In The Supreme Court of Bermuda

CIVIL JURISDICTION
2021: No. 368

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
AND IN THE MATTER OF THE BERMUDA CONSTITUTION

BETWEEN:

A

(a minor, by J B, her father and next friend)

Applicant

-and-

MINISTER FOR EDUCATION

Respondent

Before:	**Hon. Chief Justice Hargun**
Representation:	**Mr. Peter Sanderson of BeesMont Law Limited, for the Applicant and Mrs. Shakira J Dill-Francois, Deputy Solicitor General, for the Respondent**
Dates of Hearing:	**28 March 2022**
Date of Judgment:	**22 April 2022**

JUDGMENT

Whether the requirement of a saliva COVID-19 test is a "search" within the meaning of section 7(1) of the Constitution; whether the Applicant "consented" to the test; whether the Minister had lawful authority to implement the policy; whether the lawful authority complied with the principle of legality

HARGUN CJ

Introduction

1. These judicial review proceedings relate to the decision by the Minister for Education ("**the Minister**" or "**the Respondent**") to (i) require pupils to undergo a COVID-19 test prior to each return to school and (ii) not to open schools unless a certain percentage of pupils have submitted to a COVID-19 testing. The Applicant, a pupil at an aided or maintained school, established under section 15 of the Education Act 1996 ("**the Education Act**"), seeks a declaration that this decision by the Minister was unlawful. The Applicant seeks an order of mandamus requiring the Minister to allow the Applicant to attend school regardless of whether she has submitted to a COVID-19 test. The Applicant also seeks an order of prohibition, prohibiting the Minister in closing the Applicant's school on the grounds that insufficient children have submitted to a COVID-19 testing. The Applicant also seeks to challenge the Minister's decision as being in breach of her fundamental rights set out in section 7 of the Bermuda Constitution Order 1968 ("**the Constitution**").

2. In support of the application the Applicant has filed three affidavits by her father and next friend, Mr J B dated 17 November 2021, 11 February 2022 and 17 February 2022. On behalf of the Minister there are two affidavits by Ms Kalmar Richards, the Commissioner ("**the Commissioner**") of education for the Department of Education dated 17 January

2022 and 1 March 2022; and two affidavits by Dr Ayoola Oyinloye, the Chief Medical Officer ("**the CMO**") dated the 17 January 2022 and 18 February 2022.

Relevant statutory provisions

3. The Applicant's application requires the Court to consider the following provisions of the Education Act, section 7(1) of the Constitution and certain provisions of the Occupational Safety and Health Act 1982 ("**OSHA**").

4. The relevant provisions of the Education Act provide that:

> *"**Parents must secure the education of their children***
>
> *42 (1) It shall be the duty of the parent of every child of compulsory school age to cause him to receive suitable education either by regular attendance at a recognized school or otherwise.*
>
> *(2) If any question arises whether a child of compulsory school age is or is not receiving suitable education—*
>
> *(a) **otherwise than by regular attendance at a recognized school**; or*
>
> *(b) at a recognized school, that question shall be referred to, and determined by, the Minister, and the decision of the Minister shall be final.*
>
> ***Parents must secure regular attendance of children at school***
>
> *44 (1) If any child of compulsory school age who is enrolled as a pupil at a recognized school fails to attend regularly at the school, the parent of the child commits an offence against this Act.*

Interpretation of Part VI

50 (1) In this Part "free education" in relation to any child, means education for which no fee for the tuition of the child is payable by or on behalf of the child or for which the fees for the tuition of the child are payable by the Minister by way of a grant-in-aid.

Entitlement to free education

51 (1) Subject to the provisions of this Act, every child who is resident in Bermuda shall have a right to receive free primary school, middle school and senior school education, suited to his age, ability, special needs (if any), aptitude and health, at an aided or maintained school.

Implementation of right to free education

52 (1) Subject to the provisions of this section, with respect to the implementation of the right of children to receive free education pursuant to this Act, such right shall be implemented by the provision of free education at all maintained schools and by making suitable arrangements for such education in aided schools.

