

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
A.D. 2020
(CIVIL)**

SKBHCV2020/0090

In the matter of sections 2, 3, 5, 12, 13, 14, 15, 16, 18, and 19 of the Constitution of Saint Christopher and Nevis for injunctive, declaratory and other relief.

In the Matter of SRO 13 of 2020 entitled 'Resolution of the National Assembly made under section 19(3) of Saint Christopher and Nevis 1983 Constitution Order' published on 18th April, 2020 and Erratum for SRO No. 13 of 2020 published in the Official Gazette (EXTRAORDINARY) No. 34 on the 13th May, 2020.

In the matter of an Application by the Claimants, Marcella Liburd, Konris Maynard and the Right Hon. Dr. Denzil L. Douglas for declarations, damages and other relief alleging that SRO 13 and Erratum for SRO No. 13 are inconsistent with and/or breach of Section 2, 3, 5, 12, 13, 14, 15, 16, and 19(7) of the Constitution and are therefore null and void.

In the matter of an Application by the Claimants, Marcella Liburd, Konris Maynard and the Right Hon. Dr. Denzil L. Douglas for declarations, damages and other relief that the Government is using SRO 13 and the Erratum for SRO No. 13 in a manner which is not reasonably justifiable in a democratic society or to manage the emergency contrary to sections, 2, 3, 5, 12, 13, 14, 15, 16, and 19 of the Constitution.

In the matter of an Application by the Claimants, Marcella Liburd, Konris Maynard and the Right Hon. Dr. Denzil L. Douglas that their rights under sections 2, 3(b), 12 and 13 of the Constitution and for redress pursuant to Sections 18 and 96 of the Constitution.

BETWEEN:

MARCELLA A. LIBURD
(Personally, and as Deputy Leader of the St. Kitts
and Nevis Labour Party)

First Claimant

KONRIS MAYNARD
(Personally, and as a member of the St. Kitts
and Nevis Labour Party)

Second Claimant

THE RT. HON. DR. DENZIL L. DOUGLAS
(Personally, and as Leader of the St. Kitts and
Nevis Labour Party)

Third Claimant

And

**THE ATTORNEY GENERAL OF SAINT
CHRISTOPHER AND NEVIS**

First Defendant

**ZIZ BROADCASTING
CORPORATION LIMITED** (a company providing
essential public services on behalf of the
Government and State, and therefore an
emanation of the State)

Second Defendant

Before: The Hon. Mr. Justice Trevor M. Ward QC

Appearances:-

Mr. Sylvester Anthony and Ms. Angelina Gracy Sookoo-Bobb for the claimants.

Mr. Christopher Hamel-Smith SC, Mr. Douglas Mendes SC, Ms. Simone Bullen-Thompson,
Solicitor General, Mr. Imran Ali, Ms. LaShaun Smart and Ms. Tashna Powell for the first defendant.

Mr. Anthony Ross QC and Ms. Kayla Theeuwen for the second defendant.

2020: September, 17
October, 15

JUDGMENT

[1] **WARD, J.:** By Originating Motion filed on 22nd May, 2020 the claimants move the Court for the following reliefs:

- (1) A Declaration that SRO 13 of 2020 entitled 'Resolution of the National Assembly made under section 19(3) of Saint Christopher and Nevis 1983 Constitution Order, published on 18th April, 2020 and Erratum for SRO 13 of 2020 published in the Official Gazette (EXTRAORDINARY) No. 34 on 13th May, 2020 are contrary to section 19(7) of the Constitution and is therefore pursuant to section 2 of the Constitution null and void and of no effect;
- (2) A Declaration that SRO 16 of 2020 Emergency Regulations (COVID-19) (No.7) (Emergency Regulations) published on 8th May, 2020 by Extra Ordinary Gazette No.33 of 2020 is (or similar Regulations in the future will be) disproportionately restrictive, and discriminatory of itself, and or in its effect and consequences against the claimants and the St. Kitts-Nevis Labour Party and is therefore (or will be) wholly arbitrary and disproportionate and are therefore not reasonably required in the interests of public safety, public order or public health contrary to sections 2, 3, 5, 12, 13, 14, 15 and/or 16 of the Constitution.
- (3) A Declaration that the effect and/or implementation of the Emergency Regulations (or similar Regulations in the future) in a discriminatory manner, in order to provide the ruling party which forms the Government, with an unfair and unequal advantage, while suppressing the Claimants and their political party which is not reasonably justifiable in a democratic society or during the Covid-19 pandemic and amounts to (or will amount to) a contravention, active denial, suppression and abatement of the Claimant's rights and freedoms guaranteed by sections 3(a), 3 (b), 12, 13 and 14 of the Constitution, and is therefore unconstitutional, null and void and of no effect;
- (4) A declaration that the Claimants' right to equality before the law, guaranteed by section 3(a), freedom of speech and expression protected by section 12, freedom of association guaranteed by section 13, and to be protected from discrimination under 15, which freedoms are also guaranteed by section 3(b) of the Constitution, to express political views have been and continues to be contravened by its policy decision contained in letter dated 4th May, 2020 and/or the failure or refusal of a public authority, the Government owned media, ZIZ Broadcasting Corporation Limited, an emanation of the State providing essential public services including radio and television broadcasting on behalf of the Government and State to invite or cover events of/and or give the claimants and the opposition political party to which they belong, the St. Kitts-Nevis Labour Party equal airtime as the ruling party, Team Unity

Coalition to express political views or to cover and broadcast the claimants' or the St. Kitts-Nevis Labour Party's political views or events and advertising in the same way and/or with the same frequency that they broadcast of the Government's events and advertising.

- [2] The claimants also seek damages and costs.
- [3] At the oral hearing, learned Counsel Ms. Sookoo-Bobb indicated that the Claimants were abandoning the second declaration sought in relation to SRO 16 of 2020 which contained the Emergency Regulations. This means that there is now no live issue relating to the constitutionality of those Regulations. Accordingly, this judgment is concerned only with the following issues: (1) the constitutional challenge to SRO 13 of 2020 on the sole basis that it contravenes section 19(7) of the Constitution by failing to provide a specific duration for the period of emergency; (2) the allegedly discriminatory manner in which the Regulations have been and are being implemented by the Royal Saint Christopher and Nevis Police Force; and (3) the allegedly discriminatory treatment meted out to the claimants and the political party to which they belong, the Saint Kitts-Nevis Labour Party (SKNLP), by ZIZ Broadcasting Corporation (ZIZ).

The National Assembly Resolution – The factual background

- [4] By Proclamation No.6 of 2020 dated 28th March, 2020 His Excellency the Governor General declared a State of Emergency on the ground of the threat of a national calamity precipitated by the COVID-19 virus. This proclamation was said to take effect from 7:00 p.m. on March, 2020 until 6:00 p.m. on Saturday 11th April, 2020. However, it was extended to 18th April, 2020.
- [5] To prevent the Declaration from lapsing after that time, it was necessary for the National Assembly to approve it by resolution supported by not less than two-thirds of all the Representatives and Senators¹.
- [6] On 17th April, 2020, the National Assembly met and approved a Resolution to extend the State of Emergency. By Statutory Rules and Orders No. 13 of 2020 published in the Extra-Ordinary Gazette No. 27 of 2020 on 17th April, 2020, the resolution was expressed in the following terms:

¹ Sections 19(3) and 19(8) of the Constitution

“NOW THEREFORE be it hereby resolved by this National Assembly that it is necessary to extend the State of Emergency for a period of six months to take effect from the 18th day of April, 2020, to combat the threat of the COVID-19 virus to the Federation of Saint Christopher and Nevis.”

