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2 **IN OPEN COURT**
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4
5 N THE GRAND COURT OF THE CAYMAN ISLANDS (Civil)
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8 CAUSE NO: 161 OF 1996
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11 BETWEEN: ELSWORTH GRANT AND CHERRY CHIN PLAINTIFFS
12 (as guardians ad litem of Shemaiah Grant, a
13 minor).
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18 AND: THE PRINCIPAL OF JOHN A CUMBER 1ST DEFENDANT
19 PRIMARY SCHOOL
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22 AND: THE CHIEF EDUCATION OFFICER 2ND DEFENDANT
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25 AND: THE EDUCATION COUNCIL 3RD DEFENDANT
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31 **Appearances:**
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33 Mr. Norman Hill Q.C. instructed by Delroy Murray of Samson, Murray and Jackson for the
34 plaintiffs.

35 Mr. Pierre Lamontagne Q.C. instructed by Mr. Arden Warner of the Attorney General's
36 Chambers for the defendants.
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41 **JUDGMENT**
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43 The plaintiffs are the parents of young Shemaiah Grant, an 8 year old boy who has been expelled
44 from school because of his failure to comply with the School Rules.

1 His expulsion has been expressed in the usual terms as to continue “until such time as he
2 complies”. The Rules are that “Boys’ hair should be cut low and combed and the girls’ should
3 be nicely combed and well kept”; and “Dreadlocks” and “Designer hairstyles” are prohibited.

4 Shemaiah wears his hair in dreadlocks.

5 His parents, both of whom attest to be of the Rastafarian persuasion, will not yield.

6 Their claim, as articulated mainly through the father’s statements and their joint affidavit, is to
7 the right to be allowed to bring up their child in the religious persuasion and practice of their
8 faith which is as members of the Twelfth Tribe of Israel or Rastafari.

9 They claim that the School Rules unjustifiably infringe their right to freedom of religion and so
10 the decision taken and based upon them, to expel Shemaiah, for attending at school with his hair
11 in dreadlocks, is illegal and irrational and should be set aside.

12 For its part, the Education Council which is charged under the Education Law with responsibility
13 for the educational system of the Islands, and which took the ultimate decision of 19th December
14 1995 to expel the child, seeks to maintain and uphold the decision.

15 Thus the case presents a conflict of the most direct kind between the asserted rights of the
16 individual and the power of the State to curtail those rights, in the name of the common good.

17 And while the action is brought in the name of the child and for the child’s benefit, the
18 proclaimed beliefs and asserted rights must, in reality, be recognised to be those of the parents.

19 At the time when the decision was taken the child was not yet 5 years old and so could have
20 developed no religious convictions of his own. So in reality it is the freedom of religion of the
21 parents that is in issue here. However, the fact that the case at bar is pleaded as it is should not
22 impede its disposition. There is the inevitable interrelationship between the rights of an infant or
23 minor child and the rights and obligations of the parents. Should authority be required for such

1 an obvious proposition, see the persuasive decision on this point of the Canadian Supreme Court
2 in B. (R.) v Children's Aid Society [1995] 1. S.C.R. 315 PER La Forest J at 333.

3 Nonetheless, while the legal rights must be recognised and observed, the approach to the
4 resolution of the conflict between rights and authority must be taken bearing in mind that the
5 child's rights are subject to the practical control of the parents. This will be taken up in the
6 examination of the issues.

7 The challenges to the decision to expel will fall ultimately to be considered by reference to the
8 grounds for Judicial Review relied upon in this case: ultra vires (or illegality) and irrationality.

9

10 The background circumstances

11 The Education Law ("the Law") mandates that for every child between the age of 4 years nine
12 months and sixteen years of age education shall be compulsory.

13 This is subject only to the power of the Education Council ("the Council") to expel a child
14 pursuant to the provisions of section 22 of the Law.

15 It is the duty of every parent on or before the child attains school age, to see to the child's
16 registration for attendance at school.

17 In July 1994, in anticipation of the child becoming of school age the next year, the father sought
18 to register him with the John A Cumber Primary School. This is a government school located in
19 West Bay, where the family resides.

20 I gather from the arguments, that at the time of the application for the boy's registration, the
21 parent's Rastafarian persuasion and the boy's appearance had somehow been brought to the
22 attention of the school authorities. Due to its obvious sensitivities, the application was taken up
23 before the Council.

1 I see from the record (page 46 of the defendant's judge's bundle) that the application was first
2 considered at the Council meeting of 3rd August 1994. The minutes show entries of decisions
3 then taken and which I will set out, along with other decisions of the Council in sequence, for the
4 better discussions of the issues raised in this case. In particular these decisions of the Council are
5 relevant because it is argued on behalf of the defendants that the early decisions of the Council
6 to uphold and maintain the School Rules have not been challenged and must therefore be
7 regarded as valid and extant and, in light of their continued disobedience and breach, as
8 inevitably leading to the boy's expulsion.

9 The entry for 3rd August 1994 reads:

10 "The Chairman brought to Council an application for a student *to be admitted* to a
11 Government school wearing dreadlocks. The child's father was adamant and
12 threatened legal action on the grounds of discrimination should the child not be
13 admitted.

14 A discussion took place and the issue was brought to a vote. Mrs. Basdeo
15 abstained and all other members voted *against allowing the student into school on*
16 *the grounds that it contravened school policy*. There was further discussion on
17 the matter and it was decided to seek counsel from the Attorney General in
18 drafting the response" (emphasis added).

19
20 I have no evidence of what immediately followed but for months thereafter the matter sat
21 dormant until June 1995, when the child's mandatory attendance at school became imminent.

22 On the 29 June 1995, the father wrote to the Ministry of Education enclosing his "Notice To The
23 Powers That Be" fully articulating his views on the Law, his and his son's rights, as he perceived

1 them under the law and under the International Conventions, and explaining his beliefs as a
2 Rastafarian expressed as predicated upon the teachings of the Holy Bible.

3 This “manifesto” – as it has been aptly described – also denounces the earlier decision (3.8.94) of
4 the Council in the following strident terms:

5 “It has come to my attention that a child who is registered in a Government school
6 in the Cayman Islands is not permitted an education on the grounds of the fact
7 that this child is a locks Rasta Youth.

8 I shall prove this to be racist, biased and discriminating opinion and if not
9 corrected by Government will be considered an act of aggression and will be dealt
10 with accordingly in the ways of war. Please remember from history, “no war is
11 won without the shedding of blood.” For this time I stand alone but like my
12 forefathers before me, I too shall die if need be for the sake of promoting and
13 encouraging respect for human rights and for the fundamental freedoms for all
14 without distinction as to race, sex, language or religion”.

15 This stridency notwithstanding, on the 21 August 1995 the Council met and its minutes show the
16 following entry:

17 “Re the matter of a request by Ras. Grant to have his child admitted into the
18 Government primary school in September 1995, Council expressed the view that
19 despite the fact that according to the law one cannot stop the child from attending
20 school, the policy of the school dictates certain codes of behaviour dress etc.

21 A vote was taken with eight against and no one in favour of admitting the child to
22 school with his hair in locks.”

23 There was one abstention.

1 The matter will be considered further at the next meeting of Council”.

2

3 So it appears from the records of the Council, that it had decided to uphold and maintain the
4 School Rules by requiring that the child not be admitted without his hair being trimmed.

5 The child’s father was informed by letter dated 25th August 1995 of this decision and invited in
6 the following terms to appeal to Council:

7 “At a recent meeting of Education Council, held on 21st August, the matter re the
8 admission of a Rasta student wearing locks to school was considered.

9 The Council decided that the child should not be admitted to school at this time.

10 The decision was also made to discuss the matter further at its next meeting. In
11 the meantime this decision has to be upheld.

12 If you desire you may appeal directly to (Education) Council in the matter”.

13 I break the narrative here to make the following observation.

14 Although there is no challenge to the vires or legality of the School Rules, Mr. Hill did seek to
15 argue latterly in his reply, that the Council were here deciding to uphold the School Rules
16 notwithstanding that they recognised that the Law mandated that the child be allowed to attend
17 school.

18 To the extent this criticism suggested a challenge to the legality of the School Rules as distinct
19 from the decision to uphold it, such a collateral attack upon the Rules is, of course,
20 impermissible: Smith v East Elloe Rural District Council et al [1956] 1 All E.R. 355.

21 In the absence of any challenges to these early decisions themselves to uphold and maintain the
22 School Rules, these decisions themselves must also be regarded as valid. They stand to be
23 considered as part of the context in which the decision which has been challenged – that of the

1 19th December 1995 to expel the child until such time as he complies, - was taken. The legal
2 reasons for this will be discussed further below.

3 Now I return to the narrative.

4 Despite the letter of 25 August 1995, the child continued to attend school with his hair in
5 dreadlocks. On 1st September 1995, the father wrote to the Council indicating his intention to
6 appeal as he had been invited to do. He expanded upon his earlier submissions in his
7 “manifesto” in these somewhat less strident terms than before:

8 “My child must be given an education (according to the laws of the Cayman
9 Islands) and has every right to attend school on the first starting day of school,
10 like every other child which has applied and registration accepted to enter the
11 school ---. It is most unfair that you request my child not attend school and be
12 denied an education until the Education Council meets. I am not requesting
13 permission to preach or to indoctrinate anyone in school but to be treated equal
14 and the same as everyone, we must remember that the children are our future and
15 if discrimination because of anyone’s religion, race etc. are a part of the school
16 policy (please note it is not a part of Cayman Islands law and cannot be a part of
17 the law) continues we are not setting a positive example.

18 I feel that the children should be taught not to discriminate against someone else
19 just because they look different and are of a different colour, race, religion and
20 this I think will be a good example to start with”.

21 True to his own intents, before the Council next met and before the Council replied, the father
22 continued to present the child at school with his hair in dreadlocks.

1 The Principal called the Ministry for guidance and was advised that he should keep the child in
2 his office until further advised.

3 A further letter was sent to the father requiring conformity to the School Rules and again inviting
4 him to meet with the Council if he wished to appeal.

5 That meeting occurred on 18th September 1995 when both parents took the opportunity to attend.

6 It appears from the minutes that the Council members themselves had a general discussion on
7 Rastafarianism both within and without the presence of the parents.

8 As many of the issues which now fall for determination arose from those discussions, I set out
9 the minutes of them in full; (with emphasis supplied throughout):

10 *“AT THE MEETING the general issue of “Dreadlocks” as a religion and*
11 *“Dreadlocks” vis-à-vis the Caymanian Society was discussed and it was agreed*
12 *that:-*

13 (i) Mr. Grant would be given a fair chance to put his case then asked to leave
14 while the Council deliberated.

15 (ii) The principal would have to be given clear guidelines how to proceed
16 especially re having the child physically removed from the school if
17 necessary

18 (iii) *Council was not against the child's religion but it had to see to the*
19 *upkeep of the school's policies*

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

1 IN HIS PRESENTATION - MR. GRANT referred to his interpretation of the
2 school rules vis-à-vis what he termed as ‘designer’ hairstyles (also prohibited) and
3 his “God-given right to do as he pleases”.

4 He made reference to the Belief of the Strategic Planning in Education and
5 repeatedly to the Bible. Mr. Grant informed the meeting that:

6 *“Locks has nothing to do with our religion. Its between man and God. You don’t*
7 *have to wear locks to be a Rasta. I am a Christian. I respect the law of God*
8 *rather than man”.*

9 Mr. Grant said that he was prepared to take the matter to the U.N.

10 Following the discussion after Mr. Grant’s departure, Council resolved that:-

11 *1. The provisions of the dress code for the West Bay Primary School*

12 *prohibiting the wearing of dreadlocks be maintained for the following reasons:-*

13 *(i) the prohibition is not discriminatory on religious grounds as the wearing*
14 *of dreadlocks is not an essential tenet of Rastafarianism*

15 *(ii) the wearing of dreadlocks, which is not generally acceptable to the*
16 *Caymanian Community, would defeat one of the main aims of a uniform*
17 *dress code, which is to ensure as far as possible that pupils do not suffer*
18 *prejudice because of their dress or appearance;*

19 *2. the Principal of West Bay primary school should be accordingly authorised to*
20 *deny admission to the School to Shemaiah Grant so long as he continues to*
21 *wear dreadlocks”.*

1 The Council also then resolved that Mr. Grant would be informed of its decision in writing and
2 that the provisions of section 22 (4) [(Section 22 (5) as it now stands)] would be brought to his
3 attention.

4 Sec 22 (5), which will be more fully considered below, provides:

5 “Subject to the provisions of this Law no person who is eligible for admission to a
6 government school as a pupil at that school shall be refused admission thereto
7 except on any ground approved by the Council in each particular case”.

8 Mr. Grant persisted nonetheless and Shemaiah attended school for the entire first term –
9 September 1995 to December 1995. This happened notwithstanding that his presence at school
10 was in breach of the School Rules and despite his non-admission. Moreover, his attendance
11 persisted during the term notwithstanding that it had been reprovved also by the Principal’s order
12 of suspension for 7 days, and then by the Chief Education Officer’s order of suspension for 30
13 days - both acting pursuant to section 22 (6) of the Law.

