



[2023] JMSC Civ 74

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

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2023CV00356**

**IN THE MATTER** of an application for  
Administrative Orders

**AND**

**IN THE MATTER** of the Charter of  
Fundamental Rights and Freedoms of  
the Constitution of Jamaica

**AND**

**IN THE MATTER** of an Application by  
Detective Constable Julian Frazer, an  
Authorised Officer, for a Production  
Order pursuant to Section 21 of the  
Cybercrimes Act 2015.

<b>BETWEEN</b>	<b>AMOI LEON-ISSA</b>	<b>APPLICANT</b>
<b>AND</b>	<b>HER HONOUR MRS. SASHA MARIE ASHLEY</b>	<b>1<sup>ST</sup> RESPONDENT</b>
	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>2<sup>ND</sup> RESPONDENT</b>

**IN CHAMBERS**

**Mr. Chukwuemeka Cameron for the Applicant**

**Ms. Kamau Ruddock and Mr. Matthew Gabbadon instructed by Director of State  
Proceedings for the Respondents.**

**Heard: March 30<sup>th</sup>, 2023 and April 26<sup>th</sup>, 2023**

**Leave to apply for judicial review- Production Order-Disclosure- Ultra Vires- Unreasonable- Section 21 of the Cybercrime Act**

**SHELLY WILLIAMS, J**

**BACKGROUND**

[1] The Applicant was the mother of Gabriel King (GK), who was murdered on the 13<sup>th</sup> of January 2022. His body was recovered from the motor vehicle that was owned by the Applicant. On the said date, of the 13<sup>th</sup> of January 2022, the Applicant made a report to the police that her vehicle had been stolen, with GK abode. The iPhone, which is the subject of the Production Order that is being challenged in this application, was recovered by the police from the Applicant's motor vehicle. On the 6<sup>th</sup> of September 2022 the first Respondent granted an ex parte application for a Production Order concerning the iPhone of the Applicant. The original Production Order stated that: -

*i. Mrs. Amoi Leon Issa, Owner of a gold and white iPhone 13 Pro Max bearing IMEI number 352060425852025 and cellular number 876-379-2847 (hereinafter referred to as "the cellular phone", produces in intelligible form to Detective Constable Julian Frazer, an authorized officer pursuant to section 21 of the Cybercrimes Act 2015, with forty-eight (48) hours of service of this Order, any communication data, cell site data and other data contained on he said cellular phone for the purpose of a criminal investigation into the murder Gabriel King which occurred on Thursday January 13, 2022 about 11:30 a.m. between Oak Hill Avenue and Fairfield Avenue, Fairfield Estate in the parish of St. James.*

*ii Mrs. Amoi Loen Issa, owner of a gold and white iPhone 13 Pro Max bearing IMEI number 352060425852025 and cellular phone number 876-379-2847, produces to Detective Constable Julian Frazer, with forty-eight (48) hours of service of this Order any key that is in her*

*control or possession that is necessary to obtain access to any communication data, cell site data and other data contained on the said cellular phone, for the purpose of a criminal investigation into the murder of Gabriel King which occurred on Thursday January 13, 2022 about 11:30 am between Oak Hill Avenue and Fairfield Avenue, Fairfield Estate in the parish of St. James.*

**[2]** The Applicant challenged the Production Order that had been granted by the Parish Court Judge, by filing a Notice of Application for Court Orders on the 4<sup>th</sup> of November 2022. That application sought to discharge or vary the original Production Order. The application was heard on the 14<sup>th</sup> of November 2022 which resulted in the order being varied to now state: -

- i. *Mrs. Amoi Leon Issa, owner of a gold and white iPhone 13 Pro Max bearing IMEI number 352060425852025 and cellular telephone number 8763792847 (hereinafter referred to as cellular phone) on or before the 24<sup>th</sup> day of November 2022 provides access to and/or produces in intelligible form to Detective Inspector Roderick Muir, an authorized officer pursuant to section 21 of the Cybercrimes Act 2015, any communication data or other data contained on the cellular phone by making written disclosure of any key that is in her possession or control that is necessary to obtain access to and/or put in intelligible form communication data or other data for the purpose of a criminal investigation into the death of Gabriel King which occurred on the 13<sup>th</sup> day of January 2022 in the parish of St. James.*
- ii. *Mrs. Amoi Leon Issa shall not be entitled to be present during the process of accessing and/or producing in intelligible form the said communication data or other data however an Attorney-at-Law instructed by her may attend as an observer only.*

