[2018] JMSC Full 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016HCV01427

THE HONOURABLE MR JUSTICE BRYAN SYKES, CHIEF JUSTICE (AG)

THE HONOURABLE MRS JUSTICE CAROL LAWRENCE BESWICK, SENIOR PUISNE JUDGE

THE HONOURABLE MRS JUSTICE LISA PALMER HAMILTON (AG)

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

IN THE MATTER OF AN APPLICATION BY THE APPLICATIN ALLEGING BREACH OF HIS CONSTITUITONAL RIGHTS UNDER SECTION 13 (h) OF THE CONSTITUTIONAL REDRESS PURSUANT TO SECTION 19 OF THE CHARTER OF RIGHTS AND FREEDOMS (CONSTITUTIONAL AMENDMENT) ACT 2011

AND

IN THE MATTER OF AN APPLICATION BY SEAN W HARVEY

BETWEEN	**SEAN W HARVEY**	**CLAIMANT**
AND	**BOARD OF MANAGEMENT OF MONEAGUE COLLEGE**	**FIRST DEFENDANT**

AND	**MINISTRY OF EDUCATION YOUTH AND INFORMATION**	**SECOND DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**THIRD DEFENDANT**

IN OPEN COURT

Trudy Ann Dixon-Frith and Kristopher Brown instructed by DunnCox for the claimant

Tamara Dickens and Taniesha Rowe-Coke instructed by the Director of State Proceedings for the defendants

Constitutional law – Allegations of unequal and inhumane treatment – Whether teachers' college a public authority – How to determine whether an entity is a public authority – Charter of Fundamental Rights and Freedoms, Sections 13 (1), (2), (3) (h), 4

February 19, 20 and June 29, 2018

SYKES CJ (AG)

[1] Mr Sean Harvey is visually impaired. He makes the claim that he was not employed by Moneague College ('the college') because of his 'visual impairment and disability.' According to Mr Harvey, in July 2014 he applied for the post of lecturer in social work. This he did after becoming aware of an advertisement placed in a local newspaper in June/July 2014. He was invited for an interview on July 31, 2014.

[2] He claims that after the July 31, 2014 interview, he was contacted by Ms Jacqueline Haye, Personnel Manager of the college, who told him that his interview went well but he was not chosen because the college buildings could not accommodate persons with his disability. There is no other evidence of this conversation. It is only his word. Needless to say, Ms Haye has denied saying what has been attributed to her. None of the candidates shortlisted arising from the June/July 2014 advertisement was selected.

[3] The post of lecturer in social work was again advertised in August 2014 and he applied a second time. He resubmitted his application and attached a letter informing the college that he was visually impaired but that would not affect his ability to access the college buildings. He says that Ms Haye contacted him and told him that he did not meet the requirements and so his application failed.

[4] Mr Harvey states that he asked for information about the interview process but the response was that the interview was unstructured and so the college was unable to provide him with the actual text of the questions asked at the interview of all the candidates who were interviewed. The college, he says, was unable to say whether similar questions were asked of each candidate. He adds that score sheets were not provided to him because the college told him that the score sheets were discarded after the successful candidate was interviewed.

[5] He makes the assertion that all of this amounts to a violation of section 13 (3) (h) of the Charter of Fundamental Rights and Freedoms ('the Charter'). Section 13 (3) (h) requires Mr Harvey to prove that the 'right to equitable and humane treatment by a public authority in the exercise of any function' has been violated in relation to him. The violation, he submits, arose because he was well qualified for the job and was unfairly treated on account of his visual impairment. This assertion will be shown to be inaccurate because Mr Harvey did not meet two of the three requirements for the job at the time of his application and interview. The requirements he failed to meet, which were specified in both advertisements were (a) teaching certification and (b) five years teaching experience. To use his

words, he 'was refused the opportunity of employment by reasons of discrimination on grounds of [his] visual impairment and disability.' This violation, he asserts, has caused him to suffer loss and he seeks compensation by way of damages.

[6] The Ministry of Education, Youth and Information ('the ministry') is part of this claim, Mr Harvey says, on the basis that it 'is a statutory body responsible for the management and administration of public education in Jamaica' and also that it is responsible for the college. No specific allegation was made against the Ministry.

[7] Mr Harvey's version of events has been contested by the college which has responded by evidence from Ms Jacqueline Haye. The college states that Mr Harvey did not meet the stated criteria.

The alleged violation

[8] It is necessary to state the provisions of the Constitution that are engaged by this case. Section 13 (1), (2), (3) (h) and (4) of the Charter of Fundamental Rights and Freedoms are set out:

> *(1) Whereas*
>
> *(a) the state has an obligation to promote universal respect for, and observance of, human rights and freedoms;*
>
> *(b) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and*
>
> *(c) all persons are under a responsibility to respect and uphold the rights of others recognised in this Chapter*
>
> *the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those*

rights and freedoms do not prejudice the rights and freedoms of others.

(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society –

(a) this Chapter guarantees the rights and freedoms, set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and

(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

(3) The rights and freedoms referred to in subsection (2) are as follows:

(a)…

(h) the right to equitable and humane treatment by a public authority in the exercise of any function;

(4) This Chapter applies to all law and binds the legislature, the executive and all public authorities.

[9] Section 13 (1) sets out the aspirations of the Charter. It declares that Jamaica is not just a democratic society but also a free one. It states the commitment of the state to promote universal respect for and observation of human rights and freedoms. Those rights and freedoms, the subsection declares, arise not because the state confers them but from the simple fact that human beings are entitled to them just by being human which itself means that humans have inherent dignity.

[10] Section 13 (1) leads to subsection (2) which states that certain rights are guaranteed and inferentially enforceable by court action.

[11] The approach to constitutional interpretation is now so well established in our jurisprudence that the principle can simply be summarised without extensive

citation of authority. The primary principle is that a constitution is a unique document and is not to be interpreted like the normal Act of Parliament although it is an Act of Parliament. It has been said that a constitution should be given a generous interpretation subject to the limitations found in the constitution itself. The jurisprudence has also recognised that because a constitution is a legal instrument which gives justiciable and enforceable rights respect must be had to the language used as well as to the 'traditions and usages which have given meaning to that language' (**Minister of Home Affairs v Fisher** 44 WIR 107). In the case of the Jamaican Charter, the traditions and usages of the meaning of the language can only mean traditions and usages of the language as used and understood in Jamaica. This Charter was enacted by the Jamaican Parliament who were elected by us. The previous Bill of Rights (the equivalent of the present Charter) was enacted by a foreign legislature by persons who were not elected by Jamaicans but who consulted with the elected representatives of Jamaica. To use the words of Professor Trevor Munroe, this new Charter is autochthonous and not bequeathed by the former colonisers. This respect for the language is necessary because, as noted earlier, not every conceivable right has been guaranteed by the constitution and the language tells us which ones the constitution has selected, guaranteed and therefore made 'justiciable and enforceable.'

[12] It was restated that 'the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution' but 'it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty' and therefore a 'generous and purposive interpretation is to be given to constitutional provisions protecting human rights.' However, the 'court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society.' Finally, it has been said that in 'carrying out its task of constitutional interpretation the court is

not concerned to evaluate and give effect to public opinion' (**Patrick Reyes v R** (2002) 60 WIR 42, 55 (Lord Bingham)).

[13] There appears to be a potential source of inconsistency in this passage by Lord Bingham but that need not be addressed in full at this time. Suffice it to observe that his Lordship did not indicate the means by which the judge is to come to this understanding of 'evolving standards of decency that mark the progress of a maturing society.' Whose opinions are important in this regard given that the judge 'is not concerned to evaluate and give effect to public opinion'? So public opinion is excluded but whose opinion matters for the purpose of determining the content of 'evolving standards of decency that mark the progress of a maturing society'? Academics, international agencies such as the United Nations? If so what gives academics, international agencies or any other sufficiently self or otherwise anointed person any inherent greater ability to decide 'evolving standards of decency' than that of the public of Jamaica? Or is it that Lord Bingham was a making case for only the elite, however identified, to be the sole arbiters of 'evolving standards of decency'? This seems like an embryonic anti-democratic view; a surprising position in an age when democracy is being touted – by many - as the best of the variant forms of government. In any event, all that is meant by these two cases is that a generous and purposive interpretation cannot yield a meaning that the words actually used cannot bear and that the words used had a meaning at the time they were used.

[14] What this means is that language has meaning. If it did not have meaning, then no communication could take place. Written language is the tangible symbol by which the maker of the symbols conveys the idea in his or her mind to the mind of the reader. The written language usually has rules that make communication possible. Effective communication between reader and writer means that both know the rules. That, incidentally, is what grammar does. It allows communication when both the communicator and communicatee know the grammar of the language used. It follows that when the writer of the symbol uses certain symbols, that is to say, words, he or she is using them on the premise

that the reader of the symbols shares the same or at least similar understanding of the meaning of the symbols used as well as the extant grammatical rules. At the time when the writer wrote, presumably the words had meaning which means that there is – despite the efforts of many - such a thing as original intent, that is to say, the words, regardless of how long ago they were written had a meaning that was understood by the writer and by the reader, at the time they were written. If that were not so Shakespeare's body of work would have been unintelligible at the time he wrote and even more so now. The same can be said for Homer's Iliad. The notion that one cannot gain access to the likely original intent of the writer of a text is simply not as well founded as some have claimed. In the same way that writers today indicate their preference by using words so too did writers of long ago. There are not many persons who make the claim that Shakespeare's work should not be understood today as he had written it several hundred years ago but somehow a constitution that was written even a few years ago has lost its original meaning and becomes the subject of a generous interpretation – often times code for reading into the constitution the current predilection of the day - regardless of what the writer(s) of the text meant despite the fact that there is a procedure for amendment which incidentally has been utilised in Jamaica several times with apparent success.

