COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp No. 26 of 2018

IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

BETWEEN

THE HONOURABLE CARL BETHEL

(in his capacity as Attorney General of the Bahamas)

1st Appellant

THE HONOURABLE BRENT SYMONETTE

(in his capacity as Minister of Immigration)

2nd Appellant

WILLIAM PRATT

(in his capacity as Director of Immigration)

3rd Appellant

PETER JOSEPH

(in his capacity as Officer in Charge of the Carmichael Detention Centre)

4th Appellant

TELLIS BETHELL

(in his capacity as Commodore of the Bahamas Defence Force)

5th Appellant

AND

JEAN-RONY JEAN-CHARLES

Respondent

BEFORE: **The Honourable Sir Hartman Longley, P**
The Honourable Mr. Justice Jon Isaacs JA
The Honourable Sir Michael Barnett, JA (Actg.)

APPEARANCES: **Mr. Loren Klein, with Mr. Gary Francis, Ms. Darcel Smith-Williamson and Ms. Hyacinth Smith, Counsel for Appellants**
Mr. Frederick Smith, QC, with Mr. R. Dawson Malone, Mr. Garth Philippe, and Mr. Crispin Hall, Counsel for Respondent

DATES: **30 May 2018; 22 June 2018; 27 July, 2018; 17 October 2018**

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Civil Appeal – Constitutional Law- Habeas Corpus ad Sibjiciendum - Constitutional Relief- Immigration Act

The Attorney General appeals an Order of Justice Hilton whereby the learned judge dismissed a habeas corpus application but granted constitutional relief to the applicant. The respondent cross appealed; challenging the decision to dismiss the application for habeas corpus.

Held: appeal allowed, the judge's decision set aside. The respondent's Notice/Cross Appeal dismissed.

per Barnett, JA: In my judgment not only was the judge correct to dismiss or discharge the Writ of habeas corpus on the material that was before him, the judge ought not in my judgment to have caused the writ to be issued.

It is clear that the affidavit of Clotilde Charles did not satisfy the requirements of the Rule. It does not state that Jean-Rony Jean-Charles is "unable to make the affidavit himself" and does not state "for what reason" he is unable to make the affidavit. The mere fact that the applicant was being restrained does not mean that he is unable to make the affidavit himself. All applicants who make the application are by definition restrained.

The Clotilde affidavit raises the specter whether or not he was unable to make the affidavit because he was no longer restrained and was no longer in the country. It is surprising therefore that the trial judge would have acted on that affidavit given its glaring defect and given the fact that it failed to state what the rules required.

Further, in paragraph 4 of the Clotilde affidavit she states that the affidavit contains statements of facts which are not of her own knowledge. This is impermissible. Order 41 rule 5 states, "an application for a writ of habeas corpus is not an interlocutory application.

No doubt had the judge's attention be brought to the fact that the Applicant was no longer being detained and was not being detained when the application was first filed on the 29th November, 2017, he would not have granted leave to make an application for the writ of habeas corpus. That

Writ is only concerned with bringing the body of a person actually being detained by or in the control of a respondent. If the evidence is that at the time of the application the person is not being detained, then there is no basis for the relief of habeas corpus.

In any event when the matter came for hearing on the 19th December, 2017, the Return made it clear that the respondents/appellants were not detaining any person who may have fit the description of the applicant.

In my judgment, the applicant not being under the control of the respondents/appellants or being detained by them on the 29th November, 2017 when the application for leave was filed, the judge ought not to have made the Order granting leave and upon the Return was entitled to put an end to the habeas corpus proceedings by dismissing the action.

It is clear that after seeing the Return confirming that the applicant was not being detained by the respondents and was not being detained by them at the time the applicant launched the habeas corpus proceedings and/or the 19th December, 2017 when the Motion for Contempt was made the judge had no alternative but to dismiss the habeas corpus application and the motion for contempt.

The habeas corpus having been brought to an end the court ought not to have considered any further applications in that action arising ought of the detention of the applicant.

Justice for Families Ltd v Secretary of State for Justice [2014] EWCA Civ 1477 considered

Secretary of State for Foreign and Commonwealth Affairs et al v Rahmatullah [2012] UKSC 48 mentioned

Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428 considered

per Isaacs JA: On the hearing of the habeas corpus application, the judge accepted that the applicant was not in the custody of the appellants.

The determination of the judge not to issue the Writ (although phrased in the terms "I hereby dismiss the writ") ought to have terminated the habeas corpus application. As I understand the decision of the judge, he was satisfied that the individual named in the application was not being detained by the appellants. In those circumstances and in keeping with the purpose of the Writ, the need to examine the legality of the applicant's detention was no longer necessary.

The basis for my conclusion lies in the purpose of the application that was before the judge, to wit, a habeas corpus application. The sole purpose for such an application was to challenge the lawfulness of the detention of the individual, said to be the brother of the affiant, Clothilde, who swore the affidavit on 29th November, 2017 on behalf of the individual.

Applications under the Habeas Corpus Act are to ensure that persons detained by the State are done so in accordance with the law. Detainers are called upon to justify to the courts the bases upon which they purport to detain a person. If the court determines that the detention is not justified the Writ issues and the person is directed to be freed from custody.

Once the judge was satisfied that the Return disclosed that the applicant was not in the appellants' custody, he was obliged to decide formally that the Writ not issue.

In the face of his doubts as to whether Jean-Rony Jean-Charles was one and the same as Jean Charles, the judge erred in treating them as such "**in the absence of definitive evidence**".

Mr. Smith has invited us to find that the dismissal of the Writ application by the judge is somehow invalid because it is not for a judge to dismiss a Writ if he does not think it should issue, but that it be made to lie in the Registry. To my mind, this argument is a distinction without a difference. Once the judge determines the Writ should not issue whether he dismisses it outright or not, the application is at an end. It cannot be resurrected by some application for contempt and/ or constitutional relief.

It is not unknown for persons to be abducted by individuals posing as agents of the State only for it to be discovered later that the individuals were merely dissemblers. That could have been the case in the present matter. Thus, it was important for the judge to be sure that Jean-Rony Jean Charles, applicant for habeas corpus, was Jean Charles, expelled individual. Nevertheless, that issue would only have arisen on a constitutional application separate and apart from the habeas corpus application.

In the absence of certainty as to the identity of the applicant, there could be no finding of a constitutional breach.

Aldinor v Immigration Department and another [2013] 1 BHS J. No. 82 considered

Jean, et al v Minister for Public Safety, et al [1981] 31 W.I.R. 1 considered

Labour and Home Affairs and others (1981) 31 WIR 1 considered

R v Beckford (2004) BHS J. N 430 mentioned

Pierre-Charles v. Director of Immigration and another [2013] 1 BHS J. No. 109 mentioned

JUDGMENT

Delivered by The Honourable Sir Michael Barnett, JA (Actg):

1. This is an appeal by the Attorney General against an Order of Hilton J., whereby the learned judge dismissed a habeas corpus application but granted constitutional relief to the applicant. The Attorney General appeals the Order granting constitutional relief and the respondent cross appealed challenging the decision to dismiss the application for habeas corpus.

The Litigation

2. On the 29th November, 2017 an ex parte summons was filed in the following terms:

> **LET ALL PARTIES CONCERNED.....on the hearing of an application for an order that a writ of habeas corpus do issue against the Defendants and that the costs of this application be costs in the cause.**

3. The applicant was "Jean-Rony Jean-Charles". The respondents were the Attorney General, the Minister responsible for Immigration, the Director of Immigration, another Immigration Officer and the Commodore of The Defence Force.

4. The application was supported by an affidavit of "Clotilde Jean Charles". The affidavit was in the following terms:

> **1. "I am the sister of the Applicant, Jean Rony Jean Charles (Jean Rony") herein.**
> **2. I am authorized to make this affidavit on his behalf.**
> **3. I swear this affidavit in support of Jean Rony application for a Writ of Habeas Corpus ad subjiciendum to issue.**
>
> **4. The facts set out herein are within my own knowledge and where they are not, I identify the source and grounds of such facts which I verily believe to be true.**
>
> **5. Jean-Rony was born at the Princess Margaret Hospital, Nassau, New Providence, Bahamas on 5 December, 1982 and is entitled to Bahamian citizenship. A copy of his birth certificate is exhibited as"JC- 1"**
>
> **6. Jean-Rony has never travelled outside of The Bahamas.**
>
> **7. Despite this, he was unlawfully arrested by officers of Immigration officers on or about early September 2017.**
>
> **8. Jean-Rony has committed no offence under the Immigration Act.**

9. **Jean-Rony is presently falsely imprisoned in the Carmichael Concentration Camp Detention Centre.**

10. **Since his arrest, I have taken documents proving his birth to the Department of Immigration upon their request, but I still have not been able to secure his release. Jean-Rony's family members I have made numerous attempts to secure his release and are told that has matter is being "investigated", whatever that means!**

11. **Jean-Rony's family and I we were recently advised by Ms. Rolle of the Enforcement Unit, of the Immigration Department, that his documents which were submitted to the Department of Immigration and could not be found.**

12. **It is now almost 12 weeks since he was illegally arrested and falsely imprisoned. He has not been charged with any offence in any court.**

13. **He has not been given bail.**

14. **He has not been taken before any Court in The Bahamas.**

15. **He has not been served with a deportation order.**

16. **He has not been charged with any criminal offence.**

17. **Despite numerous attempts by me and his family to secure his release, he is still unlawfully imprisoned by the Department of Immigration in contravention of the Constitution and the Criminal Procedure Code Act.**

18. **I am advised by counsel to Jean-Rony that the Respondents are not entitled by law or otherwise to falsely arrest and falsely imprison Jean-Rony.**

19. **Jean-Rony's imprisonment is unconstitutional and unlawful."**

5. I will comment on this affidavit later in this judgment.

6. On the 29th November, 2017 the applicant, "Jean-Rony Jean-Charles" also issued an Originating Motion. The Motion stated that:

> **"TAKE NOTICE that pursuant to the direction of the Honourable the Supreme Court of Justice in the Supreme Court Building in the City of Nassau in The Island of New Providence will be moved on the — day of _____ 2017 at the sitting of the Court, or so soon thereafter as counsel can be heard on behalf of JEAN-RONY JEAN-CHARLES for an order that a writ of habeas corpus do issue directed to the Director of Immigration to have the body of the said JEAN-**

RONY JEAN-CHARLES before the Court at such time as the Court may direct upon the grounds set out in the affidavit of CLOTILDE JEAN-CHARLES dated 27th day of November, 2017 used on the application to the Honourable Court for such order, a copy of which affidavit is served herewith."

