Easter Term
[2021] UKPC 12
Privy Council Appeal No 0079 of 2020

JUDGMENT

Brandt (Appellant) *v* Commissioner of Police and others (Respondents) (Montserrat)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Montserrat)

before

Lord Reed
Lord Lloyd-Jones
Lord Sales
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON

10 May 2021

Heard on 23 March 2021

Appellant
David Dorsett PhD
Jarid Hewlett
(Instructed by Axiom Stone Solicitors)

Respondents
Anesta Weekes QC

(Instructed by Office of the Director of Public Prosecutions)

LORD STEPHENS:

Introduction

1. The appellant, David Samuel Brandt, is charged with various sexual offences which it is alleged he committed in Montserrat between 2010 and 2015. Part of the evidence which the prosecution seeks to admit at his trial are WhatsApp messages, images, and other data ("WhatsApp data") which were obtained by the police as a result of a search of the appellant's cell phones. The appellant accepts that search warrants authorised the police to search *for* and to seize the cell phones, but he contends that the warrants did not authorise a search *of* his cell phones. On that basis he contends that the search of his cell phones was unlawful and in breach of his constitutional right of privacy. He therefore challenges the admissibility of the WhatsApp data in his criminal trial. However, rather than making the challenge as to admissibility in the criminal proceedings, the appellant commenced separate proceedings in the High Court against the Commissioner of Police, the Attorney General, and the Director of Public Prosecutions ("the respondents") by way of an application for an administrative order relying on sections 2, 9 and 20 of the Montserrat Constitution seeking, amongst other relief, a declaration that the WhatsApp data is inadmissible in the criminal proceedings.

2. Evans J (Ag) ("the judge") dismissed the claim for an administrative order holding that the search of the cell phones was not unlawful and that the application for an administrative order was an abuse of process, though he declined to find that the application was either frivolous or vexatious. The Court of Appeal (Michel JA, Webster JA (Ag) and Carrington JA (Ag) unanimously dismissed that part of the appeal relating to abuse of process but, by a majority, held that the search of the appellant's cell phones was unlawful though not in breach of the Constitution. The Court of Appeal granted a declaration that the search of the cell phones was unlawful.

3. The appellant now appeals as of right to Her Majesty in Council seeking to establish that the search of his cell phones was not only unlawful but was also in breach of his constitutional right to privacy. On the basis that it was a breach of his constitutional right, he seeks to establish the remedy to which he is entitled, and, in that respect, he contends that the common law position expressed in *Kuruma v The Queen* [1955] AC 197 as to the reception of unlawfully obtained evidence does not remain good law. Finally, he challenges the finding that the

administrative proceedings were an abuse of process on the ground that it is inconsistent with the judge's finding that the administrative proceedings were neither vexatious nor frivolous. This final ground of appeal raises the issue as to whether the administrative proceedings were an abuse of process. At the hearing of the appeal the Board directed that this final ground should be addressed first by both parties. At the conclusion of the submissions in relation to that ground the Board informed the parties that it would humbly advise Her Majesty that the appeal on that ground ought to be dismissed, as the Court of Appeal had correctly upheld the judge's decision that the administrative proceedings were an abuse of process. The Board then heard submissions as to whether the Court of Appeal should have dismissed the appeal, without granting any declaration, given that the administrative proceedings were an abuse of process.

Factual background

4. The appellant is an attorney-at-law whom the judge described as "a competent criminal advocate". He is a former politician having served as Montserrat's Chief Minister from 22 August 1997 to 5 April 2001.

5. In September 2015, the Montserrat police applied for and obtained from the Chief Magistrate a warrant to search premises occupied by the appellant based on the reasonable suspicion that he had committed the offence of conspiracy to commit unlawful sexual intercourse with a girl under the age of 16 contrary to the Montserrat Penal Code and had in his possession "cell phones, iPads, computers and other electronic items". In the warrant dated 16 September 2015, the Chief Magistrate authorised the police to search the premises occupied by the appellant at Olveston, Montserrat for "articles essential to the inquiry into the said offence". The Chief Magistrate, based on the suspicion that the appellant had committed the aforementioned offence issued two further warrants on 19 and 22 September 2015 which also authorised the search for articles essential to the inquiry into the offence.

