THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

Claim No. CV2017–03276

IN THE MATTER OF AN APPLICATION FOR REDRESS PURSUANT TO SECTION 14 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO FOR THE CONTINUING VIOLATION OF CERTAIN RIGHTS GUARANTEED UNDER SECTION 4

BETWEEN

SHARON ROOP **CLAIMANT**

AND

THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO **DEFENDANT**

Before the Honourable Madame Justice Margaret Y. Mohammed

Date of delivery: November 9, 2018

APPEARANCES:
Mr. Anand Ramlogan SC, Mr. Gerald Ramdeen, Ms. Chelsea Stewart instructed by Mr. Robert Abdool-Mitchell Attorneys at law for the Claimant.
Ms. Tinuke Gibbons-Glenn, Mr. Stefan Jaikaran and Ms. Candice Alexander instructed by Ms. Svetlana Dass Attorneys at law for the Defendant.

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JUDGMENT

Introduction

1. The Constitution of Trinidad and Tobago[1] ("the Constitution") guarantees persons the fundamental right of freedom of conscience, religious belief and observance. The Constitution is to be interpreted and applied to address the needs of a changing society. Trinidad and Tobago has always prided itself as a religious tolerant society and the foundation for this is the constitutionally enshrined right of tolerance of religious belief under section 4 (h). The Constitution therefore respects the dignity of all members of society irrespective of religious persuasion. The tolerance of religious freedom is reflected in our National Anthem which states *"Here every creed and race find an equal place";* and the nation's watchwords of *"Discipline, Production and Tolerance"*.

2. The Claimant is a Woman Special Reserve Police officer enrolled in the Trinidad and Tobago Police Service ("the TTPS") since 2009 and a practicing Muslim. She has brought this action since she claims that her right of freedom of conscience, religious belief and observance has been breached since she is not permitted to wear the hijab with her uniform whilst at work.

3. Sometime in 2015 she wrote to the Commissioner of Police requesting permission to wear the hijab with her uniform whilst on duty since it was part of her religious observation as a Muslim woman. In that same Memorandum she noted that she was not the only individual who was seeking permission for the ability to observe her faith whilst executing her professional duties. She also enclosed a number of pictorial depictions of the manner in which the hijab could be worn with her uniform and provided research material on the wearing of the hijab by Muslim women in law enforcement in several non-Muslim countries.

[1] Chapter 1:01

4. The Commissioner of Police did not respond to her Memorandum. More than two and a half years after not receiving a response to that Memorandum, the Claimant sought legal advice.

5. A pre-action letter dated 9th July 2017 was sent by the Claimant's attorney at law to the Commissioner of Police, the Minister of National Security and the Solicitor General, the representative of the Attorney General, in whose name proceedings against the State are to be brought. The pre-action correspondence highlighted the particular section of the **Police Service Regulations 2007**[2] ("the Regulations"), which prevents the Claimant from wearing the hijab, and called upon the Commissioner and/or Minister to take the necessary steps to amend the Regulations.

6. On 22nd June 2017, State Counsel responded on behalf of the Permanent Secretary of the Ministry of National Security, indicating that the matter had been "*formally redirected to the Trinidad and Tobago Police Service, who has purview over matters of this nature*".

7. By way of letter dated 31st July 2017, a Legal Officer of the TTPS, Ag Inspector Kazim Ali, responded to the pre-action letter in the following terms:

> "Be informed the Commissioner of Police has given careful consideration to your client's request, however, I regret to inform you that the law has not changed, the dress order for female officers (second division) is outlined under Regulation 121 and Schedule D of the Police Service Act Chapter 15:01.
>
> Therefore, until there is a change in the legislation, the Trinidad and Tobago Police Service cannot accede to your request".

8. Having been refused the request to wear the hijab with her uniform, the Claimant commenced the instant action. She filed an affidavit in support of her claim. ("the Claimant's Affidavit"). The Claimant also filed an affidavit by Mufti Abraar Alli ("the Abraar Alli Affidavit") a religious leader from whom she had sought advice and counselling about

[2] Regulation 121.

the predicament in which she found herself as a Muslim female police officer. Upon receipt of the Defendant's evidence the Claimant filed an affidavit in reply ("the Claimant's Affidavit in Reply"). The affidavits filed on behalf of the Defendant were from the Commissioner of Police, Mr. Stephen Williams ("the Williams Affidavit"), Assistant Commissioner of Police, Mr. Surajdeen Persad, Acting Senior Superintendent of Police Mr. Kenny McIntyre, Police Corporal Mr. Neil Nawal and Woman Sergeant of Police Ms. Marilyn Phillip.

9. The reliefs which the Claimant seeks are as follows:

   a. A declaration that the Claimant's right to freedom of conscience and religious belief and observance has been infringed by the denial of the request to wear a hijab and/or the prohibition against wearing a hijab together with her uniform whilst on duty as an officer of the Trinidad and Tobago Police Service;
   b. A declaration that the Police Service Regulations, 2007 is unconstitutional, invalid, null and void to the extent that it makes no provision for the wearing of the hijab;
   c. Damages to be assessed before a Master in chambers;
   d. Costs;
   e. All necessary and consequential orders and directions and such further and/or other relief as the Court might consider necessary or expedient or as the Court deems fit.

10. The issues which arise to be determined are:

   a. Whether the Claimant's rights under section 4(h) have been infringed?
   b. Whether the Regulation 121 of the Police Service Act[3] is unconstitutional?
   c. Whether the Claimant is entitled to damages?
   d. Whether the instant action is an abuse of process?

[3] Chapter 15:01

Whether the Claimant's rights under section 4(h) of the Constitution have been infringed?

11. It was common ground that by section 1(2), the Constitution has legislative supremacy and that any law which is inconsistent with it is void. Part 1 of Chapter 1 of the Constitution sets out the fundamental rights which have been enshrined. Section 4 provides that freedom of conscience and religious belief and observance is a fundamental right enshrined in the Constitution. It provides that:

> 4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:
>
> …
>
> (h) freedom of conscience and religious belief and observance;

12. Section 5(1) prohibits the abrogation, abridgment or infringement of the rights in section 4 of the Constitution. It states:

> 5. (1) Except as is otherwise expressly provided in this Chapter and in section 54,[4] no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.

13. Section 13 provides the exception where Parliament can make laws which are inconsistent with sections 4 and 5 of the Constitution. It states that:

> 13. (1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be

[4] Parts II (section 6) and III (sections 7-12) of Chapter 1 refer to exceptions for existing law and for emergencies, respectively, and are not relevant to the instant facts. Section 54 refers to constitutional amendment by Parliament and is not relevant to these facts.

reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

(2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House.

(3) For the purposes of subsection (2) the number of members of the Senate shall, notwithstanding the appointment of temporary members in accordance with section 44, be deemed to be the number of members specified in section 40(1).

14. Section 14 provides the mechanisms by which the rights in Chapter 1 (including those in section 4) may be enforced before the courts:

"14. (1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion."

15. The Police Service Act is the governing law which empowers the making of regulations for the mode of dress or attire by police officers. Section 78(1) of the Police Service Act states:

"78. (1) The President may make Regulations, subject to the affirmative resolution of the House of Representatives, to give effect to the purpose of this Act, and in particular for the following matters:

…

(j) the description and issue of arms, ammunition, accoutrements, uniform and necessaries to be supplied to the Police Service;

16. Regulation 121 of the Regulations sets out the mode of dress for police officers in Appendices C and D as:

> "121. The description of all items of uniform and the orders of dress to be worn by officers shall be as set out in Appendix C and D or as prescribed by the Commissioner with the approval of the Minister and shall be published in the Gazette."

17. With respect to head covering for female police officers, Appendices C and D prescribe a dark blue cap. It states:

> APPENDIX C
>
> FIRST DIVISION OFFICERS' UNIFORM AND ORDERS OF DRESS
>
> …
>
> Cap—Dark blue Regulation for female police officers.
>
> …
>
> APPENDIX D
>
> SECOND DIVISION OFFICERS' UNIFORM AND ORDERS OF DRESS
>
> INSPECTORS
>
> Cap—Dark blue regulation for female police officers.
>
> …
>
> SERGEANTS, CORPORALS AND CONSTABLES
>
> …
> Cap—Dark blue regulation for female police officers.

18. Section 122 of the Regulations provides:

> 122. An officer shall not whilst on duty in uniform wear a badge, emblem or other decoration other than those officially approved.

19. It was common ground that the Claimant has a fundamental right to freedom of conscience and religious belief and observance. It was not in dispute that the Police Service Act was not passed by any special majority.

20. It was submitted on behalf of the Claimant that she is entitled to relief under section 14 of the Constitution as her right under section 4(h) of the Constitution has been infringed by the Regulations which are inconsistent with that right and that the governing Police Service Act was not passed with a special majority. Senior Counsel for the Claimant argued that since there are express constitutional derogations to the fundamental rights and freedoms in sections 4 and 5 in the Police Service Act, the approach the Court is to adopt in determining whether there is a breach of the Claimant's right under section 4 (h) of the Constitution, is to follow the test which was postulated by the minority in the Court of Appeal decision in **Barry Francis and Roger Hinds v the State**[5] where it rejected the proportionality approach set out by the Privy Council in **Kenneth Suratt v The Attorney General**[6] and **Omar Maraj v The Attorney General**[7].

21. Alternatively, Counsel for the Claimant argued that even if the Court is to apply the test of proportionality, the infringement is disproportionate with the Claimant's protected freedom of religion under section 4 (h) of the Constitution since there can be no ground on which the State can legitimately argue that there was some objectively purposeful and reasonable justification to prohibit the wearing of the hijab as part of the uniform of the TTPS. Counsel also submitted that there is no evidence that the wearing of the hijab in the manner depicted in the pictures exhibited to the Claimant's affidavit will compromise the proper performance of her duties or give rise to security concerns.

22. The Defendant has conceded that there has been some curtailment of the Claimant's rights through the requirement for her to conform to the police uniform but it contended

[5] Criminal Appeal Nos 5 & 6 of 2010
[6] [2007] UKPC 55
[7] [2010] UKPC 29

that this curtailment is justified by the legitimate aim of maintaining a neutral environment in the TTPS which is critical to its functioning irrespective of the faith of its members. The Defendant did not state exactly what test the Court ought to apply in determining whether the Claimant's right under section 4 (h) has been infringed but from the submissions it appeared to me that the Defendant applied the test of "reasonably justified".

The applicable test

23. The law in Trinidad and Tobago with respect to determining whether an Act of Parliament is unconstitutional was settled up until the decision of Baroness Hale in the Privy Council decision in **Suratt**.