[7] It is common ground that SRO 13 of 2020 did not accurately reflect the terms of the Resolution that was actually approved by the national Assembly. Indeed, the claimants assert that the SRO 13 as published, reflected the rejected view of the minority in Parliament, that the time period should have been specific. By letter dated 7th May, 2020, the first and second claimants wrote to the first defendant pointing this out and expressing the view that it was a total misrepresentation of the result of the discussions and votes of Members of the National Assembly and complained that the word “for” had been substituted for “up to” and that the words “or such shorter period as may be specified” were omitted in SRO 13 of 2020.

[8] By letter dated 15th May, the first defendant acknowledged the difference complained of between the Resolution as passed in the National Assembly and SRO 13 of 2020 and attributed it to an error in the draft sent to be published. He advised the first and second claimants that an Erratum was published on 12th May, 2020 which made corrections to reflect the terms of the Resolution as passed by the National Assembly. With those changes, highlighted by bold underlining, the resolution currently reads:

“NOW THEREFORE be it hereby resolved by this National Assembly that it is necessary to extend the State of Emergency **up to** a period of six months **or such shorter period as may be specified** to take effect from the 18th day of April, 2020, to combat the threat of the COVID-19 virus to the Federation of Saint Christopher and Nevis.”

The Claimants’ Submissions

[9] On behalf of the Claimants, Ms. Sookoo-Bobb contends that the Resolution passed by the National Assembly to extend the State of Emergency for *up to a period of six months or such shorter period as may be specified* was passed for an ambiguous period of time contrary to section 19 (7) of the Constitution.

- [10] Ms. Sookoo-Bobb submitted that on a proper construction, section 19(7), read with sections 19(3) and 19(5) makes it clear that a resolution passed by Parliament extending a State of Emergency must not be for an ambiguous period. It is said that while there is an identified starting date of 17th April, 2020 there is no definitive end date. There is an outer or maximum period of time included in the resolution but one cannot say with certainty, on its plain and ordinary meaning, whether or not the State of Emergency would end in six months or at some earlier time. The end date should have been clearly stated in the resolution.
- [11] Ms. Sookoo-Bobb further submitted that the effect of the resolution as worded, is to place the decision of the end date of the State of Emergency in the hands of the Executive, in breach of the separation of powers doctrine. Such an undetermined period of derogation of fundamental rights is inimical to the rule of law as it has the effect of transferring back to the Executive the margin of appreciation of when the emergency, and by extension, the derogation from fundamental rights, should end. Such a function is reserved for the Parliament by section 19(7) of the Constitution, submitted learned counsel.
- [12] The Claimants submit further that while the language of the resolution is clear and unambiguous, it creates an uncertain timeframe for the State of Emergency. This ambiguity cannot be saved, amended or modified to bring it into conformity with the provisions of the Bill of Rights section of the Constitution as to do so will necessarily involve the court in policy considerations when the question is “at the political end of the spectrum”.

The Defendant's submissions

- [13] On behalf of the first defendant Mr. Douglas Mendes, Senior Counsel, submitted that the Resolution properly construed does provide for the Resolution remaining in force for a specified period of six months. Mr. Mendes submitted that this is derived from the fact that the National Assembly intended to approve the declaration of the state of emergency and that intention was manifested by its resolve to extend the State of Emergency. Further, Mr. Mendes submitted that it was also clear that the National Assembly intended that the Resolution remain in force for a shorter period than the automatic twelve-month period provided for under section 19(7). This intention is expressed by the resolution “*to extend the State of Emergency up to a period of six months.*” The

first defendant acknowledged that this is clumsily expressed and that a clearer statement of its intention would have been expressed in the words “for a period of six months” or “for six months”.²

[14] Nonetheless, given the Assembly’s plain intention to stipulate a period shorter than twelve months, the only reasonable interpretation of the words used in the Resolution is that the Assembly intended to specify the shorter period of six months during which the resolution was to remain in force and to dis-apply the longer, default period of twelve months. Since the Assembly resolved to extend the State of Emergency “up to a period of six months ...to take effect from the 17th day of April, 2020”, it was submitted that if the question is posed: what is to take effect from 17th April, 2020, the answer must be the period of six months. Thus, the first defendant contends that the resolution extends the State of Emergency from 17th April, 2020 for a period of six months. This is put beyond doubt by the words which follow: “or such shorter period as may be specified.” These words show that the Assembly envisaged the possibility that a period shorter than six months might subsequently be specified which must mean that the period of the extension that was then being resolved was six months. Once it is clear that the Assembly intended to extend the period of the emergency for a period not longer than six months then the Court should give effect to its intention even if clearer words could have been used.

[15] Alternatively, the first defendant submitted that should it be held that on a proper construction it does not provide for any specified period shorter than twelve months, then by virtue of section 19(7) the Resolution, automatically remains in force for a period of twelve months.

Discussion

[16] A proper analysis of the competing propositions is best elucidated by first setting out fully the relevant provisions of the Constitution. Section 19 provides:

“Declaration of emergency.

19. (1) The Governor-General may by proclamation declare that for the purposes of this Chapter a state of emergency exists either in Saint Christopher and Nevis or in part of Saint Christopher and Nevis.

(2) A proclamation under subsection (1) shall not be effective unless it includes a declaration that the Governor-General is satisfied that a public emergency has arisen—

(a) because of the possibility that Her Majesty may shortly be at war;

² First defendant’s written submissions at paragraph 17.

- (b) because of the occurrence of any accident or natural calamity; or
- (c) because action has been taken by any person, or there is an imminent threat of action by any person, of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community or any substantial portion of the community of supplies or services essential to life.

(3) Every declaration of emergency shall lapse—

- (a) in the case of a declaration made when the National Assembly is sitting, at the expiration of a period of seven days beginning with the date of publication of the declaration; and
- (b) in any other case, at the expiration of a period of twenty-one days beginning with the date of publication of the declaration,

unless it has in the meantime been approved by resolution of that Assembly.

(4) A declaration under subsection (1) that a state of emergency exists in a part of Saint Christopher and Nevis that comprises or includes all or part of the island of Nevis shall, to the extent that it relates to that island, lapse—

- (a) in the case of a declaration made when the Nevis Island Assembly is sitting, at the expiration of a period of seven days beginning with the date of publication of the declaration; and
- (b) in any other case, at the expiration of a period of twenty-one days beginning with the date of publication of the declaration,

unless it has in the meantime been approved by resolution of that Assembly.

(5) A declaration of emergency may at any time be revoked by the Governor General by proclamation.

(6) Unless sooner revoked—

- (a) a declaration of emergency that has been approved by resolution of the National Assembly in pursuance of subsection (3) shall cease to be in force if that resolution ceases to be in force; and furthermore
- (b) a declaration of emergency that has been approved by resolution of the Nevis Island Assembly in pursuance of subsection (4) shall, to the extent that it relates to the island of Nevis, cease to be in force if that resolution ceases to be in force notwithstanding that a declaration of the National Assembly approving it in pursuance of subsection (3) remains in force.

(7) A resolution of the National Assembly or the Nevis Island Assembly passed for the purposes of this section shall remain in force for twelve months or such shorter period as may be specified therein:

Provided that any such resolution may be extended from time to time by a further such resolution, each extension not exceeding twelve months from the date of the resolution effecting the extension; and any such resolution may be revoked at any time by a further resolution.

