

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA  
THE HON MISS JUSTICE STRAW JA  
THE HON MRS JUSTICE V HARRIS JA**

**SUPREME COURT CIVIL APPEAL NO COA2020CV00023**

<b>BETWEEN</b>	<b>GREG TINGLIN</b>	<b>1<sup>ST</sup> APPELLANT</b>
<b>AND</b>	<b>ODEL BUCKLEY</b>	<b>2<sup>ND</sup> APPELLANT</b>
<b>AND</b>	<b>ARNOLD HENRY</b>	<b>3<sup>RD</sup> APPELLANT</b>
<b>AND</b>	<b>CLAUDETTE CLARKE</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>2<sup>ND</sup> RESPONDENT</b>

**CONSOLIDATED WITH**

**SUPREME COURT CIVIL APPEAL NO COA2020CV00028**

<b>BETWEEN</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>APPELLANT</b>
<b>AND</b>	<b>CLAUDETTE CLARKE (Administratrix of the Estate of Keith Clarke, deceased and in her own right)</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>GREG TINGLIN</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>AND</b>	<b>ODEL BUCKLEY</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>AND</b>	<b>ARNOLD HENRY</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>AND</b>	<b>CHIEF OF DEFENCE STAFF</b>	<b>INTERESTED PARTY</b>
<b>AND</b>	<b>INDEPENDENT COMMISSION OF INVESTIGATIONS</b>	<b>INTERESTED PARTY</b>

**AND**

**DIRECTOR OF PUBLIC  
PROSECUTIONS**

**INTERESTED PARTY**

**Michael Hylton QC and Mike Hylton instructed by Hylton Powell for Greg Tinglin, Odel Buckley and Arnold Henry**

**Dr Lloyd Barnett, Leonard Green, Ms Sylvan Edwards and Makene Brown instructed by Chen, Green and Company for Claudette Clarke**

**Ms Althea Jarrett and Ms Carla Thomas instructed by the Director of State Proceedings for the Attorney General of Jamaica**

**Walter Scott QC, Ms Carlene Larmond, Andre Moulton and Ms Deniece Walters instructed by Patterson Mair Hamilton for the Chief of Defence Staff**

**Mrs Tana'ania Small Davis, Mikhail Jackson and Ms Keisha Simpson instructed by Livingston Alexander & Levy for the Independent Commission of Investigations**

**Adley Duncan for the Director of Public Prosecutions**

**10, 11, 12 February 2021 and 13 January 2023**

**F WILLIAMS JA AND STRAW JA**

**Introduction**

[1] This consolidated appeal arises from the majority decision of the Full Court delivered on 18 February 2020, in which it ruled that good-faith certificates issued by the Minister of National Security ('the Minister') could not be relied on by Messrs Greg Tinglin, Odel Buckley and Arnold Henry and that their criminal trial in the Home Circuit Court should continue.

[2] The notice and grounds of appeal in the first appeal (number COA2020APP00023) were filed on 16 March 2020. The three appellants named therein, (Messrs Greg Tinglin, Odel Buckley and Arnold Henry) are all members of the Jamaica Defence Force and will conveniently and collectively be referred to as 'the soldiers'. That appeal will also be referred to as 'the soldiers' appeal'. In the soldiers' appeal, Mrs

Claudette Clarke ('Mrs Clarke'), and the Attorney General of Jamaica ('the AG') appeared as the first and second respondents, respectively. Mrs Clarke, in the soldiers' appeal, filed a counter-notice of appeal on 30 March 2020.

[3] The notice and grounds of appeal in the second appeal (number COA2020APP00028) were filed on 31 March 2020 by the AG against Mrs Clarke and the soldiers. This appeal will be referred to as 'the AG's appeal'. On 24 April 2020, Mrs Clarke also filed a counter-notice of appeal in the AG's appeal. Three interested parties were included in the AG's appeal, namely the Chief of Defence Staff ('CDS'), the Independent Commission of Investigations ('INDECOM') and the Director of Public Prosecutions ('DPP'). These interested parties also appeared in the court below and were granted permission at the case management conference hearing in these matters, to appear as interested parties.

## **Background**

[4] It is necessary to set out the general circumstances which gave rise to the decision of the Full Court.

[5] On 23 May 2010, the Governor-General of Jamaica declared a period of public emergency and, accordingly, the Emergency Powers Regulations, 2010 were promulgated. Some four days later, on 27 May 2010, Mrs Clarke's husband, Keith Clarke ('Mr Clarke') was killed at their home during an operation carried out by the security forces, including the soldiers.

[6] Subsequently, in July 2012, the DPP instituted criminal proceedings against the soldiers. They were charged on an indictment (dated 30 July 2012) for the murder of Mr Clarke.

[7] On 9 April 2018, when the criminal proceedings came on for hearing, defence counsel presented certificates (in respect of each soldier) signed by the then Minister of National Security, Mr Peter Bunting. It was contended that these certificates (which will

be referred to as 'the good-faith certificates' or 'the certificates') immunized the soldiers from prosecution.

[8] The good-faith certificates were dated 22 February 2016 and were issued in accordance with regulation 45 of the Emergency Powers (No 2) Regulations, 2010 ('the Regulations'). They stated that the actions of the soldiers which may have caused the death of Mr Keith Clarke were "done in good faith in the exercise of their functions as members of the security forces, for public safety, the restoration of order, the preservation of the peace and in the public interest".

[9] On 11 April 2018, a ruling was made by the learned trial judge (G Brown J) that the trial should be stayed pending the determination of the Full Court as to the validity of the good-faith certificates.

[10] On 15 June 2018, Mrs Clarke filed a claim (assigned the number 2018HCV002290) challenging the constitutionality of the good-faith certificates as well as the Regulations. The hearing by the Full Court took place in November 2019, and it rendered its decision on 18 February 2020. It is this decision that has been challenged by these appeals.

### Judgment of the Full Court

#### *The unanimous decision*

[11] The Full Court, composed of L Pusey, Dunbar Green and Nembhard JJ, unanimously held that the Minister had the authority to issue the good-faith certificates as they do not infringe on the doctrine of separation of powers or the prosecutorial powers of the DPP. In those respects, the Full Court found that the good-faith certificates were not a final adjudication of criminal liability but were akin to administrative documents, subject to the consideration of the court. Also, that the good-faith certificates were not a bar to prosecution, but that they raised a rebuttable presumption and placed the burden of proof on the prosecution to show that the relevant acts which were so certified were not performed in good faith. The Full Court

also opined that even in the absence of the good-faith certificates, the Regulations create protection from liability, as the court would still have to assess the issue of good faith during an emergency period.

[12] The Full Court was also united in the decision that the period when the relevant acts were performed is critical for determining the validity of the good-faith certificates; in that, the acts so certified ought to have been performed within the period of the declared state of emergency. Accordingly, the Full Court found that it was open to the Minister to issue the good-faith certificates after the expiration of the relevant emergency period in relation to acts that were performed during the emergency period.

#### *The majority decision*

[13] The Full Court, Dunbar Green J (as she then was) dissenting, held that the circumstances in which the Minister had signed the good-faith certificates, (those being six years after the incident and four years after the voluntary bill of indictment was proffered), were manifestly unreasonable and unfair. It was held accordingly, that the good-faith certificates were unconstitutional, null and void, and without effect. As a consequence, the criminal trial of the soldiers was ordered to continue, without the soldiers being able to rely on the good-faith certificates.

#### *The dissenting judgment*

[14] Dunbar Green J's principal point of dissent from the majority judgment was that there ought to be no adverse finding against the soldiers regarding the Minister's delay in issuing the good-faith certificates. The learned judge opined that in relation to the validity of the good-faith certificates, no reason had been advanced for the Minister's delay in issuing the good-faith certificates. Consequently, the learned judge found that the soldiers ought to be allowed to rely on the good-faith certificates at trial. Dunbar Green J also opined that immunity could be asserted as a preliminary point before the trial judge and that the DPP could respond with evidence of rebuttal before arraignment, to establish that there was no good faith within the meaning of the legislation.

[15] The learned judge also opined that judicial review was inappropriate to deal with the rebuttal of the good-faith certificates under regulation 45(3), as the merit of the Minister's decision had not been put into issue before the Full Court. The learned judge also opined that immunity was not conferred by the Minister's grant of the certificates, but rather by the operation of regulation 45(1).

### **The soldiers' appeal (COA2020APP00023)**

[16] Eleven grounds of appeal (lettered a to k) were argued before this court. These were:

"a. The majority erred in law when they failed to give due regard or consideration to the fact that only the following three issues arose for determination:

1. Whether the Good Faith Certificates infringe the principle of separation of powers and are therefore ultra vires, null and void [sic]
  2. Whether the Emergency Powers Regulations are unconstitutional to the extent that they grant the Minister power to grant immunity of Good Faith Certificates [sic]
  3. Whether the certificates are ultra vires, null and void because they were issued outside the period of emergency.
- b. The majority erred in law and/or acted outside of their jurisdiction when they considered and based their decision on the Minister's purported delay in issuing the Good Faith Certificates, which was not an issue before the court.
- c. The majority failed to give any or any sufficient weight to the nature of the proceedings, being a constitutional claim and not a judicial review claim and in the circumstances took into account the irrelevant factor of the Minister's delay in issuing the Good Faith Certificates.
- d. The majority erred in law when, in the absence of any evidence indicating the reasons for the Minister's alleged

delay, they found the Good Faith Certificates were manifestly unreasonable and unfair because of the delay in issuing them.

- e. The majority erred in law in that they failed to recognize that a delay in issuing the Good Faith certificates is not a breach of any constitutional provision and/or principle.
- f. The majority erred in failing to recognise that there is no duty or legal requirement of fairness to the prosecution and therefore Good Faith Certificates cannot be deemed unconstitutional on that basis.
- g. The majority erred when they denied the Appellants the protection of the Good Faith Certificates on the basis of delay in circumstances where there was no time limit in the Emergency Powers Regulations (2010) for issuing them and there are no time limits on when the Appellants could be prosecuted.
- h. The majority erred when they denied the Appellants the protection of the Good Faith Certificates on the basis of delay in circumstances where they had no control over when the Good Faith Certificates are issued.
- i. The majority erred when they failed to consider that making an adverse finding against the Appellants on the basis of the Minister's alleged delay was itself manifestly unjust and unfair.
- j. All three judges erred in finding that the proper forum for challenging a certificate issued pursuant to Regulation 45(3) is at the criminal trial, instead of recognizing that judicial review would be the appropriate forum.
- k. All three judges failed to have proper regard to the clear language of Regulation 45(1) [of] the Emergency Powers Regulations which states that **'no action, suit prosecution or other proceeding shall be brought or instituted against any member of the security forces in respect of any act done in good faith during the emergency period'** so that the appropriate forum to determine whether Good Faith Certificates are valid could not be during a trial after a prosecution has already been brought." (Emphasis as in the original)

[17] In their appeal, the soldiers' sought to have set aside, the Full Court's decision that: the delay in the issuance of the good-faith certificates was manifestly unfair and unreasonable and therefore rendered them unconstitutional, null, void and invalid; and that the criminal trial should continue. The soldiers also sought orders to have Mrs Clarke's claim dismissed, and the good-faith certificates declared constitutional and valid.

