Trinity Term
[2022] UKPC 26
Privy Council Appeal Nos 0064 of 2021
and 0065 of 2021

JUDGMENT

Dominic Suraj and 4 others (Appellants) *v* Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)
Satyanand Maharaj (Appellant) *v* Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Reed
Lord Hodge
Lord Sales
Lord Hamblen
Lady Rose

JUDGMENT GIVEN ON
20 June 2022

Heard on 21 and 23 March 2022

Appellants (Dominic Suraj, Marlon Hinds, Christopher Wilson, Bruce Bowen and Collin Ramjohn)
Peter Knox QC
Anand Ramlogan SC
Vishaal Siewsaran
Adam Riley
(Instructed by Ganesh Saroop (Trinidad))

Appellant (Satyanand Maharaj)
Anand Ramlogan SC
Kate O'Raghallaigh
Adam Riley
(Instructed by Freedom Law Chambers (Trinidad))

Respondent (Attorney General of Trinidad and Tobago)
Thomas Roe QC
Fyard Hosein SC
Natasha Jackson
(Instructed by Charles Russell Speechlys LLP)

LORD SALES AND LORD HAMBLEN: (with whom Lord Reed, Lord Hodge and Lady Rose agree)

1. Introduction

1. These appeals raise important issues relating to the fundamental human rights and freedoms enshrined under the Constitution of Trinidad and Tobago adopted in 1976 ("the Constitution").

2. These issues arise in the context of regulations enacted by the Minister of Health ("the Minister") in March/June 2020 using his powers under section 105 of the Public Health Ordinance 1940 ("the Ordinance") to prevent or check a "dangerous infectious disease", namely Covid-19.

3. The regulations challenged as being unconstitutional in the appeal of Suraj and others prohibited gatherings of more than five people in any public place without reasonable justification where the gathering was not associated with the provision of certain specified services.

4. The regulations challenged as being unconstitutional in the appeal of Maharaj prohibited gatherings of more than ten people in any public place without reasonable justification at religious services or gatherings unless they complied with Guidelines for Places of Worship issued by the Ministry of Health with effect from 22 June 2020 ("the Guidelines").

5. In both appeals it is contended that: (1) the regulations infringed the appellants' rights under section 4 of the Constitution; (2) the regulations were not saved under the exception for existing law set out in section 6 of the Constitution; (3) the regulations could only have been made under sections 7 to 12 of the Constitution concerning public emergencies, and (4) the issue of the regulations by the Minister was contrary to sections 1 and/or 2 of the Constitution as being inconsistent with the notions of a sovereign democracy and/or constitutional supremacy.

6. In the Maharaj appeal further issues arise as to whether the regulations in question were unlawful for want of legal certainty and thereby *ultra vires* the Ordinance and unconstitutional.

7. A central issue in both appeals is whether ordinary or subsidiary legislation can impinge upon the fundamental rights and freedoms set out in section 4 of the Constitution as long as it pursues a legitimate aim and is proportionate to it, as stated by Baroness Hale of Richmond in giving the judgment of the majority of the Board in *Suratt v Attorney General of Trinidad and Tobago* [2008] AC 655, para 58 ("*Suratt*"). This issue was the subject of marked disagreement between the majority (Bereaux, Weekes and Yorke-Soo Hon JJA) and the minority (Archie CJ and Jamadar JA) of the Trinidad and Tobago Court of Appeal in *Francis v The State* (2014) 86 WIR 418 ("*Francis*").

2. The Constitution

8. The relevant parts of the Constitution for the purposes of these appeals are summarised below.

9. The preamble of the Constitution provides:

> "Whereas the People of Trinidad and Tobago -
>
> (a) Have affirmed that the Nation of Trinidad and Tobago is founded upon principles that acknowledge the supremacy of God, faith in fundamental human rights and freedoms, the position of the family in a society of free men and free institutions, the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator;
>
> …
>
> (c) have asserted their belief in a democratic society in which all persons may, to the extent of their capacity, play some part in the institutions of the national life and thus develop and maintain due respect for lawfully constituted authority;

(d) recognise that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

(e) desire that their Constitution should enshrine the above-mentioned principles and beliefs and make provision for ensuring the protection in Trinidad and Tobago of fundamental human rights and freedoms.

Now, therefore the following provisions shall have effect as the Constitution of the Republic of Trinidad and Tobago:

PRELIMINARY …"

10. In the Preliminary part of the Constitution it is provided that:

"1(1) The Republic of Trinidad and Tobago shall be a sovereign democratic State. …

2. This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency.

3(1) In this Constitution -

…

'law' includes any enactment, and any Act or statutory instrument of the United Kingdom that before the commencement of this Constitution had effect as part of the law of Trinidad and Tobago, having the force of law and any unwritten rule of law …"

11. The Constitution sets out the principal institutions of the state which reflect its democratic character. Chapter 3 deals with the President, who is elected; and Chapter 5 deals with Executive Powers, the executive authority of the state being vested in the President (section 74). Chapter 4 deals with Parliament. Section 39 provides that it

shall consist of the President, the Senate (ie the upper House) and the House of Representatives (ie the lower House). The Senate is composed of Senators appointed by the President, subject to certain requirements, for the period of a Parliament. The House of Representatives is composed of members who are elected. Section 53 provides:

> "53. Parliament may make laws for the peace, order and good government of Trinidad and Tobago, so, however, that the provisions of this Constitution or (in so far as it forms part of the law of Trinidad and Tobago) the Trinidad and Tobago Independence Act 1962 of the United Kingdom may not be altered except in accordance with the provisions of section 54."

12. Section 59 states that, save as otherwise provided in the Constitution, questions proposed for decision in either House shall be determined by a majority vote. In a manner similar to the Westminster Parliament, the House of Representatives may present Money Bills to the President for assent though not passed by the Senate (section 64), and for other Bills the House of Representatives has a power to do so after a certain period of delay, if the Senate rejects them (section 65). Thus, so far as law-making by statute is concerned, the democratic nature of the Constitution is primarily expressed in the legislative capacity of the House of Representatives exercised on the basis of ordinary majority votes.

13. Chapter 1 of the Constitution is headed:

"**THE RECOGNITION AND PROTECTION**

OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS"

14. Part I of Chapter 1 is headed **"RIGHTS ENSHRINED"** and contains sections 4 and 5 which provide:

> "4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) the right of the individual to respect for his private and family life;

(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;

(e) the right to join political parties and to express political views;

(f) the right of a parent or guardian to provide a school of his own choice for the education of his child or ward;

(g) freedom of movement;

(h) freedom of conscience and religious belief and observance;

(i) freedom of thought and expression;

(j) freedom of association and assembly; and

(k) freedom of the press.

5(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or

infringement of any of the rights and freedoms hereinbefore recognised and declared.

(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not -

[there follows a list of specific things that Parliament may not do, including]

(a) authorise or effect the arbitrary detention, imprisonment or exile of any person;

…

(c) deprive a person who has been arrested or detained - … (iii) of the right to be brought promptly before an appropriate judicial authority; …

…

(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms."

15. These provisions replicate almost precisely sections 1 and 2 of Trinidad and Tobago's 1962 Constitution, enacted at independence ("the 1962 Constitution"). As is well known, sections 1 and 2 of the 1962 Constitution were in turn modelled on the Canadian Bill of Rights 1960.

16. Part II of Chapter 1 is headed "**EXCEPTIONS FOR EXISTING LAW**" and contains section 6, the savings clause, which states that nothing in sections 4 and 5 "shall invalidate" an "existing law". It provides:

"6(1) Nothing in sections 4 and 5 shall invalidate -

(a) an existing law;

(b) an enactment that repeals and re-enacts an existing law without alteration; or

(c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.

…

(3) In this section -

…

'existing law' means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1);

…"

17. Part III of Chapter 1 is headed "**EXCEPTIONS FOR EMERGENCIES**" and contains sections 7 to 12. Part III sets out certain powers which may be used during a "period of public emergency". This is defined in section 10(4) to mean any period during which Trinidad and Tobago is engaged in a war, there is in force a Proclamation by the President that a state of public emergency exists, or there is in force a resolution of both Houses of Parliament supported by the votes of not less than two-thirds of all the members of each House declaring that democratic institutions in Trinidad and Tobago are threatened by subversion. Section 8 confers on the President a power to make such a Proclamation, including in the event of "outbreak of pestilence or of infectious disease". Where a Proclamation is made the President is given power to pass emergency regulations under section 7(1), and Parliament a power under section 7(3) to pass an Act of Parliament for the period of the emergency, which regulations or Act may infringe the rights and freedoms in section 4, unless the inconsistency is shown not to be "reasonably justifiable".

18. Section 8 provides:

> "8(1) Subject to this section, for the purposes of this Chapter, the President may from time to time make a Proclamation declaring that a state of public emergency exists.
>
> (2) A Proclamation made by the President under subsection (1) shall not be effective unless it contains a declaration that the President is satisfied -
>
> (a) that a public emergency has arisen as a result of the imminence of a state of war between Trinidad and Tobago and a foreign State;
>
> (b) that a public emergency has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence or of infectious disease, or other calamity whether similar to the foregoing or not; or
>
> (c) that action has been taken, or is immediately threatened, by any person, of such a nature and on so extensive a scale, as to be likely to endanger the public safety or to deprive the community or any substantial portion of the community of supplies or services essential to life."

19. Section 7 provides:

> "7(1) Without prejudice to the power of Parliament to make provision in the premise, but subject to this section, where any period of public emergency exists, the President may, due regard being had to the circumstances of any situation likely to arise or exist during such period, make regulations for the purpose of dealing with that situation and issue orders and instructions for the purpose of the exercise of any powers conferred on him or any other person by any Act

referred to in subsection (3) or instrument made under this section or any such Act.

(2) Without prejudice to the generality of subsection (1), regulations made under that subjection may, subject to section 11 [which provides for review of detention], make provision for the detention of persons.

(3) An Act that is passed during a period of public emergency and is expressly declared to have effect only during that period or any regulations made under subsection (1) shall have effect even though inconsistent with sections 4 and 5 except in so far as its provisions may be shown not to be reasonably justifiable for the purpose of dealing with the situation that exists during that period."

20. The emergency powers are subject to Parliamentary oversight, including debate on whether their use is warranted, and control over the extension, duration, and revocation of the Proclamation, as set out in sections 9 and 10 which provide:

"9(1) Within three days of the making of the Proclamation, the President shall deliver to the Speaker for presentation to the House of Representatives a statement setting out the specific grounds on which the decision to declare the existence of a state of public emergency was based, and a date shall be fixed for a debate on this statement as soon as practicable but in any event not later than 15 days from the date of the Proclamation.

(2) A Proclamation made by the President for the purposes of and in accordance with section 8 shall, unless previously revoked, remain in force for 15 days.

10(1) Before its expiration the Proclamation may be extended from time to time by resolution supported by a simple majority vote of the House of Representatives, so, however, that no extension exceeds three months and the extensions do not in the aggregate exceed six months.

(2) The Proclamation may be further extended from time to time for not more than three months at any one time, by a resolution passed by both Houses of Parliament and supported by the votes of not less than three-fifths of all the members of each House.

(3) The Proclamation may be revoked at any time by a resolution supported by a simple majority vote of the House of Representatives."

21. Part IV of Chapter 1 is headed "**EXCEPTIONS FOR CERTAIN LEGISLATION**". It comprises section 13, which provides that subject to special procedural requirements legislation which is inconsistent with sections 4 and 5 may be passed by Parliament, as follows:

"13(1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

(2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House.

…"

22. The other exception provided for under section 5 is set out in section 54 in Chapter 4 which provides for the repeal of Chapter 1 by an Act passed with a two thirds majority in each House.

23. Part V of Chapter 1, headed "General", comprises section 14. Section 14(1) provides that "if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him", he may apply to the High Court for redress. Section 14(2) confers power on the High Court to grant such redress as is appropriate "for the purpose of enforcing, or securing the enforcement of, any of

the provisions of this Chapter to the protection of which the person concerned is entitled". Section 14(4) provides that where "any question arises as to the contravention of any of the provisions of this Chapter" in any court other than the High Court or the Court of Appeal, that court may refer to the question to the High Court.