24. Before **Suratt,** the settled position was expressed in **Hinds v R**[8] and **Thornhill v the AG**[9]. The position of the Privy Council in **Hinds** and **Thornhill** was that laws which were passed and which were inconsistent with the fundamental rights provisions of sections 4 and 5 were only valid if they were passed by the method prescribed by the Constitution for doing so, namely by the special majority. In **Hinds** Lord Diplock expressed the rational for the safeguards as:

> "One final general observation: where, as in the instant case, a constitution on the Westminster model represents the final step in the attainment of full independence by the peoples of the former colony or protectorate, the constitution provides the machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representative in Parliament acting by specified majorities, which is generally all that is required,

[8] [1977] AC 195

[9] [1981] AC 61

though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the peoples themselves. The purpose served by the machinery for "entrenchment" is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitutions, should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws. So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with the entrenched provisions of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provisions." (Emphasis added).[10]

25. In **Suratt** which was followed by **Omar Maraj**, the Privy Council changed the test and introduced proportionality as the test for determining the constitutionality of ordinary legislation (ie not passed with any special majority). In **Suratt** the issue was the constitutionality of the Equal Opportunities Act ("the EOA"). The Court of Appeal in this jurisdiction struck down certain parts of the EOA on the basis that it was passed by a simple majority and not pursuant to section 13 of the Constitution as there were certain provisions which were inconsistent with the enjoyment of certain fundamental rights and freedoms. At the Privy Council, Baroness Hale found that although the EOA was passed by a simple majority and it had provisions which are inconsistent with sections 4 and 5 of the Constitution, the EOA was not inconsistent with the Constitution. In arriving at this fundamental shift in position, Baronnes Hale applied a two-step approach in determining

[10] [1977] AC 195 page 214

the constitutionality namely: (i) Does the limitation of the fundamental right pursue a legitimate aim and: (ii) If so, is the limitation proportionate to the aim.

26. Subsequent to this fundamental shift, several judges at the Court of Appeal[11] in this jurisdiction have expressed their disagreement with the approach by the Privy Council in **Suratt** and **Omar Maraj** but nonetheless they have applied the test postulated in **Suratt** on the basis that the local Court is bound by the decision in **Suratt**.

27. Subsequent to **Suratt** was the decision of the Court of Appeal in this jurisdiction of **Barry Francis.** In that case, the Appellants were involved in an altercation in May 2001 at a bar in Sangre Chiquito with a Mr. Joseph. Mr. Hinds shot Mr. Joseph in the head and fled the scene in a motor vehicle driven by Mr. Francis. The vehicle was intercepted by the police and was eventually searched. Marijuana weighing 1.16kg and a shotgun was found in the back seat. The appellants were jointly charged with shooting with intent to cause grievous bodily harm, possession of a dangerous drug for the purpose of trafficking, possession of a firearm and possession of ammunition. They were both convicted in respect of the shooting and ammunition charges. However, they appealed their sentence in respect of the offence of possession of a dangerous drug for the purposes of trafficking for which they each were sentenced to twenty five (25) years in prison.

28. The central question for the Court of Appeal was whether section 5(5) of the **Dangerous Drugs Act**[12] in conjunction with section 61 is "reasonably justifiable in a society that has a proper regard for the rights and freedoms of the individual." The Court found that section 5(5) of the **Dangerous Drugs Act** in conjunction with section 61 removed judicial discretion, by imposing the mandatory minimum penalty which is inconsistent with sections 4(a) and 4(b) of the Constitution.

[11] See Mendonca JA in Ferguson v Attorney General Civ App No 185 of 2010; Jamadar JA in Ishmael v The Attorney General Civ App No 140 of 2008.
[12] Chapter 11:25

29. The majority in **Barry Francis** applied the proportionality test as laid down in **Suratt** and held that there may be legislation which is disproportionate and, therefore, inconsistent with sections 4 and 5 of the Constitution but which '*may still be effectual because democracies recognize that some disproportion in aims and policy of the Executive, may be required in the public interest'*[13]. The majority also held that they considered it *'unnecessary to address any of the issues posed by Archie CJ and Jamadar JA in their joint opinion on that question'*[14].

30. In the joint opinion by Archie CJ and Jamadar JA, the minority disagreed with the proportionality test laid down in **Suratt** and stated that the approach to be adopted is that used in **Hinds v R**[15] and **Thornhill v the Attorney General**[16]. The minority set out a strong case distinguishing **Suratt** in setting out their position that **Suratt** is not binding on the Courts in this jurisdiction.

31. The minority position in **Barry Francis** is attractive. However, even if I agree with the approach laid down in **Hinds** and **Thornhill**, I remain bound by the Privy Council decision in **Suratt**. Therefore, in determining whether the **Police Service Act,** which was passed by a simple majority is constitutional, I am guided by the approach in **Suratt** where I am required to examine (i) does the limitation of the fundamental right pursue a legitimate aim: and (ii) if so, is that limitation proportionate to the aim.

<u>Does the limitation of the fundamental right pursue a legitimate aim?</u>

32. It was not in dispute that no constitutional freedom is absolute and even freedom of religious belief and observation is subject to limitations to protect the security of the State, public safety, order and well-being[17]. The fundamental right in issue is the right to freedom of conscience, religion and belief. In **Sanatan Dharma Maha Sabha of Trinidad**

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[13] See paragraph 101
[14] See paragraph 53 of decision of Bereaux JA in Barry Francis
[15] [1977] AC 195
[16] [1981] AC 61
[17] HCA 2065/2004 Sanatan Dharma Maha Sabha of Trinidad and Tobago and ors v The Attorney General Jamadar J (as he then was) at page 69

and Tobago and ors v The Attorney General[18] Jamadar J (as he then was) described the constitutionally guaranteed right to freedom of conscience, religion and belief at page 68 as:

> "First, it guarantees "freedom" to be and to act in accordance with conscience and religion. Freedom is based on dignity and equal and inalienable rights (paragraph 1 of the Preamble). Freedom is present where there is an absence of compulsion or restraint. And both coercion and constraint can be effected by direct and indirect means. Freedom in its negative sense is the absence of coercion and constraint and in its positive sense, is the right to hold and manifest beliefs and practices.
>
> Thus, <u>the essence of the concept of freedom of religion is the inalienable right to hold such religious beliefs as an individual chooses, and to embody and declare them openly and freely. Freedom of religious observance is equally the inalienable right to manifest, express and participate in such rituals, practices and activities which are a part of and consistent with avowed religious beliefs."</u> (Emphasis added)

33. According to the evidence of the Claimant, her right to observe all the tenets of her religion are infringed by the failure of the Regulation in the Police Service Act to permit her to wear the hijab at work. Paragraphs 5-9 of the Claimant's affidavit stated that:

> 5. I was born into a family of mixed religions but my grandmother who I loved and admired very much was a very devout Muslim who practiced the Islamic faith all her life. As a child I followed the teachings of Islam that were taught by my grandmother and I attended the Masjid with her. I always remained part of the Islamic faith and revered the principles upon which it is based and tried to live my life according to the teachings of Islam which I knew.

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[18] HCA S 2065/ 2004

6. I started studying the Qur'an and attending the Masjid regularly and sought guidance on how I should live my life as a Muslim woman. I have officially taken Shahada, which is the Islamic equivalent of baptism.

7. The Qur'an and the Hadiths, which are the traditions or teachings of the Prophet Muhammad (PBUH) impart that the wearing of the hijab is an act of modesty which is mandated for all Muslim women. The verses or ayahs of Surat Al-Ahzab and Surat An-Noor Apart from preserving modesty, the wearing of the hijab is an act of devotion to Allah subhanahu wa ta'ala and it is a religious obligation which a woman has to undertake. As a Muslim woman, Sunnah or the behavioural norms which I am obligated to follow include the wearing of the hijab.

8. Approximately three (3) years ago, having learnt more about the religious significance, meaning and importance of the hijab I began covering myself and wearing the hijab at all times. I also immediately raised the issue with my superiors in the TTPS as I am desirous of observing my religious practices at all times, including whilst I am on duty. To my knowledge and what I have been taught by the religious leaders, there is no exemption from wearing the hijab for Muslim women who are truly practicing the faith. In other words, it isn't optional.

9. My immediate superiors were very supportive when I raised the issue with them and encouraged me to write to the Commissioner of Police and seek approval. On September 30th 2015 I wrote a memorandum to the Commissioner of Police seeking permission to wear the hijab with my uniform. In the said memorandum, I outlined the religious significance of the hijab to him and included samples of the headscarf type covering which I proposed to wear. I included a picture of myself in a hijab which matched

and looked very professional with the TTPS uniform so that the Commissioner would be able to visualise the manner in which I proposed to wear the uniform. I also included research material which I had gathered to demonstrate to the Commissioner that the wearing of the hijab by law enforcement officers was an accepted practice in various countries which are not Islamic countries but which are free and democratic societies, such as the United Kingdom and Canada. A true copy of the memorandum dated September 30th 2015 is hereto annexed and marked **"S.R.1"**.[19]

34. Based on the Claimant's evidence, the wearing of the hijab is part of her expression and practice of her religious observances as a Muslim woman who has taken Shahada which is the Islamic equivalent of baptism.

35. The Defendant's evidence for placing the limitation placed on the Claimant's right to wear the hijab with the police uniform was set out in the Williams affidavit which stated:

> "8. The Regulations stipulate the code for police uniforms. The standards set for uniforms seeks to maintain a religious-neutral police uniform. Persons joining the police service are made aware of the key requirements of serving as a police officer including the uniform requirements as well as the work days which are seven days per week and twenty four hours a day.
>
> 9. Persons with certain religious persuasions may be guided in their religious practices by considerations such as the Sabbath. However, this does not affect the performance of a police officer's duties. Thus for instance, if an officer's duty falls on his Sabbath, that officer would still be required to perform his duties on his Sabbath.

[19] The Claimant's affidavit filed on the 14th September 2017

10. In joining the Trinidad and Tobago Police Service, officers would know that there is no special provision for time off on the basis of religion. This is in respect of any religion. Accordingly, in light of these set regulations, if we make accommodation for one religious persuasion, we would have to accommodate all other religious persuasions. It is in this context that we continue to be religious-neutral….

12. In Trinidad and Tobago, the Police Service remains religious-neutral although members of our society practice various religious beliefs. This was my main consideration in deciding not to make any recommendations for a change in uniform to accommodate the Claimant. In my opinion, allowing any recommendations for the wearing of the hijab with the police uniform would open up the floodgates as to what we can and cannot allow by members of different religious persuasions within the Police Service.

13. In addition, allowing persons of different religious persuasions to take time off from duty to practice their differing religious persuasions will affect the efficiency of the Police Service. The officers are free to practice their religious activities while they are not on duty. However, they are not allowed to do so while they are on duty."

36. The Claimant disputed paragraph 12 of the Williams affidavit in the Claimant's affidavit in Reply where she stated at paragraph 8 that:

> "…accommodation is already made for persons to wear items which carry religious significance, such as items of jewelry like crosses and rosaries which are worn by Christians and raksha sutra strings on the wrist which is worn by Hindus in the Police Service, Muslims are the only mainstream religious group that do not enjoy such accommodation."

The test for section 4(h)

37. In **Sanatan Dharma Maha Sabha**, Jamadar J (as he then was) suggested that the approach the Court should take in the application of section 4(h) individual cases as:

> "Because the freedom of religious belief and observance is characteristically individualistic, the "subjective objectivity" test mooted above is in this court's opinion the forensic exercise to be undertaken in order to determine whether the belief or observance is legitimately and constitutionally "religious".
>
> Thus, in ascertaining whether a claimed belief or observance is "religious", the court is obliged to inquire into the doctrine or practice and to determine whether the individual demonstrates sincerity in the belief or in the practice (i.e. simply whether the belief or practice is subscribed to honestly or whether it is contrived or fictitious). Further, both the belief and practice to qualify as "religious" should be consistent with a person's perceptions of self, humankind, nature and (where relevant) with a higher, greater or different order of being (one's cosmology). And, in assessing the above, this exercise is to be done irrespective of whether a particular belief or practice conforms with and/or is prescribed by "official" religious dogma or tradition or the opinions of religious officials.
>
> In my opinion, such an understanding of the section 4(h) guarantee is consistent with a personal and subjective understanding of the stated freedom and its linkage to "conscience".
>
> Clearly, apart from trivial or insubstantial or frivolous claims (which suggests that the impediment to the freedom must be integral or essential or fundamental), the 1976 Constitution protects the actual or reasonably anticipated (section 14) infringement of the religious beliefs and observances of individuals and groups who can qualify for protection, whether such an infringement is direct, indirect, intentional, unintentional, foreseeable or unforeseeable (by the alleged offender)."

