COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Criminal Law Division (Const. Side)
2020/CRIM/Con/0005

IN THE MATTER OF Articles 19, 20, 23 and/ or 28 of the Constitution of the Commonwealth of the Commonwealth of The Bahamas

AND

AND IN THE MATTER of the Contempt of Court of Donna Dorsett-Major on 3rd June 2020 by Summons dated 23rd July, 2020

BETWEEN:

DONNA DORSETT-MAJOR

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTION

First Respondent

AND

THE HON. ATTORNEY-GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Second Respondent

Before: **The Honourable Mr. Justice Loren Klein**
Appearances: **Mr. Murrio Ducille for the Applicant**
Mrs. Kayla Green-Smith for the Respondents
Hearing dates: **18, 19 August 2020**

RULING

KLEIN J:

Constitution — Fundamental rights and freedoms — Constitutional Motion seeking redress for breach of fundamental rights — Counsel and Attorney-at-Law cited for contempt for swearing false affidavit — Affidavit demeaning Judge and bringing the Court into disrepute — Summons to show

cause why counsel should not be committed for contempt — Constitutional Motion brought while contempt hearing pending before Judge — Whether contravention of Fundamental Rights — Right to protection from arbitrary arrest and detention, article 19 — Right to the protection of the law, article 20 — Right to freedom of expression, article 23

Supreme Court — Jurisdiction of Supreme Court — Applicant seeking declaratory relief and stay of contempt proceedings before a Judge of Co-ordinate Jurisdiction — Application for transfer of proceedings to a Judge other than Judge before whom alleged contempt took place — Whether court has jurisdiction to grant such orders— Constitution, Article 28 — Judge hearing contempt charge of own motion — Whether breach of the right to trial by independent and impartial tribunal — Citation for contempt based on Judge's prior finding of filing false affidavit — Whether breach of natural justice — *Audi alteram partem* rule —Whether contravention of the presumption of innocence

Practice and Procedure — Strike-Out — Constitutional Motion — Rules of the Supreme Court, Order 18, rule 19(1) — Frivolous and/or Vexatious — Disclosing no reasonable cause of action — Tending to prejudice, embarrass or delay the fair trial of the action — Abuse of Process — Whether alternative remedy available — Collateral attack on court decision — Naming of Judge as Respondent

Practice and Procedure— Contempt Procedure — Evidence — Whether Judge entitled to rely on facts within her own knowledge —Whether contempt in the face of the court

INTRODUCTION

[1] Collateral constitutional challenges to the validity of legal proceedings present the court with a most unwelcome judicial task. This is because they require one judge of the Supreme Court to peer over the shoulders of another and determine the lawfulness of the judicial acts of a colleague exercising equal and co-ordinate jurisdiction.

[2] Unhappily, this application falls into that category of cases. By this amended Originating Notice of Motion for constitutional relief, filed 18 August 2020, the applicant, a counsel-and-attorney at law of the Supreme Court, seeks declarations that her fundamental rights under Articles 19, 20 and 23 of the Constitution have been or are about to be infringed as a result of her citation for contempt and the pending hearing of that contempt charge by Charles J., before whom the alleged contempt was committed. She further seeks a permanent stay of the contempt proceedings or, in the alternative, an order that the contempt proceedings be transferred to another Judge for trial.

[3] This, it is said, can be done under the plenitude of powers which reside in the constitutional jurisdiction of the Supreme Court under article 28 to grant redress for infringement of fundamental rights, including those caused by judicial breaches.

[4] Disposal of the applicant's claim requires me to address several specific issues, namely: (i) whether the applicant is entitled to constitutional redress for contravention of the fundamental rights which are claimed, or whether those claims should be struck out, as contended by the respondents; and (ii) whether the court can stay or, in the alternative,

transfer the proceedings to another Judge. But these issues must be considered against the backdrop of a more fundamental question: Is a judge of the Supreme Court able to declare that the orders or actions of a fellow judge of equal jurisdiction contravene or threaten to contravene an applicant's fundamental rights in circumstances where that other judge is seized of the proceedings the applicant seeks to arrest? Or must the applicant simply invoke the appellate process to correct any perceived errors of law, fact or procedure?

FACTUAL BACKGROUND

[5] The Applicant is a counsel and attorney-at-law of the Supreme Court. On the 1 May 2020, Charles J. delivered her decision in the matter of *Alan Crawford and Sharon Crawford v. Christopher Stubbs, Shanna Cove's Estate Company Ltd. and Donna Dorsette-Major (Trading as Dorsett Major & Co., a firm)* (2025/CLE/gen/00765) (the main action). She ruled against the defendants and in the course of that ruling held that the third defendant (Mrs. Donna Dorsette-Major) had been guilty of professional negligence.

The recusal application

[6] Consequent on that ruling, the first and second defendants made an application for the recusal of Charles J., alleging that there had been "the presence of bias or the appearance of bias" against the Defendants. As deduced from the Judge's ruling dated 6 July 2020 (the recusal ruling), the defendants alleged generally that the Judge had a relationship/association with the plaintiffs and/or the law firm representing them, which gave rise to the presence or appearance of bias. The recusal application was supported by an affidavit sworn by the first defendant, Christopher Stubbs, filed 26 May 2020. Mrs. Dorsette-Major also swore an affidavit in support of that application, which was filed on the 3 June 2020.

[7] Charles J. refused to recuse herself, for the reasons set forth in that Judgment. I reproduce the concluding paragraphs of the ruling, which give rise to the application currently before this Court:

> **"[37] For all of the reasons stated above, I hold that the recusal application is unfounded and without merit and is aimed at bringing the court into disrepute. I would therefore dismiss the recusal application with costs to the Plaintiff. If costs are not agreed, I will summarily assess on Monday 24 August, 2020 at 10:30 a.m.**
>
> **[38] Having found that Mrs. Major has fabricated the contents of her Affidavit, I will cite her for Contempt of Court. The appropriate charge is being prepared and will be formally read to her on 23 July 2020 at 12:00 p.m. in Open Court. Mrs. Major will have an opportunity to be heard and be represented by Counsel.**
>
> **[39] In addition, the law firm of Martin & Martin drafted the Major affidavit. Had that law firm carried out a proper investigation into this matter, they would have discovered that the allegations in Mrs. Major's affidavit consist of untruths and fabrications. I will also cite the law firm of Martin & Martin for Contempt of Court. The appropriate charge will be formally read on 23 July 2020 at 12:00 noon in Open**

Court. The firm will also have an opportunity to be heard and represented by Counsel."

The Show-Cause Summons

[8] The show-cause summons was issued under the hand of the Registrar of the Supreme Court dated 23 July 2020, although Mrs. Major in her affidavit in support of her notice of constitutional motion states that a signed version was not issued until 29 July 2020. However, on the 4 August 2020, the contempt proceedings commenced and the summons was formally read to the applicant.

[9] I hereby set out the summons (omitting the heading) to provide the context and nature of the allegations without judicial editorializing:

TO: DONNA DORSETT-MAJOR

YOU ARE HEREBY SUMMONED by the Honourable Madam Justice Indra H. Charles, a Justice of the Supreme Court of the Commonwealth of The Bahamas, Nassau, N.P., The Bahamas to attend the Court on Tuesday, 4th day of August, A.D., 2020 at 1:30 o'clock in the afternoon or so soon thereafter to show cause why you should not be committed for contempt for swearing to the Affidavit of Donna Dorsett-Major filed on the 3 June 2020 in Common Law and Equity Division 2015/CLE/gen/00765 in support of the recusal applications of the First and Second Defendants which contained untruths and fabricated statements.

THE CHARGES/PARTICULARS OF CONTEMPT ARE:

1. **That you intentionally swore an Affidavit in the said action which contains the following false and malicious allegation:**

    a. **On 22 February 2019, the Judge travelled with her then clerk, Mr. Gardiner, attorneys Anthony Newbold, the late Mr. Roy Sweeting and yourself to Cat Island. She (the Judge) was not accompanied by an aide.**
    b. **Upon our arrival at the Airport in Cat Island, it became apparent to you that the Crawfords were there waiting for the Judge since there were no police officers at the airport in Cat Island to greet the Judge. You also alleged that the Judge and her clerk were driven by Mr. Crawford in Mr. Crawford's vehicle. The late Mr. Sweeting also rode with the Judge and her clerk.**
    c. **Shortly after the locus visit, the Judge walked with you and the Crawfords followed behind. You said that the Judge asked you if you could convince Mr. Stubbs to sell his property to the Crawfords for a reduced price of $100,000, in exchange for them discontinuing the matter against you and Mr. Stubbs.**
    d. **We were invited to lunch at Shanna's Cove.**
    e. **After lunch, and on your urging, Attorney Anthony Newbold, the Judge, Mr. Sweeting and the Crawfords rode in the same vehicle and the Crawfords took them to the airport.**

2. **That the allegations are not only intentional, wounding and fabricated but were intended to demean a Judge of the Supreme Court of the Bahamas, bring the Court into disrepute and prejudice the due administration of justice."**

DATED this 23rd day of July, A.D., 2020
BY ORDER OF THE COURT

[10] In brief, the allegations in the summons are that the applicant, by means of false averments, imputed to the Judge partiality or favoritism to the plaintiffs and/or the law firm representing the plaintiffs, and alleged that her logistical arrangements for the visit to the locus were mainly catered by the plaintiffs. Further, the suggestion is that the judge may have improperly attempted to use her influence to procure an outcome favourable to the plaintiffs.

[11] Essentially, the charge is one of scandalizing the court—i.e., an act done or writing published calculated to bring a court or judge of the court into contempt or lower his authority (*R v Gray* [1900] 2 QB 36)—which is actionable as criminal contempt.

[12] The contempt proceedings were commenced on the 4 August 2020 and adjourned to the 20 August 2020, at least in respect of the applicant, although they were apparently continued on the 19 August 2020 in respect of the other alleged contemnor (the firm). By a further Directions Order dated 27 August 2020, the 2 September 2020 dated was vacated and a new date of 25 September 2020 set for the hearing of the show-cause summons. This was further adjourned to the 14 October 2020.