3. The Ordinance and the regulations under challenge

24. The Ordinance provides:

> "103. [The President] may, by proclamation, declare any disease (in addition to the diseases specifically mentioned in section 2 of this Ordinance) to be an infectious disease or a dangerous infectious disease within the meaning of this Ordinance, and so long as the proclamation remains unrevoked the disease specified therein shall be deemed to be an infectious disease or a dangerous infectious disease, as the case may be.
>
> …
>
> 105(1) [The Minister of Health] shall have the direction of all measures dealing with dangerous infectious diseases, and may make regulations with regard to the control of any dangerous infectious disease for all or any of the following purposes:
>
> > (a) the restraint, segregation, and isolation of persons suffering from any dangerous infectious disease, or likely from exposure to infection to suffer from any such disease;
> >
> > …
> >
> > > (i) the doing of any such matter or thing as may appear advisable for preventing or checking such diseases;
> >
> > …

> Provided … that in the event of immediate action becoming, in the opinion of [the President], necessary to deal with any dangerous infectious disease under the provisions of this section … and of its not being practicable, in the opinion of [the President] [for the Minister of Health to consider the matter forthwith], the [President] may [pending such consideration] take all such measures, do all such things, [and] exercise all such powers … as might be taken, done, [or] exercised … by [the Minister of Health] …
>
> (2) The provisions of sections 132 and 133 shall apply to all regulations made under this section.
>
> (3) There may be attached to any breach of any regulation made under this section, a fine not exceeding four hundred and eighty dollars, or a term of imprisonment, with or without hard labour, not exceeding six months.
>
> …
>
> 132. All regulations made under this Part of this Ordinance shall be published in the Royal Gazette, and when so published shall thenceforth have the same effect and operation as if they were enacted by and formed part of this Ordinance."

(In the Ordinance as originally passed, section 105 referred to the Central Board of Health, but by subsequent legislation references to the Board were substituted with "Minister of Health" and references to the Governor were replaced with "President".)

25. The regulation issued under the Ordinance which is challenged in the Suraj appeal is regulation 3(1)(b) of the Public Health [2019 Novel Coronavirus (2019-nCoV)] (No 9) Regulations, 2020 ("the Gatherings Rule") which had effect from 10 to 17 April 2020 and provided in regulation 3:

> "3(1) During the period specified in regulation 9, a person shall not, without reasonable justification -

…

(b) be found at any public place where -

(i) the number of persons gathered at any time exceeds five; and

(ii) the gathering is not associated with …

[the provision of certain specified services, none of which the appellants were engaged in]

…

(7) A person who contravenes this regulation commits an offence and is liable on summary conviction to a fine of fifty thousand dollars and imprisonment for a term of six months."

26. The regulation issued under the Ordinance which is challenged in the Maharaj appeal is contained in the Public Health [2019 Novel Coronavirus (2019-nCoV)] (No 23) Regulations, 2020 which came into force on 2 August 2020 and provided in regulation 2:

"2(1) During the period specified in regulation 16, a person shall not, without reasonable justification -

(a) be found at any public place where the number of persons gathered at any time exceeds ten;

…

(2) The limit of persons at -

(a) religious or ecclesiastical services or any other religious gatherings including funerals, weddings and

christenings, may exceed the number set out in subsection (1), provided that they comply with the Guidelines for Places of Worship issued by the Ministry of Health; and

(b) other public places may exceed the number set out in subsection (1), in accordance with guidelines made by the Chief Medical Officer for a specific purpose in respect of the 2019 Novel Coronavirus (2019-nCoV).

(3) A person who contravenes this regulation commits an offence and is liable on summary conviction to a fine of fifty thousand dollars and imprisonment for a term of six months."

We refer to the prohibition on religious gatherings above ten people where the Guidelines have not been complied with, which is produced by reading regulation 2(1)(a), 2(2)(a) and 2(3) together, as "the Religious Gatherings Rule".

27. The Guidelines issued by the Ministry of Health to which regulation 2(2)(a) referred were those with effect from 22 June 2020 which were available to access on the Ministry of Health website and are annexed hereto. This case is only concerned with a regulation which incorporated existing accessible material by reference, which is a legitimate form of subordinate legislation (see *R v Secretary of State for Social Services, Ex p Camden London Borough Council* [1987] 1 WLR 819 and *Pankina v Secretary of State for the Home Department* [2011] QB 376, paras 24 and 26); it is not concerned with distinct issues of possibly unlawful sub-delegation of legislative power which might have arisen if the regulation had sought to incorporate by reference guidelines which changed content over the period of its operation.

4. The factual background

28. On 30 January 2020, the World Health Organisation declared Covid-19 to be a Public Health Emergency of International Concern and on the following day, 31 January 2020, the President declared it to be a "dangerous infectious disease" under her powers in section 103 of the Ordinance.

29. On 19 March 2020 the Minister made the first of the Covid-19 regulations under the Ordinance. These were repealed and replaced by further such regulations on 21 March 2020. Numerous further versions were introduced, numbered "(No 3)", "(No 4)" and so on. Each iteration was in force for a short period, and revoked that which had been previously in place.

30. The regulations were made in the light of advice from the Chief Medical Officer and the Technical Director of the Epidemiology Division and taking into account the contagious nature of Covid-19, its seriousness for older persons with pre-existing medical conditions, the risk that if there were too many infections this would place such strain on the medical system that persons seeking treatment for other conditions might not receive treatment and (as was the position at the time) the lack of any vaccine or anti-viral drug with which to combat the disease.

31. Regulations issued under the Ordinance remained the only relevant legislation until May 2021. On 15 May 2021 in a Proclamation declaring that a state of public emergency existed in Trinidad and Tobago, the President passed the Emergency Powers Regulations 2021 by Legal Notice 142 of 2021 under section 7 of the Constitution, on the grounds that she was satisfied that a public emergency had arisen "as a result of the … outbreak of pestilence or of infectious disease". These regulations covered much the same ground as the regulations issued under the Ordinance, including restrictions on gatherings.

32. As required by section 9(1) of the Constitution, the Emergency Powers Regulations were then put before the House of Representatives, with a statement setting out the grounds for declaring the state of emergency, and by resolution made on 24 May 2021 the House extended the Proclamation for three months to 25 August 2021, which was the maximum time for an extension permitted by section 10(1) of the Constitution. They then extended it again by resolution made on 25 August 2021 for a further three months to 25 November 2021. In the meantime, the President passed replacement Emergency Powers Regulations on 29 May 2021 (which contained restrictions on gatherings in public).

33. The Emergency Powers Regulations came to an end when the House of Representatives revoked the Proclamation made under section 7 of the Constitution on 17 November 2021.

5. The proceedings

The Suraj appeal

34. On 9 April 2020 the appellants were arrested and accused of breaching the Gatherings Rule. They were charged on 14 April 2020.

35. The police had formed the view that the appellants were present at a party at Alicia's Guest House. The appellants gave explanations as to their presence at the Guest House and the impact of being arrested, later charged, and detained in custody. Some of the appellants were detained in custody for four or five days.

36. On 17 June 2020 the appellants filed an Originating Motion, complaining both about their arrest and charge, and about the restrictions imposed by the Gatherings Rule. They claimed (i) a declaration that the Gatherings Rule was "unconstitutional, null, void and of no legal effect" and that their arrest, charge and prosecution was unlawful and in breach of their constitutional rights under section 4(a), (g), (h) and (j) and (ii) that they were entitled to damages and further or other relief.

37. On 24 June 2020 the High Court directed a split hearing of the issues, dealing first with the declaratory relief claimed and holding over any issue as to damages.

38. On 11 September 2020 Boodoosingh J (as he then was) dismissed the appellants' claim. The appellants appealed against this decision on 15 September 2020.

39. In November 2020 the charges against the appellants were dismissed in the Magistrates Court for want of prosecution. On 3 November 2020 the State appealed the dismissal of the charges. It is not clear what the position currently is on these proceedings.

40. The Court of Appeal (Archie CJ, Dean-Armorer JA and Aboud JA) dismissed the appellants' appeal on 20 April 2021. On 16 June 2021 final leave to appeal to the Judicial Committee of the Privy Council was granted by the Court of Appeal.

The Maharaj appeal

41. The appellant is a Hindu Pundit and the spiritual head of the Satya Anand Ashram in San Juan. Spiritual services at the Ashram are conducted on Thursday evenings and on all major Hindu spiritual occasions which occur on various dates each month. The Ashram has 50 members and approximately 75 attendees at each service. The Ashram also hosts weekly Hindi language classes, in addition to classes on Indian classical dance, music, and the study of Hindu religious texts.

42. On 15 March 2020, the appellant saw on social media and through other media outlets that the government of Trinidad and Tobago was implementing restrictions to deal with the Covid-19 pandemic. From March 2020 onwards, the new restrictions caused all services at the Ashram, and the appellant's activities as religious leader of the Ashram, to be suspended.

43. On 3 August 2020 the appellant issued an *ex parte* application for leave to apply for judicial review of the Religious Gatherings Rule and for redress under section 14 of the Constitution. On 14 August 2020 the appellant was granted permission to withdraw his claim for judicial review and pursue only the constitutional claim. The appellant sought a declaration that sub-regulations (2) and (3) of the Religious Gatherings Rule were unconstitutional, illegal, null and void and of no legal effect and that they had breached his constitutional rights under section 4(a), (b) and (h) of the Constitution and an award of damages.

44. On 11 September 2020 Boodoosingh J gave judgment upholding the claim in part by making a declaration that:

> "ii. … the relevant Public Health [2019 Novel Coronavirus (2019-nCoV)] Regulations, 2020 (No 23) are unlawful to the extent only that they make a breach of the Guidelines for Places of Worship, made by the Ministry of Health, a criminal offence.
>
> iii. The other aspects of this claim are dismissed."

45. Both the appellant and the Attorney General appealed from Boodoosingh J's judgment. On 20 April 2021 the Court of Appeal dismissed the appellant's appeal but allowed that of the Attorney General. On 16 June 2021 final leave to appeal to the Judicial Committee of the Privy Council was granted by the Court of Appeal.

6. The issues

46. In the Suraj appeal the challenge is made to the Gatherings Rule. In the Maharaj appeal the challenge is made to the Religious Gathering Rule (together "the Rules"). The issues common to both appeals are as follows:

(i) (1) Whether the Rules infringed the appellants' rights under section 4 of the Constitution.

(ii) (2) Whether the Rules could only have been made under sections 7 to 12 of the Constitution concerning public emergencies.

(iii) (3) Whether the Rules are saved under the exception for existing law set out in section 6 of the Constitution.

(iv) (4) Whether the issue of the regulations by the Minister is contrary to sections 1 and/or 2 of the Constitution as being inconsistent with the notions of a sovereign democracy and/or constitutional supremacy.

47. In the Maharaj appeal the following additional issue arises:

(i) Whether sub-regulations (2) and (3) of the Religious Gatherings Rule were unconstitutional, illegal, null and void, and of no legal effect for want of legal certainty and whether they infringed the appellant's constitutional rights under section 4 of the Constitution to due process of law and/or the protection of the law and/or to freely observe his religion.

7. Issue (1) - Whether the Rules infringed the appellants' rights under section 4 of the Constitution

48. The appellants in the Suraj appeal complain that the Gatherings Rule violates their rights under section 4(g) (freedom of movement) and (j) (freedom of association and assembly). The appellant in the Maharaj appeal also complains that the Religious Gatherings Rule violates his rights under section 4(b) (right to equality before the law and protection of the law) and (h) (freedom of conscience and religious belief and observance).

The nature of the rights and freedoms in section 4 of the Constitution

49. As explained below, Issue (1) turns principally on the proper approach to interpretation of the fundamental rights and freedoms in section 4 of the Constitution. Are they to be read as subject to a qualification that there may be interference with them (to use a neutral term) where that is to promote a legitimate aim in the public interest and the interference is proportionate to that aim? Or are they to be interpreted as absolute rights which permit of no interference, but which can only be disapplied in certain circumstances pursuant to section 7 of the Constitution, in emergencies, or section 13 of the Constitution, by legislation passed by super-majorities in both Houses? This is a matter of considerable significance for the law of Trinidad and Tobago.