### **Mrs Clarke's counter-notice of appeal (in the soldiers' appeal)**

[18] Mrs Clarke relied on several grounds in her counter-notice of appeal (which counter appeal will be referred to as 'the first counter-notice of appeal'), which were stated as follows:

a. The learned trial Judges erred when it [sic] found that the Minister's power to issue the good faith certificates 'do not offend the doctrine of separation of powers'.

b. The learned trial Judges erred when it [sic] failed to make any orders or declarations that the Appellants cannot legally or constitutionally be barred by virtue of the good faith certificates or any certificate issued by the Minister of National Security.

c. The learned trial Judges erred when it [sic] failed to make any declarations or orders that the Emergency Powers (No.2) Regulations 2010, to the extent that it purports to grant the Minister of National Security the power to grant immunity from bringing or instituting any action suit prosecution or other proceedings against any member of the security forces, are unconstitutional, null and void.

d. The learned trial Judges erred when it [sic] failed to make any specific order relating to the power and/or authority, if any, of the Minister of National Security to issue good faith the [sic] certificates on February 22, 2016 or any certificate under the Emergency Powers (No. 2) Regulations 2010, outside of the Emergency Period.

e. The learned trial Judges erred in that they failed to make any order that the Good Faith Certificates issued by the Minister were clearly intended to pre-determine an issue which

would arise for judicial determination in any legal proceedings in which the legality and/or constitutionality of the Appellants' actions at the home of the Clarkes, including the killing of Mr. Clarke, arose for determination.

f. The learned trial Judges erred in not ruling that the only lawful authority for terminating or preventing the conduct of criminal proceedings is the Director of Public Prosecutions pursuant to Section 94(3) of the Constitution.

g. The learned trial Judges erred in ruling that Certificates issued on February 22, 2016 outside of the Regulations made on June 22, 2010 could have any valid, legal effect, hence the court erred in not finding that those Certificates were *ultra vires* for the reason that they were issued outside of the Emergency period.

h. The learned Judges failed to rule that [regulation] 45 of the Emergency Powers (No. 2) Regulations, 2010 is *ultra vires* since there are no powers conferred upon the Governor General by Section 3 of the Emergency Powers Act that empowers him to issue Good Faith Certificates in respect of criminal or other unlawful actions taken by members of the Security Forces." (Emphasis as in the original)

[19] Mrs Clarke, in her counter-notice, sought to have this court declare that: (i) the good-faith certificates were *ultra vires* on the basis that they conflict with the principle of separation of powers; (ii) the Regulations are unconstitutional, null and void, to the extent that they purport to grant the Minister of National Security power to grant immunity or good-faith certificates; and (iii) the good-faith certificates or any certificate issued outside of the emergency period are *ultra vires*, null and void.

### **The AG's appeal (COA2020APP00028)**

[20] The AG advanced the following five grounds of the appeal:

"(i) The majority erred in law in failing to recognise that having not found that regulation 45 of the Emergency Powers Regulations 2010 infringed the doctrine of separation of powers or that it infringed the prosecutorial powers of the Director of Public Prosecutions under the Constitution, there

was no legal basis on which they could have found that the certificates were unconstitutional.

(ii) The court erred in its interpretation of regulation 45 in finding that the place for rebuttal of the presumption of good faith is during the trial process having regard to the purpose and intent of regulation 45 which is to prevent the commencement of a prosecution against members of the security force.

(iii) The court erred in failing to recognise that the Good Faith Certificates are not a bar to the prosecution in that it failed to recognise that regulation 45 provides immunity from prosecution to members of the security forces and that the Good Faith Certificates create a rebuttable presumption which could only be challenged by judicial review.

(iv) The majority having found that the Minister may issue Good Faith Certificates under regulation 45, after the expiry of the regulations, fell into error in finding that the Minister acted unreasonably in issuing the certificates and therefore the certificates are invalid.

(v) The majority erred in finding that the delay in issuing the Good Faith Certificates could result in the certificates being unconstitutional in circumstances where the claim was not one for a breach of any constitutional right, more so a right involving an entitlement to a process within a reasonable time.”

[21] The AG sought to have this court allow its appeal, set aside the majority decision of the Full Court and refuse the orders sought in Mrs Clarke’s claim.

### **Mrs Clarke’s counter-notice of appeal (in the AG’s appeal)**

[22] Nine grounds of counter appeal were advanced by Mrs Clarke in the AG’s appeal. This counter appeal will be referred to as ‘the second counter-notice of appeal’. The grounds are as follows:

“a. The learned trial Judges erred when it [sic] found that the Minister’s power to issue the good faith certificates ‘do not offend the doctrine of separation of powers’.

b. The learned trial Judges erred when it [sic] failed to make any orders or declarations that the criminal prosecution or trial cannot legally or constitutionally be barred by virtue of the good faith certificates or any certificate issued by the Minister of National Security.

c. The learned Judges failed to hold that the issues dealt with in the said Certificates are reserved for the Director of Public Prosecution in determining whether an indictment should be preferred or for the Judiciary in a trial on such an indictment.

d. The learned trial Judges erred in not ruling that the only lawful authority for terminating or preventing the conduct of criminal proceedings is the Director of Public Prosecutions pursuant to Section 94(3) of the Constitution.

e. The learned trial Judges erred in that they failed to make any order that the Good Faith Certificates issued by the Minister were clearly intended to pre-determine an issue which would arise for judicial determination in any legal proceedings in which the legality and/or constitutionality of the Appellants' actions at the home of the Clarkes, including the killing of Mr. Clarke, arose for determination.

f. The learned trial Judges erred when it [sic] failed to make any declarations or orders that the Emergency Powers (No. 2) Regulations 2010, to the extent that it purports to grant the Minister of National Security the power to grant immunity from bringing or instituting any action suit prosecution or other proceedings [sic] against any member of the security forces, are unconstitutional, null and void.

g. The learned trial Judges erred in holding that the Minister had the power or discretion to make or issue the Good Faith Certificates after the relevant Regulations had expired and were no longer in operation.

h. The learned trial Judges erred in ruling that Certificates issued on February 22, 2016 outside of the Regulations made on June 22, 2010 could have any valid, legal effect, hence the Court erred in not finding that those Certificates were ultra vires for the reason that they were issued outside of the Emergency period.

i. The learned Judges failed to rule that [regulation] 45 of the Emergency Powers (No. 2) Regulations, 2010 is ultra vires since there are no powers conferred upon the Governor General by Section 3 of the Emergency Powers Act that authorises him to empower the Minister to issue Good Faith Certificates in respect of criminal or other unlawful actions taken by members of the Security Forces.” (Emphasis as in original)

[23] In this second counter-notice of appeal, Mrs Clarke sought similar orders to those sought in the first counter-notice of appeal.

### **The issues**

[24] There is significant overlap of the issues arising in the two appeals and their respective counter appeals. Accordingly, this court is of the view that an issue-based approach will be the most appropriate and efficient way to properly dispose of these appeals. Further, the issues raised in the counter-appeals, which primarily relate to the Constitution of Jamaica (‘the Constitution’), are more properly discussed before addressing the issues raised in the appeals. In the result, these are the issues (framed as questions) that arise for determination:

1. Does the Governor-General have authority to confer on the Minister power to issue good-faith certificates? (Mrs Clarke’s first counter-notice of appeal grounds c and h and Mrs Clarke’s second counter-notice of appeal ground i)
2. Did the Full Court correctly find that the Minister’s power to issue the good-faith certificates does not offend against the doctrine of separation of powers? (Mrs Clarke’s first and second counter-notice of appeal grounds a and e, in both.)
3. Did the Full Court correctly find that the good-faith certificates do not infringe on the prosecutorial powers of the DPP to initiate or pursue action against members of the security forces? (Mrs Clarke’s first counter-notice of appeal ground f and second counter-notice of appeal grounds c and d)

4. Was the Full Court correct in its finding that the good-faith certificates could be issued outside of the relevant emergency period? (Mrs Clarke's first counter-notice of appeal grounds d and g and second counter-notice of appeal grounds g and h)
5. Did the majority err in considering the Minister's delay in issuing the good-faith certificates and in their finding on the effect of that delay? (Soldiers' appeal grounds a, b, c, d, e, g, h and i and AG's appeal, grounds (i), (iv) and (v))
6. Is there is a duty or legal requirement of fairness to the prosecution by which the good-faith certificates could be invalidated? (Soldiers' appeal ground f)
7. Did the Full Court err in its determination of the legal effect of the good-faith certificates? (Mrs Clarke's first counter-notice of appeal ground b and Mrs Clarke's second counter-notice of appeal grounds b and f)
8. Did the Full Court err in its consideration of the proper forum in which to challenge the good-faith certificates? (Soldiers' appeal grounds j and k and AG's appeal grounds (ii) and (iii))

**Issue 1: Does the Governor-General have authority to confer on the Minister power to issue good-faith certificates? (Mrs Clarke's first counter-notice of appeal grounds c and h and Mrs Clarke's second counter-notice of appeal ground i)**

Mrs Clarke's submissions

[25] Counsel submitted that the Act contains no provision to enable the Governor-General to confer the Minister with power to issue good-faith certificates; accordingly, regulation 45 is *ultra vires*. Counsel also sought to challenge the validity of the Emergency Powers Act ('the Act') by submitting that the Act was passed under a colonial regime that conflicts with the Constitution.

### The AG's submissions

[26] It was submitted that the Regulations were enacted pursuant to section 3 of the Act and are issued pursuant to a discrete regime which is lawful under the Constitution. It was submitted that the grant of immunity from prosecution in the Regulations is not a prohibited circumstance and is incidental to the effective exercise of the powers granted pursuant to section 3 of the Act. It was also posited that, furthermore, the powers given to the Governor-General under the Act are quite wide and expressly stipulate what is excluded.

[27] Counsel relied on the judgment of Attorney General of Jamaica v Claudette Clarke (Administratrix of the estate of Keith Clarke, deceased and in her own right) and Ors [2019] JMCA Civ 35 ('AG of Jamaica v Claudette Clarke and Ors') to submit that this challenge to the judgment lacks any proper basis as the immunity is derived from the Regulations and not the Minister.

### The CDS' submissions

[28] It was submitted that a consideration of section 2 of the Constitution in determining the Minister's power to issue good-faith certificates was not required as the challenge was to the good-faith certificates and not necessarily the law under which they were derived.