[15] The meaning attached to any symbol used is not inherent. This is why Lord Wilberforce in **Fisher** spoke of having regard to the 'traditions and usages of that language.' The phrase 'traditions and usages' recognises the fact that language not only has a logical or intellectual dimension but also a psychological dimension.

[16] Since Mr Harvey relies on section 13 (3) (h) and the defendants have resisted the claim on every aspect of the provision, that is to say, the college is saying that (a) it is not a public authority, (b) there was no inequitable and inhumane treatment and (c) it was not exercising any function that attracted constitutional obligations. The first question to be decided is whether the college is a public authority within the meaning of section 13 (3) (h) of the Charter.

Is the college a public authority under section 13 (3) (h) of the Charter?

[17] Since the claim is based on section 13 (3) (h) it must be established that the college is a public authority. Mr Harvey stated that the college is 'a statutory tertiary multidisciplinary institution.' To say that the college is a statutory tertiary institution is not sufficient because the fact that an entity is established by statute, does not, without more, make it a public authority. The reason is given by Lord Mance in **YL v Birmingham City Council and others** [2008] 1 AC 95 at paragraph 101; page 131:

> *…, the mere possession of special powers conferred by Parliament does not by itself mean that a person has functions of a public nature. Such powers may have been conferred for private, religious or purely commercial purposes.*

[18] Some assistance on what is a public authority can be drawn from **Aston Cantlow and Wilmcote and Billesley Parochial Church Council v Wallbank** [2004] 1 AC 546. The context is different from that of the Charter but the ideas are helpful. Lord Nicholls, in speaking of what is called in English jurisprudence core or standard public authorities for the purpose of section 6 (1) of the Human Rights Act ('HRA'), said at paragraph 7; page 554:

> ***7*** *Conformably with this purpose, the phrase "a public authority" in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression. It is in respect of organisations of this nature that the government is answerable under the European Convention on Human Rights. Hence, under the Human Rights Act 1998 a body of this nature is required to act compatibly with Convention rights in everything it does. The most obvious examples are government departments, local authorities, the police and the armed forces. Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution: see the*

valuable article by Professor Dawn Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act": [2000] PL 476.

[19] This passage is based on the distinction drawn under the HRA between core/standard public authorities and hybrid public authorities. The distinction comes out very clearly in the judgment of Lord Hope in **Aston Cantlow** at paragraph 35; page 561:

> ***35*** *It is clear from these provisions that, for the purposes of this Act, public authorities fall into two distinct types or categories. Courts and tribunals, which are expressly included in the definition, can perhaps be said to constitute a third category but they can be left on one side for present purposes. The first category comprises those persons or bodies which are obviously public or "standard" public authorities: Clayton & Tomlinson, The Law of Human Rights (2000), vol 1, para 5.08. They were referred to in the course of the argument as "core" public authorities. It appears to have been thought that no further description was needed as they obviously have the character of public authorities. In the Notes on Clauses which are quoted in Clayton & Tomlinson, para 5.06, it was explained that the legislation proceeds on the basis that some authorities are so obviously public authorities that it is not necessary to define them expressly. In other words, they are public authorities through and through. So section 6 (5) does not apply to them. The second category comprises persons or bodies some of whose functions are of a public nature. They are described in Clayton & Tomlinson as "functional" public authorities and were referred to in the argument as "hybrid" public authorities. Section 6 (5) applies to them, so in their case a distinction must be drawn between their public functions and the acts which they perform which are of a private nature.*

[20] I have concluded that core or standard public authorities in English jurisprudence is what the Charter has in mind. The Charter does not contemplate hybrid public authorities.

[21] Before going on to identify the characteristics of a core public authority, Lord Neuberger in **YL** provides an idea that must be borne in mind even though I have decided that section 13 (3) (h) refers only to what can be called standard or core public authorities. The idea is that the performance of a core function may entail different acts. From this it is clear that a function that a public authority does may not necessarily be its core function or even a part of its core function. This means that not every act done by a public authority is subject to Charter obligations because that act may not be an act that is or a part of its core function. It is quite possible for a public authority to take on a function outside of its strict legal remit. For example, a statutory regulator of the banking sector providing lunch for the children of its employees. Put another way, the core function of an entity is not necessarily determined by its actions in any particular instance since its actions in a given circumstance may well be not connected to its core function. Thus the Public Defender may decide to subsidise the cost of its employees traveling to and from work. The idea just expressed is adumbrated by his Lordship at paragraphs 130 – 131; page 142:

> ***130*** *Section 6 is, at least in some respects, not conspicuous for the clarity of its drafting. Thus, there was some debate before your Lordships as to whether there was a distinction between "acts" and "functions" in the section. In my view, both as a matter of ordinary language and on a fair reading of the section, there is a difference between "functions", the word used in section 6 (3) (b), and "act[s]", the word used in section 6 (2) and (5) and defined in section 6 (6). The former has a more conceptual, and perhaps less specific, meaning than the latter. A number of different acts can be involved in the performance of a single function. So, if this appeal succeeds, a proprietor providing care and accommodation pursuant to section 26 (1) of the 1948 Act would be performing a "function", which, while "of a public nature", would involve a multitude of acts, many of which would be private-eg contracting for the purchase of food or for the consumption of electricity.*
>
> ***131*** *Accordingly, a core public authority is bound by section 6 (1) in relation to every one of its acts whatever the nature of the act concerned; there is therefore no need to distinguish between*

> *private and public acts or functions of a core public authority. On the other hand, a hybrid public authority is only bound by section 6(1) in relation to an act which (a) is not private in nature and (b) is pursuant to or in connection with a function which is public in nature.*

[22] While I cannot comment on the correctness of this as far as English law is concerned I would not adopt for Jamaica the idea that every act of a core public authority regardless of its nature must necessarily be part of its core function. It is my humble view that there is nothing in the logic that compels such a conclusion.

[23] The conclusion I have come to is that when deciding whether an entity is a public authority for the purpose of section 13 (3) (h) of the Charter regard must be had to its constitutive documents, that is to say, examine the documents which brought the entity into existence in order to determine what was it established to do. Thus even before its first day of operation, if there are constitutive documents, we should be able to say with a reasonable degree of certainty that its primary function or its reason for existence is such that it is a core public authority and that certainty, before it has done anything either good or bad, can only come from its constitutive documents because at that time it has not done any act or refrained from doing any act to such an extent that an inference about its function can be drawn. A broad guide is to see whether it was set up to carry out any governmental function whether at central or local government level. The legal form is not determinative but may be an important consideration. The passage from Lord Nicholl's judgment in **Aston Cantlow** provides some guidance on the entities that are obviously governmental and it is these which I have called core public authorities.

[24] It is now time to see if there are West Indian cases that assist in identifying public authorities that may be the subject of constitutional obligations. The cases were brought to my attention by her Ladyship Palmer Hamilton J (Ag). It is to these I now turn.

[25] In **Fort Street Tourism Village v Attorney General of Belize and others, Fort Street Tourism Village v Maritime Estates Ltd and others** (2008) 74 WIR 133 it became necessary to decide whether a private company was a public authority and therefore was bound by the fundamental rights provisions of the Belizean Constitution. The Court of Appeal said that it was not a public authority and therefore was not bound by the fundamental rights provisions. The court got there by a series of propositions, the main one being that the entity did not have coercive power. In stating its propositions, the Belizean Court of Appeal decisively rejected the idea advanced by the learned Chief Justice that the private company was subject to the constitution by way of horizontal application, that is to say, between private citizen and private citizen. Although the present Jamaican Charter speaks to horizontal application, the case was not argued on that basis and therefore that possibility need not be considered. The learned Chief Justice also held that it was not necessary that body should have coercive powers before it is subject to constitutional obligations.

[26] The Belizean Court of Appeal's reference to the necessity for the presence of 'coercive power' is supported by Lord Diplock in **Maharaj v Attorney General of Trinidad and Tobago (No 2)** (1978) 30 WIR 310, 318 where his Lordship said:

> *Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in s 1 already existed,* ***it is in their Lordships' view clear that the protection afforded was, against contravention of those rights or freedoms by the State or by some other public authority endowed by law with coercive powers.*** *The chapter is concerned with public law, not private law. One man's freedom is another man's restriction; and, as regards the infringement by one private individual of the rights of another private individual, s 1 implicitly acknowledges that the existing law of torts provided a sufficient accommodation between their conflicting rights and freedoms to satisfy the requirements of the new Constitution as respects those rights and freedoms that are specifically referred to.* (Emphasis added).

[27] The facts of the case give some idea of what Lord Diplock meant by coercive power. In that case Mr Maharaj was committed to prison by the trial judge in the exercise of the judicial power of the state. The executive arm of the state – the police - gave effect to the judge's order.

