COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2021/PUB/con/00001

In the Matter of Article 22 of the Constitution of The Bahamas
And In the Matter of Article 28(1) of the Constitution of the Commonwealth of the Bahamas
And In the Matter of Section 29(6) of the Dangerous Drugs Act

BETWEEN:

LORENZO STUBBS

Applicant

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Respondent

Before: The Hon. Mr. Justice Loren Klein

Appearances: Mr. Bjorn Ferguson with Ms. Rhodreka Strachan for the Applicant
Ms. Cordell Frazer for the Respondent

Hearing Date: 17 November 2021

RULING

KLEIN, J.

Constitution of The Bahamas—Fundamental Rights—Freedom of Religion—Rastafari faith—Applicant an adherent of the Rastafari faith, charged before the Magistrate's Court with possession of a small amount of Indian hemp—Dangerous Drugs Act (DDA), Ch. 228—Possession said to be for religious purposes—Marijuana claimed to be used as a religious sacrament by Rastafari—Constitutional motion—Constitutionality of s. 29(6) of the DDA—Limitations on Fundamental Rights and Freedoms—Reasonably required for the protection of public health or safety—Reasonably justifiable in a democratic society—Article 30 (1) of the Constitution, "Savings Law Clause"—Whether DDA 2000 a saved law—Dangerous Drugs Act 1938, Ch. 12—Approach to Constitutional adjudication—Evidence in support of Constitutional application—Need for legislative and adjudicative facts.

INTRODUCTION AND BACKGROUND

[1] The criminal case out of which this constitutional motion arises concerns a charge before the magistrate's court for possession of a tiny quantity of the dried-out parts of a plant described in the statutory text as Indian hemp—an amount said to be about 1.6 ounces in weight and purchased for $60.

[2] Those simple facts, however, give rise to a far weightier question in the application before this court, namely: whether the freedom to manifest one's religion, which is guaranteed by the Constitution, trumps the prerogative of Parliament to make laws prohibiting the possession and

use of substances considered harmful in the public interest, but which certain persons or groups consider are essential to manifesting their religious beliefs.

[3] The issue arises in the following way. Indian hemp is classified as a dangerous drug under the Dangerous Drugs Act 2000 ("the DDA" or "the Act"), the possession of which is banned, except for very limited scientific and medical purposes by authorized personnel.

[4] To the contrary, the applicant, who is charged with possession of Indian hemp, claims that the plant—which he knows (perhaps with greater botanical accuracy) as marijuana—is a 'sacred herb', used as a sacrament in manifesting his faith as a Rastafarian. He contends, therefore, that he has a constitutional right to possess and use it and, to the extent that the DDA does not contain an exemption for religious use, it is incompatible with his constitutional right to freedom of religion.

Indian hemp and marijuana: a misnomer?

[5] By way of background, I start with a brief botanical and historical excursus.

[6] As indicated, what is criminalized under the DDA is "Indian hemp". This is defined to include "all parts of any plant of the genus cannabis whether growing or not from which the resin has *not been extracted; the resin extracted from any part of such plant; and every compound, manufacture, salt derivative, mixture or preparation of such plant or resin*".

[7] The plant that I suspect we are really concerned with, however, goes by the botanical name *Cannabis sativa* or *Cannabis indica*. In common parlance it is known as marijuana, ganga, pot, weed and hashish—although strictly speaking hashish is the resinous secretions obtained from the marijuana plant.

[8] While Indian hemp and marijuana both belong to the genus *cannabis*, they are in fact very different varieties of the hemp family. Marijuana was created by the selective cultivation of Indian hemp to produce plants containing a higher level of tetrahydrocannabinol ("THC"), the compound that produces psychoactive effects in humans. Hemp plants cultivated for industrial purposes only contain a tiny amount of THC. In fact, the level of THC present is often used to scientifically distinguish hemp (0.3% or less THC) from marijuana (greater than 0.3% THC). This distinction is not found in the DDA. It enacts a general prohibition on the possession of Indian hemp, whatever the level of its psychoactive component.

[9] Hemp has been lawful for millennia and was used in India and China for medicinal and other purposes for thousands of years. It is one of the most widely grown commercial crops in the world, and it is cultivated for a wide range of horticultural and industrial purposes. Modern therapeutic uses of the marijuana plant are said to include, among others, a role in reducing the side-effects of cancer treatment, and in treating glaucoma, epilepsy and multiple sclerosis.

[10] The manner in which hemp/cannabis became listed as a dangerous drug, both under the various international treaties and in domestic legislation, is also worthy of comment. It was not until the early 20th century, following the International Opium Conference at the Hague in 1925, that the international criminalization of Indian hemp began. In fact, according to some accounts, the decision to ban the import and export of Indian hemp at the 1925 conference was based on a claim by the Egyptian delegation (then grappling with an opium epidemic at home) that

Indian hemp was as dangerous as opium, even though there was no scientific evidence to support this, and Hemp was not even on the conference agenda!

[11] At the time of the adoption of the 1961 United Nations Single Convention on Narcotic Drugs (see further below), the main active compound in cannabis had not even been established. As a result, cannabis and cannabis resin were listed alongside other known drugs, whose active compounds are specified, while "*extracts and tinctures of cannabis*" were included in the active compound table in lieu of a known active substance.

[12] For convenience, and for the purposes of this Ruling, I shall refer to Indian hemp, cannabis and marijuana synonymously.

Factual and procedural background

[13] The facts which give rise to the criminal proceedings are not in dispute, save for two issues, neither of which is material to these proceedings. They may be gleaned from the affidavit of the applicant, filed 6 January 2021, and that of Corporal 3532 Danielle Brown, filed 22 June 2021. The latter also exhibits the police report of Constable 3620 Dormeus and the applicant's record of interview. I should mention that these "facts" are still matters to be determined by the magistrate, and they are only recounted here to provide the necessary background to the application.

[14] According to the police report, on 28 December 2020, police officers arrested the applicant at his home, #3 Casterella Street, Pinewood Gardens, and charged him with being "*in possession of a quantity of dangerous drugs, namely Indian hemp*". This followed a search of the house based on information the police said caused them to become suspicious that drugs were being sold from the residence. It is averred that a search warrant was obtained for this purpose.

[15] Dormeus recounts that he and another officer breached the door after they identified themselves as police officers and got no response. He stated that he smelled a "high aroma" of marijuana emanating from the house once the door was forced open. The police sniffer dog, K-9 Rexo, apparently detected a scent leading to the kitchen near the dish drainer, where the officers discovered a clear plastic bag containing suspected cannabis. Six persons, all residents of the home, were cautioned and initially arrested in connection with this incident.

[16] As indicated in his record of interview and statement, dated 29 December 2020, the applicant took sole ownership of the substance and claimed that he possessed it for his religious and "personal" use. He was arraigned in the Magistrate's Court on 6 January 2021 before Chief Magistrate Joyann Ferguson-Pratt on the charge of possession of dangerous drugs contrary to section 29(6) of the Dangerous Drugs Act, which is punishable under section 29(2)(b) of the Act. He was granted police bail in the amount of $1,500.00, with one surety. It was represented to this Court that the criminal proceedings against him in the magistrate's court had been adjourned pending the determination of the constitutional application.

[17] The first factual dispute is that the applicant claims that the search of the premises was done without a warrant. The police on the other hand assert that they were in possession of a valid warrant. A warrant dated 28 December 2020 is in fact exhibited to the affidavit of Danielle

Brown. However, no constitutional issue is being taken before this court as to the legality or otherwise of the search and so nothing turns on this issue.

[18] The second is the statement of the applicant (at paragraph 17 of his affidavit) that he had no previous convictions. This is contradicted in the Brown affidavit. There, it is averred that the applicant was previously convicted on 9 July 2014 before Magistrate's Court No. 8, after pleading guilty to possession of marijuana, for which he was placed on three months' probation. It is indicated that the applicant, then 27, was found in possession of a marijuana 'joint' which was hidden in his turban, after being stopped on his motorcycle while enroute to Paradise Island for work.

[19] The issue of prior conviction is also not of any direct relevance to the constitutional claim, although the Crown seeks to exploit the failure of the applicant to mention his religious beliefs during the 2014 incident as indicative of a lack of sincerity in his adherence to Rastafari practices (of which more will be said later).

Procedural history

[20] The application was commenced by Notice of Originating Motion ("the Constitutional motion") filed 6 January 2021, supported by an affidavit filed the same date. As originally framed, the constitutional motion sought the following reliefs:

> "1. A Declaration that in the circumstances that have appeared there is a threat of a breach of the Applicant's right guaranteed by Article 22 of the Constitution.
> 2. A Declaration that Sections 22, 23 and 24 of the Dangerous Drugs Act are unconstitutional.
> 3. Interim relief in the nature of an Order to stay proceedings in the Magistrate's Court
> 4. An Order making provisions for the Costs occasioned by this application."

[21] At the outset of the hearing, I questioned Mr. Ferguson whether the provisions of the DDA cited in the Constitutional motion (ss. 22, 23 and 24) were engaged, as these sections came under Part VI of the Act. That part of the Act deals with the possession of dangerous drugs with the intent to supply. The applicant was charged under s. 29(6) with simple possession, however, as the quantity of drugs did not attract the statutory presumption of an intention to supply under s. 22(3). In light of this, Mr. Ferguson sought leave to amend paragraph 2 of the Motion to seek a declaration that s. 29(6) of the Act was unconstitutional, for which leave was granted.

The issues

[22] The central issue is whether section 29(6) of the DDA, to the extent that it enacts a blanket prohibition on the possession of Indian hemp (or marijuana) and makes no exemption for possession of marijuana for religious purposes, breaches the right to freedom of religion and is therefore constitutionally invalid.

[23] In determining this issue, it will be necessary to consider the following:

(i) whether the blanket prohibition on the possession and use of marijuana constitutes an interference with the right to religious freedom claimed under article 22;

(ii) if so, whether the impugned provisions are reasonably required for the attainment of any of the public policy objectives listed in article 22, such as public health or safety, and are in pursuit of a legitimate legislative aim; and

(iii) if (i) and (ii) are established, whether the relevant provisions of the DDA represent a proportionate way of achieving this legislative aim, so as to be reasonably justifiable in a democratic society (i.e., justification and proportionality analysis).

[24] Other ancillary issues arise, such as whether Rastafarianism amounts to a religious belief, or otherwise engages article 22; whether the practice of using marijuana is essential to a manifestation of Rastafari beliefs; and whether the applicant himself is sincere in his religious observances.

The approach to constitutional adjudication

[25] In *Omar Archer Sr. v. Commissioner of Police and Anor.* (2017/PUB/con/0024), Bahamas Supreme Court, this Court set out the approach to constitutional adjudication in some detail [see paras. 67-69], which I summarized at para. 69 as follows:

> "[69] In summary, the approach to constitutional adjudication under the rights set out in the Bahamian constitution (and constitutions which are similarly patterned) is as follows:
>
> (1) The starting point is the rebuttable presumption of constitutionality, but this is primarily a rule of statutory construction that requires legislation so far as possible to be construed harmoniously with the Constitution; it is not a significant factor when the right being adjudicated depends on a proportionality analysis.
>
> (2) Second, whether the law or action *prima facie* interferes with the expressed right based on a textual analysis of the right and applying a liberal and generous construction to the Constitution to give effect to the rights.
>
> (3) Third, 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, which requires that the law is rationally connected to that objective and is not arbitrary, unfair or based on irrational considerations. This is required to be established by the State.
>
> (4) Fourth, whether the law or measure, even if reasonably required, can be established as being not justifiable in a democratic society. This requires an application of the proportionality test, and an examination of: whether the legislative objective justifies limiting a fundamental right, whether the measures are designed to meet that objective, whether the approach guaranteed to cause minimal impairment to the right is used, and whether in all the circumstances a fair balance has been struck between the rights of the individual and rights of the community. The onus is officially on the complainant/plaintiff to establish this "negative", although it is clear that parts of the test are objective and overlap with the test at paragraph (3) above (which is part of the State's burden).

(5) Fifth, if it is a law which predates the Constitution (an 'existing law') but executive action taken or subsidiary legislation made under it are being challenged, the court must still conduct the analysis at paras. (2)-(4)."

[26] This exercise unfolds against the well-known principle of interpretation (as described in the *Omar Archer* case [para.68.1]) that requires a constitutional document to be accorded:

> "…a 'large and liberal construction, not to be diminished by a 'narrow and technical construction' (*Edwards v Attorney-General for Canada* [1930] AC 124 [136] per Lord Sankey LC), and to be given a 'generous interpretation avoiding the 'austerity of tabulated legalism' suitable to give individuals the full measures of the fundamental rights…" (*Minister of Home Affairs v Fisher* [1980] AC 319, 328-329). In other words, the court is required to adopt a construction that is pro-rights."

