IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2018 HCV 02728

THE HONOURABLE MR JUSTICE EVAN BROWN

THE HONOURABLE MS. JUSTICE NICOLE SIMMONS

THE HONOURABLE MRS JUSTICE SONIA BERTRAM LINTON

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

AND

IN THE MATTER of an Application alleging breach of constitutional rights under section 13 (3)(c), 13 (3)(g), 13 (3)(h), 13 (3)(i), 13 (3)(j)(ii), 13(3)(k), 13(3)(r),13(3)(s) and Section 17 of the Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act, 2011

AND

IN THE MATTER of an Application for constitutional redress pursuant to section 19(1) of said charter

BETWEEN	**DALE VIRGO**	**1st CLAIMANT**
AND	**ZV** **(By her mother and next friend SHERINE VIRGO)**	**2ND CLAIMANT**

AND	**BOARD OF MANAGEMENT OF KENSINGTON PRIMARY SCHOOL**	**1ST DEFENDANT**
AND	**MINISTER OF EDUCATION**	**2nd DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**3RD DEFENDANT**
AND	**OFFICE OF THE CHILDREN'S ADVOCATE**	**INTERVENER**

IN OPEN COURT

Mr Isat Buchanan and Mr Mikhail Williams for the claimants

Mrs Carla Thomas instructed by the Director of State Proceedings for the 1st, 2nd and 3rd Defendants

Ms Shamsi Green instructed by the Office of the Children's Advocate for the Intervener

September 23, 24, 25, 26, 2019 and July 31, 2020

Constitutional law – Charter of Fundamental Rights and Freedoms – Section 13 (3) (c), (g), (h), (j)(ii), (k) and (s) – Freedom of expression – Freedom of religion – Equality before the law – Right of every child to such measures of protection as are required by virtue of the status of being a minor as part of the family – Right of a child to publicly funded tuition in a public educational institution at the pre-primary and primary levels – Equitable and humane treatment – Respect for and protection of private and family life and privacy of the Home – Freedom of expression – Freedom from discrimination – Education Act and Regulations

EVAN BROWN, J

[1] I have had the benefit of reading the judgment of my sister Bertram Linton, J, I agree with her reasoning and conclusions and have nothing further to add.

SIMMONS, J

[2] I have had the opportunity of reading the judgment of my sister Bertram Linton, J and I have nothing else to add.

SONIA BERTRAM LINTON, J

BACKGROUND

[3] The 2nd Claimant ZV, is a minor, and along with her parents, wear their hair in a locked hairstyle. In or around April 2018, the parents applied for a place at the Kensington Primary School, in the parish of St. Catherine. She was accepted to the school and was to commence the new school term in September 2018. In May 2018, the 2nd Claimant's mother signed the relevant contract for her to be registered. On or about July 9, 2018 the child and her mother attended an orientation session, where the mother was presented with a school rule handbook. An issue then arose as to the locked hairstyle the child was wearing, as there was a policy of '*no braids, no beads, no locking of hair'*. The mother was told that she had to remove the locks, or cut the child's hair, failing which, there was a possibility that the offer of a place at the school could be withdrawn. During a heated discussion, the stated reason given to the mother, is that parents do not wash their dreadlocked children's hair, in a timely manner, and the hair gets "**junjo**" and this had created serious lice infection issues in the past. The parties and the court understood that to mean that the hair worn in that fashion encouraged insanitary conditions among the children and was a health hazard. The mother made enquires as to where in the school handbook there was such a rule, and she was informed that it was an unwritten policy based on the experience of the personnel at the school, which had prompted intervention by the school authorities in the past.

[4] Thereafter the mother was advised by school authorities that the child could attend the school's mandatory summer school program with her locked hairstyle, however she would not be allowed to attend school in September 2018, unless the child's hair was without the locks or cut. She was given a deadline of 28th August, 2019 for the locks to be removed, failing which there was the possibility that the offer of a space for the child could be withdrawn.

[5] The mother, it was reported, communicated that it was just a hairstyle and she did not see what the fuss was about, as it was not harming anyone and that she would discuss it with her husband. She also intimated that she thought it was an unfavourable comment on her family's sanitary practices, to which she took serious objection. No further discussion was had with the school, but it is clear that the parents objected to the demands of the school in respect of how their daughter's hair was to be kept.

[6] By way of Notice of Application for Court Orders dated and filed on the 3rd of August, 2018, the Claimants sought an order restraining the Defendants from denying the child's attendance to Kensington Primary School for the academic year commencing September 2018. On the 3rd of August, 2018 before Mrs Justice Palmer-Hamilton an order was made by consent in the following terms:

> *"The 1st and 2nd Defendants are restrained from denying ZV, daughter of the 1st and 2nd Claimants entry to and attendance at the Kensington Primary School for the academic year commencing September, 2018 until the determination of the constitutional claim brought herein."*

[7] The Claimants allege that their constitutional rights have been infringed by the imposition of the Defendants' unwritten policy of '*no braids, no beads, no locking of hair'*. They filed a Fixed Date Claim Form on the 18th of July, 2018 and an amendment on the 7th of September, 2018. In the Amended Fixed Date Claim Form the Claimant requests the following Declarations:

> *"1. A declaration that the policy to exclude individuals of school going age from being admitted to and /or attending primary and/or secondary schools in Jamaica*

on the basis of wearing their hair in dreadlocks is unconstitutional in that it breaches the following rights of the individual to which the following declarations are sought:

a. The right to freedom of expression (s 13(3)(c)); so that a declaration that the practice or policy of 1st and/or 2nd Defendant, to impose rules that prohibit the attendance at School of ZV (hereinafter referred to as ZV) for reason that she wears dreadlocks contravenes her right to freedom of expression guaranteed under the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011;

b. The right of equality before the law (s 13(3)(g); so that a declaration that the practice or policy of the 1st and/or 2nd Defendants that prohibit the attendance at School of ZV for reason that she wears dreadlocks contravenes her constitutional right to equality before the law;

c. The right of every child (i) to such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State; (ii) who is a citizen of Jamaica, to publicly funded tuition in a public educational institution at the pre-primary and primary levels 13(3)(k); so that a declaration that the practice or policy of the 1st and/or 2nd Defendants that prohibits the attendance at School of ZV for reason that she wears dreadlocks contravenes her constitutional rights and protections afforded at Section 13(k) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, as well as her statutory right to enrol in and attend School as provided for at Section 28 of the Child Care and Protection Act;

d. The right to equitable and humane treatment by any public authority in the exercise of any function 13 (3)(h), a declaration that the practice or policy of the 1st and/or 2nd Defendants that prohibit the attendance at School of ZV for reason that she wears dreadlocks contravenes her constitutional

right to equitable and humane treatment by a public authority in the exercise of their functions;

e. 13 (3)(j)(ii) respect for and protection of private and family life, and privacy of the home; or

f. A declaration that the decision of the 1st Respondent to deny ZV full enrolment at School until or unless her dreadlocks are cut breaches her right to due process as guaranteed at Section 16 of the Charter of Fundamental Rights and Freedoms;

g. Any other right entrenched in the constitution.

2. A declaration that the policy to exclude individuals who wear dreadlocks of school going age from being admitted to and/or attending primary and/or secondary schools in Jamaica unless the said dreadlocks are removed is unconstitutional in that it has breached is breaching or is likely to breach the following collective rights of the family:

a. The right to freedom of expression (s 13(3)(c));

b. The right to equality before the law (s 13(3)(g));

c. The right to freedom from discrimination on the ground of race, place of origin, social class, colour, religion or political opinions (s. 13 (3) (i) (ii));

d. The right to equitable and humane treatment by any public authority in the exercise of any function (s. 13 (3) (h));

e. The right of everyone to respect for and protection of private and family life, and privacy of the home (s. 13 (3)(j)(ii));

f. The right to due process (s. 13 (3)(r), 16);

g. The right of freedom of religion (s. 13 (3)(s)); and

h. Any other right entrenched in the constitution.

3. A direction that orders the 1st, 2nd and 3rd Defendants to eliminate all rules, practices or policies that prohibit the attendance of ZV at School for reason that she wears dreadlocks;

4. A declaration that any policy or rule made by a public official that prohibits the wearing of dreadlocks in any forum is unconstitutional and is accordingly void ab initio.

5. A declaration that pursuant to section 13(5) of the Charter of Fundamental Rights and Freedoms that private schools that make any policy or rule that prohibits the wearing of dreadlocks is unconstitutional and is accordingly void ab initio.

6. Damages

7. Costs

8. Such further and other relief as this Honourable Court deems fit."

[8] Counsel also indicated during his oral submissions that the orders requested in the Fixed Date Claim Form filed on the 25th of July, 2018 by the Intervener could be used as a template for the orders requested if the Court is minded to consider those orders as opposed to the orders requested by the Claimant. The orders sought by the Intervener are as follows:

"1. A declaration that the practice or policy of the 1st and/or 2nd Defendant, to impose rules that prohibit the attendance at School of ZV for reason that she wears dreadlocks contravenes her right to freedom of expression guaranteed under the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011;

2. A declaration that the practice or policy of the 1st and/or 2nd Defendant that prohibit the attendance at school of ZV for reason that she wears

dreadlocks contravenes her constitutional right to equitable and humane treatment by a public authority in the exercise of their functions;

3. A declaration that the practice or policy of the 1st and/or 2nd Defendants that prohibits the attendance at School of ZV for reason that she wears dreadlocks contravenes her constitutional rights and protections afforded at Section 13(k) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, as well as her statutory right to enrol in and attend School as provided for at Section 28 of the Child Care and Protection Act;

4.A declaration that the decision of the 1st Respondent to deny ZV full enrolment at School until or unless her dreadlocks are cut breaches her right to due process as guaranteed at Section 16 (1) of the Charter of Fundamental Rights and Freedoms;

5. A direction that orders the 1st, 2nd and 3rd Respondents to eliminate all rules, practices or policies that prohibit the attendance of ZV at School for reason that she wears dreadlocks;

6. Compensation for breaches of ZV's constitutional rights;

7. Such further and other reliefs as this Honourable Court deem fit.

8. Costs"

The issue of standing of Dale Virgo The 1st Claimant

[9] One of the preliminary issues that was raised by Ms Thomas was whether the Claimants, in particular the 1st Claimant, had standing to bring the claim or entitlement to any of the reliefs being sought. On this issue, I have adopted the reasoning of the court in the case of **Banton and others v Alcoa Minerals** (1971) 17 WIR. Parnell J, which position was also examined and approved **in Maurice Tomlinson v Television Jamaica Ltd**. **and others** (2013) JMFC FULL, 5 on the issue of standing:

Before an aggrieved person is likely to succeed with his claim before the Constitutional Court, he should be able to show:

(1) that he has a justiciable complaint; that is to say, that a right personal to him and guaranteed under Cap III of the Constitution has been or is likely to be contravened

AND;

(5) that the controversy or dispute which has prompted the proceedings is real and that what is sought is redress for the contravention of guaranteed right and not merely seeking the advisory opinion of the court on some controversial, arid, or spent dispute

[10] I agree with Ms Thomas that the 1st Claimant, Dale Virgo, has been joined in the claim despite there being no complaint of any breach of his personal constitutional rights by any of the Defendants. The policy in question only relates to students of the 1st Defendant and the 1st Claimant is not one. Though the right to respect for and protection of private family life was pleaded, the 1st Claimant has not shown that he has a 'justiciable complaint' to ground his claim and prove to this court that he is entitled to any of the reliefs being sought.