(8) A resolution of the National Assembly for the purposes of subsection (3) and a resolution of the Assembly extending any such resolution shall not be passed in the Assembly unless it is supported by the votes of not less than two-thirds of all the Representatives and Senators; and a resolution revoking any such resolution shall not be so passed unless it is supported by the votes of a majority of all the Representatives and Senators.

(9) Any provision of this section that a declaration of emergency shall lapse or cease to be in force at any particular time is without prejudice to the making of a further declaration of emergency whether before or after that time.

(10) In the exercise of his or her powers to make or revoke any such declaration as is referred to in subsection (4) the Governor-General shall act in accordance with the advice of the Prime Minister but no such advice shall be given without the concurrence of the Premier.

(11) In this section “declaration of emergency” means a declaration under subsection (1).”

[17] In summary, section 19(1) gives the Governor General the Authority to make a Proclamation declaring that a State of Emergency exists. In order to be effective, however, the Proclamation must contain a declaration that he is satisfied that a public emergency has arisen on account of one of the matters stipulated under sub-section (2). Sections (3) and (4) prescribe the time when every such declaration lapses unless approved by resolution of the National Assembly. Such resolution must be supported by not less than two-thirds of all the Representatives and Senators³.

[18] The Governor General may at any time revoke a declaration of emergency made by him under sub section (1).

[19] However, a state of emergency which has been approved by the National Assembly shall remain in force for twelve months unless within the resolution itself, a shorter period is specified, but may be extended from time to time by further resolution not exceeding twelve months at a time. The state of emergency which is approved by resolution of the National Assembly thus ceases to be in force

³ Sections 19(3) and 19 (8) of the Constitution

when the resolution ceases to be in force either by effluxion of time or by being revoked by further resolution of the National Assembly pursuant to the proviso to subsection (7).

- [20] The real bone of contention in this case is the interpretation to be given to section 19 (7). The claimants contend that when read with 19(3) and (5), it must mean that the duration of any period of emergency must be stated within the body of the resolution and must be for a fixed period. Such an interpretation is necessary to ensure that Parliament alone determines the extent of a State of Emergency and not the Executive arm. Secondly, to provide legal certainty to the claimants regarding the period of derogation from their rights under sections 5 and 15 of the Constitution.
- [21] The first defendant contends that on a plain reading of section 19 (7) it does not stipulate or require that the resolution contains a fixed period during which the state of emergency should run. What it does, is to provide a default or automatic period of twelve months where the resolution does not stipulate a shorter period.
- [22] The gravamen of the claimants' concern seems to be that the resolution as worded, reposes in the Executive what they describe as "the margin of appreciation" meaning the power to decide the end date of the state of emergency in breach of the separation of powers doctrine. For the reasons that follow I do not agree that section 19 (7) bears the meaning ascribed to it by the claimants; nor do I agree that the resolution as worded, places the decision regarding the end date in the hands of the executive.
- [23] In this case, the facts demonstrate that the Parliament convened and resolved to approve the Governor General's declaration of a state of emergency and to extend it. This intention to approve and extend is manifest on the face of the Resolution itself in the words "**NOW THEREFORE** be it hereby resolved by this National Assembly that it is necessary to extend the State of Emergency."
- [24] The first issue is whether section 19 (7) required that the resolution state a fixed period for the duration of the state of emergency. If the answer to that is yes, is the resolution as worded compliant with this requirement.
- [25] Section 19 (7) speaks to the life of any resolution approving a declaration of emergency passed by the National Assembly or the Nevis Island Assembly for the purpose of section 19. It stipulates a maximum duration of twelve months during which the resolution shall remain in force. It provides an exception to this default or automatic twelve-month period by providing that it may be of shorter

duration where shorter period is specified within the text of the resolution itself. This does not translate into an injunction to do so. Failure to specify a shorter period will trigger the default period of twelve months. 19 (3) does not alter the position as that section is concerned with the duration of the Governor General's Proclamation. Section 19 (5) is similarly of no assistance. As the claimants have argued, correctly in my view, this section speaks to the Governor General's authority to revoke his declaration of emergency made under section 19 (1) and not to a resolution approved by the National Assembly.

[26] I must for completeness address the argument that section 19 (7) is required to be read in the manner contended for by the claimants, in order to guard against breach of the separation of powers doctrine by leaving to the Executive the decision when to bring the state of emergency to an end. This argument fails properly to appreciate the constitutional mechanism provided for revoking or bringing to an end a resolution approved by the National Assembly. The effect of section 19 (7) and its proviso is that a resolution of the National Assembly approving a declaration emergency terminates either on the expiration of the time specified in the resolution if any; or, if no time is specified, on the expiration of twelve months; or by revocation at any time by a further resolution of the National Assembly. Therefore the words "*or such shorter period as may be specified*" convey no power to the Executive. The public interest in ensuring that the legislature retains control over the duration of any potential effect on fundamental rights and freedoms occasioned by any emergency measures enacted is preserved.

[27] Accordingly, I hold that section 19 (7) does not, on proper construction, require a fixed period to be stated within the resolution. Even if, contrary to my conclusion it did, I am satisfied that the resolution as worded would not be in breach of such a construction. The first defendant accepts that the wording of the resolution is clumsy. He is right to so concede. It is rather clumsily expressed. Greater clarity would have been achieved by the words "for a period of six months" or "for six months". However, the question is not whether it is clumsily expressly but whether its meaning is clear such that the intention of the National Assembly may be discerned. Once the Assembly's intention is clear, then effect should be given to it.

[28] The first defendant has argued that a number of matters are clear on the face of the resolution. First, that the Assembly intended to approve and extend the state of emergency. Secondly, it was the Assembly's intention to do so for a period shorter than the default or automatic period of twelve

months provided for under section 19 (7) by using the words “*to extend the State of Emergency up to a period of six months.*” There is no gain saying this.

[29] I further agree with Mr. Mendes’ submission that the addition of the words “*or such shorter period as may be specified*” must refer to a future event as there is no period shorter than six months specified within the resolution. As I have already indicated at paragraph 25 above, such future intervention is provided for in section 19 (7) and the proviso thereto and falls within the remit of the National Assembly. Until such an intervention occurs it must be clear that the state of emergency is for a period of six months. For these reasons, I would, in any event, hold that the resolution has specified a specific period during which the state of emergency is to continue. The resolution stipulated that it commenced on 17th April 2020, and would last up to six months. Such a period is capable of precise ascertainment. But even if it could be said that it does not, section 19 (7) would operate to fix it for twelve months.

[30] I find the dicta of Bowen L.J. and Fry L.J. in **Curtis v Stovin**⁴ to be apposite:

“The rules for the construction of statutes are very like those which apply to the construction of other document, especially as regards one crucial rule - viz that if possible, the words of an Act of Parliament must be construed so as to give a sensible meaning to them ...

The only alternative construction offered to us would lead to the result that the plain intention of the Legislature has entirely failed by reason of a slight inexactitude in the language of the section. If we were to adopt this construction, we would be construing the Act in order defeat its object rather than with a view to carry its object into effect.”

[31] Accordingly, the declaration sought in relation to the National Assembly Resolution is refused.