The Legal Framework

The relevant Constitutional provisions

[27] Although nothing turns on it for the purposes of this application, it adds some colour to the issue at hand to start with the Preamble of the Constitution, which contains references to "*an abiding respect for Christian values*" and "*the Supremacy of God*".

[28] In its 2014 Report, the Constitutional Commission stated that these references were not exclusionary or discriminatory to other religions and did not favour any particular religious group (para. 10.8). The Commission noted that, in any event, the recitals in the preamble were not justiciable, even though it was possible to refer to them when interpreting other fundamental rights.

[29] The Privy Council echoed similar sentiments in a 2017 case on appeal from this jurisdiction (*Commodore of the Royal Bahamas Defence Force v. Laramore* [2017] UKPC 13 (the "Laramore case")), about whether the requirement to participate in Christian parades violated the religious freedoms of a Muslim serving member of the Force. Lord Mance, delivering the ruling, said [7]:

> "While the recitals to the Constitution express a commitment to the supremacy of God and an abiding respect for Christian values, it is not suggested that this qualifies or limits the freedoms guaranteed by the substantive text of Chapter III of the Constitution, although it could, arguably, have some relevance to an issue of justification (particularly in the context of ceremonial parades, not directly before the Board on this appeal)."

[30] Chapter I of the Constitution of the Commonwealth of the Bahamas 1973 ("the Constitution") declares two overarching principles: first, that The Bahamas is a sovereign democratic state; and second, that the Constitution is the supreme law and prevails over any other law.

> "1. The Commonwealth of the Bahamas shall be a sovereign democratic State.

> 2. This Constitution is the supreme law of the Commonwealth of The Bahamas, and subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law, to the extent of the inconsistency, be void."

[31] Chapter III deals with the protection of the fundamental rights and freedoms of the individual. It commences with a general declaration of rights at art. 15 and then sets out specifically enumerated rights at articles 16-27. These are commonly referred to as the "Bill of Rights". These rights are generally patterned on the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ("ECHR"): see *Hinds v R* [1977] A.C. 195 (212), and *Minister of Home Affairs v Fisher* [1980] A.C. 319, 328, per Lord Wilberforce.

[32] Article 15 declares in broad outline the fundamental rights and freedoms which are said to be protected, subject to the more specific provisions to be found in the enumerated articles:

> "15. Whereas every person in The Bahamas is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—
> (a) life, liberty, security of the person and the protection of the law;
> (b) freedom of conscience, of expression and of assembly and association; and the protection for the privacy of his home and other property and from deprivation of property without compensation,
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest …"

[33] This article does not fall for consideration, as the law is clear from a series of Privy Council decisions that it does not create free-standing or justiciable rights, except to the extent that the declared rights are also the subject matter of the enumerated provisions (see *Newbold and ors. v Commissioner of Police and ors.* [2014] 4 LRC 684; *Campbell-Rodriques v. AG* [2007] UKPC 565).

[34] Article 22 deals with the protection of freedom of conscience and religion. It provides in relevant part as follows:

> "22.—(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this Article the said freedom includes freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion of belief in worship, teaching, practice and observance."
>
> […]
>
> (a) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision which is reasonably required-

(b) in the interest of defence, public safety, public order, public morality or public health; or

(c) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practice any religion without the unsolicited interference of any member of any other religion, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

[35] Article 30 contains what is known as the "savings law clause". This purports to shield pre-Constitutional or pre-existing written laws from constitutional challenge. Its effect on the impugned law is also relevant to the constitutional issue to be decided, as the respondent has invoked it to "save" the provisions of the DDA from constitutional infirmity, even if the court were to find that the impugned provision contravenes the claimed right. That article provides as follows:

"*Saving of existing law*.

30.—(1) Subject to paragraph (3) of this Article, nothing contained in or done under the authority of any *written law* shall be held to be inconsistent with or in contravention of any provisions of Article 16 to 27 (inclusive) of this Constitution to the extent that the law in question—

(a) Is a law (in this Article referred to as "an existing law") that was enacted or made before 10th July 1973 and has continued to be a part of the law of The Bahamas at all times since that day;
(b) repeals and re-enacts an existing law without alteration; or
(c) alters an existing law and does not thereby render that law inconsistent with any provision of the said Article 16 to 27 (inclusive) in a manner in which, or to an extent to which, it was not previously so inconsistent.

(2) In paragraph 1 (c) of this Article, the reference to altering an existing law includes references to repealing it and re-enacting it with modifications or making different provisions in lieu thereof, and to modifying it; and in this paragraph and the said paragraph (1) references to repeal and re-enactment of an existing law shall be construed accordingly.

(3) […]."

[36] As indicated, because of the historical and jurisprudential affinity of the Constitution with the ECHR, it might be useful to set out art. 9 of the Convention (which corresponds to art. 22 of the Constitution) for comparative purposes:

"1. Every has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public health or morals, or for the protection of the rights and freedoms of others."

The relevant provisions of the Dangerous Drugs Act

[37] The long title of the DDA proclaims it to be "*an Act to regulate the importation, exportation, manufacture, sale and use of dangerous drugs*." Several of the relevant provisions are as follows:

> "s. 2: […] "Indian hemp" includes all parts of any plant of the genus cannabis whether growing or not from which the resin has not been extracted; the resin extracted from any such plant; and every compound, manufacture, salt derivative, mixture or preparation of such plant or resin.
>
> s.3: It shall not be lawful for any person to cultivate, trade in, import or bring into The Bahamas any of the drugs to which this Part applies except a qualified person with special authority of the Minister for medical or scientific purposes and if any person acts in contravention of this section he shall be guilty of an offence against this Act: […]
>
> s.6: The drugs to which this Part [Part II] applies are raw opium, cocoa leaves, Indian hemp and resins obtained from Indian hemp and all preparations of which such resins from a base, meperidine (also known as pethidine and demerol) and any other drugs to which the Minister may by Order declare that this Part shall apply."
>
> "s. 29(6) Where any drug to which this Act applies is, without the proper authority, found in the possession of any person or stored or kept in a place other than a place prescribed for the storage or keeping of such drug, such person, or the occupier or owner of such place or the owner of or other person responsible for the keeping of such drug unless he can prove such drug was deposited there without his knowledge or consent, shall be guilty of an offence against this Act."
>
> "29. (2) Every person guilty of an offence against this Act for which no other penalty is provided shall in respect of each offence, be liable —
> (a) on conviction on information, to a fine of one hundred and twenty-five thousand dollars or to imprisonment for ten years, or to both;
> (b) on summary conviction, to a fine of fifty thousand dollars or to imprisonment for five years, or to both, …."

[38] It is reasonably clear that one of the purposes of the DDA was to give domestic effect to various international conventions intended to achieve some harmonization of standards under international law for the control of narcotic drugs and psychotropic substances. Many countries adopted and transformed those Conventions into domestic law. The Act specifically makes mention of the three main international drug control conventions: the Single Convention on Narcotic Drugs 1961, which the Bahamas acceded to on 13 August 1975; the United Nations Conventions Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, ratified by the Bahamas on 30 January 1989; and the Vienna Convention on Psychotropic Substances, acceded to on 31 August 1937.

[39] Under the 1961 Single Convention, cannabis and its resin were classified as a Schedule IV drug. These are the most harmful substances, to which are applied the strictest control measures, alongside addictive opioids such as heroin, which has been recognized as having little or no therapeutic value. In 2020, the UN Commission on Narcotic Drugs ("CND") voted to remove cannabis and cannabis resin from Schedule IV, after a series of World Health Organization (WHO) recommendations recognizing their therapeutic and medicinal potential. However, the drugs remain subject to controls under Schedule 1.

The Applicant's Case

[40] The applicant submits that there are two main issues for determination: (i) whether the Rastafari faith is considered a religion within The Bahamas; and (ii) whether his constitutional right to freedom of religion and freedom of conscience is hindered by the enactment of section 29(6) of the DDA.

[41] As to the first, he relies on several international and local cases to ground the contention that the Rastafari faith has been recognized by various courts as a religion. The first is *Re Chikweche* [1995] 2 LRC 93, where Gubby CJ, after reviewing the case law from various jurisdictions and academic opinion, referred to Rastafarianism as having the status of a religion in a "*wider and non-technical sense*". He accepted that at the very least it was a system of belief founded on personal morality which attracted constitutional protection.

[42] In that case, the Supreme Court of Zimbabwe held that the wearing of dreadlocks by the applicant, a devout follower of Rastafari, was protected by his freedom of conscience under s. 19(1) of the Constitution of Zimbabwe [the corresponding provision to art. 22]. Therefore, the refusal of the judge to allow him to take the oath to be registered as a legal practitioner violated his constitutional right to freedom of religion.

[43] Reference is also made to the American case of *Reed v Faulker* (1988) 842 F 2d 960, where Circuit Judge Posner, in the US Court of Appeals, Seventh Circuit, after describing Rastafarians as "*a religious sect that originated among black people in Jamaica but that has adherents among American blacks as well*" said:

> "The district judge assumed that the Rastafarian faith is a bona fide religion for purposes of the First Amendment, and there is no reason to doubt this is a proper interpretation."

[44] In *Reed*, an inmate who claimed to subscribe to the Rastafari faith, sued the prison officials on the grounds that the forced cutting of his dreadlocks infringed his religious liberty and discriminated against him, since American Indians were not made to cut their hair. The trial judge rejected the claim on the basis that he did not find that *Reed* was a sincere adherent to the faith, but the appeals court vacated the decision and remanded the case for further consideration, mainly on evidential grounds.

[45] Closer to home, the applicant cites the authority of *Superintendent of Her Majesty's Prison v Barry [2003] BHS J. No. 98*. In *Barry*, the Court of Appeal overturned the decision of the trial judge who had found that the decision of the prison superintendent to cut the locks of a Rastafarian serving a sentence for conviction on drug possession—incidentally, also Indian hemp, which he also claimed was possessed for religious purposes—violated article 22 and breached his right to freedom of conscience.

[46] Significantly, both the trial judge and the Court of Appeal accepted that Rastafarianism was either a religion or a belief system that came within the ambit of article 22. It was also common

ground between the parties (one of whom was the Attorney General) that article 22 was engaged. As the court said:

> "8. There was no dispute before the learned judge or this court as to whether Rastafarianism is a religion for, as Mr. Munroe correctly pointed out, the ambit of Article 22 is not restricted to religion in the strict sense of that word since the Article itself refers to "freedom of thought" as one of its protected rights. It was therefore unnecessary for the learned judge to delve into matters on which he was not required to adjudicate. As he himself stated at page 20-21 of his decision—
>
> > 'It seems without doubt that modern jurist have accepted that Rastafarianism is a religion in the wide and nontechnical sense and that its followers should be given the various legislative protection where applicable.
> > To be fair, the respondent does not contend otherwise.' "

Evidence of religious practices

[47] In his affidavit, the applicant avers that from the age of 19 he has been practising the Rastafarian faith at the Ethiopia African Black International Congress, located Fire Trail Road, New Providence. He submits that cannabis is central and integral to Rastafari and, therefore, the provisions of the DDA and its blanket criminal sanctions on the possession of cannabis infringe on his right to practice his Rastafari faith freely.

[48] In this regard, he adopts the expert evidence led in *Prince v President of the Law Society of the Cape of Good Hope [2002] 4 LRC 508* (hereinafter referred to as "*Prince I*"), explaining the role played by cannabis in Rastafari religious observances as follows [at para. 18]:

> "…to the Rastafari, cannabis or 'the herb', as the Rastafari call it, is a sacred God-given plant to be used for the healing of the nation. Rastafari describe their religious experience as 'knowing God', 'gaining divine wisdom' and 'seeing the truth'. In the pursuit of their religious experience they seek to gain access to the inspiration provided by Jah Rastafari, the Living God. The use of cannabis is critical to the opening of one's mind to inspiration because God reveals himself through this medium. It is believed that through the use of cannabis one is best able to fulfil this obligation. Thus, cannabis is also called incense. The use of cannabis is a sacrament known as Communion which accompanies reasoning."