[28] This position was repeated by Lord Diplock in **Thornhill v Attorney General** (1976) 31 WIR 498, 515 – 516:

> *It is beyond question, however, that a police officer in carrying out his duties in relation to the maintenance of order, the detection and apprehension of offenders and the bringing of them before a judicial authority is acting as a public officer carrying out an essential executive function of any sovereign State, the maintenance of law and order or, to use the expression originally used in England, "preserving the King's Peace". It is also beyond question that in performing these functions police officers are endowed with coercive powers by the common law, even apart from any statute. Contraventions by the police of any of the human rights or fundamental freedoms of the individual that are recognised by Chapter 1 of the Constitution thus fall squarely within what has since been held by the Judicial Committee in Ramesh Lawrence Maharaj v Attorney-General (No 2) (1978) 30 WIR 310 to be the ambit of the protection afforded by section 6, viz contraventions "by the State or by some other public authority endowed by law with coercive powers" (30 WIR at page 318). In this context "public authority" must be understood as embracing local as well as central authorities and including any individual officer who exercises executive functions of a public nature.*

[29] In **Thornhill**, the context was an arrest by the police. The power to arrest is clearly coercive. In **Maharaj** the court was exercising coercive power and received the assistance of the executive branch of government in arresting and imprisoning Mr Maharaj. In **Thornhill** it was the police that arrested the person. If these two cases are representative samples of coercive power then at the very least coercive means acting against the will of someone or forcing them to do something that he, she or it does not want to do.

[30] To return to **Fort Street.** Mottley P held at paragraph 32; page 168:

> ***[32]*** *…The issue to be determined in this case was whether FSTV, being a private entity, had any coercive power so as to make it amenable to an action under s 20(1) of the Constitution for the protection of the fundamental rights as guaranteed under Ch 2 of the Constitution. The Chief Justice ought to have been guided by what was said by Lord Diplock in Maharaj's case and reaffirmed in Thornhill's case.* ***The rights are enforceable against the state or a public authority endowed with coercive powers****. Had the Chief Justice adopted this approach, he would have concluded that FSTV was not a public authority endowed with coercive power.* (Emphasis added)

[31] Carey JA stated at paragraph 71; page 179:

> *…**the authorities** of Thornhill v A-G of Trinidad and Tobago (1981) 31 WIR 498, [1981] AC 61, [1980] 2 WLR 510 and Maharaj v A-G of Trinidad and Tobago (No 2) (1978) 30 WIR 310, [1978] 2 All ER 670, [1979] AC 385* ***show that what is redressible under the Constitution, are contraventions of the rights and freedoms guaranteed under the Constitution, by the state or some other public authority endowed by law with coercive powers****. These authorities have neither been overruled, doubted, except by an academic, nor modified. We are, as part of the curial hierarchy, obliged loyally to follow and give effect to them on the principle of stare decisis.* (Emphasis added)

[32] Morrison JA was equally adamant at paragraph 132; page 198:

> ***[132]*** *So that while it may be that the Chief Justice was correct in thinking that the absence or presence of 'coercive powers', is not necessarily determinative of the issue whether the body or authority in question is amenable to judicial review,* ***it remains the position on a long and unbroken line of authority that for that body to be amenable to constitutional redress it must be a body endowed with functions, duties and powers of a public nature and clothed for the purpose of carrying out those functions with coercive powers****.* (Emphasis added)

[33] Their Lordships held that coercive power must be present. Being susceptible to judicial review is not enough to make an entity the subject of constitutional obligations.

[34] For the Belizean Court of Appeal, this was not new ground because in 1984, the same court made the same point in **Alonzo v Development Finance Corporation** [1985] LRC (Const) 359, 362 – 363 per Summerfield P:

> *The fundamental rights and freedoms protected by the Constitution are not intended as guarantees of purely private rights, that is rights as between one individual and another.* ***They are intended as protection afforded to individuals against any contravention of those rights and freedoms by the state or by some other public authority endowed by law with coercive powers.*** *The employer in this case, although a statutory corporation set up by an Ordinance, is not a public body endowed by law with coercive powers.* ***In its contractual relations with employees it is in exactly the same position as any private employer. Nothing turns on the fact that it is a statutory corporation. It is not exercising functions of a public nature when it engages personnel or terminates their contracts of employment.*** (Emphasis added)

[35] Summerfield P took the matter further by saying that even if the entity is a statutory body when it is dealing with its employees it is in the same position as a private person. It is possible to take this a step further and say that when seeking to employ someone it is in the same position as a private person.

[36] In the recent Barbadian case of **Auto-Guadeloupe Investissement SAS v Alvarez and others** (2014) 84 WIR 49 where counsel put the matter squarely before Kentish J with this submission at page 67:

> ***[56]*** *Contending that the jurisprudence has developed beyond Maharaj, counsel urges the court to embrace the statements of the Court of Appeal of Jamaica, as those statements do not seek to limit constitutional redress to infringements by the State or public bodies.*

[37] Kentish J declined counsel's invitation and went on to hold, what can be described as the orthodox position, namely, that constitutional redress can be had only against the state or public authorities. Kentish J held at paragraph 100; page 74:

> ***[100]*** *I am therefore satisfied that redress for contravention of the Constitution of Barbados is properly available only against the State or agencies of the State. To hold otherwise, I would be rejecting in the words of Conteh CJ that 'constitutional wisdom and legal orthodoxy regard the government, its agencies and departments ... as the ready and obvious candidate for amenability to public law for the purposes of redress'. To do so would be ill-conceived and wrong in the face of 'a long and unbroken line' of authorities to the contrary.*

[38] The same view had prevailed in the courts of the Republic of Trinidad and Tobago (**Dukaran Dhaban v The Port Authority of Trinidad and Tobago** HCA No S1591 of 2004 (unreported) (delivered on May 10, 2011) Amrika Tiwary-Reddy J; **Boxhill and others v The Port Authority of Trinidad and Tobago** Civil Appeal No 11 of 2008 (unreported) (delivered on February 28, 2013).

[39] The argument that was advanced before Kentish J in the Barbadian High Court rested on the Jamaican Court of Appeal and Privy Council case of **Grant v Director of Public Prosecutions** (1980) 30 WIR 246, Carberry JA took the view that that orthodoxy did not necessarily hold good for the then provisions of the Jamaican Constitution. The interesting thing about **Grant** is that the complaint was that the pre-trial publicity by a privately owned newspaper company had led to an infringement of the fundamental right to fair trial. The private newspaper was not made a party to the case. The action was brought against the Director of Public Prosecutions for failing to take steps to prevent the privately owned newspaper from continuing its breach. The entire case proceeded on the basis that the newspaper may have violate the right even though the newspaper was owned and operated by a private company. The claim failed because there were

other adequate means of redress available. Carberry JA put it this way at page 273:

> *So far as the Director of Public Prosecutions' argument was based on the observations in Maharaj's case (Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2) (1978), p 310, post, [1978] 2 All ER 607, [1978] 2 WLR 902, PC) that constitutional redress is available only against the State or some other such public body, Campbell J found the argument conclusive, and White J also accepted it.*
>
> *With respect, we agree with Smith CJ that the argument is not conclusive. We do not, as at present advised, agree that the remedies provided by the redress section in the Constitution are never available against or in respect of contraventions by private citizens.*

[40] This view of Carberry JA was not adversely commented on by Lord Diplock when the case went on appeal to the Privy Council whose judgment was delivered by Lord Diplock who, it will be recalled, spoke in terms that have been understood to mean that if an entity does not have coercive power then it is not or cannot be the subject of constitutional obligations. In the Privy Council Lord Diplock said at page 309:

> *Although the basic principles enshrined in all Constitutions on the Westminster model are the same, the language in which fundamental rights and freedoms are expressed and guaranteed is not the same in the Constitution of Jamaica as in the Constitution of Trinidad and Tobago; and the Court of Appeal in the instant case was rightly cautious about treating decisions on the Trinidad and Tobago Constitution as necessarily applicable without qualification to the Constitution of Jamaica.*

[41] It would seem that Lord Diplock was forced to pause and at least entertain the possibility of horizontal application by these words from Carberry JA at pages 274-275:

> *While it is true that the State (being either legislature, executive or judiciary) may provide the persons most likely to infringe the several provisions, for example by arresting or detaining persons, hindering their freedom of movement, compulsorily acquiring their property, charging them with criminal offences etc, it by no means follows that private persons may not be guilty of these contraventions; and there are some that are more likely to be committed by such persons than by the State. For example, depriving a person of his life (s 14); or entry on to private property (s 19); or hindering the freedom of conscience (s 21); or hindering the freedom of expression (s 22); or hindering the freedom of assembly or the right to form or belong to trade unions (s 23); and see also s 15(4). While, therefore, it is clear that the Constitution contains provisions aimed at imposing restrictions on the legislature, and the executive, it does not (with respect) follow that Lord Diplock's remarks in Maharaj's case (Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2) (1978), p 310, post, [1978] 2 All ER 607, [1978] 2 WLR 902, PC) limiting constitutional redress to contraventions by the State apply to the Constitution of Jamaica. Certainly, redress is obtainable against the category of person or State organisation that he mentions, but that it does not apply to contraventions by private persons does not necessarily follow, and in any event was not before their Lordships.*
>
> *As regards such actions against private persons, it may well be that on most occasions the existing remedies in tort will be such that the Constitutional Court, mindful of the proviso to s 25(2) will decline to exercise its powers because it is satisfied that adequate means of redress for the contravention are available. It is not, however, necessary for us to make any final decision on this matter, because we are concerned in this case with a potential contravention by the State, a failure to protect the due course of justice.*

[42] It may be said that even if Carberry JA is correct and assuming that Lord Diplock had indeed paused for thoughtful reflection on his previously stated position - that constitutional redress is not available against private individuals - it does not necessarily mean that regarding the state or public authorities those authorities need not have coercive powers. The cases that Lord Diplock had decided before **Grant** did not have to determine whether the entities in question were public

authorities. They were obviously so; one was a judge of the High Court whose order to arrest the lawyer was carried out by police **(Maharaj**), and the other was a police officer (**Thornhill**). Assuming the correctness of Carberry JA, the legal proposition would now read: constitutional redress is available against (a) the state or public authority with coercive powers and (b) a private citizen who need not have coercive powers.

