[2020] JMFC Full 01

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CONSTITUTIONAL DIVISION

CLAIM NO. 2018 HCV 02290

BEFORE: **THE HONOURABLE MR JUSTICE L. PUSEY**
THE HONOURABLE MRS JUSTICE DUNBAR GREEN
THE HONOURABLE MISS JUSTICE NEMBHARD

BETWEEN	**CLAUDETTE CLARKE (Administratrix of the Estate of Keith Clarke, Deceased and in her own right)**	**CLAIMANT**
AND	**GREG TINGLIN**	**1ST DEFENDANT**
AND	**ODEL BUCKLEY**	**2ND DEFENDANT**
AND	**ARNOLD HENRY**	**3RD DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**4TH DEFENDANT**
AND	**CHIEF OF DEFENCE STAFF**	**INTERESTED PARTY**
AND	**INDEPENDENT COMMISSION OF INVESTIGATIONS**	**INTERESTED PARTY**
AND	**DIRECTOR OF PUBLIC PROSECUTIONS**	**INTERESTED PARTY**

IN OPEN COURT

Dr Lloyd Barnett, Mr Leonard Green, Miss Sylvan Edwards, Mr Makene Brown and Miss Sheri Jones instructed by Chen, Green & Company for the Claimant

Mr B. St. Michael Hylton Q.C. and Miss Melissa McLeod instructed by Hylton Powell for the 1st, 2nd and 3rd Defendants

Mesdames Althea Jarrett, Carla Thomas, Deidre Pinnock and Kimberley Clarke instructed by the Director of State Proceedings for the 4th Defendant

Mr Walter Scott Q.C. and Miss Carlene Larmond instructed by Patterson Mair Hamilton for the Chief of Defence Staff

Mrs Tana'ania Small Davis, Mr Mikhail Jackson and Miss Keisha Simpson instructed by Livingston Alexander & Levy for the Independent Commission of Investigations

Mr Adley Duncan and Miss Latoya Bernard for the Director of Public Prosecutions

Heard: November 13 and 14, 2019 and February 18, 2020

Constitutional law – Constitutionality and validity of good faith certificates – Whether good faith certificates infringe the doctrine of separation of powers – Whether good faith certificates supersede the prosecutorial powers of the Director of Public Prosecutions – Whether good faith certificates which were issued outside of the period of emergency are ultra vires, null and void – The Jamaica (Constitution) Order in Council, 1962, Emergency Powers Act, section 3, Emergency Powers Regulations, 2010, regulations 45 and 46

L. PUSEY J

[1] This case sits at the intersection between the individual's right to life and the state's responsibility to protect its citizens and itself against those who may wish to disrupt law and order. The circumstances that led to this application and the arguments of counsel are set out clearly in the judgment of Nembhard J and it is unnecessary for them to be repeated here.

[2] I have read in draft the decision of Nembhard J and I agree with her reasoning and conclusions.

[3] I have also read the decision of Dunbar Green J and I in large part agree with her reasoning. The Court is united in the view that the Good Faith Certificates which have been issued by the Minister of National Security are not a bar to the prosecution of the first three defendants. The Certificates raise a presumption of good faith which may be rebutted during the trial process.

[4] The Emergency Powers Regulations create protection from liability and even in the absence of the Good Faith Certificates, a court would have to consider whether or not members of the security forces have acted in good faith, during an emergency period before determining criminal or civil liability. The Good Faith Certificates are significant because where they exist, they place the burden on the Crown to rebut the presumption of good faith in order to establish criminal liability.

[5] This Court is united in its view that the Minister's power to issue these certificates do not offend the doctrine of separation of powers. The certificates do not interfere with the power of the Director of Public Prosecutions to initiate or pursue action against members of the security forces. The certificates do not fetter the judiciary.

[6] The Court is united in its view that the Minister may issue certificates after the relevant emergency period has expired. The reason for this is that fact finding procedures may take some time and it is reasonable that the Minister may make this decision and issue these certificates after the relevant emergency period has expired.

[7] Nembhard J and I are of the view that, in this instance, the Minister's decision to issue the Certificates at the time that he did and in the circumstances of this case, was unconstitutional because it was manifestly unreasonable and unfair.

[8] In my view the principles of constitutionality guarantee the rights of all individuals to a fair and balanced system. The first three defendants face charges in the criminal court and have a right to due process. However, the persons affected by their actions are also protected by the constitution. This is especially so if, as all parties agree, the first three defendants' actions were committed while they were acting as agents of the state. It is the court's duty to balance the rights of the individual with the powers of the state.

[9] In doing so, the court must give the constitution "a generous and purposive" construction as stated in **Ministry of Home Affairs v Fisher** [1980] AC 319. The court is not merely looking at the interpretation of the statute but is also construing the constitution as a living breathing document. This is especially so when the court is dealing with powers granted to the state in times of national emergency. Lord Atkins, in **Liversidge v Anderson** [1942] AC 206, led the charge in indicating that the rights of the individual should be respected even in times of dire emergency. He held the view that even when England was at war, the courts had to act as the guardians of individual rights. It is from this perspective that I have come to the conclusion that statutory powers that affect constitutional rights must be exercised in a just, fair and reasonable manner. The next logical step is that, where those statutory powers have been exercised in a manner that is clearly unfair and unjust, the court, in exercising its constitutional role, must invalidate those acts.

[10] Reluctantly, I have come to the conclusion that the Minister, having signed the Good Faith Certificates some six (6) years after the incident and four (4) years after the preferring of the Voluntary Bill of Indictment, is in my view so unfair and unjust that it cannot be seen to be in conformity with the constitution.

[11] I am aware that the claimants have a civil action for breach of constitutional rights, so I am not expressing any opinion as to whether those constitutional rights have been violated.

[12] I am also cognizant of the fact that the Minister's action could have been challenged in these courts by judicial review. In fact, both counsel for the Chief of Defence Staff and for the first three defendants have indicated that the propriety of the issuing of the Certificates at that time may have been more appropriately examined in the process of judicial review. In a judicial review action, a court may have had evidence indicating the reasons for the Minister's decision or an explanation for the delay in issuing the Good Faith Certificates. Therefore, there may be criticism that, this being a constitutional claim, no such evidence indicating the reasons for the Minister's decision or explaining the delay having been presented to the Court, the Court is not empowered to invalidate the Good Faith Certificates. Despite this, I am resolute in my view that, in this case, the exercise of the power of the Minister to sign the Good Faith Certificates was manifestly unreasonable and unfair.

[13] It was manifestly unreasonable and unfair for the Minister to grant the Certificates after such a long delay for the following reasons. Firstly, it involved actions done during a state of emergency. During such periods of national emergency, the fundamental rights and freedoms of the individual are subsumed in order to ensure the safety of the state. It is therefore important that the state acts circumspectly in relation to any violation of these rights. Secondly, the incident involved, on the face of the allegations, the loss of the life of a householder during a forced entry into his house. Thirdly, it was unreasonable and unfair because the issues involved affected prosecutions instituted by independent arms of the state after extensive investigation and a ruling of the Director of Public Prosecutions. Fairness, in a criminal trial, means that all parties should have ample opportunity to prepare for the trial and gather relevant evidence. To have instituted a legal hurdle some four (4) years after the charge had been laid, contributed to making the action unfair.

[14] In summary, my view is that, although the Minister has the power to issue good faith certificates after a period of emergency, based on the circumstances of this

case, to issue the Good Faith Certificates in the manner that he did was manifestly unreasonable and unfair.

[15] As a result, I would be inclined to grant the following Declarations: -

(1) That the criminal trial initiated by virtue of the Voluntary Bill of Indictment originally issued in July 2012 by the Director of Public Prosecutions should be restored to the trial list and be permitted to continue;

(2) That the Good Faith Certificates or any Certificate issued on 22 February 2016 by the Minister of National Security outside of the Emergency Period were issued in circumstances that were manifestly unreasonable and unfair and are therefore null and void and without effect.

DUNBAR GREEN J

BACKGROUND

[16] I have read the drafts of my learned brother and sister and I gratefully adopt the summary of the essential facts and arguments as outlined by my sister. I should also say at the outset that the court is grateful to all counsel for the depth and breadth of their submissions which I found to be of immense assistance in arriving at my decision.

[17] According to the facts alleged in the claimant's affidavit, the deceased, Neville Clarke, was on 27th May 2010 at home with his wife and daughter at premises situated in Red Hills, St. Andrew when a raiding party of members of the Jamaica Constabulary Force and the Jamaica Defence Force (the security forces) fired gunshots at the house and gained entry by removing the front grill and breaching the door. They entered a bedroom where the family had taken refuge. Mr. Clarke was climbing down from a closet where he had gone to hide when members of

the raiding party, including the 1st, 2nd and 3rd defendants (the soldiers), turned their guns on him and fired multiple gunshots, killing him instantly. This incident occurred during a period of Public Emergency that was declared by the Governor-General on 23rd May 2010.

[18] Following investigations, the soldiers were charged with murder, but when the matter came up for trial on 9th April 2018, the defence produced three certificates (Good Faith Certificates) which were issued by the then Minister of National Security (The Minister) pursuant to Regulation 45 (3) under the **Emergency Powers Regulations, 2010** (the regulations), claiming that they amounted to a grant of immunity against prosecution in favour of the soldiers. The Certificates state, *inter-alia*:

> *"…In accordance with Paragraph 45 of the above Regulations, I hereby certify that the actions of…on May 27, 2010, between the hours of 12 a.m. and 12 p.m. at 18 Kirkland Close, Red Hills St, Andrew, which may have contributed to or caused the death of Keith Clarke, were done in good faith in the exercise of his functions as a member of the security forces for public safety, the restoration of order, the preservation of the peace and in the public interest…"*

[19] The learned trial judge ruled that the validity of the certificates should be determined by the Full Court. Accordingly, the claimant instituted these proceedings claiming the following reliefs:

> *A Declaration that the purported Good Faith Certificates dated February 22, 2016 issued by the then Minister of National Security (Mr. Peter Bunting) to the 1st, 2nd and 3rd defendants, infringe or are in conflict with the principle of the separation of powers enshrined in the Constitution and are therefore ultra vires and by virtue of section 2 of the Constitution, null and void.*

A Declaration that the prosecution of the criminal trial of the 1st, 2nd and 3rd defendants cannot legally or constitutionally be barred by virtue of the said Certificates or any Certificates issued by the Minister of National Security.

