

23-02-01

IN THE CAYMAN ISLANDS COURT OF APPEAL

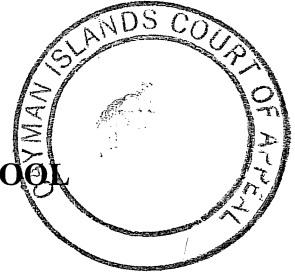
Civil Appeal No. 16 of 1999
Grand Court Cause No. 161 of 1996

BETWEEN:

ELSWORTH GRANT AND CHERRY CHIN
(as guardians ad litem of Shemiah Grant, a minor)
Appellants/Plaintiffs

- and -

THE PRINCIPAL, JOHN A. CUMBER PRIMARY SCHOOL
- and -
THE CHIEF EDUCATION OFFICER
- and -
THE EDUCATION COUNCIL
Respondents/Defendants



BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Rt. Honourable Mr. Justice T. Georges, Justice of Appeal
The Honourable Mr. Justice G. Collett, Justice of Appeal

Norman Hill Q.C. and Delroy Murray instructed by Samson Murray Jackson for the Appellants.
Pierre Lamontagne Q.C. and Arden Warner instructed by the Attorney-General for the Respondents.

November 27th, 28th, and 29th 2000

Delivered February 23rd 2001

JUDGMENT

COLLETT, J.A.

Shemiah Grant is a young Caymanian boy living with his parents, the appellants, in West Bay. In 1994, when he approached the age of 4 ³/₄ years, they registered him with the Department of Education as required by Section 16 of the Education Law (1997 Revision). Education between that age and the age of 16 years is compulsory under Section 13 of that Law.

A normal school career would seem to have lain ahead for this new pupil at John A. Cumber Primary School, West Bay. There was, however, one snag. The Appellants were and are sincere and committed adherents of the so-called Rastafarian faith, part of which involves the wearing by males of hair uncut and in its natural state. The Rules of the School, however, demand that “boys’ hair should be cut low and combed” – Rule 7.

By such an improbable contradiction of principles, the stage was set for an implacable clash of wills between the Appellants and the Respondents which has tragically blighted the educational career of this young child throughout the important, formative years of five to ten by denying him a public primary schooling.

The facts and chronology surrounding this conflict of wills have been exhaustively set out in the first ten pages of the judgment of Smellie C.J. in the Grand Court against which this appeal is brought. Suffice it to say at this stage that the Education Council, the Respondent body charged under the Law with oversight of the conduct of public education in these Islands, considered the issue on no less than six occasions between August 3rd 1994 and February 29th 1996. On each of these occasions, the Council, by an 8 – 0 unwavering majority of its members, upheld the requirements of the School Rule quoted above and declined to countenance any relaxation.

Having initially voted to refuse admission to the school of Shemiah, if he should attend with his hair in “locks”, the Council subsequently upheld the action of the Respondent Principal of the School in suspending him from class when his parents persisted in presenting him there in that condition. Finally, on December 19th 1995, the Council directed the expulsion of Shemiah from the school after he had continued throughout the first term of the 1995/96 school year to attend classes with his

hair uncut in contravention of the earlier decisions to refuse him admittance and to suspend him for successive periods of 7 and 30 days respectively. In reaching this decision to expel, the Council invoked section 22(6) and (7) of the Law which empowers it to invoke that sanction "if the pupil commits an act which is of such a nature that his presence in the school is likely to have a detrimental effect on the other pupils of the school or on the school". The Rules themselves contain no alternative sanction against such non-compliance. It remains to note that section 22(10) provides that "a pupil who has been expelled from a Government school shall not be re-admitted to any Government school without the approval of the Council".

It is evident that the parents of the boy were quite unwilling to accept the reiterated stance adopted by the Council, maintaining with greater or lesser vehemence in letters and in a personal invited appearance before the Council on September 18th 1995 that they and the child had an indefeasible human right to assert their religious beliefs in such observance as dreadlocks regardless of the requirements of the school Rules. References were made to numerous International Covenants to which the Cayman Islands are adherent. The tone adopted, in particular by the father during these exchanges, was not always best calculated to allay the obvious concerns and reservations which the Council members entertained as to the consequences of any relaxation.

