REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. 2009-00439

IN THE MATTER OF AN APPLICATION BY FELIX JAMES FOR AN ADMINISTRATIVE ORDER UNDER PART 56 OF THE CIVIL PROCEEDING RULES (1998)

AND

IN THE MATTER OF SECTION 14 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF SECTION 68 AND 69 OF THE CRIMINAL PROCEDURE ORDINANCE

AND

IN THE MATTER OF THE CONTINUING DETENTION OF FELIX JAMES FROM THE 9TH NOVEMBER, 2006 TO THE PRESENT DAY AT THE STATE PRISION BY SERVANTS AND/OR AGENTS OF THE STATE OF THE REPUBLIC OF TRINIDAD AND TOBAGO

JUDGMENT

Introduction

This was a ***Constitutional*** motion instituted pursuant to section 14 of the constitution and Part 56 of the ***Civil Proceedings Rules 1998***. In 1971 the Claimant had been ordered to be detained at Her Majesty's pleasure pursuant to section 68 and 68 of the ***Criminal Procedure Ordinance*** under a special verdict of guilty but insane.

In these proceedings, the Claimant contended that his fundamental rights had been infringed by the failure of State authorities to conduct periodic reviews of his detention. The Court considered the effect of recent authorities including the Court of Appeal decision in ***The Attorney General v Seepersad & Panchoo***[1] as well as the quantum of compensation due to the Claimant as a result of the breach.

Procedural History

1. By his Fixed Date Claim Form, the Claimant sought the following relief:

"1) A Declaration that the delay and failure to review and assess the mental state and case for the continued detention of the Claimant between 8th November, 2004 and January, 2009 was in breach of the Claimant's rights under ss.4(c), (d) and s.5(2) (a) (b) (e) and (h) of the Constitution.

2) A Declaration that the failure of the State, its servants and or agents since the 10th January, 2007 which failure is continuing to date to determine whether the Claimant is a fit and proper person to be released and to make an order or direction regarding the continued detention is in breach of the Claimant's rights under ss.4(a), (b) (d) and 5 (2) (e) and (h).

3) A Declaration that the Claimant is entitled to have periodic and regular reviews of his mental state and his continued detention of no more than 6 month intervals and the failure to conduct such reviews was and continues to be in breach of the Claimant's rights under s.4(a), (b) and 5 (2) and (h).

4) A Declaration that the execution of the Claimant's detention between 10th January, 2007 and January, 2009 was in breach of the Claimant's rights under ss. 4(a) (b) (d) and 5(2) (a) (b) (c) and (h).

[1] ***The Attorney General v Seepersad & Panchoo*** Civ.App. 125 of 2005.

5) *A Declaration that the failure to release the Claimant was and continues to be in breach of the Claimant's rights under ss.4(a) and s.4(b).*

6) *An order that the Claimant be released from custody.*

7) *An order that damages be paid to the Claimant."*

2. The Fixed Date Claim was supported by two affidavits, namely the affidavit of the Claimant, sworn to on 5th January, 2009 and filed herein on 10th February, 2009, and by the affidavit of Terrence Davis, Attorney-at-law, sworn to and filed on 10th February, 2009. The Claimant also relied on his affidavit in Reply, on 2nd July, 2011 and on the second affidavit of Terrence Davis, which was sworn and filed on 13th August, 2009.

3. The Defendant Attorney General relied on the affidavit sworn to by attorney-at-law Nairob Smart, on 12th June, 2009 and filed herein on 2nd March, 2010. In his affidavit, Mr. Smart, attorney-at-law in the Chief State Solicitors Department, set out the entire history of these proceedings.

4. Learned Attorneys-at-law for the Claimant and for the Defendant filed written submissions on the 15th October, 2009 and the 18th March, 2010 respectively.

5. On 14th June, 2010, the Court heard supplemental submissions on behalf of both parties, following which the court reserved judgment to a date to be fixed by notice.

6. It is significant that by the date of submissions in this matter, the Claimant had already regained his liberty. The Claimant received a Presidential pardon on 30th June, 2009 and on 2nd July, 2009 was released from custody.

7. Having regard to the Claimant's release, learned Attorney-at-law, Mr. Ramdeen in his written submissions indicated his intention to abandon items of relief sought at paragraphs 3, 5 and 6 of the Fixed Date Claim.

8. Accordingly, learned Attorney-at-law for the Claimant made his submissions only in support of claims in respect of the Claimant's continued incarceration without any review process being applied to the Claimant.