### The ruling of the Full Court on this issue

[29] From one perspective, both the majority of the Full Court, at paras. [124] to [128] of the judgment, and the dissenting judge, at paras. [28] and [29], appear to have accepted that the Governor-General has the power, pursuant to section 3(1) of the Act, to make the impugned regulations. This is what the majority held (as expressed by Nembhard J):

- a. "[124] I find that I must have regard to the circumstances that have given rise to this matter. There can be no denying that the circumstances, as they obtained in May of 2010, were

extreme. It is in the context of such a period of extreme crisis that the Act vests the Governor General with the power to make Regulations for securing the essentials of life to the community. Those Regulations may confer or impose powers and duties as the Governor General may deem necessary or expedient for the preservation of the peace, for securing and regulating the supply and distribution of food and other necessities, for the maintenance of the means of transportation, as well as, for any other purposes essential to the public safety and the life of the community.

- b. [125] Section 3 of the Act also empowers the Governor General to make such provisions incidental to these powers as may appear to him to be required for making the exercise of these powers effective.
- c. [126] It is in this context that Regulation 45(1) of the Regulations grants immunity from any action, suit, prosecution or other proceedings, to members of the security forces 'in respect of any act done in good faith during the emergency period'.
- d. [127] The question that arises is whether it can be said that the power to grant immunity, pursuant to Regulation 45(1) of the Regulations, can be said to be incidental to those vested in the Governor General under section 3 of the Act. I find that it is.
- e. [128] I accept the submission that the intent of the Regulations is to allow members of the security forces to take the necessary action for the preservation of public order and public safety during a period of public emergency. When the Governor General declares a state of emergency, pursuant to section 20 of the Constitution, he is, effectively, invoking wartime powers. The Constitution expressly deals with states of emergency in section 13(9) and 13(11). The Regulations do not arbitrarily grant immunity for all actions of the members of the security forces but only in given circumstances which are reasonable and justified."

Similarly, Dunbar Green J, in her dissenting judgment, found as follows:

- f. [28] Although not stated expressly in the contested provisions, it can be deduced that during a period of public emergency the security forces may be required to and must be relied on

to operate in unusual circumstances and exercise unusual powers. In those situations, the inherent dangers and risks that are sometimes necessary to protect the public can have a chilling effect on members of the security forces if they fear personal exposure to prosecution when they are performing their lawful duties. It seems to me that the immunity which is granted by Regulation 45 is therefore designed to ensure that members of the security forces, provided they act lawfully, should do so without fear if they are required to exercise powers which in normal times could be a violation of law.

- g. [29] As the learned Director of State Proceedings, Miss Althea Jarrett, submitted, Regulation 45 does not specifically identify all actions that the security forces would be required to take but it lays out the circumstances in which their actions would be deemed to be in good faith. The immunity gives them that assurance and is therefore very much consistent with the powers under section 3(1) for the Governor-General to make such provisions that are incidental to the powers he granted to members of the security forces in order to make the exercise of those powers effective.”

[30] In coming to a clear view, however, on the particular issues raised in ground h of Mrs Clarke’s first counter-notice of appeal and ground i of the second counter-notice of appeal, it is important to have regard to the issues that the Full Court identified and addressed. In the dissenting judgment, the issues are identified at para. [21] and the conclusions are to be found at para. [69] of the judgment. In relation to the decision of the majority, the issues are identified at para. [81] and the conclusions and orders are to be found at paras. [159] and [160] of the judgment. The three issues identified for discussion by the dissenting judge were: (i) whether the good-faith certificates infringe the principle of separation of powers; (ii) whether the Emergency Powers Regulations are unconstitutional to the extent that they grant the Minister power to grant good-faith certificates; and (iii) whether the certificates are *ultra vires*, null and void because they were issued outside the period of emergency. The only difference between that and the majority position is to be found in what the majority identified as issue two which was: “Whether Regulation 45 of the Emergency Powers Regulations, 2010 can supersede the prosecutorial powers of the Director of Public Prosecutions under the Constitution”.

[31] By way of comparison, this is what is stated in, for example, ground h of the Mrs Clarke's first counter-notice of appeal:

- a. "The learned Judges failed to rule that [regulation] 45 of the Emergency Powers (No. 2) Regulations, 2010 is ultra vires since there are no powers conferred upon the Governor General by Section 3 of the Emergency Powers Act that empowers him to issue Good Faith Certificates in respect of criminal or other unlawful actions taken by members of the Security Forces."

[32] It does not appear, therefore, that this issue was directly addressed by the court below and that the comments of the court below on this issue were *obiter dicta*. The reason for this is that the issue that is now before us was never placed or argued before the Full Court. In fact, it is fair to say that nowhere in the declarations sought did Mrs Clarke challenge the powers of the Governor-General to grant the Minister power to issue the certificates.

### Discussion

[33] It is important to this discussion to set out in full section 3 of the Act, pursuant to which the impugned regulations were made. That section reads as follows:

"3(1) During a period of public emergency, it shall be lawful for the Governor-General, by order, to make Regulations for securing the essentials of life to the community, and those Regulations may confer or impose on any Government Department or any persons in Her Majesty's Service or acting on Her Majesty's behalf such powers and duties as the Governor-General may deem necessary or expedient for the preservation of the peace, for securing and regulating the supply and distribution of food, water, fuel, light and other necessities, for maintaining the means of transit or locomotion, and for any other purposes essential to the public safety and the life of the community, and may make such provisions incidental to the powers aforesaid as may appear to the Governor-General to be required for making the exercise of those powers effective.

(2) Without prejudice to the generality of the powers conferred by subsection (1), such Regulations may so far as appears to the Governor-General to be necessary or expedient for any of the purposes mentioned in that subsection-

(a) make provision for the detention of persons and the deportation and exclusion of persons from Jamaica;

(b) authorize on behalf of Her Majesty –

(i) the taking of possession or control or the managing or carrying on, as the case may be, of any property or undertaking;

(ii) the acquisition of any property other than land;

(c) authorize the entering and search of any premises;

(d) provide for amending any enactment, for suspending the operation of any enactment, and for applying any enactment with or without modification;

(e) provide for charging, in respect of the grant or issue of any licence, permit, certificate or other document for the purposes of the Regulations, such fee as may be prescribed by or under the Regulations;

(f) provide for payment of compensation and remuneration to persons affected by the Regulations;

Provided that nothing in this Act shall be construed to authorize the making of any Regulations imposing any form of compulsory military service or industrial conscription, or providing for the trial of persons by Military Courts:

Provided also that no such Regulation shall make it an offence for any person or persons to declare or take part in a lock-out or to take part in a strike, or peacefully to persuade any other person or persons to declare or take part in a lock-out or to take part in a strike.

(3) In paragraph (d) of subsection (2) 'enactment' includes any Regulation.

(4) Any Regulations so made shall be laid before the Senate and the House of Representatives as soon as may be after

they are made, and shall not continue in force after the expiration of seven days from the time when they are so laid before the Senate and the House of Representatives, whichever shall be the later unless a resolution is passed by the Senate and the House of Representatives, providing for the continuance thereof.

(5) The Regulations may provide for the trial, by Courts of Summary Jurisdiction, of persons guilty of offences against the Regulations; so, however, that the maximum penalty which may be inflicted for any offence against any such Regulations shall be imprisonment with or without hard labour for a term not exceeding three months, or a fine not exceeding two hundred dollars, or both such imprisonment and fine, together with the forfeiture of any goods or money in respect of which the offence has been committed:

Provided that no such Regulations shall alter any existing procedure in criminal cases, or confer any right to punish by fine or imprisonment without trial.

(6) The Regulations so made shall have effect as if enacted in this Act, but may be added to or altered by resolution of the Senate and House of Representatives or by Regulations made in like manner which shall be laid before the Senate and House of Representatives and shall be subject to the like provisions as the original Regulations.

(7) The expiry or revocation of any Regulations made shall not be deemed to have affected the previous operation thereof, or the validity of any action taken thereunder, or any penalty or punishment incurred in respect of any contravention or failure to comply therewith, or any proceeding or remedy in respect of any such punishment or penalty." (Emphasis added)

[34] Perusing section 3 of the Act in its entirety, one has to agree with the submissions of counsel for the AG that the wording of this section of the Act does grant to His Excellency, the Governor-General, the power to make regulations of the nature of those that fall for consideration in this appeal.

[35] Having regard to the entirety of the Act and its clear language and scope, it is apparent that the Act gives to the Governor-General very wide powers to make

regulations geared towards the preservation of the peace, among other things, during a period of emergency. Incidental to that is the power to give to the members of the security forces a measure of protection in the form of a shield of immunity as they perform their duties during a state of emergency. It is to be remembered that a period of emergency and the conditions that obtained during the period in question, may fairly be likened to war-time conditions. The security forces were under attack and had to engage in several gun battles with armed gun men, in defence of themselves and civilians. The breadth of the powers accorded by the Act to the Governor-General is meant to empower him to deal with extraordinary circumstances effectively.

[36] Additionally, ground h of Mrs Clarke's first counter-notice of appeal and ground i of her second counter-notice, in the way that they are worded, seem to have as their focus, the contention that there is no power to issue good-faith certificates "in respect of criminal or other unlawful actions taken by members of the Security Forces". That formulation would make accepting that ground difficult, the assumption of criminality or unlawfulness, being a matter that will have to be resolved by a trial process, if the validity of the good-faith certificates is not upheld.

[37] There is, therefore, no merit in ground h of Mrs Clarke's first counter-notice of appeal or ground i of her second counter-notice of appeal. In relation to ground c, we agree with the conclusions reached unanimously by the Full Court on the issue, i.e. that the Regulations are not unconstitutional, or otherwise invalid.

**Issue 2: Did the Full Court correctly find that the Minister's power to issue the good-faith certificates does not offend against the doctrine of separation of powers? (Mrs Clarke's first and second counter-notice of appeal grounds a and e)**

Mrs Clarke's submissions

[38] Counsel for Mrs Clarke submitted that the good-faith certificates infringe the doctrine of separation of powers by arrogating to the Minister authority to pre-determine the issue of *mens rea*, which properly falls within the remit of the court. It was further argued that the good-faith certificates prevented the court from embarking

on the trial of the soldiers. As such, it was contended that the good-faith certificates were unconstitutional, as neither Parliament nor the Governor-General has power to confer the Minister with jurisdiction to determine issues of criminal culpability in trials.

[39] Reliance was also placed on the case of **Hinds and others v R** (1975) 24 WIR 326 and **R (on the application of Privacy International) v Investigatory Powers Tribunal** [2019] 4 All ER 1.

#### The AG's submissions

[40] Counsel contended that the issuance of the good-faith certificates does not infringe on the doctrine of separation of powers. Counsel also argued that in issuing the certificates, the Minister had not determined either criminal or civil culpability of the members of the security forces. Neither, it was submitted, did the good-faith certificates act as a prejudgment that the acts were performed in good faith. Further, it was argued that the proviso to regulation 45, "unless the contrary is proved", demonstrates that the good-faith certificates are not decisive of the issue of culpability but rather allow an opportunity for the contrary to be proved before the court. Counsel cited the cases of **Wicks v DPP** [1947] AC 362 and **Liyanage and others v Reginam** [1966] 1 All ER 650.