AND that the costs of and occasioned by this motion be the Applicant's in any event to be agreed or taxed and paid by the Respondents to the Applicant.

7. This Originating Motion is puzzling. Although it said that it was issued pursuant to the direction of a Justice of the Supreme Court, no such direction was in fact given prior to the filing or issue of the Originating Motion. The Record does not reflect that any hearing of the summons or the Originating Motion both of which were filed on the 29th November, 2017 took place prior to the 7th December, 2017.

8. On the 7th December, 2017 the Summons for leave which was filed on the 29th November, 2017 came for a hearing before Justice Hilton. It was an ex parte hearing.

9. A transcript of that hearing is included in the Record of Appeal.

10. The transcript contains the following exchange between counsel for the applicant and the judge:

> **"MR. SMITH: And having regard to the fact that it is an ex parte application in giving notice to the AG of the application, I sent them an e—mail in which I outlined certain things and I asked for a response to certain things which I have not received. But the important point which I make in that regard is that I said to the Respondent in that e-mail, as you are aware, Habeas corpus proceedings were issued. I attached copies et cetera, I have an obligation as it is an ex parte motion to make disclosure to the court of all relevant facts. I will be attaching a copy of this e-mail so there is simply a short affidavit attaching my e-mail which I can take the court briefly through if necessary.**
>
> **THE COURT: I don't believe that is necessary.**
>
> **MR. SMITH: It will be on file, my Lord.**
>
> **THE COURT: You are not going into the details and that's to the conditions which he is in custody for.**
>
> **MR. SMITH: Let me just say, every person is entitled to their liberty, my Lord, has had the opportunity of reading the affidavit in support.**

THE COURT: I have read the affidavit in support of Clotilde Jean Charles.

MR. SMITH: And I believe I, prima facie, made out a case that the person has been in custody for more than 48 hours and we simply wish that the authorities either justify the detention or that he be released on the hearing if your Lordship gives the issue of the writ. I don't think that I have a greater burden than that this morning. And that the cost of the application be in the cause, my Lord."

11. For completeness an unfiled affidavit of Akeira Martin exhibited correspondence between Mr. Frederick Smith counsel for the applicant and the Director of Immigration. For the purposes of this appeal I only need to set out the email from Mr. Smith to the Director of Immigration of the 6th December, 2017. It is in the following terms:

> **"Dear Minister and DOI**
> **It is regrettable that I have not had oven the courtesy of a reply to this pressing issue from you or anyone else.**
>
> **I have seen some comments in the press by the DOI and Mr. Symonette in the press yesterday. I do not consider them to be an answer to the matters which I have raised.**
>
> **Yesterday, I went again to the CCC to see my client (Mr. Jean-Charles, "JC"). Finally Mr. Neilly (in charge of enforcement) and then Mr. Wellington (in charge of the CCC) assisted me.**
>
> **Mr. Neilly kindly put me onto his phone and I spoke with Mr. Pratt the one who told me that JC was not at the CCC and that he had been deported on November 24, 2017.**
>
> **I asked to see a deportation Order.**
>
> **He said there was not one and that he had not been "deported" and that he had been "repatriated" ; he did not tell me where; I assume to Haiti? Given that JC's mother was from Haiti.**
>
> **May I please have**
>
> **1. Confirmation of what has happened to my client while in your unlawful custody.**
>
> **Is he or is he not at the CCC? If he is not there where else is he?**
>
> **2. Copies of all relevant papers relating to his arrest, detention and eventual removal from The Bahamas (if in fact that has occurred?)**

3. Confirmation of where he was sent to?

4. Confirmation that he was provided with financial means where he was sent to

6. Contact information of where he is.

In the meantime, not having any official word as to his whereabouts, I am filing a motion on JR's behalf in respect of his right to counsel. The costs of such an action can be avoided if you reply to this email urgently.

As you will note from Clotilde's affidavit, my client was born in The Bahamas and has never travelled abroad. His 5 siblings are all citizens of The Bahamas and JC was born in The Bahamas (see the Exhibit to Clotilde's affidavit)

His family are extremely worried about him. If he has indeed been removed to Haiti, he knows nobody there and he has no means.

Further, if as the DOI told me yesterday that he was removed on November 24, 2017, his family are even more anxious and worried, as they have not heard from him; he has not called; he has not left any messages; he has disappeared.

The information provided by the DOI yesterday is even more troubling to the family, as they have been constantly attempting since September to secure JC's release and in doing so have met, spoken to and produced various papers to Ms. Rolle and Mr. Ferguson at the Immigration Building at Hawkins Hill.

At no time were they told that JC was to be removed from the Bahamas. They were misled into believing that as they continued to provide various papers being requested, the DOT was reviewing them for the purpose of satisfying the DOI that JC was indeed born in The Bahamas and was entitled to be here.

Whether or not he had applied for a certificate of citizenship is nothing to the point.

Article 25 of the Constitution guarantees every person immunity from expulsion except under the authority of any law.

The relevant law that allows for the lawful removal of a person from The Bahamas is The Immigration Act Section 40 and the subsequent provisions that afford due process and a right of appeal to the Governor General in the event that a deportation order is made against a person.

Accordingly, the euphemism "repatriation" is an odd choice, given "Expulsion" ," Repatriation"," Deportation" or "Removal" from The Bahamas, by whatever name the DOI wants to call it, is completely illegal and unconstitutional in the 1st instance unless a person falls into the categories in section 40 which is the only legal basis upon which a person can be removed from the Bahamas.

Copies of Art 25 and Sec. 40 are attached for your ease of reference.

A person who is born in The Bahamas cannot be removed from the Bahamas simply because they have not been issued some sort of status, or papers, or documents. JO has a birth certificate and has lived in The Bahamas all of his life.

Yesterday, December 5, 2017 was his 35th birthday. No doubt you would have seen the scenes at the CCC yesterday when Clotilde was weeping for JC on what should have been a happy but which was a tragic occasion as she learnt of the news of his removal.

As you are also aware, Habeas Corpus proceedings were issued last week; I attach copies of the ONM, Ex P Summons and. Affidavit of his sister Clotilde Charles for your ease of reference.

I have an obligation as it is an exparte motion for leave to make disclosure to the court of all relevant facts.

I will be attaching a copy of this email.

If you wish to say anything to me, please do so urgently so that it can form part of the record.

In the meantime, I demand that you make immediate arrangements to return JC to The Bahamas, the country of his birth and that in the meantime, you ensure his safety and wellbeing.

You will be held responsible for his death and or any injury to him both by civil and criminal action.

I urge you to treat this with the seriousness this deserves and urgently.

Rights Bahamas and other national and international NGOs are concerned. I am also reporting this to the various human rights organizations of the United Nations and the OAS.

May I please hear from you urgently as I am seeking to appear before a judge of the Supreme Court as soon as possible on the HC motion.

12. After hearing counsel for the Applicant the judge made an oral ruling in the following terms:

"Just for finalization then, having considered the motion filed on the 29th of November, 2017 and the summons filed on the same date, 29th November, 2017 and having read the affidavit of Clotilde Jean Charles also filed on the 29th of November, 2017. The Court having heard counsel for the Applicant, the court pursuant to Order 54 hereby grant leave to the Applicant for a writ of Habeas Corpus and to issue to the five named Respondents and the writ is to be returnable before me to this court on the 19th day of December, at 11 a.m.

13. I pause to note that there was no reference by the judge to an unfiled affidavit of Akeira Martin nor did counsel draw to the judge's attention that he made no mention of that unfiled affidavit.

14. The Order perfected by applicant was in the following terms:

"Dated December 7, 2017.

UPON THE APPLICATION of Jean-Rony Jean-Charles by Summons and Originating Motion filed herein on November 29, 2017;

AND UPON READING the Affidavit of Clotilde Jean-Charles filed on November 29, 2017;

AND UPON READING the unfiled Affidavit of Akeira Martin in further support of the Habeas Corpus Application ("the Application") with the undertaking to file the same on December 8, 2017;

AND UPON HEARING Mr. Frederick Smith QC, Counsel for the Applicant appearing with Crispin Hall;

IT IS HEREBY ORDERED that:

1. Leave be and is hereby granted to issue a Writ of Habeas Corpus ad Subjiciendum against each of the Respondents, returnable on Tuesday, December 19, 2017 at 11.00 am in the forenoon;

2. Leave be and is hereby granted to amend the description "Carmichael Concentration Camp" to "Carmichael Detention Centre" in the heading of the action henceforth;

3. The Costs of and occasioned by the Application be costs in cause."

15. As I said although the Order records that the judge read the unfiled affidavit of Akeira Martin in his oral ruling the judge did not state that he read or took into account that affidavit.