9. In his supplemental oral submissions, learned Counsel further streamlined the issues before the Court by indicating that no claim was made in respect of any period of time before the orders which had been made by the Honourable Justice Ibrahim in late 2006. Learned Counsel conceded that his claim was restricted to the period 10th January, 2007 to 30th June, 2009.

Undisputed Facts

1. The Claimant was charged with murder in 1971. On 25th April, 1975, the jury returned a verdict of guilty but insane and the Claimant was ordered to be detained pursuant to sections 68 and 69 of the ***Criminal Procedure Ordinance***[2] Chap. 4:03 until Her Majesty's pleasure be known.

2. In 2003, the Claimant instituted proceedings pursuant to section 14 of the ***Constitution***[3] before the Honourable Justice Ibrahim. An order "without objection" was entered in those proceedings on 2nd October, 2006. In its initial form, the order required the Minister of National Security to consider whether the Claimant was a fit and proper person for release. This order directed further that damages be assessed by a Master in Chambers.

3. The order of Justice Ibrahim was later amended to require the Attorney General to decide whether the Applicant was a fit and proper person for release.

4. On 10th January, 2007, Attorney General, the Honourable Mr. John Jeremie acting pursuant to the amended order of Justice Ibrahim decided that the Claimant was not a fit

[2] Now referred to as the *Criminal Procedure Act*, Chap. 12:02

[3] Chap. 1:01

and proper person for release. The Claimant sought judicial review of the Attorney General's decision. The application for judicial review was determined in the Claimant's favour on 30th January, 2009[4]. The Honourable Attorney General appealed the January 2009 decision and obtained a stay of execution pending appeal. The stay was discharged on 29th May, 2009. It was common ground that the Claimant was released on 2nd July, 2009.

5. Between January, 2007 and June, 2009, the incumbent Attorney General, The Honourable Mrs. Brigid Annissette-George took steps to effect a review of the Claimant's detention. On 13th May, 2008, while judicial review proceedings were yet pending, the incumbent Attorney General wrote to the Chief Medical Officer requesting that a medical examination of the Claimant be conducted.

6. The May, 2008 letter of the Attorney General was exhibited in these proceedings and reflects the reasoning of the Attorney General in this way:

> *"More than a year has now elapsed since the Attorney General considered the question of the release of Mr. James and more than three years has elapsed since Mr. James was last assessed ..."*

7. The then Attorney General requested that a medical tribunal be set up to carry out a medical examination of Mr. James for the purpose of determining his suitability for release. Accordingly, there is no evidence that the Attorney General held the view that the review process should not be conducted while judicial review proceedings were pending.

8. Having made her request in May, 2008, the uncontroverted evidence was that the then Attorney General made enquiries as to the status of the Claimant's assessment by letters dated 16th October, 2008 and 3rd December, 2008.

[4] Cv 00513 of 2008. ***Felix James v The Attorney General.***

9. The Claimant was in fact evaluated by Specialist Medical Officers on 27th July and 4th August 2008. He was assessed by the medical tribunal on 12th January, 2009 and the medical tribunal tendered its report to the Attorney General on 9th March, 2009.

10. The Attorney General sought clarification of the tribunal's report by letter dated 24th March, 2009. On 30th April 2009, the medical tribunal, consisting of Dr. Gillian Scotland, Dr. Celia Ramcharan and Dr. Nellen Baboolal submitted their report for the Chief Medical Officer and recommended that Mr. James was fit for release. The Attorney General advised His Excellency accordingly and the Claimant was released on 2nd July, 2009, having received a Presidential Pardon on 30th June, 2009.

The Cabinet Minute[5]

11. While the Claimant was still incarcerated and many years prior to his approach to the High Court by way of a constitutional motion, the Honourable Justice Stollmeyer in the case of ***Noreiga and Funrose v The Attorney General of Trinidad and Tobago***[6] suggested general guidelines where special verdicts are returned by the jury[7]. Guidelines similar to those suggested by the Honourable Justice Stollmeyer were set out in Note for Cabinet AG (2005) 233 of December, 28th, 2005 for Cabinet's consideration. It was recommended to Cabinet that if a person is found on review to be insane then further reviews should take place within a period of no more than six months[8].

[5] Exhibited as "TD 1" to the 10th February, 2009 affidavit of Terrence Davis.

[6] H.C.A. No. 2474 of 2003 ***George Noreiga v Attorney General of Trinidad and Tobago***; H.C.A. No. 1816 of 2003 ***Edmund Funrose v Attorney General of Trinidad and Tobago.***

[7] *Ibid* at page 32 of 35.