6. On 22 September 2015 the police conducted a search of the appellant's offices and premises. They seized various items belonging to the appellant including his cell phones. Those cell phones were subsequently searched by the police and revealed potentially incriminating communications in the form of the WhatsApp data. The appellant accepts that he sent the messages contained in the WhatsApp data.

7. By a letter dated 11 August 2016 to the Commissioner of Police, written and signed by the appellant on his firm's notepaper, he asserted that the police

had engaged in an intensive invasion of his privacy "by searching the information" on, amongst other items, his cell phones "without a court order specifically authorising them to do so". He asserted that this "action [was] in breach of [his] right to privacy as guaranteed by the Montserrat constitution". In support of that proposition he relied on and quoted from a decision of the Supreme Court of Canada in *R v Vu* 2013 SCC 60; [2014] 3 LRC 515; [2013] 3 SCR 657, and the decision in the Supreme Court of Grenada of Ellis J in *Myland (Shankiell) v Commissioner of Police* Claim No GDAHCV 2012/0045 ("*Myland* case"). The appellant concluded his letter by seeking agreement on "the requisite quantum of damages for breach" of his constitutional rights.

8. On 14 September 2016 the appellant was charged by the Director of Public Prosecutions with offences contrary to section 141 (a) and (d) of the Penal Code. In summary, the charges under section 141 (a) alleged that the appellant sent sums of money to female persons so that they would bring under-age girls to Montserrat to have sex with him and the charge under section 141 (d) alleged that the appellant provided financial support to an under-age girl in return for her agreement to have sex with him. These offences were alleged to have taken place variously in 2010, 2013, 2014 and 2015.

9. In accordance with the Criminal Procedure Code, the appellant first appeared in the Magistrate's Court for an initial hearing. The Chief Magistrate referred the matter to a judge of the High Court for a sufficiency hearing. The sufficiency hearing was completed and subsequently on 25 April 2019 an indictment was laid against the appellant.

10. It appears that the prosecution's case is heavily reliant on the WhatsApp data, and the Director of Public Prosecutions suggests that it contains compelling evidence of the charges on the indictment. It was always anticipated that there would be an issue as to the admissibility of this data in the criminal proceedings. Accordingly, by a case management order dated 20 February 2019 the appellant was directed to give written notice accompanied by any legal submissions by 29 March 2019 in respect of the admissibility of the WhatsApp data. That direction was repeated in an updated case management order of 15 April 2019. Furthermore, on 16 May 2019 in a case management conference, the appellant was ordered by the judge to "give written notice accompanied by any legal submissions in respect of the admissibility of the WhatsApp evidence sought to be adduced by the prosecution by 20 May 2019".

11. The appellant did not comply with those directions in the criminal proceedings. Rather, on 27 May 2019, he commenced separate proceedings in the High Court by way of an application for an administrative order seeking relief under section 20 of the Constitution asserting that his constitutional right to

privacy under section 9 was contravened when his cell phones were searched without prior authorisation some 3 years and 8 months previously in September 2015. The remedies which he sought included (a) a "declaration that the search of the … cell phones was without prior authorization and was unlawful and unconstitutional"; (b) a "declaration that the evidence obtained as a result of the unlawful and unconstitutional searches of the … cell phones is inadmissible as evidence in court proceedings involving the [appellant]"; (c) "interim relief and final relief in the form of a stay of any criminal proceedings against the [appellant] involving the use of evidence obtained from searches of the … cell phones when the … cell phones were seized under the authority of search warrants dated 16, 19 and 22 September 2015"; and (d) damages.

12. In para 4 of the appellant's affidavit supporting the application for an administrative order and despite the contents of his letter dated 11 August 2016 to the Commissioner of Police in which the appellant had specifically referred to the *Myland* case, he sought to justify the delay in bringing the application on the basis that "within the last couple of weeks in preparing for trial" his counsel "has come across a judgment delivered" in the *Myland* case.