14 Finally, on 19th December 1995, the decision of the Council was taken to expel the child.

15 Apart from the foregoing chronology, I think it only remains for me - in order to complete the
16 factual background - to note that the child has been schooled at home by a private tutor ever
17 since his expulsion. As the parents are unable to meet the costs themselves, the Government has
18 been meeting those costs. Mr. Lamontagne, during the proceedings before me, confirmed that it
19 is the Government’s intention to continue to do so – should the child fail to secure re-admission
20 to the school. This is to ensure that the child receives a program of education approved by the
21 Chief Education Officer in keeping with the mandatory requirements of the Education law.

22 There is thus no issue before me whether the child will be deprived of an education; what the
23 child is being denied is an education in a school environment in the society of other children.

1

2 The plaintiffs' grounds for relief

3 The plaintiffs claim declaratory orders that the expulsion of the child was ultra vires and void.

4 Alternatively, declaratory orders that the decision to expel was in breach of the Law and/or the
5 Human Rights Declaration and various Conventions cited.

6 The Declaration and Conventions cited are the following: The United Nations Universal
7 Declaration of Human Rights 1948; the European Convention on Human Rights; The
8 International Convention on Civil and Political Rights; the Convention Against Discrimination in
9 Education; and the Convention on the Rights of the Child.

10 There are also prayers for an order for certiorari to quash the decision to expel on the ground that
11 the decision does not appear in the Minutes of the Council. That ground was however not
12 pursued in the arguments, but this is not surprising as the minutes of 19th December 1995 do in
13 fact reflect that decision.

14 Complaint is also made in the re-amended Originating Motion against the decisions of 28
15 September 1995 of the Principal and of the Chief Education Officer respectively, to suspend the
16 child.

17 However, as those decisions never became effective, no arguments were developed in relation to
18 them.

19 They remain important nonetheless because those decisions purport to have been predicated
20 upon the opinion of the Chief Education Officer ("the C.E.O.") that the child had committed or
21 continued to commit "an act of such a nature that his presence in the school was likely to have a
22 detrimental effect on other pupils of the school or on the school".

1 It was the C.E.O's report upon the child's attendance as being "detrimental" that later predicated
2 the decision of the Council to expel.

3 Only after the opening of the case before me did Counsel for the plaintiffs seek to add the ground
4 of "Wednesbury unreasonableness" [(1948) 1 K.B. 223)] as a separate ground. Then a further
5 amendment to the Originating Motion was allowed to put forward the ground that "the decision
6 to expel was unreasonable as its enforcement would infringe upon the plaintiffs' religious
7 beliefs".

8 Thus the religious persuasion of the parents and their right to bring the child up in keeping with
9 the practices of their faith, became of central importance to the pleadings.

10 It is in the alleged breach of this fundamental right it was argued that the decision to expel should
11 be declared unreasonable, ultra vires, null and void.

12 I emphasise that the challenge is to the decision to uphold the School Rules by expelling the
13 child, not to the validity of the Rules themselves. Time and again however the latter challenge
14 crept into the arguments. So, for reasons which I will shortly explain, I consider their validity to
15 be, in any event, the correct view to be taken of the Rules.

16 The plaintiffs' case also proceeds upon the argument that the decision to enforce the School
17 Rules in respect of this particular child cannot be divorced from its likely effect; - that the child
18 would be so detrimentally affected by the psychological and emotional trauma of having to cut
19 his hair in breach of the religious teachings of his parents and of the practices and beliefs of the
20 Rastafari - that the decision should be declared irrational and null and void.

21 It follows from this that some examination of the proclaimed beliefs - Rastafarianism as a
22 religion - and of its fundamental tenets and beliefs, becomes necessary for determining the

1 existence of the fundamental right which is asserted and if so, to what extent it has been
2 breached.

3

4 Rastafarianism: "Movement" or Religion?

5 I was referred to a number of different studies on Rastafarianism.

6 All writers agree that it had its beginnings in the early 20th century as a socio-political movement
7 fueled by the protests of persons, mainly young men, who regarded themselves as marginalised
8 members of Jamaican Society.

9 Prof. Rex Nettleford (now Vice Chancellor of the University of the West Indies) in a study,
10 published in 1973, harkened back to the origins of the Movement:

11 "The sounds and pressure of poverty continued to be underlined in clear colour,
12 the Jamaican of unmistakably African decent decidedly relegated to the base of
13 the Society. All the responses known to Jamaican history were invoked by the
14 Rastafarian - - - For in Rastafarianism are to be found such old responses as
15 psychological withdrawal, black nationalism, apocalyptic exultation and
16 denunciation tied to the bold assertion of a redemptive ethic as aid to liberation
17 and relief from suffering".

18 The "apocalyptic exultation" and "denunciation" of which Nettleford wrote finds its expression
19 perhaps nowhere more consistently and dramatically than in the characterisation of Jamaica as
20 "Babylon".

21 Later, as the Movement extended its presence throughout western society so it extended its
22 "denunciation".

1 This traditional sentiment not only identifies “Babylon” as the realm of the oppressor classes in
2 contradistinction to Ethiopia in particular - and wider Africa in general - as the promised land; it
3 also serves as the theocratic basis for the regard by the Rastafarians of themselves, - and more
4 and more so by others – as a sect apart. Hence also “the psychological withdrawal” of which
5 Prof Nettleford wrote. It was a withdrawal which posited that Ethiopia would be the place of
6 redemption upon the event, and which awaited the event, of the Final Coming.

7 The “Back to Africa” movement as temporal and earthly philosophy was most powerfully
8 articulated by Marcus Garvey, whom the early Rastafarians regarded as a prophet, but his early
9 prophecy of separation and repatriation has over the years evolved instead into a reality of
10 identity. Now, for many Rastafarians, the early prophecy has transformed into a reluctant
11 acceptance of time and place. This is nonetheless always underpinned with the resolute assertion
12 of a distinct identity.

13 The need for assertion of identity by the Rastafarians was what originally gave rise to the
14 phenomenon of “dreadlocks”. Dr. Barry Chevannes (Professor of Anthropology at the
15 University of the West Indies) in his work “Rastafari: Roots and Ideology” explains that as the
16 Movement developed, the title “Warrior” or “Dreadful” was conferred on those who
17 distinguished themselves with ascetic discipline. This discipline included adherence to the tenets
18 which were evolving. “Dreadful” or “Dread” therefore became, among adherents, synonymous
19 with “upright”.

20 From the 1930’s beards and dreadlocks became a practice and a biblical reference was found to
21 justify it, namely: the Nazarite vow of Samson.

22 There had been a divergence of views between early adherents on appearance and presentation.
23 As distinct from the “Dreadlocks” there were the “Combsomes”.

1 By the late 1960's however, following on the significant event of the appointment of a delegation
2 on repatriation to Ethiopia by the Jamaican Government, headed by a dreadlocked "brethren" of
3 the Rastafari; the style of the Combsomes all but vanished.

4 Dr. Chevannes speaks of early Rastafarian religiosity as having its roots in Revivalism and
5 Nyalism - the religious innovations of the enslaved Jamaican population which first emerged
6 during the Taki Rebellions of 1760 and by which they sought "to wrest the Christian message
7 from the messenger" by the substitution of their own symbols (such as a Black God) and rites
8 and rituals; for those of Christian orthodoxy which had become, in the minds of the colonised
9 people, synonymous with a distortion of the true message.

10 The emergence of the Rastafarian movement as a separate religious sect first appeared with the
11 ascension of Haile Selassie as Emperor of Ethiopia

12 The following extract from the historical work The Story of the Jamaican People; by Sherlock
13 and Bennett describes the event:

14 "In 1930 Ras Tafari, great-grandson of King Sahika Selassie of Shoa, was
15 crowned Negus of Ethiopia in St. George's Cathedral, Addis Ababa. The young
16 king took the name Haile Selassie (Might of the Trinity) as well as other titles,
17 King of Kings and the Lion of Judah, which proclaimed his ancestry in the
18 legendary line of decent from King Solomon.

19 --- This was the glory that filled the mind of Leonard Howell, who had served in
20 the Ashanti war of 1896, had learned several African languages and had returned
21 to Jamaica some time after the coronation, convinced that Haile Selassie was the
22 Messiah of the black people. He began his ministry amid the slums of West
23 Kingston.

1 He (and other preachers) - - built up a small but faithful membership. Somehow
2 the name "Ras Tafari" and not Haile Selassie came to be adopted --. His name,
3 Haile Selassie, is used in their rituals, in prayers and songs. The name "Jah",
4 which is also revered, is probably a shortened form of Jehovah".

5 It is through Haile Selassie's lineage of descent from King Solomon of the Old Testament and the
6 Queen of Sheba, that the Rastafari claim to be members of the Twelfth (or "lost") Tribe of
7 Israel.

8 This lineage also provided the argument - some might say syllogism - for the regard of Haile
9 Selassie as a Messiah, equally with Christ.

10 Dr. Chevannes reports that in most cases of conversion to Rastafarianism the Bible, the infallible
11 word of God, becomes the final arbiter, the source of ultimate appeal. He reports that many
12 Rastafari were converted by its power. Because Rastafarianism bases its teachings on the Bible,
13 the same source of Christian orthodoxy, some adherents when giving a different interpretation to
14 its contents also accused the traditional Churches of distorting or hiding the truth from the
15 people. This outrage was not a new theme. It was very much the theme of earlier Revivalism
16 which imbued the slave rebellions earlier mentioned and those of the early 19th century and many
17 other "rebellions" against the establishment of colonial Jamaican Government. It is a theme
18 which has been present all through the development of the Rastafari movement and provides the
19 syncretism between the Old and New Testaments and which the rebels "superimposed with an
20 Africanised Christianity".

21 This is "the bold assertion of the redemptive ethic" of which Prof. Nettleford wrote.

1 The evolution of Rastafarianism and its global spread as an anthropological phenomenon has
2 been ongoing. It is described in "The Story of the Jamaican People" (op. cit.) as having been a
3 "transforming cultural force since the 1960's".

4 The internationalisation of Rastafari is now manifest in Rastafari social presence in Canada,
5 Britain, the United States, Europe, Japan, Australia, New Zealand and, of course, throughout the
6 Caribbean.

7 Most studies attribute this spread to the migration of Jamaicans and to the now global appeal of
8 Reggae music.

9 In the case of the former, it was the children of the immigrants whose crisis of identity abroad
10 found resolution in Rastafari. For them all the symbols – colours, language, diet and hair –
11 became sources of identity. For many of those young men, the dreadlocks in particular became
12 more a symbol of pride in heritage, than a religious manifestation.

13 For its part, Reggae music has come to be regarded as a powerful medium for communicating
14 the message and spirit of the Rastafari and has been attributed with having successfully
15 neutralised the negative impact of what Dr. Chevannes describes as "the movement's
16 misperceived association with crime and violence" in North America in particular. He reports
17 on a warm memorial tribute to Bob Marley in which the author - ("Guitar Player" May 1991,
18 82) - cites the love for Marley's music as the common bond linking a blues guitarist in
19 Mississippi, a black South African soldier serving in Namibia, a young accordion player in a
20 South African township and a group of Australians, New Zealanders and Scotsmen in London.

21 From all the foregoing, there certainly is ample evidence for a conclusion that Rastafarianism is a
22 multi-faceted anthropological phenomenon.

1 It appears, however, to be as much to be a socio-political and cultural movement as it appears to
2 be a religious movement.

3 As Mr. Lamontagne observed during the hearing: To the extent that the plaintiffs can invoke
4 fundamental rights in this case, there could equally have been complaints based on the rights to
5 freedom of thought, conviction, philosophical beliefs and expression.

6 However, I think it will be apparent from the analysis of the law and treaties on the fundamental
7 rights; that no greater objective could have been achieved by averring those in the pleadings than
8 by the averment of the right to freedom of religion.

9 That being the basis of the claim here, it is the particular infringement against which the vires
10 and reasonableness of the decision to expel are to be measured.

11 I am therefore required to proceed to more specific findings upon Rastafarianism as a religion
12 and if so, as to its tenets and their implications.

13 Mr. Lamontagne advised that I should regard as highly persuasive the English cases already
14 decided upon this most sensitive and difficult of issues.

15 Those cases point to a view of religion more strictly and perhaps narrowly taken than in the cases
16 which have been decided in other countries, in particular in the United States.

17 In the English case of Barralet v Attorney – General [1980] 3 All E.R.- Dillon J (as he then was)
18 had to consider whether the objects of “The South Place Ethical Society” were for the
19 advancement of religion or otherwise charitable so as to entitle the Society to certain privileges
20 under the law.

21 The objects of the Society were:

- 22 (i) the study and dissemination of ethical principles those being the belief that the object of
23 human existence was the discovery of truth, love and beauty as opposed to belief in any

1 supernatural power and (ii) the cultivation of a rational religious sentiment. The word
2 “religion” was used in a sense which eschewed all supernatural belief. Although the
3 Society’s beliefs were non-atheistic regarding belief in God.

4 Finding that its objects were charitable on grounds other than its religious objectives, the Court
5 held that the word “religion” in its natural and accustomed sense, was concerned with man’s
6 relation with God, whereas “ethics” was concerned with man’s relation with man. Although a
7 sincere belief might fill in the possessor’s life a place parallel to that occupied by belief in God in
8 the mind of theists, that did not make the belief a religion. Furthermore, faith in a God and
9 worship of that God by submission, veneration, praise, thanksgiving or prayer were essential
10 attributes of religion and there could be no worship in that sense only of an ethical or
11 philosophical ideal.