Implementation of the Emergency Regulations by the Police

[32] The claimants’ pleaded case is that the Royal Saint Christopher and Nevis Police Force implemented or enforced the Emergency Regulations enacted under SRO 16 in a discriminatory manner in order to provide the ruling party which forms the Government, with an unfair and unequal advantage, while suppressing the Claimants and their political party, the SKNLP.

⁴ (1889) 2 QBD 513

- [33] The factual context giving rise to this complaint may be shortly stated. The Governor General's Proclamation declaring the existence of a State of Emergency was followed by the enactment of SRO 16 of 2020. Emergency Powers (COVID-19) (No. 7) Regulations. These regulations took effect from 9th May, 2020 and expired on Saturday 23rd May, 2020. On their expiration they were replaced by SRO No. 19 of 2020.
- [34] The regulations in force at the material time provided, *inter alia*, for days of limited operations; night curfews (8:01 p.m. of one until 4:59 a.m. of the following day)_and twenty-four-hour curfew. It also made provision for social and physical distancing protocols as well as the requirement for wearing of masks outdoors. The regulations also gave the Commissioner of Police the discretion to grant exemptions.
- [35] The manner in which these regulations were implemented by the police in relation to the claimants and the SKNLP to which they belong is in dispute. The issue is whether they were implemented in a discriminatory manner. If the claimants succeed in proving their allegations, the issue becomes whether the actions of the police contravened the claimants rights under sections 3(a) and (b), 12, 13 and 14 of the Constitution.
- [36] Before turning to the evidence adduced, I address a preliminary objection taken by the claimants in relation to the reply affidavits filed on behalf of the defendants. The claimants contend that they do not respond to any new matters raised by the claimants in their reply affidavits but include matters that ought to have been addressed in their first affidavits. This is not a well-founded complaint. I hold that the matters contained in the defendant's affidavits arise fairly to meet new matters raised by the claimants.

The claimants' evidence

- [37] The affidavit evidence of the second and third claimants chronicles the alleged instances of discriminatory treatment at the hands of the police. According to the second claimant, this was evident as early as 13th May, 2020. To celebrate the Prime Minister's announcement of the dissolution of Parliament and the holding of general elections, the claimants and others, in a convoy comprising less than ten vehicles, each containing a maximum of two occupants, drove into Basseterre. Police intercepted the procession at Pine Gardens.

- [38] On 16th May, 2020, a day on which a 24 hour curfew was in effect, the Concerned Citizens Movement (CCM), the Nevis based affiliate of the coalition Team Unity Administration, launched its election campaign with a public meeting at 8:00 p.m. The claimants allege that the Regulations did not give the Commissioner of Police power to grant such permission on a 24 hour curfew day. The event also had more than 10 persons in attendance contrary to the regulations.
- [39] On 18th May, 2020 the Prime Minister and another Minister facilitated a gathering comprising 36 persons at an indoor facility. Social distancing was not observed. Also on that said date, more than ten supporters of the ruling party participated in a motorcade and procession in Sandy Point. They did not adhere to Covid-19 Regulations. Yet further on that date there was a public gathering of more than ten persons at the home of Len Harris, ruling party supporter and brother of the Prime Minister, which saw no police intervention.
- [40] On 19th May, 2020, Team Unity launched its election campaign at the Marriott Hotel which was attended by a significant number of persons. Social distancing was not practised and persons did not wear face masks. A photo was exhibited depicting a Team Unity candidate posing with 15 young men, most of whom were not seen wearing face masks.
- [41] On 22nd May, 2020 the ruling party held another outdoor meeting which featured members of the ruling party appearing unmasked on the platform. That said day, members of Team Unity held a motorcade which the police did not intercept. However, a drive through for which the second claimant had obtained prior police approval to use a loud speaker and which was conducted in compliance with the regulations was intercepted by the police. The procession was only allowed to continue after the intervention of counsel.
- [42] Finally, in the days subsequent to 23rd May, 2020 while the police granted Team Unity permission to campaign without any time restrictions and permitted them more personnel to be outside during curfew hours, they granted the SKNLP only a limited number of such personnel.
- [43] Additionally, the third claimant complains that while the police did not investigate breaches of the regulations by Team Unity supporters, on 4th May they investigated a pre-recorded video circulating on social media showing him in attendance at a virtual march held on a partial curfew day with less than 10 persons in attendance.

The first defendant's evidence

- [44] In response to the claimants' allegations, several affidavits were filed by the Commissioner of Police and other police officers. The Commissioner explains the investigation of the 4th May video featuring the third claimant, by saying that the third claimant had been granted police permission for 10 persons to attend and lay wreaths at the graveside of former trade union leaders but information was received that the SKNLP was holding an event with more than 10 persons. Superintendent Travis Rogers confirms that he gave instructions to Inspector Jasper Carty of the Dieppe Bay Police Station to investigate the matter. Inspector Carty reported to him that as he approached Willets Development in a marked police vehicle, several persons who were gathered in the roadway ran on to different properties when the vehicle approached.
- [45] The Commissioner confirmed the interception of the procession involving the claimants on 13th May, 2020. His justification was that he had observed that over 15 vehicles with red flags (SKNLP colours) were gathered at Frigate Bay. No permission had been granted for that motorcade. He accordingly informed the police station and the motorcade was intercepted.
- [46] As it relates to the CCM's campaign launch on 16th May, 2020, the Commissioner deposed that he authorized Divisional Commander for Nevis, Superintendent Lyndon David, to grant permission for the event notwithstanding that it was a 24 hour curfew day. He justifies his decision to grant permission on the basis that it was election season. Superintendent David deposed that he attended the launch on the 16th. He observed that it was attended by speakers, technicians and a few supporters. Social distancing was practised by all who attended and there was never a large crowd in attendance.
- [47] As it relates to allegations of Team Unity activities on 18th May, the Commissioner deposed that he was initially unaware of the motorcade when it was in progress. When he did learn of an intention to conduct a later motorcade throughout Sandy Point, he personally contacted the Deputy Prime Minister about it and the motorcade did not proceed. As to the gathering that included the Prime Minister and another Minister, the Commissioner acknowledged that no permission was granted for that event. He deposed that when this matter was brought to his attention by the first claimant and Dr. Asim Martin the following morning, he spoke with the Minister concerned and admonished him about the need to obtain permission and to observe all Covid-19 protocols going forward. He also advised the first claimant and Dr. Martin that they too could apply for permission to hold meetings.

As to the gathering at the home of Len Harris, the Commissioner averred that he received no report of such a gathering. Superintendent Rogers also deposed that the records at the Tabernacle Police Station and/or at any other Police Station under Division B did not show that any report was lodged in respect of that gathering.

[48] Regarding the 19th May campaign launch of Team Unity, the Commissioner confirmed granting permission for the launch but disclaimed knowledge of what actually transpired at the launch.

[49] As it relates to the 22nd May, 2020 outdoor meeting of the CCM, the Commissioner said he was unaware of this. Regarding the interception of the SKNLP motorcade of that day, the Commissioner stated that they had been granted permission to have a drive through. When he learnt that they were having a motorcade, he directed the police to allow vehicles bearing public address systems to proceed but to divert the other vehicles elsewhere. Inspector Dickenson speaks to this occurrence also.