The constitutional motion

[13] On the 10 August 2020, the Applicant filed an Originating Notice of Motion (the motion), supported by an affidavit sworn the same date, seeking the declarations and orders set out therein (see below). When the matter came before me on the papers, being filed in the middle of one of the series of 'lockdowns' made under the Emergency Powers Regulations as a result of the Coronavirus public health emergency, I gave directions by email for the application to be promptly served on the Office of the Attorney General, and set 18 August 2020 for the hearing.

[14] However, as it later emerged that the OAG had not been served in sufficient time to respond to the application, I conducted a case management hearing on the 18 August and set the matter for 19 August 2020. At the case management hearing, I granted leave for the amendment of the Motion to name an additional respondent, for the reasons briefly explained in the preliminary observations below.

[15] The Motion seeks the following reliefs:

> **"1. A Declaration that the rights afforded to the Applicant pursuant to Articles 19, 20 and 23 and/or 28 of the Constitution of the Commonwealth of the Bahamas have been or are about to be infringed;**
>
> **2. An Order that the contempt proceedings in relation to the Applicant be permanently stayed and therefore discontinued;**

3. In the alternative, an Order transferring the contempt proceedings from the carriage of the Honourable Madam Justice Charles to another Justice of the Supreme Court;…".

Respondents' counter summons

[16] The respondents countered quickly with a summons of their own, seeking Orders "pursuant to Order 18 Rule 19(1) (a)(b)(c) and (d) of the Rules of the Supreme Court 1978 or alternatively the inherent jurisdiction of the Honourable Court that the action be dismissed as against the Respondents on the grounds that":

> **"a). [I]t discloses no reasonable cause of action and it is scandalous, frivolous or vexatious. The pleadings disclose no claim or allegation against the Director of Public Prosecution. Further on the Applicant's own evidence, there is a remedy available to her that is in progress before an Honourable Court of concurrent jurisdiction. Further, the Applicant's evidence brings the Honourable Court into disrepute and prejudices the due administration of justice;**
>
> **b) Further it may prejudice, embarrass, delay the fair trial of the action and is an abuse of process of this Honourable Court. This application is seeking to further delay the fair hearing of the trial that is in progress before the said Honorable Court of concurrent jurisdiction. Further if the Applicant is dissatisfied with the findings of the said Honourable Court there is also an Appeal available to her."**

Preliminary Observations

Naming the Judge as a Respondent

[17] At the directions hearing on the 18 August, the Applicant sought leave to add the Attorney-General and "the Honourable Madam Justice Charles" as the 2nd and 3rd Respondents, respectively, to the Motion. I readily granted leave for the Hon. Attorney General to be joined as a party, but indicated that I saw no justification for adding the Honourable Judge, having regard to the doctrine of judicial immunity and the nature of a claim for constitutional redress, which is essentially directed to the Crown/State. Mrs. Green-Smith for the respondents indicated that she would also object to the addition of the Hon. Judge, and identified herself with the concerns raised by the Court. Mr. Ducille eventually conceded the point, and withdrew the application for joinder of the Judge.

[18] In my judgment it was a concession very properly made. Firstly, the rule of judicial immunity of judges from suit when purporting to discharge their judicial functions (in the absence of *mala fides*) is too plain to require any restatement (see *Sirros v Moore* [1975] 1 QB 118; applied in *Higgs and Another v. Blackman and Others* [2011/PUB/Con/0002] (per Adderley, J., [31-32]; *Mangra v. Magistrate Janet Bullard and another* [2015/CLE/gen/00540] (per Charles, J. [10-24])). And in this regard, an action for declaratory relief is no different from an action for damages: see *O'Reilly v Mackman* [1983] 2. A.C. 237), where Lord Diplock upheld the immunity of a Board of Visitors (assimilating their position to that of judicial officers) and said (at 253, C): "If a prisoner

or litigant is not allowed to sue a justice of the peace for damages, neither should he be allowed to sue him for a declaration that he was biased."

[19] Further, it is clear that in States with written constitutions specifically providing for the redress of fundamental rights, the claim is one to be brought directly against the State in respect of an alleged breach by any branch of Government, including the judicial branch. In the landmark case in this field (*Maharaj v A.G. of Trinidad and Tobago* (No.2) [1978] 2 All ER 670), one of the issues which arose was who was the proper respondent to a claim by a barrister seeking constitutional relief out of his imprisonment for contempt on the order of a judge without the particulars of the contempt being explained to him. Lord Diplock delivering the advice of the Board said (675 H-676 A; 677-J):

> **"It was argued for the Attorney-General that even if the High Court had jurisdiction, he is not the proper respondent to the motion. In their Lordships' view, the Court of Appeal were right to reject this argument. The redress claimed by the appellant under section 6 was redress from the Crown (now the State) for a contravention of the appellant's constitutional rights by the judicial arm of the state. By section 19(2) of the Crown Liability and Proceedings Act 1966, it is provided that proceedings against the Crown (now the state) should be instituted against the Attorney-General, and this is not confined to proceedings for tort."**
> **[….]**
>
> **"The order of Maharaj J. committing the appellant to prison was made by him in the exercise of the judicial powers of the state;…So if his detention amounted to a contravention of his rights under section 1(a), it was a contravention by the state against which he was entitled to protection."**

[20] Therefore, the naming of a judge as a respondent to proceedings impugning judicial acts is unnecessary and gratuitous.

Summary of Parties' Submissions

Breach of constitutional rights

[21] The Applicant contends that her rights under article 19 [protection from arbitrary arrest and detention], article 20 [protection of the law/due process] and article 23 [protection of freedom of expression] have been, or are about to be breached as a result of the citation for contempt and the pending hearing of the charge.

[22] These allegations were not developed with any particularity in the applicant's written submissions. However, as supplemented by Mr. Ducille in oral submissions, I understood his argument in support of the applicant's case to be based on a number of propositions, which I attempt to summarize as follows:

(i) that the applicant has not been given a fair hearing in respect of the contempt proceedings, as the Judge decided that the affidavit (which is the substratum for the charge) was fabricated without conducting a hearing on the same, and therefore violated the applicant's right to be presumed innocent (art. 20);

(ii) that in coming to this conclusion the judge relied on 'extrinsic' evidence, i.e., evidence which she adduced from her personal knowledge of the proceedings and information obtained administratively;
(iii) that it has not been found that the contents of the affidavit were knowingly false and intended to interfere with the administration of justice;
(iv) that as a result of these fundamental procedural breaches, the applicant is potentially exposed to deprivation of her liberty in violation of due process of law and protections afforded under art. 19; and
(v) that the criticism in the affidavit may be viewed as critical commentary which does not amount to contempt and therefore the proceedings constitute an interference with the applicant's rights to freedom of speech under art. 23.

[23] The Applicant also seeks a permanent stay of the contempt proceedings, or that they be transferred to another Judge.

The affidavit in support

[24] The affidavit filed in support of the Constitutional Motion contains further allegations in respect of the Judge's findings on the recusal application and her presiding over the contempt proceedings. Generally, they are to the effect that the proceedings "presume guilt on her [the applicant's] part" which would make a fair hearing impossible; that she was denied procedural fairness in respect of the finding that the affidavit was fabricated; and that essentially the judge is acting in her own cause. As is stated at para. 4, "*the learned Judge ....is the framer of the charges made against me and the prosecutor of those charges. In addition, she has repository knowledge of the events surrounding the matter and is the adjudicator and intended sentencer*."

[25] Insofar as it is necessary to refer to the affidavit to properly appreciate the applicant's case, I deliberately generalize its contents. In fact one of the ground on which the respondents attack the application is the contention that the supporting affidavit itself "brings the court into disrepute and prejudices the due administration of justice." I will say more on this later.

[26] While the submissions marshalled in support of the applicant's constitutional motion necessarily impugn the contempt proceedings, I should make it very plain at the outset that this court cannot (and does not) express any opinion on the merits or otherwise of the substantive contempt charges. That hearing is still pending before a Judge of co-ordinate jurisdiction who is properly seized of the matter, and this court must therefore necessarily remain aloof.

<u>Respondents' Submissions</u>

The Strike out application

[27] The respondents seek to strike out the action on the grounds which have been set out above in their summons. In particular, they rely on the following grounds in their skeleton

arguments: (1) that the action discloses no claim against the Director of Public Prosecutions; (2) that there are adequate alternative means of redress available to the applicant; (3) that the evidence in support of the Motion brings the Court into disrepute and prejudices the due administration of justice; (4) that the application seeks to "further delay" the fair hearing of the trial; and (5) that the applicant has an appeal available to her if dissatisfied with the outcome. If may be readily seen that grounds 2 and 5 overlap, and as far as necessary can be dealt with together.

ANALYSIS AND DISCUSSION

Jurisdiction

[28] At the heart of this challenge lies the question of the boundaries of the court's constitutional jurisdiction to grant relief generally and specifically in respect of the judicial acts of another judge with equal and co-ordinate jurisdiction. It is therefore appropriate to make a few general remarks about jurisdiction at the outset.

The Supreme Court's jurisdiction

[29] The Supreme Court is declared by section 7 of the Supreme Court Act (Ch. 58) to have "unlimited original jurisdiction in civil and criminal causes and matters" and such appellate jurisdiction as is conferred on it by law. It has the power to judicially review the proceedings of inferior courts, but as a court of unlimited jurisdiction, it itself is not subject to judicial review. Except for a limited category of orders—e.g., *ex parte* or interlocutory orders, default judgments, etc., which can be reviewed equally by judges of coordinate jurisdiction because they are either provisional in nature, non-dispositive or lack the benefit of a hearing on the merits—the decisions or orders of the Supreme Court can only be challenged on appeal (*Strachan v. The Gleaner Company* [2005] UKPC 33 [32]).