[11] On the facts, the 1st Claimant has not shown that he has been personally affected by the policy of the 1st Defendant. His Attorney argued that the breach is in relation to the Claimant's child's rights. His assertion that his younger, baby child is likely to be affected, also does not rise to the level required, as it suggests that the court should decide on an issue that has not yet arisen and may not even arise. He says that when the evidence is lead, his standing would be better understood,

[12] The court found that the issue of standing was indeed an issue to be decided at the start, and that the 1st Claimant did not have "locus standi" to bring the claim; as such he was removed as a Claimant.

[13] Mr Buchanan later sought leave to appeal this order. He says that the issue of standing would be better ventilated if the evidence is lead in the matter. He relied on the decision in **Julian Robinson v Attorney General** [2019] JMFC Full 4**,** claiming that the 1st Claimant's right to private family life, has been breached or is likely to be breached, by the Defendants' seeking to bar his child from attending the school with her locks. He submitted that the 1st Claimant has standing from the very fact that he has stated that his rights have been breached and the fact that the 1st Claimant has been denied his African Jamaican culture, both of which are a breach of section 19 of the Constitution, and as such he is rightly before the court.

[14] Ms Thomas challenged Mr Buchanan's submissions arguing that the issue of standing should be considered a preliminary issue. She submitted that the authority of **Julian Robinson** does not apply in this instance, in particular the section of Palmer-Hamilton, J's judgment on which he has grounded his submissions, as the judge was addressing the matter of severance.

[15] Ms Thomas submitted that there are a number of authorities that state that standing is a preliminary issue. She relied on the case of **Maurice Thomlinson** dicta of Paulette Williams J, where she posits:

> *"The 1st Defendant has raised the question as to whether the Claimant has standing or is entitled to seek the declaration at paragraph 1 of the Charter. Mrs Gibson-Henlin on their behalf has submitted that this is a starting point in relation to fundamental rights cases as the applicant for redress must allege infringement 'in relation to himself.' She notes that this is not a new position but the clause which previously was at section 25 (1) of the constitution is now to be found at section 19 (1). She describes it as a threshold question.*

[16] Ms Thomas submitted in accordance with the authority cited, that any alleged infringement of a right must be of a breach of the Claimant's rights. The Claimant should not be acting as proxy for someone else. It also established that the question of whether

the Claimant has standing should be dealt with first. It would be a waste of the court's time to go through a matter and then later determine whether the Claimant has standing.

[17] She says that the test for leave to appeal found in Rule 1.89 of the Court of Appeal Rules is to be applied. The rule requires that permission to appeal should only be given if the court considers that the appeal would have a reasonable chance of success. The Claimant has to prove that the court erred in law, which, counsel submits the 1st Claimant has failed to do. Accordingly, the application for leave must be denied.

[18] The court considered the submissions of both counsel, applied Rule 1.89 of the Court of Appeal Rules and ordered that leave to Appeal the issue of 'locus standi'of the 1st Claimant is refused.

The issue of standing of ZV

[19] Another preliminary issue raised by Ms Thomas is whether the 2nd Claimant has sufficient locus standi to bring this claim. Ms Thomas has submitted that the facts on which the 2nd Claimant's case rests are not sufficient to prove that her fundamental rights have been, is being or is likely to be infringed as required by section 19 (1) of the Constitution. Further counsel argued that like the 1st Claimant, the 2nd Claimant has not fulfilled the requirements to succeed in a constitutional claim as laid out in the **Maurice Tomlinson case**.

[20] Counsel relied on the first and second requirements of the test in **Maurice Tomlinson**. In relation to these, she said that no charter right of the 2nd Claimant had been, is being or is likely to be breached and as such she does not have a justiciable complaint. She argued that the 2nd Claimant has been a student at the school since July 2018. Her education was not actually disrupted and she was never actually prevented from attending school, due to her locked hair, despite the suggestion of the possibility made by one of the school functionaries, who was never identified. She contrasts this with the cases of **Re Chikweche** [1995] 4 SA 284 ZC and **Dzvova v Minister of Education Sports and Culture and Others** (2007) AHRLR 189 (ZwSC 2007)**,** where the parties seeking constitutional redress were in fact barred from exercising their rights. In

the case of **Re Chikweche,** a Rastafarian lawyer was denied admission as a practitioner. On the day of his application the presiding Judge considered him to be “unkempt’ and not properly ‘dressed’, referring to his hair which he wore in dreadlocks. The judge declined to permit him to take the oath of loyalty. He challenged the judge’s refusal by seeking a referral of the matter by the Supreme Court, expressing that the wearing of dreadlocks was an expression of his religious and philosophical beliefs. The finding of the learned Judge that the Applicant was not a fit and proper person was determined to be factually incorrect.

[21] In **Dzvova**, the applicant who is the father of the child, commenced a suit against his son’s Headmaster, Primary School and the Minister of Education, Sports and Culture because the school had removed his son from his classes because he wore his hair in dreadlocks. In 2005, the child matriculated from his pre-school to its connected primary school in accordance with the new policy of the Ministry. The applicant had never cut his child’s hair and allowed his hair to grow and naturally lock in the dreadlocked style which was a feature of his Rastafarian beliefs. The child entered and was attending the school initially without issue.

[22] In January 2006 the father was called by the teacher-in-charge to discuss the state of his child’s hair and was asked to provide a letter to explain the reason for its state. He complied and presented a letter from his church. During this time the child was being detained and was not allowed to attend his classes with the other children. The School-Head later sent a letter to the child’s father informing him that his child’s hair did not comply with one of the regulations of the school, which required children to have hair that was short and well combed regardless of sex, race, or religion. The father had further discussions with the school-head, the teacher-in-charge and others, however, the matter was not resolved and as such he sought a remedy from the court. The high court ordered that the school allow the child to attend until the determination of the matter. Upon the determination of the matter the court found that the school, in barring the child from attending due to his expression of his Rastafarian beliefs in wearing dreadlocks, contravened sections 19 and 23 of the Zimbabwe Constitution.

[23] Ms Thomas, makes this comparison to show that in the abovementioned cases all the applicants were in fact barred from engaging in activities in which they had been participating. She contended that the situation in our case is not supported by similar facts as the 2nd Claimant was not prevented from exercising any of her fundamental rights and is currently being educated at Kensington Primary School. Accordingly, there had been no infringement of her rights.

[24] Ms Thomas also argued that another requirement of the test has not been met, as the controversy or dispute in this case has been spent. This is because the 2nd Claimant being prevented from attending school by virtue of her locks would no longer be an issue as she would fall within the religious exception to the rule, once it was disclosed. She submitted that the claim should be dismissed on the basis that it failed to meet the fifth criteria as laid down in the **Maurice Tomlinson** case.

[25] Mr Buchanan submitted that the 2nd Claimant's entry into school for the new term in September, and long term attendance at the school had been threatened by the principal and other representatives of the school because the 2nd Claimant wears her hair in a locked hairstyle and that this was reason enough to validate her standing to bring the action,

[26] I cannot agree with Ms Thomas' arguments on the issue of standing of the 2nd Claimant. From the facts, it is fair to say that the 2nd Claimant has made allegations personal to her against the Defendants, that her right to education, freedom of expression and religion among others have been breached. She is alleging that the breaches occurred when her mother was informed that she would be prevented from attending the school if her locks were not removed. She is alleging that the breach was in relation to her constitutional rights; and she is not acting as proxy for anyone.

[27] Furthermore, I find her complaint to be justiciable as it relates to her right to access education, freedom of expression and freedom of religion. Further she is seeking declarations to protect her perceived fundamental rights against a state entity which, is usually only litigated in the constitutional court. Lastly, the controversy or dispute that has

prompted this issue is still live. Currently, the 2nd Claimant remains a student of the school and is attending without issue due to an order of the court allowing her attendance until this claim has been resolved. It is my view that if this matter is not properly ventilated that the 2nd Claimant may find herself in the same position, that she was at the genesis of this matter. I therefore find that the 2nd Claimant has sufficient standing to bring this claim.

CLAIMANT'S SUBMISSIONS

[28] It was submitted that the Defendants have violated, is violating or is likely to violate the rights of the 2nd Claimant and her family, guaranteed under section 13 (3) of the Constitution. In addressing this particular section of the Charter, He has adopted the position in the **Julian Robinson case,** which Counsel Mr Buchanan says, established that when seeking constitutional redress, the Claimant need only establish a "prima facie" invasion of the alleged right or rights.

[29] He adopts the test though, with some slight modifications when considering the matter of infringement of rights. These include:

> a. Where laws are passed by parliament, there is a presumption of constitutionality;
>
> b. The onus is on the Claimant to rebut the presumption of constitutionality;
>
> c. Once the presumption is successfully rebutted the onus is on the state to demonstrate that the infringement is demonstrably justified in a free and democratic society having regard to:
>
> > i. The proportionality of the objective of the abrogation to its desired result; and
> >
> > ii. The extent to which safeguards are in place to mitigate or limit greater right infringements.

[30] He argued that the policy to exclude students from attending educational institutions because of their dreadlocked hair breaches section 13(3)(c) of the Charter which provides for the right to freedom of expression and that the right to freedom of expression encompasses one's hair style, which was violated when the school, an agent of the state, imposed unreasonable and unjustifiable restrictions on dreadlocked hair in its school. Further that the school rule and the minister's policy guidelines violate ZV's right to express herself through her hair style. In the absence of any justification for the restriction by the rule, the limit on the right to freedom of expression is unjustified and unconstitutional.

[31] He compared this position with the position in the United States of America where a broader interpretation of this right is adopted, as in the case of **Tinker v Des Moines Independent Community School District** 393 US 503 (1968) where the petitioners, three public school pupils in Des Moines, Iowa, were suspended from school for wearing black armbands to protest the Government's policy in Vietnam. The US Supreme Court held that their conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth. Moreover, since they were not disruptive, and did not impinge upon the rights of others, there is no justification for the infringement of the petitioners' constitutional rights.

[32] Counsel also relied on the case of **McEwan et al v Attorney General of Guyana** [2018] CCJ 30 where Saunders PCCJ addressed the right to freedom of expression as guaranteed in Article 146 of the Constitution of Guyana and concluded that:

> "*It is essential to human progress that contrary ideas and opinions peacefully contend. Tolerance, an appreciation of difference, must be cultivated, not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed…*"

[33] Mr. Buchanan argued that the right to freedom of expression is invoked by the way in which a person wears their hair. It is submitted that it is immediately identifiable that a person is Rastafarian by their grooming practices, in particular the wearing of locks,

and relied on the case of **McEwan and Others v The Attorney General of Guyana** [2018] CCJ, 30 where the court at paragraph 76 found that:

> "*A person's choice of attire is inextricably bound up with the expression of his or her gender identity, autonomy and individual liberty. How individuals choose to dress and present themselves is integral to their right to freedom of expression. This choice, in our view, is an expressive statement protected under the right to freedom of expression."*

[34] Counsel emphasized that the clear evidence is that the 2nd Claimant's family express themselves by wearing locks and their entire family unit subscribed to that form of expression. Therefore, he invited the court to consider the harm that would result if the child had to choose between her locks and her education.

