



[2026] JMFC Full 02

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU2021CV04561

CORAM: THE HONOURABLE MRS. JUSTICE L. SHELLY WILLIAMS

THE HONOURABLE MRS. JUSTICE T. HUTCHINSON SHELLY

THE HONOURABLE MRS. JUSTICE T. MOTT TULLOCH-REID

IN THE MATTER OF the Jamaica (Constitution) Order
in Council 1962

AND

IN THE MATTER OF the application pursuant to
section 19 of the Jamaica (Constitution) Order in
Council 1962

BETWEEN	JOSEPH PATTERSON	1ST CLAIMANT
AND	DAVID THOMPSON	2ND CLAIMANT
AND	ABBEY-GAYLE THOMPSON	3RD CLAIMANT
AND	KEVAUGHN HARRIS	4TH CLAIMANT
AND	ATTORNEY GENERAL OF JAMAICA	DEFENDANT

Mr. Hugh Wildman and Mr Duke Foote instructed by Wildman and Company, for the Claimants

Ms. Taniesha Rowe-Coke instructed by the Director of State Proceedings for the Defendant

Heard: June 10th, 2024, and 16th of April 2026

CONSTITUTIONAL LAW – The Jamaica (Constitution) Order in Council, 1962, section 49 – Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, sections 13 (3)(e) and (f) – Disaster Risk Management Act, sections 26, 27 and 52 – Public Order Act, sections 6,11 and 12

SHELLY WILLIAMS SPJ, HUTCHINSON SHELLY AND MOTT-TULLOCH REID, JJ

Background

- [1]** The Claimants filed a Fixed Date Claim Form, accompanied by an affidavit in support, seeking several declarations arising from alleged breaches of their Constitutional Rights. The affidavit of Mr. Joseph Patterson was sworn on behalf of the other three Claimants. He averred that he was the leader of a political movement known as the United Independents Congress (UIC), formed in 2019.
- [2]** Mr. Patterson stated that he was dissatisfied with the Government's response to the COVID-19 pandemic and, as a result, he and other members of UIC held a public march in Mandeville on September 11, 2021. His affidavit further stated that during the march, he spoke with the police and that no objections were raised.
- [3]** Mr. Patterson, along with his followers, decided to undertake another walk on September 22, 2021, in the parish of Kingston. The walk was scheduled to start at the Ward Theatre and end at Gordon House. He testified that the police assaulted several of his members, including the 2nd Claimant, at the Ward Theatre. He also stated that the members continued their walk to Gordon House; however, they were halted by police who had set up barricades along the route. The walk was then cancelled. On the way back from Gordon House, the 4th Claimant was assaulted by police, and the 3rd Claimant was arrested.

[4] His affidavit stated that when returning to Ward Theatre, he, Mr. Patterson, was assaulted and put into a police vehicle. He sustained a sprained finger and a twisted foot due to police actions. Later, he was taken to the Central Police Station, where he was charged with violating the **Public Order Act** and the **Disaster Risk Management Act**, as well as resisting arrest. While in custody, he also received a summons for breaches of the **Disaster Risk Management Act** and the **Public Order Act** related to marches in Mandeville and Kingston.

[5] The Claimant filed a Fixed Date Claim Form, which was later amended on the 25th of January 2022. The Amended Fixed Date Claim Form sought the following declarations: -

1. A Declaration that **section 26 (2) of the Disaster Risk Management Act**, and the amendments thereunder and thereto, are in conflict with **section 20 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**, rendering the said **section 26(2) of the Disaster Risk Management Act** and the amendments thereunder and thereto, illegal, null and void and of no effect.
2. A Declaration that the purported restriction of the Claimants' right to freedom of movement, as guaranteed under **section 13 (3) (f) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011** by the Defendant, through the amendments and regulations promulgated under **section 26(2) of the Disaster Risk Management Act**, is illegal, null and void and of no effect.
3. A Declaration that the purported restriction of the Claimants' right to freedom of expression, as guaranteed under **section 13 (3) (e) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011** by the Defendant, through the amendments and regulations promulgated under **section 26(2) of the Disaster Risk Management Act**, is illegal, null and void and of no effect.

4. A Declaration that the purported restriction of the Claimants' right to freedom of peaceful assembly and association, as guaranteed under **section 13 (3) (e) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011** by the Defendant, through the amendments and regulations promulgated under **section 26(2) of the Disaster Risk Management Act**, is illegal, null and void and of no effect.
5. A Declaration that any restriction on the Claimants' right to freedom of movement, as guaranteed under **section 13 (3) (f) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011** must comply with the provisions of **section 49 of the Constitution of Jamaica ("Constitution")**.
6. A Declaration that any restriction on the Claimants' right to freedom of expression, as guaranteed under **section 13 (3) (c) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011** must comply with the provisions of **section 49 of the Constitution**.
7. A Declaration that any restriction on the Claimants' right to peaceful assembly and association, as guaranteed under **section 13 (3) (e) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011** must comply with the provisions of **section 49 of the Constitution**.
8. A Declaration that the provisions of the **Disaster Risk Management Act** and in particular, **section 26(2)** and the amendments thereunder and thereto, fail to meet the test of demonstrably justified in a free and democratic society, as the measures enacted under the **Disaster Risk Management Act** are already provided for under **section 20 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**, rendering the said provisions of **section 26(2)** and the amendments thereunder and thereto, illegal , null and void and of no effect.

9. A Declaration that the failure of the Defendant to invoke the provisions of **section 20 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011** by having the Governor General proclaim a State of Emergency, in restricting the Claimants' right to freedom of expression, movement and peaceful assembly and association, as guaranteed under **section 13 (3)(c)(f)(e) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**, renders the measures implemented by the Defendant under **section 26(2) of the Disaster Risk Management Act** and the amendments thereunder and thereto. illegal, null and void and no effect.
10. Declaration that in the absence of a proclamation by the Governor General declaring a State of Emergency under **section 20 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**, actions taken by the Executive to control the outbreak of the Covid-19 pandemic under **section 26(2) of the Disaster Risk Management Act** and the amendments thereunder and thereto, are illegal, null and void and of no effect.
11. A Declaration that **sections 27(1) (b) and 52(b) of the Disaster Risk Management Act** are in conflict with **section 20 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**, rendering the said **sections 27(1) (b) and 52(b) of the Disaster Risk Management Act**, illegal, null and void and of no effect.
12. A Declaration that **section 26 (2) of the Disaster Risk Management Act** and the amendments thereunder and thereto, breach the Separation of Powers doctrine, which underpins the **Constitution**, in particular:
 - a. the Act, and the amendments thereunder and thereto, make no reference to the authority of Her Majesty's representative; namely, the Governor General, in the promulgation of orders

and/or regulations made pursuant to the Act and the amendments thereunder and thereto.

- b. make no reference or no provision for the intervention of Her Majesty or the Parliament of Jamaica, in any extension and/or renewal of the provisions of any order and/or regulation under the said Act and the amendments thereunder and thereto, and by focusing on the concentration of power to make such orders and/or regulations in a single Minister under the Act and the amendments thereunder and thereto.

