



# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**

**2020: No. 429**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**IN THE MATTER OF A CLAIM FOR DAMAGES FOR UNLAWFUL ARREST AND  
TRESPASS**

**BETWEEN:-**

**ZARA HARPER**

**Applicant**

**-and-**

**THE COMMISSIONER OF THE BERMUDA POLICE SERVICE**

**Respondent**

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**Before: Hon. Chief Justice Hargun**

**Representation: Mr. Jerome Lynch QC of Trott and Duncan for the Applicant  
Mr. Brian Myrie, Attorney General's Chambers, for the Respondent**

**Date of Hearing: 16 August 2021**

**Date of Judgment: 27 August 2021**

# JUDGMENT

*Whether continuation of concurrent criminal and judicial review proceedings constitutes an abuse of process; whether a court exercising its criminal jurisdiction has the power to award compensatory damages*

## HARGUN CJ

### **Introduction**

1. The underlying judicial review proceedings are commenced by Ms. Zarah Harper (the **Applicant**) by way of Notice of Originating Motion dated 25 January 2021 (leave having been given on 4 January 2020), whereby the Applicant seeks the following relief:
  - (a) An order quashing the decision summarily to arrest the Applicant, a declaration that her arrest was unlawful, and a consequent declaration that the Applicant is no longer subject to any bail conditions;
  - (b) A declaration that the subsequent search of the Applicant’s home was unlawful;
  - (c) Directions that the Respondent forthwith return all items seized from the Applicant’s home during the raid on 12 October 2020 and all copies of photographs made or taken of those items;
  - (d) an order quashing the warrant dated 9 October 2020 to search the premises of “Vibe”;
  - (e) Directions that the Respondent returned forthwith all items seized from the premises of Vibe on 12 October 2020;

- (f) An order that the Respondent pay the Applicants damages by way of compensation for unlawful arrest and violation of a privacy, pursuant to section 67 of the Supreme Court Act 1905; and
  - (g) An order that the costs of this application for judicial review be paid by the Respondent.
2. Following the commencement of the judicial review proceedings the Applicant was charged with indictable offences contrary to section 145(a) and section 351(1)(b) of the Criminal Code 1907.
  3. This is an application by the Commissioner of the Bermuda Police Service (the **Respondent**) for an order that the judicial review proceedings should be struck out by the Court primarily on the basis that, charges having been laid against the Applicant, the continuation of the judicial review proceedings constitutes an abuse of process of the Court.
  4. At the conclusion of the hearing on 16 of August 2021 I declined to strike out the judicial review proceedings and indicated that I will set out the reasons in writing in due course. This judgment sets out the reasons for that decision.

## **Background**

5. The factual background leading up to the issuance of the judicial review proceedings is set out in the Notice of Originating Motion, filed pursuant to RSC Order 53, rule 5(2).
6. The Applicant is the owner, manager and a director of Vibe 103 radio station. On 3 July 2020 an event was held at Blu Restaurant Bar and Grill (**Blu**) in Warwick Parish, which the Applicant had been involved in organising. There was subsequent negative publicity surrounding that event and an investigation was started by the Bermuda Police Service (**BPS**) shortly thereafter.

7. The BPS applied and were granted a warrant for the search of Blu on 10 July 2020, the Magistrate having been satisfied that there were reasonable grounds to suspect that an indictable offence under the Bribery Act 2015 and the Public Health (COVID 19 Emergency Powers) Regulations 2020 had been committed. The warrant for Blu was granted to cover:

*“All documents and records relating to an event/party scheduled by Zane DeSilva and others between Friday, 3 July 2020 and Saturday for July 2020.*

1. *All emails, records, or documentation physical or digital format relating to event held at Blu Restaurant on Friday 3 July and Saturday for July 2020 by ZARABI Entertainment.*
  2. *CCTV footage of the building and restaurant to include interior and exterior.”*
8. On 5 October 2020 as part of their investigation into the matter the BPS requested through correspondence with the attorneys for Zane DeSilva to arrange for him to be interviewed, the interview was scheduled by arrangement for 12 October 2020.
  9. The BPS applied on 9 October 2020 to the Hamilton Magistrates Court for a warrant to search the address of Vibe, again on the basis of the alleged offences under the Bribery Act 2015 and the Public Health (COVID 19 Emergency Powers) Regulations 2020. The warrant was granted for:

*“All the documents and records relating to an event/party scheduled by Zane DeSilva, Zarah Harper, Zarabi Entertainment and others between Tuesday, 16 June 2020 and Monday, 6 July 2020.*