[43] In the **Fort Street** case, the court stated that in addition to the presence of coercive power there were other features that ought to be present before an entity could be regarded as a public authority for the purpose of being a bearer of constitutional obligations. The legal standard for coming to that conclusion is called the 'combination of features test.' This expression comes from **Poplar Housing and Regeneration Community Association Ltd v Donoghue** [2002] QB 48 which was cited in **Fort Street**. **Aston Cantlow** and **YL** are both post **Poplar** decisions and other than a mild criticism of **Poplar** in **YL**, both **Aston Cantlow** and **YL** have confirmed that legal standard albeit in different language. **Poplar** was criticised in respect of the application of the test and only by two of the Law Lords in **YL**. The criticism was that **Poplar** was determined more by the close links between the housing association and the council rather than by its function (Baroness Hale **[61]**; Lord Mance **[105]**).

[44] This combination of features test is nothing more than a definition by characteristics by which the entity can be recognised as a public authority under the Charter. The court was not referred to any of the West Indian cases. Having taken into account the English cases including **R (on the application of Weaver) v London and Quadrant Housing Trust (Equality and Human Rights Commission intervening)** [2009] EWCA Civ 587, the West Indian cases

and the articles [1] I conclude that for the purpose of section 13 (3) (h) the features or factors that are to be used to decide whether an entity is a public authority are whether it:

(i) has political, administrative, regulatory, or coercive powers, given by statute or common law and not by private law;

(ii) receives public funding in whole or in part;

(iii) is a non-governmental organisation as suggested by its constitutive documents;

(iv) carries out central or local governmental functions;

(v) nature is governmental, central or local, in a broad sense?

(vi) is providing a public service;

(vii) is controlled by the executive.

[45] From these considerations it can be seen that the determination of whether a body other than the obvious ones such as the police is an intensely factual one. Even after these considerations are taken into account 'it is desirable to step back and look at the situation as a whole' (**Poplar** Lord Woolf **[66]**).

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[1] Oliver, Dawn, *The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act,* PL 2000 Aut 476 – 493; Oliver, Dawn, *Chancel Repairs and the Human Rights Act*, PL 2001 Win 651 – 653; Meisel, Frank, *The Aston Cantlow case: blots on English Jurisprudence and the Public/Private Law Divide*, PL 2004 Spr 2 – 10; Oliver, Dawn, *Functions of a Public Nature under the Human Rights Act*, PL 2004, Sum 329 – 351; Sunkin, Maurice, *Pushing Forward the Frontiers of Human Rights Protection: the meaning of public authority under the Human Rights Act*, PL 2004 Aut 643 – 658; Williams, Alexander, *A Fresh Approach to Hybrid Public Authorities under the Human Rights Act 1998: private contractors, rights-stripping and "chameleonic" horizontal effect*, PL 2011, Jan 139 – 163;

[46] All that has been referred to so far have been helpful in resolving the meaning of section 13 (3) (h) of the Charter. The Charter in its wording does not raise the issue of hybrids and so can be left out of account. It is my conclusion that the section only applies to those entities that are core public authorities by their intrinsic nature. That is why the documents or instruments that brought the entity into being are fundamental in determining whether an entity is a public authority. The very wording of the section confirms this view.

Application

[47] The relief claimed is based on section 13 (3) (h). This requires proof, whether by admission or evidence, that the college is a public authority. Mr Harvey has not placed before the court any material on the establishment of the college. We do not know, from the evidence presented, whether the college was established by statute, charter, a company under the Companies Act, a charitable organisation or whether it is an unincorporated body. There is no evidence of whether it is privately owned or operated but gets money from the government. There is no evidence of whether the college was carrying out a governmental function, central or local. The fact that it was regulated to some extent by the Ministry of Education is not sufficient. It is quite possible that the college is privately owned but is supported by the government. Privately owned licensed financial institutions in Jamaica are regulated by state regulators but that does not make them any less purely private bodies. It may be that the college is publicly owned but operated by a private entity for the government. The college may be owned and operated by the government. The fact of government support is not determinative. However, the evidence presented does not permit an answer either way.

[48] This issue is not academic because the authorities have made it plain that the existence of a statute establishing the entity is not conclusive that it is a public authority bearing constitutional obligations. When the court raised the matter, Mrs Dixon-Frith responded by submitting that it was pleaded that the college was a

statutory body. There is no evidence that the college is a statutory body but if such evidence existed it is not sufficient. Counsel referred to various provisions of the Education Act in order to establish that the college is subject to section 13 (3) (h) of the Charter. Those provisions will now be examined to see if Mr Harvey has made good his claim.

The Education Act

[49] Counsel relied on section 9 of the Education Act ('EA'). It reads:

> *(1) Every public educational institution shall be administered –*
>
> *(a) by a Board of Management, which shall consist of not less than three persons appointed in the prescribed manner and shall have such powers and duties as may be prescribed; or*
>
> *(b) where the Minister so directs, in accordance with the provisions of a scheme approved by the Minister.*
>
> *(2) Every scheme which provides for the management of a public educational institution shall contain provisions for the constitution, powers and duties of a Board of Management for the educational institution to which the scheme relates and shall also provide for the keeping and audit of the accounts of such Board in a manner satisfactory to the Minister.*
>
> *(3) The Minister may take such action as he may consider necessary whenever there is a serious failure in the successful working of any public educational institution and the Board of Management appointed under this section has failed, within a reasonable time after having been required by the Minister so to do, to provide a remedy for such failure.*

[50] Mrs Dixon-Frith next turned to section 2 of the EA where definitions are found. These are the ones counsel highlighted.

> *Board of Management means, in relation to any public educational institution, the Board of Management of that institution.*

Public educational institution means any educational institution which is maintained by the Minister and includes any aided education institution.

Teachers college means any institution established for the purpose of training teachers for service in public educational institutions.

[51] Counsel cited regulation 90 (1) of the Education Regulations made under the EA. The relevant part reads:

(1) The Minister shall, after consultation with the Board of Management of a public educational institution, determine …

[52] This is how the submission went after citing these provisions. The EA speaks to a Board of Management. Every public educational institution has a Board of Management. The college has a Board of Management. Therefore, the college is a public educational institution. From this comes the conclusion that a public educational institution is a public authority under section 13 (3) (h).

[53] This reasoning assumes the very thing that has to be proved. Nothing has been said about how the college was established. The defendants accept that the college is publicly funded since it is a public educational institution. This concession seems to be based on labels found in the EA (such as the definitions referred to above) rather than actual factual determination of whether the college is in receipt of public funds.

[54] As has been shown the fact of receiving public funds is not determinative. The fact that the government has some regulatory impact on the entity is not sufficient to make it a public authority for the purpose of section 13 (3) (h) of the Charter. Mr Harvey has not adduced sufficient evidence to prove that the college is a public authority under the Charter and therefore his claim fails on this ground.

Whether Mr Harvey's treatment was not equitable and humane

[55] Mr Harvey says he was told, by telephone, that he was not hired because he was visually impaired. Mrs Haye, from the college, denies that she told him what has just been stated.

[56] The factual background, in more detail, is that the post of lecturer in social work was advertised in June/July 2014. The requirements stated for the job were:

(i) Master's Degree in social work;

(ii) at least five year's teaching experience; and

(iii) teaching certification.

[57] Three persons were shortlisted including Mr Harvey. No one from this group was selected for the job. It was after the interview Mr Harvey said that Mrs Haye told him what has already been stated. It is common ground that Mr Harvey lacked teaching certification in June/July 2014.

[58] The post was re-advertised in August 2014. Mr Harvey sent an email to the college asking that he be reconsidered for the position of lecturer in social work. Persons were shortlisted and interviewed. The person selected from this second round of interviews had both a first and second degree in social work as well as teaching experience and teaching certification.

[59] The person selected received his teaching certification in 1981. He taught in the years 1977/79 and 1982/87. Since 1987 he worked in the insurance industry until 2003. Then he moved to the Social Development Commission between 2003 and 2014.

[60] On the other hand, Mr Harvey also had a first and second degree in social work. His resume revealed that he was actively involved in social work related activities for quite some time. He began teaching at Northern Caribbean University in January 2013. He taught courses in social work.

[61] The person selected after the August 2014 interviews had no experience in teaching social work at all. His teaching experience was at primary and secondary levels.

