[2018] JMCA Civ 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 70/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

AND

IN THE MATTER of an Application by **MAURICE ARNOLD TOMLINSON**, alleging a breach of his constitutional rights under sections 13(3)(a), 13(3)(c), 13(3)(g), 13(3)(i)(i), 13(3)(j)(ii), 13(3)(o), 13(3)(p), 13(3)(6) and 14 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011

AND

IN THE MATTER of an Application by **MAURICE ARNOLD TOMLINSON** for constitutional redress pursuant to section 19(1) of said Charter

AND

IN THE MATTER of an application made pursuant to Rule 56.9 of the Civil Procedure Rules, 2002 (CPR)

BETWEEN	**THE PUBLIC DEFENDER**	**APPELLANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**RESPONDENT**
AND	**MAURICE TOMLINSON**	**INTERVENOR**

Lord Gifford QC and Seymour Stewart instructed by JamLawCaribbean for the appellant

Mrs Nicole Foster-Pusey QC and Miss Carla Thomas for the respondent

Mrs Shawn Wilkinson and Lenroy Stewart instructed by Wilkinson Law for the Intervenor

22, 23 February 2017 and 9 November 2018

MORRISON P

Introduction

[1] Mr Maurice Tomlinson (MT) is a citizen of Jamaica. He is a homosexual, and is legally married to another man under the laws of another State.

[2] By a fixed date claim form filed on 27 November 2015 (the claim), MT seeks various declarations in respect of alleged breaches of the rights guaranteed to persons in Jamaica by the Constitution of Jamaica, as amended by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 (the Constitution). The named defendant to the claim is the Attorney General of Jamaica (the Attorney General).

[3] The specific focus of MT's challenge is on sections 76, 77 and 79 of the Offences Against the Person Act (the OAPA). Section 76 provides that any person convicted of the offence of buggery (described in the Act as "the abominable crime of buggery") shall be liable to imprisonment at hard labour for a term not exceeding 10 years. Section 77 provides that any person convicted of attempting to commit buggery, assault with intent to commit buggery, or indecent assault upon any male person, shall be liable to imprisonment for a term not exceeding seven years, with or without hard labour. And section 79 provides that any male person who is convicted of (whether in public or

private) committing, being a party to the commission of, or procuring or attempting to procure the commission by any male person of any act of gross indecency with another male person, shall be liable at the discretion of the court to imprisonment for a term not exceeding two years, with or without hard labour.

[4] MT contends that, to the extent that consensual sexual activities between persons aged 16 or older, including persons of the same sex, are criminally prohibited and penalised under sections 76, 77 and 79 of the OAPA, these sections contravene his rights to liberty and freedom of the person; security of the person; freedom of expression; equality before the law; respect for and protection of private and family life, and of privacy of the home; and protection from inhuman or degrading punishment or other treatment. In addition, MT submits that section 79 breaches his right to freedom from discrimination on the ground of gender.

[5] To support the various declarations which he seeks, MT also applies for a number of consequential orders. These include orders prohibiting the Jamaica Constabulary Force from laying charges under sections 76, 77 and 79 of the OAPA, and the Director of Public Prosecutions or its agents from prosecuting persons, in relation to consensual sexual activities between persons above the age of 16, including persons of the same sex.

[6] Several bodies sought leave to be added as Interested Parties to the claim. The appellant (the Public Defender) is one of them. The Public Defender is a commission of Parliament established under section 4(1) of the Public Defender (Interim) Act (the PDA), "[f]or the purpose of protecting and enforcing the rights of citizens".

[7] The other bodies who sought leave to be added as Interested Parties were the Jamaica Coalition for a Healthy Society, the Lawyers Christian Fellowship Ltd, Hear the Children's Cry Limited, and a group of church-related bodies collectively referred to in the court below as 'The Churches' (the other applicants).

[8] MT did not oppose the Public Defender's application, but he opposed those of the other applicants. On the other hand, the Attorney General did not oppose the application by the other applicants, but she opposed the Public Defender's. In a detailed written ruling given on 6 July 2016, Laing J (the judge) granted the other applicants' applications, but refused that of the Public Defender. With regard to the latter, the judge said this[1]:

> "The grant of the application is discretionary and after balancing the possible benefit to be gained by the Public Defender's participation against the likely negative impact to that public office arising from such participation, having regard to the statutory remit of the Public Defender's office, I am of the opinion that the Court ought to exercise its discretion in refusing the application of the Public Defender."

[9] On 21 November 2016, this court gave the Public Defender leave to appeal against this ruling. This is therefore the Public Defender's appeal, in respect of which MT has sought and been granted leave to appear as an Intervenor. The only issue which arises on the appeal is whether the judge was correct in his conclusion that the Public Defender's statutory remit, taken together with the other discretionary factors to which he referred,

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[1] At para. [76]

militated against allowing her to appear and to make submissions as an Interested Party in the proceedings.

The Public Defender's application in the court below

[10] The Public Defender's application was filed on 14 January 2016. In it, she sought orders that she be permitted to appear as an Interested Party, served with copies of the fixed date claim form and all other documents filed in the matter, and be at liberty to make oral and or written submissions on the issues joined between the parties. The grounds of the application were as follows:

> "1. The Applicant is a Commission of Parliament created by section 4 of the Public Defender (Interim) Act for the purpose of protecting and enforcing the rights of citizens. The claim avers that the rights of the [Intervenor] have been breached by the State, and/or that the State has failed, or is failing to uphold the rights of the [Intervenor], a citizen of Jamaica.
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> 2. The issues to be adjudicated upon in this claim are of national significance in that the resolution thereof, although relating specifically to the [Intervenor], touch and concern the legality of provisions of existing legislation.
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> 3. Given its remit, it is desirable that the Public Defender be added as an Interested Party since the proceedings involve issues of constitutional breaches (of Charter Rights), and a direct challenge to the constitutionality of legislation governing the conduct of persons.
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> 4. In accordance with Part 56.13(c) and (d) of the Civil Procedure Rules 2002 the Applicant has a sufficient interest in the resolution of the issues raised in the Fixed Date Claim."

[11] The Public Defender's application was supported by the affidavit of the current holder of the office, Mrs Arlene Harrison-Henry[2]. Describing the Public Defender[3] as a "Commission of Parliament ... with the primary mandate of protecting and enforcing the rights of citizens", Mrs Harrison-Henry made the case for an order granting the application in the following way[4]:

> "3. The Offences Against the Persons Act (the *OAPA*) was enacted in 1864 during which time Jamaica was a colony and a part of the Commonwealth empire. Since the enactment of the OAPA the concept of fundamental rights and freedoms has evolved with major developments in the concepts of human rights. The Supreme Court has the burden of ensuring the progressive realization of those fundamental human rights.
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> 4. Sections 76, 77 and 79 of the OAPA are being challenged in this claim on the basis that the enactments breach the fundamental rights and freedoms of the [Intervenor] as a homosexual.
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> 5. Jamaica has bound itself to upholding fundamental rights and freedoms both internationally and locally and these commitments are reflected in the international instruments which Jamaica has signed and ratified, some of which have been incorporated into domestic law. The primacy with which fundamental rights and freedoms are treated is reflected by the enactment of the Constitutional provisions, which provide that laws which are inconsistent with the constitution, to the extent of the inconsistency, shall be void.
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> 6. The establishment of the Public Defender is one such expression of the commitment Jamaica has made of its

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[2] Affidavit of Arlene Harrison-Henry, sworn to on 13 January 2016 and filed on 14 January 2016
[3] At para. 2
[4] At paras 3-10

dedication to ensure that the rights of the most vulnerable citizens of Jamaicans [sic] are protected.