Having failed to move the Council, the Appellants, on March 25th 1996, applied ex parte for leave to challenge the expulsion decision in the Grand Court, by way of a judicial review. Leave having been granted, an originating motion was filed on May 8th 1996. It seems unfortunate that in a matter of such urgent importance to the future of the child, that the matter could not be processed forward to a hearing before May 1999, some three years later. After a full hearing in which Senior Counsel appeared on either side, the Chief Justice in a full, careful and meticulously researched judgment,

delivered on June 18th 1999, dismissed the application and upheld the decision of the Respondents. It is against that ruling that the Appellants now appeal to this Court.

Several issues of law were canvassed in the Grand Court proceedings which have at the hearing of the appeal been either abandoned or conceded by the Appellants as having no crucial bearing on the result. At one point, as the Chief Justice pointed out, the validity of the School Rules vis-à-vis the Education Law appeared to be indirectly called in question. Before us it was not suggested that the right of a school headmaster or principal to make reasonable rules for the regulation and good order of the school could be called into question. There is ample English authority, notably the judgment of Lord Goddard L.C.J. in Spiers v. Warrington Corporation [1953] 2 All E. R. 1052, to support the existence at common law of such a right to make reasonable rules.

Furthermore, there can be little doubt that the right to make and enforce obedience to school rules extends to the right to regulate dress and appearance of pupils when in school. The only question which remains open in this case is whether or not it is reasonable in all cases and under all circumstances to enforce rather than to relax a school rule, otherwise perfectly valid and enforceable: in other words, are all school rules to be regarded as immutable or cast in stone? There are indications, even in the Rules of John A. Cumber that in some exceptional circumstances a relaxation can be considered if a valid excuse, such as for not wearing of full uniform, can be advanced by the parents of a particular pupil.

Another point which now seems to be moot is whether the requirement of Section 22(6) and (7) that a pupil must be shown to have committed "an act" which demonstrates his presence in school as likely to have a detrimental effect can be construed as including a course of conduct for which a

five-year-old can hardly be regarded as morally responsible. The child in this case can hardly be blamed for appearing on school premises with his dress or appearance as ordered by his lawful parents or guardians at home. At first sight such a wide construction seems farfetched, but I am persuaded by the careful analysis of the learned Chief Justice that it is inevitable if the sanction is to be made effective, in the case of younger pupils in particular, against a persistent and unjustifiable refusal to comply. I therefore concur, if with some reluctance, in the ruling of the Grand Court that resort to Sections 22(6) and (7) in such cases is not per se an unlawful or excessive exercise of those statutory powers. The contrary view was not seriously pressed upon us by Mr. Hill.

Another point which was once at the forefront of the Appellant's argument in these proceedings was an alleged contravention of a series of international conventions binding in international law upon the United Kingdom government and also applied specifically to the Cayman Islands. Specific reference was made in the Originating Notice of Motion to the Universal Declaration of Human Rights, The European Convention on Human Rights, the Convention against Discrimination in Education, and the Convention on the Rights of the Child.

So formidable a list of legal obligations might appear at first sight to present an equally formidable case for the Appellants. The flaw in that line of argument is, however, that none of these conventions has yet been translated into the domestic law of the Cayman Islands, either by a law of the legislature or by the enactment of a Bill of Rights into the written Constitution of these Islands as laid down by Order-in-Council. Absent such a provision, the English authorities have clearly established that no relief can be entertained by the Courts of the Cayman Islands for any alleged breaches of these or any other applicable international conventions. The learned Chief Justice so found at page 37 of his judgment, succinctly quoting the words of Lord Oliver in Maclaine Watson

& Co. Ltd v. Department of Trade and Industry [1989] 3 All E.R. 523 at page 544: “Quite simply a Treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and it is outside the purview of the Court ...”.