A Declaration that the Emergency Powers (No.2) (sic) Regulations 2010 to the extent that it purports to grant the Minister of National Security the power to grant immunity or certificates of good faith are unconstitutional, null and void.

A Declaration that the Good Faith Certificates or any certificates issued on February 22, 2016 by the Minister of National Security outside of the Emergency Period are ultra vires, null and void.

A Declaration that the criminal trial initiated by virtue of the Voluntary Bill of Indictment issued on September 12, 2016 by the Director of Public Prosecutions should be restored to the trial list and permitted to continue.

[20] There was a sixth declaration sought but this will not be dealt with on account of the Court of Appeal decision in ***Attorney-General of Jamaica v Claudette Clarke*** [2019] JMCA Civ 35.

THE ISSUES

[21] Three main issues arise on the Claim. The first is whether the Good Faith Certificates infringe the principle of separation of powers and are therefore ultra vires, null and void. The second is whether the Emergency Powers Regulations are unconstitutional to the extent that they grant the Minister power to grant immunity or Good Faith Certificates. The third is whether the certificates are ultra vires, null and void because they were issued outside the period of emergency. The first two issues overlap, so it is convenient to deal with them together under the rubric of whether the principle of separation of powers has been violated by Regulation 45 (1) and (3) and the Minister's issuance of the certificates.

Whether the principle of separation of powers has been infringed

[22] Section 26 of the Constitution vests in the Governor-General the power to issue a proclamation declaring that Jamaica is in a state of public emergency.[1] Parliament has also vested the Governor General with the power to make regulations during such periods.

[23] Section 3 (1) of Act provides as follows: -

> *During a period of public emergency, it shall be lawful for the Governor-General, by order, to make Regulations for securing the essentials of life to the community, and those Regulations may confer or impose on any Government Department or any persons in Her Majesty's Service or acting on Her Majesty's behalf such powers and duties as the Governor-General may deem necessary or expedient for the preservation of the peace, for securing and regulating the supply and distribution of food, water, fuel, light and other necessities, for maintaining the means of transit or locomotion, and for any other purposes essential to the public safety and the life of the community, and may make such provisions incidental to the powers aforesaid as may appear to the Governor-General to be required for making the exercise of those powers effective.*

[24] However, the Governor-General's discretion to make regulations for the purpose of securing the essentials of life to the community must be justifiable in the sense that the regulations must be consistent with the words of the Act. His discretion is also constrained by the constitutional design of separation of powers among the three branches of government.[2]

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[1] Proclamation No 26 of 2010 was issued on 23rd May 2010. Section 26 of the Constitution was repealed by Act 12 of 2011.

[2] See ***Hinds v The Queen*** [1977] A.C. 195, 212 d-f and ***Lowell Lawrence v Financial Services Commission*** [2009] UKPC 49 on separation of powers.

[25] Pursuant to section 3 (1) of the Act, the Governor-General promulgated Regulations 45 (1) and (3) of the Emergency Powers Regulations, 2010 viz:

> *(1) Subject to paragraph (2) no action, suit, prosecution or other proceeding shall be brought or instituted against any member of the security forces in respect of any act done in good faith during the emergency period in the exercise or purported exercise of his functions or for the public safety or restoration of order or the preservation of the peace in any place or places within the Island or otherwise in the public interest.*
>
> *(2) …*
>
> *(3) For the purposes of this regulation, a certificate by the Minister that any act of a member of the security forces was done in the exercise or purported exercise of his functions or for the public safety or for the restoration of order or the preservation of the peace or otherwise in the public interest shall be sufficient evidence that such member was so acting and any such act* ***shall be deemed to have been done in good faith unless the contrary is proved.*** *(My emphasis)*

[26] The intention of Parliament which is expressed in section 3 (1) of the Act is that the Governor-General should exercise discretionary powers in exceptional circumstances where he has declared that a state of public emergency exists. The claimant's contention is that when the Governor-General promulgated the regulations he was seeking to exercise prosecutorial and/or judicial powers, or infringed on them and he had no constitutional or statutory authority to do so.

[27] If the regulation which grants immunity to members of the security forces under the Emergency Powers Regulations is to be valid it must, at the very least, be consistent with the provision in the Act, in which case it might be regarded as

though it were itself an enactment. This principle was expressed by Viscount Simon in these terms:

> *There is, of course, no doubt that, when a statute like the Emergency Powers (Defence) Act, 1939, enables an authority to make regulations, a regulation which is validly made under the Act, i.e. which is intra vires of the regulation-making authority, should be regarded as though it were itself an enactment… (***Wicks v Director of Public Prosecutions** [1947] 1 All ER 205, 206 – 207)

[28] Although not stated expressly in the contested provisions, it can be deduced that during a period of public emergency the security forces may be required to and must be relied on to operate in unusual circumstances and exercise unusual powers. In those situations, the inherent dangers and risks that are sometimes necessary to protect the public can have a chilling effect on members of the security forces if they fear personal exposure to prosecution when they are performing their lawful duties. It seems to me that the immunity which is granted by Regulation 45 is therefore designed to ensure that members of the security forces, provided they act lawfully, should do so without fear if they are required to exercise powers which in normal times could be a violation of law.

[29] As the learned Director of State Proceedings, Miss Althea Jarrett, submitted, Regulation 45 does not specifically identify all actions that the security forces would be required to take but it lays out the circumstances in which their actions would be deemed to be in good faith. The immunity gives them that assurance and is therefore very much consistent with the powers under section 3(1) for the Governor-General to make such provisions that are incidental to the powers he granted to members of the security forces in order to make the exercise of those powers effective.

[30] I turn now to the argument that the certificates are a fetter on the powers of the court. Lord Carnwath in ***R (Privacy International) v IPT*** [2019] 4 All ER para 111 expressed the cardinal principle that “Judicial review can only be excluded

by the most clear and explicit words." Learned counsel, Dr Lloyd Barnett, submitted that the purported certificates were clearly intended to pre-determine the issue of *mens rea* which is reserved for the determination of the trial court and sought to bar the Supreme Court from exercising its judicial functions. This proposition requires an examination of the qualifying words in the certificates, "unless the contrary is proved".

[31] Counsel for both sides helpfully referred the court to a number of authorities including the recent decision of the Court of Appeal in ***Attorney-General of Jamaica v Claudette Clarke*** *[2019] JMCA Civ 35,* where, at paragraph 39 Morrison, P. opined that:

> *The issuance of the certificate accordingly creates a rebuttable presumption that the member of the security forces acted in the capacity provided for in the regulations and in good faith.*

[32] I have also taken note that in the case of ***Major General Antony Anderson and Jamaica Defence Board v Independent Commission of Investigations*** [2018] JMFC Full 4, a similar observation was made by Daye J., when he said, obiter, at paragraph 153:

> *…The language of this provision is that under the certificate any act of a member of the Security Forces done in the exercise of his functions or in the public interest is sufficient evidence that he was so acting and is deemed to be done in good faith unless the contrary is proved.* ***This means that the unlawfulness of the act of a member of the Security Forces would still be at large****. (My emphasis)*

[33] What I understand from the authorities and my own reading of the provision is that the Minister's certificate suffices as proof of the defendant's good faith unless there is evidence that the contrary is true. That is the plain meaning of the words, **"shall be deemed to have been done in good faith unless the**

contrary is proved". These qualifying words clearly indicate that Regulation 45 does not confer "conclusiveness, finality, or unquestionability upon [the Minister's] decisions." (Per Lord Wilberforce in ***Anisminic Ltd v Foreign Compensation Commission*** [1969] 2 A.C. 147 at 207.) Simply stated, the issuance of the Minister's certificate may be jurisdictionally lawful or within his "permitted field"[3] but what it asserts can be challenged by proof that it is factually incorrect. If it were otherwise, with the stroke of a pen, the Minister could sign away the citizen's fundamental right to life even if there were strong allegations that life was taken in circumstances which could not be justified by the state of emergency. This would be anathema to the power vested in the Governor-General to make the regulations and made worse by the fact that during a state of emergency, the citizen is most vulnerable because the state exercises powers which it does not in normal times. Moreover, such a state of affairs would be repugnant to the Constitution of Jamaica which has its antecedents in the Universal Declaration of Human Rights (***Minister of Home Affairs v Fisher*** [1980] A.C. 319, 328).

[34] I digress momentarily to deal with the tangential issue of the proper forum for dealing with a Regulation 45 (3) rebuttal. It was advanced in the course of arguments that this is a matter for judicial review. I do not agree. When a citizen alleges that actions by members of the security forces were not done in good faith she is under an obligation to prove it. In effect, she could be asserting no more than that her allegations are true and that the representation by the Minister in the certificates is false. That issue does not necessarily require an enquiry as to the reasons the Minister issued the certificates. Judicial review would arise if the challenge were to the manner in which his decision was made or as to the authority to make the decision in the first place. Nothing of the sort is in

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[3] In ***R v IPT*** Lord Carwath attributes the following proposition to Lord Sumption in ***Re Racal Communications Ltd*** (1980) 2 All ER 634: "…the key issue when considering the scope of an ouster clause is to define the "the permitted field" of the relevant adjudicative body, that being identified by a careful analysis of the interpretative power conferred by the enabling Act."

contention. I therefore do not see how any of the limbs of judicial review - illegality, procedural impropriety, irrationality and proportionality - as expounded in ***Council of Civil Service Unions v Minister of State for Civil Service*** [1984] 3 All ER 935 and expanded in ***R v Home Secretary Ex parte Daly*** [2001] 2 AC 532, could be relevant to determining proof of the absence of good faith in accordance with Regulation 45. I accept that a merit review may be undertaken in the course of a judicial review under the limb of proportionality but in this case the merit of the Minister's decision has not been called into question.