[50] As it relates to the contention that post 23rd May, 2020 the police granted Team Unity permission to campaign without any time restrictions and permitted them more personnel to be outside during curfew hours while granting the SKNLP only a limited number of such personnel, the Commissioner deposed that on Monday 25th May, 2020 he held a meeting with representatives of the SKNLP, Mr. Martin and Ms. Williams, who complained that they were not on equal footing with Team Unity. He advised them that they could apply for whatever permission they required and it would be reviewed. The Commissioner deposed that he followed up on three occasions, including Nomination Day and 28th May, 2020 with both representatives to ensure that he had not overlooked any application that had been sent. It was only after this, that applications were received later that day and he granted permission for SKNLP personnel to be out during the curfew hours across the eight constituencies. **(Exhibit HB5)**. He further deposed that during the week of 25th May, he received an application from the SKNLP to have a drive through Basseterre that Friday from 11:00 a.m. to 4:00 p.m. and, on Sunday, through Frigate Bay from 11:00 a.m. with no end time specified. He telephoned Ms. Williams and indicated that he had no objections but suggested a different route for Friday as that was a busy day. He also suggested an alternative time for the Sunday event. His suggestions were accepted by the SKNLP.

[51] As it relates to the activities of the CCM in Nevis, Superintendent David deposed that the CCM was not requested to disclose the names of persons attending their events because the CCM disclosed

their names in their letters of request. He supported this assertion by exhibiting the letters of request **LD3** and **LD4**. As it relates to permission granted in respect of meetings between 25th May, 2020 and 04th June, 2020, Superintendent David exhibited the correspondence between him and the CCM outlining the terms under which permission was granted, including stipulating limits to the number of persons and specifically identifying who could attend (**LD6**).

- [52] Superintendent Rogers also deposed that on 27th May, 2020, having received word from the Commissioner of Police that he had not given permission for any motorcades to be held, he dispersed an unauthorized Team Unity motorcade. He however, allowed two to four vehicles carrying party candidates to journey from the nominations stations to their respective party headquarters. He also deposed that on 31st May, he facilitated a SKNLP “whistle stop” which he allowed to proceed despite some breaches of the regulations by participants.

The legal principles

- [53] The claimants contend that the foregoing acts complained of, constitute breaches of their Constitutional rights guaranteed by sections 3(a), 3(b), 12, 13 and 14 of the Constitution.

- [54] Section 3, so far as relevant, provides:

“3. Whereas every person in Saint Christopher and Nevis is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his or her race, place of origin, birth, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

- (a) life, liberty, security of the person, equality before the law and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and

- [55] Section 12 provides:

“Protection of freedom of expression.

12. (1) Except with his or her own consent, a person shall not be hindered in the enjoyment of his or her freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication is to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence.

[56] Sections 13 and 14 provide materially:

Protection of freedom of assembly and association.

13. (1) Except with his or her own consent, a person shall not be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assembly freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests or to form or belong to political parties or other political associations.

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

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
- (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons; or
- (c) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Protection of freedom of movement.

14. (1) A person shall not be deprived of his or her freedom of movement, that is to say, the right to move freely throughout Saint Christopher and Nevis, the right to reside in any part of Saint Christopher and Nevis, the right to enter Saint Christopher and Nevis, the right to leave Saint Christopher and Nevis and immunity from expulsion from Saint Christopher and Nevis.

[57] The concept of equality before the law encompasses the notion that persons who are similarly situated or circumstanced should be treated alike; and that persons who are not alike could be treated differently. This inherently involves an element of comparison. The concept was expressed in the following terms by Ellis J in **Fahie and Williams v Commissioner of Police and the Attorney General**⁵ quoting Jamadar, J in the **Maha Saba** case from the Republic of Trinidad & Tobago:

“...what the concept of equality encompasses is the idea that persons who are alike (similarly situated/circumstanced) should be treated alike; and that persons who are not alike could be treated differently, though in some proportion to their differences. Thus a

⁵ BVIHCV2012/0314

person is treated unequally if that person is treated differently (and worse) than others who (the comparison group) are similarly situated (circumstanced) to the complainant. In *Bhagwande v Attorney General*, P.C. No. 45 of 2003, Lord Carswell stated at paragraph 18:

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

[58] In ***A v Secretary for the Home Department***⁶ Lord Bingham framed the question thus:

“The question is whether persons in an analogous or relevantly similar situation enjoy preferential treatment, without reasonable or objective justification for the distinction, and whether and to what extent differences in otherwise similar situations justify a different treatment in law (see *Stubbings v UK* [1997] 3 FCR 157 at 174 (para 70)).”

[59] The claimants must therefore establish that they have been treated differently from their similarly circumstanced comparators, Team Unity, on account of their political affiliations and opinions. This turns on the facts which have to be assessed against the specific pleading that the police implemented or enforced the regulations in a discriminatory manner in order to provide the ruling party which forms the Government with an unfair and unequal advantage, while suppressing the Claimants and their political party. This amounts to an assertion of bad faith on the part of the police.

[60] The evidence adduced before me does not support this bold claim. The claimants do not allege that they made applications to the police for privileges during the state of emergency which were denied. Indeed, the evidence clearly demonstrates that the police granted permission for all political parties to be able to conduct their respective election campaigns during the state of

⁶ [2004] UKHL 56

emergency and pandemic. Both sides were permitted to move around during curfew hours; to conduct “drive throughs” or “whistle stops”; both were permitted to launch their campaigns; both had one motorcade or the other disrupted.

- [61] Further, as it relates to the event at Len Harris’ home and the Team Unity Motorcade of 22nd May, the police deny knowledge of these events. They have not been cross-examined to contradict their assertions and I accept their evidence as true. It therefore cannot be said that the inaction in relation to these events was on account of a desire by the police to confer an unequal and unfair advantage to Team Unity.
- [62] The evidence also establishes that there were unauthorized events held by both the SKNLP and Team Unity. This has not been denied by the claimants. Where the police were aware of unauthorized Team Unity events, such as the contemplated Sandy Point motorcade on 18th May and the gathering at which the Prime Minister and another Minister were in attendance, the evidence is that the Commissioner of Police himself intervened to admonish the Deputy Prime Minister and the Minister respectively. Additionally, Superintendent Rogers’ unchallenged evidence is that he dispersed an unauthorized Team Unity motorcade on 27th May.
- [63] There were also minor breaches of the regulations by both sides as gleaned from the evidence of Superintendent Rogers. This is to be expected as it is utopic to expect 100 per cent compliance where the human element is at play. Even if it is accepted that the police may not have enforced the regulations strictly in every instance of its breach, the evidence is that such breaches and non-enforcement occurred during the activities of both political camps.
- [64] I am satisfied that the police took an even-handed approach to the campaigns of both sides. This is particularly well illustrated by the evidence of the Commissioner when detailing the pro-active steps he took in contacting SKNLP officials to ensure that he had not overlooked any applicants from them and practically inviting them to apply to have their supporters granted permission to campaign during curfew hours. None of this was denied by the claimants and I accept this evidence as true. Such conduct on the part of the Commissioner is completely inconsistent with the partisan motives ascribed to him and the police force by the claimants.
- [65] I hold that the claimants have failed to establish a factual basis to ground allegations of inequality of treatment or breaches of section 3. It follows that the claimants have failed to establish the

factual basis to sustain the claim that they were denied their rights of freedom of expression, freedom of assembly and association or freedom of movement guaranteed under the Constitution. The declarations sought in this regard are refused.