1. *All emails, correspondence, records or documentation, video footage and photographs in physical or digital format inclusive of and relating to the event held*

*at Blu restaurant on Friday 3 July and Saturday for July 2020 by ZARABI Entertainment.”*

10. On the morning of 12 October 2020, at approximately 06:45, six officers of the BPS attended the Applicant’s home address and arrested her without a warrant, for providing false information to a public officer.
11. The Applicant states that despite a request to wait until two of the Applicant’s children had left for school, the officers proceeded to search the Applicant’s house in the presence of the Applicant, her husband, their two school-age children and 18-month-old baby. The officers seized the Applicant’s phone, her laptop, her old laptop (used by her daughter) and various paperwork. The applicant states that she was never shown any form of warrant, either for arrest or for the search of her home.
12. Following the Applicant’s arrest and the search of her, the officers then informed her that they had a warrant to search Vibe (her place of work), which is a neighboring property. The officer subsequently seized a computer from Vibe.
13. The Applicant was then conveyed to Hamilton Police Station, where after processing she was held in a cell until her interview at approximately 12:30.
14. The Applicant maintains that access to the phone, laptops and computer were provided by the Applicant to the BPS. The Applicant asserts that following that, repeated written requests were made by attorneys on behalf of the Applicant for the return of the computer seized from Vibe as it was essential to the operation of the business. The Applicant says that the BPS have refused all such requests.<sup>1</sup>
15. The Applicant asserts that the actions of the BPS were unlawful in three respects:

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<sup>1</sup> The court is informed by counsel for the Applicant that the computer has been returned.

- (a) Her summary arrest and the subsequent search of her home address were unlawful as the BPS failed to consider, or unreasonably decided against, less intrusive alternatives;
- (b) There can have been no proper basis for the application and execution of the warrant for Vibe; and
- (c) The BPS failed to return the computer seized from Vibe since 12 October 2020, and/or to provide a copy of the material thereon, in breach of the Police and Criminal Evidence Act 2006 (**PACE**).

### **The application to strike out the judicial review proceedings**

16. As noted above, following the commencement of criminal proceedings against the Applicant, the Respondent has made this application seeking to strike out the judicial review proceedings on the basis that their continuation constitutes an abuse of process. It is said by Mr. Myrie, on behalf of the Respondent, that all the issues which the Applicant has raised in the judicial review proceedings can and should be raised by the Applicant in the criminal proceedings pending against her. Mr. Myrie contends that the continuation of parallel civil and criminal proceedings pending in relation to the same factual matter is a recipe for confusion and potentially conflicting findings between the civil and criminal courts. Mr. Myrie argues that the real motivation for the continuation of the judicial review proceedings is that the Applicant is seeking to have two opportunities to present her allegations in relation to the same issues which have been raised in the judicial review proceedings and in the criminal proceedings. He says that the main purpose of the judicial review proceedings is to delay the determination of the criminal proceedings against the Applicant. For all these reasons that Mr. Myrie contends that the continuation of the parallel criminal and civil proceedings constitutes an abuse of the process and on that basis the Court should strike out the judicial review proceedings.

17. In passing, I should note that the application to strike out the judicial review proceedings is said to be made on all four strands of the RSC Order 18, rule 19 but I accept the submission made by Mr. Lynch QC that the only applicable ground here is the one relating to abuse of process.

## **Discussion and analysis**

18. The decisions of the Privy Council and the Bermuda courts support the propositions that (i) the continuation of judicial review proceedings and criminal proceedings arising out of the same facts and raising similar issues have the potential of constituting an abuse of process; (ii) whenever possible all issues which can be determined in the criminal proceedings should be determined in the criminal proceedings and not in separate civil or judicial review proceedings; (iii) reliance upon fundamental rights and freedoms set out in the Bermuda Constitution Order 1968 in the context of pending criminal proceedings should be determined in the criminal proceedings and not referred to the Supreme Court exercising its civil jurisdiction; and (iv) if the purpose or effect of continuing parallel civil proceedings is to delay or sideline the pending criminal proceedings arising out of the same facts, that is likely to constitute abuse of process and the court should either strike out or stay the civil proceedings pending the determination of criminal proceedings.