Infringement of constitutional rights

[49] To establish the violation of his constitutional rights, the applicant acknowledges that he has to surmount the presumption of constitutionality and mainly has the burden to prove the "unconstitutionality" of section 29(6) of the DDA. For this purpose, he relies primarily on two regional cases, separated in chronology by nearly twenty years. The first is the case of *Ras Sankofa Maccabbee v The Commissioner of Police and The Attorney General of Saint Christopher and Nevis [2019] ECSC J0503-2;* and the second is *Francis v Commissioner of Police and the Attorney General of Antigua and Barbuda ANUHCV [1996/019]*.

[50] In *Francis*, Benjamin J., whilst eventually upholding the constitutionality of the challenged legislation, found that the criminalization of cannabis hindered Rastafari in their enjoyment of

freedom to practice their religion, belief or worship. Part of the learned Judge's reasoning was as follows:

> "34. The Applicant's contention is that he is a person who has been hindered in his enjoyment of his freedom of religion or belief guaranteed by section 11(1) and (40 of the Constitution. The crux of his complaint is that the very existence of the Misuse of Drugs Act, s. 6(1) and (2) of which make it an offence to be in possession of the Class B controlled drug cannabis, operates to hinder his freedom of religion as a follower of Rastafari. The offence renders it unlawful for him to use his sacrament as he is faced with the choice of either running afoul of the law or being deprived of his spiritual food.
>
> [….]
>
> [37] During cross-examination, the Applicant's attention was drawn to section 9 of the Misuse of Drugs Act of which he was not aware. That section confers upon the Minister the discretion to make regulations for exemptions, grant licenses and empower medical practitioners to prescribe in respect of controlled substances. The Applicant was ignorant of the Minister's powers to give a licence for research. Consequently, he admitted never applying for any licenses or exemptions. Those answers were coupled with the submission by Counsel for the Respondents to the effect that on the authority of *Ramson v Barker*, the Applicant must show that his arrest by the Police was deliberately intended to hinder or prevent him from exercising his fundamental right to freedom of belief.
>
> [38] I am not attracted to the Respondent's approach to the problem as it operates to place a restrictive interpretation of the provisions of Chapter II of the Constitution. It could not have been intended that in order to invoke the protection of section 11(1) an applicant must in every case show a deliberate attempt to hinder his or her enjoyment of freedom of religion or belief. In my view, it matters not that the act complained of was not aimed directly at the person's enjoyment of his freedom of religion or belief. I therefore accept that the Applicant has been, is being and/or is likely to be hindered in the enjoyment of his freedom to manifest and propagate his religion or belief in worship, teaching, practice and observance."

[51] Significantly, the learned judge gave deference to the State's prerogative to place limitations on the claimed right in the interest of public health and safety, especially in light of the lack of any conclusive evidence on the potential adverse effects of marijuana use:

> "[57] I ask the question, what is the State's obligations in the face of such evidence of a divergent nature. The Misuse of Drugs Act prohibit the possession of controlled substances, including cannabis. Access by the public to such substances is restricted and penalties are prescribed for breaches. The goal is secular although, as I have earlier concluded, it operates to hinder the Applicant and its followers of Rastafari in the enjoyment of the sacred herb as part of their religious worship, practice and observance. However, given the state of medical knowledge, the State is obligated in the interest of the public safety and public health to shield the entire society, inclusive of Rastafari, from potential, unknown and uncertain dangers in respect of which answers are still being awaited."

[52] While endorsing many of the court's findings in that case, the applicant attempts to distinguish the holding on the grounds that the ruling must now be considered anachronistic in light of the new learning regarding the therapeutic benefits and relative lack of harmful effects of marijuana. In fact, it was suggested that as the Judge's ruling was predicated mainly on the

indeterminacy of the evidence then before him, he would probably conclude differently if he were called upon to consider the matter today.

[53] The applicant contends further that the impugned provision of the DDA does not meet the test set out by the Privy Council in the landmark case of *Elroy De Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 A.C. 69*, for determining whether legislation is reasonably justifiable in a democratic society. This test requires the court to determine whether the legislative objective is sufficiently important to justify limiting a fundamental right; whether the measures designed to meet the objectives are rationally connected to it; and whether the means to impair the right or freedom is no more than necessary to achieve that objective (i.e., justifiability and proportionality analysis).

[54] In support of the contention that marijuana does not pose a significant public health or public safety risk so as to require limiting religious freedoms in the way done by the DDA, the applicant makes reference to the 2018 CARICOM Regional Commission Report on marijuana ("Waiting to Exhale—Safeguarding our Future through Responsible Socio-Legal Policy on Marijuana"). The Commission was appointed by the Caricom Heads of Government in 2014, and part of its mandate was to inquire into the "…*social, economic, health and legal issues surrounding marijuana use in the Caribbean and to determine whether there should be a change in the current drug classification of marijuana thereby making the drug more accessible for all types of usage (religious, recreational, medical and research*".

[55] In its Executive Summary (pg.3, para. 4), this is what the Commission said:

> "The Commission accepts the evidence that the original classification of cannabis in law as a dangerous drug with no value was made without the benefit of scientific research and data. This classification, first in international treaties, was spearheaded by the US and was automatically followed domestically. Documents declassified and released to the public in 2002, illustrate that the US Shafer Commission, in a 1972 Report to the US Congress, itself challenged this classification, finding that marijuana presented little harm and should be decriminalized. Given the key finding that now establishes that cannabis/marijuana has several beneficial effects, cannabis/marijuana can no longer be accurately classified in law as a "dangerous drug" with "no medicinal or other value". This finding is significant since the illegal status of the drug was premised on its classification as a dangerous drug."

[56] The applicant also relies on the fact that in 2020, the United Nations Commission on Narcotic Drugs, following recommendations by the World Health Organization's 41st Expert Committee on Drug Dependence ("ECDD"), removed cannabis from its Schedule IV classification, alongside drugs such as heroin and other opioids, which are considered exceptionally harmful to public health and subject to the highest levels of control.

[57] That report was not put into evidence. However, it is in the public domain and available on the website of the World Health Organization ("WHO") (https://www.who.int). I think it instructive to set out a few key recommendations contained in that report (pg. 40-41):

> "Cannabis and cannabis resin are included in Schedule 1 and Schedule IV of the 1961 Single Convention on Narcotic Drugs. Substances that are included in both of these Schedules are particularly liable to abuse and to produce ill-effects and have little or no therapeutic value. Other substances that are included in both Schedules I and IV are fentanyl analogues, heroin and other opioids that are considered especially dangerous. Use

> of all these substances is associated with a significant risk of death, whereas cannabis use is not associated with such risk.
>
> The evidence presented to the Committee did not indicate that cannabis and cannabis resin were particularly liable to produce ill-effects similar to the effects of the other substances in Schedule IV of the 1961 Single Convention on Narcotic Drugs. In addition, preparations of cannabis have shown therapeutic potential for treatment of pain and other medical conditions such as epilepsy and spasticity associated with multiple sclerosis, which are not always controlled by other medications. Cannabis and cannabis resin should therefore be scheduled at a level of control that will prevent harm caused by their use but, at the same time, will not act as a barrier to access and to research and develop of cannabis-related preparations for medical use.
>
> The Committee concluded that cannabis and cannabis resin do not meet the criteria for placement in Schedule IV.
>
> The Committee then considered whether cannabis and cannabis resin were better placed in Schedule 1 of Schedule II of the 1961 Single Convention on Narcotic Drugs. While the Committee did not consider that cannabis is associated with the same level of risk to health as that posed by most of the other drugs placed in Schedule 1, it noted the high rates of public health problems arising from cannabis use and the global extent of such problems. For these reasons, it recommended that cannabis and cannabis resin continue to be included in Schedule 1 of the 1961 Single Convention on Narcotic Drugs."

[58] The applicant contends that the blanket prohibition of cannabis is therefore not reasonably required nor justifiable in a democratic society, based on these and other reports which show that marijuana is not as harmful as once thought. It is further submitted that the use of marijuana for sacramental purposes by Rastafari does not pose any threat to public health or safety, or to Government. Therefore, the failure to carve out an exemption for religious use in the Act is said to be unconstitutional.

The Ras Sankofa Maccabbee case

[59] The applicant largely anchors his case for unconstitutionality on the ruling of Ventose J. in the *Ras Sankofa Maccabbee* case from St. Kitts and Nevis. There, the learned judge upheld a claim that provisions criminalizing the possession and cultivation of marijuana under the Drug (Prevention and Abatement of the Misuse and Abuse of Drugs) Act of the Laws of St. Christopher (St. Kitts) and Nevis infringed the claimant's (a practising Rastafari) rights to freedom of conscience and religion and privacy under the St. Kitts and Nevis Constitution.

[60] In coming to that decision, Ventose J. placed emphasis on the recent studies and literature on the effects of cannabis use, which generally indicate that the drug is not as harmful as historically represented, and therefore the State could not justify the blanket prohibition when less restrictive options were available to protect the public. I set out several select passages from that case:

> "[80] … The Defendants have not in my view provided adequate, or any evidence, to explain why the general prohibition on the use, possession and cultivation of cannabis in the Drugs Act is necessary in the interests of public health, public order or public safety in light of the contraventions of the Claimant's right to freedom of conscience guaranteed to him by sections 3 and 11 of the Constitution.

> [81] The Defendants maintain that the general prohibition is necessary because there are no less restrictive options in respect of the present general prohibition contained in the Drugs Act as a means to deal with what is stated to be a serious social and health problem. The Defendants point to problems in administering any possible exemption for medical use. […]
>
> [82] Rather than find the ways in which the religious use may be accommodated, the Defendants maintain throughout in their affidavit evidence, submissions and during oral argument that a total prohibition is necessary in the interests of public health and public safety. That approach without adequate supporting evidence is impermissible and constitutionally suspect. The prohibitions contained in sections 6(2) and 7(1) of the Drugs Act, to quote from Prince II, do not employ the least restrictive means to deal with a social and health problem for which there are now a number of less restrictive options supported by a significant body of expertise.
>
> [83] In my view, for reasons explained above, the Defendants have not provided adequate, or any, evidence to show that sections 6(2) and 7(1) of the Drugs Act are reasonably required in the interest of defence, public safety, public order, public morality or public health in accordance with section 11(5)(a) of the Constitution. As a result of this finding, it is not necessary for the Claimant to show that sections 6(20 and 7(1) are not reasonably justifiable in a democratic society.
>
> [98]…Although cannabis poses a health risk to some vulnerable members of the population, such as children, pregnant women and young persons, that alone is no good reason for the blanket prohibition on the use, possession and cultivation of cannabis by adults for personal use in private. While appropriate legislation setting out the parameters of such of such a right will need to be put in place by the National Assembly to deal with this, the lack of a legislative framework cannot by itself lawfully justify the continued prohibition on the use, possession and cultivation of cannabis by adults in private for their personal use.
>
> [100] There is no principled basis to hold that the use, possession and cultivation of cannabis contravene the right to freedom of conscience under sections 3 and 11 of the Constitution but at the same time hold that they do not contravene the right to privacy under sections 3 and 9 of the Constitution. Once the contravention is found to exist, the burden shifts to the state to establish (by evidence) that one or more of the exceptions to these fundamental rights and freedoms apply. The Defendants have failed to provide adequate or any evidence to establish any justification for the limitations on these fundamental rights and freedoms under sections 9(2) and 11(5)(a) of the Constitution."

The Respondent's case

[61] The respondent does not take any issue with the claimed status of Rastafari as a religion. What is challenged, however, is the sincerity of the applicant's religious beliefs. Moreover, it is contended that the applicant failed to show evidence of the nexus between the possession of dangerous drugs and the practice of his faith as a Rastafarian. As noted above, in the Brown affidavit the respondent refers to a 2014 incident where the plaintiff was arrested for possession of marijuana, but pled guilty and apparently never indicated then that he possessed and used the drugs for sacramental purposes. Based on this, the respondent asserts that "…*the Applicant uses marijuana as a recreational drug and not for any religious reasons*".

[62] This is what is stated at para. 17 of the Brown affidavit:

> "17. That the applicant's affidavit is void of any evidence demonstrating the significance of marijuana to his religion and belief as a Rastafarian. That the applicant simply makes bare assertions that he cannot practice his faith because he is prohibited from possessing marijuana. That it is for this reason I verily believe that the Applicant possesses the said marijuana for the purpose of recreational use and not religious."

[63] The respondent underscores the presumption of constitutionality and submits that the "burden" is on the applicant to prove the invalidity of the legislation. I should indicate at once that this latter contention is not strictly accurate, as the burden of proof in challenges to the constitutionality of legislation shifts between the complainant and the State. For example, in *Observer Publications v. Matthew* [2001] UKPC 11, their Lordships said [25]: "*The onus on those supporting the restriction is to show that it is so reasonably required. If the onus is discharged, the burden shifts to the complainant to show that the provision or thing done is not reasonably justified in a democratic society*."