13. A Declaration that **sections 6 and 12 of the Public Order Act** are in conflict with **section 13 (3) (f) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**, which guarantees the right to freedom of movement, rendering the said **sections 6 and 12 of the Public Order Act**, illegal, null and void and of no effect.

14. A Declaration that **section 11 (b) of the Public Order Act** is in conflict with **section 13 (3) (f) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**, which guarantees the right to freedom of movement, rendering the said **section 11 (b) of the Public Order Act**, illegal, null and void and of no effect.

15. A Declaration that **sections 6 and 12 of the Public Order Act** fail to meet the test of demonstrably justified in a free and democratic society, and are in breach of **section 13 (3) (f) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**, which guarantees the right to freedom of movement, rendering the said **sections 6 and 12 of the Public Order Act** illegal, null and void and of no effect.

16. A Declaration that **section 11(b) of the Public Order Act** fails to meet the test of demonstrably justified in a free and democratic society and is in breach of **section 13 (3) (f) of the Charter of Fundamental Rights and**

Freedoms (Constitutional Amendment) Act 2011, which guarantees the right to freedom of movement, rendering the said **section 11(b) of the Public Order Act** illegal. null and void and of no effect.

17. An Order striking out **section 26(2) of the Disaster Risk Management Act** and the amendments thereunder and thereto, as breaching the Constitution aforesaid, and an order for an assessment of damages against the Defendant in favor of the Claimants.

18. An Order striking out **section 27(1) (b) and 52 (b) of the Disaster Risk Management Act** and the amendments thereunder and thereto. as breaching the **Constitution** aforesaid and an order for an assessment of damages against the Defendant in favor of the Claimants.

19. An Order striking out **section 6 and 12 of the Public Order Act** and the amendments thereunder and thereto, as breaching the **Constitution** aforesaid and an order for an assessment of damages against the Defendant in favor of the Claimants.

20. An Order striking out **section 11 of the Public Order Act** and the amendments thereunder and thereto, as breaching the **Constitution** aforesaid, and an order for an assessment of damages against the Defendant in favor of the Claimants.

[6] The Defendant filed four affidavits in response to the Amended Fixed Date Claim Form. These affidavits were from Deputy Superintendent Oral Henry, Sergeant Omar Madden, and Senior Superintendent Steve McGregor. Senior Superintendent McGregor stated that he was the officer in charge of a team engaged in special operational duties within the Kingston Central police division. He travelled to the Ward Theatre on September 22, 2021, and observed a large gathering of people. He spoke with the first-named Claimant, Mr. Joseph Patterson, who identified himself as the group's leader. His testimony is that he informed Mr. Patterson that the gathering was unlawful because no permission

had been granted. He advised Mr. Patterson that he was in violation of the **Disaster Risk Management Act** and the **Public Order Act**.

- [7] Senior Superintendent McGregor's evidence is that he pulled out a bullhorn and instructed the crowd to disperse. Mr. Patterson then informed the crowd that they would march toward Gordon House, and they began marching toward Church Street. Barriers had been erected to prevent anyone from marching to Gordon House. Mr. Patterson again addressed the crowd in defiance of his instructions, and he was arrested for breaching the **Disaster Risk Management Act** and the **Public Order Act** and taken to Kingston Central Police Station. The officer denied assaulting Mr. Patterson.
- [8] Sergeant Omar Madden averred that he was a member of the special team led by Senior Superintendent McGregor. His affidavit supported the events described by the Senior Superintendent. He also stated that he was the one who arrested Mr. Patterson that day and denied assaulting him during the arrest. The affidavit of the Deputy Superintendent was that he was at the Kingston Central Police Station, where he observed four persons in a room.
- [9] The final affidavit submitted on behalf of the Defendant was from Jacqueline Bisasor-McKenzie, the Chief Medical Officer of Jamaica. She outlined in her affidavit the threat posed by the COVID-19 virus, the research conducted both locally and internationally on the virus, and the measures taken to combat the pandemic.

THE ISSUES

- [10] The issues to be considered in this case, namely: -
- (i) Were the Claimants' rights to freedom of movement, peaceful assembly, and expression violated by **section 26(2) of the Disaster Risk Management Act**?

- (ii) In the event the rights to freedom of movement, freedom of peaceful assembly, and freedom of expression are breached, are the breaches proportionate?
- (iii) Does **section 26(2) of the Disaster Risk Management Act**, along with its amendments and related provisions, conflict with **Section 20 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**, thus rendering **Section 26(2)** and its amendments unconstitutional?
- (iv) Do **sections 27(1)(b) and 52(b) of the Disaster Risk Management Act** conflict with **Section 20 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**, rendering them illegal, null, and void, and of no effect?
- (v) Whether the enactment of **section 26(2) of the Disaster Risk Management Act** contravenes **Section 49 of the Constitution**, rendering it unconstitutional, null, and void
- (vi) Does **section 26(2) of the Disaster Risk Management Act** breach the separation of powers doctrine?
- (vii) Do **sections 6, 11(b), and 12 of the Public Order Act** conflict with **Section 13(3)(f) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**, and if so, should they be struck down as unconstitutional?
- (viii) Do **sections 6, 11(b), and 12 of the Public Order Act** conflict with **section 13(3)(f) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**, and if so, should they be struck down as unconstitutional?
- (ix) Should the Claim be referred for assessment of damages for the said breaches?

THE CLAIMANTS' SUBMISSIONS

- [11] The Claimants argued that the promulgation of the **Disaster Risk Management Act ("DRMA")**, especially **section 26(2)** and its amendments, directly conflicts with **section 20 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 ("Charter")**.
- [12] Counsel for the Claimants argued that the absence of a declaration of a State of Emergency by the Governor General led to a violation of **section 20 of the Constitution**. Counsel concluded that the failure to comply with **section 20 of the Constitution** in enacting the **DRMA** and associated Regulations/Orders made it unconstitutional. The Claimants also contend that such amendments could only be made under **section 49 of the Constitution**.
- [13] The Claimant argued that the DRMA does not satisfy the test established in **R v Oakes** [1986] 1 SCR 103. Counsel contended that **section 26(2) of the DRMA** and its amendments are not demonstrably justified in a free and democratic society, as required by **Oakes** and reiterated by the Chief Justice in **Julian Robinson v The Attorney General of Jamaica** [2019] JMFC Full 04. The Claimants' counsel argued that the provisions of the **DRMA** were unnecessary to address the pandemic, as existing laws already provided the government with the authority to control it. The laws cited by the Claimants included the **Public Health Act** and the **Emergency Powers Act**, the former of which allows the Minister to implement sweeping measures to control the spread of COVID-19.
- [14] Mr. Wildman's position was that the disputed sections of the **DRMA** and the amendments to it, as invoked by the State, limited the Claimants' rights under the **Charter**, specifically **sections 13(3)(e) (the right to freedom of expression)** and **13(3)(f) (the right to freedom of peaceful assembly and association)**. The Claimants argue that the State cannot meet the burden of proof, i.e., show, on a balance of probabilities and at a higher standard, that the provisions of the **DRMA** are clearly justified in a free and democratic society.