19. In *Warren v The State (Pitcairn Islands)* [2018] UKPC 20 (Privy Council), the appellant, a resident of Pitcairn Islands, was convicted on 20 charges of possessing child pornography contrary to section 160 of the Criminal Justice Act 1988 (UK) and two charges of possessing grossly indecent items contrary to section 8 of the Pitcairn Summary Offences Ordinance. These proceedings were accompanied below by numerous applications in which it was maintained that, as a result of alleged flaws in the Pitcairn Islands Constitution (“the Constitution”), failures in administration, deficiencies and impropriety in the appointment of judges, judicial bias and lack of independence and other similar causes, there was systemic constitutional error. The proceedings gave rise to 21 defence applications, 2,000 pages of written submissions, 60 days of oral hearings and 30 judgments.

20. One issue considered by the Privy Council was whether it was open to the appellant to issue separate proceedings relying upon fundamental rights guaranteed under the Constitution (the equivalent of section 15 proceedings in Bermuda) or whether the appellant should be confined to take the constitutional points in the context of the criminal proceedings. Lord Hughes and Lord Lloyd-Jones, delivering the advice of the Board, held, [11-13], that the appellant must take the constitutional points in the criminal proceedings and to do so in separate civil proceedings was an abuse of process:

*“11. In its judgment of 23 October 2015 the Court of Appeal considered in detail the various grounds of appeal founded on section 25 of the Constitution. It dismissed them all. It then went on to note that those matters were able to be and had been fully addressed within the criminal proceedings. Had there been any merit in the allegations of breach of the Constitution, a remedy was available within the criminal proceedings by way of the issuance of a stay, or other remedy proportionate to the breach, if that were appropriate. That being so, it was an abuse of process for the appellant also to resort to section 25...”*

*12. The Court of Appeal noted that, consistently with this passage, section 25(3) of the Constitution allows the Supreme Court to decline to exercise its powers under the section if satisfied that adequate means of redress are available under any other law, as, it considered, they were here. It concluded (at para 231):*

*“The section 25 applications served no useful purpose other perhaps than providing an appeal as of right to this Court. Lovell-Smith J and Haines J dismissed the applications. We consider they were an abuse of process and uphold their decisions.”*

*13. The Board agrees with the Court of Appeal that the applications should not have been made under section 25 because, had there been any substance in any of the grounds advanced, adequate means of redress would have been available within the criminal proceedings. The Board further agrees that the making of the*



*section 25 applications was an abuse of process. Accordingly, the Board dismisses the appeal pursuant to section 25(10) for this reason.*

21. Another issue considered by the Privy Council was the undesirability of having parallel criminal and judicial review proceedings in circumstances where it was open to the appellant to raise the same issues in the criminal proceedings. Again, the Privy Council held, at [21], that the appellant must be confined to take those issues in the criminal proceedings:

*“21. The Board refuses special leave on this ground for the following reasons:*

*...*

*(2) Judicial review is available in Pitcairn in appropriate cases. The requirement of leave is a legitimate control whereby only those applications which disclose an arguable case which merits full investigation are permitted to proceed.*

*(3) The appellant decided not to take any further steps in the proposed judicial review until all criminal proceedings had been determined. The court acceded to the appellant’s request and deferred the case management conference until after the conclusion of the criminal proceedings.*

*(4) Judicial review is a remedy of last resort and was not appropriate in these circumstances because there existed an equally effective alternative remedy in the form of applications in the criminal proceedings.”*

22. In *Brandt v Commissioner of Police* [2021] UKPC 12 (Privy Council), the appellant was charged with various sexual offences which it was alleged he committed in Montserrat between 2010 and 2015. Part of the evidence which the prosecution sought to admit at his trial were WhatsApp messages, images, and other data (“WhatsApp data”) which were obtained by the police as a result of a search of the appellant’s cell phones. The appellant accepted that search warrants authorised the police to search *for* and to seize the cell

phones, but he contended that the warrants did not authorise a search *of* his cell phones. On that basis he contended that the search of his cell phones was unlawful and in breach of his constitutional right of privacy. He therefore challenged the admissibility of the WhatsApp data in his criminal trial. However, rather than making the challenge as to admissibility in the criminal proceedings, the appellant commenced separate proceedings in the High Court against the Commissioner of Police, the Attorney General, and the Director of Public Prosecutions (“the respondents”) by way of an application for an administrative order relying on sections 2, 9 and 20 of the Montserrat Constitution seeking, amongst other relief, a declaration that the WhatsApp data is inadmissible in the criminal proceedings.

