

the compulsory enrolment and verification of identity information and the creation of a National Identity Number and a National Identification Card. The Act establishes a National Civil and Identification Database for the assignment of identification numbers, issuance of identification cards and analysis of statistical data. The Act also effected consequential amendments to various statutes.

[3] The Act applies to all citizens of Jamaica, and individuals ordinarily resident on the island. Persons who are entitled to immunities and privilege under the **Diplomatic Immunities and Privileges Act** are exempt. The statute creates a mandatory regime in which non-compliance attracts criminal sanctions.

[4] Mr. Julian Robinson has alleged that sections 4, 6 (1) (e), 15, 20, 23, 27 (1), 30, 36 (4), 39, 41, 43 (1), 60 and the Third Schedule of the **National Identification and Registration Act** are unconstitutional. It is his position that these sections of the legislation are likely to breach rights guaranteed under the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) 2011**. He posited that the legislation presents a threat to the following fundamental rights and freedoms;

- (a) the right to equality before the law;
- (b) the right to life, liberty and security of the person;
- (c) the right to protection from search of person and property;
- (d) respect for and protection of private and family life, privacy of home;
- (e) protection of privacy of other property and of communication;
- (f) the right to equitable and humane treatment by any public authority,
- (g) the right to freedom from discrimination on the ground of race, place of origin, social class, colour, religion or political opinions;

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- (h) the right to vote;
- (i) the right to a passport;
- (j) the right to protection from torture, or inhumane or degrading punishment;
- (k) the protection of property rights; and
- (l) the right to due process.

The Decision of the Court

[5] The court declared specific provisions to be unconstitutional and also held that the offensive provisions could not be severed. The court unanimously decided that the **National Identification and Registration Act** is unconstitutional, null, void and of no legal effect. The consequence of this is that the statute is struck down from the laws of Jamaica.

The Reasons for Judgment

- [6] The Charter of Fundamental Rights and Freedoms guarantees certain fundamental rights and freedoms. The rights and freedoms guaranteed are not absolute.
- [7] The presumption of constitutionality of Acts passed by Parliament does not apply in the same manner in respect of the new Charter as it did with the previous Bill of Rights. A new test of constitutionality was introduced when the Charter of Fundamental Rights and Freedoms was amended in the year 2011. The test for whether a statute is constitutional is outlined below.
- [8] The starting point is that the claimant must establish, on a balance of probabilities, that a right has been, is being or likely to be violated. If the claimant establishes any or all of the three possibilities then the legal and evidential burdens shift to the violator to prove that the violation is either (a) permitted by

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sections 18, 49, and 13 (9), (12) of the Charter or (b) is demonstrably justified in a free and democratic society.

[9] In this case the state did not rely on sections 18, 49, 13 (9), or (12) to justify any violation. The state's case rested solely on establishing that either there was no violation or, if there was that the violation is justified in a free and democratic society.

[10] The test to determine whether a law can be justified in a free and democratic society is a two-stage test and may, for convenience, be referred to as a proportionality test. The test is in two stages. The first stage is that the law must be passed for a proper purpose. The second stage has three components, namely, (a) the measure must be carefully designed to achieve the objective, (b) the means used must violate the right as little as possible; and (d) there must be proportionality between the measure and the effect, that is to say, the benefit must be greater than the harm to the right.

[11] In the event the state fails to prove that the measure is demonstrably justified in a free and democratic society the claimant will succeed. In the event that the court is left in a state of uncertainty as to whether the state has satisfied its burden then the claimant must succeed.

[12] In determining whether a right or freedom has been violated the court needs to examine the scope of the right and then decide whether the statute has an impact on the area protected by the statute. When that is done the court then determines whether that impact amounts to a violation and then whether that violation is exempt from unconstitutionality.

[13] The right to privacy has at least three dimensions: privacy of the person; informational privacy, and privacy of choice. The compulsory taking of biometric information is a violation of the right to privacy because it amounts to a search of the person and, unless exempt by provisions of the Charter or shown to be

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demonstrably justified in a free and democratic society, a law which permits this will be unconstitutional. The compulsory collection of and storage of biometric data is a violation of the right to information privacy because the person has lost control over his personal information. In addition, there must be strong and adequate safeguards for the protection of the data and where this is absent or inadequate the law will be unconstitutional. The removal of the right of the person to decide with whom he or she wishes to share his biometric information is a violation of the right to privacy and, unless exempt by provisions of the Charter or shown to be demonstrably justified in a free and democratic society, will violate the Charter because the person is prevented from deciding whether he or she will part with the information.

- [14] Sykes CJ held that section 6 (1) (e), 20, 39, 41, 43 (1), 60, The Third Schedule, and the Sixth Schedule are unconstitutional. Sykes CJ found that sections 4, 15, 23, 27, 30 and 36 (4) did not violate the Charter.
- [15] Batts J held that the previously mentioned sections, save for section 6(1) (e) are unconstitutional. Batts J also found section 45 to be unconstitutional although it was not pleaded. He did so on the basis that there had been submissions made by both parties on that section and because the constitutionality of an Act is of general public interest and ought not to depend on fine points of pleading. Batts J found that sections 6(1), 15, 23, 27, 30 and 36(4) were not unconstitutional.
- [16] Palmer Hamilton J (Ag) concurred with Batts J in finding section 45 to be unconstitutional although it was not pleaded. She did so on the basis that the claimant had asserted that section 13(3)(j) of the Charter was likely to be violated. Consequently, the defendant was put on notice and it was open to the court to make a finding on the constitutionality of section 45 of the **National Identification and Registration Act**.

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[17] It was unanimously decided that the offending sections could not be severed from the rest of the statute and therefore the entire law was bad and had to be declared unconstitutional. The Learned Judges arrived at this position for different reasons. Sykes CJ held the regime as it presently stands does not offer sufficient protection for the sensitive data that is to be collected. Batts J held that the contemplated scheme is reliant on its universal applicability and on its mandatory components and therefore cannot survive severance of the offensive provisions. Palmer Hamilton (Ag) concurred with Batts J in holding that severance could not be effected because when the mandatory provisions are removed the essence of the legislation is lost.

[18] The court has reiterated that it is the duty of the court to uphold the Constitution in general and the fundamental rights and freedoms in particular. The rights and freedoms must never be abridged or abrogated except as provided for in the Constitution itself.

NOTE: This summary is provided to assist in understanding the Court's judgment. It does not form part of the reasons for that decision. The full decision of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.gov.jm/content/judgments>.

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