13. On 14 June 2019 the judge commenced hearing the application for an administrative order. He also heard an application in the criminal proceedings to quash the indictment. It appears that Dr Dorsett represented the appellant in both applications. The judge enquired as to who would be attending court on the appellant's behalf on the following Monday, 17 June 2019 when the criminal trial was due to commence. The judge was informed that Dr Browne QC, who had been instructed to represent the appellant, was unwell and that Dr Dorsett was unable to attend due to prior engagements before the Court of Appeal. On 17 June 2019 the judge was presented with a medical certificate that listed Dr Browne's medical complaints. The judge, having been informed by the prosecution that Dr Browne had never responded to any of their communications, was concerned as to whether Dr Browne had been instructed because of his perilous state of health so that inevitably an application would be made to postpone the trial. However, the judge acceded to the application for an adjournment of the criminal trial to 18 November 2019 so that the appellant could instruct new leading counsel.

14. In a judgment dated 9 July 2019 the judge dismissed the administrative application, holding that the search of the cell phones was not unlawful and that the application for an administrative order was an abuse of process though he declined to find that the application was either frivolous or vexatious. On 20 August 2019 the appellant appealed to the Court of Appeal as of right pursuant to section 20(4) of the Constitution. The only ground of appeal pursued by the appellant before the Court of Appeal was that the judge "erred in dismissing the claim for an administrative order when the search of the appellant's mobile

phone was in violation of the appellant's constitutional right to privacy". In relation to that ground of appeal the appellant's counsel informed the Court of Appeal that "the only relief that [the appellant] was seeking in the event that the appeal [was] to be allowed were declarations that the search of the cell phone was unconstitutional and/or unlawful", see the judgment of Carrington JA at para 30. In this way the appellant abandoned any claim for damages in the administrative proceedings. In a judgment dated 14 February 2020 the Court of Appeal allowed the appeal in part holding that the search that resulted in the obtention of the WhatsApp data was unlawful, but not unconstitutional, and dismissing that part of the appellant's appeal which related to the finding that the administrative proceedings were an abuse of process.

15. The appellant appeals to Her Majesty in Council as of right (see section 20(4) of the Constitution and the Montserrat (Appeals to Privy Council) Order 1967 (SI 1967/233)) The procedure to be followed was considered in detail by Lord Mance in *E Anthony Ross v Bank of Commerce (Saint Kitts and Nevis) Trust and Savings Association Ltd* [2010] UKPC 28 [2011] WLR 125". On 23 June 2020 in accordance with that procedure conditional leave was obtained from the Court of Appeal subject to compliance by the appellant with certain conditions including the provision by him of security for costs and preparation of the record. On 17 September 2020 final leave was granted by the Court of Appeal upon those conditions having been satisfied.

The Constitution

16. The administrative proceedings rely on sections 2, 9 and 20 in Part 1 of the Montserrat Constitution which protects various fundamental rights and freedoms.

17. Section 2, under the rubric of "Fundamental rights and freedoms of the individual", recites that:

> "Whereas every person in Montserrat is entitled to the fundamental rights and freedoms of the individual, … subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—
>
> (a) … the protection of the law;

(b) …;

(c) protection for his or her private and family life, the privacy of his or her home and other property …,"

Section 2 continues by providing that:

"the subsequent provisions of this Part shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, and related rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said protected rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

18. Section 9 is the subsequent provision of Part 1 that has effect for the purpose of affording protection of private and family life and of privacy of the home and other property. In so far as material that section provides:

"9 (1) Every person has the right to respect for his or her private and family life, his or her home and his or her correspondence.

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

(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—

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

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

(c) for the prevention or detection of offences against the criminal law or the customs law;

(d)….

(e)…."

19. A method of enforcing the fundamental rights contained in Part 1 of the Constitution is set out in section 20(1) which provides that "If any person alleges that any of the foregoing provisions of this Part has been, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available to him or her, that person may apply to the High Court for redress". It can be seen that this method of enforcement by an application to the High Court is expressly without prejudice to any other action which is lawfully available to him or her so that it is not the sole method of obtaining redress.

20. The jurisdiction of the High Court to hear and determine any application under section 20(1), is contained in section 20(2) which also provides a discretion in that the High Court "may", not shall, "make such orders, issue such writs and give such directions as it *may* consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Part to the protection of which the person concerned is entitled" (emphasis added).