[35] In relation to the right to equality before the law section 13 (3) (g) of the Charter, he submitted that the section gives a guarantee of substantive equality, which does not require evidence of a comparator who is treated differently. He went on to say that its protection is open-ended and employs the use of a very loaded term, that of 'equality before the law'. Here he relies on the case of **G v The Head and Governor of St. Gregory's Catholic Science College** [2011] EWHC 1452 (Admin) where the court found that the school rules preventing 'G' from wearing cornrows to school, was indirect discrimination on the basis of ethnicity, and signalling the importance of race equality and the absence of a comparator in establishing a complaint on equality grounds. He also cited the Canadian authority of **Law Society of British Columbia v Andrews** [1989] 1 S.C.R 143 at 15 and case of **Law v Canada** [1999] 1 RSC 497 in support of this point.

[36] As it relates to the right to access to education section 13 (k) (i) and (ii), it was submitted that this policy to exclude students from attending educational institutions because of their locks breaches the Charter. This is on the grounds that the policy denies the individual access to education and disrupts family life which is not in keeping with the 'best interest of the child's standard. It is also inconsistent with the concept of inclusive education and access to education is grounded on inclusive education. Inclusion is

understood in the context of section 13(3) (k) as the right of each child to publicly funded education at the pre-primary and primary level.

[37] Once a student is admitted into a school, that student is then governed by section 29 (1) of the Education Regulations. The regulation provides the principal with power to suspend a student, and the Board of the School to add time to the suspension or expel the student. It deals specifically with discipline and not the admission to the institution. Similarly, under section 31 of the regulations a child shall be excluded from attending a public school during any period they are known to be suffering from a communicable disease or infestation or during the period of pregnancy. Neither situation applied to ZV.

[38] On the right to equitable and humane treatment provided for in section 13(3) (h) of the Charter, he says that equity ought to be the same as fairness in every situation. The extent to which the school allows students to keep their hair at any length and in any style, provided that the rule "*no braids, no beads and no locking of hair*" is observed, ZV has been treated less favourably by the school when she was told by school officials that her acceptance was in effect conditional on her parents removing her dreadlocks before the start of the school year. This he said, was not demonstrably justified in a democratic society.

[39] In relation to the right to freedom of conscience and religion provided for under Sec. 13 (3) (b) (i) (ii), (s) and section 17 of the Constitution, counsel sought to define the freedom of religion as expressed in the Canadian case of **R v Big M Drug Mart Limited** [1985] I SCR 295

> *"the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal."*

[40] And further:

> *"Every individual (is) free to hold whatever religious beliefs his or her conscience dictates provided, inter alia, only that such manifestations do*

not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own."

[41] He also relied heavily on the case of "**In Re Chikweche**" 1995 (4) SA 284 (ZC), a case from the Supreme Court of Zimbabwe, which suggested that when "assessing the Claimants assertion, that their Rights need not be any concern with the validity or attraction of the Rastafarian faith or beliefs; only with their sincerity as in the instant case where the Claimants have adopted the practices by taking the Nazarene vow and incorporating the symbolism of growing dreadlocks within their family life".

[42] Counsel says that in **Re Chikweche**, it was held that the reference in s 19 (1) to freedom of conscience in the Constitution of Zimbabwe is intended to encompass and protect systems of belief which are not centred on a deity or religiously motivated, but are founded on personal morality. Other cases cited on this point were, the Canadian case of **Morgentaler and Others v R** [1988] 1 SCR 30, and **Dzvova v Minister of Education Sports and Culture and Other** (91/06) (91/06)) [2007] ZWSC (09 October 2007).

[43] It was argued that the court ought to adopt the approach taken by the Court in **Re Chikweche** and that sections 13 (3) (b), (i) and (ii), (s) and 17 extends protection to genuinely held religious beliefs and those beliefs which are sincere and based on personal morality. He also argued that section 13 (3) (b) specifically protects conscientiously held beliefs whether it is grounded in religion or secular morality. He says that in section 13 (3) (b), freedom of conscience, was intended to encompass and protect systems of belief which were not centred on a deity or were not religiously motivated and it is on this basis that the Defendants have violated this right.

[44] He says the 1st Defendant anchored its authority to make rules, by erroneously relying on section 29 of the Educations Regulations, which is clearly used as the preamble for the rules sections of the school manual. Whilst the Education Act has conferred power to the Minister of Education to create policy and regulations regarding discipline in schools and other related matters, the Minister is given general powers by the Education Act designed to facilitate the object and purpose of the Act. There is nothing in the Education

Act or Regulations which confer similar powers on the principal of a school to make similar rules or regulations. Furthermore, section 29 of the Education Regulations deals specifically with student behaviour and section 30 gives a principal limited power to discipline a student who is found to be in behavioural breach of the school rules.

[45] Counsel states that at no time was the principal of the school ever appointed to the office held by the Minister nor were the powers of the Minister delegated to him. Counsel relied on the case of **Dzvova** where the Supreme Court noted that there is no suggestion by the school, nor can it be argued that keeping dreadlocks is an act of ill-discipline or misconduct. Rather, it concluded that dreadlocks are the manifestation of a religious belief and not related to his conduct at the school.

[46] He made it clear that the banning of dreadlocks is not demonstrably justified in a free and democratic society. This argument was on the basis that less restrictive measures were available to correct the mischief that the rule was trying to address. He went further to state that this is a breach of ZV's constitutional rights. There was no evidence presented to the court that can conclude that ZV's hair has not met the hygiene standard which is the object and purpose that the school's rule relating to hair style was trying to achieve.

DEFENDANT'S SUBMISSIONS

[47] Ms. Thomas, for the Defendants submitted that the constitutional rights of the 2nd Claimant, ZV, were not breached, and so the declarations sought should be refused. She also submitted, in the alternative, that if the court finds that there has been a breach of the 2nd Claimant's rights, then the breach is demonstrably justified in a free and democratic society.

[48] In her submissions on the 2nd Claimant's assertion that her right to freedom of expression has been breached, she relied on the dicta of Sykes J (as he then was) in the case of **Maurice Tomlinson v Television Jamaica Ltd., CVM Television Ltd. And Public Broadcasting Corporation of Jamaica** [2013] JMFC Full 5. Here it was said that the right to freedom of expression is not limited to speech, but can include the wearing of

a particular hairstyle to express a person's thoughts and ideas. She however, contends that a person can be wearing a particular hairstyle without the intent to convey any particular thought or idea. So that the prohibition of a particular hairstyle by itself is not sufficient to prove that the right to freedom of expression has been breached.

[49] She submitted that for the 2nd Claimant to prove an infringement of the right, she must show that she intended to express a particular belief or idea with the wearing of the hairstyle, and that its prohibition suppressed it. She who asserts that her freedom of expression is being infringed, must identify the idea they had attempted to express. In support of this point counsel relied on the European Court of Human Rights ("the ECHR") case of **Mahmut TIG v Turkey** (No 8165/03) (24 May 2005).

[50] The 2nd Claimant or her parents had not presented any indication or evidence to establish that she wore the hairstyle as an expression of her individual belief or ideas in the Nazarite vow or Rastafarianism. Counsel also argued that the evidence of the 2nd Claimant's mother about her and her husband's belief in the Nazarite Vow and their view that their children are born 'Nazarenes' is not sufficient. This argument was on the ground that they failed to establish that the 2nd Claimant made a conscious decision to subscribe to the views and beliefs of her parents or that her hairstyle is a manifestation of that belief. According to the evidence of Mrs Virgo, the 2nd Claimant as a child born into a Nazarite household did not have a choice in this belief system. She contends there is no evidence to indicate that the 2nd Claimant would have addressed her mind to a particular idea in wearing her hair that way. Accordingly, it is on this basis, counsel contends, that the 2nd Claimant's right to freedom of expression has not been infringed by the Defendants.

[51] Ms Thomas said that the 2nd Claimant's right to equality before the law, has not been infringed, and the relief sought in declaration of the claim, should not be granted. She relied on the case of **Central Broadcasting Services Limited and Another v Attorney General** [2006] UKPC 35, and the case of **Rural Transit Association Ltd. v Jamaica Urban Transit Company and others** [2016] JMFC FULL 04, to argue that this right could not be engaged in the instant case, because what is being challenged by the 2nd Claimant is not a law but a rule or policy. She contends that the court in the case of

Rural Transit interpreted section 13 (3) (g) of the Constitution to be referring to legislation and the common law. According to counsel, for the right to be engaged the complaint must be related to a law or is the source of the infringement. The fact that the alleged rule is a policy of the school and not a law, means that there was no infringement of the 2nd Claimant's right to equality before the law.

[52] Ms Thomas also submits that the 2nd Claimant's right to such measures of protection as are required by virtue of the status of being a minor, or as part of the family, society and the State; (i) who is a citizen of Jamaica, to publicly funded tuition in a public education institution at the pre-primary and primary levels, encapsulated in section 13 (3) (k) of the Constitution, has not been infringed by the Defendants. She relied on the Inter-American Commission on Human Rights case of **Ms X v Argentina** Case 10.506, Report No 38/96 (October 15, 1996) to argue that the right is aimed at protecting children from circumstances in which they are vulnerable because of their status of being a minor and unable to give consent.

[53] So, that the policy could not be viewed as violating the right to measures of protection as adherence to this policy would not cause physical harm to the child and could not be done without the parent's knowledge and consent.

[54] In relation to the right of a child to have access to publicly funded tuition in a public education institution, counsel says that the 2nd Defendant's policy on the locking of hair does not deny the 2nd Claimant's right to publicly funded education at a primary school. She relied on the European Court of Human Rights case of **Ali v United Kingdom** [2011] All ER (D) 96, to support her argument. In this case, in relation to a similar provision , the court found that they may well be valid reasons for exclusion from access to education, in relation to a particular institution, but so long as alternative measures of continuing the child's education were adopted, there were instances when this may be appropriate .

[55] She also challenged the assertion that the Defendants contravened section 28 of the Child Care and Protection Act in that the 1st Defendant's policy has prevented the 2nd Claimant from exercising her right to education. She contends that as the matter before

the court is for constitutional redress, the court should only consider issues relating to the breach of constitutional rights, arguing that since the issues are concerned with an alleged breach of a constitutional right, the question of whether the Act was contravened is not to be entertained.

[56] Moreover, she argues that even if this could be raised in these proceedings, there was no breach of section 28 of the Act as this section is restricted to a person who has custody, care and control of a child of a certain age. The Act places the obligation on the person in this position to ensure that the child is enrolled in and attending school. She concludes that the board of education, by extension the school, does not fall within the purview of the Act.