12 In coming to that conclusion Dillon J. eschewed the definitions adopted by the United States
13 Supreme Court in United States v Seeger (1965) 380 US 163 as being too wide; ie:

14 “A sincere and meaningful belief, which occupies in the life of its
15 possessor a place parallel to that filled by the God of those admittedly
16 qualifying for the (statutory) exemption on the grounds of religion ---” .
17 (per Justice Clarke) or

18

19 “--- sincere belief which in his life fills the same place as a belief in God
20 fills in the life of an orthodox religionist --- ”. (per Justice Douglas)

21

22 On the first of these two definitions Dillon J .commented:

23 “The ground of the opinion in the Supreme Court in Seeger’s case, that

1 any belief occupying in the life of its possessor a place parallel to that
2 occupied by God in the minds of theists is religion, prompts the comment
3 that parallels, by definition, never meet”.

4 Dillon J. did not however offer any comment upon the second definition in Seeger’s case that of
5 Douglas J which does not suffer from a similar semantic or intellectual foible.

6 If that latter definition of religion is taken, then I think it would be met in this case for, as we
7 have already seen, in the life of the Rastafari, there is sincere belief in Ras Tafari which fills the
8 same place as a belief in God fills in the life of an orthodox religionist.

9 The English case law, as reviewed in Barralet’s case requires, however, the presence of the two
10 distinct elements: faith and worship. At page 924 at letter h, Dillon J stated:

11 “It seems that two of the essential attributes of religion are faith and worship; faith
12 in a God and worship of that God. This is suggested by the definitions of religion
13 given in the Oxford English Dictionary, although I appreciate that there are other
14 definitions in the other dictionaries and books --:

15 A particular system of faith and worship -- recognition on the part of man of some
16 higher, unseen power as having control of his destiny and as being entitled to
17 obedience, reverence and worship”.

18 As to what may constitute worship, the English cases have also ventured - as is most definitively
19 seen from the following passage from the judgment of Buckley LJ in the Church of Scientology
20 case; R v Registrar General ex parte Segerdal [1970] 3 All. E.R. 886 at 892:

21 “Worship I take to be something which must have some, at least, of the following
22 characteristics, submission to the object worshiped, veneration of that
23 object, praise thanksgiving, prayer, or intercession”.

1 It is the absence in the evidence, and documented studies before this court, of a definitive
2 showing of the element of “worship”, that leads Mr. Lamontagne to submit that Rastafarianism
3 is not a religion.

4 I shall pause here to observe that religion by its very nature is not a subject readily given to
5 definition by means of inquiry. It is not a subject amenable to definition by rules. There is and
6 there can be no single doctrinal meaning. Far from there being agreement, history has produced
7 the deepest possible conflicts as to what in the most general sense, is true or false religion and as
8 to what may be taken as valid religious beliefs.

9 Even when presented only with specific issues of religious rights, as in this case, a judge
10 therefore must be astute not to be overly intrusive in the inquiry which would lead to the
11 recognition or non-recognition as religion of a particular system of beliefs and practices for
12 which the right to protection is asserted.

13 The resolution of the question should not turn upon a subjective judicial perception of the
14 particular belief or practice being examined.

15 As the United States Supreme Court observed in (Thomas v Review Board of Indiana
16 Employment Security Division) 450 U.S. 707 (1981): “religious beliefs need not be acceptable,
17 logical, consistent or comprehensible to others in order to merit first amendment protection,” and
18 freedom of religion “includes the right to maintain theories of life --- which are rank heresy to
19 followers of orthodox faith”

20 It has been argued by at least one writer that this approach developed in the United States cases
21 such as Seeger and Thomas and which may be described as the “functional approach”; is
22 acceptable as it is consistent with the Constitutional protection of freedom of religion and with
23 the realities of litigation, for it is not the doctrine that is on trial when a Constitutional claim is

1 before the Court. “Rather it is an individual’s *belief* that is in issue and an approach that focuses
2 attention on the importance and sincerity of that belief is likely to be protective of unorthodox
3 religions like Rastafarianism.” See “Soul Rebels: The Rastafarians and the Free Exercise Clause”
4 by Timothy B. Taylor; The Georgetown University Law Journal [Vol. 72: 1605 at 1612. 1984].
5 The theistic view on the other hand, - that which may be described as having been taken in the
6 English cases, - as we have seen requires the showing of a belief in a relation to God involving
7 duties superior to those arising from any human relation.
8 Hence the need for a showing not only of *Faith* but of *Worship* as well.
9 Application of the functional approach would, it appears to me, lead to the conclusion that
10 Rastafarianism is a religion. Questions of formal worship aside for the moment: there is in the
11 life of the true Rastafarian a “sincere *belief* that occupies the same place as God in the life of the
12 orthodox religionist”. (per Justice Douglas in Seeger’s case).
13 It is a persuasive argument that even if Jah Ras Tafari is not the Judeo-Christian God, to the
14 Rastafarian he is “a functional equivalent”. (“Soul Rebels” op. cit. at page 1612).
15 And, like the practices of the Amish, accorded Constitutional protection in Wisconsin v Yoder
16 406 U.S. 205 (at 215-216); the Rastafarian beliefs occupy a place in the hearts and minds of
17 adherents that is proclaimed to be “much more than merely a matter of personal preference”
18 rather a “deep religious conviction, shared by an organised group, and intimately related to daily
19 living”.
20 If one takes, on the other hand, the theistic view of the English cases, one would need to see
21 evidence of the acknowledgement not only of the omnipotence and supremacy of the deity, but
22 of the relationship of worship, obedience and reverence as well.

1 Dr. Chevannes provided expert testimony which went unchallenged in these proceedings and in
2 which he expressed the opinion that the Rastafari movement is a religion in the sense that “in its
3 practices it creates a bond uniting man to God, and a virtue whose purpose is to render unto God
4 all worship due to him as the source of all being and the principal government of all things”.

5 Dr. Chevannes is emphatic that the movement is not a cult “as it is not an obsessive, secretive
6 and/or faddish devotion to a principle or person”.

7 Other opinions by researchers have produced evidence of a ritualistic, albeit non-formalistic,
8 practice of worship.

9 The aspect of these practices among the Rastafari which has perhaps received the most attention
10 is the ritualistic use of marijuana which Rastafarians refer to as “ganja” or “the holy herb”. All
11 the studies and evidence, including Dr. Chevanne’s affidavit, refer to the Rastafarian adherence
12 to the use of ganja as a high sacrament.

13 This is a factor to be placed in the balance of reasonableness in the final decision in this case and
14 I will return to consider that practice further below.

15 For now, I note the place of the drug as sacrament in the context of the ritual and in the inquiry
16 as to whether there is indeed a recognisable form of worship.

17 Dr. Leonard Barrett, Professor of Religion at Temple University and another leading authority on
18 the Rastafari, reports that Rastafari ritual meetings, invariably involving the use of the drug, are
19 called “grounations” and “nyabingis” and there is a standard form of prayer – of Judeo –
20 Christian extraction - but with exhortation at the end to “Jah Ras Tafari”.

21 Dr. Barrett also notes that many Rastafarians have been attracted to the Ethiopian Zion Coptic
22 Church and the Ethiopian Orthodox Church – a phenomenon according to Barrett which is
23 symptomatic of the ongoing syncretism that has marked the growth of Rastafarianism.

1 Yet another writer - [T. White “Catch a Fire” (1983)] – comments:

2 “The Rastas were simply trying to establish a United Church of Rastafari. Their
3 efforts had been stymied because none of the far-flung brethren could reach a
4 consensus on where Selassie stood in the great scheme of things. Was he God? A
5 close relative? A prophet to succeed Abraham, Moses and Jesus?”

6 This debate it appears arises because it is still inappropriate to regard Rastafarians as a unified
7 religious group.

8 There are numerous subgroups and geographic representations and, beyond the core tenets,
9 habits and practices, it seems there is an ongoing process of development and variation in belief
10 and practices.

11 As to what are the core tenets and beliefs another which arises to be of pivotal concern in this
12 case – apart from the sacralisation of ganja – is, of course, the wearing of dreadlocks. I will return
13 to consider the place to be accorded to it below as well.

14 There is a divergence of views on the matter itself of the status to be accorded to Rastafarianism
15 – certainly a divergence of judicial views.

16 This is notwithstanding the fact, as Dr. Chevannes testified, of the recognition of the United
17 Nations of Rastafarianism as one of the religions of the World.

18 Rastafarianism has positively been recognised by the Courts of Zimbabwe as a bona fide religion
19 or belief to be accorded the Constitutional protection of freedom of conscience in Re Chikweche
20 [1995] 2 LRC 93. There an attorney was held wrongfully to have been barred from admission to
21 practice because of his dreadlocks.

22 Implicitly also - from my reading of the case - by the Court of Appeal of Jamaica in R. v. Hines
23 and King (1971) 17 W.I.R. 326 in upholding the right of the defendant Hines, a Rastafarian, to

1 take the oath, not in the prescribed form but in a form, albeit upon the Bible, which was binding
2 upon his conscience: "I swear by Almighty God, King Rastafari---".

3 That case is, however, as close as it appears the judges of the Caribbean have come to according
4 recognition to Rastafarianism as a religion. Several judges in the West Indies have referred
5 variously to Rastafarianism and to the movement as "the Rastafarian cult" (Duffus JA of the
6 Court of Appeal in Jamaica, in R v Larman et al (1964) 6 WIR 550 at 552); as "members of the
7 Rastafarian movement" (Peterkin CJ of the Court of Appeal of the West Indies Associated
8 States, in Freeland v R (1981) WIR 378; at 379); as a "cult called the "dreads" or "rastas" (Lord
9 Keith of Kinkel, of the Privy Council, in Joseph vs The State of Dominca (1988) 36 W.I.R. 216
10 at 217); as "the rastafarian sect" (by Singh JA of the Court of Appeal of the Eastern Caribbean
11 States, in Henry et al vs R (1993) 46 W.I.R. 135 at 136).

12 In the United States, a number of cases have come before the Courts in relation to Rastafari
13 claims to the right to the free exercise of their religious beliefs under the first Amendment to the
14 Constitution which states that "Congress shall make no law respecting an establishment of
15 religion or prohibiting the free exercise thereof---".

16 In a number of these cases, the complaint was levelled against regulations in correctional
17 facilities which required inmates to cut their hair and be clean shaven. The results show
18 differing views.

19 In the only such case that has gone as far as the United States Supreme Court, the Court declined
20 to decide whether the movement constituted a religion even while intimating that it did not
21 consider Rastafarianism to be protected by the Constitutional amendments. In the Taylor article
22 G.T.L.J. ("Soul Rebels" op. cit; 1610) the author notes: "The Court did not engage in any
23 meaningful analysis of the question. Instead in a footnote it stated: "It is the opinion of this

1 Court that the Rastafari are more a Jamaican Social and political subculture than a religion”:
2 Robinson v Foti 527 F. Supp. 1111.

3 However, since the Robinson v Foti case, the Rastafari have fared better in having their faith
4 recognised as a religion by United States courts. In The People v Lewis 496 N.Y.S. 2d 258 and
5 in Reed v Faulkner 842 F. 2d 960 the Appeals Court of New York and the United States Court of
6 Appeal 7th Circuit respectively upheld the claims of the Rastafarian plaintiffs to be exempt from
7 the cutting of their dreadlocks on religious grounds.

8 In United States v Bauer, Treiber Best et al 96 C.D.O.S. 756, the Court of Appeal for the 9th
9 Circuit expressly recognised Rastafarianism as being among the “1558 religious groups
10 sufficiently stable and distinctive to be identified as one of the existing religions in this country”
11 and so recognised the defendants’ right to argue in their defence for a Constitutional exemption
12 in the possession and use of marijuana as a sacrament. This was notwithstanding the
13 circumstances of the case where the defendants allegedly were involved in importing, cultivating
14 and selling very large quantities of marijuana; - an outcome which prompted Mr. Lamontagne in
15 the arguments in this case, to decry the absurdity to which the grant of ascendancy to
16 Constitutional freedoms can lead.

17 In England, where, as in the Cayman Islands, there have been no Constitutionally entrenched
18 fundamental rights to invoke, claims by the Rastafari, not based on religion but on ethnicity,
19 have been unsuccessful under the Race Relations Act 1976: Dawkins v Crown Suppliers (PSA)
20 Ltd TLR 4th Feb 1993.

21 Having - with some hesitation - but unavoidably taken the foregoing enquiry into the history,
22 beliefs and practices of Rastafarianism and into the case law, I must now express a conclusion on
23 the first question: is Rastafarianism a religion?

1 It is without doubt a multi-faceted anthropological phenomenon. It began as, and perhaps
2 predominantly remains, a socio-political movement. It has also certainly evolved into a nearly
3 global cultural influence attractive to many, across racial divides, in search of ideology and
4 identity. But for many of the adherents, underlying all this is the constantly proclaimed
5 redemptive ethic of religious beliefs. Without doubt also it is a messianic and millenarian belief,
6 as it is especially characterised by the belief in a messiah or saviour and the coming of an ideal
7 society upon the expulsion of “Babylon,” a coming to be brought about, if necessary, even by
8 “revolution”.

9 It is that “redemptive ethic” proclaimed by constancy of practice and belief for more than half a
10 century now, and though perhaps abhorrent to much orthodox thinking, which I conclude
11 deserves recognition as “religion” within the meaning of the common law.