7. The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 was enacted after a Constitutional Commission, established by Parliament, recommended after wide public consultation and due deliberation, that Chapter III of the Constitution of Jamaica, be replaced by a new Chapter which provides more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica. The Charter provides that the state has an obligation to promote universal respect for, and observance of, human rights and freedoms.

8. I have been shown a copy of the Fixed Date Claim Form and Affidavit of MAURICE ARNOLD TOMLINSON in support thereof. The claim alleges breaches of sections 13(3)(a), 13(3)(c), (13(3)(g), 13(3)(i), 13(3)(j)(ii), 13((3)(o), 13(3)(p), 13(3)(6) and 14 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011. The gravamen of the claim is that the [Intervenor], a homosexual man, is adversely affected by various enactments which criminalize sexual activity between consenting adult males. In terms of the relief sought, the [Intervenor] seeks to invoke the Court's jurisdiction to strike down the various legislative provisions which the [Intervenor] avers are discriminatory in nature, and through which said legislative provisions, homosexual men are rendered vulnerable to abuse.

9. Previously a similar motion was brought; that was in 2013. In was **Claim No. 2013 HCV 00650** and was filed by ***Javed Saunja Jaghai*** and ***J-Flag Management Company Limited*** alleging the infringement of rights under various sections of the Constitution, on the basis that the [Intervenor] was a homosexual. That Claim in 2013 was withdrawn before the arguments were presented in Court, hence the issues raised therein were never judicially determined.

10. I am of the view that the resolution of the issues raised in the Claim and the decision on whether or not to

> grant the relief sought would affect a class of citizens in Jamaica, and in the circumstances the Public Defender has a sufficient interest in the matter."

[12] In submissions before the judge[5], counsel for the Public Defender relied on the inherent jurisdiction of the Supreme Court to regulate its own proceedings and on Part 56 of the Civil Procedure Rules 2002 (the CPR). As regards the latter, the Public Defender pointed out that, under rule 56.1(2), applications by way of originating motion or otherwise for relief under the Constitution are referred to as "applications for an administrative order"; and that, under rule 56.15(1), the court may, at the hearing of an application for an administrative order, "allow any person who or body which appears to have a sufficient interest in the subject matter of the claim to make submissions whether or not served with the claim form".

[13] On the question of "sufficient interest", the Public Defender submitted that, applying the analogous test of standing for judicial review, she fell within rule 56.2(2)(d), as a "statutory body where the subject matter falls within its statutory remit"; and rule 56.2(2)(e), as a "body ... that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application". In this regard, she referred to the statement by Rawlins JA (as he then was) in **The Attorney General of St Lucia v Martinus Francois**[6], that "Part 56.2 of the Rules … provides very liberal

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[5] Submissions by Public Defender on Application to be added as an Interested Party, dated and filed 8 March 2016

[6] (unreported), Court of Appeal, Saint Lucia, Civil Appeal No 37/2003, judgment delivered 29 March 2004, para. [151]

and relaxed rules of standing for application for judicial review ... Interest groups and bodies are particularly facilitated". The Public Defender accordingly invited the judge to adopt a similar approach with respect to her application in this case.

[14] But, more substantially, the Public Defender relied on her role under the PDA as an independent commission of Parliament charged with the statutory duty of protecting and enforcing the rights of citizens. In these circumstances, it was submitted that, given that the issue of homosexuality was one of significant public interest with international dimensions, "[i]t would almost be a dereliction of duty for the Public Defender not to seek to intervene in the proceedings"[7].

[15] Finally, with respect to the question whether the Public Defender has legal personality for the purpose of its application to be joined as an Interested Party, reliance was placed on section 13(5) of the PDA. That section provides that "[i]f any question arises as to whether the Public Defender has jurisdiction to investigate any case or class of case … the Public Defender may apply to the Supreme Court for a declaration determining that question". The Public Defender contended that this provision gave rise to "an inescapable inference" that Parliament intended that she should have the requisite legal personality.

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[7] Submissions by Public Defender on Application to be added as an Interested Party, dated and filed 8 March 2016, para. 29

[16] The Attorney General opposed the Public Defender's application on two grounds. The first was that the statutory functions of the Public Defender are purely investigatory and the PDA does not confer any authority, power or standing sanctioning the application to be joined in MT's action as an Interested Party. The application was accordingly misconceived and *ultra vires* the PDA. Secondly, the Attorney General contended that the Public Defender has no legal personality. Accordingly, she is not empowered to make applications to the court, save pursuant to the authority given to her to commence legal proceedings for the specific purpose mentioned in section 13(5) of the PDA. The Attorney General submitted that, where Parliament intends to confer legal personality on any body, it does so expressly by reference to section 28 of the Interpretation Act.

What the judge decided

[17] The judge dismissed the Public Defender's application on two bases. The principal one was that the statutory remit of the office of the Public Defender did not permit her to intervene in proceedings of this kind[8]:

> "[71] ... [T]he PD Act provides that the nature of the Public Defender's intervention ought to be by way of investigation and in my view it would be a strained construction to find that such investigation includes ... participation in a claim as an interested party.
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> [72] The Public Defender relies on its statutory remit as a basis of its assertion that it has sufficient interest in the subject matter of the claim … I do not agree. To the extent that the application of the Public Defender is founded on a statutory duty for the reason outlined in

[8] Paras [71]-[72]

> the preceding paragraph I find that there is no such statutory remit."

[18] Secondly, the judge considered that, even if he was wrong on this point, it would be "potentially toxic" for the Public Defender "to voluntarily insert herself directly into the centre of a nationally divisive issue"[9]:

> "As has correctly been identified [sic] Counsel for the Public Defender, there [sic] two diametrically opposed positions – two sides with the battle lines drawn. There are only two possible results: the buggery laws either infringe the constitution, or they do not? Presumably, the Public Defender's submissions to the Court would be of little assistance if they are neutral. If they are not going to be neutral, which position would the Public Defender take? The [Intervenor's] support of the Public Defender's application suggests that there is already a view formed, by the [Intervenor], (not unreasonably), as to the Public Defender's stance on the issue. The obvious danger is that regardless of the side which the Public Defender chooses, she runs the risk of the [sic] losing the trust of, or worse, completely alienating, the other side. Public confidence in the office may also be further negatively affected if the Public Defender supports or advances a position which the Court ultimately finds to be plainly wrong."[10]

[19] In the result, the judge determined that the proper exercise of his discretion required that the Public Defender's application should be refused. But, as I have already indicated, the judge granted the applications of the other applicants. In relation to them,

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[9] Para. [74]
[10] Para. [75]

the judge adopted what he described[11] as "the more liberal and relaxed approach to standing embraced by the Courts in the plethora of authorities to which reference has previously been made". Noting the widespread public interest which the issue of homosexuality and the continued existence of the buggery laws have generated, the judge considered that, "[i]f ever there was a matter which begged for a liberal approach to standing in order to facilitate the participation of a wide cross section of the public who have a genuine interest in the topic, this certainly is it". Having found that, on a balance of probabilities, the other applicants were not busybodies, the judge concluded that although they might not be directly affected by MT's claim, they each had a sufficient interest in the claim to justify their participation in the proceedings.

The grounds of appeal[12]

[20] The Public Defender challenged the judge's decision on a number of grounds of appeal (10 in all). I trust that I do them no disservice by summarising them in this way:

i. Although referring to the liberal approach to the issue of standing, the judge failed to adopt, or to properly apply, that approach with respect to the Public Defender's application, particularly as regards to the concept of "sufficient interest", as set out in rule 56.2 of the CPR (the question of standing).