[57] On the issue of a breach of the right to equitable and humane treatment by any public authority in the exercise of any function, she contends that the 2nd Claimant has failed to adduce sufficient evidence to show that she was treated differently from any other child in similar circumstances. Here she relied on the Jamaican case of **Sean Harvey v Board of Management of Moneague College, Ministry of Education Youth and Culture and Attorney General of Jamaica** [2018] JMSC Full 3, where the majority of the court concluded that the interpretation in the Trinidadian case of **Bhagwadeen v Attorney General of Trinidad and Tobago** (2004) 64 WIR 402, of a similarly constructed section to our Charter, applied.

[58] Importantly she says that the Claimant has failed to identify a policy, in existence, formulated by the Minister of Education that prohibits the wearing of locks in school.

[59] On the issue of an alleged breach of the 2nd Claimant's right to respect for and protection of private and family life and privacy of the home, Ms Thomas says that if the court finds that this right has been infringed, the infringement was reasonably justified in a free and democratic society. Reliance was placed on the rule laid down in **R v Oakes** [1987] LRC (Const) 477, which was adopted and applied in the Jamaican case of **Jamaica Bar Association v the Attorney General and General Legal Counsel** [2017] JMFC Full 02. She says that the 1st Defendant implemented the rule against the wearing

of locks to maintain an acceptable level of hygiene in the school and to maintain discipline and order to ensure effective teaching and learning time in the school. Essentially, it is argued that society prioritizes the health and hygiene of its people. It is most important when combined with the need for children attending school to acquire a sufficient education to function property in society. She submits that the objectives behind the rule implemented by the 1st Defendant are sufficiently important and as such are reasonably justifiable in a free and democratic society.

[60] The rule was not arbitrary and targeted hairstyles that are known to be sources of bad hygiene and disorder in classes which, reduced the effectiveness of the teaching and learning experience of the students. She says that this rule was, in the school's view, the best method they perceived to address the issue as there is evidence to prove that the other methods implemented by the 1st Defendant did not have any long term effect. Ultimately, it is argued that the acquisition of an education is of such paramount societal concern, that any infringement or interference of a right in the pursuit of ensuring that there is a maximization of the opportunity to acquire an education, must be regarded as demonstrably justified in a free and democratic society.

[61] On the issue of the alleged breach of the right to due process, she contends that the right is generally focused on the right of an individual in criminal proceedings, and further that the 2nd Claimant has not identified the particular section that applies to this case.

[62] There is no express or implied stipulation or statement in the 1st Defendant's policy that was exclusionary, in that, it does not prevent individuals of school-going age from attending primary or secondary school on the basis of wearing their hair in locks. She contends, therefore, that the right to due process has not been engaged or infringed.

[63] Counsel had submitted that the declaration should not be granted in relation to the issue that a policy excluding individuals who wear locks from being admitted to or attending primary or secondary schools unless the locks are removed is unconstitutional and has breached, is breaching or is likely to breach the collective rights of the family.

This submission was made on the basis that the declaration should not be granted as the policy being described in the declaration does not exist. The 1st Defendant does not have a policy that applies generally to individuals attending all primary schools. In fact, there is unchallenged evidence that the 1st Defendant allows students to attend with locked hair if the hairstyle is worn as a result of religious beliefs. Counsel submits that there is evidence in the affidavit of Miss Christine Hamilton, current principal to prove that the mother of the 2nd Claimant was not told to cut the 2nd Claimant's locks.

[64] Moreover, counsel stated that there is no policy which excludes individuals from attending school unless they remove their locks and there is nothing in the guidelines implemented by the 2nd Defendant that exclude individuals from attending school unless their locks are removed.

[65] In fact, the claim has not made clear what is meant by 'collective rights', and that the Charter does not guarantee 'collective family rights'.

[66] Ms Thomas, on the issue of a direction that orders the Defendants to eliminate all the rules, practices or policies that prohibit the attendance of ZV at the school for the reason that she wears locks, submits that the 2nd Claimant is not entitled to this declaration. She contends that the 2nd Claimant has not adduced any evidence that there exists a rule, practice or policy by the 1st Defendant that prohibits the attendance of the 2nd Claimant to school on the ground that she wears locks. In relation to the 2nd Defendant, counsel reiterates that there exists no rule, practice or policy of this nature.

[67] Such a declaration would suggest that the 1st Defendant had a policy that was specifically aimed at the 2nd Claimant. Rather the policy with respect of the locking of hair, is a part of the uniform policy that applies to all the students who attend Kensington Primary School.

[68] She says that any policy or rule by a public official that prohibits the wearing of locks in any forum is unconstitutional and is accordingly void ad initio, that there is no proper basis upon which this declaration may be granted as it is outside the scope of this claim, and imprecise. The declaration seeks enforcement against all public officials but

the only public official currently before the court is the Minister of Education, who is responsible for the general management of the education system. The 2nd Claimant in her claim did not identify any decision or policy by any other public official that relates to the locking of hair.

[69] Further, no evidence has been adduced by the Claimants in relation to the policies and practices of private educational institutions and no private schools have been made a party to this claim. Ultimately, this declaration should not be granted as there is no basis for it and it is outside the scope of the claim.

[70] The orders sought by the 2nd Claimant should be refused as there has been no breach of the 2nd Claimant's rights and that even if the court finds that there had been a breach of her rights, that the breach was reasonably justified in a free and democratic society.

INTERVENER'S SUBMISSIONS

[71] Counsel, Ms Green, representing, the Office of the Children's Advocate, made submissions on the basis that the matter before the court relates to the practice of prohibiting dreadlocks in a public educational institution which is in contravention of the constitutional rights of children as well as their statutory rights under the Child Care and Protection Act. So that this matter falls within the remit of the Office of the Children's Advocate as set out in section (14) (1) of the Child Care and Protection Act. Additionally, the intervener is acting as an independent party in the proceedings separate from the Claimant's and Defendant's case. The intervener's purpose is to ensure that the best interest of the child is the paramount consideration in these proceedings.

[72] They are seeking the same reliefs as the 2nd Claimant, in that the right to freedom of expression has a broad scope and can include the attire of an individual as a way of expressing their identity and personal beliefs.

[73] She relied on the Caribbean Court of Justice case **Quincy McEwan et al v The Attorney General of Guyana** [2018] CCJ 30 (AJ) in support of this point, in particular where the court says that:

> "*A person's choice of attire is inextricably bound up with the expression of his or her gender identity, autonomy and individual liberty. How individuals choose to dress and present themselves is integral to their right to freedom of expression."*

[74] The Jamaican case of **Maurice Tomlinson v Television Jamaica and Ors** also took a similar position in its interpretation of the equivalent section in the Jamaican Charter of Rights and Freedoms. She relied on the definition articulated by Sykes J where he posited:

> *"[253] Looking now at section 13(3) (c) of the Charter which provides that all persons enjoy the right to freedom of expression it is important to note that the legislature chose the word 'expression' and not 'speech'. This is so because it was clearly appreciated that not all expression can be called speech, as in the spoken or written word. Without being exhaustive, speech includes different forms of expression such a speech, sign language, dance, drama, cartoons, poetry, and depending on the context, silence. It seems to cover just about any form of expression by which meaning can be conveyed from the mind of the communicator to the person intended to be communicated with. The words used permits of a wide meaning – expression is not limited to speech or word and there is nothing in the context which excludes gestures, miming and such like. The word 'expression' can be legitimately bear the meanings indicated."*

[75] It is counsel's contention that this definition should also be applied to include dreadlocks as a form of expression. In her submissions counsel sought to prove that the policy by the 1st Defendant, prohibiting the wearing of the dreadlock hairstyle, constituted a breach of this right.

[76] She acknowledged that a school has the right to formulate policies to maintain discipline and decorum, and contends that they must balance its power to do so with its duty to protect the fundamental rights and freedoms of their students. The question for determination by the court is how to treat a policy that may or may not infringe upon the freedoms of others. On this point counsel relied on the case of **Sehdev v Bayview Glen Junior Schools Ltd** [2013] JMFC Full 5 wherein the court considered the balance between school regulation/policy with the right of freedom of expression.

[77] Counsel uses the **Sehdev** case to support her submissions that the right of freedom of expression is grounded in religious ties. She justly acknowledges that the Claimant has not made a specific claim or submission that there was a breach of her fundamental right to freedom of religion, nor did she indicate in her claim that she wears dreadlocks as an expression of her religious convictions. Despite the lack of any evidence presented by the 2nd Claimant that there was a breach of her freedom of religion, counsel submits that, implicit in paragraph 18 of the Affidavit in Support of Fixed Date Claim Form, there exists religious underpinning regarding the wearing of locks by the 2nd Claimant and her family.

[78] Ms Green submits further that, though the religious elements were not borne out in the pleadings of the 2nd Claimant, it is evident that the 2nd Claimant and her parents identify themselves with this hairstyle from a religious context. She contends that this hairstyle is so engrained in their religious identity and belief that the denial by the school, of the wearing of the hairstyle, is tantamount to a constitutional breach. She contends that the 2nd Claimant's identity and self-awareness is intertwined with the wearing of locks, which she asserts, is to be held at a higher standard from that of just a frivolous attire or hairstyle without meaning, and that despite the lack of specific reference to the 2nd Claimant's own beliefs, it is evident that the wearing of locked hair is ingrained in the lifestyle that the 2nd Claimant and her family practice.

[79] She challenged the affidavit evidence of Christine Hamilton where Ms Hamilton expressed "…she did not indicate that she and her family wore locks for religious reasons…'', and contend that Ms Hamilton did not indicate in her evidence whether the

2nd Claimant and her family were advised that religious reasons were a ground on which the wearing of dreadlocks would be permissible. So while it is understood that the 2nd Claimant must show that her constitutional rights had been breached, however, without being advised otherwise of the existence of an exception to the rule, the 2nd Claimant would not have been prompted to state otherwise.

[80] In an attempt to ground her submissions on the approach a school is to employ to prevent a potential breach of Constitutional Rights, she relied on the case of **G (by his litigation friend) v Head Teacher and Governors of St Gregory's Catholic Science College** [2011] EWHC 1452 (Admin). She relied on the following dicta, where the court states in part at paragraph 14:

> *"1. School uniform plays a valuable role in contributing to the ethos of a school and setting an appropriate tone. Most schools in England have a school uniform or dress code, and other rules on appearance. DCSF strongly encourages schools to have a uniform as it can instil pride; support positive behaviour and discipline; encourage identity with, and support for, school ethos; ensure pupils of all races and backgrounds feel welcome; protect children from social pressures to dress in a particular way; and nurture cohesion and promote good relations between different groups of pupils. Above all, many schools believe that school uniform supports effective teaching and learning.*
>
> *2. There is no legislation that deals specifically with school uniform or other aspects of appearance such as hair colour and style, and the wearing of jewellery and make-up, and this is non-statutory guidance. It is for the governing body of a school to decide whether there should be a school uniform and other rules relating to appearance, and if so what they should be. This flows from the duties placed upon the governing body by statute to conduct the school and to ensure that school policies promote good behaviour and discipline amongst the pupil body.*

What should a school do?