50. The Board addressed this question of interpretation of the Constitution in *Suratt*, in which it decided that the rights and freedoms in section 4 are to be read as subject to that implied qualification. Prior to the Board's ruling in that case it had been recognised both by the Board and by the local courts that the rights in section 4 (and those they replicate set out in the 1962 Constitution) are liable to be read as subject to implied limitations. In the majority judgment delivered by Lord Steyn for the Board in *Roodal v The State* [2003] UKPC 78; [2005] 1 AC 328 he observed (para 20): "The bill of rights under the 1976 Constitution was cast in absolute terms. There are undoubtedly implied limitations on these guarantees. One such limitation may derive from section 53 of the Constitution which vests in Parliament the power to make laws for the peace order and good government of Trinidad and Tobago: see Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (1992), at pp 87-89 …". Demerieux cites the judgment of Wooding CJ in the Court of Appeal in *Collymore v Attorney General* (1967) 12 WIR 5 in which, speaking of the equivalent rights in the 1962 Constitution, he said (p 15): "the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country. In like manner, their constitutionally-guaranteed existence notwithstanding, freedom of movement is no licence for trespass, freedom of conscience no licence for sedition, freedom of expression no licence for obscenity, freedom of assembly no licence for riot and freedom of the press no licence for libel." The Board carefully explained in *Panday v Gordon* [2005] UKPC 36; [2006] 1 AC 427, paras 17-23 (Lord Nicholls of Birkenhead) that the rights in section 4 should be read as subject to limitations and not as absolute rights.

51. The relevance of a proportionality test in Caribbean constitutions was first examined by the Board in its judgment in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69. That case concerned the

constitution of Antigua and Barbuda which set out fundamental rights and contained a provision which allowed for interference with such rights unless it "is shown not to be reasonably justifiable in a democratic society". In a judgment which has proved influential, this was interpreted as imposing a proportionality test. The test has been somewhat refined in the caselaw since then: see T Robinson, A Bulkan and A Saunders, *Fundamentals of Caribbean Constitutional Law*, 2nd ed (2021), pp 473-475. It is now taken to conform with the modern conventional approach to issues of proportionality, which involves asking in relation to a measure (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community: see *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 19 (Lord Bingham of Cornhill) and *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, paras 20 (Lord Sumption) and 73-74 (Lord Reed).

52. *Suratt* concerned the compatibility of the Equal Opportunity Act 2000 ("the EOA") with the Constitution. That Act, passed as ordinary legislation by a simple majority in both Houses, created a new tribunal with jurisdiction to determine complaints of unlawful discrimination contrary to the Act with commensurate powers to make its procedures effective and to grant relief. The members of the tribunal did not have the same constitutionally entrenched protections of their independence as High Court judges and justices of appeal and it was said that the assignment of the judicial power of the state to such a body was contrary to the Constitution in various respects. That claim was upheld by the local courts, but an appeal was allowed by the Board by a majority (Lord Bingham dissenting). The main issue, on which Lord Bingham dissented, was whether the establishment of the tribunal infringed the requirement of separation of powers inherent in the Constitution.

53. It was also argued that particular provisions of the EOA were inconsistent with rights and freedoms in section 4 of the Constitution, including that sections 17 and 18 (which prohibited discrimination in the supply of goods and services and accommodation) contravened the right in section 4(a) of the Constitution to enjoyment of property and not to be deprived of it without due process, and that section 7 (which prohibited action likely to offend, insult, humiliate or intimidate persons with the intention of inciting gender, racial or religious hatred) infringed freedom of expression as protected in section 4(i) of the Constitution. It was common ground that the provisions of the EOA did interfere with the rights and freedoms in section 4. The appellants' answer was that "the rights protected by the Constitution are not absolute, that reasonable and proportionate qualifications of a protected right are not inconsistent with the Constitution, and that the qualification in the EOA,

directed to promoting the aim of non-discrimination also embodied in the Constitution, was reasonable and proportionate" (see para 33).

54. By reason of his view on the main issue in the case, Lord Bingham observed that he did not need to rule definitively on this point, but said "I would, however, accept that the rights protected by section 4 are not, at least in most instances, absolute" (para 33); and he indicated that he would have been disposed to reject the claim that sections 7, 17 and 18 of the EOA infringed any right which the Constitution protects (paras 33-34). The majority, by contrast, did have to rule definitively on the point in order to reach their conclusion that the appeal should be allowed. They took the same view as Lord Bingham. In what is admittedly a rather compressed passage at para 58, Baroness Hale, giving the judgment of the Board, said this:

> "… It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in sections 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The courts may on occasion have to decide whether Parliament has achieved the right balance. But there can be little doubt that the balance which Parliament has struck in the EOA is justifiable and consistent with the Constitution. Section 7 does impinge upon freedom of expression but arguably goes no further in doing so than the existing law; if it does go further, by including gender as well as racial or religious hatred, it is merely bringing the law into conformity with all modern human rights instruments, which include sex or gender among the prohibited grounds of discrimination. Sections 17 and 18 do impinge upon freedom of contract but in ways which are now so common in the common law world that it can hardly be argued that they are not proportionate to the legitimate aim which they pursue. …"

55. This ruling by the Board regarding the proper interpretation of the rights and freedoms in section 4 of the Constitution was part of the *ratio decidendi* in the case. As can be seen, although Lord Bingham forbore from giving a definitive ruling on the

point, the view of the Board was in substance unanimous on this issue. The Board repeated and endorsed para 58 of its judgment in *Suratt* in its unanimous judgment in *Public Service Appeal Board v Maraj* [2010] UKPC 29, para 31. In *Webster v Attorney General of Trinidad and Tobago* [2015] UKPC 10; [2015] ICR 1048, para 24, and *Sahatoo v Attorney General of Trinidad and Tobago* [2019] UKPC 19, paras 22-24 ("*Sahatoo*"), the Board interpreted the right to equal treatment in section 4(d) of the Constitution as a qualified right in respect of which a difference in treatment could be justified where it has a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In its judgment in *Sahatoo* the Board expressly declined an invitation to depart from this approach.

56. Despite this constant jurisprudence at the highest level, the correct approach to the interpretation and effect of the fundamental rights in section 4 has remained a matter of controversy in the local courts, where there is a significant body of opinion which regards the ruling in para 58 of *Suratt* as a misstep in the analysis of the place of section 4 in the Constitution. This is encapsulated in extended *obiter* comments in the minority judgment of Archie CJ and Jamadar JA in *Francis*. They considered that the rights in section 4 are absolute rights (subject only to sections 7, 13 and 54 of the Constitution) and that it is not appropriate to interpret them as subject to any proportionality test: paras 151-152. Against this view, another strand of judicial opinion in the local courts supports the ruling in *Suratt* for principled reasons, as set out in an *obiter* reply in the majority judgment in *Francis* by Bereaux JA, with which Weekes and Yorke-Soo Hon JJA concurred: paras 205-217. They contrasted a "restriction" of the rights in section 4, which can be justified (what we have termed an interference), with their "abrogation" (ie breach of the rights). Both judgments were *obiter* on this point of dispute, because in *Francis* itself the court was unanimous in holding that section 5(5) of the Dangerous Drugs Act, which imposed lengthy mandatory sentences for certain drugs offences and was passed using the super-majority procedure in section 13 of the Constitution, violated rights under section 4 and the inconsistency could not be justified pursuant to section 13. But the reasoning in both judgments on the point of dispute was carefully considered and detailed.

57. The Court of Appeal in the present case returned to this issue. Dean-Armorer JA gave the sole substantive judgment, with which Archie CJ and Aboud JA agreed. Speaking for the court, she said (para 123) "[w]e are inclined to adopt the minority view" in *Francis*, whilst recognising that they were bound by the ruling in *Suratt*. But she also stated (para 124) that the issue of the correctness of the approach in *Suratt* was not relevant to the determination of the appeal.

58. However, as the appeal to the Board has been developed, that issue has proved to be unavoidable and has indeed taken centre stage. Mr Peter Knox QC for the appellants invites the Board to adopt the reasoning of the minority in *Francis*, meaning in substance that it should depart from its ruling in *Suratt*. He submits that the words "abrogate, abridge or infringe" in section 5(1) of the Constitution should be given their natural meaning, and on any view the Rules involved an abridgement or an infringement of the rights under section 4 on which the appellants rely. Further and in the alternative, Mr Knox contends that the Board should confine the approach set out in *Suratt* to a comparatively small category of case in which the interference with the rights in section 4 is minor or insubstantial, not going beyond where it reaches "a certain level of significance" (adopting the phrase used by Lord Dyson giving the judgment of the Board in *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32; [2012] 1 AC 1, para 23 ("*Paponette"*)). He also maintains that whether an interference reaches a sufficient level of significance should be judged in the light of traditional understanding of the extent of the rights and the limitations upon them as was already established in the law at the time the 1962 Constitution and then the current Constitution were introduced.

59. In view of the division of opinion in the local courts regarding the interpretation of the fundamental rights in section 4 and the effect of section 5 of the Constitution, and having regard to the importance of this for the law of Trinidad and Tobago generally, the Board considers that it should re-visit that issue with the benefit of the discussion in the minority and majority judgments in *Francis*. This requires analysis of the place of the section 4 rights in the scheme of the Constitution, the nature of Trinidad and Tobago as a democratic state and the relationship between sections 4 and 5 of the Constitution, on the one hand, and sections 7 and 13 on the other. For the reasons set out below, which expand upon what was said in compressed form in *Suratt* and reflect the main part of the reasoning of the majority in *Francis*, the Board has concluded that the interpretation of the rights adopted in *Suratt*, para 58, is correct.

60. In the Board's view, the words "abrogate, abridge or infringe" in section 5(1), given their ordinary meaning, do not support Mr Knox's submission. They are neutral regarding the interpretation of the rights in section 4. If those rights are to be interpreted as subject to the proposed implied qualification, then it is only if a legislative measure involves a disproportionate interference with the right that any question of the abrogation, abridgement or infringement of the right itself arises. The phrase used in section 5(1) does not indicate that *any* interference with (or restriction of) one of the protected rights must be regarded as an abrogation, abridgement or infringement of it. It is simply employed as a compendious description of the various ways in which the rights in section 4 might be breached, which is consistent with the idea that they are only breached if a measure interferes with them in a disproportionate way. That this is its meaning is also made clear by other words used

in Chapter 1 which fall to be read in a coherent manner with section 5(1). Section 13(1) speaks of an Act which is "inconsistent with sections 4 and 5" (ie in breach of the rights in section 4) and section 14 speaks of "contravention" of the provisions of Chapter 1 (ie again referring to breach of the rights in section 4). Internal indications drawn from other key provisions in the Constitution thus support this view of the meaning of section 5(1).

61. Indeed, perhaps the clearest indication is drawn from section 5 itself. The structure of section 5 overall provides strong support for the *Suratt* approach to the interpretation of the rights in section 4. This is because section 5(2) sets out various aspects of the rights contained in section 4 which are made absolute in their effect, subject only to other provisions in the Chapter (ie sections 7 and 13) and to section 54. Thus, for example, arbitrary detention (section 5(2)(a)) and the imposition of a cruel and unusual punishment (section 5(2)(b)) would involve interference with the rights set out in section 4(a), (b) and (c), and possibly others, and there would have been no point in drafting section 5(2) to create absolute rights not to be treated in these ways if the basic rights set out in section 4 were already to be regarded as absolute in the sense for which Mr Knox contends (ie subject only to sections 7, 13 and 54). Similarly, section 5(2)(h) creates an absolute right to have the protection of such procedural provisions as may be necessary for giving effect and protection to the rights in section 4, ie most obviously by guaranteeing the right to go to court to enforce those rights. But the right of access to some form of legal redress is already inherent in the right to protection "by due process of law" (section 4(a)) and to "the protection of the law" (section 4(b)), so section 5(2)(h) would have been unnecessary if those rights were already absolute. The same points can be made in relation to sections 1 and 2 of the 1962 Constitution, which were in nearly identical terms to sections 4 and 5.

62. As noted above, the model for the list of rights in section 1 of the 1962 Constitution, which was then carried into section 4 of the Constitution without change, was the Canadian Bill of Rights 1960. As adopted, the 1962 Constitution had the same basic structure as the current Constitution. Section 4 of the 1962 Constitution broadly corresponded to section 7 of the Constitution and said that Acts passed during a public emergency would have effect notwithstanding the rights protected by sections 1 and 2, subject to an equivalent proviso. Section 5 of the 1962 Constitution was equivalent to section 13 of the Constitution and provided that an Act which expressly declared that it should have effect notwithstanding sections 1 and 2 and was passed with a super-majority in both Houses would have effect accordingly, subject to the same proviso as section 13.