Honest conviction

38. Has the Claimant demonstrated a sincere and honest conviction in the practice of wearing the hijab at all times as required by her Islamic faith? There was no evidence from the Defendant to contradict the Claimant's evidence. Based on the evidence of the Claimant, there can be no doubt that she has demonstrated a sincerity in her Islamic belief.

Legitimate nexus

39. Is there a legitimate nexus with her religion? The evidence in support of the Claimant was from Mufti Abraar Alli. Mr. Alli described himself as a businessman and a religious scholar. He set out his knowledge and experience in Islamic teachings at paragraphs 3 to 9 as:

> "3. I am an Assistant *Imam* at the Nur-e-Islam Jamaat in El Socorro. I am a *Mufti*, which is an expert in Islamic legal matters who is permitted to give rulings on Islamic issues, such as marriage, divorce, prayer, business and trade. The role of the Mufti is to use their education and training in Islamic law to interpret the law and provide guidance to followers of Islam, or render an opinion on a matter that touches and concerns the interpretation of Islamic law and tradition. This is known as a *fatwah*.
>
> 4. I am the head of Islamic and Arabic Education at Nur-e-Islam and Principal of *Maktab* (Islamic primary level educational system) and *Madrassa* (primary plus level Islamic education) at this Jamaat.
>
> 5. I am also the Founder, Chairman and Director of Al-Ihsaan Institute, an Islamic educational institute which provides primary level education and offers courses in Arabic, ***Hifdh*** (or memorization of the Qu'ran) and introductory courses for beginners or newcomers to Islam.
>
> 6. I was a student of the Islamic Dawah Academy Jame'ah Riyadul Uloom based in Leicester in the United Kingdom from 2004 to 2010 where I

completed the *Alimiyyah* course. As *'Alim'* I was educated in Islamic theology and jurisprudence. The objective of the course was gain in depth understanding of the meaning, interpretation and application of the Holy Qu'ran and other sources of Islamic knowledge.

7. I was educated in Arabic as well as the key sciences of *Fiqh* (Islamic jurisprudence) Hadith (traditions of the Prophet) and *Tafsir* (exegesis of the Holy Qur'an. Through my studies, I have acquired a better understanding of the how Islamic law is derived from the Holy texts and how they are applied to individuals and mankind as a whole.

8. I also completed the *Ifta* course at *Jamiatul Ilm Wal Huda* in Blackburn in the United Kingdom between 2010 and 2012 in which I was educated in various subject areas such as charity, purity, pilgrimage, inheritance and women's issues.

9. In each of the courses I completed I acquired *Ijazah,* which is like a license or authorization from learned Islamic Scholars from various countries indicating that I had acquired knowledge from them and was authorised to disseminate same. True copies of some of my certificates are hereto attached as **"A.A.1"**."

The Hijab

40. Erum Tariq-Munir of Iowa State University in "The Dynamic of wearing the hijab for Muslim American Women in the USA"[20] set out a brief history of the wearing of the hijab as:

> "Hijab in the literal sense means a "curtain" as shown above. In the era of the Prophet, hijab may have started as seclusion for his wives as a physical barrier along with the restrictions it applied. It slowly spread through the rest of the

[20] Iowa State University Capstones, Theses and Dissertations 2014

Muslim community. How this happened is not entirely clear although Ahmed thinks that a combination of factors such as the raised status of Arabs and the wives of the Prophet, increased wealth, and Muslim conquests of areas where veiling was common amongst the elite, all contributed to the adoption of the veil by the rest of 12 the Muslim community... What we do know for a fact is that Muslim men and women are required to dress modestly and protect their awrah (private parts). Men are required to cover at least the area between their navel and the knees ... In presence of men who are not their mahram, meaning a woman is allowed to marry them, women are required to cover their whole body except their face and their hands…

In the Arabic language, there are various words that describe the clothing used for modesty and covering, such as abaya, lithma, buqa, dishdasha, among many others... To make things complicated many of these terms are also used to refer to men's' articles of clothing... This complex issue of naming Muslim women's' clothing is denoted by the single word "veil" in the western world which seems inefficient to convey the true meaning of hijab. Today, hijab, veil or a headscarf usually refers to a piece of clothing worn to cover a woman's hair and neck area along with other conservative clothing such as long sleeves, long skirts and loose pants…. For Muslim women who follow this practice, hijab is much more than a piece of cloth covering one's hair. Since Muslim women are required to refrain from wearing transparent and tight clothing, they choose various styles of clothing to cover, from the Indian and Pakistani shalwar kameez to western pants and dresses to Arab abayas and jilbabs. The head cover mostly known as the hijab also comes in many different shapes, sizes and colors and is made from various materials. Most South Asian women wear a triangular hijab, which is a square piece of fabric folded into half like a triangle or a rectangular scarf covering their ears and neck area... Many African American Muslim women wear variations of the African head wrap which covers the hair but exposes the ears and the neck

area, because they believe that even though the Quran 13 requests modesty, it does not implement a specific style of dress."

41. Mufti Alli, whose credentials as an Islamic scholar have not been challenged by the Defendant described the customs and practices of women who profess to follow the teachings of the Islamic faith at paragraphs 11 to 16 of his affidavit as:

"11. I learnt then that the Claimant was a police officer and was struggling with the issue of wanting to comply with the teachings of the Qur'an and the Prophet Mohammed which she had been taught. I learnt that she had taken *Shahada* which the first of the five pillars of Islam and involves the recitation of a profession of faith before a minimum of two other Muslims. The *Shahada* – *"La ilaha illa Allah Muhammadur rasul Allah"* – is an expression of two fundamental beliefs that make a person a Muslim; that there is no God but Allah and Mohammed is the servant and messenger of Allah.

12. A person who takes *Shahada* must accept the laws of Allah *subhanahu wa ta'ala* and submit their life to the commandments of Almighty Allah *subhanahu wa ta'ala* which are found in the Holy Qur'an and the Sunnah, the customs and practices of people who profess the Islamic faith. This would include wearing the Hijab, which is one of the requirements of the dress code for Muslim women.

13. In the Qur'an, the direct commandment for post-pubescent women to cover their hair and neck is found is *Surat An-Noor*, *ayah 31* which says

"And tell the believing women to reduce of their vision and guard their private parts and not expose their adornment except that which necessarily appears thereof and to wrap a portion of their khumur over their juyub and not expose their adornment except to their husbands, their father …"

14. Firstly, the verse is directed to all “believing women” which means that the commandment is directed to all women who take *Shahada* and profess the Muslim faith. Islamic scholars around the world agree that the phrase *“was laa yubdina zenatahunna illa ma dhahara minha”* means that everything must be covered except for what must ordinarily appear to carry out daily affairs in public; that is, the face and hands. Throughout history, it has been agreed among various scholars that the covering of the hair is *fard* – meaning that it is a religious obligation or command directly from Almighty Allah.

15. The part of the scripture which is translated as *“to wrap a portion of their khumur over their juyub and not expose their adornment”* must be interpreted with reference to the historical context. At the time, *khumur* were the cloths that were draped over the top of the head and allowed to hang downwards. Women at that time, in various religions and cultures, were already covering their hair and the commandment was therefore for them to continue doing so, but additionally to wrap the *Khumur* over their *‘juyub’* which is the opening to the front of a dress, referred to as the bosom area. The commandment was meant to ensure that their ears, neck and chest were no longer exposed, but were covered along with the hair. This is just one of the many sources from which the obligation to wear the Hijab is derived.

16. It should be noted that it is the unanimous view held by all mainstream Muslim scholars and the four schools of Islamic code and law, namely *Hanafi Madhab, Maliki Madhab, Shafi’ Madhab* and the *Hanbali Madhab*, that it is compulsory for all Muslim women to wear the hijab. This fact has been mentioned in the hundreds of codified Islamic law books throughout the history of Islam and has been the undivided view of Islamic scholars for over 1438 years. Furthermore the covering of the head and/or hair is also

the recognized form of dress of the pious women of our previous prophets and the people of the past, the likes of Ibrahim, Moses, Mary & Jesus."

42. According to Mufti Alli's unchallenged evidence the hijab is a cloth worn by women in the Muslim faith which is draped over the top of the head and allowed to hang down. It covers the hair, ears, neck and chest. He also deposed that in the Muslim faith it is compulsory for all Muslim women to wear the hijab.

43. Based on the evidence of Mufti Alli on the Islamic faith, there is a legitimate religious nexus between the wearing of the hijab for women who profess to observe the practice of the Islamic faith. As such, based on the Claimant's undisputed evidence, since she has professed to observe the tenets of Islam she is required to wear it at all times including when she is at work.

44. Is the limitation proportionate to the aim? According to the Williams affidavit, there are two aims for not permitting the wearing of the hijab with the police uniform at work namely (a) to maintain a neutral religious working environment for members of the TTPS of all faiths and (b) to prevent the opening of the "floodgates" where persons of other religious beliefs may make other claims to accommodate their beliefs.

45. In 2016 the Privy Council in **Madhewoo v State of Mauritius**[21] discussed the issue of proportionality in challenges of constitutional rights as:

> "22. In addressing the question whether section 4(2)(c) of the 1985 Act (as amended) was reasonably justifiable in a democratic society the Supreme Court drew on jurisprudence of the European Court of Human Rights in *S v The United Kingdom* (2009) 48 EHRR 50, para 101, and *Şahįn v Turkey* (2005) 41 EHRR 108, para 103. In substance the Court asked whether the measure pursued a legitimate aim, whether the reasons given by the national authorities for the interference in

[21] [2016] 4 WLR 167

pursuit of that aim were relevant and sufficient, and whether the measure was proportionate to the aim pursued. This evaluation is essentially the same as that adopted by the courts in the United Kingdom in relation to article 8(2) of the ECHR, in which the courts ask themselves (a) whether the measure is in accordance with the law, (ii) whether it pursues a legitimate aim, and (iii) whether the measure will give rise to interferences with fundamental rights which are disproportionate, having regard to the legitimate aim pursued. In relation to (iii), the courts ask themselves: (a) whether the objective is sufficiently important to justify a limitation of the protected right, (b) whether the measure is rationally connected to the objective, (c) whether a less intrusive measure could have been used without compromising the achievement of the objective (in other words, whether the limitation on the fundamental right was one which it was reasonable for the legislature to impose), and (d) whether the impact of the infringement of the protected rights is disproportionate to the likely benefit of the measure: *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2012] 1 AC 621, para 45; *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 790-791, para 74; and *R (Bibi) v* Page 10 *Secretary of State for the Home Department (Liberty intervening)* [2015] 1 WLR 5055, para 29. " (Emphasis added)

Floodgates

46. In my opinion there is no merit in the floodgates argument and therefore it is disproportionate as a reason for not permitting the wearing of the hijab. Based on the Claimant's affidavit in Reply religious symbols are already worn by police officers with their uniform. Mr. Williams has provided no evidence how the floodgates would be opened. In my opinion, his equation of the wearing of the hijab affecting the efficiency of the police service since officers may request time off to observe the Sabbath is flawed. There is no evidence how the wearing of the hijab with the uniform would impact on the

efficiency of the police service and to equate this with officers requesting time off to observe the Sabbath is irrational.