4. A school should ensure that its school uniform policy is fair and reasonable. It should ensure that the uniform chosen is affordable and does not act as a barrier to parents when choosing a school. A school must have regard to its obligations under the Human Rights Act and anti-discrimination legislation. We strongly recommend that in setting its uniform/appearance policy the governing body:

• Consults widely on its proposed school uniform policy and changes to an established policy. As well as current pupils/carers, prospective pupils and parents/carers should be included in any consultation. Consultations should also include representatives of different groups in the wider community, such as community leaders representing minority ethnic and religious groups, and groups representing pupils with special educational needs or disabilities. Local authorities may have already prepared information and guidance for schools or may be able to conduct consultations on some issues on behalf of schools. An example is attached at Annex 1;

• Considers how the proposed uniform policy might affect each group represented in the school;

• Considers the concerns of any groups about the proposed policy, and whether the proposed policy amounts to an interference with the right to manifest a religion or belief, and whether it is discriminatory. The school will need to weigh up the concerns of different groups and it might not be practical to accommodate fully the concerns of all groups. For example, groups of children drawn from different parts of the same religious community may each have differing requirements, requiring several variations of school uniform if each were accommodated in full, which would not be practical."

[81] She asserts that it is evident that the school has a duty to create policy that does not amplify and promote discrimination. She argued that the school, in expressing to the Claimant's mother that the policy preventing the wearing of deadlocks exists to prevent the possibility of an outbreak of 'junju' and 'lice', is discriminatory against a class or group of people. She contends that the school did not establish a policy or rule that promoted healthy clean hair but rather a rule or policy that was based on a statement that classified a group of people to be unhygienic and dirty.

[82] Ms Green went on to say that in the socio-political environment that exists in Jamaica, the school ought to be alive to the idea of 'dreadlocks' and its religious, spiritual and cultural significance. So that the school has failed the 2nd Claimant and her parents by first, neglecting to alert them of the school rule and later not informing them of the religious exception to the rule. Counsel submits that this is a grave oversight on the part of the school principal and the school representatives, who would have met with the 2nd Claimant and her parents, all of whom, would have been wearing the hairstyle, which counsel asserts, has undeniable ties to a belief and value system that surpasses an ordinary hairstyle.

[83] As it relates to the right of a child in section 13 (3) (k) of the Charter, counsel submits that the Claimant was denied access to education based on her family values and beliefs. She contends that though the school has justified the existence of the rule by asserting that it was established for hygienic purposes, she questions how they can then justify the existence of an exception to the rule, based on the policy's primary purpose. This has lead counsel to question the existence of such an exception. Accordingly, in support of her submissions counsel relied on the case of **Ms X v Argentina**.

[84] She says the rule or policy was inequitable and discriminatory as other students who are the same age as the 2nd Claimant are experiencing a smooth admittance into Primary School, while she has to be concerned about her dreadlocks preventing her from being accepted into school.

[85] She submits that the 2nd Claimant's constitutional rights had been breached and redress is to be given.

ISSUES FOR DETERMINATION

[86] The issues for the Court's determination in this matter are:

a) Whether the stated policy of Kensington Primary school of, "No braids, no beads no locks" violated the constitutional rights of the claimant as pleaded. AND

b) Whether a decision as to a choice of personal expression, taken by a child and their family can be imposed on a school in contravention of school rule and policy.

DISCUSSION AND ANALYSIS OF ISSUES

[87] I have had a chance to examine all the authorities referred to in detail and the submissions made by the parties and will refer to them as relevant in the analysis and decision making.

[88] This is not a case of Rastafarians being prevented from having their child attend a public institution because of dreadlocks worn out of religious observance. That issue has long been settled in our school system and there are countless children throughout our schools in attendance who wear dreadlocks. It was very succinctly stated by the 2nd Claimant's attorney that the religious beliefs of the parents were never communicated to the school and the tenure of the case argued by the claimant's attorney was not one which was defending the abridging of religious freedom. In fact, the Claimant's attorney openly stated that the parents or the child did not and should not have to disclose any religious adherence, and that the child should be allowed to attend school in the way that her hair was adorned because it represented the family's decision as to their expression and freedom, to choose how to wear their hair and not necessarily in keeping with any religious belief. This in and of itself is a bold and generalised statement which if taken at face value has innumerable implications for the length and breadth of self-expression that

should be allowed in our schools. The issue of a Nazarene Vow taken by the parents and their hair as an expression of it would seem to be a belated addition to the claim.

[89] With regard to this generalised statement, the quotation at our paragraph 78(above) from **G (by his litigation friend) v Head Teacher and Governors of St Gregory's Catholic Science College** has been very instructive and enlightening and would seem to me to be quite sage.

[90] It is a settled practice and policy in all the schools throughout the island that religious diversity in terms of adornment, of the various children who attend school is accepted and accommodated including Rastafarians.

[91] This case is about a desire to have acceptance and accommodation of what is said to be a right to individual expression of a conscientiously held belief, based on a decision taken by an individual and their family, about their chosen mode of self-expression. In other words, how far should the school and/or the courts should go in endorsing this extent of freedom of expression by individual students in light of rules and regulations for uniform and adornment laid down for public schools.

The relevant provisions of the Charter of Fundamental Rights and Freedoms

[92] There are several provisions of the Charter that the 2nd Claimant alleges to have been breached by the Defendants. Sections 13 (3) (c), (g), (h), (j) (ii) and (k) are set out as follows:

> *(3) The rights and freedoms referred to in subsection (2) are as follows –*
>
> *(c) the right to freedom of expression;*
>
> *(g) the right to equality before the law;*
>
> *(h) the right to equitable and humane treatment by any public authority in the exercise of any function;*
>
> *(i) the right to freedom from discrimination on the ground of –*

(i) being male or female;

(ii) race, place of origin, social class, colour, religion or political opinions;

(j) the right of everyone to -

(ii) respect for and protection of private and family life, and privacy of the home; and

(k) the right of every child –

(i) to such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State;

(ii) who is a citizen of Jamaica, to publicly funded tuition in a public educational institution at the pre-primary and primary level.

Right to equality before the law

[93] I turn now to consider the claim that the policy of the 1st Defendant in the prohibition of the wearing of locks or locked hair, breached ZV's constitutional right to equality before the law. She is seeking a remedy in the form of a declaration that the practice of the Defendants in prohibiting her attendance at school for the reason that she wears dreadlocks contravenes her right to equality before the law.

[94] There is no dispute that the school established this policy, not as a way to maintain discipline and order in the school but as a preventative measure in the case of an outbreak of 'lice' and 'junjo'. It is clear from the evidence that the school had sanctioned this policy on the basis of its own experiences with unhygienic students in the past.

[95] In the Court of Appeal case of **Rural Transit Association Ltd v Jamaica Urban Transit Company and others**, the court considered the reasoning of the court in **Banton** and in **Maurice Tomlinson**, in particular on the issue of standing. The court concluded

that in order to determine if a Claimant's right has been breached, *"the court has to examine the nature, content and meaning of the right which has been said to be infringed."*

[96] Therefore, what does it mean to have '*equality before the law"*? In answering this question, the court in **Rural Transit** sought guidance, on the interpretation of section 13 (3) (g), from the Privy Council case of **Central Broadcasting Services Limited and Another v Attorney General** [2007] 2 LRC, where a similar provision under section 4 of the Trinidad and Tobago Constitution was being considered. McDonald, J posited:

> *[169] In Central Broadcasting Services Limited and Another v Attorney General (2007) 2 LRC, the Judicial Committee of the Privy Council offered guidance on the interpretation of the following similar provisions under Section 4 of the Trinidad and Tobago Constitution.*
>
> *"(b) the right of the individual to equality before the law and the protection of the law.....*
>
> *(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions....."*
>
> *[170] In Central Broadcasting Services Ltd. Lord Mance noted at paragraph 20:*
>
> *"The Board has, however, one observation to make on the treatment in the courts below of inequality. In both courts it was assumed that the unequal treatment which was established justified a breach both of s 4 (b) and s 4 (d) of the Constitution. The Board does not consider this to be correct. Section 4 (d) is the provision covering circumstances such as the present.* ***Section 4 (b) is, in the Board's view directed to equal protection as a matter of law in itself and its administration in the Courts"***

> *[171] I find that Section 13 (3) (g) of the Jamaica Constitution may be interpreted in the same way as Section 4(b) of the Trinidadian Constitution having regard to the similarity of the provisions.*
>
> ***(Emphasis mine)***

[97] This case illustrates that for the right under section 13 (3) (g) to be engaged the alleged breach must be a law. The Constitution defines 'law' in section 1 (1) of the Constitution, it states:

> "1 (i) 'law' includes any instrument having the force of law and any unwritten rule of law.'

[98] We can deduce from this definition that the Constitution, when referring to 'any instrument having force of law', is describing legislation and any subsidiary laws such as regulations. The Constitution does not specify what can fall within the term 'unwritten rule of law' leaving the court to make its own interpretation. In the case of **Arthur Baugh v Curtis et al** (unreported) Supreme Court, Claim No. CL B 099 of 1997, judgment delivered 6 October 2006, Sykes J considered what is included in the term 'unwritten rule of law'. He states:

> *"From these passages unwritten law must include the common law. If it were not so then what we would have had is the possibility of the common law prevailing over the constitution – a possibility inconsistent with the position that the Constitution is the supreme law of Jamaica. The effect of Lord Hope's analysis is that the authority of Nasralla has been severely weakened. What was not so vividly expressed in the majority was made plain by the concurring minority."*

[99] McDonald, J in her analysis of the right to equality before the law, having considered the content, nature and meaning of the right, determined that the right cannot include policy, even if it is a policy of a government entity as a policy does not have force of law. She posits in paragraph 188:

> *So having regard to the definition contained in Section 1(1) of the Constitution of 'law', and the manner in which the Court has interpreted that section, I find that it could not be seen as including a policy that has been made, or a directive that has been given which does not have the force of law as contemplated by these authorities. I would respectfully adopt the observation of my learned colleague Mr. Justice Frank Williams when he states that "the difficultly that the Claimant faces in light of the definition of law in Section 1 of the Constitution and the general undertaking of the scope of section 13 (3)(9)," is that the Defendants have all described the creation of the exclusive bus lane as a policy or project and there has been no instrument having the force of law put before the court or any reference made to any rule of the common law which the court might consider as the source of the constituted breaches being complained of".*

[100] Having regard to the assessment of the authorities, I am of the view that the facts of this case do not support a finding that the right to equality before the law has been engaged, let alone infringed by the Defendants. The policy in question does not meet the criteria, it not being a law.

Right of a child to such measure of protection as are required by virtue of the status of being a minor or as part of the family, society and the State

[101] Children, are one of the most vulnerable classes of citizens in our society, and so are rightly afforded specific protection under the Constitution, for safeguard from circumstances that will take advantage of their inherent vulnerability but also ensure their holistic development. The 2nd Claimant is asserting that the 1st Defendant has breached her right as a minor by enacting a policy that interferes with the protection afforded to her by her status as a minor. The question for this court is how does the policy banning the wearing of locks and other prohibited hairstyles interfere with this right?

[102] I was not able to discern from the submissions how this right has been infringed by this policy.

[103] Currently, there is no jurisprudence on this particular right in this jurisdiction as the court has never had a constitutional claim of this nature. Namely, one that identifies a possible or potential infringement of the right of a minor child with regard to school rules. The novelty of this constitutional challenge requires this court to determine the nature of the right. The best approach I feel, is to assess the language of the provision.