- iii. *In the event the Attorney-at-Law so instructed is unable to present the process of accessing and/or producing in intelligible form the said communication data or shall not, on that account only, be postponed or otherwise delayed but may proceed in the absence of such Attorney-at-Law.*
- iv. *A third party, being a qualified computer expert mutually agreed on by counsel for the Jamaica Constabulary Force and counsel for Mrs. Amoi Leon Issa, may attend as an observer only the process of accessing and/or producing in intelligible form the said communication data or other data.*
- v. *In the event of qualified computer expert cannot be mutually agreed upon by counsel for the Jamaica Constabulary Force counsel for Mrs. Amoi Leon Issa by the 22<sup>nd</sup> day of November 2022, the process of accessing and/or producing in intelligible form the said communication data or other data shall not, on that account only, be postponed or otherwise delayed but may proceed in the absence of an agreement upon a third party. Further, in the event a qualified computer expert mutually agreed upon is unable to be present, the process of accessing and/or producing in intelligible form the said communication data or other data shall not, on that account only, be postponed or otherwise delayed but may processed in the absence of that third party. Every key produced in pursuance of this Order shall be stored, for so long as it is retained, in a secure manner and any records of such key shall be destroyed as soon no longer needed to access and/or put into intelligible form the said communication data or other data. The number of persons to whom the key is produced or otherwise made available, and any copies made thereof, shall be limited to the minimum that is necessary for the purpose of enabling the*

*communication data or other data to be accessed or put into intelligible form.*

**[3]** The Applicant filed an application for leave to file judicial review on the 6<sup>th</sup> of February 2023, along with an accompanying affidavit. The Orders sought were:-

- 1) The Application is granted an extension of time to make this application;
- 2) Leave is granted to the Applicant to apply to the Court to Review in the aspects of:
  - a) the production and Ancillary Order made on the 6<sup>th</sup> day of September 2022 as varied on the 18<sup>th</sup> day of November 2022 by Her Honour Mrs. Sasha-Marie Ashley in the Parish Court for the parish of St. James where she ordered that:

*“Mrs.Amoi Leon Issa, owner of a gold and white iPhone 13 Pro Max bearing IMEI number 352060425852025 and cellular phone 876-379-2847 (hereinafter referred to as “cellular phone”), produces in intelligible form to Detective Constable Julian Frazer, an authorized officer pursuant to section 21 of the Cybercrimes Act 2015, within forty-eight (48) hours of service of this Order, any communication data, cell site data and other data contained on the said cellular phone for the purpose of a criminal investigation into the murder of Gabriel King which occurred on Thursday January 13, 2022 about 11:30am between Oak Hill Avenue and Fairfield Avenue, Fairfield Estate in the parish of St. James.*

*Mrs. Amoi Leon Issa, owner of a gold and white iPhone 13 Pro Max bearing IMEI number 352060425852025 and cellular phone number 876-379-2847, produces to Detective Constable Julian Frazer, within forty-eight (48) hours of service of this Order any key that is in her control or possession that is necessary to obtain to any communication data, cell site data and other data contained on the said cellular phone, for the*

*purpose of a criminal investigation into the murder of Gabriel King which occurred on Thursday January 13, 2022 about 11:30 am between Oak Hill Avenue and Fairfield Avenue. Fairfield Estate in the Parish of St. James.*

- b) In relation to paragraph 2) a) the Applicant will seek the following Administrative Orders:
  - i) An order of Certiorari to quash the Order granted on 6 September 2022 pursuant to Section 21 of the Cybercrimes Act 2015 in an application made by Detective Constable Julian Frazer for a Production Order as varied on 18 November 2022;
  - ii) Damages;
  - iii) Further and such other relief as this Honourable Court deems fit; and
  - iv) Costs.
- 3) The Applicant is granted interim relief as follows:
  - a) A stay of execution of all proceedings pursuant to the Order granted on 6 September 2022 pursuant to Section 21 of the Cybercrimes Act 2015 in an application made by Detective Constable Julian Frazer for a Production Order and Varied on 18<sup>th</sup> November 2022; and
  - b) An order of Prohibition to restrain the Parish Court Judge of the parish of St. James, or any other Parish Court Judge of the island of Jamaica, from granting or executing any proceedings in furtherance of the Production Order.
- 4) Costs of the Application to be costs in the claim.
- 5) Such further or other relief as this Honourable Court may deem just.