Smellie C.J. proceeded in his judgment to review the series of subsequent English cases of highest authority in which the degree to which domestic courts can take some account of international convention obligations, not incorporated into domestic law, was considered. Not all of the dicta appearing in these judgments are fully consistent. Of particular importance, perhaps, is the observation of Lord Bridge that “nothing less than an important competing public interest will be sufficient to justify” a restriction upon a convention right to freedom of expression – see Brind and others v. Secretary of State for the Home Department [1991] 1 All E.R. 720 at page 723. In Regina v. Ministry of Defence, ex parte Smith and other appeals [1996] 1 All E.R. 257 the English Court of Appeal held that it might interfere with the exercise of an administrative decision if satisfied that it was unreasonable as being beyond the range of responses open to a reasonable decision maker and in judging whether or not this was so it could take account of the human rights context: the more substantial the interference with such rights the more the court would require by way of justification before being satisfied that the decision was not unreasonable.

Having considered these expressions and others derived from the numerous authorities considered by the Chief Justice in his review of the law upon this point, I concur in his eventual finding that the relevance of the conventions in the present case lies in their importance as a background to the decision of the Council to expel this little boy.

Before entering upon a detailed examination of this crucial issue it will, however, be convenient first of all to turn to the separate issue raised before us by the Respondents' Notice, namely whether the trial judge erred in fact and in law in holding that Rastafarianism is a religion. If it is not, of course, the whole basis for the assertion that there is justification for a relaxation of the relevant School Rule in this case falls away. That issue was at the forefront of the respective arguments developed before Smellie C.J.: numerous authorities were cited and examined in his judgment and expert testimony was admitted to assist in the determination of this somewhat difficult and recondite issue.

The difficulty is enhanced by the circumstance that different jurisdictions have developed different tests by which to determine whether or not a given set of beliefs should legally qualify for recognition as a religion. The American courts have tended to adopt what has been described as a "functional" test in cases largely concerned with the availability of protection under the 1st Amendment to the U.S. Constitution. The essence of that test is best described in the judgment of the U.S. Supreme Court in Seegar (1965) 380 U.S. 163 as being a "sincere belief which in his life fills the same place as a belief in God fills in the life of an orthodox religionist".

By contrast, in the English case of Barralet and others v. Attorney General and others [1980] 3 All E.R. 918, Dillon J. held that two of the essential attributes of religion are faith and worship – a recognition of the existence of some unseen higher power as having control of a person's destiny and as being entitled to obedience, reverence and worship. Insofar as worship is concerned, the essence of it was described by Buckley L.J. in R. v. Registrar General, ex parte Segerdal and another [1970] 3 All E.R. 886 at page 892 as being "submission to the object worshipped,

“veneration of that object, praise, thanksgiving, prayer or intercession” or some of those characteristics.

Having considered the range of reported cases from numerous jurisdictions concerning the recognition or non-recognition of Rastafarianism as a religion as well as the expert and other evidence before him, the learned Chief Justice concluded that, whichever of the two tests mentioned above were applied to the question, Rastafarianism did indeed qualify in Cayman law to be considered as a religion. By their notice, the Respondents challenge this finding, asserting that only the “theistic” test favoured by the English courts should be applied and that, if this were done, the element of true worship would be found lacking in Rastafarianism. They do not quarrel with the finding that it would qualify under the functional test but say that that is not the proper test to be applied in the courts of these Islands.

Expert testimony on this issue was given by Dr. Barry Chevannes of the University of the West Indies who had extensively studied the Rastafarian movement and published two works upon the subject. His evidence, which was unchallenged, was to the effect that the Rastafari movement falls within the legally accepted definition of religion because “[their] belief embraces the concept of man’s relation to Divinity, to reverence, worship obedience and submission to mandates and precepts of supernatural or superior beings”. Other reasons were also advanced by the witness in his affidavit for arriving at that opinion. Once that evidence was accepted it is little wonder that the Chief Justice arrived at his conclusion: Rastafarianism should indeed be classed as a religion and even if the “theistic” test was the true one, it would qualify.

Faced with this evidence, Mr. Lamontagne, for the Respondents, was driven to put forward before us the argument that, since Rastafarian ceremonies involved the use of marijuana, which is illegal in the Cayman Islands, such ceremonies should be disregarded when considering whether or not the existence of worship had been established. Such an argument cannot hold water because it involves the absurdity that Rastafarianism, now a movement transcending national boundaries, would qualify as a religion in countries where its use is permitted (such as the Netherlands) but not in those where its use is prohibited. A definition of this nature cannot be circumscribed by the exigencies of positive law in particular jurisdictions.