#### The CDS' submissions

[41] It was argued that the Minister's power to issue good-faith certificates was not inconsistent with the constitutional power of the DPP to initiate prosecutions. Counsel likewise contended that there was a distinction to be maintained between the grant of immunity by the Regulations and the certification that the members of the security forces acted in good faith. Accordingly, the Minister, by issuing the good-faith certificates, provides a rebuttable evidential basis for the conferment of immunity by the Regulations, which is compatible with the Constitution.

## Discussion

[42] The first step in considering this issue is to interpret and determine the effect of the statute and the impugned provision. One looks to the literal meaning of the words used unless this would result in absurdity. Lord Millet in **Regina v Central Valuation Officer and another, ex parte Edison First Power Limited** [2003] UKHL 20, observed at paras. [116] and [117] that:

“[116] ... The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.

[117] But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it: see (in a contractual context) *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235, [1973] 2 All ER 39 at p 251 of the former report, *per* Lord Reid.”

[43] The powers under the provisions of the Act are brought into effect when a proclamation has been made that there is a period of public emergency existing. The Governor-General is to issue such a proclamation if he is satisfied that certain conditions exist. There is no challenge to the nature of the circumstances that existed in Jamaica on 23 May 2010. The security forces were in armed conflict with certain criminal elements. The Constitution itself (section 20) vests in the Governor-General the power to issue the proclamation.

[44] Section 3(1) of the Act (as previously discussed) authorizes the Governor-General, during a period of public emergency, to make regulations for securing the essentials of life to the community, to confer or impose powers and duties on any person in Her Majesty's service that is deemed necessary or expedient for the preservation of the peace and securing of necessities of life. It also permits him to

make such provisions incidental to the above powers as may appear to him to be required for making the exercise of those powers effective.

[45] Although counsel for Mrs Clarke concedes that the Act is clearly a war-time measure, having been passed on the eve of the Second World War, he contended that it was passed under a colonial regime and is in conflict with the Constitution. We are not sure if counsel is contending that war-time measures can no longer be relevant in post-colonial societies such as Jamaica. However, even with the existence of the Charter of Fundamental Rights and Freedoms, Parliament may pass laws or organs of the State can take action which may abrogate or infringe rights if doing so can be shown to be demonstrably justified in a free and democratic society (sections 13(2)(b) and 13(9) of the Constitution). Moreover, section 13 itself speaks to limitations of restraint of liberty and freedom of movement during a period of public emergency or public disaster. It is important to bear in mind, therefore, the circumstances leading up to the making of the proclamation. At the time the proclamation being discussed in this appeal was made by the Governor-General, it was in a time of extraordinary upheaval and violence, including the burning of police stations.

[46] Regulations 45(1) and (3) of the Regulations speak to the issue of immunity granted to members of the security forces who have taken action during the period of emergency. Regulation 45(1), in plain language, asserts, subject to paragraph 2 (which is not relevant to these proceedings), that no action, or prosecution, should be brought or instituted against members of the armed forces in respect of any act done in good faith during the emergency period in the exercise or purported exercise of their functions. Once the certificate is granted, the acts of the security forces are deemed to have been done in good faith "unless the contrary is proved" (regulation 45(3)) (emphasis added).

[47] The language of Regulations 45(1) and (3), therefore, does not ultimately prohibit the DPP from exercising her constitutional mandate pursuant to section 94(3) of the Constitution to institute and undertake criminal proceedings. Without more, as

counsel for the CDS has submitted, based on Regulation 45(1), even without the granting of certificates, the soldiers would have been entitled to raise the issue of good faith at the initial point of any attempt to prosecute them. They failed to do so, and a prosecution has, in fact, been initiated. When the Minister granted the good-faith certificates six years later, the prosecution could go forward by disproving the issue raised in the good-faith certificates.

[48] Regulation 45(3) allows the relevant Minister to issue a certificate that a particular act of the members of the security forces was done in good faith. If the certificate is issued, it is *prima facie* evidence that the members of the security forces were acting in good faith, but this is until and unless the contrary is proved. On the face of those words, there can be no interpretation that these regulations are inconsistent with the doctrine of separation of powers or restrict the DPP's constitutional powers and functions under section 94 of the Constitution. On this basis, the DPP is not prevented from initiating a prosecution, but if the issue of good faith is raised, then it does appear that there must be some preliminary finding so that the issue of good faith can be resolved.

[49] The term "good faith" is defined in the Concise Oxford Dictionary, 10<sup>th</sup> edition, as: "honesty or sincerity of intention". The expression appears to be a nebulous concept in criminal proceedings. It cannot be substituted for intention, which has a completely different meaning and function from the concept of good faith. Also, it does not fit well within the criminal law, which is based essentially on the notion of *mens rea*. However, it seems certain that if the prosecution has cogent evidence to establish that the elements of murder are satisfied, there would have to be some finding of the existence of extraordinary circumstances in order for the certificate of good faith to be accepted.

[50] What the provisions have attempted to do is to allow an added layer of protection to members of the security forces who may have been acting under extraordinary circumstances in the performance of their functions to restore public safety.

[51] Further, the Regulations, while to some extent are possibly suggestive of predetermination of certain issues, do not ultimately prevent prosecution of criminal offences. They cannot be said to give the Minister the authority to predetermine the issue of *mens rea*, which is a matter for a judge and jury. The good-faith certificate, albeit stated to be deemed sufficient evidence that the acts of the members of the security forces were done in good faith, is subject to disproof. So, if there is evidence to suggest a murder has been committed, although committed by members of the armed forces during the emergency period, then some inquiry has to be initiated for the issue of the appropriate *mens rea* to be considered and determined. There is no necessity here, therefore, to apply any presumption against ouster of constitutional jurisdiction, as this is certainly not the effect of the Regulations as passed (see **R (on the application of Privacy International) v Investigatory Powers Tribunal** and **AG of Jamaica v Claudette Clarke and others** at para. [39]).

[52] Mrs Clarke, therefore, fails on this issue, as the court below did not err in holding that the Regulations and/or good-faith certificates did not infringe on the doctrine of separation of powers.

**Issue 3: Did the Full Court correctly find that the good-faith certificates do not infringe on the prosecutorial powers of the DPP to initiate or pursue action against members of the security forces? (Mrs Clarke's first counter-notice of appeal ground f and second counter-notice of appeal grounds c and d)**

Mrs Clarke's submissions

[53] Relying on section 94(5) of the Constitution, counsel submitted that the powers of the DPP are "to the exclusion of any other person or authority". Therefore, it was argued, the Constitution grants no power to the Governor-General to authorize the Minister to grant a certificate that, in effect, prevents the DPP from instituting or continuing criminal proceedings. It was contended that there was no provision in the Constitution which gives the Governor-General power to limit prosecutions. Furthermore, it was contended, the emergency powers provisions of the Constitution

give no authority to the Governor-General to modify the constitutional powers of the DPP, which are entrenched by sections 94(2) and (4) of the Constitution.

[54] Counsel also sought to distinguish between grants of immunity and a grant of pardon. Reference was made to section 90 of the Constitution, which empowers the Governor-General (on the recommendation of the local Privy Council) to exercise the prerogative of mercy. Counsel emphasized, however, that such a pardon is only exercisable after a criminal trial has ended and a conviction and sentence recorded. Accordingly, it was submitted that section 90 could not grant any power to grant immunity from prosecution or make regulations that grant such immunity. Counsel relied on **DPP and others v Felix and others** (2017) 90 WIR 288.

#### The DPP's submissions

[55] For the Crown, it was submitted that the powers of the DPP and its protection from interference are entrenched in section 94 of the Constitution and that the Regulations amounted to an attempt at encroachment on the prosecutorial powers of the DPP.

#### The soldiers' submissions

[56] With regard to this issue, Queen's Counsel, Mr Hylton, labelled Mrs Clarke's submissions as being misconceived. It was submitted that it is the Regulations that immunize the soldiers and not the good-faith certificates. Accordingly, it was argued that the Minister could not have been exercising prosecutorial powers and thus would not have encroached on the DPP's powers. Furthermore, the submissions continued, regulation 45(1) stands independent of regulation 45(3) in that, in the absence of the issuance of the good-faith certificates, the soldiers would still be immune from prosecution once it is demonstrated that they acted in good faith within the meaning of the Regulations.

[57] Counsel relied on the decision of the Court of Appeal in **AG of Jamaica v Claudette Clarke and ors** to submit in the alternative that, even if the Minister's

power to issue the good-faith certificates could be construed as a power to grant immunity, that power was not absolute, as it was open to the DPP to prove the contrary – that is, that the subjects of the certificates did not act in good faith. Queen’s Counsel further noted that the DPP’s prosecutorial power itself was not absolute.

[58] Additionally, reliance was placed on the Ugandan case of **Kwoyelo (alias Latoni) v Uganda** [2012] 1 LRC 295 in submitting that the mischief intended to be cured by the Regulations fell within the framework of the Constitution and was thus *prima facie* constitutional. Likewise, the DPP was able to prosecute soldiers who were ineligible for protection under the Regulations.

[59] The case of **Lendore and others v Attorney General** [2017] 5 LRC 369, an appeal to the Privy Council from Trinidad and Tobago, was also prayed in aid of the soldiers’ submissions.

#### Discussion

[60] The establishment of the office of the DPP and the powers of that office are set out in section 94 of the Constitution as follows:

“94. – (1) There shall be a Director of Public Prosecutions, whose office shall be a public office.

(2) A person shall not be qualified to hold or act in the office of Director of Public Prosecutions unless he is qualified for appointment as a Judge of the Supreme Court.

(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -

(a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;

(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(4) The powers of the Director of Public Prosecutions under subsection (3) of this section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.

(5) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (3) of this section shall be vested in him to the exclusion of any other person or authority:

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the Court.

(6) In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.

(7) For the purposes of this section, any appeal from any determination in any criminal proceedings before any court, or any case stated or question of law reserved for the purposes of any such proceedings, to any other court in Jamaica or to the Judicial Committee of Her Majesty's Privy Council shall be deemed to be part of those proceedings."

[61] To our minds, to the extent that regulation 45(1) stipulates that "no action, suit, prosecution or other proceeding shall be brought or instituted against any member of the security forces" in certain circumstances, does, on the face of it, tend to support the view that it is trespassing on the role of the DPP as set out in section 94(3)(a) of the Constitution, which power the DPP is to exercise "in any case in which he [or she] considers it desirable so to do". However, even if that view is correct, the importance of the words at the end of regulation 45(3), that is, that the Minister's certificate shall be sufficient evidence of good faith, "unless the contrary is proved", would seem to rob the regulation of what might have first appeared to be its finality in proscribing the initiating of any prosecution in the circumstances therein stated. The use of the words "unless

the contrary is proved” supports the view (and the finding of the court below) that the effect of the good-faith certificates (and the regulation on which such certificates are based) is not absolute; but that the certificates raise a rebuttable presumption, with the prosecution being able to challenge them and contend that they should not be allowed to stand.