The grounds on which the Applicant is seeking the orders are as follows:

- 1) The Application has sufficient interest in the matter as required by Civil Procedure Rule (CPR) 56.2 (1) to wit an order has been made by the Parish Court Judge against the Applicant compelling her to produce all the information of her cellular phone, that:
  - a) Deprives her of her right to privacy, right to informational privacy and freedom of expression; and right to due process; and
  - b) Exposes her to criminal sanction if she fails to comply with the order of the Court.
- 2) The CPR 56.3 provides that the Applicant must first obtain the leave of Honourable Court before applying for judicial review.
- 3) The application has been made promptly with respect to the date that the Order was varied i.e 18 November 2022 but the application is, however, outside the prescribed time for a challenge to the original order as same was made 6 September 2022.
- 4) The Applicant did attempt to challenge the original by filing an application on 23 November 2022, however that application could not proceed and was withdrawn due to a failure to comply with CPR 56, which said was not discovered until 15 December 2022 which after the period prescribed for filing an application for leave to apply for judicial review;
- 5) There is no alternative remedy available to the Applicant if leave is refused the Applicant's right will be substantially prejudiced. The Applicant before approaching this Honourable Court sought audience before the Parish Court Judge with a view to having the order discharged. That application was refused. While the Parish Court Judge did vary the order, the effect of the variation was rendered nugatory

because at all material times the police will have access to all the personal and confidential data of the Applicant without any constraints or safeguards;

- 6) The decision which the Applicant is challenging is *ultra vires*, an abuse of power and was wholly irrational and unreasonable when regard is had to the nature and the provisions of the Cybercrimes Act and the Charter of Fundamental Rights and Freedoms;
- 7) The Applicant's allegations are serious as they involve breaches to her constitutional rights afforded in the Charter of Fundamental Rights and Freedoms;
- 8) The Applicant has arguable grounds for review and a realistic prospect of Success in that;
  - a) The Parish Court Judge acted *ultra vires in* making a production order under section 1 (2) of the Cybercrimes Act when she made an order for the production of "any data" which in effect is an order for the production of all data on the cellular phone.
    - i) The power to make a production order only arises where there is an application for "specified" information. There was no application for "specified" information.
    - ii) The Parish Court Judge only has the power to make a production order for specific data and not general data.
    - iii) In the absence of specified data being identified by the Constable in Parish Court Judge could not and failed to make a determination as to whether the information being sought is reasonably required for the purpose of a criminal investigation.



- b) The Parish Court Judge acted *ultra vires* when she made an order to produce cell site data.
- c) The Parish Court Judge acted *ultra vires* when she granted an application for an ancillary order without complying with section 21 (7) (a) of the Cybercrimes Act to wit she failed to describe the data or other computer output to which it relates.
- d) The Parish Court Judge failed to consider relevant matters, to wit:
  - i) The Parish Court Judge failed to consider that there is now a Data Protection Act that was gazetted on December 1, 2021 that constrains how the Constable can process personal data, in particular, the third data processing standard that mandates personal data shall only be processed where it is adequate, relevant and limited to what is necessary for the purposes for which they are processed. Giving the Constable access to all the personal data on the cellular phone for as long as the Constable deems necessary is disproportionate and necessary intrusion of the information privacy rights of the Applicant, for the purpose of processing.
  - ii) There is no evidence on the face of the said Order that the Court considered the statutory obligations imposed upon the tribunal set out in section 21 (8)(a) of the Cybercrimes Act 2015 specifically:
  - iii) the extent and nature of any other information, in addition to the data or computer output in question, to which the key is also a key;
  - iv) and adverse effect that complying with the order might have on any lawful business carried on by the person to whom the order is addressed; and

*(a) required such production as is proportionate to what is sought to be achieved, allowing, where appropriate, for production in such manner as would result in the putting of the*

*information in intelligible form other than by disclosure of the key itself.*

- v) The said Order failed to take into account any likely contents of the iPhone which should be excluded on the basis that they are privileged documents or confidential documents which have nothing to do with the criminal investigation into the death of Gabriel King and which disclosure could have deleterious effect of the Applicant and third parties;
  - vi) The said Order failed to take into account the fact that the Applicant now enjoys a right to information privacy that is guaranteed by the Charter of Fundamental Rights and Freedoms and that any restriction of that ought to be demonstrably justified, in accordance with the law, proportionate and necessary;
  - vii) The said Oder failed to take into account the likely irreparable damage the Applicant may suffer as a result of the intrusion into her privacy.
- e) The Parish Court Judge failed to put in place or consider safeguards contemplated by the statute, to wit;
- i. That the said Order failed to name the persons who would view the data, specify the method of extraction and by whom;
  - ii. The said Order is in wider terms than is necessary and justifiable to achieve the object of the order which is to identify the unknown assailants guilty of the murder of Gabriel King
  - iii. That the said Order does not take into account many adverse effect that complying with the Order might have on any lawful business carried on by the Applicant;

- iv. The said Order fails to specify the number of persons who will have access to the key and does not specify the necessity for the persons to have access purpose of enabling the data concerned to be accessed or put into intelligible form;
- f) The Parish Court Judge acted with procedural impropriety and failed to discharged her duty to act fairly when she refused the application of Amoi Leon-Issa herein to have the ex parte application, the affidavit in support and its supporting documents (if any), of the Constable filed in support of the production order served on the Application herein; and
- g) The act of the Parish Court Judge in ordering the production of information that did not reside on the cellular phone was oppressive and manifestly unfair especially in circumstances where failure to comply with the order could lead to the imprisonment of the Applicant herein by virtue of the statute and in circumstance where a penal notice was attached to the said production order.