- [15] Counsel for the Claimants further argued that the measures enacted under the **DRMA** breached the Doctrine of separation of powers because the provisions in the Act conferred enormous powers on the executive that they would not otherwise have had but for the enacted legislation. He submitted that, during the enactment process, there was no compliance with the fundamental requirements of the separation of powers doctrine, a critical feature of the Jamaican Constitution. Reliance was placed on the authorities of **Moses Hinds v The Queen; Director of Public Prosecution v Jackson** [1977] AC 195 and **Director of Public Prosecution of Jamaica v Kurt Mollison** [2003] UKPC 6 in support of this position.
- [16] The Claimants were charged under **sections 6, 11, and 12 of the Public Order Act**. Mr. Wildman's position is that these provisions cannot stand as the Claimants' rights are enshrined and guaranteed under the **Constitution**. He submitted that the behaviour the Claimants engaged in during their demonstration was not in violation of any law warranting their arrest and charge, as the demonstration was in response to provisions of the **DRMA** and they were well within their rights to do so.
- [17] The Claimant's final position was that the provisions of the **Public Order Act** are pre-independence laws, even though they are saved, and that it is still necessary to align these provisions with those of the **Charter**. He argued that the Constitution is the supreme law and must take precedence over pre-existing law. The Claimants relied on the authority of **Collymore v Attorney General of Trinidad and Tobago** (1967) 12 WIR 5 in support of this position.

THE DEFENDANT'S SUBMISSIONS

- [18] Counsel for the Defendant argued that there are two State of Public Emergency ("SOPE") regimes: one under the Constitution and another under the **DRMA**. The Defendant maintained that they do not conflict and that the Government of Jamaica can choose which regime to invoke in response to a public emergency. Counsel

for the Defendant argued that the SOPE, as permitted under **section 20 of the Constitution**, is restrictive, whilst the **DRMA** offers a broader approach.

- [19] Counsel argued that there is no constitutional requirement for the Government's response to the COVID-19 pandemic to be through the SOPE mechanism in **Section 20 of the Constitution**. Counsel for the Defendant cited the cases of **Dominic Suraj and others v Attorney General of Trinidad and Tobago** and **Satyanand Maharaj v Attorney General of Trinidad and Tobago** [2022] UKPC 26 to support their position.
- [20] Counsel for the Defendant argued that if the Claimants' rights under **sections 13(3)(c), 13(3)(e), and 13(3)(f) of the Charter** were violated, then such a violation was demonstrably justified in a free and democratic society. Counsel for the Defendant argued that these rights, as outlined by the Full Court in **Maurice Tomlinson v The Attorney General of Jamaica & Ors.** [2023] JMFC Full 5, are not absolute. Mrs. Rowe Coke also noted that the Charter states that the protection of rights and freedoms is limited by the extent that they do not infringe upon the rights and freedoms of others.
- [21] Mrs. Rowe Coke acknowledged that the **DRMA** regulations enacted in response to the COVID-19 pandemic imposed substantial restrictions on movement in public spaces. However, counsel argued that none of the provisions in **Order No. 9 of the DRMA (Enforcement Measures) Order, 2021**, limited the right to peaceful assembly and association or freedom of speech, as individuals were still permitted to gather and express themselves, as long as they adhered to the specified numerical limits and maintained adequate social distancing.
- [22] Counsel for the Defendant argued that the government's response to combat the COVID-19 virus was based on sound scientific research. Additionally, given the modes of transmission and the fact that it was a highly infectious disease, the measures enforced were undoubtedly proportionate to the legitimate aim of curtailing and mitigating the disease's effects and saving lives.

LAW AND ANALYSIS IN RELATION TO CONSTITUTIONAL RIGHTS

[23] **Section 13 of the Constitution** guarantees several fundamental rights to all Jamaican citizens. **Section 13 of the Constitution** states that: -

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

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

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

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

(a) the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted;

(b) the right to freedom of thought, conscience, belief and observance of political doctrines;

c) the right to freedom of expression;

(d) the right to seek, receive, distribute or disseminate information, opinions and ideas through any media;

(e) the right to freedom of peaceful assembly and association;

*(f) the right to freedom of movement, that is to say, the right
(i) of every citizen of Jamaica to enter Jamaica; and*

*(ii) of every person lawfully in Jamaica, to move around
freely throughout Jamaica, to reside in any part of
Jamaica and to leave Jamaica;*

[24] The preamble to the rights states that these rights may be limited. The preamble notes that rights must be interpreted as free, 'save only as may be demonstrably justified in a free and democratic society.' The test for limiting rights is referred to as proportionality. The Canadian case of **R v Oakes** [1986]1 SCR 103 established the issues to be addressed in deciding whether a fundamental right should be curtailed, which are:

1. The objective which the measure or measures responsible for limiting a **Charter** right are designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom.
2. Once a sufficiently significant objective is recognised, the party seeking to limit the **Charter** right must show that the means chosen are reasonable and demonstrably justified. The courts will be required to balance the interests of the persons or groups whose rights are or are likely to be infringed, with those of society.

[25] In the Full Court decision of **Julian J Robinson v Attorney General** (supra) and **Jamaica Bar Association v The Attorney General and the General Legal Council** [2020] JMCA Civ. 37 at paragraphs 108. Chief Justice Sykes, in paragraphs 108 to 110, discussed the approach the Court should adopt regarding proportionality. He stated that: -

*a) the law must be directed at a proper purpose that is
sufficiently important to warrant overriding fundamental rights
or freedoms;*

b) the measures adopted must be carefully designed to achieve the objective in question, that is to say rationally connected to the objective which means that the measures are capable of realising the objective. If they are not so capable then they are arbitrary, unfair or based on irrational considerations;

c) the means used to achieve the objective must violate the right as little as possible;

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

He concluded at paragraphs 109 and 110 that: -

[109] In respect of (d), if the consequences of the measure on individuals or groups are very severe then the objective must be shown to be of great importance in order to justify the severity of the consequences and if this is not shown then the law will be unconstitutional.

[110] It is at (d) that one finds the courts engaging in a balancing exercise. What is it that is balanced? The balancing that is being done arises because on the one hand there is a limiting law and on the other is the constitutional right or freedom. The court takes account of the benefit to be gained on the one hand and the harm on the other. What this requires is an assessment of whether the benefit to be gained by the violation is outweighed by the severity of the harm to persons. If the harm caused is greater than the benefit, then the law is

unconstitutional. This component of the proportionality test is asking that there be a proper relationship between benefit to be gained and harm caused.

[26] The approach taken by the Chief Justice regarding proportionality in the **Julian Robinson** case was upheld in the Privy Council cases of **Dominic Suraj and others v Attorney General of Trinidad and Tobago, Satyanand Maharaj v Attorney General of Trinidad and Tobago** [2022] UKPC 26, and **Jay Chandler v The State of Trinidad and Tobago** [2022] UKPC 19. These cases demonstrate that fundamental rights are subject to limitations under the proportionality test.

