, informed Mrs Virgo that the School had a policy ('the policy') against the wearing of dreadlocks. This policy stipulated that students attending the School were not permitted to wear braids or beads or lock their hair. The rationale behind the policy was that some parents do not properly groom their female children's hair. It is said that, in the past, the delinquency had caused an outbreak of lice and fungus infestation at the School. In addition, a student swallowed a bead. Consequently, the School's position was that for ZV to attend there, she would have to remove her dreadlocks. The policy was not included in the contract that Mrs Virgo, and other parents, were initially asked to sign in May 2018. When the matter became the subject of litigation, the School's acting principal, Ms Christine Hamilton, deposed that the omission was due to an administrative oversight.

[8] The School later presented the appellants with an amended contract, which included the policy. Notwithstanding the policy, ZV was permitted to wear her dreadlocks to the School's mandatory summer school programme. Mrs Virgo was still, however, required to remove ZV's dreadlocks by 29 August 2018, otherwise, the child would be prohibited from attending the School when classes started the following month. At the time, Mrs Virgo, although finding the policy offensive, advised the School that the dreadlocks were just a hairstyle. She later informed Mr Virgo, who also wore dreadlocks, of these developments. He was incensed by the information.

[9] The appellants' displeasure with the policy resulted in their filing a fixed date claim form on 18 July 2018, asserting that the respondents had breached their constitutional rights. The first hearing of the fixed date claim form was held on 3 August 2018 before

Palmer-Hamilton J (Ag), as she then was. On that date, by the consent of the parties, Palmer-Hamilton J (Ag) issued an injunction prohibiting the Board and the Minister from barring ZV from attending the School until the determination of the substantive constitutional claim.

[10] On 7 September 2018, the appellants amended their fixed date claim form and sought, among other things, orders and declarations that the policy was unconstitutional and that it breached various rights under the Constitution. In para. 1 of the amended fixed date claim form, the appellants claim:

> "A declaration that the policy to exclude individuals who wear dreadlocks of school going age from being admitted to and/or attending primary and/or secondary schools in Jamaica on the basis of wearing their hair in dreadlocks is unconstitutional in that it breaches the following rights of the individual to which the following declarations are sought:
>
> a. The right to freedom of expression (section 13(3)(c))…;
>
> b. The right to equality before the law (section 13(3)(g))…;
>
> c. the right of every child (i) to such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State; (ii) who is a citizen of Jamaica, to publicly funded tuition in a public educational institution at the pre-primary and primary levels (section 13(3)(k));…
>
> d. the right to equitable and humane treatment by any public authority in the exercise of any function [(]section 13(3)(h)[)];…
>
> e. …respect for and protection of private and family life, and privacy of the home [(section 13(3)(j)(ii))]; or
>
> f. A declaration that the decision of [the Board] to deny ZV full enrolment at [the School] until or unless her dreadlocks are cut breaches her right to due process as guaranteed at Section 16 of [the Charter];
>
> g. Any other right entrenched in the constitution."

[11] The appellants also sought declarations that:

a. the policy has breached, is breaching, or is likely to breach the collective rights of the family, (which are the rights listed above in para. [10] a. to g.), as well as the right to freedom of religion (para. 2 of the amended fixed date claim form);

b. a direction that the respondents eliminate all rules, practices or policies that prohibit ZV's attendance at the School because she wears dreadlocks (para. 3 of the amended fixed date claim form); and

c. any policy or rule made by a public official or private school that prohibits the wearing of dreadlocks, in any forum, is unconstitutional and therefore invalid (paras. 4 and 5 of the amended fixed date claim form).

[12] In addition to those declarations, the appellants sought damages (para. 6 of the amended fixed date claim form).

[13] The OCA, in intervening, filed a fixed date claim form on 25 July 2018. It claimed declarations, which closely resembled those of the appellants, namely, that the policy breaches ZV's rights to:

a. freedom of expression;

b. equitable and humane treatment by a public authority;

c. measures of protections due to her as a result of her being a minor, part of the family, society and the State as well as her protections by being a citizen of Jamaica, to publicly funded tuition in a public educational institution up to the primary level and her statutory right, under section 28 of the Child Care and Protection Act, to enrol in and attend school; and

d. due process under section 16 of the Charter.

[14] The OCA also sought:

a. a direction for the respondents to eliminate all rules, practices or policies that prohibit ZV from attending the School because she wears dreadlocks;
b. compensation for the breaches of ZV's constitutional rights;
c. costs; and
d. any other order the court deemed fit.

The ruling of the court below

[15] The Full Court heard the substantive claim. On 31 July 2020, it ruled that Mr Virgo did not have the standing to institute the claim and that, based on the pleadings, ZV's constitutional rights were not breached. Accordingly, the Full Court found that the appellants were not entitled to any relief. The Full Court restricted itself to these parties and the policy. It did not address the wider question that the appellants raised concerning "any policy or rule by a public official or private school".

Grounds of appeal

[16] The appellants have appealed the Full Court's decision. The OCA intervened in the appeal only to argue the issue of whether the policy breaches ZV's right to freedom of expression.

[17] The appellants' amended grounds of appeal are:

> "a. The Full Court's … finding of fact [that Mr Virgo had not shown that he was personally affected by the policy] is contrary to the evidence.
>
> b. The Full Court erred in law when it failed to adopt the correct approach in claims for alleged breaches of constitutional rights, and instead improperly framed the issues in the way they did.
>
> c. The Full Court failed to consider, or alternatively to sufficiently consider, the relevant factors to give effect to the Appellants' constitutional rights or to decide

whether the stated policy of [the School], of 'no braids, no beads [,] no locks' and/or the actions of the 1st, 2nd and/or 3rd Respondent's [/Respondents'] representatives breached the Appellants' constitutional rights.

d. The Full Court erred in law by finding that [Mr Virgo] had no *locus standi* and no justiciable complaint.

e. The Full Court erred in law when it failed to hold that the 1st, 2nd and/or 3rd Respondent's policy and actions infringed the [appellants'] right to respect for and protection of private and family life, and privacy of the home.

f. The Full Court erred in law when it failed [to] hold that the 1st, 2nd and/or 3rd Respondent's policy and actions breached [ZV's] rights to:

i. Freedom of expression;

ii. Freedom of religion;

iii. Publicly funded tuition in a public school;

iv. Equitable and humane treatment by a public authority in the exercise of any function; and

v. respect for and protection of private and family life, and privacy of the home." (Italics as in original)

[18] The issues arising from these grounds are:

a. Whether Mr Virgo had legal standing to bring the claim (grounds a. and d.);

b. Whether the Full Court adopted the incorrect approach for considering alleged breaches of constitutional rights, and consequently, incorrectly framed the issues (ground b.); and

c. Whether the policy breached ZV's constitutional rights (grounds c., e., and f.).

The issues will be considered in that order.

This court's approach to review

[19] This court knows its function is not to exercise independent discretion and cannot disturb the Full Court's decision solely because it would have exercised its discretion differently. The court will only interfere with the Full Court's decision if it is demonstrated that the Full Court misunderstood the law or the evidence or that its decision was plainly wrong or so aberrant that no court regardful of its duty would have arrived at that decision (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, at para. [20], following **Hadmor Productions Ltd and others v Hamilton and Others** [1983] 1 All ER 1042).

The court's approach to considering alleged breaches of constitutional rights

[20] In section 13, the Charter recognises, promotes and guarantees, among others, the various human rights and freedoms, the breach of which the appellants claim redress. The relevant portions of the section are:

> "13.–(1) Whereas–
>
> (a) the state has an obligation to promote universal respect for, and observance of human rights and freedoms;
>
> (b) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and
>
> (c) all persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter,
>
> the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.

(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society –

(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and

(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

(3) The rights and freedoms referred to in subsection (2) are as follows-

…

(c) the right to freedom of expression;

…

(g) the right to equality before the law;

(h) the right to equitable and humane treatment by any public authority in the exercise of any function;

…

(j) the right of everyone to–

…

(ii) respect for and protection of private and family life, and privacy of the home; and

…

(k) the right of every child–

(i) to such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State;

(ii) who is a citizen of Jamaica, to publicly funded tuition in a public educational institution at the pre-primary and primary levels;

(s) the right to freedom of religion, as provided in section 17;

…"

[21] A person who alleges that his or her fundamental rights or freedoms have been, are being, or are likely to be breached, may claim constitutional redress, under section 19, subsections (1) and (2) of the Charter:

> "(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) Any person [authorised] by law, or, with the leave of the Court, a public or civic [organisation], may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter." (Emphasis supplied)

[22] Their Lordships of the Privy Council, in **Attorney General and another v The Jamaican Bar Association (Jamaica); General Legal Council v Jamaican Bar Association (Jamaica)** [2023] UKPC 6; (2023) 102 WIR 475 ('**AG v Jambar**'), addressed the way applications for constitutional redress should be initiated and approached. They said, in para. 24 of their opinion:

> "An application to the court for redress under section 19 of the Constitution of Jamaica, based on an allegation that legislation violates rights and freedoms guaranteed by the Charter without demonstrable justification, usually requires the court to engage in two processes of interpretation (which may be iterative) and (if justification is alleged) a process of legal evaluation. All those processes require to be undertaken in context, and there may be disputes of fact about that context… The general principles to be brought to bear for this task are clearly set out in the recent opinion of the Board in *Day v Governor of the Cayman Islands* [2022] UKPC 6 at paras 34-38 and need no repetition." (Italics as in original)

[23] The Board, in **Chantelle Day and another v The Governor of the Cayman Islands and another** [2022] UKPC 6 referred to their judgment in **Reyes v The Queen** [2002] UKPC 11; [2002] 2 AC 235, concerning the Constitution of Belize. The process of interpretation was set out in para. 26 of the latter case, in which their Lordships stated, in part:

> "When (as here) an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation. If there is an issue…about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not…."

[24] Their Lordships emphasised that the interpretation of a constitution requires a special approach. They so said in their continuation of para. 26 of **Reyes v The Queen**:

> "…A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. **The court has no licence to read its own predilections and moral values into the Constitution**, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society…" (Emphasis supplied)

[25] The Charter requires such an approach in cases where an individual alleges breaches of its provisions. Although relatively new to this country, the Charter is similar in structure and content to constitutional and legislative instruments in some other parts of the world. Respected judgments from other jurisdictions considering such similar provisions have assisted this court and the judges of the Supreme Court in several previously decided cases. Prominent among the decisions from other jurisdictions is the important Canadian case of **R v Oakes** [1986] 1 SCR 103; [1987] LRC (Const) 477 ('**Oakes**'), dealing with alleged breaches of constitutional rights.

[26] In **Oakes**, Dickson CJ adumbrated a two-stage test for assessing legislation or state actions, which are challenged as limiting constitutional rights. He said, in part, on pages 138-139 of the former report:

> "To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. **First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'**…
>
> **Second, once a sufficiently significant objective is recognized, then the party invoking** [the constitutional criteria justifying limiting legislation or action] **must show that the means chosen are reasonable and demonstrably justified**. This involves 'a form of proportionality test'…" (Emphasis supplied, italics as in original)

He broke down the proportionality test into three parts, continuing on page 139:

> "There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question…Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom and the objective which has been identified as of 'sufficient importance'." (Italics as in original)

[27] Among the cases on the point, decided in this jurisdiction, are **Al-Tec Inc Limited v James Hogan and others** [2019] JMCA Civ 9 and **Julian J Robinson v The Attorney General of Jamaica** [2019] JMFC Full 04 ('**Robinson v AG**'). In **Al-Tec Inc Limited v James Hogan and others**, at para. [164], Edwards JA (Ag), as she then was, summarised the **Oakes** approach to considering limits on constitutional rights. She said:

> "[164] ...How is it determined whether a restriction is demonstrably justifiable? There are essentially five central criteria which must be met. See **R v Oakes** [1986] 1 SCR 103; **Defreitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing** [1998] 3 WLR

675; **Huang v Secretary of State for the Home Department** [2007] 2 AC 167; **R v Secretary of State for the Home Department** [2014] UKSC 60. These criteria in summary are that:

> (1) there must be a sufficiently important objective in making the restriction;
>
> (2) the measures used must be carefully designed to achieve that objective and must be rationally connected to that objective;
>
> (3) the means used should be the least drastic so that it impairs as little as possible, the protected rights or freedoms;
>
> (4) the effect should not be disproportionate; and
>
> (5) the interests of society must be balanced against those of individuals and groups." (Emphasis as in original)

[28] Their Lordships of the Privy Council, in **AG v Jambar**, also considered the **Oakes** approach to constitutional relief and found it to be applicable to this jurisdiction. The Board did so at para. 26 of **AG v Jambar**:

> "…[It is unnecessary to resolve the applicability of the principle of presumption of constitutionality] because both the Full Court and the Court of Appeal approached their task by the application of the principles set out in the decision of the Canadian Supreme Court in *R v Oakes* [1986] 1 SCR 103. In short, the burden of establishing that legislation derogates from a constitutionally guaranteed right lies on the claimant for redress, whereas the burden of establishing demonstrable justification lies on the State. **The Board agrees with the Full Court that the differences in language between the Canadian and Jamaican Charters do not detract from the applicability of the *Oakes* analysis of the court's task**." (Italics as in original, bold type supplied.)