**[4]** The application was heard on the 30<sup>th</sup> day of March 2023 and the decision reserved until the 26<sup>th</sup> of April 2023.

### **Applicant's Submissions**

**[5]** It was the submission of the Applicant that she has sufficient interest in the application for leave to apply for judicial review as it concerns orders that not only involves an infringement of her privacy rights but also non-compliance of which may result in legal proceedings for obstruction or contempt. She also argued that there is no other remedy available to her as she exhausted her avenues of relief in the court below with the grant of an order by the learned Parish Judge to vary or set aside the Production Order. This decision, she explained, can neither be appealed as it was not a judgment pursuant to section 2 of the Judicature

(Appellate Jurisdiction) Act, nor can further variation be sought to provide greater protection of her rights. Further, she argued that she did not delay in bringing the application to the Court as the order and variation order were made the 6<sup>th</sup> September 2022 and 18<sup>th</sup> November 2022, respectively, and that the filing of the application was made on the 23<sup>rd</sup> November 2022.

[6] On the question of whether the threshold has been met in the matter for the grant of leave for judicial review Counsel cited the case of **Satnarine Sharma v Brown-Antoine and others** (2006) 69 WIR 379 where Lord Bingham and Walker set out the threshold test for leave for judicial review as being an arguable ground for judicial review having a realistic prospect of success. Counsel also relied on the case of **Hon. Shirley Tyndall, O.J.. et al v Hon. Justice Boyd Carey (Ret'd) et al** Claim No 2010 HCV 00474, decided 12<sup>th</sup> February 2010 which defined an arguable ground with a realistic prospect of success as one where the ground is not fanciful or frivolous and is not synonymous with an arguable ground with a good prospect of success or real likelihood of success.

[7] It was the submission of Counsel for the Applicant that there is real prospect of succeeding in this matter. Counsel based his submission on the following:

- i. that the Parish Court Judge acted ultra vires in making the Production order and the ancillary order of “any data’ under section 21(2) and 21(7)(a) of the Cybercrimes Act, which was in effect, an order for the production of all data on the cellular phone. He submitted that the Parish Court Judge only had the power to make a Production Order for specific data and not general data.
- ii. He also argued that this power to make a Production Order only arises if there are specific factual circumstances met under section 21 of which only two elements were present in the instant case, that is, a criminal investigation and a written application by a constable. He submitted that,

given there was no disclosure, the Applicant was disadvantaged as the evidence submitted which led to the Production Order being granted.

- iii. Counsel further contended that even in the event there was a written application, it could not have specified the data which the Jamaica Constabulary Force (JCF) had a reasonable belief existed on the cellular phone as no specified data was stated in the order. He submitted that the Parish Court Judge was not in a position to determine if the information was reasonably required for the criminal investigation.
- iv. It was argued that on the face of the order and in the absence of the application and the supporting affidavit and documents, the conclusion to be reached is that the learned Parish Court Judge failed to take into consideration matters that were prescribed by the Cybercrimes Act.
- v. Counsel's final submissions was that on the face of the order and the affidavit of Ms. Janelle Carr, there is no evidence, or an indication that the JCF implemented any safeguards as prescribed by section 21(14) to limit the intrusion of the state into the Applicant and other third parties privacy rights. Counsel further submitted that there was no action on the part of the Parish Court Judge to ascertain that safeguards were put in place.

**[8]** Counsel contended that there was procedural unfairness in the process by the refusal to disclose to the Applicant the application and supporting documents that formed the basis of the order restricting the Applicant's right to privacy. It was argued that there was no evidence before the Court that the JCF or any representative of the state objected to the disclosure nor was there evidence to ground public interest immunity, and as such it was submitted that disclosure ought to have been made to ensure procedural fairness.

**[9]** He further argued that given the nature of the interests affected by the decision of the Parish Court Judge, that is, the constitutional right to privacy of communication and the Applicant's right to informational privacy, the Parish Court Judge was duty

bound to put in place additional procedural safeguards to ensure the attainment of fairness.