63. The minority in *Francis* placed considerable weight on the fact that section 1 of the 1962 Constitution and section 4 of the current Constitution were modelled on the

Canadian Bill of Rights in their discussion of the historical background to the 1962 Constitution: paras 35-47. In the debates leading up to the adoption of the 1962 Constitution, Mr H O B Wooding, for the Bar Association, argued for the incorporation of rights expressed simply and concisely in line with the Canadian model while Mr Ellis Clarke, who had produced an earlier draft, argued that this would leave "the basic and fundamental problem that these rights which you give have to be subject to a wide power in Parliament to override them", that the Bar Association's proposal that there should be such a power only in a case of emergency was insufficient, and that Parliament's power to take steps in the public interest should not be stultified. According to the minority (para 45), when one compares the positions adopted in this debate with the terms of the 1962 Constitution as it emerged (and those of the current Constitution) "one can conclude that there was a compromise", whereby Mr Clarke's insistence on some allowance for parliamentary override was covered by sections 4 and 5 of the 1962 Constitution (now sections 7 and 13 of the Constitution).

64. In the Board's view, however, the background of the Clarke/Wooding debate leading to the 1962 Constitution provides no clear guide as to the meaning and effect of the rights in the 1962 Constitution or in section 4 of the Constitution. In particular, the Board does not consider that the background to the 1962 Constitution supports the opinion of the minority in *Francis* that the rights in section 4 are absolute rights.

65. In the first place, the Board considers that the fact that section 4 of the Constitution (as derived from section 1 of the 1962 Constitution) was modelled on the Canadian Bill of Rights does not bear the weight which the minority sought to place on it. The Canadian Bill of Rights was ordinary legislation, so the rights it declared in section 1 were always capable of being overridden by ordinary legislation which was inconsistent with them. Section 2 of the Bill of Rights stated that every law of Canada "shall, unless it is expressly declared by an Act … that it shall operate notwithstanding the … Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe" the rights there set out; but this was just a rule of construction of ordinary legislation. It was not until *R v Drybones* [1970] SCR 282 that the Supreme Court of Canada held that a law which could not be construed so that it did not abrogate, abridge or infringe the relevant rights was of no effect, and even in that case Cartwright CJ, Abbott J and Pigeon J delivered powerful dissenting judgments arguing that the Bill of Rights, as an ordinary Act of Parliament, was subject to any later enactment which sufficiently made it clear that, notwithstanding use of different language, Parliament intended to legislate in a way which was inconsistent with those rights. So although the rights in section 1 of the Canadian Bill of Rights were expressed in the same language as those in section 1 of the 1962 Constitution (and section 4 of the Constitution), they operated in a different way and with different force and effect in the Canadian context as understood at the time. In substance, they were always subject to being overridden by legislation passed by ordinary majorities in Parliament.

By contrast, if they were to be interpreted as absolute rights in the 1962 Constitution and the current Constitution, there would be no such power in Parliament to use legislation passed by ordinary majorities to restrict such rights. The constitutional context and the effect of the rights being so different in the two cases, in the Board's view one cannot infer from the adoption of the Canadian model that the rights in the Constitution were intended to be absolute, in the sense of being incapable of being interfered with or restricted to any degree by ordinary legislation.

66. Secondly, as is developed below, the override powers in what are now sections 7 and 13 of the Constitution do not meet the point made by Mr Clarke about the need to avoid stultification of the powers of Parliament by the adoption of fundamental rights which had excessive force. It is equally possible that the relevant compromise between the different positions in the Clarke/Wooding debate should be taken to be that the rights in what is now section 4 are impliedly qualified as stated in *Suratt*. That would still mean that the rights had serious substantive effects, in that any interference with or restriction of them would have to be justified according to the proportionality standard. The Board also notes that Mr Wooding became Wooding CJ, who made the comments in the *Collymore* case referred to above; so it is far from obvious that he thought that the rights for which he was advocating should be taken to be absolute rights. To decide whether the *Suratt* approach or that of the minority in *Francis* is correct, the Board considers that it is necessary to look for more determinative indicators regarding what effect the rights are supposed to have. These are best provided by the text and scheme of the Constitution.

67. Section 1(1) of the Constitution declares that Trinidad and Tobago is a sovereign democratic state. Accordingly, Parliament is established as the body with authority to make laws for the peace, order and good government of the country: section 53 (the equivalent provision in the 1962 Constitution was section 36; and generally the position and mode of operation of Parliament under that constitution was the same as under the current Constitution). As set out in para 12 above, the elected House of Representatives is the principal institution of the state which gives effect to the democratic principle and it does so according to the usual democratic procedure of one person one vote on the basis of decision-making by ordinary majority. As the majority judgment correctly pointed out in *Francis*, para 211, interpreting the rights in section 4 as subject to an implied proportionality qualification means that effect can be given to section 53 in circumstances in which a super-majority in each House is not always attainable. In the Board's view, this is a powerful indication that the rights in section 4 should be interpreted as set out in *Suratt*. If, by contrast, they are treated as absolute, the law-making power which Parliament enjoys under section 53 to take measures in the public interest would be severely and unjustifiably undermined. This is the point which Baroness Hale made in *Suratt*, para 58, when she observed that "[l]egislation frequently affects rights such as freedom of thought and expression and

the enjoyment of property". The Board observes that the point has even greater force when one bears in mind the full range of the rights in section 4 and their wide ambit.

68. A very large part of ordinary legislation, passed by Parliament for good reasons of the public interest, must inevitably interfere with or operate as restrictions on those rights. In the Board's view it is not plausible to suppose that the framers of the 1962 Constitution and the current Constitution intended to disable Parliament from taking ordinary legislative action in the public interest. The natural solution to accommodate the inevitable friction which always exists between individual fundamental rights and democratic decision-making in a constitutional liberal democracy like Trinidad and Tobago is that conventionally adopted so often in such states, namely to require that interference with such rights should be permitted in the public interest, but only if the interference is proportionate to a legitimate aim.

69. The minority in *Francis* did not find this solution persuasive. Instead they reasoned, at paras 62 and 147, that the framers of the 1962 Constitution and the current Constitution were aware of the entrenched political divisions in Trinidad and Tobago along ethnic, religious and geographical lines so that "consensus around a matter as sensitive and significant as the limitation or restriction of human rights is ideally and pragmatically necessary", so that their intention must have been to "stymie government" in such a plural society unless such a consensus could be achieved, ie in particular on the basis of the super-majority provision in section 13 of the Constitution (section 5 of the 1962 Constitution). However, with respect, the Board cannot accept this reasoning, for two principal reasons.

70. First, as pointed out above, the framers of the 1962 Constitution and of the current Constitution intended that Parliament, operating in the usual way rather than under the super-majority procedure, should have power to make laws for the peace, order and good government of the state. In the Board's view the minority judgment in *Francis* greatly underestimates the extent to which ordinary legislative activity may interfere to a greater or lesser degree with rights with the wide ambit of those in section 4 of the Constitution. The inference cannot be drawn that the Constitution was intended to stymie government by ordinary legislative activity whenever such interference was in issue. That would undermine the power of effective government in the public interest by ordinary legislative activity which the Constitution confers on Parliament. Many societies are pluralistic, with strong political divisions, yet ordinary legislative activity is still required to be taken to secure the general public interest in an effective manner. As is pointed out in Robinson et al, *Fundamentals of Caribbean Constitutional Law*, p 483, to interpret the rights in section 4 as absolute, as the minority in *Francis* do, "would generate an impossible situation for law-makers, one unheard of in human rights jurisprudence".

71. Secondly, it seems to the Board that to interpret the rights in section 4 as absolute rights as the minority do would conflict with the nature of Trinidad and Tobago as a democratic state. The democratic nature of the state is declared and guaranteed by the Constitution. Yet if the rights in section 4 were absolute, then, where they apply, legislative action could only be taken pursuant to section 7 or section 13, using the super-majority procedure which requires a three fifths majority in both Houses. As observed by S Wong, "Delineating and Derogating Constitutional Rights in Trinidad and Tobago" (2014) 40 Commonwealth Law Bulletin 690, 702-703, and in Robinson et al, *Fundamentals of Caribbean Constitutional Law*, p 483, the effect of that would be to give a veto to a minority of the unelected members of the Senate. As explained above, that right of veto would extend across a large part of ordinary legislative activity. In the Board's view, it cannot have been the intention of the framers of the Constitution that democratic processes of law-making and the democratic nature of the state should be compromised by creating such a veto power in a minority of an unelected body.

72. A further reason why the Board is respectfully unable to accept the view of the minority in *Francis* that the rights in section 4 are absolute is that the rights of individuals will often be in conflict when legislative choices have to be made. So, in the present case, the right to life of significant numbers of the population (section 4(a)) was in conflict with the rights relied on by the appellants, particularly the right to freedom of assembly (section 4(j)). The Constitution provides no coherent mechanism for conflicting rights to be balanced against each other, so the rights themselves must be interpreted as being subject to an implied limitation to allow for this, as the Board pointed out in *Panday v Gordon* (above), para 22 (Lord Nicholls). Reading the rights as subject to an implied proportionality qualification is the appropriate way to allow for the balancing of rights in conflict with each other which is required.

73. A further problem with the view of the minority in *Francis*, in the Board's opinion, is that that they do not recognise or allow for the coherent operation of the fundamental rights in relation to executive and governmental action outside the legislative context. The rights in section 4 do not just come into play when legislation is in contemplation, but are general in their application. It seems to the Board that it was this dimension of the issue to which Baroness Hale was referring in *Suratt*, para 58, when she observed that the rights were "qualified rights which may be limited, either by general legislation *or in the particular case*, provided that the limitation pursues a legitimate aim and is proportionate to it" (emphasis added). When any public official - from the President down to an ordinary police officer or social worker - takes action involving an individual, that individual is entitled to require them to respect their fundamental rights under section 4. So, for example, unless the rights are treated as subject to an inherent proportionality requirement, a social worker could not take a child who is at risk into care against the objections of parents who say that to do so

would infringe their right to respect for their family life under section 4(c). Moreover, this example illustrates how individual rights can conflict when executive action has to be taken just as much as when legislative choices have to be made, since the child's rights to protection under section 4(a), (b) and (c) conflict with those of the parents. As explained above, the rights have to be balanced against each other. In the Board's view, the only way in which the rights can operate coherently at the level of ordinary executive action by public officials is if they are interpreted as limited rights, which naturally implies they are subject to a proportionality qualification.

74. It cannot sensibly be suggested that the solution to this sort of situation is legislation passed by the super-majority procedure in section 13. Parliament does not have the time or resources to react to each and every individual case which might arise by seeking to pass an Act by a super-majority; and it would not wish to pass legislation by a super-majority in advance which authorised intervention whenever a social worker wished, without any control by reference to the rights at stake, since that would permit them to take action even when it would be undesirable and contrary to the rights and interests of both children and parents. The solution which the framers of the Constitution must have contemplated is that Parliament should create general powers for public officials by ordinary legislation in the usual way and that in exercising those powers those officials would be obliged to respect the fundamental rights in section 4, subject to a proportionality qualification which would allow them to take effective action in the public interest and to protect the rights of all.

75. Similar points can be made in relation to the powers given to other public officials, eg powers conferred on police officers to stop and search and to arrest. They interfere with various of the rights in section 4, such as the rights of respect for private life and freedom of movement, but the powers do not have to be conferred by an Act passed by a super-majority; and the exercise of them has to be compatible with such rights on the particular facts of any individual case.

76. The minority in *Francis* sought to distinguish *Suratt* on various grounds, including by suggesting that the ruling in para 58 was per incuriam by failing to refer to various matters and by parsing the language used in that paragraph to reduce its effect: *Francis*, paras 98-102. The Board does not agree that the ruling in *Suratt*, para 58, was made per incuriam as regards any significant or relevant matter, nor that it can be read down or limited in the way proposed by the minority.

77. Contrary to the view of the minority in *Francis*, the Board does not consider that its judgment in *Hinds v The Queen* [1977] AC 195, 214, is inconsistent with the ruling in *Suratt*. Lord Diplock simply pointed out there that where a state has a binding constitution with entrenched provisions, the court's role is to examine whether

legislation conflicts with those provisions. This says nothing about how the entrenched provisions are to be interpreted for the purpose of carrying out that exercise. Nor, contrary to the view of the minority, does the Board consider *Suratt* to be inconsistent with the judgment of the Board in *Thornhill v Attorney General of Trinidad and Tobago* [1981] AC 61. This was not concerned with the question of whether the rights in the 1962 Constitution or the current Constitution might be subject to an implied qualification of the kind in issue in *Suratt*. In fact, the judgment delivered by Lord Diplock in *Thornhill* recognised (p 70) that the rights expressed in absolute and unlimited terms in section 1 of the 1962 Constitution had to be read as subject to limits "in the interests of the people as a whole and the orderly development of the nation", which is fully in line with the view taken in *Suratt*. Lord Diplock referred to the law existing at the time of adoption of the Constitution as one source from which such limits could be identified, but did not say it was the only one.