12 And for the avoidance of doubt, I should state that I would so conclude by either of the two
13 approaches taken in the cases considered above – “the functional” or the theistic.

14

15 The fundamental tenets and beliefs

16 Having so concluded it follows that I should record my finding on the significance of the two
17 tenets which figure most prominently in this case: dreadlocks and ganja.

18 I should here state that there is no issue as to the genuineness of the beliefs of the plaintiffs. Mr.
19 Lamontagne has acknowledged that in terms.

20 A convenient reference point for the significance of these two tenets is the affidavit of Dr.
21 Chevannes (paragraphs 8 –12):

22 “8. the founders (of Rastafari) and early followers etched a system of
23 belief which posit:

- 1 - the destiny of Emperor Haile Selassie as the returned Messiah;
- 2 - that God is Black;
- 3 - that Blackness far from being a sign of debasement is a sign of divine
- 4 origin
- 5 - that all Africans in the Diaspora will be repatriated.

6

7 9. That over the following decades several important developments

8 have taken place in the movement among these are:

- 9 - the use and sacrilisation of ganja:
- 10 - the development of a philosophy, whose central core concerns
- 11 integrity of the self, the I
- 12 - the sacrilisation of the dreadlocks

13

14 10. The dreadlocks originated in the very late 1940s and early 1950s. Those

15 who first carried themselves in this way sought to emulate the pictures of

16 Kenyan Mau Mau warriors fighting British colonial power as well as the

17 marginal position of derelict street people of Kingston, Jamaica, from

18 which position they saw themselves as able to adopt a critical prophetic

19 posture towards Jamaican Society. It was this critical propheticism, which

20 earned them the designation dread and pulled the young alienated people,

21 particularly males into the movement.

22

23 11. By the end of the 1960s the overwhelming majority of Rastafari adherents

1 wore Dreadlocks --- the ascendancy of the Dreadlocks was the result of
2 an over-a-decade – long struggle between the “Combsome” Rastafari and
3 the Dreadlocks Rastafari over the issue of hair as a signifier of marginality
4 to Jamaican Society, personal commitment to repatriation and spiritual
5 struggle based on the personal integrity of race and colour.

6
7 12. That a man’s dreadlocks are thought by the Rastafari, who endorse the
8 practice to be his “crown”, that is a sign of God’s approval and of his
9 status as king over the inner kingdom of the self, the I. Some Rastafari go
10 so far as to attribute spiritual powers to the dreadlocks itself.

11 As an outgrowth of the head, which is regarded as the seat of knowledge,
12 the dreadlocks are considered especially sacred. In consequence,
13 dreadlocks is one of the first signs of adoption of Rastafari beliefs, and
14 conversely, the shedding of it is one of the first signs of relinquishing
15 those beliefs and associations. Among some groups, the ritual shearing of
16 the dreadlocks is a humiliating and dreaded punishment.

17
18 13. That nowadays, with the internationalisation of the Rastafari, many persons
19 of African ancestry adopt the Rastafari dreadlocks without adopting
20 Rastafari beliefs.

21 Many do so as a way of celebrating the unique characteristics of the
22 woolly spiralled hair of black Africans”.

1 This account confirms the accounts in the other studies that the wearing of dreadlocks is – for the
2 true Rastafarian – at once a personal attribute of self and identity as well as an outward
3 manifestation of the Rastafari faith and of adherence to its tenets and practices.

4 The defendants’ concession as to the genuineness of beliefs is made notwithstanding the father’s
5 protestations at the meeting of 19th September 1995 of the Education Council that: “Locks has
6 nothing to do with our religion---. You don’t have to wear locks to be a Rasta. I am a Christian.
7 I respect the law of God rather than man”.

8 Implicit in that statement is nonetheless the acknowledgment of another proposition which is
9 apparent from the literature and which is otherwise self-evident: that one can adhere to the
10 Rastafarian beliefs without wearing dreadlocks.

11 Indeed, despite the textual authority in the Holy Bible (Leviticus 21:5; Numbers 6:2-13)
12 Professor Barrett and T. White (both quoted in “Soul Rebel” G.T.L.J. op.cit. page 1608a) report
13 that “While the dreadlocks style is a “true symbol” of a Rastafarian, not all Rastafarians adopt
14 it”. And “only Rastafarian men traditionally wear dreadlocks; women are Biblically commanded
15 to cover their heads. This is part of a generally secondary status accorded to women in
16 Rastafarian doctrine”.

17 From all the foregoing, particularly as to the history of its adoption, I think it is fairly to be
18 concluded that the wearing of dreadlocks is rather more symbolic of the Rastafari faith and of
19 adherence to its beliefs than it is itself a central or fundamental tenet of the beliefs themselves.

20 The dreadlocks are, nonetheless, central and fundamental to the Rastafarian’s perception and
21 expression of himself as such. Rather like the ethnic and religious symbolism of the Sikh boy’s
22 turban and hair in Mandla v Lee [1985] 1 All. E.R. 1062.

1 I have already indicated that I consider there is very little to be won or lost by the narrow
2 confinement of the issues in this case to the question of infringement of the single or particular
3 fundamental right to freedom of religion. I should clearly express my views, at this juncture,
4 that I consider the outcome would be the same whichever right – whether that of freedom of
5 religion, of beliefs, convictions or expression – might have been claimed to have been infringed.
6 This leads conveniently to a consideration of the law on the status of freedom of religion as a
7 fundamental right. This I will approach from the viewpoint first of the Human Rights
8 Covenants, then the common law which governs the position in Cayman (as it still does at the
9 time of writing in England) as distinct from the Constitutional entrenchment in other countries.

10

11 The Human Rights Covenants

12 The plaintiff claims that the defendants’ decision to expel the child is in breach of the protection
13 accorded to the right to freedom of religion (and tangentially the right to education) by no less
14 than 5 separate International Instruments.

15 The relevant provisions in them I will extract as follows.

16

17 The Universal Declaration of Human Rights

18 Articles 18 and 26 were cited.

19 Article 18 reads:

20 “Everyone has the right to freedom of thought, conscience and religion; this right
21 includes freedom to change his religion or belief, and freedom, either alone or in
22 community with others and in public or private, to manifest his religion or beliefs
23 in teaching, practice, worship or observance----”

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The European Convention on Human Rights

Articles 9 and 14 were cited along with Article 2 of the First Protocol.

“Article 9 reads:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others

Article 2 of the First Protocol to the European Convention reads:

“Article 2

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

1 The United Nations International Covenant on Civil and Political Rights

2 Article 18 which was cited is expressed in terms very similar to those in the European
3 Convention on Human Rights.

4 Article 18.4 reads:

5 “The States Parties to the present Covenant undertake to have respect for the
6 liberty of parents and when applicable, legal guardians to ensure the religious and
7 moral education of their children in conformity with their own convictions”.

8

9 The United Nations Convention Against Discrimination in Education

10 Article 1.1 reads:

11 1. “For the purposes of this Convention, the term discrimination includes any
12 distinction, exclusion, limitation or preference which, being based on race,
13 colour, sex, language, religion - -
14 has the purpose or effect of nullifying or impairing equality of treatment –“
15

16 The United Nations Convention on the Rights of the Child

17 Article 28

18 1. States Parties recognise the right of the child to education, and with a view to
19 achieving this right progressively and on the basis of equal opportunity, they
20 shall in particular:

21 (a) Make primary education compulsory and available free to all

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23 (e) Take measures to encourage regular attendance at schools and the
24 reduction of drop – out rates

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2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention

Article 29

1. States Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential
 - (b) The development of respect for human rights and fundamental freedoms and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values for the national values of the country in which the child is living; the country from which he or she may originate, and for civilisations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

1 Article 33

2 States Parties shall take all appropriate measures, including legislative,
3 administrative, social and educational measures, to protect children from the illicit
4 use of narcotics drugs and psychotropic substances as defined in the relevant
5 international treaties, and to prevent the use of children in the illicit production
6 and trafficking of such substances”

7

8 Each of the four United Nations instruments cited above applies to the Cayman Islands having
9 been ratified by the United Kingdom and acceded to on this Country’s behalf.

10 The European Convention on Human Rights has a similar status except that by virtue of
11 reservations entered by the United Kingdom on behalf of the Cayman Islands, persons subject to
12 Cayman Islands jurisdiction do not have the right of petition to the European Court of Human
13 Rights which is set up by the Convention. This is so notwithstanding that this is a right which is
14 accorded to persons subject to the United Kingdom jurisdiction.

15 Mr. Hill emphasised the tenets of the Conventions which would clearly prohibit discrimination
16 on religious grounds and submitted that in the absence of any other recourse for their
17 enforcement, this court should regard itself as obliged to see to the protection of the rights which
18 they are intended to secure.

19 He acknowledged, however, that the Conventions have not been incorporated into Cayman
20 domestic law and that he was not inviting judicial adventurism. Rather, as I understood him, a
21 permissible degree of activism.

22 His argument in the main was that as the very laudable objectives of the Covenants contained in
23 the Conventions are not inconsistent with the Education Law but are in fact reflected in the

1 general policy of the Law, then the decision to maintain the particular School Rules and to expel
2 because of the breach of those Rules, is contrary to the policy of the Education Law and contrary
3 to the International Covenants and so should be set aside.

4 In the absence of grounds in the application challenging the validity or vires of the School Rules,
5 it must be openly noted that this argument implicitly again involved such a challenge in a
6 collateral manner.

7 As such a challenge is impermissible – (Smith v East & Elloe (supra)) - the argument in my view
8 could only depend upon the ground of irrationality at the end of the day; ie: as to whether the
9 decision itself was irrational in the Wednesbury sense.

10 The question then is whether – given that the Covenants are not part of our domestic law and so
11 cannot be directly enforced so as to give effect to specific rights or obligations – (see Streeter et
12 al v The Immigration Board et al Cause 633 of 1998 (unreported decision of this Court
13 31.12.98)) – it is nonetheless permissible for this Court to take account of them in determining
14 the reasonableness or otherwise of the decision to expel.

15 In the absence of domestic legislation which conflicts with the Covenants (and which would
16 have to be enforced nonetheless (Streeter supra)); the case law does suggest that there is some
17 room for considering the Covenants.

18 I consider that if this Court is to avoid regarding the Country's treaty obligations as mere
19 platitudinous exhortations; or as mere "window dressing" (to borrow a phrase used by another
20 Court to express a similar concern: - Tavita v Minister of Immigration [1994] 1 LRC 421 at
21 431; New Zealand) - they must at least be deserving of consideration, in a case such as this, in
22 examining the reasonableness or otherwise of the impugned decision.

1 I say in a “case such as this” but should be more specific by noting that this is a case in which the
2 statute itself is silent, not ambiguous, as to relevant considerations; ie: as to the nature of the
3 School Rules and as to the manner of their enforcement.

4 To be clear, I do not hold that the Courts can have regard to the Covenants so as to give direct
5 effect to rights and obligations in terms of them simply because the statute under construction
6 does not expressly preclude the Covenants.

7 That would be impermissible.

8 As Lord Oliver said in Maclaine Watson & Co Ltd v Dept. of Trade and Industry [1989] 3 All.
9 E.R. 523 at 544 – 45:

10 “Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a
11 Treaty is not part of English law unless and until it has been incorporated into
12 the law by legislation. So far as individuals are concerned, it is *res inter alios*
13 *acta* from which they cannot derive rights and by which they cannot be deprived
14 of rights or subjected to obligations; and it is outside the purview of the Court not
15 only because it is made in the conduct of foreign relations, which are the
16 prerogative of the Crown, but also because, as a source of rights and obligations,
17 it is irrelevant”.

18

19 The view I take I have based upon what I consider to be the present state of the case law, to be
20 found in the highest judicial authorities. In the House of Lords decision in Brind v Secretary of
21 State for the Home Department [1991] AC 696 it was decided that the European Convention on
22 Human Rights, not having been incorporated into English domestic law, could not be a source of
23 rights and obligations and, in the absence of *ambiguity* in the statutory provision then being

1 considered - (section 29 (3) of the Broadcasting Act 1981)- the Convention could not be resorted
2 to for the purposes of construction of the Act.

3 In Ex parte Brind, the Home Secretary's decision to issue directives prohibiting the direct
4 broadcast of statements by representatives of terrorist organisations, on the ground that such
5 directives were necessary in the public interest to combat terrorism, was held not to be
6 impeachable on the ground of Wednesbury unreasonableness.

7 In coming to their decision, the Law Lords rejected the proposition that there was a presumption
8 that, as a matter of English domestic law, the courts would review the exercise of administrative
9 discretion on the basis that the discretion had to be exercised in conformity with the European
10 Convention.

11 Such a test would involve balancing the reasons for the decision against the interference with
12 human rights, to determine whether the decision – maker could have reasonably concluded that
13 his decision was necessary and justifiable. Since such an approach would require the court to
14 embark upon a consideration of the merits of the decision, and to substitute its own judgment for
15 what was needed to achieve the statutory objective, it was impermissible.

16 Notwithstanding that these limitations were recognised, each of the Law Lords in his speech did
17 take some cognisance of the European Convention. Lord Templeman (at p 725 letter j) observed
18 that the Wednesbury principles were satisfied in the case because, among other things, there was
19 evidence that the Home Secretary had taken into account all relevant matters including the
20 European Convention. Lord Bridge, while holding that the judiciary could not import the
21 Convention into domestic law, accepted that any restriction of the right to freedom of expression
22 required to be justified and that nothing less than an important competing public interest will be
23 sufficient to justify it (at 723 letter j).