21. Section 20(4) makes provision for an appeal from the High Court to the Court of Appeal and to Her Majesty in Council. Under that subsection an appeal "shall lie as of right to the Court of Appeal from any final determination of any application or question by the High Court under this section, and an appeal shall lie as of right to Her Majesty in Council from the final determination by the Court of Appeal of the appeal in any such case." However, section 20(4) also contains a proviso that "no appeal shall lie from a determination by the High Court under this section dismissing an application on the ground that it is frivolous or vexatious". In this way, if the application is either frivolous or vexatious no appeal lies to the Court of Appeal, which in turn excludes any appeal to Her Majesty in Council.

The judgment of the High Court

22. In his judgment the judge having reviewed the relevant authorities and legislation, held, at para 45, that "the interrogation of the [appellant's] phone was lawful and did not breach the [appellant's] fundamental right to privacy". The judge also recorded that even if the extraction of the WhatsApp data had been in breach of the appellant's fundamental right of privacy the respondents maintained that the evidence was still admissible under common law, relying on *Warren v The State (Pitcairn Islands)* [2018] UKPC 20 at para 33 in which it was stated that "Prosecution evidence may of course be excluded if its effect on the trial would be unfair …. But the test of exclusion is not the nature of any irregularity in obtaining the evidence but rather the extent of any unfairness caused thereby".

23. The judge also considered the respondents' contention that the bringing of the application for an administrative order constituted an abuse of process. The judge had made several findings adverse to the appellant. At para 6 the judge held that as "a result of various appeals and applications (none of which have succeeded) this trial has in my view been deliberately delayed by the [appellant]". The judge added that he was "clearly of the view as a result of the manner in which this matter has been conducted that the [appellant] has no desire for a trial ever to take place". At paras 24 to 27 the judge considered the appellant's delay in bringing the application for an administrative order, and rejected the explanation that the application was prompted by research carried out by his counsel Dr Dorsett who had come across the decision in *Myland* in "the last couple of weeks". The judge referred to the letter of 11 August 2016 as showing that the appellant was "well aware of the very authorities" which he was now claiming were "the product of Dr Dorsett's recent research".

24. The judge having considered relevant authorities stated at para 72 that the "court must be vigilant in cases such as this, where the constitutional applications are clearly and cynically being used to derail imminent criminal proceedings". The judge concluded that the application for an administrative order was an abuse of process on two grounds.

25. First at para 73 the judge held that "The use of Constitutional motions such as this, is in my view wholly inappropriate and to expect the Court to trespass upon the criminal jurisdiction is wholly wrong".

26. Second at para 74 the judge held "that the attempt to raise this matter at this late stage is yet another misconceived delaying tactic/device that was

intended to delay and/or derail the criminal trial by giving the [appellant], if unsuccessful (as he was always going to be) a further appeal to the Court of Appeal with accompanying further applications for a stay of the already delayed trial of this matter and possibly an appeal to the Privy Council where it will join the [appellant's] other appeals".

27. Having found that the application for an administrative order was an abuse of process the judge considered at paras 78 to 83 whether he should find that the appellant's application was frivolous or vexatious. In doing so the judge confined his analysis to the appellant's two previous applications for administrative orders. At para 81 the judge considered that the first application was clearly frivolous but felt constrained to hold that the second was neither vexatious nor frivolous and therefore did not count against the appellant. Accordingly, the judge declined to make a finding that this application was frivolous or vexatious.

The judgment of the Court of Appeal

28. The Court of Appeal unanimously dismissed the appeal against the decision that the application for an administrative order was an abuse of process but by a majority held that the search of the appellant's cell phones without a warrant specifically authorising their search was unlawful, though not unconstitutional. Judgments were given by all three members of the court.

(a) The issue as to abuse of process

29. Michel JA at paras 1 and 14 and Webster JA at paras 15 to 19 held that the filing and prosecution of the application for an administrative order both in the Court of Appeal and in the High Court, was an abuse of the process of the court with Webster JA holding that "for that reason only" I would dismiss the appeal." In arriving at that conclusion and at para 17 of his judgment Webster JA stated that there had been no appeal against the finding of abuse by the trial judge. At para 18 Webster JA noted "that this is the third attempt by the appellant to delay the trial by filing appeals challenging decisions of the courts below on constitutional grounds, all of which have been dismissed". Webster JA then quoted from part of the judgment of the Court of Appeal relating to the second attempt in which it was stated that the "procedure used by the appellant to bring this matter to the High Court as a constitutional claim is entirely wrong and improper." At para 19 Webster JA concluded that "this is a more egregious attempt by the appellant to derail the criminal trial".