[35] I see no reason why the defendants could not assert the immunity by relying on the certificates, as a preliminary point, before the trial judge and the Director of Public Prosecutions (DPP) respond with evidence of rebuttal. This would have nothing to do with the Minister's actions, inactions or reasons for his action but rather the potency of the challenge which is to be mounted against the facts presumed by the certificates. I would agree that the opportune time for such matters to be dealt with is before arraignment.

[36] Without being prescriptive, the evidence to be adduced by the DPP would not go to proof of ingredients in relation to the charge but rather proof of the circumstances in which the incident occurred to establish that there was no good faith within the meaning of the legislation. This might include evidence as to whether a state of emergency existed at the time; the circumstances which existed; whether the alleged acts were carried out in accordance with powers given under the regulations inclusive of public safety, restoration of order and preservation of peace; and whether the acts were done in relation to the functions of the security forces. This procedure should not affect the defendants' right to a fair trial.

[37] Once a defendant asserts the qualified immunity and produces a certificate, the burden is on the DPP to show that the impugned action was done without good faith. However, if there was no certificate issued and the defendant was relying

solely on Regulation 45 (1) for the immunity, he would have had the burden of showing that he acted in good faith.

[38] The Good Faith Certificate is therefore no more than a legally valid determination by the Minister. It does not have the effect of ousting the jurisdiction of the court. To paraphrase Lord Carnwath in ***R v IPT***[4], the decision to issue a Good Faith Certificate is a power which is entirely in the gift of the executive but it does nothing to weaken the ultimate control by the courts.

[39] I therefore do not agree with Dr Barnett that the Good Faith Certificates were clearly intended to pre-determine an issue which could arise for judicial determination. Parliament and the Governor-General did not confer on the Minister any jurisdiction or power to "decide on the essential issues of amenability and culpability in a criminal trial." The certificate is an administrative document which a court can consider.

[40] In ***Liyanage v Reginam*** [1966] 1 All ER 650 the Privy Council discussed the approach which is applicable when determining unconstitutional interference with judicial power. Lord Pierce opined:

> *"Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed…and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgement of the judiciary in specific proceedings" (p.659)*.

[41] Applying ***Liyanage***, I have considered that the purpose of the contested regulation was to support the effective exercise of powers, in good faith, by the soldiers, during the Emergency Period. The regulations make provision for judicial oversight by limiting the immunity and making it subject to proof of bad faith. The words "unless the contrary is proved" are unambiguous and they make

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[4] Para 104

the Governor-General's intention clear that there should be judicial proceedings where there is evidence of unlawful conduct by members of the security forces.

[42] When Regulation 45 is read with Regulation 41 it becomes even more pellucid that the scheme of the regulations does not intend to fetter judicial or prosecutorial powers. Regulation 41 provides:

> ***The powers conferred by these Regulations are in addition and not in derogation of any powers exercisable by any persons*** *to take such steps as may be necessary for securing the public safety, and* ***nothing in these Regulations shall affect the liability of any person to trial and punishment for any offence otherwise that in accordance with these Regulations.***

[43] The powers of the DPP are set out in Section 94 of the Constitution. Section 94 (3) states:

> *The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do –*
>
> *to institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any offence against the law of Jamaica;*
>
> *to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and*
>
> *to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.*

[44] The claimant has submitted that in the exercise of the DPP's power under the Constitution she cannot be subjected to the direction or control of any other

person or authority[5] and accordingly the Minister could not grant a certificate which has the effect of terminating or preventing the conduct of the criminal proceedings.

[45] I agree with Mr. Walter Scott, Q.C. that the grant of the immunity and the certification that the members of the security force acted in good faith are distinct matters. The immunity is conferred by Regulation 45 (1) whilst the Minister's role pursuant to Regulation 45 (3) is to provide a certificate that an act was done in the public interest. It is therefore not the Minister's act which confers the immunity and any certificate by him is rebuttable and therefore consistent with and in no way diminishes the DPP's powers under section 94 (3) of the Constitution. She may prove matters contrary to those contained in the certificate by challenging them in the appropriate forum. I should add that the Minister's certificate cannot terminate or prevent the conduct of criminal proceedings if the DPP determines that there is evidence to the contrary of what the certificate represents and the court decides that the presumption of good faith is rebutted. Moreover, as learned counsel Mr. Michael Hylton, Q.C. submitted, the Minister was not exercising powers to decide who to prosecute when he issued the certificates and the DPP would still have the power to prosecute those who would not be eligible for protection under Regulation 45 because they had not acted in good faith.

[46] Dr Barnett also submitted that, apart from the DPP exercising her right to enter a *nolle prosequi* or a decision of the court dismissing criminal charges, there is only one authority with the power to grant absolution from criminal liability and that is the Governor-General in exercise of the prerogative of mercy under section 90 of the Constitution. That power, he said, would not be exercisable to stop or prevent trials in the court or make regulations that grant immunity from prosecution. I agree with learned counsel that the Governor-General does not have any express power under the Constitution to do any of these things. However, the Governor-General was not purporting to act under Section 90 when

[5] Section 94 (6) of the Constitution

he promulgated the regulations and I do not believe that the promulgation was an exercise of any power to grant absolution from criminal liability.

[47] Section 3 of The **Emergency Powers Act** contains no express provision on immunity but given the wide powers granted to the Governor-General by Parliament, he was acting within the "permitted field" to make provisions for the grant of immunity, under Regulation 45. I agree with Miss Jarrett that in times of public emergency, Parliament delegates its primary legislative functions to the Governor-General who gets an unusual power to make legislation for a protective mechanism. When he promulgated Regulation 45, therefore, the Governor-General was acting under Parliamentary imprimatur to make regulations for securing the essentials of life to the community in a period of public emergency. As Mr. Hylton Q.C. submitted, there was nothing unconstitutional in the purpose of the regulations and the mischief which it was supposed to cure was within the framework of the Constitution.

[48] Before concluding this aspect of the issues, I should like to comment on Mr. Hylton's submission that the DPP's power to prosecute under the Constitution is not absolute and is subject to lawful limits which are permissible and constitutionally sound. The Ugandan case of ***Kwoyelo (alias Latoni) v Uganda*** [2012] 1 LRC 295 provides a very helpful exegesis on this point. It concerned an Act of Parliament granting an amnesty or pardon and the Supreme Court said that it was within Parliament's power to make such a law, hence what the Parliament did was not in violation of separation of powers. That case recognised that the President had the power to grant pardon after trial and conviction, as similarly obtains in Jamaica with the Governor-General, but it also recognised that a pardon can be granted by an Act of Parliament under a provision in the Ugandan Constitution which is similar to the provision in Section 16 (9) of the Jamaican Constitution.

[49] Section 16 (9) of the Constitution provides, inter-alia: "… no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence".

Clearly this constitutional right is separate from the prerogative of mercy under Section 90. Put differently, the Governor-General can grant a pardon subsequent to a conviction but there is also provision under the Constitution for a pardon to be granted for a criminal offence before trial. I am not saying that the immunity under Regulation 45 (1) is a pardon or that the effect of the provision on immunity was to pardon the defendants. My point is that the immunity is within the prerogative of the state where it is in the interest of justice and in the interest of the public that it be granted. This principle is not alien to domestic law, as seen, for example, under the **Immunities and Privileges Act** and the immunity from prosecution accorded children under the age of twelve years pursuant to the **Child Care and Protection Act**.[6]

[50] I am satisfied that the promulgation of the regulations did not infringe or conflict with the principle of the separation of powers enshrined in the Constitution and was therefore not ultra vires, null and void by virtue of Section 2 of the Constitution nor was the issuing of the certificates by the Minister an exercise of judicial function or a fetter on the DPP's powers.

Whether the certificates are null and void because they were issued after the expiry of the Emergency Powers Regulations

[51] I refer to the case of ***R (on the application of Edison First Power Ltd) v Central Valuation Officer and another*** [2003] 4 All ER 209 at 237 in which Lord Millett dealt with the issue of statutory interpretation and said, "The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless."[7] I now look at the issue of time limit using Lord Millet's statement as the point of departure.

[52] Regulation 45 (1) puts a time limit on acts which may be certified as having been done in good faith. These acts must be done "**…during the emergency period".**

[6] Section 63

[7] See also Bennion on Statutory Interpretation, 6th ed. (2013) s. 312

However, there is no time limit for issuing the Good Faith Certificates. The argument advanced by the claimant seems to be as follows. For the court to find that a Good Faith Certificate had been validly issued under Regulation 45, it must be that it was issued during the period of public emergency. If it was issued after the period of public emergency had expired, then it is invalid.

[53] The answer to this argument is to be found in the judgment of Viscount Simon in ***Wicks v Director of Public Prosecutions***[8] and in Section 3 (7) of the Emergency Powers Act.

[54] In ***Wicks***, the appellant was convicted for doing acts likely to assist the enemy contrary to the Defence (General) Regulations 1939 which were made under the Emergency Powers (Defence) Act 1939. That Act, after numerous extensions, expired on February 24, 1946. The impugned conduct of the appellant occurred between April 1943 and January 1944. The trial took place on May 27 and 28, 1946. Section 11 (3) of the Act provided: "The expiry of this Act shall not affect the operation thereof as respect things previously done or omitted to be done." The question for decision was whether Section 11 (3) authorised the conviction of the appellant notwithstanding the previous expiry of the Act.