78. In the Board's view, the difficulty in reading the ruling in *Suratt*, para 58, as applying only in restricted circumstances was amply demonstrated by the inability of Mr Knox to suggest any sound or principled dividing line between cases where the rights in section 4 are to be read as subject to an implied proportionality qualification and when they should be treated as absolute.

79. Mr Knox suggested that the balance between the rights of individuals in section 4 and the public interest should be taken to be fixed by the way in which that balance had been struck at the time the Constitution was adopted. He sought to gain support for this position from the introduction to section 4 which says that the rights therein "have existed and shall continue to exist". In this way he sought to accommodate the idea that various laws which are entirely normal according to the common law tradition but which interfere with the rights in section 4 are nonetheless permitted under the Constitution. These would include, eg, the law of defamation (which interferes with freedom of expression: section 4(i)) and the law of property (which, by virtue of the power of a property-owner to exclude others, interferes with freedom of movement: section 4(g)).

80. But there is no indication in the Constitution that it was intended to be frozen in time in its application in this way. On the contrary, it was intended to lay down a basic framework to be applied at the time of its adoption and far into the future, with the capacity to adapt and develop in light of changes in society. The reference in the opening part of section 4 to the rights having existed and continuing to exist simply means that the citizen can be confident that there will be no reduction in the protection of their rights as compared with the position in 1962 or 1976, not that the very general rights specified in section 4 are to be taken to be frozen at those times. As was explained by the Board in *Minister of Home Affairs v Fisher* [1980] AC 319, 328, the

rights set out in Constitutions of this kind are to be given a broad and purposive construction, since the Constitution is a living instrument capable of adaptation and growth as social standards change. This point has been made on many occasions in relation to a wide range of such Constitutions, including the Constitution of Trinidad and Tobago: see eg *Public Service Appeal Board v Maraj* (above), para 29; *Seepersad v Comr of Prisons* [2021] UKPC 13; [2021] 1 WLR 4315, para 26; and *Chandler v The State (No 2)* [2022] UKPC 19 ("*Chandler (No 2)*"), para 73. Some provisions of the Constitution, including the savings provision in section 6, are fixed and determinate in their effect, and hence not amenable to adaptation according to the living instrument doctrine: see *Chandler (No 2)*, paras 22, 28, 32(vi) and 73. But, by contrast, the rights in section 4 are not precisely defined and certainly are to be interpreted in accordance with that doctrine.

81. That feature of the Constitution has this consequence. Since the rights in section 4 have to be read as limited or qualified rights (as explained above and as acknowledged in the *Thornhill* case), they have to be capable of carrying the relevant qualification with them as they develop according to the living instrument doctrine. Simple reference to the law as it existed in 1962 or 1976 will not be effective to achieve this, since such limits as existed then will not have been framed in light of the current application of the rights. The nature of the Constitution as a living instrument therefore indicates that a more general form of qualification must have been intended, and points to the proportionality qualification set out in *Suratt*. Furthermore, the fact that the rights are liable to change in ways which have new and wider effects on governmental activity which itself adapts as society develops means that the scope for friction between the fundamental rights of individuals and the general interest of the community referred to in para 68 above is likely to increase, which gives still greater force to the point made there. This reinforces the inference that it must have been intended that the rights in section 4 should incorporate a mechanism to strike a fair balance between those rights and the public interest. The proportionality qualification identified in *Suratt* is the appropriate mechanism for that purpose.

82. Mr Knox's attempt to rely on the *Paponette* judgment is misplaced. That case concerned a constitutional challenge to legal changes in the way taxi-drivers could carry on their trade, based on their right under section 4(a) of the Constitution not to be deprived of the enjoyment of their property. Lord Dyson delivered the majority judgment of the Board. The Board, departing from the view of the Court of Appeal, held that although the new law did not deprive the claimants of their businesses altogether, it did amount to a substantial interference with them which was sufficient to amount to an infringement of the claimants' rights under section 4(a). This meant that it was for the government to justify the interference as being in the public interest: para 25. In support of this conclusion, in the passage at para 23 to which Mr Knox refers, Lord Dyson relied on authority of the European Court of Human Rights to

the effect that to engage the protection of the right to enjoyment of property set out in article 1 of the First Protocol to the European Convention on Human Rights, the infringement must "reach a certain level of significance".

83. Lord Dyson's reasoning at para 25 regarding the operation of the right in section 4(a) of the Constitution is fully in line with *Suratt*, para 58. Once an interference with the right was established, the government would have a defence (such that no violation of the right would exist) if it could justify the interference. In other words, the right itself was interpreted to be a qualified right, not an absolute one. As regards para 23 of the judgment, Lord Dyson was not suggesting that the opportunity to justify an interference with the rights set out in section 4 only arose in limited circumstances, if the interference was minor. He was making the point that there was no interference at all with the relevant right set out in section 4(a) unless a certain level of intrusion upon the business interests in issue had occurred. Below that threshold of intrusion, no need for justification would arise.

84. The Board does not accept Mr Knox's further submission that the proportionality qualification set out in *Suratt*, para 58, is only applicable in relation to minor interferences with the rights in section 4 (or as he put it in further formulations, that the qualification does not apply where the interference "represents a reasonably substantial or major departure from the norm", as judged by what is generally accepted in the laws of other democratic states, or where the interference is "extraordinary" rather than "ordinary"). No such limitation was suggested in *Suratt* or the other authorities referred to above. Although Baroness Hale described the statutory provisions challenged in *Suratt* as "common in the common law world", she was not suggesting that the proportionality test she set out in para 58 was capable only of justifying that limited kind of interference. More fundamentally, to limit the *Suratt* interpretation of the rights as proposed would be unprincipled. The Board can see no basis for arriving at an interpretation of the rights which differs in this respect depending on the effect which some measure under review has upon the rights in question. The interpretation of the rights must be uniform across the whole range of their application. The proportionality test is flexible and is itself adapted for this, and allows for less significant interferences to be justified more readily while at the same time allowing for more significant interferences also to be justified provided the public interest in the legitimate aim pursued is sufficiently strong.

85. Furthermore, a threshold test that the proportionality qualification comes into play only when the interference is minor would be inherently uncertain and difficult to apply. It cannot be inferred that the framers intended that such an additional threshold test should be read into the rights in section 4 by implication.

Sections 7 and 13 of the Constitution

86. A final and important aspect of the scheme of the Constitution must also be addressed. This concerns the relationship between the proportionality test inherent in the rights in section 4 of the Constitution and the tests applicable in the proviso at the end of section 7(3) and that at the end of section 13(1). It is clear that the test under those provisos must be different from any proportionality test inherent in the rights themselves, since the former only comes into operation if a law passed under section 7 or section 13 is inconsistent with sections 4 and 5, ie on the interpretation of the rights according to *Suratt*, para 58, where the interference with the right in question is already disproportionate so that the right is (or might be) violated. The tests in the respective provisos to section 7(3) and section 13(1) must be more generous to the government than the proportionality test inherent in the rights themselves, since the object of section 7 and section 13 is to save legislation from invalidity where it is otherwise in breach of the rights. So what is the nature of the tests in the provisos, and does that cast light upon the question whether *Suratt*, para 58, is correct?

87. The minority and the majority in *Francis* both grappled with these questions. It is convenient to focus first on section 13(1), which is of general application and not confined in its operation to situations involving a public emergency. The minority pointed out that the language of the proviso ("unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual") is similar to the relevant formulation in the constitution of Antigua and Barbuda which was under consideration in *de Freitas v Permanent Secretary* (above) ("is shown not to be reasonably justifiable in a democratic society"), which was interpreted in that case to import a proportionality test. In the case law of Trinidad and Tobago prior to *Francis* the proviso to section 13(1) had been interpreted, in line with the judgment in *de Freitas*, as importing a proportionality test: see *Northern Construction Ltd v Attorney General of Trinidad and Tobago* 31 July 2002 (HCA No Cv 733 of 2002), pp 35-39 per Jamadar J (as he then was) at first instance and Civ App No 100 of 2002 (27 February 2009), paras 23-24 per Archie CJ on appeal ("*Northern Construction*").

88. The minority in *Francis* (Archie CJ and Jamadar JA, as he had become) reasoned that if the proviso to section 13(1) imports a proportionality test, then there would be a contradiction if the section 4 rights are themselves interpreted as incorporating such a test by implication: para 113. They discounted the possibility that there might be different degrees of proportionality applicable at the different stages of analysis: paras 114(a) and 115. They referred to the judgment of the Board in *Worme v Comr of Police of Grenada* [2004] 2 AC 430, which concerned the constitution of Grenada, in order to suggest that the proviso in section 13(1) does not incorporate a proportionality test as

such, albeit it might be used as an aid for deciding whether the proviso had been satisfied: paras 122-124. They concluded (para 125) that the process of analysis contemplated by section 13 involves three discrete steps; (i) determination that legislation is inconsistent with the rights in section 4; (ii) determination whether this is reasonably justifiable, for which a proportionality test may be a useful aid; and (iii) testing this against "the core inviolable and relevant standards of a democratic society against which the provisions challenged must ultimately be measured".

89. The majority reasoned that the proportionality test was inherent in the section 4 rights and therefore, if one followed that three-stage approach to the application of section 13 derived from the judgment of the Court of Appeal in *Northern Construction*, any legislation found to be inconsistent with sections 4 and 5, because its provisions are disproportionate, "will most certainly not be reasonably justifiable under section 13(1)": para 207. They referred to the judgment of the Court of Appeal in *Ishmael v Attorney General of Trinidad and Tobago* 27 July 2012 (Civ App No 140 of 2008) which suggested that the decision in *Northern Construction* might have to be reviewed and questioned whether the proportionality test was not more appropriately to be considered under section 13(1); but their view was that the proportionality test is appropriate to the question of inconsistency with sections 4 and 5 and not to section 13(1), although it might be used as a tool in construing the proviso in section 13(1).

90. With respect, the Board finds neither the position of the majority nor that of the minority to be entirely satisfactory. In the Board's view, (1) the correct interpretation of the Constitution is that the rights in section 4 are to be read as incorporating an implied proportionality test as set out in *Suratt*, para 58, for all the reasons set out above; (2) the proviso to section 13(1) also incorporates a proportionality test; but (3) the framing of the test in each case is different, so there is no inconsistency or incoherence involved. The proportionality test inherent in the rights in section 4 is the conventional and usual proportionality approach originally explained in *de Freitas v Permanent Secretary* and refined thereafter, which is more demanding from the point of view of the state than that under section 13(1). Another way of putting this is to say that the test of proportionality appropriate under section 13(1) involves a lesser intensity of review by the courts and a wider margin of appreciation or discretion for the state, acting by legislation passed by a super-majority in both Houses of Parliament.

91. The proportionality approach for bringing into account both individual rights on the one hand and the general interest of the community on the other is aimed at ensuring that a balance is struck between the two. The stronger the public interest in issue, the greater the interference with individual rights which may be permitted without there being any violation. Generally, in a democracy, it is the democratic

institutions which have the primary responsibility to identify the public interest and what is required to promote it. As Baroness Hale put it in *Suratt*, para 58: "It is for Parliament in the first instance to strike the balance between individual rights and the general interest". Where Parliament gives expression to the public interest not merely by legislation passed in the usual way, but by an Act passed by a super-majority in each House pursuant to section 13 and which records expressly on its face that it is to have effect "even though inconsistent with sections 4 and 5", Parliament will have identified in a particularly clear and forceful way its opinion as to where the public interest lies. In a democratic state, the courts must be expected to be especially respectful of the choice made by Parliament to pass legislation in that form and slow to substitute their own view of the necessity for and proportionality of the measure taken.