[29] Their Lordships also said, at paras. 77 and 78:

> "77. The [**Oakes** two-stage test] is similar to that which the Board recently described as 'the modern conventional approach to issues of proportionality' in *Suraj v Attorney*

General of Trinidad and Tobago [2022] UKPC 26, [2022] 3 WLR 309, at para 51. This involves asking in relation to the relevant measure:

> '(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. See *Huang v Secretary of State for Home Department* [2007] 2 AC 167, para 19 (Lord Bingham of Cornhill) and *Bank Mellat v HM Treasury* (No2) [2013] UKSC 39, [2014] AC 700, paras 20 (Lord Sumption) and 73-74 (Lord Reed).'

78. In considering whether 'a less intrusive measure could have been used' the need to allow the legislature a margin of appreciation is of particular importance. As Lord Reed explained in *Bank Mellat v HM Treasury* (No2) [2013] UKSC 39, [2014] AC 700 at para 75:

> 'In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781- 782 that the limitation of the protected right must be one that 'it was reasonable for the legislature to impose', and that the courts were 'not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line'. This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (*Illinois State Board of Elections v Socialist Workers Party* (1979) 440 US 173, 188-189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a

> strict application of a 'least restrictive means' test would allow only one legislative response to an objective that involved limiting a protected right.'" (Italics as in original, bold type supplied)

[30] As mentioned in the above quotation, the proportionality test has been modified to require that the limiting measure restricts the Charter right "as little as is reasonably possible" (see para. 131 of **R v Edwards Books and Art Ltd** [1986] 2 SCR 713).

[31] Based on those decisions, the **Oakes** approach to considering alleged breaches of constitutional rights has now been, not only fairly settled, but accepted for application by the courts in this jurisdiction.

[32] Several principles may be distilled from those decisions and applied to this case. The relevant ones are:

a. claims for redress for breaches, or likely breaches, of any of the fundamental rights and freedoms, are to be initiated under section 19 of the Charter (section 19(1));
b. "…the burden of establishing that legislation [or State action] derogates from a constitutionally guaranteed right lies on the claimant for redress, whereas the burden of establishing demonstrable justification lies on the State." (para. [26] of **AG v Jambar**);
c. the standard of proof that is placed on the claimant is the civil standard, and the court should give a generous and purposive interpretation to the provisions of the Charter which protect human rights (para. 35 of **Chantelle Day and another v The Governor of the Cayman Islands and another**, para. [203] (b) and (d) of **Robinson v AG**) and para. [88] of **Quincy McEwan and others v The Attorney General of Guyana** [2018] CCJ 30 (AJ);

d. if a breach of a Charter right is not established, that is the end of the matter, but if it is established, the onus shifts to the party seeking to justify the limitation of that right (para. [203] (i) of **Robinson v AG**);

e. the standard of proof placed on the party seeking to justify limiting the right is also the civil standard "but at the higher end, closer to the fraud end of the spectrum of proof", as the term "demonstrably justified", which is set out in section 13(2) of the Charter, suggests (para. [203] (h) and (j) of **Robinson v AG**);

f. the party seeking to justify limiting the right must show, firstly, that the objectives of the law or action "relate to concerns which are pressing and substantial in a free and democratic society" and secondly, that the means chosen to address those objectives "are reasonable and demonstrably justified", in other words, the law or action is proportionate to achieve the objectives (pages 138-139 of **Oakes**);

g. the two-stage test set out in **Oakes** was slightly reformulated by Sykes CJ in para. [108] of **Robinson v AG**:

> "[a)] the [limiting] law must be directed at a proper purpose that is sufficiently important to warrant overriding fundamental rights or freedoms;
>
> [b)] the measures adopted must be carefully designed to achieve the objective in question, that is to say rationally connected to the objective which means that the measures are capable of realising the objective. If they are not so capable then they are arbitrary, unfair or based on irrational considerations;

[c)] the means used to achieve the objective must violate the right as little as is reasonably possible;

[d)] there must be proportionality between the effects of the measures limiting the right and the objective that has been identified as sufficiently important, that is to say, the benefit arising from the violation must be greater than the harm to right.";

h. if the law or action falls within a specific constitutional limitation, it will be held to be demonstrably justified in a free and democratic society;

i. if there is a tie between the claimant's assertion of a breach of the Charter right and the State's proclamation that it is demonstrably justified, the claimant must succeed because the violator can only succeed if the violation is clearly justified (para. [203] (t) of **Robinson v AG**); and

j. the party seeking to limit the right has a duty of candour to provide all relevant information to the court (para. [203] (u) of **Robinson v AG**).

[33] On the issue of proportionality, mentioned above, Sykes CJ noted, in para. [108] of **Robinson v AG**, that Dickson CJ, in **Oakes**, outlined a two-stage test, the first stage being the proper purpose test, while the second stage, dealing with the proportionality requirement, involves three stages. If the law or State action did not pass the proper purpose test, then the second phase, which comprised the other three limbs, would no longer be relevant. Sykes CJ preferred to consider the test as having four stages, rather than two, but then said:

> "Thus whether one thinks of it as a two-stage test, or one test with four parts, it does not matter because in the end the four criteria are applied. From my perspective I prefer to think of the test as four criteria rather than in two stages."

[34] Sykes CJ's four-part approach to the issue of proportionality is not only faithful to "the three important components of a proportionality test" described by Dickson CJ on page 139 of **Oakes**, but is very similar to that set out by the majority's position, reflected in the judgment delivered by Lord Sumpton in **Bank Mellat v HM Treasury (No.2)** [2013] UKSC 39; [2014] AC 700. He said, in part, in para. 20:

> "The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law...Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them…." (Italics as in original)

Sykes CJ's approach is, therefore, entirely appropriate and is thus included as part of the distilled principles.

[35] Although it is not legislation, the policy is the impugned State action and may be assessed using these distilled principles. The principles will be applied in considering the respective grounds of appeal.

Issue a. Whether Mr Virgo had legal standing to bring the claim (grounds a. and d.)

[36] The Full Court found that the policy only affects the students at the School and, since Mr Virgo did not fall into that category, it held that he had not demonstrated that the policy personally affected him (see para. [10] of the Full Court's judgment). It consequently held that he did not have the standing to bring the claim against the respondents. Accordingly, he was removed as a claimant in the proceedings in the court below. Counsel appearing before the Full Court for Mr Virgo, Mr Isat Buchanan, challenged this finding and applied for interlocutory leave to appeal it. The Full Court refused the application.

[37] Mr Virgo did not renew his application for leave to appeal before this court. Although the Full Court made his lack of standing one of its final orders, and no point was made before this court on the propriety of his notice of appeal, as filed, he does not have an existing appeal. In any event, his proposed grounds of appeal, which were filed without leave, show no basis on which he could have succeeded. The Full Court was correct in its ruling with respect to him.

[38] The notice and grounds of appeal filed on 10 September 2020, to the extent that it purports to be a notice of appeal by Mr Virgo, is struck out as being invalid.

Issue b. Whether the Full Court adopted the incorrect approach for considering alleged breaches of constitutional rights, and consequently, incorrectly framed the issues (ground b.)

[39] The Full Court considered whether the policy breached ZV's constitutional rights, based on her pleaded case. It also considered whether personal expression by a minor or the minor's family should be accommodated by a school, even if it breaches the school's rule or policy (see para. [86] of the judgment of the Full Court). The Full Court deliberated whether ZV's wearing of dreadlocks was a form of self-expression based on her family's belief and how far schools and courts should go to accommodate this

expression in the context of public school rules and regulations (see para. [91] of the judgment of the Full Court).

[40] Mr Hylton KC, on behalf of ZV, argued that the Full Court's approach, in para. [86] of its judgment, is incorrect. He advanced that the Full Court should have adopted the approach in **Robinson v AG** by asking whether the policy breached or was likely to breach the appellants' rights. Counsel stated that if the policy breached the appellants' rights then the Full Court should have considered whether the breach was demonstrably justified in a free and democratic society. Learned King's Counsel maintained that had the Full Court adopted that approach, it would have resulted in a different decision.

[41] Ms Jarrett KC, as she then was, on behalf of the respondents, agreed that the Full Court's approach did not accord with the approach adopted in **Robinson v AG**. Learned King's Counsel contended that the Full Court considered the constitutional rights and determined whether the respondents breached those rights in relation to ZV. She argued that the Full Court found that the respondents did not breach ZV's rights and so its failure to address the burden and standard of proof and the justifiable limits on the rights does not invalidate the ruling.

Discussion and analysis

[42] The Full Court did not discuss the standard of proof in determining whether the policy was demonstrably justified in a democratic society. This is understandable, considering that the Full Court stated that ZV's rights, as pleaded, were not breached (see para. [162] of the Full Court's judgment). Accordingly, the Full Court did not expressly refer to the **Oakes** test. It did, however, consider a restricted application of the proportionality stage of the test in **Oakes**. Para. [160] of the Full Court's judgment states, in part:

> "…The measures adopted [by the School] are designed to meet the objective as identified and based on the past experiences in this regard at the school. The objective of creating a more controlled hygienic environment is important

> to the proper order and effective learning at the school and does not prevent [ZV] from enjoying religious freedom, and the expression of that religious choice and cultural ethnicity to which her parents subscribe in their household."

[43] The Full Court having found that ZV's rights and freedoms were not breached, did not need to move on to the second stage of the **Oakes** test. Before determining if the Full Court erred in failing the consider the second stage, this court must assess whether the Full Court was correct in its finding that ZV's rights and freedoms were not breached. If it is found that there has been a breach, the breaches must be considered through the lens of the second stage of the **Oakes** test, which was outlined above.

Issue c. Whether the policy breached ZV's constitutional rights (grounds c., e. and f.)

[44] The Full Court concluded that, based on ZV's pleadings, neither the Board nor the Minister of Education breached her constitutional rights. In deciding whether the Full Court was correct, each alleged breach will be considered in turn.

<u>Freedom of expression</u>

[45] The Charter, in section 13(3)(c), recognises the right to the freedom of expression. The provision has been quoted in para. [20] above.

[46] The Full Court ruled that ZV's freedom of expression, in the context of a religious belief was not engaged or breached, since ZV, through her parents, did not inform the School of a religious affiliation, which the respondents curtailed (see para. [139] of the Full Court's judgment). The Full Court stated that the Virgos needed to have informed the School that ZV wore the dreadlocks as an expression of her Nazarite vow, as it cannot be assumed that everyone who wears dreadlocks does so as a form of religious expression, "or any expression at all" (see para. [141] of the Full Court's judgment). Indeed, Mrs Virgo is reported as having told the School's principal that ZV's locked hair "was just a style" (page 105 of the record). The Full Court also opined that the addition of the Nazarite vow as the reason for ZV's dreadlocks was "a belated addition to the claim" (see para. [88] of the Full Court's judgment).

[47] Mr Hylton submitted that the Full Court erred when it ruled that the policy did not restrict ZV's constitutional right to freedom of expression. He highlighted that Guyana's constitutional right to freedom of expression is similar to that of Jamaica. In that context, he referred the court to the case of **Quincy McEwan and others v The Attorney General of Guyana**, where the Caribbean Court of Justice stressed the importance of the right of freedom of expression and the court's duty to protect it. Learned King's Counsel argued that the Full Court's consideration of whether ZV's parents should have told the School that her dreadlocks expressed their family's Nazarene beliefs and that this information was belatedly added to the claim, was flawed. Mr Hylton asserted that the Full Court only needed to consider the evidence before it, regardless of whether the Virgos informed the School belatedly of the child's religious beliefs. He submitted that since the Full Court found that ZV's dreadlocks expressed her family's religious beliefs and the policy prevented ZV from attending the School with her dreadlocks, the inevitable conclusion should have been that the policy infringed her right to freedom of expression. Learned King's Counsel relied on, among others, **Tinker v Des Moines Independent Community School District** 393 US 503 (1969) ('**Tinker**') which demonstrated that the wearing of armbands constituted a mode of expression.