1 The scope for regard to treaty obligations I think had found even wider range in the earlier
2 pronouncements of Lord Diplock in Garland v British Rail Engineering Ltd. [1983] 2 A.C. 751 at
3 771:

4 “- - it is a principle of construction of United Kingdom statutes --- that the words
5 of a statute passed after the treaty has been signed and dealing with the subject
6 matter of the international obligation of the United Kingdom, are to be construed,
7 if they are reasonably capable of bearing such a meaning, as intended to carry out
8 the obligation, and not to be inconsistent with it”.

9

10 And most recently in a judgment of the Judicial Committee of the Privy Council in Matadeen
11 and Another v Pointu and Others [1998] 3 LRC 542 at 557 even wider language was expressed;
12 per Lord Hoffman. The issue was whether, by reference to Mauritius’ accession to the United
13 Nations International Covenant on Civil and Political Rights, its Constitution should be
14 construed as having entrenched a right to equality of treatment in education, a fundamental tenet
15 of the Covenant:

16 “Since 1973 Mauritius has been a signatory to the International Covenant on Civil
17 and Political Rights 1986. It is a well recognised canon of construction that
18 domestic legislation, including the Constitution, should if possible be construed so
19 as to conform to such international instruments. Again, their Lordships accept
20 that such international conventions are a proper part of the background against
21 which S.3 (of the Constitution) must be construed”.

22

23 Other observations made in that case are of equal general importance here – at p 558 g – 559 d:

1 “So it is submitted that the Constitution of Mauritius should be interpreted to
2 contain a similar principle [to that contained in articles 2.2. and 26 of the
3 Covenant)] and that the courts should invalidate any form of discrimination unless
4 it is based upon reasonable and objective criteria.

5 Their Lordships consider that the fallacy in this argument is the assumption that a
6 state party can comply with the Covenant only by enacting its principles as part of
7 its constitutional law and conferring upon its courts the power to invalidate
8 legislation which it considers to infringe those principles. In other words it is
9 wrong to assume that compliance with the principles of art 2.2 must be justiciable
10 in domestic law. On the contrary, as art 2.2 makes clear, the Covenant
11 contemplates a diversity of constitutional arrangements, including both legislative
12 and “other measures” by which effect may be given to the rights recognised in the
13 Covenant, including the right to the equal protection of the law. It is the legal and
14 political system as a whole and not merely the human rights entrenched in the
15 Constitution which must comply with the covenant. In conformity with this
16 principle, the Human Rights Committee has held that a state party is not obliged
17 to incorporate the provisions of the Covenant into its domestic law (see
18 McGoldrick *The Human Rights Committee* (1991) p271) and the European Court
19 of Human Rights has taken the same view of incorporation of the European
20 Convention (see *Ireland v UK* (1979 – 80) 2 EHRR 25).

21 Furthermore, interpretation of the covenant allows a “margin of appreciation” to
22 the state party in deciding what amounts to the equal protection of the law and

1 there is no reason why that margin of appreciation should be expressed by the
2 judicial branch of government rather than the legislature or executive.

3 On the facts of the present case - - - their lordships are of opinion that the ordinary
4 administrative law of Mauritius and in particular the power to quash the minister's
5 decision as unreasonable, under the principles in Wednesbury Corp [1947] 2 All
6 E.R. 680, would have been entirely adequate to secure compliance with the equal
7 treatment provisions of art. 26. There was no need to involve any other
8 constitutional protection".

9
10 In the United Kingdom itself, since the decisions of the House of Lords in Ex parte Brind
11 (supra), the Court of Appeal has revisited the issue of the relevance of the European Convention
12 on Human Rights in R v Ministry of Defence, ex parte Smith and others (1996) 1 All E.R. 257.
13 This was in a case of Wednesbury unreasonableness challenge to the Ministry of Defence policy
14 of exclusion of homosexuals from the armed forces. In dismissing the applications, the Court
15 held that it would interfere with the exercise of an administrative discretion where it was
16 satisfied that the decision was unreasonable in the sense that it was beyond the range of
17 responses open to a reasonable decision – maker. In judging whether the decision – maker had
18 exceeded that margin of appreciation, the human rights context was clearly important: the more
19 substantial the interference with human rights, the more the court would require by way of
20 justification before it was satisfied that the decision was reasonable. However, the greater the
21 policy content of a decision and the more remote the subject-matter of a decision from ordinary
22 judicial experience, the more hesitant the court would necessarily be in holding a decision to be
23 irrational; and although in such circumstances the test for irrationality had to be applied with

1 even greater caution than normal, the test itself remained the same, being sufficiently flexible to
2 cover all situations.

3 In the circumstances of the case, as the United Kingdom obligations to secure compliance with
4 the European Convention on Human Rights was not one which was enforceable by the domestic
5 courts, the fact that a decision – maker failed to take account of convention obligations when
6 exercising an administrative discretion was not of itself a ground for impugning that exercise of
7 discretion; *the relevance of the convention was only as background to the complaint of*
8 *irrationality.*

9 So then, the following rationalisation may be attempted of the present state of the law:

10 First, the International Covenants cannot be directly enforced where they have not been
11 incorporated into domestic law. It follows that as long as they remain unincorporated they can
12 give rise to no ground in and of themselves for the setting aside of administrative decisions
13 purportedly taken as based upon statutory provisions or upon powers given by statute.

14 Nonetheless, where the statute being construed is ambiguous (Ex parte Brind) or, as in this case,
15 silent, as to the criteria to be applied in the taking of the administrative decision, it will be
16 permissible to assess the *reasonableness* of the decision in question by having regard to whether
17 it complies with the provisions of the Covenants as the presumption in those circumstances will
18 be that the provisions of the Covenants are intended to apply (Garland's case; Matadeen v.
19 Pointu). Thus, the Covenants may be regarded as a background measure or standard of
20 reasonableness (R v. M.O.D. Ex parte Smith). Equally, where the decision in question is one
21 based upon powers derived at common law, (here the School Rules) as well as from statute,
22 reference may also be had to the Covenants as relevant background to a challenge of
23 Wednesbury unreasonableness: per Lord Scarman (in his dissenting judgment but consistent with

1 the majority on this issue) in Ahmad v Inner London Education Authority [1978] 1 All. E.R. 574
2 at 583 f.

3 Thus, the Covenants are not entirely irrelevant - in the manner and in the circumstances
4 described - they may be regarded as the background against which the test of reasonableness is to
5 be applied.

6 All that having been said; in this case, what it all comes back to and needs go no further than –
7 (as was observed by Lord Hoffman in Matadeen v Pointu (supra)) – is the test of irrationality or
8 Wednesbury unreasonableness.

9 More specifically, there is no scope for the introduction of a test of “proportionately,” such as has
10 been developed in the European context, for deciding whether a provision upon which an
11 impugned decision is based is one which is “reasonably necessary in a democratic society”.
12 Such a test invites the substitution of the Court’s view of what is reasonably necessary or
13 proportionate.

14 And indeed “sonorous judicial statements of uncontroversial principle often conceal the real
15 problem” which is – in this case, as in Matadeen v Pointu and all other cases on the point, – “to
16 make out the boundary between the powers of the judiciary, the legislature and the executive” in
17 deciding how the principles of human rights are to be applied; (per Lord Hoffmann at p 552 letter
18 f).

19 The High Court of Australia has ventured farther than either the Privy Council or the English
20 Courts in holding – (Minister for Immigration v Teoh 128 ALR 352) – that a Convention once
21 ratified can give rise to a legitimate expectation, in the absence of statutory or executive
22 indications to the contrary, that administrative decision – makers would act in conformity with
23 the Convention and - (in a case where the Convention on the Rights of the Child arose for

1 consideration) - treat the best interests of the child as a primary consideration. This was in a case
2 where the decision under review required children born in Australia to be deported with their
3 father who was a foreigner.

4 The possibility of such an expectation arising from the ratification of the Conventions has also
5 been recognised by the New Zealand courts – Tavita v Minister for Immigration (supra) and by
6 the Trinidad and Tobago Courts in Baptiste (Comr. Of Prisons)v Thomas [1998] 3 LRC 297 at
7 312 at letter f.

8 In each of those cases it was recognised that the only result of the legitimate expectation was the
9 *procedural right* of having the decision-maker take account of the State's covenanted obligations
10 in respect of the citizen in coming to the decision.

11 The creation of a *substantive right* in the enforcement of the covenanted obligation was not
12 intended.

13 That, however, is said to be nonetheless the practical outcome in requiring the decision-maker to
14 take account of the Covenants and is the reason for academic criticism of the decision in Teoh's
15 case. See for instance "Unincorporated Treaties in Australian Law" Public Law Journal, Sweet
16 & Maxwell Summer 1996 p 190 on.

17 Although cited to the English Court of Appeal in R. v MOD Ex pate Smith (supra) neither
18 Teoh's nor Tavita's case (both supra) was referred to in the judgments.

19 No complaint of procedural impropriety arises in this case and so I need not express a view on
20 the persuasiveness of the findings of a legitimate expectation arising from the ratification of the
21 Conventions. I leave that issue for a more appropriate time.

22 I note nonetheless, that the father in this case did bring the Conventions to the attention of the
23 Council and it has not been said that the Council failed to consider them.

1 Having set the legal framework for the scope for reference to the Conventions when I turn to the
2 ground of irrationality, I now turn to consider the scheme of the legislation, the specific
3 provisions of the Law and the rule-making powers at common law.

4 The Law, the School Rules and the Vires of the decision to expel

5 It is accepted by Mr. Hill that the body entrusted with the governance of the educational system
6 of the Cayman Islands is the Education Council. Section 3 of the Law established the Council
7 and section 4 describes in broad outline its powers.

8 Section 3 provides:

9 “3. There is established an Education Council whose constitution is set forth in
10 the First Schedule and whose duty is to promote education in the Islands and the
11 progressive development of schools in accordance with the Law.

12 The chief administrative officer of the educational system is the C.E.O. whose post is created by
13 section 9 of the Law and section 10 describes in broad outline the duties of the post.

14 The post of Principal of a school is recognised by the Law in section 2 where he is described as
15 “a teacher in charge of a school”.

16 As already noted, education in the Cayman Islands is compulsory for children of school age.
17 This is mandated by the Law in sections 13(1); 14(1) and 16.

18 And as section 22 subsection 5 (already noted above) provides, Government is under a
19 corresponding duty to provide children of school age with formal education.

20 I pause here to note that the education policy of the Islands insofar as it is discernable from the
21 Law can hardly be described as not being in keeping with the pleaded International Covenants;
22 in particular the Convention on the Rights of the Child 1989, Article 28. This is notwithstanding
23 that the Law pre-dated that Convention by more than a decade.

1 There are inevitable limitations however, and it is necessary to see, in the context of this case,
2 how the Law itself recognises that limitations can be imposed.

3 That brings section 22 of the Law once more to the fore.

4 We have already seen that by subsection (5) *admission* of an eligible child to a government
5 school - which this school is - cannot be refused "except on any ground approved by the Council
6 in each particular case". Presumably it was by reference to this section that the matter was first
7 considered by this Council.

8 Subsections 22 (6), (7) and (10) go on to provide:

9 (6) If any pupil in a government school commits any act which is of such a
10 nature that his presence in the school is likely to have a detrimental effect
11 on other pupils of the school or on the school, the principal may suspend
12 the pupil from the school for a period not exceeding seven days and shall
13 make a report immediately to the Chief Education Officer.

14
15 (7) When a report is made pursuant to subsection (6) the Chief Education
16 Officer shall investigate the matter and deal with it as he deems necessary;
17 and he may suspend the pupil for a further thirty days, and shall inform the
18 Council which shall thereupon decide on the matter, and the Council may
19 expel the pupil

20 - -

21 (10) A pupil who has been expelled from a government school shall not be re-
22 admitted to any government school without the approval of the Council".

23

1 There is no dispute in this case that the procedural requirements of the Law were met in arriving
2 at the Council's decision to expel, and as already noted, the first ground in the plaintiffs'
3 application to the effect that the Education Council took no actual decision to expel, as required
4 by section 22 (7), was not pursued.

5 The argument instead was that the child had committed no act such as contemplated by
6 subsection (6) would justify expulsion, and so the decision to expel primarily was for that reason,
7 *ultra vires*.

8 Subsection (6) requires the showing of an interrelationship between the act committed by the
9 child and the ultimate decision of the Council to expel.