30. Carrington JA set out the principles to apply in determining whether proceedings are an abuse of process by reference to the *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15; [2006] 1 AC 328, *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265, *Sharma v Brown-Antoine* [2007] 1 WLR 780 and *Alcee v Attorney General* SLUHCV2016/0006. In the light of those authorities and at para 41 Carrington JA stated that it was "therefore necessary to consider, before making a determination as to whether there has been a breach of constitutional rights, whether some other available and adequate means of legal redress was available to the appellant". Having reviewed the background to the proceedings he found that "there is no reason for a separate constitutional challenge to be made on the issue of the searches which led to the evidence" because "the criminal proceedings, … [provided] an effective means by which an accused can seek relief in respect of evidence which he claims to be inadmissible". Carrington JA then found at para 46 that "in the circumstances, it was an abuse of process for the appellant to seek relief under the Constitution in the form of a declaration of the constitutionality of the search of the cell phones…".

(b) The issue as to whether the search of the cell phones was unlawful or unconstitutional

31. In addition to considering the issue of abuse of process all the members of the Court of Appeal considered the question as to whether the action of the police in searching the appellant's cell phones was unconstitutional and/or unlawful. In deciding to do so Michel JA took into account that both in the Court of Appeal and in the High Court the parties addressed this question fairly extensively so that it merited "some judicial comment". At para 22 Webster JA recognised that "the issue of the lawfulness of the search and the admissibility of the evidence recovered are quintessentially matters for the trial judge in the impending trial of the appellant" but agreed with Michel JA "that it is important for this court to give guidance on the matter". In the event, in addition to making some judicial comment or giving guidance Michel JA and Webster JA granted a declaration that the search was unlawful whilst Carrington JA dissented.

32. In summary before the Court of Appeal Dr Dorsett for the appellant, relied on the decision in *R v Vu* to establish that the search warrants did not permit the police to search the cell phones for electronic data and communications as the warrants were only in relation to searches for tangible items so that the appellant's constitutional right to privacy continued in respect of data and correspondence accessible through the cell phones. Ms. Weekes QC for the respondents, submitted that the terms of the warrants, when read together with the evidence led before the magistrate to obtain them, made it clear that the

warrants were directed at the data and communications on the electronic devices and not the devices only, as the devices only would obviously not be relevant to the types of offence which the appellant was suspected of having committed. She further submitted that the factual situation in *R v Vu* was distinguishable from this case.

33. Michel JA at para 7 considered that the *Myland* case and the case of *R v Vu* were persuasive and at para 10 he was of the view that, in keeping with those authorities, the search of the appellant's cell phones was unlawful, as not being authorised by a warrant to search for and seize cell phones. At para 23 Webster JA agreed with Michel JA. However, Carrington JA, whilst accepting at para 48 that the principles stated in *R v Vu* should apply to the interpretation of the right to privacy under section 9 of the Constitution considered, at para 37, that *R v Vu* did "not lay down an absolute rule as to the wording of a search warrant". He continued that "What [*R v Vu*] emphasises is that, if the need for a search must be justified to a judicial authority, a reviewing court must be satisfied that the person authorising the search was able to consider the need for the search of the computers etc based on information before him and had reached a decision that, in the circumstances, such an invasion of privacy was justified". On this basis he considered, at para 48, that the application of the principles in *R v Vu* "requires the court to examine the evidentiary background to the grant of the relevant warrants". He also stated that "the judge presiding over the criminal trial is in a better position to" examine that background.

Legal principles in relation to abuse of process

34. The boundaries of what may constitute an abuse of the process of the court are not fixed. As Stuart-Smith LJ said in *Ashmore v British Coal Corporation* [1990] 2 QB 338 at 348, the categories are not closed and considerations of public policy and the interests of justice may be very material. Lord Diplock's speech in *Hunter v Chief Constable of the West Midlands Police [*1982] AC 529 at 536 underlines this point. He stated:

> "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give

> rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

Abuse of process must involve something which amounts to a misuse of the process of litigation. However, whilst the categories of abuse of process of the court are not fixed there are clear examples which are relevant to this appeal.