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[11] At para. [82]
[12] See Amended Notice of Appeal filed on 31 August 2016

ii. The judge did not properly analyse, and as such misconstrued, or failed to give adequate effect to, the relevant provisions of the PDA (the statutory remit).

iii. The judge's decision was based on irrelevant considerations, such as (i) his speculation as to what the Public Defender's position on MT's claim might be; and (ii) what effect the Public Defender's support for a position which the court ultimately held to be "plainly wrong" might have on public confidence in the office (irrelevant considerations).[13]

The question of standing

[21] It is accepted that MT's claim is an application for an administrative order of the kind referred to in rule 56.1(2) of the CPR. Provided that the Public Defender could demonstrate that she had a "sufficient interest in the subject matter of [MT's] claim", therefore, rule 56.13(2)(c) empowered the judge to allow the Public Defender to be heard in the proceedings; and rule 56.13(2)(d) enabled the judge to give directions as to whether the Public Defender should make submissions by way of written brief or orally at the hearing.

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[13] In formulating this summary, I acknowledge a debt of gratitude to the summary proposed by counsel for MT at para. 12 of her written submissions filed on 13 January 2017.

[22] As has already been seen[14], the Public Defender justified her assertion of a sufficient interest in this "nationally divisive issue" in the court below principally on the basis of her position as "a statutory creature independent of any arm or organ of the State, and charged with the statutory duty to protect the rights of persons"[15]. Perhaps not surprisingly, this approach led the Attorney General to contend from the outset that it was necessary for the court to determine "whether the Public Defender, a creature of the [PDA], is permitted by that Act to exercise the function she now purports to by applying to join these proceedings as an interested party"[16]. And, equally unsurprisingly in my view, it also led the judge to treat the issue of the Public Defender's standing purely as a matter of *vires*, without adverting specifically to any consideration of the "liberal approach to standing".

[23] However, the question of whether the judge ought to have adopted a liberal approach to standing in relation to the Public Defender's application has now resurfaced in Ground 2 of the amended grounds of appeal:

> "The learned Judge although repeatedly referring to the liberal approach on the issue of standing, he manifestly did not adopt that approach with respect to the Appellant's application to be joined as an Interested Party."

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[14] See para [14] above
[15] Public Defender's written submissions, para. 27
[16] Attorney General's Submissions in Opposition to Application by Public Defender to be added as an Interested Party, dated and filed 22 April 2016, para. 3

[24] It is, of course, now fully accepted that the modern law of judicial review is committed to a liberal approach to the issue of standing. In this regard, the judge referred to my own judgment in **Jamaicans for Justice v Police Service Commission and The Attorney General**[17], in which I observed that –

> "70. … The requirement in rule 56.2(1) that an applicant for judicial review should have a sufficient interest in the subject matter of the application must therefore be read in the context of the developed law of standing, without recourse to what Lord Diplock dismissed in the **Inland Revenue Commissioners** case (in 1981)[18] as 'technical restrictions on locus standi ... that were current 30 years ago or more'."

[25] A good example of the modern approach is provided by **R v Inspectorate of Pollution and another, ex parte Greenpeace Ltd (No 2)**[19]. In that case, an environmental protection organisation was treated as having a sufficient interest for the purposes of an application for certiorari to quash a decision to permit testing of a new thermal oxide reprocessing plant which would result in the discharge liquid and gaseous radioactive waste. In rejecting the respondent's argument that the applicant was a 'mere' or 'meddlesome busybody', the court concluded[20] that "it was eminently respectable and responsible and its genuine interest in the issues raised is sufficient for it to be granted locus standi".

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[17] [2015] JMCA Civ 12
[18] **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd** [1982] AC 617, 641
[19] [1994] 4 All ER 329
[20] At page 351

[26] There is, in my view, no reason to think that a sufficient interest for the purposes of an application for leave to be treated as an interested party should be any different from that for an applicant for judicial review. So, in principle, the liberal approach to standing which the modern approach enjoins, should equally avail a party applying for leave to intervene in proceedings for an administrative order as it would an interested party. But, in this case, as has been seen, the Public Defender explicitly grounded her application on her statutory role as an independent commission of Parliament charged with the duty of protecting and enforcing the rights of citizens. In these circumstances, as it seems to me, it is inevitable that the Public Defender's standing to make that application must turn on the answer to the logically prior question of whether her statutory remit permits her to play the role which she seeks to assume.

[27] For these reasons, I do not think that the judge can be faulted for not having determined the Public Defender's application purely on the basis of a liberal approach to standing. Nor is there in my view any hint of anomaly or contradiction in the judge having applied that approach to the quite different considerations which would have underpinned the applications of the other applicants, who were all bodies of private persons.

The Public Defender's statutory remit

The background to the PDA

[28] It is common ground that the PDA has its origins in the Ombudsman Act of 1978. Section 3(1) of that Act provided that, "[f]or the purpose of conducting investigations in accordance with the provisions of this Act, there is hereby constituted a commission of Parliament to be known as the Ombudsman". Under the rubric, 'Functions of the

Ombudsman', section 12(1) empowered the Ombudsman to investigate administrative actions on the part of a Ministry, department or agency of Government, the Jamaica Constabulary Force, the Rural Police or any statutory body or authority, where it appeared to the Ombudsman that some person or body of persons had or may have sustained injustice as a result of such action. Section 13 provided that an investigation could be undertaken by the Ombudsman either on his own initiative or pursuant to a complaint made to him under the Act.

[29] The PDA, which came into effect on 16 April 2000, repealed and replaced the Ombudsman Act. It was preceded by the Public Defender (Interim) Bill (the PDA Bill), the Memorandum of Objects and Reasons appended to which stated that, "this Bill seeks to make provision for the establishment of a commission of Parliament to be known as the Public Defender which will provide the citizen protection against abuses of State power and damage caused by unjustifiable administrative action or inaction".

The relevant provisions of the PDA

[30] Section 3 states the expectation of Parliament in enacting the PDA that the office of Public Defender should ultimately enjoy permanent status:

> "This Act shall continue in force until provision is made in the Constitution of Jamaica for the establishment of a Public Defender in terms which preclude the alteration of that provision otherwise than in accordance with the procedures prescribed by or in relation to section 49 (2) of that Constitution and shall then expire."

[31] Section 4(1) establishes the office of Public Defender:

> "For the purpose of protecting and enforcing the rights of citizens, there is hereby established a commission of Parliament which shall be known as the Public Defender."

[32] Section 4(2) provides for the appointment of the Public Defender by the Governor-General, after consultation with the Prime Minister and the Leader of the Opposition.

[33] Under the rubric, "Functions of the Public Defender", Part III of the PDA sets out in some detail the powers of the Public Defender. Under section 13(1)(a), the Public Defender shall investigate any action taken where he is of opinion that any person or body of persons –

> "(i) has sustained injustice as a result of any action taken by an authority or an officer or member of such authority, in the exercise of the administrative functions that authority; or
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> (ii) has suffered, is suffering or is likely to suffer an infringement of his constitutional rights as a result of any action taken by an authority or an officer or member of that authority ..."

[34] Section 2 defines "authority" to mean (a) a Ministry, department or agency of Government; (b) a Parish Council or the Kingston and St Andrew Corporation[21]; (c) a statutory body or authority; (d) a company registered under the Companies Act, in which

[21] Under section 5(1) and (2) of the Local Governance Act, 2016, a Parish Council and the Kingston and St Andrew Corporation are now referred to as a Municipal Corporation and the Kingston and St Andrew Municipal Corporation respectively.

the Government or an agency of Government holds not less than 51% of the ordinary shares.