[55] Viscount Simon said at pages 206-207:

> *The question raised by this appeal, therefore, is simply this. Is a man entitled to be acquitted when he is proved to have broken a defence regulation at a time when that regulation was in operation because his trial and conviction take place after the regulation has expired? As was pointed out in the course of the argument, very strange results would follow if that were so. Supposing the case were one in which a man broke the regulation a week or two before it expired, then, on the argument of the appellant, as those appearing for him have frankly admitted, he could never be punished, unless, indeed, the trial was carried to the point of*

[8] Supra

conviction before the regulation itself expired. One could put a more extreme case. The authorities may have been so prompt as to start the prosecution before the regulation had expired, but, if the trial were not over, then at the very moment when the regulation expired the trial would necessarily cease and the man would go free. In so far as one is entitled to consider the reasonableness of the contentions put forward by the appellant, obviously those results would be far from reasonable, but, of course, the question is not or, at any rate, not mainly, whether such a result would be reasonable or such as one should expect. The question is a pure question of the interpretation of sub-s (3) of s 11 of the Emergency Powers (Defence) Act, 1939.

It is pointed out that s 38(2) of the Interpretation Act, 1889, does not apply to the case of a statute or a regulation which has the power of a statute when it expires by effluxion of time. The sub-section is addressed to Acts which have been repealed, and not to Acts which expire owing to their purely temporary validity. It is, I apprehend, with this distinction in mind, which is certainly well-known to the authorities who frame statutes, that the draughtsman inserted the words used in s 11 of the Emergency Powers (Defence) Act, 1939. Section 11 begins with the words "Subject to the provisions of this Section," which warn anybody that the provisions which follow are not absolute, but are subject to qualification. It is, therefore, not the case that, at the date chosen, the Act expires in every sense. There is a qualification. Without discussing whether the intermediate words are qualifications, sub-s (3), in my opinion, is plainly a qualification. It begins with the phrase "The expiry of this Act "—a noun which corresponds with the verb "expire

> *"— "shall not affect the operation thereof as respects things previously done or omitted to be done." Counsel for the appellant have, therefore, been driven to argue ingeniously, but to admit candidly, that the contention which they are putting forward is that the phrase "thing previously done" does not cover offences previously committed. In my opinion, that view cannot be correct. It is clear that Parliament did not intend sub-s (3) to expire with the rest of the Act, and that its presence in the statute preserves the right to prosecute after the date of expiry. This destroys the validity of the appellant's argument altogether…*

[56] The circumstances of this case raise a similar issue as to timing. The charges were not brought against the soldiers until after the expiry of the Period of Emergency. Why then should the Minister have been required to issue the certificates prior to the expiry of the Period of Emergency? Anticipatory issuance of certificates, unrelated to any specific charge, suit or the like could be arbitrary. Furthermore, would it be just to deny the defendants the protection of a certificate because it was issued or obtained six (6) years after the state of emergency had expired, yet they could be prosecuted at any time after the expiry?

[57] Section 3 (7) of the Act is a savings clause for actions which were done when the regulations were in effect. It provides:

> *The expiry or revocation of any Regulations so made shall not be deemed to have affected the previous operation thereof, or the validity of any action taken thereunder, or any penalty or punishment incurred in respect of any contravention or failure to comply therewith, or any proceeding or remedy in respect of any such punishment or penalty.*

[58] Regulation 46 of the Emergency Powers Regulations 2010 provides:

Without limiting the effect of Section 3 (7) of the Act, any appointment or order made, or any action or thing done under or by virtue of, any provision in the Emergency Powers Regulations, 2010 (which expire after June 22, 2010) and which was in force or otherwise subsisting immediately before their expiry –

Shall be deemed for the purposes of these Regulations to have been made, commenced or done, as the case may be, under these Regulations;

May be continued under these Regulations as if begin (sic) hereunder.

[59] The effect of these provisions is that if the security forces committed acts after the expiry of the regulations they would not be covered by the provisions. According to the facts of this case, the incident which led to the death of Mr Keith Clarke occurred on 27th May 2010. This was well within the Emergency Period. The issuing of the certificates by the Minister was therefore an administrative act, consequent on actions by the security forces during the period the regulations were in effect. It seems to me that the absence of a time limit for issuing the certificates is an indication that the important element that has to be satisfied is the time when the acts were performed and not when they were certified as having been done in good faith. This is a sensible arrangement.

[60] For practical purposes the certificate can be issued after the regulations have expired, which is why section 3 (7) stipulates that the expiry of the regulations shall not be deemed to have affected any action taken thereunder. That is a just and reasonable outcome.

[61] This issue raises important questions of public policy in relation to the administration of justice and the powers and responsibility of the executive. There is a public interest in regulations being made for the efficacy of a state of emergency, including maintaining the morale of members of the security forces in

very unique and difficult periods such as a war or public emergency, and there is a public interest in there not being an abuse of executive powers. The regulation clearly serves both interests. It is inconceivable, anomalous and illogical that the state would want to protect soldiers if they acted in good faith during a period of public emergency but not protect them for those same or similar actions because they were being enquired into after the state of emergency had ended.

[62] Subsequent promulgation of the regulations has made the Governor-General's intention clear. Regulation 45 now includes subsection 5 which reads as follows, *inter-alia*:

> **"For avoidance of doubt, the powers of the Minister under paragraph (3) may be exercised notwithstanding the expiration of these regulations"[9]**

[63] The later version of Regulation 45 is based on the same considerations and context as the contested version. They were made pursuant to the same Act. It is one scheme. The additional words do not introduce anything radically new but seek to make the intention of the Governor-General abundantly clear. I therefore agree with the submission by Mr. Scott, Q.C. that use of the term "**For avoidance of doubt**" is an assurance or re-statement of a position that had already been implied by the previous provisions of Regulation 45, and confirms that the law as is stated is what it has always been.

[64] There being no restriction on the time within which the Minister may act, the Good Faith Certificates are therefore valid.

[65] Before leaving this point, I should say something about the certificates being produced to the court on 9th April 2018, some six (6) years after the voluntary bill of indictment was preferred, eight (8) years after the regulations expired and some two (2) years after they were purportedly signed by the Minister. According to the transcript, the DPP was served with copies of the Certificates on or about

[9] The Emergency Powers Regulations, 2018

the 5th April 2018, one day after defence counsel Mrs Valerie Neita Robertson Q.C. told the court that she received a copy.

[66] The defendants have no control over whether or when the Minister issues a certificate. The date of the request for one, length of time for internal procedures, political considerations and any number of vagaries can bear upon that question. From the transcript it is not clear when the defendants would have first become aware that the Minister had issued the Good Faith Certificates or when the Minister issued them as distinct from signing them. On the facts before me I could therefore make no adverse findings in relation to the defendants.

[67] Ordinarily, a defendant should indicate his reliance on an immunity at the earliest opportunity as this could assist with the efficient administration of justice. It is also the case that a qualified "good faith" immunity is not a protective sword but a shield. It is a privilege which can be waived and may be deemed by the court to have been waived if the defendants were dilatory in asserting it. Inasmuch as an immunity is exceptional and should be construed narrowly, in the case before me, it would effectively diminish the purpose and undermine the public policy objective behind the immunity were I to impose a time limitation for asserting it or find that the right to rely on it had been waived.

[68] Accordingly, the criminal proceedings should be restored to the trial list and the defendants be allowed to rely on the certificates.

CONCLUSION

[69] For the reasons set out above, I have arrived at the following conclusions:

(1) The Good Faith Certificates dated February 22, 2016 do not infringe and are not in conflict with the principle of separation of powers enshrined in the Constitution.

(2) The Good Faith Certificates were validly issued by the Minister.

(3) The regulations do not infringe on the prosecutorial powers of the DPP under the Constitution.

(4) The criminal proceeding is to be restored to the trial list and the defendants allowed to rely on the Good Faith Certificates.

NEMBHARD J

INTRODUCTION

[70] By way of a Fixed Date Claim Form, filed on 15 June 2018, the Claimant, Claudette Clarke, Administratrix of the Estate of Keith Clarke, Deceased, and in her own right, seeks the following: -

(1) A Declaration that the purported Good Faith Certificates dated 22 February 2016 issued by the Minister of National Security (then Mr Peter Bunting) to the 1st, 2nd and 3rd Defendants, infringe or are in conflict with the principle of the separation of powers enshrined in the Constitution and are therefore ultra vires and by virtue of section 2 of the Constitution, null and void;

(2) A Declaration that the prosecution of the criminal trial of the 1st, 2nd and 3rd Defendants cannot legally or constitutionally be barred by virtue of the said Certificates or any Certificate issued by the Minister of National Security;

(3) A Declaration that the Emergency Powers (No 2) (sic) Regulations 2010 to the extent that it purports to grant the Minister of National Security the

power to grant immunity or Certificates of Good Faith are unconstitutional, null and void;

(4) A Declaration that the Good Faith Certificates or any Certificate issued on 22 February 2016 by the Minister of National Security outside of the Emergency Period are ultra vires, null and void;

(5) A Declaration that the criminal trial initiated by virtue of the Voluntary Bill of Indictment issued on 12 September 2016 by the Director of Public Prosecutions should be restored to the trial list and be permitted to continue;

(6) A Declaration that the actions which were taken by the 1st, 2nd and 3rd Defendants which included the forced entry into the Claimant's home and the killing of KEITH CLARKE engaged and infringed the fundamental rights of the said KEITH CLARKE and the Claimant to protection of life (s. 13(3)(a)); to humane treatment (ss. 13(h) and 13(o), 13(j), 13(l)); protection from search of property, of private and family life and privacy of the home, (s. 13(j)) and cannot therefore be excused or justified by the said Certificates;

(7) Such further or other Orders as the Court may deem proper and fit.

