Michaelmas Term
[2022] UKPC 51
Privy Council Appeal No 0100 of 2019

JUDGMENT

Jean-Rony Jean Charles (Appellant) *v* The Honourable Carl Bethel (in his capacity as Attorney General of the Bahamas) and 4 others (Respondents) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Reed
Lord Hodge
Lord Kitchin
Lord Hamblen
Lady Rose

JUDGMENT GIVEN ON
15 December 2022

Heard on 5 July 2022

Appellant
Edward Fitzgerald KC
Frederick Smith KC
Adrian de Froment
Roderick Dawson Malone
(Instructed by Simons Muirhead Burton LLP (London))

Respondents
Tom Poole KC
Kayla Green Smith, Crown Counsel
(Instructed by Charles Russell Speechlys LLP (London))

LORD HODGE (with whom Lord Reed, Lord Kitchin, Lord Hamblen and Lady Rose agree):

1. On 18 September 2017 officers of The Bahamas Immigration Department arrested and detained a man who gave his name as "Jean Charles" and his date of birth as 1 December 1985. The arrest took place in the Fire Trail Road area of New Providence. Because he had no documents in his possession when he was asked to produce them, he was taken to the Carmichael Road Detention Centre. The detained man later signed an immigration profile form in which he confirmed his name and the date of birth which he had given the officers. The profile had a photograph of the man in the top right-hand corner of the document. The authorities checked the birth records at The Bahamas Registrar General's Department and found no record of a "Jean Charles" having been born in The Bahamas on 1 December 1985. The authorities did not charge him with any offence or take him before any court, no deportation or detention order was made in respect of him, but on 24 November 2017 he was expelled to Haiti.

2. The appellant, Jean-Rony Jean Charles, asserts that he was that man. The respondents admit that the person who was expelled on 24 November 2017 is the same person as the man who was returned to The Bahamas in response to the order of the court described below. They also admit that that person was returned to The Bahamas under an emergency travel document under the name of "Jean-Rony Jean Charles" with a date of birth of 5 December 1982. The emergency travel document contained a photograph of the appellant when he was aged 18 years, which, according to the appellant's counsel, the Ministry of Foreign Affairs obtained from their files. The appellant's legal representative, Mr Frederick Smith KC, objected to the use of an out-of-date photograph and provided the Ministry with an updated photograph of the appellant. Nonetheless, the respondents assert that there is an unresolved issue as to whether the appellant is the same man as the "Jean Charles" whom they expelled and then returned to The Bahamas. As explained below, on the information provided at the hearing of this appeal, the Board struggles to see any substance in the suggested issue as to whether the appellant is the person whom the respondents expelled and returned to The Bahamas. That however is not determinative of the appeal.

3. The principal issues on this appeal at the outset were (i) whether the appellant was entitled to seek constitutional redress in the context of an application for habeas corpus, (ii) whether the judge had the power to grant him constitutional redress after the judge had dismissed the writ of habeas corpus, and (iii) whether, in the circumstances in which the application for constitutional redress was made, the judge failed to act with procedural fairness in granting him constitutional redress. The parties have since agreed that the first question should be answered in the

affirmative. The parties raised other issues as to whether the appellant's constitutional rights had been breached and, if so, what remedial order should have been made, and whether an appellate court could resolve those matters, but, as explained below, those issues do not arise because of the Board's decision on the question of procedural fairness.

1. The factual background

4. The appellant was born in Princess Margaret Hospital, Nassau, New Providence, The Bahamas on 5 December 1982. His parents were not citizens of The Bahamas. His mother was and is a citizen of Haiti and the appellant has not been registered as a citizen of the Bahamas. The appellant's sister, Clotilde Jean Charles ("Clotilde"), in an affidavit dated 28 November 2017 in the proceedings described below, explains these circumstances of the appellant's birth and asserts that the appellant has never travelled outside The Bahamas. The respondents wish to investigate her assertions.

5. Clotilde explained in her affidavit, and the respondents do not challenge her factual account before the Board, that she is the appellant's sister. She asserted that the appellant had been arrested and imprisoned in the Carmichael Road Detention Centre about 12 weeks before, that she and other members of the appellant's family had made numerous attempts to secure his release, that the family had been told that the matter was being investigated and that his documents which they had submitted to the Department of Immigration could not be found. In the affidavit Clotilde also asserted that her brother's imprisonment was both unlawful and unconstitutional. She asked the High Court for leave to issue a writ of habeas corpus directing the respondents to show cause why the appellant should not be immediately released.