[62] The undeniable fact is that Mr Harvey had neither five years teaching experience nor teaching certification despite the fact that by the August 2014 interviews he had been teaching courses in social work at the tertiary level since January 2013. It must be remembered as well that none of the persons from the June/July interviews was selected. On the face of it, the person selected met the stated criteria.

[63] The Privy Council in **Bhagwadeen v Attorney General of Trinidad and Tobago** (2004) 64 WIR 402 has shown that Mr Harvey needs to show that he has been treated differently from some other similarly circumstanced person. Lord Carswell said at paragraph 18; page 408:

> *A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] 2 All ER 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.*

[64] Mr Harvey did not have two of the three stated requirements for the job. The person selected had all three. There is therefore no evidence that Mr Harvey failed to secure the job because he was not treated equally.

[65] Having examined the evidence on whether Mrs Haye made the statement attributed to her, I am unable to say on a balance of probabilities that she did make the statement. There is nothing in the evidence to tip the scales in Mr Harvey's favour or Mrs Haye's. On the face of it there would be no need for her

to say what has been attributed to her because on an objective view Mr Harvey did not meet the stated criteria for the job. Why would an experience human resource manager make such a statement where the applicant has not met the stated standard? But assuming that she did say what has been attributed to her, it is common ground that none of the three shortlisted applicants met the stated criteria. Being the best qualified candidate of those who applied does not mean that a failure to secure the job translates into a lack of equal and humane treatment if on an objective view, the best qualified candidate of those who applied did not meet the stated criteria. It seems that Mr Harvey was treated equally in that he and the other two shortlisted candidates were similar circumstanced in that none met the criteria and none was selected after the interviews which occurred after the June/July 2014 advertisement. Whereas by the August 2014 round of selection, the candidate that was selected on an objective view met the stated criteria of teaching certification and at least five years' experience in teaching regardless of how long ago those were attained. The advertisement did not say how recent the teaching experience needed to be or how recent the teaching certification ought to be. In addition, the selected candidate had a post graduate degree in social work. Mr Harvey's claim has failed on this ground also.

Disposition

[66] Mr Harvey has failed in his claim. Judgment is entered for the defendants. No order as to costs.

BESWICK J

[67] I have had the privilege of reading in draft the judgment of the learned Chief Justice. I agree with his conclusion. I have however reached that determination from a different perspective.

THE CLAIM

[68] Mr. Sean Harvey claims that because of his visual disability, he suffered discrimination at the hands of the Board of Management of Moneague College (1st Defendant). In his Amended Particulars of Claim[2] he details the particulars of discrimination:

"(i) The Claimant is a well qualified Lecturer and was unfairly treated and discriminated against by being told that he was not chosen for the post as the college building could not accommodate persons with a disability.

(ii) The Claimant was discriminated against when he was refused the opportunity of employment by reasons of his visual impairment and disability.

(iii) The said acts of discrimination amounted to the denial of the Claimant's right to equitable and humane treatment under the Charter of Fundamental Rights and Freedoms".

In short, his specific complaint is that his right to equitable and humane treatment by a public authority, in the exercise of any function was breached by the Board of Management of Moneague College.

[69] He seeks:

(a) declarations that breaches occurred and

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[2] Filed February 19, 2018

(b) damages for salary lost by virtue of the breaches.

He joins the Ministry of Education as a defendant because he says that it is the statutory body responsible for the management and administration of public education in Jamaica and is the body responsible for the 1st Defendant.

[70] The first issue therefore is the determination of the precise nature of the action of the Board of Management of the Moneague College about which Mr. Harvey complains, in order to examine it to establish if it was inequitable and inhumane. Thereafter, the court would determine if any such treatment contravened the provisions of the Constitution, that is, if the treatment was by a public authority in the exercise of any function.

The interview

[71] It is accepted that on July 13, 2014, the Board of Management of the Moneague College advertised for applicants for an interview to fill a post of Lecturer in Social Work. The minimum qualifications required for the position were a master's degree in social work, at least five years teaching experience and teaching certification. There is also no dispute that Mr. Harvey was one of three persons interviewed for the position and that none was selected. This led to a second advertisement on August 17, 2014 approximately four weeks later for the same position. Again, Mr. Harvey applied, attaching a letter asking to be re-considered. In the letter, he assured the Chairman of Moneague Teachers College that *"[N]either steps nor terrain poses any challenge to a fully independent person who is blind…..I reassure again that I will be fully able to navigate your campus while offering the maximum service needed to equip your new social workers with the request[sic] skills, in light of my experience as a social work practitioner, educator and a person with a special ability (an area in which your social workers will intervene in their course of study and subsequent[sic] their practice)".* After the second interview, there was a successful applicant. This was not Mr. Harvey.

The conversation

[72] A fundamental disagreement between the parties arises as to communication between them after the first interview. It is Mr. Harvey's evidence that after his interview, which was on July 31, 2014, he was contacted by Ms. Jacqueline Haye, Personnel Manager of the Defendant. Mr. Harvey says that Ms. Haye advised him that his interview went well, however he was not chosen because the building could not accommodate persons with disability. It is that alleged communication that forms the cornerstone of Mr. Harvey's complaint.

[73] The college denies that any such conversation occurred. Ms. Haye stated that she informed all three original candidates including Mr. Harvey that they were not successful. She says that Mr. Harvey asked her if he was not selected on account of his visual impairment, to which she answered no. According to her she advised him specifically that his visual impairment had no impact whatsoever on the panel's decision. He was advised that he did not meet the criteria for selection[3].

[74] I accept on a balance of probabilities that the conversation did take place in accordance with Mr. Harvey's evidence. The uncontested evidence of Mr. Harvey is that in applying for the position on the second occasion, he attached a letter advising the defendant that the fact that he is visually impaired would not affect his ability to access the defendant's buildings.

[75] In my view, he would not have included that assurance unless an issue had arisen which he thought should be addressed. There is no evidence that before or during the first interview, he or anyone had addressed his visual impairment and whether or not it would affect his ability to perform the job he sought. There is no evidence that he was asked any question in that regard by his interviewers.

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[3] Affidavit filed February 1, 2017

There is no evidence of any challenge being mentioned. What then caused him to raise that issue in the second application for the job? I note that his assurance was not a general one encompassing his ability to deal with all probable consequences of his impairment, as for example, any written communication which he might have been required to read, or to produce. Rather, the assurance was focussed on a particular matter – his access to the buildings. To my mind, that letter of assurance likely resulted from an enquiry/comment by the Board of Management of the Moneague College about that particular perceived challenge. It was his attempt to rectify a problem before again trying to be interviewed for the same position a mere three weeks after having been rejected. In my view, Mr. Harvey felt empowered/encouraged to apply again, believing the words of the Personnel Manager that his interview had gone well, but that the building could not accommodate him.

[76] The Board of Management of the Moneague College provided evidence that they had on staff other persons with disability. This was to support their assertion that they would not discriminate against physically challenged staff members. Evidence of the interest that the college showed in the welfare of a disabled staff member is in Ms. Haye's affidavit.

> *"Additionally, the College currently has on staff, a physically disabled person, Mr. Clifford Clarke, who is a clerical officer in the Registry Department. He too is facilitated with accommodations on campus and a fundraising initiative underway by the College to acquire a motorized chair for Mr. Clarke."*[4]

[77] There was no evidence of the peculiarity of this staff member's disability and more importantly no evidence of when he acquired the said disability or of how the disability could potentially impact on the performance of his job.

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[4] Para 22

[78] The college also had on staff a lecturer who had been declared legally blind. This was the evidence of Mrs. Haye. According to her he was diagnosed during his tenure. The disability therefore arose years after he had been employed. I therefore regard these references to the employment of other physically challenged persons as being less than helpful in the particular circumstances, except to show an absence of compelling evidence that the college embraced new employees with disabilities.

[79] The Board of Management of the Moneague College provided additional evidence to support its defence that it did not discriminate against Mr. Harvey. This was from witness Haye who testified that it could not have been true that Mr. Harvey was told that he could not access their Social Work Department building because that department did not even have designated rooms. He was thus inaccurate in believing that the college had decided he could not access them. Such a decision on his ability to access rooms would have been premature if not impossible.

[80] I find myself unable to accept this additional evidence as entirely accurate. Whereas the precise number of the room which Mr. Harvey would have used may not be known, there certainly must be a general area in which he would be expected to operate. The alternative would be that the social work teachers and students would be expected to be wandering nomads throughout the entire campus. Contrary to supporting the defence, this evidence attacks the credibility of the defence's case.

[81] A further consideration is that Mr. Harvey sought assistance from the Public Defender. There is not a suggestion that Mr. Harvey had other issues needing the Public Defender besides the instant perceived injustice.

[82] Because of my views expressed above, I accept on a balance of probabilities that Mr. Harvey spoke truthfully when he testified that the personnel manager, Ms. Jacqueline Haye said to him that he was not chosen because the building

could not accommodate persons with disability. However, those words by themselves would be insufficient proof of discrimination in these particular circumstances where Mr. Harvey did not meet the criteria advertised as being required to fill the post. Mr. Harvey must show that he was treated differently from others in the same circumstances, that is, circumstances of not meeting the stated criteria.