BACKGROUND

[71] By way of a Proclamation published on 23 May 2010[10], the Governor General declared a State of Public Emergency in Jamaica. In the early morning of 27 May 2010, while the period of public emergency was still in effect, a joint police-military team entered premises occupied by Mr Keith Clarke ("the deceased") and his family in Kirkland Heights, Saint Andrew. Present at the premises at the material time were the deceased, the Claimant, Mrs Claudette Clarke ("Mrs

[10] Jamaica Gazette Supplement Proclamations, Rules and Regulations, Sunday May 23, 2010, Proclamation No. 6/2010

Clarke"), who was the wife of the deceased, and Miss Brittani Clarke ("Miss Clarke"), the daughter of the deceased.

[72] In circumstances which have yet to be judicially determined, the deceased was shot and killed by members of the joint police-military team who were present at the premises. This tragic event has given rise to three sets of proceedings in the Supreme Court, one criminal and two civil.

[73] By way of a Voluntary Bill of Indictment, issued on or about 30 July 2012, the 1st, 2nd and 3rd Defendants, Greg Tinglin, Odel Buckley and Arnold Henry, respectively, who were at the material time members of the Jamaica Defence Force ("JDF") and of the joint police-military team, were charged with the murder of the deceased as a result of the events of 27 May 2010 ("the criminal proceeding").

[74] On 24 May 2013, Mrs Clarke (as Administratrix of the deceased's estate and in her own right) and Miss Clarke filed an action against the 4th Defendant, the Attorney General for Jamaica, under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act[11], arising from the events of 27 May 2010. The claim was to recover damages for negligence; and/or in the alternative trespass to the person; and/or in the alternative misfeasance in public office; and/or in the alternative breach of the deceased's right to life, right to protection of private property and the right not to be treated in a degrading and inhumane manner, in contravention of the Constitution of Jamaica.

[75] Paragraph 25 of the Particulars of Claim in this action ("the 2013 action") set out the details of the alleged constitutional breach.

[76] In the Defence filed on 29 July 2013, the Attorney General admitted that members of the security forces opened fire at the premises occupied by the Clarke family and at the deceased but maintained that they had done so in response to being shot at and in self-defence.

[11] Claim No 2013 HCV 03159

[77] The trial of the 2013 action was, in due course, fixed for 7 December 2015. By an Order made on 20 November 2015[12], the Court of Appeal stayed the trial until the determination of the criminal proceeding.

[78] The criminal proceeding did not come on for trial until 9 April 2018. It was then that the Court was provided with certificates ("Good Faith Certificates") purporting to grant immunity from prosecution to each of the Defendants. Each certificate was, on its face, signed by the Minister of National Security ("the Minister") on 22 February 2016, pursuant to regulation 45(3) of the Emergency Powers Regulations, 2010 ("the Regulations"). The Regulations were in turn made under section 3 of the Emergency Powers Act ("the Act").

[79] Each Good Faith Certificate recited the following: -

> *"In accordance with Paragraph 45 of the above Regulation, I hereby certify that the actions of JDF Corporal Odel Carrington Buckley[13] on May 27, 2010, between the hours of 12 a.m. and 12 p.m. at 18 Kirkland Close, Red Hills, St. Andrew, which may have contributed to or cause [sic] the death of Keith Clarke, were done in good faith in the exercise of his functions as a member of the security forces for public safety, the restoration of order, the preservation of the peace and in the public interest.*
>
> *The said actions were undertaken by the named member of the security forces during the existence of the emergency period declared by proclamation number 6/2010 by the Governor General, May 23rd, 2010."*

[80] During the criminal proceeding, the issue of the validity of the Good Faith Certificates was raised, owing to the fact that they appeared to have been issued by the Minister after the Director of Public Prosecutions ("the DPP") had exercised her constitutional power to commence the criminal proceeding. Glen

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[12] [2018] JMCA App 17

[13] A certificate in identical terms was issued in respect of the 1st and 3rd Defendants

Brown J took the view that this was not a controversy for him to resolve and made an order staying the criminal proceedings for three (3) months, to enable the parties to apply to the Full Court for a determination of the question of the validity of the Good Faith Certificates.

ISSUES

[81] The following issues arise for the Court's determination: -

(1) Whether the Good Faith Certificates, issued pursuant to Regulation 45 of the Emergency Powers Regulations, 2010, are in breach of the doctrine of the separation of powers; (Declarations 1 and 3)

(2) Whether Regulation 45 of the Emergency Powers Regulations, 2010 can supersede the prosecutorial powers of the Director of Public Prosecutions under the Constitution; (Declarations 2 and 5) and

(3) Whether the Good Faith Certificates, which were issued outside of the period of emergency, are ultra vires and therefore null and void; (Declaration 4)

[82] This judgment does not purport to treat with the relief sought at paragraph (6) of the Fixed Date Claim Form, filed on 15 June 2018. This is in light of the pronouncement of the Court of Appeal that the consideration of the issues raised therein is stayed to the date of the trial of the 2013 action.

THE LAW

The relevant statutory and regulatory provisions

[83] Section 2 of the Act defines a "period of public emergency" as any period during which there is in force a Proclamation by the Governor General declaring that a state of public emergency exists.

[84] Section 3 of the Act, in so far as it is relevant for the purposes of this analysis, reads as follows: -

"3-(1) During a period of public emergency, it shall be lawful for the Governor-General, by order, to make Regulations for securing the essentials of life to the community, and those Regulations may confer or impose on any Government Department or any persons in Her Majesty's Service or acting on Her Majesty's behalf such powers and duties as the Governor-General may deem necessary or expedient for the preservation of the peace, for securing and regulating the supply and distribution of food, water, fuel, light and other necessities, for maintaining the means of transit or locomotion, and for any other purposes essential to the public safety and the life of the community, and may make such provisions incidental to the powers aforesaid as may appear to the Governor-General to be required for making the exercise of those powers effective.

(2) …

Provided that nothing in this Act shall be construed to authorize the making of any Regulations imposing any form of compulsory military service or industrial conscription, or providing for the trial of persons by Military Courts:

Provided also that no such Regulation shall make it an offence for any person or persons to declare or take part in a lock-out or to take part in a strike, or peacefully to persuade any other person or persons to declare or take part in a lock-out or to take part in a strike.

(6) The Regulations so made shall have effect as if enacted in this Act, but may be added to or altered by resolution of the Senate and House of Representatives or by Regulations made in like manner which shall be laid before the Senate and House of Representatives and shall be subject to the like provisions as the original Regulations.

(7) The expiry or revocation of any Regulations so made shall not be deemed to have affected the previous operation thereof, or the validity of any

action taken thereunder, or any penalty or punishment incurred in respect of any contravention or failure to comply therewith, or any proceeding or remedy in respect of any such punishment or penalty."

[85] It is pursuant to section 3 of the Act that the Regulations were made. Regulation 45 provides as follows: -

'45(1) Subject to paragraph (2), no action, suit, prosecution or other proceedings shall be brought or instituted against any member of the security forces in respect of any act done in good faith during the emergency period in the exercise or purported exercise of his functions or for the public safety or restoration of order or the preservation of the peace in any place or places within the Island or otherwise in the public interest.

(2) …

(3) For the purposes of this regulation, a certificate by the Minister that any act of a member of the security forces was done in the exercise or purported exercise of his functions or for the public safety or for the restoration of order or the preservation of the peace or otherwise in the public interest shall be sufficient evidence that such member was so acting and any such act shall be deemed to have been done in good faith unless the contrary is proved.

(4) In this regulation –

"the emergency period" means the period of public emergency (which commenced with the Proclamation of the Governor-General published in the Jamaica Gazette Supplement Proclamation, Rules and Regulations on the 23rd day of May, 2010) as extended with effect from the 23rd day of June, 2010 by Resolution of the House of Representatives made on the 22nd day of June 2010;

"member of the security forces" means any authorized person or senior authorized person and any other person acting under the authority of such a person as aforesaid.

46. Without limiting the effect of section 3(7) of the Act, any appointment or order made, or any other action or thing done under or by virtue of, any provision in the Emergency Powers Regulations, 2010 (which expire after June 22, 2010) and which was in force or otherwise subsisting immediately before their expiry –

(a) shall be deemed for the purposes of these Regulations to have been made, commenced or done, as the case may be, under these Regulations;

(b) may be continued under these Regulations as if begun hereunder.'

DISCUSSION

Whether the Good Faith Certificates, issued pursuant to Regulation 45 of the Emergency Powers Regulations, 2010, are in breach of the doctrine of the separation of powers (Declarations 1 and 3)

The submissions

The Claimant's submissions

[86] The Claimant's submissions on this first issue were adopted by the Independent Commission of Investigations ("INDECOM") and by the DPP. The gist of those submissions has been captured below.

[87] The Claimant contends that the Good Faith Certificates conflict with the doctrine of separation of powers, as enshrined in the Constitution of Jamaica ("the Constitution") and are therefore null and void. Dr Lloyd Barnett, submitting on the Claimant's behalf, stated that the Good Faith Certificates were clearly intended to predetermine an issue which would arise for judicial determination in any legal proceedings involving issues surrounding the legality and/or constitutionality of the Defendants' actions at the home of the Clarkes.

[88] By virtue of the fact that the Good Faith Certificates read that the actions of each of the Defendants "were done in good faith in the exercise of his functions as a member of the security forces, for the public safety, the restoration of order, the preservation of the peace and in the public interest" predetermines the issue of mens rea, which ought properly to be determined by a trial Court. To that extent, Dr Barnett submitted, the Good Faith Certificates were issued as instruments of immunity with the objective of barring the Court from adjudicating.

[89] It was further submitted that, apart from the DPP's exercise of her right to enter a Nolle Prosequi or a decision of the Court, the Governor General is the only authority vested with the power or authority to grant absolution from criminal liability. This is in the exercise of the prerogative of mercy pursuant to section 90 of the Constitution. Even where there is no supremacy of the constitution, such as exists in Jamaica by virtue of section 2 of the Constitution, a decision by a statutory authority cannot be protected from the supervisory jurisdiction of the Courts. In this regard, Dr Barnett relied on the authority of **R (on the application of Privacy International) v Investigatory Powers**[14].