Issues 1 and 2: Whether the Claimants' right to Freedom of Movement and Freedom of Assembly had been breached? In the event the rights to freedom of movement, freedom of peaceful assembly, and freedom of expression are breached, are the breaches proportionate?

[27] Issue 1 raised before us concerns alleged breaches of the Right to Freedom of Movement and the Right to Freedom of Assembly. If it is accepted that the Right to Freedom of Movement and the Right to Assembly were breached, issue 2 concerns whether any such breach was proportionate, taking into account the COVID-19 pandemic. These issues are addressed together because they overlap in several respects.

[28] The Claimants allege that their rights to freedom of movement and freedom of assembly were breached on two occasions during the COVID-19 pandemic, i.e.

- a. On the 22nd of September 2021, they were prevented from completing their march on Gordon House.
- b. On September 11, 2021, they were charged with staging a march in Mandeville.

[29] **Section 13 of the Constitution** gives each citizen certain Fundamental Rights, which include:

(c) the right to freedom of expression;

(d) the right to seek, receive, distribute or disseminate information, opinions and ideas through any media;

(e) the right to freedom of peaceful assembly and association;

(f) the right to freedom of movement, that is to say, the right-

(i) of every citizen of Jamaica to enter Jamaica; and

(ii) of every person lawfully in Jamaica, to move around freely throughout Jamaica, to reside in any part of Jamaica and to leave Jamaica;

[30] Section 16 of the Constitution guarantees the right to freedom of movement; however, it also places limits on this right. **Section 16** states: -

(1) No person shall be deprived of his freedom of Protection of freedom movement, and for the purposes of this section the said freedom means the right to move freely throughout Jamaica the right to reside in any part of Jamaica, the right to enter Jamaica and immunity from expulsion from Jamaica.

(2) Any restriction on a person's freedom of movement which is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

(a) which is reasonably required in the interests of defence, public safety, public order, public morality or public health; or

- (b) *for the imposition of restrictions on the movement or residence within Jamaica of any person who is not a citizen thereof or the exclusion or expulsion from Jamaica of any such person; or*
- (c) *for the imposition of restrictions on the acquisition or use by any person of land or other property in Jamaica; or*
- (d) *for the imposition of restrictions upon the movement or residence within Jamaica of public officers, police officers or members of a defence force; or (e) for the removal of a person from Jamaica to be tried outside Jamaica for a criminal offence or to undergo imprisonment outside Jamaica in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.*

[31] The issue of how the Courts should address proportionality in relation to the COVID-19 pandemic and the need for Parliament to confront the crisis was detailed in the Privy Council case of **Dominic Suraj and others v Attorney General of Trinidad and Tobago; Satyanand Maharaj v Attorney General of Trinidad and Tobago (Suraj)**, where Lord Sales and Lord Hamblen (with whom Lord Reed, Lord Hodge and Lady Rose agree) stated at paragraph 91 that: -

*The proportionality approach for bringing into account both individual rights on the one hand and the general interest of the community on the other is aimed at ensuring that a balance is struck between the two. The stronger the public interest in issue, the greater the interference with individual rights which may be permitted without there being any violation. Generally, in a democracy, it is the democratic Page 36 institutions which have the primary responsibility to identify the public interest and what is required to promote it. As Baroness Hale put it in *Suratt*, para 58: "It is for Parliament in the first instance to strike the balance between individual rights and the general interest". Where Parliament gives expression to the public interest not merely by legislation passed in the usual way, but by an Act passed by a*

super-majority in each House pursuant to section 13 and which records expressly on its face that it is to have effect “even though inconsistent with sections 4 and 5”, Parliament will have identified in a particularly clear and forceful way its opinion as to where the public interest lies. In a democratic state, the courts must be expected to be especially respectful of the choice made by Parliament to pass legislation in that form and slow to substitute their own view of the necessity for and proportionality of the measure taken.

- [32]** In addressing the issues raised, the first question was whether the Claimants’ rights to freedom of movement and freedom of assembly had been breached. The affidavit evidence of Dr. Bisasor McKenzie was that restrictions had been instituted due to the COVID-19 pandemic. Dr. Bisasor McKenzie went on to explain why these restrictions were implemented during the pandemic. These restrictions were in furtherance of the three ‘Cs’.

“The “Three C’s” are used to describe settings where transmission of COVID 19 virus spreads more easily. These are:

Crowded places

Close Contact settings especially where persons have conversations in close proximity.

Confined and enclosed spaces with poor ventilation”

- [33]** In her affidavit, Dr. Bisasor McKenzie stated that measures were implemented based on data from other countries showing the virus's rapid spread. She averred that the response to the COVID-19 pandemic had to be rapid and that non-pharmaceutical interventions had been shown to be effective in reducing virus transmission.
- [34]** The Ministry of Health, armed with this information, then instituted measures to limit the number of persons who could assemble at one time and to determine when persons were allowed to assemble.

[35] The measures introduced by the Ministry of Health limited the number of people who could gather at any given time, thereby restricting the Right to Freedom of Movement and to assemble. The Ministry of Health's actions were intended to limit the spread of COVID-19 and ensure the welfare and health of all citizens. These measures allowed for distancing to curtail or slow the spread of the pandemic. It is accepted that the Right to Assemble and the Right to Freedom of Movement should not be arbitrarily limited, but given the worldwide pandemic and the resulting deaths, we find that the restrictions were justified in a free and democratic society.

[36] According to the evidence submitted to this court by Dr. Jacqueline Bisasor-McKenzie, the COVID-19 pandemic posed a grave risk to the public. The pandemic had the potential to affect all persons in Jamaica. Unfortunately, the greater the risk, the greater the interference with individual rights. Given the circumstances, we do not find the limits imposed on individuals disproportionate and therefore find no merit in relation to issues 1 and 2.

Issues 3 and 4: Whether the Regulations promulgated under section 26(2) of the Disaster Risk Management Act in response to the COVID-19 pandemic conflict with section 20 of the Constitution in relation to a state of public emergency, and therefore section 26(2) of the DRMA is unconstitutional, and Do Sections 27(1)(b) and 52(b) of the Disaster Risk Management Act conflict with Section 20 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, rendering them illegal, null, and void, and of no effect?

[37] Issues 3 and 4 are being addressed together because they concern the constitutionality of three sections of **DRMA**.

[38] Mr. Wildman argued that **sections 26(2), 27(1), and 52(b) of the DRMA** conflict with **section 20 of the Constitution** because the **DRMA** was enacted in violation of **section 20's** constitutional requirements. Counsel submitted that the **DRMA** is not a freestanding piece of legislation and that, to restrict the rights to freedom of

movement and freedom of assembly, it must also comply with the constitutional provisions set out in **section 20**.