- [10] On the argument of whether the leave if granted should act as a stay of proceedings, Counsel submitted that unless restrained, the JCF will take steps against the Applicant.

### **Respondents' Submissions**

- [11] The Respondents' position was that the Applicant's filing of the application on February 6, 2023 for leave to apply for judicial review, five months after the impugned decision, was an undue and inexcusable delay. It was argued that the Applicant should have applied by the latest December 6, 2023 and as such she was out of time. It is submitted therefore that delay being a discretionary bar to obtaining relief from judicial review, the Applicant should not be granted leave.
- [12] It was also contended by the Respondents that if leave is granted to apply for judicial review of the order of the Parish Judge, the criminal investigation into the murder of GK would be compromised as the data on the Applicant's phone is reasonably required for this investigation. It was also argued that in the interest of good administration, public bodies ought to be able to make decisions with some finality and not be subject to uncertainty as to when or whether their decisions will be set aside by a Court.
- [13] It was further submitted that there are no arguable grounds with a realistic prospect of success that would meet the threshold test. It was argued that the decision of the Parish Judge was reasonable and fair having regard to all the circumstances. Counsel stated that the evidence was clear that the Parish Judge carefully considered the correct factors and law and crafted an order which would safeguard the Applicant's Constitutional Rights while furthering the objectives of the Cybercrimes Act. It was also noted that the applicant failed to provide any evidence of the Parish Judge considering material which was extraneous to the application in the Parish Court. It was therefore submitted that the decision of the Parish Court

Judge could not be considered irrational as the law and facts enabled the Judge to make such a decision. It was also argued that there was no unfairness resulting from the decision having regard to the material considerations and the fact that the Court was empowered to grant the order once it is satisfied the data was reasonably required for the purpose of the criminal investigation.

**[14]** As to the granting of an order of certiorari, it was submitted that for such an order to be granted, the applicant would have to show that there was an unlawful exercise of the power by the 1<sup>st</sup> Respondent pursuant to the Cybercrimes Act. It was submitted that the Applicant failed to show that the 1<sup>st</sup> Respondent acted outside of her powers.

**[15]** Finally, it was submitted that a grant of the Interim Relief would result in a pause in the investigation of the gruesome murder of a child and there were risks involved in allowing more time to pass. The Court was asked to take judicial notice of the fact that the Applicant was overseas at time the application had been made before the Parish Judge for a discharge or variation of the Production Order. It was submitted that, based on this fact, the Applicant is not entitled to the grant of the stay of execution.

**[16]** As it relates to the prohibition order it was argued that the Applicant would be required to show the Court that there is likely to be a breach of natural justice. It was submitted that there was no evidence provided that the Court could grant such an order. It was submitted that the effect of the order would be to restrain Judges of the Parish Court.

## **ISSUES**

**[17]** There are three main issues to be decided in this cases namely: -

- a. Whether the Applicant should be granted an extension of time to file the application for leave to apply for judicial review?

- b. Whether the first Respondent acted ultra vires the Cybercrime Act in granting the Production Order?
- c. Whether disclosure should be granted to the Applicant of the evidence that formed the basis of the Production Order?

## **The Law**

### **The Civil Procedure Rules**

**[18]** The Civil Procedure Rules 2002 (CPR) dictates the procedure to be adopted when applying for judicial review. In seeking to apply for judicial review the applicant must first satisfy the Court that they fall into the category of persons that have been aggrieved. **Rule 56(1)** states that:-

An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application. (2) This includes –

- (a) any person who has been adversely affected by the decision which is the subject of the application;
- (b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);
- (c) any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;
- (d) any statutory body where the subject matters falls within its statutory remit;
- (e) any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application; or 291



Administrative Law (f) any other person or body who has a right to be heard under the terms of any relevant enactment or the Constitution.

- [19] Prior to filing a Claim for judicial review the Applicant must receive leave from the Court. Rule 56 (3) lays down the procedure for applying for leave for judicial review. In this case the Applicant had failed to file the application for Judicial review within a three month period of the grant of the original Production Order. In light of that, she has filed an application for extension of time. The Applicant would have to satisfy **Rule 56** (6) of the CPR before an extension can be granted. Rule 56 (6) (1) and (2) states that:

***56.6 (1)** An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose*

*(2) However the court may extend the time if good reason for doing so is shown.*

### **What is the standard by which leave is to granted?**

- [20] The test that must be satisfied when applying for leave for judicial review was set out in in the Judicial Committee of the Privy Council in success **Sharma v. Brown – Antoine** (2006) P C Appeal No. 75 of 2006; In Sharma (supra) the Chief Justice had sought to challenge a decision to prosecute him on the basis that it was unfair and /or an abuse of the process of the Court. Lords Bingham and Walker at paragraph 14(4) of the decision stated that:-