92. That the proportionality framework may be affected by the extent of the engagement of the democratic institutions of the state is well attested by decisions in other jurisdictions: see *Draon v France* (2006) 42 EHRR 40, para 108; *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, paras 108-109 and 113-116; and *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223, paras 208-209 ("*SC*"). In the context of the Constitution, where an Act has been passed using the super-majority procedure in section 13, "the democratic credentials of the measure" are especially strong (in the language used by Lord Reed in *SC* at para 209). Accordingly, although the court has to make the ultimate judgment whether the proviso in section 13(1) has been satisfied or not, it is obliged in doing so to give especially great weight to the judgment of Parliament regarding the importance of the public interest which is sought to be promoted by the measure in question. In the context of section 13 it is clear that the intention is that the weight to be given to the judgment of Parliament regarding the importance of the public interest and how individual rights should be accommodated in relation to that is even greater than in relation to an ordinary proportionality assessment, because the Constitution provides that Parliament may override the ordinary application of the rights in section 4 where it judges that the public interest requires this, provided that it faces up directly to the possibility that the measure may be inconsistent with sections 4 and 5 and uses the super-majority procedure. The proviso in section 13(1) is a long-stop check against abuse of that power and cannot be taken merely to replicate the ordinary proportionality standard inherent in the rights in section 4.

93. That this is the intended effect of the proviso is reinforced by the fact that under it the onus is cast upon the person who contests the compatibility of the measure in question with the Constitution to show that it is not reasonably justifiable. This is to be contrasted with the position under the ordinary proportionality test inherent in the rights in section 4, where if the measure is shown to constitute an interference with a right the onus is on the state to justify it: see *Paponette*, paras 25 and 36-43; *Webster v Attorney General of Trinidad and Tobago* (above), para 21; and

Robinson et al, *Fundamentals of Caribbean Constitutional Law*, pp 472-473. Where the court poses the question whether, according to the long-stop test in section 13(1), a measure is "reasonably justifiable" and the onus is on the complainant to show that it is not, according to unspecified bedrock principles which underpin a democratic society and one which "has a proper respect for the rights and freedoms of the individual", in the absence of being able to refer to a clear standard set out in positive law a court will be slow to conclude that this has been shown: compare *SC* (above), para 208. As Archie CJ rightly observed in *Northern Construction*, paras 5 and 21-22, section 13(1) places a "heavy burden" on the complainant.

94. Nonetheless, in the Board's view the test to be applied under the proviso in section 13(1) is still a version of the proportionality test, albeit one framed in a way which gives especially strong weight to the judgment of Parliament regarding the imperative nature of the public interest. Where legislation has been passed by a super-majority, that is capable of affecting each of the four stages in the proportionality test (para 51 above). It shows that Parliament considers the public interest objective to be very important indeed (stage (i)), which in turn is likely to affect assessment of whether there is a sufficient degree of connection between the measure in issue and that objective (stage (ii)), whether the trade-offs in public policy terms in using that measure as opposed to others are acceptable (stage (iii)) and the question at stage (iv) (sometimes called proportionality in the strict sense). The essential question posed under the proviso, taking account of this framework, is whether the Act in question strikes an acceptable balance between the rights and freedoms of individuals and the general interest of the community. The proportionality test has been developed as the appropriate way to answer this question across a range of contexts and, since it is readily capable of being adapted in a suitable way to be applied here as well, there is good reason to conclude it should be used in the context of section 13(1). Therefore, with due allowance for the particular context in which it falls to be applied, the Board considers that Jamadar J and Archie CJ were correct in their respective judgments in *Northern Construction* in holding that the application of section 13(1) involved the application of a version of the proportionality test. But the framework in which the proportionality assessment has to be made under section 13(1) is qualitatively different from that in which an ordinary proportionality assessment is made, so that the Board does not think it right to characterise it as a "sliding scale" as Archie CJ and Jamadar JA did in *Francis* at para 114(a).

95. The Board does not consider that it is appropriate to divide the operation of section 13(1) into the three stages proposed by the minority in *Francis* and apparently accepted by the majority. That seems unnecessarily complicated and is potentially confusing. In the Board's view the application of the proviso in section 13(1) involves a single test, which is a proportionality test framed as set out above. It is not strictly necessary to decide whether the Act in question is inconsistent with sections 4 and 5 -

although whether it is and the extent of any inconsistency is likely to be a relevant consideration - because the power given to Parliament by section 13 is to legislate against what may be a background of uncertainty about how the courts might react to a particular measure in terms of assessing its compatibility with sections 4 and 5 when applying the ordinary proportionality standard. Parliament does not have to reach a firm and final conclusion that the measure is inconsistent with those provisions, but only has to state expressly that the legislation enacted is to have effect "even though" it is inconsistent with them (which is to say, might eventually be found by a court to be so). Where Parliament uses the power under section 13 it says, in substance, that whether or not the Act is inconsistent with the rights in section 4 Parliament's judgment is that the public interest in giving it effect is so strong that it should not be set aside by reference to sections 4 and 5 but should instead be subject only to the less intensive proportionality test in the proviso in section 13(1). That involves application of a single test which ought not to be broken up into distinct parts as proposed in *Francis*. Contrary to the view of the minority in *Francis*, the Board does not consider that its judgment in the *Worme* case (above) is in any way inconsistent with this analysis.

96. The same analysis is applicable in relation to the operation of the proviso in section 7(3) of the Constitution for similar reasons. The power under section 7 to legislate by regulation or primary legislation in a manner inconsistent with sections 4 and 5 arises only in a period of public emergency. In a public emergency, the public interest in taking measures to address the emergency will be especially strong, as is clear from the circumstances defined in section 8 in which the President may proclaim that an emergency exists. It is also clear from the fact that section 7(2) permits legislation made pursuant to section 7 to override even the rights which are made absolute under section 5(2)(a), (c) and (h), by providing for the detention of persons, subject to the procedural protection in section 11, if that is reasonably justifiable for the purpose stipulated in section 7(3). The President is an elected official who is ultimately accountable to the electorate for his actions and, further, sections 9 and 10 give Parliament a close supervisory role regarding any Proclamation. Therefore, again, the democratic credentials of any measure taken pursuant to such a Proclamation are strong. The constitutional control under the proviso in section 7(3) is also tighter than under the proviso in section 13(1), in that any measure must be "reasonably justifiable for the purpose of dealing with the situation that exists during that period".

Conclusion on the correctness of Suratt, para 58

97. The ruling by the Board in *Suratt*, para 58, was intended to be a statement having general effect. Having carefully reconsidered the matter with the benefit of the

judgments in *Francis*, the Board concludes that it was correct for the reasons given in succinct form in *Suratt* and at greater length in this judgment.

The proportionality of the Rules and their consistency with sections 4 and 5

98. Having reached the conclusion that the rights in section 4 are qualified by a proportionality test and are not absolute rights, it remains for the Board to determine whether the Rules were inconsistent with the appellants' rights in section 4 on which they rely. This question has to be addressed bearing in mind that it is the ordinary proportionality approach which is to be applied, not the approach more generous to the state which is applicable under sections 7 and 13. Although Mr Thomas Roe QC, for the respondent, raised issues regarding the relevance of some of these rights, he accepted that the Rules interfered at least with the right of assembly in section 4(j). For the purposes of deciding Issue (1) the Board is prepared to make the assumption that the Rules interfere with the other rights relied on as well, without deciding whether they do. What is said here is subject to the Board's consideration of the distinct *lex specialis* argument presented by Mr Knox (Issue (2) below).

99. In the Board's judgment, the Rules were passed for a legitimate aim of the public interest, to protect the public from the spread of a virulent and dangerous disease. The Rules made some allowance for religious gatherings, but on any view they represented a very substantial interference with the right of freedom of assembly and the Board will assume that the interference with the other rights relied on was substantial as well.

100. Despite this, the Board is satisfied that the interference with the appellants' rights was proportionate and hence consistent with those rights and involved no violation of them. The Rules were promulgated on the basis of expert scientific advice against a background of considerable uncertainty about how the disease was transmitted and how best to counter its spread. The public interest in issue, the protection of the right to life and the health of the whole population, was an especially important one. In the Board's view, the Rules struck a fair balance between the rights of the appellants and the general interest of the community and were plainly a proportionate means of protecting the public interest in the circumstances. The Board takes the same view of this as the Court of Appeal of England and Wales in *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; [2021] 1 WLR 2326 in relation to similar restrictions on gatherings.

101. On this aspect of the case the Board endorses the reasoning of Boodoosingh J at first instance. If his judgment had depended on this point, he would have found that

the Rules were a proportionate response to the management of the pandemic in the circumstances which applied when they were promulgated and during the period they were maintained in place. As he explained in his judgment, the spread of Covid-19 had been "rapid and pervasive" with the result that healthcare systems were placed under great strain and many people lost their lives. Based on scientific advice, governments around the world, including in Trinidad and Tobago, felt the need to act quickly by implementing restrictions on rights and freedoms that would previously have been unthinkable. There was a need to respond urgently in the face of the pandemic, which called for consideration of a range of economic, social and political factors in relation to which a significant measure of respect was to be accorded to the judgment of the executive and the legislature. The uncontradicted evidence of the Minister of Health, Mr Terrance Deyalsingh, and the Chief Medical Officer, Dr Roshan Parasram, was to the effect that the Rules were introduced on the basis of expert scientific advice which indicated that severe impacts would be likely to result if no action was taken. The evidence was that controlling gathering and enforcing social distancing were critical elements in a strategy to check the spread of the disease. The measures taken were similar to those taken in a range of other democratic states. The regulations were amended on several occasions and it was clear that there had been constant monitoring of the status of the virus in Trinidad and Tobago with adjustments being made in the light of that. At the same time, persons in the position of the appellants had procedural protections available to them, in terms of access to the courts to contest the lawfulness and constitutionality of the measures being taken.

8. Issue (2) - Whether the Rules could only have been made under sections 7 to 12 of the Constitution concerning public emergencies

102. Mr Knox submitted that where a public emergency occurs, such as the Covid-19 crisis, the regime in sections 7 to 12 of the Constitution is a *lex specialis* code which excludes the operation of the Ordinance. Therefore the Rules, which were promulgated by the Minister using his powers under the Ordinance, had no proper legal basis and were void. The Board does not accept this argument.

103. The Ordinance sets out general powers for dealing with public health emergencies associated with infectious diseases. It pre-dated both the 1962 Constitution and the current Constitution and was not repealed or modified by them. There is no inconsistency between the regime in the Ordinance and the regime in the Constitution. The former confers general powers for dealing with emergencies, the exercise of which must be compatible with the rights in section 4 of the Constitution. The latter sets out a range of exceptional powers, subject to special controls, which may be used where necessary to override individual rights, including by ordering detention to combat the spread of disease (section 7(2)). The overlap between the

regimes was extensive and obvious, particularly in light of the width of the definition of public emergency in section 8(2)(b) of the Constitution. The inference to be drawn from the absence of any reference in the 1962 Constitution and the current Constitution to the regime in the Ordinance is that the two regimes were intended to exist alongside each other, not that the regime in the Constitution should exclude the Ordinance regime.

104. The regime in sections 7 to 12 of the Constitution is clearly not intended to have *lex specialis* status. This group of sections has the heading "Exceptions for Emergencies", indicating that it operates, when put into effect by a proclamation of a public emergency, as an exception from the legal position which otherwise obtains. Section 7(1) states that the regime is "[w]ithout prejudice to the power of Parliament to make provision" to deal with health emergencies. Even as an exceptional regime within the Constitution the code in sections 7 to 12 is not an exclusive *lex specialis* for dealing with issues where individual rights may need to be overridden, because the general power in section 13 to do that exists alongside it.

105. There is good reason to think that the framers of the Constitution intended that the regime in the Constitution should not displace the regime in the Ordinance. Both regimes set out useful powers which provide the government with options about how to proceed in the face of a public health emergency. It would be undesirable to drive government to seek to suspend individual rights too readily by forcing it to use the powers under the constitutional regime. A government which decides to respond to a difficult public health issue cautiously and with restraint, by employing powers under the Ordinance which have to comply with the individual rights in section 4, should not then be exposed to legal challenges based on the contention that the President ought instead to have declared a public emergency under section 8. The public interest requires that the government should be able to respond flexibly and with confidence that the measures it takes will not be unduly at risk of legal challenge. The framers of the Constitution cannot have intended that the authorities would be presented with a difficult dilemma about which powers they should use in the face of a public health crisis.

9. Issue (3) - Whether the Rules are saved under the exception for existing law set out in section 6 of the Constitution

106. In the light of the Board's conclusion that the Rules did not infringe the appellants' rights under section 4 of the Constitution, this issue does not need to be determined. Since, however, it has been fully argued and was a ground relied upon by the courts below, the Board shall briefly address it.