23. The Privy Council considered that the institution of parallel civil proceedings was an abuse of process and its reasoning is set out at paragraphs 35,38, 40 and 41:

*“35. First, to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court’s process in the absence of some feature “which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate”. The correct approach to determining whether a claim for constitutional relief is an abuse of process because the applicant has an alternative means of legal redress was explained by Lord Nicholls, delivering the judgment of the Board in Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328 at para 25, as follows:*

*“...where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special*

*feature would be a case where there has been an arbitrary use of state power.”*

*There are examples of the application of that approach in cases such as Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265 at 68, Jaroo v Attorney General of Trinidad and Tobago [2002] 1 AC 871 at para 39 and most recently, in Warren v The State (Pitcairn Islands) [2018] UKPC 20 at para 11. This approach prevents unacceptable interruptions in the normal court process, avoids encouraging technical points which have the tendency to divert attention from the real or central issues, and prevents the waste and dissipation of public funds in the pursuit of issues which may well turn out to be of little or no practical relevance in a case when properly viewed at the end of the process. This approach also promotes the rule of law and the finality of litigation by preventing a claim for constitutional relief from being used to mount a collateral attack on, for example, a judge’s exercise of discretion or a criminal conviction, in order to bypass restrictions in the appellate process (see eg Chokolingo v Attorney General of Trinidad and Tobago [1981] 1 WLR 106 at 111–112).*

...

*38... However, the Board observes that abusive tactics, such as using administrative proceedings to derail or delay parallel proceedings, can, in appropriate circumstances, be defeated by a court in the exercise of discretion declining to adjourn the parallel proceedings. In making this observation the Board recognises that the adjournment of the criminal trial in this case was not caused by reason of the administrative proceedings but rather was necessitated by the ill-health of counsel (see para 13 above)*

...

40. *The Board considers that giving any advice or guidance or granting any declaration is contingent on the existence of valid proceedings. If the proceedings are an abuse of the process of the court then they do not satisfy that contingency. The High Court and the Court of Appeal were effectively being invited to interfere in the criminal trial process by making rulings as to the future conduct of the trial. The Board respectfully considers that if, as both the High Court and the Court of Appeal found, the administrative proceedings were an abuse of the process of the court, then no obiter comments should have been made in those proceedings as to applicable principles in relation to the admissibility of the WhatsApp data in the criminal proceedings.*

41. *The administrative proceedings are an abuse of the court's process in the absence of some feature "which, at least arguably, indicates the means of legal redress otherwise available" in the criminal proceedings would not be adequate, see AG of Trinidad and Tobago v Ramanoop..."*

24. In *Mahesh Sannapareddy v The Commissioner of the Bermuda Police Service* [2017] SC 12 Civ (6 February 2017) Kawaley CJ accepted the submission at [38] that "*it is a matter of public importance that a criminal investigation should be allowed to take without interruption or risk of possible derailment by a process of JR.*"

25. The propositions set out in paragraph 18 above appear to be supported by the above authorities and, in view of the Court, represent Bermuda law. Indeed, Mr. Lynch QC did not dispute that continuation of parallel proceedings does indeed have the potential of constituting an abuse of process. His main point was that the issue whether parallel proceedings in fact constitute an abuse of process depends on the facts of the particular case and in this case no such abuse existed. I now turn to consider this submission.

26. Mr. Lynch QC submitted that there was no basis for the suggestion that the purpose of the judicial review proceeding was to delay the criminal proceedings. He advised the Court that it was the Applicant's intention to have the criminal proceedings determined as soon

as possible. He further advised the Court that the Applicant did not intend to seek a stay of the criminal proceedings pending the determination of the judicial review proceedings. Indeed, Mr. Lynch QC advised the Court, that the Applicant was content to have the substantive hearing of the judicial review proceedings *after* the determination of the criminal proceedings. The Applicants main concern was that the judicial review proceedings should not be struck out at this stage on a summary basis.

27. Secondly, Mr. Lynch QC refuted the suggestion that the issues which have been raised in the judicial review proceedings can properly be raised in the criminal proceedings. He pointed out that he cannot properly raise the issues that the Applicant's arrest was unlawful or that the subsequent search of the Applicant's home address was unlawful because these issues did not go to any relevant issue in the criminal proceedings. Mr. Lynch QC argued that these issues may well have been relevant in the criminal proceedings if the Applicant was minded to take the position that the evidence sought to be produced by the prosecution was inadmissible. However, the Applicant had no intention of submitting that the evidence relied upon by the prosecution was inadmissible. Indeed, Mr. Lynch QC pointed out, that the Applicant relied upon the evidence sought to be produced by the prosecution. In the circumstances, these issues raised in the judicial proceedings, argued that Mr. Lynch QC, are entirely irrelevant in the criminal proceedings and it would not be open to him to properly raise those issues in the criminal proceedings.