*“787: The ordinary Rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and it is not subject to a discretionary bar such as delay or an alternative remedy, - R v. Legal aid Board, ex parte Hughes (1992) 5 Admin L.R. 623 at 628, Fordham, Judicial Review Handbook (4<sup>th</sup>Edn, 2004), p. 42. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its. Application (Our Emphasis.*

*It is not enough that a case is potentially arguable – an applicant cannot **plead** potential arguability to: justify the **grant** of leave **to issue** proceedings upon a speculative basis which it is hoped the **interlocutory processes of the court may strengthen**” Matalulu v Director of Public Prosecutions (2003) 4 LRC 712 at 733.” (our Emphasis)*

- [21] Mrs. Dunbar- Green JA (Ag), as she then was, in the case of **Private Power Operators v Industrial Disputes Tribunal et al** [2021] JMCA Civ.18 reinforced the same position as to the course to be adopted in cases of judicial review when she stated at paragraphs 70 of the judgement:

*It is well established that the review court is to fix its gaze on questions of lawfulness or unlawfulness of the decision, that is, matters primarily pertaining to jurisdiction and procedure, inclusive of fairness of the IDT's processes, reasonableness of its decision in the Wednesbury sense and its adherence to the rules of natural justice. This would, necessarily, involve an assessment of whether the IDT's decision was arrived at based on errors of Law.*

- [22] Justice Mangatal (as she then was) in the case of **Digicel (Jamaica) Ltd v. The Office of Utilities Regulation** (2012) JMSC Civ. 91 sought to give some perspective as to how the Court should approach the issue of whether leave should be granted. She stated at paragraphs 20:

*Judicial Review is the Court's way of ensuring that the functions of public authorities are carried out in accordance with the law and also that these bodies are held accountable for any abuse of power or unlawful or ultra vires acts.*

## **Analysis**

**Whether an extension of time should be granted to the Applicant to file the application for leave to apply for judicial review?**

- [23] The Applicant filed an application for leave to apply for judicial review on the 6<sup>th</sup> of February 2023. The administration order that was being challenged is the Production Order granted by the first Respondent. The original Production Order is dated the 6<sup>th</sup> of September 2022, however, that order was later amended on the 18<sup>th</sup> of November 2022.

**[24]** In computing time for leave to apply for judicial review, the application filed on the 6<sup>th</sup> of February 2023 would have been outside of the three- month time period as it relates to the original Production Order. The Applicant, however, is taking issue with the amended order that had been granted on the 18<sup>th</sup> of November 2022. I find that the Applicant does not require an extension to apply for leave for judicial review, as the three- month period had not expired as it relates to the amended Production Order.

### **Whether the first Respondent acted ultra vires?**

**[25]** Counsel for the Applicant submitted that the first Respondent, acted ultra vires when she granted the Production Order. The issue raised by Counsel for the Applicant was that the amended Production Order speaks to the accessing of 'any data' from the iPhone belonging to the Applicant. This he submitted, was contrary to the Cybercrimes Act (the Act), that requires specificity in Production Orders.

**[26]** In addressing this issue I considered three points namely:-

- a. Did the first Respondent have jurisdiction to grant a Production Order?
- b. What is to be included in a Production Order?
- c. Are there safeguards that can be implemented to protect the information contained in the iPhone of the Applicant that is not related to the Production Order?

### **Can a Parish Court Judge grant a Production Order?**

**[27]** The first issue to be decided is whether or not a Resident Magistrate (Parish Court Judge) can grant Production Orders? Section 21 of the Cybercrime Act gives authority to Parish Court Judges to grant Production Orders. Section 21 (1) and (2) states that :-

*(1) A Resident Magistrate, if satisfied on the basis of an application made by a constable, that any data or other computer output specified in the application is reasonably required for the purpose of a criminal investigation or criminal proceedings, may make an order under subsection (2).*

*(2) An order under this subsection may require a person in possession or control of the data or other computer output to produce it in intelligible form to the constable.*

It is clear, based on this Section of the Act that the first Respondent did have jurisdiction to grant the Production Order.

### **What is to be included in a Production order?**

**[28]** The second issue that arises is what should be included in Production Orders.? This query is answered by Section 21 (1) of the Act which states that Production orders should :-

- a. include any data or other computer output specified in the application.
- b. be reasonably required for the purpose of a criminal investigation or criminal proceedings.