2. The legal proceedings

6. On 29 November 2017 the appellant's family filed an ex parte summons for leave to issue a writ of habeas corpus on behalf of the appellant. The writ was supported by Clotilde's affidavit which the Board has described in paras 4 and 5 above. The writ was also supported by an affidavit by Akeira Martin, the appellant's attorney, sworn on 7 December 2017, exhibiting email correspondence which had passed between the appellant's counsel, Mr Frederick Smith KC, and among others, the first, second and third respondents in which he protested about his inability to see the appellant at the detention centre and narrated that immigration officers had told him that his client had been repatriated on 24 November 2017.

7. After an ex parte hearing on 7 December 2017 Hilton J, by order of that date, gave permission to issue the writ of habeas corpus with a return date of 19 December 2017. The third and fourth respondents filed a Return on 18 December 2017 which was made by Keturah Ferguson, the acting Director of Immigration. In the Return the acting Director of Immigration narrated that neither Jean Charles, date of birth 1 December 1985, nor the appellant, date of birth 5 December 1982, was detained in custody on 29 November or 7 December 2017. The acting Director of Immigration described the detention of the adult male Haitian, Jean Charles, on 18 September 2017, the absence of evidence that he was born in or had legally entered The Bahamas which gave him status to remain, and his escorted "return" to Haiti by charter flight on 24 November 2017. The Return narrated that "Jean Charles" had confirmed his identity and stated date of birth in the immigration profile and at a roll call. The Return included a redacted document listing the Haitian nationals scheduled for deportation on 24 November 2017 which included as one of that number "Jean Charles aka Jean Roni". The Return stated:

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

8. Notwithstanding that assertion, in their written submissions filed on 19 December 2017 the respondents stated (para 9): "the Applicant is currently in Haiti having travel[led] on board Bahamas Air Charter # C6-BFC on Friday 24 November 2017, escorted by Immigration and Defence Force Officers."

9. The hearing on the writ and the Return took place before Hilton J in the Supreme Court on 19 December 2017. On the morning of the hearing the appellant's legal team filed a notice of motion seeking a finding of contempt of court and constitutional redress under article 28 of The Bahamas Constitution. The respondents objected to the court entertaining the application for constitutional redress on the basis that an alternative remedy was available to the appellant. The judge heard arguments in relation to both the writ of habeas corpus and the constitutional motion.

10. Hilton J, in a judgment dated 26 January 2018, which was handed down on 30 January 2018, dismissed the writ of habeas corpus because the appellant was not detained by the respondents on the date when the writ was issued. The judge dismissed the objection to the application for constitutional redress, holding that the

appellant did not have adequate means of redress through a civil suit for false imprisonment. In para 21 of his judgment the judge stated:

> "It is undisputed that:
>
> (a) The applicant was arrested by the immigration authorities on 18 September 2017 and then detained by them at the Carmichael Road Detention Centre until 24 November 2017.
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> (b) The applicant was never charged with any offence under the Immigration Act or any other statute in the Bahamas.
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> (c) The applicant was never taken to any court to answer any charges.
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> (d) No deportation order or detention order was issued against the applicant.
>
> (e) The applicant was put on a plane and involuntarily taken to Haiti on 24 November 2017.
>
> (f) The reason for his arrest, detention and expulsion from The Bahamas was stated in the document attached to the Return labelled 'Profile' as follows: 'Subject was arrested on a routine status check on Fire Trail Road. The subject was asked to produce documents and had no documents in his possession. Subject was brought to the Detention Centre for further processing.' The name listed was Jean Charles; Nationality: Haitian; Date of Birth December 1 1985; Place of Birth: Nassau, Bahamas."