The redress provision

[30] Article 28(1) of the *Constitution* provides that whenever a person alleges that any of the provisions of articles 16-27 (inclusive) "…has been, is being or is likely to be contravened in relation to him then, *without prejudice to any other action with respect to the same matter which is lawfully available*, that person may apply to the Supreme Court for redress." In granting such redress, the Court is empowered to "make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing" the enforcement of any of the provisions of articles 16-27 to which the claimant may be entitled. Notwithstanding that constitutional relief is declared to be available in *addition to* any other relief, somewhat paradoxically the proviso to article 28(1) provides that "the Supreme Court *shall not* exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."

Redress for judicial breaches

[31] When the issue of whether a judge of the High (Supreme) Court had jurisdiction to entertain a constitutional claim in respect of the acts of a judicial colleague of equal rank first reared its head in the *Maharaj* case in the late 1970s, it presented the Trinidadian first instance courts with a novel legal problem.

[32] The facts of that case in Commonwealth Caribbean constitutional law are well known. In summary, a barrister was committed to prison for 7 days after the Judge summarily found him guilty of contempt in a case in which the attorney was engaged before him. He was simply charged with "contempt of court", for what the Judge described in his written reasons as a "vicious attack on the integrity of the Court". His request for an adjournment to retain counsel was also denied. Mr. Maharaj then applied that same day *ex parte* by notice to the High Court claiming redress under s. 6 of the Constitution of Trinidad and Tobago for a violation of the right under section 1(a) not to be deprived of liberty expect by due process of law. He was released from prison pending the hearing of his motion, but ordered to serve the remaining six days after his motion was dismissed. He appealed this ruling to the Court of Appeal, as well as obtained special leave to appeal the committal order to the Privy Council, as no appeal was then available to the Court of Appeal from a committal for contempt. On his appeal, the Privy Council quashed the committal order for breach of natural justice by the failure of the Judge to explain the specific nature of the contempt charge to Mr. Maharaj to enable him to defend himself (*Maharaj v. Attorney-General for Trinidad and Tobago* [1977] 1 All ER 411). But it was against a further appeal to the Privy Council from the decision of Court of Appeal rejecting the claim for redress that the Board gave its seminal decision in *Maharaj (No. 2) (supra).*

[33] Scott J., who heard the motion for constitutional redress against the committal order made by another judge of the High Court, dismissed it on the grounds that there was no jurisdiction to entertain the application, which he held was tantamount to an appeal against the decision of a judge of equal standing. However, the Court of Appeal (*Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No. 2)* [1977] 29 WIR 325) and their Lordships in the Privy Council on appeal from that decision had little difficulty in finding that the Supreme Court was empowered under its original jurisdiction to deal with such a claim, as it did not involve any appeal of fact or law on the contempt proceedings.

[34] In the Court of Appeal, Hyatali CJ said as follows (pg. 332, e-f):

> **"Section 6(1), however, is the provision which confers jurisdiction on the High Court. In my opinion, its language is sufficiently wide and general to permit an applicant to pursue a claim for redress in any case which he alleges in relation to himself, that a person exercising the plenitude of legislative, executive or judicial power, has contravened or threatens to contravene the provisions securing the applicant's rights and fundamental freedoms. A judge of the High Court is, therefore, not excluded from the purview of s. 6(1).**
>
> **It is true that in dealing with such an application, a judge may be required to consider the merits and validity of an order made by a judge of equal jurisdiction, but in so doing, he would be exercising no more than an original jurisdiction, expressly vested**

> **in him by the provisions of s. 6(1). In my judgment, an application thereunder in respect of a judge's order is, strictly speaking, a complaint that such an order is unconstitutional on the grounds that it infringes the applicant's rights and freedoms and cannot be regarded as an appeal *stricto sensu*, to the High Court, against an order made in the same court by another judge."**

[35] Speaking for the majority in the Privy Council ([1978] 2 All ER 670), Lord Diplock said 675, h):

> **"What it does involve is an enquiry into whether the procedure adopted by the judge before committing the appellant to prison for contempt contravened a right, to which the appellant was entitled under s. 1(a), not to be deprived of his liberty except by due process of law. Distasteful though the task may well appear to a fellow judge of equal rank, the Constitution places the responsibility for undertaking the enquiry fairly and squarely on the High Court."**

[36] It is unsurprising therefore that Mr. Ducille would seek to anchor his entitlement to seek declaratory relief for alleged judicial breaches on the reasoning of the Privy Council in *Maharaj (No.2).* There, the Privy Council held, for the first time in the Commonwealth Caribbean, that a constitutional claim for redress could be brought directly against the state for judicial breaches and was also remediable in damages. In coming to this conclusion, their Lordships said [at 678] that the constitutional provisions (in the context of the Constitution Trinidad and Tobago) showed a "*clear intention to create a new remedy whether there was already some other existing remedy or not…*".

[37] The principle established in *Maharaj*, that a claim for constitutional redress (including damages where appropriate) might lie directly against the state for judicial wrongs, revolutionary as it was when pronounced, has now become trite law. It has been routinely followed in other parts of the Commonwealth and this jurisdiction (see, for example, *Farquharson v AG* [2016] 5 LRC 1). But it has not attracted universal adherence in the common law countries (see, for example, *A-G v. Chapman* [2011] NZSC, where a majority of the New Zealand Supreme Court held that public policy did not favour extending public law damages to judicial breaches, giving life to the misgivings expressed in the dissenting opinion of Lord Hailsham in *Maharaj (No.2)*). In the context of the UK—a country that lacks a written constitution containing a redress clause, but which has a Human Rights Act (1988) that allows a claim for a breach of Convention rights, including those by a court or tribunal—the UK Court of Appeal has upheld a decision of the High Court that the proper forum for such a claim against a judge of the High Court cannot be a court of co-ordinate jurisdiction, but must be made in the Court of Appeal (*Aamir Mazhar v. Lord Chancellor* [2019] EWCA Civ. 1558).

[38] In a series of later cases from the Caribbean in which the PC were called on to re-examine the ratio in *Maharaj (No.2)*, their Lordships have more and more emphasized the exceptionality of the relief and availability of the appellate process as factors militating against such relief (see, for example, *Hinds v A-G of Barbados* [2002] 1 AC 854; *Forbes v A-G* [2003] 1 LRC 350, and *Independent Publishing Co. Ltd. v. A-G of Trinidad and Tobago* [2005] 4 LRC 301. In *Hinds*, Lord Bingham of Cornhill said (pg. 870):

> **"It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so the Constitution must be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision…".**

[39] In *Forbes*, the threshold for pursuing collateral constitutional redress was put even higher and Lord Millet said (at para. 18) it was limited to those—

> **"…rare cases where there has been a fundamental subversion of the rule of law that resort to constitutional redress is likely to be appropriate. However, exceptional the case is formulated, it is clear that the constitutional rights to due process and the protection of the law do not guarantee that the judicial process will be free from error. This is the reason for the appellate process."**

[40] In *Independent Publishing*, the Privy Council came close to distinguishing *Maharaj (No.2)* on the ground that it was the unfairness in that case presented by the then lack of the ability to appeal a committal for contempt (except by special leave to the Privy Council) which justified the exceptional ruling [87, 88]:

> **"Lord Diplock's judgment [in *Maharaj (No.2)*] has been widely understood to allow for constitutional redress, including the payment of compensation, to anyone whose conviction (a) resulted from a procedural error amounting to a failure to observe one of the fundamental rules of natural justice, and (b) resulted in his losing his liberty before an appeal could be heard. That, however, is not their Lordship's view of the effect of the decision. Of critical importance to its true understanding is that Mr. Maharaj had no right of appeal to the Court of Appeal against his committal, and equally, therefore, no right to apply for bail pending such an appeal."**
>
> **Where, as in Mr. Maharaj's case, there was no avenue of redress (save only by special leave direct to the Privy Council from a manifestly unfair committal to prison, then, despite Lord Hailsham's misgivings on the point, one can understand why the legal system should be characterized as unfair. Where, however, as in the present case, Mr. Ali was able to secure his release on bail within 4 days of his committal—indeed, within only one day of his appeal to the Court of Appeal—their Lordships would hold the legal system to be a fair one."**

[41] The effect of these cases is that the door thrown open in *Maharaj (No. 2)* allowing collateral constitutional redress for judicial breaches has been gradually pulled to by the subsequent jurisprudence of the Privy Council. The boundaries of the jurisdiction have been more narrowly drawn. In this regard, I borrow by analogy the memorable statement of Laws LJ that "…every tapestry has a border", made in the context of a judicial review application in which he was considering the "very large tapestry" of the power to act for 'peace, order and good government' (*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] 1 QB 1067 [55].

[42] So too are the borders of the Article 28 tapestry hemmed in by what is commonly called

the proviso to the Constitution itself, judicial authority and rules placing limits on the relief that the court may properly grant. The interplay of these limitations is fundamental to the outcome of this application.

Issue (i): Is the applicant entitled to declaratory relief for alleged contravention of constitutional rights, or should the claim be struck out?

The strike out application

[43] The issue of whether the applicant is able to assert a constitutional claim for relief has to be considered against the backdrop of the respondents' strike out application.

General principles of law in striking out applications

[44] The principles regulating striking out applications are well settled and are only reiterated here for convenience. *Order 18, r.19 (1)* of the *Rules of the Supreme Court 1978* (*RSC 1978*) provides that the court may, at any stage, strike out any pleading on a number of well-known grounds, namely that it discloses no reasonable cause of action, it is scandalous, frivolous or vexatious, it may prejudice or delay the fair hearing of the matter, or is otherwise an abuse of the process of the court. The latter is a catch-all for a variety of circumstances in which a court might find it necessary to put a halt to proceedings to protect its process.

[45] Apart from the above rule, the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see *The Supreme Court Practice 1997 (White Book)*, Vol. 1, at para. 18/19/18; *Reichel v Magrath* (1889) 14 App. Cas. 665).

[46] The requirement of a reasonable cause of action has been described as *"…a cause of action with some chance of success, when…only the allegations in the pleadings are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out"*: *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094, CA, per Lord Pearson at p. 1101-F.

