COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Public Law Division

2020/PUB/jrv/00024

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN

AND

The Most Hon. Hubert A. Minnis
(In his Capacity as Prime Minister of The Commonwealth of The Bahamas; and the Competent Authority)

1st Respondent

AND

The Hon. Carl W. Bethel Q.C
(In his capacity as the Attorney General of the Commonwealth of The Bahamas)

2nd Respondent

Ex Parte

DWIGHT ARMBRISTER

Applicant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. I.A. Nicholas Mitchell for the Applicant
Mr. Franklyn Williams, Deputy Director of Legal Affairs with him Mr. David Higgins and Mrs. Kayla Green-Smith for the Respondents

Hearing Date: 19 October 2020

Judicial Review – Leave to bring judicial review – Are reliefs sought constitutional in nature – Applicant in the wrong court – Did the Applicant have an alternative remedy – Whether the matter ought to have been brought by constitutional motion

The Applicant, the owner of D'Waters Cafe, a restaurant located on Arawak Cay, alleges that he was adversely affected by two of the Emergency Powers Orders which were made

pursuant to Article 29 (2) of the Constitution. Aggrieved by those decisions, he seeks leave to apply for judicial review. He takes issue with specific provisions of the Orders which he says were not reasonably justified in accordance with Article 29 (2) of the Constitution in that the measures implemented were not reasonably required to meet the legislative outcome, were not rationally connected to the purpose of enacting the Orders and did not impair the constitutional rights of the Applicant as minimally as possible.

The Respondents made two preliminary objections to the application for leave to apply for judicial review namely: (i) that the application is constitutional and has no element of judicial review, thereby rendering the matter outside the scope of judicial review and (ii) the Applicant had available to him an alternative remedy in the form of constitutional motion which he ought to have exhausted before applying for judicial review.

HELD: Dismissing the application for leave for judicial review with no costs to the Respondents.

1. Generally-speaking, there are three well-established heads upon which judicial review may be brought by which an applicant with a caveat for further development on a case by case basis which may add further grounds such as the principle of "proportionality: **Council of Civil Service Unions v Minister for the Civil Service** [1985] A.C. 374 at 410-411 applied. An applicant must therefore bring his application for leave within one of those grounds.

2. The Court will refuse a judicial review application which is substantially constitutional – **In the Matter of an Application by Seereeram Brothers Limited** HCA No. 3123 of 1993 (Trinidad and Tobago).

3. There is no difference between alleging that Article 29 (2) of the Constitution was breached and alleging expressly that a particular constitutional right was breached. Therefore, the right to constitutional redress was well available to the Applicant.

4. There will be no order as to costs: **Daniel Mussington and Gervin Gumbs v The Attorney General of Anguilla,** Miscellaneous Suits Nos. 044 and 045 of 2001 (unreported) – Judgment of Hariprashad-Charles J applied.

RULING

Charles J:

Introduction

[1] On 11 March 2020, COVID-19 was declared a pandemic by the World Health Organization. It was the beginning of a trail of death and suffering and the start of a succession of states of emergency, lockdowns and curfews across the globe. No country was spared.

[2] Following the outbreak of this deadly virus, the Honourable Prime Minister, in his capacity as the Competent Authority, declared a state of emergency pursuant to Article 29 of the Constitution.

[3] Article 29(2) of the Constitution saves any law enacted during the state of emergency from being held to be unconstitutional notwithstanding that it infringes the fundamental rights and freedoms set out in Articles 19 – 26 so long as they are reasonably justifiable in the circumstances for the purpose of dealing with the emergency. Pursuant to Article 29(2), several pieces of legislation were enacted which imposed, among other things, a curfew and a lockdown, thereby affecting individuals' freedom of movement.