16. The Writ itself said:

"WE COMMAND you that on Tuesday, December 19, 2017 at 11.00 in the forenoon, before the Honourable Mr. Justice Gregory Hilton, of

the Supreme Court of the Commonwealth of The Bahamas situate on Bank Lane on the Island of New Providence, one of the islands of the Commonwealth of The Bahamas, you have on that day and at the time specified herein, the body of JEAN-RONY JEAN-CHARLES, being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein, that our Supreme Court may then and there examine and determine whether such cause is legal, and have you there then this Writ.

WITNESS His Lordship, the Honourable Mr. Justice Gregory Hilton, the 8th day of December, 2017.

17. At the same time a Notice of the Writ was issued by counsel for the applicant and directed to the respondents. The Notice was in the following terms:

> **"WHEREAS this Court has granted a Writ of Habeas Corpus directed to the Respondents herein, commanding them to have the body of the Applicant herein, JEAN-RONY JEAN-CHARLES, before the Honourable Mr. Justice Gregory Hilton, Justice of the Supreme Court of the Commonwealth of The Bahamas situate on Bank Lane, Nassau, The Bahamas on the day and time specified in this Notice together with the cause of his being taken and detained.**
>
> **TAKE NOTICE, that you are required by the said Writ to have the body of the said JEAN-RONY JEAN-CHARLES before the Court on Tuesday, December 19, 2017 at 11:00 in the morning and to make a return to the said Writ. In default thereof the said Court will then, or so soon thereafter as Counsel can be heard, be moved to commit you to prison for your contempt in not obeying the said Writ."**

18. I pause to note that although the Writ itself refers to Jean-Rony Jean-Charles "by whatever name he may be called" the Notice of the Writ did not contain those words. The Notice simply referred to "Jean-Rony Jean-Charles".

19. The return date for the Writ was Tuesday, 19th December, 2017.

20. On the 18th December, 2017 the respondents to that Motion (who are the appellants in this appeal) made a Return. It was in the following terms:

> **"1. I, Keturah Ferguson, declare that I am currently the Acting Director of Immigration and that I am duly authorized to make this return on behalf of William Pratt, the Third Respondent herein who is joined in these proceedings in his official capacity as Director of Immigration and Peter Joseph, joined to these proceedings in his capacity as Officer in Charge of the Carmichael Road Detention. Collectively, referred to as the "alleged detainers"**

2. In obedience to the writ, I herewith do certify and return, without prejudice, that JEAN-RONEY JEAN-CHARLES, date of birth: 5 December, 1982, the subject named therein, is not presently in the custody or control of the alleged detainers.

3. That by way of explanation, on 18 September. 2017 during routine patrol in the area of Fire Trail Road, an adult male Haitian national was interviewed by officers of the Department of Immigration. The said Haitian national, gave his name as JEAN CHARLES, age 31, and his date of birth as 1 DECEMBER, 1985.

4. That the said Haitian national was not able to provide any documents or any proof as to his lawful presence in The Commonwealth of The Bahamas. He was taken to the Carmichael Road Detention Center for further investigation relative to suspected contravention of the Immigration Act.

5. That the Court is invited to take judicial notice of the influx of illegal immigrants to the shores of the Commonwealth of The Bahamas and the corresponding heighten vigilance of local authorities in that regard.

6. That the said Haitian national subsequently signed an Immigration Profile form confirming his identity and other information he provided to the authorities as correct, in particular,: Name: Jean Charles and Date of Birth: 1 December 1985. He duly signed his name as "Jean Charles". The information he provided to the authorities at the material time was accepted as true and correct as to his identity. A true copy of the said Immigration Profile form is exhibited hereto as "Exhibit KFI".

7. A subsequent check of birth records at the Bahamas Registrar General Department, based on the information provided by said Jean Charles, Date of Birth: 1 December 1985, yielded negative results. A true copy of the Registrar Generals Department verification of birth check with negative results is exhibited as "Exhibit KF 2".

8.There was no record or any other evidence presented or subsequently uncovered that the subject, who identified himself as, Jean Charles, DOB: 1 December 1985, (a non citizen) and being a Haitian national, was either born in The Commonwealth of The Bahamas, entered the Commonwealth of The Bahamas legally, obtained leave to enter the Commonwealth of The Bahamas pursuant to the Immigration Act, nor had any status whatsoever which entitled him to remain in the Commonwealth of The Bahamas.

9. That said Jean Charles, DOB: 1 December 1985, subsequently safely returned to his home country, The Republic of Haiti, on board Bahamas Air Charter # C6-BFC on Friday 24 November, 2017. A true copy of the Bahamas Immigration Detention Centre Surrender Order is exhibited as "Exhibit KE3". A redacted listing of passengers on board said Charter flight (as is is relevant)(sic)is exhibited as "Exhibit KF4"

10. That said Jean Charles again confirmed his identity as Jean Charles, DOB: I December 1985 during a roll call of passengers prior to boarding the charter flight to The Republic of Haiti and appeared to be in good health.

11. That a team of escort officers from the Department of Immigration and the Royal Bahamas Defence Force also traveled on the Bahamas Air charter flight to The Republic of Haiti. The aircraft was met by Bahamian and Haitian officials in The Republic of Haiti Haiti. Jean Charles, and other Haitian nationals were immediately handed over to the Haitian authorities, who duly accepted their nationals, for subsequent release.

12. Accordingly, the subject identifying himself as Jean Charles, a Haitian national, born on 1 December 1985, has been released and has safely departed the custody and control of the Bahamas Department of Immigration and is , as far as I am aware, no longer within the jurisdiction of The Commonwealth of The Bahamas. Any custody and control of said came Jean Charles, born on 1 December 1985 or whatever name he may be called came to an end on 24 November, 2017.

13. At the material time there was no record or conclusive evidence confirming or reason to believe that the said Jean Charles (DOB: 1 December 1985) base on the information he provided to the authorities and/or the subject of this writ herein, Jean-Roney Jean-Charles are one and the same person.

14. In all the circumstances and in any event, I certify that neither Jean Charles (DOB: 1 December 1985) nor a Jean-Roney Jean-Charles (DOB: 5 December, 1982) are currently in the custody or control of the alleged detainers nor was either person in said requisite custody or control of the the alleged detainers on 29 November. 2017 or 7 December, 2017 at the time of filing the application for a writ of habeas corpus or neither when leave to issue the writ was granted by the Supreme Court respectively.

15. Further cautionary checks as to the receipt of any application for registration as a citizenship of the Commonwealth of The Bahamas, <u>if so eligible or entitled</u>, with respect to either a Jean Charles (DOB

1 December 1985) or a Jean-Roney Jean-Charles (DOB: 5 December, 1982) yielded negative results.

16. This return is made without prejudice to any possible challenge to, inter alia, the duty of full and frank disclosure of the Applicant and the want of jurisdiction of the Court to grant leave to issue the subject writ on the grounds that, inter alia, the Court's jurisdiction to issue said writ also came to an end on 24 November, 2017 once the custody or control came to an end and thereafter ceased to exist.

17. The contents of this return is true and correct to the best of my information and belief.

18. For the reasons above it is humbly prayed that the Writ of Habeas Corpus ad Subjiciendum issued on 7 December, 2017 be dismissed."

21. Upon receipt of that Return, the applicant on the following day, which was the date set for the hearing of Originating Motion, issued Notice of Motion for Contempt of Court and/or Constitutional Relief under Article 28 of the Constitution. It was in the following terms:

> **"TAKE NOTICE that the Honourable Mr. Justice Gregory Hilton, Justice of the Supreme Court of the Commonwealth of The Bahamas sitting in open court at the Supreme Court, situate on Bank Lane, Nassau, The Bahamas, The Bahamas will be moved on Tuesday, December 19, 2017 at 11:00 am or so soon thereafter as Counsel for the Applicant can be heard on an application pursuant to the Honourable Court's inherent jurisdiction for:**
>
> **1. A finding of contempt against the Respondents for breach of the Writ of Habeas Corpus Ad Subjicienduin dated and filed on 8th December, 2017 ("the Writ") and/or;**
>
> **2. An order that within 21 days or such time as the Court may prescribe, the Respondents do produce the Applicant pursuant to the terms of the Writ failing which the Respondents shall be liable to imprisonment or a fine and/or;**
>
> **3. Relief under the Writ to wit:**
>
> **a. A pronouncement and adjudication that the causes of the Applicant being taken and detained were unlawful;**
>
> **4. Alternatively, if the Court is unwilling to make further order on the Writ, and in the premise that the Respondent has in fact been deported (which remains an issue of fact and is not conceded), then the Court is moved pursuant to its jurisdiction under Chapter 3 of**

the Constitution of The Bahamas to make the following orders under Article 28 of the Constitution:

a. A declaration that the Applicant's right under Arts: 19(1), (2) and (3), and 25(1) of the Constitution have been breached by the Respondents;

b. A mandatory order requiring the Respondents immediately to issue a travel document to allow the Applicant to travel out of wherever he was deported to and travel into The Bahamas;

c. An order that the Respondents provide discovery as to how the Applicant's deportation occurred (as set out in the email from the Applicant's counsel requesting the same);

d. A mandatory order requiring the Respondents to return the Applicant to The Bahamas forthwith at their expense and release him there; or, having complied with 4 (b) and (c) and at the Applicant's option;

e. An order that the Respondents pay the reasonable cost of the Applicant's travel back to The Bahamas, to be paid forthwith upon his return and certification of the amount in question by his Attorneys; and

f. A declaration that, unless and until any further court order to the contrary is made, the Applicant is entitled to remain in The Bahamas, to seek gainful employment here, and to enter and leave the country unmolested; and

g. An order that the Respondents do pay to the Applicant compensation under Art. 19(4) for their breaches of his rights under Arts. 19W, (2) and (3) and Article 25(1) in such amount as the Court shall see fit.