The submissions on behalf of the 1st, 2nd and 3rd Defendants

[90] The Defendants, on the other hand, contend that it is the Regulations themselves and not the Good Faith Certificates, that immunize them from prosecution. Mr Michael Hylton Q.C., on behalf of the Defendants, submitted that the Minister merely provides evidence by way of a certificate that the requirement of good faith has been met. It is the Governor General who makes the Regulations that grant the immunity and the Governor General has the constitutional power to limit prosecution.

[91] It was also submitted that the Minister, in issuing the Good Faith Certificates, exercised no power to determine who to prosecute nor did he encroach on the DPP's power to prosecute. He merely issued certificates, which, on their face,

[14] [2019] 4 All E.R. 1

indicate that the Defendants, in the exercise of their functions as members of the security forces, met the requirement of good faith and are entitled to the protection afforded by the Regulations.

[92] It was further submitted that, even in the absence of the Good Faith Certificates, or of the power given to the Minister to issue them under Regulation 45(3) of the Regulations, the Defendants would still be immune from prosecution by virtue of Regulation 45(1) of the Regulations, provided that they can demonstrate that they acted in good faith in the circumstances set out in the Regulations. The power vested in the Minister to issue Good Faith Certificates, under the Regulations, is not an absolute one, as evidenced by the words "unless the contrary is proved". It would therefore be open to the DPP to seek to provide evidence to the contrary and as such the Good Faith Certificates do not encroach on her powers.

[93] Finally, it was submitted that, in any event, the DPP's power to prosecute under the Constitution is not an absolute one and is subject to lawful limits which are permissible and constitutionally sound, for example, the Governor General's power under the Constitution to grant a pardon. In that regard Mr Hylton Q.C. relied on the authority of (**Kwoyelio (alias Latoni) v Uganda**[15] and **Uganda v Kwoyelo**[16].

The submissions of the 4th Defendant

[94] Learned Counsel Miss Althea Jarrett submitted on behalf of the 4th Defendant, the Attorney General of Jamaica, that, for the Claimant to establish that there was a breach of the doctrine of separation of powers, she must demonstrate that, in issuing the Good Faith Certificates, the Minister was exercising a function that was properly to be exercised by another arm of government. In this case, the

[15] [2012] 1 LRC 295

[16] Constitutional Appeal No 1 of 2012, judgment delivered 8 April 2015 (unreported)

Claimant must specifically demonstrate that the Minister was exercising a function that ought properly to be exercised by the judiciary.

[95] Miss Jarrett submitted further that, in the circumstances of the instant case, it is clear that the Minister, in issuing the Good Faith Certificates, made no determination of the culpability of the Defendants and was not performing the functions of a judge.

[96] In an effort to ground these submissions, Miss Jarrett relied on three (3) authorities: **Moses Hinds and Others v The Queen**[17]; **Lowell Lawrence v Financial Services Commission**[18]; and **Liyanage and Others v Reginam**[19].

The submissions on behalf of the Chief of Defence Staff

[97] Mr Walter Scott Q.C., on behalf of the Chief of Defence Staff, submitted that the Good Faith Certificates issued by the Minister under Regulation 45 are to operate as proof that the actions of the members of the security forces took place in the circumstances delineated in Regulation 45(3). The issuing of the Good Faith Certificates raises a presumption that the Defendants were acting in good faith. These circumstances are limited to the exercise or purported exercise of their functions as security forces; for the public safety; restoration of order; and the preservation of the peace.

[98] It was also submitted that the immunity is conferred by the Regulations, which have been promulgated by the Governor General. The Minister's role, pursuant to Regulation 45(3), is to issue a certificate which indicates, on the face of it, that an act of a member of the security forces was done in good faith. This is, of course, unless the contrary is proved. The Good Faith Certificates therefore create a rebuttable evidential basis for immunity as conferred by the Regulations.

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[17] [1977] A.C. 195

[18] SCCA No. 129/05, judgment delivered 18 July 2008 (unreported); [2009] UKPC 49

[19] [1966] 1 All E.R. 650

[99] It was further submitted that it cannot be said that there is any infringement of the doctrine of separation of powers because: (a) it is not the Minister's act that confers the immunity; and (b) any certificate issued by the Minister is rebuttable and therefore consistent with and in no way diminishes the DPP's powers under section 94(3) of the Constitution.

Analysis and findings

The doctrine of the separation of powers

[100] The doctrine of the separation of powers is a doctrine which is fundamental to the organization of a state – and to the concept of constitutionalism – in so far as it prescribes the appropriate allocation of powers, and the limits of those powers, to differing institutions. In any state, three essential bodies exist: the executive, the legislature and the judiciary. It is the relationship among these bodies which must be evaluated against the background of the principle.

[101] The essence of the doctrine of the separation of powers is that there should be, ideally, a clear demarcation of functions between the legislature, executive and judiciary, in order that none should have excessive power and that there should be in place a system of checks and balances among the institutions.

The historical development of the doctrine

[102] The identification of the three elements of the constitution derives from Aristotle (384-322 BC). In **The Politics**,[20] he proclaimed the following: -

> *"There are three elements in each constitution…if these are well arranged, the constitution is bound to be well arranged, and the differences in constitutions are bound to correspond to the differences between each of these elements. The three are, first, the deliberative, which discusses everything of common importance; second, the officials; and third, the judicial element."*

[20] BK iv, xiv, 1297b35

[103] Thus, the constitutional seeds of the doctrine were sown early, reflecting the need for a government according to and under the law, a requirement encouraged by some degree of separation of functions among the institutions of the state.

[104] The constitutional historian FW Maitland traces the separation of powers in England to the reign of Edward I (1272-1307). Viscount Henry St John Bolingbroke (1678-1751), in **Remarks on the History of England**, advanced the idea of separation of powers, stating that, since this division of power, and these different privileges constitute and maintain a government, it follows that the confusion of them tends to destroy it.

[105] The clearest expression of the demand for a separation of functions was made by Baron Montesquieu (1689-1755), who expressed the view that liberty cannot exist when there is a merger between the executive and the legislature. He stated that liberty would be impossible if there were no division between the judicial arm on the one hand and the executive and legislative arms on the other.[21]

The contemporary doctrine

[106] The doctrine of the separation of powers no longer bears the meaning conceived of by the early writers. In the context of the times then, the doctrine addressed the legitimate concern of the day, which was the fear of arbitrary rule. In today's world, the new meaning of the doctrine may be stated in two senses. Firstly, the doctrine helps us to appreciate that in the complexities of modern government, there can only be shared powers among separate and quasi-autonomous yet inter-dependent state organs. Secondly, the doctrine helps us to appreciate the truism that the system of government in which we operate works on the assumption that there is a core function which can be classified as legislative, executive and judicial and that these core functions belong to their respective

[21] Montesquieu, 1989, Book XI, Chapter VI

branches or organs. Thirdly, the doctrine helps us to recognize that government involves the blending of the respective powers of the principal organs of the state.[22]

The doctrine and the Jamaican Constitution

[107] The Constitution of Jamaica is fundamentally concerned with the protection of the principle of constitutionalism which rests not only on the existence of an independent and impartial judiciary but also on the protection of its powers and jurisdiction from usurpation by the executive and the legislature. Such exclusiveness, as is accorded to the judicial power, derives not from any abstract doctrine of the separation of powers but from the provisions of the Constitution itself.

[108] It is a basic principle of Jamaican constitutional law that the rights and obligations of individuals should be determined by judicial bodies which are not subject to the control or directions of the legislature or the executive. In Jamaica, the position of the judiciary is protected by the express provisions and necessary implications of the Constitution, which is written and supreme.

[109] In **Liyanage v The Queen**,[23] the Privy Council stated that there exists a separate power in the judicature which under the constitution cannot be usurped or infringed by the executive or the legislature. There, the Board was concerned with the constitutionality of the statutes amending the Criminal Procedure Code, by purporting to widen the classes of offences which could be tried without a jury, by three Supreme Court judges nominated by the Chief Justice; for the admission of evidence not otherwise admissible; and for the application of new minimum penalties. The provisions were expressed to be retrospective to cover a particular incident. The Board held that the amending statutes were directed to secure the conviction and punishment ex post facto of particular persons for

[22] See - Fiadjoe, 1999, p 161

[23] [1967] 1 A.C.259; [1966] 2 W.L.R. 682; [1966] 1 All E.R. 650

particular offences on specific occasions and therefore involved a usurpation of the judicial power.

[110] Their Lordships examined the provisions relating to, inter alia, the appointment and security of tenure of the judges and concluded: -

> *"These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a constitution by which it was intended that judicial power should be shared by the executive or the legislature. The constitution's silence as to the vesting of judicial power is consistent with its remaining where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature."*[24]

[111] On this basis, the amending statutes were held to be inconsistent with the constitution, ultra vires and void.

[112] In **Hinds v The Queen**[25], the question was raised as to whether Parliament had acted ultra vires the Jamaican Constitution by purporting to establish a superior court of record exercising jurisdiction similar to that of the Supreme Court and by providing for the designation thereto of judicial officers other than by the process of appointment by the Judicial Services Commission. In the majority judgment, their Lordships adopted the conclusion of the Privy Council in **Liyanage** that there did exist in the judicature a "separate power" which could not be usurped or whittled away by the legislature.

[113] Lord Diplock, in examining the doctrine, had this to say: -

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[24] [1966] 1 All E.R. 650, at page 658 D-F, as per Lord Pearce

[25] [1977] A.C. 195, at page 212 D-F, as per Lord Diplock

> *"It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the judicature. Nevertheless, it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively."*

The approach to constitutional interpretation

[114] A constitution differs fundamentally in its nature from ordinary legislation passed by the parliament of a sovereign state. It embodies what is in substance an agreement reached between representatives of the various shades of political opinion in the state, as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in the future. It provides for continuity of government through successor institutions, legislative, executive and judicial, of which the members are to be selected in a different way but each institution is to exercise powers which, although enlarged, remains of a similar character to those that had been exercised by the corresponding institution that it had replaced.