The Act seems to require some form of specificity in the order as it cannot be at large. The reference of the term 'any data' must be related to the criminal investigation or criminal proceedings. In this case the order that was granted by the first Respondent was for :-

*any communication data or other data contained on the cellular phone by making written disclosure of any key that is in her possession or control that is necessary to obtain access to and/or put in intelligible form communication data or other data for the purpose of a criminal investigation into the death of Gabriel King which occurred on the 13<sup>th</sup> day of January 2022 in the parish of St. James.*

I find that the order made by the learned Parish Court Judge was in keeping with the wording of the Act. In addition, the words 'any data' was narrowed by reference to a specific criminal investigation which was detailed in the order.

**[29]** In granting Production Orders, Parish Court Judges are duty bound to include in the orders specifics as to the telephone or computer that the data is to be extracted from as well as the manner in which the production is to be made. These are referred to in the Act as ancillary claims. Section 21(6) of the Act states that:-

*The ancillary order shall-*

*(a) describe the data or other computer output to which it relates;*

*(b) specify the time by which the order is to be complied with, being a reasonable time in all the circumstances; and*

*(c) set out the production that is required by the order and the form and manner in which the production is to be made,*

I find that the amended production Order did comply with Section 21 (6) of the Act. The order stated:-

- b. The phone that the data was to be extracted from.
- c. The date by which the information should be provided.
- d. The person the information was to be relayed to.
- e. That it should be in intelligible form.

### **What safeguards are there to protect third parties?**

**[30]** The Act has built in safeguards which limits the orders that can be granted by the Parish Court. Section 21 (8) states that :-

*In granting an ancillary order, the Resident Magistrate shall-*

*(a) take into account-*

- (i) *the extent and nature of any other information, in addition to the data or computer output in question, to which the key is also a key;*
- (ii) *any adverse effect that complying with the order might have on any lawful business carried on by the person to whom the order is addressed;*

**[31]** It is clear that the first Respondent had addressed her mind to the safeguards required by the Act when she granted the amended Production Order. The first Respondent had ordered that an Attorney, as well as computer expert, appointed by the Applicant, could be present at the time that the information was being extracted from the iPhone.

**[32]** Once the data is retrieved from the iPhone, further safeguards were inserted in the order as to who was to examine the data, and the manner in which the data was to be preserved. This was in keeping with Section 21 (14) of the said Act which states that :-

*A constable who obtains an ancillary order shall ensure that such arrangements are made as are necessary for securing that-*

*( a) a key produced in pursuance of the order is used to obtain access to, or put into intelligible form, only data or other computer output in relation to which the order was made; 29*

*b) every key produced in pursuance of the order is stored, for so long as it is retained, in a secure manner, and any records of such key are destroyed as soon as no longer needed to access the data or other computer output concerned or put it into intelligible form; and*

*(c) the number of-*

*(i) persons to whom the key is produced or otherwise made available; and*

*(ii) copies made of the key, is limited to the minimum that is necessary for the purpose of enabling the data or other computer output concerned to be accessed or put into intelligible form.*

The order granted by the first Respondent was that :-

*Every key produced in pursuance of this Order shall be stored, for so long as it is retained, in a secure manner and any records of such key shall be destroyed as soon no longer needed to access and/or put into intelligible form the said communication data or other data. The number of persons to whom the key is produced or otherwise made available, and any copies made thereof, shall be limited to the minimum that is necessary for the purpose of enabling the communication data or other data to be accessed or put into intelligible form.*

**[33]** Counsel for the Applicant, submitted that there was a concern about possible leaks of the information extracted from the iPhone of the Applicant. He referenced several articles that had been published in various news outlets after the incident. He urged the Court to consider whether or not the information extracted from the iPhone could be secured. The concerns of counsel, I find, are without merit as a constable can be charged with an offence if he fails to secure the information which is the subject of the Production Order. This is stated in Sections 21 (15) of the Act.

**[34]** I find that there is no realistic prospect in arguing that the Production Order was ultra vires for the following reasons:-

- a. the amended Production Order is specific as to the data that is to extract from the iPhone.
- b. the amended Production Order includes safeguards that would protect the information that is to be extracted from the iPhone, the manner the information is to extracted, and the manner in which it is to be preserved.

- c. the Production Order excluded data relating to third parties as it specified that it relates to only information concerning the murder of GK.
- d. the Production Order is in keeping with the wording of the Act.

I do not find that the first Respondent exceeded her jurisdiction when she granted the amended Production Order.

### **Was the request reasonable?**

**[35]** The Applicant had submitted that the request made by the police for a Production Order was unreasonable in the circumstances of this case. The test for reasonableness was laid down in the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 233** where Lord Greene stated at pages 233-234 that:

*The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favor of the local authority, it may be still possible to say that, although the local authority has kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority... but as a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in them.*

**[36]** The allegations in this case are that :-

- a. The Applicant was in a motor vehicle with the deceased.
- b. The deceased had been handed the iPhone by the Applicant.
- c. The Applicant made a report that her motor vehicle had been stolen with GK abode.