[64] While the respondent acknowledges the applicant's right to freedom of conscience and religion, the position taken on whether or not the DDA impinges on those rights is somewhat equivocal. For example, this statement appears in the main written arguments at para. 45:

> "It is therefore submitted that the Applicant's religious freedoms in the present case was not infringed as his arrest, charge and pending trial for the offence of Possession of Dangerous Drugs pursuant to section 29(6) and punishable under section 29(2) (b) of the Dangerous Drugs Act is 'contained in' and/or done 'under the authority of' a law and is therefore subject to expressed limitation under Article 22(5) of the Constitution of the Bahamas." [Underlining supplied.]

[65] However, in supplemental submissions, the respondent submitted the following:

> "Further, it is submitted that although the Dangerous Drugs Act impinges on the right to freedom of religion which is protected by Article 22 of the Bahamas Constitution, it cannot be said for this reason alone the provisions of sections 22, 23 and 24 of the Dangerous Drugs Act are unconstitutional." [Underlining supplied.]

[66] The respondent makes heavy weather of the point that the freedoms guaranteed by the constitution are not absolute and are subject to limitations that are necessary for the protection of public safety, order, morality, health and the fundamental rights and freedoms of others. They cite in this regard several Privy Council authorities, in particular the Board's statement in *Surratt v. Attorney General of Trinidad and Tobago* [2008] AC 655, where their Lordships said:

> "It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in sections 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it."

[67] In this regard, it is contended that the DDA is reasonably required in the interests of public health and public safety, citing the Jamaican Supreme Court case of *Forsythe v The Director of Public Prosecutions et al* (1997, 34 J.L.R. 512). That case involved a claim by the applicant, Dr. Dennis Forsythe, a Rastafarian and attorney-at-law, for a declaration that his rights to

freedom of religion had been infringed by the Dangerous Drugs Act 1924, after he was arrested for illegal possession of marijuana and a chillum pipe which was used for smoking. He claimed in his affidavit in support of his motion for constitutional relief that:

> "Ganga is integral to my Religion as a Rastafarian and I should not be made a 'criminal' because of Religion's definition of ganja not as a "drug" but as a "Plant" and be declared a "dangerous person" explicitly or impliedly, only because of my adoration and usage of Ganga as a Sacrament, regarding it as I do as the "body of Christ" and observing it in the same divine manner in which the Established Church observes the Eucharist…".

[68] The distinguished three-member panel (Wolfe C.J., Ellis, Clarke, JJ.) dismissed his claim, mainly on the grounds that the right to religious freedom was reasonably restricted in the interest of public health. They also held that the DDA was protected by the "savings law" clause, which insulated pre-independence laws from constitutional scrutiny. In coming to its decision, the court adopted the dictum of Lord Diplock in *Director of Public Prosecutions v Wishart Brooks* [1974] All ER 840, a possession case from Jamaica on appeal to the Privy Council, where the DDA was deemed to be in the interest of public health.

[69] Wolfe CJ, giving the court's decision said [43]:

> "The savings provision of section 26(8) of the Constitution apart, the purpose and effect of the impugned legislation are relevant in determining the question as to its constitutionality: see *The Queen v. Big M. Drug Mart Ltd. (Others intervening)* (1986) L.R.C. 332 at 356. The Act was promulgated in 1948. It cannot be gainsaid that the purpose of the Act and its antecedent legislation dating back to 1924 was, as Mr. Campbell [Crown counsel] submitted, to protect the community from dangerous drugs in unregulated circumstances and thus promote public health and public safety. And it is to be observed that ganga has been characterized judicially at the highest level as a dangerous drug, the possession of which, the legislature obviously intended to prohibit in the sense of knowingly having in one's physical custody or under one's physical control: see *Director of Public Prosecutions v. Wishart Brooks* (1974) 21 W.I.R. 412 (P.C.)."

[70] The respondent contends that by parity of reasoning this court should likewise accept that the DDA is a law enacted to promote public health and safety, as the Jamaican Act and the Bahamas DDA are very similar, and therefore that the DDA is a law whose provisions are reasonably required in the interest of public health.

[71] At paragraph 16 of the Brown affidavit, there is also to be found the following assertion in support of the claim that the legislation is intended to fulfill a constitutionally-authorized public purpose policy:

> "[16]. [T]he Dangerous Drugs Act is of general application, that is, it applies to everyone (whether Rastafarian or not) and its purpose is to promote public health and public safety. Hence the charge of possession of dangerous drugs contrary to section 29(6) and punishable under section 29(2)(b)…does not infringe upon the constitutional rights of the Applicant to practice his faith."

[72] Finally, the respondent submits that the action which gives rise to the complaint by the respondent was done under the authority of a written law which is "saved" by article 30(1) of the Constitution. The respondent does not develop its argument on this point in any detail, except to state that the DDA is saved by virtue of article 30(1) of the Constitution, as the law

was first enacted in 1939, then repealed and replaced in 2000 with similar provisions. The respondent further points out that Rastafarianism did not emerge in Jamaica until the 1930s, and indeed very much later in The Bahamas. Therefore, it is said that the legislative prohibition of cannabis pre-dated the emergence of Rastafarianism in The Bahamas, which is a clear indication that the law was intended to be neutral and of general application.

DISCUSSION AND ANALYSIS

The content of the right to freedom of religion

[73] The right to freedom of religion expressed at article 22(1) includes the right to hold or not hold religious beliefs, and to manifest one's religion, alone or in community with others. Article 22, like article 9 of the ECHR, lists a number of ways in which the manifestation of one's religion may take place, namely, worship, teaching, practice and observance. As the Privy Council observed in the *Laramore* case [12]:

> "[…] The first part of article 22(1) defines the protections afforded. It covers both of what the European Court of Justice recently called "the *forum internum*", the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public": Case C-188/15 *Bougnaoui v Micropole SA*, para. 30. The second part specifies various aspects of the freedom (of conscience), the enjoyment of which is by virtue of the first part not to be "hindered". By use of the word "includes" it specifies them on a non-exclusive, basis."

[74] It is common ground that the claim in this matter comes within one or more of the ways in which the applicant may manifest his faith.

Whether Rastafarianism a religion

[75] As indicated, the applicant has put very little by way of evidence before the court to justify the existence of Rastafarianism as a religion, or to establish any nexus between its practice and the use of marijuana (a point which does not escape the criticism of the respondent). However, I am content to reproduce the following from the Caribbean Commission's Report, under the rubric "*Religious Views, Rights and Rastafarians*", as an accurate description of the religious practices of Rastafari:

> "3.10: Cannabis was integrated into the Rastafarian religion which emerged during the 1930's in Jamaica. Rastafarianism, after struggling before the courts, was identified judicially as a religion in the case of *Francis v AG*. It is accorded sacramental importance in this religion and it is smoked to aid in spiritual quests.
>
> 3.11 In the case of the Rastafarian, cannabis is regarded as a "holy herb", a gift from God that has been cultivated and smoked for its medicinal benefits as well as for its psychoactive properties to aid in a spiritual quest. Moreover, cannabis, called ganga by Rastafarians, is their primary sacrament and its ritualized smoking during communal smoking sessions, known as 'reasoning' or 'grounding', is paramount to their way of life.

> 3.12 Ganga is viewed as the more natural and direct route to communion with God and the Rastafari brethren, and it is used as an essential elements in prayer and meditation. Biblical verses are often cited to authenticate and legitimize the naturalness and glories of ganga.
>
> 3.13 Some researches have identified similarities between chillum smoking sessions of the Hindus and the reasoning sessions of the Rastafarians. Therefore, cannabis is integral to this religion's identity and prohibition of its use constitutes an extreme invasion on their right to freedom of religion."

[76] It is just as well that counsel for the Crown conceded that Rastafarianism was a religion or a belief system which attracted the constitutional protection afforded under article 22. I think it was a concession well made in light of the generality of article 22 and the case law.

[77] I have already referred to a number of international and Commonwealth decisions where the Rastafarian faith has been described either as a religion, or religious sect or a belief system worthy of protection, even if it does not come within the "theistic" definition of religion. However, in the *Francis* case (*supra*), Benjamin J. confronted the issue frontally and said [29]:

> "I hold no reservations whatsoever that Rastafari is a religion within the meaning and context of section 11 of the Constitution and I hereby declare that Rastafari is a religion entitled to protection thereunder."

[78] The word religion is not defined by article 22, nor in the text of article 9, and neither does the ECHR jurisprudence give any general guidance as to what constitutes a religion. The majority of cases proceed on the assumption, for the purposes of disposing of the application before the court, that the claim concerns a religious belief (see, for example, *Chappell v UK* (App. 1257/86 (1987) 53DR 241, where the Commission was prepared to assume that Druidism was a religion for the purposes of article 9, without deciding the point).

[79] For example, in *Skugar and Others v. Russia* (App. No. 40010/04)), the ECHR said as follows:

> "Accordingly, in determining the applicability of Article 9 of the Convention, the Court is called upon to decide, firstly, whether the applicant entertained beliefs that may genuinely claim protection as a religious creed or matter of conscience and, secondly, whether the applicants' actual conduct may be considered a direct expression of those beliefs which require protection.
>
> On the first question, the Court notes that it is not its province to evaluate the legitimacy of religious claims or to question the validity or relative merits of interpretation of a particular aspects of beliefs of practices. It is ill-equipped do delve into discussion about the nature and importance of individual beliefs, for what one person may hold as sacred may be absurd or anathema to another and no legal or logical argument can be invoked to challenge a believer's assertion that a particular belief or practice is an important element of his religious duty. This does not, nevertheless, prevent the Court from making factual findings as to whether an applicant's religious claims are genuine and sincerely held (see *X v the United Kingdom*, no. 7291/75, Commission decision of 4 October 1977).

[80] The subjectivity of the nature of freedom of conscience was also emphasized by the Privy Council in the *Laramore* case, where it was held [at para. 14]:

> "Freedom of conscience is in its essence a personal matter. It may take the form of belief in a particular religion or sect, or it may take the form of agnosticism or atheism. It is by reference to a person's particular subjective beliefs that it must be judged whether there has been a hindrance. No doubt there is an objective element in this judgment, but it arises only once the nature of the individual's particular beliefs has been identified."

[81] However, as has been repeatedly affirmed in the ECHR's case law, the right to freedom of thought, conscience and religion does not protect every belief system; only those which attain a certain level of seriousness, cohesion and importance. Furthermore, it is not every act which is inspired, motivated or influenced by that belief that constitutes a "manifestation" of it. Only those acts which are intimately linked to the religion or belief count as a "manifestation" within the meaning of Article 9 (*Eweida and Others v. United Kingdom* [82]).

[82] I am similarly inclined to the view that it is not necessary (or advisable) for this court to embark on an inquiry into whether Rastafarianism falls properly to be classified as a religion. Given the subjective nature and cultural sensitivities of such classifications, it is not a matter which the court is particularly well-equipped to carry out. It is perhaps better left to sociologists and philosophers to attempt such a taxonomy. In any event, it is far too late in the day to challenge the status of Rastafarianism as a religion or religious sect or belief system, in light of the long line of cases in which distinguished international and Commonwealth regional courts have granted it constitutional recognition and protection, as well as the substantial body of academic opinion which has accorded it similar status.

[83] I have no hesitation in holding, therefore, that the Rastafari faith or movement is a belief system with a sufficient level of seriousness, cohesion and importance to come within the protection of article 22. I also accept that there is a sufficiently close and direct connection between the sacramental use of marijuana and the underlying belief system for the matter to fall within the protection of article 22.

The sincerity of the applicant's beliefs

[84] With respect, I reject the attempts of the respondent to cast doubt on the sincerity of the applicant's belief, or the centrality of marijuana to the Rastafari faith—although they may not be wrong to point out the paucity of evidence led by the applicant on the issue.

[85] The respondent is clearly entitled to adduce evidence of non-observance of religious practices on the question of sincerity of religious belief, which may sometimes be relevant, especially in those cases where a person may be seeking to adopt a religion simply to obtain some benefit (e.g., such as an inmate in a prison; see *Reed v Faulkner*, supra). But the mere fact that the applicant did not profess his religious beliefs on a previous occasion when he was charged with possession of marijuana is irrelevant to the issue of whether he then held, or now holds, those beliefs. I therefore do not find that there is anything on the facts to cast doubt on the sincerity of the applicant's claims to his beliefs and adherence to the Rastafari faith.