5. Section 7 of the Bermuda Constitution provides that:

*"**Protection for privacy of home and other property***

7 (1) Except with his consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) that is reasonably required—

(i) in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit; or

(ii) for the purpose of protecting the rights and freedoms of other persons;

(b) to enable an officer or agent of the Government, a local government authority or a body corporate established by law for a public purpose to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government or that authority or body corporate, as the case may be; or

(c) to authorise, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or the entry upon any premises by such order, except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

6. The relevant provisions of the OSHA provide that:

> *"**General duties of employers***
>
> *3 (1) It shall be the duty of every employer to ensure, **so far as is reasonably practicable**, the health, safety and welfare at work of all his employees.*
>
> *(2) Without prejudice to the generality of an employer's duty under subsection (1), the matters to which that duty extends include in particular—*
>
> *...*
>
> > *(f) arrangements for consulting and co-operating with the safety and health committee or the safety and health representative at the place of employment for the purpose of resolving concerns on matters of health, safety and welfare at work.*
>
> *(3) In such cases as may be prescribed, every employer shall prepare and as often as may be appropriate revise a written statement of his general policy with respect to the safety and health at work of his employees and the organization and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all his employees.*
>
> *...*
>
> ***General duties of employers and self-employed persons to persons not in their employment***
>
> *4 (1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, **so far as is reasonably practicable**, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.*
>
> *...*

(3) In such cases as may be prescribed, it shall be the duty of every employer and every self-employed person, in the prescribed circumstances and in the prescribed manner, to give to persons (not being their employees) who may be affected by the way in which he conducts his undertaking the prescribed information about such aspects of the way in which he conducts his undertaking as might affect their health or safety."

Rival contentions

7. The Applicant contends that every child has a right to free education **at** an aided or maintained school and Mr Sanderson submits, on her behalf, that the Court should be very wary of any incursions on that right, given the fundamental importance of all children being able to effectively exercise that right. The decision of the Minister means that if a child does not undergo a COVID-19 test, she cannot attend school; and if insufficient children consent to a COVID-19 test, then the school will remain closed.

8. Mr Sanderson submits that a mandated COVID-19 test amounts to a search for the purposes of section 7(1) of the Constitution. The threat of denying a child access to free education means that the consent to the search is not freely given. It follows, Mr Sanderson argues, that such a scheme can only be done under the legal authority, as required by section 7(2) of the Constitution. If there is no legal authority, then the demand to undergo a search is unlawful.

9. Ms Dill-Francois, on behalf of the Minister, acknowledges that the children between the ages of 5-18 are entitled to free education but submits that there is no requirement that such education must take place in a school. If this was the case, Ms Dill-Francois argues, it would mean that the Ministry would not be able to implement remote learning during the pandemic.

10. On behalf of the Minister, it is argued that even if a child is not permitted to enter the school premises, the Ministry will not restrict them from their right to free education, as they will

be provided with the necessary learning material to ensure that they can continue to learn at home. In the circumstances, it is submitted on behalf of the Minister, that the Applicant has a choice whether to take a COVID-19 test and if she elects not to do so at the Ministry will take the necessary steps to provide her with free education. In the circumstances, it is submitted on behalf of the Minister, that if the Applicant elects to take a COVID-19 test, the test is performed with her consent and in the circumstances section 7(1) of the Constitution is not engaged at all.

11. Mr Sanderson correctly contends that the relevant issues for the Court to consider are:

    (1) Is a COVID test a "search" within the meaning of section 7(1) of the Constitution;

    (2) If so, was there effective consent; and

    (3) If there was no effective consent, is there legal authority to conduct such a search.

Discussion

Is it a search?

12. Section 7(1) of the Constitution, dealing with fundamental rights and freedoms, provides that except with his consent, no person shall be subjected to the search of **his person** or his property or the entry by others on his premises. Does a mandatory requirement that a person must undergo a saliva COVID test amounts to a search of his person within the meaning of section 7(1) of the Constitution?

13. In *R v Dyment* [1988] 2 SCR 417, the Supreme Court of Canada was concerned with the scope of section 8 of the Canadian Charter of Rights and Freedoms ("**the Charter**") which provides that "*Everyone has the right to be secure against unreasonable search or seizure*." In that case a doctor treating the appellant in a hospital after a traffic accident collected a vial of free-flowing blood for medical purposes without the appellant's knowledge or consent.