5. Costs."

22. On that same date, 19th December, 2017 the court heard the habeas corpus application as well as the motion for contempt and constitutional relief.

23. On the 26th January, 2018 the Court delivered a written judgment and made the following Order:

> **"BEFORE HIS LORDSHIP THE HONOURABLE MR. JUSTICE GREGORY HILTON dated this 26th day of January; 2018;**
>
> **UPON THE HEARING on December 19th, 2017 of the following, brought on behalf of JeairRony Jean-Charles (the "Applicant"):**

(i) Trial of the Writ of Habeas Corpus Ad Subjiciendum ified on 8th December 2017 returnable on 19th December, 2017 (the "Writ"); and

(2) Notice of Motion for Contempt and/or Constitutional Relief under Article 28 of The Constitution of The Bahamas filed on 19th December, 2017;

AND UPON HEARING Mr. Frederick Smith Q.C., of Counsel for the Applicant, appearing with Mr. Damian Gomez Q.C., Mr. R. Dawson Malone, Mr. Nicholas Mitchell, Mt Garth Philippe and Mr. Crispin Hail;

AND UPON HEARING Mr. Gary Francis, of Counsel for the Respondents, appearing with Mr. Audirio Sears;

AND UPON READING the following Affidavits filed on behalf of the Applicant:

(1) Affidavit of Clotilde Jean-Charles filed on 29th November, 2017; and

(2) Affidavit of Akeira Martin filed on 8th December, 2017;

AND UPON READING the 3rd-4th Respondents' Return to the Writ filed on 18th December, 2017;

IT IS HEREBY ORDERED that the Writ be and is hereby dismissed;

IT IS HEREBY DECLARED that the Applicant's rights under Article 19 (i), (2) and (3) and Article 25(1) of The Constitution have been breached;

AND IT IS HEREBY FURTHER ORDERED that:

1. The Respondents immediately issue a travel document to the Applicant to allow and permit the Applicant to travel from The Republic of Haiti into The Bahamas;

2. The Respondents pay the reasonable cost of the Applicant's travel back to The Bahamas, to be paid forthwith upon his return and certification of the amount;

3. The 2nd and 3rd Respondents forthwith, but not later than 60 days after the return of the Applicant to The Bahamas and upon application made by the Applicant, to issue such status to the Applicant as would permit him to remain in The Bahamas and to legally seek gainful employment;

4. The Respondents do pay to the Applicant compensation under Article 19(4) for their breaches of the Applicant's right under Article

19 (i), (2) and (3) and Article 25 (i) in such amount as to be determined after hearing submissions by Counsel; and

5. The Respondents shall pay the Applicant's cost, to be taxed if not agreed."

24. The respondents have appealed that Order and the Applicant has filed a respondent's Notice/Cross Appeal.

25. The appeal is in the following terms:

"TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel cart be heard on behalf of the above-named Appellants on Appeal from that part of the Judgment and Orders of the Honourable Mr. Justice Gregory Hilton, given on the 30th day of January 2018 (and dated the 26th January 2018) in Action Number 2017/CRI/HCS/0068. wherein the Learned Trial Judge made a Declaration and Orders in the following terms:

"(1). A Declaration that the Applicant's rights under Article 19(1), (2) and (3) and Article 25(1) of the Constitution have been breached.

(2) An Order requiring the Respondents to immediately issue a travel document to the Applicant to allow and permit the Applicant to travel from The Republic of Haiti into The Bahamas.

(3) An Order that the Respondents pay the reasonable cost of the Applicant's travel back to The Bahamas, to be paid forthwith upon his return and certification of the amount.

(4) An Order directing the 2nd and 3rd Respondents forthwith, but not later than 60 days after the return of the Applicant to The Bahamas and upon application made by the Applicant, to issue such status to the Applicant as would permit him to remain in The Bahamas and to legally seek gainful employment.

(5) Order that the Respondents do pay to the Applicant compensation under Article 19(4) for their breaches of the Applicant's right under Article 19 (1), (2) and (3) and Article 25

(1) in such amount as to be determined after hearing submissions by Counsel.

(5) And, that cost be paid to the Applicant, to be taxed if not agreed."

For an Order that the said Declaration and Orders be set aside and judgment entered for the Appellants AND that Respondents may be adjudged to pay the Appellants costs of this Appeal.

AND FURTHER TAKE NOTICE that the Grounds of this Appeal are as follows:

1. **The learned Judge erred in law and principle in rejecting the contention of the Appellants that the Respondent had alternative means of redress available to him, and should have exhausted such redress before seeking to make a constitutional claim [see paragraphs 7 and 16 of the Ruling].**

2. **In the circumstances, the learned Judge was wrong to consider and determine the application for constitutional redress without affording the Appellants a proper opportunity to respond, and his actions deprived the Appellants of a fair hearing.**

3. **Further, the judge erred in relying on third-party evidence to support a constitutional claim, when the said affidavit was specifically sworn solely for the purposes of the habeas corpus proceedings.**

4. **In any event having dismissed the Respondent's habeas corpus claim (see paragraph 14), the affidavit in support of that Claim sworn by the Respondent's sister on his behalf fell away, and the Judge made a grave error of law in determining the constitutional application in the absence of any affidavit evidence (or any admissible evidence) in support of the claim**

5. **The Learned Judge erred and misdirected himself in law and fact in finding that the Respondent's constitutional rights had been breached under Articles 19 and/or 25, or at all, there being no evidence of the same, and in so finding failed to pay any regard, or sufficient regard, to the exemptions provided under both Articles 19 and 25 for the purposes of effecting the removal from the Bahamas of persons who are not citizens of the Bahamas.**

6. **The Learned Judge was wrong to find that Sections 25 and 41 of the Immigration Act outline the only powers of detention contained in the Immigration Act (see paragraph 28) and in so doing failed to embark on a wholistic construction of the Act and in particular failed to give proper interpretive effect to sections 25 and 26, when read together.**

7. **The Learned Judge erred and misdirected himself in law in finding that a person taken into custody pursuant to the Immigration Act could not be detained for a period of more than 48 hours.**

8. **The learned judge was wrong in law and legal principle, and overreached his Constitutional authority, in ordering the Appellants to issue travel documents to the Respondent and to issue such status to the Respondent as would allow him to remain in the**

Bahamas and seek employment, there being no issue under consideration by the Court in respect of any application made by the Respondent.

9. The Judge erred in making an Order against the Appellants for the payment of compensation for the alleged breaches of the Constitution, there being no basis for the grant and justification of such an award.

AND TAKE FURTHER NOTICE that the Appellants reserve the right to amend this Notice of Appeal."

26. The respondent's Notice/Cross Appeal is in the following terms:

"TAKE NOTICE that the Court of Appeal will be moved on Wednesday, 30th May, 2018 at 10:00 am or so soon as Counsel can be heard on behalf of the above-named Respondent on cross appeal from that part of the Judgment of the Honourable Mr. Justice Gregory Hilton given on 26th January, 2018 whereby the learned Judge ordered at paragraph 13 that:

I find that, notwithstanding that the arrest and detention of the Applicant from 18th September 2017 to 24th November 2017 may have been unlawful, the fact that the Applicant was not in the custody of the Respondents at the time the application for the Writ was made on 29th November 2017 means that the order for the Writ should not have been issued and I hereby dismiss the Writ of Habeas Corpus Ad Subjiciendum."

AND TAKE NOTICE that this Cross Appeal is for:

a) A DECLARATION that the Writ of Habeas Corpus Ad Subjiciendum was properly and lawfully issued.

b) An ORDER that the learned Judge's decision to dismiss the Writ of Habeas Corpus Ad Subjiciendum be and is hereby set aside.

c) Costs

AND FURTHER TAKE NOTICE that the grounds of this appeal are

1. The learned Judge was wrong to order that the writ of Habeas Corpus ("the Writ") be dismissed because:

1.1. There was no proper basis on which to dismiss the Writ. The Writ was properly issued. At the time it was issued, there was sufficient uncertainty as to whether the Respondent was in the Appellants' custody to justify the issuing of the Writ. The Writ served its intended purpose. It was only following the

Return to the Writ that it became apparent that the Respondent had been deported to Haiti.

1.2. Having concluded that the Return showed that the Respondent had left the Appellants' custody and control, the proper course would have been for the Judge to find that the Appellants had made sufficient return, and to make no further order on the Writ.

1.3. A writ of Habeas Corpus is not capable of being dismissed. There was no application to strike out the Writ or set aside leave to issue the Writ, that was not what the learned Judge ordered, and in any event there would have been no proper basis for doing so.

The Respondent reserves the right to amend this Cross Appeal Motion."