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

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

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

attack on, for example, a judge's exercise of discretion or a criminal conviction, in order to bypass restrictions in the appellate process (see eg C*hokolingo v Attorney General of Trinidad and Tobago* [1981] 1 WLR 106 at 111–112).

36. Second, using the process of the court for an improper motive or purpose may be an abuse of process, see *Fuller v Attorney General of Belize* [2011] UKPC 23 , 79 WIR 173 at para 5(iii). Commencing proceedings, not with the genuine object of obtaining the relief specified, but for some collateral purpose such as to delay or derail other proceedings, would amount to using the process of the court for an improper motive or purpose.

37. A case may fall within both of these categories and there may be an overlap between them. That overlap is demonstrated by the facts in this appeal. The question as to whether the administrative proceedings were not commenced with the genuine object of obtaining the relief specified is informed by a number of matters, including whether all the relief could have been obtained in the criminal proceedings.

38. Section 20(4) of the Constitution contains the proviso that "no appeal shall lie from a determination by the High Court under this section dismissing an application on the ground that it is frivolous or vexatious". No submissions were made to the Board and the Board expresses no views as to whether proceedings which are an abuse of process could or might fall within the definition of "frivolous or vexatious" in that section. However, the Board observes that abusive tactics, such as using administrative proceedings to derail or delay parallel proceedings, can, in appropriate circumstances, be defeated by a court in the exercise of discretion declining to adjourn the parallel proceedings. In making this observation the Board recognises that the adjournment of the criminal trial in this case was not caused by reason of the administrative proceedings but rather was necessitated by the ill-health of counsel (see para 13 above).

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

the outcome of the parallel proceedings, but the adjourned proceedings cannot be used to challenge the outcome in the parallel proceedings: see *Chokolingo v Attorney General of Trinidad and Tobago* at 111–112.

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

Consideration of the appeal in relation to abuse of process

41. The administrative proceedings are an abuse of the court's process in the absence of some feature "which, at least arguably, indicates the means of legal redress otherwise available" in the criminal proceedings would not be adequate, see *AG of Trinidad and Tobago v Ramanoop* and para 35 above.

42. Dr Dorsett, on behalf of the appellant, whilst recognising the guidance provided by Lord Nicholls in *Ramanoop* for determining whether a constitutional claim is an abuse of process, sought to confine this category of abuse of process to cases in which there was no arguable contravention of a human right or fundamental freedom. He submitted that if there was an arguable contravention of a human right as in this case, then applying for an administrative order was not an abuse of process. In this respect he relied on *Harrikissoon v Attorney General of Trinidad and Tobago* in which the Board held that the transfer of a teacher from one school to another involved no contravention of any human right or fundamental freedom. However, the submission that the outcome in *Harrikissoon* would have been different if some human right had arguably been engaged is incorrect. Rather, that case is a further illustration of the principles enunciated by Lord Nicholls in *Ramanoop*.

43. On behalf of the appellant it was submitted that a challenge to the admissibility of the WhatsApp data could only be tested on appeal if it was admitted at the criminal trial and if the appellant was convicted. It was suggested that this made the criminal proceedings inadequate, as for the appellant to exercise any right of appeal he would first have to have been convicted. It was

stated that by bringing an administrative claim the appellant could test admissibility on appeal whilst also maintaining his innocence. The Board does not consider that the difference in status of the appellant during the appeal process leads to the means of challenge in the criminal proceedings being inadequate. Rather, that is the ordinary means of challenge available to all persons accused of criminal offences. Furthermore, it is normal in any criminal trial to consider all relevant and applicable authorities in relation to the admissibility of evidence. If there is a submission that the principles in *Kuruma v The Queen* are no longer good law, then that submission, for whatever it may be worth, can be adequately made in the criminal proceedings.

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

45. The appellant also submitted that the administrative proceedings were "best suited" to determine the admissibility of the WhatsApp data as there was said to be no factual dispute in the administrative proceedings as to the search warrants or as to the searches. In this way it was suggested that the administrative proceedings could address important legal issues on what were essentially agreed facts. However, the test is not whether the administrative proceedings are "best suited" to address the legal issues but rather whether the parallel criminal proceedings provide "adequate" means of legal redress. In addition, in this case, it may be that there are factual issues to be resolved in the criminal trial (see paras 32 and 33 above) though whether this is so is entirely a matter to be decided in the criminal trial. Finally, the Board considers that the criminal trial in this case is best suited to determine any legal or factual issue in relation to the admissibility of the WhatsApp data.