[35] Section 13(2) lists a number of actions or matters which, in general, "the Public Defender shall not investigate". It is unnecessary for present purposes to set out the list in its entirety, though it might be noted that it includes administrative actions in respect of which the complainant has or had a remedy either by way of court proceedings or in any tribunal constituted or under any other Act[22] (unless she is satisfied that in the particular circumstances it is not reasonable to expect the complainant to take or have taken such proceedings)[23]; the commencement or conduct of civil or criminal proceedings in any court of law in Jamaica or before any international court or tribunal[24]; any action taken by the Director of Public Prosecutions in the exercise of his or her constitutional functions[25]; and any action which, by virtue of any provision of the Constitution, may not be enquired into by any court of law[26].

[36] Section 13(4)-(6) makes important provisions as to the Public Defender's relationship with the courts. First, section 13(4) provides that the fact that it is open to the complainant to apply to a court for redress under what is now section 19 of the Constitution[27] does not by itself preclude the Public Defender from conducting an

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[22] Section 13(2)(a)
[23] Section 13(3)(a)
[24] Section 13(2)(b)(i)
[25] Section 13(2)(d)
[26] Section 13(2)(e)
[27] The provision was originally found in section 25, but this section has been repealed and replaced by section 19, under the rubric, 'Application for redress'

investigation in respect of any matter. Next, section 13(5) provides that, "[i]f any question arises as to whether the Public Defender has jurisdiction to investigate any case or class of case under this Act, the Public Defender may apply to the Supreme Court for a declaration determining that question". And finally, section 13(6) provides that, "[t]he fact that an action is commenced in any court in connection with a matter under investigation by the Public Defender shall not preclude such investigation unless the court otherwise directs".

[37] Section 14(1)-(5) makes provisions as to complainants and the manner of making a complaint to the Public Defender. Section 14(1) provides that "any person or body of persons, whether incorporated or not" may make a complaint under section 13(1)(a)(i) or (ii). Section 14(2) makes special provision as to who may make the complaint in the case of a minor ("his parent, guardian, next friend or person in *loco parentis*"); or in the case of a person who is not able to act for himself by reason of infirmity, or any other cause, or who has died ("his personal representative, or a member of his family, or any other suitable person"). Section 14(3) provides that every complaint shall be in writing, while section 14(4) and (5) makes special provision for a complaint addressed to the Public Defender by an inmate or detainee in a Government institution.

[38] Section 15(1) provides for the carrying out of an investigation by the Public Defender, either on her own initiative or on a complaint made pursuant to sections 13(1)(a)(i), (3) and (4) and 14, while section 15(2) gives her an absolute discretion over the commencement or continuation of an investigation. Among the powers conferred on

Public Defender are the power to determine whether there is a *prima facie* case in respect of which the complainant can institute proceedings[28]; to ensure that any person who alleges that his constitutional rights have been or are likely to be infringed is provided with access to legal advice and where necessary legal representation[29]; and to authorise payment of legal aid[30].

[39] Part III having established the parameters within which the Public Defender is empowered to conduct investigations, Part IV goes on to deal with the process of the investigation. For present purposes, it is unnecessary to dwell on this Part in any detail, save to observe the following. Section 16(1) makes provision for specified officers in relation to any complaint to be given an opportunity to comment in writing on any allegations; section 16(2) permits the Public Defender to adopt whatever procedure she considers appropriate to the circumstances of a particular case; section 16(4) provides for the making of regulations prescribing the procedure to be adopted at any hearing; section 16(7) and (8) provides for the Public Defender to inform the various interested parties of the result of the investigation, to make such recommendations as she thinks fit and ultimately, if she considers it necessary, lay before Parliament a special report on the case; section 16(11) provides that, on the conclusion of an investigation, the Public Defender shall make such recommendations as she sees fit to the authority concerned; and section 16(12) provides that the Public Defender may, if she considers this course to

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[28] Section 15(4)
[29] Section 15(5)
[30] Section 15(6)

be warranted by the evidence, refer the matter to the person or body competent to take such disciplinary or other proceedings as may be appropriate in the circumstances and, in all such cases she must lay a special report before Parliament.

The Public Defender's submissions

[40] Lord Gifford QC for the Public Defender drew our attention at the outset to section 3 of the PDA. He submitted that this provision clearly demonstrates Parliament's view that the office of the Public Defender properly belongs in the Constitution. Against this background, he suggested that the language used by Parliament in section 4(1) was sufficiently general to empower the Public Defender, irrespective of the specific powers of investigation given in sections 13-15, to operate in a wider sphere. In this regard, he laid particular emphasis on the introductory words of section 4(1) ("For the purpose of protecting and enforcing the rights of citizens"), contending that this was language which was clearly intended to broaden the scope of the Public Defender's remit.

[41] In order to make this point good, Lord Gifford invited us to compare the language used by Parliament in a number of other statutes which have established Commissions of Parliament, both in Jamaica and elsewhere. The first was the Ombudsman Act itself, section 3(1) of which, as has already been observed, stated that "[f]or the purpose of conducting investigations in accordance with the provisions of this Act, there is hereby constituted a commission of Parliament to be known as the Ombudsman". Secondly, we were referred to section 4(1) of the Electoral Commission (Interim) Act, which states that "[t]here shall be established for the purposes of this Act ... a commission of Parliament which shall be known as the Electoral Commission of Jamaica". Thirdly, section 3(1) of

the Independent Commission of Investigations Act states that, "[f]or the purposes of this Act, there is hereby constituted a Commission of Parliament to be known as the Independent Commission of Investigations". Fourthly, section 3(1) of the Contractor-General Act states that, "[f]or the purposes of this Act there is hereby constituted a Commission of Parliament to be known as the Contractor-General". Fifthly, section 4(1) of the Child Care and Protection Act states that, "[f]or the purpose of protecting and enforcing the rights of children, there is hereby established a commission of Parliament which shall be known as the Children's Advocate". And lastly, section 4(1) of the Political Ombudsman (Interim) Act states that, "[f]or the purpose of conducting investigations in accordance with the provisions of this Act, there is hereby constituted a commission of Parliament to be known as the Political Ombudsman".

[42] Lord Gifford submitted that, read against this background, Parliament's addition of the words, "For the purpose of protecting and enforcing the rights of citizens ...", to the statutory formula establishing the office of the Public Defender, denoted a deliberate change of wording. This in turn had the effect of constituting the Public Defender the protector of the people. Lord Gifford also referred to the definition of 'commission' taken from Stroud's Judicial Dictionary[31]: "[t]he word 'commission' is ... used to denote a trust or authority exercised ... or the persons by whom the trust or authority is exercised." On this basis, it was submitted that a commission, such as the Public Defender, is a solemn trust given by Parliament to persons or bodies to carry out functions on matters of

[31] Stroud's Judicial Dictionary of Words and Phrases, 4th edn, volume 1, page 507

particular importance. The Electoral Commission (Interim) Act, the Independent Commission of Investigations Act and the Contractor-General Act were all cited as examples of such commissions.