Discrimination by ZIZ

- [66] ZIZ is a State-owned radio and television company incorporated pursuant to the laws of Saint Christopher and Nevis. It operates the only local television station in St. Kitts and has a social media presence on Facebook and YouTube. Mr. Lester Hanley is the Chair of its Board of Directors. He was appointed to that position in August 2017 when the then Board, appointed in May, 2015 was reconstituted.
- [67] On 27th April, 2020, the SKNLP wrote to Mr. Lester Hanley, Chairman of ZIZ, making a general request for equal airtime; a weekly one-hour broadcast on ZIZ radio of a public information programme on issues facing St. Kitts. The Chairman responded by letter dated 4th May, 2020 advising that during the state of emergency and due to the COVID-19 pandemic, broadcast priorities was being given to, inter alia, the Governor General, the Office of the Prime Minister, the Chief Medical Officer, the Health Emergency Operations Centre, members of the Corona Virus Task Force and the National Emergency Operations Center. The letter concluded by stating its policy that services would not be available to those with outstanding or delinquent accounts without the approval of the Chairman.
- [68] On 12th May, the Governor General dissolved the National Assembly. On 18th May, the Prime Minister announced that Nomination Day would be 27th May and that the general election would take place on 5th June, 2020. On 22nd May, 2020 the claimants filed this claim. On 27th May, they served the Originating Motion and an application for an interim injunction restraining ZIZ from implementing the delinquent accounts policy and encroaching upon the claimants' or SKNLP's right to equal time on ZIZ and demanding equal coverage. By Consent Order made on 29th May, the injunction application was withdrawn.
- [69] The claimants by their pleadings, contend that ZIZ has contravened their right to equality before the law, guaranteed by section 3(a), freedom of speech and expression protected by section 12, freedom of association guaranteed by section 13, and to be protected from discrimination under section 15 by its policy decision contained in letter dated 4th May, 2020 and/or its failure or refusal

to invite or cover events of the SKNLP; to give the claimants and the SKNLP equal airtime as the ruling Team Unity Coalition to express political views; to cover and broadcast the claimants' or the SKNLP's political views or events and advertising in the same way and/or with the same frequency as they broadcast Government's events and advertising.

The claimants' evidence

- [70] In his affidavit, the second claimant alleges that ZIZ has a penchant for featuring politically biased news articles favouring the Team Unity administration; intermingling governmental messages with political overture, agitations and campaigning under the guise of Covid-19 coverage and via programmes such as "Leadership matters" which he avers is overloaded with political agitation and campaigning and featured persons who were election candidates for Team Unity but were not members of the Government. He avers that the second defendant's website and YouTube account are filled with coverage of both paid and unpaid events of the ruling party in its capacity as Government of the day. By contrast there are only three videos featuring the third claimant.
- [71] The second claimant further avers that ZIZ has failed to provide equal treatment in its election coverage between Team Unity and the Labour Party and is blatantly political in nature and in favour of the ruling party. He catalogues a number of SKNLP activities between 1st May – 25th May which were posted to the party's Facebook page, but which were not covered by ZIZ.
- [72] In his affidavit, the third claimant deposed that despite numerous written and oral requests for coverage over the last five years, the second defendant has refused to cover political events or statements by the claimants or the SKNLP in contravention of their rights to freedom of expression and not to be discriminated against. He says that the suppression of these rights have been made worse since the advent of the Covid-19 pandemic and the resulting state of emergency regulations. The third claimant deposed that among other things, ZIZ has broadcast political meetings of the ruling party but continues to deny the claimants and the SKNLP equal access or coverage.
- [73] Tamelia Demming deposed that at 9:35 a.m. on 27th May, 2020, this claim and supporting documents were served on ZIZ. At 10:12 a.m. ZIZ made a post on its Facebook page announcing the implementation of the Fair Election Broadcasting Policy. Minutes before this, at 9:51 a.m. the St. Kitts- Nevis Times, which she describes as a known Team Unity sympathizer and mouthpiece, posted details of the Board's decision on its Facebook page. Later that day at 2:58 p.m. ZIZ posted

a video with the Chairman reading verbatim the post which appeared on the SKN Times Facebook page.

The second defendant's evidence

- [74] The Chairman of ZIZ deposed that historically, broadcasting time on ZIZ has been controlled by the Government in power in St. Kitts and Nevis. When the SKNLP was in Government, none of the other political parties ever had any formal allocation of broadcasting time. He deposed that since the current Board was appointed, steps have been taken to give broadcasting time to opposition political parties. He cites ZIZ's broadcast of the third claimant's Christmas message in December, 2018 as an example. He further deposed that during the time that the SKNLP has been the opposition party, ZIZ has broadcast messages from them and has given it broadcast time. He said that there were innumerable instances of information presented on ZIZ media that were provided to ZIZ by the SKNLP for promulgation. He said there were "many, many" instances in which messages from or about the SKNLP have been broadcast, highlighted and portrayed over ZIZ media. He exhibits "**LH4**" which he says are three examples of an overwhelming number of stories reflecting press releases and statements from, and changes within, the SKNLP that have appeared on ZIZ media, all of which pre-date the Fair Election Broadcasting Policy. He also exhibited "**LH5**" as evidence of three examples of articles posted to ZIZ's website highlighting the SKNLP.
- [75] The Chairman deposed that on Nomination Day, 27th May, 2020, ZIZ implemented a new policy regarding equal broadcasting time during the 2020 General Election ("Fair Election Broadcasting Policy"). This policy would be in effect from nomination day until 11:59 p.m. on 4th June which was the day before the election. The policy entailed the allocation of a total of eight hours of paid programming to each registered political party and independent candidate, the cost of which would be borne by the State. It was his evidence that the Board began drafting the policy at the beginning of May, 2020. He refuted the suggestion that it was prompted by the service on ZIZ of this Motion on the morning of 27th May, 2020. The Chairman averred that the Board had advised certain political leaders about the Fair Election Broadcasting Policy prior to its formal implementation. He exhibited WhatsApp discussions with the leader of the opposition in Nevis and Dr. Terrence Drew, of the SKNLP dating from 22nd May, 2020. He concluded by stating that the Board is in discussions about implementing a fair broadcasting policy that would apply outside election periods.

Discussion

- [76] The claimants contend that they are entitled to equal air time on ZIZ. They make no distinction between the pre-election period and the election period commencing with nomination day. The second defendant contends that equal access is only required during the election period commencing on Nomination Day.
- [77] The first issue is whether the claimants are at all times entitled to equal broadcast or media time on ZIZ or only during the election period. If so, whether the claimants' Constitutional rights to freedom of expression and association and not to be discriminated against on the basis of their political beliefs, have been breached by the actions of ZIZ and, if so, whether they are entitled to damages.

The law

- [78] As it relates specifically to access to State media in the pre-election period between the dissolution of Parliament and the election, Caribbean jurisprudence is to the clear effect that equal access must be afforded. This issue was addressed in **Joseph Parry et al v Mark Brantley**⁷.
- [79] In that case the evidence adduced established that during the pre-election period, the state-owned and financed radio station on its daily, "Nevis News Cast," carried only news items and reports about the political events of the ruling Nevis Reformation Party. The Permanent Secretary in Mr. Parry's Ministry testified as to the policy of the Department to cover only the events of the ruling party. Not one of the opposition CCM's political events was given exposure. The trial judge held that the Government Information Service must exist for the use of all political parties and not limited to the activities of the ruling party alone. In the premises, he held that Mr. Brantley's right to free expression and the freedom to campaign on equal terms and without unreasonable restrictions were infringed.
- [80] He granted a declaration that Mr. Brantley's right to freedom of expression and his right not to be treated in a discriminatory manner by reason of his political opinions guaranteed under sections 12 and 15 of the Constitution of Saint Christopher and Nevis had been contravened by the failure of the Nevis Island Administration's radio station on its nightly Nevis News Cast to cover any of the political events organised by Mr. Brantley's political party during the campaign leading up to the election of 11th July 2011.