- [39] Counsel submitted that, because there was no declaration of a state of emergency (SOPE) and no declaration by the Governor General, the implemented restrictions breached **section 20 of the Constitution**. Mr. Wildman concluded that the failure to comply with **section 20 of the Constitution** in the enactment of the amendment, regulations, or Orders thereunder renders the same unconstitutional.
- [40] Ms. Rowe Coke submitted that there are two SOPE regimes, one under the Constitution and the other under the **DRMA**. She argued that they do not conflict and that the Government of Jamaica may choose which regime to apply in response to a public emergency. Counsel contended that there is no constitutional requirement that the Government's response to the COVID-19 pandemic must be by way of the SOPE mechanism in **section 20 of the Constitution**

LAW & ANALYSIS

- [41] **Section 20 of the Charter** (the interpretation) section provides as follows:

"period of public disaster" means any period during which there is in force Proclamation by the Governor-General declaring that a period of public disaster exists;

"period of public emergency" means any period during which

(a) Jamaica is engaged in any war;

(b) there is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; or

(c) there is in force a resolution of each House of Parliament supported by the votes of a two-thirds majority of all the members of

each House declaring that democratic institutions in Jamaica are threatened by subversion;

"service law" means the law regulating the discipline of a defence force or police officers.

(2) A Proclamation made by the Governor General shall not be effective for the purposes of subsection (1) unless it is declared that the Governor General is satisfied

(a) that a public emergency has arisen as a result of the imminence of a state of war between Jamaica and a foreign State;

(b) that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life;

(c) that a period of public disaster has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity, whether similar to the foregoing or not.

(3) A Proclamation made by the Governor General for the purposes of and in accordance with this section (a) shall~ unless previously revoked, remain in force for fourteen days or for such longer period, not exceeding three months, as both Houses of Parliament may determine by a resolution supported by a two-thirds majority of all the members of each House; (b) may be extended from time to time by a resolution passed in like manner as is prescribed in paragraph (a) for further periods, not exceeding in respect of each such extension a period of three months;' (c) may be revoked at any time by a

resolution supported by the votes of a two-thirds majority of all the members of each House. (4) A resolution passed by a House for the purpose of paragraph (c) of the definition of "period of public emergency" in subsection (1) may be revoked at any time by a resolution of that House supported by the votes of a majority of all the members thereof. (5) The court shall be competent to enquire into and determine whether a proclamation or resolution purporting to have been made or passed under this section was made or passed for any purpose specified in this section or whether any measures taken pursuant thereto are reasonably justified for that purpose."

[42] The **Charter** defines the circumstances that can be deemed to be periods of public emergency. One such circumstance is a proclamation by the Governor General that a SOPE exists. Pursuant to **section 20(2)**, for such a proclamation by the Governor General to be effective, he must declare that he is satisfied that:

(a) that a public emergency has arisen as a result of the imminence of a state of war between Jamaica and a foreign State;

(b) that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life;

(c) that a period of public disaster has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity, whether similar to the foregoing or not.

[43] The Court accepts that the **Constitution** is the supreme law of the land and that any legislation that conflicts with its provisions would be null and void and without

legal effect; however, the declaration of a SOPE pursuant to **section 20** is not mandatory. There are several prerequisites that must be met before the Governor General can order a SOPE.

[44] The **DRMA** also contemplates and gives authority to the Prime Minister in the event of a disaster. This leads to the question of whether there is a difference between **section 20 of the Constitution and the DRMA**.

[45] A disaster is defined in the **DRMA** as:

“disaster” means the occurrence or threat of occurrence of an event or other calamity, whether caused by an act of God or otherwise, which –

(a) results or threatens to result in loss or damage to property, damage to the environment or death, ill health or injury to persons on a scale which requires emergency intervention by the state; and

(b) may result from fire, accident, an act of terrorism, storm, hurricane, pollution, disease, earthquake, drought, flood, the widespread dislocation of the essential service, or other calamity;”

[46] **Section 26 of the DRMA** authorizes the Prime Minister to declare disaster areas in response to threats from or impacts of a natural or anthropogenic hazard. This authority stems from a report submitted by the Office of Disaster Preparedness and Emergency Management to the Minister, who must notify the Prime Minister in writing.

[47] **Section 27** authorizes an officer to issue directions in the interest of public safety or public health. Police officers are included in the definition of authorized officers. **section 52(b)** addresses penalties for failure to comply with those directions. **Sections 27(1) and 52(b) of the DRMA** state that: -

27. Where an order has been made under section 26, an authorized officer may, if he believes it is necessary in the interest of public safety or public health, and subject to such directions as the Director-General may give, do any of the following in relation to the declared area-

(b) give directions to regulate the movement of any persons, animal or vehicle within, into, out of or around the declared area;

52. Every person who –

(b) without reasonable excuse, fails to comply with a direction given or requirement imposed by an authorized officer under section 27(1)(b), (g), (h), (p) or (r)

Commits an offence and shall be liable on summary conviction before a Resident Magistrate, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding twelve months.

[48] In the **DRMA**, “hazard” is defined as a natural or man-made phenomenon that is likely to cause physical damage or economic loss, or to threaten life, well-being, or property. In our assessment of the **DRMA**’s provisions, the Prime Minister is granted much broader powers to combat not only disasters but also the threat of disasters. This must be contrasted with **section 20 of the Constitution**, which requires that an earthquake, hurricane, flood, fire, outbreak of pestilence, or

outbreak of any infectious disease has already occurred before a State of Emergency can be declared.

[49] The number of persons affected by the COVID-19 virus was quite small when the regulations were promulgated to help contain the outbreak. This would fall into the category of a threat of a disaster, rather than the actual occurrence of a disaster.

[50] We therefore cannot agree with Mr. Wildman's submissions as they relate to **sections 26, 27 (1)(b), and 52(b)**. As discussed above, it is evident that the Prime Minister had the option to utilise the provisions of the **DRMA** to address the situation. We find that the **DRMA** was one of the options available to the Government to curtail the effects of the COVID-19 pandemic and there was no conflict with **section 20 of the Constitution**. We do not accept that the use of the **DRMA** was a means of circumventing the **Constitution** and it is null and void. We find that there was no conflict between the provisions of **section 20 of the Constitution** and **sections 26, 27(1)(b), and 52(b) of the DRMA**.

Issue 5: Whether the enactment of section 26(2) of the Disaster Risk Management Act contravenes section 49 of the Constitution, rendering it unconstitutional, null, and void?

[51] Mr. Wildman submitted that any amendment to the entrenched provisions of the rights of Freedom of Assembly and Freedom of Movement in **sections 13 (e) and (f) of the Charter** must be made in accordance with section 49 of the Constitution. He argued that the enactment of **section 26(2) of the DRMA** did not comply with the amendment mechanism in **section 49 of the Constitution**. The Claimant contends that the required procedure for amending entrenched provisions of the Constitution was circumvented by promulgating the amendment to the **DRMA**. Counsel relied on two decisions of the Privy Council, **Suraj and DPP v Mollison**. Mr. Wildman argued that failure to do so rendered the amendment and the Regulations/Orders thereunder unconstitutional.