10 First the Principal must be of the view that the conduct which is of concern is of such a nature
11 that the presence of the child in the school is likely to have a detrimental effect on other pupils of
12 the school or on the school. The expression "commits any act", I consider must include not just
13 a single act but even more so, an ongoing course of conduct in breach of a School Rule. In this
14 case – questions of the reasonableness of the enforcement of the School Rule for the moment
15 aside – this provision of the Law must certainly be construed as covering a situation such as
16 presented here, where a child repeatedly attends at school, in breach of the School Rules as well
17 as in violation of a decision of the Education Council, communicated in writing to his parents,
18 that he should not attend whilst he violated the Rule. That is the effect of the letters from the
19 Education Council to the child's father on 25 August and 21 September 1995. It seems also to
20 have been the basis of the decision to suspend the child – (the decision not to admit him having
21 been ignored) – which was taken by the Principal in the face of the reality of the child's
22 continued attendance at school while not conforming with the Rules. See Mr. Crawford's (the
23 principal) – letter to the child's father dated 28 September 1995 which, I think, explains that the

1 decision there expressed "to suspend" is that in the first place required by the Law; ie: that of
2 the Principal. Mr. Hill submitted otherwise, but I do not agree. While the letter refers to
3 "instructions from the Chief Education Officer to suspend your son Shemaiah Grant --- for a
4 period of seven days;" it also goes on to express in the Principal's words the reason for the
5 suspension. That is: the non - compliance; and so as to indicate the Principal's own view - by
6 reference to his citation of the relevant provision of the Law - that the "detrimental act" had been
7 committed.

8 While there is no challenge on ground of procedural impropriety, I will deal en passant with this
9 argument, in the process of explaining why I do not consider a challenge to the legality of the
10 decision to be of merit.

11 The background to this matter should not be overlooked. The matter had been considered by the
12 Education Council, even prior to the child being presented to the school for the first time. In an
13 anticipatory manner, the Council had taken a decision which they were empowered to take
14 pursuant to section 22 subsection 5 upon considering the matter of the child's admission.

15 The minutes of the 21st August 1995 next show that in response to the father's letter and
16 "Notice" of 29th June 1995, the Council decided to uphold the School Rules and its earlier
17 decision.

18 The father was so advised in a letter of 14 September 1995. Next came the meeting of the 18
19 September 1995 where the minutes reflect that the child, having been presented at the school
20 notwithstanding the Council's written decision, "the headmaster called the Ministry for
21 guidance". All this is to be taken against the Principal's affidavit filed in this matter in which he
22 avers that, with the approval of the Education Council: "I have excluded (the child) from
23 participation in the school as a student until he conforms with school rules" (paragraph 8). And

1 in paragraph 10: “On or about 25 September 1995, I received approval from the Education
2 Council to deny the child admission to school and if necessary to suspend him”. All this, in my
3 view, while implicitly acknowledging that his own discretion was to be exercised.

4 The Principal concludes at paragraph 13 of his affidavit: “At all material times to my knowledge
5 I and the other defendants have complied with the requirements of the Education Law, and
6 neither I nor the other Defendants have discriminated on the basis of his religious faith and
7 practice against Shemaiah Grant, nor on any other basis”.

8 While the matter of whether the principal acted in accordance with the Law is a matter for this
9 Court; what this paragraph also addresses I think must be the implicit acknowledgment of his
10 own primary responsibilities under the Law.

11 For those reasons, I do not accept the submission that the evidence in paragraph 11 of the
12 Principal’s affidavit taken with the letter he wrote to the father on 28 September 1995, shows
13 that the Council and the C.E.O., but not the Principal himself, came to the view that the child’s
14 conduct was “detrimental” within the meaning of subsection (6); so as to negate the proper basis
15 for the initial decision to suspend the child.

16 That disposes, I think, of the challenge to the vires of the decision to expel for the reason also
17 that the subsequent report by the Principal to the C.E.O, the C.E.O’s investigation and further
18 decision to suspend for a further period of 30 days, the C.E.O’s report to the Council – all as
19 necessary prerequisites to the Council’s own decision ultimately to expel having regard to the act
20 it deemed detrimental - are all matters of record and are not challenged on the ground of being
21 ultra vires.

22 As to the validity or vires of the School Rules themselves there is, as already noted, no challenge.
23 Nor in my view could any challenge be upheld. The power to make reasonable school rules

1 exists at common law. It is an authority vested in the school itself and has been recognised by
2 the courts in decisions which have stood for over a hundred years now. The cases also show that
3 this authority in the school is exercisable, not surprisingly, by the person charged with the
4 responsibility for the school, the Principal. It is that very authority that was purported to be
5 exercised by the Principal at the John A Cumber primary school in promulgating the School
6 Rules which are in issue in this case.

7 The principles are, I believe, most clearly described by Lord Goddard CJ in 1953 in a case which
8 gave rise to issues the gravamen of which was not unlike that in this present case: Spiers v
9 Warrington Corp. [1953] 2 All. E.R. 1052.

10 The appellant and his wife argued that they had acted reasonably in not sending their daughter to
11 school in the school uniform for health reasons notwithstanding that they had neither sought nor
12 obtained the headmistress' accommodation for the deviation from the school rule. The following
13 passage comes from Lord Goddard's judgment (at p.1056 letter E to H):

14 “The headmistress obviously has the right and the power to prescribe the
15 discipline for the school, and in saying that a girl must come to school not
16 wearing a particular costume unless there is a compelling reason of health, surely
17 she is only acting in a matter of discipline and a matter which must be within the
18 competence of the head master or head mistress of any school --.

19 If the question were whether parents reasonably believed that it was in the
20 interests of the child to wear some particular dress, as I pointed out in the course
21 of the argument, not in the least wanting to treat this matter as anything but
22 serious, there are people in this country who believe and honestly believe that in

1 the summer it is desirable in the interest of their children that they should wear no
2 clothes at all except what the barest necessities of decency require”.

3 Lord Goddard then went on to point to the obvious absurdity of allowing the subjective views of
4 the parents and not the standards set by the Rules to dictate the terms of the dress code.

5 Not surprisingly, the issue of enforcement of school rules and the power to make them has come
6 to be the subject of judicial pronouncement on both sides of the Atlantic.

7 In Saskatchewan, Canada in 1971, Tucker J. in the High Court had to decide whether the School
8 Board had the right to make regulations in regard to length of hair of pupils attending school
9 where, in the opinion of a parent and the pupil, a different length improved the appearance of the
10 pupil so long as it was well-kept and clean and was approved by the parent. It was also argued
11 that the mode in which the applicant wore his hair was a matter for him and his parents to decide;
12 that any interference with this was an invasion of his right to privacy, individual development
13 and self – expression; that the action of the Board was not designed to uphold discipline or
14 protect the health of the male students; that it was an undue exercise of arbitrary and arrogant
15 authority on the part of the School Board and an endeavor to impose their tastes in personal
16 appearance on the parents and their children attending school.

17 In deciding that the School Rule was valid and could not be challenged by certiorari, Tucker J.
18 reviewed and applied the many leading English and Canadian cases which recognise the rule-
19 making power in the School and stated (Re Ward et al and Board of the Blaine Lake School 20
20 D.L.R. (3d) 651 at 673):

21
22 “I am of opinion that the power of prescribing within reasonable limits the extent
23 of cleanliness required of pupils attending school, the extent of clothing they

1 should wear, their general appearance, including hair grooming, was within the
2 powers of the Board under the heading “administering and managing the
3 educational affairs of the school district” and “exercising a general supervision
4 and control over the schools of the unit”. In these days of the so-called
5 “permissive society” one does not need to indulge in much in the way of flights of
6 imagination to envisage how difficult it would be to conduct a class of boys and
7 girls where they could wear as little or as unusual clothing as some children or
8 some parents might see fit.

9 This would include not only care, cleanliness and covering of various parts of the
10 body but preventing of unusual types of dress and hair styling which might be
11 calculated to distract the pupils from their work in the classroom or adversely
12 affect a proper and reasonable air of discipline in school”.

13
14 In the present case - the decision to expel, in order to be within the powers given by the Law, had
15 to proceed upon a detrimental “act” having been committed by the child.

16 As already noted that “act” was found to be the continued and flagrant breach of the School
17 Rules.

18 The validity of the Rule itself is not challenged; and we have already discussed why such a
19 challenge would not succeed. As to the question what is the test of whether a decision making
20 body acts ultra vires or outside the ambit of the powers vested in it by the Law, the case law is
21 equally well settled.

22 Leading text book writers have stated the test of legality in succinct terms:

23 “An administrative decision is flawed if it is illegal. A decision is illegal if:

1 (1) it contravenes or exceeds the terms of the power which authorises the making
2 of the decision; or

3 (2) it pursues an objective other than that for which the power to make the
4 decision was conferred”

5 (Judicial Review of Administrative Action, 5th Edition by de Smith, Woolf and Jowell page 95).

6 In the wider sense, the test of whether a decision making body has acted ultra vires, the classical
7 pronouncement of the principles remains that of the House of Lords in Anisminic v Foreign
8 Compensation Commission and Another [1969] 1 All. E.R. 208. Lord Reid at page 213 stated:

9 “It has sometimes been said that it is only where a tribunal acts without
10 jurisdiction that its decision is a nullity. But in such cases the word “jurisdiction”
11 has been used in a very wide sense, and I have come to the conclusion that it is
12 better not to use the term except in the narrow and original sense of the tribunal
13 being entitled to enter on the enquiry in question. But there are many cases
14 where, although the tribunal had jurisdiction to enter on the enquiry, it has done or
15 failed to do something in the course of the enquiry which is of such a nature that
16 its decision is a nullity. It may have given its decision in bad faith. It may have
17 made a decision which it had no power to make. It may have failed in the course
18 of the enquiry to comply with the requirements of natural justice. It may in
19 perfect good faith have misconstrued the provisions giving it power to act so that
20 it failed to deal with the questions remitted to it and decided some question which
21 was not remitted to it. It may have refused to take into account something which
22 it was required to take into account. I do not intend this list to be exhaustive. But
23 if it decides a question remitted to it for decision without committing any of those

1 errors it is as much entitled to decide that question wrongly as it is to decide it
2 rightly”.

3 Implicit in this statement is another principle that has become equally well settled. It is that
4 findings of fact – in this case as to what conduct will constitute an act likely to have detrimental
5 effect on the other pupils or on the school itself are matters for the Council to decide. Such
6 matters of fact are not matters reviewable by the Court for the substitution of its own views as to
7 what might or might not be detrimental.

8 Although the question may still be open as to whether a decision can be impugned where there
9 exists no factual basis for it, as distinct from whether the factual basis which exists can properly
10 give rise to the decision – (R v Criminal Injury Compensation Board (supra) judgment of the
11 House of Lords 25.3.99) – it is settled that the courts will not interfere upon the latter basis:
12 Jacques Scott & Co. Limited v Moxham and The Liquor Licensing Board (judgment of the
13 Cayman Islands Court of Appeal C.I.C.A. No. 14 of 1998; 30.11.98 unreported).

14 In this case it is clear from the record that the Education Council addressed their minds to the
15 questions required by the Law to be addressed in coming to their decision to expel. They
16 examined the circumstances of the child’s attendance at school in breach of the School Rule,
17 found that the course of conduct was an “act detrimental” and so determined to expel the child
18 until he complied. That last qualification placed upon their decision was important given the
19 spirit of the Law, seeking as it does to mandate a policy of compulsory education. It left the
20 necessary scope for the further exercise of the discretionary powers vested in the Council by
21 subsection (10) section 22 of the Law.

1 In deciding to maintain the School Rules which are themselves deemed to be valid, I find that the
2 Education Council in the circumstances of this case has not been shown to have acted outside the
3 powers vested by the Law.

4 Moreover, it follows I consider that the burden of so showing remained throughout upon the
5 plaintiffs, as the decision remains valid until set aside by a decision of the Court. This is implicit
6 in the principles enunciated in the Anisimic case which, although disapproving the earlier
7 decision of the House in Smith v East Elloe (supra); also left intact the basic proposition stated
8 by Lord Radcliffe (at p 871 letter H):

9 “An order (decision) even if not made in good faith, is still an act capable of legal
10 consequences. It bears no brand of invalidity on its forehead. Unless the
11 necessary proceedings are taken at law to establish the causes of invalidity and to
12 get it quashed or otherwise upset, it will remain as effective for its ostensible
13 purpose as the most impeccable of orders”.

14 See also R v. Secretary of State for the Environment ex. P. Ostler (1977) Q.B. 122, 135
15 explaining the relationship between the Anisimic and Smith v. East Elloe cases)

16 Irrationality

17 The challenge to the Council’s decision on the ground of irrationality is one that must satisfy a
18 high and stringent test. It is a test which is only consistent with the principle already recognised
19 that it is the Council which is vested with the authority to administer the Law and its
20 policies and an applicant cannot hope to succeed simply by asking the Court to conclude that it
21 would have decided the matter differently.
22
23
24
25

26 It would be “a wrongful usurpation of power” by the judiciary to substitute its view, the judicial
27 view, on the merits, and on that basis to quash the decision.

1 See: Ex parte Brind (supra) and as discussed in Streeter v Immigration Board (also supra – at
2 pages 7 – 8).

3 Rather the test, if an applicant hopes to succeed on the ground of irrationality to set an
4 administrative decision aside, is stated in its most classical terms by Lord Diplock in Council of
5 Civil Service Union v Minister for the Civil Service [1985] 2 All. E.R. 374 at 410 – 411.

6 “By irrationality, I mean what can by now be referred to as “Wednesbury
7 unreasonableness” [(1948) 1 K.B. 223)]. It applies to a decision which is so
8 outrageous in its defiance of logic or of accepted moral standards that no sensible
9 person who applies his mind to the question to be decided could have arrived at
10 it”.

11 Can the decision of the Council to maintain the School Rules in the circumstances presented to
12 them in this case be so described? Can it be so described because the decision required the
13 cutting of the child’s hair, or his “dreadlocks” and so the infringement of his religious beliefs; the
14 right to the outward manifestation of those beliefs and implicitly, his parents’ rights to bring him
15 up in keeping with the beliefs of their faith?