[48] Learned King's Counsel disputed the contention that ZV herself had to give evidence that her freedom of expression had been breached. He insisted that there are mechanisms in place to protect the rights of children. One such mechanism, he argued, was that section 13(3)(k) of the Charter provides that the rights of every child are to be protected by necessary measures and a claim by a next friend satisfies that provision.

[49] Ms Jarrett submitted that, based on the pleadings and the lack of evidence, the Full Court correctly found that ZV's right to freedom of expression was not breached. She asserted that the Full Court correctly considered the scope of the right of freedom of expression and relied on guidance from **Mahmut Tig v Turkey** (unreported), The European Court of Human Rights, Query No 8165/03, judgment delivered 24 May 2005,

and the Full Court decision of **Maurice Arnold Tomlinson v Television Jamaica Limited and others** [2013] JMFC Full 5.

[50] Learned King's Counsel agreed with Mr Hylton that:

(a) the Full Court based its conclusion on the issue of whether ZV's right to freedom of expression was breached, on the appellants' failure to inform the Board of the meaning ZV's dreadlocks conveyed;

(b) the right to freedom of expression did not hinge on ZV's parents informing the Board of the reason she wore the dreadlocks; and

(c) what was relevant was the evidence that was before the court.

[51] Thereafter, however, Ms Jarrett diverged from Mr Hylton's position. She submitted that ZV's claim under section 19 of the Constitution should have been supported by evidence from ZV that she was exercising that right, namely, that she wore her dreadlocks to express her Nazarene belief or any other meaning. Counsel added that the right was two-fold, in that it required the physical manifestation of the right as well as its content, which is the meaning being conveyed by the expression. Learned King's Counsel cited **Irwin Toy Limited v Quebec (Attorney General)** [1989] 1 SCR 927 for this position. She advanced that the right placed the burden on ZV personally, to give evidence of the meaning she conveyed or intended to convey when she wears her dreadlocks. Ms Jarrett submitted that there was no such evidence by ZV. Learned King's Counsel reasoned that it would be insufficient for a person acting as next friend for ZV to say that the Nazarene beliefs were the beliefs of ZV's family. Ms Jarrett also relied on **Quincy McEwan and others v Attorney General of Guyana** for her submissions on this point.

[52] Ms Parke, on behalf of the OCA, limited her argument to submissions on freedom of expression. She submitted that since the Full Court acknowledged that a person's hairstyle comprises their expression and having accepted that the Virgo family took the

Nazarite vow, it should have appreciated that they did not inform the School of their vow because the School did not ask. Ms Parke also argued that the School did not tell the Virgos that religious belief was a permissible exception to its policy. She contended that the School should have been aware that it was possible that ZV wore dreadlocks because of her family's belief. Learned counsel argued that School's rules should be balanced, and the policy in the instant case, is not. Learned counsel sought a declaration which preserves children's rights to wear properly groomed dreadlocks whether worn for religion, spirituality or cultural identity. She also seeks a declaration that school rules, generally, be formalised since unwritten rules and exemptions create fertile ground for uncertainty, abuse and discrimination.

Discussion and analysis

[53] Article 19 of the Universal Declaration of Human Rights ('UNDHR') states that everyone has the right to freedom of expression:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[54] In a similar vein to section 13(3)(c), sections 1 and 2 of the Canadian Charter recognise the right to freedom of expression and stipulate that it can only be curtailed by reasonable limits that are demonstrably justified. The sections state:

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Everyone has the following fundamental freedoms:
>
> (a)…
>
> (b) freedom of thought, belief, opinion and expression…"

[55] Article 10 of the European Convention on Human Rights ('ECHR') also provides the right to freedom of expression. The Article reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[56] The European Court of Human Rights, in para. 49 of **Handyside v UK** (App no 5493/72), (1976) 1 EHRR 737 pronounced that:

> "…Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to para 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

[57] Saunders PCCJ in **Quincy McEwan and others v The Attorney General of Guyana** at para. [75] also recognised the importance of freedom of expression to democracy, describing it as the "cornerstone of any democracy". He said:

> "Because it underpins and reinforces many of the other fundamental rights, freedom of expression is rightly regarded as the cornerstone of any democracy."

[58] Several cases assert that how a person attires himself or herself may constitute a form of expression. In **Quincy McEwan and others v The Attorney General of Guyana**, police officers arrested a group of transgendered persons, who were dressed in female clothing, which was in breach of section 153(1)(xlvii) of the Summary

Jurisdiction (Offences) Act of Guyana. That provision states that it is a crime for a man to dress in female clothing or a woman to dress in male attire in a public place, for an improper purpose. The appellants pleaded guilty to wearing female attire, but they later brought claims that section 153(1)(xlvii) was unconstitutional. One of the issues with which the Caribbean Court of Justice had to contend was whether section 153(1)(xlvii) contravened the appellants' right to freedom of expression as espoused in Article 146 of the Guyanese Constitution. In that case, the court explored Article 146 of the Constitution of Guyana, which reads:

> "146. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence."

[59] Saunders PCCJ, in para. [76] noted that how a person dresses and presents himself or herself is important to the right to freedom of expression. He said:

> "…How individuals choose to dress and present themselves is integral to their right to freedom of expression. This choice, in our view, is an expressive statement protected under the right to freedom of expression."

[60] Importantly, not every activity will be considered "an expression", which the Charter guarantees. It must be established that the activity falls within the scope of the Charter right. To fall within the scope, the activity must be two-fold. There must be a physical manifestation, coupled with content that conveys a meaning. In **Mahmut Tig v Turkey**, the applicant was a third-year student at a university but was denied entry to the university because, contrary to a decree that was posted at the university (based on an order that the university's Senate adopted), he wore a beard. The applicant filed an appeal, arguing that the decree was unconstitutional. One area of challenge was that the decree breached his right to freedom of expression because his beard constituted part of his physical appearance. The ECHR rejected this submission because the applicant did

not prove that he was prohibited from expressing a particular opinion outlined in Article 10 of the ECHR. The court by a majority ruled that:

> "As to Article 10, the Court notes that, even in very particular circumstances, assuming that the right to freedom of expression may include the right of a person to express his ideas by the way in which he wears his beard **it has not been established that the applicant was prevented from expressing a particular opinion within the meaning of Article 10 by the prohibition of the wearing of a beard**." (Emphasis supplied)

[61] In **Irwin Toy Limited v Quebec (Attorney General)** Irwin Toy Limited sought declarations that sections 248 and 249 of the Canadian Consumer Protection Act, which prohibited commercial advertisements directed at people under 13 years, contravened, among others, the Canadian Charter of Fundamental Rights and Freedoms. The Supreme Court of Canada pronounced that where there is an alleged breach of the right to freedom of expression, the first step is to determine whether the claimant's activity falls within the scope of the right. Dickson CJ, Lamar and Wilson JJ said at pages 968-969:

> "… the first step to be taken in an inquiry of this kind is to discover **whether the activity which the [claimant] wishes to pursue may properly be [characterised] as falling within 'freedom of expression'**. If the activity is not within s. 2(b), the government action obviously cannot be challenged under that section….
>
> **'Expression' has both a content and a form**, **and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning**. **That meaning is its content**….
>
> **We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed**. **Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee**." (Emphasis supplied, italics as in original)

The majority underscored that expression must be in non-violent ways.

[62] The majority, having found that the advertisements fell within the ambit of the right to freedom of expression, then moved to the next step, of contemplating whether the purpose of the government's action was to restrict freedom of expression. They stated, on pages 975 to 976:

> "In sum, the [characterisation] of government purpose must proceed from the standpoint of the guarantee in issue. With regard to freedom of expression, **if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee**. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity." (Emphasis supplied)

[63] The majority, on page 976, warned however, that even where the government's intention is not to restrict freedom of expression, its action may have that effect but it is for the claimant to prove the restriction. They said:

> "Even if the government's purpose was not to control or restrict attempts to convey a meaning, the Court must still decide whether the effect of the government action was to restrict the [claimant's] free expression. Here, the burden is on the [claimant] to demonstrate that such an effect occurred. In order so to demonstrate, a [claimant] must state her claim with reference to the principles and values underlying the freedom."

[64] The majority summarised the principle on pages 978-979 and asserted that the claimant must indicate the meaning being conveyed by the expression:

> "…If the government's purpose was not to restrict free expression, the [claimant] still claim that the effect of the government's action was to restrict her expression. **To make this claim, the [claimant] must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or**

individual self-fulfillment and human flourishing."
(Emphasis supplied)

[65] This court, in **Maurice Arnold Tomlinson v Television Jamaica Limited and others** [2020] JMCA Civ 52 ('**Tomlinson v TVJ and others**'), applied the reasoning in **Irwin Toy Limited v Quebec (Attorney General)**. In **Tomlinson v TVJ and others**, Mr Tomlinson filed a fixed date claim, before the Full Court, seeking redress for constitutional breaches. His claim was against the failure of two of Jamaica's television stations to broadcast a video, which he had produced. He argued that their conduct breached sections 13(3)(c) and (d) of the Charter, which are the right to freedom of expression and the right to seek, receive, distribute or disseminate information, opinions and ideas through any media respectively. The Full Court dismissed his claim and he appealed to this court. The court, in resolving the issue of whether Mr Tomlinson's right to freedom of expression had been breached, considered the scope and content of the advertisement and whether it fell within the ambit of the guaranteed right (see para. [137]). This court also considered whether the purpose of the activity was limited. It reasoned that television stations limited the right since the advertisement was not aired. The court's discourse continued with the determination of the horizontal application of the Charter, which has no bearing on this matter.

[66] Guidance on the point can also be gleaned from the jurisdiction of the United States. There, the wearing of armbands was said to amount to free speech. In **Tinker**, three students who attended public school wore black armbands, protesting the country's involvement in Vietnam. The school developed a policy that students who wore the armbands and refused to remove them would be suspended. The three students were suspended. The Court of Appeal of the United States found that the wearing of the armbands constituted free speech in the First Amendment and it did not cause or potentially cause disturbance to others. The majority of the Court of Appeal noted a distinction between rules that impact the work of the schools or rights of other students, and rules that did not. The majority at pages 507-508 said:

> "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hairstyle, or deportment. Cf. *Ferrell v Dallas Independent School District*, 392 F. 2d 697 (1968); *Pugsley v Sellmeyer*, 158 Ark. 247, 250 S. W. 538 (1923). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'
>
> The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools [sic] or the rights of other students." (Italics as in original)

[67] This implies that actions by students which disrupt school activities or negatively impact the rights of other students will not be protected by freedom of speech (see page 513).

[68] Section 13(1) of the Charter declares that all persons in Jamaica are entitled to the rights outlined and all persons should respect the rights of others. ZV, being a minor, is no exception.

[69] Human rights are also guaranteed to everyone. This is clearly outlined in Article 2 of the UNDHR. It states:

> "Article 2
>
> **Everyone is entitled to all the rights and freedoms set forth in this Declaration**, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status…" (Emphasis supplied)

[70] Interestingly, however, the Convention on the Rights of the Child grants the right to the child who is "capable of forming his or her own views". At Article 12 it provides:

> "1. **States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child**.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." (Emphasis supplied)

[71] There is, however, no such restriction imposed in the Charter. The Charter guarantees the right to freedom of expression to all Jamaicans. The Charter recognises that children lack full legal competence because of their status as minors and they should be protected accordingly (see section 13(3)(k)(i)).

[72] In the present case, Mrs Virgo, ZV's mother and next friend, gave evidence on her behalf. She was entitled to do so. She said that ZV had been wearing the hairstyle since she was a year old, but did not say, however, what ZV's view of the dreadlocks was. ZV was six years old at the time the School refused her entry. At that age, she would have been able to contribute to the issue of the content of her hairstyle. It is noted that in **Dzvova v Minister of Education, Sports and Culture and others** there is no evidence that the child gave evidence of his preference.