[4] The first Emergency Order was implemented on 20 March 2020. The Honourable Prime Minister, during a nationwide address, announced a 9:00 pm to 5:00 am daily curfew, restrictions on private gatherings, and closure of most in-person businesses, with limited hours for food stores and farmers' markets, pharmacies, gas stations, laundromats, banks, construction, and restaurants (limited to take-out only). The restrictive measures continued throughout 2020 and some continue to date.

[5] Many complained bitterly about the restrictive measures and the decisions taken by the Competent Authority. Some even protested on social media and elsewhere but, Mr. Dwight Armbrister ("the Applicant"), a businessman and the owner of

D'Waters Café located on Arawak Cay, at what is colloquially known as the "Fish Fry", decided to take the "bull by the horns" and approached the Court.

[6] Aggrieved by the decision(s) of the Competent Authority when it enacted the Emergency Powers (Covid 19 Pandemic) (No. 3) Order 2020 and the Emergency Powers (Covid 19 Pandemic) (Lockdown) Order 2020 (collectively referred to as "the Orders"), the Applicant seeks leave to review those decisions. He seeks leave pursuant to the provisions of Article 29 of the Constitution of the Commonwealth of The Bahamas ("the Constitution") and further, pursuant to the Emergency Powers Act namely:

a. Emergency Powers (Covid 19 Pandemic) (Lockdown) Order 2020 dated 27 July 2020 ("the Lockdown Order");

b. Emergency Powers (Covid 19 Pandemic Lockdown) (No 3) Order 2020 dated 4 August 2020 ("the Pandemic Order")

[7] The Respondents challenged the application for leave on the following two discrete grounds: (1) it is not proper for the Applicant to have raised a breach of a constitutional right in an application for judicial review and (2) the Applicant did not exhaust all rights of appeal/means of challenging the decision of the Competent Authority.

The Applicant's grounds for seeking judicial review

[8] The Applicant alleges that the decisions taken by the Competent Authority to implement certain measures:

a. were not reasonably justified in accordance with Article 29(2) of the Constitution;
b. were ultra vires Article 29(2) of the Constitution;
c. were not reasonably required to meet the legislative outcome;
d. were not rationally connected to the purpose of enacting the Orders; and

e. had the effect of limiting certain fundamental rights under the Constitution with no reasonable relation between the objective which is being sought to be achieved by the Emergency Order.

Issues

[9] The following two issues arise for determination namely:

1. Whether the effect of the application amounts to an allegation of a breach of constitutional right and;

2. Whether there was a means available to the Applicant to challenge the measures taken by the Competent Authority otherwise than by judicial review.

Flexible nature of judicial review

[10] A flexible approach to the principles of judicial review, particularly where important rights are at stake, had been endorsed by the Supreme Court in **Kennedy v Charity Commission** [2014] 2 WLR 808 at para.51, where Lord Mance said this:

> **"The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle. … The nature of judicial review in every case depends on the context."** [Emphasis added]

[11] Flexibility of approach to the intensity of scrutiny and the weight to be given to any primary decision maker's review in judicial review matters is not a novel concept. It is generally accepted that the threshold test is whether the application for leave is "arguable" or has "a realistic prospect of success". The *locus classicus* is the judgment of Lord Bingham and Lord Walker in **Sharma v Brown-Antoine** [2006] UKPC 57, [2007] 1 WLR 780 which highlighted the flexibility of the test in its application. At para 14(4), the law lords stated:

> **'(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: R v**

> **Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R(N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, para 62, in a passage applicable mutatis mutandis to arguability: "… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."**

Purpose and scope of judicial review applications

[12] In **Brian R. Christie v The Civil Aviation Authority (Bahamas Air Navigation Services Division)** [2017/PUB/jrv/00010], this Court, at para 16 of that Judgment set out the role of the Court in judicial review matters and stated:

> **"Judicial Review is the method by which the Court exercises a supervisory jurisdiction over public decision-making bodies to ensure that those bodies observe the substantive principles of public law and do not exceed or abuse their powers while performing their duties."**