⁷ HCVAP2012/0003-0005

[81] That case is also authority for the proposition that an opposition party is not required to plead or prove that he had demanded access. In discounting this argument Mitchell, JA stated:

“Nor was there any need for Mr. Brantley to have pleaded or proved, as urged by Dr. Browne, that he had demanded free or equal access or had sought to purchase access to the Government media and been refused before he could be entitled to claim political discrimination by the Nevis Island Administration headed by Mr. Parry. It is not a requirement for an opposition political party in a general election campaign to request the government-owned media to cover their political events to an equal extent as they cover the governing party’s campaigning. When they give unfair coverage to the governing party’s campaign events in their programming the likely explanation is political bias or, more insidiously, fear of victimisation if they do not show political bias in favour of the ruling party. There was a burden on Mr. Parry, as there is on the leader of any political party in power, in Nevis as he instructs the Governor-General to dissolve the Assembly and to call elections, to ensure that the government-owned media execute or perform their important constitutional role in an election campaign of giving equal time to all major political parties, thus giving sustenance to the democratic process. Failure to do so runs the risk, as in this case, of the Premier being justifiably accused of being responsible for a breach of the opposition’s fundamental right not to be discriminated against.”

[82] Based on the foregoing, there can be no doubt that the claimants were entitled to be granted equal access to ZIZ once Parliament was dissolved on 12th May, 2020. Whether they were, will be addressed below.

[83] The debate in this case is whether the same holds outside of the election period. The answer to this question requires a closer consideration of the concepts of freedom of expression and equal treatment.

[84] In considering the concept of and limits to freedom of expression, the Privy Council in **Benjamin v Minister of Information**⁸ accepted that it does not include a general and unfettered right for any private citizen or organisation to have access to broadcasting time on radio and television in order to forward its opinions.

⁸ (2001) 58 WIR 171

[85] The House of Lords in **R (Pro-Life Alliance) v British Broadcasting Corporation**⁹ Lord Hoffman stated:

“The fact that no one has a right to broadcast on television does not mean that article 10 has no application to such broadcasters. But the nature of the right in such cases is different. Instead of being a right not to be prevented from expressing one’s opinions, it becomes a right to fair consideration for being afforded the opportunity to do so; a right not to have one’s access to public media denied on discriminatory, arbitrary or unreasonable grounds.”

[86] **Rambachan v Trinidad and Tobago Television**¹⁰ concerned the refusal of State owned Trinidad and Tobago Television to broadcast on its network a pre-recorded speech of the applicant unless he made certain changes to the text. Deyalsingh J, in exploring the meaning of “equal treatment” stated:

“In *Smith & A.G. v Williams* CA 19 1980 “equal treatment” under section 4(d) was equated to...” the right to equal treatment in similar circumstances both in the privileges conferred and the liabilities impose by law...that in other words, there should be no discrimination between one person and another if as regards the same matter...their position is the same” –(per Kelsick, J.A.) There must in the public service, be no favouring of one citizen over another. The public official must be fair; he must hold the scales public benefits equally. Equal treatment does not, of course, mean identical treatment. It means similar or substantially similar treatment in similar or substantially similar circumstances and even in similar or substantially similar circumstances there must be justifiable reason in certain cases for treatment, which is not equal. Government is never an easy matter and it will be impossible for it to function if a plea only of different treatment is necessary to make out a case under the equal treatment guarantee...”

[87] Deyalsingh J, went on to hold:

“The Government is duty bound to uphold the fundamental rights and with television being the most powerful medium of communication in the modern world, it is my view idle to

⁹ [2004] 1 AC 185

¹⁰ HCA No. 4 789 of 1988.

postulate that the freedom to express political views means what the Constitution intends it to mean without the correlative adjunct to express such views on television. The days of soap box oratory are over, so are the days of political pamphleteering. And the Government cannot in my view 'control' the only television station in Trinidad and Tobago in these modern times and refuse a recognized political party the use of this most powerful medium of communication to express its political views. The fundamental right would otherwise be stultified and would put the recognized political parties in opposition in a position of grave disadvantage. It would be taking away from them one of the most effective vehicle of political expression. It would be undemocratic..."

[88] **In Spencer v St. Luce (Minister of information) et al** ¹¹ the applicant complained that as Leader of the Opposition, he was entitled to time on the public media radio and television ABS. He had made repeated requests by letters for use of the radio and television to make statements on national issues and to respond to statements of national importance when made by the Prime Minister or other ministers of Government. These requests were ignored. In endorsing Deyalsingh, J's dicta in the above quotation, Redhead J, cautioned:

"I must not be understood to be agreeing to a situation where everyone in Antigua and Barbuda is entitled to use of the radio and television neither I am saying or agreeing to a situation where everyone who says he has a political party and is in opposition to the government is entitled to the use of radio and television.

Indeed it is my view that the court will be acting irresponsibly if that court were to say that everyone is entitled or has a right to equal access to the radio and television having regard to the fact that in Antigua and Barbuda radio and television is a very scarce resource."

[89] At paragraph 109, Redhead, J added:

"I do not think it can be contemplated in mind of the applicant that he should have equal radio/TV time as government Ministers as the government has among other things a legislative programme to put out."

¹¹ Claim No. 16 of 1994

[90] In **Rambachan v TTT** Deyalsingh, J expressly recognized that Government could enjoy some advantage in access to the airways without necessarily offending against the Constitution. At paragraph 124 he stated:

“Government should be given the opportunity to inform the people of its activities but of course, it should be done in as “non-political” a way as possible. It must of course, be admitted that some advantage must accrue to government from this accommodation but I do not see it offending against the Constitution as long as it kept within fair limits.”

[91] The cases seem to establish that while the claimants are not entitled to equal or identical access to state owned media as a general proposition, they do have a right to fair consideration for being afforded the opportunity to do so and the right not to have their access to ZIZ denied on discriminatory, arbitrary or unreasonable grounds.

Findings

[92] Both the claimants and the second defendant have, on occasion, employed hyperbolic language to make their case. The claimants assert that the second defendant has failed or refused to carry SKNLP despite “numerous and oral requests for coverage over the last 5 years.” The evidence does not go as far as establishing an absolute failure or refusal to feature articles or stories about the SKNLP as in the **Rambachan** case. Evidence has been adduced that, pre-dating the Fair Elections Broadcasting Policy, ZIZ did provide some coverage of SKNLP events and press conferences. For its part, the second defendant claims that there are “many, many” instances in which messages from or about the SKNLP have been broadcast, highlighted and portrayed over ZIZ media...” and “an overwhelming number of stories reflecting press releases and statements from, and changes within, the SKNLP that have appeared on ZIZ media.” This is an exaggeration.