[115] Recognizing the status of a Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity and greater generosity than other Acts. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the

traditions and usages which have given meaning to that language. It is quite consistent with this and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation, a recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.[26]

The function of interpreting the Constitution

[116] The function of interpreting the constitution is vital where it is written, supreme and may only be amended with difficulty. This task is often referred to as 'construction' rather than 'interpretation'. While the rules of construction of constitutional instruments are usually regarded as similar to those that apply to the interpretation of statutes, these rules are often modified so as to take into account the special character and status of the constitutional provisions.

[117] Despite the importance of this function, the Constitution does not contain any explicit provision investing the judiciary with general powers to interpret and enforce the Constitution or to strike down legislative or executive actions which are in conflict with it. The only provisions which specifically confer this function on the judiciary are those relating to the fundamental rights provisions,[27] the exemption of a Senator or Member of Parliament from disqualification by reason of his being a party to a Government contract on his satisfying the court that he was not culpable,[28] the determination of election petitions and cases of disputed Parliamentary membership[29] and the hearing of suits for the recovery of penalties against unqualified persons who sit and vote in Parliament.[30] There are however

[26] See - Minister of Home Affairs and Another v Collins Macdonald Fisher and Another [1980] A.C. 319

[27] Section 25 of the Constitution

[28] Section 41 of the Constitution

[29] Section 44 of the Constitution

[30] Section 46 of the Constitution

clear indications that the Courts are intended to be the guardians of the Constitution as a whole.

[118] In **D.P.P. v Nasralla**,[31] which was concerned with the interpretation and enforcement of fundamental rights provisions, the Court had this to say: -

> *"We think the true rule is that where the language of a constructional provision is clear and unambiguous, then it should be construed according to the plain, ordinary meaning of the words. If, however, the words are not clear and unambiguous, then the provision should be construed so that it should be given meaning consonant with the declared object of the Legislature as contained in Chapter III of the Constitution."*[32]

The Minister's power to grant immunity under the Regulations

[119] Section 3 of the Act empowers the Governor General to (i) confer or impose on any government department, or any persons in Her Majesty's Service or acting on Her Majesty's behalf, such powers or duties as may be deemed necessary or expedient for the purpose of achieving the aims of the period of emergency; and (ii) make such provisions incidental to those powers "as may appear to the Governor-General to be required for making the exercise of those powers effective."

[120] It is in this context that Regulation 45(1) grants immunity from any action, suit, prosecution or other proceedings to members of the security forces "in respect of any act done in good faith during the emergency period in exercise or purported exercise of his functions or for the public safety or restoration of order or the preservation of the peace in any place or places within the Island or otherwise in the public interest".

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[31] [1967] A.C. 238

[32] D.P.P. v Nasralla, [1967] A.C. 238, as per Douglas, J (as he then was) at pp. 307-308

[121] It is in aid of this grant of immunity that Regulation 45(3) (i) empowers the Minister to issue a certificate stating that any act of a member of the security forces "was done in the exercise or purported exercise of his functions or for the public safety or for the restoration of order or the preservation of the peace or otherwise in the public interest"; and (ii) provides that the certificate shall be sufficient evidence that such member was so acting and any such act shall be deemed to have been done in good faith unless the contrary is proved".

[122] The questions remain as to whether the Good Faith Certificates infringe the doctrine of the separation of powers and whether, to the extent that the Regulations vest the Minister with the power to grant immunity, they are null and void.

[123] For the Claimant to succeed on these grounds, she must demonstrate that the Minister, in the exercise of the power vested in him pursuant to Regulation 45(1) of the Regulations, was carrying out a function that was properly to be performed by another arm of government. In the circumstances of the instant case, the Claimant would be required to establish specifically, that, the Minister, in issuing the Good Faith Certificates, was exercising a function that ought properly to have been performed by the judiciary.

[124] I find that I must have regard to the circumstances that have given rise to this matter. There can be no denying that the circumstances, as they obtained in May of 2010, were extreme. It is in the context of such a period of extreme crisis that the Act vests the Governor General with the power to make Regulations for securing the essentials of life to the community. Those Regulations may confer or impose powers and duties as the Governor General may deem necessary or expedient for the preservation of the peace, for securing and regulating the supply and distribution of food and other necessities, for the maintenance of the means of transportation, as well as, for any other purposes essential to the public safety and the life of the community.

[125] Section 3 of the Act also empowers the Governor General to make such provisions incidental to these powers as may appear to him to be required for making the exercise of these powers effective.

[126] It is in this context that Regulation 45(1) of the Regulations grants immunity from any action, suit, prosecution or other proceedings, to members of the security forces "in respect of any act done in good faith during the emergency period".

[127] The question that arises is whether it can be said that the power to grant immunity, pursuant to Regulation 45(1) of the Regulations, can be said to be incidental to those vested in the Governor General under section 3 of the Act. I find that it is.

[128] I accept the submission that the intent of the Regulations is to allow members of the security forces to take the necessary action for the preservation of public order and public safety during a period of public emergency. When the Governor General declares a state of emergency, pursuant to section 20 of the Constitution, he is, effectively, invoking wartime powers. The Constitution expressly deals with states of emergency in section 13(9) and 13(11). The Regulations do not arbitrarily grant immunity for all actions of the members of the security forces but only in given circumstances which are reasonable and justified.

[129] I find that, by issuing the Good Faith Certificates, the Minister made no determination in relation to the culpability of the Defendants. The function performed by the Minister could be described as being administrative in nature and was not a judicial process. It cannot therefore be said that, in this regard, the Minister usurped the role or function of the judiciary.

[130] The issuance of the Good Faith Certificates creates a rebuttable presumption that the member of the security forces acted in the capacity provided for in the Regulations and in good faith. It is important to note that the immunity granted by Regulation 45(1) is not an immunity from suit granted to the executive itself. It

does not purport to bar action against the executive in respect of the allegedly wrongful acts of its servants or agents. Nor does the Regulation take away the power of the Court to review a certificate issued by the Minister or the circumstances surrounding the issue of such a certificate. This is evidenced by the use of the words "…unless the contrary is proved".[33]

Whether Regulation 45 of the Emergency Powers Regulations, 2010 can supersede the prosecutorial powers of the Director of Public Prosecutions under the Constitution (Declarations 2 and 5)

The submissions

The Claimant's submissions

[131] The Claimant contends that the presentation of the Good Faith Certificates, as a barrier to the criminal prosecution of the Defendants, is unauthorized by the Constitution. Section 94(3) of the Constitution empowers the DPP to discontinue criminal proceedings instituted or undertaken by her or any other person or authority. In the exercise of this power, it was submitted, the DPP cannot be subjected to the direction or control of any other person or authority.[34] Accordingly, it was submitted, the Minister could not lawfully grant a certificate that has the effect of terminating or preventing the conduct of the criminal proceedings.

The 4th Defendant's submissions

[132] The 4th Defendant accepts that the DPP is given wide powers in relation to the prosecution of a criminal offence, it was submitted however, that, that power must be viewed in the light of other constitutional powers under which the Regulations were issued. It was also submitted that the Regulations were passed pursuant to section 26 of the Bill of Rights which authorizes the Governor

[33] See – The Attorney General of Jamaica v Claudette Clarke (Administratrix of the Estate of Keith Clarke, Deceased and in her own right) and Others [2019] JMCA Civ 35

[34] Section 94(6) of the Constitution

General to issue a Proclamation declaring that a state of public emergency exists. The Act is the statutory expression of the powers given to the Governor General by section 26 of the Bill of Rights.

[133] Secondly, it was submitted that there is nothing in the Act which faintly suggests an intention to give the Governor General the power to transfer any of the functions of the judiciary or of the DPP to any minister or executive officer. Nor does it vest the power to grant any certificates of good faith, in respect of any issues which may arise before the Court. Even in colonial legislation, with no parliament or no constitution which entrenched judicial power, it was submitted, the Act does not purport to invest the Governor General with the power to make regulations with as far reaching effect as the Regulations.

[134] Finally, it was submitted that, the Governor General, under the Emergency Powers Act, enacted pursuant to section 26, are quite wide, with the section outlining the specific circumstances that are excluded. The giving of immunity from prosecution to the members of the security forces, in the circumstances outlined in Regulation 45 of the Regulations, is clearly not one of the circumstances prohibited. Consequently, the provisions of the Regulations are authorized by the Constitution regardless of whether they have an impact on the DPP's prosecutorial powers.

The submissions of INDECOM and the DPP

[135] Learned Counsel Mr Mikhail Jackson, submitting on behalf of INDECOM, adopted the submissions of the Claimant in this regard. He submitted further that the Constitution is the supreme law of the land and that, if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law, shall, to the extent of the inconsistency, be void.

[136] It was further submitted that Regulation 45 of the Regulations are not in conformity with the scope of the authority given the Governor General, as the

purported grant of immunity from prosecution is not a purpose essential or incidental to, safeguarding the public safety and the life of the community.

[137] The Learned Deputy Director of Public Prosecutions, Mr Adley Duncan, submitting on behalf of the DPP, adopted paragraphs 16 and 17 of the Claimant's written submissions and paragraph 22 of that of INDECOM.

[138] Mr Duncan submitted further that section 94 of the Constitution vests the power to discontinue criminal proceedings solely in the DPP, who is, constitutionally, not subject to the direction or control of any other person or authority. It was submitted that that constitutional power cannot be superseded by the purported exercise of a power granted by subsidiary legislation by a Cabinet Minister, which, in any event, had expired.