Meaning of the conversation

[83] I give the plain, ordinary meaning to the words which I have accepted to have been spoken by the Personnel Manager concerning Mr. Harvey's disability. Simply put, they conveyed her opinion that he presented himself well to the persons interviewing him to fill the position, but because of his physical challenge, he could not readily access the relevant buildings. It would follow that in her view he would not be suitable for the job. However, the entire circumstances of the selection process must be considered in determining if Mr. Harvey were treated differently.

Was he treated differently from others?

[84] Mr. Harvey claims that he was deprived of his right to equitable and humane treatment in the selection process. It seems to me that an important question must therefore be whether or not Mr. Harvey was treated differently from others in that process, and thereafter determine if that treatment was inequitable and also inhumane.

[85] There is no evidence as to the manner in which the other applicants were treated in either interview. It was however after the second interview that the selection occurred.

How was the selection done?

[86] The evidence is that there were two interviews before the selection was done. What was the nature of those interviews? The evidence is that the Moneague

Teachers College has no record of that. All the score cards of the interviewees were discarded when the selection was made. The interview was "unstructured". If that were true, that would be unacceptable. The college is concerned with the administration of education, specifically the training of teachers. An educational institution, perhaps moreso than any other entity, depends to a large extent on the accuracy of records. Students' professional lives often depend on the institution's ability to provide accurate records of their performance, both educational and otherwise, at the institution for important life-changing reasons.

[87] Further, there is a Human Resource Department at the college with an experienced human resource practitioner. This Department also must depend on proper record keeping. Indeed, the Human Resource Department may be viewed as being built on records and recording. There is no evidence of a reason why such recent records were destroyed. The result of this unacceptable and inexplicable behaviour is that there is no evidence before the court as to the conduct of the interviews. There is not even an affidavit from the interviewers as to the conduct of the interviews.

[88] An inference which may be drawn is that the college deliberately destroyed the records of the interviews which were an important aspect of the selection process. Even if it is not true that the documents were destroyed, they have not been made available to the court despite Mr. Harvey's request. Here again the inference could properly be drawn that there was a deliberate effort to conceal the interview aspect of the selection process. Why? Mr. Harvey relies therefore solely on the result of the interview and on the words he alleged were spoken, to attempt to prove his case. Yet, there is no evidence as to the manner of selecting the successful candidate.

The result

[89] The successful candidate fulfilled all the criteria stated in the advertisement. He had a master's degree in social work, a bachelors of science degree in social

work, a certificate in teaching and 7 years teaching experience. He could therefore be properly accepted for the position. Mr. Harvey lacked the teaching certification and the requisite years of teaching experience. On the face of it, there could be no issue properly raised as to the selection of the candidate in accordance with the published criteria.

Questions

[90] However, a closer look at the qualifications of Mr. Harvey and the successful candidate elicits questions. The successful candidate's most recent work experience was as Programmes Coordinator at the Social Development Commission. His teaching experience was at the Norman Manley High School in the area of science and physical education from 1982-1887 and at the Lime Hall Primary School with teaching responsibility for grade 5 students from 1977-1979. It appears that his teaching experience was not related to social work.

[91] Mr. Harvey's teaching experience was with social work in recent times. Since January, 2013 he has been employed to the Northern Caribbean University as an adjunct lecturer in social work. During April to August 2012 he served as a community engagement officer at the Development Options Limited. From 2009 to 2012 he was a Research Assistant at the Centre for Disabilities, UWI, Mona. From 2009 to 2011 he was a student social worker with various practicum placements.

[92] What are the appropriate criteria for a social work lecturer? What were the criteria advertised for the social work lecturer? Were they different? Were the interviewers limited to the advertised criteria?

The choice

[93] Both the successful candidate and Mr. Harvey fulfilled the academic requirements. Mr. Harvey lacked the certification and teaching experience. The choice facing the interviewers as it concerns the successful candidate may well

be seen to have been between a candidate who filled the criteria advertised but whose teaching experience was not in social work but rather was in science and physical education at a high school and primary school, or a candidate who was then currently lecturing at the tertiary level in social work and had been so doing for eighteen months , but who did not have a teaching certificate and five years of teaching experience.

[94] The man in the street may not have chosen the candidate which the college chose. However, the college's choice accorded with the advertisement for a candidate to fill the position. The advertisement mentioned nothing about the necessity for the teaching experience of the successful candidate to be in social work or for the teaching experience to have been recent.

Discrimination

[95] There may be questions as to whether or not the most suitable candidate was selected. However, there is no evidence provided to properly conclude there was discrimination in the selection of the candidate, or that Mr. Harvey's rejection arose in any different manner than did the rejection of the other candidates. The unchallenged evidence is that he did not meet all the stated required criteria, the successful candidate did.

Charter of Fundamental Rights and Freedoms

[96] It is Section 13 (3) (h) of the **Charter of Fundamental Rights and Freedoms** that Mr. Harvey alleges has been breached. Section 13 provides inter alia,

13- (1) Whereas –

(a) . . . .

(b) All persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they

are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and

(c) All persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter,

the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.

(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society-

(a) This Chapter guarantees the rights and freedoms set out in subsections (3) . . . of this section . . . .

(3) The rights and freedoms referred to in subsection (2) are as follows-

. . . .

(h) the right to equitable and humane treatment by any public authority in the exercise of any function.

[97] The evidence does not show an act of discrimination, or indeed any act or treatment which needs to be examined as to its constitutionality. The candidate selected met the advertised criteria. Mr. Harvey did not. Because of my view, it is not necessary for me to consider whether the college is a public authority and whether it has the function to hire teachers or any associated activity.

[98] In my judgment, based on the evidence and indeed, the absence of evidence of the selection process, it might be said that Mr. Harvey was treated unfairly when he was deprived of the requested details of the selection process. However, there is no evidence that his constitutional right was breached.

[99] In **Patrick Reyes v R**[5] Lord Bingham said at paragraph 26;

> *"As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the constitution……. The court has no licence to read its own predilections and moral values into the constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society (see Trop v Dulles, above, at 101.) In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion ….."*

[100] In my view Mr. Harvey has failed to meet the test outlined by the Privy Council in **Bhagwadeen v Attorney General of Trinidad and Tobago**[6] that is that he has been treated differently from some other similarly circumstanced person. Mr. Harvey has not shown that he was treated differently from the other candidates. Despite being invited for an interview it is a fact that he did not meet the criteria for the post. It is also a fact that none of the candidates interviewed in response to the first advertisement was selected. I cannot conclude from the evidence that if it were not for his disability he would have been selected.

[101] The action or inaction of the Board of Management of the Moneague College may be considered to be unjust, unreasonable or unfair, but falls short of breaching the constitutional rights of Mr. Harvey. I would therefore enter judgment for the defendants.

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[5] [2002] UKPC 11

[6] [2004] UKPC 21

PALMER HAMILTON J (AG)

[102] I have read the judgments of my learned brother Bryan Sykes, CJ and my learned sister, Carol Beswick, J and I concur. Therefore, I will not embark on a prosy discourse of the findings of fact and the distilling of the law which were both so adequately dealt with by Sykes, CJ and Beswick, J. However, I will opine further on the Constitutional and Human Rights law perspective and will seek merely to supplement that which has already been artfully addressed by Sykes, CJ.

[103] I, having adopted the summary of the evidence and findings of fact by Beswick, J, recognize that there is a narrow issue to be addressed. That issue being whether there was in fact a violation or infringement of section 13(3)(h) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 (hereinafter referred to as The Charter) which reads:

> *the right to **equitable** and **humane** treatment by any **public authority** in the exercise of any function. (my emphasis)*

[104] This section is pursuant to section 13(2)(a) which stipulates that the rights and freedoms set out in subsection (3) are guaranteed. Chapter 13 guarantees those rights, inter alia, and the greatest obligation is on the State. The State must guarantee these fundamental rights and freedoms. This is further qualified by section 13(1)(a) of The Charter which expressly states that the State has the obligation to promote universal respect for and observance of human rights and freedoms. This is the substratum of International and Regional Human Rights Law, the responsibility of the State in the protection of the human rights of its citizens and persons within its borders.

[105] The sections within the Charter do not exist as silos or stand in isolation, for each human right, as captured within the Charter, is interdependent and inextricably linked to each other. Hence, section 4 of the Charter states that Chapter III (which includes the relevant section 13) applies to all law and binds the

legislature, the executive and **all public authorities**. I find it interesting that only two (2) arms of State are specifically mentioned, seemingly excluding the third (3rd) arm of state being the Judiciary. Implicit in this "exclusion" is the fact that it is the judiciary that will seek to enforce the law and to whom citizens who have been wronged will go in order to seek constitutional redress. As Sykes, J (as he then was) stated in the case of **Maurice Tomlinson v Television Jamaica Ltd., and The Public Broadcasting Corporation of Jamaica**, [2013] JMFC Full 5 at paragraph 206:

> *The courts are the only institutions established by law to say what the law is. It is not because Judges are inherently wiser than others but rather it is the result of the Westminster model based on the rule of law and the separation of powers.*

Law and Analysis

[106] In my view, even if we were to find that there was a violation or infringement of the right to equitable and humane treatment, that violation rises or falls on whether the entity or institution being accused of this violation, is a public authority.