Constitutional applications are amenable to the Court's strike-out jurisdiction

[47] Importantly, the respondents emphasize that claims seeking relief under Article 28 of the Constitution are not immune from the strike-out jurisdiction of the court under *RSC Ord. 18, r. 19,* or in the exercise of the Court's inherent jurisdiction. They rely in particular on the Privy Council's decision in *Maurice Glinton and Leandra Esfakis v. Rt. Hon. Hubert A. Ingraham, et al.,* [2007] 1 WLR 1, (2006) UKPC 40, on appeal from this jurisdiction.

[48] There, in response to an argument that constitutional actions were not amenable to the Court's strike-out jurisdiction under *Order 18, R. 19(1)(a),* their Lordships said (at paras. 11-13):

"…the Court of Appeal was right to direct itself that claims should only be struck out

> **in plain and obvious cases and, of course, *courts should look with particular care at constitutional claims, constitutional rights emanating from a higher order law.* But constitutional claims cannot be impervious to the strike out jurisdiction and it would be most unfortunate if they were. It cannot be right that anyone issuing proceedings under article 28 of the Constitution is guaranteed a full hearing of his claim irrespective of how ill-founded, hopeless, abusive or vexatious it may be."**

[49] Generally speaking, the jurisdiction to strike out ought to be sparingly exercised, and the court should be even more hesitant to peremptorily terminate judicial claims where constitutional rights are asserted. In *Operation Dismantle Inc. v R* [1986] LRC (Const) 421, which incidentally involved a claim for declarations under the Canadian Charter, the trial judge refused to strike out the statement of claim, stating that such a result should follow only if the facts were not capable of constituting a "scintilla of a cause of action". This might be thought too high a standard, and on the facts of the case the Federal Court of Appeal allowed the respondents' appeal and struck out the statement of claim, which was upheld by the Canadian Supreme Court (in the case cited *supra*).

[50] Wilson J., delivering the majority ruling, said as follows (481, 486):

> **"It seems to me that whenever a litigant raises a 'serious constitutional issue' involving a violation of the Charter or the Canadian bill of Rights then, since what is being complained of is an alleged violation of a right, it follows almost by definition that the nature of the alleged violation must be asserted. Moreover, as the respondents point out, section 24 (1) of the Charter makes the infringement or denial of a right a pre-condition to obtaining relief in the courts under that section. […]**
> **I believe, therefore, that the appellants, even on the common law action for a declaration, must establish at least a threat of a violation, if not an actual violation, of their rights under section 7 of the Charter in order to bring a viable claim for declaratory relief against governmental action.**
> **The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action "with some chance of success' (*Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094) or, as Le Dain put it in *Downson v Government of Canada* (1982) 37 NR 127 (FCA), at page. 138, is it "plain and obvious that the action cannot succeed?"**

[51] In short then, to escape the respondents' strike out pincers, it must be established (accepting the facts as pleaded) that the applicant has a reasonable cause of action that her fundamental rights have been violated by the exercise of the judicial powers, or that there is a threat of such violation. Put another way, it must be "plain and obvious" that that applicant's claim for declaratory relief cannot succeed.

The constitutional claims

[52] I have set out above the provisions of article 28(1), which provides an avenue for redress of fundamental rights. A person who alleges an infringement of his or her fundamental rights may seek recourse to the redress provision to vindicate past, present and apprehended future breaches. The constitutional *imprimatur* for this is clear enough, but if any support is needed one may recall the words of their Lordships in the Privy Council in **Boodram v**

AG of Trinidad & Tobago [1996] AC 842 (544, E-F): *"[T]he power of the High Court can in suitable cases be used to avert a threatened breach of constitutional rights, and also that the jurisdiction exists in cases short of absolute certainty that what is feared will come to pass*."

[53] In *Omar Archer Sr. v. The Commissioner of Police and The Attorney General of the Commonwealth of the Bahamas* (unreported) [2017/PUB/Con/00024), I set out in some detail the steps for advancing a claim for a breach of a constitutional right by a law or action of the executive (paras. 67-69). I only summarize a few relevant principles here: (i) whether the applicant can establish that the law or action *prima facie* interferes with the expressed right based on a textual analysis of the rights; (ii) whether the law or action, even if it constitutes an interference, may be justified as being reasonably required for the protection of any of the stated private rights or public policy objectives (by the Respondents); and (iii) whether the law or action, even if reasonably required, can be established by the Applicant as not being justified in a democratic society, i.e., the proportionality test. These are obviously sequential and cumulative steps, and the applicant does not progress to the next step unless the preceding can be satisfied.

Breach of the right to a Fair hearing

[54] Article 20(1) guarantees to anyone charged with a criminal offence the right to a "fair hearing within a reasonable time by an independent and impartial court established by law." Further, art. 20(8) provides, *inter alia*, that any court or adjudication authority prescribed by law for the determination of any civil right or obligation shall be "independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time." The principles relating to a fair trial also include the right to be presumed innocent until proven guilty.

[55] The right to a fair trial is often said to be non-derogable, in contradistinction to several of the other fundamental rights which are subject to various limitation and exceptions. However, the scope of the right to a fair hearing is such that not every minor default will lead to a trial being unfair.

[56] There is also no dispute that a person charged with criminal contempt is entitled to the procedural protections similarly afforded to a person charged with an offence. This is because criminal contempt, while cognizable before courts exercising civil jurisdiction, is a *sui generis* offence which nevertheless has to be proven to the criminal standard of beyond a reasonable doubt, and an alleged contemnor is entitled to the presumption of innocence. Counsel for the applicant relied on the Zimbabwean Supreme Court case of *Re Chinamasa* 9 [BHRC] 519, where it was held that "a person charged with contempt was entitled to the fundamental protections of s. 18 of the Constitution guaranteeing, *inter alia*, the right to fair trial by an independent and impartial court and the presumption of innocence". At pg. 539 (G), Gubbay CJ said:

> **"It follows, in my view, that although contempt by scandalising the court is an offence *sui generis* and is not part of the ordinary criminal law, it is none the less the**

responsibility of the judicial officer hearing the matter to ensure that the procedures adopted complies with the constitutional protections afforded an accused person charged with an ordinary criminal offence. After all the contemnor, like the convicted accused, is liable to punishment in the discretion of the court."

[57] Counsel for the respondents agrees that the procedural protections apply, and in fact in her own submissions draws the attention of the Court to the Bahamian Court of Appeal decision in *James Fleck v. Pittstown Point Landings Limited* SCCIV. App. No. 131 of 2019, where the COA (applying the Privy Council's decision of *Dhookarika v Director of Public Prosecutions* [2014] 5 LRC 211) specifically pronounced that the "constitutional guarantee of the right of a fair trial applies" to contempt proceedings.

[58] In the instant case, the applicant's main complaint as to unfairness is based on the predicate finding that the affidavit was false. In her affidavit, she states (para. 20) that: "The essential charge in relation to the contempt charge against me would have to be that I made the above allegations against the Learned Judge in an affidavit knowing that they were false." She avers further (para. 24) that "prior to the Learned Justice arriving to (*sic*) a finding of fact that my affidavit was fabricated and untrue, I was not given an opportunity to seek legal advice, enter a plea, call evidence and/or make submissions as to my guilt or lack thereof."

[59] Has the applicant been assured the procedural protections for a fair trial, and is there any basis for an apprehension that the hearing cannot be fair? In my judgment, and for the reasons briefly explained below, I do not think that the applicant can make out a case for the breach of the right to a fair hearing, whether as a result of the conduct of the proceedings so far, or prospectively.

[60] I deal first with the finding by the Judge that the affidavit was fabricated, without hearing from the applicant (as she contends). By way of preliminary observation, it cannot be said that the recusal hearing was held in the absence of the applicant, although it is unclear to what extent the applicant participated in the proceedings. It is recorded in the masthead of the ruling that the application was "heard on the written submissions" and that the attorney for the applicant "did not participate in the recusal application but was present with his client."

[61] Second, it is established by a long line of authorities, that an initial act or finding which may culminate in a decision detrimental to a person's interest, may not offend natural justice and in particular the *audi alteram partem* rule (hear the other side) if that person is entitled to be heard at a later stage (see *Rees v Crane* (1994) 2 AC 173, pp. 189-192). As discussed below, the applicant is clearly entitled to and will be heard on the issue of whether the content of the affidavit amounts to a contempt of court.

[62] For the proposition that she should have been afforded a hearing on the issue of whether the affidavit was false, the applicant relies primarily on a case from the High Court of New Delhi (*Abdul Muee & Ors. vs. Hammad Ahmed (Cont. Case (Crl.)* No. 0009/2009). Speaking for a two-judge panel, Kumar J., reciting the submission made by counsel for the petitioner said:

> "*…the Court has to determine the matter of charge (sic) either on the affidavits filed or after taking such further evidence as may be necessary, it is imperative that in order to determine the falsity of the affidavit of November 2005 of Hammad Ahmad, respondent, the Court can take evidence and determine that the false affidavit has been filed and after determining that the affidavit was filed, take action for committing contempt (sic) of Court.*"

[63] The reliance on this case is, however, entirely misplaced. That submission was being advanced in the context of an application which had been filed by the petitioner against the respondent for contempt for allegedly filing a false affidavit in civil proceedings between the parties. The trial judge had dismissed the application as an abuse of process, but did not decide whether the affidavit filed was false or not. Thus, an adjudication as to whether or not the affidavit was in fact false was a condition precedent to the initiation of the civil contempt action by the petitioners. The court actually dismissed the contempt application on the ground that it was outside the statutory limitation period, but it did find that in any event the petitioners could not invoke the contempt jurisdiction on a *prima facie* assertion that the affidavit was false; this was a matter for determination in the civil actions pending between the parties.