[52] Mrs. Rowe Coke submitted that the amendment and the Regulations/Orders under the **DRMA** are not unconstitutional. She argued that Parliament is empowered under the **Constitution** to make laws for the peace, order, and good governance of Jamaica. Rights, although guaranteed, are not absolute, and Parliament has the power to interfere with those rights where it is demonstrably justified in a free and democratic society. Counsel concluded that the powers given to the Prime Minister under the **DRMA** may restrict fundamental rights, and that such a restriction falls within ordinary legislative activity. The Defendant contended that different pieces of legislation govern actions that may be taken on the emergence of disasters, and that there is no unconstitutionality in the Government's electing one of those means afforded to it by the legislature. Mrs. Rowe Coke argued that the Minister acted *intra vires* in promulgating the legislation and that the **DRMA** is not unconstitutional.

LAW & ANALYSIS

[53] This issue was argued in a previous case, **Freedom Come Ministries International Ltd v The Attorney General of Jamaica** [2024] JMFC Full 05. We accept the reasoning and conclusions regarding this issue as detailed in paragraphs 72 to 74 of the **Freedom Come** decision, which state that:

[72]. Section 49 addresses alterations to the provisions of the Constitution. It provides as follows;

“49. (1) Subject to the provisions of this section Parliament may by Act of Parliament passed by both Houses Constitution. alter any of the provisions of this Constitution or (in so far as it forms part of the law of Jamaica) any of the provisions of the Jamaica Independence Act, 1962. (2) In so far as it alters- (a) sections 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, subsection (3) of section 48, sections 66, 67, 82, 83, 84,85, 86, 87, 88, 89,90, 91, 94, subsections (21,

(3), (4), (3, (6) or (7) of section 96, sections 97, 98, 99, subsections (3), (4), (3, (6), (7), (8) or (9) of section 100, sections 101, 103, 104, 105, subsections (3), (4), (3, (6), (7), (8) or (9) of section 106, subsections (1), (2), (4), (3, (6), (7), (8, (9) or (10) of section 111, sections 112, 113, 114, 116, 117, 118, 119, 120, subsections (2), (3), (4), (5), (6) or (7) of section 121, sections 122, 124, 125, subsection (1) of section 126, sections 127, 129, 130, 131, 135 or 136 or the Second or Third Schedule to this Constitution; or

(b) section 1 of this Constitution in its application to any of the provisions specified in paragraph (a) of this subsection, a Bill for an Act of Parliament under this section shall not be submitted to the Governor-General for his assent unless a period of three months has elapsed between the introduction of the Bill into the House of Representatives and the commencement of the first debate on the whole text of that Bill in that House and a further period of three months has elapsed between the conclusion of that debate and the passing of that Bill by that House. (3) In so far as it alters this section; sections 2, 34, 35, 36, 39, subsection (2) of section 63, subsections (2), (3) or (5) of section 64, section 65, or subsection (1) of section 68 of this Constitution; section 1 of this Constitution in its application to any of the provisions specified in paragraph (a) or (b) of this subsection; or any of the provisions of the Jamaica Independence.

a Bill for an Act of Parliament under this section shall not be submitted to the Governor-General for his assent unless- (i) a period of three months has elapsed between the introduction of the Bill into the House of Representatives and the commencement of the first debate on the whole text of that

Bill in that House and a further period of three months has elapsed between the conclusion of that debate and the passing of that Bill by that House, and (ii) subject to the provisions of subsection (6) of this section, the Bill, not less than two nor more than six months after its passage through both Houses, has been submitted to the electors qualified to vote for the election of members of the House of Representatives and, on a vote taken in such manner as Parliament may prescribe, the majority of the electors voting have approved the Bill. (4) A Bill for an Act of Parliament under this section shall not be deemed to be passed in either House unless at the final vote thereon it is supported- (a) in the case of a Bill which alters any of the provisions specified in subsection (2) or subsection (3) of this section by the votes of not less than two thirds of all the members of that House, or (b) in any other case by the votes of a majority of all the members of that House. (5) If a Bill for an Act of Parliament which alters any of the provisions specified in subsection (2) of this section is passed by the House of Representatives- (a) twice in the same session in the manner prescribed by subsection (2) and paragraph (a) of subsection (4) of this section and having been sent to the Senate on the first occasion at least seven months before the end of the session and on the second occasion at least one month before the end of the session, is rejected by the Senate on each occasion, or (b) in any other case by the votes of a majority of all the members of that House. (5) If a Bill for an Act of Parliament which alters any of the provisions specified in subsection (2) of this section is passed by the House of Representatives- (a) twice in the same session in the manner prescribed by subsection (2) and paragraph (a) of subsection (4) of this

section and having been sent to the Senate on the first occasion at least seven months before the end of the session and on the second occasion at least one month before the end of the session, is rejected by the Senate on each occasion, or (b) in two successive sessions (whether of the same Parliament or not) in the manner prescribed by subsection (2) and paragraph (a) of subsection (4) of this section and, having been sent to the Senate in each of those sessions at least one month before the end of the session, the second occasion being at least six months after the first occasion, is rejected by the Senate in each of those sessions, that Bill may, not less than two nor more than six months after its rejection by the Senate for the second time, be submitted to the electors qualified to vote for the election of members of the House of Representatives and, if on a vote taken in such manner as Parliament may prescribe, three-fifths of the electors voting approve the Bill, the Bill may be presented to the Governor-General for assent (6) If a Bill for an Act of Parliament which alters any of the provisions specified in subsection (3) of this section is passed by the House of Representatives- (a) twice in the same session in the manner prescribed by subsection (3) and paragraph (a) of subsection (4) of this section and having been sent to the Senate on the first occasion at least seven months before the end of the session and on the second occasion at least one month before the end of the session, is rejected by the Senate on each occasion, or (b) in two successive sessions (whether of the same Parliament or not) in the manner prescribed by subsection (3) and paragraph (a) of subsection (4) of this section and, having been sent to the Senate in each of those sessions at least one month before the end of the session, the second occasion

being at least six " months after the first occasion, is rejected by the Senate in each of those sessions, . that Bill may, not less than two nor more than six months after its rejection by the Senate for the second time, be submitted to the electors qualified to vote for the election of members of the House of Representatives and, if on a vote taken in such manner as Parliament may prescribe, two-thirds of the electors voting approve the Bill, the Bill may be presented to the Governor-General for assent. (7) For the purposes of subsection (5) and subsection (6) of this section a Bill shall be deemed to be rejected by the Senate if-, (a) it is not passed by the Senate in the manner prescribed by paragraph (a) of subsection (4) of this section within one month after it is sent to that House; or (b) it is passed by the Senate in the manner so prescribed with any amendment which is 'not agreed to by the House of Representatives. \ . (8) .For the purposes of subsection (5) and subsection (6) if this section a Bill that is sent to the Senate from the House of Representatives in any session shall be deemed to be the same Bill as the former Bill sent to the Senate in the same or in the preceding session if, when it is sent to the Senate, it is identical with the former Bill or contains only such alterations as are specified by the Speaker to be necessary owing to the time that has elapsed since the date of the former Bill or to represent any amendments which have been made by the Senate in the former Bill. (9) In this section- (a) reference to any of the provisions of this Constitution or the Jamaica Independence Act, 1 962, includes references to- any law that alters that provision; and (b) "alter" includes amend, modify, re-enact with or without amendment or modification, make different provision in lieu of, suspend, repeal or add to.