[43] Going further afield, we were referred, firstly, to the well-known South African case of **The National Coalition for Gay and Lesbian Equality and The South African Human Rights Commission v The Minister of Justice and others**[32]. By its decision in this case, the Constitutional Court of South Africa struck down the laws prohibiting consensual sexual activities between men in that country. But Lord Gifford was principally concerned to show us the extent of the remit of the South African Human Rights Commission, a commission established under the authority of section 184 of the South African Constitution. Under the rubric, 'Functions of the South African Human Rights Commission', section 184(1) provides that the Commission must, among other things, "promote respect for human rights and a culture of human rights", and "monitor and assess the observance of human rights in the Republic"[33]. Section 184(2) goes on to invest the Commission with power "to investigate and to report on the observance of human rights", and "to take steps to secure appropriate redress where human rights have been violated"[34].

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[32] (unreported), Constitutional Court, South Africa, Case CCT 11/1998, judgment delivered 9 October 1998
[33] Constitution of the Republic of South Africa, 1996, section 184(1)(a) and (c)
[34] Section 184(2)((a) and (b)

[44] We were next referred to **R v N S et al; Ontario Human Rights Commission, Intervenor**[35], in which the principal issue was whether a witness in a criminal case should be allowed to testify while wearing a veil. A subsidiary question arose as to whether the Ontario Human Rights Commission (the OHRC) should be permitted to intervene in the proceedings. Established in 1961, the OHRC's functions are contained in the Ontario Human Rights Code, section 29 of which provides that "[t]he functions of the [OHRC] are to promote and advance respect for human rights in Ontario, to protect human rights in Ontario and, recognizing that it is in the public interest to do so and that it is the [OHRC's] duty to protect the public interest, to identify and promote the elimination of discriminatory practices ...".

[45] The OHRC's application for permission to intervene succeeded. Explaining his reasons for granting it, Marrocco J observed[36] that the OHRC "has a real, substantial and identifiable interest in this matter", and further[37], that the OHRC "… clearly has expertise in this area and therefore is able to help the court appreciate fully the human rights implications of any decision".

[46] Finally, as far as authority goes, Lord Gifford referred us to the decision of Benjamin CJ in **Caleb Orozco v The Attorney General of Belize**[38], in which the claimant successfully made a case for constitutional relief very similar to the one which

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[35] 95 O R (3d) 735; [2009] CarswellOnt 2268
[36] At para. [70]
[37] At para. [73]
[38] (unreported), Supreme Court, Belize, Claim No 668/2010, judgment delivered 10 August 2016

MT makes in this case. In that case, the Chief Justice granted applications for leave to intervene to a total of seven interested parties, four of whom supported the claimant and three of whom joined the Attorney General in opposing the claim.

[47] Against this background, Lord Gifford submitted that there was no reason either in principle or in the language of the Act to except Jamaica from the clear trend in other jurisdictions. The authorities support the presence of statutory human rights bodies before the courts in matters such as these and the presence of the Public Defender in this case can only be helpful. For, despite the judge's characterisation of the case as one in which there are "two diametrically opposed positions", the Public Defender is not limited by partisan or popular views and is therefore capable of bringing a comprehensive and impartial perspective to the proceedings.

MT's submissions

[48] As in the court below, Mrs Wilkinson for MT supported the submissions made on behalf of the Public Defender. She complained of what she described as the judge's failure to appreciate the important role played by human rights principles and organisations in protecting minorities in any society from "the tyranny of the majority". To underscore this point, Mrs Wilkinson referred us to the, as ever, profoundly thoughtful reflection by the late Lord Bingham of Cornhill, then the Lord Chief Justice of England and Wales, on the

dangers posed over the centuries to unpopular minorities, including homosexuals, by unbridled majority rule[39]:

> "Public opinion is … the opinion of the majority; it rarely reflects the views of any minority, let alone an unpopular or disregarded minority. And while public opinion is capable of being generous and tolerant it is also capable of being vengeful and intolerant. Public opinion is an unreliable source of protection to those most in need it."

[49] In these circumstances, Mrs Wilkinson submitted, given that the Public Defender's statutory remit is to protect and enforce the rights of **all** Jamaicans, she is best qualified to be an interested party in these proceedings. Mrs Wilkinson also argued that there was nothing in the PDA to suggest that the functions set out in sections 13-15 were intended by Parliament to be exhaustive of the Public Defender's powers. In this regard, she drew attention to section 40 of the Interpretation Act, which provides that, "[w]here in any Act power is given to any person to do or enforce the doing of any act or thing all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing"; and 56(1), which provides that "[t]he preamble of any Act may be referred to for assistance in explaining the scope and object of the Act". Finally, submitting that the power to bring action was implicit in the Act, Mrs Wilkinson referred us to, among other things[40], Lord Woolf MR's observation in

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[39] Lord Bingham of Cornhill, 'The Way We Live Now: Human Rights in the New Millennium' - The Earl Grey Memorial Lecture, University of Newcastle upon Tyne, 29 January 1998; http://www:bailii.org/ok/other/journals/WebJCLI/1998/issue 1/bingham l.html

[40] Mrs Wilkinson also referred us to the decision of the Full Court of the Supreme Court in **Police Federation and Others v The Commissioner of the Independent Commission of Investigations**

Broadmoor Special Hospital Authority and another v Robinson[41], that "[i]f a public body is given responsibility for performing public functions in a particular area of activity, then usually it will be implicit that it is entitled to bring proceedings seeking the assistance of the courts in protecting its special interests in the performance of those functions".

The Attorney General's submissions

[50] At the outset of her response on behalf of the Attorney-General, Mrs Foster-Pusey QC pointed out that this was an appeal from the judge's exercise of the discretionary power to allow any body appearing to have a sufficient interest in the proceedings to be heard conferred by rule 56.13(2) of the CPR. Accordingly, on the basis of long-established principle, the appellate court will ordinarily defer to the judge's exercise of his discretion; in particular, this court will not interfere solely on the ground that it might itself have exercised the discretion differently. This court's intervention will only be justified if the judge's ruling can be shown to have been based on a misunderstanding of either the law or the evidence which was before him, or is otherwise "so aberrant that it must be set

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[2013] JMFC Full 3, in which the power to arrest and charge was implied in the Independent Commission of Investigations Act. However, the Court of Appeal declined to go as far as that in its subsequent decision in **Police Federation et al v The Commissioner of the Independent Commission of Investigations and another** [2018] JMCA Civ 10, in which it was held by a majority that, although the Act gave officers of Indecom no powers of arrest, they nevertheless retained the common law powers of arrest which each citizen possessed.

[41] [2000] QB 775, 787

aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it" [42].

[51] Applying this test, Mrs Foster-Pusey submitted that none of the issues raised by the grounds of appeal met this threshold and that this court should therefore decline to interfere with the judge's exercise of his discretion. She submitted that the judge had approached the matter correctly by, firstly, considering whether the Public Defender, as a creature of the PDA, was confined to acting within the parameters set out in the Act; and secondly, determining that the statutory remit of the Public Defender is confined to the investigation of action or inaction on the part of an authority which it is believed has caused an injustice or may cause an infringement of a person's rights.

[52] Mrs Foster-Pusey submitted further that the judge's approach of looking beyond section 4 of the PDA was consistent with the well-established principle of statutory interpretation that the court must seek to ascertain the intention of Parliament in passing an Act by reference to its provisions as a whole. For this point, she relied on Bennion on Statutory Interpretation[43]:

> "It is firmly established that an Act or other instrument must be read as a whole. Lord Walker of Gestingthorpe said 'a holistic approach would seem to accord with the universally acknowledged need to construe the statute as a whole'. ...

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[42] **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, per Lord Diplock at page 1046; and **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, paras [19]-[20].