[64] That is not the case here. Here, the affidavit was filed before the Judge with carriage of the matter, and the facts which were asserted were within her personal knowledge. There is nothing procedurally improper with a judge relying on matters which are within his or her personal knowledge in dealing with a recusal or contempt proceedings (see, *infra*, *R v Cohn* (1985) 10 CRR 142; and *R v Griffin* (1988) 88 Cri App Rep. 63).

[65] The applicant further contends that the judge went "outside of the court to find evidence" and "imported evidence that was not a part of the trial". This was in relation to the Judge's reliance on her own knowledge of the visit to the *locus in quo* and travel invoices obtained from the Deputy Registrar, to contradict the assertions made, for example, that the Judge travelled without an aide (to the extent that this is material). The ruling clearly records that these invoices were made available to counsel. Again, this would form part of the information within the personal knowledge of the Judge to which she would clearly be entitled to refer.

[66] Secondly, the finding that the affidavit is false is not a finding of "guilt" of contempt, although the applicant erroneously asserts that there has been a finding of contempt, a point which I address later. Neither does the finding displace the presumption of innocence. Whenever the court issues a show-cause summons, it is predicated on a finding that the alleged contemnor has done something, i.e. that there is conduct constituting an *actus reus*, which, if the requisite *mens rea* is established at trial and there is no available defence, may amount to contempt. Both must be present to constitute a criminal contempt, and it appears that only an intention to interfere with or impede the course of justice will satisfy the mental element to commit for contempt.

[67] These elements were discussed in *Dhooharika v DPP* [2015] AC 875, where their Lordships were considering the constitutionality of the offence of scandalizing the court in the context of the Constitution of Mauritius. Lord Clarke, delivering the opinion of the

Board, said [42 et. seq.]:

> **"42. What then of the ingredients of the offence? In the passage from *R v Gray* [1900] 2 QB 36, quoted at para. 24 above, Lord Russell CJ described the *actus reus* thus: "Any act done or writing published calculated to bring a court or judge of the court into contempt, or to lower his authority, is a contempt of court'. The word 'calculated' is ambiguous and could be understood to mean as meaning "subjectively intended". However, the authorities have construed it as meaning "objectively likely": […] Further, as Lord Steyn put it in the passage from *Ahnee's* case at p. 306 quoted above, the offence exists solely to protect the administration of justice.**
>
> **43. What then of mens rea? This question is considered by Arlidge, Eady & Smith on Contempt at paras. 5-246—5-251. It was originally said by Wilmot J that "it is the intention which, in all cases, constitutes the offence: '*actus non fit reum, nisi mens sit rea'*." He did not however describe the mens rea he had in mind.**

[68] After reviewing English and Commonwealth authorities, his Lordship concluded:

> **"46. In the opinion of the Board these decisions, although not conclusive, give some support for the conclusion that the prosecution must prove that the defendant intended to interfere with the administration of justice. […]**
>
> **48. ...Since the court is here concerned with a criminal offence, the burden must be on the prosecution to establish the relevant facts beyond reasonable doubt. There can be no legal burden on the defendant. Thus, at any rate, once the defendant asserts that he acted in good faith, the prosecution must establish that he acted in bad faith. If the prosecution establish that he either intended to undermine public confidence in the administration of justice or was subjectively reckless as to whether he did or not, that would in the opinion of the Board, be evidence of bad faith."**

[69] In *Malgar Ltd. v R.E.Leach (Engineering) Ltd.* [1999] EWHC 843 (Ch.), Sir Richard Scott, VC, considering an application (albeit under the UK CPR. 32.14) for permission to commit the defendant company for contempt in making false statements in documents verified by statements of truth, was of the opinion that whether the matter amounted to contempt depended on the general law, not the Rules of Court. After conceding that the case law was not entirely clear on the point, he concluded however that: "*But I would think that it must in every case be shown that the individual knew that what he was saying was false and that his false statement was likely to interfere with the course of justice*."

[70] As to claim that the finding by the Judge that the applicant filed a false affidavit displaces the presumption of innocence, I refer to what was said by Goodman JA in in the Canadian case of *R v Cohn* (1985) 10 CRR 142 (cited in *Chinamasa*), where Goodman JA said:

> **"It is not a matter of the presumption of innocence being made inapplicable in contempt proceedings. <u>In a case such as this it is simply a matter that the facts known to the presiding judge which took place in his court and with respect to which there can be no doubt and no better proof adduced are such as to amount to *prima facie* proof unless the alleged contemnor calls evidence or gives evidence with affords him a prima facie defence.</u> In that regard, he is in no different position than a person**

accused of an offence under the Criminal Code where the prosecution has established a prima facie case." [Emphasis supplied.]

[71] The applicant equates the finding that the affidavit was false as tantamount to a finding of contempt. It is true, as the applicant points out (citing the decision of the Judge herself in *Louis Bacon v Sherman Brown and Steve McKinney* [2012/CLE/gen/0503]), that knowingly swearing a false affidavit in and of itself may amount to a contempt. As far as I can discern, however, the essential charge being made in the summons is that the false averments in the affidavit "*were intended to demean a Judge of the Supreme Court of the Bahamas, bring the Court into disrepute and prejudice the due administration of justice*." It seems to me that the swearing of the false affidavit in this case is the *conduct* being relied on to charge the contempt, and not the contempt itself. Perhaps this could be clearer in the summons, but in my judgment this falls far short of creating any unfairness to the applicant. The nature of the contempt of scandalizing the court by bringing it into disrepute is clearly set out.

[72] In fact, the applicant's written submissions implicitly acknowledges the need for the contempt in this case to be established beyond the mere filing of a false affidavit. This is what the applicant submits:

> **"Although on the face of things it may have seemed that the contents of the affidavit were criminally defamatory, and not of good faith, we submit that if the Applicant had been given an opportunity to be heard and provide a defence, the Courts would have seen otherwise. In addition, the Courts would have seen that the affidavit was to the best of the Applicant's knowledge and that she did not knowingly make false statements. They would have seen that there was no intention on her part to interfere with the administration of justice."**

If this be the case, then this is a defence very much open to the applicant to assert at the hearing of the contempt charges.

[73] Third, the applicant contends that the Judge has not only found her 'guilty' of filing a false affidavit without hearing her, but that in fact the Judge has found her in *contempt* without a hearing. This is obviously incorrect. A citation for contempt is not a finding of contempt (see *Keod Smith et. al. v. The Queen* (SCCivApp & CAIS No. 96 of 2015). As indicated in the authorities cited above, the standard for finding criminal contempt equates to the criminal standard of beyond a reasonable doubt. In *Re Chinamasa*, Gubbay CJ, likened a citation as akin to a rule nisi, quoting Goodman JA in *R v Cohn* (1985 10 CRR 142 (at 157):

> **"At its highest, the application of a rule nisi by the presiding judge merely shifts the burden of evidence as distinct from shifting the burden of persuasion to the accused. This court has already so held in *R v Pereira* …where Martin JA, speaking for the court said: 'Summary proceedings for contempt in the face of the Court do not infringe the right of an accused to be tried before an impartial tribunal and his right to be presumed innocent. The burden on the accused is an evidential one only and if at the end of the proceedings there exists a reasonable doubt as to guilt, he is entitled to be acquitted."**

[74] Fourth, the right to a fair hearing has to be assessed as part of a composite trial process (see *Boodram v AG of Trinidad and Tobago*) and this includes the appellate process. Even assuming *ad arguendo* that any shortcomings might have occurred (or might occur) in the proceedings, that by itself does not lead ineluctably to a hearing being unfair. In *Independent Publishing Company Ltd. v Attorney General of Trinidad and Tobago et. al.* [2004] UKPC 26, considering whether contempt orders against journalists and a media publishing houses for violating a non-publication order made by the judge in a high profile multiple murder case violated the right to fairness and due process, their Lordships said [88]:

> **"In deciding whether someone's section 4(a) "right not to be deprived [of their liberty] except by due process of law" has been violated, it is the legal system as a whole which must be looked at, not merely one part of it. The fundamental right, as Lord Diplock put it, is to "a legal system ...that is fair". Where, as in Mr. Maharaj's case, there was no avenue of redress (save only by special leave direct to the Privy Council from a manifestly unfair committal to prison, then, despite Lord Hailsham's misgivings on the point, one can understand why the legal system should be characterized as unfair. Where, however, as in the present case, Mr. Ali was able to secure his release on bail within 4 days of his committal—indeed, within only one day of his appeal to the Court of Appeal—their Lordships would hold the legal system to be a fair one.**

And continuing at 92:

> **"[G]iven that Mr. Ali had a right of appeal, their Lordships regard him as having enjoyed the benefit of due process. As in *Hinds*, so too here: any shortcomings in the first hearing could be made good on the appeal and by the grant of bail meanwhile. The system as a whole was fair."**

[75] In all the circumstances, I do not find that the applicant can make out a reasonable cause of action with some chance of success to an entitlement to a declaration for breach of the right to a fair trial.

Right not to be deprived of personal liberty except by due process

[76] Article 19 secures unto a person the right not to be "deprived of his personal liberty save as may be authorized by law", and subject to a list of enumerated cases in which deprivation of liberty may be authorized. Notably, one of the situations carved out from the protection is where the detention may be "in execution of the order of a court on the grounds of his contempt of that court or another court or tribunal."

[77] The right not to be deprived of liberty except by due process is obviously here being asserted *qui timet* ("I fear") presumably on the basis that one of the possible punishments if the applicant is found guilty of contempt is imprisonment, subject to the terms and conditions as may be specified by the Court.

[78] I agree with counsel for the respondents, however, that the allegation in this regard is wholly premature. The substantive hearing of the contempt charge against the applicant

has not yet concluded and it would be futile and speculative to hypothesize that the process will be unfair or cannot be fair. These proceedings are pending and the Judge is able, even during the course of the hearing, to take measures to protect the due process rights of the applicant, if thought necessary. Further, despite the fears of the applicant, and not to state the obvious, it is not a foregone conclusion that she will be found guilty of contempt, and therefore potentially exposed to a deprivation of liberty. She is entitled to defend against the contempt charge and to appeal the outcome of the same, as well as to apply for bail pending any appeal in the event of a custodial sentence.