[93] Contrary to the claimants’ assertion, I find that ZIZ did not fail or refuse to invite or cover events of the SKNLP. The evidence (“**LH4**” and “**LH5**” exhibited to the first affidavit of the Chairman) shows that between 2018 and 2019, ZIZ featured a statement from the Deputy Leader of the SKNLP, coverage of SKNLP press conferences and carried stories featuring the launch of two SKNLP candidates. During 2018 and 2019 ZIZ carried the following stories:

- (i) **19 August 2018 – “Douglas Condemns Fatal shooting**
- (ii) **1 September 2018 – “SKNLP Launches Candidate”**

- (iii) **30 January 2019 – SKNLP Press Conference”**
- (iv) **28 March 2019 – “SKNLP Congratulates Natta”**
- (v) **6 May, 2019 – “SKNLP Remembers Labour Stalwarts”**
- (vi) **6 May, 2019, - “Labour Day March”**
- (vii) **20 May, 2019 – “SKNLP New Executive”**
- (viii) **24 May, 2019 – “SKNLP Protest outside Electoral Office”**
- (ix) **29 August, 2019 – “SKNLP Press Conference”**

- [94] While this coverage is not equal to the airtime afforded Team Unity, the SKNLP is not entitled to equal airtime or to coverage with the same frequency as the broadcast of Government’s events as the claimants contend. That said, this can hardly represent what the second defendant describes as an “overwhelming number of stories” featuring the SKNLP.
- [95] While the claimants are not entitled to equal or identical treatment in the pre-election period, this cannot mean that their right to freedom of expression and the right not to be discriminated against on account of their political affiliation or opinion, should be thereby denuded. For these rights to be meaningful, adequate coverage must be afforded even if not equal.
- [96] As it relates to the election period, the evidence which I accept is that by the time of the dissolution of Parliament on 12th May, 2020, ZIZ was already engaged in the crafting of the Fair Elections Broadcasting Policy. This provided for equal broadcasting time to be provided to the five registered political parties and any nominated independent candidate ahead of the June 5th General Election. From Nomination day, 27th May until 11:59 p.m. on 4th June, ZIZ would allocate a total of eight hours of paid programming to each registered political party and nominated independent candidate. It allocated an additional 30 minutes per day, free of charge, to each party or independent candidate. Political advertisements from all political parties and candidates would be featured on ZIZ for the first time. The unchallenged evidence is that this marked a historic first by ZIZ to open up the airwaves to all political contenders.
- [97] The Claimants contend that this policy was prompted by the institution of this claim which was served on the second defendant on 27th May, 2020. I find that is not the case. WhatsApp messages exhibited by the Chairman, clearly refute any suggestion that the Fair Election Broadcasting Policy was prompted by service of this claim on 27th May. The Chairman was in contact with Dr. Terrence “Omie” Drew on Friday 22nd May, 2020. The message read:

[Chairman]: "Greetings Omie. Grateful if you can send me your proposed schedule for radio and televisions coverage soonest. Will get back to you shortly with policy going forward but we have worked out for all parties a combination of paid and free air time. Both on radio and television. This is in line with our previous discussion. Remember we also discussed covering press conferences. I need your schedule on those as well."

Dr. Drew: "Goodafternoon (Sic)

Chairman: I have already tasked the news team. Asked about the recent press conference and was told we got word just before the event. Would prefer to have these events scheduled to ensure coverage. Please also indicate any launch events etc.

Dr. Drew: GA I forward info to office.

Chairman: thanks. Kindly have them sent to lester@zisonline.com."

- [98] These exchanges demonstrate that there had been discussions between the Chairman and Dr. Drew of the SKNLP regarding coverage of their events. They were invited to supply their schedule of events. The exchanges also make plain that the Fair Election Broadcasting Policy was a work in progress and was not a knee jerk reaction to the institution of this claim and its service on the second defendant on 27th May, 2020.
- [99] I therefore find that before the dissolution of Parliament, ZIZ had set about devising a Fair Elections Broadcast Policy which aimed to afford the claimants equal airtime in relation to all other political parties and independent candidates. Further, as the WhatsApp correspondence shows, ZIZ's Chairman was actively engaging with Dr. Drew of the SKNLP and the opposition leader in Nevis.
- [100] Nonetheless, a fair analysis of the evidence adduced (in particular **K.M. 19 & K.M. 20**) demonstrates that between the period 12th May, when parliament was dissolved, and 22nd May, when this claim was filed, ZIZ did not afford the Claimants equal access to the State owned media.
- [101] For example, the SKNLP posted approximately 47 campaign events for the month of May on its Facebook page, none of which was featured by ZIZ. On its YouTube platform only three videos featured the third claimant.

- [102] The second defendant submitted that there is no evidence that the claimants demanded airtime and were refused. This may be so, but I do not accept that a political party has to request airtime in order to have items about their activities featured. My position accords with the views of the Court of Appeal in **Joseph Parry** cited at paragraph 80 above.
- [103] One would think that any reasonably astute journalist would know that social media is a fertile source of information and could reasonably be expected to interrogate social media platforms of all political contenders in order to provide some semblance of balanced coverage.
- [104] Accordingly, I find that the claimants have established that during the election period commencing 12th May, 2020 until the implementation of the Fair Elections Broadcasting Policy on 27th May, 2020, ZIZ breached their Constitutional rights under sections 3, 12, and 15 of the Constitution.
- [105] Accordingly, in relation to this period, it is hereby declared that the Claimants' right to equality before the law, guaranteed by section 3(a), freedom of speech and expression protected by section 12, and to be protected from discrimination under 15 have been breached by ZIZ by their failure to give the claimants and the opposition political party to which they belong, the St. Kitts-Nevis Labour Party equal airtime as the ruling party, Team Unity Coalition, to express political views or to cover and broadcast the claimants' or the St. Kitts-Nevis Labour Party's political views or events and advertising in the same way and/or with the same frequency as the broadcast of the Government's events and advertising.
- [106] The claimants seek damages as well. The Court of Appeal in **Urban St. Bryce**¹² discussed the circumstances when it may be appropriate to award such relief. Baptiste, J.A. stated:

“An award of vindictory damages is to be distinguished from compensation pure and simple, and from exemplary or punitive damages at common law; and it is by no means required in every case of constitutional violation...

Importantly, the power to give redress under section 16 of the Constitution for a contravention of the appellant's constitutional rights is discretionary. There is no constitutional right to damages. In some cases, a declaration that there has been a violation of constitutional right may be sufficient satisfaction for what happened. As stated in **James v Attorney General of Trinidad and Tobago**, to treat monetary compensation

¹² SLUHCVP 2018/0036

as automatic where violation of a constitutional has occurred, would undermine the discretion that is vested in the court by Section 16. It all depends on the circumstances...

"In applying the relevant learning referred to earlier the function of granting relief is intended to serve to vindicate the constitutional right. In some cases a declaration on its own would be all that is needed." [paras 37-41]

- [107] In this case, I have found that there is clear evidence that before the dissolution of Parliament, ZIZ had set about devising a Fair Elections Broadcast Policy which aimed to afford the claimants equal airtime in relation to all other political parties and independent candidates during the election period. Further, as the WhatsApp correspondence shows, ZIZ's Chairman was actively engaging with Dr. Drew of the SKNLP and the Opposition Leader in Nevis. And while the coverage during this period wasn't equal to that afforded its team Unity comparator, ZIZ did feature some stories relating to the SKNLP.
- [108] In these circumstances, I consider that a declaratory remedy provides a sufficiently emphatic vindication of the breach of the claimants' rights.
- [109] Given that both sides have achieved some measure of success, each party shall bear its own costs.

Trevor M. Ward, QC
High Court Judge

By the Court

Registrar