I conclude therefore that the learned Chief Justice was correct to accept Rastafarianism as a religion and it remains to consider whether, and to what extent if so, the wearing of locks or dreadlocks forms an integral part of the worship practice of devout Rastafarians. That this was the view of Dr. Chevannes is borne out by paragraphs 10 – 14 inclusive of his first affidavit. Not all Rastafarians accepted this practice when the movement first began in 1950 but by the end of the 1960's "the overwhelming majority of Rastafarians wore dreadlocks" after an over a decade long struggle with the "Combsome" sect of that movement.

Dr. Chevannes goes on to state (paragraph 12) that "a man's dreadlocks are thought by the Rastafari, who endorse the practice, to be his "crown", that is a sign of God's approval and of his status as king over the inner kingdom of the self, the I. ... Among some groups, the ritual shaving of the dreadlocks is a humiliating and dreaded punishment." Since it has been conceded by the Respondents that the Appellants are sincere and committed adherents to the Rasta faith, this constitutes powerful evidence that their son's hair is an essential part of the observance of the religious principles on which they have brought him up.

Against this must be set the reported remark of the male Appellant, when arguing his case before the Respondent Council on September 18th 1995, that “locks has nothing to do with our Religion it’s between man and God. You don’t have to wear locks to be a Rasta”. By reference to Dr. Chevannes’ evidence the latter part of that reported statement can be regarded as strictly correct. The earlier part is puzzling in view of the obvious commitment of the Appellants to that practice. No explanation was offered by the Appellant subsequently in the proceedings and it remains unexplained. I certainly do not take the view that it amounts to a formal admission on the part of the Appellant given the whole circumstances under which it appears to have been said and taking account of the background of the case. The learned Chief Justice chose to accept the unequivocal and independent evidence of Dr. Chevannes as to the importance of “locks” in the Rasta faith and I can see no good reason to question the decision on this point.

The Chief Justice thereafter proceeded at length to examine a series of authorities culled not only from the English but also from Canadian jurisprudence and from decisions of the European Commission, with a view to establishing the nature and extent of freedom of religion. His conclusion was to the effect that such freedom already existed at common law before the international conventions already referred to accorded it recognition in international law. At the same time, the cases cited demonstrated that such freedom is not absolute but must be exercised within the bounds of such restrictions as are laid down in each jurisdiction by legislation or other positive law. Reference was made to Ahmad v. Inner London Education Authority [1978] 1 All E.R. 574, a decision of the English Court of Appeal, to Regina v. Harrold (1971), 19 D.L.R. (3d) 471, a decision of the British Columbia Court of Appeal, and to the decisions of the European Commission in Karaduman v. Turkey, Yanasik v. Turkey, and Bernard v. Luxembourg.

The effect of these decisions taken as a whole is to refute the initial argument of the Appellants in the Grand Court proceedings that freedom of religion, whether considered as arising at common law or derived from applicable international conventions, ensured an absolute right for themselves and their son to receive a public education under the Education Law of the Cayman Islands regardless of the stipulation of applicable school rules; so that the actions of the Respondents taken under section 22(6) and (7) of the Law were per se unlawful. The learned Chief Justice ruled against any such contention and after fully re-considering that issue, I am no doubt that he was right to do so. It follows that he was also correct to rule that in those circumstances the only route by which the decision to expel could be called into question was by invocation of the doctrine of “Wednesbury unreasonableness” and, in invoking that doctrine, the onus of proof rested upon the Appellants to show that the decision to expel fell foul of that test.

What then is the proper test for “Wednesbury unreasonableness”? Different formulations have been advanced by different judges in the years since that doctrine was first enunciated in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223. At page 229 of that report, Lord Greene M.R. is quoted as follows:

“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used ... as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he is to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”. Similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one

sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith, and, in fact, all these things run into one another.”

So formulated, the test is a stringent one. It is also on the face of it an objective one; yet it must be recognised that the application of it to the circumstances of any particular decision is necessarily subjective. What may have been regarded as perfectly normal in the context of a given society at an earlier time in its history may in the course of its more recent development have come to assume the mantle of unreasonableness. This must be borne in mind when examining the reasons which lie behind the decision under examination in this case.