11. Hilton J found that the appellant had produced a Bahamian birth certificate, that he had never left The Bahamas before his expulsion and that no recommendation for deportation or deportation order had been made in relation to him. The judge held that the arrest and detention of the appellant had deprived him of his constitutional rights to personal liberty (article 19(1)), his right of access to a legal representative (article 19(2)) and his right to be brought before a court without undue delay (article 19(3)). He held that the appellant's expulsion from The Bahamas

was a breach of his right to enjoy freedom of movement under article 25 of the Constitution. He ordered that (i) the respondents immediately issue the appellant with a travel document to enable him to return to The Bahamas from Haiti, (ii) the respondents pay the appellant's cost of travel in returning to The Bahamas, (iii) the second and third respondents (the Minister of Immigration and the Director of Immigration) issue forthwith to the appellant on his application "such status … as to permit him to remain in The Bahamas and to legally seek gainful employment." The judge also ordered that the respondents pay compensation to the appellant for the breaches of his constitutional rights in an amount which would be determined at a future hearing.

12. In response to the judge's order, on 31 January 2018 the Ministry of Foreign Affairs issued an emergency travel document for the appellant, identifying him as Jean-Rony Jean Charles and his date of birth as 5 December 1982. As mentioned above, the travel document contained a photograph of the appellant as a teenager. The person whom the respondents describe as Mr Jean Charles returned to The Bahamas on 3 February 2018 using the emergency travel document. On his arrival, he was arrested and detained by immigration officers and taken to the detention centre. In an application in these proceedings on 5 February 2018 Hilton J ordered the release of "the Applicant, Jean Charles" from the detention centre.

13. By this time, the respondents had appealed the orders of Hilton J dated 26 January 2018. The second ground of appeal asserted that the hearing had been unfair. The respondents contended that "the learned Judge was wrong to consider and determine the application for constitutional redress without affording [the respondents] a proper opportunity to respond, and his actions deprived them of a fair hearing." The appellant cross-appealed against the dismissal of the writ of habeas corpus.

14. After a hearing on 5, 8 and 12 February 2018, Hilton J in an order dated 20 February 2018 granted a stay of the part of his order of 26 January 2018 which required the second and third respondents to grant the appellant a status to enable him to seek gainful employment. The judge refused to grant a stay of the parts of the order which provided other redress. He stated in para 19 of his judgment of 20 February 2018 that the respondents had undertaken and he ordered that the appellant be allowed to remain at liberty in The Bahamas without interference from the immigration authorities until the completion of the entire appeal process and that he not be prevented from engaging in lawful employment.

15. The Court of Appeal (Sir Hartman Longley P, Isaacs JA and Barnett JA) heard the respondents' appeal on 30 May, 22 June and 27 July 2018. In a reserved

judgment dated 17 October 2018 the Court of Appeal allowed the respondents' appeal, set aside the judge's orders and dismissed the appellant's cross-appeal.

16. Barnett JA and Isaacs JA produced reasoned judgments and Sir Hartman Longley P agreed with the reasons of both judgments. Barnett JA reduced the issues in the appeal to two questions: (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 19 December 2017? The Board on this appeal is not concerned with the first question. Barnett JA gave three reasons for answering the second question in the negative. His first reason was that the application for constitutional relief ought to have been pursued in separate proceedings. He stated:

> "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 out of the detention of the applicant.
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> 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."

(i) His second reason was that the identity of the applicant was an unresolved issue in the mind of the judge who should not have entertained the application for constitutional redress until that issue had been resolved (para 56). Thirdly, he held that the proceedings had been unfair to the respondents in the habeas corpus application who had come to court to deal with that application. The application for constitutional redress should have been considered "only after proper pleadings and agreed or determined issues of fact" (para 58). This was so whether or not the respondents had applied for an adjournment.

17. Isaacs JA focused in his judgment on two of the grounds of appeal. Those grounds were (i) whether the respondents had been deprived of a fair hearing and (ii) whether Clotilde's affidavit "fell away" on the dismissal of the application for habeas corpus and the judge fell into error in deciding the application for constitutional redress in the absence of affidavit evidence. The core of his reasoning was set out in paras 88 and 89 of his judgment in which he said:

> "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 be 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 a 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."

He continued by stating that it was not unusual for persons to be abducted by individuals posing as agents of the state. It was therefore important for the judge to be sure that the applicant for habeas corpus was the expelled individual. He stated: "Nevertheless, that issue would only have arisen on a constitutional application separate and apart from the habeas corpus application". He concluded (para 91): "In the absence of certainty as to the identity of the applicant, there can be no finding of constitutional breach."