Shortly after, the appellant explained that he had consumed a beer and medication. The doctor, after taking the blood sample, spoke to the police officer who had attended at the accident and at the end of their conversation gave him the sample. The officer had not noted any evidence of the appellant's drinking, had not requested a blood sample from either the appellant or the doctor and had no search warrant. The sample was analysed, and appellant was subsequently charged and convicted of impaired driving. At the time, section 237(2) of the *Criminal Code* did not require a person to give a blood sample.

14. The Supreme Court of Canada held that section 8 is concerned not only with the protection of property but also with the protection of the privacy interests of individuals from search or seizure. The use of a person's body without his consent to obtain information about him invades an area of privacy essential to the maintenance of his human dignity. The dignity of the human being is equally seriously violated when use is made of bodily substances taken by others for medical purposes in a manner that does not respect that limitation. The trust and confidence of the public in the administration of medical facilities would be seriously taxed if an easy and informal flow of information, and particularly of bodily substances from hospitals to the police, were allowed.

15. Claims to privacy must, held La Forrest J at [18], be balanced against other societal needs, and in particular law enforcement. La Forrest J cited the judgment of Dickson J in *Hunter v Southam Inc.* [1984] 1 SCR 145, at 159-160:

> "The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by section 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement."

16. On the facts of that case, the Supreme Court held that the seizure was not reasonable. The violation of the privacy interests here was not minimal. The use of an individual's blood or other bodily substances confided to others for medical purposes for uses other than such purposes seriously violated the personal autonomy of the individual. Although the needs of law enforcement are important and beneficent, there is danger when this goal is pursued with too much zeal. Given the danger to individual privacy of an easy flow of information from hospitals and others, the taking by the police of a blood sample from a doctor who has obtained it for medical purposes cannot be viewed as anything but unreasonable in the absence of compelling circumstances of pressing necessity. Lamer J noted that there was no urgency or any other reason justifying such a seizure without first obtaining a warrant, assuming, of course, that the police officer, after having spoken to the doctor, could bring himself within the conditions required for obtaining a valid warrant.

17. Similar sentiments are expressed in the decision of the European Court of Human Rights ("**ECHR**") in *Schmidt v Germany* (Application No. 32352/02, a case concerning the scope of Article 8 of the Convention which provides that "*Everyone has the right to respect for his private and family life, his home and his correspondence*." The applicant in that case complained about the order and taking of the blood and saliva samples which the authorities contended were necessary to determine the applicant's authorship of a letter which amounted to a criminal offence and possibly to establish his guilt for the offence. In relation to the scope of Article 8 at the ECHR held:

> "*The Court notes that the respect for private life as provided by Article 8 involves respect for a person's physical integrity. The taking of blood and saliva sample from the applicant constitutes a compulsory medical intervention which, even if it is of minor importance, must consequently be considered as an interference with his right to privacy (see X v the Netherlands, decision of 4 December 1979, no. 8239/78, 16 D/R 184; X v Austria, decision of 13 December 1979, no. 8278/78, 18 D/R 154).*

Such an interference gives rise to a breach of Article 8 unless it can be shown that it was "prescribed by law", pursued one or more legitimate aims or aims as defined in paragraph 2 and was "necessary in a democratic society" to attain them.

…

The Court further considers that the taking of blood and saliva sample was ordered in order to determine the applicant's authorship for a criminal offence. The offence, which consisted in casting false suspicion on a third person, forgery and deformation, was of the severe nature in the light of particular circumstances of the case and was connected with the investigation of the fatal attack on a Turkish family which caused nationwide public attention. Therefore, the order served a legitimate aim, namely the interests of national security and public safety."

18. Consistent with the decision of the Supreme Court of Canada in relation to Article 8 of the Charter in *R v Dyment* and the decision of the ECHR in relation to Article 8 of the Convention in *Schmidt v Germany*, the Court finds that mandatory requirement to take a saliva COVID test and to disclose the result to the Ministry can constitute a "search" within the meaning of section 7(1) of the Constitution. Section 7(1) protects against physical search of the person but "*is aimed essentially at protecting the dignity of the human person*" and necessarily includes the notion that it is for the person to decide whether or not to disclose information about himself as he sees fit.

Was there consent?