What then were the reasons advanced by the Education Council for their decision to expel Shemiah Grant? These appear most clearly from the series of minutes of the Council’s meetings between 1994 and 1996 already referred to. From the outset, before the child was even registered, the Council decided against admitting him to school with his hair in locks. When the child was first sent to school in that condition the Council reiterated that the school policy should be adhered to and the child excluded “until he conforms to the rules of the school and cuts his hair”. Council had already restated its policy before the 1995/96 school year began and had expressed the view that:

“Drugs and its illegal use is part of the Rastafarian belief and thus the acceptance of a child wearing “locks” into our school system could be seen as an acceptance of Rastafarianism and its accompanying tenets.”

In view of the importance which the learned Chief Justice attached to this expression of view, it merits at this point a more detailed examination. One is immediately struck by the oblique expression of members’ concerns in that regard. The minutes do not disclose that members thought the presence of 5 year old Shemiah in class would actually be likely to introduce a culture of illicit

drug use into John A. Cumber school. Rather, if the accuracy of the minute can be relied on, they seem to have been concerned with the image of the Council in the eyes of some members of the public as being "soft" on drugs. If that were indeed the basis of the members' views, it would constitute a totally irrelevant consideration for the expulsion of a pupil, having nothing to do with any "act" likely to be detrimental to other pupils or the school.

Alternatively, one can examine the reason given on the basis that members of the Council apprehended a likely detriment to the school and other pupils through the putative association of Rastafarianism with drugs. But, from the fact that the parents of a 5 year old boy adhere to a religion, the adherents of which are reputed to use illicit drugs in ceremonial, can it be reasonable to suppose that by allowing the boy into the school with his hair uncut, another and quite separate manifestation of that religion, they would be encouraging the introduction of a drug culture into the school in question? Surely not; the premises do not lead logically to the conclusion and it is hardly necessary to subject the reasoning to a Socratic interrogation in order to demonstrate its fallacy. Instead it demonstrates that an irrelevant matter was taken into consideration in the deliberations of the Council.

There was no evidence that the parents, still less the young child, was a user of marijuana or any other drug; no evidence that the child would even seek to promote the use of drugs by other pupils (an unlikely circumstance in one so young), no evidence that although he attended school throughout the first term of the school year, any complaint was made of a detrimental effect on the school or on any other pupil. The affidavit of the Respondent Principal is entirely silent in this regard.

* Not the encouragement of the drug culture but an acceptance of the fact that the child should be regarded as an adherent ^{himself} - the very reason put forward as the basis for overriding the school rules

not the point

What other reasons are discernible from the minutes or the correspondence between the parties for the decision to expel? In the minutes of September 18th 1995 it is recorded that the rule prohibiting dreadlocks be maintained for two reasons, the first being that wearing of dreadlocks is not an essential tenet of Rastafarianism. As the learned Chief Justice found, that is not strictly true, but the Council can be excused for thinking that it was, in view of the male Appellant's puzzling remark when he addressed them and not having the benefit of Dr. Chevannes' testimony. All the same, it is an error of fact which has some weight in assessing the rationality of their decision.

The other reason given was that the wearing of dreadlocks "which is not generally acceptable to the Caymanian community" (sic) would defeat one main aim of the dress code, i.e. "to ensure as far as possible that pupils do not suffer prejudice because of their dress or appearance." It seems not a little ironic that in order to protect a little boy from possible prejudice on the part of his classmates, it should be necessary to remove him out of school altogether and prompts the question whether a simple homily on the part of a sympathetic principal or teacher to the class could not less drastically have eliminated any possible prejudice.

I have borne in mind throughout that it is the function of the Education Council and not the courts to determine whether the facts disclosed in any given case warrant the exercise of the disciplinary powers vested in them by section 22 of the Law. However, even recognising that it is no part of our duty to substitute our own decision for the Council's, it is difficult to uphold as rational a decision made upon the basis of reasons so mistaken, insubstantial and irrelevant as have been disclosed in this case, when measured against the consequence that a child has been wholly deprived of the opportunity to benefit from a normal primary education at the only school where he might have benefited from it.