[107] What is regarded or defined as a public authority is not generic but seems to be dependent on a particular jurisdictional context. This becomes quite evident from some of the cases relied on by both counsel which were relevant to the United Kingdom. In my view, it would be worth our while to examine some of these cases and distinguish them from some cases from the Region.

[108] Before embarking on this comparative analysis, I hope to bring some clarity to what is being referred to as a human right in this instant case, that is, the right to equitable and humane treatment by any public authority in the exercise of any function. Can this right be truly classified as a human right or is it merely a constitutional right that is indigenous to the Jamaican jurisdictional context?

The Controversy of Human Rights

[109] There has been a raging debate about the expression "human rights" since World War II. According to Burns Weston (20 New Encyclopaedia Britannica – 15th edn. 1992):

> *The expression "human rights" is relatively new, having come into everyday parlance only since World War II and the founding of the United Nations in 1945. It replaces the phrase "natural rights", which fell into disfavour in part because the concept of natural law (to which it was intimately linked) had become a matter of great controversy, and the later phrase the rights of Man.*

[110] The very meaning of human rights is hotly contested, though it can well be appreciated that all rights arise in specific historical circumstances. They are a reflection or embodiment of what our mores, norms, customs and practices are that are held to be sacred and should be protected.

[111] David Sidorsky in Essays on Human Rights (1979) (Sidorsky (ed)) recognized that the term "Human Rights" seemed to fulfil two (2) different, although consistent, functions. On one hand, the phrase **universal human rights** is used to assert that universal norms or standards are applicable to all human societies. This assertion has its roots in ancient ideas of universal justice and in medieval notions of natural law. On the other hand, the idea of human rights is used to affirm that all individuals, solely by virtue of being human, have moral rights which no society or state should deny.

[112] Sidorsky goes further to say that:

> *the current function of the theory of human rights, unlike the doctrine of natural rights, is not primarily that of serving as a principle of legitimacy with a particular national state. It has become part of an effort to develop standards of achievement with respect to citizens' rights within an international community.*

[113] It is evident that there is a continuity between the traditional theory of natural rights and recent formulations of human rights. This continuity can be divided into six categories. I will mention only a few, being:

(i) It was characteristic of theorists of natural rights to develop a list of specific rights;

(ii) In all traditional theories of natural rights, such rights were ascribed only to human beings. Since having natural rights was intrinsically connected to being a human being, there was a basis for the later transition from the phraseology of natural rights to that of human rights;

(iii) A major characterization of natural rights derived from this belief that rights are the properties of persons capable of exercising rational choice; and

(iv) Natural rights, derived from the order of nature or from the nature of natural man but not from society or history. While rational intuition is no longer relevant for the contemporary views of human rights, the belief that rights are universal and not relative, to particular social or historical culture has become, if anything, even more important in their use as international norms.

[114] In other words, human rights are guaranteed wherever you may be, and citizens will not be aware of these rights unless they are embodied in a Constitution, such as ours or in the Human Rights Act 1998 of the United Kingdom.

[115] This purely academic discussion then elucidates the path on which the Claimant, Mr. Sean Harvey, wishes to trod, hence his reliance in section 13(3)(h) of the Charter. In my view, his challenge is not whether the section relied on is a human right but whether the infraction he is complaining of in his capacity is a human

right which has been catered for in the Charter. This too is hinged on the interpretation of a public authority, inter alia.

Interpretation of the Constitution and Section 13(3)(h)

[116] The interpretation of the Constitution in general and more specifically section 13(3)(h) relied on by the Claimant is paramount. In a national legal system, lawyers and courts can seek to give specific content to general statutory standards by resort to a common law background or to a constitutional tradition, indeed by reference to the entire legal culture and society within which these standards become operative. Interpretation can reach towards generally understood practices, customs or purposes (see text: International Human Rights in Context – 2nd edn., Henry, J. and Steiner & Philip Alston, page 109). This principle resonates in what Judge Kentridge stated in **S v Zuma** [1955] ZACC 1 **[15]** which was cited by Sykes, J (as he then was) in the Full Court decision of **Maurice Tomlinson** at paragraph 155**:**

> *…regard must be paid to the legal history, traditions and usages of the country concerned, if the purposes of its constitution are to be fully under stood. This must be right.*

[117] The well touted principle is that the Constitution should be treated like any International Covenant and is therefore seen as a living document or instrument carrying with it, through the ages, an inherent adaptability to a modern day context. As such, Lord Wilberforce in **Minister of Home Affairs v Fisher**, (1979) 44 WIR 107, stated that a Constitution is to be given "a generous interpretation because a constitutional instrument is sui generis, calling for principles of interpretation of its own, suitable to its character … without necessary acceptance of all the presumptions that are relevant to legislation of private law."

[118] This was further endorsed in the case **Patrick Reyes** v **R**, (2002) 60 WIR 42 at paragraph 26 and quoted by Sykes, J in the **Maurice Tomlinson** case at paragraph 147. Lord Bingham opined that:

> *A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society.*

Equitable and Humane Treatment

[119] Not much has been said or explained in any of the authorities cited by both counsel on the definition or interpretation of the term equitable and humane treatment. Perhaps it could be that the terms ought to be given their ordinary meaning. The interpretation of equitable and humane treatment was given minimal treatment in the case of **Rural Transit Association Limited v Jamaica Urban Transit Company Ltd., The Commissioner of Police and the Attorney General** [2015] JMFC Full 4, in which C. McDonald, J stated that the words equitable and humane should be read conjunctively. I agree wholeheartedly with McDonald, J's interpretation that equitable does not mean equal, nor are they synonymous with each other. McDonald, J gives a clear definition of equitable to mean fair and just, however neither McDonald, J nor F. Williams J (as he then was), proffered an interpretation or definition of humane. Nonetheless I will adopt the definitions utilised by Counsel Mrs. Dixon-Frith and Ms. Tamara Dickens. Simply put, humane means showing kindness towards other people and is often used in the context of the treatment of categories of persons such as the disabled.

[120] In my view, it is for this reason, that the case of **Bhagwadeen** v **The Attorney General of Trinidad and Tobago**, [2004] UKPC 21 is not applicable to the instant case. Section 4 (d) of the Constitution of Trinidad and Tobago states that the right recognized is the "right of the individual to **equality** of treatment **from** any public authority in the exercise of **its** functions." (My emphasis). The case turned on whether the appellant in the **Bhagwadeen** case received **equality** of treatment.

[121] Lord Carswell stated that a "claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or could be treated differently from some other similarly circumstanced person or persons as actual or hypothetical comparators. The comparison must be such that the relevant circumstances in the one case are the same, or not materially different in the other."

[122] In my judgment, the plumbline used to test whether or not this right to equality of treatment has been infringed is not the same one that should be used to determine whether the right to equitable and humane treatment has been infringed. It cannot be denied that one can treat persons equally but it is still inequitable because due to one person's circumstances they may be at a clear disadvantage if the same resources are distributed equally across the board. Be that as it may, I find that insufficient evidence was placed before this court for us to make a fair assessment as to whether there had been inequitable and inhumane treatment meted out to Mr. Sean Harvey.

Public Authority – The Regional Context

[123] There have been a few variations in the definition of what is a public authority. In fact, in the United Kingdom, it seemed to have generated quite a controversial debate which Public Law author, Dawn Oliver in her article "Chancel Repairs and The Human Rights Act," attempted to bring some clarity to it. In commenting on the case of **Aston Cantlow PCC v Wallbank** [2001] All ER 393, she expressed that the Parochial Church Council was a public authority because it possessed powers which private individuals lacked to determine how others should act, and it was created and empowered by law. She further stated that the *"phrase public authority in section 6 of the United Kingdom Human Rights Act, 1998, though not a term of art and though its application might not always be obvious or easy, was perfectly intelligible, so that resort should not be had to Hansard for help in interpreting it."*

[124] A careful examination of some cases from the Caribbean region and the two (2) United Kingdom locus classicus of **Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank,** [2004] 1 AC 546 and **Regina (Weaver)**

v London and Quadrant Housing Trust (Equality and Human Rights Commission Intervening) [2010] 1 WLR 363**,** may offer some guidance**.**

[125] In the **Maurice Arnold Tomlinson** case, Paulette Williams, J (as she then was) found favour with the submissions made by Counsel on the definition of public authority. Her Ladyship, at paragraph 70, cited **Rambachan v Trinidad and Tobago Television Co., Ltd., et al** T.T. 1985 HC 8 which stated:

> *Lord Diplock used the phrase "public authority" in a very broad sense to mean any entity however constituted in which the government as a matter of deliberate policy decided in the public interest to participate in a substantial way, whether financially or otherwise.*

Williams, J, at paragraph 71, further analysed the term "public authority" by commending the passage from the **Aston Cantlow** case, where Lord Nichols explained the meaning of public authority:

> *phrase a public authority in section 6 (1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression. Behind the instinctive classification of organizations as bodies whose nature is governmental lie factors such as the possession of specific powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest and a statutory Constitution.*

[126] In the **Weaver** case, heavy reliance was placed on the case of **YL v Birmingham City Council (Secretary of State for Constitutional Affairs intervening**) [2008] AC 95 by Elias, LJ as he also sought to navigate the various nuances of a "public authority."