[79] Mr. Ducille commended to my attention a passage in the UK Court of Appeal case of *R v Griffin* (1988) 88 Cri App Rep 63, where Mustill LJ pointed out the pitfalls of the summary prosecution for contempt in the face of the court. There, describing the summary contempt process and contrasting it with the ordinary criminal process, Mustill LJ said:

> **"…there is no summons or indictment, nor is it mandatory for any written account of the accusation made against him to be furnished to the contemnor. There is no preliminary enquiry or filtering procedure, such as committal. Depositions are not taken. There is no jury. Nor is the system adversarial in character. The judge himself enquire into the circumstances, so far as they are not within his personal knowledge. He identifies the grounds of complaint, selects the witnesses and investigates what they have to say (subject to a right of cross-examination), decides on guilt and pronounces sentence."**

[80] It is true that when a court rises to protect its authority of its own motion and issues a show-cause notice the process bears some verisimilitude to the summary process, in that the Judge performs a multiplicity of what would ordinarily be conflicting roles. But unlike contempt which is proceeded with peremptorily to protect against acts in the face of the court designed to interrupt the administration of justice (see below), a show-cause notice provides the offender with notice and the chance to arrange for legal representation.

[81] To some extent, the applicant's objection to the Judge dealing with the contempt *ex proprio motu* (of the court's own motion) arises from some confusion over the proper classification of whether the conduct in respect of which the contempt proceedings arises is contempt in the face of the court (*in facie curia*) or contempt outside the court (*ex facie curia*). In fact, the expression contempt in the face of the court is somewhat of a misnomer, as it is clear that it not only embraces contempt within the view or precincts of the court but extends to contempt which the court can punish of its own motion, that is "…contempt in the cognizance of the court.": see *Balogh v. St. Alban's Crown Court* [1975] QB 73 (at 84); *McKeown v R* (1971) 16 DLR (3d) Can SC. In the latter case, it is referred to as contempt in the Court's presence (*sedente curia*). The alleged contempt in this case is clearly in the cognizance of the court.

[82] In answer to the contention that the judge is unable to act impartially in the contempt proceedings because of this multiplicity of roles, Mrs. Green-Smith points out that the Rules of the Supreme Court (R.S.C.) Order 52, rule 4, specifically preserves the common law right of a judge to make an order of committal of his own motion against a person who is guilty of contempt. She also relied on the case of *Caves Co. Ltd. v Higgs, Re Kenneth*

McKinney Higgs and James M. Thompson (Contempt of Court) [1988] BHS J. No. 122 [No. 866 of 1986], which remains the *locus classicus* in this jurisdiction on the issue of contempt.

[83] The contempt proceedings in *Caves* also arose from an affidavit filed in support of an application for the Judge's recusal, which was said to "scandalize" the court in various paragraphs "in imputing to a judge of the Supreme Court of the Bahamas over the past thirty years the inability to be impartial to the defendants." Counsel was also charged for aiding and abetting the scandalizing of the court by aiding and abetting his client in instituting proceedings based on the affidavits and for his own part in using language in the summons which was "calculated to bring judge of the Supreme Court of the Bahamas into contempt and the administration of justice in the Court generally in disrepute".

[84] In finding both guilty of contempt on show-cause summonses, Gonsalves Sabola J. held as follows:

> **"8. Where a court must rise to the protection of its own authority and integrity, it is wholly inappropriate for the judge contemned to abdicate his responsibility by saddling another judge of the court with the duty of dealing with the contempt committed. The historical development of the common law power of a Judge to punish for contempt has proceeded independently of any consideration of the *nemo judex* rule of natural justice. Conceptually, the judge is not a "party" to a cause nor is the contempt he deals with his cause. It is the highest attestation to the character expected in a judge that the law as developed has never encouraged questions of his capacity and inclination to balance with objectivity the multiple roles he plays where a contempt is committed within his cognisance."**

[85] Counsel for the respondents also pointed out that ruling was endorsed by the Court of Appeal *In the Matter of the Contempt of Maurice Glinton QC, In the Face of the Court on 28 September 2015*, and in *In the Matter of the Contempt of Court of Maurice Glinton QC on 9th October 2015, Nos. 1 and 2 of 2015*, where the Court described the decision as "illuminating".

[86] The fact that the court is proceeding on its own motion also does not necessarily offend against due process, even if the process is open to criticism. As the learned editors of "*Borrie & Lowe: The Law of Contempt*" (LexisNexis), 4th Edition 2010 put it:

> **"The fact that the judge tries and punishes the case himself is open to the obvious criticism that he is simultaneously judge, witness, prosecutor and plaintiff. The criticism is most pertinent where the alleged contempt comprises conduct directed against the judge personally. However, strictly speaking this procedure does not offend against the principle of natural justice, namely, *nemo judex in sua causa*, since the prosecution is not aimed at protecting the judge personally, but protecting the administration of justice. Nevertheless, some would argue that, in such cases, justice is not seen to be done."**

[87] In the instant case, the Applicant has been provided with a summons issued under the hand of the Registrar specifying the contempt and has been allowed adequate time and facilities

to defend the charge. Provisions have also been made for her to adduce evidence, and the Court is being assisted by the Attorney-General as *amicus curiae*.

[88] I therefore find the applicant's apprehensions that she might be deprived of liberty by a failure to observe due process, apart from being inherently speculative and premature, impossible to sustain.

Freedom of expression

[89] Article 23 guarantees to every person the right to freedom of expression, which includes "…freedom to hold opinions, to receive and impart ideas and information without interference, and freedom from interference with his correspondence." The Applicant contends in her affidavit that the proceedings for contempt "…poses an unconstitutional restriction on the Applicant's fundamental right to freedom of speech." Or, as put in counsel's pastiche in the written submissions:

> "*the Applicant ought not to be penalized for words that were written in the hopes of rectifying issues in a public institution and that weren't proven beyond a reasonable doubt to have been made so as to interfere with the administration of justice. That for this, the Defendant is subject to the protection pursuant to Article 23 of the Constitution."*

[90] Counsel for the applicant relied on the oft-cited speech of Lord Atkin in *Ambard v. Attorney General of Trinidad and Tobago* [1936] AC 322 (at 335) that there must be some tolerance for judicial criticism:

> **"…where the authority and position of an individual judge, or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."**

[91] He also made reference to the historic case from the Bahamas of "*In the matter of a special reference from the Bahamas Islands* (1893) AC 138, where the Privy Council held that a letter published in the *Nassau Guardian* critical of the Chief Justice was not a contempt, as it was not calculated to interfere with the administration of justice, although it might have been libellous.

[92] In my view, the reliance on *Ambard* and *In re the Bahama Islands* is not apposite this case. Both cases were concerned with articles or letters published in the newspapers by third parties commenting on matters related to the administration of justice or judicial personalities. As comes out clearly from the *Ambard* case, the defence of fair comment is available to "…any member of the *public* who exercise the right of criticizing, in good faith, in private or public, the public act done in the seat of justice" and "provided that

members of the public abstain from imputing improper motives to those taking part in the administration of justice."

[93] The circumstances of counsel filing an affidavit containing offensive contents and false content is vastly different from publications by third parties which might have the effect of scandalizing the court. Counsel is under additional duties as an officer of the court, and subject to Rules and regulations governing his or her conduct. In *Caves Company Ltd. v Higgs, Re Kenneth Higgs and James Thompson (contempt of court)* (*supra*), Gonsalves-Sabola J stated:

> **"9. On his admission to practice a counsel and attorney is deemed by statute to be an officer of the court and, therefore, is under a special duty to uphold the authority of the court and show it appropriate respect. When acting on behalf of his client counsel is limited to and should adhere to the instructions given by the client, except that no counsel may take a subordinate position in the conduct of the case or share it with the client; *Halsbury, 4th Edn*. Vol. 3, paragraph 1180. Counsel behaves improperly where he allows himself to be used by a client as an agency of insult or degradation of the opposite party or witnesses of opposing counsel. But he becomes a principal contemnor when he submits to being used by his client as a channel of abuse calculated to scandalize the court himself. A client who dares to instruct counsel so to act must come to expect that his instructions will be refused out of hand or that counsel will decline to represent him. Counsel may not shelter immune behind a façade of "client's instructions" and, as was here done, present to the court process which attacks the character of judges, insinuates their lack of impartiality, suggests their participation in or suppression of fraud and their taking sides with the rich against the poor. Counsel is perceived as himself being a principal in the perpetration of the contempt of court thus committed."**

[94] The courts have long censured, or punished counsel for contempt for filing prolix, frivolous or scandalous pleadings, or false affidavits (see the old case of *Linwood v. Andrews and Moore* (1888) 58 L.T. (N.S.) 612, where a barrister was imprisoned for conspiring with a solicitor to file false affidavits to the court; and the more recent authorities from this jurisdiction (already cited), in which counsel were found in contempt for abusing the pleading process of the court: *Caves Company Ltd. v Higgs, Re Kenneth Higgs and James Thompson (contempt of court)* [1998] BHSJ No. 122 (1986 No. 866); and *The Queen v. The Rt. Hon. Perry G. Christie, Prime Minister of the Commonwealth of The Bahamas (in his capacity as the Prime Minister responsible for Crown Lands) and others; Ex parte Coalition to Protect Clifton Bay (Contempt of Court: Keod Smith and Derek Ryan)* (2017) 1 BHS J No. 127).

[95] There is therefore no sustainable allegation of any *prima facie* breach of the right to freedom of expression. But even if there were, I point out that one of the exceptions to the right to freedom of expression (art. 23(2)), is to allow for anything done under the authority of any law which is reasonably required and which is not shown not to be reasonably justified in a democratic society for "maintaining the authority and independence of the courts". In *Ahnee v DPP* [1999] 2 AC 294, an appeal from Mauritius, the Privy Council held that although freedom of expression was guaranteed by the Constitution, the offence

of scandalizing the court fell within the qualification to that right, since it existed solely to protect the administration of justice and was therefore reasonably justified in a democratic society.