[13] In **Kemper Reinsurance Company v Minister of Finance and others (Bermuda)** Privy Council App. No. 67 of 1997 at para 18, Lord Hoffman described the judicial review process in this way:

> **"In principle, however, judicial review is quite different from an appeal. It is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct. In the case of a restriction on the right of appeal, the policy is to limit the number of times which a litigant may require the same question to be decided. The court is specifically given power to decide that a decision on a particular question should be final."**

[14] Judicial review is only available against decisions of public bodies exercising public functions. Purchas L.J. in **Regina v East Berkshire Health Authority ex parte**

Walsh (1965) 1GB 152 and quoted at para 27 of **Bain (Re)** [1993] BHS J. No. 16 emphasised the importance of demonstrating that the decision was public:

> **"Finally, at page 181 Purchas L.J. posed the very question which, mutatis mutandis, I must address in the instant case: "did the remedies sought by the applicant arise solely out of a private right and contract between him and the authority or upon some breach of public duty placed upon that authority which related to the exercise of the powers granted by statute to them to engage and dismiss him in the course of providing a national service to the public?"**

[15] Generally-speaking, there are three well-established heads upon which judicial review may be brought by which an applicant with a caveat for further development on a case by case basis which may add further grounds such as the principle of "proportionality. In the landmark case of **Council of Civil Service Unions v Minister for the Civil Service** [1985] A.C. 374 at 410-411, the House of Lords has confirmed that powers derived from the prerogative are public law powers and their exercise amenable to the judicial review jurisdiction. Lord Diplock conveniently classifies under three heads the grounds upon which administrative action is subject to control by judicial review as illegality, irrationality or "*Wednesbury unreasonableness*" and procedural impropriety. He explained the three well-established heads in this fashion:

> **"By "illegality, as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."**
>
> **By irrationality, I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether the decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system…."**

> **I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice".**

[16] Judicial prudence also dictates that the Court, in exercising this power, must however be careful not to overstep its supervisory role. It must not interfere with a decision that a public authority has reached that was not irrational, illegal or procedurally unfair.

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[17] **I**n **Bethell v. Barnett and Others** [2011] 1 BHS No. 30, a judicial review proceeding which involved a decision by the Judicial and Legal Services Commission, Isaacs Sr. J. (as he then was), at para [85] described the court's role in judicial review proceedings as follows:

> **"I must caution myself that this is a judicial review and not an appeal. Thus, the only questions I must answer are: was the decision of the JLSC to appoint the Applicant as the DLRRC irrational; and was the Applicant treated unfairly. I remind myself of the manner in which Gordon, JA put the position in *Hugh Wildman v The Judicial and Legal Services Commission of the Eastern Caribbean States*, Civil Appeal No. 9 of 2006 at paragraph 31. He opined:**
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> > **"I remind myself that the function of the court in judicial review is not to act as an appellate forum from the body whose decision is being challenged. If the process was fair and the decision not deviant, then the order sought under the judicial review must be refused.""**

[18] In judicial review proceedings, the applicant has the onus to prove that a ground for review exists and warrants a hearing by the Court. In **Standard Commercial Property Securities Limited and others (Respondents) v. Glasgow City Council (Appellants) and others** [2006] UKHL 50 at para 61, the House of Lords confirmed that the onus is on the claimant [applicant] to establish a case, and in so doing, affirmed the approach taken by Lord Brightman in **R v Birmingham City District Council Ex p O** [1983] 1 AC 578:

> **“The onus is on Standard (the claimant) to establish that, in deciding that an indemnity for their costs represented the best price or best terms that could reasonably be obtained, Glasgow reached a decision which was ultra vires or which no reasonable authority could have reached: *R v Birmingham City District Council Ex p O* [1983] 1 AC 578, 597C-D per Lord Brightman.”**

[19] It is also well-settled that an Applicant seeking leave to bring judicial review proceedings should first exhaust any right of appeal or other means provided for challenging the decision before making an application for judicial review. Lord Scarman in **R v Inland Revenue Commissioners, ex parte Preston** [1985] AC 835 at page 852:

> **“My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision.”**

[20] In **Dwayne Woods et al v John Pinder et al** 2020/PUB/jrv/21, the Respondents raised the preliminary challenge that the Applicants had not exhausted alternative remedies before applying for judicial review. The Court affirmed the position of Isaacs JA in **Moxey v Bahamas Bar Council and Others** [2017] 1 BHS J. No. 125 that an application for judicial review will be denied where there are available alternative remedies. At para 17, the learned judge stated:

> **As indicated, the Respondents raised the preliminary attack on the application for judicial review, that the Applicants have not exhausted alternative remedies before seeking judicial review. The law in this area is fairly well settled. The legal principle is simply that judicial review is a remedy of last resort and not first recourse and the Court will exercise its discretion to refuse to hear applications for judicial review where there are available alternative remedies. (See also Isaacs JA in Moxey v Bahamas Bar Council and others [2017] 1 BHS J. No. 125)** [Emphasis added]

[21] In determining whether the Applicant had an alternative remedy, the Court considers whether the alternative remedy offers recourse that is equal to or better than the recourse available under judicial review. In **Moxey v Bahamas Bar**

Council [supra], the Applicant unsuccessfully argued that section 54 of the Legal Profession Act did not afford the appellant an alternative remedy. What is relevant is the effect of the alleged alternative remedy as compared to judicial review:

> **"I readily accept that a statutory right of appeal is not necessarily to the exclusion of an applicant availing himself of judicial review proceedings. However, in my judgment, where a person is accorded an appeal route to a tribunal superior to the tribunal to which judicial review lies, it would border on an abuse of the courts' processes to allow him to circumvent the appeal process."** Para 42
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> **"There is no reason to restrict the amplitude of an appeal under the section to the merits only. As a matter of fact, by bypassing the Supreme Court pursuant to section 54 of the Act, Parliament has indicated that issues involving counsel and attorneys-at-law should be heard quickly and definitively. It would make a nonsense of the section if a person was able to approach the Supreme Court, a court subordinate to this Court, for judicial review, bearing in mind that Bar Council's decision under section 12 is placed on the same footing as "a judgment or order" of the Supreme Court. In effect then, the Judge was being asked to rule on a decision taken by a tribunal of concurrent jurisdiction. That is not the purpose for judicial review, that is the purpose of an appeal as is provided in section 54."** Para 44

Law on the exclusion of constitutional matters from judicial review

[22] Courts have determined that judicial review applications which are substantially constitutional matters ought to be refused. In **In the Matter of an Application by Seereeram Brothers Limited** HCA No. 3123 of 1993 (Trinidad and Tobago), the Applicant Company brought an application for judicial review of a decision by the Central Tenders Board to award a contract for construction of the Belmont Road in Tobago to a company notwithstanding that the Applicant Company had submitted the lowest bid. One of the grounds for judicial review submitted by the Applicant was that the decision was made contrary to natural justice principles. In particularising how it was so perverse, the Applicant Company alleged that its right to equality of treatment from a public authority was infringed in that the decision was contrary to the principles of natural justice in that the Respondent Board (i) failed to disclose the criteria for selection; (ii) treated the applicant unfairly; (iii) acted in breach of the principle of fair procedure and (iv) impinged upon the enshrined right under the Constitution of the Republic of Trinidad and Tobago of

the individual to equality of treatment from a public authority. The Respondents raised the question of whether it was proper for the Applicant to have raised a breach of a constitutional right in an application for judicial review. To this, Jones J referred to his own judgment in **Nixie Quashie v Airports Authority of Trinidad and Tobago** HCA 1220 of 1990 wherein he struck out allegations of breach of constitutional rights in an application for judicial review. Jones J stated then:

> **"Neither the speeches of Lord Diplock and Lord Roskill cited above nor the decision in Lynch v Trinidad and Tobago Racing Authority and the Attorney General of Trinidad and Tobago detract from the principle that a litigant must bring his case within the rules applicable to the particular type of action he pursues. An applicant for Judicial Review must still show that he wishes to impugn the decision of the body on the ground of illegality, irrationality or procedural impropriety. Mr. Applewhite quite rightly pointed out that the applicant in his affidavit went at great lengths to show that he was denied the enjoyment of his property and equality of treatment, matters which were clearly outside the realm of Order 53. Accordingly grounds 4(a) and 4 (b) are struck out": see page 38 of Seereeram Brothers.**

[23] Later on, in the same page (38), Jones J said:

> **"While on a further consideration of the matter I might have gone too far in my treatment of the applicant's grounds in that particular case, I am still of the view that where for instance the only complaint an applicant has against a public authority is that the authority had breached his constitutional rights, a Court in this jurisdiction ought not be called upon to embark upon an enquiry into a breach of constitutional rights in order to determine whether an administrative discretion has been properly exercised".**

[24] In applying the foregoing to the facts of **Seereeram Bros.**, the Court allowed the grounds because the other eight grounds submitted were grounded in illegality, irrationality and procedural impropriety, and the constitutional breach was merely cited as an instance of the Board's illegality. The overarching ground was still procedural impropriety namely that the Board had come to its decision contrary to natural justice. The breach of the Constitution was not the substance of the ground for judicial review.

[25] Bharath J in **In the Application of Corporal No 10089 Christopher Holder** HCA No 2581 of 1993 (TT) considered both the decisions of **Quashie** [supra] and **Seereeram Bros**. [supra] in holding that constitutional matters are inappropriate for applications for judicial review. He had this to say at page 7:

> **"In my view, comingling of constitutional matters with errors in administrative decisions are inappropriate in Judicial Review proceedings and should be struck out. <u>The proper procedure to be followed where there are mixed questions of constitutional and administrative law is to file separate proceedings for review of administrative decisions and constitutional matters for infringement of the Constitution and then consolidate them so they can be heard together</u>. All proper reliefs with damages can then be granted. <u>Although I hold that constitutional matters are inappropriate and should be struck out, I heard full arguments in these proceedings and will treat this matter as an exception but dealing with the infringement of constitutional rights on the basis of denial of fairness or breach of natural justice and not otherwise</u>. For the future I do not propose that this exception should be used as a precedent."**[Emphasis added]

[26] Like Jones J in **Seereeram Bros**, here, Bharath J was careful to distinguish complaints of infringement of constitutional rights in relation to natural justice, which is itself an accepted ground of judicial review based on illegality on the one hand, and on the other, infringements of constitutional rights not on that basis. This distinction makes it is clear that allegations of constitutional rights breaches generally ought not to be heard in a judicial review application.

Preliminary objections

[27] Learned Counsel, Mr. Williams who appeared for the Respondents, objected to the suitability of the application on two limbs, namely:

1. That the effect of the Applicant's grounds for judicial review challenges the constitutionality of certain provisions of the Orders, notwithstanding that the Applicant does not explicitly allege a breach of a specific right. Consequently, the matter is unsuitable for judicial review and ought to have been brought by constitutional motion;

2. That, even if an argument for judicial review could be made (which they do not accept), the Applicant failed to exhaust the alternative remedy provided by Article 28 of the Constitution.

Whether the Application is substantially based on a constitutional issue

[28] Mr. Mitchell, appearing as Counsel for the Applicant, submitted that the enactment of the Pandemic and Lockdown Orders were not reasonably justifiable because: (i) they were ultra vires the power vested in the Competent Authority under the Constitution, (ii) they were not reasonably required to meet the legislative outcome, and (iii) there was no rational connection between the Orders and the purposes for which they were implemented. The Orders, says Mr. Mitchell, more than minimally impair the constitutional rights and freedoms of business owners at Arawak Cay.