16 If one assumes – as I have endeavoured to show that I must – the validity of the School Rules,
17 then an affirmative finding of irrationality it seems to me would necessarily involve a finding of
18 ascendancy of the individual rights over the School Rules themselves.

19 I take that view of the matter for two patent reasons. The first is that the onus remains
20 throughout upon the plaintiffs to show irrationality. The second is that no other ground, apart
21 from the averred breach of the individual rights, is put forward to show irrationality.

1 In this country there exists no Constitutional entrenchment of the fundamental human rights so as
2 to give to them ascendancy over other provisions of the law of the land and by which they might
3 otherwise be circumscribed.

4 In this jurisdiction, asserted claims for the observance of the basic human rights must be
5 considered on a case by case basis within the relevant social and legal context in which they are
6 asserted.

7 That being the basic benchmark, it is just as well to observe now that it follows that the
8 experience of the Courts in other jurisdictions in deciding such claims based upon entrenched
9 Constitutional provisions regarded as the Supreme Law of those jurisdictions, can be of only
10 limited guidance in passing upon whether the Council decided irrationally in the present case.
11 Such guidance as I think can be taken from them I will, nonetheless, mention.

12

13 Freedom of Religion

14 This leads naturally to the question: What is the nature of the right to freedom of religion in this
15 jurisdiction?

16 I accept, as that Mr. Lamontagne submitted, that like the power to make the School Rules
17 themselves, the right is one which has always existed at common law.

18 The subject does not appear to have arisen before for judicial pronouncement in this jurisdiction.

19 In the United Kingdom in Ahmad v ILEA [1978] 1 All E.R. 574 the judges of the Court of
20 Appeal regarded the words of the statute there under discussion (S.30 of the Education Act 1944)
21 as recognising the right to freedom of religion which had always existed.

22 It was however a right the observance of which was to be regarded as having its limitations.

23 In the words of Lord Denning MR at p 577 letters e – f:

1 “I have no doubt that all headmasters will try to arrange their time-table so as to
2 accommodate devout Muslims like Mr. Ahmad [(in the observance of their
3 weekly duty of prayer)]; but I do not think they should be compelled to do so, if it
4 means disrupting the work of the school and the well – being of the pupils”.

5
6 Cases decided in Canada, *before* the Charter of Rights and Freedoms of 1982 entrenched the
7 basic human rights in the law of that country, I found to be particularly helpful; not only for
8 identifying the source of the common law right but also as to deciding how these rights are
9 balanced with the competing interests of the State.

10 In Regina v Harrold (1971) 19 DLR (3d) 471 the Court of Appeal of British Columbia
11 acknowledged and confirmed that the citizens of that province enjoyed the right to freedom of
12 religion. However the problem presented was whether a member of a group of religionists, who
13 had been convicted for contravening a municipal anti-noise bye – law was allowed, in the pursuit
14 of his bona fide religious activities, to violate the bye –law. The bye law in question, if
15 enforceable, would prohibit the members of his religious group from pursuing the objects of their
16 charter by gathering in groups in the streets chanting their transcendental sounds to the
17 accompaniment of musical instruments.

18 In concluding that the right was circumscribed by and subject to the bye-law, the court applied
19 the following passage from the earlier judgement of the Canadian Supreme Court in Saumur v
20 City of Quebec [1953] 4 D.L.R. (decided at a time when the province of Quebec already had a
21 Constitutional Charter of Rights) upon the question what is meant by and embraced in the
22 expression “freedom of religion” (at page 477):

23 “Strictly speaking, civil rights arise from positive law; but freedom of speech,

1 religion and the inviolability of the person are original freedoms which are at once
2 the necessary attributes and modes of self-expression of human beings and the
3 primary conditions of their communal life within a legal order. It is in the
4 circumscription of these liberties by the creation of civil rights in persons who
5 may be injured by their exercise, and by the sanctions of the public law, that the
6 positive law operates. What we realise is the residue within the periphery.
7 Their significant relation to our law lies in this, that under its principles to which
8 there are only minor exceptions, there is no prior or antecedent restraint placed
9 upon them: the penalties, civil or criminal, attach to results which their exercise
10 may bring about, and apply as consequential incidents. So we have the civil
11 rights against defamation, assault, false imprisonment and the like, and the
12 punishments of the criminal law; but the sanctions of the latter lie within the
13 exclusive jurisdiction of the Dominion.
14 Civil rights of the same nature arise also as protection against infringements of
15 these freedoms”.

16
17 Whatever the nature of the freedom under discussion, the theme recurs throughout the cases so
18 that the proposition must indeed be regarded as trite: Doubtless through the fundamental
19 freedoms exist and will be enforced by the Courts, it is equally the case is that they are freedoms
20 subject to and governed by the law.

21 And notwithstanding that in the United States the position enjoyed by the right to the freedom of
22 religion is entrenched by the First Amendment; the limitations have been long recognised to exist
23 there as well. This is classically expressed by the trenchant and oft – cited words of Justice

1 Frankfurter in his dissenting judgement in West Virginia State Board of Education v Barnette
2 [(1943)] 319 U.S. 624 at 653:

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“The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma”.

9 This statement of principle in my view suffers no diminution when one considers the
10 particular objectives which are taken up in the School Rules; which though derived at common
11 law, are the equivalent of bye-laws for the School.

12 The Rules themselves being valid, cannot be criticised as prima facie embracing any
13 discriminatory purpose. Nor, indeed on the face of them, could any such objection arise: While
14 an inevitable incident of the prohibition of dreadlocks is the infringement of the expression of
15 the Nazarine vow of the devout Rastafarian, it cannot be said that discrimination is the objective
16 of the Rules. The rules themselves are expressed as intended to maintain uniformity for the sake
17 of discipline. On the face of the Rules themselves, all hairstyles, (including designer hairstyles)
18 which do not comply, are prohibited.

19 Further but related concerns for discipline, beyond the actual breach of the Rules arose,
20 however, when the Council came to decide whether to maintain the Rules in the face of the
21 plaintiffs’ challenge to them.

22 That those considerations were irrelevant or unreasonable the plaintiffs are obliged to prove in
23 keeping with where the burden lies in this case.

1 From my own review of the records of the Council and for the reasons which follow, I am unable
2 to conclude that the plaintiffs have discharged that burden.

3 The Courts have long recognised the public interest in maintaining discipline in schools and in
4 regarding discipline as being of paramount importance to the school. Again dicta from the
5 Canadian and United States cases are on point:

6 “ - - it should not be forgotten that the State too has an interest in the
7 education of its citizens.

8 Whether one views it from an economic, social, cultural or civic point of
9 view, the education of the young is critically important in our Society.

10 From an early period, the provinces have responded to this interest by
11 developing schemes for compulsory education. Education is today a

12 matter of prime concern to governments everywhere. Activities in this
13 area account for a very significant part of every provincial budget.

14 Indeed, in modern Society, education has far reaching implications
15 beyond the province, not only at the national but at the international

16 level. Much of what was said by the Supreme Court of the United States
17 in the following passage in *Brown v Board of Education of Topeka* 347

18 U.S. 483 (1954) at 493 has application here:

19 “Today education is perhaps the most important function of state
20 and local governments. Compulsory School attendance laws and

21 the great expenditures for education both demonstrate our
22 recognition of the importance of education to our democratic

23 society. It is required in the performance of our most basic

1 responsibilities even service in the armed forces. It is the very
2 foundations of good citizenship. Today it is a principal instrument
3 in awakening the child to cultural values, in preparing for later
4 professional training, and in helping him to adjust normally to his
5 environment. In these days, it is doubtful that any child may
6 reasonably be expected to succeed in life if he is denied the
7 opportunity of an education”.

8
9 Both of these cases Jones v The Queen in Canada in 1988 citing Brown v Board of Education in
10 the U.S.A. in 1954 were decided in jurisdictions each then having Constitutional entrenchment of
11 fundamental rights. Both nonetheless recognised, in the views of the highest Courts of the land,
12 the paramount interest of the State in a modern democratic society in ensuring an effective
13 system of education.

14 In Jones v The Queen the appellant, a pastor of a fundamentalist church, had refused on religious
15 grounds to send his children to public school as required by the Act or to seek an exemption
16 under the Act on the basis that the children were receiving efficient education elsewhere.

17 The children (along with others) were in fact receiving instruction from the appellant in the
18 basement of his Church.

19 In upholding his conviction for refusing to comply with the Act, the Supreme Court concluded
20 that although the Act effectively restricted the appellant’s absolute freedom to educate his
21 children according to his religious convictions, this was allowed by section 1 of the Canadian
22 Charter of Rights and Freedom which provided that the rights and freedoms were subject to

1 “such reasonable limits prescribed by law as can be demonstrably justified in a free and
2 democratic society”.

3 In the opinion of the majority, notwithstanding that that wording in the Charter suggested a duty
4 on the State to ensure the reasonableness of the restrictive measures, the Court would only
5 intervene if, in exercising their functions, the authorities sought to impose arbitrary standards or
6 if they otherwise acted in a manner which was fundamentally unfair.

7 In our present case, it is important to observe that like the fundamentalist pastor in Jones v The
8 Queen; the parents of the child here sought no accommodation from the authorities by way of an
9 exemption.

10 Instead here we had the father’s insistence in the exercise of his “God given rights” .

11 Indeed, in so declaring to the Council at the meeting of 18.9.95, the father in this case has taken a
12 position which amounts to this: That he is exempt from all laws that in any way might interfere
13 with the manner in which and the means by which he sees fit to engage in the practice and
14 propagation of his particular religion.

15 While that position may be consistent with the millenarian traditions of the Rastafarian faith and
16 practices, it is, unfortunately, not consistent with the realities of existence in a secular society.

17 And so this case, perhaps unfortunately, does not arise for consideration having regard to what
18 accommodations, if any, the Council, if requested, might have been prepared to grant.

19 While freedom of religion is certainly alive and well in the Cayman Islands, it is a freedom
20 which exists, like the other civil liberties, at common law. That status as I have already noted,
21 but more importantly in this context, does not afford that freedom ascendancy over the School
22 Rules such as to place an onus on the Council in this case to justify the reasonableness or the
23 fairness of the School Rules.

1 It would be therefore inappropriate for this Court to approach this case by reference to the
2 standard of what “reasonable limits can be demonstrably justified in a free and democratic
3 society”.

4 That is the language of Constitutional entrenchment and appropriate where entrenchment places
5 the onus upon the decision maker. Here we remain firmly within the scope of the common law
6 and more particularly within the purview of “Wednesbury unreasonableness” and the onus is
7 upon the party pleading unreasonableness.

8 For that primary reason, the many interesting cases which were discussed as having been decided
9 under regimes of Constitutionally entrenched rights, can therefore, in my view be referred to
10 only as background for what may be deemed “reasonable” by way of infringement on the
11 freedom in question.

12 For the reasons already discussed, only that same limited value can be ascribed to the cases
13 decided in the International Courts by reference to the various International Conventions under
14 discussion.

15 The following cases are illustrative of the views of the European Commission as to what
16 infringements might be regarded as “reasonable” within the meaning of the European
17 Convention.

18 In Karaduman v Turkey Ecom.HR app. No. 16278/90 a Turkish university student had been
19 refused a certificate of her degree to which she had earned the academic right because of her
20 refusal to provide identification photographs required for the administrative process of the
21 certificate. The identity photograph she had provided was unsuitable because it was taken with
22 her wearing a headscarf, as required by her religious beliefs. The Commission decided:

23 “that having regard to the requirements of a secular university system, that

1 regulating students' dress and refusing them administrative services, such as the
2 issue of a degree certificate, for as long as they fail to comply with such
3 regulations does not, as such, constitute an interference with freedom of religion
4 and conscience".

5
6 In Yanasik v Turkey ECom.HR 14524/89, the European Commission found that school rules
7 which prohibited the participation of students in Muslim fundamentalist activities and which had
8 led to the expulsion of a student for such participation, did not offend Article 2 of the European
9 Convention on Human Rights (first Protocol). The Commission stated:

10 "Moreover - - in principle the right to education cannot be allowed to impinge on
11 the State's right to regulate education - -".

12 In Bernard v Luxembourg Ecom.HR App. No. 17187/90 the Commission arrived at a decision
13 which has poignant significance in a case like the present where the rights asserted are in reality
14 the rights of the parents to instill their beliefs in their child. The Commission ruled that the
15 parent's convictions which are protected are those which do not conflict with the fundamental
16 rights of the child and that where, instead of supporting such rights, the parent's asserted rights
17 come into conflict with them, the child's right to education must prevail.

18 The present case is one which I consider to involve exactly such a conflict, as the fundamental
19 right of the child to attend school has been brought in question by the parents' insistence that he
20 should attend in breach of the Rules for the sake of their religious beliefs.

21
22 Two English cases Ahmad and Mandla v Lee (both supra) which were decided by reference to
23 statutes in the U.K. are also to be considered, and I turn to them in detail now.

1 In Ahmad as we have seen, the school teacher of the Muslim faith was unsuccessful in seeking
2 to invoke the provisions of the Education Act to obtain an exemption from Friday afternoon
3 classes in order to attend to his prayers.