[104] An understanding of the nature of the right can be found in the Inter-American Commission on Human Rights case of **Ms X v Argentina**. In that case Ms X filed a complaint to the Commission on Human Rights against the Federal Government of Argentina regarding the compulsory vaginal inspections she and Y, her 13-year-old daughter, had to endure when visiting her husband, and father of her daughter, in prison. The two issues before the court were:

> *Whether the requirement that Ms X and her daughter undergo a vaginal inspection before each physical contact visit with Mr X is in compliance with the rights and guarantees present in the American Convention on Human Rights?*
>
> *Whether this requirement and the performance of the procedure prevented them from fully exercising their rights protected under the American Convention, particularly those enshrined in Article 5.*

[105] The Commission concluded that by imposing an unlawful condition for the fulfilment of Ms. X and Y's prison visits, without judicial and appropriate medical guarantees, and performing these searches and inspections under these conditions, the State of Argentina violated the rights of Ms. X and her daughter Y. In particular, as it pertains to Y, the commission found that Argentina infringed her right found in Article 19 of the Convention. The Article reads:

Every minor has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

[106] I find that section 13 (3) (k) (i) of the Charter can be interpreted in the same way as Article 19 as they are written in a similar language. The commission's interpretation of Article 19 reads:

103. The text of the American Convention recognizes that children must be the subject of special care and attention, and that the State has a duty to adopt all "measures of protection required by his condition." ***A child is especially vulnerable to violations to his or her rights because, by virtue of their very status, as children have no legal standing in most cases to make decisions concerning situations that may have grave consequences on their well-being. The state has a special duty to protect children and to ensure that, whenever state authorities take actions that may in any way affect a child, special care is taken to guarantee the child's rights and well-being.***

104. In the instant case the State of Argentina has proposed and performed on a minor, who did not have the legal capacity to consent, a potentially traumatic procedure that potentially could have violated a number of the rights guaranteed by the Convention without observing the requirements of legality, necessity, reasonableness and proportionality which are among the necessary conditions to the imposition of any restriction on the rights of the Convention. Furthermore, the state did not grant Y the minimum protection against abuse or actual physical damage that could have been offered by requiring the proper judicial authority to decide on the propriety of the procedure, and in the event the measure was deemed necessary requiring that it be performed by medical personnel. The Commission does not consider that the existing requirements described by the Chief

> *of Internal Security to protect minors--that the inspections be performed in the presence of one or both of the child's parents, and that the search be less rigorous and seek to preserve a child's sense of modesty (pudor)--accorded the petitioner adequate protection."*

[107] I would adopt this reasoning by the Inter-American Court on Human Rights. I find that there is no breach of the right of a child to such measure of protection as is required by virtue of the status of being a minor. What evidence did the 2nd Claimant adduce to indicate that this right has been infringed? The evidence presented on behalf of the 2nd Claimant is that her mother was informed of the existence of the policy, and that because of it, the mother would have to cut her daughter's hair in order for her to attend school. This is the extent of the factual evidence presented in support of the claim that her right to protection as a minor was infringed.

[108] This evidence is not sufficient in my view as it did not give any indication that she, ZV was personally affected by the position taken by the school on her locked hair. Whether she was informed of the statement made by the school's former principal, whether she had a reaction to this information, be it positive or negative, was not expressed in any of the affidavits filed on her behalf. I find it difficult to agree with the 2nd Claimant that her right as a child to protection was infringed. It is not sufficient in my view, to base my decision solely on the reaction of the mother, particularly when she had not acted upon the suggestion to cut her daughter's hair. I have to keep in mind that this case is about the right of the child and not that of the mother.

[109] It is my view that there was no justiciable physical or mental harm which would have been caused by the Defendants. The withdrawal of the space at the school never materialised. The act of removing the locks of ZV's hair could have only been carried out with the knowledge and consent of her parents.

The right to publicly funded tuition in a public educational institution at pre-primary and primary levels

[110] Mr Buchanan, has contended that the policy of the 1st Defendant has the effect of excluding students from attending an educational intuition because of their choice of hairstyle, in particular dreadlocks, which is in breach of section 13 3 (k) (ii) of the Charter. I will reiterate, that despite Mr Buchanan's submissions, the hairstyle the 2nd Claimant has is not what is widely considered in the general cultural sense in Jamaican society to be dreadlocks. As it concerns the exclusion of the 2nd Claimant for wearing her hair in locks, she relies on the affidavit of her mother, Sherine Virgo. In the affidavit, Mrs Virgo describes a conversation she had with Mrs Carlene McCalla Francis, the former principal of Kensington Primary School, where Mrs McCalla Francis indicated that ZV was not allowed to wear her hair locked and would not be permitted to attend the school unless said locks were removed.

[111] In the affidavit, Mrs Virgo states:

> "*7. On Monday the 9th of July, 2018. Orientation day the 1st Claimant and I were given the schools handbook. When we were leaving the school on the said day, Mrs Carlen McCalla Francis, who identified herself as the principal of the said school, approached the 1st Claimant and me indicating that it has been brought to her attention that ZV wears locks and that it was the school's policy that students should not wear locks.*
>
> *8. When we enquired of her for the reasons that locks were not allowed, her response was that the classroom get hots [sic] and parents do not wash their children's hair causing "junjo" and "lice". For the record, the 1st Claimant and I both wear locks and found the statement of the said principal, and the policy she is seeking to enforce as deeply offensive to our sense of self and our private lives.*

> *9.* ***What made matters worse is that the said principal in no uncertain terms indicated that unless ZV cuts her locks by the 29th day of August 2018, she will not be permitted to attend the 1st Defendant's educational institution****. The said principal did however indicate that she would permit the said minor child to attend the summer school until she cut her hair. However, I verify believe that the only reason she was permitted to attend summer school is because we had already made the requisite payments."*
>
> ***(Emphasis mine)***

[112] What is discernible from this interaction is that the claimant's mother/parents, throughout this interaction, did not inform the school that their daughter had locked hair for religious purposes, and it is evident that the hairstyle the 2nd Claimant was wearing was not easily identified as such. This view is supported by the information in the affidavit of Christine Hamilton, the current Principal. She says that during orientation the 2nd Claimant's hairstyle was identified as 'sister locks' and that the mother, Mrs. Virgo had indicated that her hair was 'just a style'.

[113] Ms Christine Hamilton in her affidavit states:

> *"During the orientation, the teachers identified the 2nd Claimant as wearing a 'sister locked' hairstyle. Mrs McCalla-Francis, the principal at the time, the guidance counsellor and I decided to discuss matter of the 2nd Claimant's hairstyle with the 2nd Claimant's mother. When the 2nd Claimant's mother was asked, she acknowledged that it was just a style. She did not indicate that she and her family wore locks for religious reasons. The school's policy on locking of the hair was explained to the 2nd Claimant's mother although it was agreed that the policy was not present in the handbook as whilst typing it had been left out and that omission had not been discovered before distribution. The 2nd Claimant's mother agreed to unlock the 2nd Claimant's hair, however she pointed out that it would be*

difficult to do same overnight, and so it could be done during the summer of August 29, 2018. She however, pointed out that before doing the unlocking of the hair, she would speak with her partner on the matter. She asked if the 2nd Claimant could be allowed to attend summer school with the hairstyle, to which we gave our agreement.

11. On July 10, 2018, the 2nd Claimant's mother returned to school and indicated that her husband was in disagreement with the decision. Mrs McCalla-Francis explained that this was a policy that had been in place for a long time and that it had to be put in place because of the incident with the lice infestation."

[114] A common thread found in the evidence of both women is that the 2nd Claimant, was being prevented from attending this particular primary school on the ground that her hairstyle does not conform to its internal guidelines for dress. Accordingly, the most important question in this regard, is whether the 2nd Claimant, in being denied attendance to this particular institution, because of her hairstyle, is a breach to her right to education as provided in section 13 (3) (k) (ii).

[115] The right to education was first referenced in the Universal Declaration of Human Rights (UDHR) of the United Nations in 1948. This right was codified in Article 26 of the UDHR which defines and describes the right to education. Article 26 reads in full:

- *Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.*

- *Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and*

friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

• *Parents have a prior right to choose the kind of education that shall be given to their children.*

[116] The first paragraph states unequivocally that everyone has a right to education, and that education at the elementary level – primary for Jamaica – is to be free and compulsory. The second paragraph evokes the aim of education, the importance of education for the healthy growth of the human mind and to strengthen the respect of human rights. The final paragraph supports parent's right to choose the kind of education that they believe is most appropriate for their child. This right underscores the importance of education as a fundamental aspect of human development as it promotes thinking, develops solidary, understanding and cooperation. With this understanding of the right, it is the logical step that children would be the first beneficiaries of it. Accordingly, the education of a child is an inalienable right.

[117] The contracting parties of the European Union, in observance of the UDHR, have codified the collective fundamental rights in their own document called the Convention for the Protection of Human Rights and Fundamental Freedoms. The right to education is preserved in Article 2 Protocol 1 which states:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

[118] The leading case on the interpretation of Article 8 of the Convention is the case of **Ali v The United Kingdom**. The applicant in **Ali**, was excluded from school after he and two other children were discovered in the vicinity of a fire that was started in a waste basket in a classroom. He was suspended, pending completion of a police enquiry, which extended beyond the maximum allowed time period for a suspension. Though the

investigation was completed with no action against him, the school continued the exclusion until a meeting was arranged with his parent for his reinstatement. However, his parents did not attend the meeting which resulted in his name being removed from the school register. Several months later his father requested his re-instatement but at that time his place had been re-allocated. The House of Lords did not uphold his complaint as it found that there was no systematic failure of the education system. The applicant appealed to the European Court of Human Rights who upheld the decision of the House of Lords.

[119] The court made an assessment of the law on the right and concluded:

> *51. Article 2 of Protocol No. 1 guarantees, inter alia, a right of access to educational institutions existing at a given time… Nevertheless, such access constitutes only a part of the right to education. For the "right to education" to be effective, it is further necessary that, inter alia, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed.*
>
> *52. The Court recognises that in spite of its importance the right to education is not absolute, but may be subject to limitations. Provided that there is no injury to the substance of the right, these limitations are permitted by implication since the right of access "by its very nature calls for regulation by the State" (Belgian Linguistics Case, cited above, p. 28, § 5 and Campbell and Cosans v. the United Kingdom, 25 February 1982, § 41, Series A no. 48).*
>
> *53. Admittedly, the regulation of educational institutions may vary in time and in place, inter alia, according to the needs and resources of the community and the distinctive features of different levels of education. Consequently, the Contracting States enjoy a certain margin of*

*appreciation in this sphere, although the final decision as to the observance of the Convention's requirements rests with the Court. In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim. However, unlike the position with respect to Articles 8 to 11 of the Convention, it is not bound by an exhaustive list of "legitimate aims" under Article 2 of Protocol No. 1 (see, mutatis mutandis, Podkolzina v. Latvia, no. 46726/99, § 36, ECHR 2002-II)**. Furthermore, a limitation will only be compatible with Article 2 of Protocol No. 1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved** (Leyla Şahin v. Turkey [GC], no. 44774/98, § 154, ECHR 2005-XI).*

***54. Article 2 of Protocol No. 1 does not necessarily entail a right of access to a particular educational institution** (Simpson v the United Kingdom, Application No. 14688/89, 24 February 1998). (Emphasis mine)*

[120] I adopt the European Court of Human Rights interpretation of Article 2 and apply it to section 13 (3) (k) (ii) of our Charter. I find the wording of the Article and section 13 (3) (k) (ii) to be sufficiently similar for this court to adopt the dictum of the European Court on Human Rights. The Court recognised that the Article provides protection only in relation to access to an educational institution and quality of education. Though, as was repeatedly indicated by the court, the right to access is limited, as this right has to be regulated by government entities. Thus, this right of access does not necessarily extend to a general right to attend a particular institution of choice. In spite of this the court indicated that if this right is being limited then the limitation must be for a legitimate aim.