[73] Section 49 addresses specifically the procedure to be followed for alterations/ amendments to the constitution. It goes further to state how alterations to respective sections are required to be undertaken. This is distinguishable from the procedure of the enactment of ordinary legislation which may affect the fundamental rights and freedom guaranteed by the Charter. The issue is whether ordinary legislation can be promulgated that interfere/impacts charter rights, or whether these changes must be by way of an amendment under section 49 of the constitution?

[74] This issue was addressed in the case of **Suraj** where at paragraph 50 of the judgment Lords Sales and Hamblen stated at para 50.

“The Board addressed this question of interpretation of the Constitution in *Suratt*, in which it decided that the rights and freedoms in section 4 are to be read as subject to that implied qualification. Prior to the Board’s ruling in that case it had been recognised both by the Board and by the local courts that the rights in section 4 (and those they replicate set out in the 1962 Constitution) are liable to be read as subject to implied limitations. In the majority judgment delivered by Lord Steyn for the Board in *Roodal v The State* [2003] UKPC 78; [2005] 1 AC 328 he observed (para 20): “The bill of rights under the 1976 Constitution was cast in absolute terms. There are undoubtedly implied limitations on these guarantees. One such limitation may derive from section 53 of the Constitution which vests in Parliament the power to make laws for the peace order and good government of Trinidad and Tobago: see Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (1992), at pp 87-89 ...”. Demerieux cites the judgment of Wooding CJ in the Court of Appeal in *Collymore v Attorney General* (1967) 12 WIR 5 in which, speaking of the equivalent rights in the 1962 Constitution, he said (p 15): “the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of

*Parliament are inimical to the peace, order and good government of the country. In like manner, their constitutionally-guaranteed existence notwithstanding, freedom of movement is no licence for trespass, freedom of conscience no licence for sedition, freedom of expression no licence for obscenity, freedom of assembly no licence for riot and freedom of the press no licence for libel.” The Board carefully explained in *Panday v Gordon* [2005] UKPC 36; [2006] 1 AC 427, paras 17-23 (Lord Nicholls of Birkenhead) that the rights in section 4 should be read as subject to limitations and not as absolute rights. (Emphasis applied)*

[75] *It is accepted that the Constitution of Trinidad and Tobago is not identical to that of Jamaica. However, the principles regarding the effect that ordinary legislation may have on those fundamental rights is applicable to our constitutional interpretation. The Privy Council noted further at para 68: “68. A very large part of ordinary legislation, passed by Parliament for good reasons of the public interest, must inevitably interfere with or operate as restrictions on those rights. In the Board’s view it is not plausible to suppose that the framers of the 1962 Constitution and the current Constitution intended to disable Parliament from taking ordinary legislative action in the public interest. The natural solution to accommodate the inevitable friction which always exists between individual fundamental rights and democratic decision-making in a constitutional liberal democracy like Trinidad and Tobago is that conventionally adopted so often in such states, namely to require that interference with such rights should be permitted in the public interest, but only if the interference is proportionate to a legitimate aim.”*

[76] *We adopt the Privy Council’s analysis at paragraph 74. We find that it would amount to an absurdity that, in circumstances of enacting an ordinary piece of legislation that may affect a fundamental right, it would require the provisions of Section 49 to be followed. At para 74, the Board stated: “.... The solution which the framers of the Constitution must have*

contemplated is that Parliament should create general powers for public officials by ordinary legislation in the usual way and that in exercising those powers those officials would be obliged to respect the fundamental rights in section 4, subject to a proportionality qualification which would allow them to take effective action in the public interest and to protect the rights of all.”

Issue 6 - Does section 26(2) of the Disaster Risk Management Act breach the separation of powers doctrine?

[54] Mr. Wildman submitted that the enactment of **section 26(2) of the DRMA** conflicts with the **Constitution** because, during the enactment process, the essential requirements of the separation-of-powers doctrine, a critical feature of the **Constitution**, were not observed. He further submitted, relying on the **Mollison** case, that this act results in the erosion or obliteration of the separation-of-powers distinction between the executive and the legislature.

[55] Mrs. Rowe Coke submitted that **DRMA** did not conflict with the **Constitution** or infringe the separation of powers.

[56] This issue was also raised and decided in the case of **Freedom Come**. We again adopt the dicta from **Freedom Come** in paragraphs 80 to 85;

[80] *The Doctrine of the Separation of Powers is a well-established principle which seeks to establish and maintain the powers given to each arm of government. The Claimant submitted that the measures enacted under the DRMA amounts to a removal of the power specifically assigned to the legislature and places it in the hands of the Executive, which violates the doctrine of the separation of powers.*

[81] *In **Moses Hinds v. R** 14 the Privy Council in addressing the doctrine of separation of powers and judicial independence emphasized the importance of the doctrine. The Court was charged*

to determine whether provisions of the Gun Court Act which sought to transfer powers specifically given to the Judiciary, to a body created by the Executive was constitutional. They concluded that the principle of separation of powers was implicit in the Constitution. Parliament had no power to transfer the discretion to determine the severity of punishment from the Judiciary to a Board created by the Executive.

[82] The circumstances being determined in the case at bar are somewhat different, but the principle remains sound in law. Mr. Wildman has submitted that the provisions under the DRMA allow the Executive to pass laws which affected the fundamental rights of citizens without the control of the legislation.

[83] The issue of the separation of powers was opined upon in several Privy Council cases. In the case of Browne v R (St. Christopher and Nevis) [1999] UKPC 21 at paragraph 6 of the decision Lord Hobhouse delivering the decision on behalf of the Board stated: -

Hinds was a decision of the Privy Council on appeal from the Court of Appeal of Jamaica. Jamaica, like St. Christopher and Nevis, has a constitution which follows the "Westminster" model. These constitutions are drafted upon the principle of separation of powers. A statute had set up a "Gun Court" to try persons charged with firearms offences. Section 8 of the statute prescribed a mandatory sentence of detention at hard labour during the Governor-General's pleasure for certain offences, determinable by the Governor-General on the advice of a five-man review board of which only the chairman was a member of the judiciary. Various defendants who had been convicted before the court and sentenced in accordance

with section 8 appealed contending that the sentence was unconstitutional. The appeals succeeded. Lord Diplock giving the opinion of the Board said, at pp.225-6:-

"In the field of punishment for criminal offences, the application of the basic principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model makes it necessary to consider how the power to determine the length and the character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of power. ... In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence - as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments ... What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."

[84] In the case of Suraj at paragraphs 119 and 120 the Lord Lords stated that: - 119.