4 This was notwithstanding that the Act, taken on its literal wording, would grant a complete
5 exemption. As such an interpretation would require an exemption for every adherent of every
6 faith who might require it and would be unacceptably disruptive of schools; that literal
7 interpretation was rejected by the majority of the Court.

8 Counsel informed me that in his application to the European Court of Human Rights (“the
9 ECtHR”) where he relied upon Articles 9 & 10 of the European Convention, for similar reasons
10 expressed by the ECtHR, Ahmad was also unsuccessful there. In another case, even while
11 invoking the Constitutional language, the Human Rights Commission held that the guarantee by
12 the State of freedom of thought, conscience and religion is subject to such limitations as are
13 prescribed by law and are “reasonably necessary in a democratic society” and that the guarantee
14 is simply a protection against indoctrination of religion by the state: Angelini v Sweden S 1 DR
15 41 [1986] COMHR.

16 In Mandla v Lee (supra) the Sikh boy’s right to attend school without cutting his hair and while
17 wearing his turban, was a right which was recognised and enforced pursuant to specific statutory
18 provisions under the Race Relations Act 1976. In that case, as the boy came within an ethnic
19 group recognisable as such by the Act and whose religious, cultural and national practices were
20 protected by the Act, the School could not show that the “no turban” rule was “justifiable” within
21 the meaning of the Act, merely because the headmaster had a genuine belief that the school
22 would provide a better system of education if it were allowed to discriminate against those who

1 wore turbans. The following passage from the opinion of Lord Fraser (at p 1070 b – d [1983] 1
2 All E.R.) bears consideration:

3 “An attempted justification of the no turban rule, which requires more serious
4 consideration, was that the respondent (headmaster) sought to run a Christian
5 school, accepting pupils of all religions and races, and that he objected to the
6 turban on the ground that it was an outward manifestation of a non-Christian faith.
7 Indeed, he regarded it as amounting to a challenge to that faith. I have much
8 sympathy with the respondent on this part of the case and I would have been glad
9 to find that the (“no turban”) rule was justifiable within the meaning of the statute,
10 if I could have done so. But in my opinion that is impossible. The onus under
11 para. (b) (ii) is on the respondent (headmaster) to show that the condition which
12 he seeks to apply is not indeed a necessary condition (of the boy’s ethnicity), but
13 that it is in all circumstances justifiable “irrespective of the colour, race,
14 nationality or ethnic or national origins of the person to whom it is applied, that is
15 to say that it is justifiable without regard to the ethnic origins of that person. But
16 in this case the principal justification on which the respondent relies is that the
17 turban is objectionable just because it is a manifestation of the second appellant’s
18 ethnic origins. That is not, in my view, a justification which is admissible under
19 para. (b)(ii). The kind of justification that might fall within that provision would
20 be on based on public health - - -”.

1 Apart from the obvious differences that in this case there is no statute which creates the special
2 protections and that there is here no onus on the Council to show the justification: that passage
3 from the Sikh boy's case invites other comparisons with the present case.

4 In this case, important though the concerns for uniformity of appearance doubtlessly were, those
5 were not the only concerns expressed by the Council in deciding to maintain the School Rules.

6 The prohibition against dreadlocks being worn by the children of primary school age was also
7 expressed as a concern regarding the outward manifestations of the Rastafarian beliefs. And
8 here, as Mr. Lamontagne described it, lays the "real difficulty" with this case. It is a difficulty
9 which Mr. Hill never directly confronted. And in contradistinction to the Sikh boy's case this
10 outward manifestation, far from being one simply of ethnicity or belief specially protected by
11 statute – is of a belief and practice which is specifically prohibited by the law; ie: the use and
12 sacrilisation of marijuana.

13 The members of the Council were particularly concerned about this and this was a concern
14 which I must treat as continuing throughout, from the time of their initial decision not to admit
15 the child, until their decision to expel. See what is recorded about this aspect of the matter in
16 their minutes of 18 September 1995:

17 "Council was not against the child's religion but it had to see to the upkeep of the
18 schools policies.

19 Drugs and its illegal use is a part of the Rastafarian belief and that the acceptance
20 of a child wearing "locks" into our school system, could be seen as an acceptance
21 of Rastafarianism and its accompanying tenets".

22

1 Thus the wearing of the child's dreadlocks, for the very reason of its symbolic force and value to
2 the child and his parents, became of concern to the Council as a matter for enforcing the School
3 Rules.

4 In the absence of any concessions by the parents as to their "right" to the strict adherence to the
5 practices of their faith, this concern of the Council's could hardly be described as unreasonable
6 or irrational and certainly not, in my view, in the sense of the stringent test laid down in the
7 Wednesbury case.

8 The test of unreasonableness, when applied against the background of the International
9 Covenants would, in my view, produce no different outcome in the circumstances of this case. It
10 is to be remembered that Article 33 of the Covenants on the Rights of the Child would require
11 the administrative body (here the Council) to take all reasonable steps to discourage and protect
12 those children in its charge from the use of narcotic and psychotropic drugs. And Article 3.1
13 requires that the best interests of the child shall be a primary concern.

14 Equally we see – in the context of Constitutional entrenchment - from the decision of the United
15 States Supreme Court in Oregon Dept. of Human Rights v Smith 494 U.S. 8872 (1990) that the
16 dismissal of the appellants in that case from their jobs because they used peyote, an
17 hallucinogenic drug, for sacramental purposes in a ceremony of their Native American Church
18 and contrary to law, was not in breach of their freedom of religion protection under the
19 Constitution. And while in this case it is a proper concern that the enforcement of the School
20 Rules by requiring the child's hair to be shorn would perhaps "gravely endanger if not destroy
21 the free exercise of the child's religious beliefs" - (Wisconsin v Yoder (supra) - and threaten the
22 development of his self-esteem, given the powerful (and the Council would say "sinister")
23 symbolism inherent in the strict practices of his faith; the Council's concerns I must recognise as

1 going far beyond mere disciplinarian concerns for uniformity of appearance. Children,
2 particularly those of the ages in a primary school, are very impressionable. The suggestion that
3 an eight year old child is or might be actively involved in the practice of all the tenets of the
4 Rastafarian beliefs, would be, to say the least, a destructive message to send.

5 When this case is viewed in that way the other case – that perhaps most heavily relied upon by
6 Mr. Hill – Mohammed v Moraine et al [1996 3 LRC 475 – takes the matter no further for the
7 plaintiffs. Decided against the background of the Trinidad and Tobago Constitution which
8 entrenches the fundamental rights including freedom of religion, the case was however
9 ultimately decided on grounds of Wednesbury unreasonableness. It was decided that the
10 school’s decision to exclude a Muslim girl from classes because she infringed the school rules by
11 wearing her religious head-dress, the hijab, was unreasonable. The primary factors were that the
12 school had failed to take account of the psychological effect of insisting that the pupil remove the
13 hijab; that many other schools had allowed it in acknowledgement and accommodation of the
14 religious practices of Muslims who were a large minority in the population; that there was
15 therefore nothing to justify the school’s concern that exemption of the pupil would lead to
16 indiscipline or the other concerns expressed by the school; that refusing exemption out of
17 concern for “opening the floodgates” to applications for exemptions suggested that the school
18 had simply adhered to a fixed policy and had not properly considered the pupil’s reasons for
19 application for exemption and, moreover, the school had considered the irrelevant factor that the
20 pupil could seek a transfer to another school.

21 I think I only need set down those reasons for the conclusion in that case to show the difference
22 from the present matter.

1 Here there was no “application for exemption” or accommodation sought and although the best
2 interests of the child are to be considered nonetheless; here the father’s insistence is tantamount
3 to an assertion of a right to breach the School Rules. In the end, what the Council was
4 confronted with here was the proper concern for the effect upon the child vis-à-vis his
5 manifestations of the religious beliefs by the wearing of dreadlocks with all its worrisome
6 symbolism. And all of this in flagrant breach of the Rules and in disregard for the earlier
7 decisions of those responsible for the School.

8 I emphasise here the Council’s concerns must be recognised as those of the body charged with
9 the responsibilities vested by the Law.

10 It is not for a court to say that their concerns were misplaced or misconceived and, far from the
11 circumstances of this case showing the concerns to be unreasonable, I conclude that the plaintiffs
12 have failed to discharge the onus of so proving.

13 Finally I should note that contrary also to Mr. Hill’s criticism that the Council – like the School
14 in Mohammed v Moraine – regarded itself as obliged to follow a strict policy; the Council
15 throughout applied their minds to the issues and exercised the discretion they regarded as vested
16 by the Law.

17

18 Summary of Conclusions

19

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21 1. The importance of Education in modern society points to a vital and paramount
22 interest in the State to maintain an effective and efficient educational system.

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2. In the Cayman Islands the State’s functions and powers in that regard are

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2 delegated by virtue of the Education Law to the Education Council.
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6 3. There has always been and remains a common law power in a School,
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8 exercisable by the Principal, to make and apply reasonable School Rules.
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12 4. The School Rules requiring uniformity of appearance and prohibiting the wearing
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14 of dreadlocks, at the John A. Cumber Primary School, derive from that common
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16 law power and are to be regarded as prima facie valid; no challenge to their
17
18 validity has been raised.
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22 5. In the circumstances in this case, where no accommodation was sought by the
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24 parents or given allowing any form of exemption from the Rules; and where the
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26 conduct resulted in the flagrant breach of the School Rules by the child and his
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28 parents, the decision of the Education Council to uphold and maintain the Rules
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30 was a decision which they were entitled to take under Section 22 of the Education
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32 Law.
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36 6. In the exercise of their powers, the Education Council properly assumed and
37
38 acknowledged that Rastafarianism is a religion and so proceeded to consider the
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40 matter and arrive at their decision without any misconceptions or errors in that
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42 regard.
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44 The Council did not, however, accept that the wearing of dreadlocks is a
45
46 mandatory requirement of Rastafarianism and this was by reference to the father's

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2 assertion that it was not. The Council's concerns about the symbolism of drug
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4 abuse was a relevant factor open to them to be considered as out-weighing the
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6 admitted likely emotional impact upon the child in having to trim his hair.
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10 7. The freedoms of thought, conscience and religion are fundamental rights which
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12 exist in the Cayman Islands and are derived from and protected at common law.
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16 8. However, in the absence of Constitutional entrenchment declaring their extent or
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18 defining their limits, these rights, like those of the other civil liberties, are defined
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20 by the limits of the ordinary law. As was acknowledged by the House of Lords
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22 in 1990 (A.G.v Guardian Newspaper, A.G. v Times Newspaper (supra)):
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24 "The starting point of our domestic law is that every citizen has the right to do
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26 what he likes, unless restrained by the common law or by statute".
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30 9. The School Rules being valid and enforceable at common law for the specific
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32 purposes of ensuring the proper governance of the school, are not to be set aside
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34 as being merely discriminatory of the child's religion, nor as subordinate, in the
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36 context of the school environment, to the child's or his parents' right to the
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38 freedom, practice and expression of their religious beliefs.
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42 10. It follows, that in any challenge to the reasonableness of the Council's decision to
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44 expel the child for continuing to attend at school in breach of the School Rules,
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46 the onus is upon the plaintiffs to show unreasonableness or irrationality in keeping

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2 with the stringent test laid down by the case law.
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6 11. Reference to the International Covenants (and the cases decided by the
7
8 International Courts pursuant to them) is of comparative value only as
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10 background for measuring the reasonableness of the decisions in this case, as the
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12 Covenants are not incorporated into domestic Cayman Law.
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14 Cases decided under specific Constitutional provisions in other countries which
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16 entrench the fundamental rights similarly can have only limited comparative
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18 value. I have sought to explain in this judgment the significance I believe is to be
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20 attached to the International Covenants which have been ratified by the United
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22 Kingdom relating to the rights asserted in this case and which have application to
23
24 the Cayman Islands. I can, for obvious reasons, give no indications in this
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26 judgment as to whether that outcome would have been any different had the
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28 Covenants been incorporated into Cayman Law.
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30 The same applies to the hypothesis of Constitutional entrenchment of the
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32 fundamental rights.
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34 Ultimately the relevant test in this case is "Wednesbury unreasonableness".
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38 12. In considering the reasonableness of the Council's decision to expel the
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40 child until he trims his hair and complies with the School Rules, the Court may
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42 not substitute its own views for that of the Council as to the importance of the
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44 School Rules or as to the likely effect its breach might have upon the School or
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46 upon other pupils of the School.


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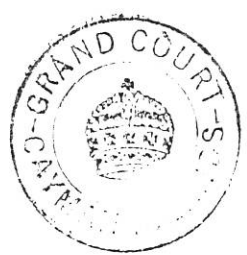
As the Education Council is charged with the responsibility for the School and for the Islands' system of education, the Council's judgment in that regard is that which the Education Law recognises.

Only to the extent that it can be clearly shown that the Council's decision is so irrational that no reasonable body of persons charged with their particular responsibilities could have arrived at such a decision can this Court intervene.

In this regard, the comparative standard of reasonableness to be discerned from the cases decided under the Covenants and under the Constitutional regimes does not, in my view, point to unreasonableness in the Councils' decision in this case.

13. For all the reasons discussed in this judgment, I conclude that the plaintiffs have failed to show that the decision to expel is ultra vires the Law or illegal and have failed to meet the test of "Wednesbury unreasonableness" and the application must therefore be dismissed.


Anthony Smellie
CHIEF JUSTICE



DATED THIS 18TH DAY OF JUNE 1999.