[29] Mr. Williams objected to the suitability of the application for judicial review. He argued that since all of the Applicant's complaints deal with breaches of the Constitution, the complaints are substantially constitutional. Accordingly, the matter is unsuitable for judicial review as there are no administrative complaints.

[30] Mr. Williams correctly pointed out that where an application, as the present one, is effectively a constitutional motion dealing with breaches of fundamental rights and freedom but is presented as a judicial review application, the court ought to refuse leave.

[31] Mr. Mitchell sought to circumvent this by asserting that the Applicant does not make a broad-based allegation that a constitutional right such as freedom of movement has been infringed; that the challenge is only on the basis of proportionality. However, for the reasons stated below, I agree with Mr. Williams that the Applicant's case and the five issues which he identified in his written submissions filed in support of his application for leave are purely based on the Constitution and ought to have been commenced as a constitutional motion.

[32] What Mr. Mitchell has skilfully done is to rephrase what are, at their core, allegations of breaches of constitutional rights. Despite that cleverly approach, at the end of the day, the Applicant's complaints are grounded in Article 29 of the Constitution. The Applicant complained that the decisions taken by the Competent Authority, more particularly the enactment of the Pandemic and Lockdown Orders were not reasonably justifiable in accordance with Article 29. The essence of the Applicant's complaint is the reasonableness (or lack thereof) of the exercise of the Competent Authority's power – a power vested in him by the Constitution.

[33] Mr. Mitchell sought to draw a distinction between (i) challenging the constitutionality of the Orders generally (which he says he does not allege) and (ii) challenging the extent to which the measures implemented by the Orders impaired the Applicant's constitutional rights. In my view, both of these challenges call for an examination of whether the Orders' protocols are contrary to the constitution. The latter is more specific, as it calls for a specific analysis of whether the protocols mandated by the Orders are proportionate to the mischief and whether they disproportionately impaired a constitutional right. Inextricably, this involves an analysis of the constitutionality of the Orders. The two are mutually inclusive.

[34] Further, a breach of Article 29(2) of the Constitution (which is what the Applicant complains of) is a breach of a specific fundamental right. Article 29 permits the breach of all the fundamental rights and freedoms contained in Articles 16 to 27 so long as it is reasonably justifiable. The determination of whether an infringement of the fundamental rights is reasonably justifiable involves an analysis of the matters set out by Lord Sumption in **Bank Mellat (Appellant) v. Her Majesty's Treasury (No. 1) (Respondent)** [2013] UKSC 38 at para 20 which are: (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a <u>less intrusive measure could have been used</u>; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. If, after such analysis, the infringement is not reasonably justifiable, then the breach of the

right(s) is not protected by the Article and it is a breach of whichever right the protocol had the effect of infringing. Therefore, notwithstanding that the Applicant did not expressly assert that the Orders had the effect of infringing a specific right such as freedom of movement, the application still effectively suggests that the constitutional right of freedom of movement was infringed. It therefore calls for an assessment of the manner in which the Competent Authority has exercised its right to infringe certain constitutional rights during a state of emergency. Undoubtedly, such assessment must include the Constitution and constitutional principles.

[35] Moreover, the cases relied upon by the Applicant do not assist him in proving that the matters complained of are not constitutional. In fact, they do quite the opposite. The cases highlight that what the Applicant is asking the Court to determine is precisely what Jones J. in **Seereeram Bros.** said applicants of judicial review ought not to ask the Court to do – to assess the Competent Authority's performance in striking a balance between the competing interests of the individual's fundamental rights and the interests of the community.

[36] In this vein, the Respondents properly relied on the Privy Council case of **Harrikissoon v Attorney General of Trinidad and Tobago** [1980] AC 265 where the distinction was made between judicial review of administrative action and the enforcement of human rights and fundamental freedoms with reference to the provisions in the Trinidad and Tobago (Constitution) Order in Council 1962 (similar to our Constitution) was elucidated by Lord Diplock at page 268:

> **"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action…."** [Emphasis added]

[37] Further, Counsel for the Applicant made submissions inviting the Court to interpret the Constitution in a particular way to determine the matter. He implored the Court to interpret the Constitution strictly. Accordingly, Counsel has recognised that the determination of the matter requires an analysis of the Constitution.