[8] Exhibit T.D. 1 of the affidavit of Terrence Davis filed on 13th Agust, 2008..

Law

12. The decision in ***Funrose and Noreiga v The Attorney General of Trinidad and Tobago*** was overturned by the Court of Appeal in ***The Attorney General of Trinidad and Tobago v Ian Seepersad; Roodal Panchoo***[9]. The Honourable Justice of Appeal Soo Hon at paragraph 64 of her judgment had this to say:

> *"It is my view that both* ***Noriega*** and ***Funrose*** *were wrongly decided. At page 17 of the judgment the learned judge stated "there is no violation of the principle or doctrine of separation of powers." Section 67 of the Criminal Procedure Act was challenged on the basis of the breach of the principle of the separation of powers. Instead the Judge concentrated ... on applying* ***Matthews and Boyce*** *and found that the provisions of 67 and 68 were saved ..."*[10]

13. The decision of the Court of Appeal in ***The Attorney General of Trinidad and Tobago v Ian Seepersad Roodal Panchoo***, though overruling ***Funrose and Noriega***[11]**,** re-stated the entitlement to review when there is a sentence of detention at the Court's pleasure.

14. The learned Justice of Appeal Soo Hon cited ***Attin v The Attorney General of Trinidad and Tobago*** and quoted Justice Mendonça (as he then was) at page 12 of his judgment as stating:

> *"there was common ground between the parties that the Applicant is entitled to a review from time to time ..."*[12]

[9] Civ. App. No. 125 of 2005.

[10] *Ibid,* at paragraph 64.

[11] *Supra*

[12] H.C.A. No. 2175 of 2003 ***Attin v The Attorney General of Trinidad and Tobago***

Submissions On Quantum

15. While learned Senior Counsel for the Attorney General submitted only that compensation should be reasonable, learned Counsel for the Applicant made extensive submissions on the appropriate quantum of damages due to the Claimant.

16. Learned Counsel, Mr. Ramdeen referred to general principles of assessment of compensation due for breach of constitutional rights and in particular to ***Maharaj No 2 v Attorney General*** (1977) 30 W.I.R. 310, where Lord Diplock said:

> *Such compensation would include loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress and inconvenience suffered by the Claimant due to his incarceration."*[13]

Additionally, learned Counsel for the Claimant referred to a host of other local decisions, which may readily be divided into two main categories:

- Where the Claimant or Applicant had been wrongly or unconstitutionally detained. This included for example ***Abraham v The Attorney General***[14], ***A. G. v Siewchand Ramroop***[15]

- Where the Claimant or the Applicant was already incarcerated but their period of detention was unlawfully prolonged because of an error on the part of state authority example ***Josephine Millet v Sherman Mc Nicolls.***[16]

[13] Maharaj v The Attorney General (1977) 30 WIR 310 at page 321.

[14] H.C.A. # 801 OF 1997.

[15] P.C.A. No. 13 of 2004.

[16] Civ. App. 14 of 2000.

Reasoning and Decision

1. It is settled as a matter of law that a prisoner who is detained under a special verdict of guilty but insane is incarcerated during the Court's pleasure. At paragraph 76 of her judgment[17], the Honourable Justice of Appeal Soo Hon observed:

> *"It has been held to be an intrinsic feature of a sentence of detention at the Court's pleasure that there be a continuing review of the minimum term"*

2. It is further settled that such a detainee is entitled as a matter of law to periodic reviews of his suitability for release.

3. This entitlement to review was also recognised by the Cabinet of Trinidad and Tobago and had been implemented in respect of persons who had been serving similar sentences. As a matter of Government policy, persons detained as guilty but insane are entitled to periodic reviews at intervals of no more than six months. In my view, detention without the prescribed periodic review constitutes an infringement of the Claimant's right to liberty and a deprivation of the Claimant's right to procedural provisions, as contemplated by section 5 (2) (h) of the ***Constitution*** as are necessary for the protection of the Claimant's right to liberty.

4. The Claimant in these proceedings had been detained under the special verdict of guilty but insane since 1971.

5. For many years he received no reviews until his approach to the High Court by way of a constitutional motion in 2003.

6. It is undisputed that one of the items of relief awarded to the Claimant by the Honourable Justice Ibrahim was monetary compensation for the years up to 2006. Accordingly, the Claimant has been awarded relief for being detained without reviews up to the year 2006.

7. It is certainly for this reason that learned attorney-at-law, Mr. Ramdeen, restricted the claim to the years 2007 to 2009. The significance of the first date is that it marks the

[17] The Attorney General of Trinidad and Tobago v Ian Seepersad; Roodal Panchoo (supra)

impugned decision of the Attorney General to refuse the Claimant's release on the ground that he was not a fit and proper person for release.