- d. The motor vehicle was later found and when it was searched the body of the deceased GK was found.
- e. The iPhone in question was found inside of the said motor vehicle.

**[37]** The Applicant would have been the last identified person to have seen GK alive. There was a report made by her about her motor vehicle being stolen, which would have to be investigated by the police. What is of importance is the fact that the iPhone, belonging to the Applicant was found in the car along with the body of the GK. The evidence of the Applicant is that she had given the iPhone to GK for him to occupy his time. The iPhone may have captured information from the time the Applicant alleged that her motor vehicle had been stolen, to the time the body of GK was recovered in the said motor vehicle. It would be reasonable under the circumstances for the contents of the iPhone to be examined. These allegations would lend itself to a Production Order being granted so that the contents of the iPhone may be examined. It would therefore not be unreasonable for the said order to be granted.

**Whether there should be disclosure of documents during the course of investigation?**

**[38]** The Applicant has taken issue with the fact that the affidavit evidence provided to the first Respondent, which led to the learned Judge issuing the Production Order had not been disclosed to her. Production Orders, as indicated in the Cybercrime Act, are requested by police constables to Resident Magistrates (Parish Court Judges) on ex parte applications.

**[39]** The question is whether information gathered prior to a person being charged ought to be disclosed? There has been a number of cases that have opined on whether disclosure is to be facilitated prior to a person being charged. In the case of **Independent Commission of Investigation v Tabannah (Everton) and another** [2019] JMCA Civ 15, a number of police officers filed a claim for judicial

review challenging the decision of the Independent Commission of Investigation (Indecom) to deny their request for disclosure of information prior to their arrest. Brooks JA, as he then was, opined at paragraph 41 stated that :-

*The prosecution now routinely discloses to the defence all the material that it has in its possession. The practice only obtains, however, after a person had been charged with an offence. There was no practice of providing material to a person who might be charged with an offence. A proposal that such disclosure should take place would be impractical. Such a person would be no more entitled to the material than would any other member of the public. There would be no basis for disclosing to the public anything other than a summary of the material collected during an investigation. That practice referred to prosecutions initiated by police investigations. The Act also did not impose any greater obligation to disclose than a police officer would have, prior to charging a person.*

[40] In the case of **R v Gills** 1994 ABCA 212 a case from Canada, the appellant was acquitted of a charge under s. 253(b) of the Criminal Code of operating a motor vehicle with more alcohol in his system than is permitted by law. The Provincial Court Judge had determined that the certificate of analysis should not be admitted into evidence because the police officer had not allowed the appellant to read the breathalyzer readings as his breath samples were being analyzed. The Crown appealed the acquittal to the Summary Conviction Appeal Justice. The Crown's appeal, was allowed, the Court of Appeal directed that the certificate of analysis be admitted into evidence, and remitted the matter back to the Provincial Court for completion of the trial. It is from this decision that the appellant appeals. Fraser CJA stated at paragraph 7 of his decision that :-

*Further, a person suspected of having committed a criminal offence has no right to disclosure unless and until he has been charged with a criminal offence. The reason is that disclosure is designed to ensure that an accused knows the case he has to meet. Unless and until he has been charged,*

*there can be no conviction and there is no case for him to meet. Here no charges had been laid at the time that the appellant took the breathalyzer test.*

- [41] The murder of GK is currently being investigated by the police. There is no evidence that the Applicant is to be charged for any offence. There is no duty on the crown to disclose any material to the Applicant prior to a charge being laid against her. There is no duty on the Respondent, the police or the crown to make any disclosure of any material prior to the Applicant being charged.

## **Conclusion**

- [42] The Applicant has failed to satisfy the test for leave to be granted for judicial review. The Production Order granted by the first Respondent was not ultra vires. The amended Production Order has a number of orders that provides safeguards that protects information concerning third parties not associated with the investigations. The Production Order allows for the extraction of the information from the iPhone to be undertaken in the presence of the Applicant's Attorney as well as an approved computer expert of the Applicant's choosing. The law itself places safeguards in place wherein the relevant police officer would be charged and placed before the Court if any information, extracted from the iPhone is disclosed to the public. The Production Order granted by the first Respondent is not unreasonable under the circumstances.

## **[43] Order**

1. The application for leave to apply for judicial review is denied.
2. Time is extended until the 31<sup>st</sup> July 2023 for the Applicant to comply with the Production Order.
3. No order as to cost.