Discussion

27. This appeal was heard over three days. The amount of paper laid before the court consisting of the Record, submissions and authorities was voluminous. However, in my judgment the issues raised by this appeal can be reduced to two questions. They are:

    1. Was the trial judge correct to dismiss the Writ of habeas corpus and the motion for contempt; and
    2. Was the judge correct to grant constitutional relief on the motion filed on the 19th December, 2017?

I will deal with each question in turn.

Was the Judge Correct to Dismiss the Writ of Habeas Corpus and the Motion for Contempt?

28. In my judgment not only was the judge correct to dismiss or discharge the Writ of habeas corpus on the material that was before him, the judge ought not in my judgment to have caused the writ to be issued.

29. Order 54 Rule 1 provides:

> **"1. (1) An application for a writ of habeas corpus ad subjiciendum must be made to a judge in court except that in cases where the application is made on behalf of an infant, it must be made in the first instance to a judge otherwise than in court.**

(2) An application for such writ may be made ex parte and, subject to paragraph (3), must be supported by an affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint.

(3) Where the person restrained is unable for any reason to make the affidavit required by paragraph (2), the affidavit may be made by some other person on his behalf and <u>that affidavit must state that the person restrained is unable to make the affidavit himself and for what reason</u>." [Emphasis added]

30. It is clear that the affidavit of Clotilde Charles did not satisfy the requirements of the Rule. It does not state that Jean-Rony Jean-Charles is "unable to make the affidavit himself" and does not state "for what reason" he is unable to make the affidavit. The mere fact that the applicant was being restrained does not mean that he is unable to make the affidavit himself. All applicants who make the application are by definition restrained.

31. The Clotilde affidavit raises the specter whether or not he was unable to make the affidavit because he was no longer restrained and was no longer in the country. It is surprising therefore that the trial judge would have acted on that affidavit given its glaring defect and given the fact that it failed to state what the rules required.

32. Further, in paragraph 4 of the Clotilde affidavit she states that the affidavit contains statements of facts which are not of her own knowledge. This is impermissible. Order 41 rule 5 states, "an application for a writ of habeas corpus is not an interlocutory application."

33. In paragraph 17 she states categorically that her brother is still "unlawfully in prison" this was not a matter of which she had any knowledge at the time she made her affidavit. Her affidavit does not state that she ever saw her brother at the detention camp nor did it state the basis upon which she knew at the time the affidavit was sworn that he was still being detained at the detention camp.

34. These defects illustrate why it was important and why the rules require that an affidavit be made by the applicant himself.

35. Moreover, the letter from Mr. Smith to the Director of Immigration of the 6th December, 2007 which was exhibited to the unfiled affidavit of Akeira Martin made it clear that counsel for the applicant knew or was told that the applicant was not in custody nor was he being detained on the 7th December when his application for leave was being heard. Clotilde or at least the applicant's counsel knew that the applicant was no longer in the jurisdiction and was not being detained by the respondents. The letter which was exhibited to the Martin affidavit stated:

> **"Yesterday, I went again to the CCC to see my client (Mr. Jean Charles) (JC)". Finally Mr. Neilly (in charge of enforcement) and then Mr. Wellington (in charge of the CCC) assisted me. Mr. Neilly kindly put me onto his phone and I spoke with Mr. Pratt the DOI <u>who told me that JC was not at the CCC and that he had been deported on November 24th, 2017.</u>**
>
> **I asked to see the deportation order.**
>
> **He said there was not one and that he had not been "deported" and that he had been "repatriated" he did not tell me where; I assumed to Haiti? Given that JC's mother was from Haiti."**

36. And later,

> **"In the meantime, I demand that you make immediate arrangements to return JC to The Bahamas, the country of his birth and that in the meantime, you ensure his safety and wellbeing."**

37. This may explain why the applicant was unable to swear the affidavit himself. The applicant was no longer being detained by the respondents and that the factual predicate upon which a Writ of habeas corpus is issued no longer existed.

38. In her affidavit, Clotilde does state that she was authorized to make the affidavit on her brother's behalf but does not state when the authorization was given and the manner in which it was given. She never states that she ever saw her brother at the Detention Centre or ever spoke to him whilst he was being detained to obtain the authorization from him to bring these proceedings.

39. A review of the transcript of the ex parte hearing of the 7th December, 2017 does not reflect that the court was ever told how Clotilde received the authorization to make the affidavit and more importantly nor was the court attention drawn to the fact that the applicant's counsel had already been told that the applicant was not being detained and that he had been repatriated to Haiti since the 24th November, 2017.

40. Although reference was made to an unfiled affidavit of Akeira Martin at the 7th December, 2017 hearing and the judge did not insist upon reading it and did not refer to it in his oral ruling, there was a requirement on this ex parte application that the judge's attention be brought to that fact.

41. In **Siporex Trade SA v Comdel Commodities Ltd** [1986] 2 Lloyd's Rep 428 Bingham J as he then was said an applicant for ex parte relief must:

> **"identify the crucial points for and against the application, and not rely on general statements, and the mere exhibiting of numerous documents...He must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant**

the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the Court may discharge the injunction even if after full inquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure".

42. No doubt had the judge's attention been brought to the fact that the applicant was no longer being detained and was not being detained when the application was first filed on the 29th November, 2017, he would not have granted leave to make an application for the writ of habeas corpus. That Writ is only concerned with bringing the body of a person actually being detained by or in the control of a respondent. If the evidence is that at the time of the application shows that the person is not being detained then there is no basis for the relief of habeas corpus.

43. In any event when the matter came for hearing on the 19th December, 2017, the Return made it clear that the respondents were not detaining any person who may have fit the description of the applicant.

44. Once this fact has been accepted by the court (and the court cannot in law go behind the Return), the habeas corpus proceedings must come to an end.

45. This point was made by English Court of Appeal in **Justice for Families Ltd v Secretary of State for Justice** [2014] EWCA Civ 1477. In that case the person the subject of the habeas corpus application was no longer being detained. The court said:

> "**[30] Secondly, and as I have already pointed out, the mother had been discharged from prison on the expiry of her sentence before the application for habeas corpus was made. Since the only issue on an application for habeas corpus is to determine the legality of the detention, habeas corpus will not lie if the detention has already been brought to an end: Barnardo v Ford [1892] AC 326, [1892] 56 JP 629 and (an authority supplied by Mr Hemming) Re JM Carroll (An Infant) [1931] 1 KB 317, at 327. As Lord Watson put it in Barnardo v Ford [1892] AC 326, at 333:**
>
> > **'The remedy of habeas corpus is ... intended to facilitate the release of persons actually detained in unlawful custody ... it is the fact of detention, and nothing else, which gives the Court its jurisdiction.'"**

46. The appellants and respondent to this appeal relied upon the decision in **Secretary of State for Foreign and Commonwealth Affairs et al v Rahmatullah** [2012] UKSC 48. In that case Mr. Rahmatullah was a prisoner of war captured by the British forces. Mr. Rahmatullah was transferred from control of the British forces to United States forces

pursuant to memorandum of understanding between the two forces. The issue in that case was whether or not Mr. Rahmatullah remained under the control of Secretary of State. The court held that the Secretary of State still retained control for the purposes of the habeas corpus application as it was possible that the Secretary of State could successfully procure his return from the US forces. The Supreme Court of England said:

> **"[45] At the heart of the cases on control in habeas corpus proceedings lies the notion that the person to whom the writ is directed has either actual control of the custody of the Applicant or at least the reasonable prospect of being able to exert control over his custody or to secure his production to the court. Thus in Barnardo v Ford [1892] AC 326, 56 JP 629, 61 LJQB 728 where the Respondent to the writ had consistently claimed to have handed the child, who was the subject of the application, over to someone whom he was no longer able to contact, the courts nevertheless ordered that the writ should issue because they entertained a doubt as to whether he had indeed relinquished custody of the child. There was therefore a reasonable prospect that the Respondent, despite his claims, either had or could obtain custody of the child."**

47. And reviewing a number of authorities the Supreme Court said:

> **"[64] An Applicant for the writ of habeas corpus must therefore demonstrate that the Respondent is in actual physical control of the body of the person who is the subject of the writ or that there are reasonable grounds on which it may be concluded that the Respondent will be able to assert that control. In this case there was ample reason to believe that the UK government's request that Mr Rahmatullah be returned to UK authorities would be granted. Not only had the 2003 MoU committed the US armed forces to do that, the government of the US must have been aware of the UK government's view that Mr Rahmatullah was entitled to the protection of GC4 and that, on that account, it was bound to seek his return if (as it was bound to do) it considered that his continued detention was in violation of that Convention."**

48. In this case the appellants/respondents were no longer detaining the applicant (if indeed they ever was) and there was nothing before the court by which it could have been concluded that it had the power to require the applicant to be brought back under its control.

49. In my judgment, the applicant not being under the control of the appellants/respondents or being detained by them on the 29th November, 2017 when the application for leave was filed, the judge ought not to have made the Order granting leave and upon the Return was entitled to put an end to the habeas corpus proceedings by dismissing the action.