[62] In the case of **DPP and others v Felix and others**, the issue was whether the DPP’s power to commence criminal proceedings was suspended, pending the outcome of a coroner’s inquiry when a person died in circumstances that fell within the jurisdiction of section 9 of the Coroners Act. The Court of Appeal of the Eastern Caribbean Supreme Court, in finding that the Coroner’s Act did not restrict the powers of the DPP, also found that if such a restriction had been imposed, it would have been unconstitutional, as the DPP’s powers to “initiate, take over and continue, or discontinue” criminal proceedings was clearly defined by the Constitution (see para. [23] of that judgment). In these circumstances, therefore, whilst accepting the *dicta* in **DPP and others v Felix and others** as being sound, the different factual circumstances of this case make that case distinguishable.

[63] In relation to this issue, therefore, Mrs Clarke has not made out her case in her counter appeals, and the court below was correct in its finding that the good-faith certificates do not infringe on the prosecutorial powers of the DPP to initiate or pursue prosecutions.

**Issue 4: Was the Full Court correct in its finding that the good-faith certificates could be issued outside of the relevant emergency period? (Mrs Clarke’s first counter-notice of appeal grounds d and g and second counter-notice of appeal grounds g and h).**

Mrs Clarke’s submissions

[64] Counsel for Mrs Clarke adopted the submissions of INDECOM in this respect (which are set out below) to argue that the Minister had no power to retrospectively issue the good-faith certificates outside the emergency period and that such an act was *ultra vires* and unlawful. The argument was proffered that constitutional provisions

relating to periods of emergency are time-sensitive. Having regard to regulation 46, counsel submitted that only actions taken prior to the expiration of the Regulations are saved. Further, that generally, provisions could not be invoked subsequent to their expiration, and in this case, no power was granted to the Governor-General to invoke the regulations after their expiration. There was, accordingly, no validity in the submission that section 3(7) of the Act authorizes retrospective application of the powers contained in the Regulations.

[65] It was also contended that the Minister, who had issued the good-faith certificates, had assumed office after the expiration of the Regulations and could not, therefore, properly certify the soldiers' states of mind at a time which preceded his assumption of the office.

#### INDECOM's submissions

[66] It was the submission of counsel that the good-faith certificates, as issued in this case, were null and void, having been issued subsequent to the expiration of the Regulations. Counsel further posited that the omission of the Regulations in addressing the period within which good-faith certificates could be issued does not grant the Minister authority to issue good-faith certificates at any time subsequent to the expiry of the declaration of the state of emergency?

[67] Counsel relied on section 20(3) of the Constitution and section 26 of the Interpretation Act to submit that any proclamation made by the Governor-General would have been valid for three months from the date of the proclamation and that an expired regulation has no effect. Counsel stated further that, since it was permissible to extend the emergency period, but that was not done, it could not have been permissible for the good-faith certificates to be issued outside the emergency period.

[68] It was also submitted that the Full Court's consideration of whether it was practical for the Minister to conduct an assessment of evidence during the period of

emergency to determine whether to grant the good-faith certificates was an irrelevant consideration in light of the fact that the Regulations could have been extended.

[69] In addition, counsel stated that the Full Court had erred in its reliance on the wording of the subsequent promulgation of the Regulations as a means to clarify the Governor-General's intention. It was averred that the inclusion of the words "[f]or the avoidance of doubt" in the latter regulations is not equivalent to an assurance or re-statement of a position that was already implied by regulation 45, as no such right previously existed. Further, those words were insufficient to imply a retrospective application.

[70] Counsel also criticised the Full Court's application of the case of **Wicks v Director of Public Prosecution** to submit that the holding, in that case, stated that actions done during the lifetime of an emergency period are to be governed by the applicable regulations. Therefore, the Minister would have fallen into error in exercising power granted to him outside the emergency period.

[71] Counsel further cited section 3(7) of the Act to submit that the incorporation of the savings clause could not authorize the issuance of the good-faith certificates outside the life of the Regulations. It was also submitted that the finding of the Full Court that there is no restriction on the time within which the good-faith certificates were to be issued, was absurd and resulted in the finding that the certificates, having been issued some six years after the expiry of the Regulations, was unreasonably late.

#### AG's submissions

[72] It was submitted that, in accordance with section 3(7) of the Act, which addresses the effect of the expiration of the Regulations and the validity of any acts done during the emergency period, the good-faith certificates are not invalidated by virtue of being issued outside the emergency period. The submission continued that it would have been untenable for members of the security forces, who acted in good faith

during the period of the state of emergency, to lose the protection of the Regulations because the good-faith certificates were issued outside the emergency period.

#### The CDS' submissions

[73] Urged upon the court was the submission that the proper interpretation of the Regulations permits good-faith certificates to be issued outside the emergency period. It was also argued that such a course contemplates that certain consequential powers under the statutory provisions would be called upon to be exercised after the expiration of the emergency period and accordingly require due process.

[74] Further, it was submitted that regulations 44 and 45(2) explicitly impose time limits for certain situations but that regulation 45(1) does not stipulate a time limit for protection from prosecution offered to the security forces. Counsel contended that this construct of the Regulations was a recognition that the members of the security forces were entitled to due process as guaranteed in section 16 of the Constitution.

[75] Referring to section 16(9) of the Constitution, counsel submitted that there is no stated limit to the period of protection from prosecution when one obtains a pardon. Accordingly, counsel applied that reasoning to the Regulations to aver that it was not intended for the security forces to have a limited period of protection from prosecution within the life of the Regulations.

[76] It was also submitted that the Full Court, per Dunbar Green J, was correct in having regard to the recent promulgation of current regulations in construing the one under scrutiny.

#### Discussion

[77] In our view, counsel for the CDS is correct in making the observation and submission that regulations 44 and 45(2) explicitly impose time limits for certain situations but that regulation 45(1) does not stipulate a time limit for protection from prosecution offered to the security forces. From the fact that there is no time limit

under section 45(1), it naturally follows that the issuing of the good-faith certificates after the expiry of the emergency period is not fatal to their validity, so long as the certificates relate to actions of the members of the security forces during the relevant period.

[78] The soldiers are entitled to advance the best possible defence, including any defence that could possibly challenge any element of the offence of murder that has been mounted against them, including, as is the position, in this case, the *mens rea* for murder. Before the substantive trial commences, the soldiers would also be entitled to seek to rely on the potential statutory immunity certified by the Minister in the good-faith certificates, for the court to determine whether or not the trial commences. It also cannot matter that the Minister who issued the certificates was not the Minister who was serving as such when the actions of the soldiers were carried out. No such requirement is stated in the Act or Regulations. Further, section 5 of the Interpretation Act is also relevant here, stating that:

“5. A reference in any Act to any public officer by the usual title of his office shall, if there be such an office customarily in Jamaica and unless the contrary intention appears, be read and construed as referring to the person for the time being holding or carrying out the duties of that office in Jamaica.”

[79] In the result, we find that the court below was correct in its finding that the good-faith certificates could be issued outside the relevant emergency period.

**Issue 5: Did the majority err in considering the Minister’s delay in issuing the good-faith certificates and in their finding on the effect of that delay? (Soldiers’ appeal grounds a, b, c, d, e, g, h and i and AG’s appeal, grounds (i), (iv) and (v))**

The soldiers’ submissions

[80] It was submitted that the Minister’s alleged delay in issuing the good-faith certificates was not in issue before the Full Court. Furthermore, Queen’s Counsel, Mr Hylton argued that there was no evidence on which the court could have properly assessed any purported delay. Specific reference was also made to the Full Court’s

majority finding, at para. [159] of the written reasons, to support the contention that the majority had cited no constitutional principle to demonstrate that the delay had resulted in the unconstitutionality of the good-faith certificates.

[81] Another argument put forward was that the majority had essentially granted a judicial review remedy in a constitutional claim by quashing the Minister's decision to issue the good-faith certificates on the basis of delay. In such a circumstance, it was contended, Mrs Clarke had circumvented the safeguard of Part 56 of the Civil Procedure Rules ('CPR') to prove that she satisfied the requirements to be granted leave to apply for judicial review. Counsel also sought to rely on the decision of the Board in **Attorney General v Ramanoop** [2005] UKPC 15, in support of the contention that constitutional claims ought not to be utilized to sidestep the process of judicial review because the nature of both proceedings was different.

[82] Further, it was submitted that the majority's finding that there was no time limit for the issuing of the good-faith certificates was inconsistent with the finding that the certificates were unconstitutional on the basis of delay. Thus, it was contended the court could not, on the one hand, find that there was no time limit for the Minister to issue the good-faith certificates but then maintain that the good-faith certificates were void for the Minister's delay in issuing them.

#### The AG's submissions

[83] The position of the AG was that the majority had erroneously applied the principle of delay in judicial review proceedings to decide that the good faith certificates were unconstitutional. Also, it was contended that there was no proper footing on which the majority could have deemed regulation 45 unconstitutional since the Full Court had found that regulation 45 did not breach the doctrine of separation of powers or infringe on the prosecutorial powers of the DPP.

[84] Additionally, it was submitted that the majority fell into error in finding that the delay in issuing the certificates was manifestly unfair and unreasonable, when it had

also held that the Minister was at liberty to issue good-faith certificates after the expiration of the relevant emergency period.

#### The DPP's submissions

[85] In addressing the soldiers' submission that the issue of delay was not canvassed before the Full Court, Crown Counsel relied on section 48(g) of the Judicature (Supreme Court) Act to submit that the judiciary is vested with the power to make findings to resolve issues arising in claims. That power, it was submitted, exists irrespective of whether the issues have been specifically pleaded. It was further stated that the court, in the exercise of its inherent jurisdiction, is able to make reasonable findings in its interpretation of the Constitution. Reliance was placed on **Belize International Services Limited v The Attorney General of Belize** [2020] CCJ 9 (AJ) BZ ('**Belize International Services Limited**'). However, Crown Counsel asserted that in this case, the issue of delay had featured prominently before the Full Court and was ventilated by the parties through competing arguments. Crown Counsel also sought to rely on the dictum of Dunbar Green J, to proffer that an enquiry as to the Minister's reasons for issuing the good-faith certificates was unnecessary, as the claim before the Full Court did not challenge the manner in which the decision to issue the good-faith certificates was made.

[86] The argument that there was an inconsistency between the Full Court's finding that there was no time limit in which to issue the good-faith certificates and that the good-faith certificates were invalidated by delay, was labelled as misconceived. Crown Counsel commented that the absence of a time limit under the Emergency Powers Act ('the Act') or the Regulations does not mean that the Minister is at large to issue good-faith certificates at any time. Rather, it was averred, the issuance of the good-faith certificates must conform to wider constitutional principles.