[38] As I see it, all of the complaints brought by the Applicant relate to the unreasonableness of the measures mandated by the Orders **in relation to the provisions of the Constitution.** The substance of the application is constitutional because the Applicant alleges that the nature of the measures are contrary to the Constitution and that they are not reasonably justifiable **having regard to the fact that the Constitution requires that measures taken be reasonably justifiable where they limit rights.** The facts of the present case are distinguishable from the facts of **Seereeram Bros.** [supra] and **Corporal Holder** [supra], where the allegations of breach of constitutional rights were allowed because they were made on the basis of breach of natural justice (illegality) itself, which is a ground of judicial review.

[39] Taking issue with the *manner* in which the constitutional power was exercised does not take it outside the purview of constitutional law. As stated by Jones J in **Nixie Quashie v Airports Authority of Trinidad and Tobago** HCA 1220 of 1990, "an applicant for Judicial Review must still show that he wishes to impugn the decision of the body on the ground of illegality, irrationality or procedural impropriety."

[40] For all of these reasons, I find that the Applicant, having challenged substantially the constitutionality of the emergency powers orders, ought to have filed a constitutional motion instead of judicial review proceedings. Notwithstanding my decision as to the constitutional nature of the application rendering it unfit for judicial review, I will carry on to determine whether the Applicant had an alternative remedy available to him which would have provided him with equal redress.

Judicial Review is a remedy of last resort

[41] Mr. Williams submitted that if their first objection fails, the Court should still refuse the application for leave on the ground that the Applicant has not exhausted alternative means of challenging the Competent Authority's decision. He further contended that the result sought by the Applicant, which is for the Orders to be struck down, can be achieved by constitutional motion. He relied on the dictum of Winder J in **Woods et al** [supra] where he affirmed the position of the Court of Appeal in **Moxey** [supra] and Lord Scarman in **R v IRC ex parte Preston** [supra].

[42] The arguments of both parties on this question of the availability of an alternative remedy emanate from their respective arguments as to whether or not the nature of the application is constitutional. The Applicant submitted that because they do not make a broad stroke challenge to the constitutionality, the matter is not a constitutional one to which the Article 28 right of redress applies. The Respondents, on the other hand, contend that because the matter is effectively a constitutional challenge, the right to challenge breaches by Article 28 constitutional motion applies to the Competent Authority's decisions.

[43] In my judgment, I have already decided that the Applicant's contention of a breach of Article 29(2) necessarily constitutes an allegation of a breach of some right under Articles 16 - 26. It follows that it would make a nonsense of the right of constitutional redress provided by Article 28 not to make use of it. I agree with Mr. Williams that the right to bring an action by constitutional motion provided by Article 28 was available to the Applicant.

[44] In the premises, I will refuse leave for judicial review.

Costs

[45] In the Anguillan case of **Daniel Mussington and Gervin Gumbs v The Attorney General of Anguilla,** Miscellaneous Suits Nos. 044 and 045 of 2001 (unreported) Judgment of Hariprashad-Charles J, the Applicants were unsuccessful and the

Attorney General sought costs on the ground that the applications were frivolous and bound to fail. On the issue of costs, I stated:

> **"However, in Constitutional matters, if a claim made by an unsuccessful applicant against the State was brought in good faith to test a matter of public interest, the Court should be hesitant to award costs against the suppliant citizen seeking the sanctuary of the courts. As a result, I do not think that it is fair to award such Costs against the Applicants".**

[46] Applying the same principles to the instant case, I make no order as to costs.

Dated this 23rd day of March, A.D., 2021

Indra H. Charles
Justice