[43] FAR Bennion, Bennion on Statutory Interpretation, 5th edn, page 1156

> The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is expressly or by implication modified by another provision elsewhere in the Act.
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> ... Reading a text as a whole may reveal that one part rules out a suggested legal meaning of another part."

[53] To make the same point, Mrs Foster-Pusey also referred us to the decision of the House of Lords in **R v J**[44], in which Lord Bingham of Cornhill reiterated the principle that it is the duty of the court to seek to give effect to all the provisions of a statute:

> "... It is the duty of the court to give full and fair effect to the meaning of a statute. In a purely domestic context such as this, it cannot construe the statute by reference to any extraneous legal instrument. It must seek to give effect to all the provisions of a statute. It cannot pick and choose, giving effect to some and discounting others ... If a statutory provision is clear and unambiguous, the court may not decline to give effect to it on the ground that its rationale is anachronistic, or discredited, or unconvincing."

[54] Mrs Foster-Pusey accordingly submitted that the judge was required to consider both the general mandate given to the Public Defender in section 4 of the PDA, as well as the provisions of sections 13-15, which speak specifically to the functions of the Public Defender. This in turn led her to the further submission that the well-known canon of

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[44] [2004] UKHL 42, para. [15]

construction, *generalibus speciala derogant*, was also applicable to the ascertainment of the true construction of the PDA. As Bennion explains[45] –

> "Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision."

[55] Against this background, Mrs Foster-Pusey took us through sections 13-15 of the PDA in some detail. She submitted that these sections demonstrate that the function of the Public Defender is a purely investigatory one, initiated either of her own motion (in certain specified cases[46]), or pursuant to a complaint made by a person or body of persons. She submitted further that the limits of the Public Defender's powers can be seen from (i) section 13(5), which empowers the Public Defender to apply to the Supreme Court to determine whether she has jurisdiction to investigate a particular case or class of case under the PDA; (ii) section 15(4), which, while requiring the Public Defender to determine whether there is a *prima facie* case in respect of which a complainant might institute provisions, specifically provides that she "shall not represent any complainant in any court or in any tribunal"; (iii) section 15(5), which provides that the Public Defender "shall ensure that any person who alleges that his constitutional rights have been or are likely to be infringed is provided with ready access to professional advice and where

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[45] Bennion, page 1164
[46] Complaints pursuant to section 13(1)(a)(i), (3) and (4)

necessary to legal representation"; and (iv) section 15(6), which provides that, for the purposes of section 15(5), the Public Defender must take all necessary steps to ensure that the complainant is afforded legal aid. The effect of these provisions, it was submitted, "is to proscribe any involvement in court proceedings by the [Public Defender]"[47].

[56] Mrs Foster-Pusey accepted that the tendency of the courts has been to accommodate, and even welcome, the participation of human rights advocacy groups in matters involving a claim of an abuse of human rights. However, she submitted that, upon a reading of the PDA as a whole, Parliament did not intend that the Public Defender should have the role for which she contends in these proceedings. Rather, the true role of the Public Defender is more akin to that of an Ombudsman, the scope of whose functions, duties and responsibilities are generally as summarised by Dr Francis Alexis in his seminal text, Changing Caribbean Constitutions[48]:

> "The functions, duties and responsibilities of an Ombudsperson, or Complaints Commissioner, may be summarised as stated in this paragraph. She has a duty to consider complaints made in writing to her that persons have suffered injustice as a result of improper administrative action on the part of a department of Government or other prescribed public authority. If she finds that a complaint is worthy of investigation, she should investigate it. She may also on her own motion, or at the behest of certain other such agencies as parliamentarians, investigate for such injustice. If she is satisfied that a complaint is substantiated, she may make recommendations, to the entity concerned for the redressing of the injustice. If those recommendations are not acted upon materially as required by her, she may make a

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[47] Respondent's Submissions, para. 38
[48] 2nd edn, para. 22.20

> report on the matter directly to Parliament. She may make special and annual reports to Parliament on her work, including recommendations to avoid or minimise instances of administrative injustice."

[57] And, dealing specifically with the case of the Public Defender in Jamaica, Dr Alexis adds this[49]:

> "In Jamaica the Public Defender investigates to see if, as a result of any action taken by a relevant authority, any person 'has sustained injustice'; or 'has suffered, is suffering or is likely to suffer an infringement of his constitutional rights'; the office existing for 'protecting and enforcing the rights of citizens'."

[58] In effect, Mrs Foster-Pusey submitted, as appeared from the Memorandum of Objects and Reasons (the Memorandum) appended to the PDA Bill, the Public Defender's role was intended by Parliament to be akin to that of an Ombudsman. In this regard, she relied on what the late Justice (and Professor) Vincent Crabbe characterised[50] as one of the conventions of legislative drafting; that is, the utility of the Memorandum as a guide to the intention of Parliament:

> "The Memorandum is a useful guide as to what is intended to be achieved by the proposed legislation as well as telling the ordinary reader what the Bill seeks to do."

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[49] At para. 22.25

[50] VCRAC Crabbe on Legislative Drafting, 2nd edn, page 103. In his time, Professor Crabbe was, among many other things, a judge of the Supreme Court of Ghana and a Professor of Law in the University of the West Indies. He died on 7 September 2018, just a few weeks short of his 95th birthday.

Discussion and conclusions on the statutory remit

[59] As has been seen[51], the Public Defender founded her application on the following propositions: (i) MT's claim is in respect of an alleged breach by the state, whether positively or by omission, of his rights as a citizen of Jamaica who is a homosexual man; (ii) the office of Public Defender is a Commission of Parliament, created by section 4 of the PDA, "for the purpose of protecting and enforcing the rights of citizens"; (iii) the claim involves issues of national significance, the resolution of which touches and concerns the legality and/or constitutionality of provisions of existing legislation governing the conduct of persons; and (iv) given the remit of the office of Public Defender and the provisions of rule 56.13(c) and (d) of the CPR, she has a sufficient interest in the resolution of the issues raised by the claim.

[60] No one would dispute, I think, that the issues raised by MT's claim are matters of great national interest. The range of church, church-related and children's groups which have sought to participate in the claim surely attests to this fact. Nor can there be any doubt that these are issues of great social, legal and, particularly if MT is right, constitutional significance, which affect the rights of a class of citizens in a very personal way.

[61] So, the only question is whether the Public Defender's statutory remit is sufficiently ample to allow for her participation in these proceedings. For the brief reasons which

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[51] See para. [10] above

follow, I have come to the clear conclusion that it is not. In arriving at this conclusion, I should say at once that I have not lost sight of the various examples to which Lord Gifford referred us of the status accorded to human rights organisations in other places. However, what those cases demonstrate, in my view, is that much will turn in every case on the relevant statutory or constitutional provisions which the particular dispute engages.

[62] In **The National Coalition for Gay and Lesbian Equality and The South African Human Rights Commission v The Minister of Justice and others**[52], for instance, it will be recalled that the relevant commission was established under the authority of the South African Constitution, and explicitly mandated to "promote respect for human rights and a culture of human rights"; and to "monitor and assess the observance of human rights in the Republic". The commission was also specifically empowered "to investigate and to report on the observance of human rights"; and "to take steps to secure appropriate redress where human rights have been violated".

[63] Similarly, in **R v NS et al; Ontario Human Rights Commission, Intervenor**[53], the OHRC's stated function was "to promote and advance respect for human rights in Ontario, to protect human rights in Ontario and ... to protect the public interest to identify and promote the elimination of discriminatory practices".