Neutrality

47. I now turn to the neutrality argument. In support of the argument of neutrality the Defendant referred the Court to the cases of **United State v Lee**[22]; **Goldman v Weinberger, Secretary of Defence**[23]; **Achbita & Anor v G4S Secure Solutions**[24]; **Kurtulmus v Turkey**[25] and **Ebrahiman v France**[26] which are international case law based on specific provisions in those jurisdictions as illustrated below.

The United States of America

48. In **United States v Lee** a member of the Amish order failed to withhold security taxes from his employees or to pay the employer's share since it was his belief that payment of taxes and receipt of benefits would violate the Amish faith. The US Supreme Court held inter alia that where there is conflict between the Amish faith and social security obligations, not all burdens on religion were unconstitutional. The State may therefore justify a limitation on religious liberty by showing an overriding Governmental interest. This case can be distinguished from the instant case since it did not deal with the wearing of any religious symbols.

49. **Goldman v Weinberger**[27] was a 1986 case from the Supreme Court of the United States of America. The plaintiff, an orthodox Jew and ordained rabbi claimed that the application of air force regulation to prevent him from wearing his yarmulke (a practice described by the petitioner as silent devotion akin to prayer) infringed upon his First Amendment

[22] 455 US (1982)
[23] 475 US 503 (1986)
[24] 2017 IRLR 466
[25] [2006] ECHR 1169
[26] [2015] ECHR 370
[27] 475 US 503 (1986)

freedom to exercise his religious belief. In the Supreme Court, Justice Rehnquist held that the First Amendment did not prohibit the application of Air Force Regulations to prevent the wearing of yarmulke by the plaintiff while on duty and in uniform.

<u>The European Court of Human Rights and The European Court of Justice</u>

50. In **Achbita v G4S Secure Solutions NV**[28] Ms. Achbita, a muslim, started to work for G4S as a receptionist in 2003. At the time there was an unwritten rule within G4S that employees could not wear visible signs of their political, philosophical or religious beliefs in the workplace. In April 2006, Ms. Achbita informed her line managers that she intended to wear an Islamic headscarf during working hours but she was informed by the management of G4S that the wearing of the headscarf would not be tolerated since it was contrary to G4S's position of neutrality. In May 2006, she again notified her employer that she would be returning to work wearing the Islamic headscarf. That same month, G4S works council approved an amendment to the workplace regulations, which came into force on 13th June 2006, which prohibited employees in the workplace from wearing any visible signs of their political, philosophical or religious beliefs and/or from engaging in any observance of such beliefs'. On 12th June 2006, Ms. Achbita was dismissed for her insistence that she wished to wear the Islamic headscarf at work.

51. Her action was dismissed in the Labour Court in Belgium and her appeal was also denied in the Higher Labour Court, Belgium. The Higher Court noted that Ms. Achbita was not dismissed because of her Muslim faith but she persisted in wishing to manifest her faith during working hours by wearing the Islamic headscarf. Ms. Achbita appealed to the European Court of Justice.

52. The European Court of Justice observed that the internal rule at issue referred to the wearing of visible signs of political, philosophical or religious beliefs and covered any

[28] EU Case C-157/15

manifestation of such beliefs without distinction. Therefore, the rule was to be regarded as treating all workers of the undertaking in the same way requiring them in general to dress neutrally. There was no evidence that the internal rule was applied differently to Ms. Achbita. The Court ruled that employers can ban the wearing of any "political, philosophical or religious sign" including Islamic headscarves, without it being direct discrimination so long as the ban is based on internal company policies requiring that employees should dress neutrally.

53. The case of **Kurtulmus v Turkey**[29] was a decision from European Court of Human Rights in January 2006. Ms. Kurtulmuş was an associate professor at the Faculty of Economics of the University of Istanbul who wore an Islamic headscarf. In 1998 she underwent disciplinary investigation following an allegation that she failed to comply with the rules on dress for public servants. In May 1998 she was reprimanded for continuing to wear the Islamic headscarf while teaching and subsequently on 27th May 1998 she was deemed to have resigned from her post under paragraph 15 of the Disciplinary Procedure Rules, again on the ground that she had willfully failed to comply with the Rules on Dress applicable to Staff in State Institutions. She applied for an order setting aside the 27th May decision and on 27th April 1999, the Istanbul Administrative Court rejected the applicant's application on the ground that the evidence in the investigation file showed that she had willfully and persistently refused to comply with the rules on dress for public servants despite being sent numerous reminders. On 27th June 2000, the Supreme Administrative Court upheld the judgment of 27th April 1999.

54. Ms. Kurtulmuş complained to the European Court of Human Rights that the ban on her wearing a headscarf when teaching violate her right guaranteed by Article 9 of the European Convention On Human Rights to manifest her religion freely, sexual discrimination on the ground that the religious precept required the headscarf to be worn

[29] (App No 65500/01) ECHR 24 January 2006

applied to Muslim women only and not to Muslim men and that she did not have a fair hearing in the administrative courts.

55. The European Court of Human Rights found that the rules complained of by Ms. Kurtulmuş were justified by the "imperatives pertaining to the principle of neutrality in the public service and in particular in the State education system and to the principle of secularism. The Court also found no violation of Article 9 and 14 in that:

> "The manifest purpose of the rules is to preserve both secularism within education institutions and its corollary, the principle of the neutrality of the public service. Furthermore, male members of staff are also subject to analogous rules requiring them not to express their religious beliefs in an ostentatious manner."

56. In **Ebrahimian v France**[30], Ms. Ebrahimian was a social worker in psychiatry service in the Hospitality and Hospital Care Centre of Nanterre. On 11th December 2000 she was informed by the Director of Human Resources that her contract would not be renewed. This decision was a disciplinary measure due to her refusal to remove the hijab she wore and complaints made by patients in the Centre. She challenged this decision in Court but the administrative Court found that the non-renewal of the contract was in accordance with the principles of secularism and neutrality of public services. She appealed but on 9th May 2011 the Conseil d'État declared the appeal inadmissible.

57. Ms. Ebrahimian alleged that the non-renewal of her social assistance contract was contrary to her right to freedom of religion provided for in Article 9 of the European Convention on Human Rights. The Court noted that Article 1 of the French Constitution states that France is a secular republic which ensures equality before the law of all citizens. The Court also noted that the administrative case law showed that the neutrality of public services constitutes an element of the secularism of the State. The Court recognised that it has already accepted that States may invoke the principles of secularism

[30] [2015] ECHR 370

and state neutrality to justify restrictions on the wearing of religious symbols by civil servants.

58. Counsel for the Claimant referred the Court to the learning in **Eweida and others v The United Kingdom**[31].

59. In **Eweida** four applications were brought against the UK by Christians who believed that they had suffered unlawful discrimination by their employers on the grounds of their religious beliefs. Ms. Nadia Eweida and Ms. Shirley Chaplin believed that their faith required them to wear a small cross on a chain visibly around their necks but their respective employers refused to allow them to continue in their role unless they removed their cross. Mr. Gary MacFarlane and Ms. Lilian Ladele complained about the sanctions taken against them by their employers as a result of their concerns about performing services which they considered to condone homosexual union. The applicants argued that the State had violated their right to freedom of religion under Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and/or their right to be free from discrimination in the exercise of this freedom under Article 14 together with Article 9 ECHR in that the State had failed to take action to protect these rights or had taken actions which violated the rights. Domestic law, they argued, had failed to adequately protect their right to manifest their religion.

60. Ms. Eweida was a practising Coptic Christian who worked for British Airways Plc (BA) as a member of the check in staff. BA required their staff to wear a uniform. If an employee was required to have an accessory or clothing for mandatory religious reasons it had to be covered up by the uniform and if it could not be covered up then approval was required through local management as to the suitability of the design to ensure compliance with the uniform standards. Authorisation was given for male Sikh employees to wear a dark

[31] Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10

blue or white turban and female muslim ground staff were authorised to wear hijabs in BA approved colours.

61. Ms. Eweida up until 20th May 2006, concealed a cross which she wore at work under her clothing. On 20th May 2006 she began to display her cross and after refusing to remove or cover it she was sent home without pay. She was then offered administrative work without customer contact which would not require her to wear a uniform but she refused the offer. In November 2006, BA announced a review of its uniform policy and, in January 2007, BA amended the policy so that religious or charity symbols would be permitted where authorised in future. In February 2007, Ms Eweida was reinstated in her old job, able to wear her cross. Ms. Eweida brought claims of unlawful discrimination and sought compensation for the period of time she was without pay. She complained that there was a breach of her right to manifest her religion contrary to Article 9 of the ECHR. Her claims were rejected by the UK courts.

62. The European Court on Human Rights considered that the United Kingdom, in common with a large number of Contracting States in the European Union does not have legal provisions specifically regulating the wearing of religious clothing and symbols in the workplace. The Court did not consider that the lack of specific protection under domestic law in itself meant that Ms. Eweida's right to manifest her religion by wearing a religious symbol at work was insufficiently protected. However, it held that the UK courts, in applying the law, had violated Ms Eweida's rights under Article 9. The UK Courts had failed to strike the right balance on the proportionality of the employer's measure to prevent Ms Eweida from wearing the cross in preserving its corporate image and her right to manifest her religious belief.

63. Ms. Chaplin worked as a nurse in a State hospital, the Royal Devon and Exeter NHS Foundation Trust. The hospital had a uniform policy which provided that "If worn, jewellery must be discreet." In 2007 new uniforms were introduced which included a V-

necked tunic for nurses. In 2009, Ms. Chaplin's manager requested that she removed the "necklace" and though she insisted that the cross was a religious symbol, her approval to wear it was denied on the ground that the chain and cross might cause injury if an elderly patient pulled on it. The hospital suggested that Ms. Chaplin attach the cross to a badge but, as the badge was not worn at all times, Ms. Chaplin refused. Her claims of unlawful direct and indirect discrimination were rejected by the UK Employment Tribunal.

64. The European Court on Human Rights found that there was no violation of her convention rights because the reason why she was not allowed to wear the cross was for her health and safety and that of the patients she worked with.

65. Ms. Ladele was a registrar for a local authority. She believed that same-sex civil partnerships are contrary to God's law. The authority had a "Dignity for All" policy in which the authority agreed to challenge discrimination in all its forms. The policy stated that the authority had no tolerance for discrimination. In 2005 the Civil Partnership Act 2004 came into force, providing for legal registration of civil partnerships between same-sex couples. In December 2005 the authority designated all registrars as civil partnership registrars, a role that Ms. Ladele felt she could not undertake given her beliefs. She made informal arrangements with colleagues to exchange work so that she did not have to conduct civil partnership ceremonies. In 2006, two of her colleagues complained that this was discriminatory. The authority informed Ms. Ladele that her refusal to conduct the partnerships was a breach of its Code of Conduct and equality policy. She became the subject disciplinary proceedings and lost her job. She thereafter brought claims of direct and indirect discrimination. Although the Employment Tribunal found in her favour, the UK's appeal courts both found against her.