50. I respectfully agree with Hilton J., where he said at paragraph 14 of his judgment:

> **"If, as has now been shown to be the case by the Return, the Applicant was not detained by the Respondent at the time of the application for leave to issue the Writ was granted, then the issuance of the Writ was ordered on the false or mistaken premise that the Applicant was in the custody of the Respondents. In such a case I have the power to recall the Writ and release the Respondents from the order to produce the Applicant.**
>
> **I find that, notwithstanding that the arrest and detention of the Applicant from 18th September 2017 to 24th November 2017 may have been unlawful, the fact that the Applicant was not in the custody of the Respondents at the time the application for the Writ was made on 29th November 2017 means that the order for the Writ should not have been issued and I hereby dismiss the Writ of Habeas Corpus Ad Subjiciendum."**

51. It is clear that after seeing the Return confirming that the applicant was not being detained by the respondents and was not being detained by them at the time the applicant launched the habeas corpus proceedings and/or the 19th December, 2017 when the Motion for Contempt was made the judge had no alternative but to dismiss the habeas corpus application and the motion for contempt.

Should the court have granted constitutional relief?

52. In my judgment there were a number of reasons why the judge ought not have proceeded to consider the Application for Constitutional Relief and or to have granted the same.

53. Firstly, the habeas corpus having been brought to an end the court ought not to have considered any further applications in that action arising ought of the detention of the applicant.

54. The court ought to have required the applicant to institute new proceedings if he wanted to seek that relief. An application for a writ of habeas corpus is a discrete action and should always remain a discrete action.

55. Secondly, in paragraph 5 of his judgment the judge said:

> **"5. Prior to the hearing of Submissions by the respective parties the court was concerned as to the uncertainty with regard to the name of the Applicant and as to whether "Jean-Rony Jean Charles" is one and the same person as "Jean Charles"**
>
> **In the absence of the actual person (who was flown to. Haiti on 24th November 2017 on the Direction of the Immigration authorities**

according to the Return) there can be no conclusive answer or determination on the question.

There has been much publicity in the printed press and social media with respect to this mailer and, while ordinarily, that plays no part in judicial deliberations, I am constrained in the absence of definitive evidence either way to hear the matter and make findings and conclusions based upon the Law with regard to the facts that have been presented and proven.

This matter will be treated by me continuing onward with the name of the Applicant as follows:

Jean Rony Jean Charles A.K.A Jean Charles

56. In my judgment as the identity of the applicant was in the mind of the judge still an unresolved issue the court ought not to have entertained any application for constitutional or any other relief until that issue had been resolved.

57. Thirdly, it was obviously unfair to the respondents in the habeas corpus application to have to deal with an application for constitutional relief when that application was being made for the first time at the morning fixed for the Return in the habeas corpus matter. They had only come before the court to deal with the habeas corpus application and the Return showing that they did not have in their custody a person that may fit the identity of the person named as the Applicant.

58. Whether the respondents applied for an adjournment or not, given the importance of that issue it could only be considered after proper pleadings and agreed or determined issues of fact.

59. The applicant states that there was no need for the matter to be adjourned for any factual inquiry as his application could have been determined by the facts contained in the Return. With respect I do not agree. The Return itself raised issue as to whether the applicant was the person who was detained by the State and released from detention prior to the commencement of the proceedings. The name was different and the date of birth was different.

60. The judge fell in error when he proceeded with the application for constitutional relief and I would set aside all orders made by him on that application.

61. Of course, this does not prevent the Applicant from now applying for constitutional relief. He can still do so. No doubt face the issue as to whether there are other more appropriate causes of action to obtain relief such as an action in tort for wrongful arrest and false imprisonment. However, it would not be appropriate for me to adjudicate on the propriety

of those claims on this appeal. They should be ventilated in an appropriate action after proper pleadings, discovery and evidence.

62. I would allow the appeal and set aside the Order made by the judge and dismiss the respondent's Notice/Cross Appeal.

The Honourable Sir Michael Barnett, JA (Actg)

Delivered by the Honourable Mr. Justice Isaacs, JA:

63. On 27 July 2018, we heard the submissions of Counsel; and reserved our decision. We render it now. Inasmuch as my learned brother Barnett, JA (Acting) has provided the historical context of the case, I gratefully adopt the procedural history outlined by him.

64. The appellants' appeal from that part of the judgment and Orders of Mr. Justice Gregory Hilton ("the Judge"), given on 30 January 2018 (and dated 26 January 2018) in Action No. 2017/CRI/HCS/0068, wherein the Judge made a Declaration and Orders in the following terms:

> **1. "A Declaration that the Applicant's rights under Article 19(1), (2) and (3) and Article 25(1) of the Constitution have been breached.**
>
> **2. An Order requiring the Respondents to immediately issue a travel document to the Applicant to allow and permit the Applicant to travel from The Republic of Haiti into The Bahamas.**
>
> **3. An Order that the Respondents pay the reasonable cost of the Applicant's travel back to The Bahamas, to be paid forthwith upon his return and certification of the amount.**
>
> **4. An Order directing the 2nd and 3rd Respondents forthwith, but not later than 60 days after the return of the Applicant to The Bahamas and upon application made by the Applicant, to issue such status to the Applicant as would permit him to remain in The Bahamas and to legally seek gainful employment.**
>
> **5. Order that the Respondents do pay to the Applicant compensation under Article 19(4) for their breaches of the Applicant's right under Article 19 (1) (1), (2) and (3) and Article 25(1) in such amount as to be determined after hearing submissions by Counsel.**
> **(i) And, that cost be paid to the Applicant, to be taxed if not agreed."**

65. The appellants want the Court to make an Order to set aside the Declaration and Orders and have judgment entered for them; and that the respondents be made to pay the costs of the appeal.

66. Nine grounds of appeal were advanced by the appellants but I am satisfied that this appeal may be disposed of on grounds 2 and 4 without the necessity of entering into a consideration of the seven other grounds. Grounds 2 and 4 are as follows:

> **"2. In the circumstances, the learned Judge was wrong to consider and determine the application for constitutional redress without affording the Appellants a proper opportunity to respond, and his actions deprived the Appellants of a fair hearing."**

and

> **"4. In any event, having dismissed the Respondent's habeas corpus claim (see paragraph 14), the affidavit in support of that Claim sworn by the Respondent's sister on his behalf fell away, and the Judge made a grave error of law in determining the constitutional application in the absence of any affidavit evidence (or any admissible evidence) in support of the claim."**

67. I am satisfied that this appeal must succeed on grounds 2 and 4 of the appellants' grounds of appeal. Further, on the view that I hold, I would dismiss the Respondent's Notice/Cross Appeal as I am satisfied that the Judge's decision is unsustainable.

68. As indicated previously, the Judge found that the appellants' had breached certain constitutional rights of the Respondent arising out of his detention at the Carmichael Road Detention Centre and subsequent removal from The Bahamas. The Judge made these findings after hearing and determining a Notice of Motion for "Contempt/Constitutional relief" which was brought during the hearing for a Writ of habeas corpus ad subjiciendum ("the Writ"). That notice was only filed on the day of the hearing for the habeas corpus, and the appellants did not file any submissions in response or evidence in reply.

69. On the hearing of the habeas corpus application, the Judge accepted that the applicant was not in the custody of the appellants. Thus, he "dismissed" the Writ, stating as follows:

> **"I find that, notwithstanding that the arrest and detention of the Applicant from 18 September 2017 to 24 November 2017 may have been unlawful, the fact that the Applicant was not in the custody of the Respondents at the time the application for the Writ was made on 29th November 2017 means that the order for the Writ should not have been issued and I hereby dismiss the writ of Habeas Corpus Ad Subjiciendum."**

70. The determination of the Judge not to issue the Writ (although phrased in the terms "I hereby dismiss the writ") ought to have terminated the habeas corpus application. As I understand the decision of the Judge, he was satisfied that the individual named in the application was not being detained by the appellants. In those circumstances and in keeping with the purpose of the Writ, the need to examine the legality of the applicant's detention was no longer necessary. See **Barnardo v Ford** [1892] AC 326 and **Justice for Families Ltd. v Secretary of State for Justice** [2014] EWCA Civ 1477 (at para. 30),

> **"The remedy of habeas corpus is . . . intended to facilitate the release of persons actually detained in unlawful custody . . . it is the fact of detention, and nothing else, which gives the court its jurisdiction".**

71. The basis for my conclusion lies in the purpose of the application that was before the Judge, to wit, a habeas corpus application. The sole purpose for such an application was to challenge the lawfulness of the detention of the individual, said to be the brother of the affiant, Clothilde, who swore the affidavit on 29th November, 2017 on behalf of the individual. The affidavit filed in support of the application stated, inter alia:

> **"I, CLOTILDE JEAN- CHARLES, of Hyler Street, Nassau, The Bahamas, do make oath and say that:**
>
> 1. **I am the sister of the Applicant, Jean-Rony Jean Charles ("Jean-Rony") herein.**
> 2. **I am authorised to make this application on his behalf.**
> 3. **I swear this affidavit in support of Jean - Rony's application for a Writ of Habeas Corpus Ad Subjiciendum to issue.**
> 4. **The fact set out herein are within my own knowledge and where they are not, I identify the source and grounds of such facts which I verily believe to be true.**
> 5. **Jean-Rony was born at the Princess Margaret Hospital, Nassau, New Providence, Bahamas on 5 December, 1982 and is entitled to Bahamian citizenship. A copy of his birth certificate is exhibited as "JC-1"**
> 6. **Jean-Rony has never travelled outside of The Bahamas.**
> 7. **Despite this, he was unlawfully arrested by officers of Immigration officers on or about early September 2017.**

8. Jean-Rony has committed no offence under the Immigration Act.

9. Jean-Rony is presently falsely imprisoned in the Carmichael Concentration Camp Detention Centre.

10. Since his arrest, I have taken documents proving his birth to the Department of Immigration upon their request, but I still have not been able to secure his release. Jean-Rony's family members.