3. The contentions of the parties

18. Mr Edward Fitzgerald KC for the appellant advanced three arguments which can be summarised shortly. First, he contended that the Court of Appeal had erred in holding (i) that an application for constitutional redress could not be brought in the same action as an application for habeas corpus and (ii) that the evidence in Clotilde's affidavit and in the Return which were placed before the court in relation to the application for habeas corpus could not be used in the application for constitutional redress. Secondly, there was no doubt that the appellant was the

person who had been arrested, detained, removed from The Bahamas and then returned. Thirdly, the respondents had not been denied a fair trial in the application for constitutional redress as the respondents had not applied for an adjournment of that application to allow them to address the substantive application by adducing evidence or otherwise. In any event, any unfairness could be cured on appeal. He invited the Board to restore the judge's order or, if the Board were minded to make a different remedial order, to give him permission to make further submissions.

19. Mr Tom Poole KC for the respondents accepted that an application for constitutional redress could be brought in the same action as an application for habeas corpus. He submitted that the Court of Appeal had not fallen into error as it had held only that in the particular circumstances of this case it was appropriate for the appellant to make a separate application for constitutional redress. In any event his principal submission was that the Court of Appeal was right to hold that the respondents had not been given a fair hearing by the judge as they had not been given the opportunity make submissions and adduce evidence in response to the substance of the appellant's application for constitutional redress.

4. Analysis and determination

20. In the Board's view, the parties are correct in their agreement that it was competent for the appellant to raise an application for constitutional redress by motion in his action for habeas corpus. Article 28 of the Constitution of The Bahamas provides:

> "(1) If any person alleges that any of the provisions of articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.
>
> (2) The Supreme Court shall have original jurisdiction –
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> (a) to hear and determine any application made by any person in pursuance of paragraph (1) of this article; …
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> Provided that the Supreme Court shall not exercise its power under this paragraph if it is satisfied that adequate

means of redress are or have been available to the person concerned under any other law. …

(4) No law shall make provision with respect to rights of appeal from any determination of the Supreme Court in pursuance of this article that is less favourable to any party thereto than the rights of appeal from determinations of the Supreme Court that are accorded generally to parties to civil proceedings in that court sitting as a court of original jurisdiction.

(5) Parliament may make laws to confer upon the Supreme Court such additional or supplementary powers as may appear to be necessary or desirable for enabling the court more effectively to exercise the jurisdiction conferred upon it by paragraph (2) of this article and may make provision with respect to the practice and procedure of the court while exercising that jurisdiction."

21. It is clear from the wording of paragraph (1) of article 28 and the expansive nature of what is provided in paragraphs (4) and (5) that the Constitution does not lay down any formal procedures to be followed when an applicant seeks constitutional redress and that it seeks to facilitate the exercise by the Supreme Court of its constitutional jurisdiction. Although Parliament has not made laws relating to practice and procedure in this field, paragraph (5) is unquestionably facilitative in its intention. An expansive approach to article 28 of the Constitution is also consistent with the well-established constitutional jurisprudence of the Board that provisions of the Constitution be given a liberal interpretation in order to give individuals the full measure of the rights and freedoms which the Constitution confers: *Minister of Home Affairs v Fisher* [1980] AC 319, 328-329 per Lord Wilberforce; *Seepersad v Commissioner of Prisons of Trinidad and Tobago* [2021] UKPC 13; [2021] 1 WLR 4315, para 26; *Attorney General for Bermuda v Ferguson* [2022] UKPC 5; [2022] 3 WLUK 176, para 46; *Day v Governor of the Cayman Islands* [2022] UKPC 6, paras 36-37.

22. More specifically, the Board in interpreting equivalent provisions in the Guyanese Constitution has emphasised the clear intention of the Constitution that a person who alleges that his or her fundamental rights are threatened or have been contravened should have unhindered access to the court: *Jaundoo v Attorney General of Guyana* [1971] AC 972, 982-983 per Lord Diplock. In so holding the Board

quoted, at 983, with approval from the judgment of Warrington J in *In re Meister, Lucius and Brüning Ltd* (1914) 31 TLR 28, 29 in which he stated:

> "where the Act" (sc Constitution) "merely provides for an application and does not say in what form that application is to be made, as a matter of procedure it may be made in any way in which the court can be approached."