19. Mr Sanderson, for the Applicant, submits that the Applicant only agreed to take the saliva COVID test under duress having regard to the concerns that (i) further remote schooling would exacerbate the Applicant's existing anxiety issues; (ii) the quality of remote schooling did not compare well with classroom learning; and (iii) family employment commitments would have made it very difficult to provide supervised remote schooling.

20. In this regard Mr Sanderson relies upon the decision of the Court of Appeal for British Columbia in *Cruickshanks v Stephen* [1992] CanLII 1929. In that case the appellant appeared before the Parole Board who was considering the suspension of his day parole because of a minor infraction. During that hearing the appellant was informed that the options open to the Board included the right of the Board to cancel 1242 days of remission time which, if not revoked, would leave him entitled to mandatory supervision just nine days later.

21. During the hearing the question of conditions to be attached to his forthcoming mandatory supervision were discussed and the appellant agreed that he would comply with a condition requiring periodical urinalysis. Having regard to the options available to the Parole Board at the time and concern the appellant naturally had about the loss of approximately three years of liberty, he agreed to provide the urine samples for analysis.

22. A week later the appellant attended the Board to discuss the terms of the mandatory supervision to which he was then entitled. Terms were then imposed upon him which were (a) that he abstain from all intoxicants; (b) that they follow psychological counselling at the direction of his supervisor; and (c) that he submit to urinalysis or breathalyser sampling at the request of his supervisor or a peace officer. He objected to the urinalysis provisions but under threat he would immediately be apprehended if it did not furnish a sample that very day he did so and he was required to strip and furnish a urine sample under observation. One of the issues for the Court of Appeal was whether the appellant consented to the condition of the periodical urinalysis within the meaning of the section 8 of the Charter.

23. The Court of Appeal held that having regard to the options available to the Parole Board at that time and the concern the appellant naturally had about the loss of approximately three years of liberty, it is not surprising that he agreed to provide the urine samples for analysis. The prospect of losing approximately three years of liberty clearly had a decisive impact upon the appellant's decision to "consent" to the provision of urine samples. In the circumstances it is not surprising that the Court of Appeal held that they could not accede to the submission that the appellant consented to this procedure.

24. It is also noteworthy that the Court of Appeal held in clear terms that is this condition had been introduced by the Parole Board arbitrarily and without any rational basis. The Court of Appeal held that:

> "*However this condition is considered, it was potentially and actually apply in a completely arbitrary way. The only justification offered, not to the appellant but rather to us, was that the authorities needed a "baseline" to monitor future samples. We are not announcing upon the vires of s. 16 generally, but only upon the arbitrary breach of the appellant's Charter rights on January 17, 1992. We are not even saying that a provision for urinalysis would necessarily always be a breach of the Charter. What is prohibited by the Charter is a regime that interferes in such a serious way with the liberty of the subject under circumstances where there are no standards and where the use of the provision interfering with the liberty of the subject can be applied arbitrarily*."

25. Mr Sanderson submits that a strong parallel exists between the facts in *Cruickshanks* and this case in relation to the issue of consent. The Court is unable to accept the submission.

26. Firstly, the facts in *Cruickshanks* were on any basis exceptional. An inmate was given the "choice" of agreeing to provide urine samples or potentially face the loss of approximately three years of liberty. It is readily understandable that the Court of Appeal considered that such a decision was clearly made under duress. Here the "choice" presented by the Ministry of Education to its students is either to provide a saliva sample for COVID-19 test or receive their education remotely during the pendency of the COVID-19 pandemic or until conditions improve.

27. Secondly, in considering the "choice" presented to the students, it is relevant to bear in mind that the Education Act contemplates that compulsory education can be provided to students "*otherwise*" than attendance "*at*" public schools. Section 42(1) provides that it shall be the **duty** of every child of compulsory school age to cause him to receive suitable education. This duty imposed by section 42(1) can be discharged **either** by the parent ensuring that the child

attends at a recognised school **or otherwise**. Section 42(1) clearly contemplates that the obligation to provide compulsory education can be discharged by arrangements other than "*regular attendance at a recognised school*." Section 42(2) provides that if the question arises whether a child of compulsory school age is or is not receiving suitable education **otherwise than by regular attendance at the school**, that question shall be referred to the Minister and the decision of the Minister shall be final. The Education Act clearly contemplates that the Minister can decide whether arrangements otherwise than by regular attendance at the school are sufficient and appropriate so as to provide compulsory education under the Education Act.