[73] It is, therefore, relevant to determine whether, given the circumstances of this case, the matter fell within the scope of the right of freedom of expression. The judgment in **McEwan and others v The Attorney General of Guyana** supports the principle that a person's attire is a mode of expression. **Dzvova v Minister of Education, Sports and Culture and others** and **In Re Chikweche** 1995 (4) SA 284 (ZC), among others, support the principle that the way a person wears their hair is a mode of expression. In both cases, however, religion was the major issue before the court. **Mahmut TIG v Turkey** is difficult to resolve in this context. The European Court of Human Rights held

that Mr Tig's reliance on the explanation of his beard, as only a part of his physical appearance, did not constitute an expression of a "particular opinion".

[74] Although not stated by her, the evidence in this case is that ZV wore her hair in dreadlocks for a reason. Mr Virgo, in his supplemental affidavit, filed on 7 September 2018, stated at para. 2:

> "I am the father of a minor, [ZV], my wife and I are both dreadlock wearing Jamaicans. My daughter is also a dreadlock Jamaican…."

He continued at para. 15:

> "My daughter has been wearing her hair as a dreadlocks from she was 1 year old. She has therefore worn dreadlocks for more than 5 years. Accordingly, by wearing her hair in dreadlocks, ZV was physically manifesting her right to expression."

[75] The next step is to determine if ZV was expressing a "particular opinion" by wearing her dreadlocks.

[76] Mr Virgo, in his supplemental affidavit, stated that the dreadlocks play a role in their family's religion, existence and identity. He said, in para. 16:

> "My unborn child will without question wear, his/her hair in [dreadlocks], **an important part of our family life, expression, and though not Rastafarian, it nonetheless plays a significant role in our religion. Dreadlocks is a part of our existence and identity**." (Emphasis supplied)

[77] Mrs Virgo, in her affidavit filed 15 February 2019 also expressed that dreadlocks form part of the family's family life, belief system and conscience and the hairstyle is a part of their identity.

[78] Mr and Mrs Virgo, therefore, explained the reason for ZV wearing the dreadlocks. Their evidence suggests that the dreadlocks form a part of their Nazarene beliefs, their existence and identity.

[79] However, the Full Court rejected that the expression was a form of self-expression. In para. [152] the Full Court said, in part:

> "Setting aside the religious belief now disclosed, the school's policy cannot be said to be infringing on [ZV's] right to self-expression, if the reason her hair is locked is simply a decision as to self-expression that her parents have taken as to adornment applicable to manifest their lifestyle…."

[80] The Full Court's rejection of the aspect of content is, with respect, flawed. Although its reasoning would be consistent with the approach taken in **Mahmut TIG v Turkey**, the evidence in this case goes beyond mere physical appearance. It speaks to ZV's identity. The meaning conveyed cannot be rejected because it is not considered substantial or valid. The court in **Irwin Toy Limited v Quebec (Attorney General)** made it clear that the right to freedom of expression cannot be excluded "on the basis of the content or the meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee" (see page 969).

[81] In those circumstances, the Full Court was wrong to find that the policy did not infringe ZV's right to freedom of expression. The dreadlocks were the physical manifestation of the expression of a Nazarene lifestyle, which was the content. While the matter of whether ZV was expressing a religious belief by that hairstyle, has not yet been determined, what is certain is that there is sufficient evidence from ZV's parents that ZV wore the dreadlocks to express her existence and identity. ZV's right to freedom of expression was therefore engaged. This aspect of the ground has merit. It will later become necessary to determine if the policy's limitation of the right was demonstrably justified.

[82] The OCA sought general declarations about children's rights and the formalisation of rules and exemptions. Those will not be given in this judgment, which concerns ZV and the policy. The OCA only intervened on the narrow point of whether the policy breaches ZV's right to freedom of expression and the orders they seek, exceed their remit. The formalisation of general rules and exemptions is within the purview of the executive.

Freedom of religion

[83] The Charter, in section 13(3)(s) provides for "the right to freedom of religion as provided in section 17" of the Charter. Section 17 provides that:

> "17. –(1) Every person shall have the right to freedom of religion including the freedom to change his religion and the right, either alone or in community with others and both in public and in private, to manifest and propagate his religion in worship, teaching, practice and observance…."

[84] The Full Court, in para. [146], acknowledged that people have a right to express their religious beliefs or conscientiously held beliefs. However, it found that there was insufficient evidence to determine that the School breached ZV's freedom of religion. The Full Court added that ZV's religious belief was not disclosed to the School and the advancement of the dreadlocks, as an expression of the Nazarite vow, was a late addition to the claim (see para. [88] of the Full Court's judgment). The Full Court highlighted the popularity of the locked hairstyle and traditional dreadlocks and noted that ZV's locks were not the traditional freeform locks usually associated with Rastafarians. Accordingly, the Full Court determined that Mrs Virgo should have advised the School, at the time it notified her of the policy, the reason for ZV's dreadlocks and why she should be allowed to wear her dreadlocks (see paras. [147] and [148] of the Full Court's judgment). The Full Court compared the situation to those where parents inform the School of their religious affiliations if they do not want their child to participate in Christian or denominational activities at public schools. It ultimately found that ZV's parents, having failed to inform the School that ZV's dreadlocks were for religious purposes, had not engaged her right to freedom of religion. The court found that it could not be said that the respondents breached that right.

[85] Mr Hylton submitted that the right to freedom of religion was not restricted to holding a religious belief. He further submitted that, by virtue of section 17 of the Constitution, citizens have the right to manifest religion in practice and observance. Learned King's Counsel asserted that the Full Court appreciated that ZV's locks expressed her family's religious belief but dismissed the claim that it was an expression of religious

belief because the Virgos disclosed that information late. He argued that the Full Court ought to have assessed the evidence that was available at the trial. If it had done so, King's Counsel continued, the Full Court would have appreciated that ZV's right to freedom of religion had been breached or was likely to be breached.

[86] Learned King's Counsel also advanced that since the Full Court accepted that the Virgos held a religious belief, the matter of how or when the beliefs are practised or expressed, should not be questioned and they do not need to prove it. He referred this court to **In Re Chikweche**, **United States v Ballard** 322 US 78 (1944) and **R v Big M Drug Mart Limited** (1985) 1 SCR 295. Learned King's Counsel submitted that the School breached the appellants' right to freedom of religion from the moment they refused to allow ZV to attend School with her dreadlocks, after knowing she wore them as part of her religious belief. Learned King's Counsel asserted that the School became aware of this once they received the affidavit evidence during the proceedings before the Full Court, and should, thereafter, have permitted ZV to attend the School, with her dreadlocks.

[87] Learned King's Counsel highlighted that the Full Court found that the Nazarene belief is a religion, which finding, the respondents have not appealed. Accordingly, the respondents' submission that the Nazarene belief does not meet the minimum standard of a religion is untenable. Learned King's Counsel also underscored that the respondents' submissions are contradictory in that, on the one hand, they argue that the Nazarene faith is not a religion and on the other hand, they posit that the appellants should have informed the School that the dreadlocks were worn for religious reasons.

[88] Ms Jarrett contended that the Full Court did not find that the Nazarite vow was a religion. Learned King's Counsel argued that the Full Court's reference, in para. [133] of its decision, to "features of the religion", was in relation to Mrs Virgo's evidence and the Response to Request for Information. Learned King's Counsel also argued that the Full Court only explored that it was an expression of the Nazarene belief, not a religion. Further, learned King's Counsel submitted that the appellants' evidence did not enable

the Full Court to determine whether the Nazarite vow was a religion. Additionally, learned King's Counsel highlighted that Mr Virgo's evidence is that his family members are not Rastafarians. This framework is necessary, learned King's Counsel, argued, because, it is important to first determine whether the Nazarene belief is a religion, because beliefs must achieve a minimum standard before it can attain constitutional protection as a religion, as opposed to other beliefs which the Constitution does not protect. She referred the court to **JWM v Board of Management** that a religion must include the belief, faith and worship of a supreme being which guides the moral or spiritual conduct of its believers. Ms Jarrett asserted that the right to freedom of religion is different from freedom of expression, simpliciter, as religion involves believing in something bigger than yourself. She argued that before the right to religion can be breached, that religion must have first been declared to the School, but the appellants did not declare it, instead, they complained that they were not obliged to inform the School of their religious affiliation. Learned King's Counsel submitted that the Full Court was correct in finding that the appellant's right to religion and to manifest their religion was not breached.

[89] In any event, learned King's Counsel indicated that the School was prepared to allow ZV to attend the institution when they were made aware that she wore the dreadlocks for "religious purposes" but the appellants proceeded with the claim.

Discussion and analysis

[90] In order to be clothed with this right, an applicant must establish that their belief is a religion. EC Mwita in **JWM v Board of Management**, before determining whether JWM's minor daughter's right to freedom of religion was breached, pronounced that it was necessary for him to first explore whether Rastafari was a religion, deserving of the constitutional protection in the Republic of Kenya. The judge said, in para. 21:

> "The single question that arises for determination in this petition is whether the decision to exclude [JWM's minor daughter] from school has violated her right to education on religious grounds. However, before I venture to answer this question, **I find it necessary to address a preliminary issue, namely; whether Rastafari is a religion to**

> **warrant invocation of protection under Article 32 of the Constitution**. But, first, what is religion[?]" (Emphasis supplied)

[91] Article 32, subsections (1) and (2), of the Constitution of the Republic of Kenya states that:

> "(1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.
>
> (2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship."

[92] In deciding JWM's claim, the learned judge first cited various authorities which defined religion. He did so in paras. 22-24:

> "22. The Constitution does not define the word 'religion.' We must therefore turn elsewhere to find the meaning of this word. Concise Oxford English Dictionary, Twelfth Edition defines 'religion' as[:]
>
> ***'(1) the belief in and worship of a superhuman controlling power, especially a personal God or gods, a particular system of faith and worship;***
>
> ***(2) a pursuit of or interest followed with great devotion.'***
>
> 23. Black's Law Dictionary, Ninth Edition defines 'religion' as[:]
>
> ***'A system of faith and worship usually involving belief in a supreme being and usually containing a moral or ethical code; especially such a system [recognised] and practiced by a particular church, sect, or denomination.'***
>
> 24. On the other hand, Griel, A.L. & D.G. Bromley; Defining Religion: Investigating the Boundaries between the Sacred and Secular, 2003. Amsterdam: JAI, define religion as[:]
>
> ***'a unified system of beliefs and practices relative to sacred things set apart and forbidden, beliefs and practices which unite into a single moral community***

> ***called a church and all those who adhere to them[.]'"***
> (Emphasis as in original, italics as in original)

[93] From those authorities, the learned judge determined that Rastafari is a religion. The learned judge stated, in paras. 25 and 26:

> "25. It follows from the above definitions that religion encompasses aspects such as beliefs, faith and worship of a superior being which determine a person's moral or spiritual conduct. And from what [JWM] averred in his pleadings, deposed in his affidavits and testified on oath in court, that they believe in the biblical teachings which forbid shaving of hair; that they keep the Ten Commandments given by a superior being and that they observe the Sabbath as their day of worship, it is my holding that Rastafari is a religion whose sincere adherents should be accorded full protection under Article 32 of the Constitution just like those of other religions.
>
> 26. This view finds support in an Article by Midas H. Chawane, ***The Rastafarian movement in South Africa: A religion or way of life*** (Journal for the Study of Religion vol.27 n.2 Pretoria 2014) in which he opines that whether Rastafarians see their movement as religious or not will depend on their definition of religion. He argues that when other aspects of the definitions are applied such as ***'a unified system of beliefs and practices, Rastafarianism qualifies as a religion'***." (Italics and bold type as in original)

[94] Counsel, in the present case, submitted numerous authorities on Rastafari, however, as indicated earlier, this case is not about Rastafari as a religion. Mr Virgo, in para. 16 of his supplemental affidavit, expressly stated that his family are not Rastafarians. Mrs Virgo, specifically stated, in her affidavit filed on 15 November 2019, that they are Nazarenes.