Lord Diplock recognised one qualification to that statement, which is relevant in this case when the Board turns to consider the challenge to the fairness of the procedure which Hilton J adopted. Lord Diplock stated (p 983):

> "There is only one qualification needed to this statement. It is implicit in the word 'redress'. The procedure adopted must be such as will give notice of the application to the person or the legislative or executive authority against whom redress is sought and afford to him or it an opportunity of putting the case why the redress should not be granted."

He added that did not prevent the court from making conservatory orders ex parte and before notice was given if the urgency of the case so required.

23. There is also authority from the local Bahamian courts which upholds the use of an oral motion or informal means to invoke the Supreme Court's jurisdiction under article 28 of the Constitution: *R v Moxey* No 215/9/95, para 2 per Sawyer CJ; *Bain v Attorney General* [2013] 1 BHS J No 220, paras 14-15 per Isaacs Sr J.

24. In the face of this authority, the Board would be surprised if the judges of the Court of Appeal in their judgments were holding that as a general rule a constitutional challenge could not be made in an action for habeas corpus and that separate legal proceedings were required. Barnett JA's statements at paras 53 and 54 of his judgment, which the Board has quoted in para 16 above, are certainly capable of bearing that meaning. Mr Poole, however, argues that that is not what the Court of Appeal was saying: para 19 above. It is not necessary in this case for the Board to analyse in any detail the judgments of the Court of Appeal. It is sufficient to state that if the judgments are correctly interpreted as saying that such a separate action is needed as a general rule and that the evidence contained in Clotilde's affidavit and in the Return was not available for consideration in the constitutional challenge, those conclusions would be in error.

25. In the Board's view, the real dispute on this appeal is whether or not Hilton J dealt with the appellant's last-minute application for constitutional redress in a way which was procedurally unfair to the respondents. To resolve this dispute it is necessary to examine more closely the way in which the application for constitutional redress was made. The appellant's legal team in their notice of motion dated 19 December 2017, which sought a finding of contempt against the respondents as well as constitutional redress, challenged the respondents' Return in the habeas corpus application because it did not establish that the person referred to in the Return was in fact the appellant (paras 6 and 13). The starting position on behalf of the appellant therefore was that there was uncertainty as to whether the appellant was the person who had been removed from The Bahamas.

26. At the hearing on 19 December 2017 when the appellant's legal team raised the motion for constitutional redress, Mr Francis for the respondents informed the court that he wished to take preliminary points which might determine its outcome. He stated that he was in court in response to the writ of habeas corpus and that, if the court determined the sufficiency of the Return, a supplemental affidavit "would become a point". In addressing the court on behalf of the appellant Mr Smith appeared to suggest that the respondents be given 21 days to come back to court to seek to persuade the court that his client, Jean-Rony Jean Charles, was the same person as the Jean Charles with a different birth date whom they had repatriated to Haiti and to persuade the court that they did not have sufficient control over that person to bring him back. In support of this argument he referred to, among other authorities, *Rahmatullah* v *Secretary of State for Defence* [2012] UKSC 48; [2013] 1 AC 614. In the course of his submission he referred to the person being in unlawful detention as being "Mr Jean-Rony Jean Charles or this man Jean Charles". In reply Mr Francis opened by expressing the respondents' uncertainty as to whether the appellant was the Jean Charles who had been repatriated to Haiti as well as making technical arguments about Clotilde's affidavit. He also argued that because the person detained had been repatriated to Haiti, the appellant's application for habeas corpus must fail. He submitted that the application for constitutional redress ought not to have been made at this stage because there were alternative remedies in the form of an action for false imprisonment. He invited the court to dismiss the application. In his response submissions Mr Smith invited the court to rule that the arrest and detention of the appellant was unlawful. Turning to the writ of habeas corpus he informed the court that he did not seek a finding of contempt and the committal of the respondents but he wanted the court's order for the production of the appellant to be respected. In this regard he invited the court to adjourn the hearing to allow the respondents to produce relevant evidence, stating:

> "And we say the way the court can do that is to say to the respondents, listen by your own evidence there is

> confusion of who this person is. We are going to adjourn and I am going to give you an opportunity to satisfy me as we set out in our motion, what the facts really are."