46. The judge not only found that the administrative proceedings were an abuse of process based on the availability of an adequate legal remedy in the criminal proceedings but also on the basis that the administrative proceedings

were commenced for the improper purpose of delaying or derailing the criminal trial. The judge was entitled to draw that inference based on:

(a) the long delay between the searches of the cell phones and the appellant commencing the administrative proceedings;

(b) the lack of any valid explanation for that delay;

(c) the association in time between the start of the criminal trial and the appellant commencing the administrative proceedings;

(d) the two previous administrative applications;

(e) the fact that the admissibility of the WhatsApp data could be challenged in the criminal trial; and

(f) the failure of the appellant to avail of the opportunities provided to him in the criminal trial to challenge the admissibility of the WhatsApp data. The appellant could have, challenged the admissibility of the WhatsApp data before the magistrate, in the sufficiency hearing or in compliance with the directions of the judge to make submissions in respect of the admissibility of the WhatsApp data, but he failed to do so.

There was no challenge either in the Court of Appeal or before the Board to any of these factors.

47. The appellant submitted that the judge's finding that the administrative proceedings were an abuse of process was inconsistent with the finding that the administrative proceedings were neither vexatious nor frivolous. However, the Board considers that the fact that judge did not certify the application as frivolous and vexatious does not have any implications for the question whether there was an abuse of process.

48. The Board considers that the conclusion of the judge that the administrative proceedings were an abuse of the court's process was plainly right.

49. The Board respectfully considers that the Court of Appeal was plainly right to dismiss the appellant's appeal relating to abuse of process.

50. The Board notes that all the members of the Court of Appeal recognised that questions as to the admissibility of evidence were for the trial judge in the criminal proceedings. At para 14 Michel JA stated that "The issue of the admissibility of the evidence obtained from the search of the cell phones is one which is and always was for the determination of the trial judge in the criminal trial of the appellant, if the Crown seeks to adduce it at the trial". Webster JA at para 17 stated that "It is trite law that the appellant had the right, and still does, to object at his trial to the admission of the evidence taken from his cell phone". Carrington JA refused to exercise his discretion to grant a declaration that the search was unlawful stating at para 48 that "the allegation that the search is unlawful, ie not covered by the terms of the warrant issued by the magistrate, arises from the same facts as the allegation of unconstitutionality. Therefore, if it is appropriate for the judge presiding at the criminal trial to determine the issue of constitutionality, it appears also appropriate for him to determine whether the search was unlawful for that or any other reason".

51. The Board also notes that, despite the conclusion that the administrative proceedings were an abuse of the court's process and that the admissibility of evidence was for the trial judge in the criminal proceedings, the lawfulness of the search of the cell phones was also analysed by the judge in the administrative proceedings and by each member of the Court of Appeal. Again, with respect, the Board considers that all questions relating to the admissibility of the WhatsApp data ought to have been left to the criminal trial. On this basis the Board respectfully observes that none of the analysis in the administrative proceedings is authoritative. The Board was invited to consider the lawfulness and constitutionality of the search of the cell phones, on an obiter basis. The Board considered that it would be inappropriate to do so as these are matters for the criminal trial. As the Board has not considered these issues it would be inappropriate for it to express any views as to the merits of the different analysis

and conclusions reached by the judge and by the members of the Court of Appeal, except that it follows that any of the obiter comments in relation to the constitutionality of the searches of the cell phones was incapable of supporting any declaration. The declaration must be set aside. These are all matters are for consideration in the criminal trial.

52. The Board considers that it is appropriate not only to dismiss the appeal but also to set aside the declaration made by the Court of Appeal and to order that the administrative proceedings be dismissed on the basis that they are an abuse of process. In this way it will be apparent on the face of proceedings that the analysis as to whether the search of the cell phones was unlawful or unconstitutional was obiter and not authoritative.

Disposal

53. For the reasons set out above, the Board will humbly advise Her Majesty that the appeal should be dismissed, the declaration made by the Court of Appeal should be set aside and it should be ordered that the administrative proceedings should be dismissed on the basis that they are an abuse of process.