[95] In her Response to Request for Information filed 9 September 2019, following the respondents' Request for Information filed 22 August 2019, Mrs Virgo explained the Nazarite vow. She said:

> "The Nazarite vow is a religious belief held by the claimants as part of their faith and family practice, which finds [its] tenets in Numbers 6: 1-21. The vow has three requirements:

> a. Abstain from alcohol and specifically those derived from grapes;
>
> b. Not to make contact with corpses and graves; and
>
> c. **Refrain from the cutting of their hair** [Cf: Leviticus 21:5- 'They shall not make baldness upon their head, neither shall they shave off the corner of their beard nor make any cuttings in their flesh']
>
> A person is either born as a Nazarite or, becomes a Nazarite by an intentional verbal declaration in the presence of a Nazarite. In any event, the claimants object to being required to prove their faith or their conscience." (Emphasis supplied)

[96] It is unnecessary, for this case, to decide whether taking a Nazarite vow or being a Nazarene is a religion. The School, by way of the Second Affidavit of Christine Hamilton (who by this time was the School's principal), filed on 13 September 2019, after the Response to Request for Information was filed, asserted that since ZV's hairstyle is worn for religious reasons, the policy would not apply to ZV. She said:

> "2. …I have been made aware by the affidavit of Sherine Virgo filed on 22 February 2019 and the claimants' answer to the defendants' Request for Information filed on 9 September 2019 that **the hairstyle of the 2nd claimant, ZV, is as a result of religious reasons, namely the taking of the Nazarite Vow. Based on these circumstances, the school rule which does not allow students to lock their hair would not apply to [ZV].**
>
> 3. This position of the school would not have been communicated to [ZV's] parents as the school board was never given the opportunity by [ZV's] parents to understand the reasons for the wearing of [ZV's] hairstyle prior to the answer to the Request for Information. This was a result of the fact that [ZV's] parents refused the board's offer to meet to discuss the issue and did not thereafter make themselves available for dialogue to allow for a resolution of the situation." (Emphasis supplied)

[97] However, that assertion by the School does not establish that there was a breach of ZV's right to freedom of religion.

[98] The Full Court is correct in finding that the School was not aware of ZV's beliefs when it communicated the policy to her mother. The quotations above show that the School was only informed of the reason for the hairstyle when it was served with the Response to the Request for Information and Mrs Virgos' supplemental affidavit filed on 29 April 2019. Upon receiving that information, the School made the assertion set out above. ZV's claim that her right to freedom of religion was breached, is, therefore, misconceived.

[99] The Full Court is also correct in finding that the respondents "cannot be found to have breached a right that they were not informed was 'in play' or was being exercised". ZV's right to freedom of religion was not contravened, nor (based on the School's acceptance of her religious belief, once it was informed of it) was it likely to be contravened. The cases of **Dzvova v Minister of Education, Sports and Culture and others,** and **JWM v Board of Management** are distinguishable because the party infringing the right was informed, before the onset of litigation, that the hairstyle was inspired by religion. Similarly, **R v Big M Drug Mart Limited** was, from its inception, a case based on discrimination because of religion. The Supreme Court of Canada confirmed that legislation proscribing the sale of goods on a Sunday infringed the freedom of religion.

[100] In **In Re Chikweche**, the Zimbabwe Supreme Court took the view that a judge's refusal to allow Mr Chikweche to take the oath, to be admitted to practice as a legal practitioner, was made on the basis that "the wearing of dreadlocks revealed that [he] was not 'a fit and proper person' to be registered [as a legal practitioner]". Although religion was discussed as a substantial part of the leading judgment, the decision did not turn on that point.

[101] The grounds of appeal, which are based on the issue of freedom of religion, cannot succeed since ZV had not notified the School of her religious beliefs, nor had she asserted a right to freedom of religion. Once notified, the School promptly conceded that the policy did not apply to her.

Publicly funded tuition at the pre-primary and primary levels

[102] The right to publicly funded tuition at the pre-primary and primary levels is protected by section 13(3)(k)(ii) of the Charter.

[103] The Full Court found that ZV's right to education was not engaged and accordingly, the respondents did not breach her right (see para. [123] of the Full Court's judgment). It considered whether the School, in denying ZV admission because of her dreadlocks, breached her right to education as espoused in section 13(3)(k)(ii) of the Charter (see para. [114] of the Full Court's judgment). The Full Court began by examining the right to an education as outlined in Article 26 of the UNDHR. Article 26 states:

> "1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
>
> 2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
>
> 3. Parents have a prior right to choose the kind of education that shall be given to their children."

[104] Thereafter, the Full Court explored the right to education in the ECHR. Article 2 Protocol 1 of the ECHR provides:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to

> education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

[105] The Full Court relied on **Ali v The United Kingdom** [2011] ECHR 17 where a student was prevented from attending school, initially because of a pending criminal investigation. The Full Court accepted that the equivalent right in the ECHR is similar to section 13(3)(k)(ii) of the Charter. It reasoned that there is no right to attend a school of choice, but the limitations on attendance must be for a legitimate purpose. The Full Court accepted that hygiene would constitute a legitimate aim for limiting access to education. Accordingly, it found that the School's policy did not breach ZV's right to education. It stated that ZV is able to attend another school that accommodates her dreadlocks as a form of expression.

[106] Mr Hylton stridently argued that the policy breached ZV's right to publicly funded tuition in a public school. He noted that the Full Court relied on **Ali v The United Kingdom** but submitted that the circumstances of this case are different since, in **Ali v The United Kingdom**, the student was suspected of participating in wrongdoing and accordingly was suspended. The court, therefore, ruled that the school's decision was proportionate and permissible. In the present case, however, learned King's Counsel's submission ran, the School did not accuse ZV or her parents of any wrongdoing. Learned King's Counsel also argued that the School is a public one, accordingly, if the School unjustifiably restricts a student from attending the institution, then so too can other public schools. He contended that the policy contravenes regulation 23(2) of the Education Regulations, 1980 ('the regulations') which provides that an eligible student for admission to a public educational institution should only be refused admission if there is no available accommodation or on any other ground which the Minister approves. None of these conditions, learned King's Counsel argued, are present in ZV's case. Mr Hylton argued that there were authorities from other jurisdictions that demonstrate that the School's conduct amounted to a breach of a child's right to an education. He relied on **Ali v Head Teacher and Governors of Lord Grey School** [2006] 2 AC 363, **JWM v Board of**

Management and **Dzvova v Minister of Education, Sports and Culture and others**.

[107] Learned King's Counsel acknowledged that schools should implement rules and regulations addressing hairstyle and grooming, where the breach is minimal and demonstrably justified. He, by way of illustration, invited the court to consider the wearing of uniforms, which is a breach of freedom of expression, but a minimal breach that is demonstrably justified to avoid distractions to the students. In the instant case, he argued that the policy requiring ZV to cut her dreadlocks is disproportionate to the intended objective as it would take years to regrow.

[108] Ms Jarrett acknowledged that the Full Court relied on **Ali v United Kingdom**, and Article 2 of Protocol 1 of the ECHR, to dissect this right. She noted, however, that Article 2 is not identical to section 13(3)(k) of the Charter but submitted that their essence is the same in that they both state that no one should be denied the right to education. Learned King's Counsel agreed with the Full Court that the right did not entitle a student to a general right to attend any educational institution of their choice. Learned King's Counsel argued that if the drafters of the Constitution intended this, the section would have specifically stated that there be access to a public school of one's choice, as is with the case with other sections in the Constitution, which expressly give access to facilities or services of one's choice. Learned King's Counsel referred the court to sections 14(2) and 16(6)(c) of the Constitution. She made the further point that if the right is interpreted in the way the appellants assert then if parents like and choose a particular school but their child is not admitted to that school, they would have a claim. Ms Jarrett argued that the foundation of the right is to provide free education which she maintained was not violated in the present case.

Discussion and analysis

[109] Section 13(3)(k)(ii) of the Charter provides the right "to publicly funded tuition in **a** public educational institution" (emphasis supplied). The wording of the Charter is clear. A child does not have a right to attend any school of his or her choice.

[110] The Full Court adopted Article 2 of Protocol 1 of the ECHR because it was "sufficiently similar" to the Charter. This court accepts that reasoning. Article 2 of the First Protocol of the ECHR reads:

> " **Right to education**
>
> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, **the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions**." (Emphasis supplied)

[111] It is recognised that the Charter outlines the right to education positively, while the ECHR outlines the right in the negative. Article 2 also makes additional provision for the State to respect parents' rights to ensure that education and teaching align with their religious and philosophical views. That addition is not present in the Charter. That spirit is however captured in section 44 of the Education Act. It provides that the Minister must consider the wishes of parents when educating children. It states:

> "In the exercise and performance of the functions assigned to him by this Act, the Minister shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure, **the wishes of parents are to be considered in the education of students**." (Emphasis supplied)

[112] The ECHR is, therefore, as the Full Court expressed, "sufficiently similar" to our legislative landscape on the right to education. Accordingly, the decided cases, interpreting Article 2 of the First Protocol of the ECHR, offer persuasive guidance on distilling the right to education.

[113] In **Ali v Head Teacher and Governors of Lord Grey School**, Mr Ali was a student at the Lord Grey School. He, along with two other boys, was believed to be responsible for a fire in a classroom at the school on 8 March 2001. The deputy head teacher informed Mr Ali and the two other boys that they were not to attend the Lord Grey School during the investigation into the arson. The head teacher also wrote to Mr

Ali's parents advising that he should not attend the Lord Grey School until 5 April 2001. They gave him schoolwork to do at home and permitted him to attend to sit examinations. Mr Ali's parents eventually stopped collecting schoolwork from the Lord Grey School. The deputy head teacher wrote to Mr Ali's parents on multiple occasions extending his period of exclusion pending the investigations and on one such occasion made arrangements for alternate education, which offered him a place at the alternate institution but that educational arrangement did not include the full national curriculum. The parents did not accept that offer.

[114] The Crown discontinued the charge against the boys and the school invited Mr Ai's parents to a meeting to discuss the matter and his re-entry but they did not attend. The headteacher then advised Mr Ali's parents that he could no longer attend the school. This period of exclusion exceeded the permissible statutory limits. He later obtained admittance into another school. He filed a claim that his right to education, according to Article 2 of the First Protocol of the ECHR, was breached. The domestic court ruled that the school's action was not the reason that Mr Ali was not being educated since his parents rejected the offer from the educational institution. Mr Ali appealed to the Court of Appeal which found that his right to education was breached, despite the offer of alternative education. The school appealed to the House of Lords.

[115] The House of Lords, for varied reasons, ruled that the school's exclusion of Mr Ali was unlawful but determined that Mr Ali's right to education under the ECHR had not been breached. Their Lordships determined that the right would only have been breached when the education system fails to provide access to a minimum standard of education. Lord Hoffmann, in interpreting Article 2 of the First Protocol of the ECHR, noted that the right to education, provided therein, does not give a right to remain in a particular institution. He said at paras. 56 and 57:

> "56 …This does not however guarantee access to any particular educational institution the domestic system does provide…Nor is there a right to remain in any particular institution. Everyone is no doubt entitled to be educated to a minimum standard (*R (Holub) v Secretary of State for the*

> *Home Department* [2001] 1 WLR 1359, 1367) but the right under article 2 extends no further.
>
> 57 … but article 2 of the First Protocol is concerned only with results: was the applicant denied the basic minimum of education available under the domestic system? For this purpose it is necessary to look at the domestic system as a whole…. " (Italics as in original)

[116] He went further to say that the Convention right is breached when there is a denial of access to education. He said, in part, in para. 61:

> "…In the case of article 2 of the First Protocol, that would have required a systemic failure of the educational system which resulted in the respondent not having access to a minimum level of education. As there was no such failure, that is the end of the matter…."

[117] Mr Ali then appealed to the European Court of Human Rights. The European Court of Human Rights ruled (**Ali v United Kingdom** [2011] ECHR 40385/06; (2011) 30 BHRC 44) that the right to education was not absolute and necessarily involved permissible limitation. It said, in para. 52:

> "The court recognises that in spite of its importance the right to education is not absolute, but may be subject to limitations. Provided that there is no injury to the substance of the right, these limitations are permitted by implication since the right of access 'by its very nature calls for regulation by the State'…"

[118] The European Court of Human Rights, as did Lord Hoffmann in the House of Lords, articulated that the right to education outlined in Article 2 of the First Protocol of the ECHR does not "necessarily entail a right of access to a particular educational institution (*Simpson v UK*, Application No. 14688/89, 24 February 1998)" (Italics as in original - see para. 54).

[119] It is therefore settled that the right to education, as contemplated in the Charter, is not an absolute right and there are limitations to the right. The School sought to exclude ZV, but, it must be recognised that there is no right to attend any school of one's choice. The right only embodies access to education. ZV had already gained access to the School,

but, like Mr Ali, was later excluded from the institution. The European Court of Human Rights offered guidance in para. 58 in determining whether an exclusion amounts to a breach of the right to education. It said:

> "In determining whether or not an exclusion resulted in a denial of the right to education, the court will have to consider whether a fair balance was struck between the exclusion and the justification given for that measure…"

[120] The European Court of Human Rights accepted that Mr Ali's exclusion was not a denial of the right to education because it was proportionate to the aim pursued, since the Lord Grey School only excluded him, in the first instance, pending the criminal investigation and would have readmitted him if the parents had attended the meeting to which they were invited. Additionally, Mr Ali was offered alternative education, which he declined (see paras. 59-62).