11. and I have made numerous attempts to secure his release and are being told that this matter is being "investigated", whatever that means!

12. Jean-Rony's family and I we were recently advised by Ms. Rolle of the Enforcement Unit, of the Immigration Department, that his documents which were submitted to the Department of Immigration and could not be found.

13. It is now almost 12 weeks since he was illegally arrested and falsely imprisoned. He has not been charged with any offence in any court.

14. He has not been given bail.

15. He has not been taken before any Court in The Bahamas.

16. He has not been served with a deportation order.

17. He has not been charged with any criminal offence.

18. Despite numerous attempts by me and his family to secure his release, he is still unlawfully imprisoned by the Department of Immigration in contravention of the Constitution and the Criminal Procedure Code Act.

19. I am advised by counsel to Jean -Rony that the Respondents are not entitled by law or otherwise to falsely arrest and falsely imprisoned Jean -Rony.

20. Jean -Rony's imprisonment is unconstitutional and unlawful.

21. Having regard to the facts described herein, I respectfully ask this Honourable Court for leave to issue a Writ of Habeas

Corpus directing the Respondents to show cause why he should not be immediately released."

72. I will for the purposes of my decision refer to the individual as "Jean-Rony" but it is not to be understood, that at this juncture, I do accept that the individual who is listed as the respondent is the individual the appellants had in their custody, notwithstanding Mr. Smith's invitation to do so.

73. Applications under the Habeas Corpus Act are to ensure that persons detained by the State are done so in accordance with the law. Detainers are called upon to justify to the courts the bases upon which they purport to detain a person. If the court determines that the detention is not justified the Writ issues and the person is directed to be freed from custody.

74. A good example of the Writ in action is the case of **Jean and others v Minister of. Labour and Home Affairs and others** (1981) 31 WIR 1. In **Jean**, the applicants, some thirty-one of them, challenged their detention by the State pending their deportation through an application from habeas corpus ad subjicidendum before Blake J. It is a case that has been cited often over the years.

75. In **Aldinor v Immigration Department and another** [2013] 1 BHS J. No. 82, a Supreme Court decision, I had occasion to make reference to **Jean** and two other cases that considered it favourably. At paragraphs 15 to 19 I wrote:

> **"15 The deprivation of an individual's liberty is a very serious intrusion on the right of such individual to be at large. So much so that Article 19 of the Constitution declares a person may lose his liberty only in a manner consonant with the law. Any detention not authorised by statute or the common law may breach the individual's constitutional rights. I set out the relevant portions of Article 19:**
>
> **"19. (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases-**
>
> **a) in execution of the sentence or order of a court, whether established for The Bahamas or some other country, in respect of a criminal offence of which he has been convicted or in consequence of his unfitness to plead to a criminal charge or in execution of the order of a court on the grounds of his contempt of that court or of another court or tribunal;**
>
> **b) in execution of the order of a court made in order to secure the fulfillment of any obligation imposed upon him by law;**

c) for the purpose of bringing him before a court in execution of the order of a court;

d) upon reasonable suspicion of his having committed, or of being about to commit, a criminal offence;

e) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;

f) for the purpose of preventing the spread of an infectious or contagious disease or in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

g) for the purpose of preventing the unlawful entry of that person into The Bahamas or for the purpose of effecting the expulsion, extradition or other lawful removal from The Bahamas of that person or the taking of proceedings relating thereto, and, without prejudice to the generality of the foregoing, a law may, for the purposes of this subparagraph, provide that a person who is not a citizen of The Bahamas may be deprived of his liberty to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within The Bahamas or prohibiting him from being within such an area.

(2) Any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention and shall be permitted, at his own expense, to retain and instruct without delay a legal representative of his own choice and to hold private communication with him; and in the case of a person who has not attained the age of eighteen years he shall also be afforded a reasonable opportunity for communication with his parent or guardian.

(3) Any person who is arrested or detained in such a case as is mentioned in subparagraph (1)(c) or (d) of this Article and who is not released shall be brought without undue delay before a court; and if any person arrested

or detained in such a case as is mentioned in the said subparagraph (1)(d) is not tried within a reasonable time he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefore from that other person."

16 Article 19 recognizes the power of the State to detain and expel non-nationals. However, this must be done within the four corners of the law. I do not think there is a need to have recourse to the Constitution in this case. The Habeas Corpus Act provides an adequate alternative remedy to the Applicant as envisaged in Article 28 of the Constitution. Although narrow in its scope, to wit, a court may only look at the face of the document authorizing the detention to determine whether or not a true reason or basis for the detention is disclosed, it can effect the release of a person wrongfully detained.

17 In Jean, et al v Minister for Public Safety, et al [1981] 31 W.I.R. 1 Blake, J explained the HCA's limited efficacy when he said at page 12, letter H

> **"The statute was enacted in 1679. It is for all practical purposes identical with the Habeas Corpus Act of the United Kingdom of the same year, enacted in the reign of Charles II. It still retains its state of pristine purity. In the 302 years which have since elapsed, it has yielded neither to the change of time, nor circumstance. In contradistinction, the history of the Habeas Corpus Act in England has been entirely different. In that country as a result of agitation as to the deficiencies of the 1679 Act, Parliament passed the Habeas Corpus Act 1816."**

18 In the course of his judgment Blake, J. referred to the statement of Lord Goddard, C.1 in R. v. Board of Control, ex parte Rutty [1956] 2 QB 109 at page 124:

> **"That this court has the power to examine into the truth of the facts set forth in the return to a writ of habeas**

> **corpus and to examine them by means of affidavit evidence is clear from sections 3 and 4 of the Habeas Corpus Act 1816. That Act effected a notable change in the law. Previously neither at common law nor by the Habeas Corpus Act 1679 could the court do more than look at the return and decide whether on its face it showed a lawful cause of detention. The facts could only be controverted by an action for a false return."**
>
> **19 The view expressed by Blake, J has been cited with approval by Judges in subsequent cases, e.g., Hall, J in McDonald v R. Criminal Appeal No. 58 of 2000 (unreported) and me in Davis, et al v Attorney-General [2010] 2 BHS J No. 45."**

76. In **Aldinor** I arrived at the conclusion that an error appeared on the face of the Return and ordered that the Writ issue.

77. I also refer to **R v Beckford** (2004) BHS J. N 430, another of my decisions, where I said at paragraphs 12 to 13:

> **"12. It is trite law that when a law invests an authority with the power to interfere with the personal liberty of others there must be the strictest compliance with the letter of the law. But if authority is needed see Jean's case at page 21 where Blake, J. said:**
> **"All the authorities go to show that when drastic powers are given to interfere with personal liberty, there must be the strictest compliance with the letter of the law, be the person affected a subject by birth or naturalization, or a stranger within the gates."**
>
> **13. Thus, it is incumbent upon those who seek to detain the Applicant and interfere with his personal liberty to disclose to the Court that they possess the lawful authority to do so."**

78. See also **Pierre-Charles v. Director of Immigration and another** [2013] 1 BHS J. No. 109.

79. Unlike extradition cases where by practice applicants are permitted to rely on affidavit evidence to support a detention, the same in my view does not hold true for the 'run of the mill' habeas corpus hearing. The detainer must rely solely on what is disclosed on the face of the Return.

80. The Return submitted by the appellants stated;

> 1. **"I, Keturah Ferguson, declare that I am currently the Acting Director of Immigration and that I am duly authorized to make this return on behalf of William Pratt, the Third Respondent herein who is joined in these proceedings in his official capacity as**

Director of Immigration and Peter Joseph, joined to these proceedings in his capacity as Officer in Charge of the Carmichael Road Detention. Collectively, referred to as the "alleged detainers"

2. In obedience to the writ, I herewith do certify and return, without prejudice, that JEAN-RONEY JEAN-CHARLES, date of birth: 5 December, 1982, the subject named therein, is not presently in the custody or control of the alleged detainers.

3. That by way of explanation, on 18 September 2017 during routine patrol in the area of Fire Trail Road, an adult male Haitian national was interviewed by officers of the Department of Immigration. The said Haitian national, gave his name as JEAN CHARLES, age 31, and his date of birth as 1 DECEMBER, 1985.

4. That the said Haitian national was not able to provide any documents or any proof as to his lawful presence in The Commonwealth of The Bahamas. He was taken to the Carmichael Road Detention Center for further investigation relative to suspected contravention of the Immigration Act.

5. That the Court is invited to take judicial notice of the influx of illegal immigrants to the shores of the Commonwealth of The Bahamas and the corresponding heighten vigilance of local authorities in that regard.

6. That the said Haitian national subsequently signed an Immigration Profile form confirming his identity and other information he provided to the authorities as correct, in particular: Name: Jean Charles and Date of Birth: 1 December 1985. He duly signed his name as "Jean Charles". The information he provided to the authorities at the material time was accepted as true and correct as to his identity. A true copy of the said Immigration Profile form is exhibited hereto as "Exhibit KF 1".

7. A subsequent check of birth records at the Bahamas Registrar General Department, based on the information provided by said Jean Charles, Date of Birth: 1 December 1985, yielded negative results. A true copy of the Registrar Generals Department verification of birth check with negative results is exhibited as "Exhibit KF 2".