#### The CDS' submissions

[87] The CDS adopted the submissions advanced for the soldiers in arguing that the majority of the Full Court had erroneously treated with the issue of delay. As such,

Queen's Counsel Mr Walter Scott submitted that the majority erred in finding the good-faith certificates null and void. By finding such, it was submitted that the Full Court had embarked upon a consideration that was not properly before them, as no issue was raised or pleaded as to the unreasonableness or unfairness of the Minister's act in issuing the certificates. In addition, it was stated that there was no evidence on which the court could properly embark upon resolving that issue.

### Discussion

[88] In treating with this issue, the majority of the Full Court concluded that the six-year delay in signing the good-faith certificates was unfair, unjust and manifestly unreasonable so that it could not be seen to be in conformity with the Constitution (paras. [8], [9], [10], [13], [157], and [158] of the judgment). L Pusey J indicated that statutory powers exercised in a manner that is unjust and unfair must be invalidated by the court in the exercise of its constitutional role (see para. [9]). Nembhard J at para. [158] also expressed the view that, "the effect of the Good Faith Certificates would be to reverse the burden of proof at the trial ... which, at this time and in the circumstances of this case, would not be fair".

[89] The majority's findings on this point were made within the context of a fixed date claim form that requested declarations that:

1. the good-faith certificates infringed on the principle of the separation of powers and were therefore null and void;
2. the criminal trial could not be barred by virtue of the good-faith certificates;
3. the Regulations, to the extent that they gave the Minister power to grant immunity, was unconstitutional, null and void;
4. the good-faith certificates, having been issued outside of the emergency period, were null and void; and
5. the criminal trial should be restored to the trial list and permitted to continue.

[90] Essentially, therefore, the fixed date claim form challenged the constitutionality of the good-faith certificates, particularly as it related to the doctrine of the separation of powers as well as the constitutionality of the Regulations, and asserted that the certificates were null and void, especially having been issued outside of the emergency period. In the result, the good-faith certificates could not have the effect of barring the criminal trial.

[91] Whilst the majority of the Full Court declared that the good-faith certificates were null and void as a result of delay, no declarations were made that the good-faith certificates or the Regulations breached the Constitution. Hence, there was no specific finding of a breach of any particular provision of the Constitution, relevant to delay or otherwise. On the other hand, there were unanimous findings that there was no breach of the doctrine of the separation of powers, no infringement on the powers of the DPP and further that the Regulations permitted the issuance of the good-faith certificates outside of the emergency period.

[92] Also apparent from the fixed date claim form and the issues which were highlighted for consideration by the learned judges of the Full Court is that the issue of the delay of four and six years, respectively, was not raised before the court for consideration as a constitutional breach in and of itself. There was no reference in the judgment that this was argued before the Full Court as an issue. The arguments surrounding delay were evidently confined to the narrow question of whether it was lawful for the certificates to have been issued outside of the emergency period.

[93] Accordingly, the questions remain, since the Full Court had found that the good-faith certificates were lawfully issued pursuant to the Act and the Regulations, although issued after the emergency period, was it open to the court to find that the delay of four and six years, respectively, in issuing the certificates was manifestly unreasonable and unfair and did this finding create an inconsistent ruling? Additionally, could this issue have been properly determined by the court outside of the forum of judicial review?

[94] The case of **Belize International Services Limited**, a decision of the Caribbean Court of Justice ('the CCJ'), offers some assistance and is of persuasive authority. This case was relied on by the DPP in submitting that the issuance of the good-faith certificates must conform to wider constitutional principles. The CCJ examined the concept of the rule of law within international norms and its impact on evaluating state actions, especially within the context of commercial dealings. The Government of Belize was being sued by Belize International Services Limited for breach of contract. Jamadar JCCJ engaged in a detailed analysis of the state's action, including (1) the extent to which any terms of the agreement between the parties were inconsistent with the Constitution, (2) whether there was statutory illegality and (3) whether the contract was prohibited.

[95] At paras. [304] and [305] Jamadar JCCJ stated:

"[304] ... clues as to what is constitutive of the basic and fundamental features, principles, and values of Belizean constitutionalism, are not limited to the literal content of the Constitution as text *per se*. Some are predictably unwritten, to be discerned from overall structure, context, and content, albeit of the Constitution itself, as well as from broader historical, cultural, and socio-legal contexts. Constitutional common law, as developed by independent Caribbean Judiciaries (as the third arm of Government) and elsewhere, has also discovered and revealed structural and substantive features and values that constitute this basic 'deep' structure. Three are now uncontroversial – the separation of powers, the rule of law (as including both due process and protection of the law), and, the independence of the judiciary (with the associated power of judicial review in relation to both constitutional and administrative actions).

[305] Of all these potentially basic 'deep' structures, the two that are most relevant to this case are judicial review and the rule of law. ... In the final analysis, it is suggested that, as a general principle, the executive and all state and public agencies and authorities are subject to the standards of accountability and good governance that the constitutional imperative of the rule of law demands, in all of their dealings with private enterprise third parties, including in the making,

changing, and breaking of commercial contracts. The courts, as guardians of the Constitution, are also guardians of Belizean constitutionalism, and as such, the agents of the People. **This 'constitutional species' of judicial review of legislative and executive actions, is the means by which this standard-keeping and accountability is rendered.**" (Emphasis added)

[96] In a footnote to the last sentence of para. [305], Jamadar JCCJ quoted from the text, *Fundamentals of Caribbean Constitutional Law*, Sweet & Maxwell, (2015), at paras. [4-005], and [5-001 to 5-002] authored by Tracy Robinson, Arif Bulkan and Adrian Saunders, in which it was stated that "[j]udicial review is both a power and a duty exercised by ... courts to review laws and governmental action to ensure their consistency with the constitution".

[97] At para. [350] Jamadar JCCJ opined that inherent in these Westminster-derived constitutions are unwritten constitutional principles and values, such as the rule of law, manifesting as a safeguard against irrationality, unreasonableness, unfairness and the abuse and arbitrary exercise of executive power. The understanding to be derived from Jamadar JCCJ's analysis is that the fundamental issue of the rule of law undergirds these constitutions. This is further exemplified by section 2 of the Constitution which stipulates the supremacy of the Constitution. It states:

"2. Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

[98] At para. [339], Jamadar JCCJ stated that the rule of law is a principle of constitutional morality and that the arbitrary exercise of constituted power is, therefore, subject to this "constituent morality". At para. [340] he pointed out that "accountability, equality and respect for persons, contracts and property, as well as administrative fairness, feature as essential aspects of the rule of law".

[99] Having regard to the *dicta* expounded above, the importance and value of the rule of law are accepted as a broad concept overarching Westminster-derived

constitutions, such as in this jurisdiction. It may have been open, therefore, to the Full Court to consider the issue of the overall delay as a principle of constitutional morality and whether it could be determined to be “the arbitrary exercise of constituted power.” In those circumstances, a finding of unconstitutionality may not have been inconsistent with the finding that the good-faith certificates could have been issued outside of the emergency period. However, the issue not having been raised in the fixed date claim form and the respondents having had no opportunity to provide any possible explanation as to the cause or reason for the delay, the Full Court was in no position to embark upon any examination or analysis of the issue, so as to determine whether the delay in acting by the Minister should be impugned as being inconsistent with the rule of law.

[100] Further, to the extent that the principles of fairness and unreasonableness (emphasized by the majority) are part of a nuanced approach to the concept of the rule of law, it should also be recognized that these principles are most relevant to judicial review. As Jamadar JCCJ expressed, “...judicial review of legislative and executive actions is the means by which ... accountability is rendered” (see para. [95] above). More will be said in the analysis of issue 8 about the appropriateness of judicial review as the forum for consideration of the Minister’s action in issuing the good-faith certificates. However, when one considers the judicial comments of Jamadar JCCJ made in the **Belize International Services Limited** case, it is clear that a detailed analysis of the state’s actions would be crucial to any determination on the point. The majority appear to have concluded that the Minister’s actions were unreasonable and unfair solely based on the delay of four years and six years, respectively, without more. L Pusey J recognized the court’s duty to balance the rights of the individuals with the powers of the state but did not consider how the rights of the soldiers may have been affected since they were distinct from the state, having been charged for the offence of murder.

[101] The issues involved were of an extraordinary nature and could not be considered as a run-of-the-mill administrative decision by the Minister. The circumstances leading

up to Mr Clarke's death involved a rare turn of events akin to a declaration of war, which led to the promulgation of the Regulations by the Governor-General. Dunbar Green J's observation at para. [61] is worth repeating in this regard (albeit, made relevant in regard to whether the good-faith certificates were properly issued subsequent to the expiry of the state of emergency). She stated that "[t]here is public interest in regulations being made for the efficacy of a state of emergency, including maintaining the morale of members of the security forces in very unique and difficult periods such as a war or state of emergency, and there is a public interest in there not being an abuse of executive powers". Both these considerations ought to have been given equal weight by the majority of the Full Court before concluding that the delay was such as to not be in conformity with the Constitution.

[102] The majority did emphasize that the fundamental rights and freedoms of the individual are subsumed in order to ensure the safety of the state and that it was important, therefore, for the state to act circumspectly in relation to any violation of these rights (para. [13], per L Pusey J). While these sentiments cannot be gainsaid, the violation of the rights of the soldiers (being stripped of potential immunity for the acts carried out during the emergency period) was not given any recognition. As Dunbar Green J expressed at para. [66], "[t]he defendants have no control over whether or when the Minister issues a certificate. The date of the request for one, length of time for internal procedures, political considerations and any number of vagaries can bear upon the question. ... On the facts before me I could therefore make no adverse findings in relation to the defendants".

[103] Mrs Clarke would, therefore, not have been entitled to a declaration that the good-faith certificates were null and void on the basis of delay since the reasons for the delay would have been an important element for consideration. Further, a balanced assessment was crucial before concluding that there was a breach of any constitutional principles of fairness and reasonableness.

[104] For all of the above reasons, we are of the view that the Full Court (majority) erred in the conclusion that the good-faith certificates were null and void as a result of the Minister's delay in their issuance.

[105] The soldiers' grounds a, b, c, d, e, g, h and i and the AG's grounds (i), (iv) and (v) on this issue are therefore meritorious.

**Issue 6: Is there is a duty or legal requirement of fairness to the prosecution by which the good-faith certificates could be invalidated? (Soldiers' appeal ground f)**

The soldiers' submissions

[106] It was submitted that the majority's ruling which denied the soldiers the ability to rely on the good-faith certificates was manifestly unjust insofar as it placed the burden on the soldiers to prove (in the criminal proceedings) that they had acted in good faith. Regarding the soldiers' right to a fair trial, provided by section 16(1) of the Constitution, it was submitted that (i) the soldiers should not be hampered in their defence on the basis of the Minister's delay and (ii) the burden placed on them to provide evidence that they acted in good faith, so as to obtain immunity from trial, rather than on the prosecution, gives rise to serious issues in relation to their right to a fair trial.