107. This issue falls to be considered on the premise that the Rules do infringe the appellants' rights and freedoms under section 4. If so, section 5 provides that "no law" may do so "except as is otherwise expressly provided in this Chapter and in section 54". The respondent contends that it is otherwise so provided as the Ordinance predated the Constitution and is an "existing law", section 105 of the Ordinance conferred a wide power to make regulations which did not conform to the rights and freedoms set out in section 4, that wide power has been continued because under section 6 "nothing in sections 4 and 5 shall invalidate … an existing law", and the Rules were intra vires that power and must therefore be regarded as valid laws.

108. There is no doubt that the Ordinance is an existing law and that the Rules were intra vires the Ordinance. In those circumstances the respondent contends, as the courts below accepted, that the effect of section 6 in preserving section 105 of the Ordinance means that the regulations issued pursuant to the Minister's powers under that provision must be treated as valid laws unaffected by sections 4 and 5 of the Constitution. Mr Roe submitted that the Constitution entrenched certain human rights and freedoms in the condition they stood in when the Constitution was enacted, which means being subject to the Minister's powers under the Ordinance and therefore to regulations properly issued pursuant to those powers. The Board does not accept this argument.

109. First, an existing law is defined in section 6(3) to mean "a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1)". Clearly the Rules themselves do not fall within this provision.

110. The Rules did not have effect as part of the law of Trinidad and Tobago immediately before the commencement of the Constitution or indeed at any time before 2020 when they were issued pursuant to the Minister's powers under section 105 and published in the Royal Gazette in accordance with section 132 of the Ordinance. Nor were the Rules an enactment otherwise "referred to in subsection (1)". Aside from an existing law, subsection (1) covers enactments which repeal and re-enact an existing law without alteration, or which alter an existing law but do not derogate from any fundamental right in a manner or to an extent that an existing law did not previously so derogate. Although a strictly limited type of future laws are therefore to count as existing law, this does not include future regulations passed under existing laws. It could easily have been so provided, as it is in some other Constitutions which retain an express saving for things authorised by existing law, such as in section 30(1) of the Constitution of the Bahamas.

111. Secondly, there is a distinction between the vires of the Rules and their constitutionality. The fact that the Rules were intra vires the Ordinance does not determine their constitutionality. That depends on whether they meet the definition of "existing law" set out in section 6, since only "existing laws" are exempted from having to satisfy the constitutional requirements in sections 4 and 5. They do not do so for the reasons set out above.

112. Thirdly, it is difficult to see why the framers of the Constitution would have wanted to save a power for the executive to pass secondary legislation to infringe the fundamental rights under section 4 of the Constitution, in circumstances where they were taking away such a power from Parliament itself, unless it obtained a special majority, or there was an emergency calling for the use of the President's powers. This reinforces the point made above that the vires of the Rules should not be conflated with their constitutionality. Sections 4 and 5 of the Constitution, read alongside the precise and limited definition of "existing law" in section 6, introduced constitutional standards which all new laws are required to meet, whether they are contained in primary legislation or subordinate legislation.

113. Fourthly, it is well established that, in case of doubt, exceptions to the rights and freedoms protected under a Constitution, such as the savings clause in section 6, are to be construed restrictively - see, for example, *R v Hughes* [2002] UKPC 12; [2002] 2 AC 259 at para 35 and the recent decision of the Board in *Chandler (No 2)*, at para 43.

114. In support of its case the respondent relied on the Board's decision in *de Freitas v Benny* [1976] AC 239. That case involved a challenge to the death penalty under the 1962 Constitution. Although it was accepted that the death penalty was constitutional by reason of the savings clause, it was argued on behalf of the appellant that the executive act of choosing to carry it out was not. A distinction should be drawn between the protected legislation and administrative acts done in furtherance of such legislation. This argument was rejected by Lord Diplock in giving the opinion of the Board. He stated as follows at p 246C:

> "It is in their Lordships' view clear beyond all argument that the executive act of carrying out a sentence of death pronounced by a court of law is authorised by laws that were in force at the commencement of the Constitution."

115. By analogy, Mr Roe submitted in the present case that once one accepts that the Ordinance, an existing law, gave the Minister authority to make the Rules, it

follows that the executive act of exercising that authority was authorised by that existing law and therefore constitutional.

116. There is, however, an obvious and important distinction between an authorised executive or administrative act in the implementation of an existing law and the issue of regulations under such a law. Such regulations are themselves laws. Regulations such as the Rules are law and they are "new" rather than "existing" law unless they fall within the definition of existing law set out in section 6.

117. Mr Roe further argued that unless the savings for existing law extended to regulations made under the Ordinance, the saving of the Ordinance as existing law would be deprived of any or any real effect. That is not the case. As the Board's analysis and conclusion on Issue (1) demonstrates, it is perfectly possible to issue regulations under the Ordinance which impinge upon but do not infringe rights under section 4 of the Constitution.

118. Had it been necessary to determine this issue, the Board would therefore have concluded that the Rules were not saved under the exception for existing law set out in section 6 of the Constitution.

10. Issue (4) - Whether the issue of the regulations by the Minister is contrary to sections 1 and/or 2 of the Constitution as being inconsistent with the notions of a sovereign democracy and/or constitutional supremacy

119. The appellants argued that the Ordinance itself is unconstitutional and inconsistent with the notions of a sovereign democracy and constitutional supremacy, insofar as it vests in the Minister the sole, unsupervised, power to make infringing regulations without reference to Parliament, as they contend happened in this case. The assumption that the Minister still has powers to pass laws of the same width and scope after independence as he had enjoyed before independence undercuts the supremacy of the Constitution, expressly guaranteed by section 2, by which the previous colonial constitutional order founded on parliamentary supremacy was overridden - see, for example, *Guyana Geology and Mines Commission v BK International Inc* [2021] CCJ 13 AJ (GY).

120. The short answer to this issue is that the Rules are not infringing regulations, but, had they been, they would have been unconstitutional by reason of sections 4 and 5 of the Constitution. In any event, as made clear by the Board's judgment in *Chandler (No 2)*, general notions of a sovereign democracy and constitutional supremacy cannot

be separated or untethered from the specific provisions of the Constitution - see, in particular, paras 75 to 95. As made clear in addressing Issue (2), the Constitution does not mean that the Rules could only have been made under sections 7 to 12 of the Constitution concerning public emergencies and for the Minister to have partly overlapping powers under the Ordinance is not unconstitutional. It follows that the use of such powers cannot be contrary to notions of a sovereign democracy and constitutional supremacy as reflected in the Constitution. It is entirely compatible with the notion of a sovereign democracy that powers can be conferred on a Minister to make subordinate legislation; that is indeed a common feature in democracies. Constitutional supremacy is respected by the checks available to ensure that the Rules are consistent with the provisions of the Constitution.

11. The Maharaj appeal issue - Whether the Religious Gatherings Rule was unconstitutional, illegal, null and void, and of no legal effect for want of legal certainty and whether it infringed the appellant's constitutional right to due process of law and/or the protection of the law and/or to freely observe his religion

121. We set out the Religious Gathering Rule again here in order to focus our discussion of this issue. It provides so far as material:

> "2(1) During the period specified in regulation 16, a person shall not, without reasonable justification -
>
> (a) be found at any public place where the number of persons gathered at any time exceeds ten;
>
> …
>
> (2) The limit of persons at -
>
> (a) religious or ecclesiastical services or any other religious gatherings including funerals, weddings and christenings, may exceed the number set out in subsection (1), provided that they comply with the Guidelines for Places of Worship issued by the Ministry of Health;
>
> …

> (3) A person who contravenes this regulation commits an offence and is liable on summary conviction to a fine of fifty thousand dollars and imprisonment for a term of six months."

122. The appellant does not dispute the legal validity of the general prohibition against gatherings above ten persons contained in regulation 2(1)(a) read with regulation 2(3). However, he contends that on its proper interpretation and read as a whole the Religious Gathering Rule criminalises breaches of the Guidelines. The vagueness surrounding what compliance with the Guidelines requires means that the Rule does not meet the basic requirement of any criminal law, that it is sufficiently certain to enable a person to know what conduct is forbidden. He submits that this means that the part of regulation 2 which comprises the Religious Gathering Rule is ultra vires section 105 of the Ordinance and that it also fails to comply with the requirement of constitutionality as set out in sections 4 and 5 of the Constitution.

123. The requirement of sufficient legal certainty is well established. As Lord Bingham of Cornhill stated in *R v Rimmington* [2005] UKHL 63; [2006] 1 AC 459, para 33:

> "… no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it …"

124. Lord Bingham explained that the relevant common law principles were summarised by Judge LJ in his judgment in *R v Misra* [2005] 1 Cr App R 21, paras 32-34:

> "32. … In the 17th century Bacon proclaimed the essential link between justice and legal certainty:
>
> > 'For if the trumpet give an uncertain sound, who shall prepare himself to the battle? So if the law give an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes … Let there be no authority to shed blood; nor let sentence be pronounced in any court upon cases, except according to a known and certain law' …

33. Recent judicial observations are to the same effect. Lord Diplock commented in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591 at p 638:

> 'The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.' In *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 279 he repeated the same point:
>
> > "Elementary justice or, to use the concept often cited by the European court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible."
>
> More tersely, in *Warner v Metropolitan Police Comr* (1968) 52 Cr App R 373, 414; [1969] 2 AC 256, 296, Lord Morris of Borth-y-Gest explained in terms that:
>
> > "… In criminal matters it is important to have clarity and certainty." …

34. … Vague laws which purport to create criminal liability are undesirable, and in extreme cases, where it occurs, their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction. If the court is forced to guess at the ingredients of a purported crime any conviction for it would be unsafe. That said, however, the requirement is for sufficient rather than absolute certainty."

125. If the Religious Gatherings Rule does criminalise breaches of the Guidelines across all aspects of what they deal with then there is obvious force in the appellant's

case. As is pointed out, the language of the Guidelines is problematic. Various imprecise terms are used such as “endorse”, “encourage”, “ensure”, “advise”, “adapt”, “consider” and “should” rather than clear mandatory terms such as “shall” or “must”. It is submitted that because the Guidelines contain such a proliferation of requirements, imperatives, suggestions, recommendations, and advice, the ambit of the notional criminal conduct is inherently unfettered. It is also difficult to see how the policing of this notional criminal conduct would be anything other than arbitrary and disproportionate in its effect.

126. The critical question is whether or not on its proper interpretation the Rule criminalises breaches of the Guidelines. The judge held that it did; the Court of Appeal held that it did not. Guidance as to the proper approach to that task of interpretation is provided in the Board’s recent decision in *Attorney General of the Turks and Caicos Islands v Misick* [2020] UKPC 30, paras 38-41, another case involving regulations made in order to address issues raised by the Covid-19 pandemic. Adapting what was there said to the present case:

> “38. In interpreting [the Religious Gatherings Rule] the first question is what is the natural or ordinary meaning of the particular words or phrases in their context in the Regulations. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the [Minister] when making … the Regulations that it is proper to look for some other possible meaning of the word or phrase, see *Pinner v Everett* [1969] 1 WLR 1266 at 1273. In performing that exercise the text of [the Religious Gatherings Rule] has to be read in its context in its widest sense, to include the context of the Regulations as a whole …
>
> 39. The legal context includes the Constitution and a court would not lightly infer that [the Religious Gatherings Rule] is intended to override or displace basic tenets of the Constitution - see *Bennion* [Bennion on Statutory Interpretation, 7th ed (2017)] at para 25.1.
>
> 40. Also of potential relevance is the principle of effectiveness - ie where possible, an enactment will be construed so that its provisions are given force and effect rather than rendered nugatory - see *Bennion* at para 9.8.

> 41. Finally, the weight to be attached to the grammatical meaning, though still significant, is reduced if the Regulations bear the hallmark of imprecise drafting - see *Bennion* at para 9.4."