27. Mr Smith submitted that the respondents should produce evidence of the repatriation of Mr Jean-Rony or Mr Jean Charles. Mr Smith then suggested that he was in fact seeking a finding of contempt where the respondents asserted that there was confusion as to who the removed person was. He submitted that the Return was not sufficient; the respondents must bring evidence to the court as to what the true factual position was. He argued that the alternative remedy for the tort of false imprisonment was not a sufficient remedy but that constitutional redress was required. In concluding his submission Mr Smith stated:

> "Your Lordship there is an order which they must obey and we think, my Lord, without dramatising, my Lord, we have provided a structure under the motion for the court to deal with this in a deliberate fashion, which balances the justice to the respondent[s] and the justice to the applicant, so the court can eventually determine the rights between the parties, but with the state of current play it cannot, my Lord. Thank you."

28. Faced with oral submissions from both parties which disclosed some uncertainty as to their position, the judge stated that he would not decide the matter until he had a transcript. Having read the uncorrected transcript, the Board observes that (i) Mr Smith appears to have invited the judge not to determine the case on the basis of the evidence lodged but to give the respondents the opportunity to clarify the position by leading evidence, and (ii) the respondents did not request an adjournment to produce such evidence, perhaps in reliance on Mr Smith's suggestion that the judge should order an adjournment, but relied on their argument of an alternative remedy.

29. It is clear from Mr Smith's later submissions at a further hearing on 26 January 2018, in which several cases were discussed, that he had not envisaged that the court would determine the identity of the person who had been arrested, detained and removed without the adducing of further evidence. He stated that there had been a dispute in the case of Jean-Rony Jean Charles as to who had been removed from The Bahamas and that he had indicated to his opponent that he intended to seek the leave of the court to file additional evidence on that matter. Hilton J's response was that he was "not going to comment much about what may or may not be", stating "I do not wish to get into that issue at all."

30. In his judgment of the same date (para 5) Hilton J recorded that before the hearing the court was uncertain both as to the correct name of the appellant and as to whether Jean-Rony Jean Charles was the same person as Jean Charles. In the absence of the person who had been flown to Haiti on 27 November 2017 there could be no conclusive answer. He stated that he would proceed by using as the applicant's name "Jean-Rony Jean Charles aka Jean Charles". If the judge was indeed uncertain as to whether Jean-Rony Jean Charles had been removed to Haiti, there is an obvious flaw in this approach of using both names as it involved the conclusion that the appellant was the person who had been removed to Haiti. As the appellant's counsel conceded before the Court of Appeal, there was a live issue before Hilton J as to whether the person who had been removed to Haiti was the appellant and that issue remained unresolved. Notwithstanding the existence of that issue and the suggestion to the judge by the appellant's counsel that evidence be led on another occasion, the judge determined the application for constitutional redress. In so doing, the judge looked to Clotilde's affidavit and the Return as the relevant evidence, disregarding the suggestion by Mr Smith at the end of his submission that there be an adjournment to allow the disputed facts to be resolved by the production of evidence.

31. In those circumstances the Board agrees with the Court of Appeal that there has been procedural unfairness toward the respondents. Being aware of the suggestion on behalf of the appellant of an adjournment, the respondents were entitled to think that, if their preliminary objection that there was an alternative remedy to the constitutional challenge were rejected, there would be an opportunity to conduct investigations and lead further evidence in response to the constitutional challenge. The Board does not accept that it was incumbent on the respondents to apply for an adjournment and that by not doing so they have waived any procedural objections.

32. Where there are substantial disputes as to fact it will be rare that a summary procedure is appropriate. As the Board has observed in appeals from Trinidad and Tobago, where applications for constitutional redress are brought by originating motion (viz section 14(1) of the 1976 Constitution of Trinidad and Tobago), a summary procedure is not suited for deciding substantial factual disputes except in the simplest of cases: *Jaroo v Attorney General of Trinidad and Tobago* [2002] UKPC 5; [2002] 1 AC 871, para 36 per Lord Hope; *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15; [2006] 1 AC 328, para 22 per Lord Nicholls. As Lord Nicholls stated in the latter case (para 30), where there is a substantial dispute of fact and the application for constitutional redress has been commenced by summary proceedings, the appropriate course may be to seek a direction from the court that the constitutional proceedings continue as though begun by writ and appropriate directions as to pleadings, discovery etc.