66. The Court considered that a balance needed to be struck between Ms. Ladele's freedom to religious beliefs and the protection of the Convention rights of others. The Court also noted that the authority's policy aimed to secure the rights of others which were also protected under the Convention and that the Court generally allows the national

authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights. The Court held that it could not find that the State, either in the form of the local authority who enforced the policy or the courts who adjudicated the authority's decision, had violated Ms. Ladele's Article 14 right.

67. Mr. MacFarlane was employed by a private organisation, Relate Avon Limited (Relate), which provided confidential sex therapy and relationship counselling which conflicted with Mr. MacFarlane's belief that homosexual activity is sinful. Relate's equal opportunities policy stated that, amongst other things, the company was committed to ensuring that no clients receive less favourable treatment on the basis of their sexual orientation. In 2007, there was perception that Mr. MacFarlane was unwilling to work on sexual issues with homosexual couples. The matter was investigated. In 2008 he acknowledged that there was conflict between his religious beliefs and psycho-sexual therapy with same-sex couples if he was asked to do such work, he would do so. Following a further disciplinary meeting, Mr. MacFarlane's statement that he would provide such services was considered to be false and he was dismissed in March 2008. His claims of direct and indirect discrimination were rejected by the UK courts.

68. The Court observed that Mr. McFarlene had voluntarily signed up to the employer's counselling programme knowing that Relate operated an Equal Opportunities Policy and that filtering of clients on the ground of sexual orientation would not be possible. The Court held that "the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination. The State authorities therefore benefitted from a wide margin of appreciation in deciding where to strike the balance between Mr McFarlane's right to manifest his religious belief and the employer's interest in securing the rights of others. In all the circumstances, the Court does not consider that this margin of appreciation was exceeded in the present case."

The United Nations Human Rights Committee

69. Counsel for the Claimant also referred the Court to the case of **Hudoyberganova v Uzbekistan**[32] a case considered by the United Nations Human Rights Committee. In this case, Ms. Hudoyberganova was a student at the Farsi Department at the Faculty of languages of the Tashkent State Institute for Eastern Language in Uzbekistan and she started wearing Institute during her second year of studies. In January 1998 the Institute adopted new regulations under which students did not have any right to wear religious dress. She was asked to sign the regulations and she did but wrote that she disagreed with the provisions prohibiting students from covering their faces. She was suspended from the students' residence and, eventually, from the Institute.

70. Ms. Hudoyberganova complained that her rights under Articles 18 and 19 of the International Covenant on Civil and Political Rights (ICCPR) were violated because she was excluded from the University for wearing a headscarf for religious reasons which she refused to remove.

71. The United Nations Human Rights Committee (UNHRC) considered that "the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considered that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion." The UNHRC ruled that the Institute's treatment of Ms. Hudoyberganova violated Article 18 of the Covenant.

72. The international perspective in determining the breach of a person's right to religious freedom was informed by the historical context of the practice of religion in those jurisdictions and the provisions therein. These cases demonstrated that the Courts were guided by the principles of neutrality, secularism and proportionality in manifesting one's

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[32] CCPR/C//82/D/931/2000.

religious belief and the employer's interest in securing the rights of others as provided for under the European Convention of Human Rights.

The Caribbean Perspective

73. The Claimant also referred to the case of **Commodore Royal Bahamas Defence Force and Others v Laramore**[33] which was a judgment of the Privy Council emanating from the Bahamas. The Respondent, Mr. Laramore, was a former petty officer of the Royal Bahamian Defence Force (the Force). The Force conducted Colours parades on 14 occasions a week on four of which occasions Christian prayers were said at one point in the parade. From 1193 to 2006, pursuant to Coral Harbour Temporary Memorandum No 20/93 ("the 1993 Memorandum"), members of religious beliefs other than Christianity were given the opportunity to excuse themselves by falling out of the parade during the prayers, falling back in immediately thereafter. However, on the 9th November 2006, this arrangement was revoked by a further Temporary Memorandum No 67/06 ("the 2006 Memorandum"), stating that "Effective immediately, all personnel are to remain present for the conduct of prayers during ceremonial parades and morning/evening colours".

74. Mr. Lamore, who converted to Islamic faith in 1993 requested after the 2006 Memorandum "to be exempted from all Christian activity in the [Force] and other religion other than Islam as it is known that I am a believer in Islam". He was charged with disobedience when he left the parade on two occasions when the prayer was about to begin. He instituted proceedings challenging the constitutionality of the 2006 Memorandum. On 9th April 2013, he was awarded damages and the Court of Appeal dismissed the Appellants appeal on 24th July 2014 after which the Appellants appealed to the Privy Council.

[33] [2017]UKPC 13

75. The Privy Council dismissed the appeal. Lord Mance stated that there was no doubt that Mr. Laramore was "hindered in the enjoyment of his freedom of conscience." He commented at paragraph 22:

> "His conscience told him that he should not be taking part in the prayers which were part of regular colours parades. He made this point after he had converted to the Muslim religion in 1993, and he pursued it after the 2006 Memorandum reversed the dispensation introduced in 1993. The effect of the 2006 Memorandum was that he was no longer able to enjoy or give effect to his freedom of conscience by falling out during prayers. Sir Michael Barnett CJ aptly quoted in this connection from the judgment of Dickson J in The Queen v Big M Drug Mart Ltd [1985] 1 RCS 295, 336:
>
> > 'Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.' "

76. The case of **Sumayyah Mohammed v Moraine and another**[34] emanated from this jurisdiction. In that case, the applicant, a Muslim, having passed the Common Entrance Examinations in 1994, was refused admission at Holy Name Convent dressed in a hijab. The school, a public school under the Education Act, had regulations made in accordance with the Act which required pupils to wear the school uniform and as such the principal of the school and the Board of Management refused to allow any exemption to the application to wear dress conforming to the hijab. The principal suggested that the

[34] [1995] 49 WIR 371

application might seek a transfer to another school or resit the examination. Further, the principal explained that if an exemption was allowed, other parents would seek exemptions and that the uniform was a useful tool in administration, conducive to good discipline and created a sense of unity and of family.

77. The applicant attended the school wearing a modified version of the school uniform which conformed with the hijab (the uniform consisting of a long skirt, a long-sleeved blouse and a hijab) but was not allowed to attend classes and was suspended. She claimed that the decision contravened her constitutional rights in particular, those under section 4(a) (the right to enjoyment of property), (b) (right to equality before the law) and (d) (right to equality of treatment by public authorities) the Constitution.

78. The Court held inter alia that under section 6 of the Constitution which is the savings law clause the school was able to insist on compliance with school regulations (including the wearing of school uniform), and the applicant did not enjoy a *de facto* right of exemption from that requirement. However the Court quashed the decision of the respondents on the basis that they had applied the school regulations inflexibly and had not taken into account the psychological effect on the applicant of refusing to allow her to conform to the hijab (to which exception was not taken by the Ministry of Education); there was no evidence to support the respondents' plea that conforming to the hijab would be conducive to indiscipline or would erode the sense of tradition or loyalty to the school, nor that it would accentuate distinctions between students from affluent homes and less affluent ones.

79. The approach taken by the Courts in jurisdiction outside of Trinidad and Tobago in determining the breach of a person’s right to religious freedom was based on specific provisions in those jurisdictions and clearly they were informed by the historical context of the practice of religion. The Williams Affidavit stated that one of the reasons for not permitting the hijab to be worn with the police uniform is for the police service to maintain a religious neutral environment. In my opinion, the appropriate approach to

take in this jurisdiction is to consider the constitutionally enshrined right in section 4 (h) given the historical context in this jurisdiction.

The History of Religion in Trinidad and Tobago

80. In **Sanatan Dharma Maha Sabha** Jamadar J (as he then was) gave a historical account of religion in Trinidad and Tobago from 1498 to 1996. Jamadar J (as he then was) referring to historical data stated for 300 years Trinidad was an exclusive Christian Roman Catholic colony. From 1797 with the introduction of British Colonial Rule the official policy moved to acceptable Christian religious traditions in the context of Christian pluralism. After the introduction of the slaves with their traditional religious practices and later the East Indian Indentured labourers who were Hindu or Muslim, the society while being more religious diverse still maintained a Christian centric attitude. This was reflected in public holidays before the Constitution in 1976 being Christian centric. For example " Christmas Day", "Good Friday", "Easter Monday", "Whit Monday" and " Corpus Christi " are all Christian public holidays which were statutorily recognized since 1872. "Whit Monday" was discontinued on the 16th February 1996 when it was replaced by Indian Arrival Day. [35] The non-Christian public holidays were only prescribed after 1976 in the Eid –ul-Fitr and Divali (Muslim and Hindu religious celebration) Order made on the 7th December 1979. Later public holidays were prescribed for Emancipation[36]; Indian Arrival Day[37]; Spiritual Baptist Liberation Shouter Day[38].

81. The previous Regulation was from 1971 when based on the historical context, Trinidad and Tobago was still a Christian centric and, though a young independent State, the Head of State was still Her Majesty the Queen who is also the Head of the Church of England, a

[35] Taken from page 16 of the judgment of Jamadar J(as he then was) in HCA S 2065/ 2004 Sanatan Dharma Maha Sabha v and ors v AG

[36] Order made on the 15th October,1984

[37] Order made on the 12th May 1995

[38] Order made on the 16th February 1996

protestant Christian faith. It is therefore reasonable to conclude that the 1971 Regulations were shaped by a Christian centric attitude.

82. Did the framers of the Constitution in 1976 envision that this may change in the future? The preamble to the Constitution is a useful starting point. It states:

> "Whereas the People of Trinidad and Tobago have affirmed that the Nation of Trinidad and Tobago is founded upon principles that acknowledge the supremacy of God, faith in fundamental human rights and freedoms"

83. In **Sanatan Dharma Maha Sabha**, the Jamadar J (as he then was) opined at page 67 that:

> "Though not a theoratic State, Trinidad and Tobago constitutionally affirms the Nation's acknowledgement of the supremacy of God, clearly over and above even the Constitution itself."

84. I have found no reason to disassociate from the aforesaid comment since the preamble to the Constitution clearly sets out the basis of the Republic of Trinidad and Tobago is the recognition of a God.

Interpreting the Constitution

85. In interpreting a Constitution Lord Diplock in **AG of Gambia v Jobe**[39] stated the general principle as:

> "A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled is to be given a generous and purposive construction."

[39] [1984] AC 689 at 700

86. In **Matthew v The State**[40] Lord Hoffman echoed similar sentiments at paragraph 42 where he stated:

> "[42] The correct approach to interpretation of a constitution such as that of Trinidad and Tobago is well-established by authority of high standing. In Edwards v Attorney-General for Canada [1930] AC 124, 136, Lord Sankey LC, giving the judgment of the Board, classically described the constitution established by the British North America Act 1867 as 'a living tree capable of growth and expansion within its natural limits.' The provisions of the Act were not to be cut down 'by a narrow and technical construction', but called for 'a large and liberal interpretation'. Lord Wilberforce spoke in similar vein in Minister of Home Affairs v Fisher [1980] AC 319, 328-329, [1979] 3 All ER 21, when he pointed to the need for a 'generous interpretation', 'suitable to give to individuals the full measure of the fundamental rights and freedoms referred to' in the constitution and 'guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences'. The same approach was commended by Dickson J, giving the judgement of the Supreme Court of Canada in Hunter v Southam Inc [1984] 2 SCR 145, 155:
>
> > 'The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its

[40] [2004] 3 WLR 812 at 826-827

framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Processor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one'." (Emphasis added).