[121] In this analysis, it is necessary to consider the guidance of the European Court of Human Rights, as well as the regulations that outline the basis on which a student may be denied access to a public education institution. Regulation 23(2) of the regulations states:

> "23…
>
> (2) Subject to the provisions of these Regulations, no person who is eligible for admission as a student to a public educational institution shall be refused admission thereto except–
>
> (a) on the ground that accommodation is not available in that institution; or
>
> (b) on any other ground approved by the Minister either generally or in any particular case."

[122] Regulation 31 of the regulations also provides that a student may be excluded from a school where the student is suffering from a communicable disease, from infestation or is pregnant. It reads, in part:

> "31.–(1) A student shall be excluded from attending a public educational institution during any period in which he is known to be suffering from a communicable disease or infestation.
>
> (2) …."

[123] In the present case, Ms Hamilton, on behalf of the School, indicated in her affidavit, filed on 15 January 2019, that the School sought to exclude ZV for hygiene reasons, based on its experience with certain hairstyles causing conflict among students and an outbreak of lice and fungal infestation. She said:

> "3. …These hygiene issues gave rise to conflicts between students resulting in incidents that disrupted classroom activities, and which ultimately led to a reduction in the teaching and learning contact hours. One such incident occurred during class when a student who had a 'locked' hairstyle was pushed off the bench by another student who was offended by the smell of the student's hair.
>
> …
>
> 5 In 2009, the hygiene challenges in relation to the poor grooming of the hair of female students reached a very serious stage when there was an outbreak of lice and fungi infestation in students' hair. At that point, the school board decided to formulate a policy to alleviate the problem by addressing the hairstyles which were creating this situation. As a result, the board took the decision to prohibit the wearing of braids and 'locking' or [']sister-locking' hairstyles by students…"

[124] Whereas the regulations provide that a student may be excluded for health reasons, that exclusion is only permissible "during the period for which he[/she] is known to be suffering from the communicable disease or infestation". Ms Hamilton indicates the rule is to prevent the outbreak of the lice and fungi, but that exclusion was unlawful as there was no evidence that ZV was suffering from lice or fungi. Further, the regulations would have only permitted her exclusion for the time that she would be suffering from the malady. The School, having decided to exclude ZV from attending because she wore dreadlocks, without evidence that she was suffering from lice or fungal infestation, did not strike a fair balance between her exclusion and the justification. Accordingly,

excluding ZV was unlawful, but it did not amount to a denial of her right to education since she was free to seek education at another institution. In these circumstances, the Full Court's finding that the policy did not breach ZV's right to education is correct.

Equitable and humane treatment by any public authority

[125] The right to equitable and humane treatment by any public authority in the exercise of any function, is protected by section 13(3)(h) of the Charter.

[126] The Full Court asserted that for ZV to prove that her right to equitable and humane treatment by any public authority has been breached, she would have to demonstrate that she had been treated differently from others in a similar position to her. It relied on **Bhagwandeen v The Attorney General of Trinidad and Tobago** [2004] UKPC 21; (2004) 64 WIR 402 and **Sean W Harvey v Board of Management of Moneague College and others** [2018] JMSC Full 3. The Full Court stated that ZV needed to adduce evidence of a child at the School, who also wore dreadlocks and did not fall within the exempted category, such as for religious purposes, and was permitted to attend the School. In the absence of such evidence, the Full Court ruled that the School did not breach her right to equitable and humane treatment (see paras. [125] and [126] of its judgment).

[127] Mr Hylton highlighted that differently constituted panels of the Full Court, in two previous decisions, namely, **Rural Transit Association Limited v Jamaica Urban Transit Company Limited and others** [2015] JMFC Full 4 and **Ashton Evelyn Pitt v The Attorney General of Jamaica and others** [2018] JMFC Full 7, have ruled that equitable treatment does not necessarily mean equal treatment. He accepted, however, that in **Sean W Harvey v Board of Management of Moneague College and others**, the majority of the Full Court's panel relied on the Privy Council decision of **Bhagwandeen v The Attorney General of Trinidad and Tobago** and held that a claimant must prove unequal treatment. He posited that the prior decisions of the Full Court were incorrect.

[128] Learned King's Counsel contended that the Full Court did not consider whether the policy was unfair or unjust. Instead, he argued, it only relied on the right to equal treatment, which was considered in **Sean W Harvey v Board of Management of Moneague College and others**, and **Bhagwandeen v The Attorney General of Trinidad and Tobago** and concluded that the appellants did not prove unequal treatment. He submitted that the Full Court erred in doing so, as the Privy Council in **Bhagwandeen v The Attorney General of Trinidad and Tobago** was not considering the right to equitable and humane treatment. He argued that the Full Court erred in relying on the authorities it did, for this right, as equitable does not only mean equal. Additionally, learned King's Counsel underscored that the various decisions of the Full Court are at cross purposes as to whether equitable is synonymous with equal.

[129] Mr Hylton argued that the Full Court erred in concluding that to prove that this right has been breached, an aggrieved person must prove that the treatment was unfair and inhumane and that he or she was treated differently from a person in a similar position. Learned King's Counsel asserted that the right to both elements is conjunctive but the breach is disjunctive. He advanced that the right is breached if either of the two limbs is adversely affected. By way of illustration, Mr Hylton referred this court to the right to life, liberty and security of the person at section 13(3)(a) of the Charter. He advanced that if the Full Court's reasoning is to be accepted, then a claimant would have to prove that he has been deprived of the right to all three before being entitled to succeed but, once one is breached, that is sufficient to bring a claim. The correct position, he argued, is that ZV only needed to prove that she was not treated equitably or that she was not treated humanely. He asserted that she was not required to prove that there was unequal treatment. Learned King's Counsel advanced that the policy was unfair and breached her right to equitable treatment by a public authority in the following ways:

a. the School had written guidelines under which students should be admitted or remain at the School, which did not include the policy;

b. during registration, Mrs Virgo signed accepting the written guidelines;
c. there was no evidence to support that ZV's locked hair was unhygienic or would possibly be infected by lice;
d. the policy was not proportionate to the intended objective; and
e. the policy was neither practical nor rational.

[130] Mr Hylton relied on **Law v Canada** [1999] 1 RSC 497 and **G v The Head Teacher & Governors of St Gregory's Catholic Science College** [2011] EWHC 1452 (ADMIN), where the courts reviewed the issue of equality of treatment and, therefore, considered whether there had been differential treatment. In doing so the courts utilised comparators.

[131] Ms Jarrett opposed Mr Hylton's view that the decisions of the Full Court were wrong. Learned King's Counsel submitted that the Full Court, in this case, relied on **Sean W Harvey v Board of Management of Moneague College and others**, where the majority determined that the Privy Council's interpretation of the right against inequality of treatment was applicable to the right to equitable and humane treatment. Learned King's Counsel argued that a person claiming that this right has been breached, must demonstrate that they were treated in a different way from another person in a similar circumstance. Learned King's Counsel noted that this was the court's approach in **The Hon Portia Simpson-Miller and others v Attorney General of Jamaica and Another** [2013] JMFC Full 4. Ms Jarrett contended that the Full Court was correct in its finding that the right was not breached as there was no evidence that ZV was treated differently from a child in a similar circumstance.

Discussion and analysis

[132] The Concise Oxford English Dictionary, Eleventh Edition, defines "equitable" as "fair and impartial". It defines "humane" as "compassionate or benevolent". A definition

of "fair" given by the same text connotes an element of equality. It states "treating people equally".

[133] The concepts of equitable treatment and inhumane treatment cannot be considered as being inextricably linked. Treatment can be inequitable without being inhumane. Mr Hylton is correct that whereas the right to equitable and humane treatment are listed together in section 13(3)(h) of the Charter, the respective nature of these rights allows for the breach of either one or both.

[134] In **Rural Transit Association Limited v Jamaica Urban Transit Company Limited and others** a different interpretation of "equitable" was pronounced. McDonald J, at para. [197] stated that the words "equitable and inhumane" are to be read conjunctively. She further stated that "equitable" means "fair/just" and expressly pronounced that it does not mean equal. F Williams J, as he then was, in para. [274], examined the definition for the words "equitable" and "humane" and explained that, to determine what is fairness, one must consider the facts and circumstances of the case. He said:

> "…It is useful to state at this juncture as well that, as I understand the word 'equitable', it means: 'fair'. I accept the submission made on behalf of [Jamaica Urban Transit Company Limited] that it does not mean 'equal'. And fairness is a concept that must be decided having regard to all the facts and circumstances of a particular case. 'Inhumane' means 'without compassion for misery or suffering; cruel'."

[135] He also agreed with McDonald J that the right is conjunctive (see para. [275]).

[136] Based on the definitions taken from the Oxford Concise Dictionary, and the cases cited below, it must, however, be said that whereas "equitable" is not synonymous with "equal", it does include the element of equality. The restriction given by the learned judges, with respect, cannot be accepted.

[137] An illustration of the analysis of equitable treatment is gleaned from the decision of **The Hon Mrs Portia Simpson-Miller and others v The Attorney-General of**

Jamaica and Another. In determining whether the right to equitable and humane treatment was breached, the Full Court explored whether certain provisions of the Mutual Assistance (Criminal Matters) Act ('MACMA') were fair. The matter stemmed from proceedings following a request of the Kingdom of the Netherlands for Jamaica to assist with criminal investigations. During this time, the Honourable Mrs Portia Simpson-Miller was the Prime Minister of Jamaica and the other claimants were affiliated with the People's National Party, which was led by her. The claimants brought the constitutional claim seeking declarations that the assistance provided under the MACMA breached their constitutional rights. Of note, for these purposes, is that the claimants sought a declaration that the Director of Public Prosecutions ('DPP'), in seeking to compel the claimants to appear in court to give evidence on oath, breached their right to equitable and humane treatment by a public authority in the exercise of any function.

[138] The claimants complained that they were being treated as suspects, instead of being asked questions to assist with investigations. They argued that the MACMA grants protection to foreign witnesses where Jamaica seeks their assistance with criminal investigations, however, there was no such protection for Jamaican witnesses where a foreign state seeks assistance with criminal investigations from Jamaican witnesses. The essence of their complaint was, therefore, that Jamaican witnesses were treated differently from:

a. foreign witnesses;
b. other suspects; and
c. other witnesses

in criminal matters in Jamaica. The claimants also argued that the hearing should not have been in open court since witnesses in committal proceedings do not have to give evidence in open court.

[139] McDonald-Bishop J, as she then was, in a characteristically comprehensive judgment, analysed each complaint about unfair or unequal treatment and concluded that there was no merit in any of them. She stated, in part, at para. [151] that the

claimants had not demonstrated that they "have been or are being treated differently by the [DPP] as a public authority **from other persons in their position who have behaved in like manner** in proceedings under the MACMA" (emphasis supplied).

[140] The Full Court in the instant case, relied on the case of **Bhagwandeen v The Attorney General of Trinidad and Tobago** and found that ZV did not provide evidence that she was treated differently from any other child in a similar circumstance, accordingly, the respondents did not breach her right to equitable and humane treatment. In **Bhagwandeen v The Attorney General of Trinidad and Tobago**, their Lordships interpreted sections 4(b) and (d) of the Constitution of Trinidad and Tobago which addresses the right to equality before the law and protection of the law and the right to equality of treatment from any public authority. Mr Bhagwandeen was a police officer who was arrested along with his wife. He was suspended and then reinstated after the charges were dismissed for want of prosecution. The charges were brought once more against them and he was arrested and released on bail and suspended, again. He sat and passed an examination which made him eligible for promotion but he was not recommended for promotion.

[141] He filed a constitutional claim seeking a declaration that the Commissioner of Police ('the Commissioner') discriminated against him for refusing to recommend him for promotion because of his suspension. He argued that his rights under sections 4(b) and (d) of the Constitution of Trinidad and Tobago which are the rights of the individual:

a. to equality before the law and protection of the law; and
b. to equality of treatment from any public authority in the exercise of its functions.