33. Looking at matters as they stood when Hilton J heard the application for constitutional redress, the Board is satisfied that there has been procedural unfairness in the manner in which the judge determined the application. Clotilde's affidavit and the Return were relevant and admissible evidence in both the habeas corpus application and the application for constitutional redress. But they were not uncontested and the respondents were denied the opportunity to adduce evidence. Where there were factual matters to be resolved, the appropriate course was for the judge to take up Mr Smith's suggestion at the end of his submission by exercising case management and directing that the constitutional proceedings should continue as if they had been begun by writ.

34. The respondents submit that there are many unresolved issues of fact on which they should have been given the opportunity to adduce evidence. In their written case (para 4) they list as examples the following: "(i) the appellant's correct name; (ii) the appellant's citizenship; (iii) whether the appellant has ever left The Bahamas; (iv) the circumstances of the arrest on 18 September 2017; (vi) the circumstances of detention between 18 September 2017 and 24 November 2017; and (vii) the circumstances of removal to Haiti on 24 November 2017."

35. Nonetheless, the Board questions whether there will turn out to be much substance in several of the alleged factual disputes. In relation to the dispute as to identity, several undisputed facts make it difficult to see much substance in the factual dispute. Those facts are (i) the attempts by the appellant's family to obtain his release after "Jean Charles" was detained on 18 September 2017 (paras 5 and 6 above), (ii) the statements by the respondents' officials that the appellant had been repatriated to Haiti (para 6 above), (iii) the respondents' use of a picture of the appellant on his emergency travel document (para 2 above), (iv) the respondents' pleadings (para 8 above), and (v) the successful application by the appellant's family to obtain his release from detention after the return of "Jean Charles" to The Bahamas (para 12 above). The identity of the appellant and whether it was he whom the authorities removed to Haiti are matters which the Board would expect the respondents to be able to resolve without difficulty in cooperation with the appellant and his family and in particular without needing a contested court hearing.

36. It appears to be common ground that the appellant did not apply for registration as a Bahamian citizen between his 18th and 19th birthdays as he may have been entitled to do under article 7 of the Constitution. It also does not appear to be contested that the appellant is entitled to permanent residence in The Bahamas if it is established that he was born there and has resided there all of his life or, if he has travelled outside The Bahamas, he has done so and returned with the necessary travel authorisations. The respondents wish to investigate whether the appellant may have travelled outside The Bahamas without authorisation and may

have returned illegally as a possible justification of the arrest, detention and removal to Haiti. Mr Poole on being questioned by the Board accepted that this was a speculation. He did not assert that the respondents had any evidence to suggest that the appellant had done so. It is not clear how an investigation into whether the appellant's mother had obtained travel documents for her family, including the appellant, will serve to show on the balance of probabilities that on some occasion the appellant travelled out of and returned to The Bahamas illegally. In any event, it is not clear how such an investigation will assist the respondents in asserting the legality of the arrest, detention and removal of the appellant unless it is demonstrated among other things that the appellant had landed in The Bahamas within a relatively short time before his arrest on 18 September 2017: see sections 25 and 26(1)(a) of the Immigration Act (Ch 191).

37. In these circumstances the appropriate course of action is to remit the application for constitutional redress to the Supreme Court so that that court can direct that the constitutional proceedings continue as though begun by writ. The court can decide what ancillary directions are appropriate to enable the parties to assemble and file relevant evidence and to advance legal arguments in those proceedings. It appears to the Board that the factual issues between the parties are in short compass and ought to be capable of resolution in a timely and proportionate manner. Mr Smith informed the Board that the appellant had not been provided with the necessary papers to obtain a work permit. Given the passage of time it will be important that the court manages the case so as to prevent dilatory behaviour which might delay the resolution of this case.

5. Conclusion

38. The Board will humbly advise His Majesty that the appeal be allowed but only to the extent of remitting the application for constitutional redress to the Supreme Court to enable it to direct that the application proceeds as though begun by writ as set out in para 37 above. The Board directs that the parties lodge their submissions as to costs within 21 days after the promulgation of this advice.