[127] Elias, LJ dealt with this analysis in a very systematic manner, by stating at paragraph 35 (3):

> *In determining whether a body is a public authority, the Courts should adopt what Lord Mance in **YL's** case described at paragraph 9, as a "factor-based approach." This requires the court*

> *to have regard to all the features or factors which may cast light on whether the particular function under consideration is a public function or not and weigh them in the round. There is, as Lord Nicholls puts it in the* ***Aston Cantlow*** *case, at paragraph 5, that "A number of factors may be relevant, but none is likely to be determinative on its own and the weight of different factors will vary from case to case.*

[128] I adopt the suggestion of Elias, LJ in my approach to assessing the applicability of section 13(3)(h) of the Charter to Mr. Harvey's situation, that is, a broad or generous application of section 13(3)(h) of the Charter should be adopted, which was the theme which permeated the **Fisher** and **Reyes** cases. In my judgment, however, even with such a broad or generous application of the section 13(3)(h) of the Charter, the basic threshold has not been met and Mr. Harvey's attempt to mount a case on this limb, falls short.

[129] In taking a closer look at Elias, LJ's analysis of a public authority in the **Weaver** case, he states at paragraph 35 (5):

> *In the Aston Cantlow case, Lord Nicholls said at paragraph 12 that the factors to be taken into account: "include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or in taking the place of central government or local authorities, or is providing public service.*

[130] Elias, LJ further states, having referenced **YL's** case, at paragraph 35 (6):

> *As to public funding, it was pointed out that it is misleading to say that a body is publicly subsidised merely because it enters into a commercial contract with a public body.....the exercise of statutory powers, or the conferment of special powers, may be a factor supporting the conclusion that the body is exercising public functions, but it depends on why they have been conferred. If it is for private, religious or purely commercial purposes, it will not support the conclusion that the functions are of a public nature....where a body is to some extent taking the place of central government or local authorities, generally a public function will be governmental in nature....whether the body is providing a public*

> *service should not be confused with performing functions which are in the public interest or for the public benefit.*

Elias, LJ further added that the fact that the function is one which is carried out by a public body does not mean that it is a public function when carried out by a potentially hybrid body.

[131] The term "hybrid body" with respect to a public authority seems to be indigenous to the United Kingdom, as this term of art has not been used in any of the authorities emanating from the Region. I need not go any further with a discussion on "hybrid body" as this was adequately explained by Sykes, CJ, which I wholeheartedly adopt. However, I venture to say that the "hybrid body" classification is not applicable in Jamaica within the context of the Charter.

[132] In my view, the case that seems to be most applicable to our jurisdiction is that of **Fort Street Tourism Village v Attorney General of Belize and others**, **Fort Street Tourism Village v Maritime Estates Ltd. and others** (2008) 74 WIR 133**.** Though the case dealt in part with section 6(1) of the Constitution of Belize, which was relevant to equality before the law and anti-discrimination, there is no mention of public authority in their constitution. However, an extensive analysis of "public authority" was embarked on which has proven to be very instructive.

[133] Mottley, P stated, at paragraph 27, that Lord Diplock explained what he meant by public authority:

> *In this context "public authority" must be understood as embracing local as well as central authorities and including any individual who exercises executive functions of a public nature.*

In my view from this passage, one of the determinative factors as to whether an entity is a public authority is that its function must be of a public nature. But what does that really mean? Mottley, P in examining **Maharaj** v **Attorney General of Trinidad and Tobago (No. 2)** (1978) 30 WIR 310, referred to Lord Diplock's ratio that rights are enforceable against the state or a public authority endowed **with coercive powers**. In my judgment, Mottley P is demonstrating that a public authority must have coercive powers and these coercive powers must be

conferred by law. It seems clear to me that public authority differs from public body because a "public authority" is qualified by the fact that it possesses coercive powers.

[134] Mottley P and Morrison JA both relied on the case of **Poplar Housing and Regeneration Community Association Ltd., v Donoghue** [2001] 4 ALL ER 604 in which Lord Woolf, CJ stated at paragraph 58:

> *The fact that a body performs an activity which otherwise a public body would be under a duty to perform cannot mean that such performance is necessarily a public function. A public body, in order to perform its public duties can use the services of a private body....it is not to make a body, which does not have responsibilities to the public, a public body merely because it performs acts on behalf of a public body which would constitute public functions were such acts to be performed by the public body itself. An act can remain of a private nature even though it is performed because another body is under a public duty to ensure that that act is performed.... What can make an act, which would otherwise be private, public, is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority." (my emphasis).*

[135] In the case of **Alonzo v Development Finance Corp.** [1984] 1 BZLR 82, Summerfield, P stated that a statutory corporation is not exercising functions of a public nature when it engages personnel or terminates their contracts of employment. Learned Counsel for the Defendants, Ms. Tamara Dickens, submitted that the mere fact of recruiting staff is not a function that is envisaged under section 13(3) (h) of the Charter. I agree with Ms. Dickens' submissions in this regard except to add that engaging or recruiting staff/personnel for the Moneague College is not exercising functions of a public nature.

[136] In my view, the criteria to be used to ascertain whether an entity is a public authority that is captured under section 13(3)(h) of the Charter, are **the combination of features test** and the **factor-based approach.** Paramount of them all, is the requirement that the body must be endowed with coercive powers. In fact, the entity being endowed with coercive powers is a common thread even in the line of cases emanating from the United Kingdom, though not expressed in the same terms.

[137] Learned Counsel, Mrs. Trudy-Ann Dixon-Frith was at pains to explain that once the entity has a Board of Management, and that entity falls within the Education Act then it is an indicator that the entity is publicly funded. As such, she further submitted, the entity, being Moneague College, would be a public authority.

[138] Respectfully, I disagree with Learned Counsel, Mrs. Dixon-Frith, because it is well established from the line of authorities that there has to be a combination of features to determine a public authority and if only one characteristic feature is present then it is not the sole determinative factor. Being publicly funded is only one of the features that the court can look for but it is not the sole feature. There is no single test of universal application. Regrettably, this court did not have much to make such a determination that Moneague College was in fact a public authority.

[139] Respectfully, I also disagree with Learned Counsel, Ms. Dickens in her attempt to demonstrate that activity is different from function and as such the hiring of staff is merely an activity and would not classify as a function. The Charter particularizes function as being" any function" and it seems purely superficial to create a distinction between the two when what is of critical importance is the **nature of the act** itself. In the **Weaver** case, Elias, LJ quoted Lord Rodger in the **Aston Cantlow** case that act and function was treated as the same. He did not draw any distinction between the concepts of function and act in this context.

[140] Elias LJ went further to state at paragraph 66

> *When considering how to characterize the nature of the act, it is in my view important to focus on the context in which the act occurs; the act cannot be considered in isolation simply asking whether it involves the exercise of a private law power or not. As Lord Mance observed in the YL v Birmingham City Council both the source and nature of the activities need to be considered when deciding whether a function is public or not; and in my view the same approach is required when determining whether an act is a private act or not within the meaning of section 6(5). Indeed, the difficulty of distinguishing between acts and functions reinforces that conclusion.*

Conclusion and Disposition

[141] The criteria to be satisfied in determining whether an entity is a public authority are:

i. Entity is endowed with coercive powers as established by law
ii. Entity has statutory powers;
iii. Entity receives public funding whether in whole or in part;
iv. The nature of the acts carried out by the entity are of a public nature or public character within a specific context;
v. The entity to some extent, is taking the place of central government or local authorities
vi. The entity's function is governmental in nature; and
vii. The entity provides a public service

The existence of all or some of those criteria is determinative of a public authority. What I have listed is merely to supplement what Sykes CJ has adumbrated.

[142] Mr. Harvey, though aggrieved, cannot succeed with his claim because he does not have a justiciable complaint. As was stated by Parnell, J in **Banton and Others v Alcoa Minerals of Jamaica and others**, (1971) 17 W I R 275, 305:

> *Before an aggrieved person is likely to succeed with his Claim before the Constitutional Court he should be able to show.... that he*

> *has a justiciable complaint that is to say that a right personal to him and guaranteed under Chapter III of the Constitution has been or is likely to be contravened.*

Mr. Harvey has not brought the evidence to show that he was treated inequitably and inhumanely by a public authority, the court having found that Moneague College was not a public authority.

[143] The **United Nations Convention on Disabled Persons** was referred to by both Counsel. In my view, it does not expressly address the treatment of disabled persons within the context of similar provisions as found in section 13(3)(h) of The Charter. I agree with learned counsel, Ms. Tamara Dickens, that there seems to be a lacuna in the Charter as it relates to the rights of disabled persons. In my judgment, section 13(3)(h) is limited because the violation of this right must be committed by a public authority (which is undefined in the Charter). Section 13(3)(i), though not relied on, is also limited because it deals only with redress with respect to the infringement of one's right to freedom from discrimination on the ground of (a) being male or female or (b) race, place or origin, social class, colour, religion or political opinions.

[144] Perhaps a very robust argument could be made to demonstrate that it is implied that disabled persons could fall within the category of discrimination on the ground of social class. However, in my view, that would be an up-hill task. The imminent enactment of the Disabilities Act may be the antidote to save the State from what could be a potentially embarrassing international blunder in not having any provision for redress in the Charter for the violation of the rights of our citizens on the basis of having a disability.

Order

SYKES CJ (AG)

1. Claim dismissed.

2. Judgment for the defendants.

3. No order as to costs