28. Thirdly, Mr. Lynch QC disputed the submission that the Supreme Court exercising its criminal jurisdiction could grant all the relief which the Applicant sought in the judicial review proceedings. In particular Mr. Lynch QC took issue with the suggestion made by Mr. Myrie that the Supreme Court, exercising its criminal jurisdiction, could award the Applicant compensatory damages sought in the judicial review proceedings.

29. In support of his submission that the Supreme Court exercising its criminal jurisdiction could award damages to the Applicant Mr. Myrie relied upon section 476D(2)(f) of the Criminal Code which provides that:

*“A judge may also adjudicate any issues that can be decided at a case management hearing, including those related to –*

- (a) the disclosure of evidence;*
- (b) the admissibility of evidence;*
- (c) expert witnesses;*
- (d) the severance of counts;*
- (e) the separation of trials on one or more counts when there is more than one accused person; and*
- (f) any other question of evidence or law relating to the case concerned.”*

30. In its proper context section 476D(2) is clearly dealing with procedural issues relating to the proper management of a prospective criminal trial and it is in that context that the judge has the jurisdiction to decide matters of evidence or law. In my judgment the determination of “*question of.. law*” in subparagraph (f) does not provide the Supreme Court, exercising its criminal jurisdiction, the power to award compensatory damages.

31. The Privy Council in *Brandt* recognised that the absence of power to award damages in the court exercising criminal jurisdiction would be a good reason to allow parallel proceedings to continue Lord Stephens, delivering the judgment of the Board, held at [39] and [44]:

*“39. Generally, in the exercise of discretion, those proceedings, or those parts of proceedings, which are held to be an abuse of the court’s process, should be dismissed. There may be exceptions. For instance, the party bringing the proceedings may be given the opportunity to withdraw them or the court may permit the proceedings to be amended. **Another instance might arise in circumstances where in proceedings which are parallel to administrative proceedings there was no power to award damages. In such circumstances, where there is a genuine subsisting claim for damages, the court, might, in the exercise of discretion, adjourn that part of the administrative proceedings pending the outcome of the***

*parallel proceedings. Those adjourned administrative proceedings would be confined to enabling an award of damages dependent on the outcome of the parallel proceedings, but the adjourned proceedings cannot be used to challenge the outcome in the parallel proceedings: see Chokolingo v Attorney General of Trinidad and Tobago at 111–112.*

...

*44. It was also submitted that in the criminal proceedings there was no ability for the court to award damages to the appellant for any breach of his constitutional right of privacy. On this basis it was suggested that the means of legal redress available in the criminal proceedings was inadequate. However, before the Court of Appeal the appellant had abandoned his claim for damages and only pursued relief by way of declarations that the search of his cell phones was unconstitutional and/or unlawful, see para 14 above. In the criminal trial decisions can be made as to the lawfulness or constitutionality of the search of the appellant's cell phone and as there is no longer any claim for damages in the administrative proceedings, the Board rejects the submission that the criminal proceedings provide an inadequate means of redress. Accordingly, the Board does not have to consider whether in the exercise of discretion it would be appropriate to adjourn any part of the administrative proceedings that claims damages."*

32. At the hearing I accepted Mr. Lynch QC's submissions that in this case (i) the institution and continuation of the judicial review proceedings would not result in delaying or derailing the criminal proceedings; (ii) the issues raised in the judicial review proceedings could not properly be raised in the criminal proceedings pending against the Applicant; and (iii) the Supreme Court exercising its criminal jurisdiction could not provide all the remedies sought by the Applicant in the judicial review proceedings as the Court, exercising its criminal jurisdiction, had no power to award compensatory damages to the Applicant.

33. It was for these reasons that the Court took the view, at the conclusion of the hearing on 16 of August 2021, that the judicial review proceedings should not be struck out. Instead, the Court directed that the substantive hearing to determine the judicial review proceedings should not take place until the criminal proceedings against the Applicant have been concluded. The Court also ordered that the issue of costs be reserved and dealt with at the conclusion of the substantive hearing.

Dated this 27<sup>th</sup> day of August 2021

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NARINDER K HARGUN  
CHIEF JUSTICE