28. Thirdly, in considering whether a decision is to be considered as having been made under duress, the Court is entitled to consider the circumstances under which the relevant person is asked to make the relevant decision. As noted, in *Cruickshanks*, not only did the appellant face the prospect of loss of liberty for nearly 3 years, but there was no sensible rationale for introducing the urinalysis condition. No reason was provided to the appellant as to why the urinalysis condition was necessary. The Court of Appeal was advised that it was required to establish a "baseline". Not surprisingly the Court of Appeal considered that the condition was entirely arbitrary. Here, there is evidence from the Commissioner and the CMO which set out the rationale why the Minister has made the decision in the interest of the children and staff who attend the public schools.

29. In a letter dated 8 October 2021 to Mr J B, and the Commissioner of the Education explains the rationale as follows:

> "*The Ministry of Education cannot make you have your child tested; however, the Minister of Education, Permanent Secretary of Education and the Commissioner of Education do have the power to place conditions on the return to school under the Occupational Safety and Health Act 1982 and the Education act 1996. Therefore, it is mandatory that your daughter take a PCR test, and that you provide a negative test result for your daughter before she can return to school for in-person learning. The same applies to all students and school staff.*

The requirement has been introduced to protect the health of students and staff, and as a reasonable measure to prevent and reduce the bringing COVID-19 into schools upon reopening. Pre-return testing has been conducted in other areas locally, for example, for E-Camps for the children of essential workers. The approach caught COVID-19 cases and reduce exposure of other persons (staff and students) to COVID-19. ***The objective of testing is not only to help reopen school safely, to keep schools open for the learning and well-being of students. Having to quarantine due to COVID-19 case would be disruptive to learning, unfair to other students and staff, not to mention their other household members. Many students and staff would find this difficult after physically being out of school since June 2021****.*

It is my sincere hope that after the rationale for testing staff and students has been provided to you that you will adhere to the testing requirement to help increase the safe return to school for your daughter or alternatively you will accept the reasonable accommodation of the work packet for your daughter*."* (emphasis added).

30. The Commissioner states in her second affidavit that within the COVID-19 environment, the priority of the Ministry and Department of Education is to ensure that all school buildings are safe for teaching and learning. In this regard, the Ministry of Education pre-return policy requires students and staff to provide evidence of a negative PCR or lab verified antigen test to school buildings after each school break.

31. The Commissioner explains that the data reveals that there has been an increase in the number of positive cases after school breaks; consequently, this policy was put in place to minimise the risk of staff and students who have COVID-19 entering school buildings, recognising that persons may have COVID-19 without the symptoms. It is also known that many students, their families and staff travel during the school breaks or that they may have persons from overseas visiting their homes and interacting with them, which could unknowingly lead to the transmission of COVID-19. The pre-return testing policy was introduced in October 2021, as

another measure to help keep schools safe, in response to an increase in the number of reported COVID-19 positive cases on the Island.

32. The Commissioner also explains that the school custodians have specific cleaning protocols to follow throughout the course of the school day. Staff and students also have the option of participating in weekly or bi-weekly antigen testing as another layer to support staff and student safety. These measures contribute to ensuring a safe in-person learning environment for students and an in-person teaching work environment for school staff.

33. In her first affidavit, the Commissioner states that in-class learning is viewed as the better option for students. However, the focus of the Ministry of Education has been to minimise continuous disruption of student learning due to identified positive COVID-19 cases in schools. For this reason, the Ministry of Education implemented remote learning at the start of 2021/2022 academic year, as the Ministry had to balance the safety of the children with the need for them to continue with their education. During remote learning, students who do not have devices are provided with learning packets, which are tasks and assignments, to continue with the provision of education. As the Commissioner further states that although it is accepted that remote learning may be inconvenient to parents and other adults, it is imperative that we make student safety a priority.

34. The Commissioner confirms that when considering such measures, the Ministry of Education sought assistance from the Ministry of Health. As a result, the Ministry of Education advised that widespread PCR testing of all public-school students, combined with the requirement that all returning students must provide a negative result, was necessary to reduce the risk of further community transmission. Such testing was irrespective of whether the student exhibited symptoms or not as it was widely known that lack of symptoms does not necessarily mean that a person is negative for COVID-19.