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[52] Para. [43] above
[53] Para. [44] above

[64] Accordingly, as interesting and informative as I have found these examples of the primacy which human rights considerations have come to enjoy internationally, I cannot treat them as determinative of the question which has arisen in this case. That question, as it has turned out to be, is primarily one of statutory interpretation.

[65] For this purpose, Lord Gifford relied principally on the language of section 4 of the PDA, in particular the statement that, "For the purpose of protecting and enforcing the rights of citizens, there is hereby established a Commission of Parliament which shall be known as the Public Defender". I accept that this language is more expansive than that used in some of the other statutes to which we were referred, most notably the Ombudsman Act. Section 3(1) of that Act provided that "[f]or the purpose of conducting investigations in accordance with the provisions of this Act, there is hereby constituted a Commission of Parliament to be known as the Ombudsman".

[66] But the formula used in the PDA is not unique. For instance, section 4(1) of the Child Care and Protection Act states that, "[f]or the purpose of protecting and enforcing the rights of children, there is hereby established a commission of Parliament which shall be known as the Children's Advocate". Notwithstanding this broad, general statement of purpose, section 4(2) provides that "[t]he provisions of the First Schedule shall have effect with respect to the constitution and functions of the Children's Advocate". So it is to the First Schedule[54] that one must turn in order to discover, to take but one example,

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[54] Section 13(1)

the Children's Advocate's powers to "conduct an investigation into a complaint made by a child, that – (a) the child's rights have been infringed by any action taken by a relevant authority; or (b) the child's interests have been adversely affected by any such action".

[67] The Public Defender, albeit not putting it quite this way, invites the court to treat the PDA as having conferred a broad, free-standing power on the Public Defender to intervene and participate in proceedings such as these.

[68] Not altogether dissimilarly, MT invites us to regard section 4 as preambular in effect, thereby permitting reference to it as an aid to interpretation of the PDA[55]. A preamble has been described as "an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow"[56]. Its importance as a guide to legislative intention was underscored by the uncontroversial remark of four of the dissenting minority in **Matthew v State of Trinidad and Tobago**[57] that "any interpretation which conflicts with the preamble must be suspect".

[69] But in this case, the Public Defender's and MT's points must founder on a number of bases. As regards MT's point, the first problem is that, as a matter of form, section 4 does not accord with the standard appearance of a preamble, which usually appears immediately after the long title of an Act of Parliament and begins with the word

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[55] In accordance with section 56(1) of the Interpretation Act
[56] Per Lord Morris of Borth-y-Gest in **Olivier v Buttigieg** [1967] 1 AC 115, 128
[57] [2004] UKPC 33, [2005] 1 AC 433, per Lords Bingham of Cornhill, Nicholls of Birkenhead, Steyn and Walker of Gestingthorpe, at [46]

'Whereas'[58]. More substantially, as was also pointed out in **Matthew v The State of Trinidad and Tobago**, it is clear that "the preamble to a statute cannot override the clear provisions of the statute". Accordingly, on whatever view one might take of section 4 standing by itself, it is clear that it is still necessary to consider that section in the context of the PDA as a whole, and in the light of its antecedents.

[70] To take the second point first, it is common ground that the statutory precursor to the PDA was the Ombudsman Act. There is no dispute that the principal function of the Ombudsman under that Act was, to adopt Dr Alexis' summary[59], "to consider complaints made in writing to her that persons have suffered injustice as a result of improper administrative action on the part of a department of Government or other prescribed public authority".

[71] I have already referred to the Memorandum appended to the PDA Bill[60]. As has been seen, the Memorandum stated the Bill's objective as being to provide for the establishment of a commission of Parliament "which will provide the citizen protection against abuses of State power and damage caused by unjustifiable administrative action or inaction". This clearly suggests, as it seems to me, that the parliamentary intention in enacting the PDA was to imbue the office of the Public Defender with essentially the same remit as that previously enjoyed by the Ombudsman.

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[58] Bennion, page 642
[59] Para. [57] above; and see section 12(1) of the Ombudsman Act, under the rubric, "Functions of Ombudsman".
[60] Para. [29] above

[72] I consider this indication to be fully supported by a reading of the PDA as a whole, in particular the detailed provisions of sections 13-15 to which I have already referred. Though not in all respects organised in the same way, those provisions are generally similar to the equivalent provisions in sections 12-16 of the Ombudsman Act. Indeed, the principal difference is in section 15(5) of the PDA, which mandates the Public Defender to ensure that a person who complains of a breach of his constitutional rights "is provided with ready access to professional advice and where necessary to legal representation"; and section 15(6), which allows the Public Defender to determine whether the complainant is in need of legal aid and, if so, "authorize payment of such legal aid ...". But in my view this, as Mrs Foster-Pusey submitted, is a difference which tends to provide further confirmation that the Public Defender's role was intended to be investigatory and, if required, facilitative in respect of access to legal representation.

[73] Finally, under this head, I should mention Mrs Wilkinson's point, based on section 40 of the Interpretation Act, that the Public Defender's power to participate in the claim can be implied from her obligation under section 4 of the PDA to protect and enforce the rights of citizens. Again, as it seems to me, this implication cannot be sustained in this case, having regard to the manner in which the Public Defender's functions are set out in PDA.

[74] These are therefore my reasons for concluding that the judge's decision that the Public Defender's statutory remit did not encompass her intervention as an interested party in the proceedings brought by MT was correct.

Did the judge take irrelevant considerations into account?

[75] Given my conclusion on the first two issues, it is strictly speaking unnecessary to consider this issue. But, as I can express my view on it very shortly, I will do so for completeness.

[76] As will be recalled[61], the judge took the view that, even if he was wrong on the question of Public Defender's statutory remit, he considered that it was undesirable ("potentially toxic") for her to involve herself in such a nationally divisive issue and thereby run the risk of alienating a section of the public. In this, I think that the judge fell into error. In my respectful view, had the judge concluded that the Public Defender had the statutory authority to "insert herself" into MT's claim in the manner in which she sought to do, the question of whether she should do so or not would have been a matter entirely for her judgment, and not that of the court.

Disposal of the appeal

[77] I accordingly consider that, notwithstanding my view that the judge erred in respect of the third issue, his conclusions on the principal issues in the appeal were entirely correct and should not be disturbed. I would therefore dismiss the appeal. As for the costs of the appeal, I would propose that the parties be invited to make written submissions within 21 days of the date of delivery of the court's judgment and that a

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[61] See para. [18] above

decision on costs be handed down, also in writing, within a further 21 days of receipt of the last set of submissions.

An apology

[78] The delay in rendering this judgment has been inordinate, particularly so in an interlocutory appeal. While the causes of these delays are well known, we fully appreciate the inconvenience which the parties inevitably suffer as a result, and we apologise unreservedly.

Postscript

[79] Since completing the final draft of this judgment, I have had the great advantage of reading the powerful contribution of McDonald-Bishop JA which follows. I am in full agreement with it.

McDONALD-BISHOP JA

[80] I have read, in draft, the comprehensive judgment of the learned President and am in complete agreement with his reasoning and conclusion that the appeal should be dismissed. There is nothing I can say to improve on the clarity of his well-reasoned opinion, but given the import of the matter, I have found it difficult to resist the compulsion to say a few words of my own. I have chosen to do so, even if it is merely to emphasise the finding that Laing J was absolutely correct to deny the appellant's application to be joined as an interested party to the substantive proceedings in the Supreme Court on the basis of the statutory scheme created by the Public Defender (Interim) Act), 1999 ("the Act" or "the statute").