8. On the second date, 30th June, 2009, His Excellency granted a conditional pardon to the Claimant leading ultimately to his release on 2nd July, 2009.

9. It is not disputed that within this limited two year period the Claimant received no review between January, 2007 and July, 2008. Thereafter the Claimant was reviewed on three occasions between July and September, 2009. These reviews eventually culminated in his release.

10. Accordingly it is not disputed, as a matter of fact, that the Claimant was detained without review for some eighteen months. Within the period of eighteen months, the Claimant would have been entitled to at least three reviews which he had been denied: June, 2007; December, 2007, and June, 2008.

11. In my view, his detention without the minimum periodic review constituted an infringement of his fundamental rights as enshrined in section 4(a) and 5(2) (h) of the ***Constitution***.

12. In my view therefore, the Claimant is entitled to the declaration sought at paragraph (4) of his Claim Form. The Claimant would also have been entitled to the declaration sought at paragraph (3) as long as references to *"continued detention"* were excised. This item of relief had however been abandoned by Learned counsel for the Claimant and accordingly will be withheld by the Court.

13. The Claimant would also be entitled to monetary compensation which I now proceed to assess.

14. Learned Counsel for the Claimant made extensive submissions on the issue of the appropriate quantum of compensation. However, no submissions as to quantum were made on behalf of the Defendant.

15. In his written submissions, Mr. Ramdeen relied on several well-known decisions including the locus classicus ***Ramesh Lawrence Maharaj v The Attorney General of***

Trinidad and Tobago (1977) 30 WIR 310; H.C.A. No. 801 of 1997 ***Abraham v The Attorney General of Trinidad and Tobago*** and Civ. App. No. 14 of 2000 ***Josephine Millette v Sherman Mc Nicolls***.

16. Earlier in this judgment, I have found these authorities to fall into two major categories[18]. In my view, the cases relied on by the Claimant are distinguishable on two grounds***:***

    (i) In the first category of cases, the Claimants in question were not in detention prior to the constitutional breach. The breach in question deprived them of their liberty and the detention which followed was illegal. By contrast, in the instant case, the Claimant was already in detention when the authorities omitted to review his suitability for release. Moreover his detention was lawful and constitutional from the inception when at his trial for murder in 1975 he was detained at Her Majesty's pleasure under the special verdict guilty but insane.

    (ii) In my view, the second distinguishing feature is that in the instant claim, there was no guarantee that a review would have resulted in the Claimant's release. Even if there had been no breach and the Claimant received the requisite periodic reviews, it would have been lawful and constitutional for the reviewing tribunal to decide that he was unfit for release. The guidelines as approved by Cabinet clearly envisage that upon review a detainee may be found to be insane. In such event, the detainee's entitlement is not to release but to another review. In all of the cited cases however, the applicants or claimants in question would not have been in detention, but for the unlawful breach of their fundamental rights. In ***Josephine Millette***[19] for example, the Applicant would not have suffered prolonged and unconstitutional detention, if the erring Magistrate had imposed a sentence within his jurisdiction.

17. Accordingly, in my view the Claimant in this matter is not entitled, as in the cited cases to compensation for a number of hours or days of detention. Rather, it is my view that

[18] See supra at page 8 of 12

[19] ***Josephine Millette v Sherman Mc Nicolls*** Civ. App. 14 of 2000.

having been denied the review, he is entitled to be compensated for the loss of the chance to be reviewed and declared fit for release.

18. The Claimant suffered no loss of income by virtue of the failure of the authorities to review him. His distress and inconvenience would be limited to his uncertainty as to when he would be reviewed[20]. In my view, the Claimant would be adequately compensated by an award of $50,000.00.

Orders

It is adjudged and declared:

i That the Claimant's detention without review between 15th January, 2007 and June 2009 was in breach of the Claimant's rights under section 4(a) and section 5 (2)(h) of the Constitution.

ii. That the Defendant Attorney General to pay to the Claimant $50,000.00 as monetary compensation for the said breaches.

iii. That the Defendant do pay the Claimant's costs fit for advocate attorney-at-law to be quantified by the Registrar in default of agreement.

Dated this 1st day of July, 2011.

Mira Dean-Armorer

Judge[21]

[20] See ***Maharaj v The Attorney General*** (No. 2) (1977) 30 W.I.R. 310.

[21] Judicial Research Assistant – Ms. Camille Warner

Judicial Secretary – Mrs. Irma Rampersad