[96] The claim for a declaration for breach of the right to freedom of expression must also summarily fail.

Additional points in the Respondents' summons

[97] My conclusions on the applicant's claims for breaches of her constitutional rights relieves me of the need to say very much more on the respondents' summons, but for completeness several issues must be addressed.

The naming of the DPP

[98] As indicated, the original version of the Notice of Motion named only the Director of Public Prosecution (DPP) as the Respondent. I raised this issue in the case management hearing, which led to the addition of the AG as respondent, although the DPP remained. Criminal contempt, which may generically be defined as conduct involving an interference with the administration of justice, may be prosecuted by the DPP in States where he or she is the prosecuting authority (see, for an example, *Dhooharika v. DPP* [2015] AC 875; [2014] UKPC 11), and similarly by the Attorney-General where the AG remains the prosecution authority. But in general, most cases are prosecuted by the court acting of its own motion, as is the case here. Thus, counsel is right in the assertion that no allegations are made nor any relief sought against the DPP and, for the reasons given above, he is obviously not a necessary or proper party to the proceedings. However, as the proper party has been named, and there is no specific relief sought to have the DPP struck out as a party (separate and apart from having the claim struck out generally), I need not say anymore on this issue.

Alternative means of redress & abuse of process

[99] Not surprisingly, the respondents argue that recourse to the use of the constitutional motion to seek relief is a misuse of constitutional process, relying first on the proviso to article 28(1). Secondly, they buttress this submission by reliance on the warning issued more than four decades ago in *Harrikissoon v Attorney-General of Trinidad and Tobago* [1980] AC 265, that it is an abuse of process to reach to the constitution when other remedies are available at common law or at statute. The *Harrikisson* principle has now achieved canonical status and has been reiterated by the Board in a number of cases, perhaps most famously in *Jaroo v Attorney-General of Trinidad and Tobago* [2002] AC 265 (per Lord Hope, at [39]). See, also, *Chokolingo v The Attorney General of Trinidad & Tobago* [1981] 1 WLR 106; *Hinds v Attorney General of Barbados* [2002] 1 AC 854, para. 24 (Lord Bingham); Lord Cooke of Thorndon in *Observer Publications Ltd. v. Matthew* (2001) 58 WIR 188, per Lord Cooke of Thorndon at 206; *Forbes v. Attorney General of Trinidad and Tobago* (2002) UKPC 21, per Lord Millett, para. 18.

[100] In *Chokolingo,* a newspaper editor was committed for 21 days for contempt for the offence

of "scandalizing the court", an offence which it was argued did not exist at common law. Instead of appealing, he applied nearly 2½ years later for constitutional relief on the grounds of deprivation of liberty contrary to due process, arguing that his conduct could not legally constitute contempt. Lord Diplock stressed that although collateral relief was theoretically available under the various constitution redress provisions, parallel remedies of that sort would allow a person many years later following a failed appeal of a criminal conviction to launch a collateral attack via a constitutional motion. This, he said, would be "quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine."

[101] However, in *Independent Publishing*, the Privy Council stressed that it did not regard *Chokolingo* as authority for denying constitutional relief in cases where the applicants were *not* making a collateral attack on their conviction for contempt. Thus, in that case, their Lordships held that the appellant journalist (whose conviction had already been set aside on appeal) and several media agencies who were not part of the contempt proceedings but were challenging the non-publication order made by the judge, were not abusing the process when they sought constitutional relief. This was because they were not making a collateral challenge, but were rather concerned with "vindicating and securing for the future their right to free expression". They were therefore held to be entitled to declarations that the right should not be in future contravened by non-publication orders made in excess of jurisdiction (para. 82).

[102] The *Harikissoon* principle was given a further gloss by the Privy Council in *AG of Trinidad and Tobago v. Ramanoop* [2006] 1 AC 328, where the Board held the notwithstanding the general rule against pursuing parallel remedies, there might be some features of a case which might make it appropriate to seek collateral relief. An example given of a special feature was where there had been an arbitrary use of state power. The Board also drew a distinction between the Constitution of Trinidad, where the court has a discretion to refuse relief where parallel remedies are available, and those Constitutions precluding the exercise by the court of its power to grant relief if satisfied that adequate alternative relief is available—the Bahamas' constitution being given by their Lordships as a specific example of the latter.

[103] Mrs. Green-Smith argued that the applicant's own evidence betrays that there are alternative means of redress available. These consist, firstly, it is said, of the very proceedings before the court for contempt, at which the alleged contemnor is entitled to a fair hearing based on the criminal standard of proof beyond a reasonable doubt.

[104] It is beyond the pale that a contemnor charged with criminal contempt is entitled to due process. But I hardly think that it can be fairly contended that an applicant who seeks constitutional relief elsewhere and not at the fount of the court whose proceedings are being challenged is abusing the legal process by not availing themselves of that alternative relief. In the *Independent Publishing* case (*supra*) [74], the Privy Council described as "an impossible argument" the contention by the respondents that the newspaper publishers (appellants) were abusing the constitutional process in seeking redress for interference with their right to free expression, it being contended they should have applied to the trial

judge to vary or discharge his own orders. Even assuming, on the view accepted by the Trinidad Court of Appeal, that the applicant could have applied to the trial judge to be relieved from his orders, their Lordships concluded "…it is hardly to suppose that such an application would have succeeded and there would have been no right of appeal against refusal."

The availability of the appeal process

[105] Second, there is said to be the prospect of an appeal after the contempt hearing has taken place, and in this regard it was pointed out that in fact there has not yet been a finding of contempt or an imposition for a punishment for contempt. Reference was made to the Court of Appeal case of *Keod Smith et. al. v. The Queen* (SSCivApp & CAIS No. 96 of 2015), where the Court of Appeal held that an appeal before an actual finding of contempt or imposition of a punishment was premature. As the Court said:

> **"We find that the appeal before us is premature. It is therefore not a proper appeal. While the learned Judge has cited the Appellants for contempt and required them to show cause why they ought not to be committed for contempt, that is not a finding of contempt, nor has there been the imposition of any punishment for contempt. The parties should allow the process to finish, then have their right of appeal, based on whatever the allegations are; be they unfairness, bias, irregularities, for example. Those options still remain open to the intended appellants in this matter, but certainly there is no finding that we can see that is appeal at this point."**

[106] I also note the reference in the applicant's affidavit to the fact that she had sought the leave of the court to appeal the Recusal decision dated 6 July 2020, and that this application is set to be heard by the Judge, although this court is unaware of the hearing date.

[107] I agree with the Respondents that the availability of an appeal both with respect to the recusal hearing (for which proceedings have already been started) and any decision on the contempt charges would provide adequate alternative redress. In the *Independent Publishing* case, the Privy Council put great emphasis on the fact that one of the appellant journalists was able to readily access the appeal process to set aside the contempt finding and obtain bail in the meantime in concluding that it amounted to a fair trial process. Their Lordships said that the journalist had enjoyed the benefit of due process, as "any shortcomings in the first hearing could be made good on the appeal and by the grant of bail in the meantime".

[108] In *Maharaj (No.2)* Lord Diplock, giving the decision of the Board famously said (pg. 679-j--680 a-b):

> **"[N]o human right or fundamental freedom recognized by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for error of fact or substantive law, even when the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say there was error. The fundamental human right is not to a legal system that is fallible but to one that is fair. It is only errors in procedure that are capable of**

constituting infringements of the rights protected by section 1(a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rule of natural justice. [Even] a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within section unless it has resulted, is resulting or is likely to result in a person being deprived of life, liberty, security of the person or enjoyment of property."

[109] Significantly, in *Independent Publishing Co. v. Attorney General*, the once important and often confusing distinction that was made between errors of fact and law and fundamental breaches of natural justice which in *Maharaj (No. 2)* justified collateral relief was quietly exploded. Tucked away just before the penultimate paragraph of the decision, their Lordships said:

> **"Now that rights of appeal exist, indeed, their Lordships see little reason to maintain the original distinction made in *Maharaj No. 2* (and still relevant at the time of *Chokolingo*) between fundamental breaches of natural justice, mere procedural irregularities and errors of law—distinctions which in any event were never very satisfactory for the reasons given by Lord Hailsham [in his dissent in *Maharah No. 2*]".**

[110] I therefore find that the applicant's recourse to constitutional redress for declarations that her rights under article 19, 20(1) and 23 have been or are likely to be contravened is in breach of the alternative remedies principle in the proviso to article 28. Apart from any issue of prematurity, the applicant has available the appeals process to correct any errors, and it is therefore an abuse of process for the applicant to seek those reliefs by collateral constitutional motion.

The affidavit further brings the court into disrepute

[111] I agree with Counsel for the respondents that there are several passages in the affidavit which, to the extent that they suggest that a fair trial is impossible before the Judge, may be regarded as reproachable and which themselves may be subject to censure or cognizable in contempt. For example, in *Viyasagara v R* (PC Appeal No. 35 of 199), the Board upheld a finding of the Supreme Court of Ceylon that a statement made by counsel to the industrial tribunal that an impartial inquiry could not be expected before the tribunal was a contempt, because there was no justification for the statement.

[112] However, it would not be a convenient or an efficient use of judicial time for this court to take cognizance of the possible contemptuous allegations in the affidavit. In *Jet 2 Holidays Ld. v. Hughes and another* [2019] EWCA Civ 1858, the UK Court of Appeal allowed an amendment to an application for contempt to allow reliance on further witness statements in addition to the original witness statements in the same contempt proceedings. Speaking for the Court of Appeal, Sir Terence Etherton, MR said:

> **56. It is plainly convenient, efficient and cost effective for the allegations of contempt in relation to the further witness statements to be heard and determined in the same**

proceedings and at the same time as the allegations in relation [to] the original witness statements. That would not give rise to any unfair prejudice to the respondents.