8. There was no record or any other evidence presented or subsequently uncovered that the subject, who identified himself as, Jean Charles, DOB: 1 December 1985, (a non citizen) and being a Haitian national, was either born in The Commonwealth of The Bahamas, entered the Commonwealth of The Bahamas legally,

obtained leave to enter the Commonwealth of The Bahamas pursuant to the Immigration Act, nor had any status whatsoever which entitled him to remain in the Commonwealth of The Bahamas.

9. That said Jean Charles, DOB: 1 December 1985, subsequently safely returned to his home country, The Republic of Haiti, on board Bahamas Air Charter # C6-BFC on Friday 24 November, 2017. A true copy of the Bahamas Immigration Detention Centre Surrender Order is exhibited as "Exhibit KF 3". A redacted listing of passengers on board said Charter flight (as is relevant) is exhibited as "Exhibit KF 4"

10. That said Jean Charles again confirmed his identity as Jean Charles, DOB: 1 December 1985 during a roll call of passengers prior to boarding the charter flight to The Republic of Haiti and appeared to be in good health.

11. That a team of escort officers from the Department of Immigration and the Royal Bahamas Defence Force also traveled on the Bahamas Air charter flight to The Republic of Haiti. The aircraft was met by Bahamian and Haitian officials in The Republic of Haiti. Jean Charles, and other Haitian nationals were immediately handed over to the Haitian authorities, who duly accepted their nationals, for subsequent release.

12. Accordingly, the subject identifying himself as Jean Charles, a Haitian national, born on 1 December 1985, has been released and has safely departed the custody and control of the Bahamas Department of Immigration and is, as far as I am aware, no longer within the jurisdiction of The Commonwealth of The Bahamas. Any custody and control of said name Jean Charles, born on 1 December 1985 or whatever name he may be called came to an end on 24 November, 2017.

13. At the material time there was no record or conclusive evidence confirming or reason to believe that the said Jean Charles (DOB: 1 December 1985) base on the information he provided to the authorities and/or the subject of this writ herein, Jean-Roney (sic) Jean-Charles are one and the same person.

14. In all the circumstances and in any event, I certify that neither Jean Charles (DOB: 1 December 1985) nor a Jean-Roney Jean-Charles (DOB: 5 December, 1982) are currently in the custody or control of the alleged detainers nor was either person in said requisite custody or control of the alleged detainers on 29

November, 2017 or 7 December, 2017 at the time of filing the application for a writ of habeas corpus or neither when leave to issue the writ was granted by the Supreme Court respectively.

15. Further cautionary checks as to the receipt of any application for registration as a citizenship of the Commonwealth of The Bahamas, if so eligible or entitled, with respect to either a Jean Charles (DOB 1 December 1985) or a Jean-Roney Jean-Charles (DOB: 5 December, 1982) yielded negative results.

16. This return is made without prejudice to any possible challenge to, inter alia, the duty of full and frank disclosure of the Applicant the want of jurisdiction of the Court to grant leave to issue the subject writ on the grounds that, inter alia, the Court's jurisdiction to issue said writ also came to an end on 24 November, 2017 once the custody or control came to an end and thereafter ceased to exist.

17. The contents of this return is true and correct to the best of my information and belief.

18. For the reasons above it is humbly prayed that the Writ of Habeas Corpus ad Subjiciendum issued on 7 December, 2017 be dismissed."

81. Once the Judge was satisfied that the Return disclosed that the applicant was not in the appellants' custody, he was obliged to decide formally that the Writ not issue. I use the term "formally" because of the indication in the following passage from Wikipedia:

> **"The wording of the writ of *habeas corpus* implies that the prisoner is brought to the court for the legality of the imprisonment to be examined. However, rather than issuing the writ immediately and waiting for the return of the writ by the custodian, modern practice in England is for the original application to be followed by a hearing with both parties present to decide the legality of the detention, without any writ being issued. If the detention is held to be unlawful, the prisoner can usually then be released or bailed by order of the court without having to be produced before it."**

82. In an article contained in the American Law Register, March, 1856, entitled, **"Remarks on The Writ of Habeas Corpus Ad Subjiciendum, and The Practice Connected Therewith."** The writer indicated that on an application for the Writ some ground for it must be disclosed. At page 263 he wrote:

> **"Assuming that such ground is shown, the ordinary modern practice seems to be to grant, in the first instance, a rule to show cause why the writ in question should not issue;"**

83. At paragraph 5 of Hilton J. judgment he stated:

> **"5. Prior to the hearing of Submissions by the respective parties the court was concerned as to the uncertainty with regard to the name of the Applicant and as to whether "Jean-Rony Jean Charles" is one and the same person as "Jean Charles"**
>
> **In the absence of the actual person (who was flown to. Haiti on 24th November 2017 on the Direction of the Immigration authorities according to the Return) there can be no conclusive answer or determination on the question.**
>
> **There has been much publicity in the printed press and social media with respect to this matter and, while ordinarily, that plays no part in judicial deliberations, I am constrained in the absence of definitive evidence either way to hear the matter and make findings and conclusions based upon the Law with regard to the facts that have been presented and proven.**
> **This matter will be treated by me continuing onward with the name of the Applicant as follows:**
> **Jean-Rony Jean-Charles A.K.A Jean Charles"**

84. In the face of his doubts as to whether Jean-Rony Jean-Charles was one and the same as Jean-Charles, the Judge erred in treating them as such "**in the absence of definitive evidence**".

85. Mr. Smith has invited us to find that the dismissal of the Writ application by the Judge is somehow invalid because it is not for a judge to dismiss a Writ if he does not think it should issue, but that it be made to lie in the Registry. To my mind, this argument is a distinction without a difference. Once the judge determines the Writ should not issue whether he dismisses it outright or not, the application is at an end. It cannot be resurrected by some application for contempt and/ or constitutional relief.

86. I hold the view that once the judge dismissed the application for the Writ, he could not entertain an application for contempt. The only means whereby the return may be impugned is by the filing an action for false return:

> **"Should the return, indeed, prima facie, appear untrue in any particular, the party making such return will have to account for it, and to state or explain why he has so dealt with the court; and this he will in practice be required to do, in answer to a rule nisi for an attachment granted against him (Canadian Prisoner's case, Fry's Rep. p. 91)."** (Page 268 of the article mentioned above)

87. However, a rule nisi for an attachment or contempt proceedings is an underlying part of the habeas corpus proceedings. Thus, when the judge "dismissed" the action the contempt proceedings would have fallen away.

88. To my mind, the information provided in the Return by the appellants about another person – ostensibly – they once held, was gratuitous surplusage which was commendably provided but could not have been used by the judge to justify the hearing of a constitutional application for either the applicant or the other person on the foot of the habeas corpus application, particularly in the absence of hearing "fully" from both sides on the constitutional point.

89. I use the term "fully" to encapsulate the audi alteram partem rule which would enable the appellants to produce affidavits/evidence in relation, for example, to the other individual and to demonstrate that the person named in the habeas corpus affidavit was not one and the same as the person with the different birth date. That the appellants acquiesced in complying with the Order made by the judge to have the person who had been removed from the jurisdiction returned is nowhere to the point; nor can subsequent events – if it turns out that the person named in the habeas corpus application is the same person "repatriated" to Haiti – validate the decision of the judge to treat the applicant as one and the same as the person born in 1985.

90. It is not unknown for persons to be abducted by individuals posing as agents of the State only for it to be discovered later that the individuals were merely dissemblers. That could have been the case in the present matter. Thus, it was important for the Judge to be sure that Jean-Rony Jean Charles, applicant for habeas corpus, was Jean Charles, expelled individual. Nevertheless, that issue would only have arisen on a constitutional application separate and apart from the habeas corpus application.

91. In the absence of certainty as to the identity of the applicant, there could be no finding of a constitutional breach.

92. The respondent filed a respondent's Notice/Cross Appeal in the following terms:

> **"TAKE NOTICE that the Court of Appeal will be moved on Wednesday, 30th May, 2018 at 10:00 am or so soon as Counsel can be heard on behalf of the above-named Respondent on cross appeal from that part of the Judgment of the Honourable Mr. Justice Gregory Hilton given on 26th January, 2018 whereby the learned Judge ordered at paragraph 13 that:**
>
> **I find that, notwithstanding that the arrest and detention of the Applicant from 18th September 2017 to 24th November 2017 may have been unlawful, the fact that the Applicant was not in the custody of the Respondents at the time the application for the Writ was made on 29th November 2017 means that the order for the Writ should not have been issued and I hereby dismiss the Writ of Habeas Corpus Ad Subjiciendum."**
>
> **AND TAKE NOTICE that this Cross Appeal is for:**

a) **A DECLARATION that the Writ of Habeas Corpus Ad Subjiciendum was properly and lawfully issued.**

b) **An ORDER that the learned Judge's decision to dismiss the Writ of Habeas Corpus Ad Subjiciendum be and is hereby set aside.**

c) **Costs."**

93. In light of my decision that the judge erred when he continued the hearing once he had determined the habeas corpus application, the respondent's Notice/Cross Appeal are unsustainable; and as a consequence, dismissed.

Conclusion

94. I allow the appeal and set the judge's decision aside; and I dismiss the respondent's Notice/Cross Appeal.

The Honourable Mr. Justice Isaacs, JA

Delivered by The Honourable Sir Hartman Longley, P:

95. For the reasons given by my colleagues, I too would allow the appeal, dismiss the respondent's Notice and Cross Appeal and set aside the decision of the learned judge.

The Honourable Sir Hartman Longley, P