The appellants argued that the Ordinance itself is unconstitutional and inconsistent with the notions of a sovereign democracy and constitutional supremacy, insofar as it vests in the Minister the sole, unsupervised, power to make infringing regulations without reference to Parliament,

as they contend happened in this case. The assumption that the Minister still has powers to pass laws of the same width and scope after independence as he had enjoyed before independence undercuts the supremacy of the Constitution, expressly guaranteed by section 2, by which the previous colonial constitutional order founded on parliamentary supremacy was overridden - see, for example, Guyana Geology and Mines Commission v BK International Inc [2021] CCJ 13 AJ (GY). The short answer to this issue is that the Rules are not infringing regulations, but, had they been, they would have been unconstitutional by reason of sections 4 and 5 of the Constitution. In any event, as made clear by the Board's judgment in Chandler (No 2), general notions of a sovereign democracy and constitutional supremacy cannot be separated or untethered from the specific provisions of the Constitution - see, in particular, paras 75 to 95. As made clear in addressing Issue (2), the Constitution does not mean that the Rules could only have been made under sections 7 to 12 of the Constitution concerning public emergencies and for the Minister to have partly overlapping powers under the Ordinance is not unconstitutional. It follows that the use of such powers cannot be contrary to notions of a sovereign democracy and constitutional supremacy as reflected in the Constitution. It is entirely compatible with the notion of a sovereign democracy that powers can be conferred on a Minister to make subordinate legislation; that is indeed a common feature in democracies. Constitutional supremacy is respected by the checks available to ensure that the Rules are consistent with the provisions of the Constitution.

[85] *We adopt the position laid down in the Suraj and we find that the Prime Minister and the Minister in promulgating the Regulations/Orders to contend with the Covid 19 pandemic did not breach the principle of separation of powers.*

Issue 7 - Do sections 6, 11(b), and 12 of the Public Order Act conflict with section 13(3)(f) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, and if so, should they be struck down as unconstitutional?

[57] The **Public Order Act of Jamaica** addresses, among other things, public marches and political meetings. There are three sections of this Act that were being challenged by the Claimant. They are **sections 6, 11(b), and 12**. **Section 6** states that: -

It shall be unlawful for any public march to take place in daylight unless a permit has been issued in respect thereof.

Section 11(6) states that: -

Any person who takes part in any public march-

(b) in respect of which a permit has not been obtained;

shall be guilty of an offence and on summary conviction before a Resident Magistrate shall be liable to a fine not exceeding twenty dollars or to imprisonment with or without hard labour for any term not exceeding three months.

Section 12 states that: -

Any person who organizes or attempts to organize or incites any person to organize or take part in any public march in contravention of the provisions of this Part shall be guilty of an offence and on summary conviction before a Resident

Magistrate shall be liable to a fine not exceeding one hundred dollars or to imprisonment with or without hard labour for any term not exceeding six months or to both such fine and imprisonment.

[58] Mr. Wildman argued that these sections of the Public Order Act conflict with **section 13(3)(f) of the Charter** and, as such, should be struck down. Mrs. Rowe Coke submitted that the sections are not unconstitutional and asked the court to consider the statute's necessity.

[59] In addressing this issue, we first examined the definition of a public meeting under the **Public Order Act**. A public march is defined as: -

“public march” means any march or procession in a public place comprising (whether wholly or partly) pedestrians, vehicles (however propelled or drawn), or bicycles (however propelled), except a march or procession

[60] **The Public Order Act** stipulates that whenever a public march is to take place an application is to be made under **section 7 of the Act**, which states: -

(1) where any person desires to organize any public march in daylight he shall, at least three days before such intended public march, make application for a permit to the senior officer of the Jamaica Constabulary Force for the parish in which the public march is to take place, or to the Commissioner of Police if the application relates to the Corporate Area of Kingston and Saint Andrew.

(2) Every application made in accordance with sub- section (1) shall contain particulars of the point of departure, route and point of termination of the public march to which such application relates, the hours between which such march will take place and an estimate of

the number of persons who are expected to participate in such march.

Section 8 of the said Act indicates under what circumstances the permit may be granted i.e.-

(1) An officer to whom application is made in accordance with the provisions of section 7 may, in any case, refuse or grant the application

(2) In cases where such application is granted the officer shall issue to the applicant a permit for the desired public march specifying therein the route to be followed and the times between which it shall take place.

[61] The point raised by Mr. Wildman is that, since the Charter of Human Rights grants you the right to, on what basis should citizens be required to obtain a permit to do so? This is not a novel point; it has been raised before and has been the subject of cases, including the House of Lords case of **Tweed v Parades Commission of Northern Ireland** [2006] UKHL 53. In that case, the appellants filed a judicial review of the Parades Commission's decision denying permission for parades. The decision primarily concerned the non-disclosure of documents. Lord Carswell, in delivering the Court's decision, identified that the appellant's case involved the infringement of his rights under Articles 9, 10, and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and invoked the proportionality test.

[62] In reviewing **sections 6, 11(b), and 12 of the Public Order Act**, the right to Freedom of Movement is curtailed to some extent, as citizens are not allowed to gather and march arbitrarily. The mischief the **Public Order Act** seems to address is the way these marches are conducted in public spaces, given that they disrupt traffic and pedestrians. The requirement or necessity of requesting a permit would:-

- a. Minimize the impact on road users by scheduling the marches during specified hours.
- b. Could allow for forward planning regarding security for other road users.
- c. Prevent more than one march from occurring at the same time, which may lead to chaos.

[63] In **Attorney General v The Jamaica Bar Association and General Legal Counsel** [2023] UKPC 6, the appellant challenged, among other things, the client's right to privacy under the amendment to the **Proceeds of Crime Act** that required an attorney-at-law to report suspicious activity. Lord Briggs and Lord Hamblen, writing on behalf of the Board, reaffirmed the **Oakes** test as the standard to apply if a right is found to have been breached. In this case, we find that the requirement to obtain a permit before conducting a public march infringes the right to movement; however, the importance of this requirement warrants overriding that right. We also find that the measures imposed are reasonably justified.

Issue 8 - Should the Claim be referred for assessment of damages for the said breaches?

[64] The final issue raised by the Claimants was whether the matter should be referred for assessment of damages. Because we do not find that the Claimants' constitutional rights were breached, no damages are to be assessed. In any event, if damages were to be assessed, the Full Court could have conducted the assessment.

CONCLUSION

[65] [65] We have considered each issue raised by the Claimants and conclude that their constitutional rights were not violated. We also conclude that **sections 6, 11(b), and 12 of the Public Order Act** are not unconstitutional. Accordingly, we

will not grant the declarations sought by the Claimants. It follows that we will not assess or award any damages to the Claimants.

ORDERS

[66] Considering the foregoing, our orders are as follows:

- a. The orders sought in the Amended Fixed Date Claim Form filed on January 25, 2022, are refused.
- b. No order as to costs in the claim.
- c. The Defendant's attorneys-at-law are to file and serve the Formal Order.