35. With respect to the measures taken by private schools, the Commissioner confirmed in her first affidavit, these measures included lateral flow testing for staff and students up to twice a week for certain private schools.

36. In his first affidavit, the CMO states that whilst children are not physiologically at a high risk of transmitting COVID-19, behaviourally, there is cause for concern. Children are more likely to be unable to maintain physical distancing and adequate hand and respiratory hygiene, or to generally comply all day long with public health measures.

37. The CMO explains that the mental harm to children and adults of this pandemic are still revealing themselves. Educational and social impacts of full-time virtual education are also being revealed. These are the reasons so much effort is being put into collaboration with all stakeholders to create policies that balance the needs of a mental well-being, educational and social well-being, health of the community and the capacity of the health system; this is an ongoing and complex challenge.

38. The CMO states, the testing of students is not intended to be punitive, but it is intended to protect the health and safety of all persons within the school environment, and this includes medically fragile children and school staff who are at increased risk of serious complications or death due to the advanced age of chronic disease. These measures are designed to keep the schools open for face-to-face learning for as long as possible.

39. The CMO also explains that the saliva test is not technically invasive in that it is simply a self-administered collection of saliva by the individual. It is therefore generally acceptable to young people or those who resist testing of any sort for ideological reasons. They are also entirely appropriate for children, with supervision to ensure correct collection of saliva specimen.

40. In his second affidavit the CMO confirms that it is his opinion that the pre-return testing of student is not illogical, and that the data collected by the Ministry of Health confirms that there is an increase in the number of students who test positive after school break. This was seen after both the summer break and the Christmas break.

41. In the circumstances and having regard to the facts that the policy in question (i) requires the students to either provide a saliva sample for COVID-19 test or receive their education

remotely during the pendency of the COVID-19 pandemic or until conditions improve; (ii) the Education Act contemplates that compulsory education can be provided to students "*otherwise*" then attendance "*at*" public schools; (iii) the saliva test is not unduly invasive in that it is simply self-administered collection of saliva by the individual student concerned; (iv) is introduced, on the recommendation of the Department of Health, with the objective of not only to help reopen the schools safely but to keep schools open for the learning and well-being of all students; (v) recognises that having to quarantine due to COVID-19 is disruptive to learning, unfair to other students and staff and members of their households, it cannot reasonably be said that when the Applicant agreed to take the saliva COVID-19 tests, her consent was vitiated by duress. Given this finding, it is common ground that there can be no valid claim for infringement of the Applicant's rights under section 7(1) of the Constitution.

Lawful authority

42. In light of the conclusion that there was consent to the past saliva COVID-19 tests, this issue can be dealt with briefly. Mr Sanderson correctly submits that the Minister needs to identify lawful authority in order to implement the testing policy. He relies upon at the decision in *R v Somerset County Council, ex p. Fewing [*1995] 1 All ER 513 for the proposition that in contrast with private persons, public bodies need to identify the source of their authority to undertake a particular act. Laws J (as he then was) explain the distinction at page 524:

> *"Public bodies and private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedom of the private citizen are not conditional upon some distinct and affirmative justification for which you must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it*

exists for no other purpose… The rule is necessary in order to protect the people from arbitrary interference by those set in power over them."

43. Mr Sanderson submits that the Minister needs to show that he has the requisite authority either from the express language of the statute or by necessary implication. Mr Sanderson referred to the speech of Lord Hobhouse in *R (Morgan Grenfell & Co) v Special Commissioner of Income Tax* [2002] STC 786 at [44] endorsing the speech of Lord Hoffmann in *ex parte Simms* [2000] 2 AC 115, at p.131:

> *"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. ... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."*

44. At [45] Lord Hobhouse considered the proper scope of the principle of "*necessary implication*":

> *"It is accepted that the statute does not contain any express words that abrogate the taxpayer's common law right to rely upon legal professional privilege. The question therefore becomes whether there is a necessary implication to that effect. A necessary implication is not the same as a reasonable implication as was pointed*

out by Lord Hutton in B v DPP [2000] 2 AC at 481. A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."