127. The starting point is therefore the words used in the Religious Gatherings Rule considered in their proper context. The basic offence is set out in regulation 2(1) and consists of being in a public place in a gathering of more than ten people without reasonable justification. It is concerned with the number of people who may gather in a public place. A higher limit of persons is then allowed for religious gatherings provided that they comply with the Guidelines. Given that the context is the appropriate "limit of persons" the key provision of the Guidelines is that which defines that limit. That is clearly set out in the Guidelines, as the Court of Appeal correctly observed at para 150:

> "Attendance shall be calculated for each building based on a measurement of 36 square feet per person. For instance,
>
> 1,000 sq ft = 27/25 persons;
>
> 2,500sqft = 69/60 persons;
>
> 4,000sqft = 111/100 persons;
>
> 7,500sqft = 208/200 persons; and
>
> 10,000sqft = 278/250 persons."

Although in each example a range of attendance numbers is given, it is the overarching rule of 36 square feet which governs, indicating that it is the higher number in the range in each case which is the relevant permitted maximum. This construction of the regulation, as read with the Guidelines, is reinforced by the usual presumption that any ambiguity in penal legislation is to be resolved in favour of the citizen.

128. The Guidelines then set out guidance in relation to a number of other matters, such as timing of services; sanitation of facilities; personal hygiene of staff member or congregant; physical distancing; use of music and use of technology for sharing of worship. None of these paragraphs of the Guidelines are to do with the limit of

persons allowable at the gathering and the Board considers that on a proper interpretation of the Religious Gathering Rule they are advisory rather than mandatory. This is borne out by a number of considerations.

129. First, a guideline is by its nature advisory. The purpose of a guideline is to provide information to advise people as to how something should be done; not what must or must not be done. A guideline is not a tramline.

130. Secondly, this is well illustrated by the language in which the Guidelines are expressed, which is essentially advisory. It uses terms such as: “preferably”; “it would be ideal”; “encourage”; “advise”; “consider”; “discourage”, “recommended”. The principal more imperative term used is “should”, not “shall” or “must”.

131. Thirdly, for all the reasons given by the appellant, the wider aspects of the Guidelines are manifestly defective as law. They do not seek to address the requirement of sufficient certainty and clearly fail so to do. Nobody would sensibly draft a law in the terms of the Guidelines. It is difficult to imagine a case of more “imprecise drafting”. This strongly suggests that it cannot reasonably be supposed to have been the Minister’s intention in promulgating the regulation that the Guidelines in their entirety should themselves constitute part of the law.

132. Fourthly, if the Guidelines are law then their manifest lack of sufficient legal certainty would, as the appellant submits, be outwith the power conferred by section 105 of the Ordinance and would contravene the Constitutional protections of due process of law and the protection of the law. An intention to contravene the limits inherent in section 105 and such “basic tenets of the Constitution” is not to be lightly inferred.

133. Fifthly, the principle of effectiveness is relevant. Where possible, an enactment should be construed so that its provisions are given force and effect rather than rendered nugatory.

134. In the Board’s view, the way in which the Religious Gatherings Rule can and should be given force and effect is by interpreting the Guidelines as being mandatory in relation to the limit of persons allowable at a gathering, but otherwise advisory. Even so, breach of the specified limit of persons does not necessarily mean that an offence has been committed. The offence under regulation 2(1) is only committed where a person attends a gathering in a public place with more than the permitted number of people “without reasonable justification”. In relation to the specified

attendance limits for religious gatherings set out in the Guidelines, this is likely to depend on the extent to which observance of those limits was reasonably to be expected and what was reasonably observable. This would be likely to vary according, for example, to whether the person is a congregant, a staff member, or the head of the religious organisation, such as the appellant.

135. To the limited extent that the Guidelines qualify the operation of regulation 2(1), the Board considers that it can be said that they set out the boundary of the criminal law and thus it can be said that breach of the Guidelines as to the spacing requirement is in substance made a criminal offence (even if that qualification is itself qualified to some degree by the general "without reasonable justification" proviso). Accordingly, the Board does not fully agree with the reasoning of the Court of Appeal. However, as explained above, the Board considers that it is only to a very limited degree that the Guidelines have that effect, ie in relation to the spacing requirement, and to the extent that they do they comply with the requirement that the criminal law should be sufficiently certain.

136. For all these reasons, which are different from those of the Court of Appeal, the Board considers that the reference in the Religious Gatherings Rule to the Guidelines does not contravene the requirement of sufficient legal certainty inherent in section 105 of the Ordinance and in section 4 of the Constitution.

12. Conclusion

137. For all the reasons set out above the Board dismisses both the appeals.

ANNEXURE

Guidelines for Places of Religious Worship

The Guidelines apply to all Places of Worship and Religious Services, and all services and activities therein including weddings, funerals and wakes. It is the responsibility of Heads of Religious Organizations to communicate these Guidelines to their members or congregants; via announcements, signs, bulletins, websites and social media. The Head of the Religious Organization is required to ensure all staff members are trained, virtually, or in-person, on the following Guidelines:

4.1.1 General Attendance

Attendance shall be calculated for each building based on a measurement of 36 square feet per person. For instance,

(i) 1,000 sq ft = 27/25 persons;

(ii) 2,500sqft = 69/60 persons;

(iii) 4,000sqft = 111/100 persons;

(iv) 7,500sqft = 208/200 persons; and

(v) 10,000sqft = 278/250 persons.

Elderly persons should be given the option to attend services separately and apart from the normal services preferably early in the morning at 6.00 am;

Where there are multiple services, there should be no less than forty-five (45) minutes between each service to allow for sanitation and cleaning of facilities.

4.1.2 Sanitation of Facilities

Establish a housekeeping schedule to incorporate routine cleaning and sanitisation with regular, frequent, and periodic cleaning of worship spaces and shared items;

[Ensuring] cleaning and sanitisation immediately before and after all gatherings and services;

Ensure that high-touch surfaces such as door knobs, handles, rails, chairs, benches, countertops, restrooms, podiums and shared spaces are properly disinfected on a frequent or periodic basis using a bleach solution – 5 tablespoons (1/3 cup) per gallon of water US 3.8L or 4 teaspoons bleach per quart of water or 70% alcohol solutions or other EPA-approved disinfectant;

Where possible, set-up hand sanitizer dispensers at specific areas; and ensure proper ventilation systems for areas of congregation using, preferably natural air in the first instance, and/or limited use of air condition.

4.1.3 Personal Hygiene

Post visual alerts (eg, signs, posters) at the entrance and in strategic locations eg, waiting areas, elevators, common areas to provide instructions (in appropriate languages) about hand hygiene, respiratory hygiene and cough etiquette. Instructions should include wearing a cloth face covering or facemask for source control, and how and when to perform hand hygiene; Provide an adequate supply of 60% alcohol-based hand sanitizer or hand washing facilities or stations (fixed or portable), soap and running water for use before and after the service. It would be ideal to have easy open-close taps or pedal actuated or hands-free taps;

Provide feet washing facilities with soap and running water for use before and after for places of worship where persons enter barefoot;

When footwear is to be removed before entering building, ensure facilities to allow separate storage;

Endorse and encourage proper mask etiquette when entering and within the establishment;

Encourage persons to bring their personal rugs/coverings/fabric where required to worship on the floor;

Encourage persons where possible to bring their own worship materials such as religious books, and aids;

Endorse and encourage proper cough and sneeze etiquette within the establishment with a tissue or use the inside of their elbow;

Anyone who falls ill or exhibits any of the following symptoms (fever, chills, cough, shortness of breath, muscle pain, headache, sore-throat, or recent loss of taste or smell) should not attend services;

Anyone who is immunocompromised and/or have a vulnerable pulmonary disease should not attend services; and

Anyone with a potential exposure to someone exhibiting any of the above symptoms or confirmed case of COVID-19 should not attend services until the period of quarantine ends.

4.1.4 Staff Member or Congregant

All persons are required to wear a face covering mask when entering the places of worship and will undergo screening with a contactless thermometer for fever and symptoms consistent with COVID-19;

If a person has a temperature < 37.5˚C and otherwise without symptoms consistent with COVID-19, then he/she is allowed to enter into the place of worship;

If the patient has a temperature >37.5˚C with fever or strongly associated symptoms consistent with COVID-19, then he/she is not allowed into the place of worship;

Identify an area to separate anyone who exhibits symptoms of COVID-19 during hours of operation, and ensure that children are not left without adult supervision;

Establish procedures for safely transporting anyone who becomes sick at the facility to their home or a healthcare facility;

Notify local health officials if a person diagnosed with COVID-19 has been in the facility and communicate with staff and congregants about potential exposure while maintaining confidentiality as required;

Advise those with exposure to a person diagnosed with COVID-19 to seek the nearest healthcare provider for symptoms;

Close off areas used by the sick person and do not use the area until after cleaning and disinfection; and

Advise staff and congregants with symptoms of COVID-19 or who have tested positive for COVID-19 not to return to the place of worship until his/her symptoms cease as confirmed by a Medical Practitioner.

4.1.5 Physical Distancing

Pre and post congregations are prohibited within and around the place of worship;

Ensure safety briefings are conducted at the beginning of each service for compliance on new normal measures such as wearing of masks; washing/sanitizing hands, maintaining physical distancing, location of wash/restrooms areas, entrance and exits;

Use successive row-by-row entry and exit for persons in an orderly manner that facilitates/encourages social/physical distancing as per Public Health Regulations;

Signage to have one-way aisles or properly direct congregants to enter and exit the building;

Provide physical guides, such as tape on floors or walkways and signs on walls, to ensure that persons remain at least six feet apart all around in lines and at other times (eg guides for creating “one-way routes” in hallways);

Discourage non-essential physical gatherings and organize virtual gatherings through live-streaming, television, radio, social media;

If a gathering is planned, consider holding it outdoors. If this is not possible, ensure that the indoor venue has adequate ventilation preferably using natural air in the first instance, and/or limited use of air condition;

Regulate the number of person/s attending services to avoid crowding based on Public Health Regulations. Consideration should be given to having multiple services with controlled numbers rather than one large gathering;

If the place of worship offers multiple services, consider scheduling services far enough apart to allow time for cleaning and disinfecting high-touch surfaces between services;

Adapt worship practices to prevent physical contact between and among worshipers, eg replace handshakes and hugs with a bow or a verbal greeting;

and

Greet people at worship spaces with friendly words and smiles, rather than handshakes or other forms of physical contact.

4.1.6 Sharing of Worship Materials

Adapt worship practices to prevent communal handling of devotional and other objects;

Encourage new ways of reverence for sacred and symbolic objects, such as bowing rather than kissing and touching;

Consistent with the community's faith tradition, consider temporarily limiting the sharing of frequently touched objects, such as worship aids, prayer rugs, prayer books, hymnals, religious texts and other bulletins, books, or other items passed or shared among congregants, and encouraging congregants to bring their own such items, if possible, or photocopying or projecting prayers, songs, and texts using electronic means;

When receiving “blessings”, this should be done six feet apart and without physical contact;

When conducting the communion service, prepacked single service items should be prepared and given out at pre-determined locations within the place of worship to congregant/s;

Ensure that meals and religious and ceremonial foods are individually prepacked and distributed to persons when exiting the place of worship as per Food and Safety Guidelines as appended; and

Ensure setting up a no touch method to collect contributions where stationary boxes can be used that facilitates/encourages physical distancing.

4.1.7 Use of Music

At this time the choir/bands cannot be allowed to assemble to maintain effective physical distancing measures;

Ensure that there are limited singers on the podium/platform (altar area); highly recommended solo performers only; and

Ensure that microphones and musical instruments are not shared and must be sanitized after each use/service.

4.1.8 Use of Technology for Sharing of Worship Materials

Consider how technology can be used to make services and other faith-based events available online. Consider partnering with other organizations to leverage on-line channels.

For example:

Video or audio-tape worship services and ceremonies and broadcast or post them on social media;

Conduct individual religious and care visits by phone or through social media and video chat platforms;

Use a remote or virtual meeting platform or teleconference facilities for meetings or small group interactive prayer; and

Expand use of television and radio channels.

Implementation of the Guidelines

The Office of the Chief Medical Officer will officially communicate the Guidelines to the Head of the Inter-Religious Organisation, who then disseminate[s] to all places of worship to ensure effective implementation and compliance. Thereafter, continuous assessment and reporting on the adherence of these Guidelines should be implemented to ensure full compliance.

Monitoring and Evaluation

The Head of the Inter-Religious Organisation, through their respective religious bodies and heads, will provide continuous assessment and reporting to the Chief Medical Officer on the implementation of these Guidelines through continuous site visits and inspection of the places of worship. Self-regulation is recommended to ensure the strict adherence to these Guidelines in order to reduce the threat and mitigate the risk of spread of COVID-19.