[121] All public education institutions, at the primary and pre-primary levels, have a duty to provide students with education in accordance with the national curriculum. In this case ZV had initially been granted unequivocal acceptance to attend the 1st Defendant. It was

upon viewing her hair that the principal among others, voiced complaints and informed the 2nd Claimant's mother of a policy forbidding hairstyles like hers. While it has been established that there is no right to access education at a particular institution, the limitation of the right and its reason, in my view, must first be considered before a court can conclude that the right is engaged. In **Ali** the applicant was excluded as a result of a criminal investigation. It was his own delay in meeting with the school to be reinstated that resulted in him losing his placement at the school.

[122] In the 2nd Claimant's circumstances she was being told she would be excluded not because of her behaviour but because of her hairstyle. Further, the school, through its then Principal, indicated that her locks are prohibited as there is a possibility that the hairstyle would lead to a lice or "junjo" infestation. It is my view that hygiene does fall within the purview of **Ali** as a legitimate aim.

[123] I adopt the reasoning of the court in **Ali** and find that the policy of the school did not breach the 2nd Claimant's right to education. The 2nd Claimant does not have a right to attend a particular institution and as such Kensington Primary School can reject the 2nd Claimant as a student. This does not affect the 2nd Claimant's right to education as she could always attend another school that supports her form of expression. Accordingly, the right to education is not engaged and thus the 1st Defendant has not breached the 2nd Claimant's right to education.

Right to equitable and humane treatment

[124] In dealing with a possible breach of this constitutional right, the Privy Council in the case of **Bhagwandeen v Attorney General of Trinidad and Tobago** (2004) 64 WIR 402 which was applied in the **Sean W Harvey v Board of Management of Moneague College, Ministry of Education Youth and Information and Attorney General of Jamaica** [2018] JMSC Full 3 established that the Applicant needs to show that he has been treated differently from some other similarly circumstanced person. Lord Carswell at paragraph 18; page 408 stated:

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

[125] Mr Buchanan argued that the policy to exclude students from attending educational institutions because of their locked hair, breaches the section of the Charter in that the principal and the school board as public officials had treated the 2nd Claimant less favourably than their counterparts who do not have locks. In my view this is not a proper comparator, the 2nd Claimant would have had to bring evidence to show that a child who had locked hair like the 2nd Claimant, and not falling under any of the exceptions, e.g religion, was allowed to attend the school without issue. Without showing a proper comparator she has no foundation for claiming that this right has been breached by the Defendants.

[126] The 2nd Claimant in my view has failed to establish how she has been treated differently than another child in similar circumstances to her own. The Court therefore agrees with the submission of counsel for the Defendants that the 2nd Claimant has failed to adduce any evidence to show that her right to equitable and humane treatment has been breached. I find that her right to equitable and humane treatment has not been infringed by the Defendants

Respect for and protection of private and family life, and privacy of the home

[127] Mr Buchanan submitted that the fact that 2nd claimant's entire family wears locks, this is sufficient evidence that locks is inextricably bound up with their expression of themselves and their identity as a family who subscribe to a particular view. He asserts that the family, should not have to prove the collective conscience of their private and family life and should not have to choose between their privacy and the 2nd Claimant's right to education. In response to this submission, counsel, Ms Thomas submitted that this right has not been infringed as she has not been prevented from going to the school and has continued her schooling with her locks intact. She submits, in the alternative, that if the court found that this right was engaged, the policy was demonstrably justified in a free and democratic society.

[128] In seeking to understand the right, I find that an analysis of decisions of the Court of European Convention on Human Rights is instructive. The right to private and family life is provided in Article 8 of the European Convention on Human Rights states:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

[129] It has been established that the right to private life is a broad concept which is incapable of exhaustive definition (**Costello-Roberts v the United Kingdom**, judgment of 25 March 1993, para 36). The case of **Mahmut Tig v Turkey**, ECHR (2nd edition sitting on 24th May 2005) is instructive on the issue on the breach of a right to private and family life by an educational institution. Here the applicant complained of an infringement of his right to respect for his private life, by university authorities who had prohibited him from

wearing his beard within university walls. He submitted that he wore a beard because it was part of his physical appearance; he does not say that he is inspired to wear the beard, by particular ideas or beliefs and in particular in respect of any religious precept. Therefore, the measure complained of could not constitute as such an interference with the freedom of religious conscience.

[130] In the same way in the case at bar, I note that indication was initially given by the 2nd Claimant's parents that the wearing of the hair style by the child, had no specific significance. It was an expression of their family's identity, and later after the court proceedings were initiated, expressed to be in keeping with the tenets of a religious vow. It has even been argued by their lawyer during the conduct of the case, that they should have been automatically identified by the school as Rastafarian. They had an obligation to disclose relevant information to the school authorities. If there was some disclosure, however confusing as it now appears the reason for the hairstyle was, and the result was refusal to accept the child, the right would have been engaged and we would be now able to discuss whether it has been breached and whether that breach was justified.

[131] My finding is that this right was not breached. Accordingly, the claimant has not suffered any interference with her right to respect for her private and family life. She has not been prevented from exercising her right to private and family life and as the right has not been engaged in this case.

Freedom of Expression

[132] Mr Buchanan submitted that the policy of the 1st Defendant, to prohibit students from wearing their hair in dreadlocks, in particular the 2nd Claimant, has breached her right to freedom of expression. The position taken in the case of **Maurice Tomlinson**, where the full court was tasked with the interpretation of section 13 (3) (c), ought to be applied in this case. The dictum of Sykes J is notable as, in interpreting the section, in paragraph 253:

> *[253] Looking now at section 13 (3) (c) of the Charter which provides that all persons enjoy the right to freedom of expression it is important to note*

> *that the legislature chose the word 'expression' and not 'speech.' This is so because it was clearly appreciated that not all expression can be called speech, as in the spoken or written word.* ***Without being exhaustive, speech includes different forms of expression such as speech, sign language, dance, drama, cartoons, poetry, and depending on the context, silence. It seems to cover just about any form of expression by which meaning can be conveyed from the mind of the communicator to the person intended to be communicated with****. The word used permits of a wide meaning – expression is not limited to speech or word and there is nothing in the context which excludes gestures, miming and such like. The word 'expression' can legitimately bear the meanings indicated. (Emphasis mine)*

[133] The dictum expresses the point that the right to freedom of expression encompasses any form of expression that is used to communicate a particular idea, this I accept includes hairstyles worn with intent. I also accept that every hairstyle does not convey a message and in a majority of cases is worn without intent to convey any meaning whatsoever. I accept that in this case before me, as it has now been expressed through the affidavit of Sherine Virgo the mother, and in the Response to Request for Information, that 2nd Claimant's locks are an expression of the family's Nazarene Beliefs. In her affidavit, Mrs Virgo expressed that she and her husband took a Nazarite Vow in 2009 and since then have been growing their hair and had decided to raise their children with that same belief system, a belief that bases its tenets in Numbers chapter 6 verses 1 – 21. A few features of this religion were specified, which are, abstaining from the consumption of alcohol, in particular, alcohol derived from grapes, not making contact with corpses and graves, and not cutting one's hair. It Is indicated that a person can be born a Nazarite or take a Nazarite vow.

[134] Numbers Chapter 6 Verse 5 as it is relevant to this case says:

"*During the entire period of their Nazirite vow, no razor may be used on their head. They must be holy until the period of their dedication to the LORD is over; they must let their hair grow long…" (New International Version)*

[135] Counsel Mr Buchanan, placed reliance on the cases of **Tinker v Des Moines Independent Community School District**, **McEwan et al v Attorney General of Guyana** and the new guidelines **NYC Commission on Human Rights Legal Enforcement Guidance on Race Discrimination on the Basis of Hair** as providing guidance to the court in determining if ZV's right to freedom of expression has been breached. I find that these cases are applicable and I do find and accept guidance from these cases as the application of the law in our own jurisdiction.

[136] Ms Thomas in her submissions argue that this right has not been breached by the Defendants. She contends that the school was not informed of this religious belief and further that there is no evidence that the 2nd Claimant's hairstyle is an expression of her own ideas and beliefs in the Nazarite Vow. She contends that in order for there to be an infringement, the 2nd Claimant must show that the aggrieved individual is expressing a particular idea or belief and that the prohibition of that hairstyle is supressing their expression of that particular belief or idea. In support of this she relied on the case of **Mahmut Tig v Turkey**, where the applicant complained that the university had breached his right to freedom of expression provided in Article 10 of the Convention. Article 10 states:

> *Everyone has the right to freedom of expression. This right included freedom of opinion and the freedom to receive or impart information or ideas without interference by public authorities and regardless of frontiers.*

[137] In **Tig** the court notes that:

> "*even in very particular circumstances, assuming that the right to freedom of expression may include the right of a person to express his*

ideas by the way in which he wears his beard, it has not been established that the applicant was prevented from expressing a particular opinion within the meaning of Article 10 by the prohibition of the wearing of a beard.

[138] Claimant's Counsel also relied on the case of **Kara v United Kingdom** (Application No 36528/97). In **Kara** the applicant was a bisexual male who wore female clothes to work. He indicated that he dressed in female clothing to express his identity and sexuality and the innate feminine aspects of his personality. He received warnings from his employer on the many occasions he wore female clothing to work until he received a letter instructing him to desist from wearing women's clothing to work as it was contrary to the Council's Code of Conduct. The applicant complained to the European Commission of Human Rights against the United Kingdom that he was being prevented from expressing himself. The court states in relation to the right to freedom of expression that:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".

The Commission finds that although the right to freedom of expression may include the right for a person to express his ideas through the way he dresses (No. 11674/85, Dec. 3.3.86, D.R. 46, p. 245 at p. 247), it has not been established on the facts of this case that the applicant has been prevented from expressing a particular opinion or idea by means of his clothing.

The Commission concludes, therefore, that an examination of this complaint as it has been submitted fails to disclose any appearance of a violation of Article 10 of the Convention.

It follows that this part of the application must also be rejected as being manifestly ill founded within the meaning of Article 27 para. 2 of the Convention.

No breach as to religious adherence

[139] I am in agreement with Ms. Thomas for the defendants that the right to freedom of expression has not been breached as it relates to her freedom of expression connected with a religious belief. No religious adherence was declared and then curtailed by the defendants. The right was never engaged.