Whether s. 29(6) constitutes an interference with freedom of religion

[86] The respondent has asserted what appear to be inconsistent positions with respect to whether the DDA constitutes a breach of the applicant's right to freedom of religion. I am inclined to accept the formulation in the supplemental submissions—that the DDA interferes with the applicant's right to religious freedom—as being the correct iteration of the respondent's views on this issue.

[87] This is not only because it is later in time and submitted after reflection, but also because the first assertion is legally incorrect. The fact that an invasion or interference with a constitutionally-guaranteed right might be authorized under one or more of the public purpose limitations does not make it any less an interference or infringement; it simply saves it from being *prima facie* unconstitutional. So essentially, the respondent has conceded that the law interferes with the applicant's freedom to express his religion. Again, I think that this is a concession rightly made, once it is accepted that the rights claimed are entitled to protection under article 22(1).

[88] As I pointed out in the *Omar Archer* case [para. 68.2], the approach of the court to determining whether there has been an interference with the right asserted is to first construe the impugned law against the literal meaning of the constitutional provision, adopting a liberal interpretation, without having regard to any of the permitted limitations or justificatory criteria. Applying this approach, I find that the applicant has made out his case that the DDA, by not carving out an exemption for religious use, impinges on his right to manifest and practice his religion.

Whether the law is reasonably required in the public interest

[89] The next threshold is to determine whether the infringement is covered by any of public policy or private rights exceptions to the protected right. Again, as I had occasion to point out in *Omar Archer*, the test is as follows:

> "68.3: Third, if the court finds that the right is prima facie infringed, it then considers whether the law is "reasonably required" for the protection of any of the private rights or public policy objectives set out in the article…[….] In *R v Oakes*, 1986 CanLII 46 (SCC) [70] it was said that this required the court to examine whether the law or measure is rationally connected to the legislative objective. The onus/burden is on the state to show that it is reasonably required, but it is clear that this is not an *onus probandi* in any strict sense. The test of reasonableness is an objective exercise, and in many cases the Privy Council has been content to assume or discern it from the text of the statute (*Attorney General v. Antigua Times* [1976] A.C. 16, *Grape Bay v A.G. of Bermuda* (2000) WLR 574, *Cable and Wireless (Dominica) Ltd. v. Marpin Telecoms Ltd. (PC)* [2001] WLR 1123). There are, however, cases where evidence might admittedly have to be led to establish reasonableness (see *Cable and Wireless*)."

[90] The respondent does in fact argue that the DDA is reasonably required in the interest of public health and safety and (as has been pointed out) relies on a Privy Council case from Jamaica in which the PC accepted that a similar Act was ostensibly in the interest of public health (*DPP v Wishart Brooks, supra*). It bears reiterating that the long title of the DDA is "*an Act to regulate the importation, exportation, manufacture, sale and use of dangerous drugs*."

Therefore, as the argument goes, in imposing a ban on Indian hemp, the legislature was seeking to put in place domestic legislative controls to protect public health and public safety.

[91] As demonstrated by the case law, the "reasonably required" test does not require any rigorous factual analysis, and might be ascertained by an objective consideration of the legislative scheme and purpose. I would therefore hold, having regard to the provisions of the DDA, and the assertions of the respondent, that the State has discharged its evidential burden in establishing that the law is reasonably required for the protection of public health and/or public safety.

[92] In this regard, I tread a different path from that taken by Ventose J. in the *Ras Sankofa Maccabbee* case, where he found that the defendants did not provide "*adequate or any evidence*" to show that the corresponding provisions in the St. Kitts & Nevis Act satisfied any of the public policy exceptions, and therefore it was not even necessary to consider whether the measures were reasonably justifiable.

[93] In my view, to subject every law to a strict forensic analysis of what is reasonably required in the interest of public policy objectives or for the protection of the rights and freedoms of others, would diminish and second-guess the prerogative of Parliament to make laws for the "*peace, order and good government*" of the State. This is not to say that the power to make laws, wide though it may be, is not subject to limitations, which are set by the constitution itself or which may be found in general principles of administrative law. But if a law seeks to achieve any of the constitutionally-enumerated public policy objectives or the protection of the rights of others, and its provisions are rationally connected to achieving those objectives, the courts should not be astute to find fault with or unravel Parliament's legislative intent. Were it otherwise, the question of whether or not a law is reasonably required would be reduced in many cases to an adjudicative exercise that is dependent on the cogency of the evidence presented in an individual case, and judicial imprimatur.

[94] In this regard, I note that the public policy ground has been successfully invoked in several of the earlier (as well as more recent) cases to uphold the legitimacy of the state's ability to make criminal laws over an applicant's claim to religious freedom: see, for example, *Francis*, *Forsythe*, and *Prince I, supra*; and *Franklin-Beentjes and CEFLU-Luz da Floresta v. the Netherlands* [Application No. 28167/07], *infra*. In *Prince I*, a majority of the South African Constitutional Court (3-2) reasoned as follows:

> "[139] The use made of cannabis by Rastafari cannot in the circumstances be sanctioned without impairing the state's ability to enforce its legislation in the interests of the public at large and to honour its international obligation to do so. The failure to make provision for an exemption in respect of the possession and use of cannabis by Rastafari is thus reasonable and justifiable under our Constitution. […]
> [141] Moreover, the disputed legislation, consistent with the international protocol, is not formulated so as to penalize only the harmful use of cannabis, as is the case with legislation dealing with liquor. It seeks to prohibit the very possession of cannabis, for this is obviously the most effective way of policing the trade in and use of the drug. This method of control was not disputed save for the exemption sought. The question is therefore not

> whether the non-invasive use of cannabis for religious purposes will cause harm to the users, but whether permission given to Rastafari to possess cannabis will undermine the general prohibition against such possession. We hold that it will.
> [142] We are also unable to agree that the granting of a limited exemption for the non-invasive religious of cannabis under the control of priests is a competent remedy on the evidence that has been placed before us. It would not meet the appellant's religious needs and he is the only person seeking relief from this Court. The Rastafarian Houses are not parties to the litigation and the appellant neither asserts nor has established authority to act on behalf of any persons other than himself. There is moreover no evidence to suggest that the granting of such an exemption would satisfy any of the Houses or enable Rastafari to practice their religion in accordance with their beliefs, or that the appellant or other Rastafari would refrain from smoking or consuming cannabis if such an exemption were to be granted. On the appellant's own evidence cannabis is required by him for the purpose of smoking, and as he told the Law Society and repeated in his affidavits, he intends to continue to do so. His claim was not for a limited exemption for the ceremonial use of cannabis on special occasions. An exemption in those terms does not accord to him the religious right that he claims. Nor would a more general exemption for the non-invasive use of cannabis for religious purposes. All that this would do would be to facilitate the possession of cannabis by Rastafari, leaving them free for all practical purposes, to use it as they wish."

[95] The Strasbourgh court in *Franklin-Beentjes* (see below) also stressed that the State was entitled to consider that the prohibition of the substance used in worship by the "Santo Daime Church" was necessary for the protection of public health, and that there were binding rules of international law on the respondent to prohibit possession except for scientific and limited medical purposes by authorized personnel.

[96] It may be postulated that that these holdings, based on the-then prevailing view of the harmful effects of marijuana, ought now to be viewed through more modern lenses, and that perhaps these cases would at the very least be distinguished (if not decided differently) in the current social and legal milieu. But, as discussed below, in considering the 'harm principle' and the degree of harm Parliament may consider sufficient to warrant enacting penal legislation for the protection of society, the Courts are required to give Parliament a 'wide margin of appreciation'.

Is the law justifiable in a democratic society?

[97] As I have found that the law is reasonably required, I go on to consider whether it is reasonably justifiable in a democratic society, i.e., proportionate. I once again return to the test formulated in *Omar Archer*:

> "[68.4] Fourth, even if it is established that the law is reasonably required, it is still subject to the final constitutional criterion of whether the provision or anything done under it is reasonably justifiable in a democratic society. This is the test of proportionality, even though that term is not specifically used in the Constitution. The phraseology of the proviso is actually expressed in the negative—to the extent that the law or thing done under it is shown "not to be reasonably justifiable in a democratic society". The significance of this negative formulation is that it shifts the burden to the plaintiff/applicant (*DeFreitas v Permanent Secretary of Ministry of Agriculture, Lands and Housing* [1999] 1 AC 69), in

> contrast to the position where the formulation is positively expressed and remains on the state (e.g., Canadian charter, ECHR). In the *Arorogangi Timberland* case, Lord Sumption, JSC, applying the test adopted by the United Kingdom Supreme Court (UKSC) in *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 93, explained that proportionality:
>
> > "depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (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 less intrusive measure could have been used; 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 interest of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

[98] I have already remarked that there has been a paucity of evidence filed in this matter from both sides. In seeking to make the case that the blanket criminalization of Indian hemp is not justifiable in a democratic society, this is what the applicant says in his affidavit:

> "7. That I am aware of the Caricom Commission Marijuana Report that was completed in 2018 that highlighted the need to reform and/or to make laws more inclusive to the minority sects in the population. Additionally, it also highlighted the need to make provisions for the Rastafarian Faith.
>
> 8. That I am also aware The Bahamas Marijuana Commission in [a] preliminary report released in 2020 that highlighted the need to make provisions in law for the Rastafarian faith to possess marijuana.
>
> 9. That I am also aware of the United Nations World Health Organizations historic vote which was taken in December 2020 to remove marijuana as a Schedule One (*sic*) drug. This position now solidifies the fact that marijuana or cannabis is no longer a dangerous drug and/or laws must be reformed to reflect this change in international law. […]
>
> 12. That this is a breach of me practicing my faith, the Dangerous Drug Act is a breach of my right to freedom of conscience because I absolutely (*sic*) prohibited from possessing marijuana to fully practice my faith and belief."

[99] In other words, the extent of the applicant's evidence on whether the law is justifiable in a democratic society is the report and recommendations of the Caricom Commission, and the UN decision to remove cannabis from a Schedule IV drug. Although referred to, the preliminary report of the 2020 Bahamas Marijuana Commission was not put before the court. Importantly, no direct scientific or expert epidemiological evidence was led as to the harmful effects or otherwise of marijuana, and whether there were less restrictive or more proportionate means of Parliament achieving its drug control objectives.

[100] To recapitulate, one of the Commission's main recommendations was that the traditional international and domestic classification of cannabis as a dangerous drug with little or no beneficial effects was not scientifically correct, and as a result the drug should be reclassified and exceptions made for limited use, including for religious purposes. The WHO's report concluded that cannabis and its resin were misplaced alongside the most dangerous of opioids

and, unlike them, cannabis did have some therapeutic benefits. As a result, the WHO recommended that it should be retained in Schedule 1, which is subject to a lower level of control, while conceding that the drug did not pose the same level of risk to health as those in Schedule 1. But it did note the "*high rates of public health problems arising from cannabis use and the global extent of such problems*."

[101] The plaintiff also prays in aid the findings in *Ras Sankofa Maccabbee* that the perception of marijuana as harmful is overstated, and therefore the total ban on its possession is not justifiable in a democratic society. The learned judge found that the position taken by the Government that a total prohibition was necessary in the interest of public health, without looking at ways in which religious use may be accommodated and without adequate supporting evidence, was "*impermissible and constitutionally suspect*". In fact, the court did not accept that the Government had even made out a case that the law was reasonably required in service of any of the public interest goals, and therefore the claimant did not have to establish, on a proportionality analysis, the negative evidential burden that the marijuana prohibitions in the Act were not reasonably justifiable in a democratic society.

[102] It is worth noting that part of the ratio in the *Ras Sankofa Maccabee* case was that the marijuana prohibitions in the Act also contravened the right to privacy under sections 3 and 9 of the Constitution under examination. In this regard, the court found that "…*there is no principled basis to hold that the use, possession and cultivation of cannabis contravene the right to freedom of conscience under sections 3 and 11 of the Constitution but at the same time hold that they do not contravene the right to privacy*," and further that the Government failed to provide any evidence to establish that intrusions on privacy rights by the marijuana prohibitions were justifiable limitations on such rights.

[103] The privacy arguments and the finding are obviously influenced by the decision of the High Court (Western Cape Division) of South Africa (*Prince v Minister of Justice* [2017] ZAWHC 30 (referred to as "*Prince II*"). There, a full bench of the Court held that the Drugs and Drugs Trafficking Act of 1992 and the Medicines and Related Substances Control Act of 1965, to the extent that they criminalized the possession in private or cultivation in a private place of cannabis by an adult for his or her own personal consumption in private, were inconsistent with s. 14 of the South Africa Constitution, which guarantees the right to privacy.