87. In the recent judgment by the Supreme Court of India in the **Navtej Singh Johar and ors v Union of India, THR Secretary and Ministry of Law of Justice**[41] the Court decriminalized certain sexual acts which were deemed as "unnatural offences" under section 377 of the Indian Penal Code and which were punishable by a ten (10) year jail term. In commenting on constitutional morality, the Court noted:

> "111. The concept of constitutional morality is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism. It is further the result of embodying constitutional morality that the values of constitutionalism trickle down and percolate through the apparatus of the State for the betterment of each and every individual citizen of the State.
>
> 113. Our Constitution was visualized with the aim of securing to the citizens of our country inalienable rights which were essential for fostering a spirit of growth and development and at the same time ensuring that the three organs of the State working under the aegis of the Constitution and deriving their authority from the supreme document, that is, the Constitution, practise constitutional morality. The Executive, the Legislature and the Judiciary all have to stay alive to the concept of constitutional morality."

[41] Writ Petition (Criminal) No 76 of 2016

88. The Supreme Court of India ruled that discrimination on the basis of sexual orientation is a fundamental violation of rights. The Court recognised that society has changed, not just from the year 1869 when the Indian Penal Code was brought into force but there has also been continuous progressive change where, in many spheres, the sexual minorities have been accepted.

89. Dipak Misra CJI concluded among other things that:

> "(iii) Our Constitution is a living and organic document capable of expansion with the changing needs and demands of the society. The Courts must commemorate that it is the Constitution and its golden principles to which they bear their foremost allegiance and they must robe themselves with the armoury of progressive and pragmatic interpretation to combat the evils of inequality and injustice that try to creep into the society. The role of the Courts gains more importance when the rights which are affected belong to a class of persons or a minority group who have been deprived of even their basic rights since time immemorial.
>
> (iv) The primary objective of having a constitutional democracy is to transform the society progressively and inclusively. Our Constitution has been perceived to be transformative in the sense that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead they ought to be given a meaningful construction which is reflective of their intent and purpose in consonance with the changing times. Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future." (Emphasis added).

90. The Constitution is to be interpreted "as a living and organic document capable of expansion with the changing needs and demands of the society". In my opinion, the intention of the framers of the Constitution in shaping the future society of Trinidad and Tobago, was for an environment where persons would be free to observe their religious belief, rituals, practices and activities in every sphere of their lives with dignity and respect for each other's religious belief and practice. It was not for a religious neutral environment. The framers of section 4 of the Constitution guaranteed the right for an individual to observe his or religious belief freely since they wanted to ensure that in a plural society like Trinidad and Tobago, the rights of the minority and the majority were equal in practicing and celebrating their religious belief.

91. The intention of the framers of the Constitution was for an evolving plural society in Trinidad and Tobago where religious symbols such as the cross, the rosary, raksha sutra, sindoor and hijab are to be permitted in public places, the work place and in schools. Indeed, the Claimant's Affidavit in Reply stated that such symbols were already permitted in the TTPS. In my opinion, permitting such symbols with a uniform would not detract from a professional appearance. I am of the view that there has not been any sufficient basis given by the Defendant to persuade the Court that the Claimant's wearing of the hijab would have a negative impact on the neutrality of the TTPS. Indeed, the argument that it may have a positive impact is more compelling since it would demonstrate to members of the Muslim faith that the TTPS is an institution which respects the fundamental rights as enshrined in the Constitution and that it treats persons of all faiths equally.

92. I have therefore concluded that the Claimant's right under section 4 (h) of the Constitution has been breached since the aims of the TTPS in not permitting her to wear the hijab is disproportionate to its aim of maintaining a neutral religious environment. There is also no merit in the floodgates argument therefore it is disproportionate as a reasons for not permitting the wearing of the hijab with the police uniform. There was no

evidence that the wearing of the hijab would impact negatively on the efficiency of the police service nor was there any correlation with officers requesting time off to observe the Sabbath is not rational.

<u>Whether Regulation 121 D of the Police Service Act is unconstitutional?</u>

93. It was submitted on behalf of the Defendant that the Regulations are saved by section 6 (1) of the Constitution. The Defendant contend that the Regulations mirror the Regulations which were passed in 1971 and which predated the 1976 Constitution as such even if the Regulations violate the Constitution, they are not invalidated as they formed 'existing law' at the time of the commencement of the Constitution and therefore are saved by section 6 of the Constitution.

94. Counsel for the Claimant argued that the Defendant's position is fundamentally flawed on the basis that a restrictive interpretation of the savings law clause in section 6 of the Constitution is required to give effect to the underlying principles of constitutional supremacy and independence of the judiciary. Secondly, the instant case falls under section 6(1) (b), which is an enactment that repeals and replaces an existing law without amendment and that the Regulations are not existing laws.

95. Section 6 (1) of the Constitution contains a 'general' savings clause. It provides:

> "6 (1) Nothing in sections 4 and 5 shall invalidate-
>
> (a) an existing law;
>
> (b) an enactment that repeals and re-enacts an existing law without alteration; or
>
> (c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right."

96. Section 6 (3) defines a " existing law' as a law that had effect as part of the laws of Trinidad and Tobago immediately before the commencement of the Constitution, and includes any enactment referred to in 6(1).

97. If the Defendant is correct then it means that the Regulations would have effect even though they are inconsistent with section 4 (h) of the Constitution.

98. There has been no shortage of criticism of the savings law clause in Caribbean Constitutions. Caribbean authors Robinson, Bulkan, Saunders in their text **Fundamentals of Caribbean Constitution Law** at pages 237-238 described the savings law clause as:

> "With these savings law clauses colonial laws and punishments are caught in a time warp, continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. Those clauses… operate in constant tension with the bill of rights and frustrate the aims and purpose of the constitutional guarantees…[They put] colonial punishments beyond challenge on the ground they are inhuman or degrading."

99. While the instant case does not concern punishments, the aforesaid quote is equally applicable to the instant matter since it is still a form of punishment as it concerns the preservation of a Christian centric British pre-colonial law in an evolved post-colonial plural Trinidad and Tobago.

100. While the instant case does not concern punishments, the aforesaid quote is equally applicable to the instant matter since it is still a form of punishment as it concerns the preservation of a Christian centric British pre-colonial law in an evolved post-colonial plural Trinidad and Tobago.

101. Margaret Burnham in her article **Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth Caribbean**[42] at page 251 describes the savings law clause as:

> "The savings law clause takes back with one hand what the fundamental rights provisions are meant to give with the other rendering ordinary laws more sacrosanct than the constitution to which they should be subordinated. Like an out of body experience, the clause requires constitutional jurists to ignore the very constitutional protections they are charged with enforcing. The clause eliminates the plasticity, organicity and elasticity that fundamental rights adjudication requires to respond effectively, as it must, both to evolving universal standards and culturally specific normative shifts."

102. The application of the aforesaid savings law clause and other similar savings law clauses have been the subject of several decisions over the years. Recently, there appears to be two different judicial approaches which have been adopted in interpreting the savings law clause by the Privy Council and the Caribbean Court of Justice ("the CCJ").

<u>The Privy Council's approach</u>

103. In 2004, the Judicial Committee of the Privy Council considered the effect of the general savings clauses in the Constitution in **Matthew v Trinidad and Tobago**[43] and in the Constitution of Barbados in **Boyce and anor v R**[44]. Both cases concerned a constitutional challenge to the mandatory death penalty applicable in both States. In both judgments (handed down on the same day), Lord Hoffman held for the majority, that whilst the mandatory death penalty violates constitutional rights, it was not invalidated due to the effect of the general savings clause which protected from challenge, laws that existed prior to enactment of the Constitution. As such, the laws concerning the mandatory death

[42] 36 U. Miami Inter-Am L. Rev 249 (2005)
[43] [2004] UKPC 33
[44] [2004] UKPC 32.

penalty which pre-dated the Constitution could not be invalidated. Lord Hoffman in **Boyce** adopted the view of Lord Devlin in **DPP v Nasralla**[45] and Lord Diplock in **de Freitas v Benny**[46] that the existing laws already embodied the most perfect statement of fundamental rights and that no inconsistency with the fundamental rights provision of the Constitution was possible.

104. In **Watson v The Queen (Attorney General for Jamaica Intervening)**[47] the appellant was convicted in the Supreme Court of Jamaica of two non-capital murders and was liable to the mandatory death penalty under 3 (1A) of the Offences Against the Person Act of 1864, as amended by the Offences Against the Person (Amendment) Act 1992. One of the issues which the Privy Council had to address was whether the provision which imposed the mandatory death sentence on persons for murder in Jamaica under the Offences Against the Persons Act of 1992 in Jamaica was constitutional since it was part of its pre-existing laws which were saved. The Privy Council held that the law as to the mandatory death penalty which was in force before the appointed day in the 1962 Jamaica Constitution ceased to be law after the introduction of the provisions in the Offences Against the Persons 1992 Act with respect to the capital murder offences. Therefore, the law was not "saved".

105. Lord Hope in **Watson** expressed the view that the purpose of the savings law clause in the Constitution of Jamaica was to secure the orderly transfer of legislative authority from the colonial power to the newly independent democracy and that once the concept of transition is invoked the established position could not be intended to endure in perpetuity, but only for the temporary purpose of transition.

[45] [1967] 2 AC 238
[46] [1976] AC 239
[47] [2005] 1AC 472 at 476

106. In the Privy Council's ruling in **Josine Johnson v The Attorney General**[48] the appellants were a police constable and a public health inspector. They claimed that Regulation 52 of the Police Service Commission Regulations and Regulation 58 of the Statutory Authorities Service Commission Regulations were discriminatory and inconsistent with Section 4 of the Constitution of the Republic of Trinidad and Tobago. They sought to have the regulations declared null and void under Section 2 of the Constitution. Their case was that the regulations discriminated against women and married female public servants in contravention of Section 4 (b) and/or (d) of the Constitution. They further sought a declaration that, pursuant to Section 5(1) of the Constitution, regulations 52 and 58 should be construed as severed from the respective Regulations on the ground that they are inconsistent with Section 4 of the Constitution.

107. The application was dismissed by Best J in the High Court who held that counsel for the applicants admitted that the said regulations formed part of the existing laws when the 1976 Constitution was enacted and that modification of the existing law by section 5 (1) of the 1976 Constitution is inconsistent with the supremacy of the Constitution. The Court of Appeal dismissed the appellant's appeal from that decision and the matter was appealed to the Privy Council for determination.

108. Before the Board, the appellants had stated that their decision whether to marry or remarry was affected by the fact that, if they did, they would have been vulnerable to an additional ground for having their appointment terminated under regulation 52 and 58 respectively. The Board held, in that situation, there was no room for that argument since the two officers were actually unmarried. As such regulations 52 and 58 did not apply to them and the proceedings were premature.

109. The Board dismissed the appeal. The Board held that the regulations discriminated on the grounds of sex which would contravene section 4 of the Constitution since it affected female officers, when deciding whether or not to marry but not male officers. The Board

[48] [2009] UKPC 53

noted that the regulations proceeded on the assumption that married women, as opposed to married men, would be taken up with family obligation which they may not have been able to combine with the proper discharge of their professional obligations.