[107] Further, it was contended that the consideration of fairness to the prosecution was improper as no such duty was owed, and furthermore, such a duty could not take precedence over the duty of fairness to the soldiers who are defendants in a criminal trial. If a balance of fairness is to be had, it should be tipped in favour of the soldiers' constitutional right to a fair trial, it was submitted.

The DPP's submissions

[108] On this issue, the DPP's submission was essentially that the soldiers retain a right to a fair trial and that any loss of the soldiers' ability to rely on the rebuttable presumption raised by the good-faith certificates does not affect them receiving a fair trial.

## Discussion

[109] Section 16 of the Constitution grants persons charged with a criminal offence the right to due process, which includes a fair hearing. In determining that the certificates should be declared null and void, the Full Court spoke to the issue of fairness that is required in a criminal trial; that all parties should have ample opportunity to prepare for trial and gather relevant evidence; that the delay was essentially unfair to the arms of the state which had instituted extensive investigations into the circumstances of Mr Clarke's death; and that this was now a legal hurdle being instituted some four years after the charges were laid (per L Pusey J at paras. [9] and [13]). It was also stated that it would not be fair to reverse the burden of proof at the trial at this time (per Nembhard J at para. [159]).

[110] However, the soldiers' right to a fair hearing would include the right to all available defences to the charge for which they must stand trial. The good-faith certificates provide the soldiers with a rebuttable statutory immunity to actions carried out by them in the exercise or purported exercise of their functions during the emergency period. In that regard, the Act and the Regulations were not found to have been unconstitutional, and the certificates themselves were found to be in keeping with the Constitution by the Full Court, save for the issue of delay discussed previously. The Act and the Regulations serve a dual process which was aptly described by Dunbar Green J, which is referenced at para. [101] above. In those circumstances, to simply cite unfairness to the prosecution could not be a sufficient basis on which to prevent the soldiers from relying on the certificates.

[111] Further, the fact that the good-faith certificates were issued before any trial had commenced should also have been given some weight by the majority. The prosecution would have essentially been in the same position if the certificates had been issued in 2012, 2013 or any year before 2018, as no trial had commenced prior to the certificates being presented. The prosecution's burden would remain the same, to rebut the presumption of good faith in order to commence the trial of the soldiers for the death of

Mr Clarke. Certainly, the presentation of these good-faith certificates ought to have been done timeously, and it is indeed regrettable that there was a delay of six years after the bringing of the charges, before the presentation of the good-faith certificates. However, there is no basis on which to conclude that the prosecution has been or will be hindered in the presentation of relevant evidence at any trial if the shield of good faith is not removed, prior to the commencement of trial.

[112] As stated previously, the Regulations do allow the prosecution an opportunity to put forward evidence that could have the effect of removing the shield of immunity. This is seen by the wording of regulation 45(3), which stipulates that the certificates are sufficient evidence that the actions were carried out in good faith, “unless the contrary is proved”. Therefore, the common law principle of fairness (affording an opportunity to all parties involved in criminal proceedings to present the best possible evidence) is not abrogated by any burden on the prosecution to provide proof to the contrary.

[113] The soldiers’ ground f succeeds.

**Issue 7: Did the Full Court err in its determination of the legal effect of the good-faith certificates? (Mrs Clarke’s first counter-notice of appeal ground b and Mrs Clarke’s second counter-notice of appeal grounds b and f)**

**Issue 8: Did the Full Court err in its consideration of the proper forum in which to challenge the good-faith certificates? (Soldiers’ appeal grounds j and k and AG’s appeal grounds (ii) and (iii))**

[114] The submissions in relation to issues 7 and 8 will be set out jointly for the sake of expediency.

#### The soldiers’ submissions

[115] In disputing that the good-faith certificates could be challenged at trial, it was presented that the correct interpretation of regulation 45, premised on its plain and ordinary meaning, is that a challenge to the good-faith certificates should occur before proceedings are initiated or at the very least before commencement of trial. This interpretation, Queen’s Counsel contended, was found in the purpose of the

Regulations, that is, to prohibit institution of proceedings against members of the security forces in respect of acts done in good faith during the emergency period. Therefore, he continued, any challenge to the good-faith certificates must be raised and finally determined prior to any criminal charges being laid.

[116] Moreover, it was submitted that it would be necessary to determine the existence of good faith before trial, regardless of whether good-faith certificates were actually issued. That reasoning was premised on the argument that the good-faith certificates are only evidence of good faith but that it is the Regulations which provide immunity from trial, unless good faith is disproved. Additionally, it was proffered that any challenge to the good-faith certificates is merely an extension of “proving to the contrary” under the Regulations and, as such, could not be cured by proving the contrary during trial.

#### The AG’s submissions

[117] Counsel postulated that the majority had erred in finding that the good-faith certificates could be rebutted at the trial. Having regard to the purpose of regulation 45, to protect members of the security forces from suit or prosecution for actions done in good faith during an emergency period, charges could, therefore, be laid only where the presumption of good faith is rebutted. Accordingly, it could not have been the intention of the drafters of the Regulations for the presumption to be rebutted at the trial stage, as that course would have defeated the purpose of the Regulations.

#### The CDS’ submissions

[118] It was submitted that immunity is conferred by the Regulations and that the extent of the Minister’s role pursuant to regulation 45(3) is to certify that the acts were performed in good faith, unless the contrary is demonstrated. The Minister thereby provides a rebuttable evidential basis for immunity, as conferred by the Regulations.

[119] In response to a question from the panel, Queen's Counsel submitted that where the Minister did not issue a good-faith certificate and a charge was laid, it would be for the defendants to raise the issue of immunity at the criminal trial. This would be in the nature of a special plea in bar. By way of example, counsel referred to the principle of *autre fois* acquit and convict, a pardon or diplomatic immunity, which would be tried and resolved. He contended that once the good-faith certificates were issued, the situation would be quite different; that, in those circumstances, the challenge should be by way of judicial review proceedings.

#### Mrs Clarke's submissions

[120] With relation to the legal effect of the good-faith certificates, it was contended that their wording "[s]hall be sufficient evidence" necessitated that they constituted evidential tools to be used in trial and could not have been intended to give the Minister the authority to grant absolute immunity from criminal prosecution. It was further submitted that the good-faith certificates were valuable only to the extent that they may be used in a trial.

[121] Counsel further submitted that the issues arising in the claim were essentially constitutional and that, compounded with the fact that no preliminary objection was taken to the institution of the claim, judicial review was inappropriate. Moreover, the submissions continued, the challenge to the legality of an Act could not be limited to judicial review proceedings.

[122] Counsel also submitted that even if the good-faith certificates were valid, the use of the words "unless the contrary is proved" (as set out in regulation 45(3)), empowers the court to evaluate whether the Minister's power in issuing the good certificates was properly exercised. Therefore, it was submitted the court's power of review is not diminished, and the argument that judicial review is the appropriate medium to challenge the issuance of the good-faith certificates is without merit.

[123] Furthermore, counsel labelled as incongruous the AG's argument that the object of regulation 45 is to prevent charges being laid against members of the security forces who acted in good faith unless the presumption of good faith is rebutted. It was advanced that such an interpretation would protractedly prevent the DPP from instituting prosecutions, as it would still be open to the Minister to issue good-faith certificates in the future.

#### INDECOM's submissions

[124] As it related to the effect of the good-faith certificates, counsel submitted that the certificates do not have to be accepted if they do not properly state the basis on which they were issued and further that they may be rebutted if there is evidence to contradict the assertion of good faith. It was also contended that the court is empowered to look behind the certificates as can be done in a claim for public interest immunity. Reliance was placed on the case of **R v Shayler** [2002] UKHL 11.

#### The DPP's submissions

[125] Crown Counsel observed that the Act had failed to stipulate the proper forum in which to establish the validity of the good faith claimed by the soldiers and asserted that this could be conducted within the criminal justice process. Further, it was submitted that such a course would be in accordance with the aim of section 48(g) of the Judicature (Supreme Court) Act to avoid a multiplicity of proceedings.

#### Discussion in relation to Issue 7

[126] On a plain reading of regulation 45(1), no prosecution should be instituted against members of the security forces for acts done (for public safety, restoration of order or preservation of peace) in good faith during the emergency period. Acts done in good faith would therefore provide a bar to prosecution as long as the shield of good faith is raised. If a member of the security force is relying on good faith, without the grant of a good-faith certificate, there would be an onus on that member to raise the

issue, prior to the institution of prosecution. It cannot be assumed that the act was done in good faith. In that event, some preliminary process before a judge alone could be held to determine if the shield of good faith could stand to bar institution of any prosecution. In the case at bar, the soldiers did not raise this shield prior to prosecution being instituted in 2012. However, they would have had the liberty to assert good faith at the commencement of the trial process. If this had been done, again, there would have had to be a preliminary process to establish whether good faith could stand, as they were entitled to exercise their right to this potential statutory immunity. In this scenario, where good faith is raised prior to trial, but in the absence of a certificate, it does appear, as counsel for the CDS has submitted, that the proper and prudent course to be adopted, would be in the nature of a special plea in bar to be tried and resolved. If the court rules that good faith has been established, then any pending trial would be aborted.

[127] However, once the good-faith certificate is issued, the effect is different. By virtue of regulation 45(3), the certificate provides a rebuttable presumption that the acts were done in good faith (see judgment of this court in **AG of Jamaica v Claudette Clarke and Ors** at para. [39]). The issue would not have to be raised by the soldiers. Since the certificates presume that the acts were done in good faith, there is a bar to the institution of any prosecution, unless contrary proof is established.

[128] In the present case, the soldiers were charged with the murder of Mr Clarke and the prosecution was instituted by way of a voluntary bill of indictment issued on or about 30 July 2012, some six years prior to the presentation of the certificates on 9 April 2018. The prosecution would not have been aware of the soldiers' intention to rely on good faith by the presentation of the certificates. While these are circumstances that could ostensibly bring the criminal justice system into disrepute (or at the least, circumstances that militate against the efficient operation of the system of justice), the issue must be resolved fairly.

[129] In that regard, the prosecution ought to be allowed to rebut the presumption of good faith. If the prosecution fails to rebut the presumption of good faith, then a trial should not be commenced. This may appear to be a predetermination as to *mens rea* for the death of Mr Clarke, but, in effect, it is an administrative assessment made by the Minister certifying that the acts done by the soldiers were done in good faith. The good-faith certificates do not predetermine culpability, as their existence does not prevent the DPP from mounting a prosecution once proof to the contrary (in regards to good faith) has been established. As both the Full Court and this court expressed, the good-faith certificates create “a rebuttable presumption that the soldiers acted in the capacity provided for in the Regulations and in good faith” (see **AG of Jamaica v Claudette Clarke and Ors** at para. [39]).