[104] The High Court also concluded that the State respondents had failed to show that the limitation was reasonable and justifiable in an open and democratic society as required by s. 36 of the South African Constitution. That section sets out specific factors for the court to take into account in determining whether the limitation is reasonable and justifiable, such as human dignity, equality and freedom. These factors largely approximate those that this court is required to have regard to in conducting the proportionality analysis identified above (although, as explained, the burden is on the applicant under the export Westminster models to show that the limitation is not justifiable). The ruling of the High Court was "confirmed" by the Constitutional Court of South Africa in *Minister of Justice and Constitutional Development and Others v. Prince and Others* [2018] ZACC 30.

[105] I hasten to point out, however, that even if simple possession of marijuana in a private place raises constitutional considerations similar to those involving possession for religious purposes—as the court seemed to have accepted in *Ras Sanofa*—the point is unnecessary for this court to decide. No challenge was raised here on grounds of privacy.

[106] For my part, however, I would venture to say that I do not accept that it follows, ineluctably, that a constitutional analysis leading to a finding that a blanket marijuana prohibition contravenes protected religious rights can, by simple parity of reasoning, be transposed into a finding that such prohibitions violate the right to privacy. The scope and content of the two rights are different, and it requires the court to construe these individual rights against the framework of the permissible and reasonable limitations and the proportionality analysis to make a determination in respect of each right challenged. Incidentally, art. 11 of the St. Kitts and Nevis Constitution (which deals with privacy rights) is indistinguishable from art 21 of the Bahamian Constitution.

[107] Further on this point, it has been frequently remarked that the so-called right to privacy in Article 21 does not by its express terms enshrine a general right to personal privacy or autonomy. It protects a more limited right to freedom from personal search or search of a person's property, or the entry by others onto his property. For example, as noted by the PC in *Newbold and ors. v. Commissioner of Police and ors.* [2014] 4 LRC 684 at 707 [para. 24], the right as expressed at art. 21 is even more circumscribed than the corresponding right in the European Convention:

> "[T]he language of art 21 is confined to 'search of…person or…property' and 'entry…on…premises'. …Article 21 reproduces art 7 of the 1969 Constitution. But art 7 marked a radical and unquestionably deliberate change from a broad protection of privacy interests. Article 7(1) of the previous 1963 Constitution read: 'Every person shall be entitled to respect for his private and family life and home'. […] Secondly, and more importantly, art 7(1) of the 1969 Constitution, now art 21 of the 1973 Constitution, was deliberately restricted to a physical subject matter. The drafters must have determined to move away from the evidently broader protection afforded by art 8 of the ECHR and its partial homologue in art 7(1) of the 1963 Constitution."

[108] In this regard, I should also make mention of the UK Court of Appeal case of *R v Morgan* [2002] EWCA Crim 721, decided under the Human Rights 1998 (U.K.), which gives effect to the ECHR, where the Court observed [para. 11]:

> "A right to private life did not include a right to self-intoxication, nor the right to possession or cultivation of cannabis, whether for personal consumption within one's home or otherwise."

ECHR jurisprudence

[109] As mentioned, the blueprint for the catalogue of rights in the written Westminster models is the ECHR, and the jurisprudence from that court, while clearly not binding, is instructive. There does not seem to be any decided ECHR case which deals specifically with the issue of the use of marijuana for sacramental purposes, but there is an analogue in the ruling of the

ECHR in the case of *Franklin-Beentjes and CEFLU-Luz da Floresta v. the Netherlands* [Application No. 28167/07], decision 6 May 2014.

[110] That case concerned a challenge to the seizure and confiscation of a quantity of *ayahuasca*, a hallucinogenic substance consumed during religious ceremonies by the "Santo Daime Church", a religious sect with its roots in South America (Brazil). This is a concoction made from plants and vines unique to the Amazon, which adherents to the religion describe as the "Holy Sacrament", and which contains the chemical "DNT", which is listed as a banned substance under the Opium Act of the Netherlands. The police searched the first applicant's house and seized a large quantity of the substance from the applicant, who was later made subject to criminal proceedings for possession of a substance which was banned under the Act.

[111] While the criminal charges were eventually discontinued, because the appeal proceedings exceeded a reasonable time under art. 6 of the Convention, the applicants commenced proceedings for the return of the ayahuasca. These were dismissed by the Court of Appeal and the Supreme Court. The applicants (the first a member of the church and the second its religious body) then applied for various declaratory relief before the ECHR on the grounds, *inter alia*, that their Article 9 rights had been violated by the failure to return the ayahuasca, and that the members of the religious association were unlawfully excluded by s. 2 of the Opium Act from the possession and use of the substance for the conduct of their religious services. They also claimed that they were discriminated against, when compared with the Christian churches, which used alcohol (in communion wine) in their ceremonies.

[112] The essential arguments of the applicants, before the domestic courts as well as before the ECHR, was that the ritual use of *ayahuasca* in church services entailed virtually no risk to public health, and that scientific expert reports showed that there were likewise no significant health or safety risks related to the drinking of *ayahuasca*. However, it is the case that the substance DMT, which is found in the concoction, can cause hallucination if taken internally, and can also cause gastrointestinal reactions such as nausea and vomiting.

[113] In examining whether the interference was necessary in a democratic society, this is what the ECHR said:

> "46. Article 9 lists a number of forms which manifestations of one's religion or beliefs may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief [….]. In particular, it does not confer a right to refuse, on the basis of religious convictions, to abide by legislation the operation of which is provided for by the Convention and which applies neutrally and generally (see *mutatis mutandis*, *C. v the United Kingdom*, no. 10358/83, Commission decision of 15 December 1983, Decision and Reports (DR) 37. p. 142).
> 47. It has long been recognized by the Convention bodies that restrictions on religious practices may be justified for the protection of health; thus it was, for example, that the Commission accepted that the compulsory use of a crash helmet by a motorcyclist, in the interest of road safety, might be held to override the religious duty of a male Sikh believer to wear his turban (see *X v. the United Kingdom*, no. 7992/77, Commission decision of 17 July 1978, DR 14, p. 234). More recently, the Court accepted that a hospital nurse could be required, in the interest of her own health and safety

> as well as her patients', not to wear a Christian cross on a chain around her neck while on duty (see *Eweida and Others v. the United Kingdom*, no. 48420/10, §§ 98-99, ECHR 2013(extracts)).
> 48. In the present case, the Court reaches a similar conclusion. It considers that the respondent party was entitled to consider that the prohibition of the possession for use of DMT was necessary in a democratic society for the protection of health, considering its known effects as described above (see para. 7 above).
> 49. The Court notes in addition that the illicit nature of DMT is reflected not only in the Opium Act but also in the rules of international law binding on the respondent Party. These rules require the respondent Party to prohibit all possession for use of that substance except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific establishments subject to the Government's direct control or specific approval...".

Conclusions on proportionality analysis

[114] Shortly stated, the factual case being made by the applicant in support of its lack of justifiability argument is that recent scientific evidence demonstrate that the alleged harmful effects of marijuana have been exaggerated, and therefore the entire medico-legal premise for its prohibition is now called into question.

[115] To be sure, the new scientific learning and the studies conducted do not support the early 20th century views that had been taken of cannabis. However, none of these reports say that the consumption of marijuana is completely without harmful effects. For example, the Caricom Commission's report noted in particular the potential adverse impact of cannabis on the cognitive development of adolescents and young adults and recommended that "*strict prohibitions remain with respect to this group of persons*" [5.25].

[116] Also of some relevance in this regard, the Commission referred to and reproduced a table from the Center for Addiction and Mental Health ("CAMH") Canada, 2016, which compared the adverse effects of cannabis to other substances such as alcohol, tobacco, amphetamines, heroin and cocaine/crack. The substances were ranked in three different areas of harm—lethality, damage to physical health, impairment of mental function—on a scale of 0 to 100. The rankings were as follows:

> "Lethality (death)" (expressed as a ratio of standard and lethal dose): alcohol (50), tobacco (0), cannabis (0), amphetamines (0), heroin (100) cocaine/crack (40);
> "Damage to physical health": alcohol (80), tobacco (100), cannabis (20); amphetamines (20); heroin (20), cocaine/crack (40);
> "Impairment of mental function": alcohol (30), tobacco (0), cannabis (30), amphetamines (60), heroin (30), cocaine/crack (80)."

That report also noted that problems with cognitive, psychomotor and respiratory functioning, as well as dependence and mental health problems, were concentrated in daily or nearly daily users, which accounts for an estimated 20-30% of users.

[117] Significantly, the Commission also came to the following conclusion [para. 5.7]:

> "The Commission is of the view that strains of cannabis with very high THC levels that have been developed, should remain prohibited substances for purposes of general public

> consumption, since they present too high risks. Indeed, such substances should be specifically banned in law. While we appreciate that currently, the practical tools may not be available to test for such qualities, the law should be futuristic in this regard since undoubtedly, such tools will be developed for wide use in the near future. Further, it is important for the law to play a role in warning of the clear risks with such strains. The only exceptions should be where such new strains of cannabis are developed and utilised in specific medical products as may be patented."

[118] The WHO Commission, while it accepted that cannabis is not associated with the levels of risk to health posed by many of the other drugs in Schedule 1, pointed to the high levels of health problems arising from cannabis use and the global extent of such problems in justifying its decision to maintain it as a Schedule 1 drug.

[119] As earlier explained, I have found that the objective of controlling drugs that might be harmful to the public is one that comes within one or more of the public policy exceptions and that the legislation is rationally connected to achieving those objectives. I have also noted that neither party adduced much by way of direct expert or scientific evidence before the court on the beneficial or harmful effects of marijuana. But, as the foregoing analysis bears out (based on the reports which were submitted to the court), although the ill effects of cannabis may have been overblown, it still poses potential harm to the public, and especially to certain vulnerable groups.

Treaty obligations

[120] In this regard, it is also notable that cannabis remains subject to control under the main international drugs conventions, even though it has been downgraded to a lesser category of harm. The State, therefore, remains under a duty in international law to comply with obligations to control the possession and trafficking in the drugs listed in the convention by suitable domestic legislation. In *Prince I*, in the passage quoted *supra*, the South African Constitutional Court accepted that the use of cannabis in the circumstances contended for could possibly impair the ability of the state to honour its international obligations. The cases from the ECHR (see *Franklin-Beentjes supra)* have also taken account of the state's international obligation in conducting the proportionality analysis.

[121] In *Prince II*, however, the Court circled back to the treaty obligations argument and came to the opposite conclusion on the contention that South Africa was obliged to give effect to its treaty obligations. It stated:

> "The constitution is the supreme law of the Republic and, in entering into international agreements, South Africa must ensure that its obligations are subject to South Africa's constitutional obligations. The Constitution is the supreme law of the Republic and, in entering into international agreements, South Africa must ensure that its obligations in terms of those agreements are not in breach of its constitutional obligations. This court cannot be precluded by an international agreement to which South Africa may be signatory from declaring a statutory provision to be inconsistent with the Constitution."

[122] This is undoubtedly correct as a statement of legal principle. It is a fundamental precept of foreign relations law that constitutional rights prevail over inconsistent international agreements, even if the effect is to put the state in breach on the international plane. But that principle is modified by several well-known canons of construction: first, there is a presumption that Parliament will legislate consistently with international obligations; and second, domestic legislation, including the Constitution, should be construed, so far as is possible, to accord with international obligations (see, for example, *Matadeen and Another v. Pointu and Others* [1998] 3 LRC 542).

[123] Thus, while the holding in *Prince II* confirms the principle that international obligations cannot override constitutional rights, it does not detract from the point that compliance with international obligations is a legitimate legislative objective and obligation of the State.

The question of justification: whether less intrusive measures could have been adopted

[124] The pith and substance of the applicant's case is that the blanket prohibition of marijuana is not reasonably required in a democratic society, as the use by Rastafarians for religious rites does not pose any threat to society or government. He contends that they are simply caught up in the net which indiscriminately catches everyone. This is the "overbreadth" argument, as it has been described in a series of Canadian cases on the point (see, for example, *R v Malmo-Levine*; *R v. Caine* [2003] 3 SCR 571; *R v. Clay* [2003] 3 SCR 735), and which is analogous to the "minimal impairment" test on the proportionality analysis (*De Freitas*, supra).