In support of their case the Appellants' counsel relied heavily on a recent decision of the High Court of Trinidad and Tobago, Sumayyah Mohammed v. Moraine and Another [1996] 3 L.R.C. 475. The facts are strikingly similar to the present case. A 12 year old girl was refused admittance to a government maintained school with a Christian ethos because as a Muslim she refused to wear the unmodified school uniform of short skirt and sleeves. Although rejecting her claim under the State Constitution, Warner J. upheld her claim against the suspension enforced by the managers of the school on the basis of "Wednesbury unreasonableness". This was despite the existence of alternative schools available to her and despite the fact that she had chosen the school in question in preference to them – a circumstance not available to the Appellants here.

In the Moraine case it was accepted that the school managers had acted sincerely in the belief that the ethos of the school would be undermined by allowing an exemption to the plaintiff from the dress code. But their fear that allowing an exemption would lead to a flood of other Muslim applicants was held to constitute a fixed policy. Nor had they taken account of the psychological damage on the child of enforcing conformity. Finally, the judge found there to be no evidence that wearing of hijab by the girl would conduce to ill-discipline or undermine the tradition of the school.

The reasoning of the learned judge in Moraine is compelling and, although this is only a first instance decision in no way binding upon us, I find it applicable in many respects to the circumstances of the instant case. Smellie C.J. sought to distinguish it on a number of grounds but with great respect I do not find any of them substantial. The first is that there is no evidence of psychological damage to the child Shemiah. Maybe not, but the damage inevitably to be caused to his self esteem if forced into an act of sacrilege by the cutting of his locks went equally

unacknowledged by the Principal or Council. Then it is suggested that since Muslims in Trinidad are a large minority population and other schools there had accommodated their religious practices, the school in question could safely do so too. But in Grand Cayman too there are many primary schools, notably George Town, East End and Lighthouse, whose rules do not ban long hair; and surely the size of the minority relative to the population as a whole is not a factor which can justify an otherwise discriminatory practice.

Then again, the learned Chief Justice arrived at the view that the Education Council in this case had not operated a fixed policy. I am unable to agree; it seems to me that the internal evidence of the Council's minutes show quite the contrary, since from beginning to end they were determined to uphold school policy and to regard the rule as to dress code and hair length propounded by the Principal as cast in stone.

Finally, it is said that the Appellants never asked for an exemption, that throughout they were insistent upon the "rights" which I have found do not exist in the form or to the extent that they believed. Perhaps in their mistaken belief they neglected to make a formal request for an exemption. Be that as it may, it does not in my judgement excuse the Respondents from their duty to explore the possibility of some relaxation of the rule in question, possibly by allowing Shemiah to attend with his locks covered in a uniform coloured cap, in order to avoid the drastic solution of putting him permanently out of school.

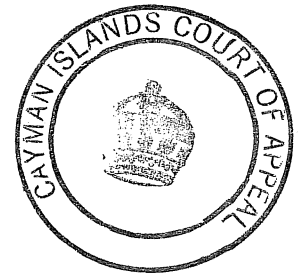
I have given every possible weight to the legitimate concerns of the Principal and the Education Council and nothing that has fallen from me in this judgment should be taken as encouraging those without a genuine religious reason from seeking to evade compliance with the rules of their

appointed school. Designer hair-styles by trendy pupils will receive no countenance from this or any other court.

However, at the end of the day, from the perspective of contemporary Cayman, I cannot regard the decision to expel this boy as rational. Indeed, when the imperative is given, take your boy out of school for good or commit a sacrilegious act, I can only regard that imperative as beyond any reasonable interpretation of the powers of the Council under section 22 of the Education Law.

I would allow this appeal, set aside the order of the Grand Court and bring up the determination of the Education Council to expel Shemiah Grant in order for it to be quashed. I would remit the matter for further consideration by the Council with an earnest recommendation that they explore some means of accommodation whereby the boy can be re-admitted into the public school system of these Islands without being required to cut his hair.

Collett, J.A.



Zacca, P.

I agree.

Georges, J.A.

I agree.