[81] Notwithstanding the seemingly broad provision of section 4 of the Act, describing the purpose for which the Commission was established, which is to protect and enforce the rights of citizens, the appellant can only do so through the exercise of the jurisdiction conferred by the statute. Section 4 is by no means a jurisdiction-conferring section. It is more descriptive and prescriptive of the broad role and purpose of the appellant and so, standing on its own, it does not enable or authorize the appellant to intervene in the constitutional challenge brought by Mr Maurice Tomlinson, alleging breaches of his constitutional rights.

[82] The appellant has also argued that the section must be considered in conjunction with sections 13, 15 and 16. However, when all these sections are considered, either singly or collectively, within the overall scheme of the Act as a whole, it becomes clear, beyond peradventure, that the appellant's case for intervening in the constitutional claim cannot stand.

[83] I need not venture much further than section 13 of the Act, which sets out the role and powers of the appellant, which is seen to be, fundamentally and undoubtedly, investigatory. But, even acting on the assumption that her powers extend beyond being an investigative one to one that entitles her to appear in court on behalf of aggrieved persons or in solidarity with them, the sphere of her operation is clearly defined and circumscribed by the provisions of section 13. Her power under section 13(1) (which is the provision that is immediately relevant for present purposes) would extend to dealing only with matters concerned with the "action taken by an authority or an officer or

member of such authority...", whether in the exercise of the administrative functions of that authority (section 13(1)(a)(i)) or not (section 13(1)(a)(ii)).

[84] The Act goes on to define "authority" as:

> "(a) a Ministry, department or agency of Government;
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> (b) a Parish Council or the Kingston and St. Andrew Corporation;
>
> (c) a statutory body or authority; and
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> (d) a company registered under the Companies Act, being a company in which the Government or an agency of Government holds not less than fifty-one *per centum* of the ordinary shares."

[85] What is at the centre of attention in this case, and which forms the subject matter of the substantive claim in the Supreme Court in which the appellant desires to intervene, is an Act of Parliament, which is alleged to be unconstitutional. Parliament is not an authority within the meaning or contemplation of the Act and investigating or interfering with the exercise of the legislative power of Parliament does not fall, at all, within the appellant's statutorily prescribed sphere of operation, which is to investigate the action of an authority, its officer or member or any action taken by a political party, its members and supporters under the circumstances set out in the Act.

[86] Furthermore, section 13(5) sets out, in no uncertain terms, the limited circumstance in which the appellant may make an application to the Supreme Court and that is where any question arises as to whether she has the jurisdiction to investigate a

case or class of case under the Act. The statutory right given to her to interface with the Supreme Court is only in relation to her jurisdiction under the Act to investigate a case. What she now desires to do, through her application to be joined as an interested party to the proceedings, would fall outside the scope of section 13(5).

[87] The appellant's direct involvement in the proceedings as an interested party would also be contrary to the clear intent of Parliament, as derived from sections 15(4), (5) and (6) of the Act. These provisions further reveal the restriction placed on the appellant to appear in court in relation to matters that properly fall within her statutory remit. They read:

> "(4) The Public Defender in the discharge of his functions, shall determine whether there is a *prima facie* case in respect of which the complainant can institute proceedings but shall not represent any complainant in any court or in any tribunal.
>
> (5) The Public Defender shall ensure that any person who alleges that his constitutional rights have been or are likely to be infringed is provided with ready access to professional advice and where necessary to legal representation.
>
> (6) For the purposes of subsection (5), the Public Defender shall-
>
> (a) determine whether the complainant is in need of legal aid;
>
> (b) authorize payment of such legal aid out of funds provided by Parliament to the Public Defender for that purpose;
>
> (c) compile a list of attorneys-at-law who in his opinion, are experienced in constitutional matters; and
>
> (d) invite the complainant to select an attorney-at-law from that list or if no such selection is made, the Public Defender may recommend an attorney-at-law whose name is on that list."

[88] It is quite clear from the foregoing provisions that Parliament did not intend that the appellant should be involved in cases in court in the manner she now wishes to participate, even in cases in which a complaint is made to her and she finds that a *prima facie* case is made out for determination by the court. In this case, Mr Tomlinson had made no complaint to her, but even so, she must be guided by section 15(5) of the Act, which means that the most she would have been able to do for Mr Tomlinson, if his case were one to which the statute properly applies, and she wished to act on her own initiative, would be to ensure that he is provided with ready access to professional advice and, if necessary, to legal representation by adhering to the provisions of subsection (6). On any construction of the relevant statutory provisions, the appellant is not authorized to appear for or on behalf of any citizen in court proceedings, alleging breach of his constitutional rights, as is the case here.

[89] It is quite evident from a proper examination of the relevant legislative scheme that there is no statutory power given to the appellant to use her good office to join an aggrieved citizen in court to challenge an Act of Parliament, or to involve herself in any matter in court which touches and concerns the exercise of Parliament's constitutional power to "make laws for the peace, order and good government of Jamaica"[62]. On no reading of the statute, which established the Commission, is this permissible.

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[62] Constitution of Jamaica, section 48(1), under the rubric, 'Powers and Procedure of Parliament'.

[90] The appellant is a Commission of Parliament, which was established to carry out Parliament's legislative will and intent for the protection of the rights of the citizens of Jamaica. She is answerable only to Parliament which has created her for its specified purposes. The appellant is to do what Parliament says she is to do, which includes reporting to Parliament on matters falling within her statutory remit, and nothing more. In so doing, the appellant must focus on the specified actions carried out by those persons who fall within her purview by virtue of section 13(1), when the need arises, in fact and in law, for her to do so. Mr Tomlinson's grouse with the law of the land, passed by the legitimate law making body, is not one of those matters with which she ought properly to concern herself in a court of law. Indeed, if the courts were to accede to her request to be joined as a party to the proceedings, challenging the constitutionality of a law of Parliament, the courts would be allowing her to act *ultra vires* her enabling statute. This would be a clear usurpation by the court of Parliament's authority, in breach of the doctrine of separation of powers. This, the court plainly cannot do.

[91] It is my view, therefore, that there is no statutory provision, combination of statutory provisions or any authority relied on by the appellant that supports her contention that she has a legal right, based on her statutory remit, to be added as a party to the proceedings brought by Mr Tomlinson in the Supreme Court. No liberal approach to the issue of standing in matters of this nature can endow her with a power or authority she does not possess, she being a creature of statute and, above all, a Commission of Parliament with a clearly defined mandate given by Parliament. The courts are duty bound

to give effect not only to the clear and unambiguous words of Parliament but also to its intent. Laing J cannot be faulted for doing just that.

[92] It is for the foregoing reasons, and those so articulately set out in detail by the learned President, that I concur in the conclusion that there is no legal basis on which this court could properly interfere with the exercise of Laing J's discretion and that the appeal should be dismissed. I also agree with the consequential orders proposed by the learned President.

F WILLIAMS JA

[93] I have had the pleasure of reading in draft the characteristically clear, insightful and elucidating judgment of the learned President; as well as the helpful concurring comments of my learned sister McDonald-Bishop JA. Having done so, I find myself to be in complete agreement with the reasoning, conclusion and orders proposed by the learned President. For me to aspire to add to his judgment would be to attempt, as it were, to "gild (or paint) the lily". I therefore am content to concur and will attempt to add nothing.

MORRISON P

ORDER

1. The appeal is dismissed.

2. The parties are invited to make written submissions on the costs of the appeal within 21 days of the date of delivery of the court's judgment.

3. The court will render its decision on costs, also in writing, within a further 21 days of receipt of the last set of submissions.