Mr Bhagwandeen also commenced judicial review proceedings to set aside the Commissioner's refusal to recommend him for promotion. He outlined numerous officers who were promoted after they were suspended. In response, the Commissioner provided evidence that the officers were reinstated for much longer than Mr Bhagwandeen before being promoted.

[142] The High Court ruled in favour of Mr Bhagwandeen on both matters. The first instance judge granted his declaration that his constitutional right of equality of treatment by a public authority had been breached, ordered the Commissioner to reconsider his decision and awarded him compensation for the breach. The Commissioner appealed to the court of appeal on the judge's decision on the constitutional point. Mr Bhagwandeen cross-appealed, contending that the first instance judge did not rule on whether the Commissioner acted with bad faith or hostility in determining whether to promote Mr Bhagwandeen. The Court of Appeal allowed the Commissioner's appeal stating that Mr Bhagwandeen was not in a similar position as the other officers who were promoted after being suspended. However, the Court of Appeal also allowed Mr Bhagwandeen's cross-appeal. He appealed to the Privy Council against the order in favour of the Commissioner.

[143] The Privy Council held that a claimant who claims inequality of treatment must show that they have been treated or would have been treated differently from a person in a similar circumstance. Lord Carswell stated, in part, in para. [18] of the Board's judgment:

> "A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] 2 All ER 26 at para 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other…."

[144] Their Lordships agreed with the Court of Appeal that there was only one police sergeant, whose only similarity was the period between the police sergeant's reinstatement and promotion, and that was insufficient proof of unequal treatment, as there were other differences between them. Accordingly, that police sergeant was not a true comparator. Having failed to provide evidence of any officer who was in a similar

position as himself, Mr Bhagwandeen could not succeed in a claim of unequal treatment (see para. [18]).

[145] In the case of **Sean W Harvey v Board of Management of Moneague College and others**, two members of the Full Court agreed that their Lordships' reasoning in **Bhagwandeen v The Attorney General of Trinidad and Tobago** was relevant in assessing a constitutional entitlement to equitable and humane treatment by any public authority in the exercise of any function. In **Sean W Harvey v Board of Management of Moneague College and others**, Mr Harvey, who is visually impaired, applied to Moneague College ('the College') to be a lecturer in social work, twice but his applications were not accepted. He claimed that he was told that it was because of his impairment that the College did not employ him. He also claimed that the defendants breached his constitutional right to equitable and humane treatment by a public authority in the exercise of its function. The College denied his allegation and said Mr Harvey was not qualified for the post as he did not have teaching certification or teaching experience.

[146] Sykes CJ relied on **Bhagwandeen v The Attorney General of Trinidad and Tobago** and found that Mr Harvey was treated equally with other shortlisted candidates because none met the criteria and none was selected after the first interview. The person selected after the second set of interviews met the criteria. Beswick J, another member of the Full Court in **Sean W Harvey v Board of Management of Moneague College and others**, also relied on **Bhagwandeen v The Attorney General of Trinidad and Tobago** and found that Mr Harvey did not satisfy that test. She determined that neither he nor any of the other candidates for the first interview, met the criteria and none was selected. She therefore determined that the defendants' conduct did not breach Mr Harvey's constitutional rights.

[147] Palmer-Hamilton J (Ag), as she then was, disagreed that **Bhagwandeen v The Attorney General of Trinidad and Tobago** was relevant to the case (see paras. [119] and [122]). However, she agreed with the other judges that Mr Harvey did not provide sufficient evidence that his right to equitable and humane treatment was breached.

[148] Additionally, in **Ashton Evelyn Pitt v The Attorney General of Jamaica and others**, the majority in that Full Court also relied on their Lordship's guidance in **Bhagwandeen v The Attorney General of Trinidad and Tobago**. Mr Pitt alleged that the way the relevant authorities went about granting an environmental permit breached his constitutional rights, including his right to equitable and humane treatment by a public authority in the exercise of any function. In resolving whether there was a breach of Mr Pitt's right in this context, the majority, in para. [109] adopted the guidance of their Lordships in **Bhagwandeen v The Attorney General of Trinidad and Tobago**. The majority of the Full Court ruled that there was no evidence that there were other persons in a similar position as Mr Pitt, who were being treated differently, and so failed to prove that his right had been breached.

[149] All those cases contemplate "equality of treatment" as part of the concept of equitable treatment. However, despite the disagreement with F Williams J's indication in **Rural Transit Association Limited v Jamaica Urban Transit Company Limited and others** on the breadth of the definition of "equitable", it is respectfully agreed that his concept of examining the circumstances of each case, is correct.

[150] Having disaggregated the rights to equitable treatment and humane treatment, it may quickly be said that there is no element of inhumane treatment in the present case. In **The State v Williams** (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC) (9 June 1995) the Constitutional Court of South Africa, in para. [27], noted a definition of the term "inhuman treatment". The court said:

> "The European Commission of Human Rights…described *inhuman treatment* as that which 'causes severe suffering, mental [or] physical which in the particular situation is unjustifiable…' The European Court of Human Rights …categorised degrading conduct as that which aroused in its victims feelings of fear, anguish and inferiority leading to humiliation and debasement and possible breaking of their physical and moral resistance." (Italics as in original)

[151] In **Adrian Nation v The Director of Public Prosecutions and another; Kerreen Wright v The Director of Public Prosecutions and another** (unreported),

Supreme Court, Jamaica, Claim Nos. 2010 HCV 5201 and 5202, judgment delivered 15 July 2011, the Full Court considered the constitutionality of legislation ('the Anti-Crime Bills') which, among other things, increased the minimum time that a person could be held in custody without being brought to court. The consideration was in the context of section 17(1) of the previous Chapter III of the Constitution. Although it declared certain provisions of the legislation to be unconstitutional, the court did not find them to have breached the right to humane treatment.

[152] At para. [132], the following was said:

> "…The situation where a defendant is able to attend before a court, albeit after a delay of a maximum of seven days, and attempt to convince the judicial officer presiding, that he or she should grant bail to the defendant, is wholly different from a convicted person being sentenced to die without being afforded an opportunity to say why that penalty is inappropriate to his particular situation. I cannot accept [the submission of counsel for one of the applicants] that there has been a breach of section 17(1) of the Constitution."

[153] The ban on the wearing of a particular hairstyle to school cannot, by itself, be considered inhumane treatment of the wearer of that hairstyle.

[154] The matter of inequitable treatment is, however, a different matter. The policy discriminates against people who wear dreadlocks and that treatment, being both negative and different from the treatment meted out to other students at the School, amounts to inequitable treatment. The evidence is that the School developed the policy because of incidents in the past of unhygienic practices relating to certain hairstyles, including dreadlocks, resulting in an outbreak of lice and fungi (see pages 103 and 104 of the record of appeal – the affidavit of Ms Hamilton). ZV wears dreadlocks but there is no evidence that her hair suffers from unhygienic practices that would cause disruptive behaviour or a breakout of lice and fungal infestation or that her hairstyle posed such a risk over and above the risk from hairstyles worn by other children at the school. The policy purports to treat her differently from other students because of her hairstyle and is, therefore, discriminatory. The fact that she was not singled out for exclusion from

amongst other students who wear dreadlocks or braids to the school, is not decisive of the issue. Unlike Mr Bhagwandeen, there is no unsavoury conduct or cloud of suspicion which placed ZV in a category deserving of negative treatment. ZV has proved a breach of her right to equitable treatment by the School.

[155] The Full Court was in error in this regard.

Respect for and protection of private and family life and privacy of the home

[156] Section 13(3)(j)(ii) of the Constitution speaks to "respect for and protection of private and family life, and privacy of the home". In assessing ZV's complaint, the Full Court relied on the definition of the right to private and family life espoused in Article 8 of ECHR.

[157] It stated that ZV's parents should have advised the School of the reason ZV wore dreadlocks. It found that since that was not done, the School had not breached ZV's right to respect for private and family life because the right had not been engaged.

[158] Mr Hylton argued that the School's policy breached this right in relation to Mr Virgo as well as ZV and the Full Court did not properly analyse, nor did it address the breach of the appellants' right to private and family life. Learned King's Counsel postulated that the family is a unit that is bonded by practices. If one member is prevented from participating in that practice, the submission ran, that member's right to private and family life will be breached, which the School did by mandating that ZV cut her hair if she is to attend the School.

[159] Mr Hylton contended that the Full Court, instead of recognising the independent constitutional right to respect for and protection of private and family life, conflated this right with the right to freedom of religion and the duty to disclose one's religion. The right to respect for and protection of private and family life, King's Counsel maintained, is a "recognition of the concept of a family and the importance of that relationship". Learned King's Counsel however observed that religion is one of the elements that comprise a family's bond. He noted the Full Court's recognition that the dreadlocks express the

family's Nazarene belief and that Mr and Mrs Virgo raised their children with the same belief system. Learned King's Counsel argued that Mr and Mrs Virgo should not have to choose between their family life and ZV's right to an education.

[160] Mr Hylton contended that the Full Court's finding, that ZV's right was not infringed since she was still permitted to attend School with her dreadlocks, is misconceived on two bases. First, ZV was only permitted to continue wearing her dreadlocks to School because of the injunction, which Palmer J (Ag) granted, that lapsed with the advent of the Full Court's decision. Second, section 19 of the Constitution permits a claimant to seek redress if a right is likely to be infringed.

[161] Learned King's Counsel agreed with Ms Jarrett that this right is similar to Article 8 of the ECHR, however, while similar, he said it is not the same, as our Constitution bolsters the right by including the word "protection" in addition to the respect. He referred this court to the wording of the right in Article 8 of the ECHR, as outlined in para. [10] of **R (on the Application of Countryside Alliance and others) v Her Majesty's Attorney General and another; R (on the application of Countryside Alliance and others) v Her Majesty's Attorney General and another** [2007] UKHL 52 ('**R v Her Majesty's Attorney General**').

[162] Ms Jarrett submitted that the right to respect for and protection of private and family life, and privacy of the home, pursuant to section 13(3)(j) of the Charter was similar to Article 8 of the ECHR. She argued that there was no evidence as to how the policy impacted ZV or that the respondents, in relation to ZV, breached this right. Learned King's Counsel further argued that, despite the Full Court's finding that the locked hairstyle expressed the family's Nazarene belief, that did not mean that the Full Court should also find that the policy breached her right to respect for and protection of private and family life and privacy of the home. She added that ZV, by way of the interlocutory injunction, to which the parties consented, wore her dreadlocks to the School. Learned King's Counsel stated that the Full Court was correct in its pronouncement that there was

no evidence that the policy personally affected ZV's right to respect for and protection of private and family life, and privacy of the home.

Discussion and analysis

[163] Article 8 of the ECHR, on which the Full Court relied, is worded similarly to section 13(3)(j)(ii) of the Constitution, save that it does not incorporate the concept of "protection" of private and family life. It provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[164] Notwithstanding the absence of the concept of "protection" in Article 8, the case law interpreting it suggests that its purpose is to protect the right. The House of Lords in **R v Her Majesty's Attorney General** pronounced that the article right also involves an element of protection. Lord Bingham, in that case vividly distilled the right to respect for private and family life as contemplated in Article 8 of the ECHR. He said, in paras. [10] and [11] as follow:

> "[10] …But the purpose of the article is in my view clear. **It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose**.
>
> [11] … From the court's judgment *in Pretty [v United Kingdom (2002) 35 EHRR1]* the Claimants drew recognition (para 61) that 'private life' is a broad term, not susceptible to exhaustive definition, but covering the physical and psychological integrity of a person, sometimes embracing aspects of an individual's physical and social identity, protecting a right to personal development and the right to establish relations with

> others in the outside world, and extending to matters within (paras 61, 62) the personal and private sphere. **The court held the notion of personal autonomy to be an important principle**… In *PG and JH* [*v United Kingdom (Reports of Judgments and Decisions 2001-IX, p 195)*] the court accepted (para 57) that a person's reasonable expectations as to privacy may be a significant, if not conclusive, factor. **In *Peck*** [***v United Kingdom*** (2003) 36 EHRR 719] **the court repeated (para 57) that art 8 protects a right to identity and personal development**, and the right to establish and develop relationships with other human beings and the outside world, potentially including activities of a professional or business nature…." (Emphasis supplied, italics as in original)

[165] In this era, there is great emphasis on privacy in all its forms. Accordingly, a person's private life must be respected and protected. This also extends to protection from unjustified intrusion by the State. However, the issue is not applicable to this case. Mr Hylton's submission that the Virgos should not have to choose between their family life and ZV's education is untenable, since ZV's right to education was not restricted to attending the School and she was at liberty to attend another publicly funded institution.