[125] However, the applicant did not adduce any evidence before the court to support the contention that the blanket prohibition is not reasonably required, or to indicate how the public interest might be adequately protected even with the enactment of less repressive measures, such as legislation giving permission to Rastafari to possess and use marijuana for religious purposes. For example, there is no evidence or other material before the court on any of the following matters: the nature and frequency of the religious ceremonies during which cannabis/marijuana is used; what quantities are required for sacramental use and who would control the dispensing; who would be eligible to use it; how the system would be administered to ensure that religious claims are not asserted as a pretext for the possession and use of marijuana for recreational or more nefarious purposes (including the drugs trade); and what mechanisms would be put in place for protecting adolescents or other vulnerable persons within the Rastafari community.

[126] Indeed, one of the particular concerns that arises with respect to policing and controlling a religious exemption in the context of the Rastafari faith is that the claimed right to use marijuana sacramentally may be manifested in private or communally, and is not restricted to place, time or by quantity. Similar concerns were highlighted by the Court in *Prince I*, where the majority said:

> "129. …Moreover, the use to which cannabis is put by Rastafari is not simply the sacramental or symbolic consumption of a small quantity at a religious ceremony. It is used communally and privately, during religious ceremonies when two or more Rastafari come together, and at other times and places. According to his own evidence, the appellant uses cannabis regularly at his home and elsewhere. All that distinguishes his use of

> cannabis from the general use that is prohibited, is the purpose for which he uses the drugs, and the self-discipline that he asserts in not abusing it.
>
> [130] There is no objective way in which a law enforcement official could distinguish between the use of cannabis for religious purposes and the use of cannabis for recreation. It would be even more difficult, if not impossible, to distinguish objectively between the possession of cannabis for the one or the other of the above purposes. Nor is there any objective way in which a law enforcement official could determine whether a person found in possession of cannabis, who says that it is possessed for religious purposes, is genuine or not. Indeed, in the absence of a carefully controlled permitted supply, it is difficult to imagine how the [island] of legitimate acquisition and use by Rastafari for the purpose of practicing their religion could be distinguished from the surrounding ocean of illicit trafficking and use."

[127] There are several other points to consider in the analysis of whether less intrusive measures could be adopted. One of the peculiarities of the cannabis/marijuana plant is that there is no way to ascertain from looking at a plant whether it contains the high levels of THC found in strains cultivated for smoking, or the low levels in plants normally bred for commercial purposes. The literature indicates that, although it may be scientifically possible to run chemical tests to determine if a particular seedling will be high-intoxicant or low intoxicant based on the ratio between the existing THC and CBD (cannobidiol), this would be cost-prohibitive and administratively impractical (see, for example, the Canadian case of *R v Clay, supra.*).

[128] To some extent, this is the elephant in the room. Thus, while it recommended the reclassification of marijuana as a dangerous drug, the Caricom Commission also specifically recommended that strains of cannabis developed with very high levels of TCH should remain prohibited substances for the purpose of general public consumption and should be banned in law. It also acknowledged that practical tools may not yet be available to test for such levels in advance of consumption, which begs the question as to how such risks are to be mitigated other than by general prohibitions.

[129] The respondent, although not under a legal duty to justify the law on a proportionality analysis, also referred to the power of Parliament to make laws for the "*peace, order and good government*" (sometimes abbreviated as "POGG" powers) in supporting its constitutionality. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No. 2) [2008] UKHL 61, Lord Hoffman said [para 50] that the words "*peace, order and good government*" are not words of limitation, but have been treated as apt to confer plenary law-making authority.

[130] In this regard, the POGG powers allow the Government to enact criminal and penal laws based on public policy and other considerations as it may consider appropriate. The courts must give (as it has often described in the European jurisprudence) a 'wide margin of appreciation' to Parliament's legislative competency. In *R v Malmo-Levine, R v. Caine* (*supra*), cases in which the Canadian Supreme Court affirmed the legislative competence of the Canadian parliament to prohibit the possession of marijuana, the majority said as follows:

> "211. It is not the courts' function to reassess the wisdom of validly enacted legislation. As L'Hereuex-Dube J. said in *Hinchey*, *supra*, at para. 34, "the judiciary should not rewrite [legislation] to suit its own particular conception of what type of conduct should be considered criminal". And further, at para. 36: "If Parliament chooses to criminalize conduct which, notwithstanding Charter scrutiny, appears to be outside of what a judge considers 'criminal', there must be a sense of deference to the legislated authority which has specifically written in these elements."
> 212. Although courts cannot question the wisdom of legislation, they must assess its constitutionality. There is, as such, no constitutional threshold of harm required for legislative action under the criminal law power. There had been uncertainties in the past in this regard, as some would have required "significant, grave and serious risk of harm to public health, morality, safety or security" before a prohibition could fall within the purview of the criminal law power (see, e.g., *RJR-MacDonald*, *supra*, at paras. 199-202, per Major J.). It is now established that as long as the legislation is directed at a legitimate public health evil and contains a prohibition accompanied by a penal sanction, and provided that it is not otherwise a "colourable" intrusion upon provincial jurisdiction, Parliament has, under s. 91(27) of the Constitution Act, 1867, discretion to determine the extent of the harm it considers sufficient for legislative action (RJR-MacDonald, *supra*, at para. 32; *Reference re Firearms Act* (Can.), *supra*, at para. 27). Obviously, however, where Parliament relies on the protection of health as its legitimate public purpose, it has to demonstrate the "injurious or undesirable effect" from which it seeks to safeguard the public. This will likely be done by demonstrating the harm to the health of the individuals or the public associated with the prohibited conduct. While there is no constitutional threshold level of harm required before Parliament may use its broad criminal law power, conduct with little or no threat of harm is unlikely to qualify as a "public health evil".

[131] In *Prince I*, the court said:

> [108] In a democratic society the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and, where necessary, to enforce that prohibition by criminal sanctions. In doing so it must act consistently with the Constitution, but if it does that, the court must enforce the laws whether they agree with them or not."

[132] In the premises, I am not at all persuaded that the applicant has made out an evidential case that the blanket prohibition of marijuana—or, conversely, the failure to make any exemption for religious use—is not justifiable in a democratic society such as The Bahamas. As indicated, Parliament has a wide competence to make laws for the peace order and good government of a society, and it is for Parliament to decide what public policy choices inform such legislation, subject to the principles of justifiability and proportionality. It is not the province of the Court to decide what level of perceived harm justifies legislation which seeks to prohibit and penalize conduct which Parliament has thought anti-social or injurious to the public.

[133] Marijuana may not be as harmful as once thought, but neither is it completely harmless. The very material relied on by the applicant to justify an exemption for religious use also evinces that there are still significant risks associated with marijuana use, especially among vulnerable groups. Further, it is still classified as a dangerous drug both under international law and domestic law, and underpins an international trade in drugs which fuels serious transnational and domestic criminality.

[134] I think it important to point out, also, that this case is not about the use of marijuana as compared to any other potentially harmful substances that might be available for public consumption, or used in religious rites. For example, one of the challenges by the applicants in the *Franklin-Beentjes* case was that they were discriminated against under article 14 of the Convention (the ECHR parallel to article 26 of the Bahamian Constitution). This was on the basis that the established churches, in particular the Roman Catholic Church and the Protestant Church in the Netherlands, performed rituals involving the sacramental use of wine, a beverage containing a significant proportion of the addictive narcotic substance alcohol. The court, in dismissing the complaint of discrimination, said in part:

> "54. The court confines itself to noting that, quite apart from the fact that wine is not subject to the repressive regulatory regime of the Opium Act, the rites referred to differ significantly from those practiced by the applications, most notably—for present purposes—in that participants neither intend nor expect to partake of psychoactive substances to the point of intoxication. The applicants are therefore not in a position relevantly similar to that of the churches with which they compare themselves."

Form of declaration sought not possible

[135] Even if I had concluded that the blanket prohibition on marijuana was not justifiable and therefore a constitutional breach, I would still have been constrained from making the declaration in the form pleaded by the applicant. This is because the declaration sought is that s. 29(6) of the DDA, without more, is unconstitutional. As explained, that section enacts a blanket prohibition on the possession of marijuana. For the court to make such a declaration would be to judicially legalize the possession of marijuana by anyone, which the court has no jurisdiction to do on the application before it. The real complaint of the applicant is not against the general public prohibition, but only that such prohibition should contain an exemption for religious use. However, out of respect for and deference to the arguments on both sides, the court considered the matter as if the declaration of unconstitutionally sought were in fact limited to the extent that it contained no exemption for religious use.

Legislative developments?

[136] In the midst of drafting this judgment, I was made aware of two Bills that are 'in circulation' —and I speak circumspectly in this regard—as there is no indication that they have been tabled in Parliament, or formally published for consultation. They are in the public domain, however, and have been the subject of press and public commentary (see, for example, a *Tribune* article dated 26 May 2021, "*Rastas reject cannabis law draft*"). They are as follows: a Medical Cannabis Bill, 2021 ("the Medical Cannabis Bill"), and a Dangerous Drugs (Amendment) Bill, 2021.

[137] Neither was put before me as part of the legislative facts by either party during the course of the hearing. But I can take judicial notice of their existence, as they have been the source of public commentary. I refrain, however, from expressing any views on their provisions, and only refer to them to the extent that it might be instructive to draw any inferences from the

legislative intent disclosed. In doing so, I remind myself of the salutary warning of Upjohn J. that the court should not take into account "*the possible effect*" of a Bill which "…*may never become law or if passed into law, may contain provisions which ultimately do not affect the rights of the parties before the court*" (*Willow Wren Canal Carrying Co. Ltd. v British Transport Commission* [1956] 1 All ER 567).

[138] The first of these Bills purports to create a regime for the medical use of marijuana and for commercial cultivation and export, under a licensing regime. The other proposes various amendments to the DDA, one of which would be to make possession of small quantities of cannabis (two ounces or less) a non-arrestable offence subject to a fixed fine of $500. The one observation that the Court will make is that neither appears to manifest a legislative intention to create an exemption either for religious or recreational use. Obviously, these Bills are being proposed in hindsight of the Caricom Commission's Report, which was tabled in Parliament. So it might be assumed that Parliament is well aware of the Commission's recommendations and decided only to give effect to the medical exception. The takeaway therefore is that Parliament has considered the position relating to cannabis and has deliberately refrained from proposing any legislation to make possession of small quantities (or any quantity) of marijuana available for religious or recreational use.

Justifiability and a democratic society

[139] As I observed in the *Omar Archer* case, in *The State v. Khoratty (Mauritius)* [2007] 1 AC, the Privy Council considered the macro features of a "democracy" to involve free elections, the protection of fundamental rights by an independent and impartial judiciary and the separation of powers between the legislature, executive and the judiciary. But is also accepted that it falls to the courts to construe at any point in time the contents of this phrase. Lord Steyn said as follows:

> "Giving content to the term 'democratic state' in section 1 is part of the task of judges who are called upon to interpret the Constitution. […] Having regard, in particular, to the specially entrenched status of section 1, in my view it would be wrong to say that the concept of democratic states to be found there means nothing more than the sum of the provisions in the Constitution, whatever they may be at the given moment. Rather, section 1 contains a separate, substantial guarantee. […] That said, the Constitution is not to be interpreted in a vacuum, without regard to the thinking in other countries sharing similar values."

[140] Article 1 of the Constitution proclaims that The Bahamas shall be a "sovereign democratic state", and I can therefore take judicial notice that in addition to possessing the formal attributes of a democratic state outlined in *Khoratty*, it is one which respects the rights and freedoms of the individual.

[141] I find nothing anti-democratic or anti-rights in Parliament's decision not to make allowances for the religious or recreational use of marijuana. There are many democratic states (in fact, the vast majority of them) that still maintain general prohibitions on the possession and use of marijuana. Further, even those states which have reduced restrictions on marijuana for

medicinal or recreational use, still exercise stringent controls, having regard, *inter alia*, to their international obligations under the various conventions.

[142] Indeed, I would go so far as to say that that it is exemplary (rather than antithetical) of a democratic society that the decision whether or not an exemption should be made for the use of a not-innocuous substance for religious purposes should be left to the duly-elected representatives of the people. They are far better situated to make decisions that involve balancing competing international, public policy, and social considerations. In performing its constitutional function to interpret legislation so as to give full effect to fundamental human rights, it is not the business of the court to attempt to provide solutions to sociological issues which are better left to executive and/or legislative action.