[140] Mr Buchanan contends that freedom of expression has been breached and /or curtailed in relation to a general prohibition as to that hairstyles being worn to school by the child as the adornment of the hair, as it was first declared was intentional and a feature of the general practice of her family as observed as part of their family's choice.

[141] Taking at face value that this decision was reached by the family, it would have had to have been stated by them to the school, as an expression of their way of carrying out one of the tenets expressed in the Vow, as it seems there would be and have been various ways of adhering to an entreaty to "let your hair grow long' without putting any razor to it". This way is their choice of adherence, but it cannot be assumed that everyone with hair adorned in this fashion is doing so in furtherance of religious expression or any expression at all.

Freedom of religion

[142] Mr Buchanan submitted that the policy of the 1st Defendant breached the 2nd Claimants right as it relates to religion. He has accepted that the school was not informed, when the issue arose, that the hairstyle was worn in deference to the 2nd Claimant and her family's Rastafarian beliefs. However, he submitted that her mother did not have to inform the school of such beliefs and is not required to be asked about her and her family's religious beliefs. Incredibly, he made the argument that the school's representatives should have, from viewing her hairstyle, realised, assumed and accepted that she was of the Rastafarian religion and as such should automatically have placed her under the religious exception that is said to exist in the school rules. This is a remarkable submission since many Christians and even persons who subscribe to no particular religion are known to wear locks and locked hair. He relied on the case of **Re Chikweche,** where the

court accepted that the appellant's wearing of dreadlocks was within the protection afforded by section 19 (1) of the Zimbabwe Constitution which, in material part read,

"no person shall be hindered in the enjoyment of his freedom of conscience that is to say freedom of thought and religion … and… to manifest and propagate his religion or belief through worship, teaching, practice and observance".

[143] In that case, the court accepted and reaffirmed, the position that Rastafarianism is a widely practiced religion, and that the expression by the appellant of his religious beliefs in the form of dreadlocks is protected. In addressing this issue the court relied on the definition of freedom of religion that was expressed in the case of **R V Big M Drug Mart Ltd** (1985) 13 CRR 64, which states:

> *"the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal…'*
>
> *And at 105:*
>
> *'(E)very Individual (is) free to hold whatever religious beliefs his or her conscience dictates, provided. Inter alia, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.'*

[144] That Court went on to state that section 19 (1) freedom of conscience is intended to encompass and protect systems of belief which are not centred on a deity or religiously motivated, but are founded on personal morality. They went further, stating that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or secular morality.

[145] In The case at bar, Defendants' Counsel Ms Thomas, submitted that the right to freedom of religion is not engaged in this case as there is a religious exemption to the policy. An indication of this religious exception is in the affidavit of Christine Hamilton. She said that the Kensington Primary School rules, on hairstyles of female students, even

though put in place for hygiene purposes, did not prohibit students from wearing dreadlocks for religious reasons and, that had the school been told that this locked hairstyle the child wore, was connected to a religion, no issue would have arisen. This has lead me to conclude that the exemption existed to be claimed.

[146] In my view there is a clear misunderstanding of the law by Mr Buchanan in his submissions on the issue of freedom of religion. While I am in agreement that people have a right to express their religious beliefs, or indeed any other conscientiously held beliefs to which they adhere, there is nothing in this case that directs the mind of this court to believe that the 2nd Claimant's right to freedom of religion has been breached, as she has not adduced sufficient evidence to this court to say that the actions of the school infringed this right for example, by somehow encouraging or forcing the child or her parents away from their stated beliefs, beliefs which I might add were never disclosed.

[147] Mr Buchanan valiantly tried to convince the court that all persons who wear locks are to be automatically identified as Rastafarians, and as such do not have to state their religious beliefs, I cannot support this submission. Currently the locked hairstyle and indeed traditional dreadlocks (that is hair that has been left to grow and lock itself) is now worn by many of various faiths, connected to many religion, or worn without any particular meaning or intent. Due to the common adoption of this hairstyle and its rapidly growing popularity, one cannot in good conscience automatically view people with it as Rastafarians. The duty to inform and assert the right rested on the parent of the child, or the person seeking to access it. It is not for the school to seek out this information or to assume it and automatically treat with the child based on that assumption. In fact, it is a policy that is exercised across the island for parents who have an issue with their child's participation in mainly Christian religious exercises at public schools, to inform the school, that their child is not to participate in such activities.

[148] It would be remiss of this court to put that burden on the school. It is particularly significant in this case as the hairstyle worn by the 2nd Claimant was not of the traditional dreadlocks or freeform locks that person normally and traditionally identify and assume as a sign that the individual is of the Rastafarian belief. It was for the 2nd Claimant's mother

at the time she was informed of the policy to then explain to the school the reason for the hairstyle and why she should be exempt from the policy. However, Mrs Virgo has admitted that she did not inform the school's representatives of the reason for the hairstyle. In fact, the religious reason was only made known to the school once the matter came before the court.

[149] In relation to the issue, therefore, it is my view that Mr Buchanan's submissions on this point cannot be upheld. The Defendants cannot be found to have breached a right that they were not informed was "in play' or was being exercised. In all the cases submitted by both counsel, on this point, the authorities were informed of the religious beliefs of the individual, thereafter, were accused to have sought to prevent persons from exercising this right. While in this case there was no such information, and the school cannot be asked to make assumptions based on physical appearance and choice of adornment. It was apparent from the evidence that the school's reason for seeking to have the 2nd Claimant's locks removed was because they believed and was told by the mother, it was being worn only as a hairstyle, and it is their unrefuted evidence that they had experienced issues connected with hygiene connected to the wearing of that type of hairstyle in the past. It would have been a different discussion, if the beliefs had been introduced and the child and parents were then prevented from exercising what they say was a basic tenet of the faith as they have now belatedly said they adhere to. I find that the claimant's right to religion has not been engaged and as such has not been infringed by the Defendants.

General prohibition on the hairstyle

[150] Having submitted that the claimant was not disposed to and did not feel that she had to reveal the family's religious belief, and they should not have to do that in order for the child to wear her hair in the fashion they wished, I am constrained to examine the issue as to the prohibition on the wearing of the locked hair style in general that the school has disclosed to be its position.

[151] The evidence in this regard, on behalf of the first defendant, is that the prohibition for students exists with the objective of maintaining, what they regard as an acceptable level of hygiene at the school among its students, so as to enhance the effectiveness of the teaching and learning experience and is sufficient to ground the limitation on the 2nd Claimant's rights. The 2nd Defendant has clearly stated that they have no such rule in force in the schools in Jamaica and in fact, I have already discussed that the school rule here does not rise to the status of a law and the school is not allowed to make rules or institute policy which derogates from the constitutional rights of any student.

[152] Setting aside the religious belief now disclosed, the school's policy cannot be said to be infringing on the 2nd Claimant's right to self-expression, if the reason her hair is locked is simply a decision as to self-expression that her parents have taken as to the adornment applicable to manifest their lifestyle. The argument proffered by the claimant is simply, that in our cultural context as black persons and Jamaicans, the locked hairstyle should not have to be explained and justified in our current society, and that the school does not have the right to assume or to approve what a student or her family believes or choose in order to express themselves culturally.

[153] In my view, schools cannot survive or be run without rules for the various constituents that make up the school population. We are certainly allowed our freedom of expression, within what moves and drives our conscience, but schools cannot be left to guess what it is, if it falls outside of set rules, guidelines and norms that are in a particular organisation. Or if it is not in keeping with what is considered to be for the health, safety and orderly organisation of the school for all the students, teachers and the rest of the school community. In fact, I daresay there may be many teachers and other personnel at the school who may choose that hairstyle as a part of the daily adornment.

[154] There is always the choice, to raise your child according to whatever decisions you have determined is best for your home, and is something to which you subscribe and believe is right and just for your family. Others around you have that same right, as do organisations, workplace and schools including public entities who must configure rules to govern their environment, to benefit all who use them.

[155] It cannot be right or just for each individual to vary the rules of engagement with these organisations, simply because a right exists to participate and avail ourselves of the benefit of publicly funded institutions, without proper reasons or justification, and simply on the basis that it does not fit in with their choices and mode of self-expression.

[156] Self-expression for many people vary from day to day, week to week, and I dare say from hour to hour, and take on wide and varied forms. I cannot envisage an orderly school society, and certainly not an institution run for the benefit of large numbers of children, often interacting in close proximity, where they are exempted from the rules of the school, simply on the basis of individual self-expression. If that were so, except for religious and other personal idiosyncrasies, self-expression in their attire and adornment would potentially then, be just based on the student's own, or their family proclivities, or the unstated choices of each of their parents for self-expression by their family, taken in their individual homes. I am wary of opening what may be considered the "flood gates" of self-expression applicable to school communities and the choice of adornment for the children therein and the impact it would have on the core function of the educational institution.

[157] This may potentially mean that a student or their parent could wake up tomorrow and identify as whoever or whatever animate or inanimate object or personality they wish or identify themselves with any belief, and come to school 'expressed' that way in pursuance of their right of freedom of expression and a decision taken in the home. Perhaps the time has come for the legislature to remove this matter from the discretion individual entities and give it the force of law. How far that is to be taken is a decision that must be made by the policy makers.

[158] Let me once again say categorically that this is not a case about Rastafarianism and religious freedom of expression and thought connected with that religion. Children have long been allowed to wear locks to school as a religious expression of their, and their parent's faith. The claimant's attorney has argued that the parents were not obliged to disclose their religious preference to the school, and that acceptance of the child's variance from the policy espoused by the school was a matter of self-expression based

on a decision taken in their home, which should be honoured and accepted without any question.

[159] So that the potential outcome of the wide unfettered acceptance of this concept may well envision a child coming to school dressed or with their bodies adorned, in any way they wished, based on their, or the family's perception of freedom of expression. It may also be, taken to its extreme and unfettered, that any decision taken in a household, can be thrust upon a publicly funded school of their choice. It would mean that whatever a child or parent determines to be the expression that best facilitates their own personal view is acceptable and allowable, and that school rules as to adornment, dress and uniform in general are viewed a suppression of expression and identity of the child and their family's choices.

[160] I find this restriction and the rules as to adornment of the hair, especially as expressed, to meet certain of the objectives of the policy of the school. The measures adopted are designed to meet the objective as identified and based on the past experiences in this regard at the school. The objective of creating a more controlled hygienic environment is important to the proper order and effective learning at the school and does not prevent the claimant from enjoying religious freedom, and the expression of that religious choice and cultural ethnicity to which her parents subscribe in their household.

Right to due process

[161] Mr Buchanan submitted that the 2nd Claimant will no longer pursue a claim under this right and as such this court will not assess whether her right to due process has been breached.

CONCLUSION

[162] For the reasons given herein I have concluded that, the 1st. Claimant has no locus standi to bring this action. The constitutional rights of 2nd Claimant, as pleaded, have not been breached and the 2nd Claimant is not entitled to the declarations sought.

Evan Brown, J

ORDERS as follows

[163] 1.The 1st Claimant has no locus standi.

2.The constitutional rights of the 2nd Claimant have not been breached.

3. No Order as to costs

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Hon. Evan Brown

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Hon. N. Simmons

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Hon. S. Bertram Linton