[166] There is, therefore, no invasion of or intrusion into the Virgos' private sphere or family life. ZV's right, in this regard, has not been breached.

[167] The ground, in relation to this right, therefore, fails.

Whether the breaches were demonstrably justifiable

[168] The Full Court did not consider whether the alleged breaches were demonstrably justified because it found that ZV's constitutional rights, as pleaded, had not been breached (see para. [162] of the Full Court's judgment). The contrary finding made above, with regard to the rights to freedom of expression and equitable treatment, would now require that consideration.

[169] Mr Hylton complained about the Full Court's omission. He further argued that the term "demonstrably justifiable" means that the justification for the breach must be clear.

He advanced that the respondents' evidence was deficient and was below the required standard to prove the justification. He noted that the only evidence in support of the policy was from the School's acting principal, Ms Hamilton who deposed that previous experiences with lice and fungal infestation caused the School to develop the policy.

[170] Learned King's Counsel asserted that there was no medical or expert opinion indicating that these hairstyles caused lice and fungal infestation or any evidence about the students who caused the outbreak. Additionally, King's Counsel contended that there was no evidence that there were any lice in ZV's hair or that she was improperly groomed or had hygiene challenges. The respondents' case at its highest, learned King's Counsel argued, was that they feared that the dreadlocks may lead to an infestation. He submitted that fear cannot override the right to freedom of expression. He cited the case of **Tinker** for this position. Learned King's Counsel submitted that the Full Court should have asked itself the following questions:

a. Do dreadlocks cease to pose a risk of lice infestation once the wearer says he or she is wearing them as a result of his or her religion?

b. Did the School consider that ZV's family's beliefs did not constitute a true religion?

[171] Learned King's Counsel insisted that the policy's objective could be achieved using other measures and is disproportionate to its aim. Accordingly, Mr Hylton submitted that the breach is not demonstrably justified.

[172] Although Ms Jarrett maintained that the policy did not breach ZV's rights, she invited the court to consider that, if it finds that the policy did so, the curtailment was slight, demonstrably justified, matched the objective and was proportionate. Learned King's Counsel referred this court to the evidence of Ms Hamilton, outlining the outbreak of lice and fungus infestation in children's hair at the School and that other measures to curtail the issue proved futile.

Discussion and analysis

The consequences of a breach of a Charter right

[173] Based on the findings made above, ZV has satisfied this court that the policy contravenes some of her Charter rights, namely, the right to:

a. freedom of expression;
b. equitable treatment by a public authority in the exercise of any function.

As a result of those findings, the Full Court must be found to have erred in its failure to consider whether the policy is demonstrably justifiable. The failure permits this court to consider this concept.

[174] The suite of rights guaranteed by the Charter is not absolute. The Charter states that the rights are subject to limitations, which are "demonstrably justified in a free and democratic society". This means that a law or State action that infringes a Charter right may be upheld, if it can be proved that it is "demonstrably justified in a free and democratic society". The standard for dissecting whether a law or action is "demonstrably justified" is outlined in **Oakes**, which has been discussed above but will be reproduced for convenience. The test provides for consideration of:

a. whether the limiting measure is sufficiently important to warrant infringing the Charter right;
b. whether the offending party has shown that the limiting measure is reasonable and demonstrably justified. The proportionality test required by this aspect of the consideration involves establishing that:
    (i) the measure is rationally connected to the objective and be capable of achieving the objective;
    (ii) the measure impairs the right as little as is reasonably possible;

(iii) there is proportionality between the effects of the limiting measure and the objective it seeks to achieve.

Whether the policy is sufficiently important to warrant infringing the Charter right

[175] In justifying the policy, Ms Hamilton deposed that there was an incident where there was a physical altercation over the smell of a child's hair with dreadlocks, but there was no evidence that the outbreak of lice and fungi infestation was contributed to specifically by dreadlocks. It was only stated in the context of the hair of female students. The salient portions of her affidavit are reproduced below:

> "3. …This increase in population brought challenges, including issues involving the personal hygiene of students. **Some of these hygiene issues related to the poor grooming of the hair of female students. There were instances where female students would have braided hairstyles for prolonged periods, such as a school term, without sufficient care being given to the hair resulting in the hair having an unpleasant smell**. These hygiene issues gave rise to conflicts between students resulting in incidents that disrupted classroom activities, and which ultimately led to a reduction in the teaching and learning contact hours. **One such incident occurred during class when a student who had a 'locked' hairstyle was pushed off the bench by another student who was offended by the smell of the student's hair**.
>
> …
>
> 5. In 2009, the hygiene challenges in relation to **the poor grooming of the hair of female students** reached a very serious stage when there was an outbreak of lice and fungi infestation in students' hair. At that point, the school board decided to formulate a policy to alleviate the problem by addressing the hairstyles which were creating this situation. As a result, the board took the decision to prohibit the wearing of braids and 'locking' or sister-locking' hairstyles by students…." (Emphasis supplied)

[176] The purpose of the policy, as Ms Hamilton indicated, is to ensure personal hygiene within the School, prevent conflict between students which interrupted classroom activities and prevent the outbreak of lice and fungal infestation. Certainly, the maintenance of personal hygiene and ensuring that the teaching and learning process is not interrupted, is important. However, Ms Hamilton also expressly stated that students who wear dreadlocks as a result of their religious belief are exempt from the operation of the policy. That concession indicates a deficiency in the importance and justification of the policy. It suggests that the policy is not essential for curing the mischief that it seeks to address.

Whether the offending party has shown that the limiting measure is reasonable and demonstrably justified

(i) The measure must be rationally connected to the objective; the law or action must achieve the objective

[177] The evidence suggests that that the policy is connected to the objective the School is seeking to achieve. The School's complaint is that there are certain hairstyles that cause issues within the institution. Accordingly, it developed the policy in seeking to address the hygiene and disruption issues within the School. Banning the impugned hairstyles would not necessarily prevent the outbreak of lice or fungal infection because there is no evidence that other hairstyles, would not cause the same undesirable results.

(ii) The measure must impair the right as little as is reasonably possible.

[178] Despite the fact that the policy is connected to the objective, the respondents also need to establish, on a balance of probabilities, that the policy limits the Charter rights as little as is reasonably possible.

[179] The evidence is insufficient to satisfy that requirement. Certainly, the effect on the wearer of the hairstyle would be significant. One could not abide by the policy at the School and still have dreadlocks at home or elsewhere.

[180] In any event, Parliament, in the regulations, outlines other methods by which the matter of hygiene can be addressed. As mentioned above, regulation 31 of the regulations also provides that a student may be excluded from school where they are suffering from a communicable disease or infestation. That is, during the period that they are suffering from that malady. That would be a suitable alternative to a complete ban on the hairstyle that the policy imposes. The policy, therefore, does not limit ZV's rights as little as is reasonably possible as is not the minimal method needed to address the mischief.

(iii) There must be proportionality between the effects of the limiting measure and the objective it seeks to achieve

[181] The effect of the policy is that ZV, but for her religious belief, would be prohibited from attending the public educational institution which had accepted her. There is no evidence that she had poor hygiene or was suffering from lice or fungal infestation. Notwithstanding, the effect of the policy was designed to exclude her from attending the School altogether. It is recognised that the prohibition of attending the School is not equivalent to a denial of the right to education as she could seek education elsewhere. However, in these circumstances, other, less stringent methods exist for addressing the mischief, and the policy has not been proved to be proportional to it. The respondents have not satisfied the requirements of the second stage of the **Oakes** test.

[182] In these circumstances, the School, in implementing the policy, has not proved that its consequent infringement of ZV's Charter rights is demonstrably justified in a free and democratic society.

Summary and conclusion

[183] Mr Virgo and ZV, by way of her next friend and mother, Mrs Virgo brought this claim against the respondents, claiming that the School's policy which banned, among other things, the wearing of dreadlocks, save for religious reasons, was unconstitutional and breached several of their Charter rights. In this appeal from the ruling of the Full Court denying their claim, it was found that Mr Virgo did not have an appeal before the court. Having been denied leave to appeal by the Full Court he did not seek leave before

this court. However, the policy directly affects ZV, a person of school-going age, who was admitted to the School.

[184] In this dispensation, the Constitution is supreme and the standard which courts are to engage in when determining whether constitutional rights have been breached is the civil standard. That is, on a balance of probabilities.

[185] An analysis of the evidence revealed that the Full Court was demonstrably wrong in its conclusion that the policy did not breach two of ZV's Charter rights, namely, her right to freedom of expression and equitable treatment by a public authority in the exercise of any function. The Full Court, however, was correct to find that the policy did not breach ZV's right to education, religious belief, respect for private and family life or privacy of the home.

[186] The Full Court having incorrectly found that ZV's Charter rights had not been breached, did not have regard to whether those breaches were demonstrably justified. It was, therefore, necessary to conduct an assessment in this regard, which concluded that the respondents did not satisfy, to the civil standard, that the infringements to ZV's Charter rights were demonstrably justified in a free and democratic society. That assessment demonstrated that the policy did not satisfy the standard and should, therefore, be ruled unconstitutional. As a result, ZV's appeal should be allowed, in part.

[187] The OCA intervened and sought orders relating to children's rights generally. Formalisation of such rules and exemptions rests with the executive and will not be given in this judgment.

Costs

[188] Mr Virgo had no appeal before the court, but the respondents took no point in that regard. No costs should be awarded against him.

[189] Mrs Virgo's appeal did not succeed in the majority of her complaints but the result in her favour is a significant victory. She should have one-half of her costs in this court and the court below.

[190] The intervener's contribution was restricted and although helpful, it being a State-funded entity should not be awarded costs against the State in these circumstances.

Proposed orders

[191] On the above reasoning, the orders should be:

1. The notice and grounds of appeal filed on 10 September 2020, to the extent that it purports to be a notice of appeal by Mr Dale Virgo, is struck out as being invalid since he has no appeal before the court.
2. The 2nd appellant's appeal is allowed, in part.
3. The decision of the Full Court made on 31 July 2020 is set aside, as it relates to:
   (i) the right to freedom of expression;
   (ii) the right to equitable treatment by a public authority in the exercise of any function; and
   (iii) the order for costs as it relates to the 2nd appellant.
4. It is declared that the policy of the Board of Management of Kensington Primary School on the wearing of dreadlock hairstyles has breached the following rights as they relate to ZV:
   (i) the right to freedom of expression; and
   (ii) the right to equitable treatment by a public authority in the exercise of any function.
5. The remainder of the Full Court's finding in relation to:
   (i) Mr Virgo as the 1st claimant; and
   (ii) ZV's other constitutional rights,
   is upheld.

6. The 2nd appellant should have one-half of her costs in this court, and in the court below. The costs are to be agreed or taxed.
7. No order as to costs as to Mr Virgo's notice of appeal or the intervener's appeal.

Apology

[192] The court apologises to the parties for the long delay in delivering this judgment and for the inconvenience it would have caused.

EDWARDS JA

[193] I have read the draft judgment of my learned brother Brooks P. I agree with nothing further to add.

BROWN-BECKFORD JA (AG)

[194] I too have read the draft judgment of my learned brother Brooks P, and I agree with his reasoning and conclusion. I have nothing further to add.

BROOKS P

ORDER

1. The notice and grounds of appeal filed on 10 September 2020, to the extent that it purports to be a notice of appeal by Mr Dale Virgo is struck out as being invalid since he has no appeal before the court.
2. The 2nd appellant's appeal is allowed, in part.
3. The decision of the Full Court made on 31 July 2020 is set aside, as it relates to:
   (i) the right to freedom of expression;
   (ii) the right to equitable treatment by a public authority in the exercise of any function; and
   (iii) the order for costs as it relates to the 2nd appellant.

4. It is declared that the policy of the Board of Management of Kensington Primary School on the wearing of dreadlock hairstyles has breached the following rights as they relate to ZV:
   (i) the right to freedom of expression; and
   (ii) the right to equitable treatment by a public authority in the exercise of any function.
5. The remainder of the Full Court's orders in relation to:
   (i) Mr Virgo as the 1st claimant; and
   (ii) ZV's other constitutional rights,

   is upheld.
6. The 2nd appellant should have one-half of her costs in this court, and in the court below. The costs are to be agreed or taxed.
7. No order as to costs as to Mr Virgo's notice of appeal or the intervener's appeal.