45. Here, the Minister relies upon section 3(1) of OSHA which provides that there shall be the duty of every employer to ensure, so far as reasonably practicable, the health, safety and welfare at work of all his employees. Section 3(3) further provides that in such cases, every employer shall prepare and as often as may be appropriate revise a written statement of his general policy with respect to the safety and health at work of his employees and the organisation and arrangements for the time being in force for carrying out their policy, and to bring the statement in any revision of it to the notice of all his employees.

46. The Minister also relies upon section 4(1) of OSHA which provides that it is the duty of every employer to conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety. Section 4(3) further provides that it shall be the duty of every employer to give to persons (not being their employees) who may be affected by the way in which he conducts his undertaking the prescribed information about such aspects of the way in which he conducts his undertaking as might affect their health or safety.

47. Sections 3(1) and 4(1) of OSHA expressly impose duties on all employers in Bermuda, including the Ministry of Education, **so far as reasonably practicable**, (i) to ensure the health, safety and welfare at work of all his employees; (ii) to conduct his undertaking in such a way that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety.

48. OSHA has imposed these statutory duties on every employer in Bermuda, including the Ministry of Education, and every employer is required to discharge the statutory duties "*so far as reasonably practicable*." Given that the statute requires every employer to take the relevant actions "*so far as reasonably practicable*", the employers, including the Ministry of Education, must have the necessary authority to take the relevant actions so that they can discharge these duties. Such authority must arise by "necessary implication".

49. Mr Sanderson further submits that even if legal authority can be identified (such as sections 3(1) and 4(1) of OSHA) such authority, as it interferes with constitutional rights, must comply with the "principle of legality". He refers to decision in *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 5,* where the Supreme Court held at [79]:

> *"79. In order to be "in accordance with the law" under article 8(2), the measure must not only have some basis in domestic law - which it has in the provisions of the Act of the Scottish Parliament - but also be accessible to the person concerned and foreseeable as to its effects. These qualitative requirements of accessibility and foreseeability have two elements. First, a rule must be formulated with sufficient precision to enable any individual - if need be with appropriate advice - to regulate his or her conduct: Sunday Times v United Kingdom (1979) 2 EHRR 245, para 49; Gillan v United Kingdom (2010) 50 EHRR 1105, para 76. Secondly, it must be sufficiently precise to give legal protection against arbitrariness:*
>
> > *"it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law … for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation - which cannot in any case provide for every eventuality -*

depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed." Gillan v United Kingdom, *para 77;* Peruzzo v Germany *(2013) 57 EHRR SE17, [2013] ECHR 743, para 35.*

50. As noted above, sections 3(1) and 4(1) of OSHA require all employers in Bermuda to discharge their statutory duties "*so far as reasonably practicable*". Sections 3(3) and 4(3) require the employers to provide all relevant information to employees and non-employees in relation to the risks posed and policies implemented in relation to those risks.

51. The issue before the Court in a given case would be whether the particular policy is reasonably required and proportionate to the risk posed to the employees and non-employees who may be affected by the adverse conditions.

52. The courts are perfectly capable of reviewing and dealing with issues such as whether the policy in question was reasonably required having regard to the risks posed; whether the measures taken are proportionate in all the circumstances; and whether adequate steps have been taken to secure the private data of employees and non-employees.

53. In the ordinary case, in the determination of these issues, the Court would be assisted by the evidence of the experts in the relevant field, as is the case here. As noted earlier, the Commissioner has given detailed explanation of the rationale behind the policy decided upon by the Minister. Further, there is the expert evidence of the CMO that the pre-return testing of students is not illogical as the data collected by the Ministry of Health confirms that there is an increase in the number of students who test positive after preschool break.

54. Accordingly, the Court is satisfied that it can properly review the discretionary decisions of the employers, including the Ministry of Education, in relation to the implementation of the COVID-19 testing policy. It is not the case that the authority granted to employers, including the Ministry of education, in this context amounts to an unfettered power. It follows that the legal authority granted to employers under section 3(1) and 4(1) of OSHA accords with the principal of legality.

Conclusion

55. For the reasons set out above, the Applicant's application for judicial review and constitutional relief in respect of the decision of the Minister is dismissed.

56. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 22nd day of April 2022

NARINDER K HARGUN
CHIEF JUSTICE