56. It is not necessary to issue new contempt proceedings every time there is a contempt in or relating to the same set of proceedings. Contempt proceedings are not like litigation between private parties where the claimant seeks a personal remedy against the defendants based on a cause of action which is not barred by limitation of time and which must generally speaking exists before proceedings can be commenced. As Moore-Brick LJ said in the KJM Superbikes case at paras. [9] and [11], proceedings for contempt are public law proceedings, and when the court gives a private person permission to pursue such proceedings against a witness who is alleged to have told lies in a witness statement it allows that person to act in a public rather that a private role, not for the furtherance of that person's private interest, but rather to pursue the public interest."

[113] I shall therefore direct that the Registrar transmit to Charles J. a copy of the affidavit filed in support of the Constitutional motion to determine whether or not any additional action might need to be taken by the court in this regard.

Tending to prejudice, embarrass or delay the fair trial of the action

[114] The respondents' grounds that the action may "prejudice, embarrass or delay the fair trial of the action" is however misplaced. As explained by Bowen LJ. In *Knowles v. Roberts* (1888) 38 Ch. D. 263, p. 270, "The rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, subject to this modification and limitation, that the parties must not offend against the rules of pleadings which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass, and delay the fair trial of the action, it then becomes a pleading which is beyond his right". So, for example, failure to indicate how much of a statement of claim is admitted or denied might constitute an embarrassing pleading. But clearly this is a rule regulating and controlling the pleadings in the action before the court, and it cannot be invoked to contend that the pleadings in one action might "prejudice, embarrass or delay the fair trial" of another action. Thus, the ground is not made out and it adds nothing to the general abuse of process claim.

Conclusions on strike out

[115] Having considered the applicant's motion and affidavit in support, the respondents' summons, and the written and oral submissions made by both sides, I am of the view that accepting the facts as alleged in the proceedings, on the current state of the law, this is an appropriate case in which to exercise my jurisdiction to strike out the applicant's claims. In my judgment the claims for the declarations do not establish a reasonable cause of action with any chance of success and are bound to fail.

[116] Moreover, I am further satisfied that the application contravenes the principles precluding the grant of relief where alternative remedies are available, and therefore constitute an abuse of the process of the court. The cases all show that the constitutional jurisdiction, wide as it is, should not be used to make collateral attacks on decisions of courts of co-

ordinate jurisdiction, or as a substitute for appellate review.

Issue (ii): The stay and transfer application

Stay

[117] The court can deal with these claims for relief shortly, as it appears to me plainly that the applicant has not articulated any basis for the grant of the relief sought. As to the stay, apart from the prayer in the notice of motion, the only other reference to it is a fleeting mention in the affidavit where the applicant prays that the show-cause hearing should be "permanently stayed and thus discontinued by declaration that the process is unconstitutional." With respect, this adds nothing to the constitutional claim. If the court had found the alleged contravention of fundamental rights made out, this would inevitably had been the outcome.

[118] In any event, there is nothing on the facts of this case that would remotely come near to justifying a stay, based on the most recent statement of the law as to the circumstances in which the court might exercise its jurisdiction to stay criminal proceedings for abuse of process. A stay is only justified where (i) it would be impossible to give the accused a fair trial; or (ii) where it is necessary to protect the integrity of the criminal justice system (for example, from executive misconduct): *Warren v. Attorney General of Jersey* [2011] UKPC, [2012] 1 A.C. 22. Obviously, to the extent that the principles apply to contempt hearing—which analogically they must since such a hearing is assimilated to a criminal hearing—it is only the first limb that would be relevant and, as has been indicated, there is no basis on which it can be said that the applicant cannot be accorded a fair hearing.

Transfer

[119] In support of its alternative claim for the transfer of the proceedings to a different judge, the applicant relies on the case of *Re Chinamasa* 9 [BHRC] 519 from the Supreme Court of Zimbabwe. In that case, the trial judge issued citations against the applicant (then the Attorney General of Zimbabwe and at the time of the hearing the Minister of Justice, Legal and Parliamentary Affairs) to show cause answer why he should not be subject to contempt for criticizing what he thought was an overly lenient sentence imposed by the judge (Adam J.) in respect of three Americans convicted of illegal possession of weapons and attempting to take them on board and aircraft. The judge had imposed a 6-month custodial sentence, and the applicant in a statement reported in the newspaper said that the sentence induced "a sense of shock and outrage in the minds of all right-thinking people" and did not "match the seriousness of the offence".

[120] The hearing of the contempt charge had been administratively assigned to a another judge (Blackie J), but the applicant contended that this offended his right to a fair trial by an impartial and independent court, as it was the same High Court which he was accused of scandalizing that was hearing the charge. This is what Gubbay, CJ said in response to that contention (539-i, to 540-e):

> **"The contention advanced by the applicant is that the High Court which he is accused of having scandalized, is the very one which is to determine whether the statements he made were contemptuous of it; it will thus be acting as judge in its own cause. Expressed differently, the injured party is not, in the circumstances, an independent judicial body. It cannot impartially adjudicate when it itself has been offended and has issued the citation. Consequently, any proceedings brought before the Hight Court would amount to a contravention of the applicants rights under s. 18 (2) of the constitution. A fair hearing would be denied him.**
>
> **The contention, which must be assessed against the factual situation and not hypothetically, raises the question of whether there is a real or substantial risk of Blackie J., or any judge of the High Court (other than Adam J, for there was never any prospect of him being chosen as the adjudicator) being unable to disabuse his or her mind of extraneous and prejudicial information or attitudes which they are not entitled to consider in reaching a decision. […]**
>
> **I regard the decision to assign the matter to Blackie J. as entirely proper. He was not the author of the judgment criticized by the applicant. He had not been involved at any stage of the proceedings brought against the three accused. It was not his personal dignity, respect and professional ability that had been injured. To suggest, therefore, that Blackie J. (or any judge for that matter) is incapable of dealing with the proceedings in an impartial and objective manner since the criticism levelled directly at a colleague affected the authority of the High Court in the administration of justice, is wholly unconvincing."**

[121] The applicant further bolsters his argument for a transfer by drawing attention to the concluding statement of paragraph 34 of the recusal ruling, where the judge in dismissing the recusal application said this:

> **"In my opinion, the fair minded and informed observer would be troubled that certain attorneys would descend to the level of fabricating allegations against judges. <u>The time is therefore ripe for the Court to discipline these lawyers</u>." [Emphasis supplied.]**

[122] I cannot say that I do not immediately apprehend why a person charged with contempt might feel some trepidation by such sentiments expressed by the very court which is determining on its own motion the contempt charge against him or her. But this does not negate the constitutional protections and procedural safeguards built into the process, and the requirement to find the contemnor guilty beyond a reasonable doubt. In any event, the statement seems to be no more than an aspirational expression that counsel, who are to be held to a higher standard, ought properly to be punished if found guilty of scandalizing the court by bringing it into disrepute.

[123] There is something, however, to be said of the process adopted in *Chinamasa* when the court can proceed more leisurely with the contempt charge, as opposed to those cases where the court must act immediately in respect of contempt *in facie curiae*. But it is entirely a matter for the exercise of the discretion of the individual judge whether or not to proceed on his or her own motion, refer the matter to the Chief Justice for hearing by another

(disinterested) judge or, exceptionally, refer the matter to the prosecuting authorities (AG, or DPP). For example, in *Balogh v Crown Court at St. Albans*, the offender was brought before the presiding judge in the same building, and not the judge whose proceedings the offender intended to disrupt. In that same case, Stephenson LJ indicated support for the proposition that one judge could commit for the contempt of another, and indicated that "it may be better for a presiding judge available in the same building to commit for a contempt of a circuit judge's court", although this depended on the circumstances of the case.

[124] For my part, I am satisfied that I have no jurisdiction to transfer this matter to another judge, including myself, when a judge of co-ordinate jurisdiction is properly seized of the matter.

[125] Before leaving this point it might be remarked, however, that it remains one of the great conundrums of the common law that a judge is duty bound to recuse him or herself from hearing a matter where there is only an appearance of bias (which might arise from innocent association with one of the parties, as in the *Pinochet (No. 2)* case), to ensure the sanctity of the *nemo judex* rule and the principle that justice must be seen to be done. Yet the same judge is free to charge, try and convict a person of what is essentially a criminal offence for insults leveled at the very Court or Judge without offending the *nemo judex* rule, on the legal fiction that the judge is a disinterested party.

[126] The common law has long recognized the anomalous position of summary contempt charges when viewed in the context of natural justice requirements. From as long ago as *Re Clements* (1877) 46 L.J. Ch. 375 at p. 383, Sir George Jessel M.R. said:

> **"[I]t seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of Judges to see that there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject."**

[127] However, it is a power that has long been recognized to be constitutional once the procedural safeguards developed at common law and set by constitutional principles are observed. These include: (i) the right to be informed of the specific charge; (ii) the right to be represented by counsel and to present a defence; (iii) the right to call evidence; (iv) the right to be presumed innocent until found guilty according to the criminal standard; (v) the right to be heard in mitigation before any sentence is passed; and (vi) the right to a fair trial by an independent and impartial tribunal. In the case which forms the subject of this constitutional challenge, there is no reason to suppose that any of these rights have been or will be breached.

CONCLUSION AND DISPOSITION OF APPLICATION

[128] For the reasons given above, I would strike out the claim for the various constitutional declarations sought on the grounds that it plain and obvious that they cannot succeed. Further, the claims also violate the principle precluding grant of relief where alternative remedies are available, and they therefore constitute an abuse of process. But even if I

were wrong in the view that the claims were *prima facie* bound to fail, in my judgment and for the reasons given, the claims were not made out.

[129] Having come to those conclusions on the lack of viability of the constitutional claims, the consequential relief seeking a stay or transfer to another judge fall away, although for the reasons given there is in any event no basis on which the court could grant such relief.

[130] The constitutional motion is hereby dismissed, with costs to the respondents, to be taxed if not agreed.

[131] I thank counsel for their industry and assistance to the court in arguing this matter at short notice.

Dated the 13 October 2020

Klein, J.
Justice