[143] Further, whilst it is permissible for the court to benchmark the position in similar democracies in considering justifiability, we are reminded by the Privy Council that it is not proper to construe the constitution in one society by reference to social developments in another (*Attorney General for Bermuda v Roderick Ferguson and Ors*. [2022] UKPC 5 [para. 54]):

> "The family of democratic states which have constitutions which protect the rights of minorities and individuals, including the enjoyment of freedom of conscience and religion, have been subject to different social developments and the Board in interpreting their constitutions has no authority to attempt to homogenize such different societies by reference to social developments in other societies. The Board's task is to give full effect to the constitutional protections conferred on members of the societies which accept its jurisdiction. As in *Laramore*, it does so by requiring the state to give full effect to the protection of freedom of conscience in the relevant constitution. In *Laramore*, and in this case, that task involves the Board determining the validity of a legislative measure by reference to its effect on an individual or minority rather than its purpose."

Conclusions on constitutional challenge

[144] In the round, my findings on the constitutional point are these. I accept that the failure to make provision for religious use of marijuana amounts to an interference with the applicant's rights to observe and manifest his religion. But I also find that there is sufficient evidence and other material before the court to establish that the impugned provisions of the DDA are reasonably required to attain public policy objectives, whether for public health or safety. Furthermore, in my judgment, the applicant has not provided any evidence or other material to satisfy the court that the failure to make an exemption for religious use is not justifiable in a democratic society, or that the legislative measures in the DDA are disproportionate to their objectives.

[145] In all the circumstances of this case, I do not find that s. 29(6) of the DDA, insofar as it fails to contain an exemption for religious use of marijuana, is unconstitutional. As explained, I certainly do not (and cannot) find that it is unconstitutional *per se*, as in substance no challenge is being made to the general prohibition, despite the way in which the claim for relief is pleaded.

[146] I am cognizant that some might see this ruling as a retrograde decision, in light of the liberalization of laws in many countries regarding the use of marijuana. As noted, legislation

in several sister Caribbean countries as well as other parts of the Commonwealth and many US States, has cleared the way for the use of small quantities of marijuana either for medical, recreational or religious purposes (e.g., Jamaica, St. Kitts and Nevis, South Africa and several other African countries, and more than half of the US States as well as several European countries). Jamaica, for example, has made possession of small quantities of marijuana a ticketable and non-arrestable offence.

[147 It is also significant, although it obviously did not figure in the court's reasoning, that the *Ras Sankofa* decision was delivered against the backdrop of the publication of the Cannabis Bill 2020 by the National Assembly of St. Kitts and Nevis, which contained provisions regulating the use of cannabis for religious purposes. In other words, the national legislative assembly was already in the process of putting the legal framework in place to make an exemption for religious use, and therefore the court's finding with respect to religious use in any event did not derogate from the executive and legislative position.

[148] What is clear is that in the vast majority of cases, relaxation of marijuana laws has come about by a deliberate policy decision of the respective parliaments or other legislative bodies, and not by dint of judicial pronouncement. This is as it should be. And nothing in this ruling should be taken as expressing any view on the desirability or wisdom (or not) as a matter social development of Parliament putting in place appropriate legislation to provide for limited permitted use of marijuana by Rastafari, or for recreational purposes. The narrow issue before this court was the constitutionality of the provision of the DDA under which the applicant was charged, considered against the claim that it contravened his right to religious freedom. And that is all the court has endeavoured to answer.

Savings law clause

[149] Even if I had found on the proportionality analysis that the impugned provision of the DDA violated the applicant's fundamental rights and was not justifiable in a democratic society (or if I am wrong in my conclusions on the constitutionality of the challenged law), I would still have to consider another point raised by the respondent. This is whether the law would be saved by virtue of what has become known as the "savings law clause"—which remains the bugbear of constitutional rights adjudication under many of the export Westminster models.

[150] In written arguments, the respondent merely submitted that "*the acts of which the Applicant complains were done under the authority of written law and is saved by article 30(1) of the Bahamas Constitution*". This, it is contended, pertains because the DDA was enacted in 1939, and was repealed and replaced by the DDA 2000, so therefore it is saved by article 30(1).

[151] The following provisions of the 1939 Act (which was not placed before the court but of which judicial notice is taken), roughly parallel the provisions set out above in the 2000 Act:

> "s. 2: […] "Indian hemp" means the dried flowering or fruiting tops of the pistillate plant known as cannabis sativa from which the resin has not been extracted, by whatever name such tops are called. […]

> s.3: It shall not be lawful for any person to cultivate, trade in, import or bring into the Colony any of the drugs to which this Part applies except a qualified person with special authority of the Governor in Council for medical or scientific purposes. […]
>
> s.6: The drugs to which this Part [Part II] applies are raw opium, cocoa leaves, Indian hemp and resins obtained from Indian hemp and all preparations of which such resins from a base and any other drugs to which the Governor may by Order in Council declare that this Part of this Act shall apply."
>
> "s. 25(5) Where any drug to which this Act applies is imported or otherwise brought into the Colony and is, without the proper authority, found in the possession of any person or stored or kept in a place other than a place prescribed for the storage or keeping of such drug, such person or the occupier of such place, unless he can prove such drug was deposited there without his knowledge or consent, shall be guilty of an offence against this Act."
>
> "25. (2) Every person guilty of an offence against this Act for which no other penalty is provided shall in respect of each offence, be liable —
> (a) on conviction on information, to a fine of one thousand pounds, or to imprisonment for ten years, or to both such fine and imprisonment.
> (b) on summary conviction, to a fine of two hundred and fifty pounds, or to imprisonment for twelve months, or to both such fine and imprisonment…."

[152] As can be seen, the definition of Indian hemp under the 2002 legislation is broader than the definition in the 1939 Act. But in my view, it seems reasonably clear that the relevant provisions of the DDA 2000 existed in the same or materially similar terms in the 1939 Act. Therefore, I accept that it comes within the definition of art. 31(1)(c) as a saved law.

[153] Having found that the impugned provision of the DDA is not unconstitutional, my findings on the savings law point are only stated here for completeness. I therefore do not think it necessary to dive too deeply into the legal issues in this regard, as the law on the point was canvassed in some detail in the *Omar Archer* case. There, this court concluded that the provisions of the Penal Code dealing with intentional libel were saved laws, and therefore immune from constitutional challenge.

[154] One of the difficulties in deciding the issue was the competing decisions of the Privy Council and the Caribbean Court of Justice ("CCJ") on the point. In a number of cases (*Boyce (Lennox) v. The Queen [2005] 1 A.C., Matthew v. Trinidad and Tobago* [2005] 1 A.C. 433, and *Newbold and Ors. v. The Commissioner of Police and ors.* [2014] UKPC 12 (an appeal from this jurisdiction), the PC gave effect to the savings clause, adopting a literal interpretation, to shield inconsistent laws which predated the constitution from being struck down. In recent jurisdiction from the CCJ (*Nervais and Severin v The Queen* [2018] CCJ 19 and *Quincy McEwan et. al. v. the Attorney General of Guyana* [2018] CCJ 30), that court came to the opposite conclusion and held that the rights provisions in the Constitution should take precedence over any existing law where there was a conflict. As I concluded in *Omar Archer*:

> "[136] Although I am greatly attracted to the cogent reasons given by the minority of the Board in the trilogy of cases, and the enlightened approach to the interpretation of the savings clause in the recent jurisprudence from the CCJ, I am nevertheless bound by the

> majority view in *Boyce* and the decision in *Newbold*. Therefore, even if I had found the impugned provision of Title xii to be inconsistent with and in contravention of article 23, it is clearly a saved law under article 30(1), and therefore cannot be impeached. The weight of judicial precedent sitting on the shoulders of a first instance judge cannot be dislodged by a casual shrug, much as there is the temptation to do so."

[155] That reasoning applies equally here. Thus, with the same melancholy that I expressed in *Omar Archer* at having to subjugate fundamental rights to the principle of "saved laws", I am nevertheless constrained to find that the challenged provision of the DDA is in any event a saved law and therefore immune from constitutional challenge.

Need for facts to prove allegations of Constitutional breaches

[156] Before coming to the *dispositif* of this ruling, it is important to sound a cautionary note to applicants who wish to advance constitutional challenges without proper supporting evidence. I remind litigants that a proper factual foundation needs to be established in relation to constitutional litigation. As was expressed in the headnote of the Canadian case of *Danson v Ontario (Attorney General)* [1990] 2 SCR 1086 (pp. 4-5):

> "A proper factual foundation must exist before measuring legislation against the provision of the Charter, particularly where the effects of the impugned legislation are the subject of attack. A distinction must be drawn between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". Adjudicative facts are those that concern the immediate parties. They are specific and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of the legislation, including its social, economic and cultural context. Such facts are of a more general nature and are subject to less stringent admissibility requirements."

[157] The court in *Danson* (as here) was also concerned with impugned legislation, which was said to violate Charter rights, and it underscored the need for an applicant for constitutional relief to establish factually how the effects of the legislation applied to him. It said (p. 20-21):

> "This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the Charter, particularly where the effects of impugned legislation are the subject of the attack. For example, in *R v Edwards Book and Art. Ltd.*, [1986] 2 S.C. R 713, at pp. 767-68, this Court declined to hold that the *Retail Business Holidays Act*, R.S.O 1980, c 453, infringed the s. 2 (a) Charter rights of Hindus or Moslems in the absence of evidence about the details of their respective religious observance. Similarly, in *Rio Hotel Ltd. v New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at p. 83, this Court declined to consider a s 2(b) Charter challenge to certain provisions of the Liquor Control Act, R.S.N.B. 1973, cl. 10, in the absence of evidence on the nature of the conduct that was claimed to constitute "expression" within the meaning of s. 2(b)."

[158] As noted, the applicant provided little evidence of his religious observances, nor any details about the use of marijuana as a sacrament by Rastafari, or why a total ban was said not to be justifiable in a democratic society, and whether something less draconian than a general prohibition (i.e., legislation permitting religious and perhaps other exemptions) would achieve Parliament's legislative objective to control such substances.

[159] In fact, it is notable that the high priest of the Bobo Shanti Tribe (Rithmond McKinney), along with representatives from that House, attended the hearings, but did not seek to participate

either to file an *amicus* brief or be joined in the action. The local Rastafari community clearly has an interest in the litigation and could have put evidential and other material before the Court which would have assisted the court in its deliberations.

[160] The criticism is not one-sided, however, and it has been noted that the respondent also offered no expert or other evidence to prove the harmful effects of cannabis, nor its association with crime, or any other social ills connected with the trade and trafficking in cannabis. There was, however, material from which the court could clearly deduce Parliament's legislative intent and the legitimate purpose in enacting the DDA, based on objective legislative facts and judicial authority. In any event, it did not fall to the respondent to prove the negative that the measure was not justifiable in a democratic society.

Stay

[161] For completeness, it should also be pointed out that one of the reliefs sought by the applicant was a stay of his criminal proceedings pending the hearing of this matter. As the magistrate's court, out of curial deference, voluntarily stayed the criminal proceedings pending the hearing of this application, it was not necessary for the court to grant a stay during the interim, and nothing more needs to be said on this point.

CONCLUSION AND DISPOSITION

[162] For the reasons given above, I dismiss the application for constitutional relief and make the following orders:

(i) I refuse the declaration that in the circumstances there is a threat of a breach of the applicant's fundamental rights guaranteed by article 22 of the Constitution.
(ii) I refuse the declaration that s. 29(6) of the Dangerous Drugs Act is unconstitutional, whether in whole or to the extent that it does not make any exemption for religious use.
(iii) I refuse the grant of a stay of the magistrate's proceedings.

Costs

[163] As the applicant has failed in his application for relief, the respondent would ordinarily be entitled to receive his costs. However, my order, in keeping with the traditional approach taken by a number of courts with respect to awarding costs where an applicant unsuccessfully raises legitimate constitutional issues, is to make no order as to costs.

[164] In this regard, I refer to the ruling of Charles J. (as she then was) in *The Queen v. Dwight Armbrister* [2021] 1 BHS J. No. 2, where she applied a similar principle, referring to her decision 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), where she said:

> "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."

[165] I would complete this short appendage on cost with a reference to the South African Constitutional Court case of "*Biowatch Trust v Registrar, Genetic Resources and others* [2009] 5 LRC 445, where the Court endorsed its holding in *Affordable Medicines Trust v. Minister of Health* [2005] 6 BCLR 529, that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the sate ought not to be ordered to pay costs. In that case, Ngcobo J said [at 138]:

> "The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case. In *Motsepe v Commissioner for Inland Revenue* this Court articulated the rule as follows: "[O]ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly, where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or 'chilling effect' on other potential litigations in this category. This cautious approach, cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this court, no matter how spurious the grounds for doing so may be or how remote the possibility that this court will grant them access. This can neither be in the interest of the administration of justice nor fair to those who are forced to oppose such attacks." ' (Footnotes omitted.)

Klein, J.

1 August 2023.