110. According to the Board, the plain intention of section 18 is that any law passed while the Independence Constitution was in force, and not declared void by the time the new Republican Constitution commenced, was deemed to be valid and to be in full force and effect at that date. Therefore, regulations 52 and 58 were not declared invalid. They had effect immediately before the Constitution came into effect in 1976. As such, they are "existing laws" in terms of section 6(1) and since they were existing laws, section 4 does not apply to them. So even though they discriminate against women by reason of their sex, they are constitutional.

111. The Board concluded that it was satisfied that regulations 52 and 58 were not inconsistent with the Constitution and therefore valid. The Board recommended that their continued inclusion in the relevant regulations be reviewed.

112. In **Sanatan Dharma Maha Sabha of Trinidad and Tobago & ors v The Attorney General of Trinidad and Tobago**[49] the applicants who were not Christians, applied by way of a constitutional motion in the High Court for various declarations to the effect that the Trinity Cross of the Order of Trinity breached their right to equality under section 4(b), their right to equality of treatment under section 4(d) and their right to freedom of conscience and belief under section 4(h) of the Constitution and continued to discriminate against them and others who were not Christians.

113. The trial judge held that, but for the savings clause in the Constitution, the applicants would have been entitled to a finding that their constitutionally guaranteed rights to non-discrimination on the basis of religion and to equality and equal treatment by law and administrative action had been and continued to be breached by the creation and

[49] [2009] UKPC 17

continuation of the award of the Trinity Cross. The trial judge did not make the declarations that the appellants had asked for because in his opinion the letters patent establishing the Constitution of the Order of Trinity and the Trinity Cross had to be deemed to be existing law, so they could not be invalidated on the ground of their inconsistency with the rights and freedoms declared in section 4. He dismissed the action. On appeal, the Court of Appeal dismissed the applicants appeal against the decision of the trial judge.

114. Subsequent to the Court of Appeal decision but before the hearing in the Privy Council the Order of Trinity and the Trinity Cross as the highest national award was re-designed and replaced by the Order of the Republic of Trinidad and Tobago.

115. The question for consideration by the Privy Council was whether the letters patent which established the Order of Trinity were part of the existing law within the meaning section 6(1) (a) of the Constitution. The Board concluded that it was not part of the pre-existing law and therefore it was not saved by section 6(1) (a) of the Constitution. The Board found that the letters patent which established the Trinity Cross as the highest award was not an 'enactment' within the meaning of section 18 of the Constitution. The Board granted the declaration which the applicants sought and found that creation of the Trinity Cross of the Order of Trinity established by the letters patent given on 26th August 1969 breached their right to equality under section 4(b), their right to equality of treatment under section 4(d) and their right to freedom of conscience and belief under section 4(h) of the Constitution.

116. The position of the Privy Council has been to uphold the existing law notwithstanding it has been inconsistent with the Constitution. However, there is a difference of opinion on the purpose of the savings law clause in the post-independence Constitutions of the Caribbean and its application and relevance to the enforcement of human rights in the twenty first century.

The CCJ's approach

117. **R v Jabari Sensimania Nervais**.[50] is a decision of the CCJ. In **Nervais** both appellants were convicted of murder and sentenced to death in accordance with section 2 of the Offences Against the Persons Act (OAPA)[51] which provides: "Any person convicted of murder shall be sentenced to, and suffer, death." They contended that their convictions were unsafe and that the mandatory death penalty was unconstitutional.

118. Section 11 of the Constitution of Barbados stated that it was the supreme law. Section 26 was a saving law clause which preserved the validity of existing law in force on the date the said Constitution came into effect and which were inconsistent with the fundamental rights provisions.

119. One of the issues the CCJ considered was whether it was legally permissible under section 2 of the OAPA for the provision to read "may" sentence to death instead of "shall" despite the saving law clause in section 26.

120. In commenting on the savings clause provision the Sir Dennis Byron observed at paragraphs 53 and 54:

> "[53] The proposition that judges in an independent Barbados should be forever prevented from determining whether the laws inherited from the colonial government conflicted with the fundamental rights provisions of the Constitution must be inconsistent with the concept of human equality which drove the march to independent status. It is also inconsistent with historical fact. The eminent jurist, Dr. Alexis in his article "*When is "An Existing Law Saved?*" opened with the truism.

[50] [2018] CCJ 19 (AJ). The CCJ being the appellate court of last resort in respect of Barbados, which replaced the appellate jurisdiction of the Judicial Committee of the Privy Council.

[51] Chapter 141 of Laws of Barbados

"Many an independence leader has personal experience with the arbitrary powers afforded by some pre-independence laws. They would therefore have known that those laws conflicted with what they were writing into the Constitutions."

[54] Although he was addressing the executive power of the state, he demonstrated the manifest conflict between the existing laws and the constitutional provisions. The Constitutions reflected the transition from pre-constitutional dictatorial power to the obligation to act with reasonable justification. In states where the composition of the executive and the legislature were often substantially the same, the attractiveness to the executive of inheriting the power formerly exercised by the colonial administration highlights the value of the concept of the separation of powers and the importance of the role of the judiciary in the interpretation and application of the constitutional regimes. Ensuring that the laws are in conformity with the Constitution cannot be left to the legislature and the executive. That is the role of the judiciary, and accordingly it is the right of every person to depend on the judiciary to fulfil that role."

121. He further went on to say at paragraphs 57, 58 and 59:

"[57] There is a large body of jurisprudence which perpetuated the view that the common law contained all the rights to which newly independent peoples could aspire. The inescapable conclusion being that the function of the bill of rights was to police post-independence laws, not past laws. This view does not sit well from the perspective of a former subjected people who are "Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory" which includes the right to freely determine their political status and freely pursue their economic, social and cultural development. It is also inconsistent with the aspirations set out in the preamble to the Constitution at [22] above.

[58] The general saving clause is an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakeable faith

in fundamental human rights. The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must be condemned. Professor McIntosh in Caribbean Constitutional Reform: Rethinking the West Indian Polity (2002), commenting on section 26 noted that to give literal effect to the provision as written was to deny any special eminence to the Constitution and in particular, its fundamental rights over all other law. He emphasized that the "horror of this is brought home to the intelligent mind when one realizes that the literal consequence is to give prominence to ordinary legislation over the Constitution."

[59] It is incongruous that the same Constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because the deprivation had existed prior to the adoption of the Constitution. With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. This cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent."

122. Sir Dennis Byron noted that a literal interpretation of the savings clause "has deprived Caribbean persons of the fundamental rights and freedoms even as appreciation of their scope have expanded over the years." He stated that where there is conflict between an existing law and the Constitution, the latter must prevail as the Courts must apply the existing laws with such modifications as may be necessary to bring them in conformity with the Constitution.

123. The CCJ applied a narrow interpretation to the savings law clause in the Constitution of Barbados on the basis that the Court should give effect to an interpretation which is least restrictive and affords every citizen of Barbados the full benefit of the fundamental rights and freedoms[52]. The CCJ rejected the view that pre-existing laws were saved in perpetuity since the savings law clause was meant to be a transitional provision and therefore they must have a time limit.

124. The CCJ was of the opinion that the role of the judiciary in an independent Barbados is to uphold its Constitution and to apply the savings law clause following the approach in **Boyce** was to prevent it from determining whether the laws inherited from the colonial government conflicted with the fundamental rights provisions of the Constitution of Barbados and was inconsistent with the concept of human equality which drove the march to independent status. Lastly, the CCJ took the position that it was incongruous that the same Constitution which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because of the deprivation had existed prior to the adoption of the Constitution[53].

125. The approach by the CCJ in applying a narrow interpretation to the savings law clause in the Constitution of Barbados appears to be similar with the view expounded by Lord Hope in **Watson** in the Privy Council.

The emerging approach in Trinidad and Tobago

126. In this jurisdiction in **Jason Jones v the Attorney General of Trinidad and Tobago**[54], one of the issues which Rampersad J had to consider was whether the provisions in the Sexual Offences Act of 1986 which made buggery a crime was saved by section 6 of the

[52] See paragraph 39 of Jabari
[53] Paragraphs 58-59 Nervais
[54] CV 2017-00720

Constitution. The Court held that the relevant provision was not saved under section 6 since the Sexual offence Act of 1986 was not a re-enactment as argued by the State but that it was an Act which was repealed and replaced and that the relevant provision, section 13, was a new provision which was not caught by section 6. In examining the savings law clause, Rampersad J recognized the limitations placed on a modern society of Trinidad and Tobago by the saving law clause and called upon the Privy Council to revisit its approach to the savings clause.

127. The learning in **Jason Jones** is instructive on the approach which has been taken in applying the savings law clause. However, the case is distinguishable from the facts in the instant case on the basis that there is no dispute that the Regulations is a repeal and re-enactment without alteration. The dispute is whether section 6(1) (b) contemplated a time lapse which did not arise in **Jason Jones**.

<u>Interpreting section 6 (1) (b) of the Constitution</u>

128. Are the Regulations "pre-existing law" which was repealed and replaced and thus caught by the savings clause under section 6 (1) (b)? The resolution of the issue depends upon the true construction of section 6(1) (b) and its application to the Regulations. Section 6 (1) (b) deals with an enactment which repeals and re-enacts an existing law without alteration.

129. Section 2 of the Constitution defines the term "existing law" as a law that had effect as part of the laws of Trinidad and Tobago immediately before the appointed day. The "appointed day" is the day fixed for the coming into operation of the Constitution by Proclamation of the Governor-General under section 4 which was the 1st August, 1976[55].

130. Section 3 of the Constitution does not define "enactment". It defines "law" as:

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[55] GN 116/ 1976

"law" includes any enactment, and any Act or statutory instrument of the United Kingdom that before the commencement of this Constitution had effect as part of the law of Trinidad and Tobago, having the force of law and any unwritten rule of law"

131. Lord Steyn in **Roodal v The Attorney General**[56] defines "enactment" as:

"80 Leaving aside the common law, section 3(1) of the Constitution defines the term "law" as including "any enactment". The term "enactment" is apt to cover not only an Act but any legal proposition contained in a section or part of a section of an Act:Bennion, Statutory Interpretation, at pp 337-340. So "an existing law" for these purposes may be an Act or a section or part of a section: Wakefield and District Light Railways Co v Wakefield Corpn [1906] 2 KB 140, 145-146, per Ridley J . It follows that section 2 means that any legal proposition in a statute is void to the extent that it is inconsistent with the Constitution. Equally, under section 6(1)(a) no legal proposition in an existing statute is to be void by reason of being inconsistent with sections 4 and 5 of the Constitution. Any legal proposition or enactment which is not void by reason of inconsistency with the Constitution is valid so far as the Constitution is concerned."

132. Lord Steyn's definition did not include any subsidiary legislation such as Regulations. However, in my opinion, it would be absurd for the laws to be saved but the Regulations which were made pursuant to the sections in the law were not saved. It must also apply to the Regulations.

133. The Police Service Act 1965 was amended by Act 33 of 1971. Regulations were passed under the 1971 Act and remained in force until repealed by the 2006 Act. By Legal Notice No.329 of 2006, 1st January 2007 was the date appointed by proclamation of the President for the entry into force of the Police Service Act 2006. However, the Regulations under

[56] [2005] 1 AC 328

the 2006 Act as published by Legal Notice 145 of 2007, came into force on the 6th August 2007 as noted by the Commencement Order Legal Notice 146 of 2007[57]. Thus, a seven (7) months gap existed between the repeal of the 1965 Act and its accompanying Regulations on 1st January 2007 and the coming into force of the existing Regulations on 6th August 2007.