[139] Finally, Mr Duncan submitted that the Good Faith Certificates, on their face, purport to be evidence of good faith unless the contrary is proved. The Good Faith Certificates, on their very face, establish that the purported immunity is subject to scrutiny and examination and does not, even on its own strength, purport to operate absolutely.

Analysis and findings

[140] Section 94 of the Constitution provides for the establishment of the Office of the Director of Public Prosecutions and stipulates the functions of the DPP. Pursuant to section 94(3) of the Constitution, the DPP is vested with wide powers in relation to the prosecution of criminal matters. This includes the power to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;[35] to take over and continue any such criminal proceedings that may have been instituted by any other person or authority;[36] and to discontinue at any stage

[35] Section 94(3)(a) of the Constitution

[36] Section 94(3)(b) of the Constitution

before judgment is delivered, any such criminal proceedings instituted or undertaken by himself or any other person or authority.[37]

[141] Section 94(5) of the Constitution provides that the powers conferred on the DPP by paragraphs (b) and (c) of section 94(3) shall be vested in him to the exclusion of any other person or authority, provided that, where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the Court.

[142] Section 94(6) of the Constitution makes it clear that, in the exercise of the powers conferred on the DPP by virtue of the section, the DPP shall not be subject to the direction or control of any other person or authority.

[143] I find that the Good Faith Certificates do not supersede or infringe on the prosecutorial powers of the DPP under the Constitution nor do they act as a bar to the prosecution of the criminal matter. As I have already stated, the Good Faith Certificates create a rebuttable presumption that the member of the security forces acted in the capacity provided for in the Regulations and in good faith. I find that the Regulations do not take away the power of the court to review a certificate issued by the Minister or the circumstances surrounding the issue of such a certificate. The words “unless the contrary is proved”, as used in Regulation 45(3) of the Regulations, suggest that the Good Faith Certificates do not purport to operate absolutely. Proving the contrary contemplates a trial in which the evidential burden to prove that the member of the security forces did not in fact act in the capacity provided for in the Regulations and in good faith rests on the prosecution.

[144] In these circumstances, I find that the criminal proceeding is to be restored to the trial list and the trial is to continue.

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[37] Section 94(3)(c) of the Constitution

Whether the Good Faith Certificates, which were issued outside of the period of emergency, are ultra vires and therefore null and void; (Declaration 4)

The submissions

The Claimant's submissions

[145] The Claimant contends that the Regulations could not retrospectively give the Minister the power or authority to issue Good Faith Certificates on 22 February 2016, in respect of actions taken in May 2010.

The 4th Defendant's submissions

[146] In this regard, it was submitted that the Good Faith Certificates are not rendered invalid by virtue of their having been issued outside of the emergency period. The Court was urged to have regard to section 3(7) of the Act which provides, in part, that the expiry or revocation of any Regulations so made shall not be deemed to have affected the previous operation thereof or the validity of any action taken thereunder. The Court was referred to the authority of **Wicks v Director of Public Prosecutions**.[38]

[147] It was further submitted that it could not have been the intention of Parliament for the provisions of Regulation 45 of the Regulations to expire when the Regulations themselves did. The untenable result would be that a member of the security forces, who acted in good faith during a period of public emergency, would be deprived of the protection afforded him by Regulations that were in effect at the time of the commission of the acts but the relevant certificates were issued outside of the period of public emergency.

[38] [1947] All E.R. 205

The submissions on behalf of the Chief of Defence Staff

[148] It was submitted on behalf of the Chief of Defence Staff that, on a proper interpretation of the Regulations, the issuance of the Good Faith Certificates, after the expiration of the period of public emergency, is justified and permissible. The framers of the Regulations, it was submitted, clearly contemplated that some powers pursuant to those Regulations would be exercised during the period of public emergency, while others that might be consequential in nature, would be exercised outside of that period. The evidence that the requirement of good faith has been met, as manifested by the issuance of the Good Faith Certificates, cannot itself be restricted when the Regulation granting the immunity is not so limited.

The submissions on behalf of INDECOM

[149] It was submitted on behalf of INDECOM that no lawful action can take place pursuant to an expired Act or Regulation. The Good Faith Certificates, each dated 22 February 2016, were issued pursuant to Regulation 45 of the Regulations, which expired on 30 June 2010. Reference was made to section 3(4) of the Act, which provides, in part, that any regulations laid by the Governor General shall not continue in force after the expiration of seven days from the time when they are so laid before the Senate and the House of Representatives unless a resolution is passed by the Senate and the House of Representatives providing for its continuance.

[150] It was further submitted that, whilst the Defendants' submissions that the drafters must have intended that the discretion of the Minister to issue certificates outside of the period of public emergency is plausible, the Court should have no regard to it.

Analysis and findings

[151] In seeking to determine whether the Good Faith Certificates, issued outside of the period of emergency, are valid, I must have regard to the following principles:

(i) the Constitution is the supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency; (ii) in determining the constitutionality of legislation, its purpose and effect must be taken into consideration; (iii) the entire Constitution must be read together as an integral whole; (iv) the words of a written constitution prevail over all unwritten conventions, precedents and practice and (v) no one provision of the Constitution is to be segregated from the other and considered alone but all the provisions bearing on a particular subject are to be brought into view and interpreted to effectuate the greater purpose of the instrument.

[152] It is generally accepted that, in determining the appropriate interpretation to be applied to any piece of legislation, the courts must avoid an interpretation that would lead to an absurd result. The courts must presume that Parliament intended to act reasonably and that it did not intend a statute to have consequences that are objectionable; or undesirable; or absurd; or unworkable; or impracticable; or merely inconvenient; or anomalous; or illogical; or futile; or pointless.[39]

[153] The learned author of Bennion on Statutory Interpretation, 5th edition, page 969, stated as follows: -

> *"The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief."*

[154] I find that in the practical reality of the circumstances that existed on the Island in May 2010, in what could be described as a period of extreme crisis, it would be absurd for Parliament to have intended that the certificates to be issued by the

[39] See – R (on the application of Edison First Power Limited) v Central Valuation Officer [2003] 4 All E.R. 209

Minister, pursuant to the Regulations, were to have been issued during the period of public emergency itself. To apply such a narrow interpretation to the provisions of the Act and of the Regulations would, to my mind, result in absurdity and would render the Act and the Regulations unworkable, impracticable, futile and pointless.

[155] It is implausible to expect that, during a period of extreme crisis, as obtained on the Island in May 2010, the Minister is to assess the conduct of each member of the security forces, with a view to determining whether his actions during the period of public emergency were done in the capacity provided for in the Regulations and in good faith. That is, whether those actions were done in the exercise or purported exercise of his functions or for the public safety or for the restoration of order or the preservation of the peace in any place or places within the Island or otherwise in the public interest.

[156] It is to be noted that where the drafters of the Regulations intended to limit the time within which any step is to be taken pursuant to those Regulations, that is expressly stated.[40]In any event, section 3(7) of the Act expressly states that the expiry or revocation of any regulations made pursuant to the Act shall not be deemed to have affected the previous operation of any such regulation nor the validity of any action taken under any such regulation.

[157] I am however troubled by the timing of the issuing of the Good Faith Certificates. The Good Faith Certificates were issued some six (6) years later and four (4) years after the preferring of the Voluntary Bill of Indictment by the DPP. I find that, in those circumstances, the Good Faith Certificates were issued at a time that was unreasonably late. I note that the investigative process had already begun and had been completed. A Voluntary Bill of Indictment had been preferred against the 1st, 2nd and 3rd Defendants and the trial in the criminal proceeding was about to begin. It is at that time that, for the first time, the fact of these Good Faith Certificates is raised.

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[40] See – Regulations 38(12) and 45(2), Emergency Powers Regulations, 2010

[158] I find that the delay in the issuing of the Good Faith Certificates is manifestly unreasonable and unfair. Furthermore, the effect of the Good Faith Certificates would be to reverse the burden of proof at the trial of the criminal proceeding, which, at this time and in the circumstances of this case, would not be fair. It is for that reason that I find that the Good Faith Certificates are unconstitutional, null and void and of no effect.

CONCLUSION

[159] By way of summary, I find firstly, that the issuing of the Good Faith Certificates does not infringe the doctrine of the separation of powers. Secondly, the Regulations do not supersede the prosecutorial powers of the DPP under the Constitution and that the criminal proceeding is to be restored to the trial list and the trial is to continue. Thirdly, the delay in the issuing of the Good Faith Certificates is manifestly unreasonable and unfair. Furthermore, the effect of the Good Faith Certificates would be to reverse the burden of proof at the trial of the criminal proceeding, which, at this time and in the circumstances of this case, would not be fair. The Good Faith Certificates are therefore unconstitutional, null and void and of no effect.

L. PUSEY J

DISPOSITION

[160] In summary, this Court concludes that: -

(1) The Minister's power to issue Good Faith Certificates under the Emergency Powers Regulations, 2010 does not infringe and is not in conflict with the principle of the separation of powers enshrined in the Constitution;

(2) The Emergency Powers Regulations, 2010 do not infringe on the prosecutorial powers of the Director of Public Prosecutions under the Constitution;

(3) The criminal proceeding should be restored to the trial list.

A majority of the Court concludes that: -

(1) In the circumstances of this case, the issuing of the Good Faith Certificates was manifestly unfair and unreasonable and therefore the Good Faith Certificates are null, void and invalid;

(2) The 1st, 2nd and 3rd defendants may not rely upon the Good Faith Certificates at the trial of this matter.

[161] It is hereby ordered as follows: -

(1) That the criminal trial initiated by virtue of the Voluntary Bill of Indictment originally issued in July 2012 by the Director of Public Prosecutions should be restored to the trial list and be permitted to continue;

(2) That the Good Faith Certificates or any Certificate issued on 22 February 2016 by the Minister of National Security outside of the Emergency Period were issued in circumstances that were manifestly unreasonable and unfair and are therefore null and void and without effect.