[130] The Full Court correctly determined the legal effect of the good-faith certificates. Mrs Clarke’s 1<sup>st</sup> counter appeal ground b and 2<sup>nd</sup> counter appeal grounds b and f, fail.

#### Discussion in relation to Issue 8

[131] That having been said, what must be resolved is the proper forum for the determination of whether the good-faith certificates should stand. The Act and the Regulations do not establish any forum for a challenge to be mounted to the good-faith certificates. Whereas there was no comment by Nembhard J on the appropriateness of judicial review as a forum in which to challenge the good-faith certificates, L Pusey J found that the Minister’s actions could be challenged by judicial review (see para. [12] of the Full Court’s decision). Dunbar Green J, on the other hand, opined that judicial review would not be the appropriate forum and, further, that immunity could be asserted as a preliminary point before the trial judge, which should be decided prior to arraignment (see paras. [34] and [35] of the Full Court’s decision).

[132] We accept that a proper challenge to the Minister’s decision should be by way of judicial review. Albert Fiadjoe in the text *Commonwealth Caribbean Public Law* (third edition), in examining the concept of judicial review, summarised at page 15 as follows:

“...the jurisdiction of the superior courts to review laws, decisions, acts and omissions of public authorities to ensure they act within their given powers. Broadly speaking, it is the power of the courts to keep public authorities within proper bounds and legality... Its jurisdiction is always invoked at the instance of a person who is prejudiced or aggrieved by an act or omission of a public authority.”

[133] The judicial review process would have allowed the court to review the Minister’s decision-making process and to determine whether relevant or irrelevant considerations were taken into account. In so doing, the court would ascertain whether there was any illegality, procedural impropriety, unreasonableness, irrationality and whether the Minister’s actions were proportionate (see the cases of **Council of Civil Service Unions and others v Minister for the Civil Service** [1985] AC 374 and **Associated Provincial Picture Houses Limited v Wednesbury Corporation** [1948] 1 KB 223). The DPP had renewed an application for leave to proceed to judicial review but this was refused by the Full Court (composed of different judges) on 7 May 2019. Accordingly, the CPR does not provide for any further challenge by the DPP (rule 56.5 of the CPR). A claim by any other party for judicial review may also prove challenging at this stage in light of the time which has elapsed since the presentation of the certificates (rules 56.6 (1) and (2) of the CPR).

[134] That said, when the actual wording of regulation 45(3) is considered in its context, judicial review would not be the only avenue available to the prosecution to challenge the shield of immunity. Certainly, the issue of good faith is broader in concept than the reasons that the Minister may give for his decision; a review of relevant factors that were considered by him; or whether he acted within his given powers. Regulation 45(3) states that the certificate shall be sufficient evidence that the acts of the members of the security forces were done in good faith unless the contrary is proved. The DPP is, therefore, at liberty to present evidence that the actions of the soldiers were not done in good faith. As Dunbar Green J expressed in para. [33] of her judgment “... what [the certificate] asserts can be challenged by proof that it is factually incorrect. If it were otherwise, the Minister could sign away the citizen’s fundamental

right to life even if there were strong allegations that the life was taken in circumstances which could not be justified by the state of emergency”.

[135] In that regard, there are avenues that exist within the broad framework of the criminal justice system that could be adapted to facilitate a determination of this process. The DPP referred the court to section 48(g) of the Judicature (Supreme Court) Act which reads:

“The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided.”

[136] Such a preliminary process, within the jurisdiction of the criminal justice system of the Supreme Court, would not nullify Parliament’s intent that a prosecution should not be instituted unless the actions of the security forces are proved not to have been done in good faith. This may have been the reasoning behind Dunbar Green J’s statement that the opportune time to deal with this issue is before arraignment and that it does not necessarily require judicial review in order to determine the reasons the Minister issued the certificates or the circumstances surrounding their issuance (see para. [35] of the Full Court’s judgment).

[137] Our view of this matter is fortified by the circumstances of the case at bar. The prosecution alleges that Mr Clarke was murdered by the soldiers. In this regard, it is expedient to consider, to some extent, what could be understood to be good faith within the criminal process. Dunbar Green J referred to the reasoning behind this concept at para. [28] of the Full Court’s judgment:

“Although not stated expressly in the contested provisions, it can be deduced that during a period of public emergency the

security forces may be required to and must be relied on to operate in unusual circumstances and exercise unusual powers. In those situations, the inherent dangers and risks that are sometimes necessary to protect the public can have a chilling effect on members of the security forces if they fear personal exposure to prosecution when they are performing their lawful duties. It seems to me that the immunity which is granted by Regulation 45 is therefore designed to ensure that members of the security forces, provided they act lawfully, should do so without fear if they are required to exercise powers which in normal times could be a violation of law.”

[138] The Concise Oxford Dictionary, 10<sup>th</sup> edition definition aside (referenced at para. [49] above), good faith is not easily defined within the criminal process. It is usually a concept understood within the context of commercial activities and the civil law. In attempting to understand the concept, extracts from an article discussing the concept of good faith within the theory of crime are considered. This article is not presented as a determination as to any final pronouncement on the issue but to inform on the problematic nature of the concept.

[139] The authors, Zafer Icer and Yusuf Yasar, in an article, “The Concept of ‘Good Faith’ in Criminal Law”, published in the Journal of Penal Law and Criminology 2019 by the Istanbul University Press, discussed the concept within the context of the Turkish Penal Code. The abstract taken from the article commences:

“Good faith is unfamiliar to criminal law because it is a private law-based concept. In criminal law, the concept of good faith has no normative counterpart in crime theory. Moreover, the doctrine of criminal law does not include the notion of goodwill within the theory of crime. ... it is not possible to accept it as a form of appearance of the moral element of the crime or as a form of view of the moral element, nor it is able to substitute intention. Because the intention is the deliberate and desired realization of the objective elements of the crime, it has a completely different meaning and function to the concept of good faith.”

[140] While Icer and Yasar explained the concept of good faith within civil law, the role of good faith in the general theory of crime within the context of the Turkish Penal

Code ('TPC') is also examined. They emphasized that in the TPC, the concepts of "intention" and "negligence" are defined as the moral elements of the crime. Further, that these concepts appear to be preferred in many countries as seen from an examination of the comparative law criminal laws of those countries.

[141] The authors opined that in criminal law, due to the similarity with intent, it can be considered that the concept of good faith is a moral element of the crime or a form of appearance of the moral element; that for this reason, it is quite natural to think that the concept can be positioned within the moral element of crime in the general theory of crime. However, that even in the explanation of concepts such as intention and negligence, it is not possible to come across the concept of good faith; it is "purely a private law concept and no legal result has been established in terms of the existence or absence of elements of the offense, whether the persons have good faith or not under the criminal law".

[142] It does appear, therefore, on one understanding of the concept, that good faith may be an element relevant to the issue of intention. The problematic nature of this concept within criminal law tends to strengthen the view that the issue can and should be properly determined within the criminal justice system. This is so, as it would be important to assess the concept of *mens rea* and whether *mens rea* for murder or any other criminal offence can be made out to trump the shield of immunity.

[143] For all the above reasons, in the case at bar, the soldiers having already been charged for murder, we would propose that an appropriate preliminary hearing is held in order to determine whether the soldiers should be tried for the murder of Mr Clarke. We would conclude that the forum should be one that takes place within the criminal justice process. It will be recalled that regulation 45(3) speaks to the effect of any good-faith certificate issued by the Minister. It is there stated that any act referred to in the certificate shall be deemed to have been done in good faith "unless the contrary is proved".

[144] Unfortunately, however, the Regulations do not offer any guidance as to how that process is to be conducted – that is, how the contrary is to be proved. It seems to us that such a process would most usefully be conducted by a judge of the Supreme Court, sitting without a jury, following the general outline of a *voir dire*, such as those conducted to determine the admissibility of a statement. So, we anticipate that there will be the giving of sworn testimony, cross-examination, and re-examination, where necessary, followed by submissions of counsel and, at the end, by the judge's ruling on the issue.

[145] The soldiers' grounds of appeal j and k and the AG's appeal (ii) and (iii), therefore, fail.

## **Conclusion**

[146] Based on our consideration of all the issues relevant to these appeals and counter appeals, we are of the view that the Full Court correctly determined that the grant of the good-faith certificates did not infringe on the doctrine of the separation of powers, or the powers of the DPP, and that the Regulations themselves do not breach the Constitution. Further, the said certificates give rise to a rebuttable presumption of good faith and could properly have been issued outside of the emergency period, although issued six years after the incident to which they relate. The Full Court erred however, in determining that the delay in issuing the certificates was manifestly unfair and unreasonable and that as a result of such delay, the soldiers should not be allowed to rely on them.

[147] Arising from these determinations, we have concluded that it is not necessary in this case that the certificates be challenged by way of judicial review but rather, in the circumstances, that a preliminary determination be made by a judge of the Supreme Court sitting without a jury. This is to determine whether the DPP has provided proof to the contrary of the "good faith" asserted by the Minister's certificates. Mrs Clarke's first

and second counter-notices of appeal would be dismissed and the appeals of the soldiers and the AG allowed, in part.

## **V HARRIS JA**

[148] I have read in draft the judgment of F Williams and Straw JJA. I agree with their reasoning and conclusion and have nothing further to add.

## **F WILLIAMS JA**

### **ORDER**

1. The soldiers' appeal is allowed in part, in that the majority order of the Full Court that: "the Good Faith Certificates or any Certificate issued on 22 February 2016 by the Minister of National Security outside of the Emergency Period were issued in circumstances that were manifestly unreasonable and unfair and are therefore null and void and without effect" is set aside.
2. The AG's appeal is allowed in part, in that the majority order of the Full Court that "the Good Faith Certificates or any Certificate issued on 22 February 2016 by the Minister of National Security outside of the Emergency Period were issued in circumstances that were manifestly unreasonable and unfair and are therefore null and void and without effect", is set aside.
3. Mrs Clarke's first counter-notice of appeal is dismissed.
4. Mrs Clarke's second counter-notice of appeal is dismissed.
5. The order of the Full Court that: "[T]he criminal trial initiated by virtue of the Voluntary Bill of Indictment originally issued in July 2012 by the Director of Public Prosecutions should be restored to the trial list and be permitted to continue", is affirmed; save only that the trial is to be preceded, before arraignment, by a process in the nature of a *voir dire*, conducted by a judge, sitting without a jury, to determine whether the Director of Public Prosecutions can rebut the certificates of good faith issued by the Minister.

6. The said preliminary process shall be conducted by the taking of *viva voce* evidence, with statements and/or affidavits to be filed and exchanged in advance.
7. There shall be no order as to costs, unless within 14 days from the date of this order, written submissions are filed and served by the parties for the court to make an alternative order, after a consideration of the matter on paper.