134. It was submitted by the Claimant that for the saving provision to operate, the repeal and re-enactment must be simultaneous. It was argued that the previous Regulations fell upon the repeal of the 1965 Act. On the 6th August 2007 when the Regulations took effect, there was no existing law to be saved since the seven (7) months gap meant that the Regulations "lapsed" and there was no law in force that was capable of being 'saved'.

135. The Defendant's position was that since the Regulations mirrored the previous Regulations, they are saved as existing law under section 6(1) (b).

136. Section 6(1) (a) fossilizes the laws which were in effect before the proclamation of the Constitution and which are inconsistent with the provisions of the Constitution as part of valid post Constitution laws.

137. Sections 6(1) (b) and (c) are the overreaching provisions or as Professor Drayton describes as *"that mechanism for putting the past's dead hand on the future"*[58] .

138. Section 6(1) (b) states that a law which is in existence at the time of the proclamation of the Constitution but which is repealed after the said proclamation and re-enacted

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[57] LEGAL NOTICE NO. 146
MADE BY MINISTER UNDER REGULATION 1(2) OF THE POLICE SERVICE REGULATIONS, 2007 THE POLICE SERVICE REGULATIONS, 2007 (COMMENCEMENT)
ORDER, 2007

1. This Order may be cited as the Police Service Regulations, 2007 (Commencement) Order 2007.
2. The Police Service Regulations, 2007 shall come into operation on the 6th day of August, 2007.

[58] See page 25 of Judicial Education Institute of Trinidad and Tobago, Sixth Distinguished Jurist Lecture 2016 by Professor Richard Drayton.

subsequently without alteration, even if it contains provisions which are inconsistent with the Constitution falls within the saving law clause.

139. It was not in dispute that there was no alteration to the Regulations from the previous Regulations. The issue is whether it was the intention of the framers of this section in the Constitution for the repeal and re-enactment without alteration to be done immediately or to permit Parliament to repeal an existing law and later re-enact it with a law without alteration. Section 6(1) (b) does not indicate a time frame within which the replacement without alteration is to be done.

140. In **Nimrod Miguel v The State**[59] the Privy Council took the position that there can be a lapse in time between the repeal and the re-enactment once the latter is done with the appropriate parliamentary special majorities. In **Nimrod Miguel** the Defendant was charged with murder on two alternative bases: (i) that he had been part of a joint enterprise; and (ii) that he had embarked on the commission of an arrestable offence in the course of which someone had been killed, so as to make him liable under section 2A of the Criminal Law Act.

141. Section 2A had been enacted by the Criminal Law (Amendment) Act 1997 ("the 1997 Act") to reintroduce the substance of the felony murder rule after the Privy Council decision in **Moses v The State**[60] established that the rule had ceased to apply following the abolition of the distinction between felony and misdemeanour in 1979. The Defendant was convicted but the jury was not asked to say on what basis they had convicted him. He was sentenced to death under section 4 of the Offences against the Person Act, which imposed a mandatory death penalty for murder. His appeal against conviction and sentence was dismissed by the Court of Appeal.

[59] [2011] UKPC 14
[60] [1997] AC 53

142. The Defendant appealed to the Privy Council against, inter alia, sentence on the ground that the mandatory sentence of death for arrestable offence murder under section 2A infringed his right under section 5(2)(b) of the Constitution not to be subjected to cruel and unusual punishment. The Defendant contended that this mandatory sentence was not saved by section 6(1) of the Constitution, which preserved from constitutional challenge laws existing at the time of the Constitution's commencement and enactments which altered such laws without derogating from any fundamental right guaranteed by the Constitution in a manner in which or to an extent to which the existing law did not previously derogate from that right.

143. The issue for the Board to resolve was whether the felony murder rule was an existing law for the purposes of section 6. In resolving the issue, the Board had to consider whether the relevant law existed or did not exist prior to 1976 (time of Republican Constitution) up to the 1979 Act; the period from the 1979 Act to the 1997 Act; and the period since then.

144. The Board held that for the first period the felony murder rule was in existence and was an existing law within the meaning of Section 6(1)(a). As it relates to the second period however, the Board found that the felony murder rule was not in existence by reason of the 1979 Act and so there was no existing law within subsection 6(1)(a) and there was no law which was repealed and re-enacted without alteration within subsection 6(1)(b).

145. In relation to subsection 6(1)(c), the Board stated that due to the abolition of the distinction between felonies and misdemeanours by the 1979 Act, the newly introduced Section 2A of the 1997 Act was neither an existing law nor an enactment that repealed and re-enacted an existing law without alteration. Therefore, subsection (c) could not cover an enactment which alters a law that existed before the Constitution came into force but has since been abolished.

146. At paragraph 64 the Privy Council commented that:

> "64. By way of final comment the Board reflects that, on the respondent's contended for construction of section 6, Parliament could legislate to repeal a law (perhaps intentionally, recognising that it provides for cruel and unusual punishment) and then later, perhaps many years later, by a simple majority reinstate it, even indeed, as here, by a new law yet wider and so more objectionable than the original – although in that event it is conceded that the new law will be valid only to the extent that it mirrors the repealed earlier enactment. Their Lordships are satisfied that any such later reinstatement of a repealed law which is inconsistent with sections 4 and 5 can only be achieved pursuant to section 13 of the Constitution, namely by the votes of not less than three-fifths of all the members of each House of Parliament."

147. The aforesaid comment by the Privy Council supports the position that the repeal and the re-enactment do not have to be simultaneous. This is consistent with a literal interpretation of the language of section 6(1) (b) since there is no word which places any limitation. A literal interpretation in my opinion paralyses the Court from interpreting the Constitution as an organic instrument to meet the needs of an evolving society. Sir Dennis Byron in **Boyce** said that the literal interpretation of the savings law clause "has deprived Caribbean persons of the fundamental rights and freedoms even as appreciation of their scope have expanded over the years."

148. The other approach to interpreting section 6(1) (b) is to adopt a purposive interpretation. The purpose of the savings law clause was to preserve the validity of existing laws in force at the date the Constitution came into force which were inconsistent with the provisions of the Constitution. It was to secure the orderly transfer of legislative authority from the colonial power to the newly independent democracy of Trinidad and Tobago. It was meant to maintain the chain of continuity of pre-existing laws even if there was repeal

and re-enactment without alteration. The Regulations which were being re-enacted were inconsistent with section 4(h) of the Constitution.

149. The Constitution is an organic document. In order to give effect to the fundamental rights provisions in the Constitution where there are evolving universal standards and culturally specific normative shifts, a purposive interpretation to section 6(1) (b) is one which is least restrictive and affords citizens of Trinidad and Tobago the full benefit of the fundamental rights and freedom. To achieve this purpose, a narrow interpretation to section 6(1) (b) must be given. As such the conjunctive words "repeal and re-enact" must be interpreted as connoting a single event and an act which is done without any lapse in time.

150. In my opinion, in order to give effect to the purpose of the savings law clause and the full benefit of the fundamental rights and freedoms to every citizen of Trinidad and Tobago, I hold that the intention of section 6(1) (b) was for the repeal and re-enactment without alteration to be done immediately and without a lapse in time. Section 6(1) (b) was for a single act or event without any lapse in time since such lapse would cause the chain of continuity to be broken. In the instant case the repeal and re-enactment of the Regulations was not one single event and therefore the lapse in time caused the chain of continuity to be broken resulting in it not being saved by section 6(1) (b).

Has the Claimant suffered any damages?

151. At the pre-trial stage the Court had directed that the issue of liability will be dealt with first. Having found that there has been a breach of the Claimant's right under section 4 (h) of the Constitution. I will now give directions on any loss to the Claimant.

Is the instant action an abuse of process?

152. It was submitted on behalf of the Defendant that the instant action is an abuse of process since the Claimant's challenge is primarily against the decision of the Commissioner on

her request for permission to wear the hijab with her police uniform. The **Sumavvah Mohammed** judgment on which the Claimant relied was a judicial review of the reasonableness of the School Board's decision to not allow the applicant to attend school in a moderated version of the school uniform. The Court found in **Sumayyah Mohammed** that there were no breaches of constitutional rights since the School Board relied on settled practice existing at the time of the commencement of the Constitution to insist on uniformity.

153. The Claimant rejected the Defendant's assertion that these proceedings are an abuse of process as the real challenge is to the Commissioner's decision not to permit the Claimant to wear hijab. It was contended on behalf of the Claimant that the Commissioner's decision relied on the Regulations under challenge and from the outset the Defendant's position has been that the law does not permit the Claimant to wear the hijab. Further, on a fair and natural reading of the Regulations, they do not permit the Claimant to wear the Islamic veil. As such, the question of permission to wear hijab is not a matter of discretion for the Commissioner and the issue as raised in this case the proper subject of Constitutional challenge.

154. In my opinion, the instant proceedings are not an abuse of process. Every person in Trinidad and Tobago has a right to access the Court if he or she feels that there has been a breach of his or her constitutional right under section 4.

Conclusion

155. The intention of the framers of the Constitution in shaping the future society of Trinidad and Tobago, was for an environment where persons would be free to observe their religious belief, rituals, practices and activities in every sphere of their lives with dignity and respect for each other's religious belief and practice. The intention of the framers of the Constitution was also for an evolving plural society in Trinidad and Tobago where

religious symbols such as the cross, the rosary, raksha sutra, sindoor and hijab are to be permitted in public places, the work place and in schools.

156. The Claimant's right under section 4 (h) of the Constitution has been breached since the aims of the TTPS in not permitting her to wear the hijab is disproportionate to its aim of maintaining a neutral religious environment. There is also no merit in the floodgates argument therefore, it is disproportionate as a reason for not permitting the wearing of the hijab with the police uniform. There was no evidence that the wearing of the hijab would impact on the efficiency of the police service and to equate this with officers requesting time off to observe the Sabbath is not rational.

157. The Constitution is an organic document. A literal interpretation of section 6 (1) (b) paralyses the Court from interpreting the Constitution as an organic instrument to meet the needs of an evolving society. A purposive interpretation to section 6 (1) (b) is one which is least restrictive and affords citizens of Trinidad and Tobago the full benefit of the fundamental rights and freedom. In the instant case the repeal and re-enactment of the Regulations was not one single event and therefore the lapse in time caused the chain of continuity to be broken resulting in it not being saved by section 6 (1) (b).

158. The instant proceedings are not an abuse of process. Every person in Trinidad and Tobago has a right to access the Court if he or she feels that there has been a breach of his or her constitutional right under section 4.

Order

159. It is declared that the Claimant's right to freedom of conscience and religious belief and observance has been infringed by the denial of the request to wear a hijab and/or the prohibition against wearing a hijab together with her uniform whilst on duty as an officer of the Trinidad and Tobago Police Service.

160. It is declared that the Police Service Regulations, 2007 is unconstitutional, invalid, null and void to the extent that it makes no provision for the wearing of the hijab.

161. Damages to be assessed.

162. The Defendant to pay the Claimant's costs to be assessed by the Registrar in default of agreement.

Margaret Y Mohammed
Judge